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DRAFT

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DIFFERENTIAL RESPONSE: A DANGEROUS EXPERIMENT IN CHILD WELFARE Draft 8/1/2014

Elizabeth Bartholet

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INTRODUCTION

A powerful coalition of forces is pushing our nation's child welfare system toward a "reform" they generally call Differential Response. The idea is to divert the vast majority of all cases now dealt with by child protective services (CPS), to an entirely voluntary system which leaves parents free to refuse to participate without fear of any consequence.

Other names for Differential Response systems include Alternative Response, Family Assessment Response, Dual Track, Multi-Track, Multiple Response and, in an earlier era, Community Partnership.¹ Differential Response is often used to refer to the overall system that includes two tracks, one the new Alternative Response Track, and the other the traditional CPS track.² Some systems have a third track for cases which would normally be screened out by CPS based on a conclusion that there is no apparent need for CPS intervention to protect children.³ I will use Differential Response or DR to refer to the overall system, and will use Alternative Response (AR) and Traditional Response (TR) to refer to the two tracks used for cases which normally would be screened in by CPS.

DR constitutes the latest fad in extreme forms of family preservation promoted over recent decades. It is expanding rapidly throughout the country.⁴ One comprehensive analysis of DR notes that the

¹ I discuss Community Partnerships in my 1999 *Nobody's Children* book. See ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 146-154 (1999). DR was first implemented in Missouri and Florida in 1993-94. See also Alan Puckett, Casey Family Programs, *Differential Response: Review and Summary of Research Evidence*, PRESENTATION TO THE 8TH ANNUAL CONFERENCE ON DIFFERENTIAL RESPONSE (OCT. 25, 2013), <http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/DR/Documents/conference%202013%20Handouts/Friday/DR%20Review%20and%20Summary%20of%20Research%20Evidence.pdf>, archived at <http://perma.cc/7D8W-F2GJ> (last visited July 20, 2014).

² For DR history, descriptions and definitions see generally IOM (INSTITUTE OF MEDICINE) AND NRC (NATIONAL RESEARCH COUNCIL), *NEW DIRECTIONS IN CHILD ABUSE AND NEGLECT RESEARCH, 198-99, 203-04* (Anne C. Peterson et al. eds., 2014), available at <http://www.iom.edu/Reports/2013/New-Directions-in-Child-Abuse-and-Neglect-Research.aspx>, archived at <http://perma.cc/KP69-PCY9> [hereinafter IOM/NRC 2014 REPORT]; LISA MERKEL-HOLGUIN, YING-YING T. YUAN, KERI JOWERS, DANA HOLLINSHEAD, JOHN FLUKE, & AMY HAHN, NATIONAL QUALITY IMPROVEMENT CENTER ON DIFFERENTIAL RESPONSE IN CHILD PROTECTIVE SERVICES, *FINAL REPORT: QIC-DR CROSS-SITE EVALUATION 5-23* (July 2014), available at <http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/QIC-DR/Documents/Final%20Cross%20Site%20Evaluation%20Report.pdf>, archived at <http://perma.cc/H8U5-7FNW> [hereinafter MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT]; Tamara Fuller, Martin Nieto & Saijun Zhang, *Differential Response in Illinois: Final Evaluation Report 6-10* (Oct. 2013), available at http://cfr.illinois.edu/pubs/rp_20140205_DifferentialResponseInIllinoisFinalEvaluationReport.pdf, archived at <http://perma.cc/PA8K-QHRJ> [hereinafter FULLER ET AL., QIC-DR ILLINOIS REPORT]; Tamara L. Fuller, Megan S. Pacey & Jill C. Schreiber, *Differential Response Family Assessments: Listening to What Parents Say About Service Helpfulness*, CHILD ABUSE & NEGLECT 1-2 (forthcoming 2014).

³ See STEVE OLSON & CLARE STROUD, INST. OF MED. & NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *CHILD MALTREATMENT RESEARCH, POLICY, AND PRACTICE FOR THE NEXT DECADE 84* (2012), available at http://www.nap.edu/catalog.php?record_id=13368, archived at <http://perma.cc/FXC8-EQPR> [hereinafter IOM/NRC 2012 RESEARCH WORKSHOP SUMMARY].

⁴ See KRISTEN ABNER & RACHEL A. GORDON, *DIFFERENTIAL RESPONSE: A FAMILY IMPACT ANALYSIS 2012 6* (2012), http://www.familyimpactseminars.org/fia_analyses_drfa.pdf, archived at <http://perma.cc/8W6B-MSQB>. A major push was provided by the convening at the Harvard Executive Session of New Paradigms for Child Protection between 1994 and 1997, funded by the Annie E. Casey and Edna McConnell Clark Foundations. *Id.* at 5. Missouri subsequently established a DR system which became a model for other states, and by late 2010, 21 states had

“development of a national advocacy team and access to significant federal and foundation resources” make DR “one of the more widely replicated child welfare reform efforts in recent history.”⁵ A 2014 report summarizing the results of federally funded DR research indicates that DR has already been implemented in a majority of states.⁶

The wealthy and powerful Casey Family Programs has combined with the American Humane Association, the Institute of Applied Research (IAR), and the Kempe Center for the Prevention and Treatment of Child Abuse and Neglect, to promote DR, provide technical assistance in implementing DR, and design and implement the research used to claim that DR is an evidence-based success story.⁷

Casey Family Programs has played a central role. Its policy team maintains a major presence on Capitol Hill, in state governments, and in major child welfare policy forums around the country. Its financial and human resources provide a unique ability to influence policy.⁸ It has supported DR in a major way since

implemented DR in at least some part of their systems. See JOANNE RUPPEL, YUFAN HUANG & GAIL HAULENBEEK, DIFFERENTIAL RESPONSE IN CHILD PROTECTIVE SERVICES IN NEW YORK STATE: IMPLEMENTATION, INITIAL OUTCOMES AND IMPACTS OF PILOT PROJECT 5–6 (Jan. 2011), *available at* http://www.ocfs.state.ny.us/main/reports/CPS%20Differential%20Response%20Evaluation%20Final%20Report_%20Jan%202011.pdf, *archived at* <http://perma.cc/33XM-8HL3> [hereinafter RUPPEL ET AL., NY DR REPORT].

⁵ Ronald C. Hughes, Judith S. Rycus, Stacey M. Saunders-Adams, Laura K. Hughes, & Kelli N. Hughes, *Issues in Differential Response*, 23 RESEARCH ON SOCIAL WORK PRACTICE 493, 494 (Sept. 2013) [hereinafter Hughes & Rycus, *Issues in DR*].

⁶ MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 17; *see also* KAI GUTERMAN, KEVIN SOLARTE & MARY MYSLEWICZ, CASEY FAMILY PROGRAMS, THE DIFFERENTIAL RESPONSE (DR) IMPLEMENTATION RESOURCE KIT: A RESOURCE FOR JURISDICTIONS CONSIDERING OR PLANNING FOR DR 6 (2014) [hereinafter CASEY FAMILY PROGRAMS, DR RESOURCE KIT] (DR exists in relatively pure form in 22 states, with similar system reforms operational in six additional states, and another 11 states currently considering or planning DR implementation); *see also* IOM/NRC 2014 REPORT, *supra* note 2, at 199; IOM/NRC 2012 RESEARCH WORKSHOP SUMMARY, *supra* note 3, at 84; Daniel Heimpel, *Differential Response Dealt Heavy Blow*, THE CHRONICLE OF SOCIAL CHANGE (June 24, 2014), <https://chronicleofsocialchange.org/analysis/differential-response-dealt-heavy-blow-2/7289>, *archived at* <http://perma.cc/DR7Z-2J77> (DR has spread to as many as 30 states). By 2009 the percentage of screened-in child maltreatment reports referred to DR reached roughly 9%. ABNER & GORDON, DIFFERENTIAL RESPONSE, *supra* note 4, at 16 (Figure 1).

⁷ *See, e.g.*, CASEY FAMILY PROGRAMS, DR RESOURCE KIT, *supra* note 6, at 5. The Kit is designed to persuade and enable new jurisdictions to adopt DR, providing them a positive slant on the evidence regarding DR along with information as to how other jurisdictions have implemented DR. This Kit documents some of the special funding and technical assistance provided DR programs by, e.g., Casey Family Programs, Casey cousin the Marguerite Casey Foundation, IAR, and organizations involved in the QIC-DR, as discussed in Part IV.B.4 below, including the Kempe Center. *See, e.g., id.* at 60 (implementation Processes Section: Matrix, LA County, CA, Funding Sources).

⁸ *See* SEAN HUGHES, DIFFERENTIAL RESPONSE, RACIAL DISPROPORTIONALITY, AND FEDERAL FINANCE REFORM: CASEY FAMILY PROGRAMS’ 2020 STRATEGY AND THE MOVEMENT TO END FOSTER CARE IN AMERICA 3 (Mar. 28, 2013) (unpublished research memo) (on file with the article author) [hereinafter HUGHES, DIFFERENTIAL RESPONSE]. This research memo was written for Elizabeth Bartholet and Daniel Heimpel, based on research in spring-summer 2013. Together with Daniel Heimpel of Fostering Media Connections, I have been investigating since June 2013, with the aid of several research and investigation fellows, Differential Response policy and research, as well as related issues involving the current state of the Racial Disproportionality movement.

2003 when it sponsored a Breakthrough Series Collaborative on DR,⁹ and “formed a partnership with [California counties] to develop, test and begin implementing differential response.”¹⁰

One observer sums up:

Perhaps the most important common thread has been the extent to which Casey Family Programs has been the primary proponent and funder of [the DR and related finance reform movement along with other family preservation efforts]. Casey has at various times used vast sums of its human and financial resources in support of each. Notably, all . . . possess at their core a commitment to reducing out-of-home placements. This supports Casey’s 2020 goal of reducing foster care caseloads by half, and helps explain why Casey has invested so heavily . . .

..¹¹

This kind of family preservation movement has enormous power to shape the child welfare system. It is designed to change the way CPS systems use their broad discretionary power to decide whether or not to intervene in families to protect children against parental abuse and neglect. It may or may not be translated into formal law requiring CPS systems to implement DR. But regardless it operates *effectively as law* changing the nature of our child protection systems. As such it constitutes an end run around legislation like the federal Adoption and Safe Families Act of 1997 (ASFA), which was designed to reduce family preservation bias and make child safety and wellbeing a higher priority.¹² So, for example, ASFA tells state CPS systems and courts that children must be removed from parents found responsible for certain forms of dangerous child maltreatment, but those ASFA requirements are inapplicable if CPS never intervenes to make such findings.

The DR movement promotes two inter-related ideas. First is to divert some 70% of all cases now on the CPS track to a purely voluntary, “family-friendly” track.¹³ For family read parents, because the basic idea is to be friendly to parents accused of maltreating children. These parents would be free from intervention by CPS, intervention which can take the form of monitoring to ensure child safety at home, requirements to cooperate in rehabilitative treatment, removal of children to foster care as needed for their protection, and in the most extreme cases, termination of parental rights and placement of children in adoption. DR advocates say that their friendly approach will better serve children than the CPS system because it will more likely engage parents, and they point out that the CPS system fails to

⁹ Casey Family Programs, *Breakthrough Series Collaborative: Implementing Differential Response in California: Promising Practices and Lessons Learned* (Feb 2007), <http://www.cfpic.org/pdfs/BSCDifferentialResponseCA.pdf>, archived at <http://perma.cc/7SNT-H777>.

¹⁰ *Id.*; see also Heimpel, *Differential Response Dealt Heavy Blow*, *supra* note 6 (“Casey Family Programs . . . has poured money into DR expansion from California to Illinois”).

¹¹ HUGHES, *DIFFERENTIAL RESPONSE*, *supra* note 8, at 65–66; see also Daniel Heimpel, ‘*Alternative Response*’ is no Solution to Child Abuse [Commentary], *THE BALTIMORE SUN* (July 17, 2014), http://articles.baltimoresun.com/2014-07-17/news/bs-ed-alternative-response-20140717_1_child-abuse-neglect-child-welfare, archived at <http://perma.cc/HF7E-L3X7>.

¹² Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.); see also BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 1, at 188–189 (discussion of ASFA).

¹³ See discussion *infra* Part II.A. See also *e.g.*, Puckett, *supra* note 1.

provide most of the families on its caseload with any helpful services. They also argue that when CPS uses its power to remove children to foster care it often does more harm than good.

The second idea is to finance the DR system with funds diverted from the traditional CPS system.¹⁴ Those promoting DR are pushing for what they call child welfare finance reform. The major focus is on changing the federal finance structure so as to shift federal funds now going to support foster care to the new DR system. In addition DR advocates encourage the redirection of state and local funds allocated for CPS general operations to the DR system. This finance reform idea again cuts against the principles animating ASFA. ASFA's goal of getting CPS and courts to put a higher priority on child interests and child protection would presumably call for an increase not a decrease in CPS resources.

The history¹⁵ here is important in understanding the nature of this new movement and the risks to children presented. DR is a successor to two earlier "reform" movements similarly designed to keep more children at risk of maltreatment at home with their parents: Intensive Family Preservation Services, and Racial Disproportionality. All three movements have engaged in a similar strategy, impressive in its sophistication. The advocacy groups involved in each movement have promoted the policy reform initiative, promoted the self-serving but fundamentally flawed research designed to give the impression that the new policy was successful, launched campaigns to persuade a broad range of players from policy-makers to academics to media of its wisdom, and promoted implementation by child welfare administrations throughout the nation, and by state and federal legislatures.

In the past these reform initiatives have largely collapsed as the research has been found flawed and fraudulent, and the risks to children have become obvious. But memories in the child welfare field seem short.

History is repeating itself with the DR movement. DR advocates make the familiar claim that DR is "evidence-based," that it will save money by reducing foster care and thus costs to the state, but magically that it will not put children at any risk.

But the flaws in the DR research and the risks posed to children by the DR program are blatantly obvious. Research shows that children on the traditional CPS track are at enormous risk of repeat maltreatment by their parents. If kept at home most will continue to be abused and neglected. If removed to foster care and then returned home most will be again abused and neglected. The large majority of the CPS caseload that DR is designed to move to the voluntary track are not minor "dirty house" or "mere poverty" cases as advocates often contend. Most poor families do not abuse their children – indeed only a very small percentage do. Brutal violence may not be present or at least may not be obvious in most CPS cases. But whether categorized as neglect or abuse, most CPS cases involve serious drug and/or alcohol abuse, forms of "neglect" that are known to destroy kids' chances for normal development, and situations where serious violence exists but is simply not obvious.¹⁶

¹⁴ See discussion *infra* Part II.B.

¹⁵ See discussion *infra* Part I.

¹⁶ For documentation of the claims in this paragraph, see BARTHOLET, NOBODY'S CHILDREN, *supra* note 1, at 82–85, 233; Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent*

We do need to protect children better. Families on the CPS caseload are not receiving the supportive and rehabilitative services they need. Children are not receiving the protection they need.

But there is no reason to believe that simply removing the power of CPS to monitor these families, to require cooperation with rehabilitative treatment, and to remove children from parents, will work better to protect children. Research reveals that while it is hard for parents to free themselves from drug and alcohol addiction, coercive pressure to engage in treatment does sometimes work. Polite requests to engage in treatment on a purely voluntary basis are not likely to work better.¹⁷

We need to strengthen the CPS system, provide it with more resources to monitor parents, and provide more parents with more rehabilitative services. We need to do a version of differential treatment, but within and not outside the context of the CPS system, so that rehabilitative treatment can be required, not just suggested, and so that children can be protected in cases in which parents are unable or unwilling to take the necessary steps to become capable of nurturing.

CPS should of course be targeting different kinds of family situations with different types of treatment – and to a great degree CPS does that now. For many families that means keeping the children at home with supportive and rehabilitative services. But CPS will need more resources to do its job better. It keeps many children at home now with few if any services provided¹⁸ in significant part because it is forced to do triage, and devote most of its limited resources to the most serious cases.

We also need to strengthen CPS by improving its ability to protect children through removal, and through termination of parental rights and adoption, as needed. Nobody wants children to go through the disruption of removal to foster care. But research reveals that foster care operates to protect children against the risk of death and other serious harm at home.¹⁹ It would work better for children if more often it was followed by timely termination of parental rights and adoption.²⁰ Adoption works well for children generally but works best when they have not suffered lengthy periods of maltreatment or foster drift.²¹

DR proponents claim that by removing significant numbers of children from the CPS system, they will free that system to do a better job for the most serious abuse and neglect cases. But DR is designed not simply to remove children from the CPS system, but to weaken that system. The goal is not simply to divert children but to divert resources from the already resource-starved system to fund the new

Maltreatment and Protect Victimized Children, 60 BUFF. L. REV. 1321, 1323–24 (2012); see also discussion *infra* Part III.B.1.b.i.

¹⁷ See discussion *infra* Part III.B.1.b.i.

¹⁸ See, e.g., PATRICIA L. KOHL, CASEY-CSSP ALLIANCE FOR RACIAL EQUALITY IN CHILD WELFARE, UNSUCCESSFUL IN-HOME CHILD WELFARE SERVICE PLANS FOLLOWING A MALTREATMENT INVESTIGATION: RACIAL AND ETHNIC DIFFERENCES 5 (2007), available at <http://www.f2f.ca.gov/res/pdf/Unsuccessfulln-Home.pdf>, archived at <http://perma.cc/5FLG-A5AM> (overwhelming majority of cases that come to attention of CPS child kept at home with biological parent or another caregiver, with many families, even those with substantiated maltreatment, not receiving services).

¹⁹ See discussion *infra* Part III.A.

²⁰ BARTHOLET, NOBODY'S CHILDREN, *supra* note 1, at 97, 110.

²¹ *Id.* at 179.

voluntary track system. It would leave CPS less and not more able to appropriately handle the most serious cases.

There are reasons why many child welfare leaders keep promoting extreme family preservation movements. There are reasons why many leaders in the child welfare field keep promoting these movements. Child maltreatment is rooted in poverty, and in the conditions associated with poverty including unemployment, substance abuse, devastated neighborhoods. Those committing child maltreatment are themselves victims. Many of those promoting extreme forms of family preservation over the years see CPS intervention, including in particular removal to foster care and adoption, as yet another form of victimization. And they see the kinds of financial support family preservation programs like DR provides as at least some help in alleviating some of the financial needs of poor parents.

But DR cannot be justified as a poverty program. It provides pathetically limited financial stipends to a small and irrational subset of the poor – those who abuse and neglect their children. This will do nothing significant to change poverty conditions in our society.

Worse, DR sacrifices this subset of poor children, condemning them to a childhood of suffering that will also limit their life opportunities as adults. If our society honored children as of equivalent moral worth to adults, and honored child human rights as equivalent to adult human rights, we would not tolerate the extreme family preservation policies we see reoccurring over the decades. Children would be seen as having a fundamental human right to grow up with nurturing parents, of equal importance to the adult right to raise children free from state intervention.

We do need to address the conditions of poverty that create child maltreatment, but we need to address them in a serious way, through radical social change. In the meantime, we need to develop targeted maltreatment prevention programs, designed to reach parents *before* they fall into the dysfunction associated with child maltreatment. And for those children victimized by serious maltreatment, we need a CPS system strengthened so that it can provide adequate protection, through supportive services and also through required rehabilitation programs, as well as through foster care and adoption.

I. PRIOR HISTORY: EXTREME FAMILY PRESERVATION MOVEMENTS SUPPORTED BY ADVOCACY RESEARCH

I have written previously of the corrupt merger of policy advocacy with research in the movements supporting both Intensive Family Preservation (IFPS) and Racial Disproportionality.²² Here I will just briefly summarize the highlights. There are other family preservation movements with similar characteristics. But the IFPS and Racial Disproportionality Movements best illustrate the troubling

²² See Elizabeth Bartholet, *Creating A Child-Friendly Child Welfare System: The Use and Misuse of Research*, 13 WHITTIER J. CHILD & FAM. ADVOC. 8–15 (2014); Bartholet, *Creating a Child-Friendly Child Welfare System*, *supra* note 16, at 1323, 1334–35, 1340–44; see generally Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009) (focusing solely on Racial Disproportionality).

dynamics that characterize child welfare advocacy and related research over the last few decades, and at issue in the Differential Response movement today.

A. INTENSIVE FAMILY PRESERVATION SERVICES (IFPS)

IFPS was avidly promoted by the Edna McConnell Clark Foundation and the Annie E. Casey Foundation in the 1970's through 1990's.²³ It swept the nation, adopted by many states' child welfare systems. The basic idea was to define children identified as abused and neglected as "at risk of removal" to foster care, with the goal of keeping as many as possible at home. The means was to provide social worker support services on an intensive basis for roughly six weeks based on the absurd notion that child maltreatment was typically a short term crisis.

The research focused not on how well or badly the program served child interests, but instead on whether it succeeded in its goal of keeping children at home, thus saving the state money through the reduction of foster care costs. It took years for child welfare experts to focus on the flaw at the heart of the research, namely that it paid no attention to child interests. Eventually those analyzing the research noted also that IFPS failed even to succeed in its family preservation goal. In the end the program was seriously discredited, and largely abandoned.²⁴

One article provides a telling critique of the earlier IFPS research, noting methodological problems, failure to reduce removal, and failure to focus on child wellbeing. It concludes with a call for more appropriate research in the future:

[M]ore attention should be directed toward determining whether the child's overall functioning has improved because of the services received. Has abuse or neglect reoccurred? Have the child's growth and development been optimized? Has the child's cognitive and social development shown changes for the better? These and other outcomes will need to be addressed to obtain a clearer understanding of the benefits and limitations of family preservation. . . . Alternatives to family preservation, such as permanency planning [adoption] and foster care, also must be reexamined. . . . Applying family preservation to every family, as a matter of policy, may actually be placing children at risk.²⁵

Richard Gelles documents in his *Book of David* the degree to which foundation advocacy was responsible for the IFPS movement, and for its success for many years in changing the nation's child welfare system:

²³ See, e.g., Bartholet, *Creating a Child-Friendly Child Welfare System*, *supra* note 16, at 1332; see also BARTHOLET, NOBODY'S CHILDREN, *supra* note 1, at 114, 118–21, and related endnotes at 267–69; RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES 121–43 (1996).

²⁴ See e.g., *id.* at 139–40; GIDEON FISHMAN & IRA M. SCHWARTZ, KIDS RAISED BY THE GOVERNMENT 42–46 (1999).

²⁵ Amy M. Heneghan, *Evaluating Intensive Family Preservation Programs: A Methodological Review*, 97 PEDIATRICS 535, 541 (1996); see also Viola Vaughan-Eden & Frank E. Vandervort, *Invited Commentary on "Issues in Differential Response"*, 23 RESEARCH ON SOCIAL WORK PRACTICE 550, 551–52 (2013) (on the relevance of the IFPS history to the DR Movement).

[T]he expansion of the concept of family preservation and the growing support for the programs... could not have been achieved without the support, financial and otherwise, of two large and influential foundations. The Edna McConnell Clark Foundation... and the Annie E. Casey Foundation... played crucial roles in the selling, or overselling of family preservation.

Both foundations marketed family preservation with a near-religious zeal and substantial financial support. They funded start-up and demonstration programs and then promoted them....

... [They] became the official repositories of expertise and data on family preservation. State, local, and federal agencies and officials ..., relied on the two foundations for their evaluation data....

When the believers are foundations who can invest millions of dollars each year in touting the programs and when the critics are academics who merely publish their research results in scholarly journals, the outcome is entirely predictable. State and local agency heads, legislators and legislative aides, governors and presidential administrations were told about the unqualified successes of family preservation and the tremendous cost savings. The skeptics and critics were either unknown or cast as merely academic gadflies.²⁶

B. RACIAL DISPROPORTIONALITY

Racial Disproportionality was avidly promoted by various different Casey Foundations²⁷ together with a broad consortium of establishment child welfare organizations, in the early part of this century.²⁸ What came to be known as the Casey Alliance led the movement, working to get every state to adopt policies designed to reduce the number of black children removed to foster care, with the goal of achieving a match between their percentage of the foster care population and their percentage of the general population. The Alliance also began work to get the federal government to condition its funding of state child welfare systems on their ability to achieve this “racial equity” goal.

The basic idea was that the removal of black children in numbers disproportionate to their population percentage was caused by current racial bias in the child welfare system. This racial bias claim relied almost entirely on research known as the National Incidence Study which had stated in its 1996 NIS-3 report that *actual* rates of maltreatment by black and white parents were the same, and accordingly that bias must explain the different rates of removal to foster care.

The Casey Alliance used its wealth both to promote policy advocacy on these issues and to fund related research. For example, it approached states throughout the country saying: we’ll help study your racial

²⁶ GELLES, BOOK OF DAVID, *supra* note 23, at 133–35.

²⁷ The Casey organizations were the Anne E. Casey Foundation, Casey Family Services, Casey Family Programs, The Jim Casey Youth Opportunities Initiative and the Marguerite Casey Foundation. Bartholet, *The Racial Disproportionality Movement in Child Welfare*, *supra* note 22, at 880.

²⁸ For the specifics on the Racial Disproportionality Movement summarized here, *see generally* Bartholet, *The Racial Disproportionality Movement in Child Welfare*, *supra* note 22. *See also, e.g.*, articles cited *supra* note 22.

disproportionality problem, write the report stating the nature of your problem, and then we'll help solve your problem with appropriate new policies. These state reports' claims regarding bias almost all come back to the NIS research.

The Casey Alliance successfully sold the idea that racial bias in the CPS system was responsible for the numbers of black children in foster care to policy makers, academics, and the media. *But the claim on which the racial bias theory was primarily based, that black maltreatment rates were the same as white maltreatment rates, was false. The NIS-3 report's own data, hidden in a later-published Appendix, showed that actual black maltreatment rates were higher than white, and that the difference in rates roughly approximated the difference in official maltreatment reports and related removal rates. There was lots of other evidence available to the Casey Alliance demonstrating that the NIS-3 claims regarding comparative rates and system bias were likely wrong. A major conference on Racial Disproportionality at Harvard Law School (HLS) in 2011 presented research by many highly respected social scientists demonstrating that there was no basis for the NIS-3 claims in its own data, and that that the claims were inconsistent with persuasive independent research.*

By the time of this HLS conference the NIS-4 report was out in which the authors conceded that now, with a larger sample, they found a statistically significant difference between actual black and white maltreatment rates, without really conceding any error in their previous reporting.

The conference organizers co-authored a paper, published as an Issue Brief by the highly respected conference co-sponsor Chapin Hall at the University of Chicago, concluding that there was no evidence that reducing the removal of black children would achieve the kind of "racial equity" the Casey Alliance had been asserting was their goal.²⁹ I concluded in a related article:

At a minimum, the [Racial Disproportionality] claim regarding discrimination was irresponsible, and grounded on bad social science that flew in the face of a large body of contrary evidence. It helped make the case for keeping more black children with parents accused of maltreatment, despite the fact that if black children were subject to disproportionately high rates of maltreatment, they should for their own protection be removed at similarly high rates.³⁰

The Racial Disproportionality movement has been significantly disrupted, but it has not been entirely derailed, as movement proponents continue to promote its claims and goals.³¹ However, many of those supporting the movement have shifted energy and resources to supporting Differential Response.³²

²⁹ Elizabeth Bartholet et al., *Race and Child Welfare*, CHAPIN HALL ISSUE BRIEF 4 (June 2011), available at http://www.chapinhall.org/sites/default/files/publications/06_27_11_Issue%20Brief_F.pdf, archived at <http://perma.cc/7GAL-LSJN>.

³⁰ Bartholet, *Creating a Child-Friendly Child Welfare System*, *supra* note 16, at 1341.

³¹ See HUGHES, *DIFFERENTIAL RESPONSE*, *supra* note 8, at 16–21.

³² Many argue that DR will help reduce disproportionality, and keep track of race statistics as part of their DR analysis. See *id.* at 21–22.

History is now repeating itself. We again have powerful private organizations mounting a sophisticated campaign to promote an extreme family preservation policy. We again have self-serving research deployed as a central part of the strategy, research that ignores important child interests in safety and wellbeing. We again have policy makers blindly accepting the research claims, and embracing this new silver bullet fix that promises to improve the child welfare system while saving the state money.

We also are beginning to see the emergence of a serious challenge to the DR movement. Some of this is based on a debate that has erupted in the social science community, with the validity of the advocacy research that the DR movement has propagated now questioned by independent social scientists.³³

II. NATURE OF THE DIFFERENTIAL RESPONSE MOVEMENT

A. PROGRAM CHARACTERISTICS

While DR programs vary in details, most share certain core essentials, and DR proponents advocate for these essentials.³⁴

1. The Diversion Goal

The goal is to divert a large percentage of the cases that traditionally are under CPS jurisdiction to the new, voluntary Alternative Response or AR track. Advocates often talk of diverting something in the range of 70% of CPS cases. Current programs vary significantly in the percentage diverted, from 8% to significantly over 70%, with the percentage in any given program generally increasing over time.³⁵

The cases to be diverted are characterized as low-risk, or low- to medium- risk, although there are serious questions as to whether these characterizations actually fit the cases being diverted.³⁶

Diversion at the front end reduces the likelihood that children will ever be removed from their parents. If children aren't under CPS jurisdiction in the first place, then CPS is less likely to accumulate the evidence supporting a removal to foster care, or termination of parental rights and adoption. This fits

³³ See discussion *infra* Part IV.

³⁴ See, e.g., RUPPEL ET AL., NY DR REPORT, *supra* note 4, at 9 (chart listing core essentials and differences between AR and TR). See generally MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 5–13.

³⁵ See THEODORE CROSS ET AL., WHAT WILL HAPPEN TO THIS CHILD IF I REPORT? OUTCOMES OF REPORTING CHILD MALTREATMENT, PRESENTATION AT APSAC CONFERENCE IN NEW ORLEANS, LA 10 (June 2014) (on file with author) (adapted from chapter in MANDATORY REPORTING LAWS AND THE IDENTIFICATION OF SEVERE CHILD ABUSE AND NEGLECT (D. Bross & B. Mathews eds., in press)); see also C. Nicole Lawrence et al., *Multiple Response System: Evaluation of Policy Change in North Carolina's Child Welfare System*, 33 CHILD. & YOUTH SERVS. REV. 2355, 2364 (2011) (70-80% of cases in NC system diverted, and 42-71% in most other states' DR systems); KYTE ET AL., *Evaluating Where We're at With Differential Response*, 37 CHILD. ABUSE & NEGLECT 125, 129 (2013) (60-80% diverted to AR track in many states).

³⁶ See discussion *infra* Part III.B.1.a (discussion of the evidence as to the actual risk level of the cases being diverted).

with the longstanding Casey Family Programs goal of reducing foster care by 50% by 2020.³⁷ Casey makes clear that it links DR with this reduction goal.³⁸

That goal also fueled the Racial Disproportionality Movement, with Casey thinking it could achieve half its foster care reduction goal just by eliminating disproportionality.³⁹

2. Voluntary not Coercive

The AR track is entirely voluntary for parents. At the outset they can accept or reject the offer to participate in the AR program, with no consequence for rejecting it. They can also start down the AR track but get off it at any point they choose, again with no consequence.

Evidence that parents continue to mistreat their children can generate a decision to move the family from the AR to the traditional or TR track,⁴⁰ but the system is not designed to place much emphasis on looking for such evidence. AR track social workers might become aware of maltreatment, in which case they would be obliged as mandated reporters to report it to CPS. Some AR systems are supposed to routinely assess safety. But the overall goal of the AR system is to embrace diversion and “family-friendly” policies, and it appears that little emphasis is generally placed on identifying maltreatment. Also, parents who refuse participation from the outset will not be seeing social workers so there will not be the kind of evidence of maltreatment that would surface when parents meet regularly with social workers as required in the traditional CPS system. In fact, only a tiny percentage of AR families are actually switched from the AR to the TR track based on social worker conclusions that children were wrongfully assigned to AR or were otherwise in danger. In the four states for which reports reveal evidence of switch rates, those rates range from 2% (Ohio), 3% (Colorado), 3.5% (Illinois), and for the three New York counties from .3% to 1.2% to 5.6%.⁴¹ This despite the extensive evidence that a huge percentage of AR families are subjected to ongoing maltreatment.⁴²

³⁷ CASEY FAMILY PROGRAMS, 2008 CASEY FAMILY PROGRAMS ANNUAL REPORT 23 (2008) (on file with author).

³⁸ *Id.* (“Casey Family Programs has championed differential response for several years as an effective practice that safely reduces the number of children entering foster care. Our paramount goal is to safely reduce the number of children in foster care by 50 percent by the year 2020.”).

³⁹ CASEY FAMILY PROGRAMS, 2008 CASEY FAMILY PROGRAMS ANNUAL REPORT, *supra* note 37, at 33.

⁴⁰ In the Colorado system safety concerns may trigger a referral from AR to TR. *See* MARC WINOKUR ET AL., SOCIAL WORK RESEARCH CENTER, SCHOOL OF SOCIAL WORK, COLORADO STATE UNIVERSITY, PROGRAM EVALUATION OF THE COLORADO CONSORTIUM ON DIFFERENTIAL RESPONSE: FINAL REPORT 25, *available at* <http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/QIC-DR/Documents/Program%20Evaluation%20of%20the%20Colorado%20Consortium%20on%20Differential%20Response%20-%20Final%20Report.pdf>, *archived at* <http://perma.cc/37ZP-Y4BL> [hereinafter WINOKUR ET AL., COLORADO QIC-DR FINAL REPORT].

⁴¹ L. Anthony Loman & Gary L. Siegel, *Effects of Approach and Services Under Differential Response on Long Term Child Safety and Welfare*, CHILD ABUSE & NEGLECT, 2014, at 4, *available at* <http://www.sciencedirect.com/science/article/pii/S0145213414002099>, *archived at* <http://perma.cc/7EZQ-N7U8> (percent calculated based on figures given); WINOKUR ET AL., COLORADO QIC-DR FINAL REPORT, *supra* note 40, at 34; FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at 30 (another 9.8% were switched based on new screened-in maltreatment reports); RUPPEL ET AL., NY DR REPORT, *supra* note 4, at 38.

⁴² *See* discussion *infra* Part III.B.i.a.iii.

3. No Fact-Finding Investigation and No Maltreatment Findings

In a DR system there is generally no traditional CPS fact-finding investigation at the outset to determine whether the alleged maltreatment actually occurred, and if so to assess the related family dynamics, in connection with deciding which track cases belong on. Instead a “safety assessment” determines the track, often based simply on the limited information gathered in the initial hotline call reporting the incident to CPS, together with certain eligibility criteria.⁴³ Only in a minority of DR systems is there further assessment based on a home visit to make the track decision.⁴⁴ The most influential researchers promoting DR’s success state: “A primary assumption underlying [DR] is that the adversarial approach of traditional investigations seeking to validate or invalidate allegations of child maltreatment is unnecessary for all but the most extreme and criminal reports of child abuse and neglect...”⁴⁵ This assumption governs the approach to the tracking decision and also to subsequent dealings with the family.

For the first AR home visit an appointment is made, as compared to the unannounced first visit in the traditional CPS system. In AR there is no separate interview of the child at risk or other witnesses, as compared to the traditional CPS practice of interviewing alleged victims and other witnesses out of the presence of the alleged perpetrator. Separate interviews are what you do if you want to find out what happened and whether, for example, that burn on the child is the result of an accident or deliberate torture. But the point in AR is to be family friendly, and investigations focused on what the parents might have wrongfully done to the child are not thought friendly. Accordingly there is a deliberate effort to avoid focusing on the alleged maltreatment, and to avoid identifying the perpetrator.⁴⁶ Instead the focus is supposed to be on the family’s needs, and how services might best meet those needs to reduce the risk to children.

For related reasons there is no finding of maltreatment and no report of perpetrators to a central registry, by contrast to the traditional CPS system.⁴⁷

⁴³ Hughes & Rycus, *Issues in DR*, *supra* note 5, at 8 (“[S]creeners in DR programs typically make recommendations for case acceptance, establish the priority for agency response, and recommend a track assignment based on information collected in a referral telephone interview – information that is typically limited in scope and depth and potentially in accuracy.”).

⁴⁴ RUPPEL ET AL., NY DR REPORT, *supra* note 4, at 45; CASEY FAMILY PROGRAMS, DR RESOURCE KIT, *supra* note 6, at 15 (majority of jurisdictions surveyed make the track assignment decision during the central intake/hotline call); Loman & Siegel, *Effects of Approach*, *supra* note 41, at 2.

⁴⁶ See, e.g., Hughes & Rycus, *Issues in DR*, *supra* note 5, at 501 (“A defining characteristic of the alternative DR track is that caseworkers neither substantiate allegations of child maltreatment, nor do they confirm the perpetrator [Many claim] it unnecessary (and inherently disrespectful) to push families to talk about an alleged maltreatment incident or to determine who was responsible for its occurrence.”); *Id.* at 501–02 (inquiring about maltreatment dynamics, determining who was responsible, identifying child victim, not considered routine part of information gathering and often actively discouraged).

⁴⁷ BRETT BROWN, LISA MERKEL-HOLGUIN & AMU HAHN, DIFFERENTIAL RESPONSE: EARLY IMPLEMENTATION AND FIDELITY, CROSS SITE REPORT OF NATIONAL QUALITY IMPROVEMENT CENTER ON DIFFERENTIAL RESPONSE IN CHILD PROTECTIVE SERVICES 7 (May 2012), available at <http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/DR/qicdr/General%20Resources/General%20Resources/docs/cross-site-report-may-2012.pdf>, archived at <http://perma.cc/58CC->

4. Financial Support Emphasized Over Rehabilitative Services.

Many DR programs provide special funding for their AR tracks, giving AR social workers additional and more flexible funds to provide financial support for parents, as compared to traditional CPS workers. Accordingly AR track programs often provide more generous financial support services than their corresponding CPS programs. Special selection and training for AR workers orients them to be more supportive of parents, and less critical, as compared to traditional CPS workers.

AR programs generally favor financial support over rehabilitative services, as compared to corresponding CPS programs. So, for example, AR services often consist primarily of financial subsidies for rent payments, the purchase of household appliances, and the like, while CPS programs are more likely to emphasize rehabilitation services designed to enable parental fitness such as drug and alcohol rehabilitation services, and anger management counselling.⁴⁸

B. RELATED FINANCE “REFORM”

DR advocates have invested a lot in efforts to change the federal system for funding state child welfare systems. The federal government funds roughly half of all state child welfare budgets, so federal financial policy is all-powerful in determining state child welfare policy. States simply can’t afford not to do what the federal government says they must do as a condition of receiving federal funds.

Casey Family Programs has been a major presence lobbying in the Administration and Congress for several years now for what they call federal finance reform.⁴⁹ They have worked with the AHA to get other important organizations to join this effort, including the Child Welfare League of America, the National Association of Public Child Welfare Administrators, the Center for Law and Social Policy, and the Children’s Defense.⁵⁰ This has become an increasingly important strategy for expanding DR nationwide and, if successful, would free up vast new resources for DR programs, while simultaneously diverting those resources from the traditional CPS system and, in particular, foster care.⁵¹

The first step in the program is to enable and encourage states to shift on an experimental and short-term basis some of their federal foster care funding to a new DR system.⁵² The second step will be a

ZE89 [hereinafter BROWN ET AL., QIC-DR 2012 CROSS SITE REPORT]; Loman & Siegel, *Effects of Approach*, *supra* note 41, at 2.

⁴⁸ See discussion *infra* Part IV.B.1.c, IV.B.4 for specifics of the different levels of financial support and different kinds of services provided on the AR as compared to the traditional CPS tracks.

⁴⁹ Casey and its allies are promoting their finance reform ideas through, e.g., testimony at Congressional hearings, participation in House and Senate foster care caucuses, financing publications issued by partner organizations, and their own marketing materials. HUGHES, DIFFERENTIAL RESPONSE, *supra* note 8, at 4–5, 26–27. See generally, e.g., *The Antwone Fisher Story as a Case Study for Child Welfare Before the S. Comm. on Finance*, 113th Cong. (2013) (testimony of Eric Fenner, Managing Director, Casey Family Programs); *Preventing Child Abuse and Improving Responses to Families in Crisis Before the Subcomm. On Healthy Families and Communities of the H. Comm. on Education and Labor*, 111th Cong. (2009) (Testimony of Caren Kaplan, Director of Child Protection Reform, American Humane Association).

⁵⁰ HUGHES, DIFFERENTIAL RESPONSE, *supra* note 8, at 26–27.

⁵¹ *Id.* at 4, 23, 24.

⁵² *Id.* at 25–26.

push to make this shift in funds long-term and mandatory.⁵³ This step would require change in the underlying federal child welfare financing system.⁵⁴

Significant progress has already been made on the first step. Congress passed the Child and Family Services Improvement and Innovation Act in 2011,⁵⁵ allowing states to conduct 5-year demonstration projects with funds saved from reducing foster care. Many states have been using these “Title IV-E waivers” to fund DR programs.⁵⁶ Casey believes that these waiver programs will create momentum for more structural changes to the federal child welfare financing system.

Meanwhile Casey has embarked on a major push to enlist advocates and policymakers in support of the second step. This multi-faceted effort has included developing and submitting a finance reform proposal to the Senate Caucus on Foster Youth,⁵⁷ and funding coalitions and forums dedicated to pursuing finance reform (including the Partnership to Protect Children and Strengthen Families⁵⁸ and most recently a Brookings Institute-led series of meetings with Congressional and Administration staff⁵⁹). The Casey policy team also routinely presents at child welfare gatherings around the country about the need for finance reform.⁶⁰

⁵³ *Id.* at 26.

⁵⁴ *Id.* at 6, 38–64 (detailing Casey’s monumental finance reform campaign of recent years).

⁵⁵ Pub. L. No. 112-34, 125 Stat. 369 (2011). The Act requires that states certify they are using Differential Response for children found not to be at risk of imminent harm. *Id.* at § 106; see MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 17.

⁵⁶ See generally HUGHES, DIFFERENTIAL RESPONSE, *supra* note 8, at 25. The 2011 Act permits a waiver of the normal requirement of Title I-E of the Social Security Act that funds saved by reducing foster care must be returned to the federal government. See CASEY FAMILY PROGRAMS, DR RESOURCE KIT, *supra* note 6, at 6. See generally JAMES BELL ASSOCIATES, INC., PROFILES OF THE TITLE IV-E CHILD WELFARE WAIVER DEMONSTRATION PROJECTS: VOL. II: DEMONSTRATIONS ACTIVE AS OF FEDERAL FISCAL YEAR 2013 (Apr. 2013), available at

http://www.acf.hhs.gov/sites/default/files/cb/waiver_profiles_vol2.pdf, archived at <http://perma.cc/GN9D-9TJ5>.

⁵⁷ See generally CASEY FAMILY PROGRAMS, ENSURING SAFE, NURTURING AND PERMANENT FAMILIES FOR CHILDREN: THE NEED FOR FEDERAL FINANCE REFORM (May 2010), available at <http://www.casey.org/media/WhitePaper-NeedForFinanceReform.pdf>, archived at <http://perma.cc/9TRP-TQJ5>.

⁵⁸ See HUGHES, DIFFERENTIAL RESPONSE, *supra* note 8, at 45–53.

⁵⁹ See *id.* at 53–58.

⁶⁰ Recently Casey Staff prepared and helped guide through the California Child Welfare Council a series of proposals that would expand the array of services eligible for federal reimbursement to include those, like DR, that “meet the needs of a child and their family in a family-based setting.” California Child Welfare Council: Prevention and Early Intervention Comm., *Federal Child Welfare Finance Reform: The California Framework* at 2, http://www.chhs.ca.gov/CWCDOC/3_CA%20Framework%20for%20Finance%20Reform.pdf, archived at <http://perma.cc/4WFB-2772> (lasted visited July 26, 2014); see generally California Child Welfare Council: Prevention and Early Intervention Comm., *Federal Child Welfare Finance Reform: A Toolkit for California* (Jan. 2104), http://www.chhs.ca.gov/CWCDOC/1_Finance%20Reform%20Toolkit%20Overview.pdf, archived at <http://perma.cc/DN7R-GHK6>; California Child Welfare Council: Prevention and Early Intervention Comm., *Federal Child Welfare Finance Reform: Fact Sheet* http://www.chhs.ca.gov/CWCDOC/2_%20Fact%20Sheet%20on%20Finance%20Reform.pdf, archived at <http://perma.cc/N9J7-TYTA> (last visited July 26, 2014); California Child Welfare Council: Prevention and Early Intervention Comm., *Federal Child Welfare Finance Reform: The California Framework* http://www.chhs.ca.gov/CWCDOC/3_CA%20Framework%20for%20Finance%20Reform.pdf, archived at <http://perma.cc/4WFB-2772> (lasted visited July 26, 2014); California Child Welfare Council: Prevention and Early

Simultaneously, states are being encouraged to shift some of their general CPS support funds from traditional CPS activities, to help fund new DR programs – the logic is that as significant numbers of cases are diverted from CPS to DR, expenses for such traditional CPS activities as investigation and monitoring should go down.⁶¹

The DR movement strategy has been to use the latest stage of self-serving research, that conducted as part of the QIC-DR project discussed below,⁶² to demonstrate to the federal Administration and Congress that DR is an “evidence-based” success story warranting a major shift of federal funds in the DR direction. But that latest stage of research didn’t come out as positive as DR proponents had hoped. This, together with the debate in the research community that has erupted, and other obvious problems with DR, all discussed below, should encourage those in charge of federal finance policy to consider the pros and cons of DR, before radically changing our child welfare financing system in ways that threaten children.

III. RISKS TO CHILDREN POSED BY DIFFERENTIAL RESPONSE

A. Risks to Children in the Current System

Many think that CPS fails children now by not providing enough in the way of monitoring, rehabilitative services, removal to foster care, and termination of parental rights so they can move on to nurturing adoptive homes. I tried to document the case that the system currently is guilty of *under*-intervention rather than *over*-intervention in my 1999 book *Nobody’s Children*.⁶³ Part of the problem has to do with unduly limited resources, and another part with undue deference to family preservation and parent rights both by CPS and the courts.⁶⁴

DR advocates claim that their program is justified in part because CPS fails to provide services to so many of the cases in its jurisdiction. But an obvious solution to this problem would be to provide CPS with *more* resources so that it could provide more extensive supportive and rehabilitative services.

There are many different indications of the fact that children are at undue risk for abuse and neglect in the current system. First, hospital data show children at increasing risk of suffering and dying from severe maltreatment.⁶⁵

Intervention Comm., *Federal Child Welfare Finance Reform: A Call to Action to Support California Families* (Dec. 2013), http://www.chhs.ca.gov/CWCDOC/4_CalltoAction_Finance%20Reform.pdf, archived at <http://perma.cc/7R4Q-QHWU> (documents provided at March 12, 2014 meeting of the California Child Welfare Council).

⁶¹ E-mail from Ron Hughes to author (July 11, 2014); e-mail from Sean Hughes to author (July 11, 2014) (both on file with author).

⁶² See discussion, *infra*, Part IV.B.4.

⁶³ See *supra* note 1, at 98–110.

⁶⁴ *Id.*

⁶⁵ While child welfare substantiated maltreatment rates have gone down in recent years, the maltreatment-related severe injury rates recorded in hospital records rose some 5% from 1997-2009. John M. Leventhal & Julie R. Gaither, *Incidence of Serious Injuries Due to Physical Abuse in the United States: 1997 to 2009*, 130 PEDIATRICS No. 5, Nov. 2012, at 1, 2, available at <http://pediatrics.aappublications.org/content/early/2012/09/26/peds.2012-0922.full.pdf+html>, archived at <http://perma.cc/MUR2-UDLD>.

Second, experts on child maltreatment know that most children on CPS caseloads are at serious risk of the kind of abuse and/or neglect that jeopardizes their ability to grow up healthy and emotionally capable of living a fulfilling life:

[T]he vast majority of families who come to the attention of CPS are quite dysfunctional. Many are overtly pathological and either unable or unwilling to make the changes necessary to provide for their children's physical and emotional safety and/or to provide a minimal level of responsible care....⁶⁶

The great majority of CPS children –some 70-90% -- are living with parents addicted to drugs and/or alcohol. By definition these should be considered cases in which children are at serious risk.⁶⁷

Third, newspaper stories regularly chronicle the deaths of children at the hands of their parents despite the fact that CPS workers are supposed to be monitoring their welfare.⁶⁸ These situations often involve cases previously categorized as neglect rather than abuse – cases of the kind that DR advocates argue can be assumed to be minor.⁶⁹ Such stories regularly describe the dangers of extreme family preservation bias,⁷⁰ and bemoan CPS failure to intervene more actively in the form of both protective monitoring and removal to foster care.⁷¹

⁶⁶ Vaughan-Eden & Vandervort, *Issues in Differential Response*, *supra* note 25, at 551.

⁶⁷ BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 1, at 68; *see also id.* at 67–81, 207–232; *see also* John Seasock, *Identifying Abuse and Neglect in Children Whose Families are Affected by Chemical Dependence*, APSAC 22ND COLLOQUIUM 1 (June 14, 2014), http://www.apsac.org/assets/documents/2014_Colloquium/2014_Handouts/81%20workshop.pdf, *archived at* <http://perma.cc/8E9H-ZT72> (40-80%).

⁶⁸ *See, e.g.*, Jenifer McKim, *Savage Toll of Abuse for Children in DCF Care*, THE BOSTON GLOBE, Feb. 2, 2014, at A1, *available at* <http://www.bostonglobe.com/metro/2014/02/02/massachusetts-children-under-state-protection-die-from-abuse-with-alarming-frequency/2TcwcpIbWnrANkKKQs1CVP/story.html>, *archived at* <http://perma.cc/CSK4-5F4W>; Michael Levenson, Peter Schworm, & Patricia Wen, *State Family Agency Fires Two in Case of Boy Now Feared Dead*, THE BOSTON GLOBE, Dec. 18, 2013, at A1; Yvonne Abraham, *A Little Boy Lost*, THE BOSTON GLOBE, Dec. 19, 2013, at B1; Michael Levenson, *State Promoted Social Worker Before Firing Her*, THE BOSTON GLOBE, Dec. 31, 2013, at A1; Carol Marbin Miller & Audra D.S. Burch, *Preserving Families But Losing Children*, THE MIAMI HERALD (Mar. 16, 2014) <http://www.miamiherald.com/projects/2014/innocents-lost/stories/overview>, *archived at* <http://perma.cc/6SML-83SS>.

⁶⁹ The Jeremiah Oliver case referred to in note 69, *infra*, is one in which the great majority of prior allegations involving the family had been for neglect, with many screened out, and the family had a history of such issues. Nonetheless Jeremiah was killed, after going missing for four months without CPS being aware, and the mother and her boyfriend charged with murder. *See* CHILD WELFARE LEAGUE OF AMERICA, *QUALITY IMPROVEMENT REPORT SUBMITTED TO GOVERNOR DEVAL PATRICK AND SECRETARY JOHN POLANOWICZ 9–11 (May 2014)*, *available at* <http://www.mass.gov/eohhs/docs/press-release/140528-cwla-final-report.pdf>, *archived at* <http://perma.cc/UAS5-ND6V>.

⁷⁰ *See, e.g.*, Carol Marbin Miller & Audra D.S. Burch, *Innocents Lost: A Miami Herald I-Team Investigation*, THE MIAMI HERALD (March 2014), <http://www.miamiherald.com/projects/2014/innocents-lost>, *archived at* <http://perma.cc/GU2S-LAK8>. This series helped trigger sweeping child welfare reform legislation in Florida. *See* e-mail from Judge Jeri Cohen, to author (May 4, 2014) (on file with author).

⁷¹ Miller & Burch, *Preserving Families But Losing Children*, *supra* note 68 (describing the reduction in foster care and in children under CPS supervision at home thought responsible for the rising number of child deaths).

Fourth, official reports on child welfare problems, often triggered by child deaths, regularly fault CPS for providing inadequate supervision and protection for children, and fault legislators as well for the limited funding they provide CPS.⁷² These reports regularly call for more funding for CPS so that it can reduce worker caseloads, and provide better surveillance for children kept at home, more rehabilitative services, and more aggressive intervention.⁷³

Finally, social science provides persuasive evidence of the unduly limited protection offered by CPS.⁷⁴ Among cases reported to CPS hotlines each year, roughly one-third are re-reported within 12 months,⁷⁵ and since reports are thought to be good indicators of actual past maltreatment and good predictors of future maltreatment, this tells us that children are at undue risk. Roughly one-third of children who die from maltreatment were known to child protection services prior to their deaths.⁷⁶

Emily Putnam-Hornstein has demonstrated in impressive recent work⁷⁷ that for children known to CPS, “high rates of re-reporting and maltreatment recurrence” reveal “widespread system failures to adequately and appropriately respond to child abuse and neglect.”⁷⁸ Out of children referred for maltreatment before their first birthday, 82% remained in the home, and among those, 56% were referred again before the age of five. Out of those remaining home following substantiation of the initial maltreatment allegation, 58% who received no formal services were re-referred by the age of five, and 65% of those receiving such services were re-referred by that age.⁷⁹ The net is that CPS almost always

⁷² See e.g., UMESH DALAL, RICHMOND OFFICE OF THE CITY AUDITOR, OFFICE OF THE INSPECTOR GENERAL, AUDITOR’S REPORT ON THE RICHMOND DEPARTMENT OF SOCIAL SERVICES (May 9, 2013), http://www.timesdispatch.com/auditor-s-report/pdf_8bcd4476-b8bd-11e2-8442-0019bb30f31a.html, archived at <http://perma.cc/U252-G267> (follow “Download PDF” hyperlink); Richard Zullo, *Social Services Director Retires After Scathing Report*, RICHMOND TIMES-DISPATCH (May 9, 2014, 6:44 PM), http://www.timesdispatch.com/news/local/city-of-richmond/article_fc5d04b8-b8ba-11e2-a6cb-0019bb30f31a.html, archived at http://www.timesdispatch.com/news/local/city-of-richmond/article_fc5d04b8-b8ba-11e2-a6cb-0019bb30f31a.html.

⁷³ See e.g., CHILD WELFARE LEAGUE OF AMERICA, QUALITY IMPROVEMENT REPORT, *supra* note 69, at 50 (recommendations based on investigation following Jeremiah Oliver death); see also Todd Wallack, *Report Urges Smaller Caseloads, Closer Scrutiny at DCF*, THE BOSTON GLOBE (Mar. 13, 2014), <http://www.bostonglobe.com/metro/2014/03/13/report-dcf-needs-more-funding-care-for-kids/RKkjP7sCqEzFWsXZQfrteK/story.html>, archived at <http://perma.cc/DLC6-V872> (describing the interim report on Jeremiah Oliver case issued 3/13/14).

⁷⁴ See generally BARTHOLET, NOBODY’S CHILDREN, *supra* note 1, at 98–110.

⁷⁵ Amy Conley & Jill Duerr Berrick, *Community-Based Child Abuse Prevention: Outcomes Associated with a Differential Response Program in California*, 15 CHILD MALTREATMENT 282, 282 (2010); see also KOHL, UNSUCCESSFUL IN-HOME CHILD WELFARE, *supra* note 18, at 16–17 (one third of children kept home had re-report or foster placement within 36 months).

⁷⁶ NANCY PEDDLE, CHING-TUNG WANG, JAVIER DÍAZ, & ROBERT RIED, CURRENT TRENDS IN CHILD ABUSE PREVENTION AND FATALITIES: THE 2000 FIFTY STATE SURVEY 15 (Sept. 2002), available at http://www.issuelab.org/resource/current_trends_in_child_abuse_prevention_reporting_and_fatalities_the_1999_fifty_state_survey, archived at <http://perma.cc/4DND-59KY>.

⁷⁷ Emily Putnam-Hornstein, *Strengthening CPS Ability to Protect Infants and Young Children Against Maltreatment*, HARVARD LAW SCHOOL PREVENTION & PROTECTION BRAINSTORMING WORKSHOP (Apr. 2012), http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/21_strengthening-cps_putnam_hornstein.pdf, archived at <http://perma.cc/3XCP-GLUU>.

⁷⁸ *Id.*

⁷⁹ *Id.*

keeps children reported for maltreatment at home, and then generally fails to protect them from repeated maltreatment regardless of whether or not it provides services.

The DR research confirms the high risks to children on the traditional CPS track as well as the new AR track, showing that re-report rates are extremely high on both tracks, ranging between one-third to two-thirds depending on the length of the follow-up period.⁸⁰

By contrast, research indicates that removal to foster care serves to protect children from risk. First, the rates of abuse and neglect are tiny in foster care – *less than one percent annually*⁸¹ -- *as compared to the one-third to two-thirds of the population of children identified as re-victimized by maltreatment in the population kept at or returned home.*⁸² Second, Jill Duerr Berrick makes a persuasive case that most research, including the more recent research that attempts to control for important variables, shows foster care removal generally serves child best interests in terms of such factors as risk of violence to children, child “risk behaviors,” child quality of life, and other measures of safety and wellbeing.⁸³

The child-friendly reform move would be to strengthen the CPS system by providing it with significantly increased resources, and by encouraging increased intervention. That intervention should take the form of expanded supportive services but also expanded requirements that parents cooperate with rehabilitative services. It should take the form of expanded monitoring, and, in the most serious cases, expanded use of the powers to remove children to foster care and to terminate parental rights. England

⁸⁰ See discussion *infra* Parts IV.B.1.d, IV.B.2.

⁸¹ The comprehensive federal government report on child maltreatment says that half the states met the standard of 99.68% for absence of maltreatment (49% in 2012) and the rest had higher than 99% absence, except for three states which had 98.35% or higher absence rates. Not a single state fell below 98.35%. CHILDREN’S BUREAU (ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, ADMINISTRATION FOR CHILDREN AND FAMILIES) OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2012 50 (2013), *available at* <http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf>, *archived at* <http://perma.cc/BV7Y-XC52>.

⁸² Emily Putnam-Hornstein work *supra* notes 77–79; Bartholet, *Creating a Child-Friendly Child Welfare System*, *supra* note 16, at 1325, n.3; BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 1, at 109.

⁸³ JILL DUERR BERRICK, *TAKE ME HOME: PROTECTING AMERICA’S VULNERABLE CHILDREN AND FAMILIES* 108–17 (2008). The major exception was one study indicating that in cases considered “marginal,” children may do better at home than suffering the disruption and uncertainty often accompanying foster care placement. *Id.* While one recent article claims that “numerous studies” show foster care produces more harm, the author cites only two studies both of which the Berrick analysis demonstrates are of limited relevance. Tanya A. Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 240 (2013). The study Berrick characterizes as the best is one by Taussig, Clyman, and Landsverk. See e-mail from Jill Berrick, to Daniel Heimpel (Sept. 25, 2013) (on file with author). They find, consistent with prior research, significantly worse outcomes for reunified children. They conclude: “There was, and continues to be, a pervasive belief that reunification is best for children, despite the lack of research to support this assertion.... Evaluation of child welfare policy and practice should be based ... on the impact of [reunification] on behavioral health outcomes for children. ...[A]n often missed voice in the debate about what is in the best interest for children in foster care is the voice of the youth themselves. Studies that have interviewed current and former foster children report that the youth generally had positive feelings about being placed in foster care. Most youth thought it was in their best interest and reported that things would have gotten worse at home without child welfare intervention. Heather N. Taussig, Robert B. Clyman, & John Landsverk, *Children Who Return Home From Foster Care: A 6-Year Prospective Study of Behavioral Health Outcomes in Adolescence*, 108 PEDIATRICS NO. 1, July 2001, at 6, *available at* <http://pediatrics.aappublications.org/content/108/1/e10.full.pdf+html>, *archived at* <http://perma.cc/ND4W-8KN8> (footnotes omitted).

has been moving in just this direction since the highly publicized death of a young child kept at home with his mother, and is now celebrating the increase in the number of children adopted out of foster care as a triumph for child wellbeing.⁸⁴

DR is of course designed to move in the exact opposite direction, diverting the great majority of CPS cases to the voluntary AR system, reducing CPS funding, and as a consequence, reducing all forms of CPS support and intervention.

B. New Risks From Differential Response

The DR move to divert some 70% of CPS cases to a purely voluntary track, and to reduce CPS funding dramatically by diverting CPS funds to the DR track, poses obvious and serious risks to child wellbeing.

1. Risks from Diversion to Voluntary Track

a. Serious Risk Cases On the Voluntary Track

i. Diverted Cases are Serious Risk by Definition Given Nature of CPS Caseload

As discussed above,⁸⁵ most cases on the traditional CPS caseload are cases in which children face serious risks. Diverting the great majority of CPS cases to a voluntary track where parents are free simply to walk away – escaping any mandatory monitoring, any required rehabilitative treatment, any potential for child removal -- poses obvious risks to children. This is why DR advocates have always felt compelled to defend their systems as *not* likely to increase safety risks. Their arguments are not persuasive.

DR advocates claim that only low risk cases will be diverted, and point to the fact that most CPS cases are in the Neglect category as evidence that a majority of cases can safely be diverted.⁸⁶ The simple categorization of a case as Neglect is a major factor in DR decisions to track them as AR cases.⁸⁷ But it is frivolous to contend that Neglect cases are by definition minor, involving mere poverty or dirty houses. Children in the Neglect category are at risk of dying at roughly equal rates with those in the Abuse category.⁸⁸ Most Neglect cases involve parents addicted to drugs and/or alcohol who are incapable of providing the nurturing parenting that children need, until and unless the parents solve their addiction

⁸⁴ See, e.g., Angela Harrison, *Adoptions show 'record' increase*, *BBC NEWS* (Sept. 26, 2016, 9:54 ET), <http://www.bbc.co.uk/news/education-24282211>, archived at <http://perma.cc/PNC-8UVE>. See also Mary Welstead, *Child Protection in England – Early Intervention*, HARVARD LAW SCHOOL PREVENTION & PROTECTION BRAINSTORMING WORKSHOP 16–17 (May 2012), http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/27_welsteaddoc.pdf, archived at <http://perma.cc/5QZL-QJBD>.

⁸⁵ See discussion *supra* Part III.A.

⁸⁶ Amy Conley, *Differential Response: A Critical Examination of a Secondary Prevention Model*, 29 *CHILD. & YOUTH SERVS. REV.* 1454, 1455 (2007); C. Nicole Lawrence, Katie D. Rosanbalm, & Kenneth A. Dodge, *Multiple Response System: Evaluation of Policy Change in North Carolina's Child Welfare System*, 33 *CHILD. & YOUTH SERVS. REV.* 2355, 2356 (2011) (neglect cases generally assigned to AR track in various DR systems).

⁸⁷ See, e.g., Hughes & Rycus, *Issues in DR*, *supra* note 5, at 501 (noting one state reportedly tracked all neglect referrals to AR).

⁸⁸ See American Humane Society, *Fatalities Due to Child Abuse and Neglect*, <http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/fatalities-due-to-child-abuse-neglect.html>, archived at <http://perma.cc/6BWW-W4VP> (last visited July 26, 2014).

problems.⁸⁹ Accordingly child neglect often means the kind of traumatic stress that “literally changes the architecture of the child’s brain systems in ways that may permanently impair the child’s functioning in every domain of development – sensory, emotional, cognitive, and social.”⁹⁰ Many Neglect cases involve Abuse issues categorized as Neglect simply because the latter is easier to prove.⁹¹

Even assuming that *some* cases now on the CPS caseload are truly minor, posing limited risk to children, this characterization does not fit a significant percentage, and certainly nothing approaching the 70% DR diversion goal.

ii Absence of Investigation Means No Ability to Identify Which Cases Are Serious as vs Minor

DR programs have no way of identifying which cases are truly less risky, warranting diversion to the voluntary track. As discussed above,⁹² DR prides itself on not conducting at the outset, in making the decision how to track cases, the fact-finding investigation that would be needed to determine which are the high risk as compared to the low risk cases.⁹³ There is no effort to determine whether the alleged maltreatment took place and if so who was the perpetrator and what were the underlying family dynamics. While some DR systems depart from the movement ideal and use an investigation to make the initial tracking decision, most do not.⁹⁴ Nor is there an investigation once the case is put on the AR track, since any focus on what the parents might have done to the child is considered inconsistent with the family-friendly ethic, as is any separate interview of the child or other witnesses.

Common sense alone is enough to make this absence of investigation suspect. If a child has a suspicious burn, asking the child in front of the parent whether the burn resulted from an accident or from a parent’s deliberate application of a hot iron, is not likely to produce an honest answer if the child indeed is at risk of violence from the parent. If police respond to an emergency call involving domestic violence, and find a woman injured and weeping, would anyone today think it appropriate to insist that no separate interview of the woman be conducted, that instead the man and woman be kept together for a family friendly assessment of future risks so as to decide on the appropriate response?

Professional expertise confirms that fact-finding investigations, designed to figure out what actually took place in connection with the alleged maltreatment, including separate interviews of the child in a safe-

⁸⁹ BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 1, at 65–67.

⁹⁰ Frank E. Vandervort, Jim Henry, & Mark A. Sloane, *Building Resilience in Foster Children: The Role of the Child’s Advocate*, 32 *CHILD. LEGAL RTS. J.*, 1, 4 (2012); *see* articles cited *supra* note 63; *see generally* CHARLES A. NELSON, NATHAN A. FOX, & CHARLES H. ZEANAH, *ROMANIA’S ABANDONED CHILDREN* (2014) (reviewing brain science and demonstrating devastating impact of neglect on early development).

⁹¹ *See generally, e.g.*, BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 1, at 65–67.

⁹² *See* discussion *supra* Part II.A.3.

⁹³ *See, e.g.*, Vaughan-Eden & Vandervort, *Issues in Differential Response*, *supra* note 25, at 551. (“Obviously, one primary problem is that CPS cannot know which families will fall into this category until it has conducted an investigation [A]bsent such an investigation, children’s safety cannot be assured.”).

⁹⁴ *See* CROSS ET AL., *WHAT WILL HAPPEN TO THIS CHILD IF I REPORT?*, *supra* note 35, at 6.

feeling neutral space, are key elements of an appropriate assessment of future risk to the child.⁹⁵ Several workshops at a recent colloquium given by the leading professional association on child maltreatment, the American Professional Society on the Abuse of Children, emphasized the importance of such investigations, and revealed the degree to which separate interviews of the child are the accepted professional mantra.⁹⁶ Michigan has a law requiring that the child be interviewed separately.⁹⁷

Many in the child welfare field have emphasized in recent years the importance of increasing the depth and scope of traditional CPS investigations, enabling CPS workers to make better decisions as to appropriate response. They note the importance of including the “history of child maltreatment” in that assessment.⁹⁸ They promote the use of multidisciplinary teams that “interview and examine family members in an effort to determine the likelihood, nature, and/or extent of child maltreatment and develop an intervention plan.”⁹⁹

The federal government has weighed in on the need for more careful in-depth factual assessments. The Children’s Bureau has said that “[a]ssessment forms the foundation of effective practice with children and families,”¹⁰⁰ and found in its most recent Child and Families Services Review that CPS agencies were too often “not sufficiently comprehensive to capture underlying family issues that may contribute to maltreatment.”¹⁰¹

Many child welfare systems have sought to provide increasing protection to children by combining civil child services with law enforcement approaches, enabling more thorough investigations and more comprehensive responses.¹⁰² One prosecutor expressed her concern with the move to adopt DR as follows:

⁹⁵ See, e.g., Hughes & Rycus, *Issues in DR, supra* note 5, at 501 (“formal risk assessments—particularly the more reliable and valid actuarial risk assessments—are difficult to complete fully or accurately without face-to-face family contact and a deeper exploration of a family’s circumstances, including the presence and dynamics of previous maltreatment”).

⁹⁶ See e.g., Julie Kenniston & Rita Farrell, First Responder Interviews: Called by so Many Names, but how Should I Really be Doing Them, APSAC 22ND COLLOQUIUM 7 (June 12, 2014), http://www.apsac.org/assets/documents/2014_Colloquium/2014_Handouts/32%20workshop.pdf, archived at <http://perma.cc/EJZ3-E3BP>.

⁹⁷ MICH COMPILED LAWS § 722.628c (1975).

⁹⁸ Vandervort et al., *Building Resilience, supra* note 90, at 8.

⁹⁹ Kathleen Coulborn Faller, Mary B. Ortega, & Elaine Pomeranz, *Can Early Assessment Make a Difference in Child Protection? Results from a Pilot Study*, 2 J. OF PUBLIC CHILD. WELFARE 71, 73, 74 (2008).

¹⁰⁰ Administration for Children & Families, *Family-Centered Assessment*, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/famcentered/caseworkpractice/assessment.cfm>, archived at <http://perma.cc/M7VB-2UB9> (last visited July 27, 2014).

¹⁰¹ DIANE DEPANFILIS, OFFICE ON CHILD ABUSE AND NEGLECT, CHILDREN’S BUREAU (ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, ADMINISTRATION FOR CHILDREN AND FAMILIES) OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD NEGLECT: A GUIDE FOR PREVENTION, ASSESSMENT, AND INTERVENTION 102 (2006), available at <https://www.childwelfare.gov/pubs/usermanuals/neglect/neglect.pdf>, archived at <http://perma.cc/X78X-FXNF>.

¹⁰² The Federal Child Abuse Prevention and Treatment Act requires this as part of the state’s plan in order to receive federal funding. See 42 USC § 5106a (1974), amended by Keeping Children and Families Safe Act, Pub. L. No. 108-36, 116 Stat. 800 (2003).

I am deeply disturbed by the impact this will have on our ability to protect children.... With DR... child services are now prohibited from sharing information with law enforcement, and prosecutors. This will have a terrible impact on our ability to protect the children that fall within [the DR] category....¹⁰³

This is not to say that the full forensic investigation thought appropriate in criminal child abuse cases is required in all child welfare cases. But a meaningful inquiry into the facts that enables child welfare workers to know what happened in the past, so as to illuminate future risk, is.

The social science supports common sense and professional expertise in making the absence of a fact-finding investigation troubling. There general consensus among serious students of the child welfare system, based on extensive evidence, that the best predictor of whether child maltreatment will occur in the future is whether it has occurred in the past.¹⁰⁴

AR's failure to make factual findings documenting in CPS files whether maltreatment has occurred, and its failure to list perpetrators on maltreatment registries, pose additional safety issues. If children are reported in the future as again victimized, social workers and others will be denied the best evidence of the need for protective intervention.

iii. Evidence to Date Indicates Serious Risk Cases Are In Fact Diverted to Voluntary Track

There is increasing evidence in the research on DR that many of the cases diverted to the AR track are in fact characterized by serious rather than minor risk. One California DR study found that almost half the AR sample in the program analyzed were either "high risk" or "very high risk," despite the claimed goals of diverting only low risk cases.¹⁰⁵

Even the advocacy research that purports to find DR successful documents the serious risk characterizing many cases on the AR track. A 2010 Ohio study found that almost half the AR cases had

¹⁰³ E-mail from Christine Corken, First Asst. Dubuque County Attorney, Dubuque, Iowa, to author (Mar. 3, 2014) (on file with author).

¹⁰⁴ IOM/NRC 2012 RESEARCH WORKSHOP SUMMARY, *supra* note 3, at 8. The Children's Research Center, responsible for the extensive work on Structured Decision Making, found based on years of research designed to build reliable risk assessment instruments that prior maltreatment was the most relevant risk factor in estimating the likelihood of future maltreatment. See e-mail from J. Rycus, to author and others (June 1, 2014) (on file with author); see also Daniel Heimpel, *Not For Your Consideration*, THE CHRONICLE OF SOCIAL CHANGE (June 3, 2014) <https://chronicleofsocialchange.org/news/not-for-your-consideration/6875?print=1>, archived at <http://perma.cc/3B32-WS4A> (quoting experts to effect that prior maltreatment and reports of same are best predictors of future maltreatment).

¹⁰⁵ Conley & Berrick, *Community-Based Child Abuse Prevention*, *supra* note 75, at 282.

at least one past report of abuse and neglect, and almost 15% had four or more prior reports.¹⁰⁶ A recent Colorado study admitted that 76% of the AR cases were medium risk and 10% high risk.¹⁰⁷

The research shows that *ongoing maltreatment rates on the AR tracks are extremely high*. The California study noted above reveals a one-third re-report rate *within the brief nine-month AR treatment period*.¹⁰⁸ Even the lead authors of the early advocacy research supporting DR, Tony Loman and Gary Siegel, characterize the rates as unacceptably high.¹⁰⁹ Their 2013 Ohio Report shows that roughly half of all AR families received at least one subsequent family risk assessment.¹¹⁰ It shows that two-thirds of cases assessed as “low risk” had new screened in maltreatment reports within 3 and one-half years, and one-third had three or more such reports and were “chronic CA/N [child abuse/neglect] families.”¹¹¹ In an interview Tony Loman indicated that typically in his DR research he found an unduly high re-report rate, noting that in the Missouri DR program the rate was 50-60% after 5-7 years.¹¹²

And while the DR system is supposed to have a method for sending high risk cases back from the AR to the TR track, this rarely happens as discussed above – available evidence indicates that only a tiny percent of AR cases are sent back to the TR track.¹¹³ Richard Barth, a highly respected child welfare expert, says that unless AR cases are referred back “a substantial amount of the time (25% perhaps), then the system isn’t working.”¹¹⁴

b. Voluntary Track Inappropriate for Serious Risk Cases

Even Tony Loman and Gary Siegel concede that AR is inappropriate for high-risk cases, arguing based on their research that it should be targeted to families without prior maltreatment reports, rather than chronic offenders or parents with “deeper and more intractable problems, such as mental illness, substance abuse, domestic violence or children that are difficult to care for, which often characterize families frequently encountered by CPS.”¹¹⁵ But as discussed above,¹¹⁶ these factors don’t simply “often” characterize CPS cases – *they characterize the overwhelming majority of CPS cases*.

¹⁰⁶ L. ANTHONY LOMAN, CHRISTINE SHANNON FILONOW, & GARY SIEGEL, INSTITUTE OF APPLIED RESEARCH, OHIO ALTERNATIVE RESPONSE EVALUATION FINAL REPORT 42 (2010), *available at* <http://www.iarstl.org/papers/OhioAREvaluation.pdf>, *archived at* <http://perma.cc/8SA5-AD87> [hereinafter LOMAN ET AL., IAR 2010 OHIO REPORT].

¹⁰⁷ *See e.g.*, WINOKUR ET AL., COLORADO QIC-DR FINAL REPORT, *supra* note 40, at 41.

¹⁰⁸ Conley & Berrick, *Community-Based Child Abuse Prevention*, *supra* note 75, at 286.

¹⁰⁹ L. Anthony Loman & Gary L. Siegel, *Effects of Anti-Poverty Services Under the Differential Response Approach to Child Welfare*, 34 CHILD. & YOUTH SERVS. REV 1659, 1666 (2012).

¹¹⁰ L. ANTHONY LOMAN & GARY SIEGEL, INSTITUTE OF APPLIED RESEARCH, OHIO ALTERNATIVE RESPONSE EVALUATION EXTENSION: FINAL REPORT TO THE OHIO SUPREME COURT xiii–iv (Sept. 2013) (on file with author).

¹¹¹ *Id.* at xvi.

¹¹² Telephone Interview with Tony Loman, (Oct. 10, 2013) (notes on file with author).

¹¹³ *See discussion supra* Part II.A.2 (2-6%).

¹¹⁴ E-mail from Richard Barth to author (July 1, 2014) (on file with author). Barth served as consultant to the IOM/NRC project discussed below, and their report cites his concerns regarding the low switch rate. *See discussion infra* Part IV.B.2.

¹¹⁵ Loman & Siegel, *Effects of Anti-Poverty Services*, *supra* note 109, at 1665–66.

¹¹⁶ *See discussion supra* Part III.A.

i. Need for Monitoring, Supportive & Rehabilitative Services, & Protective Intervention Authority

DR proponents claim that voluntary will work better than coercive – that parents will respond to the family friendly approach by cooperating with services. They bolster their case by pointing to the research that allegedly shows that AR track parents receive more services and appear more positively engaged with their workers than TR track parents.

But there is every reason to think that the children in the serious risk cases on the AR track are at greater risk because of the entirely voluntary nature of the system.

First, as discussed above,¹¹⁷ most parents charged with maltreatment have fallen into serious dysfunctional patterns that often include a combination of substance abuse and addiction, domestic violence, and mental illness. Few will be able to escape those patterns of their own entirely free will. While there are few studies of the comparative benefits of voluntary vs coercive programs, evidence in the area of substance abuse treatment indicates that coercion works better.¹¹⁸ Tellingly, in the 2004 Minnesota DR study, when AR workers were asked which parents were least likely to benefit from AR, the most common response was that it was those involved in substance abuse.¹¹⁹

Second, once parents are identified as maltreating their children, research shows that services are unlikely to enable them to recover from their problems sufficiently to avoid ongoing maltreatment.¹²⁰ The traditional CPS system’s authority to impose monitoring by social workers, to require cooperation with rehabilitative treatment, and in the most serious cases to remove children and terminate parental rights, enables it to protect children when parents pose ongoing threats to child safety and wellbeing.¹²¹

ii. The Dropout Problem: Highest Risk Cases Most Likely to Drop Out

In addition we know that the highest risk parents are those most likely to drop out, and that they will drop out at very high rates. This means that they will not receive the services and not engage with the AR workers in the ways that are supposed to assure us that the risk of maltreatment will be reduced. It means that they will escape any monitoring by AR social workers and any attention by workers

¹¹⁷ *Id.*

¹¹⁸ See e.g., ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 289, 286–87 n.21 (1999) (“such research as exists indicates that coercive pressure is in fact useful”); Bartholet, *Creating a Child-Friendly Child Welfare System*, *supra* note 16, at 1337 n.43 (citing family drug court expert comments at Prevention and Protection Workshop held at Harvard Law School May 11, 2012).

¹¹⁹ L. ANTHONY LOMAN & GARY L. SIEGAL, INSTITUTE OF APPLIED RESEARCH, MINNESOTA ALTERNATIVE RESPONSE EVALUATION: FINAL REPORT 68 (Nov. 2004), available at <http://www.iarstl.org/papers/ARFinalEvaluationReport.pdf>, archived at <http://perma.cc/6GTV-SLKZ> [hereinafter LOMAN & SIEGAL, IAR MINNESOTA AR FINAL REPORT].

¹²⁰ BARTHOLET, NOBODY’S CHILDREN, *supra* note 1, at 109–10; Harriet L. MacMillan et al., *Effectiveness of Home Visitation by Public-Health Nurses in Prevention of the Recurrence of Child Physical Abuse and Neglect: A Randomized Controlled Trial*, 365 THE LANCET 1786, 1791 (2005) (showing that model home visitation program, promising in reducing likelihood of maltreatment among first-time parents, had no success in reducing maltreatment among parents once identified as having victimized their children); Bartholet, *Creating a Child-Friendly Child Welfare System*, *supra* note 16, at 1337–38.

¹²¹ See Bartholet, *Creating a Child-Friendly Child Welfare System*, *supra* note 16, at 1338.

connected with AR-related social service programs that might provide the potential for child maltreatment being noticed and reported. All this means in turn that their children will have seriously reduced opportunities for protective intervention by CPS in the event their safety and wellbeing are threatened.

The research on Early Home Visitation has taught us enough to be concerned about the potential DR dropout problem. Home Visitation programs have similar goals as DR, including the reduction of child maltreatment, serve similarly troubled populations, offer a range of supportive services, and operate on a similar voluntary model, with parents free to reject participation without consequence. They have been studied extensively for decades. *The best of the programs, with the best evidence of success in helping reduce the risk of maltreatment, have extremely high dropout rates, between one-third to one-half of all those parents targeted.*¹²²

A thorough 2014 report on Early Home Visitation, by Mathematica Policy Research and Chapin Hall at the University of Chicago,¹²³ reveals the extent of the problem. Dropout rates for the “long-term” programs ranged from 27% to 42% at the 12-month stage.¹²⁴ Families typically received only half the number of home visits expected.¹²⁵ In the very successful Nurse Family Partnership program only 45 to 62% of the visits planned were achieved.¹²⁶ **The report summarizes that just over half the families in all the home visitation programs studied remained in services for at least 12 months and about two-thirds of the families in the three long-term programs, noting that these rates are consistent with and may exceed rates reported in previous research.**¹²⁷

*Moreover, this report shows that the Home Visitation dropouts are disproportionately those parents most at risk for maltreatment.*¹²⁸ **And the reasons given for dropping out from Early Home Visitation programs are very significant in understanding DR safety risks. Among the primary reasons are “drug abuse, fear home visitor will observe child abuse or illegal behavior.”**¹²⁹

DR advocacy research has avoided any focus on the troublesome dropout problem. But careful reading of this research reveals what was to be expected: a very high dropout rate, with the dropouts apparently characterized by particularly high risk. For example, the 2011 New York DR Report says that

¹²² See *id.* at 1353, n.85; BARTHOLET, NOBODY’S CHILDREN, *supra* note 1, at 170, n.17, n.277. See discussion *infra* Part IV.B.4.b.ii

¹²³ See generally KIMBERLY BOLLER ET AL., MAKING REPLICATION WORK: BUILDING INFRASTRUCTURE TO IMPLEMENT, SCALE-UP, AND SUSTAIN EVIDENCE-BASED EARLY CHILDHOOD HOME VISITING PROGRAMS WITH FIDELITY (Jan. 2014), available at http://www.chapinhall.org/sites/default/files/documents/EBHV_MakingReplication_Final.pdf, archived at <http://perma.cc/F35T-54MM>.

¹²⁴ *Id.* at 38.

¹²⁵ *Id.* at 79.

¹²⁶ *Id.* Only 7% of those identified as having terminated services from the three long-term programs were identified as successfully completing the program. *Id.* at 39.

¹²⁷ *Id.* at 80.

¹²⁸ *Id.* at xvi (“Higher-risk families were more likely to leave the program early.”); see also *id.* at xviii, 25. Those identified as high risk are the very same as those regularly identified as at greatest risk for maltreatment: younger, more economically disadvantaged, and more socially isolated participants, including single parents. *Id.* at 25, 80.

¹²⁹ *Id.* at 39, 80.

31% of the AR track parents were willing to listen but did not act on the worker's recommendations or service offers, and another 6% were completely uninterested or dismissive.¹³⁰ A recent Minnesota study shows that only half of the AR track parents chose to participate.¹³¹

But the recent QIC-DR research finally begins to make clear the extent of the AR dropout problem. As discussed below¹³² it both demonstrates the high rate of dropouts and the high-risk nature of these dropouts. This is the only DR research to focus any attention on this issue.

2. Risks From Reducing Financial Support for Traditional CPS

DR proponents claim that by removing the low-risk cases to the voluntary track, CPS will be able to provide better protection to the children at highest risk.

But this claim is belied by the DR finance reform agenda. The strategy for financing DR relies on significantly reducing federal foster care funding and CPS resources more generally, so that in fact CPS would have greatly reduced capacity to protect the children on its caseload.¹³³

The child-friendly reform move would be to expand resources for CPS. These resources have shrunk in recent years because of the 2008 recession, and related federal, state and local budget-cuts.¹³⁴ This has had its own impact on child safety.

Further reducing funds for the resource-starved CPS system will put children at a newly frightening level of risk. Common sense, supported by available evidence, supports the idea that CPS will do a better job protecting children if it is given adequate resources to pay its social workers, reduce caseloads, conduct investigations, provide services, collect evidence, take cases to court as necessary to remove children, place and maintain them safely in foster care, and in appropriate cases terminate parental rights.¹³⁵

There is already some evidence that DR is adversely affecting child safety because of this diversion of funds from CPS. In Connecticut a court monitor supervising the child welfare system reported in the fall of 2013: "Front line staffing levels are inadequate given the complexity of cases that now make up the pool of investigation and ongoing service cases that social workers have on their caseloads since the

¹³⁰ *Id.* at 58.

¹³¹ Brandon Stahl, *Minnesota Counties 'Screen Out' Most Child Abuse Reports*, STAR TRIBUNE (Apr. 21, 2014), <http://www.startribune.com/local/255888251.html>, archived at <http://perma.cc/9KKZ-H5J3>.

¹³² See discussion *infra* Part IV.B.4.

¹³³ See discussion *supra* Part II.B.

¹³⁴ HUGHES, DIFFERENTIAL RESPONSE, *supra* note 8, at 32.

¹³⁵ See, e.g., CROSS ET AL., WHAT WILL HAPPEN TO THIS CHILD IF I REPORT?, *supra* note 35, at 18 (limited CPS resources associated with lower substantiation rate, lower ongoing services rate, lower child placement rate); Coulborn et al. *Can Early Assessment make a Difference in Child Protection?*, *supra* note 99, at 73 (because of paucity of resources, CPS screens out children needing services, conducts narrowly focused investigations, denies cases in which children need help, and closes cases right after substantiation); Jenifer McKim, *A Wave of Infants Lost in DCF Families*, THE BOSTON GLOBE (July 13, 2014), <http://www.bostonglobe.com/metro/2014/07/12/babies-under-department-children-and-families-supervision-suffer-sleep-related-deaths-alarming-rate/kQ5BbcvJFmzUfV6KH6IzDN/story.html>, archived at <http://perma.cc/Y7WJ-HXUK>.

implementation of the Differential Response System.”¹³⁶ Research reports document CPS worker complaints that they are newly overburdened by the diversion of resources to AR.¹³⁷ Concerns about how this diversion has threatened the safety of children on the CPS caseload have been a factor in leading a number of states to eliminate their DR programs.¹³⁸

One proffered rationale for this federal finance move is an old chestnut in the family preservation arsenal. DR proponents claim that a disproportionate amount of federal funding goes to removing children from their parents for maltreatment as vs preventing maltreatment in the first place.¹³⁹ One problem with this argument is that the calculus is based on false factual assumptions -- on the omission of many very significant federal sources of funds for prevention. Casey and others typically rely on a comparison between the Title IV-E funds provided by the federal government for foster care with the IV-B funds provided for prevention services, as if this proved their case. But this entirely ignores all the federal funds provided for prevention services through welfare and other programs.¹⁴⁰

Also, Casey poses a false choice between funding for prevention vs funding for children in out-of-home care. This is the choice only if finance reform is done on the cheap, in a budget-neutral way with no new resources dedicated to child welfare. Breaking with long-standing tradition among child welfare advocates, Casey has repeatedly declined to call for new funding, assuring policymakers that finance reform can and should be done at no cost to the federal government.¹⁴¹

Casey’s position is of course completely consistent with its 2020 foster care reduction goal. Casey believes that reducing funding for foster care will create compelling fiscal incentives for states to limit foster care usage.

Another problem with the rationale for DR finance reform is that DR has little to do with true maltreatment *prevention*. There is some evidence that prevention programs like Early Home Visitation actually work to prevent maltreatment from occurring in the first place, evidence that they work generally to reduce the likelihood of child abuse and neglect occurring in high risk families.¹⁴² But DR operates after maltreatment has occurred, and is designed to keep children identified as victims of abuse and neglect with their parents, free from any CPS intervention. There is little evidence that supportive service programs targeted at families where abuse and neglect has already occurred

¹³⁶ Court Monitor Raymond Mancuso report dated Oct. 2013, quoted in Heimpel, *Differential Response Dealt Heavy Blow*, *supra* note 6.

¹³⁷ See discussion *infra* Part IV.B.4.a.

¹³⁸ See Conclusion *infra*.

¹³⁹ William C. Bell, Jim McDermott, & Dave Reichert, *Guest: Strengthen Investment in Families to Help Foster Children*, THE SEATTLE TIMES (June 5, 2013), <http://seattletimes.com/avantgo/2021119436.html>, archived at <http://perma.cc/7VTG-RTTQ>.

¹⁴⁰ See HUGHES, DIFFERENTIAL RESPONSE, *supra* note 8, at 34–38 (Temporary Assistance for Needy Families (TANF), Social Services Block Grants, the Maternal, Infant, and Early Childhood Home Visiting Program, Medicaid, and the Child Abuse Prevention and Treatment Act).

¹⁴¹ See *id.* at 39.

¹⁴² See, e.g., BARTHOLET, NOBODY’S CHILDREN, *supra* note 1, at 166–68 (description of promising research on Early Home Visitation programs); Bartholet, *Creating a Child-Friendly Child Welfare System*, *supra* note 16, at 1347 n.69 (citing more recent Home Visitation research).

succeed, and extensive evidence indeed that most of them fail. Such children are re-victimized at rates ranging between one-third to two-thirds when kept at home or returned home from foster care.¹⁴³

We must continue to provide services to families in which there is significant reason to hope that parents can do what it takes to become fit and nurturing parents, and we should indeed clearly expand such funds. Federal finance reform designed to provide additional funds for at-home services would be an important step in enabling this.

But we should do this within the context of the CPS system so that it can act to protect children as necessary, using its authority to monitor, require cooperation with treatment plans, remove to foster care, and terminate parental rights.

IV. RESEARCH ISSUES: THE CORRUPT MERGER OF ADVOCACY WITH RESEARCH

The research picture fits the problematic pattern of prior history, discussed above.¹⁴⁴ First, most of the research is designed to justify moving in the DR direction, rather than to honestly assess whether DR serves child interests and other important goals. It is designed to *persuade* policy makers to adopt DR rather than enable them to decide whether they *should* do so. This research, referred to here as the “advocacy research,” purports to take child safety into consideration, but is not actually designed to assess DR in terms of child safety or broader measures of child wellbeing. It ignores issues that would be an obvious focus for attention were the goal really to assess DR’s impact on children.

Second, most of the research is produced by people and organizations with powerful links to those promoting DR, rather than by independent social scientists free to pursue the objective facts that should be of greatest interest to policy makers.

One set of core organizations and individuals has been heavily involved in both the promotion of DR and in the research purporting to assess its value.¹⁴⁵ This includes Casey Family Programs, the American Humane Association (AHA), the Kempe Center for the Prevention and Treatment of Child Abuse and Neglect, and the Institute of Applied Research (IAR). AHA, long active in promoting DR,¹⁴⁶ also received, with the IAR, the grant to supervise the important research project conducted by the Quality Improvement Center on Differential Response, or QIC-DR.¹⁴⁷ The AHA later relinquished its QIC-DR role to the Kempe Center, which also played a role in the earlier DR research.¹⁴⁸ The QIC-DR research was designed as the culminating research phase that would provide the basis for persuading the federal government to make a major shift of funds from CPS to DR. IAR, through their senior analysts Gary

¹⁴³ See discussion *supra* Part III.A and note 89.

¹⁴⁴ See discussion *supra* Part I.

¹⁴⁵ See Introduction *supra*.

¹⁴⁶ See RUPPEL ET AL., NY DR REPORT, *supra* note 4, at 13; HUGHES, DIFFERENTIAL RESPONSE, *supra* note 8, at 26.

¹⁴⁷ WINOKUR ET AL., COLORADO QIC-DR FINAL REPORT, *supra* note 40, at ix.

¹⁴⁸ HUGHES, DIFFERENTIAL RESPONSE, *supra* note 8, at 26.

Siegel and Tony Loman, had been responsible for most of the earlier, highly influential DR advocacy research,¹⁴⁹ and also worked as influential consultants to the QIC-DR.

Casey Family Programs has played a key role in promoting DR, in supporting DR with funding grants,¹⁵⁰ and in the research picture. They have put out advocacy documents which make an avid pitch for the DR approach, while claiming at the same time that this is supported by the research. These read as some combination of classic advocacy documents and research reports. One such is “The Differential Response (DR) Implementation Resource Kit,” apparently designed to persuade new jurisdictions to adopt DR, and to help them implement DR.¹⁵¹ It provides a totally positive view of the research, ignoring entirely the devastating critique of DR research published by Hughes & Rycus and the related debate triggered, discussed below.¹⁵² Also ignored is any discussion of other independent research critical of DR.¹⁵³ Instead the Implementation Kit makes the unqualified claim that DR “has demonstrated improvements in family engagement, worker satisfaction, and community satisfaction and cooperation, while maintaining child safety.”¹⁵⁴ Another such Casey product is the “breakthrough series collaborative” report on DR in California.¹⁵⁵ This report talks of California’s “compelling vision” involving DR, claiming to be “grounded in research and backed by an outcomes-based accountability system”¹⁵⁶ The report paints a rosy picture throughout.

The problematic merger of policy advocacy with research is further illustrated by the DR conference sponsored by the Kempe Center in October 2013. The conference brochure features DR as a success story. The conference title is “Differential Response: A Catalyst for Change.” The introduction claims: “Research and implementation experience has shown that, when CPS implements two response pathways, practice across the child welfare system improves.”¹⁵⁷ The opening keynote features a Casey Family Programs staff member, whose job is described as helping assess child welfare systems improvements, talking about: “What Families Tell Us They Need: Working Together to Keep Them Strong and Their Children Safe.”¹⁵⁸ A closing breakout session features two Casey Family Programs staff members on “Differential Response: A Review and Summary of the Research Evidence.” This is

¹⁴⁹ See Institute of Applied Research, *Papers & Reports*, <http://www.iarstl.org> (last visited July 28, 2014) for the many DR research studies they have conducted over the years.

¹⁵⁰ For example, Casey helped support the Ohio pilot DR program. See Puckett, *supra* note 1. Casey provided funds for the NY program. RUPPEL ET AL., NY DR REPORT, *supra* note 4, at 17. Marguerite Casey Foundation also provided funds for the NY program. *Id.*

¹⁵¹ See CASEY FAMILY PROGRAMS, DR RESOURCE KIT, *supra* note 6, at 4 (the report states that the DR Resource Kit is “not a statement of Casey Family Programs’ position regarding Differential Response” but the report includes no information about the negative aspects of DR).

¹⁵² See discussion *infra* Part IV.B.3.

¹⁵³ See discussion *infra* Part IV.B.2.

¹⁵⁴ CASEY FAMILY PROGRAMS, DR RESOURCE KIT, *supra* note 6, at 5.

¹⁵⁵ See *generally* CASEY FAMILY PROGRAMS, IMPLEMENTING DIFFERENTIAL RESPONSE IN CALIFORNIA: PROMISING PRACTICES AND LESSONS LEARNED (Feb. 2007).

¹⁵⁶ *Id.* at i.

¹⁵⁷ KEMPE CENTER FOR THE PREVENTION AND TREATMENT OF CHILD ABUSE AND NEGLECT AT THE UNIVERSITY OF COLORADO, ANSCHUTZ MEDICAL CAMPUS, DIFFERENTIAL RESPONSE: A CATALYST FOR CHANGE REGISTRATION 2 (Oct. 2013).

¹⁵⁸ *Id.* at 5.

summarized as follows: “Differential response stands out among child welfare practice approaches because of the research evidence of its effectiveness. . . .”¹⁵⁹

Maryland’s recent decision to adopt DR represents another example of this advocacy-research merger. Casey Family Programs helped stock the state’s advisory council meetings with consultants, co-sponsored trips to educate Maryland CPS staff about DR programs, distributed reports citing IAR positive research findings, and then helped IAR get the contract to evaluate Maryland’s new DR program.¹⁶⁰

A. What Child-Friendly Research Would Look Like

Appropriate *child welfare* research would focus on *child welfare*, and be child-friendly. This would mean, first, looking at whether from the perspective of child safety and wellbeing, we should move in the DR direction or in just the opposite direction, providing more resources to CPS so that it can do a better job of protecting children. All agree that there are problems with the current system in terms of its failure adequately to protect children. There has long been a debate about whether to move in the direction of *greater or lesser* intervention by CPS. We could learn a lot that would be helpful in designing a more child-friendly system by comparing how children do (1) when new resources are devoted to a voluntary track providing supportive services to families, as vs (2) when CPS is given equivalent new resources to support families as well as protect children. Such research would help test the dubious DR assumption that an entirely voluntary system oriented primarily to support will work better for children than a system with authority to monitor child safety, require that parents cooperate with rehabilitative services, and remove children as needed for their protection.

Second, given the high re-report rates on families on both AR and TR tracks, child-friendly research would focus on the dangers to children on both tracks, and on how we might better protect them. Again this argues for assessing how CPS would do if provided additional resources.

Third, child-friendly research would focus on the obvious risks DR poses to children to see whether those risks are real. Child-friendly research would focus on developing methods for accurately assessing the seriousness of the cases diverted to the AR track. It would focus on the high dropout rate, and develop measures for assessing the maltreatment rate along with other indicators of child wellbeing in this dropout population. It would not rely on re-report rates as accurate indicators of the extent of actual maltreatment suffered on the AR track for many reasons, including that parents dropping out are subject to less surveillance by mandated and other potential reporters.

Finally and most important, appropriate child welfare *research* would follow the tradition of *true scientific research*. It would be conducted by social scientists with no commitment or bias to finding a success story in DR. Indeed without such people designing the research it’s hard even to know all the questions that good research would investigate, and hard to identify all the flaws in existing research.

B. Existing Research

1. The Early Advocacy Research

¹⁵⁹ *Id.* at 15.

¹⁶⁰ Heimpel, ‘*Alternative Response*’ is no Solution, *supra* note 11.

a. Promotional Nature & Tone

One organization, the Institute of Applied Research (IAR), and its two senior analysts, Tony Loman, and Gary Siegel, are responsible for the most influential early DR research.¹⁶¹ They have produced a series of positive reports touting DR as a success story. These reports have been the primary basis for DR proponents' claims that this is an evidence-based program the nation's child welfare systems should embrace.

IAR's 1997 report on Missouri's DR program helped fuel the early DR movement, showing marginally lower rates of child maltreatment recurrence in DR counties and thus supporting the claim that DR was consistent with child safety.¹⁶² IAR's evaluation of Minnesota's DR program was the first randomized assignment study, and as such became very influential.¹⁶³ IAR followed with many other reports including in Ohio,¹⁶⁴ where Casey Family Programs and AHA had been heavily involved in DR's development.¹⁶⁵ The IAR research model also influenced DR research conducted by others.¹⁶⁶

Only a few of the early studies used random assignment – Missouri (1997), Minnesota (2004), Ohio (2013), and New York (2011). All these were done by IAR except New York, which followed the IAR research model.¹⁶⁷

The fact that two people associated with one organization have received repeated contracts for producing a series of positive research reports is a problem in itself. A significant percentage of all the papers and reports listed on the IAR website focus on DR.¹⁶⁸ IAR by definition has an economic bias in favor of churning out repeat versions of the DR success story. It seems unlikely that it would have received repeat contracts had its reports challenged any key DR movement premises. IAR co-authors Loman and Siegel support DR advocacy efforts with unabashed enthusiasm. For example, Siegel is quoted in the Casey Family Programs Implementation Resource Kit equating DR with a precociously brilliant child. Supporting the creation of new DR management positions, he says: "Every child needs a

¹⁶¹ See WINOKUR ET AL., COLORADO QIC-DR FINAL REPORT, *supra* note 40, at 1 n.1–6 (listing the then key research reports, with five of the six authored by Loman and Siegel).

¹⁶² GARY L. SIEGAL & L. ANTHONY LOMAN, INSTITUTE OF APPLIED RESEARCH, MISSOURI FAMILY ASSESSMENT AND RESPONSE DEMONSTRATION: FINAL EVALUATION REPORT (Nov. 1997), *available at* <http://www.iarstl.org/papers/MO%20FAR%20Final%20Report-for%20website.pdf>, *archived at* <http://perma.cc/76SN-YZQV>.

¹⁶³ See *generally* LOMAN & SIEGAL, IAR MINNESOTA AR FINAL REPORT, *supra* note 119.

¹⁶⁴ See *generally* LOMAN ET AL., IAR 2010 OHIO REPORT, *supra* note 106. An updated report was released in 2014. See *generally* L. ANTHONY LOMAN & GARY L. SIEGAL, INSTITUTE OF APPLIED RESEARCH, OHIO ALTERNATIVE RESPONSE EVALUATION EXTENSION: FINAL REPORT TO THE OHIO SUPREME COURT (Apr. 2014), *available at* <http://www.iarstl.org/papers/OhioARFinalExtensionReportFINAL.pdf>, *archived at* <http://perma.cc/W4EU-E5BQ>.

¹⁶⁵ See TIM MORRISON & NOAH DZOPA, DIFFERENTIAL RESPONSE – DRAFT REPORT 10 (July 15, 2014) (on file with author) (Conversation with Nancy Mahoney, Ohio Dept. of Jobs and Family Services); e-mail from Judith Rycus, to author (July 7, 2104) (on file with author) and page 27 of attached draft; see Institute of Applied Research, *Papers & Reports*, *supra* note 149 for the various IAR reports.

¹⁶⁶ See, e.g., RUPPEL ET AL., NY DR REPORT, *supra* note 4, at 31–40.

¹⁶⁷ MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 21, 42, 58, 69.

¹⁶⁸ Institute of Applied Research, *Papers & Reports*, *supra* note 149 (12 out of 42 reports, or 29%, have Differential Response in the title).

parent, even a child prodigy.”¹⁶⁹ Not the language you would expect an objective social scientist to use about a program he is responsible for evaluating.

The research reports read like advocacy not independent, neutral, social science. There is for example no section at the end of the reports discussing “limitations,” warning the reader of the limits of the research, and the limits on the conclusions that can fairly be drawn, alerting the reader to further research that would be useful in answering important open questions. The reports regularly include rave reviews of DR. The 2004 Minnesota report, opens its description of study highlights with the unqualified claim: “Child safety was not compromised” by the AR approach.¹⁷⁰ Its Introduction opens: “As states seek ways to make child protection systems more effective, a new paradigm has emerged with potential to be a major system reform within child protection.”¹⁷¹ The reports regularly argue for expansion of DR even though they provide very limited evidence of its safety for children. The 2011 New York Report sums up its key findings starting with family engagement and satisfaction, and ending with the early evidence that AR cases have similar re-report rates as TR cases. Based on this, together with a *prediction* that further follow-up will demonstrate a reduction in subsequent AR re-reports, it claims “positive evaluation results” and *recommends that the legislature make DR permanent!*¹⁷²

b. Parent Satisfaction as Measure of Success

When it comes to substance, the early advocacy research fails to pass the laugh test. At least it fails if you think that child interests should count as central. Each report places enormous emphasis on AR’s success in pleasing parents – or what the research calls “families” without specifying that their definition of families excludes children. *Loman and Siegel themselves sum up their work saying: “The most consistent finding in our work is that, on average, families react more positively to [AR] than to forensic investigations.”*¹⁷³ Their Minnesota report’s opening highlights summarize: “Most families liked the AR approach and responded more positively to workers who used it.”¹⁷⁴

Notably, although children in DR programs range widely in age and include a large proportion fully capable of voicing informative opinions,¹⁷⁵ no effort is made in the advocacy research to solicit their views.

The sections in this research proclaiming parent satisfaction are based on surveys of parents on the AR as compared to the TR tracks. Elaborate statistical charts demonstrate that parents on the AR track, who are by definition treated always and only in a family-friendly way, offered services featuring financial subsidies like rent payments and household purchases, never investigated to see how they

¹⁶⁹ CASEY FAMILY PROGRAMS, DR RESOURCE KIT, *supra* note 6, at 59.

¹⁷⁰ LOMAN & SIEGAL, IAR MINNESOTA AR FINAL REPORT, *supra* note 119, at vi.

¹⁷¹ *Id.* at 1.

¹⁷² RUPPEL ET AL., NY DR REPORT, *supra* note 4, at v–vii, 103.

¹⁷³ L. Anthony Loman & Gary L. Siegel, *Hughes et al.: Science or Promotion?*, 23 *RESEARCH ON SOCIAL WORK PRACTICE* 554, 556 (2013).

¹⁷⁴ LOMAN & SIEGAL, IAR MINNESOTA AR FINAL REPORT, *supra* note 119, at vi.

¹⁷⁵ MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 60 (mean age of children in three states DR systems studied range from 5.4 years to 6.4 years).

might have mistreated their children, never required to do anything, never told that the state can intervene to protect their children if they don't take the steps needed to become fit parents, tend to report they like this treatment better than parents on the TR track who can be required to engage in substance abuse and other rehabilitative treatment, and who know that if they continue to abuse and neglect their children they risk having the children removed. *What's not to like from the point of view of most parents diverted to the AR track? How can the IAR authors report this finding as if it's enormously significant, as important proof of success?*

And yet sophisticated DR movement strategists have poured millions of dollars into this research, in a deadly serious effort to radically change our nation's child welfare policy. They have apparently learned a scary lesson from the prior history discussed above. Research findings that seem laughable can have a very significant effect on policy makers.

c. Parent Engagement Claims

The early advocacy research claims that parents are actually engaged on the AR track more actively than parents on the TR track, and thus receive more in the way of services that might reduce stress and help them avoid repeat maltreatment. There are a host of problems with this finding.

First, while the research refuses to discuss the dropout problem, it is clear that both the parent and worker surveys used to measure parent engagement are based on a highly selective and by no means representative sample of the whole AR group. The surveys are sent to only those parents who choose to engage in and complete the voluntary AR track program and out of that group only a small percentage responds.¹⁷⁶ These parents are almost certainly those most invested in and appreciative of the program. By contrast, parent engagement for the TR group is measured for all parents on the track, including those who would much rather not be there. *There is therefore no comparability between the two groups, and no evidence as to the level of engagement of the entire group diverted to AR as compared to the group kept on the TR track. However we know that somewhere in the vicinity of one-third to two-thirds of those in the AR group are not in fact engaged since they dropped out.*¹⁷⁷

Second, the services provided on the AR track as compared to the TR track are significantly different. AR track services are primarily financial benefits such as food or clothing, rent and utilities payments, purchases of appliances and other household items, rather than the kinds of rehabilitative services designed to help unfit parents become fit like substance abuse treatment, and anger management and other parental fitness counseling. TR track services involve disproportionately more in the way of such rehabilitative services.¹⁷⁸ *Even if the DR research were capable of proving that parents were more engaged in AR services, this would say nothing about whether they were getting more in the way of services actually helpful in reducing child maltreatment.*

¹⁷⁶ E.g. MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 49; LOMAN & SIEGAL, IAR MINNESOTA AR FINAL REPORT, *supra* note 119, at 46. See also Loman interview, *supra* note 112 (interview with Tony Loman by Elizabeth Bartholet in which he agrees that surveys are based only on parents participating in the AR track).

¹⁷⁷ See discussion of dropout rates *supra* Part III.B.1.b.ii and *infra* IV.B.4.b.ii.

¹⁷⁸ LOMAN & SIEGAL, IAR MINNESOTA AR FINAL REPORT, *supra* note 119, at 52–57.

Third, much of the research compares AR programs that have been given new funding for services and staff to TR programs that have received no such new funding.¹⁷⁹ A related problem plaguing virtually all the research reports is that the social workers on the AR track have been given special training and directions not provided to the comparison TR track workers.¹⁸⁰

A comparison between tracks with different levels of funding and different types of training for staff and services proves absolutely nothing about whether a voluntary track will work better than a potentially coercive track in engaging parents and preventing maltreatment.

d. Child Safety Claims

The early advocacy research claims that child safety is served as well or better on the AR track as the TR track, generally relying primarily on comparative rates of re-reporting of child maltreatment. They say that for AR families these rates are roughly the same as and in some cases lower than the rates for CPS families.¹⁸¹ There are many problems with these safety claims. Most important is that there is no real focus on assessing the obvious risks of DR, by social scientists free from bias,¹⁸² so there is no way to tell what might have surfaced had there been such a focus.

In addition, many flaws in the safety claims made are obvious. First, the reports imply, but don't actually make clear, that re-report rates for dropouts are included in the total rates for the AR group or the TR group. Obviously if they are not, the re-report comparisons are close to meaningless, since as discussed above the dropouts are likely the highest risk group.¹⁸³

Second, even if dropouts were included in AR re-report totals, there is no reason to think that re-report rates reflect maltreatment rates for the dropout group in the same way they reflect such rates for the AR participant group, and no discussion of this issue. There is good reason to think they do not. There is a well-known and oft-discussed "surveillance bias" phenomenon. Families visited on a regular basis by social workers are more likely to be reported because these workers are mandated reporters.¹⁸⁴ Families receiving services are more likely to be connected with community resources with their own

¹⁷⁹ So, for example, in the early, influential Minnesota study new foundation funds for services were made available to families on the AR but not the TR track. LOMAN & SIEGAL, IAR MINNESOTA AR FINAL REPORT, *supra* note 119, at 19, 66. The 2010 Ohio study reports that \$1000 per family was provided on the AR but not the TR track, crediting Casey Family Programs together with the Ohio child welfare department for the new funding. LOMAN ET AL., IAR 2010 OHIO REPORT, *supra* note 106, at 15. The 2011 New York DR research report notes that extra funds were provided to the AR track. *Id.*; see also Hughes & Rycus, *Issues in DR*, *supra* note 5, at 510–513 (reports reviewed in Appendix A, including Minnesota, Ohio, Nevada, and New York). The Final QC-DR Report notes that in the later Ohio study extra funds were provided to the AR track by both Casey and the QIC-DR grant. MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 83. Casey's *DR Implementation Kit* notes that "flexible funds" are generally provided to AR tracks and are essential to the system. CASEY FAMILY PROGRAMS, DR RESOURCE KIT, *supra* note 6, at 49, 50

¹⁸⁰ See *e.g.*, RUPPEL ET AL., NY DR REPORT, *supra* note 4, at iv.

¹⁸¹ See, *e.g.*, Puckett, *supra* note 1 (claiming slightly reduced re-report rate in AR families).

¹⁸² See discussion *supra* Part IV.A.

¹⁸³ Tony Loman stated that his research did include the dropout re-report rates. See Loman interview, *supra* note 112.

¹⁸⁴ Conley & Berrick, *Community-Based Child Abuse Prevention*, *supra* note 75, at 284.

mandated reporters.¹⁸⁵ Families on the AR track who refuse services at the get-go will be free from this kind of surveillance, and families who drop out along the way will be relatively free.

Third, there is also no reason to think that re-reports accurately capture any differences in actual maltreatment between those who receive services on the AR track and those on the TR track, and there is no discussion of this issue. Again there is good reason to think they do not. The point of the AR track is to be family-friendly and not engage in the kind of monitoring and surveillance designed to identify maltreatment that is more characteristic of the TR track. The workers on the two tracks are differently trained and socialized, and operate from different perspectives about their role.

Fourth, the absence of any fact-finding investigation on the AR track, any findings about prior abuse and neglect, and any listing on maltreatment perpetrator registries, will likely reduce the rate at which actual maltreatment is identified in the entire group diverted to AR, both dropouts and participants. Maltreatment findings are an important part of what social workers rely on in deciding whether to conclude that additional maltreatment has occurred, and whether to report. Children on the AR track are less likely to be re-reported for maltreatment, as compared with children on the TR track, since their cases will be missing the information about prior incidents that would exist for similar cases on the TR track.

In addition to the suspect reliance on re-report rates, the research relies on social worker perceptions of family safety as an important measure of actual safety in comparing the AR to the TR families.¹⁸⁶ There are many obvious problems with this measure. Among these are first the likely bias of the workers who self-select for the AR track and are trained in ways designed to make sure they are true believers. Second, the worker assessments are based on the parents who have volunteered to participate to the end of the services period, at which point the only families left will be those who are most enthusiastic about the program and likely the lowest-risk out of the AR pool.

Finally, the research almost entirely ignores the huge safety risk posed to children evidenced by the very high re-report rates characterizing both the AR and the TR tracks. It mentions these rates at best only in passing, so that the normal reader would not even notice. But the problematic facts appear incidentally in at least some of the reports. The Minnesota 2004 Report says the overall re-report rate is about one in three families during a relatively short tracking period of 2-3 years. It predicts that long-term rates would rise to something like the general CPS recurrence rate of 65%.¹⁸⁷ *So success is claimed based on a prediction that children in the AR track will be likely to be re-reported for maltreatment at something at least close to a two-thirds rate!*

¹⁸⁵ *Id.* at 286.

¹⁸⁶ LOMAN & SIEGAL, IAR MINNESOTA AR FINAL REPORT, *supra* note 119, at 105-14; LOMAN ET AL., IAR 2010 OHIO REPORT, *supra* note 106, at 130-33.

¹⁸⁷ LOMAN & SIEGAL, IAR MINNESOTA AR FINAL REPORT, *supra* note 119, at 141-42. A recent Loman & Siegel Ohio study reveals that nearly half of the families in the combined group of AR and TR cases had one or more screened-in re-reports. Loman & Siegel, *Effects of Approach*, *supra* note 41, at 8.

We have to assume that *actual* safety risks are even higher than these re-report rates suggest, since re-reports *significantly underestimate maltreatment*.¹⁸⁸

The overall high re-report rate deserves center stage in any report truly focused on child safety and wellbeing. The overwhelming majority of children kept at home whether on the AR or TR track suffer repeated abuse and neglect. This is no surprise given that we have known for years that children once victimized by maltreatment are highly likely to be re-victimized.¹⁸⁹ But it calls out for comparing how children might do in a CPS reform program that moved in the opposite direction from DR, providing more rather than less in the way of intervention, more monitoring, more rehabilitative treatment, and readier removal in response to serious abuse and neglect.

e. Cost-Savings Claims

The early advocacy research reports typically end with sections assessing DR costs and benefits. Again the focus is one which largely ignores child interests, and also ignores long-term costs to the state.

The reports indicate that while short-term costs of the AR track including its services often are greater than the TR track, they claim that long-term the DR system will be likely to reduce financial costs. This is based almost entirely on anticipated reductions in removal to foster care associated with DR, and to a lesser degree with reductions in other traditional CPS activities like investigations.¹⁹⁰

But the reports simply *assume* that eliminating investigations and reducing foster care are good things, with no analysis whatsoever of whether it serves or disserves child interests. As discussed above,¹⁹¹ good social science provides reason to think that as a general matter reducing the rate of removal to foster care will be harmful to children, putting them at greater risk for additional maltreatment and related problems. And to the degree DR increases these long-term risks to children it will prove enormously costly to society in financial terms.¹⁹²

2. The Independent Research

Relatively few studies out of the entire body of DR research can be characterized as independent from the DR movement, free from the advocacy spirit animating the research described above. All of these independent research studies have a very different character and message from the advocacy research.

¹⁸⁸ See, e.g., IOM/NRC 2014 REPORT, *supra* note 2, at 205–06 (noting critical need for studies that don't rely on re-report rate for assessing child safety); see discussion *infra* Part IV.B.2; Kyte et al., *Evaluating Where We're at with Differential Response*, *supra* note 35, at 125, 126, 131; KOHL, UNSUCCESSFUL IN-HOME CHILD WELFARE, *supra* note 18, at 3 (recurrent maltreatment underreported based on comparisons with self-reports); *Id.* at 5, 6, 8, 31 (very significant underreporting of maltreatment, including severely violent and neglectful parenting, citing own study and previous research).

¹⁸⁹ See discussion *supra* Part III.A.

¹⁹⁰ LOMAN ET AL., IAR 2010 OHIO REPORT, *supra* note 106, at 154.

¹⁹¹ See discussion *supra* Part III.A.

¹⁹² See, e.g., BARTHOLET, NOBODY'S CHILDREN, *supra* note 1, at 55.

Amy Conley and Jill Duerr Berrick's 2010 California report¹⁹³ is filled with important cautions. They note that taking all the research done to date together, the findings are "equivocal,"¹⁹⁴ by contrast to the success story claimed in the advocacy research. They point out that while DR systems are supposed to divert only low risk cases to the AR track, in fact they regularly divert many "high risk" and "very high risk" cases,¹⁹⁵ with almost half the cases in their own study falling in these categories. They note that many DR approaches gaining support across the country "offer little more than referrals to community resources."¹⁹⁶ They flag the dropout issue, noting that "*more than half of the families who were offered [AR] services did not opt to participate in the program.*"¹⁹⁷ They point out that this dropout problem limits the relevance of comparisons between AR and TR groups.¹⁹⁸ And they note the high re-report rate characterizing both AR and TR track families – roughly one-third, with re-reports occurring sooner among the AR group.¹⁹⁹

Conley and Berrick conclude with a stunningly different overall assessment of DR's "success," finding that while it may provide families needed support, there is no reason to think it is useful in reducing child maltreatment.²⁰⁰

The highly respected Institute of Medicine and National Research Council (IOM/NRC) issued a *Research Workshop Summary* in 2012 designed to sum up important child maltreatment research as a preliminary step to revising the IOM's 1993 maltreatment research report.²⁰¹ It states that the DR research studies "have not been able to rule out the possibility that increased harm might occur."²⁰² It cites important questions raised by their consultant Richard Barth, Dean of the School of Social Work at the University of Maryland, including the question as to whether the early research findings would be vindicated by "more rigorous evaluation designs," and the question as to why so few cases were being switched from AR to TR tracks based on safety concerns.²⁰³

In 2014 the IOM/NRC final report was published. It notes that just three randomized controlled trials of DR had been conducted, and seven quasi-experimental studies. And it emphasizes: "Perhaps most critically, there is a need for studies that do not rely solely on administrative [re-report] data."²⁰⁴ It questions whether re-report rates on the AR track provide any meaningful measure of child safety:

¹⁹³ Conley & Berrick, *Community-Based Child Abuse Prevention*, *supra* note 75, at 282.

¹⁹⁴ *Id.* at 283.

¹⁹⁵ *Id.* at 283, 289.

¹⁹⁶ *Id.* at 290.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 289 (no way to know that those who continued in the program are similar to those who dropped out since "clients who were more troubled may have been more likely to opt for treatment, or alternatively, clients who were better prepared to change their parenting may have chosen to participate.").

¹⁹⁹ *Id.* at 236.

²⁰⁰ *Id.* at 290.

²⁰¹ IOM/NRC 2012 RESEARCH WORKSHOP SUMMARY, *supra* note 3, at 4.

²⁰² *Id.* at 86.

²⁰³ *Id.* at 87.

²⁰⁴ *Id.* at 206.

Because this finding is based on administrative data rather than direct measures of safety, ... it must be interpreted carefully, because the differential response process could plausibly result in less involvement of any agency with the children, who could then be less likely to be rereported even though they were being reabused.²⁰⁵

The report also notes that the number of rigorous evaluations is low, and more rigorous evaluations are needed.

Deborah Daro and Kenneth Dodge conducted a comprehensive review of DR programs in a 2009 publication, finding “few positive effects on the initiative’s four core outcomes – child safety, parental capacity and access to support, child welfare agency and network efficiency, and community responsibility for child protection....”²⁰⁶

3. Hughes & Rycus Analysis of the Early Advocacy Research

The Hughes & Rycus 2013 article makes an enormous contribution to the DR debate. It is written from within the child welfare research world by highly respected scholars who have held and continue to hold important positions with important organizations in the area of child maltreatment and research. Ronald Hughes and Judith Rycus, the lead authors, serve as director and program director, respectively, of the North American Resource Center for Child Welfare, Institute for Human Services (IHS/NARCCW).²⁰⁷ Hughes also served as Past President and serves as ongoing President Emeritus of the American Professional Society on the Abuse of Children.²⁰⁸

The IHS/NARCCW initiated in early 2010 a comprehensive research and literature review to address the organization’s developing concerns with DR implementation and evaluation, including concerns about child safety,²⁰⁹ resulting in publication of the Hughes & Rycus co-authored article in 2013. This article triggered immediate attention. The Editor of the journal *Research on Social Work Practice* devoted the entire September 2013 issue to this paper, related reaction papers, and a response to those papers by Hughes and Rycus.²¹⁰

The Hughes & Rycus analysis provides a devastating critique which includes the following key elements.

First it questioned the methodology of the DR advocacy research on multiple grounds, including the fact that experimental AR and control TR samples were not comparable, concluding:

²⁰⁵ IOM/NRC 2014 REPORT, *supra* note 2, at 205.

²⁰⁶ Deborah Daro & Kenneth A. Dodge, *Creating Community Responsibility for Child Protection: Possibilities and Challenges*, 19 THE FUTURE OF CHILD. 67, 84 (Fall 2009), available at http://futureofchildren.org/futureofchildren/publications/docs/19_02-04.pdf, archived at <http://perma.cc/MXD4-TR6Y> (discussing DR programs going under the name “community partnership”).

²⁰⁷ North American Resource Center for Child Welfare, Institute for Human Services, *Staff*, <http://www.ihs-trainet.com/about/staff.htm>, archived at <http://perma.cc/8YX4-3QPR> (last visited July 28, 2014).

²⁰⁸ American Professional Society on the Abuse of Children, *Board of Directors*, <http://www.apsac.org/board-of-directors>, archived at <http://perma.cc/6D8P-VWAA> (last visited July 28, 2014).

²⁰⁹ Hughes & Rycus, *Issues in DR*, *supra* note 5, at 495.

²¹⁰ See generally *id.* (special issue on: Issues in Differential Response).

To claim or imply that an intervention being evaluated is responsible for observed outcomes without fully considering the potential role of ... other variables can provide a distorted and exaggerated picture of the state of our knowledge about an intervention's effectiveness.

.... It is concerning that in most of the studies we reviewed, the claims presented in the research reports frequently overreached what might have legitimately been concluded, considering their many methodological limitations.²¹¹

Second they challenge the centrally important safety claim made by DR advocates – that DR doesn't put children at risk. They find, based on an extensive analysis of the nature of DR and of the research, both reason for concern about safety, and inadequate evidence alleviating that concern.²¹² They point to the many reasons that re-report rates and worker assessments of family safety provide inadequate measures of comparative child safety on the two tracks, summarizing: “[I]t is not possible to conclude that a DR model exists that can ensure that children's safety is not compromised in alternative tracks.”²¹³

Third, the article condemns the research as promotion masked as science:

[W]e found unsupported, inflated, and unfounded promotional claims to be a significant problem in the [DR] research . . . [M]any of the studies . . . failed to fully articulate and explain study limitations and often failed to propose alternative explanations for study findings, thus increasing the likelihood that readers would draw erroneous conclusions not supported by the data. Many claims in this body of literature about the benefits of DR exemplify marketing and promotional strategies rather than objective science.

This type of promotion has no place in outcome research. The scientific and ethical foundations of outcome research, its empirical and ethical legitimacy, and its practical utility are all undermined or discounted by promotional strategies other than the accurate, objective, and transparent demonstration of evidence.²¹⁴

Several leading experts and organizations within the child welfare field provided important support for the Hughes & Rycus conclusions. Viola Vaughan-Eden and Frank Vandervort, then the President and the President-Elect, respectively, of the American Professional Society on the Abuse of Children and Child and Family Resources,²¹⁵ describe the Hughes & Rycus analysis as perhaps “the most important article in

²¹¹ *Id.* at 500.

²¹² *Id.* at 500-04.

²¹³ *Id.* at 504.

²¹⁴ *Id.* at 516 (in Appendix B, titled “Science or Promotion?” at 514).

²¹⁵ APSAC is “the leading national organization supporting professionals who serve children and families affected by child maltreatment and violence.” THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN, THE APSAC 22ND ANNUAL COLLOQUIUM: NEW ORLEANS 18 (2014), available at <http://www.mipsac.org/wp-content/uploads/2013/10/2014-Colloquium-Brochure.pdf>, archived at <http://perma.cc/5Z2X-9DSU>.

Ms. Vaughan-Eden is also the current President of the National Organization of Forensic Social Work. Viola Vaughan-Eden, *Biography*, http://www.violavaughaneden.com/sub_biography.asp, archived at <http://perma.cc/NJF5-NV6Q> (last visited July 28, 2014).

the child welfare arena in the past 15 years.”²¹⁶ They question “how a program with so little empirical support gained such favor . . . in this era of evidence-based practice.”²¹⁷ Their own explanation is the “unholy alliance” between left and right,²¹⁸ noting that just such an alliance partnered to enact the first differential response legislation in Missouri in 1994.²¹⁹ They point also to the role played by “politically connected private foundations,” warning how that “can distort research designs, findings, and assertions about the efficacy of programming in the field of child welfare.”²²⁰ Finally they call for a moratorium on the use of DR until it has been “rigorously and honestly studied,” warning that failure to do so will put children at undue risk.²²¹

Christopher Baird co-authored an article on behalf of the National Council on Crime and Delinquency and the Children’s Research Center, both important organizations in the child welfare and related research fields.²²² They note that Hughes and Rycus are:

internationally known experts with extensive experience in policy and program development, much of which was designed to improve practice through family engagement techniques [who] have also championed the application of research findings and evidence-based programs to inform program development.²²³

They praise the Hughes & Rycus paper for its “compelling critique” and its courage in taking on such a popular program.²²⁴ They join in questioning the DR research methodology, noting that with AR track programs having been given extra resources not provided to the TR track, “it would be surprising” if AR parents and staff did not find AR more responsive to family needs.²²⁵ They support the concerns with the accuracy of DR safety claims, and warn of the need to be cautious about “creating cultures of ‘naïve practice’ in which workers focus solely on family strengths and protective capacities....”²²⁶

4. The QIC-DR Research²²⁷

The DR movement planned the QIC-DR stage as the culminating research platform for mounting the final push for their hoped-for federal finance reform. The QIC-DR reports were to provide the ultimate demonstration of the success of DR, proving a basis for Federal Government action diverting funding

²¹⁶ Vaughan-Eden & Vandervort, *Issues in Differential Response*, *supra* note 25, at 550.

²¹⁷ *Id.*

²¹⁸ *Id.* (citing BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 1); see discussion *infra* Part V.B.

²¹⁹ *Id.* at 550-51.

²²⁰ *Id.* at 551.

²²¹ *Id.* at 552-53.

²²² Christopher Baird, Katherine Park, & Suzanne Lohrbach, *Response to the Hughes et al. Paper on Differential Response*, 23 *RESEARCH ON SOCIAL WORK PRACTICE* 535, 535 (Sept. 2013).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 536.

²²⁶ *Id.* at 538.

²²⁷ See generally Kempe Center for the Prevention and Treatment of Child Abuse and Neglect at the University of Colorado Denver, *Quality Improvement Center on Differential Response in Child Protective Services*, <http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/QIC-DR/Pages/QIC-DR.aspx> (last visited July 26, 2014).

from traditional CPS programs to DR.²²⁸ The U.S. Children’s Bureau provided a five-year multimillion dollar grant in 2008²²⁹ to the American Humane Association (AHA) and its partners, including the Institute of Applied Research (IAR).²³⁰

Three state programs were chosen for study, in Illinois, Colorado and Ohio. The final state research reports were published in late 2013 and early 2014, and the final Cross-Site Report, designed to compare and summarize the evidence from the three state program studies, was published in July 2014.²³¹

The reports reveal troubling evidence of the danger DR poses for children. However despite this evidence the reports read like success stories yet again. Indeed the claim is now made that DR is ready not simply for dramatic expansion across the nation for the low-risk cases for which it was supposedly designed. *The reports argue that the case has been made for expansion to high-risk cases!* This conclusion is of course consistent with the Casey Family Programs goal of eliminating foster care altogether.

Thus the Ohio Final Report concludes, based on no comprehensible reasoning, that AR “may be effective among somewhat higher-risk cases.”²³² The Colorado Final Report similarly argues for considering expansion of DR to high-risk cases, without any apparent basis in evidence.²³³ This is especially interesting in light of the fact that DR in Colorado was triggered by a series of high-profile child fatalities in 2007.²³⁴ Such fatalities might be thought indicative of the need for more intensive intervention by CPS to monitor and consider removal of children, but instead triggered the institution of DR for low-risk cases, with it in turn now alleged to be appropriate for high-risk cases.

*The Final QIC-DR Cross-Site Report makes clear the general absence of evidence in the three QIC-DR state studies that AR works particularly well in any respect, even in terms of pleasing parents.*²³⁵ Nonetheless the Report ends by making claims that the studies have implications for widespread changes in

²²⁸ MORRISON & DZOBA, DIFFERENTIAL RESPONSE – DRAFT REPORT, *supra* note 165, at 18 (citing conversation with Brett Brown, former cross-site evaluator for the three-state DR evaluation worked during the summer of 2013 for Commissioner Samuels in ACF).

²²⁹ The U.S. Department of Health and Human Services, Administration for Children and Families, Children’s Bureau, credited for funding in Acknowledgments of QIC-DR Final Cross-Site Report. *Id.* at i.

²³⁰ MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 5, 10.

²³¹ See *generally* MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2.

²³² JULIE MURPHY, LINDA NEWTON-CURTIS, & MADELEINE KIMMICH, HUMAN SERVICES RESEARCH INSTITUTE, OHIO SOAR PROJECT: FINAL REPORT 133 (Nov. 2013), *available at* http://www.hsri.org/files/uploads/publications/OHIO_SOAR_Final_Report.pdf, *archived at* <http://perma.cc/E2DE-7FS8> [hereinafter MURPHY ET AL., QIC-DR OHIO FINAL REPORT]. The report relies simply on the slightly lower foster care placement rate for AR, and admits that “this evaluation has not truly tested the effectiveness of AR with higher-risk populations.” *Id.* at 132.

²³³ WINOKUR ET AL., COLORADO QIC-DR FINAL REPORT, *supra* note 40, at 124 (“the question must also be asked about whether the Colorado DR model could benefit high-risk families as well”). See *also id.* at 124 (report’s final conclusions).

²³⁴ *Id.* at 1.

²³⁵ See *generally* MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2 (chapters 6, 7, 8, 9, and see especially chapter 10 “Conclusions”).

traditional systems in the DR direction. Thus the report raises questions as to whether “jurisdictions wish to consider that all families who are referred to CPS would be eligible for AR,”²³⁶ whether higher risk cases should be included in AR, and whether CPS workers should have the discretion to reassign TR families to AR.²³⁷ It makes the connection with federal finance reform, noting that reducing foster care placements and using Title IV-E waivers may be the way to fund DR.²³⁸ And finally the Report indicates that DR may point the way to fundamental change of the entire CPS system, so that CPS itself becomes an agency largely devoted to linking even high-risk families on a voluntary basis to services rather than identifying perpetrators who can be required to engage in rehabilitation programs and whose parental rights can be restricted.²³⁹

a. Continuation of the Advocacy Research Tradition

The QIC-DR Research program promised to “vigorously study implementation, outcomes, and cost impact of DR.”²⁴⁰ Given the powerful attack by Hughes & Rycus on the earlier advocacy research, and the explosive debate reflected in the *Research on Social Work Practice* special issue, one might have hoped that those in charge of the QIC-DR program would have consulted broadly to come up with a new research team, a new set of research questions, and a new research design. Instead the research leadership team involves the same people and organizations central in the early advocacy research and, not surprisingly, has largely replicated that research approach. Only one of the three Final Reports even refers to the Hughes & Rycus article.²⁴¹ The Final Cross-Site Report makes no mention of it.

This QIC-DR leadership is responsible both for promoting and developing the DR model across the U.S., and for the research that is supposed to assess the value of that model.²⁴² This represents the same troublesome merger of advocacy and research roles that has plagued DR from the beginning.

Loman and Siegel, along with IAR, are credited in the QIC-DR reports as consultants and for contributing their research design.²⁴³ While they did not actually author the reports, their influence in the design and

²³⁶ *Id.* at 122.

²³⁷ *Id.* at 124.

²³⁸ *Id.* at 125.

²³⁹ *Id.* at 127-28.

²⁴⁰ BROWN ET AL., QIC-DR 2012 CROSS SITE REPORT, *supra* note 47, at 5.

²⁴¹ WINOKUR ET AL., COLORADO QIC-DR FINAL REPORT, *supra* note 40, at 2. The only significant concession to the critique of the earlier advocacy research is the decision to pursue an intent to treat methodology, including in the AR sample for analysis the cases switched from the AR to the TR track. The IAR removal of these switched cases from the AR analysis had been criticized by Hughes & Rycus in their response article in the *Social Work Practice* Special Issue. See Ronald C. Hughes & Judith S. Rycus, *Discussion of Issues in Differential Response*, 23 RESEARCH ON SOCIAL WORK PRACTICE 563, 574 (Sept. 2013).

²⁴² MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 5, 10. Did you mean the final report?

²⁴³ FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at Acknowledgements (“countless hours of consultation and wisdom . . . and . . . detailed comments on earlier versions of this report”); WINOKUR ET AL., COLORADO QIC-DR FINAL REPORT, *supra* note 40, at iii (Acknowledgements page thanking Loman and Siegel for research design that informed Colorado evaluation); see also MURPHY ET AL., QIC-DR OHIO FINAL REPORT, *supra* note 232, at acknowledgement page (thanking the QIC cross-site team at the Kempe Center and Walter R. McDonald and Assoc.). The QI-Final Cross-Site Report says IAR served in an “advisory capacity throughout the project, especially around the evaluation and

implementation of the research is apparent. The QIC-DR reports largely track the topics and organization of the earlier IAR reports, and reflect a similar methodology. Casey Family Foundation staff members are acknowledged as advisors.²⁴⁴

Most of the troubling features of the earlier research are replicated. So, for example, new funding is provided for services on the AR but not the TR track,²⁴⁵ and AR staff are specially selected and trained.²⁴⁶ Comparisons are then made between AR and TR tracks, and claims for AR success made, with limited acknowledgement that any such success might be due simply to the differences in funding and staffing. Indeed in Illinois an increased caseload size for the TR workers based on the DR program was reported.²⁴⁷ And in all three states workers reported workload inequities,²⁴⁸ with TR track workers in Illinois saying that they were limited in their ability to provide services by high caseloads and time limitations.²⁴⁹

There is the same troubling difference in types of services provided, with a greater emphasis on the AR track on financial support, and a greater emphasis on the TR track on rehabilitative treatment.²⁵⁰ In the Illinois system, for example, cash assistance of up to \$400 was available to AR parents,²⁵¹ in addition to other supportive services including: “car repair or transportation; housing assistance; food or clothing; appliances, furniture, or home repairs; help paying utilities; welfare/public assistance services; medical or dental care; other financial help; ... cooking or cleaning....”²⁵² The Illinois Report characterizes AR services as “especially poverty-related.”²⁵³ TR services were more likely to include counseling, domestic

instrument design,” MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 10, and notes that the evaluation instruments developed by Loman and Siegel were most commonly used. *Id.* at 50.

²⁴⁴ MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at i (acknowledgements page lists them as members of the QIC-DR’s National Advisory Committee).

²⁴⁵ See, e.g., BROWN ET AL., QIC-DR 2012 CROSS SITE Report, *supra* note 47, at 23 (all three sites have dedicated funds for AR cases available for “quick and concrete support services . . . IR workers in both Ohio and Illinois expressed some frustration with the unequal access to funds for the families they serve”); see also MURPHY ET AL., QIC-DR OHIO FINAL REPORT, *supra* note 232, at 6, 83 (funds from QIC-DR grant and Casey family Programs).

²⁴⁶ BROWN ET AL., QIC-DR 2012 CROSS SITE Report, *supra* note 47, at 25–30. See MURPHY ET AL., QIC-DR OHIO FINAL REPORT, *supra* note 232, at 39–47, 132, 135.

²⁴⁷ BROWN ET AL., QIC-DR 2012 CROSS SITE Report, *supra* note 47, at 30. The Illinois report is guilty of a newly outrageous apples and oranges comparison proving nothing regarding the alleged differences in the level of services provided on the two tracks. Thus the report first claims that the AR track provides more services than the TR track, only later admitting that the comparison is based on a period of time when the AR workers are supposed to be providing services but the TR workers are supposed to be simply investigating, with the TR system designed to provide services at a later stage of the TR process. FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at 61, 82.
²⁴⁸ *Id.* at 35.

²⁴⁹ FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at 59.

²⁵⁰ See MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 7, 85, 119.

²⁵¹ *Id.* at 2.

²⁵² *Id.* at 4, 53. See also MURPHY ET AL., QIC-DR OHIO FINAL REPORT, *supra* note 232, at 85 (for similar list of AR services).

²⁵³ FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at 10.

violence services, parenting skill and related training, substance abuse treatment, help getting mental health services.²⁵⁴

There is the same use of cost savings as supposed evidence of success,²⁵⁵ when it is of course predictable that eliminating investigations and reducing the use of foster care would reduce costs. There is the same failure to seriously engage with whether such financial savings come at the cost of increased maltreatment of children.

There is the same advocacy tone. For example the Ohio QIC-DR Final Report's introductory chapter ends with this statement of what is to come: "we describe in more detail how AR is perceived as effective in terms of implementation, practice, and outcomes."²⁵⁶

There is the same glossing over of problematic issues indicating risks for children, and the same rosy "read" of the evidence to come up with an enthusiastic success story. As discussed below,²⁵⁷ the Illinois QIC-DR reveals disturbing new evidence that DR poses risks to children, showing parents on the AR track with higher re-report rates than TR track children, extremely high drop out rates on the AR track, and AR parents who drop out with the highest re-report rates of all groups assessed. However the Illinois study's concluding chapter 8 portrays DR as a success:

One of the most consistent findings to emerge from the Illinois DR evaluation is that parents who received DR felt more strongly positive about all aspects of their child protective services experience when compared to parents who received an investigation....[A] significant percentage of parents who received DR had more positive emotional responses and fewer negative ones, were more highly engaged, and were more highly satisfied with their worker and the services they received.²⁵⁸

It sums up safety issues:

The totality of all available evidence from [the six "rigorous" RCT studies to date] seems to indicate that children who receive DR are at least as safe as those who receive an investigation.²⁵⁹

This statement conveniently avoids reference to the Report's own devastating conclusions regarding child safety in the Illinois DR program.²⁶⁰ In an interview the lead researcher confessed that while their

²⁵⁴ *Id.* at 53–56; MURPHY ET AL., QIC-DR OHIO FINAL REPORT, *supra* note 232, at 83; WINOKUR ET AL., COLORADO QIC-DR FINAL REPORT, *supra* note 40, at 79; MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 7.

²⁵⁵ FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at 84 (cost savings due to investigations and child removals on TR track); MURPHY ET AL., QIC-DR OHIO FINAL REPORT, *supra* note 232, at 124 (small sample indicates some although limited cost savings apparently mostly because of foster care reduction); MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 8, 106.

²⁵⁶ MURPHY ET AL., QIC-DR OHIO FINAL REPORT, *supra* note 232, at 12.

²⁵⁷ See discussion *infra* Part IV.B.4.b.

²⁵⁸ FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at 91.

²⁵⁹ *Id.* at 92.

²⁶⁰ See Heimpel, *Differential Response Dealt Heavy Blow*, *supra* note 6 (quoting study lead author Fuller as enthusiastic about the Illinois DR program's success despite devastating conclusions in the report); WINOKUR ET AL.,

research found that “families like it better, and in that sense it works fine,” “if you look at safety you may have a different answer.” Nonetheless she concluded that DR was “a promising practice.”²⁶¹

The Final QIC-DR Report notes that Illinois broke down the groups on the AR track for the first time, but then fails to provide any information whatsoever about the troubling evidence of safety issues that that breakdown revealed, including the evidence that AR dropouts had the highest re-report rates of all groups. Instead the Report simply refers the reader to an Appendix that was unpublished and thus unavailable on the website at the time of the Report’s online publication!²⁶²

There is the same troubling emphasis on parent satisfaction and parent perceptions of their own engagement as measures of success.²⁶³ But prior research problems are now topped by the use of parent views to make safety claims. Thus parent perceptions of child safety and family well-being are used as key indicators of the all-important child safety findings.²⁶⁴ All the problems discussed above²⁶⁵ plague this attempt to use parent views as proving anything other than the completely unsurprising conclusion that the relative handful of parents who choose to fill out the survey, among the already limited group sticking with the voluntary program to the end, are prepared to say they think it has helped them. This by comparison to those on the TR track who may of course not like the fact that they are subject to investigations, monitoring, and the threat of further intervention based on repeated child maltreatment. Using these parent perceptions as evidence of child safety seems an obviously desperate move, triggered perhaps by of the absence of other helpful evidence.

In addition, removal to foster care is now used as an important supposed measure of child safety.²⁶⁶ The fact that somewhat greater use has been made of foster care to date on the TR track, with more predicted for the future, is used to claim that children are at less risk on the AR track, with no discussion as to why this measure should count as a proxy for child safety. Given that the whole point of AR is to reduce the use of more intensive and intrusive methods of child protection, the reduced use of foster care is no surprise. Obviously one could predict a reduction in such use. The big question DR poses though is whether such reduction helps or hurts children. There are many reasons to think that foster

COLORADO QIC-DR FINAL REPORT, *supra* note 40, at 71–75, 110 (massaging the evidence to find positive safety implications). The report claims the “lack of a statistically significant finding for the short-term safety outcomes was not surprising given that the DR system reform also enhanced traditional CPS practices” with scant evidence of the latter. It claims that “the most promising finding was that there may be long-term child safety benefits and cost savings due to lower levels of re-involvement, over time” for AR families. This is based solely on the iffy “survival analysis” which purports to predict in the absence of referrals actually observed during the study period what future referrals will take place. *Id.* at 110.

²⁶¹ Heimpel, *Differential Response Dealt Heavy Blow*, *supra* note 6 (interview of Tamara Fuller).

²⁶² MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 54, 123–24.

²⁶³ See e.g., MURPHY ET AL., QIC-DR OHIO FINAL REPORT, *supra* note 232, at 132 (“[W]hile AR did not result in higher levels of family satisfaction, AR families did report being more likely to contact their worker in the future, being better off and better parents because of their experience with the agency, and report higher levels of engagement in the case work process.”).

²⁶⁴ See e.g., FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at v (Table of Contents Chapter 6 “Child Safety and Family Well-Being” listing after “6.5 Child Removals”, “6.6 Parent Perceptions of Child Safety” and “6.7 Parent Perceptions of Family Well-Being”); WINOKUR ET AL., COLORADO QIC-DR FINAL REPORT, *supra* note 40, at vi, 76.

²⁶⁵ See *supra* notes 17–18.

²⁶⁶ MURPHY ET AL., QIC-DR OHIO FINAL REPORT, *supra* note 232, at 5, 113–16.

care removal generally serves to protect children.²⁶⁷ This is part of why questions have been raised from the beginning as to whether DR puts children at undue risk. These DR reports simply ignore all the obvious problems with using this as a measure of success and claim, case proven!²⁶⁸

b. New Evidence of Safety Risks in DR

The QIC-DR research provides powerful evidence of the risks DR poses to children, however minimized by the report authors. This evidence appears in connection with the Illinois DR program, which is interesting because Illinois diverted an unusually low percentage of cases to the AR track,²⁶⁹ presumably a much lower risk group overall than the groups more typically diverted to AR.

i. High Re-Report Rates on the Voluntary Track

DR advocates have made the claim from the beginning that it posed no additional risks for children, citing as primary evidence that re-report rates on the AR track were the same as or lower than rates on the TR track. **But the Illinois QIC-DR research finds higher re-report rates for the AR track.**²⁷⁰ Moreover, the difference in re-report risk increased over time,²⁷¹ making it likely that the difference would be even greater a year or two out.

This is dramatic new news. One investigative journalist sums up the significance as follows:

The long delayed release of an evaluation of Illinois' differential response program casts new doubts on whether one of the country's most popular child welfare reforms is safe for children and a smart way to spend limited resources dedicated to families on the fringe.

According to the report, children whose parents had benefited from twice as much social work time, \$400 stipends and a philosophy that stresses family strengths were more likely to be reported for child maltreatment and become victims of substantiated abuse or neglect.

This controverts 20 years of evaluations and assurances that children involved with [DR] programs across the country were as safe or safer than children who received traditional child protective services.²⁷²

²⁶⁷ See discussion *supra* Part III.A.

²⁶⁸ When asked about this problem in the research, Tony Loman said that no research studies were contemplated assessing whether the children kept at home pursuant to DR were in fact better or worse off than the children removed to foster care. Loman interview, *supra* note 112. The 2013 QIC-DR Ohio Report does concede that higher removal rates might relate to a greater concern by TR investigators with child safety, but argues that the authors' works suggests to them that vigilance regarding safety is not relaxed under AR. They concede that the reasons for the differences in removal rates might be examined in research. *Id.* at 48–49.

²⁶⁹ MERKEL-HOLGUIN ET AL., QIC-DR CROSS SITE FINAL REPORT, *supra* note 2, at 29.

²⁷⁰ FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at 65 (18.8% of the AR families experienced re-reports as compared to 14.7% of the TR families, within 18 months of case closure).

²⁷¹ *Id.* at 66.

²⁷² Heimpel, *Differential Response Dealt Heavy Blow*, *supra* note 6.

In addition, all three QIC-DR studies found very high maltreatment re-report rates on both the AR and TR tracks, a fact that prior DR research revealed only in passing if at all. Ohio Final QIC-DR research reveals re-report rates, of 37% for AR and 36% for TR families.²⁷³ The Colorado Final QIC-DR research reveals re-report rates of 44% for AR families and 45% for TR families within a short one year of the initial referral to CPS.²⁷⁴

ii. High Drop-Out Rates and Related Safety Risks on the Voluntary Track

The Illinois Final QIC-DR research finally provides evidence about the AR dropout population. The revelation of this information seems motivated by the authors' felt need to explain away the disturbing finding that AR re-report rates are higher than TR rates.²⁷⁵ One has to ask whether, had the authors of the earlier advocacy research been willing to provide the dropout breakdown statistics, we would have seen similarly disturbing evidence. **In any event, the Illinois dropout statistics provide stunning new evidence of the risks inherent in DR.**

First, of those originally allocated to the AR track, almost one-third drop out. Less than half of all those originally diverted to AR complete the program. (The additional one-sixth are transferred to DR because their cases are re-assessed as high risk.) ***Those withdrawing after first starting down the AR track have the highest re-report rates of all. Those on the TR track have the lowest re-report rates of all. For substantiated re-reports the findings are similar, with AR withdrawers having the highest rates, and the TR rates coming in close to the bottom of the various AR and TR groups.***²⁷⁶

These data on dropout re-report rates – the first provided over many years of this advocacy research – are stunningly negative for DR proponents. The fact that those who participate and then drop off the AR track have the highest re-report rates of all groups raises powerful questions about the success of DR programs in assessing risk for purposes of assigning children to AR, the success of AR services in addressing maltreatment problems, and the risks for children of being on the AR track.

The fact that the overall dropout rate is close to one-third, counting those refusing services from the outset, is similarly troubling. DR is justified in large part as a way of providing services that allegedly are not being provided on the traditional CPS track. In Illinois DR was supposed in part to respond to the fact that the state was not meeting federal requirements for providing services to children identified as victims of child maltreatment.²⁷⁷ But now we know that the AR track also fails to provide services to a substantial proportion of all its families.

²⁷³ MURPHY ET AL., QIC-DR OHIO FINAL REPORT, *supra* note 232, at 113.

²⁷⁴ WINOKUR ET AL., COLORADO QIC-DR FINAL REPORT, *supra* note 40, at 59.

²⁷⁵ FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at 66.

²⁷⁶ For the data in this paragraph see FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at 66–67, 71.

²⁷⁷ *Id.* at 14–15.

The fact that less than half the original AR group end up completing AR services also calls into question all aspects of the DR research over the years based on parent and worker surveys, since these surveys are based on only a small sample of those who complete AR services.²⁷⁸

A final supremely interesting fact revealed by the breakdown: Those refusing AR services from the get-go have next to the lowest re-report rates, and the lowest substantiated re-report rates.²⁷⁹ This puzzling fact is left totally unexplored by the Illinois Report. Interestingly the authors make no claim that this represents the actual maltreatment rate for this population. Indeed it would be problematic for DR proponents to assert that the families who do best of all are those left totally free from the supposed benefits of AR services.

But it's important to ask why these re-report rates for the early dropouts are so low, now that we finally have this breakdown. It seems likely that this low re-report rate is simply not accurate, that maltreatment that occurs among families who refuse ever to participate in AR is not being captured by official reports. As discussed above, this group is free from the kind of surveillance characterizing both AR and TR that is more likely to trigger reports.

If the low re-report rate for early dropouts has no real relationship to actual maltreatment, then all the DR claims regarding child safety based on re-report rates made over the years are questionable.

V. THE UNDERLYING POLITICS: WHY THE RESISTANCE TO CHILD-FRIENDLY CHILD WELFARE POLICIES?

Why this DR Movement? Why has it gotten such traction given all the obvious risks to children and flaws in the research? Why this succession of extreme family preservation movements with similar characteristics? Understanding all this is key to making the future of child welfare different.

The real reasons for these policies must be different from the reasons given. Those given are too obviously questionable, and the research cited in support of these policies is too obviously flawed. So, for example, with Intensive Family Preservation Services, it's hard to believe that those promoting these policies really thought that child abuse was typically just a six week crisis that could be solved with social worker support and house cleaning. With Racial Disproportionality, it's hard to believe that those promoting the racial bias theory really thought that blacks could just overcome through their unique family strengths the poverty and related conditions which for other groups predict maltreatment. And now with Differential Response, it's hard to believe that the proponents really think that parents caught up in substance abuse, mental illness, domestic violence, and related child maltreatment, will magically become nurturing parents simply because family-friendly social workers hand them a rent payment.

²⁷⁸ And of course, only on the small percentage of those who decide to respond to the surveys. See discussion *supra* Part IV.B.1.c; see e.g., WINOKUR ET AL., COLORADO QIC-DR FINAL REPORT, *supra* note 40, at 15 (21% response rate).

²⁷⁹ For the data, see FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at 66–67, 71.

Some would say that family preservation simply reflects deeply held values about family privacy in our society. We value individual autonomy in ways that few other nations do, and this is reflected in constitutional and other policies protecting the family against state intervention.

But family privacy is not always sacrosanct. Women's rights advocates fought the idea of family privacy when they saw women victimized by domestic violence and felt the need for protective intervention by the state. They fought the idea that relationships in which women were victimized were the kinds of families that deserved preservation. And they have achieved dramatic changes in policy over recent decades expanding state intervention with the goal of liberating women from families that don't function the way families should.

Why have children not been seen as entitled to similar liberation?

A. Children Have No Rights

Unlike women, children have no rights. This is true in the literal sense that they – especially the most vulnerable among them – can't speak for themselves, demonstrate on the streets, vote, get themselves elected to office or appointed as judges, and do the other things that adults do both in expressing their rights and in pushing for the establishment of additional rights.

As a formal legal matter children have no rights under federal or state constitutional law to nurturing parents. By contrast parents have powerful constitutional rights to hold onto and raise their children free from state intervention. This constitutional framework both reflects our societal values and helps shape our entire CPS system. It makes extreme family preservation policies seem right and just.

The rest of the world thinks of children as having rights, at least as a formal matter. Virtually all other countries have ratified the Convention on the Rights of the Child (CRC), a Convention which accords children equal status with adults as rights holders. Under the CRC, children have *rights* to nurturing parents, *rights* to be protected against abuse and neglect. Under the CRC, nations have *duties* to protect children against maltreatment and to ensure that children receive appropriate nurturing.²⁸⁰ These aspects of the CRC are part of the explanation for why the United States has not ratified the CRC.

B. The Left-Right Bargain: A Cheap Version of the War on Poverty²⁸¹

Many of those advocating for extreme family preservation policies appear to be using children to promote an anti-poverty agenda. The children at risk for abuse and neglect are disproportionately the children of the poor. Left-wing forces committed to helping poor people and historically oppressed racial minority groups often see efforts to intervene in families to protect children as yet another attack upon already victimized groups. They often see family preservation services as providing at least some financial and other support for poor families in a society reluctant to provide enough such support.

²⁸⁰ Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, 633 THE ANNALS OF THE AMER. ACAD. OF POLITICAL AND SOCIAL SCIENCE 80, 85–86, 91–94 (2011).

²⁸¹ For discussion of the left-right politics of child welfare, see BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 1, at 44–55; see also GELLES, *BOOK OF DAVID*, *supra* note 23, at 132–133.

Family preservation programs do as a general matter provide financial stipends and related forms of support for a subset of poor families. If children identified as at risk for abuse and neglect are kept at home, or returned home from foster care, the parents often receive supportive services. Intensive Family Preservation Services programs offered housekeeping, childcare, transportation and other services, and many other family preservation programs offer similar assistance. Differential Response programs pride themselves on providing financial support.

Right-wing forces often see family preservation policies as a way to reduce government and save money. Those promoting family preservation provide evidence and arguments to support the cost-saving goal. And short term these policies often do save money. Eliminating CPS jurisdiction over families eliminates the costs of social worker monitoring. Reducing foster care eliminates the cost of foster parent stipends as well as CPS administration. Most family preservation policies including both IFPS and DR have been sold in significant part on the basis of such cost savings arguments.

But there are problems with this left-right bargain that should trouble people on both sides of the political spectrum. For the left, this is a pathetically limited anti-poverty strategy. Providing poor people and oppressed racial minority groups the limited financial subsidies available in these family preservation programs is no road to empowerment.

If the best we can do today are limited poverty alleviation efforts, it's wrong to choose one that comes at the expense of the most powerless subset of the poor, the children victimized by abuse and neglect. And it may ultimately be counter-productive: children so victimized are disproportionately likely to grow up impoverished themselves, in the ranks of the homeless, the unemployed, the drug and alcohol addicts, and they are disproportionately likely to victimize their own children, thus continuing the vicious cycle into future generations.

It is also perverse to select that small subset of the poor who abuse and neglect their children as the beneficiaries of this limited anti-poverty campaign. Most poor people do their flat out best to raise their children well, providing loving, nurturing care despite the oppressive conditions of their lives. Why should they be denied the financial benefits that abusive parents get in the form of family preservation services?

For the right, extreme family preservation policies may look cheap but in the long run they are very expensive. Children denied appropriate nurturing, who end up in disproportionate numbers unemployed, on welfare, in prisons, suffering emotional and physical disabilities, these children are in the long run very very expensive.²⁸²

C. Private Wealth Dominance Over Policy Advocacy and Research

For the past several decades a small group of enormously wealthy and powerful organizations have dominated both policy and research in child welfare. In the 1980s through 1990s it was the Edna McConnell Foundation and the Annie E. Casey Foundation leading the charge on IFPS. In this century it

²⁸² See Bartholet, *Creating a Child-Friendly Child Welfare System*, *supra* note 16, at 1350 and n.75.

has been a combination of the Casey Foundations, including the Annie E. Casey and the Casey Family Programs Foundation, leading the charge on Racial Disproportionality and Differential Response.

Research is desperately needed to guide policy. This is always true, given the difficulty of knowing how different policy ideas will play out in the real world. It is particularly true in child welfare given the danger that policies that purport to serve child interests will actually be motivated by various adult interests.

It is extremely dangerous to have one set of wealthy private players dominating both policy advocacy and research to the degree they have.²⁸³

VI. FUTURE DIRECTIONS FOR REFORM

A. Children's Rights

We need a radical upending of the rights hierarchy in this country, so that children are valued equally with adults, and their most fundamental rights to grow up with nurturing parents are valued equally with adult rights to raise their children.

Ratification by the U.S. of the CRC, or some other dramatic move to grant children equal status with adults as rights holders, would be a meaningful step forward in changing the dynamics of child welfare.²⁸⁴

But it would not in itself solve the problem. Even with formal rights, the fact that children are by definition powerless as compared to adults makes a difference. Adults like to think that they love and appreciate children, but there is always a risk that those with more power will exploit and oppress those with less. And there is always a risk that adults claiming to represent children will be using children to promote various adult agendas. We need to acknowledge the challenge of granting children truly equal recognition in law and policy, and begin to design new ways of holding accountable the adults who in the end will still make so many decisions about children.

B. Maltreatment Prevention: Radical Social Reform, Early Supportive Intervention, & CPS Reform

The DR proponents are right in saying that maltreatment is rooted in poverty and social injustice. They are right in saying that we should focus more on early prevention of maltreatment. But they propose a solution that fails utterly to meet the mark. Providing rent stipends and other financial benefits to the tiny subset of the poor who maltreat their children is no empowerment strategy. Nor will not do much to prevent maltreatment.

²⁸³ See Bartholet, *The Racial Disproportionality Movement in Child Welfare*, *supra* note 22, at 897–88.

²⁸⁴ See Bartholet, *Ratification*, *supra* note 280, at 84–94, 99.

We need a true war on poverty of the kind that President Lyndon Johnson announced but no President since has renewed. We need serious programs to address poverty and the conditions associated with poverty including unemployment, substance abuse, mental illness, blighted neighborhoods.

Critics of the earlier family preservation movements that preceded this DR movement noted that they also constituted cheap and, in the end, utterly inadequate attempts to address the issues of poverty and injustice underlying child maltreatment. They noted that we needed a far more radical engagement with these issues, a true war on poverty. One of the authors of a landmark critique of Intensive Family Preservation Services (IFPS), concluded in a later article that IFPS was doomed to failure because the problems producing child maltreatment were “rooted in poverty, unemployment, inadequate housing, substance abuse, and severe and persistent mental illness.”²⁸⁵ My 2009 article on the Racial Disproportionality movement argued that it was similarly misdirected, proposing a false solution that avoided the real problems and the need for truly radical social reform.²⁸⁶

While such reform is sadly not on the immediate horizon, we should expand the programs that target parents at risk for maltreatment, early on, before they fall into the kind of dysfunction that breeds maltreatment. This is the stage at which we have evidence that prevention efforts have the best chance of working. There are at least a number of early home visitation programs with powerful evidence of success in reducing maltreatment and reducing important predictors for maltreatment.²⁸⁷ We need to devote massively increased resources to these programs and to developing other promising programs similarly targeted to early prevention.

We also need to do some version of Differential Response, but within the framework of the traditional CPS system. For this we need new resources devoted to CPS, since a large part of the reason that it provides so little in the way of services to the families on its caseload has to do with the inadequacy of resources. Additional resources are also needed to enable CPS to protect the children at highest risk through monitoring, mandated rehabilitative programs for parents, removal to foster care, and adoption.

Resources will be hard to come by. Part of the allure of all family preservation proposals is that they promise to save money.

But we can't protect children adequately on the cheap. And we are not saving state funds by allowing children to be abused and neglected. Many studies demonstrate the overwhelming long-term costs involved when children grow up in the absence of appropriate nurturing.²⁸⁸

C. Research Reform

²⁸⁵ J. H. Littell, *Effects of Duration, Intensity, and Breadth of Services*, 19 CHILD. & YOUTH SERVS. REV. 17, 36 (1997).

²⁸⁶ Bartholet, *The Racial Disproportionality Movement in Child Welfare*, *supra* note 22, at 923; *see also* Bartholet, *Creating a Child-Friendly Child Welfare System*, *supra* note 16, at 1343–44 (quoting the papers summing up the evidence produced at the conference on Racial Disproportionality co-sponsored by Harvard Law School's Child Advocacy Program and Chapin Hall at the Univ. of Chicago).

²⁸⁷ *See* BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 1, at 165–168; Bartholet, *Creating a Child-Friendly Child Welfare System*, *supra* note 16, at 1344–1347.

²⁸⁸ *See* discussion *supra* note 127.

Major challenges have been raised regarding the quality and persuasiveness of the research touting DR as a success story. An increasing number of critics have given voice to their concerns both about the nature of the advocacy research and about the substance of DR programs. This gives hope for better research in the future, providing a better guide to policy makers as to whether DR is the right direction for child welfare reform or, instead, just the wrong direction. It gives hope for research making child welfare the primary focus, and research comparing DR not simply to the current inadequate CPS system, but to a strengthened CPS system with enhanced power to protect children.

But even if this hope is realized, and even if the DR Movement is brought to a halt, fundamental change in the dynamics of child welfare research is needed if history is not endlessly to repeat itself. We have now had many decades in which different forms of extreme family preservation have been promoted, supported by research designed simply to vindicate the ideological view of those promoting the policy programs. While there is some excellent independent research in the child welfare field, there is not nearly enough, and often it takes years for this research to surface, years during which advocacy programs are propagated based on false claims of success.

The child welfare field needs a new tradition of truly independent, neutral research, free from any advocacy agenda, committed to finding the objective truth. We need new sources for research funding, sources that have no commitment to predetermined policy directions. We need social scientists to be able to pursue the truth, and to ask questions and come to conclusions that challenge orthodox thinking, free from fear of retribution, including limits on future research opportunities. We need research that will place a new focus on child interests, research that can provide a meaningful guide to policy makers interested in doing the right thing for children.

Without this kind of fundamental change in the field's research dynamics, we can predict that even if the DR reform movement is derailed, another similar movement will take its place, and will enjoy years of success based largely on the same kind of self-serving research that has historically played such a harmful role.

CONCLUSION

Differential Response represents a dangerous direction for children. But it's a familiar dangerous direction. The dynamics that have produced this latest fad are the same dynamics that brought us the Intensive Family Preservation Services and Racial Disproportionality movements.

There is some indication now that this latest fad may be fading. Several states have decided to eliminate their DR programs.²⁸⁹ Florida, one of the first states to adopt DR, dropped it after some five

²⁸⁹ The Casey Family Programs Implementation Kit lists six states as having discontinued, with 3 of these in planning stages of reinstating. CASEY FAMILY PROGRAMS, DR RESOURCE KIT, *supra* note 6, at 6. The 2014 IOM Report mentions Arizona, Arkansas, and West Virginia as among those dropping. IOM/NRC 2014 REPORT, *supra* note 2, at 199.

years' experience.²⁹⁰ Illinois just recently dropped their DR program, close to the end of the QIC-DR research study.²⁹¹ The Illinois CPS department justified this decision to the legislature based on concerns that DR had caused safety problems by diverting staff from the traditional CPS system, and noting that the soon-to-be-released QIC-DR report found children on the DR track more likely to experience maltreatment recurrence than children on the TR track.²⁹² Michigan concluded that DR research provided insufficient support for the program, and thus decided in 2013 and again in 2014 not to implement DR.²⁹³ In Los Angeles, a report by the County Counsel's Children's Special Investigative Unit in 2012, triggered by a rash of child deaths, found that "under-informed investigations and an over-reliance on L.A.'s differential response experiment ..., contributed to the majority of the deaths."²⁹⁴ Los Angeles eliminated its DR program in 2012 based on these and related concerns that the program's diversion of funds and staff from the traditional CPS system put children at undue risk.²⁹⁵

Differential Response may be increasingly discredited and even derailed in the coming years. But we can expect DR to be followed by another similar movement. A radical change in the dynamics of the child welfare field, and in our thinking about children's rights, is a prerequisite for any true reform.

²⁹⁰ S. COMM. ON CHILDREN, FAMILIES, AND ELDER AFFAIRS, DIFFERENTIAL RESPONSE TO REPORTS OF CHILD ABUSE AND NEGLECT, INTERIM REPORT 2011-105, 2010 REGULAR SESS., at 3–4 (Fla. 2010), *available at* <http://www.flsenate.gov/UserContent/Session/2011/Publications/InterimReports/pdf/2011-105cf.pdf>, *archived at* <http://perma.cc/D49U-DTQM> (discussing 1998 legislation eliminating DR).

²⁹¹ See FULLER ET AL., QIC-DR ILLINOIS REPORT, *supra* note 2, at 93.

²⁹² Letter from Illinois Dept. of Children & Family Services (DCFS) to Senators Hunter and Morrison, Illinois Senate (Dec. 18, 2013) (on file with author).

²⁹³ Frank Vandervort, *With Differential Response, History Repeats Itself and Children are Placed at Unnecessary Risk*, THE CHRONICLE OF SOCIAL CHANGE (July 8, 2014), <https://chronicleofsocialchange.org/opinion/with-differential-response-history-repeats-itself-and-children-are-placed-at-unnecessary-risk/7422>, *archived at* <http://perma.cc/4LK5-VKKW> (noting as a veteran of *FPS in Michigan* the similarity between that and DR and applauding Michigan's decision to reject DR after reviewing 15 research studies, but predicting that the powerful DR forces "will be back again."); e-mail from Frank Vandervort to Ron Hughes, Judy Rycus, and author (May 26, 2014) (on file with author) (forwarding information about Michigan). See also memo from Stacie Bladen, Michigan Dept. of Human Services, to Steve Yager (Mar. 31, 2014) (on file with author) (recommending against DR implementation in Michigan, based on priority Michigan places on child safety, review of the research, and concern that DR absence of investigation puts children at risk).

²⁹⁴ Heimpel, *Differential Response Dealt Heavy Blow*, *supra* note 6.

²⁹⁵ *Id.*