

Troubled Children and Children in Trouble: Redefining the Role of the Juvenile Court in the Lives of Children

By Ann Reyes Robbins

This Essay considers the emerging research in the area of dual-jurisdiction children, often referred to as “crossover kids”—those currently or previously involved in maltreatment proceedings who have also committed delinquent acts. Part I describes the development of the juvenile courts in the early twentieth century. Part II of this Essay questions the need to “track” children along one legal path or another and points to the pitfalls of providing services to some children through a criminal justice paradigm instead of treating all children through a social work paradigm. Finally, Part III advocates a redesign of the juvenile court—a return to its roots—to better enable a court to consider the needs of the whole child, in context with the needs of her/his family.

I. DEVELOPMENT OF THE JUVENILE COURT

A. Origins of the Juvenile Court Concept of Child-Saving

As the concept of a juvenile court developed legislatively in Illinois between 1891 and the creation of the nation’s first juvenile court in Cook County in 1899, the goal of its creators remained steadfast: to engage in the work of “child-saving.”¹ While the juvenile court concept was not without controversy as to how that goal should be achieved, the guiding principle of its creators was that “[a] child should be treated as a

¹ T.D. Hurley, *Development of the Juvenile-Court Idea*, in CHILDREN’S COURTS IN THE UNITED STATES: THEIR ORIGIN, DEVELOPMENT, AND RESULTS 7, 7 (Samuel J. Barrows ed., 1904).

ABOUT THE AUTHOR: Ann Reyes Robbins is a Ph.D. student in Social Work and graduate certificate student in Public Policy and Geographic Information Science at the University of Southern California. B.A. 1994, University of Southern California; J.D. 1998, University of Michigan Law School. Certified Family Law Specialist and Domestic Relations Mediator (Indiana). I would like to thank Judge Charles Pratt of the Allen County Superior Court in Fort Wayne, Indiana for providing the inspiration for the title of this Essay.

Editor’s note: This article was previously published in the Fall 2007 issue of the University of Michigan *Journal of Law Reform*, Volume 41, Issue 1. Reprinted with permission.

child.”² It was deemed no longer acceptable for children under the age of sixteen to be “indicted, prosecuted, and confined as criminals, in prisons . . . before they knew what crime was.”³

Even though Illinois developed separate provisions within the Illinois Juvenile Court Act of 1899 for children involved in dependency proceedings and for those involved in delinquency proceedings,⁴ there was an acknowledgement from the start that children involved in delinquency proceedings often resided in households that shared qualities with dependency case households. Those who worked with the children brought before the Cook County juvenile court witnessed the “squalor of the homes” and the “vice, drunkenness, and criminality with which [some of the children were] brought in constant contact.”⁵ Therefore, in their opinion, “child-saving” necessarily involved instituting programs of prevention as well as the regular monitoring of those children that had been returned to their home environments. In fact, in the early twentieth century, children involved in dependency proceedings were “subject to the friendly visitation of a probation officer” as a condition of family preservation in lieu of out of home placement.⁶ During this period it was not unusual for the role of a probation officer, as an arm of the juvenile court, to be viewed as serving a social work function,⁷ and in some cases, the position of chief juvenile probation officer was filled by a woman.⁸

Cook County records for a nine-month period in 1903 revealed that more than half of the boys placed on probation, with what were then largely volunteer employees, did not return to the juvenile court in the year that followed.⁹ The juvenile court viewed this data as the “strongest [e]ndorsement of the humane and parental-care method” applied to child offenders.¹⁰ The function of the juvenile court came to be seen as one of educating the child, and in addition, it was recognized that community partnerships focused on preventative measures were essential to the effectiveness of the “child-saving” endeavor.¹¹

2 Samuel J. Barrows, *Introduction, in CHILDREN’S COURTS IN THE UNITED STATES*, *supra* note 1, at xi.

3 Richard S. Tuthill, *Illinois: History of the Children’s Court in Chicago, in CHILDREN’S COURTS IN THE UNITED STATES*, *supra* note 1, at 1.

4 See Illinois Juvenile Court Act of 1899, 1899 Ill. Laws 131-37 (reprinted in 49 JUV. & FAM. CT. J. 1, 1-5 (1998)).

5 Tuthill, *supra* note 3, at 4-5.

6 David S. Tanenhaus, *Growing Up Dependent: Family Preservation in Early Twentieth-Century Chicago*, 19 LAW & HIST. REV. 547, 561 (2001); see also Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17, 27 (1998) (suggesting that the structure of the juvenile court evolved into two distinct proceedings—one for dependency cases and one for delinquency cases, following *Kent v. United States*, 383 U.S. 541 (1966), and *In re Gault*, 387 U.S. 1 (1967)).

7 See Bert Hall, *Wisconsin: History of the Juvenile Court of Milwaukee, in CHILDREN’S COURTS IN THE UNITED STATES*, *supra* note 1, at 145-46; see also Jessie M. Keys, *The Work of a Probation Officer*, 10 AM. J. NURSING 656, 656 (1910); Justine Wise Polier, *The Future of the Juvenile Court*, 26 JUV. JUST. 3, 3-4 (1975).

8 See Keys, *supra* note 7, at 656; see also Hannah Kent Schoff, *Pennsylvania: A Campaign for Childhood, in CHILDREN’S COURTS IN THE UNITED STATES*, *supra* note 1, at 138.

9 Tuthill, *supra* note 3, at 6.

10 *Id.*

11 Barrows, *supra* note 2, at xvi-xvii.

B. Twentieth Century Transitions

Over the next century, social science researchers amassed extensive research demonstrating the correlation between child abuse and delinquency that was first observed by the juvenile court pioneers.¹² Specifically, children who have been maltreated have a greater likelihood of becoming involved in delinquent and criminal behavior and are more likely to commit violent offenses as young adults than children who have not been maltreated.¹³ Moreover, technological advances have enabled scientists to map brain activity and study the relationship between adolescent behavior and the structural maturation of the brain.¹⁴ Scientists have found evidence of permanent changes in a child's brain function as a result of trauma, such as that caused by physical abuse, which impact a child's development of capacities to cope with stressful stimuli, regulate emotion, or maintain interpersonal relationships.¹⁵

Despite the growing scientific evidence of the connection between delinquent behavior and maltreatment, dependency and delinquency proceedings became increasingly distinct with their own procedures and disparate approaches to helping the children that appeared before them. There is no question that the Supreme Court decision, *In re Gault*,¹⁶ provided essential due process protections to children involved in delinquency proceedings. This decision was most likely the impetus for increased professional standards among the juvenile court judiciary because it highlighted the fact that “half . . . [the judges had] no undergraduate degree, a fifth [had] no college education at all, a fifth [were] not members of the bar, and three-quarters devote[d] less than one-quarter of their time to juvenile matters.”¹⁷ However, the *In re Gault* case also marked the beginning of this conceptual dual standard of care and treatment for “troubled children” in dependency proceedings and a pendulum swing in the direction of treating “children in trouble” through a criminal justice paradigm. The idea that “[a] child should be treated as a child”¹⁸ is markedly absent from the criminal justice model, which was increasingly utilized after 1967 to handle delinquency cases.

By 1993, an estimated 18,000 juvenile probation officers in the United States came in contact with children involved in nearly 1.5 million delinquency cases handled by the juvenile courts.¹⁹ By 2002, juvenile courts handled more than 1.6 million delinquency

12 Richard Wiebush et al., *Preventing Delinquency Through Improved Child Protection Services*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUV. JUST. BULL., Jul. 2001, at 1-3.

13 *Id.* at 1.

14 Tomáš Paus, *Mapping Brain Maturation and Cognitive Development During Adolescence*, TRENDS IN COGNITIVE SCI., Feb. 2005, at 60, 60.

15 For an interdisciplinary review of the research, see Allan N. Schore, *The Effects of Early Relational Trauma on Right Brain Development, Affect Regulation, & Infant Mental Health*, 22 INFANT MENTAL HEALTH J. 201-269 (2001).

16 *In re Gault*, 387 U.S. 1 (1967).

17 *Id.* at 1 n.14.

18 Barrows, *supra* note 2, at xi.

19 Patricia McFall Torbet, *Juvenile Probation: The Workhorse of the Juvenile Justice System*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUV. JUST. BULL., Mar. 1996, at 1-2.

cases and held jurisdiction over more than 31 million children.²⁰ By this time, probation officers were generally “college-educated white males, thirty to forty-nine years old, with five to ten years of experience in the field.”²¹ In Illinois, the birthplace of the child-saving juvenile court, a fact sheet provided to the families of children involved in delinquency proceedings describes probation officers as “juvenile police officers” and the delinquency proceeding as a process that involves “a trial similar to an adult proceeding.”²² Furthermore, the fact sheet indicates that the court’s approach to punishment “attempts to strike a balance between rehabilitation and punitive actions” for those found “guilty.”²³ Where there once was a concern that children under the age of sixteen should not be held in a prison before they knew what crime was, this view has been replaced by the notion that even ten-year-old children can be confined in a juvenile detention center.²⁴ In addition, thirteen-year-old children are subject to automatic waiver of their juvenile status for certain crimes, with some discretion given to the court to waive their juvenile status in other situations, as well.²⁵

II. INEQUITIES OF A DUAL PROCESS

The disparate approaches to children in dependency proceedings and children in delinquency proceedings have exacerbated the inequalities in the demographic representation of the families brought before the juvenile courts and the subsequent outcomes for these children. In 2002, Black and Latino youth were three times more likely to be living in poverty than non-Latino white youth.²⁶ In 2004, a full 36 percent of black children, 31 percent of American Indian children, and 29 percent of Latino children were living in poverty in the United States, compared to only 11 percent of non-Latino white children.²⁷ The link between poverty and risk for abuse or neglect is well supported.²⁸ In addition,

20 ANNE L. STAHL ET AL., NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2001-2002 6, 8 (2005), <http://www.ncjrs.gov/pdffiles1/ojjdp/216251.pdf>.

21 Torbet, *supra* note 19, at 1.

22 Ill. Criminal Justice Info. Auth., CRIMINAL JUSTICE FACTS: JUVENILE JUSTICE (2000), <http://www.ncjrs.gov/pdffiles1/ojjdp/216251.pdf>.

23 *Id.*

24 *Id.*

25 *Id.*

26 HOWARD N. SNYDER & MELISSA SICKMUND, NAT’L CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 7 (2006), *available at* <http://www.ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

27 The Annie E. Casey Foundation, Kids Count: State-Level Data Online (2006), http://www.kidscount.org/sld/profile_results.jsp?r=1&d=1.

28 *See, e.g.*, Leroy H. Pelton & Joel S. Milner, *Is Poverty a Key Contributor to Child Maltreatment*, in *CONTROVERSIAL ISSUES IN CHILD WELFARE* 16, 16-28 (Eileen Gambrill & Theodore J. Stein eds., 1994); Claudia J. Coulton et al., *Community Level Factors and Child Maltreatment Rates*, 66 *CHILD DEV.* 1262, 1262-76 (1995); Brett Drake & Shanta Pandey, *Understanding the Relationship Between Neighborhood Poverty and Specific Types of Child Maltreatment*, 20 *CHILD ABUSE & NEGLECT* 1003, 1003-18 (1996); Loring Jones, *Unemployment and Child Abuse*, 71 *FAMILIES IN SOC’Y* 579, 579-84 (1990); Ellen E. Whipple & Carolyn Webster-Stratton, *The Role of Parental Stress in Physically Abusive Families*, 15 *CHILD ABUSE & NEGLECT* 279, 279-91 (1991).

there is support for a heightened risk of delinquent behavior among children who are abused or neglected.²⁹ Not surprisingly, research indicates that children of color are disproportionately represented in both delinquency and dependency proceedings and are further disproportionately represented among the impoverished.³⁰ In light of this connection, why are disadvantaged children who are brought before the juvenile court for a delinquency proceeding provided different resources and representation than children brought before the court for a dependency proceeding? Why are these children, so many from similar backgrounds, tracked as either troubled children in need of assistance or as children in trouble from whom society needs to be protected?³¹

Furthermore, for the period from 1985 through 2002, Black youth were not only overrepresented in delinquency cases proportionate to their population, but they were also more likely to be detained for their offenses than white youth in every year and across every offense category.³² The overall detention caseload during this time period increased thirty-two percent for white youth and sixty-four percent for Black youth.³³ On the dependency case side, the detention statistics are equally discouraging.³⁴ While theories abound to explain this phenomenon, no indisputable explanation has been found. What is indisputable is that the overrepresentation of children of color in both dependency and delinquency proceedings is not a new phenomenon.

In light of the similarities between the populations of children in delinquency and dependency proceedings, the handling of their cases should in theory have similarities as well. But the reality is that there are drastic differences between the procedures utilized in dependency proceedings and delinquency proceedings. One difference is that probation officers are not required to have a background in social work, nor is their educational training required to even focus on children. Moreover, no nationally adopted standards exist to ensure that children brought before a juvenile court for a delinquency proceeding will be provided with the type of advocacy afforded to children in dependency proceedings through guardian ad litem (“GAL”) and court-appointed special advocate (“CASA”) representation.

29 Joseph P. Ryan & Mark F. Testa, *Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability*, 27 CHILD. & YOUTH SERVS. REV. 227, 227-28 (2005).

30 See Joseph P. Ryan, *Dependent Youth in Juvenile Justice: Do Positive Peer Culture Programs Work for Victims of Child Maltreatment?*, 16 RES. SOC. WORK PRAC. 511, 511-12 (2006); see also, Kenneth B. Nunn, *The Child As Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 681-88 (2002).

31 See, e.g., Polier, *supra* note 7, at 5-6 (arguing that courts should play a more active role in the provision and monitoring of services to children and their families involved in juvenile delinquency proceedings and that the recognition of a child’s right to due process did not necessarily result in improved care and treatment of children and was instead an impetus for proposals that focused on offenses and not children’s needs, thereby promoting the return to treatment of children as “miniature adults”).

32 ANNE L. STAHL ET AL., *supra* note 20, at 29. Breakdowns for Latino youth during the same time period are unavailable due to the inclusion of Latino youth in each of the racial categories. See *id.*

33 *Id.*

34 See SUSAN CHIBNALL ET AL., DEPT. OF HEALTH & HUMAN SERVICES, CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY 3 (2003), available at <http://www.childwelfare.gov/pubs/otherpubs/children/children.pdf>; Michelle Y. Green, *Minorities as Majority: Disproportionality in Child Welfare and Juvenile Justice*, CHILD. VOICE, Nov.-Dec. 2002, available at <http://www.cwla.org/articles/cv0211minorities.htm>.

Dependency cases are handled using a human service organization model. Recipients of human service organization services expect that certain values, such as caring, commitment to human welfare, trust, and responsiveness to human needs, will be embodied within the framework of the human service organizations themselves, irrespective of the contradictory recognition of human service organizations as “formidable bureaucracies burdened by incomprehensible rules and regulations, and where services are delivered by rigid and occasionally unresponsive officials.”³⁵

Despite the seemingly shared goal between social service agencies and the courts to focus on the best interests of children involved in dependency proceedings, few people would associate values of “caring” and “responsiveness to human needs” with court proceedings. In fact, various scholars of legal theory emphasize the tradition of judicial restraint, which encourages judges to limit the exercise of their own power.³⁶ But the protection of children cannot be adequately undertaken in a distant, observer role, devoid of expressions of “caring” toward those involved. In some respects, different procedural treatment of delinquency and dependency cases is warranted, but different opportunities for services provided to the children is not. Such a framework is not merely a dual process; it is a dual standard for the treatment of children presenting similar socioeconomic challenges.

III. REDESIGNING THE JUVENILE COURT SYSTEM

A. Those Practices Which Have Been Proven Effective in the Context of Dependency Proceedings Should Be Applied to Delinquency Proceedings

The National Council of Juvenile and Family Court Judges (“NCJFCJ”) was established in 1937 with a mission to “improve courts and systems practice and raise awareness of the core issues that touch the lives of many of our nation’s children and families.”³⁷ Embracing the mission of the NCJFCJ and encouraging practices in line with the founding ideals of the juvenile court (i.e. “child-saving”)³⁸ may be the only way to fix many of the problems in our juvenile justice system. A hallmark of the social work profession is the recognition that the treatment of people cannot take place in a vacuum; there is an interaction between people and their environment, and that environment includes an individual’s family.³⁹ The approach taken towards children in dependency proceedings, such as family group conferencing (“FGC”) models designed to empower

35 Yeheskel Hasenfeld, *The Nature of Human Service Organizations*, in HUMAN SERVICES AS COMPLEX ORGANIZATIONS 3, 3 (Yeheskel Hasenfeld ed., 1992).

36 See, e.g., RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 304-34 (1996); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-88 (1989); Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. R. 695, 695-739 (1999); Ernest A. Young, *Judicial Activism and Conservative Politics*, 72 U. COLO. L. REV. 1139, 1144-74 (2002).

37 National Council of Juvenile and Family Court Judges, About the National Council of Juvenile and Family Court Judges, <http://www.ncjfcj.org/content/view/15/75> (last visited Sept. 21, 2007).

38 Hurley, *supra* note 1, at 7.

39 HARRIETT M. BARTLETT, THE COMMON BASE OF SOCIAL WORK PRACTICE 101-02 (1970).

families and involve them in the decision-making process, could also be beneficial to children involved in delinquency proceedings.

Despite the various permutations of the Family Group Conferencing model, there is virtually unanimous agreement in the literature that this form of Family Group Decision Making marks a philosophical shift in the way that child welfare cases are handled throughout the world.⁴⁰ Since the Adoption and Safe Families Act (“ASFA”) was enacted in 1997, concepts of restorative justice and family preservation have dramatically influenced the practice of child welfare law in the United States.

Researchers without exception herald New Zealand as the official birthplace of FGC as an early intervention technique.⁴¹ Indeed, the state sanctioning of FGC in the New Zealand Children, Young Persons and their Families Act,⁴² enacted in 1989, drew the attention of the Western world.⁴³ In addition to fulfilling New Zealand’s obligations under the United Nations Convention on the Rights of the Child,⁴⁴ the act formally recognizes the value of a minority culture by enacting the Maori⁴⁵ culture’s implicit respect for a family’s wisdom, into majority law.⁴⁶ For those of indigenous descent, the Family Group Conference Model is merely an old idea with a new name.⁴⁷ The New Zealand Children, Young Persons and their Families Act empowers families to make and implement decisions of their own in cases of abuse, neglect, and delinquency through a family meeting open to all family members.⁴⁸ Within the social work framework, the concept of empowerment involves restructuring traditional relationships between parents and professionals.⁴⁹

⁴⁰ See, e.g., JOCELYN HELLAND, INT’L INST. FOR CHILD RTS. & DEV., FAMILY GROUP CONFERENCING LITERATURE REVIEW 2 (2005), available at <http://web.uvic.ca/uicrd/graphics/FGC%20lit%20review%2005.pdf>.

⁴¹ *Id.* at 3; see also LEE BARNSDALE & MOIRA WALKER, EXAMINING THE USE AND IMPACT OF FAMILY GROUP CONFERENCING 2, 11 (2007), available at <http://www.scotland.gov.uk/Publications/2007/03/26093721/0>.

⁴² Public Access to Legislation Project, Statutes of New Zealand, <http://www.legislation.govt.nz/> (follow “Statutes” hyperlink; then follow the “Children, Young Persons, and Their Families Act 1989” hyperlink under the “C” hyperlink).

⁴³ See, e.g., Murray Levine, *The Family Group Conference in the New Zealand Children, Young Persons, and Their Families Act of 1989 (CYP&F): Review and Evaluation*, 18 BEHAV. SCI. & L. 517 (2000).

⁴⁴ United Nations Convention on the Rights of the Child, Sept. 20, 1990, 1577 U.N.T.S. 44.

⁴⁵ The FGC model is based on Maori culture and has similarities to many indigenous cultures. See, e.g., HELLAND, *supra* note 40, at 11. While the exact origin of the Maori people is disputed among scholars, they are widely believed to have been of Polynesian descent and to have arrived in New Zealand between 950-1130 A.D. See New Zealand in History, The Maori, <http://history-nz.org/maori.html> (last visited Sept. 21, 2007). The Maori people have historically placed great emphasis on the importance of family as the best place for a child to learn and grow, and consequently, the Maori people have a tradition of organizing in community groups to discuss matters of importance in the raising of their children. See A. Grey, *Play Centres in Maori Communities*, TE AO HOU: THE MAORI MAG., Mar.-May 1967, at 51. For the Maori people, family extends beyond merely parents and a child to include all generations living within the community. Advice is accepted from any member of the community, with particular deference given to the tribal elders. *Id.* The Maori culture rejects the nuclear family model as an inadequate means of defining family and community. See Silvia Cartwright, *21st Century Family Law Prospective*, 27 FAM. & CONCILIATION CTS. REV. 1, 1-5 (1989).

⁴⁶ See Levine, *supra* note 43, at 518.

⁴⁷ Jackie D. Sieppert et al., *Family Group Conferencing in Child Welfare: Lessons from a Demonstration Project* 81 FAMILIES IN SOC’Y 382, 382-91 (2000).

⁴⁸ *Id.*

⁴⁹ See generally Lyke Thompson et al., *Pathways to Family Empowerment: Effects of Family-Centered Delivery of Early Intervention Services*, 64 EXCEPTIONAL CHILD. 99, 99-115 (1997).

In FGC, this concept means that the professional is not so much a “problem-solver” as a resource for the family. Family Group Conferencing is a strengths-based, non-adversarial approach based upon the theory that child welfare is a responsibility shared by numerous entities including government agencies, tribes, communities, and families. Through the FGC, the family becomes the focal point of the decision-making process, and this paradigm shift assists with building and repairing the family’s ability to care for and protect the child.⁵⁰

The process that generates a Family Group Conference begins with a referral that is usually initiated by a social worker.⁵¹ The social worker contacts an FGC facilitator⁵² who reviews the case to determine whether an FGC is an appropriate way of supporting the family’s safe and comprehensive involvement in the child’s life.⁵³ The key referral questions include:

1. Is there a decision that needs to be made?
2. Can a conference be safely convened?
3. Are there enough family members to constitute a group?
4. Is the FGC organized with a well-defined, open-ended purpose, and no pre-defined outcome?⁵⁴

These criteria are not designed to exclude certain families from participation, and cases that involve child sexual abuse or domestic violence are not necessarily rejected as inappropriate for FGC, so long as the conference can be safely convened.⁵⁵

The official government website for the New Zealand Office of Child, Youth and Family defines a Family Group Conference as a formal meeting between social workers and the members of the family group/whanau/hapu/iwi to discuss “what needs to be done to make sure a child or young person is safe and well cared for.”⁵⁶ Typically an FGC includes the child, any parents and guardians, other family members, a social worker from Child, Youth and Family or from Iwi or from Cultural Social Services, a care and protection coordinator, counsel-for-the-child (if appointed), and in some cases, the Police.⁵⁷ Furthermore, “other people with special information may attend as necessary, such as a public health nurse; teacher; support group; psychiatrist; doctor; or lawyer.”⁵⁸

50 See Laverne F. Hill, Comment, *Family Group Conferencing: An Alternative Approach to the Placement of Alaska Native Children Under the Indian Child Welfare Act*, 22 ALASKA L. REV. 89, 89-112 (2005).

51 See HELLAND, *supra* note 40, at 3.

52 *Id.*

53 See LISA MERKEL-HOLGUIN & LESLIE WILMOT, AM. HUMANE ASS’N, FAMILY GROUP CONFERENCING: RESPONSES TO THE MOST COMMONLY ASKED QUESTIONS 2 (2004), http://www.americanhumane.org/site/DocServer/FGDM_faq_v2.pdf?docID=2561.

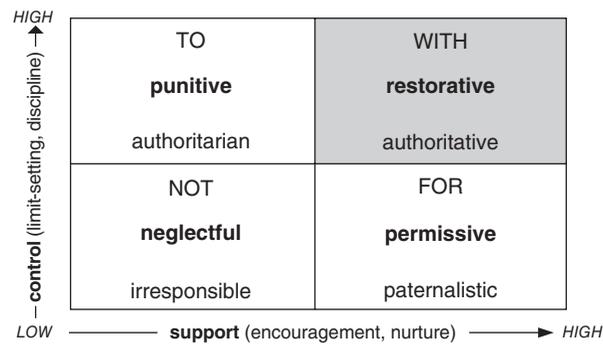
54 HELLAND, *supra* note 40, at 10.

55 See Joan Pennell & Gale Burford, *Family Group Decision Making: After the Conference*, <http://social.chass.ncsu.edu/jpennell/fgdm/FGDMbro.htm> (last visited Sept. 21, 2007).

56 New Zealand Office of Child, Youth and Family, *Family Group Conferences*, <http://www.cyf.govt.nz/1254.htm> (last visited Sept. 21, 2007).

57 *Id.*

58 *Id.*



Source: (Wachtel & McCold, 2004)

FIGURE 1. Social Discipline Window
The Next Step: Developing Restorative Communities

These additional people are present to provide information and give advice to the family; their role is not to make decisions.⁵⁹

The FGC model is intended to empower families to reach decisions about the care and safety of their children within the comfort zone of a space where the families feel that they are in control.⁶⁰ The family is afforded time to talk in private about how they believe their child can be cared for and kept safe, who should look after the child, and what help can be provided by others within the extended family or outside the family.⁶¹ The family reports its decisions to the conference participants, and everyone involved must agree that the proposed plan will keep the child safe.⁶² No agreement can be generated from an FGC that does not involve the willing cooperation of the family.⁶³ The plan must state who will be responsible for the care of the child, where the child will live, what services or organizations are needed to provide support for the child and for the family, what payments are needed to support the child, and when the plan will be reviewed.⁶⁴

While the idea of allowing families to be involved in the decision-making process pertaining to children who have committed a delinquent act may be a radical notion for some, the model's roots are grounded in social theory pertaining to restorative justice. The International Institute for Restorative Practices defines restorative practices as "the science of building social capital and achieving social discipline through participatory learning and decision making."⁶⁵ As demonstrated in Figure 1 above, the restorative

59 *Id.*

60 See HELLAND, *supra* note 40, at 2; see also, Carol Lupton, *User Empowerment or Family Self-Reliance? The Family Group Conference Model*, 28 BRIT. J. SOC. WORK 107, 107-28 (1998).

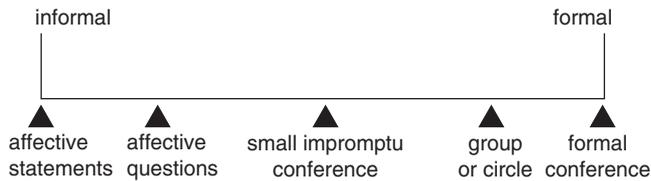
61 New Zealand Office of Child, Youth and Family, *supra* note 56.

62 *Id.*

63 *Id.*

64 New Zealand Office of Child, Youth and Family, *supra* note 56.

65 Ted Wachtel & Paul McCold, *From Restorative Justice to Restorative Practices: Expanding the Paradigm* 3 (Aug. 5, 2004) (paper presented at the Fifth International Conference on Conferencing, Circles and Other Restorative Practices), http://fp.enter.net/restorativepractices/bc04_wachtel.pdf.



Source: (Wachtel & McCold, 2004)

FIGURE 2. Restorative Practices Continuum

justice process involves working *with* family members in an authoritative fashion rather than utilizing a punitive or authoritarian paradigm that is often associated with state intervention into the family.⁶⁶

Interestingly enough, a Family Group Conference falls along the most formal end of the restorative practices continuum, as shown in Figure 2.⁶⁷ Intuitively, one might expect this formality to cause more conflict when working with a family that distrusts the juvenile justice system. However, in the case of FGC, family members are given control over the location of the meeting, privacy to meet outside the presence of professionals, and the complete authority to veto a plan as being inappropriate for the family's needs.⁶⁸ Hovering in the background is the threat of court intervention in the event that a family does not reasonably work toward a plan of care and safety for the child.⁶⁹ Accordingly, ample incentive remains for the family to retain control over the situation by making a good faith effort to alleviate any concerns related to the child/children rather than leaving the decision about placement and social services within the hands of a judicial officer.

Restorative practices fundamentally recognize that participatory engagement has a greater likelihood of leading to positive changes in behavior and of helping people to be happier, more productive, and more cooperative.⁷⁰ The success of this practice, therefore, hinges on re-enforcing the assumption that those in authority are working *with* the family and not treating them in a paternalistic way or behaving in a punitive manner toward them.⁷¹ Restorative practices achieve positive results by fostering the expression of affect or emotion, which in turn strengthens the development of emotional bonds.⁷² Silvan S. Tomkins' body of work with the psychology of affect demonstrates that "human relationships are best and healthiest when there is free expression of affect—or emotion—minimizing the negative, maximizing the positive, but allowing for free expression."⁷³ As

66 *See id.* at 2 fig. 1.

67 *See id.* at 3 fig. 2.

68 HELLAND, *supra* note 40, at 4; New Zealand Office of Child, Youth and Family, *supra* note 56.

69 HELLAND, *supra* note 40, at 4; New Zealand Office of Child, Youth and Family, *supra* note 56.

70 TED WACHTEL, THE NEXT STEP: DEVELOPING RESTORATIVE COMMUNITIES 87 (2005), available at http://fp.enter.net/restorativepractices/man05_wachtel.pdf.

71 *Id.* at 87, 91.

72 *Id.* at 87; see also TED WACHTEL, RESTORATIVE JUSTICE IN EVERYDAY LIFE: BEYOND THE FORMAL RITUAL 1-3 (1999), available at <http://fp.enter.net/restorativepractices/RJInEverydayLife.pdf>.

73 Wachtel & McCold, *supra* note 65, at 4.



Source: (Wachtel & McCold, 2004, adapted from Donald L. Nathanson, *Shame and Pride: Affect, Sex, and the Birth of the Self*, New York: W.W. Norton & Co., 1994)

FIGURE 3. The Nine Affects
The Next Step: Developing Restorative Communities

shown in Figure 3, Tomkins identified nine distinct affects that he used to explain the range and expression of emotion in all human beings.⁷⁴ Shame or humiliation, which occur whenever an experience of positive affect is interrupted, is identified as a critical regulator of human behavior.⁷⁵

Family Group Conferencing achieves success by empowering a family to make decisions for itself, albeit with “guidance,” in cases involving allegations of abuse and/or neglect, thereby decreasing the shame the family might feel over being subjected to state monitoring. This process increases the family’s social capital and encourages follow-through and ownership of the resulting conference plan. There is no evidence to suggest that this theory could not also be applied with success to children involved in delinquency proceedings, who present with abuse and neglect case backgrounds. In fact, the New Zealand Family Group Conferencing model is already utilized in New Zealand’s equivalent of delinquency proceedings; 7552 such conferences were conducted between 2002 and 2004 involving Youth Court offenders aged fourteen to sixteen.⁷⁶ Moreover, data collected regarding Youth Court offending rates from the period 1988 to 2001 supports the conclusion that current methods of diversion, including Family Group Conferencing, are more effective than past practices at diverting young people from future criminal proceedings.⁷⁷ This conclusion is also consistent with other research

⁷⁴ *Id.* at 4 fig. 3, 5.

⁷⁵ *See id.* at 5-6.

⁷⁶ *See* Andrew Becroft, *Youth Offending: Putting the Headlines in Context*, CT. IN THE ACT (N.Z. Ministry of Justice, Wellington, N.Z.), Dec. 2004, available at <http://www.justice.govt.nz/youth/media/rates1204.html> (noting, in addition, that “Child Offenders” ages ten to thirteen are processed through Family Court rather than Youth Court, absent charges of murder or manslaughter).

⁷⁷ GABRIELLE MAXWELL & ELISABETH POPPELWELL, YOUTH COURT OFFENDING RATES: FINAL REPORT TO THE DEPARTMENT FOR COURTS 15 (2003), available at <http://www.justice.govt.nz/youth/media/rates0103.pdf>. The authors also find that there has been a decline in direct referrals to diversion methods, such as Family Group Conferences, from a high in 1991, two years after the introduction of the Children, Young Persons and Their Families Act. *Id.*

studies pertaining to restorative justice methods, which have reported slight decreases in recidivism rates of participants as compared to traditional juvenile justice systems.⁷⁸ In a study specific to Family Group Conferencing in the New Zealand Youth Court, eighty-four percent of children and eighty-five percent of their parents reported being satisfied with the outcomes of the FGC.⁷⁹ This same study found that approximately sixty percent of the victims found the FGCs that they had participated in to be “helpful, positive, and rewarding.”⁸⁰ Among victims who were dissatisfied with the outcomes of the FGCs (approximately thirty-one percent), the reasons provided often included penalties for the offender that were viewed as “too harsh,” and a failure on the part of the professionals involved to communicate the eventual outcome of the FGC.⁸¹ The recidivism rate for study participants⁸² one year after involvement in a Family Group Conference was twenty-six percent.⁸³

Family Group Conferencing has been used as a rehabilitation method in United States delinquency cases, as well. However, its use is still limited to a small number of jurisdictions, and the models utilized vary significantly from the New Zealand model.⁸⁴ A community policing technique, referred to as the “Wagga Model,” originating in Australia in 1991, was used on an experimental basis for an eighteen-month period in Bethlehem, Pennsylvania starting in November 1995.⁸⁵ Unlike the New Zealand Youth Court model, the Wagga model of FGC utilized trained police officers as conference facilitators.⁸⁶ The results indicated an even higher rate of satisfaction among participants than the Morris & Maxwell study, with victims (ninety-six percent) and offenders (ninety-seven percent) alike reporting that they experienced fairness in the handling of their cases.⁸⁷ While conference participants also had lower rates of recidivism than

78 See, e.g., JEFF LATIMER & STEVEN KLEINKNECHT, THE EFFECTS OF RESTORATIVE JUSTICE PROGRAMMING: A REVIEW OF THE EMPIRICAL 9-10 (2000), available at <http://www.justice.gc.ca/en/ps/rs/rep/2000/rr00-16a.pdf> (noting also that the study results may be somewhat limited in their ability to be generalized due in part to the voluntary nature of the program participation).

79 Allison Morris & Gabrielle Maxwell, *Restorative Justice in New Zealand: Family Group Conferences as a Case Study*, 1 W. CRIMINOLOGY REV. (1998), <http://wcr.sonoma.edu/v1n1/morris.html>.

80 *Id.*

81 *Id.* Some victims also expressed dissatisfaction with decisions that they thought were “too soft.” *Id.*

82 New Zealand participants included children alleged to have committed medium-serious and serious offenses (except murder and manslaughter). *Id.*

83 *Id.* The authors note:

A matching sample against which to compare these data is not available. However, our general conclusion after reviewing other local and overseas reconviction studies is that the proportion reconvicted in the first year following a family group conference (26 percent) is certainly no worse and is possibly better than samples dealt within the criminal justice system.

Id. However, according to the Office of Juvenile Justice and Delinquency Prevention, “[t]here is no national recidivism rate for juveniles [in the United States]. Such a rate would not have much meaning since juvenile justice systems vary so much across states.” SNYDER & SICKMUND, *supra* note 26, at 234.

84 Morris & Maxwell, *supra* note 79.

85 PAUL MCCOLD & BENJAMIN WACHTEL, RESTORATIVE POLICING EXPERIMENT: THE BETHLEHEM PENNSYLVANIA POLICE FAMILY GROUP CONFERENCING PROJECT 1-2 (1998), available at <http://fp.enter.net/restorativepractices/BPD.pdf>.

86 *Id.*

87 *Id.* at 51, 59. It should also be noted, however, that participants in the experiment were required to be first-time offenders and fall within a specific offense category. *Id.* at 2.

non-participants, the small sample size makes it difficult to generalize from the results. Nonetheless, the Wagga model of Family Group Conferencing was found to be more successful and satisfying for participants (as measured across multiple variables) than Victim-Offender mediation programs, which are utilized by other U.S. jurisdictions.⁸⁸

In addition to considering expansion of the use of a Family Group Conferencing model in delinquency cases, prevention, and early intervention efforts designed to avoid formal dependency proceedings could also assist families struggling with status offense issues. A strengths and needs approach to assessing and assisting families should not be limited to dependency proceedings; rather, similarly situated children deserve similar interventions and treatment options. Social work values and approaches have a history with the juvenile court, and their use should be reconsidered for the benefit of “crossover kids.” Involving families in the development of a plan for the care and treatment of their children does not need to come at the expense of victims. Restorative justice techniques, such as Family Group Conferencing, have resulted in feelings of fairness and outcome satisfaction among all classes of participants, including victims. To better serve both children and their families, the future of the juvenile court should involve a revival of past social work values.

⁸⁸ Victim-Offender mediation programs differ from FGCs in that they limit participation in the mediation session to just the victim and the juvenile offender, thereby excluding the offender’s family from direct participation. *Id.* at 90, 96.