

# **ARTICLE: MUTUAL DEPENDENCY IN CHILD WELFARE**

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## **LexisNexis Summary**

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... The child welfare system suffers from a fundamental misorientation. ... Any move away from the prevailing conception of family autonomy thus involves a paradox: Families need state support to help avoid involvement in the child welfare system, but that support often undermines familial self-determination. ... Instead, the prevailing response to child abuse and neglect is to remove children from their homes and place them in foster care. ... As currently oriented, the child welfare system does far too little to prevent child abuse and neglect and instead works predominantly with families who have already abused or neglected their children or where abuse or neglect is imminent. ... I then explore the overwhelmingly negative consequences of this conception of family autonomy for families at risk of involvement in the child welfare system. ... Indeed, even if the state spent no additional monies on the child welfare system, acknowledging the need for prevention and state support of families would be a radical and beneficial change from the current approach because it would acknowledge the role we all play in creating the circumstances that lead to child abuse and neglect. ...

## **Highlight**

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The child welfare system is in need of fundamental reform. To the great detriment of parents and children, in the current system the state waits for a crisis in a family and then intervenes in a heavy-handed fashion. The state pays scant attention to the prevention of child abuse and neglect. This Article argues that the principal conceptual barrier to the adoption of a prevention-oriented approach to child welfare is the dominant conception of family autonomy, which venerates freedom from state control. This Article proposes a novel reconception of family autonomy that encourages engagement with the state, rather than simply freedom from the state. An "engagement with" model of family-state relations is both a more apt description of the actual relationship between all families and the state and a better prescription for the well-being of families. This model is built upon the mutual dependency of families and the state: Families need state support to function well, and the state needs well-functioning families. State support, however, must not come at the cost of familial self-determination, a principle nominally served by the "freedom from" conception of family autonomy. Therefore, this Article addresses how the state can both provide a more

robust level of support for families while still protecting familial self-determination, to the great benefit of parents, children, and the state.

## Text

[\*1486]

### Introduction

The child welfare system suffers from a fundamental misorientation. The prevailing response to families at risk of abuse and neglect is to wait for a crisis, then act. In many cases, the state intervenes only after abuse or neglect has occurred. At that point, the state often removes a child from her home and places her in foster care, which can be rife with its own dangers. Once the child is out of the home, the state takes largely ineffective steps to reunite the family. This post hoc approach to child welfare has devastating effects for children, parents, and the state. By the time intervention occurs, children have already been harmed. Parents have already succumbed to various ills, such as substance abuse. And the state's interest in the stability of families has been compromised, despite the system's twenty-two billion dollar annual price tag.<sup>1</sup>

These persistent problems could be largely avoided if the child welfare system took prevention seriously. Targeted prevention programs as well as more broad based antipoverty programs have shown [\*1487] tremendous success in both preventing child abuse and neglect and improving the well-being of families.<sup>2</sup> Despite this success, and despite evidence demonstrating the long-term ill effects of child abuse and neglect,<sup>3</sup> such programs remain almost entirely at the margins of child welfare policy.<sup>4</sup>

The principal conceptual barrier to making prevention the centerpiece of child welfare is the dominant conception of family autonomy, which venerates freedom from state intervention.<sup>5</sup> This "freedom from" conception fosters a legal and cultural environment that encourages the state to leave families alone until the family "fails."

I propose a conception of family autonomy that instead encourages "engagement with" the state. In the context of child welfare, this engagement would take the form of targeted prevention programs and general antipoverty efforts. Although some scholars have called for this type of state support,<sup>6</sup> this Article provides a solid theoretical grounding for such engagement.

In particular, my proposed conception of family autonomy builds upon an understanding that families and the state are mutually dependent. Families need the state, but the state also needs families. The state's interest sounds both in notions of capacity building (ensuring the next generation is prepared to participate in a deliberative democracy)

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<sup>1</sup> See Cynthia Andrews Scarcella et al., *The Urban Inst., The Cost of Protecting Vulnerable Children IV*, at 6 (2004), available at [http://www.urban.org/uploadedPDF/411115\\_VulnerableChildrenIV.pdf](http://www.urban.org/uploadedPDF/411115_VulnerableChildrenIV.pdf).

<sup>2</sup> See *infra* text accompanying notes 114-18.

<sup>3</sup> See, e.g., Martin H. Teicher, *Scars That Won't Heal: The Neurobiology of Child Abuse*, *Sci. Am.*, Mar. 2002, at 68, 70-75 (describing a study demonstrating that maltreatment during formative years can affect the development of the brain in ways that cannot later be cured); Martin H. Teicher, *Wounds That Time Won't Heal: The Neurobiology of Child Abuse*, 2 *Cerebrum* 50, 50-67 (2000) (same). There is also evidence that children who are abused or neglected are more likely to commit violent crimes. *Fight Crime: Invest in Kids, New Hope for Preventing Child Abuse and Neglect 2* (2003) [hereinafter *Fight Crime: Invest in Kids*] (noting that current research indicates that, of the 900,000 substantiated cases of child abuse or neglect in one year, "an additional 35,000 violent criminals and more than 250 murderers will emerge as adults who would never have become violent criminals if not for the abuse and neglect they endured as children"), available at [http://eric.gov/ERICDocs/data/eric\\_docs2/content\\_storage\\_01/0000000b/80/23/51/61.pdf](http://eric.gov/ERICDocs/data/eric_docs2/content_storage_01/0000000b/80/23/51/61.pdf).

<sup>4</sup> See *infra* notes 31, 48 and accompanying text.

<sup>5</sup> See *infra* Part II.A-B.

<sup>6</sup> See *infra* Part I.B.

and, more basically, in notions of societal stability (ensuring the next generation is not an inordinate drain on state resources).

Reconceiving family autonomy to encourage engagement with the state, and basing this conception on mutual dependency is not, [\*1488] however, sufficient. A reconceived family autonomy must also address the trenchant concern that state support of families inevitably leads to state control of families, especially for low-income families.<sup>7</sup> Any move away from the prevailing conception of family autonomy thus involves a paradox: Families need state support to help avoid involvement in the child welfare system, but that support often undermines familial self-determination.

The answer is decoupling a family's need for state support from a family's interest in self-determination. Families need engagement with the state, but this engagement should not, and indeed need not, require a loss of familial self-determination. To ensure that state support fosters, and does not hinder, familial self-determination, the state should not supplant its will and preferences for those of the family but must instead incorporate an element of deference and respect in all programs that aim to support families. After arguing that this is theoretically possible, I demonstrate that it is also possible in practice, as exemplified by three innovative programs.

A reconceived family autonomy will have two far-reaching benefits. First, it will create a more effective child welfare system that actually serves the interests of children, parents, and the state by creating an environment where a prevention-oriented approach to child welfare can take root. Second, it will further equality among families by working toward equality of opportunity for families to engage in the important work of self-determination.

With a more realistic and constructive conception of the role of the state, policymakers could begin to view child welfare policy in a more holistic manner - and not as an afterthought to the breakdown of the family. But if the halting steps that we have begun to take in this direction are to move from anomalies to prevailing practice, such steps must have a conceptual undergirding. This Article provides that structure.

Part I of this Article describes the current crisis in the child welfare system and the need for the prevention of child abuse and neglect. Part II argues that the current conception of family autonomy poses a formidable barrier to the adoption of a prevention-oriented approach to child welfare. This Part first describes the dominant conception of family autonomy and then argues that this conception has a pernicious effect on the child welfare system. Part III proposes a new conception of family autonomy. It first describes the importance for families of engaging with the state rather than seeking freedom from it. It then explores how such engagement need not come at the [\*1489] price of familial self-determination. It continues by describing three promising examples of a reconceived family autonomy - the Nurse-Family Partnership program, the Chicago School District's Child-Parent Center, and reforms to the child welfare system in Alabama.

## I. The Fundamental Misorientation of Child Welfare

The child welfare system is in serious disrepair. Although the system is intended to protect children from abuse and neglect and to keep families together, in too many cases state intervention helps neither children nor parents. One of the principal failings of the system is that it spends too few resources on the prevention of child abuse and neglect, choosing instead to intervene only after child abuse and neglect has occurred or is imminent. This Part describes both the problems with the current system and the need for prevention.

### A. A Broken System

The child welfare system is designed to protect children believed to be abused or neglected by their families and to strengthen families where children are at imminent risk for abuse and neglect.<sup>8</sup> The state offers "child protective

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<sup>7</sup> See *infra* Part II.C.

<sup>8</sup> See, e.g., [Ga. Code Ann. §19-7-5](#) (West Supp. 2006); [Minn. Stat. §626.556](#) (2006); [N.J. Stat Ann. §30:4C-1\(a\)](#) (West Supp. 2006).

services"<sup>9</sup> to families, ranging from providing support to keep a family together to removing a child from her home and placing her in a foster home or institution. This removal can lead to the termination of parental rights and the adoption of the child. There are approximately half a million children in foster care, a number that has grown dramatically over the past two decades.<sup>10</sup> As I have [\*1490] detailed elsewhere, this system simply does not serve the interests of parents, children, or the state.<sup>11</sup> Here, I will briefly describe three dimensions of the system's extreme shortcomings.<sup>12</sup>

First, the state does not resolve the underlying problems facing families in the child welfare system. Instead, the prevailing response to child abuse and neglect is to remove children from their homes and place them in foster care.<sup>13</sup> Once in foster care, the state does little to reunite families, often providing "treatment" to parents that consists of little more than boilerplate plans.<sup>14</sup> Further, the state allocates scant resources for such treatment, virtually ensuring that parents will not succeed.<sup>15</sup> Additionally, the system is self-perpetuating. Research has begun to show the intergenerational cycle of foster care. Many parents of children in foster care today were once in foster care themselves.<sup>16</sup> The system does not address this cyclical nature of abuse and neglect. For example, the state invests too little in mental health programs that would enable victims to heal their own trauma and help prevent the cycle from repeating.

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<sup>9</sup> In this Article, I use the term "child welfare system" and "child protective services" interchangeably to refer to the entire system designed to respond to the abuse and neglect of children.

<sup>10</sup> The foster care population has risen from 302,000 in 1980 to 513,000 in 2005. See Children's Bureau, U.S. Dep't Health & Human Servs., *The AFCARS Report: Preliminary FY 2005 Estimates as of September 2006*, at 1 (2006), available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report13.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.pdf); Richard Wertheimer, *Youth Who "Age Out" of Foster Care: Troubled Lives, Troubling Prospects*, Child Trends Res. Brief (Washington, D.C.), Dec. 2002, at 1, available at <http://www.childtrends.org/Files/FosterCareRB.pdf>. In 2004, child welfare agencies across the country investigated an estimated 3.5 million reports of alleged child maltreatment and substantiated 872,000 of these reports. See Children's Bureau, U.S. Dep't of Health & Human Servs., *Child Maltreatment 2004*, at 23 (2006), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm04/cm04.pdf>. Not all of the substantiated cases result in removal; in some instances, the family is provided services while the children remain in the home. See *id.* at 84. Neglect is by far the most prevalent form of maltreatment (62.4% of cases), with physical abuse a distant second (17.5%), and sexual abuse surfacing in about one in ten cases (9.7%). *Id.* at 24.

<sup>11</sup> See Clare Huntington, *Rights Myopia in Child Welfare*, [\*53 UCLA L. Rev.\* 637, 655-72 \(2006\)](#).

<sup>12</sup> In critiquing the child welfare system, I do not intend to perpetuate, as Marsha Garrison so well describes, "a simplistic, anti-authoritarian ideology that casts the state child welfare system as villain and the families served by that system as victims." Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 *Va. J. Soc. Pol'y & L.* 590, 595 (2005); accord Daniel Bergner, *The Case of Marie and Her Sons*, *N.Y. Times*, July 23, 2006, §6 (Magazine), at 28, 31-32 (profiling the care and thought of child welfare workers). Although there is certainly evidence to support this narrative, my point is that the state's interaction with families would be far more effective if reoriented along the lines I suggest.

<sup>13</sup> See Huntington, *supra* note 11, at 693 (discussing work of Duncan Lindsey and his argument that the current child welfare system takes a "residual" approach to abuse and neglect).

<sup>14</sup> See, e.g., Dorothy Roberts, *Shattered Bonds* 79 (2002); Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, [\*48 S.C. L. Rev.\* 577, 583 \(1997\)](#).

<sup>15</sup> See Roberts, *supra* note 14, at 89-91.

<sup>16</sup> See, e.g., Nan P. Roman & Phyllis Wolfe, *Nat'l Alliance to End Homelessness*, *Web of Failure: The Relationship Between Foster Care and Homelessness* 9 (1995), <http://www.endhomelessness.org/content/article/detail/1285/> (finding that, in a nationwide survey of homeless families in shelters, seventy-seven percent of those parents who had once been in foster care had at least one child who was or had been in foster care, as compared to twenty-seven percent of parents in the shelters that did not have such a history). For an anecdotal account of the intergenerational cycle, see Nina Bernstein, *The Lost Children of Wilder* (2001).

[\*1491] The failure to focus on the underlying problems is particularly egregious in cases of poverty-related neglect, where arguably the provision of services would be more effective than removal of children from the home. Research has demonstrated that the major determinant of children's removal from their parents' custody is not the severity of the abuse or neglect but, rather, unstable sources of parental income.<sup>17</sup> Poverty-related neglect cases - which constitute approximately fifty percent of all cases<sup>18</sup> - typically involve substance abuse, inadequate housing, or inappropriate child care arrangements.<sup>19</sup> Although substance abuse is a serious problem and may well present a substantial threat to the well-being of a child, the child welfare system can and should respond to poverty-related neglect in a different manner from the ten percent of cases where the abuse and neglect is so severe it warrants criminal proceedings.<sup>20</sup>

Second, the removal of children from their homes - so-called "child protection" - comes at a great cost to children. To be sure, in cases of extreme abuse and neglect, removal may well be necessary because of the danger in the home. But for the remaining cases, although some intervention may be needed, removing the child and placing her in foster care comes at a high cost. In addition to the (even temporary) loss of their families, children often languish in foster [\*1492] care for months and even years, moving from one home to another.<sup>21</sup> Furthermore, while in foster care, children are at a heightened risk for additional abuse or neglect, especially sexual abuse.<sup>22</sup> And even if eventually reunified with a parent, children who were once in foster care typically suffer significant economic, educational, and psychological hardship.<sup>23</sup>

Finally, this system is exceptionally expensive for the state. Federal, state, and local governments spend twenty-two billion dollars per year on the child welfare system.<sup>24</sup> The indirect monetary costs are even higher.<sup>25</sup> And the

<sup>17</sup> See Duncan Lindsey, *The Welfare of Children* 168-69 (2d ed. 2004); Huntington, *supra* note 11, at 666-70 (discussing the correlation between poverty and involvement in the child welfare system). Moreover, these removals are not spread evenly across race lines and instead are concentrated among African-Americans. See *id.* at 656-58 (discussing statistics concerning racial disparities in the child welfare system as well as the argument that poverty, not racial bias, accounts for the differential rates of involvement); see also *id.* at 657-58 (discussing political and geographic influences on removal of children).

<sup>18</sup> See Jane Waldfogel, *The Future of Child Protection* 125 (1998).

<sup>19</sup> See Huntington, *supra* note 11, at 666-68 (describing studies documenting this aspect of the child welfare system).

<sup>20</sup> See Douglas J. Besharov & Lisa A. Laumann, Don't Call It Child Abuse If It's Really Poverty, 3 *J. Child. & Poverty* 5, 24-29 (1997) (proposing that the state provide long-term, supportive services to families where the children are suffering from poverty-related neglect, rather than placing the children in the child welfare system). Further, although media reports profiling cases of extreme abuse or neglect abound, such cases are the exception. Indeed, the best estimates are that only ten percent of all the cases in the child welfare system involve abuse and neglect serious enough to warrant criminal charges. See Waldfogel, *supra* note 18, at 124-25. The remaining forty percent fall somewhere in between, involving abuse or neglect that does not require intervention by the criminal justice system but still rises above the level of poverty-related neglect. *Id.* Although these categories are not perspicuous, distinctions among cases can be made and it is clear that only a small percentage of cases fall into the severe category.

<sup>21</sup> See Huntington, *supra* note 11, at 660 (describing average lengths of stay and multiple placements in foster care, even despite 1997 legislation intended to address these problems).

<sup>22</sup> *Id.* at 662 (describing increased risk in foster care of physical abuse, medical neglect, and especially sexual abuse).

<sup>23</sup> See *id.* at 661 & n.123, 662 (detailing these outcomes, including, for example, the fact that sixty percent of young women who "age out" of foster care were pregnant or already parenting within twelve to eighteen months after leaving the foster care system (citing Ronna J. Cook, *Are We Helping Foster Care Youth Prepare for Their Future?*, 16 *Child & Youth Servs. Rev.* 213, 222 (1994))).

<sup>24</sup> See Scarcella et al., *supra* note 1, at 6.

<sup>25</sup> By one estimate, the indirect costs of the child welfare system amount to an additional ninety-four billion dollars. Suzette Fromm, *Total Estimated Cost of Child Abuse and Neglect in the United States* (2001), available at [http://www.preventchildabuse.org/documents/index/cost\\_analysis.pdf](http://www.preventchildabuse.org/documents/index/cost_analysis.pdf) (estimating costs of physical and mental health problems, juvenile delinquency, adult criminality, special education needs, and lost productivity).

nonmonetary harm, although difficult to calculate, is undeniably substantial. <sup>26</sup> As I detail below, despite the hefty price tag, the system does not further the state's interest in building the capacity of children or in preparing them to be contributing members of society. <sup>27</sup>

## B. The Need for Prevention

These problems of the child welfare system are well known and proposals for change abound. For example, I have proposed a problem-solving model of child welfare to take the place of the current [\*1493] rights-based model. <sup>28</sup> In that model, the state would seek to address the underlying causes of child abuse and neglect, thus attempting to solve the problems of the families in the system, rather than fruitlessly calibrating the rights of parent and child. <sup>29</sup>

A truly effective child welfare system, however, would seek to prevent child abuse and neglect, thus limiting the number of families who enter the system. <sup>30</sup> As currently oriented, the child welfare system does far too little to prevent child abuse and neglect and instead works predominantly with families who have already abused or neglected their children or where abuse or neglect is imminent. <sup>31</sup>

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<sup>26</sup> As Maxine Eichner argues:

Even more important are the vast non-financial costs to the polity from having hundreds of thousands of its most vulnerable citizens, each of whom should be developing their capabilities to become vigorous and active citizens and productive members of society, become physically, mentally, and emotionally damaged, many of them for life, by the current system.

Maxine Eichner, *Children, Parents, and the State: Re-Thinking Foster Care Relationships*, 12 Va. J. Soc. Pol'y & L. 448, 459 (2005).

<sup>27</sup> See *infra* Part III.A.2-3.

<sup>28</sup> See Huntington, *supra* note 11, at 672-74.

<sup>29</sup> See *id.* at 687-95. There have also been other proposals for reforming the child welfare system, most notably a report published in 2004 by the Pew Commission on Children in Foster Care. See Pew Comm'n on Children in Foster Care, *Fostering the Future 16-18* (2004). The Commission made numerous recommendations, including financial reforms that would increase flexibility in how federal funds are allocated, federal assistance to adoptive families and guardians, improved data collection to ensure the efficient use of resources and increase public accountability, and funding of further research. *Id.* The Commission also made recommendations aimed toward strengthening the court system, including court performance measures, outcome data collection, increased federal funding, a direct voice for parents and children in the court room, effective representation, and leadership by state chief justices to ensure the competency and training of those involved in proceedings. *Id.*

<sup>30</sup> There is an active debate about when the state should intervene in cases of suspected abuse and neglect. See, e.g., Douglas J. Besharov, *Child Abuse Realities: Over-Reporting and Poverty*, 8 Va. J. Soc. Pol'y & L. 165, 200-01 (2000) (arguing that state intervention is over-inclusive and the child welfare system should not include poverty-related cases; in these cases, "society would do better if it did nothing ... rather than the wrong - and often harmful - something"); Margaret F. Brinig, *Choosing the Lesser Evil: Comment on Besharov's "Child Abuse Realities"*, 8 Va. J. Soc. Pol'y & L. 205, 209-18 (2000) (responding to Professor Besharov by arguing that the state should err on the side of over-inclusion, and further noting that it is possible to predict more accurately which parents will abuse or neglect their children and thus use this prediction to narrow the intervention net). When the state should intervene is an important question, but, in this Article, I focus on preventing abuse and neglect altogether, not where to draw the line in marginal cases.

<sup>31</sup> See Martin Guggenheim, *What's Wrong with Children's Rights* 181-85 (2005) (discussing the origins of child protection as part of the attempt to address child poverty, but describing political changes in the twentieth century, particularly the 1970s, that led away from framing child abuse as a product of greater social ills); Lindsey, *supra* note 17, at 177-78 (describing the "residual" nature of child welfare system); *Violence in Families* 15 (Rosemary Chalk & Patricia King eds., 1998). Federal laws governing the disbursement of child welfare funds reinforce this model. States receive substantially more funds for the placement of children in foster care and adoptive homes than for the prevention of child abuse and neglect. For example, in 2002, for every federal dollar spent on the prevention of child abuse and neglect, nine federal dollars were spent on foster care and an additional three federal dollars on adoption. See Scarcella et al., *supra* note 1, at 16, 19, 21, 23-24.

**[\*1494]** Numerous scholars have called for preventive approaches to child welfare, although the prescriptions vary somewhat. For example, Dorothy Roberts has argued in favor of programs that target poverty. Professor Roberts contends that

the ingredients for a strong child welfare program are clear and simple: first, reduce family poverty by increasing the minimum wage, instituting a guaranteed income, and enacting aggressive job creation policies; second, establish a system of national health insurance that covers everyone; third, provide high-quality subsidized child care, preschool education, and paid parental leave for all families. Increasing the supply of affordable housing is also critical.<sup>32</sup>

The call for supporting families in need harks back to the principles espoused by African-American advocates for child welfare at the end of the nineteenth century. These advocates contended that the best way to help children was to help all families and to support, rather than penalize, mothers who were struggling to care for their children.<sup>33</sup>

Other scholars contend that although general antipoverty measures will have some effect on rates of child abuse and neglect, more targeted programs are also needed. For example, Marsha Garrison has argued that "the link between poverty and child maltreatment is indirect and poorly understood"<sup>34</sup> and that the connection between poverty and foster care placement rates, although correlated, is nonlinear.<sup>35</sup> Professor Garrison agrees that poverty reduction has a role **[\*1495]** to play in the prevention of child abuse and neglect, but concludes that it is not a silver bullet.<sup>36</sup> Instead, she favors such targeted programs as early childhood education that also serve the needs of parents.<sup>37</sup> Indeed, targeted prevention programs have proven highly successful.<sup>38</sup> As I describe in greater detail below, these programs typically identify high-risk families and offer early intervention, either in the

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<sup>32</sup> Roberts, *supra* note 14, at 268; see also Guggenheim, *supra* note 31, at 199-201 (making a similar argument for addressing poverty as a preventive means for addressing child abuse and neglect); Eichner, *supra* note 26, at 470-71 (same).

<sup>33</sup> After the Civil War, African-American women - who were barred from the child-saving movement of the time, which was generally led by white women - formed their own groups to address the well-being of children. See Dorothy E. Roberts, *Black Club Women and Child Welfare: Lessons for Modern Reform*, [32 Fla. St. U. L. Rev. 957, 957-58 \(2005\)](#). Instead of focusing on a particular case of abuse or neglect, this movement addressed the well-being of all children and also tried to support, rather than penalize, mothers, believing that assisting mothers would assist the children. See [id. at 958, 963-71](#); see also Guggenheim, *supra* note 31, at 182-83 (describing supports that used to exist for low-income families).

<sup>34</sup> Garrison, *supra* note 12, at 618.

<sup>35</sup> See *id.* at 617-19. For example, Professor Garrison cites evidence demonstrating that the child poverty rate in the United States is fifteen percent and the foster care placement rate is seventy-five per ten thousand children. *Id.* at 617. By comparison, Norway has a child poverty rate of four percent and a placement rate approximately half that of the United States. *Id.* But despite this correlation, Professor Garrison contends that the link is nonlinear because the United Kingdom has a child poverty rate that is several times higher than Norway's and yet has the same placement rate. *Id.* at 618. Of course, many factors can account for placement rates, including the aggressiveness of state intervention, and placement rates are not necessarily tantamount to maltreatment rates. But the statistics do call into question the claim that ameliorating poverty will automatically prevent child abuse and neglect.

<sup>36</sup> *Id.* at 618. In determining an effective prevention program, Professor Garrison has argued in favor of orienting the child welfare system toward a public health model that would analyze and determine needed reforms, rather than the current system, which is based on an "acute care" medical model where treatment is contemplated as "rapid cure and exit." *Id.* at 595. This approach would further the understanding of child abuse and neglect as problems that require extensive and far-ranging help for the parent as well as the child, and, centrally, emphasize prevention. See *id.* at 611-30 (describing the need for prevention of child maltreatment); *id.* at 630-35 (describing what is needed to transform the child welfare system into one that "emphasizes long-term, intensive, and multi-faceted interventions").

<sup>37</sup> See *id.* at 621-25 (describing such programs).

<sup>38</sup> See *Fight Crime: Invest in Kids*, *supra* note 3, at 11-18 (same); Garrison, *supra* note 12, at 621-30 (describing effective programs).

form of a visiting nurse or early childhood education.<sup>39</sup> Targeted interventions for families can have lasting effects for both children and parents<sup>40</sup> and generate considerable savings for the state over the long run.<sup>41</sup>

[\*1496] Barbara Bennett Woodhouse contends that prevention efforts should focus on more than the relationship between parent and child.<sup>42</sup> In her view, prevention should encompass an examination of the systems surrounding a family, including a child's peer group, neighborhood, and school.<sup>43</sup> Professor Woodhouse terms this approach an "environmentalist paradigm," contending that the current framework has been partially to blame for the failure to find effective solutions for reforming the child welfare system.<sup>44</sup> A child's development depends on all these systems, and therefore child welfare should examine and support these systems, in addition to supporting the family.<sup>45</sup>

In sum, although there may be some disagreement about the precise content of prevention efforts,<sup>46</sup> the risk factors for child abuse and neglect are well-documented and include (first and foremost) poverty, substance abuse, mental illness, violence among adult family [\*1497] members, single parenthood, teenage parenthood, and a lack

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<sup>39</sup> See *infra* text accompanying notes 141-60.

<sup>40</sup> For example, in 1997 and 1998, the RAND Corporation undertook a rigorous study of early childhood intervention programs. See Lynn A. Karoly et al., RAND Corp., *Investing in Our Children*, at iii (1998). The researchers defined early childhood interventions broadly and found that some programs produced short-term benefits for the children and their parents and that some of these benefits persisted over time. See *id.* at xii-xiii, 63-71. Such benefits included "gains in emotional or cognitive development for the child ... or improved parent-child relationships," "improvements in educational process and outcomes for the child," "increased economic self-sufficiency, initially for the parent and later for the child, through greater labor force participation, higher income, and lower welfare usage," "reduced levels of criminal activity," and "improvements in health-related indicators, such as child abuse, maternal reproductive health, and maternal substance abuse." *Id.* at xv.

<sup>41</sup> Targeted prevention programs have been shown to be cost-effective. See *Fight Crime: Invest in Kids*, *supra* note 3, at 19-21 (describing the cost-effectiveness of such programs). The RAND study also measured savings for the state, which the report defined as savings from participating children, who required lower public expenditures later in life and generated greater income and thus paid more taxes. See Karoly et al., *supra* note 40, at xvi. For example, participating children spent less time in special education programs and, as adults, spent less time on welfare or involved in the criminal justice system. See *id.* The savings were considerable. One program studied cost \$ 12,000 per participant, but generated \$ 25,000 in savings for the child over the period studied. *Id.* at xviii. Another program cost \$ 6000 per child and generated \$ 24,000 in savings. *Id.* Interestingly, the programs generated the greatest savings for the state for higher-risk families, whereas lower-risk families in the program did not generate a net savings to the state. See *id.* at xix. Additionally, the study calculated other monetary benefits to society, such as the extra income generated by participating families, which benefited the overall economy. The study concluded that in one program, the additional savings were another \$ 24,000, for a total of \$ 49,000 in benefits to the state compared with the \$ 12,000 cost. See *id.* at xvii-xix. For details on all of these findings, see *id.* at 73-103.

<sup>42</sup> See Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 *Va. J. Soc. Pol'y & L.* 409, 423 (2005).

<sup>43</sup> See *id.* at 424-26.

<sup>44</sup> See *id.* at 411-12.

<sup>45</sup> See *id.* at 441-46.

<sup>46</sup> Interestingly, even those commentators who generally favor aggressive intervention with a bias toward removal also support prevention programs that address the underlying causes of child abuse and neglect. For example, legal scholars who strongly favor "child protection" (intervention with a bias toward removal), such as Elizabeth Bartholet, see Elizabeth Bartholet, *Nobody's Children* 110 (1999) (arguing that the "most extreme forms of intervention work best for children"), acknowledge that a more far-reaching program to address racial and economic inequities would be the ideal approach to child welfare. See *id.* at 6 ("The starting point for honest and meaningful debate has to be the recognition that racial and social injustice is at the core of child abuse and neglect. The parents who treat their children badly are themselves victims, and if we want to stop the vicious cycle, we need to create a society in which there is no miserable underclass, living in conditions which breed crime, violence, substance abuse, and child maltreatment."). Bartholet acknowledges that far-reaching programs to address economic and racial discrimination would be best; she is simply pessimistic (some would say realistic) about the chances for the adoption of such programs. See *id.* at 5-6.

of social supports. <sup>47</sup> Taking seriously the prevention of child abuse and neglect would entail addressing these issues and promoting more targeted programs. The problem, however, is that preventive efforts have not been widely embraced.

## II. A Conceptual Barrier to Prevention: Family Autonomy

In light of the effectiveness of, and the consensus regarding the need for, preventive efforts, it is striking that prevention remains at the margins of child welfare. The reasons for this failure are complex, <sup>48</sup> but as I discuss in this Part, the principal conceptual barrier is the prevailing notion of family autonomy. As we currently conceive of family autonomy, freedom from state control is the paramount value in the relationship between the state and families. In the child welfare system, this conception plays a pervasive and often insidious role. In this Part, I describe the dominant understanding of family autonomy that informs American law and culture. I then explore the overwhelmingly negative consequences of this conception of family autonomy for families at risk of involvement in the child welfare system.

### A. Autonomy as Freedom from State Control

There are numerous conceptions of autonomy, but the prevailing idea of autonomy is the "freedom from" the power of another. Typically [**\*1498**] the "other" is the state, but it can also be another person. <sup>49</sup> In this conception of autonomy, rights form a protective barrier, isolating the individual from the other. <sup>50</sup> This view has been extensively critiqued by feminists and others, <sup>51</sup> but it continues to hold great sway.

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<sup>47</sup> For an excellent summary of the research in this area, see Garrison, *supra* note 12, at 613-16 & nn.75-90. I certainly do not mean to imply that all parents fitting this profile abuse or neglect their children. Indeed, the vast majority do not. As Professor Garrison points out, "we still lack an understanding of the mechanisms that lead to child maltreatment and the protective factors that lead most parents to resist the disorder, but environmental conditions that promote child maltreatment have been charted in detail." *Id.* at 612. Additionally, I do not mean to imply that child abuse does not occur in economically stable families. But there are good reasons to believe there is not the same likelihood that a parent in an economically stable family engaging in the same behavior as a parent in a low-income family - for example, maltreating a child due to the parent's substance abuse - will end up in the child welfare system. For example, the parent in an economically stable family will likely have greater support systems and less state surveillance than the parent in the low-income family. See Roberts, *supra* note 14, at 32-33 (noting that substance abuse in economically-stable families typically does not lead to involvement in the child welfare system, whereas it does in low-income families).

<sup>48</sup> For example, costs accrue immediately whereas the benefits accrue over time. See Karoly et al., *supra* note 40, at xvi-xix. Additionally, the costs can be borne by one agency or layer of government while the savings accrue to a different agency or layer of government. See *id.* Finally, simple animus toward the poor is also a reason we have not made these investments.

<sup>49</sup> See Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *Yale J.L. & Feminism* 7, 12 (1989) (describing the "deeply ingrained sense that individual autonomy is to be achieved by erecting a wall (of rights) between the individual and those around him").

<sup>50</sup> See *id.* Concepts of liberty and autonomy have long occupied scholars. Here, I do not intend to engage in the debate over the positive and negative liberty frame originally proposed by Isaiah Berlin, see generally Isaiah Berlin, *Two Concepts of Liberty*, in *Four Essays on Liberty* 118, 121-34 (1969) (describing this frame generally, and specifically defining negative liberty as "the area in which a man can act unobstructed by others" and positive liberty as "freedom to [] lead one's prescribed form of life"; alternately as "the freedom which consists in being one's own master, and the freedom which consists in not being prevented from choosing as I do by other men"), and all of its concomitant criticisms, see, e.g., Pierre Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 *UCLA L. Rev.* 671, 680-93 (1983) (contesting the negative and positive liberty distinction on numerous grounds and specifically arguing that it is impossible to distinguish liberty from the means of its realization because in almost all circumstances the inability to realize liberty will be "attributable at least in part to the state and thus might logically be considered [a] constraint[] on liberty"), or assess alternative frameworks, see, e.g., Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 *Stan. L. Rev.* 875, 893-901 (1994) (rejecting the positive and negative liberty frame and proposing, in its stead, descriptive autonomy and ascriptive autonomy, with the former focused on external factors that affect personal liberty, and the latter focused on a "person's sovereignty over her moral choices"). Instead, I am concerned with the barrier the current version of family autonomy presents to the state offering support to families before the crisis stage. Additionally, although I explore some

Family autonomy as "freedom from" is a pervasive feature of American family law. It is the idea and ideal that a stark line divides the family from the state. A parent's constitutional right to the care and custody of her child,<sup>52</sup> for example, is built upon this conception [\*1499] of family autonomy. The state must make a heightened showing of harm to a child before removing the child from the custody of her parent.<sup>53</sup> In this way, family autonomy serves to protect family integrity, ensuring that the state will not remove a child simply because the state believes another parent would provide a superior environment for the child.

Family autonomy ostensibly creates a buffer zone between the state and parents with respect to child-rearing decisions. Absent exigent circumstances, the state leaves parents alone to make their own decisions regarding child rearing.<sup>54</sup> This freedom protects a diversity of decisionmaking among families by preventing the state from imposing a uniform view of parenting on all families.<sup>55</sup> It thus safeguards cultural and moral diversity in matters of child rearing,<sup>56</sup> which in turn serves democratic principles.<sup>57</sup>

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of the critiques of family autonomy as positively suspect, see *infra* Part III.A.1, my central argument is that even though autonomy may well be a descriptively inaccurate and analytically bereft concept, it has real-world effects on the child welfare system. I am concerned with these effects.

<sup>51</sup> See, e.g., Michael J. Sandel, *Liberalism and the Limits of Justice* (1982); Charles Taylor, *Philosophy and the Human Sciences* 187-210 (1985); Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, [65 S. Cal. L. Rev. 1171, 1174-75 \(1992\)](#).

<sup>52</sup> See, e.g., [Wisconsin v. Yoder, 406 U.S. 205, 233-34 \(1972\)](#); [Prince v. Massachusetts, 321 U.S. 158, 166-70 \(1944\)](#); [Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 \(1925\)](#); [Meyer v. Nebraska, 262 U.S. 390, 401 \(1923\)](#); see also David D. Meyer, *The Paradox of Family Privacy*, [53 Vand. L. Rev. 527, 544-48 \(2000\)](#) (describing these cases in the larger context of the Supreme Court's family privacy jurisprudence). The *parens patriae* doctrine, which empowers the state to intervene in families to protect children, is predicated on the idea that state intervention is justifiable only when the parents have stopped caring for the child themselves. See Gary B. Melton & Megan Sullivan, *The Concept of Entitlement and Its Incompatibility with American Legal Culture*, in *Visions of Entitlement* 47, 47-48 (Mary A. Jensen & Stacie G. Goffin eds., 1993).

<sup>53</sup> This is true as a matter of constitutional law, see [Quilloin v. Walcott, 434 U.S. 246, 255 \(1978\)](#), as well as of state statutory law, see, e.g., [Cal. Welf. & Inst. Code §300](#) (West 2005). But see [Colo. Rev. Stat. Ann. §19-3-403](#) (West 2005 & Supp. 2006) (using "best interests" standard for removal of child).

<sup>54</sup> See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, [83 Mich. L. Rev. 1803, 1835-39 \(1985\)](#) (discussing the legal tradition of noninterference in the family). But see *infra* text accompanying notes 101-04 (discussing how parental decisions are not, in fact, made autonomously of the state because (1) the state determines the broad contours of familial decisions, and (2) the state itself has created the system in which parents are allowed to make certain decisions).

<sup>55</sup> See Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, [33 Wm. & Mary L. Rev. 995, 1091 \(1992\)](#).

<sup>56</sup> See Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, [2004 U. Chi. Legal F. 27, 27](#) (noting that leaving the upbringing of children to private actors "would comport with our commitment to pluralism by allowing one generation to perpetuate its own diversity, and even expand upon it, in the next generation"); see also Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, [76 Cal. L. Rev. 151, 160 \(1988\)](#) ("There is a sense in which the whole rights approach itself is an elaborately constructed means of promoting pluralism.").

<sup>57</sup> See Anne C. Dailey, *Constitutional Privacy and the Just Family*, [67 Tul. L. Rev. 955, 959 \(1993\)](#) ("The family's role in nourishing and sustaining diverse moral traditions is what in part distinguishes our liberal democracy from totalitarian political regimes... . As the locus of potential political resistance, the family acts as an important institutional check on the power of the state to mold citizens in its own image.").

This antitotalitarian role for the family has been recognized by the Supreme Court. In *Pierce v. Society of Sisters*,<sup>58</sup> the Court held that a parent has a constitutionally protected right to select a school of her [\*1500] choice for her child and, therefore, is not required to send the child to public school.<sup>59</sup> In so holding, the Court stated that

the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children ... . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>60</sup>

In addition to determining where to send a child to school, parental decisionmaking power is typically understood to include, for example, the authority to make medical decisions for the child<sup>61</sup> and the authority to decide what religion, if any, the child should follow.<sup>62</sup>

The state defers to these parental decisions, assuming parental behavior does not transgress pre-set norms. If there is such a transgression and it results in child abuse and neglect, the state intervenes in the family, often removing the child, even if only temporarily, and placing her in an alternative home.<sup>63</sup> Before a parent crosses this line, however, family autonomy protects a diversity of decisionmaking among families.

In addition to these legal manifestations - family integrity and parental decisionmaking authority - family autonomy as "freedom from" the state resonates on cultural and political registers.<sup>64</sup> It presents a neat story, offering a clear line of demarcation between the state and the family. This plot line is both easy to convey to an audience - "the [\*1501] state cannot tell you how to raise your child" - and fits within a widely accepted narrative of the all-powerful, intrusive state that must be kept at arm's length.

The rhetorical appeal of family autonomy echoes in the peculiarly American iconography of self-sufficiency. "Why help the poor? Let them help themselves." Indeed, as a society we have pathologized the need for state support.<sup>65</sup> Nancy Fraser and Linda Gordon describe this vilification of dependency, arguing that although dependency has not always had pejorative overtones,<sup>66</sup> today

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<sup>58</sup> [268 U.S. 510 \(1925\)](#).

<sup>59</sup> See [id. at 534-35](#).

<sup>60</sup> [Id. at 535](#).

<sup>61</sup> See 70 C.J.S. Physicians §116 (2005) ("In the absence of an emergency, an operation performed on a child without the consent of a parent ... is a legal wrong.").

<sup>62</sup> See [Wisconsin v. Yoder, 406 U.S. 205, 229-34 \(1972\)](#); [Pierce, 268 U.S. at 533-35](#).

<sup>63</sup> For example, a parent may choose how much television a child watches, but if a parent leaves a young child alone in the home in front of a television while she goes to work, this may be considered child endangerment. In that situation, the state no longer defers to parental decisionmaking because the decision of the parent has transgressed certain limits. But within these limits, family autonomy protects a diverse range of decisions by parents.

<sup>64</sup> Family autonomy is embraced by both liberals and conservatives, as well as, of course, libertarians. See, e.g., Marc A. Fey, Parental Rights in Education, <http://www.family.org/socialissues/A000000380.cfm> (last visited Feb. 22, **2007**) (stating that Focus on the Family "steadfastly opposes any and all domestic and international efforts of social parenting movements that would define children as wards of the state" and that "the tentacles of the modern welfare state have muddied [the] idea [of the state as parent], threatening both parental rights and democracy itself"); see also Bartholet, *supra* note 46, at 7 (arguing that a cult of family autonomy is perpetuated and protected by both ends of the political spectrum).

<sup>65</sup> Annette Appell argues that pathologizing child abuse is part of a larger discourse that locates responsibility for poverty and its related problems in the individual, rather than society. See Annette R. Appell, Disposable Mothers, Deployable Children, [9 Mich. J. Race & L. 421, 421](#) (book review) ("The dominant discourse about poverty and racism has changed significantly in the past

[\*1502]

dependency ... is an ideological term. In current U.S. policy discourse it usually refers to the condition of poor women with children who maintain their families with neither a male breadwinner nor an adequate wage and who rely for economic support on a stingy and politically unpopular government program called Aid to Families with Dependent Children (AFDC)... . Naming the problems of poor, solo-mother families as dependency tends to make them appear to be individual problems, as much moral or psychological as economic. The term carries strong emotive and visual associations and a powerful pejorative charge. In current debates, the expression welfare dependency evokes the image of "the welfare mother," often figured as a young, unmarried black woman (perhaps even a teenager) of uncontrolled sexuality.<sup>67</sup>

In sum, family autonomy as freedom from state control stands as the prevailing conception of the relationship between the state and families. As I argue below, this narrative of autonomous families is largely inaccurate - the state both supports and intervenes in the lives of all families.<sup>68</sup> But despite this descriptive inaccuracy, there is a

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

<sup>66</sup> See Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 *Signs* 309, 312-14 (1994) (describing pre-industrial use of the term to refer to the condition of individuals who relied on work to earn a living, rather than land ownership, which provided the owner with a living without laboring). In the United States, "the absence of a hierarchical social tradition in which subordination was understood to be structural, not characterological, facilitated hostility to public support for the poor." *Id.* at 320; accord *id.* at 312 (describing "four registers in which the meanings of dependency reverberate": economic (reliance on another or an institution for subsistence); sociolegal status (the absence of a separate legal identity); political (being subject to an external source of power, such as a colony); and moral/psychological (an individual character trait)). As a result, a dependency on the state for economic support came to be seen as a form of individual pathology. Fraser and Gordon argue that with the demise of legal and political dependency (for example, coverture no longer exists), and now that women typically work or at least are able to work, thus ending the economic dependency of wives, "all dependency is suspect, and independence is enjoined upon everyone." *Id.* at 324. Similarly, with the ending of Jim Crow laws, "whatever dependency remains ... can be interpreted as the fault of individuals." *Id.* at 325. This belief holds true despite the fact that dependency can run in both directions. As Jason DeParle describes sharecropping Mississippi, "while dependency was a word typically tied to the region's poor blacks, dependency ran both ways; perhaps nowhere was the prosperity of the white elite as dependent on perpetuating a large black underclass." Jason DeParle, *American Dream* 27 (2004). And this is true even though dependency on the state could help some individuals become more independent. See *id.* at 36 ("The receipt of welfare reduced [a recipient's] reliance on men, so it decreased the predatory violence in her life. It also bolstered her leverage in a rigged labor market designed for exploitation. Now she had options besides chopping cotton and washing white people's clothes."); Fraser & Gordon, *supra*, at 311 (describing how economic supports would enable women to leave abusive relationships).

<sup>67</sup> Fraser & Gordon, *supra* note 66, at 311; accord Personal Responsibility and Work Opportunity Reconciliation Act of 1996 §103(a)(1), [42 U.S.C. §601\(a\)\(2\)](#) (2000) (reinforcing the image of dependency as pathological by stating that one of the goals of the new Temporary Assistance to Needy Families (TANF) program was to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage"); Martha Albertson Fineman, *The Autonomy Myth*, at xiv (2004) (describing the "iconic construct of the autonomous individual"). The term "dependency," with this weighted history, is also central to child welfare. State statutes establishing the child welfare system refer to "dependency and neglect" as bases for intervention in the family. See, e.g., [Cal. Welf. & Inst. Code §300](#) (West 2005). For an argument that self-reliance need not be caricatured and is a useful concept, see Amy L. Wax, *Social Welfare, Human Dignity, and the Puzzle of What We Owe Each Other*, [27 Harv. J.L. & Pub. Pol'y](#) 121, 128 (2003) (discussing early reformers and noting that "they understood very well that the term 'self-reliance' was not to be taken literally, but rather was a shorthand for a particular type of constructive role in community and economic life" and further arguing that "champions of welfare reform thus cede no important ground to opponents by acknowledging that self-sufficiency is never complete and that economic independence for poor families - as for everyone else - cannot be all or nothing").

<sup>68</sup> See *infra* Part III.A.1.

pervasive belief, reflected in law and culture, that families can be and are autonomous of the state. The persistence of this ideal is particularly problematic in the context of the child welfare system.

[\*1503]

## B. Autonomy in the Child Welfare System

To be sure, the "freedom from" conception of family autonomy provides some benefits for families by protecting family integrity and a diversity of decisionmaking. But for families at risk of involvement in the child welfare system, the prevailing "freedom from" conception jeopardizes these very benefits.

The "freedom from" conception informs the legal framework governing the child welfare system, and establishes that the state lacks authority to intervene in a family until the parents cross a pre-set line governing parental behavior.<sup>69</sup> At this crisis stage, the state is authorized to intervene to protect the child. Although a reluctance to intervene can help protect family integrity, the flipside is that it helps create both a legal and cultural environment that largely absolves the state of affirmative responsibility for the well-being of families.<sup>70</sup>

Both economically stable families and low-income families have the same basic needs, including food, housing, child care, health care, and reliable transportation. Due to their greater financial resources, economically stable families may be able to satisfy these needs using their own resources. By contrast, although many low-income families [\*1504] benefit from extensive social networks that enable them to survive,<sup>71</sup> some needs require money and for these, the state may be the best, or perhaps the only, source of assistance.<sup>72</sup>

But the "freedom from" conception of family autonomy means the state does not assume an affirmative responsibility for the well-being of families. As discussed below, the state actually does support all families in numerous ways.<sup>73</sup> But the persistent idea and ideal that families exist independently of the state, although simply

<sup>69</sup> See Guggenheim, *supra* note 31, at 36-37, 181-85; Roberts, *supra* note 14, at 14-19; Eichner, *supra* note 26, at 449-50 (describing what she calls the "dominant model of child welfare"); Woodhouse, *supra* note 42, at 423 ("The intact and functioning family is proudly autonomous. Provision of services and support is the exception to the rule of autonomy, and generally must be tied to some finding or admission of family failure and dysfunction... . Thus, the model depends on parental fault as a predicate for state engagement in the life of a child.").

<sup>70</sup> I do not mean to suggest that the state provides no tangible support for low-income families. Of course there are some programs designed to help such families. See, e.g., Temporary Assistance to Needy Families, [42 U.S.C. §§601-619](#) (2000); Housing and Community Development Act of 1974, [42 U.S.C. §§1437-1437z-7](#) (2000) (establishing HUD §8 voucher program); Child Care and Development Block Grant Act of 1990, [42 U.S.C. §§9858-9858q](#) (2000). My view is that such programs do not come close to meeting the needs of families. See, e.g., Anne L. Alstott, No Exit 206 (2004) (describing the meager benefits available to families); Clare Huntington, Welfare Reform and Child Care: A Proposal for State Legislation, [6 Cornell J.L. & Pub. Pol'y 95, 100-05 \(1996\)](#) (describing the vast unmet need for high quality subsidized child care, even in the wake of federal and state investments). I recognize that others, based on their own normative views, consider current programs at best sufficient, and at worst already too burdensome on the taxpayer and an inappropriate expenditure of government funds. See, e.g., Charles Murray, *Losing Ground* 154-77, 196-236 (1984) (arguing that public assistance programs should be eliminated because they encourage joblessness, out-of-wedlock births, and dependence on state aid); James L. Payne, *Overcoming Welfare* 10-11 (1998) (arguing that the welfare system does not reduce poverty and encourages "dependent and dysfunctional lifestyles").

<sup>71</sup> See, e.g., DeParle, *supra* note 66, at 79 (describing such support networks).

<sup>72</sup> See Mary Ann Glendon, *The Transformation of Family Law* 308 (1989) ("There is at present in legal discourse little recognition that family members may need nurturing environments as much as they need rights, or that families themselves may need surrounding circumstances in order to function at their best. By systematically - though for the most part unintentionally - ignoring the 'little platoons' from which families and individuals have always drawn emotional and material sustenance, modern legal systems probably contribute to some extent to their atrophy."); Huntington, *supra* note 11, at 664-70 (describing the need for tangible assistance); see also Appell, *supra* note 65, at 465 (discussing the implications of viewing problems of families as personal and not tied to larger issues of "huge geographic, economic, and racial barriers to social movement").

<sup>73</sup> See *infra* text accompanying notes 96-107.

untrue, contributes to the belief that the state need not address the issues facing low-income families, even though these issues are correlated with higher rates of child abuse and neglect.<sup>74</sup>

The post hoc child welfare system born of this hands-off, crisis-oriented approach to families adversely affects children and parents. By the time the state intervenes, the children have already been abused or neglected, or are at considerable risk for abuse or neglect, [\*1505] and the lives of the parents likely have deteriorated to such a low that state intervention is perceived to be necessary. In other words, the damage has already been done, both to children and to the parent-child relationship.<sup>75</sup>

Further, the relationship between families and the state has also been damaged. With the impending threat of removing children from the home, there is a fundamentally adversarial relationship between the state and families. This hinders cooperation and highlights the power imbalance between the state and families. At this point, the state's posture towards families is inevitably intrusive and judgmental.

Thus, for poor families, the "freedom from" conception of family autonomy means that the benefits of the conception - protection for family integrity and a diversity of decisionmaking - are actually compromised by the very conception itself. The prevailing conception limits state responsibility for families. But without state support, a family is more likely to fail, thus opening the door for the most intrusive form of state intervention - the removal of children and placement in foster care, which threatens both family integrity and parental decisionmaking authority.

### C. The Traditional Trade-Off Between State Support and Self-Determination

State support, however, is not uncomplicated. Both historically and today, the provision of state support, especially for low-income families, has been accompanied by conditions that require the forfeiture of at least some authority over family decisions. This practice is the basis for an important and recurrent critique of state aid: that increased support for families inevitably leads to increased regulation of those families,<sup>76</sup> especially for families not within the

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<sup>74</sup> Numerous caveats apply here. The majority of low-income parents do not abuse or neglect their children. Some economically stable parents do. And some parents are wrongly treated by the child welfare system and should not have had their children removed. See Roberts, *supra* note 14, at 92-99 (describing evidence of racial bias in child welfare, leading to the overremoval of African-American children from their homes). But even taking all this into account, as I noted above, see *supra* notes 17-20, 35-41 and accompanying text, there is an undeniable correlation between poverty and child abuse and neglect. In light of the economics of low-wage jobs that force parents to work multiple jobs, the persistence of high crime rates in many neighborhoods, the lack of quality child care, the dearth of affordable, quality housing, the high cost of transportation, the lack of positive role models, and countless other forces, it is no wonder many of the basic needs of children are left unattended in low-income families. And sometimes this inattention crosses the line into abuse and neglect. I do not mean to suggest that economically stable families do not struggle with at least some of these issues, particularly substance abuse. But, rightly or wrongly, the substance abuse of economically-stable families typically does not lead to involvement in the child welfare system, whereas it does for low-income families. See Roberts, *supra* note 14, at 32-33.

<sup>75</sup> See Huntington, *supra* note 11, at 661 nn.122-26 (describing studies demonstrating poor long-term outcomes for children in foster care).

<sup>76</sup> See, e.g., Katherine M. Franke, Taking Care, [76 Chi.-Kent L. Rev. 1541, 1544 \(2001\)](#) ("The granting of rights and the recognition of public responsibility for dependency is unlikely to usher in a domain of unrestrained autonomy that some liberal projects promise. Rather, to shift responsibility for dependency outside the family is to exchange one practice of rule - the private family - for another set of regulatory governance practices, those imbued in the state and the market."); Jill Elaine Hasday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations, [90 Geo. L.J. 299, 303, 357-71 \(2002\)](#) (noting that ostensibly supportive programs, such as welfare, often come at a great cost to family autonomy, and calling for a debate over "whether and to what extent the provision of welfare should change the legal rules of parenthood") [hereinafter Hasday, *Parenthood Divided*]; Deborah L. Rhode, Feminism and the State, [107 Harv. L. Rev. 1181, 1184-85 \(1994\)](#) (describing the feminist argument that "even state policies ostensibly designed to assist women have institutionalized their subordination" but noting that this critique glosses over racial and class differences among women, which themselves are "equally powerful in ordering social relations"); see also Jill Elaine Hasday, The Canon of Family Law, [57 Stan. L. Rev. 825, 892-98 \(2004\)](#) (describing how laws that affect low-income families are categorized as welfare law and thus not seen as contributing to a dual

dominant [\*1506] group. <sup>77</sup> I understand this as the "one-way ratchet" concern. When the state aids families, it also regulates the conduct of such families. As Katherine Franke describes the concern in the context of the debate over public responsibility for care work provided in the home, the "delicate act of translation - from private need to public obligation - demands acute sensitivity to the ways in which public responsibility inaugurates a new and complex encounter with a broad array of public preferences that deprive dependent subjects of primary stewardship over the ways in which their needs are met." <sup>78</sup>

Historically, the exchange of self-determination for state support was particularly explicit and far-reaching. For example, British social theorist T.H. Marshall contended that citizenship rights could be [\*1507] divided into three categories: civil, political, and social. <sup>79</sup> He defined civil rights as "composed of the rights necessary for individual freedom," <sup>80</sup> political rights as "the right to participate in the exercise of political power," <sup>81</sup> and social rights as "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society." <sup>82</sup> According to Marshall, the traditional practice was that if an individual obtained social rights by receiving support from the state, that person suffered a de jure forfeiture of political rights and a de facto forfeiture of civil rights. <sup>83</sup> Today, although the exchange of civil or political rights for social rights is far less explicit, the idea that recipients of

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system of family law, in which one set of rules governs economically-stable families and another, more onerous, set of rules governs low-income families).

<sup>77</sup> See Rhode, *supra* note 76, at 1188 ("For any subordinate group, the state is a primary source of both repression and assistance in the struggle for equality."). Peggy Cooper Davis describes two dichotomous views of the state: one of the state as an enforcer of shared values, and another of the state as a power that must be constrained, permitting families to form their own values without undue state influence. Peggy Cooper Davis, *Contested Images of the Family Values: The Role of the State*, [107 Harv. L. Rev. 1348, 1348 \(1994\)](#). Cooper Davis argues for the latter vision, grounding her argument in a historical understanding of the Fourteenth Amendment. She contends that the antislavery tradition of human dignity and family liberty animated the principles of liberty and citizenship in the Fourteenth Amendment. [Id. at 1349-53](#). She argues that the Fourteenth Amendment requires "that each person be given a measure of autonomy appropriate to the thinking, morally conscious character of humankind: autonomy sufficient to allow self-definition and substantial moral choice." [Id. at 1349](#). Cooper Davis describes the multiple forms of oppression of slaves, but in particular the deprivation of family autonomy, noting that slaves entered into informal familial arrangements, but that such arrangements received no legal or social protection. [Id. at 1363](#). As Cooper Davis argues,

to think of family liberty as a guarantee offered in response to slavery's denials of natal connection is to understand it, not as an end in itself, but as a means to full personhood. People are not meant to be socialized to uniform, externally imposed values. People are to be able to form families and other intimate communities within which children might be differently socialized and from which adults would bring different values to the democratic process.

[Id. at 1371](#).

<sup>78</sup> Franke, *supra* note 76, at 1541.

<sup>79</sup> See T.H. Marshall, *Citizenship and Social Class* (1963), reprinted in *The Citizenship Debates* 93, 94 (Gershon Shafir ed., 1998).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See *id.* at 100 (describing the loss of political rights through legal disenfranchisement and the practical loss of civil rights through internment in a workhouse). Other examples abound. See Alexander Keyssar, *The Right to Vote* 61-65, 271-72 (2000) (describing the legal disenfranchisement of paupers in United States, still in operation until the 1960s); Marshall, *supra* note 79, at 100 (describing Factory Acts).

state aid are somehow lesser citizens is still implicit in so much of the debate surrounding social welfare programs.  
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To be sure, all government support is typically accompanied by some form of regulation or conditions, but when the state supports low-income families, the regulation and conditions can be particularly [\*1508] onerous. Programs intended to benefit the poor are generally based on a philosophy that seeks to modify behavior in exchange for benefits. <sup>85</sup> Researchers often focus on certain behaviors that, in their view, contribute to a decrease in social mobility, including not graduating from high school, having a child out of wedlock or before a person is able to support the child, not working or actively seeking work, and not abiding by the law. <sup>86</sup> Thus, the state typically ties support to the modification of these behaviors. <sup>87</sup>

These behavior modification conditions can take very intrusive forms, deeply infringing upon familial self-determination. <sup>88</sup> For example, historically the receipt of welfare assistance rendered a family vulnerable to unannounced visits in the middle of the night by case workers. The purpose of the visit was to ensure there was not

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<sup>84</sup> See, e.g., Murray, *supra* note 70, at 154-77, 196-236 (contending that state aid encourages unemployment, single parenthood, and government dependence); Payne, *supra* note 70, at 10-11 (arguing that state aid does not decrease poverty and instead encourages "dependent and dysfunctional lifestyles"); Daniel J. Mitchell, Taxes, Deficits, and Economic Growth, The Heritage Found., May 14, 1996, <http://www.heritage.org/Research/Taxes/hl565.cfm>, at 1 (opining that public assistance undermines productive behavior); Robert Rector, Welfare: A System in Need of Change - Spending on Current Programs Promotes Behavioral Poverty, St. Louis Post-Dispatch, June 27, 1995, at 15B (commenting that the welfare system creates perverse incentives that promote self-destructive behavior and dependency on the state). Indeed, as scholars describe it, the current debate over social welfare programs is whether to place claimants in the historical box (paupers whose civil and political rights should be limited because of their dependency) or to create a new box in which social rights are seen as a means of obtaining full civil and political rights. See, e.g., Chad Alan Goldberg, Citizens and Paupers: Relief, Rights, and Race from the Freedmen's Bureau to Workfare (forthcoming 2007); Chad Alan Goldberg, Contesting the Status of Relief Workers During the New Deal: The Worker's Alliance of America and the Works Progress Administration, 29 Soc. Sci. Hist. 337, 361-62 (2005).

<sup>85</sup> Cf. Morgan B. Ward Doran & Dorothy E. Roberts, Welfare Reform and Families in the Child Welfare System, 61 Md. L. Rev. 386, 391-400, 405-17 (2002) (describing and criticizing the behavior modification philosophy of TANF and the child welfare system).

<sup>86</sup> See Erol Ricketts & Isabel Sawhill, Defining and Measuring the Underclass, 7 J. Pol'y Analysis & Mgmt. 316, 321 (1988).

<sup>87</sup> Additionally, although targeted prevention programs are effective in reducing child abuse and neglect, programs directed at specific populations, rather than those generally available to all, typically come with greater conditions. See Lawrence R. Jacobs & Theda Skocpol, Studying Inequality and American Democracy: Findings and Challenges, in *Inequality and American Democracy* 214, 225 (Lawrence R. Jacobs & Theda Skocpol, eds., 2005) ("Social programs that reach broad categories of people and deliver benefits as a matter of 'rights' can enhance citizens' sense that they are deserving recipients of public succor and encourage them to participate fully in the polity. By contrast, programs that deliver meager supports to slices of people who must go through complicated, demeaning procedures to qualify can leave citizens feeling like disempowered, undeserving recipients.").

<sup>88</sup> See Viviana A. Zelizer, The Social Meaning of Money 119-98 (1994) (describing changing approaches to controlling the spending of low-income families as well as the spending on low-income families). By contrast, programs that could also be considered state aid - such as social security payments to nonworking, widowed spouses - typically have not been accompanied by such extensive regulation. See Hasday, Parenthood Divided, *supra* note 76, at 357-71 (comparing Social Security with TANF benefits as one example of the "dual normative regime" that does not require economically stable families to relinquish family autonomy in exchange for benefits but does require such relinquishment of low-income families). The concern about the power of the state to control recipients can be traced at least as far back as Charles Reich's seminal articles in the mid-1960s. See Charles A. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1251-56 (1965); Charles A. Reich, The New Property, 73 Yale L.J. 733, 756-71 (1964) [hereinafter Reich, *The New Property*]. Reich contended that welfare recipients, who were dependent on the payments for their livelihood, were vulnerable to the state and therefore the welfare payments (and other forms of government supports) should be subject to the same legal protections as traditional real property. *Id.* at 779-86.

a wage [\*1509] earner (in other words, a man) present who could be supporting the family.<sup>89</sup> The Supreme Court upheld similar visits, concluding that a welfare recipient, by accepting state assistance, agreed to the state's involvement in her family.<sup>90</sup>

In a more modern example, the receipt of welfare is often tied to the regulation of women's sexuality. In California, for example, if a child is born to a woman who has been receiving assistance for the previous ten months, the woman will not receive additional support for the child unless the child was "conceived as a result of contraceptive failure if the parent was using an intrauterine device, a Norplant, or the sterilization of either parent."<sup>91</sup> Moreover, intrusive conditions have not been applied equally, but rather first and foremost to women of color. For example, there is a history of forced sterilization programs for women of color and American Indians, justified in part by the "dependency" of these women.<sup>92</sup>

The "freedom from" conception of family autonomy is partly responsible for the mindset that permits these conditions to be imposed. Because the prevailing conception presupposes that a family can operate without state support, it helps create an environment in which state support is seen as deviant. It is this deviancy that opens the door to behavior modification conditions. Thus, if a family is perceived to be economically stable and therefore "independent" of the state, the state largely leaves parents alone to make decisions about child rearing. But if a family needs state support, it risks losing state deference to parental decisionmaking.

The dominant "freedom from" conception of family autonomy means that families take care of themselves with minimal state support, but also minimal state intervention. This has particularly detrimental effects for families at risk of involvement in the child welfare [\*1510] system because it creates a post hoc, rather than a prevention-oriented, system of child welfare. A system that focuses on prevention by offering additional supports to families must take seriously the concern about increased state regulation of familial decisionmaking. The challenge, therefore, is to reconfigure the relationship between the state and families such that the state seeks to invest in families but does so in a way that fosters rather than hinders familial self-determination. This will require a reconception of the prevailing conception of family autonomy.

### III. Reconceiving Family Autonomy

Adopting a prevention-oriented approach to child welfare will require a new conception of family autonomy. This conception must center on the need for state support, but not condition that support on a forfeiture of familial self-determination. In this Part, I first propose that instead of placing freedom from state control at the center of family autonomy, we encourage engagement with the state. Such engagement is built upon the mutual dependency of the state and families. I then explore how this engagement need not come at the price of familial self-determination. To demonstrate that a reconceived family autonomy is possible, I offer three examples of innovative programs that embody the principles I endorse.

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<sup>89</sup> See DeParle, *supra* note 66, at 37 (describing such "visits").

<sup>90</sup> See, e.g., *Wyman v. James*, 400 U.S. 309, 317 (1971) (rejecting a Fourth Amendment challenge to daytime visits where the mother was given advance notice); see also *id.* at 328 (Douglas, J., dissenting) ("The central question is whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution." (quoting Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595, 1599 (1960))). For a more recent example, see *Sanchez v. San Diego*, 464 F.3d 916, 919 (9th Cir. 2006) (upholding requirement in county's welfare law that permitted an investigator to make an unannounced visit to determine, inter alia, (1) assets of claimant, (2) presence of dependent child, and (3) absence of co-parent).

<sup>91</sup> *Cal. Welf. & Inst. Code §11450.04(b)(3)* (West 2005). There are also exceptions in that law for children conceived as the result of rape or incest. See *id.* §11450.04(b)(1)-(2).

<sup>92</sup> See Dorothy Roberts, *Killing the Black Body* 89-98 (1997); Nancy Ehrenreich, *The Colonization of the Womb*, 43 *Duke L.J.* 492, 515-16 (1993).

My aim is to identify a model of family-state relations that will best persuade the state to make the necessary investments in prevention. This structural argument is required because the state cannot be compelled as a matter of legal obligation to provide support. Some scholars have advanced such an argument in the context of the child welfare system, contending that the state possesses an affirmative legal obligation to support parents by addressing the underlying issues of child abuse and neglect.<sup>93</sup> Locating an affirmative obligation of aid is [\*1511] a steeply uphill battle, however, and not one I intend to wage. Rather, the arguments for social and economic aid are best couched in terms of structural relations, not legal obligation.<sup>94</sup>

#### A. Engaging with the State

The central goal of family autonomy should be to promote familial self-determination, which includes both family integrity and deference to parental decisionmaking. As I explored above, for families at risk of involvement in the child welfare system, the prevailing conception of family autonomy actually jeopardizes family integrity and thus parental decisionmaking.<sup>95</sup> For such families, engaging with the state is a better way of protecting familial self-determination. Targeted prevention programs as well as general antipoverty efforts will enable a parent to better care for her child, thus reducing the chance that a [\*1512] crisis will occur and the state will remove the child from the parent's home. Thus, the provision of state support for families will not weaken family integrity, and instead stands only to bolster it by giving parents a better chance of being able to raise their own children.

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<sup>93</sup> For example, acknowledging that the Federal Constitution is an unlikely source of an affirmative right to state support, some scholars have tried to locate an affirmative obligation in the *parens patriae* authority of the state. See, e.g., Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, [57 Ohio St. L.J. 519, 534-36 \(1996\)](#); Sarah Ramsey & Daan Braveman, "Let Them Starve": Government's Obligation to Children in Poverty, [68 Temp. L. Rev. 1607, 1631, 1634-35 \(1995\)](#). Although these are creative and important arguments, I believe such arguments will founder. The current conception of *parens patriae* authority in the child welfare system is that when there is evidence of abuse or neglect of a child, the state is authorized to intervene in the family and act as the "primary protector of children from abuse and neglect." Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 *Geo. L.J.* 887, 893 (1975); accord Sanford N. Katz, *Family Law in America* 132 (2003) ("Historically the state, the ultimate parent who looks after all the children in society under the *parens patriae* concept, has a right to subject parents to public scrutiny and legal examination."). Thus, *parens patriae* authority has generally been understood to empower the state to intervene to protect a child, but not to impose a concomitant duty to intervene. See [P.W. v. Kan. Dep't Soc. & Rehab. Servs., 877 P.2d 430, 436 \(Kan. 1994\)](#) ("The doctrine of *parens patriae* empowers, but does not impose a duty on, the State to act on behalf of the welfare of those unable to care for themselves."); Ramsey & Braveman, *supra*, at 1635 (noting that any language in judicial opinions appearing to impose an affirmative obligation through the *parens patriae* doctrine "seems to be mainly rhetorical"). Moreover, the authority has not been understood to require any particular manner of intervention, such as addressing poverty rather than simply removing the child. Finally, it is well-established that an individual cannot raise a substantive due process claim against the state for the failure to prevent child abuse and neglect. See [DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191 \(1989\)](#).

<sup>94</sup> Other scholars have also proposed new models for reworking the relationship between families and the state, typically arguing that state support plays an important role in ensuring the well-being of families. See, e.g., Alstott, *supra* note 70, at 208-11 (summarizing her argument that society must care for parents as a way of ensuring the well-being of children); Fineman, *supra* note 67, at 218-40 (advancing the argument for state support of care giving); Roberts, *supra* note 92, at 308-12 (proposing a new conception of liberty, which "includes not only the negative proscription against government coercion, but also the affirmative duty of government to protect the individual's personhood from degradation and to facilitate the processes of choice and self-determination," thus calling upon the state to provide "subsistence benefits, drug treatment, and medical care"); Eichner, *supra* note 26, at 463-65 (calling for a "supportive state" approach to child welfare); Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, [2004 U. Chi. Legal F. 85, 85](#) ("I would replace the paradigm in which parents and the state are pitted against each other with a paradigm in which parents and the state act as partners in ensuring an environment conducive to children's healthy development.").

<sup>95</sup> See *supra* notes 84-92 and accompanying text.

Just as families need the state, however, the state also needs families. Thus my overarching frame is one of mutual dependency: Families need state support to function, and the state needs functioning families. This subpart describes this idea in greater detail.

### 1. Rejecting the Intervention/Nonintervention Frame

The positive description of the state's role in the prevailing conception of family autonomy - the depiction of autonomous families free from all state intervention - is simply inaccurate. The state intervenes to varying degrees and in varying ways in the lives of all families at all times. I use as a starting point the insight of Frances Olsen that state intervention in the lives of families is an inevitable byproduct of organized government, and that "nonintervention" is a myth.<sup>96</sup>

**[\*1513]** This myth is perpetuated by the "ideal of the private family."<sup>97</sup>

As Olsen elaborates, in the context of the family, opponents of state intervention would still expect the state to reinforce parental authority over children by, for example, returning runaway children.<sup>98</sup> Such opponents would equally expect the state to protect the family from interference by third parties, such as a doctor who would otherwise perform nonemergency surgery without parental approval, or a neighbor who would take a child on vacation without parental approval.<sup>99</sup> Olsen sums up her perspective as follows:

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<sup>96</sup> See Frances E. Olsen, *The Myth of State Intervention in the Family*, [18 U. Mich. J.L. Reform 835, 836 \(1985\)](#). Professor Olsen has argued that the "private family," often the basis for nonintervention, is a myth, or at least an "incoherent ideal." [Id. at 835](#). Thus the terms "intervention" and "nonintervention" are largely meaningless. *Id.* Harkening back to the legal realists' deconstruction of a laissez-faire approach to government as a coherent legal frame, Olsen states that "as long as a state exists and enforces any laws at all, it makes political choices. The state cannot be neutral or remain uninvolved, nor would anyone want the state to do so." [Id. at 836](#); accord Glendon, *supra* note 72, at 307-08 ("Debates framed in terms of choice between intervention and nonintervention are as simplistic and unhelpful as those which try to distinguish sharply between individual and societal interests. These false dichotomies tend to obscure the facts that modern governments cannot avoid influencing families, directly and indirectly, in countless ways and that individuals benefit, not only from having 'rights,' but also from being surrounded by certain kinds of social arrangements."); Rhode, *supra* note 76, at 1187 ("One of liberalism's most conspicuous inadequacies is its reliance on public/private distinctions, and its refusal to make gender inequality in presumptively 'personal' spheres a central political issue... . The dichotomy of 'separate spheres' always has been illusory. The state determines what counts as private and what forms of intimacy are entitled to public recognition. Policies governing tax, welfare, childcare, family, and workplace issues heavily influence personal relationships."). Additionally, as feminist theorists have well-described, the state determines both constitutive questions (which groupings of individuals will win the moniker "family"), see Martha C. Nussbaum, *The Future of Feminist Liberalism*, in *The Subject of Care: Feminist Perspectives on Dependency* 186, 199 (Eva Feder Kittay & Ellen K. Feder eds., 2002) ("The state constitutes the family structure through its laws, defining which groups of people can count as families, defining the privileges and rights of family members, defining what marriage and divorce are, what legitimacy and parental responsibility are, and so forth. This difference makes a difference: The state is present in the family from the start ... ."), and normative questions of resource distribution (who will receive the state's largesse and with what strings attached), see, e.g., Martha Minow, *All In the Family & In All Families: Membership, Loving, and Owing*, 95 *W. Va. L. Rev.* 275, 280 (1993) (arguing that it is not possible for the state to be neutral about the definition of family because such definitions are necessary for the distribution of legal rights and state largesse).

<sup>97</sup> See Olsen, *supra* note 96, at 835.

<sup>98</sup> See *id.* at 837.

<sup>99</sup> *Id.* Although so-called "protective intervention" has been justified to protect abused and neglected children or battered women (the idea being that the family form has broken down, and thus state intervention is necessary to protect the vulnerable), as Olsen argues, this is typically understood as the exception and nonintervention as the norm. See *id.* at 841-42. As she contends, "focusing on 'nonintervention' tends to mush and confuse the ethical and political choices we make. It directs our attention to a false issue and obscures genuine issues of ethics and policy." See *id.* at 861.

The problem with state officials taking children away from poor parents is not really a problem of state "intervention," but a problem of the substance of that state behavior. What the state does is sometimes so bad that people would rather it did nothing - which of course is not possible. The effort to get the state to do nothing, even if it were possible, misfocuses attention. It is misguided to treat freedom as the polar opposite of state "intervention" or of government regulation. As Morris Cohen noted in another context, real freedom depends upon opportunities supplied by institutions that involve legal regulation. The attempt to criticize state "intervention" instead of criticizing the particular policies pursued may be especially limiting for poor people, who often have to rely on various government programs and are thus less likely to benefit from any political strategy based on the myth of nonintervention.<sup>100</sup>

Following this line of reasoning, I question whether there is a meaningful sphere of private (familial) decisionmaking that is separate from, and unaffected by, decisions made by the state. If there is such a sphere, then the concept of family autonomy has a role to play in the debate over which decisions should be made by the state and [\*1514] which decisions should be made by the family. But if there is not such a sphere, then the concept of family autonomy is analytically bereft with respect to this debate. One way to approach this question is to try to identify a meaningful familial decision that does not turn, at least in part, on a decision made by the state. I believe it cannot be done.

The state influences the content of familial decisions in two important ways. First, the state determines the contours of the world in which a family lives and then permits parents to make decisions within this geography. For example, the state has decided that all children must be educated. A parent can decide where to send a child to school, even choosing to educate her at home, but a parent cannot decide to forego education altogether.<sup>101</sup> Even seemingly smaller decisions made by the state - for example, whether to install sidewalks in a new housing or commercial development - will, perhaps profoundly, affect subsequent decisions made by a family. Of course simple decisions - whether to put a child's pants on before her shirt or vice versa - are not affected by state decisions. But the state most certainly does determine whether a child wears clothes at all, and whether those clothes are adequate and appropriate in light of, for example, the weather.

Second, the state establishes a system authorizing parents to make some decisions concerning children. Even those decisions that we perceive to be made free of state control, such as a parent deciding a course of medical treatment, are made within a decisional framework determined by the state. Parents can make these decisions because the state permits parents to make these decisions.<sup>102</sup>

Thus, the ideological construct of family autonomy is overdeterminate, misstating the actual relationship between the state and families. We believe family autonomy exists because, as I argue shortly below, some state involvement is not perceived as such and, therefore, we believe there is such a "thing" as autonomy from the [\*1515] state.<sup>103</sup> In reality, families live and make decisions in the shadow of the state all day long. To be sure, there is still value in parental decisionmaking.<sup>104</sup> But family autonomy oversimplifies the complex relationship

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<sup>100</sup> Id. at 863.

<sup>101</sup> The decision in *Yoder v. Wisconsin*, 406 U.S. 205 (1972), permitted an Amish family to remove a child from school only after the age of fourteen. See [id. at 234-36](#).

<sup>102</sup> See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349, 1351-52 (1982); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497, 1504-06 (1983). For more on the barren nature of the distinction between the state and family, see Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 *Harv. L. Rev.* 491, 494-95 (2005). I acknowledge that there are numerous ways to describe state regulation of families and that the baseline is contestable. For example, it could be argued that families used to enjoy virtually all decisionmaking authority and that over time this authority has been ceded to the state. Regardless of the origins of the current regulatory web surrounding families, it is clear that such a web exists.

<sup>103</sup> See *infra* text accompanying notes 105-06.

<sup>104</sup> See *infra* Part III.B.1 (describing the parent-child relationship as playing out over time and involving the sharing of values).

between families and the state. Once we acknowledge the inevitable intertwining of families with the state, the central question then becomes how and why the state should involve itself with families, not whether it should do so.

## 2. An Alternative Frame: Mutual Dependency

All families need the state. Families who are economically stable need the state in myriad ways. For example, such families benefit from state rules governing marriage and divorce, inheritance rights, and, perhaps most importantly, parental authority vis-a-vis third parties.<sup>105</sup> Economically stable families also benefit from the continuation of such supports as public education, the passage of protective legislation such as the Family and Medical Leave Act, and the availability of child care tax credits. Low-income families also need the state, and some of their needs, such as for public education, overlap with the needs of economically stable families. But many of their needs for state support will differ, and may include such items as subsidized housing and child care.

The narrative that some families operate without state support - that they are independent - resonates because of the phenomenon of background and foreground noise. Some types of state support are so familiar, we take them for granted and they are not perceived as state support, but rather simply the state of the world. This type of support is background noise. Any change from this status quo, however, is perceived and is suspect. It is foreground noise. The present level and type of state support of families is not perceived because it has been normalized. Thus, for example, public education is not perceived as the massive state support program that it most surely is. But a new form of state support - say, universal child care - changes the status quo and thus is perceived as an aid to families.<sup>106</sup>

**[\*1516]** As families need the state, the state also needs families. The current view of family autonomy as "freedom from" does not adequately account for the state's interest in the well-being of children. This can be formulated as an interest in ensuring a child develops into a citizen capable of participating in a deliberative democracy, or, more basically, as an interest in the child growing up to be an adult who requires minimal state spending.<sup>107</sup> For purposes of this Article, and recognizing many possible criticisms of my term, I refer to this latter type of adult as a "contributing member of society."

To elaborate on the state's two-fold interest: First, the state has an interest in the existence of a citizenry capable of participating in a deliberative democracy.<sup>108</sup> Families play an important role in creating such citizens (a "formative

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<sup>105</sup> I recognize these benefits are not equally available to all economically stable families, notably same-sex couples in the vast majority of states. Such families are at a disadvantage because they do not enjoy the same protections as families with heterosexual, married parents.

<sup>106</sup> Other examples of omnipresent but largely unperceived state support include the mortgage interest deduction and child care tax credit. According to a recent report from the General Accounting Office, the federal interest mortgage deduction equaled a \$ 61.5 billion outlay equivalent in 2004, making it the second largest tax preference outlay equivalent. See U.S. Gov't Accountability Office, *Understanding the Tax Reform Debate* 12 (2005), available at <http://www.gao.gov/new.items/d051009sp.pdf>. Additionally, different kinds of support resonate in different ways. For example, the child care tax credit is less controversial than state-sponsored child care, in part because the former is viewed as state action that allows an individual to retain more of what she "earned," rather than an affirmative transfer of resources from the state to a family. It is important to acknowledge that either way the state is subsidizing the family.

<sup>107</sup> I recognize the bias in this formulation. State spending for low-income families is pathologized, whereas other forms of state support, such as Medicare, are not.

<sup>108</sup> See Hannah Arendt, *The Human Condition* 46 (1958); Carole Pateman, *Participation and Democratic Theory* 103-11 (1970); Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 *Ethics* 352, 352-53 (1994); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 *Yale L.J.* 330, 344-48 (2006). The Supreme Court has recognized this interest. See *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."). For a

project," as Linda McClain terms it). <sup>109</sup> [\*1517] But some families need social and economic supports to function better and thus be able to undertake the formative project - ensuring that as many individuals as possible are able to participate in the collective enterprise we call a democratic society. <sup>110</sup>

Some scholars argue that the family is not the appropriate locus for building the capacity of children. If families themselves are rife with inequality, they are hardly the place to instill civic values and notions of justice. <sup>111</sup> It has also been suggested that families exist for other purposes and that they simply are not very good at this particular job, and instead such capacity-building should occur in the schools and other public institutions. <sup>112</sup> I recognize these arguments, but I [\*1518] believe families are still crucial players in the development of citizens. In addition to a family's ability, in at least some instances, to teach democratic values, families play an essential role in preparing a child to engage in other settings. For example, even if schools are a better locus for learning civic virtues, a child

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discussion of how our traditional governmental structures may hinder participation, see Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, [5 Nev. L.J. 347, 351-59 \(2005\)](#).

<sup>109</sup> Linda McClain has written about this extensively. See Linda C. McClain, *The Place of Families* 3, 17 (2006). Professor McClain describes the role of families "in the project of forming persons into capable, responsible, self-governing citizens" and argues that such "[a] formative project aims at fostering persons' capacities for democratic... self-government... ." "Democratic self-government connotes what democratic theorists refer to as 'deliberative democracy' and implicates a person's capacity to deliberate about his or her conception of justice ... ." *Id.* Anne Dailey also makes an interesting argument about the role families play in creating citizens capable of participating in a deliberative democracy. See Anne Dailey, *Developing Citizens*, [91 Iowa L. Rev. 431, 438-61 \(2006\)](#). Professor Dailey argues that "acquiring the integrated cognitive and emotional capacities of mature reasoned thinking" is essential to participation in a deliberative democracy. *Id.* at 433. She further contends that "the integrated psychological capacities for personal self-reflection and emotional self-mastery," *id.* at 433, which curb the "regressive compulsions, urges, and desires that can threaten to overwhelm mature ego functions," are learned through the relationship between a very young child and her caregiver. *Id.* at 481. Left unchecked, these "regressive impulses ... threaten our democratic way of life from inside the body politic" because they can lead to a "collective regression," which breaks down the "normal processes of collective deliberation." *Id.* at 479, 481. Dailey cites several such examples, such as the Japanese internment during World War II, which she contends was a "massive failure[] in the reasoned judgment of legal decisionmakers and ordinary citizens." *Id.* at 480.

<sup>110</sup> This plays into a larger debate among political theorists about the role of state support and participation in a democracy. On the one hand, it has been argued that state support of those in need can be conceived of as a precondition to participation. For example, T.H. Marshall argued that a welfare state is necessary to ensure all members of society can participate fully because without economic security (social rights), a person cannot exercise her civil and political rights. See Marshall, *supra* note 79, at 93; *supra* text accompanying notes 79-83 (defining and describing the relationship between civil, political, and social rights). This is in contrast to the view that citizens have a responsibility to be economically self-sufficient. This latter view can be summarized as follows:

Whereas Marshall had argued that social rights enable the disadvantaged to enter the mainstream of society and effectively exercise their civil and political rights, the New Right argues that the welfare state has promoted passivity among the poor, without actually improving their life chances, and created a culture of dependency. Far from being the solution, the welfare state has itself perpetuated the problem by reducing citizens to passive dependents who are under bureaucratic tutelage.

Kymlicka & Norman, *supra* note 108, at 355-56. In this way, economic independence is a precondition of full membership in society. See *id.* at 356. My vision of family autonomy - engagement with the state, not freedom from it - is firmly on the side of state support as a precondition of civic engagement.

<sup>111</sup> See, e.g., Susan Moller Okin, *Women, Equality & Citizenship*, 99 *Queen's Q.* 56, 65 (1992) (arguing that children learn about male dominance over women in the family setting).

<sup>112</sup> See Kymlicka & Norman, *supra* note 108, at 364. Kymlicka and Norman argue that families and other voluntary organizations cannot do all the work of preparing citizens:

While these associations may teach civic virtue, that is not their *raison d'etre*. The reason why people join churches, families, or ethnic organizations is not to learn civic virtue. It is, rather, to honor certain values and enjoy certain human goods, and these motives may have little to do with the promotion of citizenship.

*Id.*

must arrive at school able to learn such virtues. If the child's basic needs have not been met at home, it will be harder to build her capacity when she is at school. <sup>113</sup>

Moreover, apart from the important goal of preparing future citizens, the state also has an interest in families functioning well enough that they produce contributing members of society. Again, families play a key role here, given the overwhelming evidence that chronic poverty poses serious risks to the emotional, cognitive, and physical development of children, <sup>114</sup> regardless of whether the family is involved in the child welfare system. If the state provided appropriate social and economic supports, families likely would function better and thus be able to do the important work of raising children who will become contributing members of society.

Additionally, the state has an economic interest in providing this kind of support. Although the message is so often lost in our short-sighted political climate, preventive programs both work and are cheaper than "back-end" programs like foster care and the criminal [\*1519] justice system. Examples abound, <sup>115</sup> and the adage of "pay now or pay later" is a truism. <sup>116</sup> Although some programs, such as universal, quality child care, would entail considerable up-

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<sup>113</sup> See Dailey, *supra* note 109, at 458. Professor Dailey acknowledges the important role of educational and civic institutions, but notes that "educational institutions must build upon psychological structures and processes cultivated and established in the very earliest years. Early family relationships play a foundational role in fostering the emotional and cognitive mechanisms ... upon which a liberal democratic education can then build." *Id.*

<sup>114</sup> See, e.g., Arloc Sherman, *Poverty Matters* 3-4 (1997) (describing risks associated with child poverty, such as the two times higher risk of being a dropout at ages sixteen through twenty-four and the 3.4 times greater risk of being expelled from school); J. Lawrence Aber et al., *The Impact of Poverty on the Mental Health and Development of Very Young Children*, in *Handbook of Infant Mental Health* 113, 118-21 (Charles H. Zeanah, Jr. ed., 2d ed. 2000); Greg J. Duncan et al., *Economic Deprivation and Early Childhood Development*, 65 *Child Dev.* 296, 311-15 (1994); Aletha C. Huston et al., *Children and Poverty: Issues in Contemporary Research*, 65 *Child Dev.* 275, 277-79 (1994); Vonnie C. McLoyd, *Socioeconomic Disadvantage and Child Development*, 53 *Am. Psychologist* 185, 190-98 (1998). Of course there is some resilience on the part of children. See, e.g., Huntington, *supra* note 11, at 683 n.227 (citing Emmy E. Werner, *Children of the Garden Island*, *Sci. Am.*, Apr. 1989, at 106).

<sup>115</sup> See, e.g., Steve Aos et al., *Wash. State Inst. for Pub. Policy, Benefits and Costs of Prevention and Early Intervention Programs for Youth* 6 tbl.1 (2004), available at <http://www.wsipp.wa.gov/rptfiles/04-07-3901.pdf> (setting forth preventive programs that save the state money, as well as those that do not); Children's Sentinel Nutrition Assessment Program, *The Safety Net in Action* 1, 3 (2004), available at <http://dcc2.bumc.bu.edu/csnappublic/CSNAP2004.pdf> (noting that "food insecurity is associated with a greater likelihood of illnesses severe enough to warrant hospitalization for infants and toddlers," that infants and toddlers in food-insecure households are thirty percent more likely to have a history of hospitalization, and that one pediatric hospitalization costs an average of \$ 11,300, whereas that same amount would buy food stamps for a family for almost five years).

<sup>116</sup> For example, children in foster care have particularly poor long-term outcomes, whether from the initial abuse and neglect or the subsequent upheaval and placement in foster care. See Huntington, *supra* note 11, at 661 n.123. As Emily Buss describes the trade-off between paying now or paying later:

the entitlement to cash assistance and medical coverage; funding for preventive services including education and job training programs, family therapy services, and drug treatment; and funding for child care are all vulnerable to congressional reduction or elimination, in the name of shrinking government and shifting responsibility for children to their parents. Ironically, one of the predictable products of this "shrinkage" will be the bloating of that very part of government that does so poorly at replacing the care, love, and authority provided by parents. A true interest in helping parents to do their job unencumbered by government intervention should inspire support for precisely the kind of public assistance that allows as many parents as possible to avoid the greatest conceivable intrusion on family autonomy - the intrusion inevitably caused by the intervention of the child welfare system.

Emily Buss, *Parents' Rights and Parents Wronged*, 57 *Ohio St. L.J.* 431, 440 (1996). In this way, the arguments for a capacity-building approach to child welfare differ from those advanced by feminists for state support of care work. See, e.g., Fineman, *supra* note 67, at 218-40 (advancing the argument for state support of care giving).

front investment, these investments do pay off over time. <sup>117</sup> And, importantly, some child abuse and neglect prevention programs, such as the Nurse-Family Partnership program described below, cost relatively little to implement and yet have striking results. <sup>118</sup>

**[\*1520]** Whether the state's interest is characterized as one of preparing citizens or preventing future expenditures, or both, these interests are not furthered by the prevailing conception of family autonomy. That conception contributes to the state's failure to take affirmative responsibility for the well-being of families.

The need of the state for families - indeed, the dependency of the state on families - is mirrored by the need of families for state support both in building the capacity of children and preparing them to be contributing members of society. I understand this as the mutual dependency of the state and families. A mutual dependency frame acknowledges that all families need the state to some degree and that the state has a keen self-interest in meeting those needs.

### 3. Taking Mutual Dependency Seriously

If mutual dependency of the state and families is both an apt description of and prescription for the relationship between the state and families, the challenge then is to determine how each institution can best help the other. I propose a model of parent-state collaboration that views the healthy functioning of parents as essential to providing services to children. This approach centers on mutual dependency: The state has a strong interest in the well-being of children, especially very young children, but the state largely cannot reach these children without engaging parents. <sup>119</sup> Parents have a **[\*1521]** strong interest in the well-being of their children, but they may not be able to realize that interest without support from the state. To serve these interests, the state should support families through general antipoverty measures as well as targeted prevention programs. Both are essential to improve the well-being of children generally and prevent child abuse and neglect specifically.

To elaborate, the state already, if inadequately, invests in older children, largely through the public education system. But it is not enough to invest in public institutions. If the goal is to protect the well-being of children, the

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<sup>117</sup> See, e.g., Danielle Checchi, *The Economics of Education* 163-203 (2006) (documenting economic return on investments in education); Huntington, *supra* note 70, at 136-39 (describing long-term return on investments in quality child care).

<sup>118</sup> As I explore in greater detail below, see *infra* notes 142-50 and accompanying text, that program costs approximately \$ 8700 per family, see Judith Glazner et al., *Effect of the Nurse Family Partnership on Government Expenditures for Vulnerable First-Time Mothers and their Children in Elmira, New York, Memphis, Tennessee, and Denver, Colorado* 16 tbl.5 (2004), available at [http://www.acf.hhs.gov/programs/opre/welfare\\_employ/economic\\_analysis/reports/effect\\_nursefam/effect\\_nursefam.pdf](http://www.acf.hhs.gov/programs/opre/welfare_employ/economic_analysis/reports/effect_nursefam/effect_nursefam.pdf), and yet has a dramatic effect on rates of child abuse and neglect, see David L. Olds, *Prenatal and Infancy Home Visiting by Nurses: From Randomized Trials to Community Replication*, 3 *Prevention Sci.* 153, 161-62 (2002). Children in the program have an eighty percent lower rate of child abuse and neglect as compared with similarly situated children. See *id.*; see also Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, *Nurse-Family Partnership*, [http://www.dsgonline.com/mpg2.5/TitleV\\_MPG\\_Table\\_Ind\\_Rec.asp?id=368](http://www.dsgonline.com/mpg2.5/TitleV_MPG_Table_Ind_Rec.asp?id=368) (last visited Feb. 23, **2007**).

<sup>119</sup> Let me be clear about the goal of the state's investments. I believe the state should work toward equal opportunity, but not necessarily equal results, for families. It is up to the parents to realize this opportunity. I should also add that state supports should not focus solely on the parent-child relationship. Prevention and long-term treatment should look at all the systems around a child. See Woodhouse, *supra* note 42, at 425-26; Woodhouse, *supra* note 94, at 85-86 ("An ecological theory, in contrast to the child/parent/state triangle of constitutional theory ... envisions children at the center of concentric circles of human and natural systems. Rather than proposing normative principles such as rights and duties, an ecological theory is descriptive of the world as the child knows and experiences it."). Woodhouse terms this approach "ecogenerism." *Id.* at 86. These systems range from those that directly touch the child, such as the family (immediate and extended), neighborhood, school, and peer group, to those systems that are not in direct contact with the child but nonetheless influence the child, such as a parent's workplace. See Woodhouse, *supra* note 42, at 425-26.

state needs to focus in particular on very young children, especially in light of research establishing that the time between birth and age three is a vitally important period of child development.<sup>120</sup>

To support very young children, the state could make some direct investments in children, such as the provision of health care. But the point that is so often missed is that the state must also invest in children indirectly by attending to the needs of parents. Very young children are predominantly with their families - not in schools or other public institutions - during the key developmental phase. Therefore, to protect these children, the state should support parents, enabling them to care well for their children. I do not intend to explore here the myriad ways the state can provide social and economic support to parents,<sup>121</sup> but rather to argue the necessity of its doing so.

**[\*1522]** Supporting very young children is simply widening our lens of state responsibility. For example, public education can be seen as a form of support that the state undertakes with the goal of creating informed, capable citizens.<sup>122</sup> Thus, the state assumes an enormous responsibility for children beginning at age five. But there is no reason why this responsibility should begin at that particular age. It could be later; it could be far earlier. The point about foreground and background noise is relevant again. Although it may seem politically impossible for the state to undertake the necessary investments to support younger children, one reason for this is that these investments would be new and thus more perceptible. Because an investment in public education has become part of the fabric of society, it has faded into background noise and thus is not perceived as the capacity-building or protective investment that it is. In this way, advocacy of universal, state-subsidized child care appears to be a call for a new role for the state, but arguing in favor of publicly funded education does not. There is not a meaningful difference between these two types of investments, however, just a difference in familiarity and thus perception.<sup>123</sup>

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<sup>120</sup> See, e.g., Cindy Oser & Julie Cohen, *America's Babies* (2003). But see Jane Waldfogel, *What Children Need 18-20* (2006) (arguing that some of the age zero to three debate has exaggerated the importance of the early years, which are not "critical" in the sense that this is the only opportunity for child development, and that both the early and later years are important to child development).

<sup>121</sup> As I have said repeatedly in this Article, preventing child abuse and neglect will entail a combination of general antipoverty programs as well as more targeted programs, such as the Nurse-Family Partnership. For two interesting proposals for how the state could immediately begin supporting families, see Alstott, *supra* note 70, at 75-85, 117-37 (proposing "caretaker resource accounts" and "life-planning insurance"). One example of the kind of social support the state is beginning to offer families are programs aimed at creating "healthy marriages." See Erik Eckholm, *Program Seeks to Fight Poverty by Building Family Ties*, *N.Y. Times*, July 20, 2006, at A13 (describing \$ 750 million earmarked in the federal welfare reauthorization bill for "healthy marriage" and "responsible fatherhood" programs). These programs are certainly subject to debate. Critics contend the promotion of marriage does little to address the economic problems of poverty. See *id.* I agree that promoting marriage (or, perhaps less controversially, promoting healthy relationships) will not alone ameliorate poverty, but I do believe that teaching relationship skills, particularly how to manage conflict, is important for all couples. Indeed, "couples therapy" is widely accepted practice among upper-and middle-class families, who are able to pay for such support themselves. See *id.*

<sup>122</sup> See, e.g., Marshall, *supra* note 79, at 100 ("When the state guarantees that all children shall be educated, it has the requirements and the nature of citizenship definitely in mind. It is trying to stimulate the growth of citizens in the making."); Liu, *supra* note 108, at 335, 341-48 (arguing that the Citizenship Clause of the Fourteenth Amendment, coupled with Section 5, oblige Congress to ensure meaningful educational opportunity for all children as a way of securing the "full membership, effective participation, and equal dignity of all citizens in the national community").

<sup>123</sup> When deciding to make these investments, another issue to address will be determining the scope of the investment. If providing economic and social supports is a responsibility of the state, this raises the question of where the responsibility ends. For example, when the state seeks to subsidize housing, will the provision of a voucher sufficient for obtaining an apartment in a run-down neighborhood satisfy the state's responsibility? Or must the state guarantee a decent apartment in a low-crime neighborhood? A single-family home? See Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, [76 Chi.-Kent L. Rev. 1753 \(2001\)](#). As Professor Case has argued, viewing children as a public good raises questions such as the extent to which the state should subsidize children - how much is enough? - and whether the state should subsidize all children and all parents equally, see [id. at 1771-73](#), knowing that some parents are less well-equipped to parent and some children will not "produce positive externalities," [id. at 1775](#). Professor Case advances these arguments in the context of the care debate. In the child welfare context, some of her arguments are less relevant because it is not simply a question of shifting economic burdens from those with children to those

[\*1523] My argument for state support is based on both moral and practical grounds. A just state should ensure the well-being of children because our most vulnerable citizens deserve the protection of the state. But unlike those who would rescue children from their parents, my argument is that the state can best protect children by supporting the functioning of families. In addition to this moral obligation, the state has a keen practical interest in a prevention-oriented approach to child welfare because it will reduce harm to both parents and children and serve the state's interest in the development of future citizens and contributing members of society. By differentiating the moral dimension of my argument from the practical achievement of it, I am arguing that there is value in the state accepting the moral imperative of this kind of orientation to child welfare. Indeed, even if the state spent no additional monies on the child welfare system, acknowledging the need for prevention and state support of families would be a radical and beneficial change from the current approach because it would acknowledge the role we all play in creating the circumstances that lead to child abuse and neglect.<sup>124</sup>

[\*1524] In sum, making state support the centerpiece of the child welfare system will reduce poverty, lead to less child abuse and neglect, and enable individuals to lead productive lives. Moreover, these preventive measures would, in many cases, preclude the need for the radical intervention that typifies the current system. To be sure, participation in the preventive programs I envision would be voluntary. Thus, a parent who refuses such support and then abuses or neglects her child would still face involvement in the child welfare system. Further, a parent who receives state support but abuses or neglects her child also would face the system. In this way, the "stick" of the child welfare system would remain despite the greater emphasis on prevention. But a prevention-oriented approach to child welfare would at least introduce a "carrot," a vast improvement over the current stick-only system.

## B. Furthering Self-Determination

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without. In the child welfare system, the public is paying one way or the other and the question is how to maximize public payments. I contend preventive measures are a better use of tax dollars than back-end programs such as the maintenance of half a million children a year in foster care. That said, it is still relevant to explore such issues as the opportunity cost of directing limited funds to preventive programs. Further, I do not make the claim that families are entitled to social and economic supports that would enable the families to thrive. Rather, my baseline is that families should receive the supports necessary to prevent or remedy, as much as possible, child abuse and neglect. This level of support should help create the environment needed for families to undertake the formative project or, at the very least, help prepare children to be contributing members of society.

<sup>124</sup> This acknowledgement would help us move away from the narrative of "bad" parents. I refer here to the debate about whether parents who have abused or neglected their children are undeserving. See, e.g., Symposium, *The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predictive Power of Race*, [6 N.Y. City L. Rev. 61, 74 \(2003\)](#) (statement of Martin Guggenheim) ("It is the element of hatred that I wish to mention for a minute. There is a shocking presumption generated by fear, by otherness, by a lot of things - that the parents of children in foster care are bad for their children. They don't love them enough or they don't have the ability [] to raise them well. And I'm here to say that in my 30 years of work in this field, that is the most despicable slander of all, and the most difficult falsity to refute."); Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 *Va. J. Soc. Pol'y & L.* 176, 179 (2004) (noting that many parents are "victims in their own right"). But see Bartholet, *supra* note 46, at 7 (decrying the "blood bias" in the current child welfare system). I place myself firmly on the side of the debate that views the majority of parents in the child welfare system as individuals who are well-intentioned and trying their best, often under extremely difficult circumstances, to raise their children well.

Some parents are wrongly treated by the child welfare system, and should not have their children removed, see Roberts, *supra* note 14, at 92-99 (describing evidence of racial bias in child welfare, leading to the overremoval of African-American children from their homes), while other parents have made poor decisions but, in different circumstances, would have acted in a different manner. I therefore reject the notion that parents who abuse or neglect their children should lose state deference to their decisions regarding the rearing of their children. I recognize that this is the legal framework governing the child welfare system - parents who do not abuse and neglect their children are viewed as good parents and thus deserving of state deference. But parents with a poor "track record" lose their entitlement to this deference. My argument is that we should rethink this simple exchange. To be sure, some children face tremendous risks in their own homes. I am not arguing that child abuse or neglect is benign or that parents do not actually engage in such behavior. Rather, my point is that with additional social and economic supports, many parents would be able to meet the needs of their children because they would make different choices.

A conception of family autonomy built upon an understanding of mutual dependency must address the trenchant concern that state support of families is necessarily accompanied by state control of families. Although engagement with the state likely will further family integrity, by contrast, state support runs the risk of diminishing parental decisionmaking authority. The challenge is to provide support in a way that fosters that authority. <sup>125</sup>

### 1. Concerns About a Diversity of Decisionmaking

Before addressing how to protect parental decisionmaking, I want to define broadly the nature of that decisionmaking authority. [\*1525] This authority is traditionally understood as the right to make large, discrete decisions, such as which religion, if any, the child should follow, and which school the child should attend. The state cannot interfere in a particular decision made at a particular time. But conceiving of parental decisionmaking as a series of discrete events, occurring intermittently, misstates the nature of raising children. Parental decisionmaking that occurs over time is the essence of raising children. Although there may be a few key decisions, child-rearing is much more about the accumulation of small decisions. It is an ongoing project.

If raising children is about a long-term social relationship, traditional notions of family autonomy misconceive the nature of the autonomy needed. It is not only the freedom to make a particular decision, but also the freedom to raise children consistent with a set of values, which will be played out over time. Thus, autonomy takes on a particular meaning in the context of families, and this meaning is about the dynamic process of raising children, not protecting only an isolated, static decision.

Returning to the challenge of accommodating state support and parental decisionmaking authority, the state does have legitimate reasons for conditioning the receipt of aid. For example, conditions imposed by the state to ensure that public monies are used for their intended purpose protect the state fisc and promote accountability to the taxpayer. <sup>126</sup> But there is a danger that the state will impose conditions that go beyond these legitimate interests and instead seek to usurp parental decisionmaking. <sup>127</sup> If the state offered universal health care, it could be argued that parents would have an obligation to use such medical care, even if doing so contravened their personal, but not religiously based, views on appropriate medical care. For example, a parent may believe in holistic medicine and therefore choose an alternative - and for the sake of the hypothetical - ineffective treatment for a serious but not life-threatening childhood illness. [\*1526] Given the availability of medical care, the state could argue that the parent neglected the child by not pursuing the course of treatment approved by mainstream medicine and paid for by the state.

Although imposing conditions on families is, arguably, paternalistic, in the current political climate such conditions are inevitable. Therefore, the question is whether it is possible to mitigate the very real concern that receiving state aid will be contingent on a parent forfeiting her right to make decisions - large and small, today and over time - for her child. Put more broadly, the challenge is how to overcome the deeply entrenched history of exchanging self-determination for state support. From the perspective of the parent, the question is what stands to be lost if the parent accepts state support to raise a child. And from the perspective of the state, the question is what types of conditions are necessary to protect the state's legitimate interests.

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<sup>125</sup> See Nedelsky, *supra* note 49, at 13 ("The characteristic problem of autonomy in the modern state is not, as our tradition has taught us, to shield individuals from the collective, to set up legal barriers around the individual which the state cannot cross, but to ensure the autonomy of individuals when they are within the legitimate sphere of collective power. The task is to render autonomy compatible with the interdependence which collective power (properly used) expresses.").

<sup>126</sup> Acknowledging that there are legitimate state interests does, of course, beg the question of how to define those interests. For example, some readers might argue that the state has a legitimate interest in encouraging certain behavior and therefore can and should impose behavior-modification conditions on the receipt of state support, even if those conditions infringe on parental decisionmaking authority. I address this argument below. See *infra* notes 127-39 and accompanying text.

<sup>127</sup> I recognize that in some instances government regulation can foster, not hinder, parental decisionmaking. For example, legal requirements that manufacturers of certain electronic equipment install blocking devices enable a parent to exercise greater control over the content that reaches her child. Although such examples exist, my point is that regulation of low-income families is far more likely to diminish, rather than augment, familial self-determination.

Answering these questions is not easy and there is no silver bullet. Rather, it is important to acknowledge these real and substantial concerns and then to explore a few ways to mitigate the concerns. The relationship between the state and families that I envision looks something like this: Families are provided the social and economic supports needed to prevent child abuse and neglect, which will be a combination of general antipoverty policies and more targeted programs. At the same time, these supports are not overly conditioned on the recipient engaging in any particular behavior, but rather on the understanding that parents, even those who have abused or neglected their children in the past, will generally make good decisions for themselves and their children, and that parents are in the best position to assess their family's needs.<sup>128</sup> I have several proposals for how the state can provide support in a manner that does not compromise parental decisionmaking.

First, despite the normative control the state can exert when supporting families, it is possible for the state to act in a manner that enhances a family's self-determination. Indeed, this is what the state [\*1527] does for economically stable families when it offers a child care tax credit that enables a parent to select a child care provider of her choice and receive a tax credit for payments made to that provider.<sup>129</sup> Thus, knowing it is possible to act in a manner that does not overly condition aid, the state should consistently ask whether a proposed condition on the receipt of aid furthers or hinders a family's self-determination. If it hinders familial self-determination, it must then be justified by a stronger countervailing state interest.<sup>130</sup>

Of course these categories are not perspicuous. But one guiding principle is to determine whether similar aid to economically stable families is similarly conditioned. The child care credit is a good example. The state does not require parents to use state-approved child care as a condition of receiving the credit. Therefore, a child care voucher that enables a low-income parent to obtain child care should not be conditioned on this requirement either.

Further, we can distinguish between those decisions that the state has expertise in making and those decisions that a parent has expertise in making. There are some decisions that are better left to the state, such as determining, based on extensive studies, which substance abuse treatment programs are effective and therefore should be subsidized by the state.<sup>131</sup> By contrast, a family is far better able to determine for itself what supports, if any, are needed.<sup>132</sup>

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<sup>128</sup> It could be argued that "freedom from" includes the option for parents to make bad decisions. Thus the question is whether social and economic supports are truly facilitating familial self-determination, or whether there is necessarily a heavy hand of incentives or requirements that accompany any kind of state support. Even required education or drug treatment could be viewed as infringing on personal prerogatives. In response to this anticipated argument, let me clarify that I am not proposing complete state deference to parental decisionmaking. Rather, my argument is that within the general constraints of what society has determined to constitute minimally adequate parenting, the state should do more to help parents meet these standards, rather than simply penalizing parents after they fail to do so.

<sup>129</sup> See Child and Dependent Care Credit, 26 U.S.C. §21 (2000). A parent may choose any provider, including an individual, the parent deems fit; the credit is not limited to licensed child care providers. *Id.* §21(b)(2)(D). The ability to take a tax deduction for dependents is an example of the state attaching even fewer strings. See *id.* §152.

<sup>130</sup> An example of a state requirement that would override familial self-determination is childhood immunizations.

<sup>131</sup> In making the distinction between decisions that should be made by the state versus the family, I draw on the insights of Emily Buss. See Buss, *supra* note 56, at 29-35 (arguing that "relative competencies" should guide the allocation of developmental control between parent and state, giving parents greater control over matters with only private effects, and the state control over matters in which the state has a direct stake, such as education, which affects an individual's ability to participate in and contribute to "a healthy democracy and economy"). As Professor Buss noted elsewhere, the state is not a good parent and would "do better to give parents the means to be good parents themselves." Buss, *supra* note 116, at 440.

<sup>132</sup> One process for families in the child welfare system that recognizes such expertise is family group conferencing, which I have addressed in detail elsewhere. See Huntington, *supra* note 11, at 672-87. Family group conferencing recognizes that families have a considerable contribution to make in determining their own needs and that the state benefits when it listens to families on this score. In family group conferencing, the family itself determines what supports are needed - for example, child care, or transportation, or housing - and the state seeks to provide such supports.

**[\*1528]** The state can also design programs in a manner that furthers familial self-determination. Although vast cash transfers from the state to the family for the family to use as it sees fit arguably would maximize familial self-determination,<sup>133</sup> such transfers are unlikely to transpire. But the design of programs can recognize a family's expertise in itself.<sup>134</sup> In short, the actual interaction with the state makes a difference.<sup>135</sup> And if the state views familial self-determination as a value the state has an interest in promoting, it will be more inclined to do so. This self-determination is essential if families are to maintain their distinctive role in our society as incubators for connectivity and diverse values.<sup>136</sup>

Second, there are important lessons to be learned from the harm-reduction model of social services. In that approach, the state acknowledges that conditioning state support on certain behavior is not always to the benefit of the recipient or the state. For example, in the Housing First program, the state provides housing to the chronically **[\*1529]** homeless - individuals who are often struggling with multiple problems, such as substance abuse and mental illness - without imposing any conditions on the recipient.<sup>137</sup> This approach has been very successful, leading to better outcomes for the recipient (long-term housing, more stable mental health, and less substance abuse) and much lower costs for the state.<sup>138</sup> Thus, purely as a policy matter, it is important to ask whether conditions actually further the goals of the program or whether, at least in some instances, conditioning support is unnecessary or even detrimental to achieving the goals of the program.

Third, a change in cultural attitudes towards low-income families would go a long way toward overcoming the potential paternalism of the state. The state trusts all families to raise children and make decisions all day long. There is no reason why this trust should be diminished simply because the parent is using state money to effect her decisions. Additionally, when the state (acting through social workers) approaches families with the assumption that the families have strengths and abilities, there is a greater chance for collaboration between the state and families,

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<sup>133</sup> Cash transfers maximize decisionmaking in part because the effects of conditions on benefits are not uniform. For example, if the state determined that a parent could receive a child care credit only if the parent did not live with a same-sex partner, this would not, in practical terms, affect the majority of recipients. In this way, the burdens of conditions often are not evenly shared.

<sup>134</sup> See *supra* note 132 (discussing family group conferencing).

<sup>135</sup> See Nedelsky, *supra* note 49, at 14 ("The nature of people's interactions with bureaucratic decision-making may be as important as the nature of legislative policy-making in determining whether citizens are autonomous members of a democratic society or dependent subjects of collective control." (footnote omitted)). Of course state programs will entail some level of bureaucratization, which itself can be onerous. But this is not my concern here. Instead, I am concerned about the types of conditions that infringe on familial self-determination in a meaningful way, such as by permitting the state to visit the home unannounced, or by penalizing a family by refusing benefits for multiple children.

<sup>136</sup> See Areen, *supra* note 93, at 893 ("The state's desire to maintain family autonomy is not only a matter of tradition, but also reflects a recognition of the family's effectiveness as a social institution; no one has devised a better system for overseeing the rearing of most children. Autonomous families not only provide the conditions needed for the physical and emotional development of individual children, but also make possible a religious and cultural diversity that might disappear if the state extensively regulated or controlled child rearing."); cf. Dailey, *supra* note 109, at 500-01 (articulating a principle for federal support of families which "assumes there is no bright line between the private family and the State, and seeks instead to determine the kinds of governmental action that usurp, rather than reinforce, the family's childrearing role," and noting that where the line is drawn "turns in part on the distinction between inculcating particular moral values or life goals and securing conditions that allow individuals eventually to choose those values and goals for themselves").

<sup>137</sup> See Nestor M. Davidson, "Housing First" for the Chronically Homeless: Challenges of a New Service Model, 15 *J. Affordable Housing* 125, 125, 127-28 (2006); Sam Tsemberis et al., *Housing First, Consumer Choice, and Harm Reduction for Homeless Individuals with a Dual Diagnosis*, 94 *Am. J. Pub. Health* 651, 654-55 (2004). For a wonderful anecdotal account of this program, see Malcolm Gladwell, *Million-Dollar Murray*, *New Yorker*, Feb. 13-20, 2006, at 96.

<sup>138</sup> See Davidson, *supra* note 137, at 127-28 (noting that such programs cost far less than the "cycle of shelters, hospitals, mental hospitals, and incarceration" and describing positive outcomes for clients in the areas of mental health and substance abuse); see also Gladwell, *supra* note 137, at 96 (describing the one million dollars spent by the state on services, such as emergency room visits, needed by one individual, as opposed to the typical \$ 15,000 annual cost of permanent housing plus supportive services).

and less need for the social workers to make decisions for families. The success of this approach is evident in the reforms to Alabama's child welfare system that I describe below.<sup>139</sup>

Finally, equality among families should be a goal of state support. When the state limits conditions on low-income families receiving aid, it furthers that goal. The state also furthers this goal by providing aid in the first place. The provision of state support would enable low-income families to enjoy an equality of decisionmaking opportunity because much decisionmaking requires access to resources. The ability to make health care decisions has little meaning if the child has no health insurance and the parent no means to pay for the care.

[\*1530]

## 2. Equality Among Families

Although I have focused throughout this Article on the needs of low-income families, let me be clear that I am not proposing a two-tiered family autonomy, one for economically stable families and one for low-income families.<sup>140</sup> Rather, my proposal is for one version of family autonomy for all families. It may be true that economically stable families are better able to enjoy the "freedom from" vision of family autonomy because their need for state support is not readily apparent or pathologized and therefore is not conditioned on relinquishing familial self-determination. But my argument is not that there should be a "freedom from" vision of family autonomy for such families and an "engagement with" vision of family autonomy for low-income families. Rather, my argument is that familial self-determination should be the goal of family autonomy, and to reach this goal we need to establish two tenets in the relationship between families and the state.

First, all families need state support. The particular forms of support will vary depending on a family's needs, but all families benefit from and need such support, whether it comes from clear inheritance rules or subsidized child care. Second, all families also need familial [\*1531] self-determination, which entails deference from the state regarding parental decisionmaking. Currently, we do not explicitly condition state support of economically stable families on those families foregoing a measure of familial self-determination. Therefore, we should not do so for low-income families.

My proposal seeks to decouple state support from losses of self-determination. There will be one set of rules for all families. All families will receive state support as well as state deference to parental decisionmaking (within the pre-set bounds that apply to all families; no one is free to make decisions that result in child abuse or neglect).

## C. Three Promising Examples

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<sup>139</sup> See *infra* text accompanying notes 161-68.

<sup>140</sup> A two-tiered version of family autonomy risks reinforcing the dual system of family law that traditionally disadvantages, or at least sets apart, low-income families. See, e.g., Marsha Garrison, *Why Terminate Parental Rights?*, [35 Stan. L. Rev. 423, 433-34 \(1983\)](#) (describing the distinction between private and public family law). Professor Garrison notes that

public family law has seldom deferred to parental rights. The doctrine of parental rights descends instead from common law inheritance and property concepts which developed to resolve private disputes, and it has largely remained so confined. Thus, as between a parent and another private individual, courts have generally recognized superior parental rights to the custody and control of children, but under the family law of the poor, courts have routinely ordered parents to cede custody to the state without any showing of fault.

*Id.* (footnotes omitted); Hasday, *Parenthood Divided*, *supra* note 76, at 329-47 (describing the dual system of family law that emerged in the last quarter of the nineteenth century, which disadvantaged families that did not fit the dominant norm of a male breadwinner able to support an entire family with his paycheck and further arguing that for such families, state intervention was widely justified to protect children from what was perceived as a harmful family situation); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 1), 16 *Stan. L. Rev.* 257, 262 (1964) (discussing distinction between "civil family law" and the "family law of the poor," while noting that for poor families, the state readily intervened between parent and child, while for other families, the state intervened only in extreme circumstances, and then only when private parties initiated the action).

A reconceived family autonomy - one that continues to protect family integrity and a diversity of parental decisionmaking but broadens the vision of state responsibility for supporting families - is a novel idea in child welfare. There are, however, examples of programs in the field that make a step in the right direction, demonstrating how familial self-determination and state support need not be zero sum. This subpart describes three such programs. My intent in this subpart is not to explore in detail the programs that embrace this approach, nor to endorse any particular program, but rather to note that it is possible to move toward a reconceived family autonomy.<sup>141</sup>

First, the Nurse-Family Partnership program has been very successful in both preventing child abuse and neglect and serving the needs of parents and children. In this program, a public health nurse visits a low-income, first-time parent during pregnancy and the first [\*1532] two years of a child's life.<sup>142</sup> The nurse works closely with the mother on three main goals. First, the nurse helps improve prenatal health. Second, the nurse aids the development and health of the child by helping parents provide more competent care to the child. Third, the nurse improves the family's economic stability by helping parents develop and accomplish goals relating to staying in school and finding work, as well as helping parents plan subsequent pregnancies.<sup>143</sup> The program specifically addresses poverty-related problems, such as substance abuse.<sup>144</sup>

The results of the program are striking. Families receiving this kind of support have an eighty percent lower incidence rate of child abuse and neglect than similarly situated families.<sup>145</sup> The program also produces numerous other benefits for parents, children, and the state.<sup>146</sup> Moreover, it appears to be cost-effective.<sup>147</sup> The program

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<sup>141</sup> I also do not address potential criticisms of the three programs I describe, including, for example, whether the success rates may, at least in part, be influenced by selection bias. My intent is to begin a conversation about how we can better help children by helping their families. Thus, for example, even if selection bias does influence the success rates of these programs, such bias does not negate the help the state has provided the families who participate on a voluntary basis. The point is that the state can assist at least some families, and do so in a way that furthers familial self-determination. Further, there are a number of implementation questions about the exact nature and manner of the support the state would make available to families under the "engagement with" model of family autonomy that I propose. As I have said repeatedly in this Article, preventing child abuse and neglect will entail some combination of general antipoverty and targeted prevention programs. The exact combination of such programs is not the subject of this Article. Rather, my goal is to propose a conception of autonomy that will lead to a new relationship between the state and families. Once we have begun to think differently about how the state can interact with families, I and others can continue the conversation and address these interesting and important implementation issues.

<sup>142</sup> See Office of Juvenile Justice & Delinquency Prevention, *supra* note 118, at 1.

<sup>143</sup> See Glazner et al., *supra* note 118, at 1; see also Office of Juvenile Justice & Delinquency Prevention, *supra* note 118, at 1 ("Nurses work intensively with ... mothers to improve maternal, prenatal, early childhood health, and well-being with the expectation that this intervention will help achieve long-term improvements in the lives of at-risk families.").

<sup>144</sup> See Office of Juvenile Justice & Delinquency Prevention, *supra* note 118, at 1.

<sup>145</sup> See Olds, *supra* note 118, at 161; see also *id.* at 161-63 (discussing this finding in greater detail, and noting that evidence that reductions in child abuse and neglect persisted over a fifteen-year period, despite an initial up-tick following the end of the program, further finding that the participating families who did not experience lower rates of child abuse or neglect were those that also involved domestic violence); Office of Juvenile Justice & Delinquency Prevention, *supra* note 118, at 1 (noting the many benefits from such partnerships).

<sup>146</sup> Studies documenting the positive benefits of the program abound, but to give just one example, children in the visited homes had lower rates of involvement in the criminal justice system. See David Olds et al., Long-Term Effects of Nurse Home Visitation on Children's Criminal and Antisocial Behavior: 15-Year Follow-up of a Randomized Controlled Trial, 280 JAMA 1238, 1241 (1998).

<sup>147</sup> I am not arguing definitively that a preventive approach will save the state money, although there are good reasons to think it will. See, e.g., Glazner et al., *supra* note 118, at 11-19 (documenting that during the fifteen-year period following intervention, the average visited family used, in 2001 dollars, \$ 56,600 less in government services and paid \$ 8300 more in taxes than a control group, resulting in a 393% recovery over the fifteen-year period on the amount invested). My intention is to point out the economic and noneconomic costs of the current system and suggest that it may save money, and certainly would reduce human harm, to take a preventive approach to child welfare.

costs approximately \$ 8700 per family,<sup>148</sup> as compared with the direct [\*1533] and indirect costs of the child welfare system<sup>149</sup> and the noneconomic harms associated with child abuse and neglect.<sup>150</sup>

Second, early childhood education programs are known for helping children on a number of fronts, including cognitive and socio-emotional development.<sup>151</sup> What is less known about these programs, however, is that they also are associated with reduced rates of child abuse and neglect, at least when the program involves the family and offers services to the parents as well.<sup>152</sup>

Thus, for example, the Chicago School District's Child-Parent Center (CPC) provides early childhood education to children beginning in preschool and either ending at kindergarten or continuing until third grade.<sup>153</sup> The program provides services to children, including health screening and free meals, and to parents, including home visits and referrals to social service agencies.<sup>154</sup> The program also teaches parents in separate classrooms with different teachers.<sup>155</sup> A study of the program found that the rate of child abuse and neglect among children in the preschool program was fifty-two percent lower than the rate in the control group.<sup>156</sup> The results were even better for those children who stayed in the program for at least four years. For these children, the child abuse and neglect rate was forty-eight percent lower than the rate for children in the program for one to four years.<sup>157</sup>

Like the Nurse-Family Partnership program, there is evidence that the CPC is cost-effective. For a child enrolled in the program for eighteen months, the program costs \$ 6692, including all the services to the family, and generates \$ 47,759 in return to society by the time [\*1534] the child is twenty-one.<sup>158</sup> The return includes savings from lower rates of special education enrollment and fewer arrests, coupled with higher taxes paid by the students when they graduate high school.<sup>159</sup> The calculations do not account for any savings from reduced involvement in the child welfare system and preventive health care, and thus could be much higher.

Such prevention programs should be the cornerstone of the child welfare system. The dominant conception of family autonomy does not present a legal barrier to such programs, but the existence of the hands-off culture created by the conception indicates that these programs are marginalized in the world of child welfare rather than viewed as essential components. These types of preventive programs can and should be the very first attempt the state makes to support families.

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<sup>148</sup> See *id.* at 16.

<sup>149</sup> See *supra* notes 1, 24-25 and accompanying text (describing twenty-two billion dollars in direct costs and an estimated ninety-four billion dollars in indirect costs).

<sup>150</sup> See *supra* note 26 (describing nonmonetary costs of the child welfare system).

<sup>151</sup> See Karoly et al., *supra* note 40, at xii-xvi.

<sup>152</sup> See Arthur J. Reynolds & Dylan L. Robertson, School-Based Early Intervention and Later Child Maltreatment in the Chicago Longitudinal Study, 74 *Child Dev.* 3, 19-20 (2003).

<sup>153</sup> See *id.* at 8.

<sup>154</sup> See *id.*

<sup>155</sup> See *Fight Crime: Invest in Kids*, *supra* note 3, at 14 ("The parents have their own teachers and classrooms. The program also conducts home visits and offers many opportunities for parents to join in field trips or other activities with their children. All of this is aimed at helping parents to learn and practice better child-raising skills and to get them actively involved in their children's education."); Reynolds & Robertson, *supra* note 152, at 8.

<sup>156</sup> See A.J. Reynolds et al., School-Based Early Intervention and Child Well-Being in the Chicago Longitudinal Study, 82 *Child Welfare* 633, 643 (2003); Reynolds & Robertson, *supra* note 152, at 13-14.

<sup>157</sup> See Reynolds & Robertson, *supra* note 152, at 14.

<sup>158</sup> See Reynolds et al., *supra* note 156, at 645.

<sup>159</sup> See *id.* at 644-45.

Moreover, these prevention programs do not sacrifice familial self-determination. The state support strengthens families, thus lessening the likelihood that the family will become involved in the child welfare system and that the parents will lose custody of the child. Additionally, this kind of program is far less intrusive than the kind of state involvement that may lie down the road for such families if they become involved in the child welfare system. In these two programs, participation is voluntary and the state plays a facilitative role by helping parents obtain what they want and need, not dictating certain behavior or results. <sup>160</sup>

A third promising example can be found in the reform of Alabama's child welfare system. Although not a prevention program per se, Alabama has embraced a new approach to child welfare that embodies the elements of my proposed reconception of family autonomy. There, parents brought a class-action lawsuit challenging the state's child welfare practices because the state did not do enough to help families or protect children from abuse or neglect. The parties agreed to a settlement in 1991 that required Alabama to completely reform its child welfare system. <sup>161</sup> The consent decree obligated the [\*1535] state to provide services based on the strengths of children and parents and to work to preserve families whenever possible. <sup>162</sup>

In reforming its system, Alabama has focused on two important changes. It has more than doubled funding for services aimed to keep families together. <sup>163</sup> The additional funds enable social workers to provide individualized treatment plans and also offer previously unavailable services. <sup>164</sup> Further, Alabama has worked to change the views of the social workers, who were used to perceiving deficits, not strengths, in biological families. <sup>165</sup> This shift in attitudes was aided by a change of leadership. The Commissioner of the Department of Human Resources at the time of the consent decree opposed the settlement because she was concerned it would keep children in dangerous homes. <sup>166</sup> By contrast, her successor embraced the goals of the consent decree. <sup>167</sup> The approach has been succeeding, with children returned to biological parents and remaining safe in those homes. <sup>168</sup>

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<sup>160</sup> For a wonderful description of the experiences of a visiting nurse and the effects on her clients, see Katherine Boo, *Swamp Nurse*, *New Yorker*, Feb. 6, 2006, at 54.

<sup>161</sup> See Bazelon Ctr. for Mental Health Law, *Making Child Welfare Work* 5 (1998); Pamela A. Holcomb et al., *Urban Inst., Recent Changes in Alabama Welfare and Work, Child Care, and Child Welfare Systems* 13 (2001), available at [http://www.urban.org/uploadedPDF/310361\\_AL\\_update.pdf](http://www.urban.org/uploadedPDF/310361_AL_update.pdf); Erik Eckholm, *Once Woeful, Alabama Is Model in Child Welfare*, *N.Y. Times*, Aug. 20, 2005, at A1.

<sup>162</sup> See Bazelon Ctr., *supra*, note 161, at 51. New York City has made similar changes, moving toward a model that recognizes the strengths of biological families and working with families in an attempt to preserve them. This change is happening on a policy level, reducing by half the number of children in foster care, and statistics appear to support the conclusion that this shift has not compromised the safety of those children not placed in foster care. See Leslie Kaufman, *Debate Rekindled on Pressuring Families at Risk*, *N.Y. Times*, Feb. 4, 2006, at A1 [hereinafter Kaufman, *Debate*]; Fernanda Santos, *Placements in Foster Care Are at Lowest Since Mid-80's*, *N.Y. Times*, Oct. 23, 2005, at A33. City officials attribute the reduction to a strong economy, a decline in the use of crack cocaine, and an explicit policy adopted by the Administration for Children's Services (ACS) that strives to keep children in their own families. See *id.* The city offers substantial supports to parents, such as counseling, housing aid, and substance abuse treatment. See *id.* This shift came under fire following a series of high-profile fatalities among children known to the ACS. See Leslie Kaufman, *Baby Drowned as Mother Listened to CD's, Prosecutor Says*, *N.Y. Times*, Nov. 9, 2005, at B1; Kaufman, *Debate*, *supra*; Leslie Kaufman, *Mother of Boy Who Died Was Trained, Agency Says*, *N.Y. Times*, Nov. 10, 2005, at B3; Leslie Kaufman & Jim Rutenberg, *Agency Suspends Supervisors After Girl's Death*, *N.Y. Times*, Jan. 19, 2006, at A1.

<sup>163</sup> See Holcomb et al., *supra* note 161, at 14.

<sup>164</sup> *Id.*

<sup>165</sup> See Bazelon Ctr., *supra* note 161, at 51.

<sup>166</sup> See Holcomb et al., *supra* note 161, at 13.

<sup>167</sup> See *id.*

<sup>168</sup> See Eckholm, *supra* note 161.

Working more closely with families to promote family preservation and reunification embodies elements of a reconceived family autonomy. It recognizes that both the state and families have important but distinct roles to play in addressing the problems underlying the abuse or neglect. The approach does not subscribe to the view that parents must simply pull themselves up by their bootstraps and be [\*1536] better parents. Rather, it acknowledges that there are serious problems in the lives of many families and that these problems must be addressed in order for children safely to remain with or return to their biological families. Importantly, it recognizes that state assistance in this effort is essential, but that social workers must work with families and rely on their strengths to accomplish the stated goals.

All three programs demonstrate both that it is possible to help children by supporting parents and that this does not inevitably erode familial self-determination. It might be suggested that my proposal will work only in countries with a tradition of strong social welfare programs. My argument is not that we should radically change our culture, but rather that we should make choices cognizant of their repercussions. A post hoc child welfare system that does not serve the interests of parents, children, or the state is inevitable if we continue to take a hands-off approach to the support of families. Supporting families need not contradict the American tradition of familial self-determination - as demonstrated by the programs described above - but the support itself is necessary if we want to reduce child abuse and neglect, keep families together, and prepare the next generation of citizens.

### Conclusion

A prevention-oriented approach to child welfare consisting of general antipoverty efforts and particularly emphasizing more targeted prevention programs would be far more effective than the current post hoc approach. But the dominant conception of family autonomy - freedom from state control - poses a formidable conceptual barrier to the creation of a system that seeks principally to prevent child abuse and neglect, rather than simply respond to crises. I have proposed a reconception of family autonomy that would foster an environment in which a prevention-oriented approach could take root. This conception encourages engagement with the state, not simply freedom from it. It is rooted in the mutual dependency of the state and families in building the capacity, or more basically, the competency of the next generation. But state support should not, and need not, come at the price of familial self-determination. The partnership I have proposed between families and the state holds tremendous promise to address the serious failings of the current child welfare system. It also holds the promise of greater equality among families by acknowledging that all families need state support and all families need self-determination.

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