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The Most Dangerous Branch of Science? Reining in Rogue Research and Reckless Experimentation in Social Services

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The Most Dangerous Branch of Science? Reining in Rogue Research and Reckless Experimentation in Social Services

*James G. Dwyer**

ABSTRACT

Most people are unaware how much public policy is either lacking in any empirical-research support or driven by bad research. Political actors motivated by ideology or donor/constituent demands propose new government practices—in areas ranging from policing to funding of treatments for gender dysphoria in youth to welfare-qualification rules—that will greatly impact people’s lives, and if anyone asks what basis they have for thinking the impact will be good, they can readily find some study to support their case. Especially when powerless populations are put at risk, neither the legislative process nor peer review in the publication process provides a real check on reckless experimentation and incompetent or corrupt research.

This Article argues that, at least with respect to social services for vulnerable populations, innovation and scientific study should be subject to constraints analogous to those for introduction of new drugs and vaccinations. These include pre-implementation assessment of evidentiary basis by panels of independent experts, piloting, and assurance of scientific rigor as well as protections for human “subjects”—a concept that, even in medicine, should be expanded, to include anyone substantially impacted by an experimental intervention and not just those whom researchers choose to study. In addition, agencies and research institutions must become more circumspect about who provides proxy consent for non-autonomous subjects.

*Arthur B. Hanson Professor of Law at the William & Mary School of Law. This Article benefited greatly from feedback generously provided by Elizabeth Bartholet, I. Glenn Cohen, Sarah A. Font, Zachary M. Schrag, and my colleagues at an internal workshop.

As illustration of the problem and how the solutions might be implemented, the Article focuses on the repeated innovations over the past forty years in state response to child maltreatment, a pattern sure to continue indefinitely unless discipline is imposed. A voiceless population with no reliable surrogates, too often treated as distributable goods rather than persons, children in the child protection system present the perfect storm of conditions conducive to unethical behavior among policy makers and social scientists. In this realm, “fake news” destroys lives.

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I. INTRODUCTION

Research regulation captures little public attention, even when a crisis like a pandemic creates urgent need for potentially harmful medical experiments. But the approval process for human-subject research is a central aspect of life for most university departments and their faculties and for other institutions conducting research—not just medical research, but also psychological, sociological, anthropological, historical, etc.¹ And social science research – the focus of this Article – is immensely important to all areas of social policy.²

Social scientists in the United States have complained, throughout the half century in which the federal government has imposed ethics rules on human-subject research, that requiring advance approval of *their* work by Institutional Review Boards (“IRBs”), as federal regulations have been interpreted to require, is generally unnecessary and – when institutions take it seriously – so burdensome and poorly-executed that it dooms many research plans that could yield important knowledge or serve as valuable learning experiences for students.³ Their work, they say, is rather harmless, not posing physical dangers to subjects the way biomedical research does and rarely raising serious concerns about non-physical impact.⁴ Most social scientists have accepted IRB review as a fact of life,

¹ See ZACHARY M. SCHRAG, *ETHICAL IMPERIALISM: INSTITUTIONAL REVIEW BOARDS AND THE SOCIAL SCIENCES, 1965-2009* ix, 1–2 (2011) (describing how intrusive IRB review is for researchers in numerous disciplines – anyone who wishes “to interview, survey, or observe people or to train students to do so” and noting compulsory training for any new university faculty who will be conducting research on human subjects).

² Steven Rathgeb Smith, *Because Social Science Makes Sense of the Institutions That Shape Our Lives*, WHY SOC. SCI.? (July 18, 2017), <https://www.whysocialscience.com/blog/2017/7/17/because-social-science-makes-sense-of-the-institutions-that-shape-our-lives> [<https://perma.cc/M5VV-SHU5>].

³ See generally SCHRAG, *supra* note 1; see also CARL E. SCHNEIDER, *THE CENSOR’S HAND: THE MISREGULATION OF HUMAN SUBJECT RESEARCH* 33–69 (2015) (work of law professor echoing complaints of social scientists); *Institutional Review Boards and Social Science*, AM. ASS’N UNIV. PROFESSORS (Nov. 1999 & May 2000), <https://www.aaup.org/report/institutional-review-boards-and-social-science-research> [<https://perma.cc/95HS-8JEJ>] [hereinafter *AAUP Report*].

⁴ *Id.* (“the research of most social scientists involving human subjects does not pose a threat of physical or mental harm to the subjects... For these scholars, then, the Common Rule was established and has evolved within a clinical and biomedical framework that does not fit their research, or fits it poorly”); SCHRAG, *supra* note 1, at 188 (positing that only one in ten thousand social science studies poses any danger to subjects); see also SCHNEIDER, *supra* note 3, at 1 (“Social-science research and much biomedical research cannot harm subjects physically. . . . And while all research can inflict social, psychological, and dignitary harm, it happens little and is rarely grave.”); *id.* at 19 (“social harms – usually the worst nonphysical risks – are rare and modest. .

and some even ascribe value to the process.⁵ But others have issued strident calls for exempting all or nearly all social science studies from that process, charging that it violates free speech rights and causes public harm, far outweighing any benefits, by inhibiting acquisition of needed knowledge and generating great expense.⁶

This Article counters the claims that social science poses little danger and, further, that social scientists can be relied on to self-regulate. It urges greater scrutiny of research proposals in social science, or scrutiny of a different kind. The greatest dangers from social science research have yet to be widely acknowledged and addressed. The threat is not so much harm to research subjects, which has been the focus of IRB-review defenders and critics,⁷ but rather that bad research is produced and generates bad policy harmful to a much greater number of people.⁸ Intuitively, this is especially likely with policies impacting people less able to participate in policy making and to challenge research findings, or as to whom there is widespread prejudice or devaluation – for example, welfare recipients, gender-questioning youth, prisoners, domestic violence victims, juvenile delinquents, and persons with a mental disability or mentally illness.⁹

. . . But what of psychological harms? . . . The evidence confutes this stereotype of frail subjects bludgeoned by questions.”).

⁵ SCHRAG, *supra* note 1, at 5.

⁶ See generally Zachary M. Schrag, *Vexed Again: Social Scientists and the Revision of the Common Rule, 2011–2018*, 47 J. LAW, MED. & ETHICS 254 (2019); SCHRAG, *supra* note 1, at 105 (noting free speech objection); see also SCHNEIDER, *supra* note 3, at 163–84; AAUP Report, *supra* note 3.

⁷ See SCHNEIDER, *supra* note 3, at 15–19, 31 (stating that the focus of debate is three potential nonphysical harms to subjects, and arguing that there is too little reason to be concerned about these to justify ex ante regulation); SCHRAG, *supra* note 1, at 14–16, 32, 52 (discussing subjects’ interests in avoiding deception, discomfort, dignitary harm if consent to participation is not properly secured, and breach of privacy or confidentiality). There has also been some discussion of social-science research that might embarrass a community or be used for illicit purposes by government. *Id.* at 13, 16, 18, 45–46. But neither of those concerns spoke to the problems highlighted here – that is, poorly-done research and the harmful policies it can foster. See generally Kristen Underhill, *Broken Experimentation, Sham Evidence-Based Policy*, 38 YALE L. & POL’Y REV. 150 (2019).

⁸ *Id.* at 227; Jochen Gläser, et al., *The Independence of Research – A Review of Disciplinary Perspectives and Outline of Interdisciplinary Prospects*, 60 MINERVA 105, 124 (2021) (“many fields in the sciences and social sciences have begun to reflect upon a loss of trust in published results. Problems include: Errors in publications that spread through scientific communities; Results that cannot be reproduced for a variety of (partly unknown) reasons; Interpretation bias or “spin”, which is defined as “reporting practices that distort the interpretation of results and mislead readers so that results are viewed in a more favourable light”; Fraud, i.e. the falsification of results.”) (citations omitted).

⁹ The problem does at times get noticed in some policy fields. See, e.g., David Eads, *Too Many Politicians Misuse and Abuse Crime Data*, N.Y. TIMES (Aug. 10,

Research that is poorly designed, executed, and/or analyzed because of bias or incompetence is likely to produce false findings or invalid conclusions.¹⁰ This might or might not affect the individuals who populate the studies, but the potential for harm to members of the broader groups they represent is itself sufficiently great to warrant *ex ante* quality constraints on much social science research.¹¹ Yet the commission principally responsible for developing research regulation in the 1970s explicitly directed that IRB's "should not consider as risks the possible consequences of application of the knowledge gained in the research (e.g., the possible effects of the research on public policy.)"¹² In doing so,

2018), <https://www.nytimes.com/2018/08/10/opinion/politics/giuliani-trump-chicago-data-crime.html> [<https://perma.cc/L7PE-4Y9B>]; Kyle D. Pruett, *Social Science Research and Social Policy: Bridging the Gap*, 45 FAM. CT. REV. 52 (2007) (describing how the author's research on parenting was misused by opponents of same-sex marriage); Robert J. MacCoun, *Biases in the Interpretation and Use of Research Results*, 49 ANNU. REV. PSYCHOL. 259, 261 (1998) ("Sadly, there is no shortage of politicized research topics, where the motives of researchers and the interpretation of their findings are fiercely disputed. Some topics are matters of perpetual dispute; examples include research on the effects of gun control, the death penalty, pornography, and drug prohibition. And recent years have seen the emergence of new battlegrounds involving research on global warming, HIV/AIDS, the addictiveness of tobacco, the biological basis of sexual orientation, the effects of gay and lesbian service personnel on military cohesion, and the validity of therapeutically elicited repressed memories and racial stereotypes."); Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-use of Social Science Research*, 2 DUKE J. GEN. L. & POL'Y 207 (1995).

¹⁰ *Biases and Confounding*, PUB. HEALTH ACCESS SUPPORT TEAM, <https://www.healthknowledge.org.uk/public-health-textbook/research-methods/1a-epidemiology/biases> [<https://perma.cc/NNU6-4NXX>] (last visited Dec. 29, 2021).

¹¹ An additional warrant, as some ethicists outside the U.S. have noted, is that bad research cannot be justified to potential subjects or to government agencies asked to assist with it: What justification is there for investigators' scrutiny of subjects' person, behavior, or private information, and for granting them access to agency records, absent assurance a study is well designed to lead to knowledge rather than falsehood? See Ariella Binik & Spencer Phillips Hey, *A Framework for Assessing Scientific Merit in Ethical Review of Clinical Research*, 41 ETHICS & HUM. RSCH. 2 (2019); Tim Bond, *Ethical imperialism or ethical mindfulness? Rethinking ethical review for social sciences*, 8 RSCH. ETHICS 97, 102 (2012) ("Ensuring the quality of the research undertaken is an essential precondition of involving the contributions of human participants. Poorly designed or implemented research undermines public trust in the integrity of the research process and may generate misleading knowledge claims.").

¹² SCHRAG, *supra* note 1, at 71 (discussing the work and decisions of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research).

however, that commission had in mind use of *valid* research.¹³ It never addressed the problems bad research might cause or the possibility that research in some domains should undergo greater scrutiny because of potential policy use. This Article's principal concern is with those problems, and it calls for consideration of that possibility.

Existing mechanisms relied on for quality control are review of research proposals by funding agencies, post-hoc peer review solicited by publishers, and public deliberation of legal reforms.¹⁴ These are manifestly inadequate. Despite them, much poor-quality research is produced, published, and used successfully for policy and legal advocacy.¹⁵ Some funding agencies, as shown in Part II, have long been part of the problem rather than the solution, promoting research designed to advance political agendas rather than scientific knowledge. Even when funded by unbiased sources, researchers might inject their own policy biases, cut corners, misunderstand the phenomenon, or lack competencies, yet their reports can find a publication outlet.¹⁶ And, advocates and policy

¹³ *Id.* at 16, 71 (indicating that the consequence contemplated was adverse impact on sympathetic, vulnerable organizations or ethnic groups if research results fostered a negative public view of them).

¹⁴ KORNELIA TANCHEVA, PUBLIC RESPONSES RECEIVED FOR REQUEST FOR INFORMATION 85 FR 9488: PUBLIC ACCESS TO PEER- REVIEWED SCHOLARLY PUBLICATIONS, DATA, AND CODE RESULTING FROM FEDERALLY-FUNDED RESEARCH (2020), <https://www.whitehouse.gov/wp-content/uploads/2017/11/Open-Access-RFI-Comments-Reduced-5.pdf> [https://perma.cc/R4SP-KX4E].

¹⁵ See *infra* Part II; Underhill, *supra* note 7, at 227; Lee Drutman & Steven M. Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, THE ATLANTIC (Mar. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/> [https://perma.cc/A95P-CPJ5] (“Those who can saturate Washington by funding the most research, hiring the most lobbyists, and paying for the most elites to write op-eds highlighting and supporting their perspective are going to stay at the front of the crowd.”). Though this is not documented, the author has observed lawyers in family court proceedings invoke and sometimes introduce into evidence problematic research, without challenge by other counsel. For an example of mischaracterization of research in court filings, see Brief of Casey Family Programs and Ten Other Child Welfare and Adoption Organizations as Amici Curiae in Support of Petitioners at 8, *Haaland v. Brackeen*, No. 21-376, 2022 WL 585881 (U.S. Feb. 28, 2022) (No. 21-376), 2021 WL 4803872, at *8 (stating: “Research and experience confirm that, when possible, children's interests are best served by staying with their families.” and citing a study that only examined whether parents retained custody after a particular intervention and not any aspect of child welfare, and that itself noted that “avoiding placement does not necessarily mean that children and families are doing well” and that sometimes foster care “placement would actually be regarded as a ‘success’ from a clinical perspective” because the intervention identifies unsafe home conditions) (citing Kristine Nelson et al., *A Ten-Year Review of Family Preservation Research* 10 (2009)).

¹⁶ Even the most prestigious science journals occasionally accept seriously flawed work. See, e.g., Roni Caryn Rabin, *The Pandemic Claims New Victims*:

makers routinely rely on studies without regard for their quality or the reputation of the publisher.¹⁷ Even if someone challenges the quality of research relied on or the soundness of conclusions drawn from it, advocacy groups, legislators, agency officials, and judges typically have little desire, patience, or capacity to respond to questions about research quality.¹⁸

This Article proposes, as an additional *ex ante* check against flawed research, enhancing a different step in the process that extends from research idea to policy implementation – namely, IRB assessment of human-subject research proposals. Currently, that review need not (and typically does not) include assessment of research design; it focuses on the safety of research subjects and their informed consent to participation.¹⁹ Existing ethical standards and regulations were developed principally for medical experiments, as a reaction to notorious studies that physically harmed participants.²⁰ Moreover, though existing regulations address the possibility of distorting motivations, they target only profit motive, as when drug manufacturers seek positive reports on their new products.²¹ That typically is not the sort of conflict of aims that infects social science.

This Article therefore urges that IRBs be required rigorously to examine research design, and it suggests strategies for motivating their

Prestigious Medical Journals, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/14/health/virus-journals.html> [<https://perma.cc/7E3N-H8DT>] (explaining how peer review failed to prevent publication of flawed studies on use of certain drugs in treatment of COVID-19 in NEW ENGLAND JOURNAL OF MEDICINE and THE LANCET); *see also* M. Findley et al., *Can Results-Free Review Reduce Publication Bias? The Results and Implications of a Pilot Study*, 49 COMPAR. POL. STUDIES 1667, 1668 (2016) (noting pronounced concern in political science with “a peer-review process that privileges the significance of results over their theoretical contribution, research design, quality of the data and analysis”).

¹⁷ *See infra* Part II; Underhill, *supra* note 7, at 186–98.

¹⁸ Underhill, *supra* note 7, at 186–87; Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1784 (2014) (discussing problem that federal appellate court judges rely on, but are not able independently able to verify, factual claims and supporting citations submitted in amicus curiae briefs); Jeffery J. Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901, 921–22 (2011) (“The lack of shared goals means that many studies are essentially irrelevant to underlying legal policy People interpret social science evidence in ways that are consistent with their beliefs, embracing work that supports them and rejecting work that does not.”).

¹⁹ SCHRAG, *supra* note 1, at 108, 115–16.

²⁰ *See id.* at 2 (noting “IRBs’ origins as a response to abuses in medical and psychological experimentation”), 7 (“medicine and psychology set the agenda”); *id.* at 9 (“regulators forced social science research into an ill-fitting biomedical model”); *id.* at 38, 51; *see also* SCHNEIDER, *supra* note 3, at xix (characterizing the modern research-regulatory regime as a response to the infamous Tuskegee study); Zachary M. Schrag, *How Talking Became Human Subjects Research: The Federal Regulation of the Social Sciences, 1965–1991*, 21 J. POL’Y HIST. 3, 5–9 (2009).

²¹ *See infra*, Part IV.B.

members to do so. It also recommends that IRBs be charged with guarding against a broader set of interest conflicts—in particular, when researchers’ funding comes from an entity that also lobbies governments to promote a policy agenda. Just as campaign-finance law reflects recognition that wealthy advocacy organizations could buy legislative votes if permitted, research-ethics law should reflect recognition that such organizations can buy “scientific findings” if permitted.²² Many social scientists are highly dependent on grants not just for pursuing their own research ideas but also for retention and promotion in their jobs.²³ They also, to a far greater degree than in medicine, are likely to be driven by their own ideological views to design and analyze studies in such a way as to ensure felicitous results.²⁴ Once results are published, no matter how flawed, advocates for causes run with them to policy makers, and the effects are difficult to undo.²⁵ The need for more stringent *ex ante* scrutiny is pressing.

More dramatically, this Article suggests viewing new social service programs and practices as a form of human-subject experimentation, just as new medical interventions are. It recommends scientific – not just political – gatekeeping. Social welfare policy innovation impacting vulnerable populations is often fueled by “the latest research,” which might be fatally flawed, but revealed as such only after the idea it promotes is implemented. The history of “treatments” for gay and trans persons illustrates that clearly.²⁶ But whereas the Food and Drug Administration

²² Thomas E. Mann & Anthony Corrado, *Party Polarization and Campaign Finance*, CTR. FOR EFFECTIVE PUB. MGMT. BROOKINGS (July 2014), https://www.brookings.edu/wp-content/uploads/2016/06/Mann-and-Corrad_Party-Polarization-and-Campaign-Finance.pdf [<https://perma.cc/3X97-TT9B>].

²³ See Kelsey Piper, *Science funding is a mess: Could grant lotteries make it better?*, VOX (Jan. 18, 2019), <https://www.vox.com/future-perfect/2019/1/18/18183939/science-funding-grant-lotteries-research> [<https://perma.cc/JSU6-6SPU>].

²⁴ Underhill, *supra* note 7, at 166 (“Values, too, may drive the types of questions that scientists seek to answer, the causal hypotheses they seek to test, and the ways in which scientists frame their proposals and policy implications.”); *id.* at 203 (“Researchers grow invested in the well-being of the populations they study, or enter research in the hopes of improving outcomes for a group or community. Ratcheting poses long-term threats to funding priorities that work to benefit communities (most often policies for welfare and safety net programming), and researchers who fear ratcheting may be unwilling to expose negative or null program effects for fear of undermining all resources.”).

²⁵ See *id.* at 210–11 (discussing flawed evidence base that fueled proliferation of “Scared Straight” programs for juvenile offenders); *infra* Part II.

²⁶ See Marie-Amelie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 803 (2017) (discussing the psychological community’s past embracing of sexual-orientation conversion therapy, based on supposed research findings that homosexuality is a changeable characteristic and that particular therapies were effective in changing it); Jack Turban, *The Disturbing History of Research into Transgender Identity*, SCI. AM. (Oct. 23, 2020),

approval process for new vaccinations, medications, and medical devices is robust, familiar, and the focus of most scholarship on human-subject experimentation, little scholarly or government attention has been paid to ethical standards and procedures for experimentation with behavioral and other non-medical interventions. Yet innovation in social services can also have life-altering effects, and it likewise entails danger of ethical lapses and undercounting adverse impacts on vulnerable populations.²⁷ Driven by ideology, it can be downright reckless.

Viewing social-service innovation as human-subject experimentation invites the question whether it should – like novel medical interventions – sometimes be subject to pre-implementation safeguards like pre-approval by experts, piloting, controlled incremental expansion, and careful study at each stage.²⁸ Further, this Article recommends expanding the conception of who is a human subject, strengthening protections for subjects whose autonomy is undeveloped or compromised, and applying to social-services experiments risk-benefit conditions common to medical experimentation. This could go a long way toward protecting vulnerable populations from harmful practices for which the primary motivation might be other than their wellbeing, and it might minimize use of flawed research to promote such innovation.

To illustrate the problems, Part II focuses on a particular niche of social policy presenting both high human stakes and a maximal set of ethical problems relating to innovation and study – namely, human-service agency and court responses to child maltreatment. States have experimented considerably in recent decades in this realm, typically in a headlong fashion. Repeatedly, research supporting an innovation in this ideologically-charged realm has ultimately proven rife with design flaws and tendentious analysis, after it has driven government decision-making. The pattern in this field provides a vehicle to analyze to what extent rules for ethical experimentation and research could prevent dangerous innovations in social services generally and minimize the amount and impact of bad research produced and published in social sciences. Part III distills from the description in Part II a set of general problems in social services and social-science research that demands attention. Part IV considers to what extent existing research regulations could cover social service provision and social science research, to address those problems. Part V recommends new pre-approval requirements for social-service

<https://www.scientificamerican.com/article/the-disturbing-history-of-research-into-transgender-identity/> [<https://perma.cc/R8WH-RL2T>].

²⁷ See *infra* Part III.

²⁸ See *Development & Approval Process | Drugs*, U.S. FOOD & DRUG ADMIN. (Oct. 28, 2019), <https://www.fda.gov/drugs/development-approval-process-drugs> [<https://perma.cc/BMK4-ENXP>].

innovations and social-science research, with particular emphasis on those impacting non-autonomous persons.

II. AN ILLUSTRATION OF RECKLESS SOCIAL-SERVICE INNOVATION

In a typical year, over two million children in the United States, disproportionately infants, are subjects of “screened-in” reports of maltreatment.²⁹ Law governing state response to such reports, in the U.S. and elsewhere, is often characterized as a pendulum, swinging between emphasis on parents’ perceived rights to maintain their relationship with children and emphasis on safety and faster permanency for children (via foster care and adoption).³⁰ Child protection law, like criminal law, is especially politically sensitive because it disproportionately impacts persons living in poverty and members of racial minorities.³¹ Some child welfare experts have charged that child welfare policy has, as a result, become driven by ideology rather than sound research.³² An extreme anti-government, family-preservationist, community-protectionist mentality has dominated the field in recent decades, arising from sympathy with the adults in these communities, many of whom had adverse childhood experiences themselves, coupled with a less-understandable adult-focused

²⁹ U.S. DEP’T HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAM., CHILD MALTREATMENT 2019 x (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf> [<https://perma.cc/9NN3-2H2S>]. Screened-out reports might be accurate but the law does not treat the behavior or circumstance reported as abuse or neglect. *Id.* Conversely, countless children do suffer maltreatment but are never reported. *See* Brett Drake & Melissa Jonson-Reid, *Defining and Estimating Child Maltreatment*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT 14–33 (J. Bart Klika & Jon R. Conte eds., 2017); U.S. DEP’T HEALTH & HUM. SERV., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4) 16 (2010), <https://www.childhelp.org/wp-content/uploads/2015/07/Sedlak-A.-J.-et-al.-2010-Fourth-National-Incidence-Study-of-Child-Abuse-and-Neglect-NIS%E2%80%934.pdf> [<https://perma.cc/5QGV-BB2G>] [hereinafter FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT].

³⁰ *See, e.g.*, Brandon Stahl, *Child protection in turmoil across the country*, STAR TRIBUNE (Nov. 30, 2014, 5:53 AM), <https://www.startribune.com/child-protection-systems-are-in-turmoil-across-the-country/284225031/> [<https://perma.cc/B5T2-9FVH>]; JEREMY SAMMUT, RESETTling THE PENDULUM: BALANCED, EFFECTIVE, ACCOUNTABLE CHILD PROTECTION SYSTEMS AND ADOPTION REFORM IN AUSTRALIA 33 (2017), <https://www.cis.org.au/app/uploads/2017/11/rr33.pdf> [<https://perma.cc/Q4QB-AB3P>]; Gary C. Dumbrell, *Ontario’s Child Welfare Transformation: Another Swing of the Pendulum?*, 23 CAN. SOC. WORK REV. 5–19 (2006).

³¹ *See infra* at notes 90–102 and accompany text.

³² LELA B. COSTIN ET AL., THE POL. OF CHILD ABUSE IN AM. 142 (1997).

outlook on social justice.³³ These experts say this ideological commitment has infected research in the field, generating a steady stream of poorly-constructed and mistakenly-interpreted studies used to support false objections against child-protective actions and to promote more parent-protective responses to child maltreatment that ultimately prove detrimental to children.³⁴

One need not share that perspective to acknowledge threats to research integrity in the child welfare field, as in many other social service realms. As shown below, much of the research is funded by organizations that are themselves promoting or even operating the family-preservation interventions, seeking research to validate their policy aim.³⁵ The studies commonly involve observation and interaction with persons – typically adults subject to child maltreatment charges, but occasionally maltreated children – fairly characterized as “vulnerable populations.”³⁶ A subset of this vulnerable population (children) comprises non-autonomous persons legally incapable of giving informed consent to participation themselves yet whose normal proxies (parents) have potentially conflicting interests.³⁷

A. Federal Law Background of Child Protection Practice

Though technically states set child protection policy in the United States, federal law has driven much of it by conditioning states’ receipt of certain federal funding.³⁸ The Adoption Assistance and Child Welfare Act of 1980 embodied the family-preservation impulse, requiring Child

³³ See, e.g., RICHARD GELLES, *OUT OF HARM’S WAY: CREATING AN EFFECTIVE CHILD WELFARE SYSTEM* 83–91 (2017); DAVID STOESZ, *QUIXOTE’S GHOST: THE RIGHT, THE LIBERATI, AND THE FUTURE OF SOCIAL POLICY* 102–20 (2005); LELA B. COSTIN ET AL., *THE POLITICS OF CHILD ABUSE IN AMERICA* 142–45 (1997); Elizabeth Bartholet, *Thoughts on the Liberal Dilemma in Child Welfare Reform*, 24 WM. & MARY BILL RTS. J. 725 (2016). One might perceive a similar favoring of one group over another within a subordinated population in calls to defund the police, in reaction to brutally unjust treatment of persons suspected of committing crimes, which might be insufficiently attentive to potential crime victims in the same communities.

³⁴ See, e.g., Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: The Use and Misuse of Research*, 13 WHITTIER J. CHILD & FAM. ADVOC. 1, 8 (2014).

³⁵ See Elizabeth Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, 42 FLA. ST. U. L. REV. 573, 584, 609–11 (2015).

³⁶ See generally Ronald C. Hughes et al., *Issues in Differential Response*, 23 RES. ON SOC. WORK PRAC. 493 (2013).

³⁷ See *infra* notes 219–26 and accompanying text.

³⁸ See James G. Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 435–41 (2008).

Protective Services (“CPS”) to make “reasonable efforts” to prevent removal of maltreated children from their homes and to rehabilitate parents and ultimately avoid termination of parental rights (“TPR”).³⁹ The 2018 Family First Prevention Services Act (“Family First”) renewed this commitment to family preservation with additional funding for removal-prevention and reunification services.⁴⁰ In between, the Adoption and Safe Families Act of 1997 (“ASFA”) pushed back in the safety/permanency direction.⁴¹ It aimed to limit the rehabilitation time allowed to parents who have committed maltreatment, so as to avoid unduly prolonged foster-care stays for children, and to enable TPR proactively before a child is harmed when parents have already manifested severe unfitness.⁴² Also aimed at proactive intervention was the Keeping Children and Families Safe Act of 2003 (as modified in 2009), which requires states to have birthing facilities notify CPS of newborns exposed *in utero* to illegal drugs or alcohol, which in some cases signals danger to children if sent home with their birth mothers.⁴³ These federal directives create an incentive for states to experiment with policy innovations that might improve their compliance. ASFA’s shortened timeline to TPR, in particular, has led states to search for a magic pill that will transform parents quickly and/or alternatives to foster care that allow them to evade the timelines.⁴⁴

B. Advocacy Research Driving Policy Experiments

In addition to these directives from the federal government, wealthy private advocacy organizations have conceived and promoted in state legislatures, agencies, and courts new approaches to handling maltreatment cases.⁴⁵ The Annie E. Casey Foundation and Casey Family Programs play an outsized role, together controlling billions of dollars in endowment, and they uniformly display a single-minded devotion to the

³⁹ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 20 U.S.C. § 471(15)(B)); see Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, *supra* note 38, at 435–36.

⁴⁰ Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (codified in U.S.C. tit. 42).

⁴¹ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

⁴² *Id.*; see GELLES, *OUT OF HARM’S WAY*, *supra* note 33, at 67–70.

⁴³ Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, § 114(b)(1)(B)(ii), 117 Stat. 800, 809 (codified as amended at 42 U.S.C. § 5106(a)).

⁴⁴ See *infra* notes 50–89 and 103–20 and accompanying text. See generally Bartholet, *Creating a Child-Friendly Child Welfare System: The Use and Misuse of Research*, *supra* note 34.

⁴⁵ Bartholet, *Creating a Child-Friendly Child Welfare System: The Use and Misuse of Research*, *supra* note 34, at 10.

family-preservation aim and parental rights.⁴⁶ With each new strategy or program they promote, the Casey Foundation claims it will use government funds more effectively to achieve removal-prevention and reunification objectives,⁴⁷ which do not necessarily equate to what is best for a child. The core problem against which these innovations fight is absence of programs with proven effectiveness at helping parents overcome deep-seated mental health deficits, which typically stem from their own adverse childhood experiences and usually lead to disabling substance abuse.⁴⁸ As discussed below, each new approach has disappointed, and the consequences for many children have been severe – either the children are returned to the custody of parents who remain unprepared to adequately care for them (and so experience further maltreatment), or they linger in foster care so long that chances for stable permanency through adoption disappear.⁴⁹ Yet once these programs have been widely adopted, they continue by inertia even after independent research proves them to be failures.

Perhaps the earliest example was the “Intensive Family Preservation Services” (“IFPS”) model, which many states adopted in the 1980s at the urging of the Edna McConnell Clark and Annie E. Casey foundations.⁵⁰ It rested on an unwarranted assumption that parental dysfunction manifesting in child maltreatment is typically transitory and readily

⁴⁶ See Marie Cohen, *When Ideology Outweighs What’s Best for Kids*, CHILD WELFARE MONITOR (Mar. 10, 2021), <https://childwelfaremonitor.org/2021/03/10/when-ideology-outweighs-whats-best-for-kids-the-case-of-san-pasqual-academy/> [https://perma.cc/2LYD-VER9] (noting the “influence of two wealthy organizations started by the same family, Casey Family Programs and the Annie E. Casey Foundation, that have used their financial resources to produce reports..., lobby legislators, and provide free consultation with states.”); Martin Morse Wooster, *Foundation Adrift: The Casey Foundation Today*, CAP. RSCH. CTR.: FOUND. WATCH (Oct. 28, 2019), <https://capitalresearch.org/article/foundation-adrift-part-3/> [https://perma.cc/NB9W-MTUR].

⁴⁷ See Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, *supra* note 35, at 574–90; RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES* 83–91 (1996).

⁴⁸ See generally JAMES G. DWYER, *LIBERAL CHILD WELFARE POLICY AND ITS DESTRUCTION OF BLACK LIVES* (2018); Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, *supra* note 38, at 424–27.

⁴⁹ See *infra* notes 50–120 and accompanying text; see also STATE POL’Y ADVOC. & REFORM CTR., NATIONAL ADOPTION FACTS (2012), <http://childwelfaresparc.org/wp-content/uploads/2015/02/National-ADOPTION-FACTS1.pdf> [https://perma.cc/FXU2-GM58].

⁵⁰ See GELLES, *BOOK OF DAVID*, *supra* note 47, at 133–35 (noting that these foundations “played crucial roles in selling, or overselling, of family preservation. Both foundations marketed family preservation with a near-religious zeal and substantial financial support.”).

correctible.⁵¹ IFPS prescribes a heavy-dose of wrap-around services for just four to six weeks for parents whose children were at imminent risk of placement in foster care.⁵² Reports from initial research, funded by those same foundations, announced success, but they ultimately came under fire for flawed methodology and improper criteria of success – in particular, asking only if children were still in parental custody rather than whether the intervention secured children’s safety and served their long-term wellbeing.⁵³ After four decades of widespread use, IFPS still “does not meet the standards for well-supported efficacious practice in child welfare.”⁵⁴ Yet whereas some states retreated from the program, a significant minority have continued it, and Casey still touts it.⁵⁵

⁵¹ *Id.* at 133–35.

⁵² Bartholet, *Creating a Child-Friendly Child Welfare System: The Use and Misuse of Research*, *supra* note 34, at 8–9.

⁵³ See Don D. Schweitzer et al., *Building the Evidence Base for Intensive Family Preservation Services*, 9 J. PUB. CHILD WELFARE 423, 424 (2015) (“to some in the 1980s IFPS seemed like a panacea. . . . [H]owever, IFPS is currently not recognized as an evidence-based practice by most evidence-based clearinghouses.”); *id.* at 425–26 (“Early studies of IFPS programs . . . were very promising. . . . In the mid-1990s, [various authors] offered methodological critiques of this wave of research . . . [and] multiple concerns regarding outcome measures, including use of out-of-home placement as a sole measure of effectiveness in some early studies. While a central policy goal of IFPS, avoiding placement does not ensure that children and families are doing well. . . . Fraser, Nelson, and Rivard (1997) . . . noted that problems of targeting and treatment integrity continued to plague family preservation research. . . . In 2012, Al et al. conducted a meta-analytic study . . . which showed that intensive family preservation programs . . . were generally not effective in preventing out-of-home placement.”); see also Duncan Lindsey, Sacha Martin, & Jenny Doh, *The Failure of Intensive Casework Services to Reduce Foster Care Placements: An Examination of Family Preservation Studies*, 24 CHILD. & YOUTH SERVS. REV. 743, 751 (2002) (“There is general consensus among child welfare researchers that the earliest studies on family preservation that found such dramatic rates of program success were seriously deficient.”); Amy M. Heneghan et al., *Evaluating Intensive Family Preservation Programs: A Methodological Review*, 97 PEDIATRICS 535–42 (1996) (“Methodological shortcomings included poorly defined assessment of risk, inadequate descriptions of the interventions provided, and nonblinded determination of the outcomes.”).

⁵⁴ Schweitzer et al., *supra* note 53, at 439; see also Julia H. Littell & John R. Schuerman, *What Works Best for Whom? A Closer Look at Intensive Family Preservation Services*, 24 CHILD. & YOUTH SERVS. REV. 673, 673 (2002) (“Controlled studies have shown that these programs have not met initial expectations . . .”).

⁵⁵ See NAT’L FAM. PRES. NETWORK, IFPS NATIONWIDE SURVEY 3–4 (2014), http://www.intensivefamilypreservation.org/PDF/ifps_survey_report_2014.pdf [<https://perma.cc/4XN8-KANF>] (finding 14 states still using IFPS, whereas a 2011 survey found 27); MINN. STAT. § 256F.01 et seq. (2003) (repealing IFPS legislation).

Beginning in 1993, many states adopted “Differential Response” (“DR”) at the urging of Casey and other foundations.⁵⁶ DR entails diverting reports CPS deems less serious away from the traditional response of investigation and coercive intervention to a soft track of merely assessing the family’s situation and offering assistance, both of which are voluntary for parents.⁵⁷ In cases placed on the assessment track, case workers make no finding of maltreatment, so create no record of any abuse or neglect that has occurred; do not insist parents accept services; and leave children in the home regardless of parental response.⁵⁸ The underlying theory is that parents whose maltreatment appears less serious just need a helping hand and will respond more positively to a non-coercive approach.⁵⁹

Child welfare advocates were concerned from the outset that by failing to investigate, requiring parents to change behavior, creating a record, or removing a child from parental custody, agencies would leave many children in situations of danger and make it more difficult to respond properly to subsequent maltreatment reports.⁶⁰ The concern intensified following revelation that many jurisdictions were channeling most reports onto the soft track—in some places, close to three-fourths of all reports.⁶¹

⁵⁶ See CTR. FOR CHILD POL’Y, ISSUES IN DIFFERENTIAL RESPONSE: REVISITED 2 (Dec. 2019), <https://www.centerforchildpolicy.org/post/policy-report-issues-in-differential-response-revisited> [<https://perma.cc/2F7E-GFHQ>].

⁵⁷ See *id.* at 13, n. xvii.

⁵⁸ See, e.g., KY. REV. STAT. ANN. § 620.040(1)(b) (West 2019).

⁵⁹ See Kathryn A. Piper, *Differential Response in Child Protection: How Much Is Too Much?*, 82 CHILD. & YOUTH SERVS. REV. 69, 70–71 (2017); CTR. FOR CHILD POL’Y, *supra* note 56, at 2. An additional motivation states might have had for adopting DR is to avoid having to report instances of repeat maltreatment to the federal oversight agency, which ties funding to keeping repeat rates low; if there is no substantiated finding of maltreatment in a given case, that case does not become part of a pattern states must report. *Id.* at 14.

⁶⁰ See Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, *supra* note 35, at 593–608.

⁶¹ See CTR. FOR CHILD POL’Y, *supra* note 56, at 3 (noting “growing concerns about potentially detrimental consequences of DR programming on children’s safety, particularly in jurisdictions that had abandoned fact-finding, risk assessment, authoritative compliance when necessary, and ongoing safety planning with families in alternative tracks in their efforts to remain ‘family friendly’”); *id.* at 13, n.xvii (“Arizona stopped a program called Family Builders in the mid-2000s when a state audit found that of the more than 9,000 families offered services, about two-thirds (67%) declined to participate and, of those referred to Family Builders, only 28% completed a service plan. In Washington state a 2008 study found that services were offered to 70% of AR cases but [o]f those referred, 32 percent participated in services and 15 percent completed services.”) (citations omitted); Piper, *Differential Response in Child Protection: How Much Is Too Much?*, *supra* note 59, at 71 (noting 43% rate in Massachusetts, 70% in Minnesota).

The financial savings from doing so are substantial.⁶² Once again, early research – funded by foundations that promoted the innovation – claimed success, but without measuring child safety and wellbeing; instead it cited reduced rates of removals (the obvious result of making no investigation or finding) and greater parent satisfaction (the obvious result of offering financial assistance but demanding nothing).⁶³ That research was ultimately proven methodologically flawed as well as focused on the wrong outcomes.⁶⁴ Later research that did study child safety and wellbeing confirmed child advocates’ concerns, and that, along with states’ own perception of very high rates of parents’ refusing services and of increased fatalities,⁶⁵ led many states to retreat from DR – either eliminating the assessment – only track or authorizing caseworkers to

⁶² See Douglas B. Marlowe & Shannon M. Carey, *Research Update on Family Drug Courts*, NAT’L ASS’N DRUG CT. PROS. (May 2012), <https://www.nadcp.org/wp-content/uploads/Reseach%20Update%20on%20Family%20Drug%20Courts%20-%20NADCP.pdf> [<https://perma.cc/YBG3-WW2W>].

⁶³ See Hughes et al., *supra* note 36.

⁶⁴ See *id.*; Ronald C. Hughes & Frank Vandervort, *Differential response: A misrepresentation of investigation and case fact finding in child protective services*, 28(2) APSAC ADVISOR 9–16. (2016); see also CTR. FOR CHILD POL’Y, *supra* note 56, at 6 (noting as to research published between 2010 and 2018: “(1) basing conclusions on surveys with extremely low response rates..., (2) recall bias, because surveys were not completed until the time of case closure, which may have been months after services were delivered, or (3) simply ignoring study findings that supported an opposing conclusion in the reporting of findings. . . .”); *id.* at 8 (“The family survey sample was not random and the response rate for the family survey was low. None of these issues was disclosed in the discussion of findings in the research reports. . . . The response rate for family surveys ranged from 1.7% in Oregon to 16.17% in Minnesota to 24% in Colorado”); *id.* at 10 (stating “substantiated re-reporting as a measure of child safety is inherently invalid, and conclusions drawn from this measure are misleading” and explaining several reasons why) (citations omitted).

⁶⁵ Piper, *Differential Response in Child Protection: How Much Is Too Much?*, *supra* note 59, at 71 (noting 87% rate in Virginia of parent refusal of counseling and substance abuse treatment, 80% refusal of services in Wyoming); CTR. FOR CHILD POL’Y, *supra* note 56, at 23 (citing state audit finding two-thirds refused in Arizona).

revert to an investigation if parents refuse necessary services.⁶⁶ Still, though, roughly thirty states deploy a DR system.⁶⁷

In the mid-1990s, family drug courts (“FDC”) emerged in response to recognition that addiction is more intransigent than IFPS supposed, and today there are nearly four hundred in the U.S.⁶⁸ On their own initiative and without special legislative authorization, state court judges have created FDCs and special rules to govern them.⁶⁹ Their motivating theory is that longer-term wrap-around services, more frequent court appearances, and a more intimate relationship between judge and parent will substantially improve rates of parental success in overcoming addiction and avoiding loss of parental status.⁷⁰ Rather than quickly placing a child for adoption when maltreatment or endangerment results from chronic, incapacitating substance abuse, the state puts children in foster care while the judge, who also acts as a sort of coach, tries to nurture

⁶⁶ CTR. FOR CHILD POL’Y, *supra* note 56, at 10 (“there are considerable data to indicate that many children served in AR tracks have increased safety issues and may be at significantly higher risk than was identified at the time of track assignment”); *id.* at 12 (“In spite of the fact that AR track cases are, by design, lower risk than TR cases, observational studies in Georgia and Wisconsin found that re-reporting on the lower risk AR track actually exceeded that of cases on the TR track”); *id.* at 2 (“By 2018, twelve states that had tried DR discontinued the program, suspended it, or elected not to expand it statewide”); *id.* at 22–24 (“In Massachusetts: ‘From 2009 to 2013, 10 children on the lower-risk [AR] track died, including seven in 2013.’ In Florida: ‘The voluntary track [AR] of Florida’s DR program saw 80 child deaths from 2008 to 2014. Of those 80 children, 34 died after Florida DCF had documented at least 10 reports on the child’. . . . In Arizona: . . . after high-profile cases of child death or abuse, the Family Builders program ended as an alternative response in 2004. . . . In Illinois: Illinois discontinued its DR program in 2011 after a randomized controlled trial study sponsored by the NQIC-DR found that families assigned to the AR track were re-referred to CPS at higher rates than those assigned to the TR.”) (citations omitted).

⁶⁷ CHILD WELFARE INFO. GATEWAY, DIFFERENTIAL RESPONSE: A PRIMER FOR CHILD WELFARE PROFESSIONALS (Oct. 2020), https://www.childwelfare.gov/pubPDFs/differential_response.pdf [<https://perma.cc/YRL2-4H5J>].

⁶⁸ See CHILD. & FAM. FUTURES, THE NATIONAL STRATEGIC PLAN FOR FAMILY DRUG COURTS 2 (2017).

⁶⁹ See Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1500–01 (2004) (“In some states [t]here is no enabling legislation or mandate: the courts simply open shop.”); *Dependency Drug Courts*, FLA. CTS., <https://www.flcourts.org/Resources-Services/Court-Improvement/Problem-Solving-Courts/Family-Dependency-Drug-Courts> [<https://perma.cc/ST6G-A884>] (last visited Oct. 24, 2021).

⁷⁰ See DWYER, LIBERAL CHILD WELFARE POLICY AND ITS DESTRUCTION OF BLACK LIVES, *supra* note 48, at 208–09.

the parent to recovery and reunification.⁷¹ It does so even when the children are highly-adoptable infants with urgent need to form a secure attachment to a permanent caregiver,⁷² and even though the vast majority of drug-dependent parents will relapse, be arrested for crimes, and/or be reported again for child maltreatment after their initial FDC entry.⁷³ It does so without requiring approval by an independent representative for the child.⁷⁴ In some FDCs, the holding pattern for children persists much longer on average than that for children whose cases proceed in a regular juvenile court, as one might expect when the judge bonds with parents, thereby postponing and potentially thwarting stable permanency, with lifelong adverse consequences.⁷⁵

Research on FDCs also has been plagued with design flaws.⁷⁶ Researcher bias might play a role. For example, one study's team included

⁷¹ See Sam Choi, *Family Drug Courts in Child Welfare*, 29 CHILD & ADOLESCENT SOC. WORK J. 447, 451 (2012) (“Pursuant to the theory of therapeutic jurisprudence, the court functions as an agent of therapeutic change and the role of the members of the drug court may be more akin to the relationship between psychotherapist and patient than the traditional role of judge and defendant.”).

⁷² See Mary Haack et al., *Experience with Family Drug Courts in Three Cities*, 25(4) SUBSTANCE ABUSE 17, 20 (2005) (study of FDCs in three large cities showing 63% of children entered the system at birth).

⁷³ See Emily Putnam-Hornstein et al., *Risk of Re-Reporting Among Infants Who Remain at Home Following Alleged Maltreatment*, 20(2) CHILD MALTREATMENT 92 (2014); see Marlowe & Carey, *supra* note 62.

⁷⁴ See JAMES G. DWYER, LIBERAL CHILD WELFARE POLICY AND ITS DESTRUCTION OF BLACK LIVES, *supra* note 48, at 210. Immediate TPR and adoption following removal from parental custody is not even legally possible except in very limited circumstances, so the alternative to FDC is simply the normal juvenile court process, which also entails placing the child in foster care while parental rehabilitation is attempted (only less rigorously). See CHILD.’S BUREAU, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 1–2 (2020), <https://www.childwelfare.gov/pubPDFs/reunify.pdf>. And in some states, the child might not even have a legal representative in the process of deciding their fate after removal. See, e.g., FLA. STAT. § 39.4022(4)(b) (2021) (making it optional to include a child’s guardian ad litem, “if one is appointed,” in the multi-disciplinary team that develops a placement recommendation following removal from parents’ home).

⁷⁵ See Dwyer, LIBERAL CHILD WELFARE POLICY AND ITS DESTRUCTION OF BLACK LIVES, *supra* note 48, at 212, 248, 252–53; see also Jami Vigil, *Ethics Issues Unique to Problem-Solving Courts*, 46 COLO. LAW. 23, 26 (2017); Hon. Karen Adam et al., *FDC Models – Parallel vs. Integrated*, NAT’L FAM. DRUG CT. 19, 25, 43 (Oct. 10, 2012), <http://www.cffutures.org/files/webinar-handouts/FDC%20Models%20-%20Final.pdf> [<https://perma.cc/2HG6-KTQP>] (noting FDC advocates’ recognition of ethical problems with the judge’s role, tension between goals for parent and goals for child, and lack of child-welfare accountability).

⁷⁶ OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, LITERATURE REVIEW: FAMILY DRUG COURTS 6 (2016) (noting “lack of rigorous study designs, small sample sizes, absence of comparison groups or use of inappropriate comparison

the family court judge who had herself initiated the program in her jurisdiction.⁷⁷ In other FDCs studied the judges operating the courts, who volunteer for the assignment, control whether their court is subjected to study, and if so by whom and according to what measures.⁷⁸ That also could skew research toward positive findings. In addition, these studies also focus on whether parents regain possession of offspring, not child-welfare measures.⁷⁹ And even as to that adult-centered aim, the results are not uniformly positive.⁸⁰

A smaller-scale development in the 1990s was resurrection of the prison nursery – a special unit in women’s prisons where inmates who give birth while incarcerated live with their babies until release.⁸¹ New York State has had a nursery at Bedford Hills Correctional Facility since 1901, but other states that created one in the early twentieth century later shut them down, citing child-safety concerns.⁸² Starting with Nebraska in 1994, legislatures in nine states have approved new prison-nursery units.⁸³ This revival occurred with no research support for any prediction of positive child-welfare effects, simply at the urging of advocates for women prisoners who claimed children would benefit by forming an attachment

groups, inclusion of only program graduates in the outcome data, and lack of appropriate statistical controls when calculating results”); *see also* Jody Brook et al., *Family Drug Court, Targeted Parent Training and Family Reunification: Did This Enhanced Service Strategy Make a Difference?*, 66 JUV. & FAM. CT. J. 35, 37 (2015) (“Much previous research on FDCs is limited in rigor.”); Holly Child & Dara McIntyre, *Examining the Relationships Between Family Drug Court Compliance and Child Welfare Outcomes*, 94 CHILD WELFARE 67, 72 (2015) (noting 140 of 673 parents who participated were not included in the study because of incomplete data); Elizabeth J. Gifford et al., *How Does Family Drug Treatment Court Participation Affect Child Welfare Outcomes?*, 38 CHILD ABUSE & NEGLECT 1659, 1663 (2014) (“Thirty children exited foster care for other reasons, including emancipation, runaway, or death. These children were excluded from analyses.”).

⁷⁷ *See* Judge Jeri B. Cohen et al., *Increasing Family Reunification for Substance-Abusing Mothers and Their Children: Comparing Two Drug Court Interventions in Miami*, 60 JUV. & FAM. CT. J. 11, 11 (2009) (“In 1999, Judge Cohen founded the Miami-Dade Dependency Drug Court . . .”).

⁷⁸ *See* Gifford et al., *supra* note 76, at 1660 (noting “the selection bias inherent in using only a small sample of courts that agree to release their data for a study”).

⁷⁹ *See* DWYER, LIBERAL CHILD WELFARE POLICY AND ITS DESTRUCTION OF BLACK LIVES, *supra* note 48, at 210–15, 235–55.

⁸⁰ *Id.*

⁸¹ *See* Naomi Schaefer Riley, *On Prison Nurseries*, NAT’L AFFS. (Spring 2019), <https://www.nationalaffairs.com/publications/detail/on-prison-nurseries> [<https://perma.cc/KT5Q-PVC4>].

⁸² *See* Leda M. Pojman, *Cuffed Love: Do Prison Babies Ever Smile?*, 10 BUFF. WOMEN’S L. J. 46, 52, 64–65 (2001). A more punitive attitude toward female criminals might also partly explain the closings. *Id.* at 65.

⁸³ *Id.* at 57–59.

to their mothers, and – more importantly for many legislators – the public treasury would benefit, because the program would reduce criminal recidivism among these women following their release from prison.⁸⁴ To substantiate the latter claim, advocates cited studies plagued by severe selection bias, comparing women who qualified for the program (no history of violent crime, short sentences) and completed it (remained focused on parenting, committed no rule infractions) to the rest of the prison population.⁸⁵ To substantiate the attachment claim, advocates began citing new research reports from a Columbia University nursing-school team, which studied the children who began life in the Bedford Hills prison.⁸⁶ That team had also been providing direct health services to the mothers in the program,⁸⁷ which likely generated sympathy for the

⁸⁴ See, e.g., Sarah Yager, *Prison Born*, THE ATLANTIC (July/Aug. 2015), <https://www.theatlantic.com/magazine/archive/2015/07/prison-born/395297/> [<https://perma.cc/K3E3-78KJ>].

⁸⁵ See Mary Woods Byrne et al., *Intergenerational Transmission of Attachment for Infants Raised in a Prison Nursery*, 12 ATTACHMENT & HUM. DEV. 375, 377–78 (2010) (“Recidivism, one aspect of maternal rehabilitation, has been the most commonly used measure of prison nursery program success. Relationship factors have received no empirical attention until the present study.”); Erin Jordan, *Prison Nurseries Cut Female Inmates’ Risk of Reoffending*, THE GAZETTE (Jan. 31, 2011, 6:52 AM), <https://www.thegazette.com/2011/01/31%20prison-nurseries-cut-female-inmates-risk-of-reoffending/> [<https://perma.cc/BH8N-QR8H>] (“Prison nurseries are gaining ground because of evidence they reduce recidivism, which saves the cost of housing repeat offenders.”). For critique of recidivism studies, see James G. Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. 465, 503–04 (2014).

⁸⁶ See, e.g., Anna T. Smyke et al., *Mental Health Implications for Children of Incarcerated Parents*, 63 LOY. L. REV. 405, 427–28 (2017); DIAMOND RSCH. CONSULTING LLC, PRISON NURSERY PROGRAMS: LIT REVIEW & FACT SHEET FOR CT-2012 4, https://www.diamondresearchconsulting.com/_files/ugd/f2f533_fc7cfce398854a27a5b2c65feb8a8efc.pdf [<https://perma.cc/3Y2G-6R8A>]; Sarah Abramowicz, *A Family Law Perspective on Parental Incarceration*, 50 FAM. CT. REV. 228, 234–35 (2012).

⁸⁷ See Byrne et al., *Intergenerational Transmission of Attachment for Infants Raised in a Prison Nursery*, *supra* note 85, at 379 (describing “weekly visits by a Nurse Practitioner . . . incorporating anticipatory guidance regarding infant development, responsive parenting, maternal life goals, and maternal coping with reentry issues using . . . interactive communication responsive to mothers’ expressed concerns” as well as feedback to the mothers on their interactions with their children); *id.* at 387 (“[O]ur NP interventionists provided individualized visits and follow-up contacts with tailored content focusing on specific moments of maternal-infant behavior, fostering each mother’s sensitivity to infant development, and encouraging reflective narration about the child as a unique person.”); *id.* at 388 (conceding that Byrne’s research could not distinguish any positive effects of her team’s therapeutic intervention from effects of the prison nursery *per se*); *Making Women’s Health a Priority*, COLUM. U. SCH. NURSING (Aug. 5, 2014), <https://www.nursing.columbia.edu/news/making-womens-health-priority> [<https://perma.cc/K2NU-9FR9>].

mothers and personal interest in showing the program successful, so that the mothers could continue to keep their babies with them. The reports grossly distorted outcomes. They claimed to find a normal rate of attachment among the children, but only after they excluded without explanation outcomes for *seventy percent* of the children involved in the study.⁸⁸ They also ignored the fact that many of the remaining thirty percent did not remain in their mothers' care after exiting the prison – that is, suffered disruption of any attachment to their mothers, which is traumatic and typically causes lasting psycho-emotional damage.⁸⁹

In the late 1990s and early 2000s, there was increased attention to the disproportionately large number of black children in foster care.⁹⁰ Non-governmental organizations seeking to reduce the foster-care population generally,⁹¹ along with advocates for parents and for racial minorities,⁹² charged that this was a product of pervasive racial bias among CPS employees (even though most of them in high-minority-race communities are themselves of minority race).⁹³ A “Race Disproportionality Movement” (“RDM”) began, and its proposed solutions, which many local agencies adopted, included capping numbers or percentages for black children in foster care and subjecting CPS caseworkers to race-sensitivity training.⁹⁴ Both measures would leave more black children in homes where maltreatment had been reported.⁹⁵ Authors of a report on the third

⁸⁸ Dwyer, *Jailing Black Babies*, *supra* note 85, at 507–17.

⁸⁹ *See id.*

⁹⁰ *See generally* Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009).

⁹¹ *See id.* at 880 (“The Casey-CSSP Alliance for Racial Equity, which heads the Movement, consists of five Casey foundations together with the Center for the Study of Social Policy”).

⁹² *See, e.g.*, Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 109, 110 (2008); Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW J. L. & SOC. POL’Y 303 (2006); Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172 (2003); Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 578–79 (1997).

⁹³ *See* DWYER, LIBERAL CHILD WELFARE POLICY AND ITS DESTRUCTION OF BLACK LIVES, *supra* note 48, at 203.

⁹⁴ Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, *supra* note 90, at 883–84, 888. Some still endorse such measures. *See, e.g.*, Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 253, 266 (2020).

⁹⁵ Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, *supra* note 90, at 885–86; *cf.* NAOMI SCHAEFER

iteration of a “National Incidence Study” of maltreatment (“NIS-3”) – a federal effort to calculate the extent of actual, as opposed to reported, child maltreatment – endeavored to support the racial-bias charge, by claiming to find that the actual rate of maltreatment was the same for black and white families.⁹⁶

In reality, NIS-3 did not find the same rates; it found higher rates of actual maltreatment in black families, but it had too small a sample and too primitive a methodology to declare that finding definitive.⁹⁷ Yet the reporters chose to assert instead that “NIS-3 found *no* race differences in maltreatment incidence.”⁹⁸ Ultimately, a fourth National Incidence Study (“NIS-4”), with a larger sample and more refined methodology, definitively concluded that maltreatment rate does in fact vary substantially by race, explicable in terms of the much higher poverty rate among blacks, to a degree matching the disparity in rate of placement in foster care.⁹⁹ In addition, no research has found a substantial number of *unwarranted* maltreatment reports or removals for any group of children, and all iterations of the NIS have found rates of actual maltreatment for all races substantially exceed rates of reported maltreatment.¹⁰⁰ All of this – that is, that black children disproportionately incur maltreatment in numbers far greater than substantiated reports reflect, and that there is no reason to believe many substantiated reports are actually false or frivolous – suggests that policies discouraging action to protect black children in

RILEY, NO WAY TO TREAT A CHILD: HOW THE FOSTER CARE SYSTEM, FAMILY COURTS, AND RACIAL ACTIVISTS ARE WRECKING YOUNG LIVES 95–99 (2021) (describing policy of New Orleans judge to require greater injury to black children in order to authorize their removal from an abusive home).

⁹⁶ Brett Drake & Melissa Jonson-Reid, *NIS interpretations: Race and the National Incidence Studies of Child Abuse and Neglect*, 33 CHILD. & YOUTH SERVS. REV. 16, 17 (2011) (quoting ANDREA J. SEDLAK & DIANE D. BROADHURST, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT, FINAL REPORT 4–30, 8–7 (1996)).

⁹⁷ See *id.* at 18, 18 fig.1.

⁹⁸ ANDREA J. SEDLAK & DIANE D. BROADHURST, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT, FINAL REPORT 8–7 (1996) (emphasis in original); see also *id.* at 4–29 (“there were no significant race differences in any category”); *id.* at 8–7 (“there are no overall race differences in the incidence of child abuse and neglect”).

⁹⁹ JESSE RUSSELL & TRACY COOPER, TECHNICAL ASSISTANCE BRIEF: THE NIS-4: WHAT IT ALL MEANS (AND DOESN’T MEAN) 5 (2011), <https://www.ncjfcj.org/wp-content/uploads/2012/03/nis-4-technical-assistance-brief.pdf> [<https://perma.cc/5M75-Y9PG>] (“NIS-4 found ‘strong and pervasive’ race differences in child maltreatment, with higher rates of maltreatment for Black children than for White and Hispanic children.”) (quoting FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT, *supra* note 29, at 9).

¹⁰⁰ See Drake & Jonson-Reid, *Defining and Estimating Child Maltreatment*, *supra* note 29.

response to maltreatment reports have caused black children disproportionately to incur repeated maltreatment. RDM was in remission for nearly a decade after NIS-4, but in 2020 it returned with a vengeance, inspired by the Black Lives Matter movement, urging abolition of the child protection system altogether.¹⁰¹ A 2019 study funded by Casey Family Programs of a new “race-blind removal decision making” pilot program appeared to give new credence to claims of race bias, and it led New York State to direct all local agencies to adopt the program, and Los Angeles to pilot the program itself, before the fatal flaws in Casey-funded study were revealed.¹⁰²

Another, ongoing race-related movement is a concerted effort by the National Association of Black Social Workers (“NABSW”), the Casey foundations, and other advocates to ensure that any black children who have been removed from parental custody because of maltreatment are placed with relatives rather than in non-relative foster care at any point when relatives are available.¹⁰³ This intensified after passage of federal legislation prohibiting race matching in foster care and adoption placements through the Inter-Ethnic Placement Act (“IEPA”).¹⁰⁴ Casey

¹⁰¹ See, e.g., Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT YOUTH & FAM. NEWS (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/6DG3-86ZX>]; Dettlaff & Boyd, *supra* note 94, at 267.

¹⁰² See *The power of wishful thinking: the case of “race-blind removals” in child welfare*, CHILD WELFARE MONITOR (July 27, 2021), <https://childwelfaremonitor.org/2021/07/27/the-power-of-wishful-thinking-the-case-of-race-blind-removals-in-child-welfare/> [<https://perma.cc/YF24-LBB6>] (explaining fundamental flaws in the study).

¹⁰³ See Dettlaff & Boyd, *supra* note 94, at 269–70; NAT’L ASS’N OF BLACK SOC. WORKERS, *KINSHIP CARE POSITION STATEMENT 4* (2003), https://cdn.ymaws.com/www.nabsw.org/resource/resmgr/position_statements_papers/kinship_care_position_paper.pdf [<https://perma.cc/5AXM-AUG6>] (“In order to preserve and enhance the vitality of African American families . . . services must not be ‘child-focused,’ but ‘family-centered.’”); *id.* at 6 (recommending “[e]xpand[ing] the definition of kin/relative in public policies to include the full range of blood relatives (including all cousins, regardless of degree.)”); *How can we improve placement stability for children in foster care?*, CASEY FAM. PROGRAMS (Oct. 3, 2018), <https://www.casey.org/strategies-improve-placement-stability/> [<https://perma.cc/E9AF-39PF>]; Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1624–25 (2001).

¹⁰⁴ See NAT’L ASS’N OF BLACK SOC. WORKERS, *POSITION STATEMENT: PRESERVING FAMILIES OF AFRICAN ANCESTRY 4* (2003), https://cdn.ymaws.com/www.nabsw.org/resource/resmgr/position_statements_papers/preserving_families_of_afric.pdf [<https://perma.cc/K2HR-QX7N>]; cf. Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, *supra* note 90, at 889 (noting RDM efforts to scale back IEPA

and NABSW oppose that Act, the latter group having an official policy statement that “a white home is not a suitable placement for Black children.”¹⁰⁵ Caseworkers can use kin preference heavily with black children in order to circumvent IEPA’s prohibition of racial discrimination among foster and adoptive parents.¹⁰⁶ The advocacy, using flawed research and mischaracterizing competent research, has been quite effective.¹⁰⁷ Most state and local government agencies have adopted an explicit or implicit policy of preferring kinship care for any black children removed from parental custody and treating any placement of black children with white non-relatives as an unfortunate temporary measure that should be disrupted as soon as a minimally-adequate relative becomes available, regardless of any attachment a child has formed with foster parents.¹⁰⁸

Advocates make sweeping claims that research shows placement with relatives is better all-around for children.¹⁰⁹ In reality, the measured

were indifferent to the evidence that it reduced the number of black children in foster care).

¹⁰⁵ NAT’L ASS’N OF BLACK SOC. WORKERS, *POSITION STATEMENT ON TRANS-RACIAL ADOPTIONS* 4 (2003), [https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_\(b\).pdf](https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_(b).pdf) [https://perma.cc/3AFM-QXE3].

¹⁰⁶ Cf. Rob Geen, *The Evolution of Kinship Care Policy and Practice*, 14 *FUTURE OF CHILD* 131, 135 (2004) (noting children in kinship care are “far more likely to be black than children in non-kin foster care.”).

¹⁰⁷ See Merav Jedwab et al., *Kinship care first? Factors associated with placement move in out-of-home care*, 115 *CHILD. & YOUTH SERVS. REV.* 5 (2020) (“African American children, compared to other races, had higher odds of being placed in kinship care”); Geen, *supra* note 106, at 134 (“Almost all states report giving preference to and actively seeking out kin when children cannot remain with their biological parents.”).

¹⁰⁸ See Jedwab et al., *supra* note 107, at 5 (“African American children, compared to other races, had higher odds of being placed in kinship care”); Geen, *supra* note 106, at 134 (“Almost all states report giving preference to and actively seeking out kin when children cannot remain with their biological parents.”).

¹⁰⁹ See, e.g., *How can we improve placement stability for children in foster care?*, *supra* note 103 (“A systematic review of research studies on kinship care found that the behavior, mental health, and well-being of children placed in kinship care is better than that of children placed in traditional/non-relative foster care, and that children placed with relatives are least likely to experience placement instability.”); Leonard Edwards, *Relative Placement: The Best Answer for Our Foster Care System*, 69 *JUV. & FAM. CT. J.* 55, 58 (2018) (“Research has demonstrated that children placed with their kin fare better than those placed in foster care.”); Elynn Jameson, Comment, “Best” Interests and “Bad” Parents: *Immigration and Child Welfare Through the Lens of SIJS and Foster Care*, 168 *U. PENN. L. REV.* 513, 520 (2020) (“Children removed from their homes fare far better in kinship care than in foster care with strangers by every metric and it has been lauded as the best solution for the notoriously problematic foster care system.”); JOINT LEGIS. AUDIT & REV. COMM’N, *IMPROVING*

outcomes are quite mixed,¹¹⁰ and the studies have serious design flaws—in particular, falsely assuming the two populations (children in kinship care and children in non-relative foster care) are comparable, even though there is no random assignment.¹¹¹ Children placed in non-relative care are

VIRGINIA'S FOSTER CARE SYS. 28 (2018), <http://jlarc.virginia.gov/pdfs/reports/Rpt513-2.pdf> [<https://perma.cc/X7TQ-DY9B>] [hereinafter JLARC Report] (“National research shows that, compared to children in other placements, children placed with relatives tend to experience improved outcomes”); Roberts, *Kinship Care and the Price of State Support for Children*, *supra* note 103, at 1625.

¹¹⁰ See, e.g., Sarah A. Font, *Are children safer with kin? A comparison of maltreatment risk in out-of-home care*, 54 CHILD. & YOUTH SERVS. REV. 20, 22 (2015) (“children in formal kin placements were found to have significantly higher exposure to physical violence when compared with children in non-relative care (Litrownik et al., 2003). Formal kin caregivers have also been found to use harsher disciplinary techniques... [and] scored significantly higher on the Child Abuse Potential Index as compared with non-relative foster parents.”); *id.* at 24 (finding from statewide sample of nearly 50,000 children not in parental custody that “about 14.5% of IKC [informal kinship care] placements experience a maltreatment investigation, a rate at least 60% higher than NRFC [non-relative foster care] or FKC [formal kinship care] placements... FKC and NRFC placements are approximately equally likely to experience an investigation of an OHP [out-of-home placement] caregiver”); Sarah A. Font, *Kinship and Nonrelative Foster Care: The Effect of Placement Type on Child Well-Being*, 85 CHILD DEV. 2074, 2074 (2014) (finding, from national sample of 1,215 children, negative effect of kin placements on reading scores, no difference in child health, and mixed results on math and cognitive skills test scores and behavioral problems); Sarah A. Font, *Is higher placement stability in kinship foster care by virtue or design?*, 42 CHILD ABUSE & NEGLECT 99, 108 (2015) (noting “better performance among NFRC (non-relative foster care) placements with high risk children.”); see also *id.* (“All differences, even in the full sample, decrease substantially or disappear entirely after the first 2 months.”).

¹¹¹ See, e.g., Font, *Is higher placement stability in kinship foster care by virtue or design?*, *supra* note 110, at 108; Marc Winokur et al., *Kinship care for the safety, permanency, and well-being of children removed from the home for maltreatment*, 2014 COCHRANE DATABASE SYSTEMATIC REVIEWS., no. 1, at 20, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7386884/pdf/CD006546.pdf> [<https://perma.cc/XY2K-5KN3>] (“the lack of a baseline measurement of initial behavioural functioning makes ambiguous the conclusion that children in foster care have lower levels of current behavioural functioning. Furthermore, caregiver reports may be biased because foster parents have more incentive to report behavioural and mental health issues, whereas relatives are more apt to view the behaviour as acceptable and thus less likely to report it as problematic.”); *id.* (noting “the pronounced methodological and design weaknesses of the included studies and particularly the absence of conclusive evidence on the comparability of groups. It is clear that researchers and practitioners must do better to mitigate the biases that cloud the study of kinship care.”); *id.* (bemoaning “the weak standing of quantitative research on kinship care (Cuddeback 2004). Specifically, the “differences between the children who enter kinship care and those who enter nonkinship care” lead to a lack of confidence regarding the comparability of groups and the subsequent lack of control over contaminating events such as family preservation services (Barth 2008b, p. 218).

typically from more deeply fractured biological families and much harder for anyone to care for because of their pre-existing individual characteristics (e.g., disability, health problems, behavioral disorders) and pre-placement histories (e.g., sexual and other abuse by parents, prior foster care episodes).¹¹² Relatives step forward more often to take in children who are less challenging.¹¹³ Some children, though not unusually challenging, are in non-relative care because the agency was not able to identify a suitable relative at the time of removal or qualify someone identified quickly.¹¹⁴ But in those cases, the agency is likely to disrupt the

In general, the included studies also have unclear to high risks of performance, detection, reporting, and attrition bias, which compromise the tenability of the findings from the systematic review.”); Eun Koh & Mark F. Testa, *Propensity Score Matching of Children in Kinship and Nonkinship Foster Care: Do Permanency Outcomes Still Differ?*, 32 SOC. WORK RSCH. 105, 106 (2008).

¹¹² See Koh & Testa, *supra* note 111, at 106 (“Differences in the characteristics of kin and nonkin placements, which many studies have demonstrated, make such arguments plausible. Children in kinship settings are different from children in nonkinship settings in many characteristics such as age, race, and disability (Beeman et al., 2000; Berrick, Barth, & Needell, 1994; Chipungu et al., 1998; Grogan-Kaylor, 2000).); *id.* at 109 (“Children in nonkinship placements are more likely to have been removed because of abuse or neglect and to have entered out-of-home care at later years compared with children in kinship foster care.”); Jedwab et al., *supra* note 107; Carolien Konijn et al., *Foster care placement instability: A meta-analytic review*, 96 CHILD. & YOUTH SERVS. REV. 483 (2019); Font, *Is higher placement stability in kinship foster care by virtue or design?*, *supra* note 110, at 100 (“today’s children generally only enter NRFC if a kinship placement is not available.”); *id.* at 101; *id.* at 105; *id.* at 108 (“children who enter kinship care have better cognitive scores, fewer behavior problems, lower rates of disability, and fewer biological family risk factors than children entering non-relative foster care (e.g., Font, 2014).”); Font, *Are children safer with kin?*, *supra* note 110, at 21–22 (“Children with more severe maltreatment histories may have more difficulty attaching to a new caregiver, and may exhibit more behavioral and mental health problems than children with no or fewer past experiences of maltreatment. . . . [and] may be less willing to disclose when the abuser is a relative. Additionally, case-workers may make fewer visits to kinship foster homes than non-relative foster homes thus leaving less opportunity for maltreatment to be identified or disclosed.”); Geen, *supra* note 106, at 135 (noting children in kinship care are more likely to have been removed because of neglect rather than abuse, parent-child conflict, or behavioral problems).

¹¹³ See, e.g., JLARC Report, *supra* note 109, at 29 (“Of 161 local department caseworkers who responded to JLARC’s survey, about half said that, in the past 12 months, they had asked relatives to be foster parents, and relatives had ultimately declined. The most commonly cited reasons for declining were (1) the high needs of the child in foster care, such as challenging behavioral or medical needs, (2) an inability or unwillingness to go through the foster parent approval process, (3) an inability to meet the criteria for approval, and (4) an inability to assume the financial responsibilities of caring for the child.”).

¹¹⁴ See Edwards, *supra* note 109, at 63 (“Criminal background checks seemed to take months. Finding fathers was a struggle and some agencies simply did not try to

placement when any minimally-capable relative does appear, and then the children will be treated as evidence that non-relative placements are inferior because less stable.¹¹⁵ The policy causes instability, then the instability is cited to support the policy.

Currently, the Family First Act pushes states to leave children in homes with parents reported for maltreatment, shifting funds from foster care to maltreatment-prevention services.¹¹⁶ The message to social workers is that they could safely leave at-risk children in parental custody far more often, if only they provided parents more services. Certain underlying premises are crucial, but dubious – namely, that services exist that are effective in preventing maltreatment incipience or recurrence (which most often stems from chronic and severe substance abuse and/or mental illness) and that agencies have simply lacked information or money to provide those services.¹¹⁷ The Act restricts use of additional prevention money to services supported by substantial research—that is, demonstration of their effectiveness, but without a clear and concrete statement of what they must be effective in accomplishing.¹¹⁸ The Act only broadly refers to mental health, substance abuse prevention, parenting skills, and “important child and parent outcomes.”¹¹⁹ This

locate unmarried fathers. Searches for relatives often did not start until the father could be located, and many relatives were reluctant to engage in the process during the reunification process, hoping that the custodial parent would succeed in reuniting with the child.”).

¹¹⁵ See Jedwab, *supra* note 107, at 8 (“In some cases, a child could enter care because a kinship caregiver had not been screened yet, and when the family is approved, the child will be moved into the kinship care placement.”); Font, *Is higher placement stability in kinship foster care by virtue or design?*, *supra* note 110, at 105 (finding from statewide multi-year sample that “NRFC placements are... less likely to be intended as long-term placements). Sometimes the agency will even remove a child from a non-relative placement in order to shift the child to a *different non-relative* placement, in order to prevent adoption by the (typically different-race) foster parents with whom the child has lived since initial removal, because its steadfast objective when a child cannot safely return to birth parents is placement with biological relatives. See, e.g., Amended Complaint at 1, A.R.L. v. Norfolk Dep’t Hum. Servs., No. 4:20-CV-00110 (E.D. Va. July 13, 2020) [hereinafter A.R.L. Complaint]. This, too, will register as placement instability’ with non-relatives.

¹¹⁶ See Fabiola Villalpando, *Family First Prevention Services Act: An Overhaul of National Child Welfare Policies*, 39 CHILD. LEGAL RTS. J. 283, 283 (2019).

¹¹⁷ See Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, *supra* note 38, at 424–26, 430–32.

¹¹⁸ See 42 U.S.C § 671(d)(4)(C).

¹¹⁹ See 42 U.S.C § 671(d)(4)(C)(v). Ultimately, funded prevention services must be “well-supported” by “evidence,” meaning “superior to an appropriate comparison practice using conventional standards of statistical significance... in validated measures of important child and parent outcomes... as established by... at least two studies that... were rated by an independent systematic review ... well-designed and well-executed [and] were rigorous random-controlled trials (or, if not available,

invites debate about the design, validity, proper interpretation, and significance of research touted in favor of particular programs. Already there are signs that bad research will carry the day.¹²⁰

In sum, the past several decades of child welfare policy have been marked by a succession of new approaches to managing parents and children in response to maltreatment reports, aimed at preserving parents' legal status and effecting either return of children who have been removed or transfer to parents of children taken into state custody at birth. These strategies reflect hostility to adoption – especially adoption of black children by white caregivers – regardless of a child's age or existing relationship to the parents. Proponents have made empirical claims resting on bad research and subsequently undermined by good research.

III. VIEWING THE PROBLEM THROUGH A LENS OF EXPERIMENTATION AND RESEARCH ETHICS

The foregoing description of various programmatic responses to child maltreatment illustrates several problems relating to social-service experimentation and the social-science research used to promote it. These problems infect other social policy realms as well.

A. Inadequate Pre-Implementation Review

As shown in Part II, new ideas for interventions into intimate aspects of individuals lives are implemented broadly without reliable evidentiary basis for their promises. These policies have life-altering impact on persons incapable of objecting, and valid ex-post research concludes the innovation does not generate the desired outcome and instead inflicts harm.¹²¹ Certainly, social service agencies should be attentive to new

studies using a “rigorous quasi-experimental research design”).” 42 U.S.C. § 671(d)(4)(C). The Act directs DHHS to provide additional guidance, but it offered no more specificity regarding types or objectives of services than the legislation. *See* U.S. ADMINISTRATION ON CHILDREN, YOUTH, AND FAMILIES, ACYF-CB-PI-18-09 (2018), <https://www.cwla.org/wp-content/uploads/2018/12/ACYF-CB-PI-18-09-State-FFPSA-Prevention-PI.pdf> [<https://perma.cc/QHZ7-4YJ6>].

¹²⁰ *See, e.g.,* Marie Cohen, *The misuse of data to support preferred programs: the case of family resource centers*, CHILD WELFARE MONITOR (Sept. 21, 2021), <https://childwelfaremonitor.org/2021/09/21/the-misuse-of-data-to-support-preferred-programs-the-case-of-family-resource-centers/> [<https://perma.cc/J68Y-J55F>]; Marie Cohen, *Homebuilders program, never proven effective for family preservation, approved regardless by Title IV-E Clearinghouse*, CHILD WELFARE MONITOR (Apr. 8, 2020), <https://childwelfaremonitor.org/2020/04/08/homebuilders-program-never-proven-effective-for-family-preservation-approved-regardless-by-title-iv-e-clearinghouse/> [<https://perma.cc/U7CR-3D7Y>].

¹²¹ *See supra* Part II.

approaches that might be better, but novel medical interventions with far less impact would be subject to much greater ex-ante strictures, even if undertaken by public agencies without profit motive. Social-service innovations are simply not recognized as the human-subject experiments they truly are. They transform overnight from some advocacy organization's theory to the new "best practice" and implemented widely, often on the wings of early program evaluations commissioned by the advocacy organizations themselves.¹²²

Some innovations in social-service practice do require formal pre-approval by government officials, at least in some states.¹²³ For example, before the invention and proliferation of DR (channeling supposedly less serious cases to an assessment-only track), state laws required investigation of all screened-in reports, so legislatures had to amend statutes to permit local agencies to forego investigation in some cases.¹²⁴ Prison nurseries have mostly required legislation, at least for additional funding to retrofit prison space.¹²⁵ Some innovations, such as IFPS, might already have been within agency operational discretion but, in some jurisdictions or in order to make it proliferate, required new funding or redirection of existing funding, and therefore legislation at the federal and/or state level.¹²⁶ Any such legislation would go through the normal vetting process, including referral to a committee that would hold public hearings at which interested parties could present objections.¹²⁷ Other innovations might require only change to a state's administrative code, but then "notice and comment" should precede decision making.¹²⁸

Even when there is such a formal approval process by a deliberative government body, the value of vetting could vary considerably, depending

¹²² See *supra* notes 50–120 and accompanying text.

¹²³ See, e.g., Cynthia Godsoe, *Just Intervention: Differential Response in Child Protection*, 21 J.L. & POL'Y 73, 74, 77 (2012).

¹²⁴ *Id.*

¹²⁵ See, e.g., H.B. 258, 150th Gen. Assemb. (Del. 2020); JUDICIARY COMM. JOINT FAVORABLE REPORT ON HB-5569, AN ACT ESTABLISHING A CHILD NURSERY FACILITY AT THE CONNECTICUT CORRECTIONAL INSTITUTION, NANTIC (Conn. 2014).

¹²⁶ See, e.g., WASH. REV. CODE ANN. § 74.14C.040 (West 1995).

¹²⁷ See H.R. Doc. No. 110-49, at 9, 13–14 (2007).

¹²⁸ See, e.g., 20 VA. ADMIN. CODE § 40-201-40 (2018) (administrative code provision relating to foster care placements that is a mix of federal mandate (no race matching), state mandates (e.g., search for relatives), and agency policy (e.g., "place the child in as close proximity as possible to the birth parent's or prior custodian's home"); see also *Implement Foster Parent Bill of Rights and Reenforce the Role of Foster and Adoptive Parents Action*, VA. DEP'T SOC. SERVS., <https://www.townhall.virginia.gov/l/ViewAction.cfm?actionid=5383> [<https://perma.cc/J6WA-8DBC>] (last visited Dec. 28, 2021) (indicating proposed addition of Foster Parent Bill of Rights to administrative code is subject to Virginia APA).

on how prominent a proposal is on a particular legislature's agenda, the extent of public awareness, and who has the inclination and resources to participate.¹²⁹ Typical legislators are themselves policy generalists, unlikely to have expertise in a particular area such as child welfare, and few are trained or naturally sophisticated consumers of scientific research.¹³⁰ Federal legislators and congressional committees have staffers with somewhat deeper substantive knowledge on many issues, but expertise in social services for vulnerable populations might not be high on a hiring-priority list, and one legislator who does have expertise can be outvoted by two who lack expertise or do not value expertise.¹³¹ If one imagines Congress rather than the FDA deciding whether drug manufacturers may commence human-subject clinical trials with new vaccinations or pharmaceuticals, one can readily perceive the unreliability of legislative deliberation for rational decision making as to complex human service matters, especially if any lobbying and public comment are heavily lopsided in favor of approval. State legislators are less likely than federal legislators to have expertise within their staff, given their smaller office budgets, yet they are at least as susceptible to persuasion by wealthy constituents and campaign contributors.¹³²

In addition, no ethical code like that for medicine governs experimentation in provision of public benefits and services.¹³³ Omnibus legislation might require a fiscal or environmental impact for many

¹²⁹ See Drutman & Teles, *supra* note 15 (“Given limited time and nearly unlimited demands, policymakers have to choose who and what to pay genuine attention to. The loudest, most insistent voices have an advantage.”).

¹³⁰ See Craig Volden and Alan E. Wiseman, “Members of Congress are specializing less often. That makes them less effective.” *The Washington Post* (Sept. 17, 2020).

¹³¹ *Cf. See* Drutman & Teles, *supra* note 15 (describing a “pattern of diminished in-house expertise... throughout government”); Ruth Mayne et al., *Using evidence to influence policy: Oxfam’s experience*, 4 PALGRAVE COMM’N 1, 2–3 (2018) (describing cognitive shortcuts and indifference to evidence among legislators); David Eads, *Too Many Politicians Misuse and Abuse Crime Data: When sloppily cherry-picking isolated numbers, they disrespect our intelligence and our democracy*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/opinion/politics/giuliani-trump-chicago-data-crime.html> [<https://perma.cc/NBN8-2MXE>] (describing some politicians’ indifference to empirical research in promoting crime policy).

¹³² See Daniel E. Bergan, *Does Grassroots Lobbying Work?: A Field Experiment Measuring the Effects of an e-Mail Lobbying Campaign on Legislative Behavior*, 37 AM. POLS. RSCH. 327, 329 (2009); *State Legislators: Who They Are and How to Work with Them: A Guide to Oral Health Professionals*, NCSL.ORG (Mar. 2018), https://www.ncsl.org/Portals/1/HTML_LargeReports/OralHealth_3.htm [<https://perma.cc/MRL5-PRMF>].

¹³³ See, e.g., *Code of Medical Ethics: Research & innovation*, AMA, <https://www.ama-assn.org/delivering-care/ethics/code-medical-ethics-research-innovation> [<https://perma.cc/J39P-N6B8>] (last visited Oct. 24, 2021).

laws,¹³⁴ but none requires a scientifically-rigorous review of evidence informing judgments about likely impact on vulnerable persons. With respect to child welfare, the simplistic notion of “family preservation” is appealing to many, and legislators have repeatedly accepted claims by advocates for parents and for poor and minority-race communities that research shows the latest innovation will reduce state spending on foster care, child protection agencies, and other costs of parental struggles, while also improving children’s lives.¹³⁵

Public comment provides a potential mechanism for injecting greater expertise and ethical constraint, but it might come too late if lobbyists have already persuaded legislators or agency heads, and any impact is likely to depend on who shows up to hearings and how capable state agency administrators are.¹³⁶ Non-autonomous persons, whether children or mentally-incompetent adults, themselves almost never attend hearings or prepare presentations to counteract lobbying by powerful organizations like Casey Family Programs or by advocates for one or another group of adults, such as incarcerated women or poor and minority-race parents. If children do attempt to participate in policy making, they are likely to receive patronizing smiles or outright dismissal.¹³⁷ Thus, whether there is any input on their behalf that commands attention depends on existence of organizational or individual advocates for them that learn about proposed legislation or rulemaking and have the resources to lobby or to attend hearings and make an effective presentation.

¹³⁴ See, e.g., *Fiscal Impact Review*, VA. DEP’T HOUS. CMTY. DEV., <https://www.dhcd.virginia.gov/fiscal-impact-review> [<https://perma.cc/BX6P-KDY7>] (last visited Oct. 24, 2021); VA. CODE ANN. § 10.1-1188(A) (West 2021) (“All state agencies, boards, authorities and commissions or any branch of the state government shall prepare and submit an environmental impact report to the Department on each major state project.”).

¹³⁵ See Elizabeth Bartholet, *Thoughts on the Liberal Dilemma in Child Welfare Reform*, 24 WM. & MARY BILL RTS. J. 75, 725–26 (2016).

¹³⁶ See Daniel M. Butler & David R. Miller, *Does Lobbying Affect Bill Advancement? Evidence from Three State Legislatures*, POL. RSCH. Q. (forthcoming 2022) (manuscript at 2), available at <https://journals-sagepub-com.proxy.mul.missouri.edu/doi/epub/10.1177/10659129211012481>; NAT’L CONF. STATE LEGISLATURES, STATE LEGISLATORS: WHO THEY ARE AND HOW TO WORK WITH THEM 1 (Apr. 2018), http://www.ncsl.org/Portals/1/Documents/cyf/ChildSupportProfessionals_v02.pdf [<https://perma.cc/3FWB-CVCY>] (“Because of the variety and complexity of the policy issues before them, state legislators often rely on their staff, researchers, experts in the field, lobbyists, practitioners and community members to gather information and develop policies . . .”).

¹³⁷ See Peter Wade, *Sen. Dianne Feinstein Condescends to Kid Activists Touting Green New Deal*, ROLLING STONE (Feb. 23, 2019, 11:36 AM), <https://www.rollingstone.com/politics/politics-news/feinstein-green-new-deal-activists-799240/> [<https://perma.cc/3YPD-HC9E>].

Social service agency officials presumably have greater expertise in their field than do legislators, but they too might not be sophisticated consumers of social science, nor able to maintain a clear and consistent focus on the needs of the most vulnerable – in particular, if doing so is likely to be more expensive, require more staff, increase caseloads, and trigger complaints from other groups. Compared to the medical sector, the social-services sector generally has far less sophisticated and more ideologically-driven leaders and employees.¹³⁸ It also has a substantial problem of non-accountability to non-autonomous persons, because conflicts of interest often arise between those persons and their caretakers, with whom agencies more directly deal, as with child protection services.¹³⁹

In addition, agency administration incentives differ between medical and social service sectors.¹⁴⁰ The FDA does not itself produce or administer new drugs or treat patients; its performance is judged by the accuracy and objectivity of its screening function.¹⁴¹ It seems more likely to generate new funding for itself by identifying problems with new products, thereby demonstrating the agency's value, than it is by creating a perception that innovation always promises progress. In contrast, social service agency officials often have self-interested reasons to approve new interventions. They will administer the intervention, and doing so creates a promise of improved agency performance that could stave off a legislative or public verdict of ineptitude—in particular, if the legislature has signaled new expectations.¹⁴² It might open new streams of funding

¹³⁸ See RILEY, NO WAY TO TREAT A CHILD, *supra* note 95, at 146–50 (describing the very low status of social work departments within universities, very low average academic ability of social work students, and ideological nature of social worker training); STOESZ, *supra* note 33, at 102–20 (discussing dominance of adult-focused, anti-science, social-justice ideology in social work schools).

¹³⁹ See GELLES, OUT OF HARM'S WAY, *supra* note 33, at 75–93 (showing that child protection workers generally view parents rather than children as their clients and deal directly primarily with the parents, whom they are charged to rehabilitate).

¹⁴⁰ Compare *The FDA's Drug Review Process: Ensuring Drugs are Safe and Effective*, U.S. FOOD & DRUG ADMIN. (Nov. 24, 2017), <https://www.fda.gov/drugs/information-consumers-and-patients-drugs/fdas-drug-review-process-ensuring-drugs-are-safe-and-effective> [https://perma.cc/CL95-6UQK], with Yue Stella Yu, 'It's emotionally exhausting': Tennessee's Children's Services workers express frustration in workload, leadership, NASHVILLE TENNESSEAN (Aug. 5, 2021 4:48 PM), <https://www.tennessean.com/story/news/2021/08/05/tennessee-department-of-childrens-services-workers-express-frustration/5497014001/> [https://perma.cc/W9HR-XYCZ].

¹⁴¹ See *id.*

¹⁴² See, e.g., Yu, *supra* note 140 (reporting that caseworkers are under pressure from the agency head to close child protection cases quickly, even if that means

for the agency or give the director opportunity for career advancement.¹⁴³ There is also a self-policing function in medicine that might not exist in social services; drug companies lose customers and get sued if their products have adverse consequences.¹⁴⁴

Further, as discussed in Part II, many local social service agencies have substantial discretion to adopt new practices independently, without any public input or legislative approval.¹⁴⁵ One might hope these specialized agencies' supposed expertise and commitment to vulnerable persons would prevent dangerous experimentation, but both virtues are demonstrably more theoretical than real. Local human service agencies are generally staffed by graduates of weak, ideology-dominated training programs.¹⁴⁶ A common pattern in child welfare is for parent-custody-focused forces like the Casey Foundation to target sympathetic local agencies, sell them on a new approach, offer assistance of various kinds, commission and direct research to support the new approach, and then urge legislators to mandate state-wide or even nation-wide adoption of it.¹⁴⁷ The only checks on such innovations might be the very remote possibilities of successful constitutional challenge by some adults displeased with decisions adverse to *them* (e.g., applicants for foster care or adoption who somehow find out they were discriminated against), or

returning children to unsafe homes, to satisfy a legislative mandate to reduce worker caseloads).

¹⁴³ For example, Congress recently authorized federal funding for state child welfare agencies to create and operate a “prevention-focused infrastructure” to avoid removal of children from parental custody. *See Family First Legislation*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/human-services/family-first-updates-and-new-legislation.aspx> [<https://perma.cc/UGW2-VDGG>] (last visited Mar. 6, 2022).

¹⁴⁴ *Cf. DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (holding state agency not subject to constitutional tort liability for harm to children by parents).

¹⁴⁵ *See* discussion *supra* Part II (discussion of FDCs, IFPS, race-sensitivity training, foster-care race quotas, and kin preference).

¹⁴⁶ *See* RILEY, NO WAY TO TREAT A CHILD, *supra* note 95, at 146–50; STOESZ, *supra* note 33, at 102–20; JILL RIVERA GREENE ET AL., ASSESSMENT OF NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES SAFETY PRACTICE AND INITIATIVES 2, 5 (2017), <https://www1.nyc.gov/assets/acs/pdf/testimony/2017/NYCACSAssessmentReportMay2017.pdf> [<https://perma.cc/QQ4A-C7L>] (acknowledging extensive involvement of Casey staff in the study).

¹⁴⁷ *See* Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, *supra* note 35, at 576–77; Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, *supra* note 90, at 880–84; *see* *The power of wishful thinking: the case of “race-blind removals” in child welfare*, *supra* note 102 (explaining fundamental flaws in a study Casey used to promote this innovation).

else personal consequences for agency officials or caseworkers if things go badly – for example, firing or, in rare cases, criminal prosecution.¹⁴⁸

The danger of governmental policy making without public comment is especially great when it relates to non-autonomous persons. Those left behind closed doors with guardians will not be heard from. Those who come to agency attention after maltreatment and are taken into state custody (e.g., foster care) are in a situation similar to prisoners upon whom medical experimentation has been done.¹⁴⁹ State agencies can handle those persons' cases in untested ways based on speculation about effects, without awareness by an appropriate independent proxy for the dependent persons or of the community, and/or without anyone having authority to object.¹⁵⁰ For children, this can include choice of placement (e.g., kin care vs. non-kin foster care), nature of services provided and of interactions with family members, and prolongation of foster care rather than changing the permanency plan to adoption.¹⁵¹ With prison nursery programs, states

¹⁴⁸ See, e.g., *Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 817 (1977) (unsuccessful challenge to process for removing children from foster homes); Howard Fischer, *Appeals Court: Fired child welfare workers aren't owed jobs back*, ARIZ. DAILY SUN (Dec. 27, 2016), https://azdailysun.com/appeals-court-fired-child-welfare-workers-arent-owed-jobs-back/article_fe076259-143a-5aab-b0df-a4f0e5fed147.html [https://perma.cc/S3VN-TXKF]; Alejandra Reyes-Velarde, *Charges dismissed against social workers linked to Gabriel Fernandez's killing*, LOS ANGELES TIMES (July 16, 2020, 10:59 AM), <https://www.latimes.com/california/story/2020-07-15/charges-against-the-social-workers-linked-to-gabriel-fernandez-killing-will-be-dropped> [https://perma.cc/4UC5-BDRX].

¹⁴⁹ Cf. Matt Lamkin & Carl Elliott, *Involuntarily Committed Patients As Prisoners*, 51 U. RICH. L. REV. 1041, 1042 (2017) (“Like prisoners, involuntarily committed patients are confined against their will, rendering them isolated and dependent on institutional authorities.”).

¹⁵⁰ See, e.g., A.R.L. Complaint, *supra* note 115 (alleging public foster care agency violated child's due process rights by disrupting long-term placement and attachment relationship with non-relative foster parents, with no justification but internal policy to prefer kin placement, and without any administrative process or possibility of judicial review).

¹⁵¹ See Rachel Sheffield, *A Place to Call Home: Improving Foster Care and Adoption Policy to Give More Children a Stable Family*, JOINT ECON. COMM. (Sept. 9, 2020), <https://www.jec.senate.gov/public/index.cfm/republicans/2020/9/a-place-to-call-home-improving-foster-care-and-adoption-policy-to-give-more-children-a-stable-family> [https://perma.cc/G9YG-KTTR]; Amy Harfeld, *Twenty Years of Progress in Advocating for a Child's Right to Counsel: There is much work to be done before the promise of full legal rights for dependent children is realized*, ABA (Mar. 22, 2019), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2019/spring2019-twenty-years-of-progress-in-advocating-for-a-childs-right-to-counsel/> [https://perma.cc/MXH4-6QCA] (“Current law sets the federal floor to require only a non-attorney guardian ad litem (GAL) or CASA to ‘represent’ the child by conveying to the court what the GAL or CASA deems to be in the child's

literally make children prison inmates – living in a prison 24/7 potentially for two or three years – unable to leave, yet there is no appointed advocate for the child nor any rule requiring an assessment of whether residing in prison is in the child’s best interests.¹⁵² Naturally, state agencies hope their experiments will be only beneficial, but Part II showed that hope often has no empirical foundation and ultimately proves false.

Moreover, state decision makers generally face neither political accountability nor legal liability for unwise programmatic innovation. The persons most likely to be harmed are generally disempowered, not likely to discern and formally complain about defects inherent in a program or process that harmed them. In any event, state actors are protected from suit by state-action doctrine, qualified immunity and in many jurisdictions, low standards of care.¹⁵³ They incur liability, if ever, only when caseworkers are deliberately indifferent to abuse by foster parents, not for any failed family-preservation innovation.¹⁵⁴

A final problem regarding implementation of novel ideas in social services is lack of piloting – that is, an incremental approach that begins with just a few, low-risk cases and expands only after reliable verification of the safety and welfare of subjects and assessment of whether the intervention is effective.¹⁵⁵ Piloting of a sort has occurred with some innovations, but with others there has been a blanket statutory command or authorization at the federal or state level. Then many states or localities

best interest. ... Only representation by an attorney properly allows for critical court functions such as filing motions, appeals, subpoenas, and objections, and examining witnesses.”).

¹⁵² See Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, *supra* note 38, at 470–76. In the rare case when a father has tried to secure custody of a child, he has been refused. See *Apgar v. Beuter*, 347 N.Y.S.2d 872, 875 (N.Y. Sup. Ct. 1973) (“even the father does not have the power under this statute to countermand the decision of an inmate mother to keep her child”).

¹⁵³ See generally Jarod Bona, *The State Action Doctrine for Federal Constitutional Claims*, RGLOBAL (Aug. 26, 2020), <https://www.irglobal.com/article/the-state-action-doctrine-for-federal-constitutional-claims/> [https://perma.cc/VN58-SQB7]; Madeleine Carisle, *The Debate Over Qualified Immunity Is at the Heart of Police Reform. Here's What to Know*, TIME (June 3, 2021, 6:35 PM), <https://time.com/6061624/what-is-qualified-immunity/> [https://perma.cc/43SQ-LGN8].

¹⁵⁴ See, e.g., *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010); Cf. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 189 (1989) (holding state agency not subject to constitutional tort liability for harm to children by parents following CPS return of repeatedly-abused child to parent custody).

¹⁵⁵ See, e.g., Godsoe, *supra* note 123, at 74–75.

adopt the new approach wholesale for all cases or a large subset of cases.¹⁵⁶ In the pharmaceutical realm, this simply would not be allowed.¹⁵⁷

That the changes in child welfare policy described in Part II are implicitly recognized as experimental is evidenced by the fact that substantial research is typically done on them after the fact in an effort to demonstrate or objectively assess their effectiveness.¹⁵⁸ Subparts B through E below articulate the several specific problems with that research.

B. Entities with Self Interest in Outcomes Conduct the Research

Three types of incentives compromise the objectivity of researchers studying social-service delivery. What influences a particular social scientist might depend to some extent on institutional location; academic researchers are theoretically more independent than researchers working for entities that dictate the content and objectives of research – for example, some foundations, government agencies, commercial operations, or policy institutes.¹⁵⁹ But all face certain temptations to result-driven work.¹⁶⁰ One is the desire to reach the “right” conclusions in order to secure continued employment or future grants.¹⁶¹ A second is personal bias, a desire to demonstrate positive results of a program one favors

¹⁵⁶ See, e.g., Godsoe, *supra* note 123, at 74–75 (2012) (noting that some states first piloted differential response in a few counties whereas others adopted it wholesale at the outset).

¹⁵⁷ See *infra* notes 238–44 and accompanying text.

¹⁵⁸ See *supra* Part II.

¹⁵⁹ Cf. Gläser et al., *supra* note 8 (noting danger that “demands from employers” or “allegiance-turned-prejudice” compromise objectivity of research); Maria Zagorulya, *The Tough Choice of a Life Scientist: Industry vs. Academia*, J. YOUNG INVESTIGATORS (Nov. 1, 2015), <https://www.jyi.org/2015-november/2017/3/22/the-tough-choice-of-a-life-scientist-industry-vs-academia> [https://perma.cc/Q84Y-R7QQ] (“Academic researchers benefit from significant freedom when choosing their research topics, approaches, and collaborators, while industrial scientists have significantly less say in the direction of their work.”); *Think Tanks and Policy Institutes*, CITIZEN SOURCE, <https://www.citizensource.com/Opinion&Policy/ThinkTanks.htm> [https://perma.cc/E9SD-EEZB] (last visited Mar. 6, 2022) (identifying the political agendas of many research institutes); *Activist Facts*, ECON. POL’Y INST., <https://www.activistfacts.com/organizations/516-economic-policy-institute/> [https://perma.cc/AV78-F2ZF] (last visited Mar. 6, 2022) (“EcPI’s donors have on at least one occasion been allowed to review its research prior to publication.”).

¹⁶⁰ See Piper, *Science Funding is a Mess. Could Grant Lottery Make It Better?*, *supra* note 23.

¹⁶¹ See *id.*

because of one's ideology or values.¹⁶² A third is professional self-interest in the success of a program one is studying/conducting.¹⁶³

1. Financial Self-Interest

Casey Family Programs is the clearest example of money distorting child welfare policy and research. A behemoth foundation that focuses on CPS practice, Casey is ideologically committed to eliminating foster care and enhancing parents' legal rights.¹⁶⁴ It aggressively promotes family-preservation preferences in federal and state governments, and it funds a great deal of research on programs embodying those preferences.¹⁶⁵ This gives the foundation inordinate power over the field and enables its anointed researchers to control perceptions of experimental programs, at least initially.¹⁶⁶ Those whom it funds know Casey wants its favored programs to show positive results, and this likely explains much of the suspect research design and questionable interpretation of results discussed in Part II.

One particularly overt way research manifests bias is in choice of program outcomes or performance measures – for example, focusing on parental possession of children and satisfaction rather than impact on child wellbeing.¹⁶⁷ A benign explanation for this focus could be the difficulty of studying non-autonomous persons directly, including IRB approval, discussed in Part IV. But researchers express no regret about lack of direct attention to child welfare and either (1) blithely portray programs and practice as successful based solely on other measures, or (2)

¹⁶² See Gläser et al., *supra* note 8 (noting that “research allegiance, which is understood as the adherence of a researcher to a theory or approach, turns into epistemic prejudice... a strong interest in confirming the superiority of theories or approaches regardless of available evidence.”); Underhill, *supra* note 7, at 166.

¹⁶³ See *infra* notes 174–205 and accompanying text.

¹⁶⁴ See Barholet, *Differential Response: A Dangerous Experiment in Child Welfare*, *supra* note 35, at 576–77. At one point, Casey announced an aim to halve the foster care population—but not to reduce rates of maltreatment—by 2020. CASEY FAM. PROGRAMS, 2020: A VISION FOR AMERICA'S CHILDREN (2020), <https://www.gahsc.org/nm/2009/ppcasey2020vision.pdf> [https://perma.cc/ET8T-R8QT].

¹⁶⁵ Barholet, *Differential Response: A Dangerous Experiment in Child Welfare*, *supra* note 35, at 584 (“The Casey Alliance used its wealth both to promote policy advocacy on [race disproportionality] and to fund related research. For example, it approached states throughout the country saying: we will help study your racial disproportionality problem, write the report stating the nature of your problem, and then help solve your problem with appropriate new policies.”).

¹⁶⁶ See *supra* notes 50–66, 103–20 and accompanying text.

¹⁶⁷ See *supra* note 63 and *infra* notes 176 and 187–90 and accompanying text.

mischaracterize other measures as “child-welfare outcomes.”¹⁶⁸ For example, in connection with Differential Response, Casey and other foundations lobbied for supportive legislation and then funded research claiming success for DR programs based solely on rates at which parents retain custody or express satisfaction.¹⁶⁹ Subsequent study by independent social scientists determined the Casey-funded research was improperly designed and mistakenly analyzed and that DR actually put many children at substantial risk of serious harm.¹⁷⁰

2. Personal Ideology or Policy Preference

Many social scientists who focus on the child protection system appear pre-disposed to reach positive conclusions as to family-preservation programs simply because they are personally sympathetic to poor and minority-race communities.¹⁷¹ Those whose work is concentrated in a different field but who attempt a study in the child welfare realm might be ignorant of child-welfare indicators or of child-protection processes. But then, too, normative commitments, such as race or sexual orientation equality, appear to drive the research.¹⁷² This work, too, displays poor design and misinterpretation of results, consistently in a direction serving researchers’ policy commitments. Ideology can also infect editorial boards of child welfare journals, creating an inviting venue for ideologically-driven researchers.¹⁷³

¹⁶⁸ Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, *supra* note 35, at 622–23.

¹⁶⁹ *See id.* at 576–78, 591–93, 609–11, 613–15.

¹⁷⁰ *See id.* at 620–35; Hughes et al., *supra* note 36, at 493.

¹⁷¹ *See* STOESZ, *supra* note 33, at 66ff; DWYER, LIBERAL CHILD WELFARE POLICY AND ITS DESTRUCTION OF BLACK LIVES, *supra* note 48, at 201–34.

¹⁷² *See, e.g.*, Netta Barak-Corren & Nelson Tebbe, *Does Harm Result When Religious Placement Agencies Close Their Doors? New Empirical Evidence from the Case of Boston Catholic Charities*, BALKINIZATION (Oct. 27, 2020), <https://balkin.blogspot.com/2020/10/does-harm-result-when-religious.html> [<https://perma.cc/RZM8-HH23>] (report of “preliminary results,” based on supposed indicators that are actually irrelevant, suggesting no negative impact when a large private foster care agency is pushed out because it discriminates against same-sex couples, authored by law professors who previously had submitted an advocacy brief in a case then before the Supreme Court on the constitutionality of the same type of agency action).

¹⁷³ For example, the prominent child welfare journal *Children and Youth Services Review* has a Co-Editor-in-Chief who is among those in the social work field who continue to claim racial bias pervades the child protection system and explains race disproportionality, citing as sole support pre-NIS4 publications issued or supported by Casey. *See Our Faculty: Darcey Merritt*, NYU SCH. SOC.WORK, <https://socialwork.nyu.edu/faculty-and-research/our-faculty/darcey-merritt.html> [<https://perma.cc/B28U-D9VE>] (last visited Mar. 6, 2022); Darcey H. Merritt, *How*

3. Studying Oneself

Persons who study programs that they themselves create or operate have several incentives to show positive results regardless of what the truth is – namely, personal satisfaction and self-esteem, professional reputation, and future government or foundation funding of the same program or of new projects. For example, in a study of the Miami-Dade County Dependency Drug Court, Judge Jeri Beth Cohen, who founded the Court and promoted the model nationally, served as a co-investigator and co-author of the published report.¹⁷⁴ The study examined the docket of one of Judge Cohen’s colleagues, rather than her own, but Judge Cohen would naturally have been pre-disposed to reach positive conclusions and to want any positive results portrayed in the best light (i.e., as consistent with children’s welfare rather than just protecting parents).¹⁷⁵ Her co-investigators, who must have been invited or approved by her, would have known this. The research report thus declares improved “positive child welfare outcomes” for the “Engaging Mom’s Program” (EMP), yet it defined “child welfare” solely in terms of whether mothers avoided termination of their parental rights.¹⁷⁶ A subsequent independent assessment of the study data by the federal Department of Justice found

Do Families Interact with CPS?, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 203, 211 (2020) (“the child welfare system is one of a number of oppressive systems rooted in structural discrimination and, as such, racial bias plays a role in the ways in which CPS makes and executes programmatic decisions”) (citing Susan J. Wells et al., *Bias, racism, and evidence-based practice: The case for more focused development of the child welfare evidence base*, 31 CHILD. & YOUTH SERVS. REV. 1160, 1160–71 (citing ROBERT B. HILL, SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE (2006), <https://assets.aecf.org/m/resourcedoc/aecf-CFS-SynthesisOfResearchOnDisproportionalityInChildWelfareAnUpdate-2006.pdf> [<https://perma.cc/ML9Y-VUCL>])).

¹⁷⁴ See Jeri B. Cohen, J.D., U. MIAMI HEALTH SYS., <http://researchers.uhealthsystem.com/researchers/profile/150732> [<https://perma.cc/W72S-HBAT>] (last visited Dec. 28, 2021) (boasting that “In 1999, Judge Cohen established the first Dependency Drug Court in Miami and one of the first in the nation.”); Gayle A. Dakof et al., *A Randomized Pilot Study of the Engaging Moms Program for Family Drug Court*, 38 J. SUBSTANCE ABUSE TREATMENT 265, 265 (2010).

¹⁷⁵ Cf. Honorable Jeri B. Cohen, JD, EVIDENT CHANGE, <https://www.evidentchange.org/about-us/staff/honorable-jeri-b-cohen-jd> [<https://perma.cc/A8MK-JAKK>] (last visited Oct. 23, 2021) (“Judge Cohen’s strong belief in treatment courts and the unique role the judiciary and community partners play in protecting children from abuse and neglect is what defines her.”).

¹⁷⁶ See Dakof et al., *supra* note 174, at 270.

that, even so, the report's claim was false and EMP actually showed no positive effects of any kind.¹⁷⁷

Another example is a study funded by Casey Family Programs assessing the merits of “interdisciplinary law office” (“ILO”) representation of parents charged with child maltreatment, as compared to representation by solo “panel attorneys” who contract with the state on a case-by-case basis.¹⁷⁸ One of the co-authors is a clinical instructor at New York University law school, Martin Guggenheim, who founded a Family Defense Clinic that pioneered the ILO model and ultimately began placing NYU students as clinical interns in one of the three ILO offices studied.¹⁷⁹ Guggenheim also serves on the board of directors of another ILO,¹⁸⁰ and he has long lobbied government officials to eliminate the panel attorney system and substitute ILOs.¹⁸¹ Another co-author works for Casey, which has also advocated for enhanced legal representation for parents.¹⁸² So, at least two investigators had a strong antecedent interest in seeing positive results that could trigger more public and private funding for ILOs to serve parents charged with maltreatment.

The ILO study displays data-analysis sophistication and yields intuitively plausible results.¹⁸³ The ILO model seems likely to make children as well as parents better off in most cases, by injecting greater efficiency and rationality into agency and judicial processes that typically are both chaotic and counter-productively generic.¹⁸⁴ The glaring analytical flaw of the study is that by design it cannot actually show it is the inter-disciplinary nature of ILOs that caused any differences in

¹⁷⁷ See *Program Profile: Engaging Moms Program for Mothers in Family Drug Court (Miami, Fla.)*, NAT'L INST. JUST. (Dec. 11, 2020), <https://crimesolutions.ojp.gov/ratedprograms/56#otherinfo> [<https://perma.cc/C4NB-V8TQ>] (“In 2011, the Engaging Moms Program received a final program rating of Promising based on a review of a study by Dakof and colleagues (2010). In 2020, CrimeSolutions conducted a re-review of the same study, using the updated CrimeSolutions Program Scoring Instrument. This re-review resulted in the program receiving a new final rating of No Effects. Programs rated No Effects have strong evidence indicating they had no effects when implemented with fidelity.”).

¹⁷⁸ See generally Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. AND YOUTH SERV. REV. 42 (2019).

¹⁷⁹ Martin Guggenheim, *How Clinical Scholarship Impacted the Family Defense Clinic*, 26 CLINICAL L. REV. 219, 227–28 (2019).

¹⁸⁰ Gerber et al., *supra* note 178, at 53.

¹⁸¹ Guggenheim, *supra* note 179, at 230.

¹⁸² See *How does high-quality legal representation for parents support better outcomes?*, CASEY FAM. PROGRAMS (Aug. 1, 2019), <https://www.casey.org/quality-parent-representation/> [<https://perma.cc/Y3EM-Z52F>].

¹⁸³ See Gerber et al., *supra* note 178, at 52.

¹⁸⁴ See *id.*

outcomes; no effort was made to separate out effects from that feature as opposed to (1) the greater capability of the salaried attorneys the ILOs hire (mostly NYU law grads) relative to the scraping-by lawyers who do panel work, or (2) the fact of being a collaborative multi-lawyer team in a firm with administrative and clerical support rather than a bunch of disconnected solo practitioners.¹⁸⁵

What the study showed was a substantial difference in one outcome measure – length of time children spend in foster care.¹⁸⁶ And what is most objectionable about the report, and likely reflects the influence of Guggenheim and Casey, is its characterization of entry into and exit from foster care as “critical child welfare outcomes” and treatment of parent reunification and kin guardianship as achieving “permanency” for a child.¹⁸⁷ In reality, there is no straightforward connection between a maltreated child’s location and his or her welfare.¹⁸⁸ Stronger lawyers for parents would naturally get better results *for parents* (e.g., lessened likelihood of TPR, regardless of whether that would be best for children) and would owe no duty to children. The study did not endeavor to assess impact on child wellbeing from placement with relatives or disruption of any established relationship with foster parents.¹⁸⁹ Further, neither reunifying with marginally-functional parents nor transfer to relatives dragooned into service is a promising path to stability; “permanency” was misleadingly defined as “any exit to reunification, guardianship, or adoption,” without regard to how enduring the post-exit situation was.¹⁹⁰

A different sort of self-study problem is reflected in the prison nursery research conducted by a Columbia University nursing-school team.¹⁹¹ The team’s report is widely and blithely cited by advocates for

¹⁸⁵ Cf. Guggenheim, *supra* note 179, at 222, 229 (disparaging the quality of panel attorneys); *id.* at 235 (stating numerous NYU law school graduates have gone to work for the ILOs); Gerber et al., *supra* note 178, at 45.

¹⁸⁶ Gerber et al., *supra* note 178, at 49–50 (also reporting null results on avoiding entry and subsequent re-reporting for maltreatment).

¹⁸⁷ See *id.* at 43, 46, 48, 52.

¹⁸⁸ Reduced time in care appears primarily to reflect ILOs’ successfully pushing for children to go live with relatives on an informal (non-foster-care) basis, either initially after removal or by disrupting foster-care placements, not successful return to parents (i.e., permanent and without further maltreatment) or adoption. See Guggenheim, *supra* note 179, at 232 (“Giving parents lawyers from family defense offices allowed children to be permanently released to relatives more than twice as often in the first year of a case and 67% more often in the second year.”).

¹⁸⁹ Gerber et al., *supra* note 178, at 46 (stating outcome measures).

¹⁹⁰ *Id.*

¹⁹¹ *Making Women’s Health a Priority: Programs and Research Targeting Women and Maternal Health at CUSON Showcase a Diversity of Expertise*, COLUM. SCH. NURSING (Aug. 15, 2014), <http://www.nursing.columbia.edu/making-womens->

incarcerated women as proof of success in ensuring secure attachment among prison-nursery infants.¹⁹² The researchers did not work for the prison, but they provided clinical services to the mothers in the nursery unit and so presumably were heavily invested professionally and personally in the nursery program's success.¹⁹³ The leader of the service and research team, Professor Mary Byrne, received millions of dollars from NIH and other sources over many years for this research, renewed as she issued positive reports.¹⁹⁴ The most widely-cited of the reports, regarding rates of secure attachment, was published in a well-regarded journal, yet was rife with methodological problems.¹⁹⁵ In particular, the study began with 100 mother-child dyads, but it excluded seventy from reported results, for reasons suggesting those children had not formed a secure attachment – indeed, the children likely had separated entirely from their mothers.¹⁹⁶ Yet the report (and Byrne's characterizations of it repeatedly in later publications) treated the thirty children who were not excluded as representative of “children who resided in a U.S. prison nursery,”¹⁹⁷ for whom the team claimed a rate of secure attachment similar to that for the general population in the community,¹⁹⁸ ignoring the

health-priority [<https://perma.cc/D67L-ZDHL>] (describing Byrne's long-standing involvement in service provision at nursery she studied).

¹⁹² See, e.g., Caroline Beit, *Legal, Ethical, and Developmental Considerations Concerning Children in Prison Nursery Programs*, 58 FAM. CT. REV. 1040, 1045 (2020); Torrey McConnell, *The War on Women: Collateral Consequences of Female Incarceration*, 21 LEWIS & CLARK L. REV. 493, 521 (2017).

¹⁹³ See *supra* notes 81–89 and accompanying text.

¹⁹⁴ Cf. Mary W. Byrne, *Maternal and Child Outcomes of a Prison Nursery Program*, GRANTOME, <http://grantome.com/grant/NIH/R01-NR007782-02> [<https://perma.cc/Y3XD-KLTB>] (last visited Dec. 28, 2021) (showing Byrne received ~\$3M from NIH for prison nursery research).

¹⁹⁵ Byrne et al., *Intergenerational Attachment for Infants Raised in a Prison Nursery*, *supra* note 85, at 375–393; see Dwyer, *Jailing Black Babies*, *supra* note 85, at 465, 485–517 (2014) (for full description of the problems).

¹⁹⁶ Dwyer, *Jailing Black Babies*, *supra* note 85, at 509–511.

¹⁹⁷ See Lorie S. Goshin et al., *Preschool Outcomes of Children Who Lived as Infants in a Prison Nursery*, 94 PRISON J. 139, 142 (2014); Mary W. Byrne et al., *Maternal Separations During the Reentry Years for 100 Infants Raised in a Prison Nursery*, 50 FAM. CT. REV. 77, 79 (2012) (“Results of the first longitudinal study of children who resided in a U.S. prison nursery provide evidence of positive infant, toddler, and post-release preschool outcomes. Children in this group had higher-than-expected rates of secure attachment during infancy and toddlerhood.”).

¹⁹⁸ Goshin et al., *supra* note 197, at 142; Byrne et al., *Maternal Separations During the Reentry Years for 100 Infants Raised in a Prison Nursery*, *supra* note 197 (“Results of the first longitudinal study of children who resided in a U.S. prison nursery provide evidence of positive infant, toddler, and post-release preschool outcomes. Children in this group had higher-than-expected rates of secure attachment during infancy and toddlerhood.”).

enormous sampling problem. Moreover, the team had actually assessed attachment for some of the seventy children who were excluded but withheld those results.¹⁹⁹ The team's follow-up research was also problematic. The team never acknowledged that, because of the high rate of post-release separation and mothers' return to unhealthy behaviors and relationships,²⁰⁰ long-term outcomes for the thirty children included in the 2010 attachment report (let alone for the 100) were likely no better than for children born to prison inmates who have the more common and generally dismal fate of living in the community with extended family while their mothers serve prison sentences.²⁰¹ The team's spin on a seventy-six percent rate of separation was that "maternal parenting is not universally seamless" and "separations do occur."²⁰²

Finally, a phenomenon bridging all three distorting incentives is "publication bias," the notion that researchers are discouraged from reporting null results.²⁰³ Social scientists want their efforts to result in

¹⁹⁹ According to Professor Byrne, the team was only interested in comparing children's attachment with their mother's own attachment relationship to her parents, and for those children they did not have information on the mothers. E-mail from Mary Woods Byrne, Professor, Columbia Univ., to author (Feb. 27, 2012) (on file with author). The author asked Professor Byrne what the results were for those children, but she did not respond.

²⁰⁰ See Byrne et al., *Maternal Separations During the Reentry Years for 100 Infants Raised in a Prison Nursery*, *supra* note 197, at 83 (stating 24 of children at three years after prison exit had remained continuously with mothers).

²⁰¹ The team's study of preschool children's emotional well-being purported to compare the prison nursery babies with children representing "what would have happened had children not been allowed to co-reside with their mothers," but in fact compared with children whose mothers entered prison well after their birth, whose mothers' crimes were of an unknown nature (i.e., might have disqualified them from a prison nursery program), and for whom much other relevant data was not obtained. Goshin et al., *supra* note 197, 144–45, 150. Yet after conceding small sample size, numerous unmeasured variables, and that their study "cannot attribute causation of better behavioral adaptation to the prison nursery program," and after finding no significant differences on nearly all child-welfare measures, the authors ended with the declaration: "This study greatly extends the available knowledge regarding the developmental trajectories of children who have experienced early maternal incarceration and exposure to a prison nursery program." *Id.* at 152–53. There is no indication of IRB review in the report. *See id.* at 139–58.

²⁰² See Byrne et al., *Maternal Separations During the Reentry Years for 100 Infants Raised in a Prison Nursery*, *supra* note 197, at 85.

²⁰³ Franco et al., *Publication Bias in the Social Sciences: Unlocking the File Drawer*, 345 SCIENCE 1502, 1504 (2014) (synthesis of meta-analyses in social sciences finding: "Although around half of the total studies in our sample were published, only 20% of those with null results appeared in print. In contrast, ~60% of studies with strong results and 50% of those with mixed results were published. ... However, what is perhaps most striking... is not that so few null results are published, but that so many of them are never even written up (65%). ... [More than half] whose

publication (for the sake of grants, tenure, reputation, and promoting preferred policies), but journals favor studies with significant findings.²⁰⁴ Some propose “funding agencies could impose costs on investigators who do not write up the results of funded studies.”²⁰⁵ But so often, especially in the child-welfare field, funding agencies do not want null results revealed.

C. Impacted Persons Not Treated as Subjects

Some social science research is not even deemed human-subject research, so whatever safeguards against flawed design might attend such research do not apply. This is troubling, given the impact published results can have on people’s lives. For example, if CPS-related research involves only examining aggregate data, then (1) no interaction with families is required and (2) no examination of confidential personal information is required. Under the regulations, therefore, neither adults nor children would be “subjects” as to whom researchers must get IRB approval and informed consent, and no IRB would have “jurisdiction” to review the study design, as its authority is limited to human-subject research.²⁰⁶

Other studies of social service provision might entail interaction with some individuals, such that they are “research subjects” whose informed consent is required and IRB review is required, but the interactions might not be with all those substantially impacted or even those most impacted, and those not directly studied can under current rules be ignored in the approval process.²⁰⁷ For example, many studies of state response to child maltreatment discussed in Part II entail researcher interaction only with autonomous persons – parents, service providers, agency officials, and/or caseworkers.²⁰⁸ As to that research, no children are deemed subjects warranting any protection.²⁰⁹ This is true even as to children whose parents are interviewed and who might be immediately affected by

studies yielded null results and did not write a paper... reported that they abandoned the project because they believed that null results have no publication potential even if they found the results interesting personally[, and] many of them simply lose interest in ‘unsuccessful’ projects.”)

²⁰⁴ *Id.* at 1502–05; Mohammad Hassan Murad et al., *The Effect of Publication Bias Magnitude and Direction on the Certainty in Evidence*, 23 *BMJ EVIDENCED-BASED MED.* 84, 84 (2018).

²⁰⁵ Franco et al., *supra* note 203.

²⁰⁶ See Michelle N. Meyer, *There Oughta Be a Law: When Does(n’t) the Common Rule Apply?*, 48 *J. L. MED. & ETHICS* 60, 66–67 (2020).

²⁰⁷ See Holly Fernandez Lynch, *Minimal or reasonable? Considering the ethical threshold for research risks to nonconsenting bystanders and implications for nonconsenting participants*, 34 *BIOETHICS* 923, 923 (2020).

²⁰⁸ See, e.g., *supra* notes 63–65 and accompanying text.

²⁰⁹ *Id.*

researchers' conclusions (i.e., if those conclusions influence a decision whether to continue a particular local programmatic response to child maltreatment).²¹⁰ Because the researchers choose not to examine the children's condition directly, the children are not research subjects.²¹¹ For example, surveys of parent satisfaction to determine whether DR is "effective"²¹² might call for parents' or caseworkers' opinion as to children's wellbeing (e.g., "Do you think this program is better for your family than a more coercive or aggressive intervention?" or "Are the children safe?").²¹³ The children are, in a sense, themselves being experimented on with novel maltreatment-response interventions, and researchers might draw conclusions about the impact of the intervention on them. Yet they are not "research subjects," because the researchers choose to interact only with parents and not to study directly the experiment's impact on the children.

Ideally, studies of social services would generally examine directly those most impacted by the services and those for whose benefit the services ostensibly exist. Studies of FDC effects, for example, *ought to* look at (1) whether any delay in permanency prevents or disrupts attachment or causes psycho-emotional distress; (2) whether separation from foster parents that any reunification with parents entails is disorienting or disturbing; and (3) what are rates of later dysfunction among children whose families were channeled to FDC versus those who were not, etc.²¹⁴ The studies *should* determine these intervention effects by directly examining the children or their records rather than by asking case workers or parents their opinions about how the children have fared. Yet most studies treat children as "bystanders," even when researchers and

²¹⁰ *Id.*

²¹¹ See *infra* notes 299–304 and accompanying text for discussion of subject/bystander distinction.

²¹² See, e.g., L. Anthony Loman & Gary L. Siegel, *Minnesota Alternative Response Evaluation: Final Report*, INST. APPLIED RSCH. ST. LOUIS, MO. (Nov. 2004), <http://www.iarstl.org/papers/ARFinalEvaluationReport.pdf> [https://perma.cc/8HUF-N76P].

²¹³ See Lisa W. Coyne & Darin Cairns, *A Relational Frame Theory Analysis of Coercive Family Process*, PLEA AGENCY (Oct. 14, 2015), <https://plea-agency.org/wp-content/uploads/2016/03/Chapter-7-Lisa-W.-Coyne.pdf> [https://perma.cc/BG8E-2HY7].

²¹⁴ Cf. ICFW, ISSUE BRIEF: ASSESSING WELL-BEING IN CHILD WELFARE (2016), <https://uwm.edu/icfw/wp-content/uploads/sites/384/2016/06/AssessingWellBeing.pdf> [https://perma.cc/R8T9-KXEG] (describing various child welfare assessment tools); Jasmin Singh & Pieter Rossouw, *Efficacy of Drawings as a Measure of Attachment Style and Emotional Disturbance: An Australian Children Investigation*, 3 INT. J. OF NEUROPSYCHOTHERAPY 124, 126 (2015) (same), available at <https://www.thescienceofpsychotherapy.com/efficacy-of-drawings-as-a-measure-of-attachment-style-and-emotional-disturbance/> [https://perma.cc/8AF5-244J].

policy advocates use the studies to support assertions about child welfare.²¹⁵

D. Even if Impacted Persons Are Treated as Subjects, Protections are Inadequate

When studies do directly target children, such as assessment of attachment among babies in a prison nursery or behavior problems for children in relative vs. non-relative foster care, they must treat children themselves as research subjects.²¹⁶ For several reasons, however, children receive inadequate protection even in these instances.

First, the task of an IRB is generally understood to be limited to protecting subjects from adverse impact from the study itself rather than from the program under study, and specifically from disclosure of private information and traumatic actions or statements by investigators.²¹⁷ As evidenced by the steady stream of poorly-designed research published in the child welfare field even after IRB review, IRBs are generally not rigorously assessing design and proposed methodology, because they have no clear mandate to do so.²¹⁸ They thus fail to weed out proposals that are result-driven, posing the wrong questions, or otherwise methodologically flawed, yet which might result in continuation of a program injurious to the subjects.

Second, many recipients of social services lack the capacity to give meaningful consent to research participation, and they might not receive adequate proxy representation.²¹⁹ Children are presumed incapable, and even teens might find the process and its implications too complex to comprehend what is at stake – for example, if surveyed for their attitudes toward group homes or emancipation.²²⁰ Federal regulations thus

²¹⁵ See, e.g., Gerber et al., *supra* note 178.

²¹⁶ See Naomi Schaefer Riley, *Life Inside a Prison Nursery*, INST. FAM. STUD. (Apr. 10, 2019), <https://ifstudies.org/blog/life-inside-a-prison-nursery> [<https://perma.cc/Q9JN-CMZH>].

²¹⁷ See generally SCHNEIDER, *supra* note 3; SCHRAG, *supra* note 1; Federal Policy for the Protection of Human Subjects, 82 FR 7149, 7151 (“Many studies ... involve secondary analysis of data or biospecimens. Risks related to these types of research studies are largely informational, not physical; that is, harms could result primarily from the inappropriate disclosure of information”).

²¹⁸ See *supra* note 12 and accompanying text.

²¹⁹ *Participants with Diminished Capacity to Consent*, UNIV. VA., <https://research.virginia.edu/irb-sbs/participants-diminished-capacity-consent> [<https://perma.cc/R65J-VS8G>] (last visited Oct. 23, 2021).

²²⁰ *Id.*

presumptively empowers parents to decide on behalf of children,²²¹ so researchers rely on parental consent.²²² But, in situations where parents have endangered a child's wellbeing, parents are generally not suitable proxies. Apart from possibly having their own cognitive deficits, there is usually a conflict of interests; parents' presumed primary motivation after being reported for child maltreatment is to retain or quickly regain custody of their children and avoid further state oversight and coercion.²²³ Yet that is often inconsistent with children's interest in healthy development within a safe and nurturing environment. Much maltreatment is itself a reflection of parents' subordination of children's interests to their own.²²⁴ Thus, parents might give proxy consent just because they think appearing cooperative will help them, and they might refuse if they worry a child might reveal something negative about them.

Outside the CPS system, too, parents' and children's interests can conflict. Incarcerated women, for example, have intense self-interest in moving to a more comfortable, low-conflict nursery unit and having a baby with them; that is a far more pleasant way to do time.²²⁵ Further, parents' volition is substantially compromised in child protection and criminal justice systems, which threaten profoundly negative consequences for non-cooperation.²²⁶ Proxies for other groups of non-autonomous persons, such as mentally ill or disabled adults, might also be of questionable reliability in some circumstances.

Conflict and coercion are very common with state response to parental dysfunction, so one might expect to see independent advocates frequently appointed for children in connection with research,²²⁷ to substitute for parents, but there is no indication of this being done in any

²²¹ Lynch, *Minimal or reasonable? Considering the ethical threshold for research risks to nonconsenting bystanders and implications for nonconsenting participants*, *supra* note 207, at 926.

²²² See, e.g., Byrne et al., *Maternal Separations During the Reentry Years for 100 Infants Raised in a Prison Nursery*, *supra* note 197.

²²³ See *id.*

²²⁴ *Id.*

²²⁵ Anne E. Jbara, *The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Programs*, 87 IND. LAW REV. 1825, 1844 (2012).

²²⁶ See Merritt, *How Do Families Interact with CPS?*, *supra* note 173, at 203–05, 209–10; U.S. DEP'T HEALTH & HUM. SERVS., WORKING WITH THE COURTS IN CHILD PROTECTION 26 (2006), <https://www.childwelfare.gov/pubpdfs/courts.pdf> [<https://perma.cc/HS7A-QTP8>].

²²⁷ Cf. U.S. DEP'T HEALTH, EDUC., & WELFARE, THE BELMONT REPORT 7 (Apr. 18, 1979), https://www.hhs.gov/ohrp/sites/default/files/the-belmont-report-508c_FINAL.pdf [<https://perma.cc/364S-LDXC>] [hereinafter *The Belmont Report*] (stating that legally-authorized representatives (“LARs”) for non-autonomous persons “should be those who are most likely to understand the incompetent subject's situation and to act in that person's best interests.”).

of the research discussed in this Article. A typical university IRB might have no members who appreciate these problems with parental proxy consent. Columbia University's IRB, for example, seemingly saw no problem with incarcerated women giving consent for their babies' subjection to an attachment study; it enlisted a prisoner advocate to review Byrne's proposal, but no advocate for children.²²⁸ Thus, though it is a positive thing when researchers look directly at the welfare of children, there might be no real protection against potential harm from the way that research is designed, conducted, or reported, because there is no reliable IRB review nor appropriate informed consent.

Harms to children from studies (as opposed to the underlying experimentation) are of two sorts. First, the research might involve potentially disturbing interactions. For example, a line of questioning or even just observing could be upsetting to a child or interfere with provision of a therapy. The essence of attachment assessment with infants, for example, is to generate anxiety in them and then observe whether they look to a caregiver to resolve it.²²⁹ Questioning children in foster care about their situation would certainly be fraught.

Second, the research could be used improperly to validate and prolong children's current situation, possibly to their detriment. Typically, biased research validating a program will adversely affect only future entrants to the child-protection system, because current participants will have exited by the time of publication. However, in some instances the timing of reporting results and reacting to them could be such that some children examined are themselves impacted by researchers' conclusions.²³⁰ For example, someone might examine the developmental progress at age one for infants in the Washington State prison nursery program, which allows children to stay until their third birthday.²³¹ They might quickly conclude and report to authorities that the children are doing well – ignoring or downplaying contrary indications. The authorities might then rely on that report to continue the program and those children's residence in the prison. Similarly, study of children whose stay in foster care is prolonged by FDC or relative placement – which might report only rates of physical abuse and ignore impact on attachment and psychological wellbeing – could be sufficient basis for judges or legislators to persist with their approach, causing the very children studied to remain in foster

²²⁸ Byrne et al., *Maternal Separations During the Reentry Years for 100 Infants Raised in a Prison Nursery*, *supra* note 197, at 81.

²²⁹ *Id.*

²³⁰ See *The Belmont Report*, *supra* note 227.

²³¹ Melissa Santos, 'I really want him to have a different life.' *How Some Female Inmates are Raising Babies Behind Bars*, NEWS TRIBUNE (Apr. 6, 2017, 5:28 PM), <https://www.thenewstribune.com/news/politics-government/article140712783.html>.

care longer.²³² Potential detriment to future entrants from bad research also provides reason to prevent it, of course, but that might require a mechanism other than informed consent, which focuses on research subjects' welfare. Part V considers some possibilities, including IRB scrutiny of research design.

E. Some Autonomous Persons Are Incapable of Voluntary Informed Consent

Many public benefit or service contexts entail a coercive environment and diminished capacity among clients. CPS-involved parents threatened with loss of custody, TPR, or criminal charges might fear making the “wrong choice” about participation in a study. In its traditional form, the CPS process is likely experienced by most parents as disempowering.²³³ Imagine an FDC judge informing a poor parent with an addiction and little education that she has qualified for the program and that FDC has various virtues for any parent truly committed to her children. Then, after the parent has consented, the judge says “oh, by the way, will you agree to being part of a study I and some colleagues are conducting?” Fearing TPR or referral to criminal court, the parent can hardly give “voluntary” consent. Likewise, in prison nurseries, mothers live in constant fear of prison officials taking their babies away and sending them back to a regular prison unit.²³⁴ If those officials approve a study of the program, mothers risk adverse consequences if they decline consent to participation on their own behalf or on their child's behalf.²³⁵

Moreover, some social service clients might not receive full information about the nature and implications of research and might be less capable of requesting or digesting more information, or of formulating an explanation for refusing to participate, because of diminished capacity stemming from disability, mental illness, or substance abuse.²³⁶ Some parents might be adversely affected by the study itself; it might be intrusive, inconvenient, upsetting, confusing, etc. They might receive less effective treatment than they otherwise would. Or, the results might lead some decision maker to act contrary to their interests (e.g., discontinue the

²³² See Nina Williams-Mbengue, *The Social and Emotional Well-Being of Children in Foster Care*, NAT'L CONF. STATE LEGIS., https://www.ncsl.org/Portals/1/Documents/cyf/Social_Emotional_WellBeing_Newsletter.pdf [<https://perma.cc/2ZTA-CZLJ>] (last visited Oct. 24, 2021).

²³³ See Merritt, *supra* note 173, at 203–05, 209–10.

²³⁴ See Dwyer, *Jailing Black Babies*, *supra* note 85, at 465, 489–90.

²³⁵ Cf. Matt Lamkin & Carl Elliott, *Involuntarily Committed Patients as Prisoners*, 51 U. RICH. L. REV. 1041, 1064 (May 2017).

²³⁶ Cf. *id.* at 1055–56.

program, prolong a program even though it is ineffective yet creates a false impression that parents have been given a “fair chance”).

In sum, children of dysfunctional or incapacitated parents suffer from bad policy making because unpromising innovations in state response to their plight are not subject to effective protective pre-implementation protocols, and because research used to launch and perpetuate the experiments is badly designed and either fails to treat children as research subjects or secures consent to children’s participation by illicit means. Similar circumstances and problems might exist with institutional handling of adults of diminished capacity, such as those in psychiatric hospitals, drug rehabilitation centers, prisons, and congregate care for those with mental disabilities.

Other policy contexts might present a subset of these concerns. For instance, innovative practices and programs in ideologically fraught areas such as policing, gender dysphoria, and abortion counseling also are not likely to be treated as human-subject experiments requiring rigorous expert pre-implementation approval. Research in any social science field can be poorly designed because of incompetence, funder expectations, or researcher ideology. In studying other non-medical aspects of life for vulnerable populations – for example, sexual freedom for adults in institutional care or impact on family life from dispensing welfare benefits in a new way – researchers might fail to treat those persons as subjects, even though their study will inform policy most directly impacting those persons, instead focusing on their surrogates or on service providers. In other fields of study, too, investigators might solicit consent from representatives who have conflicting interests or feel pressured to consent – for example, studies of impact on psychiatric patients of novel behavior-modification therapies or the child-welfare impact of housing-relocation subsidies.²³⁷ And, in many areas of life, members of vulnerable groups giving consent for their own participation in research might lack freedom or capacity to give truly voluntary and informed consent. Part IV examines what protections existing laws and guidelines provide against these dangers.

²³⁷ *Grimes v. Kennedy Krieger Inst.*, 782 A.2d 807, 814–15 (2001) (“parents, whether improperly enticed by trinkets, food stamps, money or other items, have no more right to intentionally and unnecessarily place children in potentially hazardous nontherapeutic research surroundings, than do researchers. In such cases, parental consent, no matter how informed, is insufficient. ... If the research methods, the protocols, are inappropriate then... consent of the parents, or of any consent surrogates, in our view, cannot make the research appropriate or the actions of the researchers and the Institutional Review Board proper.”).

IV. EXISTING RULES

The social service world has relied on political actors and journal editors to protect society from ideologically-driven policy experiments fueled by bad research. Part II illustrated the dysfunction in this regime. This Part examines existing regulation of experimentation and research, to discern the extent to which legal bases already exist for better disciplining social services and social science, focusing on problems Part III identified.

A. Preventing Unpromising Experimentation

Federal regulations require manufacturers of a “drug” or medical “device” to secure approval from the Food and Drug Administration based on showing safety and efficacy relative to already-available treatments, before applying the product to human bodies for “diagnosis, cure, mitigation, treatment, or prevention of disease” or alteration of “the structure or any function of the body.”²³⁸ The stringency of the process depends on whether the product is entirely new or instead a generic imitation of or modification to an already-approved product.²³⁹ In any case, a multi-disciplinary team of experts reviews the evidence and must find sufficient reason to believe the innovations would generate benefits outweighing risks of harm.²⁴⁰ If so, the agency would initially permit only piloting of the new intervention – that is, administration to a small number of humans under close study.²⁴¹ Only if that study further supported a finding of safety, effectiveness, and acceptable risk of harm, would promoters be permitted to administer it to a larger group of persons.²⁴² Then, after further research confirmation, to a still larger group. Only after study of a third “clinical trial” confirms safety and effectiveness (relative to existing alternatives) outweighing risks may manufacturers market the

²³⁸ 21 U.S.C. § 355, 360e, 321(g), (h).

²³⁹ See Jonathan J. Darrow et al., *The 505(b)(2) Drug Approval Pathway*, 74 FOOD & DRUG L.J. 403, 404 (2019).

²⁴⁰ *Benefit-Risk Assessment in Drug Regulatory Decision-Making*, U.S. FOOD & DRUG ADMIN. (Mar. 30, 2018), <https://www.fda.gov/files/about%20fda/published/Benefit-Risk-Assessment-in-Drug-Regulatory-Decision-Making.pdf> [<https://perma.cc/8TSA-QWL7>].

²⁴¹ See *Factors to Consider Regarding Benefit-Risk in Medical Device Product Availability, Compliance, and Enforcement Decisions: Guidance for Industry and Food and Drug Administration Staff*, U.S. FOOD & DRUG ADMIN. (Dec. 27, 2016), <https://www.fda.gov/files/medical%20devices/published/Factors-to-Consider-Regarding-Benefit-Risk-in-Medical-Device-Product-Availability--Compliance--and-Enforcement-Decisions---Guidance-for-Industry-and-Food-and-Drug-Administration-Staff.pdf> [<https://perma.cc/B7C7-K49C>].

²⁴² See Darrow et. al, *supra* note 239.

intervention widely.²⁴³ They must do so with appropriate “labeling” to inform users of risks and how to minimize them.²⁴⁴

Presently, no federal law requires comparable agency review, with study of piloting at successive levels, of proposed new interventions in human lives that are not drugs or medical devices. Some other interventions are also physical – for example, medical procedures, taking physical possession of people and putting them in a new environment, or applying aversive physical stimuli to control behavior. Others are more psychological than physical, as that distinction is conventionally understood, involving communications or non-physical stimuli or incentives intended to modify mood or behavior or to gather data. Government agencies and private entities are now presumptively free to experiment with new interventions of these sorts without *ex ante* constraint.

In a few social-service settings, legal representation serves as a potential safeguard for vulnerable persons— specifically, when they are in state custody or under court supervision.²⁴⁵ In child protection court proceedings, appointment of a lawyer or guardian ad litem for the child is common.²⁴⁶ Such representatives could, in theory, endeavor to block involvement of children in experimental programs – for example, by filing a petition asking the juvenile court judge to exclude the child they represent from a new, unproven process or policy, perhaps asserting the child’s right to the best intervention already available. They might, for example, request change of permanency plan from reunification to adoption if CPS appears inclined, under a novel and untested program, to drag out parent-rehabilitation efforts too long with too little hope.

That particular request, however, is not likely to receive much hearing in an FDC or other court where the judge supports the novel parent-supportive approach being undertaken; juvenile court decisions are highly discretionary and judges believe themselves constrained by constitutional rights of parents but generally not of children. Parents might be given a choice whether to participate, but the child’s advocate will not. And as to some agency actions, there might be no legal basis for anyone to challenge. For example, if a foster-care agency is determined to disrupt a long-term non-relative placement in favor of kin care consistent with a

²⁴³ See Marcia Boumil, *FDA Approval of Drugs and Devices: Preemption of State Laws for “Parallel” Tort Claims*, 18 J. HEALTH CARE L. & POL’Y 1, 4–6 (2015).

²⁴⁴ See *Development & Approval Process: Drugs*, *supra* note 28; *Step 3: Clinical Research*, FDA (Jan. 4, 2018), <https://www.fda.gov/patients/drug-development-process/step-3-clinical-research> [<https://perma.cc/D7JQ-VG2W>].

²⁴⁵ See *Representation of Children in Child Abuse and Neglect Proceedings*, CHILD.’S BUREAU, <https://www.childwelfare.gov/pubpdfs/represent.pdf> [<https://perma.cc/FL7L-7E9X>] (last visited Oct. 22, 2021).

²⁴⁶ See 42 U.S.C. § 5106(a)–(b).

new policy predicated on the false belief that research has shown children always fare better in care of relatives, a GAL might have no legal basis for challenging this action.²⁴⁷ In any event, the juvenile court judge might share the agency's mistaken view about kin placements or the mindset that kin or racial groups own children.

Moreover, GALs generally do not challenge policies.²⁴⁸ They lack the necessary motivation, legal creativity, and resources.²⁴⁹ And, there might be no entity other than GALs able to act on behalf of a child or non-autonomous adult to halt harmful experimentation, as to that client or all such persons entering the system, nor any legal basis for such action. Some impact litigation has been brought to reform foster care systems that operate very poorly, but not to prevent or end innovations in case handling (and it typically focuses on the same evaluative criteria as the bad research, such as speed of return to parental custody).²⁵⁰ In any event, injunctive relief does little to deter agencies from experimenting in the first place. So, even if there were ample funding for system litigation, it would have a whack-a-mole futility to it. Outside the child protection system, there might be even lesser prospects for any check on social-service experimentation impacting vulnerable persons, if there is no court oversight and no appointment of legal representatives for them, as is true, for example, with placement of babies in prisons.

Ex-ante constraint on social services innovation *per se* is thus virtually non-existent, at least so long as an agency is operating within its scope of legal authority and discretion. There is the possibility, if novel interventions in individuals' lives happened to be undertaken as part of a "research" project, with an aim from the outset to study its effects, that prior IRB approval by an independent body would be required. That would resemble FDA approval of drugs and devices insofar as it assesses the safety of the intervention for "subjects."²⁵¹ And, as with any medical intervention (whether experimental or not), the regulations also would require informed consent by or on behalf of research subjects.²⁵² However, such screening and oversight apply only to the research activity *per se* and to the actions of researchers, and social service innovation is typically not

²⁴⁷ See generally A.R.L. Complaint, *supra* note 115.

²⁴⁸ See generally Mary K. Wimsett, *The Guardian Ad Litem Program—Expanding the Model and Meeting New Challenges* 77 FL. BAR J. 26 (Dec. 2003).

²⁴⁹ *Id.*

²⁵⁰ See *Washington D.C.: Lashawn A. v. Mayor Bowser*, BETTER CHILDHOOD, <https://www.abetterchildhood.org/washington-dc> [https://perma.cc/ME3C-Y6GS] (last visited Oct. 24, 2021).

²⁵¹ See *Development & Approval Process: Drugs*, *supra* note 28.

²⁵² See *Draft Guidance: Informed Consent Information Sheet Guidance for IRBs, Clinical Investigators, and Sponsors*, U.S. DEP'T HEALTH & HUM. SERVS. FDA (July 2014), <https://www.fda.gov/media/88915/download> [https://perma.cc/G9WC-5TB3].

structured like a clinical trial, embedded in a research project.²⁵³ In studies of social services, the research is usually done by individuals other than those providing the interventions, and the “research” would therefore not encompass the services themselves.²⁵⁴ The IRB would be concerned only with what researchers themselves do to people: interviewing, observing, collecting information, not what the agency does to them.²⁵⁵

Notably, even in medicine, experimentation occurs informally in clinical practice and, unless studied in a fashion that makes it “research,” without pre-approval or oversight by any ethics body.²⁵⁶ This occurs particularly in direct treatment of individual patients, when physicians are not administering a new drug or device but rather trying a new technique, process, or use of already-FDA-approved medications.²⁵⁷ Thus, at work outside the narrow medical context of new drugs and devices is a distinction between innovative “practice” and research.²⁵⁸ For the most part, current law imposes *ex ante* constraints only on the latter.²⁵⁹ In medicine, however, the possibility of *ex-post* penalty, in the form of a tort suit, creates some deterrent to reckless experimentation with procedures.²⁶⁰ Malpractice law looks to customary practice in the field as a standard of conduct, so novel approaches are inherently suspect.²⁶¹ In contrast, in social services, including child welfare programming, there might be no such *ex post* recourse for harmful experimentation, no way for those harmed to inflict a penalty on those responsible, and therefore no disincentive to gambling on novel ideas. The United States Constitution provides some check on harmful action by state agencies, but an important U.S. Supreme Court decision rejecting a constitutional tort claim against a child protection agency is viewed as establishing that state response to

²⁵³ See, e.g., Tim Kalantjankos, *What Research Methods Are Used in Social Work?*, SOC. WORK DEGREE CTR. (Sept. 2019), <https://www.socialworkdegreecenter.com/study/social-work-research-methods/> [https://perma.cc/ZLU5-CK9M].

²⁵⁴ See *id.*

²⁵⁵ AAUP Report, *supra* note 3.

²⁵⁶ See Mark A. Rothstein et al., *Unregulated Health Research Using Mobile Devices: Ethical Considerations and Policy Recommendations*, 48 J. L., MED., & ETHICS 196, 198 (Apr. 28, 2020).

²⁵⁷ Anna B. Laakmann, *When Should Physicians Be Liable for Innovation?*, 36 CARDOZO L. REV. 913, 935–36 (Feb. 2015).

²⁵⁸ See Alda Yuan, *Blurred Lines: The Collapse of the Research/Clinical Care Divide and the Need for Context-Based Research Categories in the Revised Common Rule*, 74 FOOD & DRUG L. J. 46, 47, 50 (2019).

²⁵⁹ See 46 C.F.R. 46.101 (2018); David Casarett et al., *Determining When Quality Improvement Initiatives Should be Considered Research: Proposed Criteria and Potential Implications*, 283(17) JAMA 2275 (May 3, 2000).

²⁶⁰ See Laakmann, *supra* note 257, at 915–16.

²⁶¹ *Id.* at 915.

private harms is outside constitutional bounds, with the limited exception of potential state liability for abuse occurring within state-operated facilities, including foster care.²⁶² State protection of children from maltreatment by parents or other private parties is gratuitous, the Court said, not something to which children have any right, and so can be carried out poorly with impunity.²⁶³ The Court later said the same regarding police protection of adult domestic-abuse victims.²⁶⁴

In any event, in the realm of child protection, parents generally cannot be expected to file suit for compensation when a new approach to family preservation proves detrimental for a child, because the approach likely would have been designed to serve the parents' interests and they would have agreed to participate, and it might be that no one else is motivated or would be permitted to file such a suit.²⁶⁵ Further, qualified sovereign immunity insulates state actors from liability unless a practice violated a clearly-established legal rule,²⁶⁶ which is unlikely to be the case with any experimental programmatic social-service responses to child maltreatment or other human welfare predicaments.

B. Counter-Acting Researcher Bias

The federal regulations governing research, generally referred to collectively as The Common Rule ("TCR"), could address some problems in research identified in Part III, and that could in turn lessen the likelihood of ill-advised policy experiments being initiated or prolonged. TCR applies to research financially supported by particular federal agencies, including the Department of Health and Human Services ("DHHS"), and most states have adopted regulations patterned after TCR that apply to all human-subject research within their jurisdiction regardless of funding source.²⁶⁷ Most universities and other institutions receiving federal money

²⁶² See Mary Kate Kearney, *Deshaney's Legacy in Foster Care and Public School Settings*, 41 WASHBURN L.J. 275, 284 (2002).

²⁶³ *Id.*

²⁶⁴ *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

²⁶⁵ See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149, 163–64 (1990) (Federal Rule of Civil Procedure 17 allows a "next friend" to bring suit on behalf of a child, but few people pursue that possibility, and the court must approve the representative status of that person.).

²⁶⁶ See, e.g., *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 169 (4th Cir. 2010).

²⁶⁷ See, e.g., *Ethical Guidelines, Federal Regulations and State Statutes*, UCI OFF. RSCH., <https://research.uci.edu/compliance/human-research-protections/researchers/ethical-guidelines-fed-regs-and-state-statutes.html#state> [<https://perma.cc/7SSE-ZM8V>].

for any research extend TCR rules to all human-subject research regardless of funding sources.²⁶⁸

TCR's primary policing mechanism is the IRB review of research proposals.²⁶⁹ An institution's IRB should approve a study only if the proposal shows adherence to certain guidelines. IRB approval is required, however, only for studies involving "human subjects," so there need be no prior review of studies that do not involve interaction with or action upon individuals for the purpose of studying effects on them nor revelation of personal information about individuals.²⁷⁰ Thus, studies limited to analyzing aggregate data or individualized information without identifiers are not subject to any advance screening no matter how poorly designed or how much policy impact publication of results might have.²⁷¹

In addition, a 2018 amendment to the TCR removes a substantial portion of research on government social services from its ambit.²⁷² The amendment reflects a belief that social-science research generally poses no threat of harm and in that respect is categorically different from biomedical research.²⁷³ As shown in Parts II and III, though this might be true of research subjects per se, social science research can cause great harm to persons who are subjected to social service innovations supported by bad research. As a result of the Amendment, human-subject protections now do not apply to study of "public benefit or service programs" if the study is "conducted *or supported by* a Federal department or agency."²⁷⁴ Until 2018, this exemption covered only research conducted by a federal agency itself.²⁷⁵ The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research expanded it to include research *supported by* a federal agency in capitulation to complaints from social scientists that IRB review is unnecessary for their work.²⁷⁶ The

²⁶⁸ See SCHRAG, *supra* note 1, at 43.

²⁶⁹ See 45 C.F.R. § 46.108 (2018).

²⁷⁰ 46 C.F.R. § 46.101.

²⁷¹ See *Guidance on Secondary Analysis of Existing Data Sets*, UNIV. CONN., <https://ovpr.uconn.edu/services/rics/irb-2/researcher-guide/secondary-analysis-of-data-sets/> [<https://perma.cc/2NQ5-9YSR>] (last visited Mar. 6, 2022) ("analysis of de-identified, publicly available data does not constitute human subjects research").

²⁷² Federal Policy for the Protection of Human Subjects, 82 Fed. Reg. 7149-01 (Jan. 19, 2017).

²⁷³ Federal Policy for the Protection of Human Subjects, 82 Fed. Reg. 7149-01, 7195-96 (Jan. 19, 2017) ("federal departments and agencies are already subject to other laws and policies that protect the interests of research subjects"); Underhill, *supra* note 7, at 209.

²⁷⁴ 45 C.F.R. § 46.104(d)(5).

²⁷⁵ See Federal Policy for the Protection of Human Subjects, 82 Fed. Reg. 7149-01, 7195-96 (Jan. 19, 2017).

²⁷⁶ Final Regulations Amending Basic HHS Policy for Protection of Human Research Subjects, 46 Fed. Reg. 8366-0, 8373 (Jan. 26, 1981) ("HHS believes that public concerns that the definitions are too broad will in most cases be met by the

original exemption rested in part on a perception that “this additional layer of review for such projects is duplicative and needlessly burdensome in light of the substantial review process to which they are already subjected by state and federal officials.”²⁷⁷ But this is less true of research conducted by persons outside the agencies.

When research is subject to IRB review, the process addresses bias stemming from financial conflict of interests but not from professional reward, political allegiance, advocacy commitments, or ideology.²⁷⁸ TCR requires “investigators” to disclose only personal financial interests they have that the research could affect.²⁷⁹ If an IRB determines from that disclosure or otherwise that investigators have such conflict, it must report this to the responsible federal funding agency and undertake “development and implementation of a management plan and, if necessary, a retrospective review and a mitigation report.”²⁸⁰ This might amount to simply requiring disclosure of the conflict – to the subjects in advance and to the public in publications stemming from the research. However, it can also entail appointment of an “independent monitor capable of taking measures to protect the design, conduct, and reporting of the research against bias,” altering the research plan itself, and requiring investigators to eliminate the conflict. At the extreme, if the conflict is serious and ineliminable, it can even require disqualifying persons from the research.²⁸¹ A “retrospective review” would determine after study completion whether it “was biased in the design, conduct, or reporting.”²⁸² If so, the IRB must institute a “mitigation plan” (likely consisting mostly of public notification), and a given institution might also have internal sanctions for improper conduct.²⁸³

exemptions from the regulations...”); Exemption of Certain Research and Demonstration Projects From Regulations for Protection of Human Research Subjects, 48 Fed. Reg. 9266-01 (Mar. 4, 1983).

²⁷⁷ Exemption of Certain Research and Demonstration Projects From Regulations for Protection of Human Research Subjects, 48 Fed. Reg. 9266 (Mar. 4, 1983) (to be codified at 45 C.F.R. pt. 46). Even in 1983 the Commission opined that “review by an IRB—which generally focuses on ethical questions arising from biomedical and behavioral research—[is] unnecessary and inappropriate in the context of adjustments to benefit and service programs.” *Id.*

²⁷⁸ See 42 C.F.R. § 50.604(e)(1), (f) (2018).

²⁷⁹ *Id.*

²⁸⁰ 42 C.F.R. § 50.604(g), (h).

²⁸¹ 42 C.F.R. § 50.605(a)(1).

²⁸² 42 C.F.R. § 50.605(a)(3)(ii)(A).

²⁸³ Cf. 42 C.F.R. § 50.606(c); *Retrospective Reviews and Mitigation Plans*, UNIV. MINN. OFF. INST. COMPLIANCE., <https://policy.umn.edu/operations/conflictinterest-proc04> [https://perma.cc/V4ZP-UPLA] (last visited Mar. 6, 2022).

In addition to addressing only financial sources of bias, TCR adopts a rather narrow conception of financial conflicts of interest. The paradigm case is biomedical laboratory scientists who work for or own stock in the company whose new drug is being studied.²⁸⁴ They might expect a bonus or higher stock value if they reach the “correct” conclusion, and conversely to suffer discharge if they repeatedly reach “wrong” conclusions.²⁸⁵ Corporate ownership is unlikely to be an issue in research on social services; they are generally provided by government agencies, and to the extent they are farmed out to private entities, those entities are likely to be non-profits.²⁸⁶ Employment by the agency providing the service could be an issue (if an employee is doing the research) but that appears rare in practice, at least in child welfare. The only examples identified above were the FDC judge who was one of the researchers studying her own court and the NYU clinical professor listed as an author of a study of inter-disciplinary law offices that he founded, sends students to, and serves on the board of.²⁸⁷ The prison nursery researchers were not employees of the prison, but they did receive funding through their university employer to provide services to inmates in the nursery program, and showing positive outcomes for the children could conceivably have resulted in increased institutional support for the program or greater personal supplemental compensation (e.g., endowed chair, fellowship grants).²⁸⁸ Those rewards might not fit the regulations’ definition of financial conflict,²⁸⁹ yet any normal person could be influenced by the prospect of such rewards in designing a study or interpreting results.

The concept of financial conflict of interest is even less likely to encompass more indirect ways, however substantial, by which researchers benefit personally from reaching certain results. A causal connection between results reported and receiving additional grants from government agencies or foundations is unlikely to be clear or overt. Additional funding to study the same program could be explained simply as sustained interest

²⁸⁴ See 42 CFR § 50.603.

²⁸⁵ See Michelle Llamas, *Big Pharma’s Role in Clinical Trials*, DRUGWATCH (Apr. 24, 2015), <https://www.drugwatch.com/featured/clinical-trials-and-hidden-data/> [<https://perma.cc/QF68-J5MD>].

²⁸⁶ See Robert C. Lowry, *Public Welfare Spending and Private Social Services in U.S. States*, 13 STATE POLS. & POL’Y Q. 3, 6 (2013).

²⁸⁷ See *supra* notes 77–78, 179–82.

²⁸⁸ See *supra* notes 87, 191–96.

²⁸⁹ See 42 C.F.R. § 50.603 (defining “financial conflict of interest” as “a significant financial interest that could directly and significantly affect the design, conduct, or reporting of PHS-funded research,” and defining “significant financial interest” to include “any remuneration received from the entity . . . [that], when aggregated, exceeds \$5,000 [but not including] salary, royalties, or other remuneration paid by the Institution to the Investigator if the Investigator is currently employed or otherwise appointed by the Institution”).

in the program rather than reward for those who support it. Yet a researcher specializing in particular types of programs who reaches negative conclusions or even null results might see foundations lose interest in that type of program or specifically in them, and shift research support elsewhere. In the child protection field, researchers must know that major funding entities like Casey will want positive verdicts on programs for which they have lobbied.

C. Protecting Subjects

As to human “subjects” in research, TCR directs both government agencies sponsoring or overseeing studies and IRBs to take protective steps. The agencies should evaluate any proposal taking into account “the risks to the subjects, the adequacy of protection against these risks,” “the potential benefits of the research to the subjects and others, and the importance of the knowledge gained or to be gained.”²⁹⁰

In addition, an IRB reviewing any research plan should ensure that:

- “risks to subjects are minimized and “reasonable in relation to anticipated benefits . . . and the importance of the knowledge that may reasonably be expected to result.”;²⁹¹
- “the research plan makes adequate provision for monitoring the data collected to ensure the safety of subjects,”²⁹² and, when subjects are vulnerable persons such as children and prisoners, “additional safeguards have been included in the study to protect the rights and welfare of these subjects.”;²⁹³
- “informed consent” is secured from “each prospective subject or the subject’s legally authorized representative,”²⁹⁴ with information provided to include “disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;”²⁹⁵ and
- “choice among possible subjects is “equitable” and cognizant of “the special problems of research that involves a category

²⁹⁰ 45 C.F.R. § 46.120(a).

²⁹¹ Criteria for IRB approval of Research, 45 C.F.R. § 46.111(a)(2) (2018).

²⁹² 45 C.F.R. § 46.111(a)(6).

²⁹³ 45 C.F.R. § 46.111(b); *see also* 45 C.F.R. § 46.124 (an IRB may, if it deems necessary, impose additional condition to protect subjects).

²⁹⁴ 45 C.F.R. § 46.111(a)(4); *see also* 45 C.F.R. § 46.116(a)(1).

²⁹⁵ 45 C.F.R. § 46.116(b)(4).

of subjects who are vulnerable to coercion or undue influence, such as children.”²⁹⁶

Both sets of directions call for assessment of a proposed study’s knowledge payoff, and this might seem to require scrutiny of both quality of research design and rational relation to an identified policy objective. Thus, sponsoring agencies and IRBs might expect researchers to identify some social good whose provision will be informed by a proposed study, and then those reviewers would assess whether the study is well-designed to generate knowledge about how to provide that good. However, another provision in the administrative code precludes consideration of how results might be used in public policy.²⁹⁷ Thus, one kind of serious design flaw that plagues child welfare research – namely, asking the wrong questions (e.g., about children’s custodial situation rather than their wellbeing) – would appear outside the ambit of IRB concern. Moreover, the value of knowledge to be gained is to be compared somehow to the risks *to subjects* from being studied, so if social scientists are right that their research itself generally poses no risk to subjects, then any knowledge about anything would seem sufficient to satisfy this aspect of review. The remainder of the requirements listed above are exclusively focused on a study’s impact on subjects, with no language inviting assessment of scientific validity.

In light of what has been discussed thus far, we might distinguish: (1) experimental programs initiated by researchers, like drug trials; (2) study of programs operated by government agencies rather than the researchers, where vulnerable persons are research “subjects”; and (3) studies in which vulnerable persons are deemed “bystanders.” For (1), IRBs are directed to ensure that there is little or no risk of harm to subjects from the intervention or observations; personal information will be kept confidential; investigators do not use “subjects who are vulnerable to coercion or undue influence, such as children,” unless the study could not be done on less vulnerable persons; and legally-authorized representatives (“LARs”) for non-autonomous subjects give informed consent, after being informed of “appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject.”²⁹⁸ This seems like robust protection, but this category would likely be generally understood to include only new therapies, not agency or court processes. For (2), IRBs would likely concern themselves only with careful handling of

²⁹⁶ 45 C.F.R. § 46.111(a)(3).

²⁹⁷ 45 C.F.R. § 46.111(a)(2) (“The IRB should not consider possible long-range effects of applying knowledge gained in the research (e.g., the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility”).

²⁹⁸ 45 C.F.R. §§ 46.111(a)(3), 46.116(b)(4).

confidential information. For (3), none of the above would apply to protect the vulnerable persons, because all protections are limited to subjects.

So, what is a subject? TRC defines “subject” as a person from whom a researcher either “[o]btains information... through intervention or interaction... and uses, studies, or analyzes the information” or “[o]btains, uses, studies, analyzes, or generates identifiable private information.”²⁹⁹ An intervention includes “manipulations of the subject or the subject’s environment for research purposes”³⁰⁰ and “communication or interpersonal contact between investigator and subject.”³⁰¹ Thus, persons are subjects when directly studied or interviewed, when they are acted upon “for research purposes,” or when their identifying information is collected from a parent or agency.³⁰²

“Bystanders,” in contrast, are persons predictably impacted by an experiment/study but not subjects as so defined.³⁰³ One might expect protections to depend on persons’ objective situation relative to researcher conduct, but in ethical and legal literature the distinction rests on researchers’ subjective interest. If they care to study impact on you, and perhaps if they manipulate you or your environment in order to study how that impacts someone other than you, then you are a subject with the protections the regulations afford. However, if they are not sufficiently interested in an experiment/study’s impact on you, however great that might be, to interview or observe you, you are a bystander with no *ex ante* regulatory protections.³⁰⁴ Both the research/practice and the subject/bystander distinctions thus turn on this seemingly morally arbitrary fact of the mental state of the persons acting upon you.

A strained reading of the definition of “subject” might lead to treating all new forms of government intervention in family life as research, and children always as subjects of that research when impacted, simply because agencies typically create records regarding each intervention. CPS caseworkers interacting with children in foster care obtain certain information – for example, about their health, academic performance,

²⁹⁹ 45 C.F.R. § 46.102(e)(1); *Frequently Asked Questions: Human Subjects (IRB)*, COLUM. UNIV. RSCH. COMPLIANCE & ADMIN. SYS., <https://www.rascal.columbia.edu/help/irbfaq.html#qd2> [https://perma.cc/6XL2-EVKD] (last visited Dec. 28, 2021).

³⁰⁰ 45 C.F.R. § 46.102(e)(2).

³⁰¹ 45 C.F.R. § 46.102(e)(3). The regulations do not define “investigator.” *See id.*

³⁰² 45 C.F.R. § 46.102(e)(1).

³⁰³ Nir Eyal, *Study bystanders and ethical treatment of study participants – A proof of concept*, 34 *BIOETHICS* 941, 941, 942 (2020).

³⁰⁴ *See* Lynch, *Minimal or reasonable? Considering the ethical threshold for research risks to nonconsenting bystanders and implications for nonconsenting participants*, *supra* note 207, at 923.

behavior, and visitation with parents or other relatives – that they will use *in some way*.³⁰⁵ At a minimum, the agency is required to report to a juvenile court at foster care review hearings how the child is doing, and typically local agencies report certain aggregate data to a state level human services office, which in turn reports it to the federal Children’s Bureau for inclusion in national reports.³⁰⁶ Initial placement, subsequent placement changes, and services provided to children could fit the regulatory description of interventions.³⁰⁷ If one looks at just one individual child, agency intervention and interaction seem quintessentially “practice,” but CPS handling of each child’s case typically implements a policy the agency has adopted for many cases – for example, kin placement vs. non-kin placement, or concurrent planning vs. sequential planning – and contributes to the agency’s records of overall performance.³⁰⁸ Likewise with agencies providing other social services, to adults or children; they apply a general policy to individual cases and compile some statistics to assess compliance and effects.

By such stretched or unfamiliar interpretation of key concepts in federal regulations, then, children reported as abused or neglected might receive TCR protections against a new approach to CPS response (e.g., IFPS, DR, categorical preference for kin placement), including assessment of risk of harm to them from that intervention and informed proxy consent. DHHS would have to interpret the new policy as “research” and case workers or local agencies as “investigators” in connection with that research. It then would have to deem caseworker checkups on children remaining in parental custody or placed in foster care as “interactions” that generate information the agency will “use” in the relevant sense. No one has ever before suggested applying TCR to human-service agency program innovation, though, most likely because the first hurdle is never passed; no one views such experimentation as “research.” Even if so viewed, if no one involved bothers to study the impact on children, the research community would still deem them bystanders rather than

³⁰⁵ 45 C.F.R. § 1355.44(b).

³⁰⁶ *AFCARS Data & Research*, OFF. ADMIN. FOR CHIL. & FAM., <https://www.acf.hhs.gov/cb/data-research/adoption-fostercare> [<https://perma.cc/RPV7-J68Y>] (last visited Dec. 28, 2021) (“The Adoption and Foster Care Analysis and Reporting System (AFCARS) collects case-level information from state and tribal title IV-E agencies on all children in foster care . . . [These] include demographic information on the foster child as well as the foster and adoptive parents, the number of removal episodes a child has experienced, the number of placements in the current removal episode, and the current placement setting.”).

³⁰⁷ 45 C.F.R. § 46.102(e)(2) (“physical procedures by which information... [is] gathered ... and manipulations of the subject or the subject's environment”).

³⁰⁸ Adoption and Foster Care Analysis and Reporting System, 85 Fed. Reg. 28410–11 (May 12, 2020) (to be codified at 45 C.F.R. pt. 1355).

subjects. And in addition, there is now the gaping exception noted above for public service programs supported by the federal government.

D. Making Proxy Consent Meaningful

Receipt of social services and participation in research are generally voluntary, so a potential participant's own ability to refuse or complain theoretically constitutes some check on risky experimentation and poorly designed research. Parents in a limited sense are always voluntary participants in civil child maltreatment cases; they could choose to walk away, though at the high cost of losing custody and legal-parent status.³⁰⁹ With respect to research, TCR requires "legally effective informed consent" from any autonomous person prior to making such person a research subject.³¹⁰ This entails disclosing "the information that a reasonable person would want to have in order to make an informed decision about whether to participate, and an opportunity to discuss that information."³¹¹ Such information includes "an explanation of the purposes of the research"³¹² and "any benefits to the subject or to others that may reasonably be expected from the research."³¹³ Arguably, this should include explanation of how the research might impact policy – in particular, how the research might lead to prolonging or stopping an intervention. But it is unlikely researchers or IRBs deem that necessary.

As to any non-autonomous subjects, TCR contemplates devoted proxies (LARs) have power to give or refuse consent on their behalf and so provide the same protection autonomous persons would have against an experimental program or research project that poses risks to them and little prospect of benefit.³¹⁴ TCR has provisions specific to use of children as research subjects, requiring "permission" by a representative (presumptively, parents), regardless of the study's risk level, and that likely amounts to proxy informed consent.³¹⁵ TCR also requires "assent"

³⁰⁹ See, e.g., N.J. STAT. ANN. § 30:4C-15.1 (West) (requiring the state's Division of Family Development to petition for termination of parental rights when a parent reported for maltreatment "is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child" after being offered services, or if the parent has abandoned the child).

³¹⁰ 45 C.F.R. § 46.116(a)(1).

³¹¹ 45 C.F.R. § 46.116(a)(4).

³¹² 45 C.F.R. § 46.116(b)(1).

³¹³ 45 C.F.R. § 46.116(b)(3).

³¹⁴ *Id.*

³¹⁵ See 45 C.F.R. § 46.404 ("HHS will conduct or fund research in which the IRB finds that no greater than minimal risk to children is presented, only if the IRB finds that adequate provisions are made for soliciting the assent of the children and the permission of their parents or guardians, as set forth in § 46.408."); see also 45

by any such children capable of expressing “affirmative agreement” to participation.³¹⁶ It sensibly dispenses with the assent requirement when “the capability of some or all of the children is so limited that they cannot reasonably be consulted,”³¹⁷ which is certainly true of infants and arguably all pre-adolescent children in the child-maltreatment context.

In most instances, therefore, the only real check on involvement of maltreated children in research that could support prolongation of an experimental intervention is a requirement of proxy approval. Yet that is obviously problematic in the maltreatment context, given parents’ conflict of interests, as well as their likely lesser capacity and volition. TCR does recognize the problem with relying on parental consent in the child maltreatment context, but its way of dealing with it is unsatisfactory.³¹⁸ 45 C.F.R. 46.408 provides in relevant part:

[I]f the IRB determines that a research protocol is designed for conditions or for a subject population for which parental or guardian permission is not a reasonable requirement to protect the subjects (for example, neglected or abused children), it may waive the [parental] consent requirements..., provided an appropriate mechanism for protecting the children who will participate as subjects in the research is substituted... The choice of an appropriate mechanism would depend upon the nature and purpose of the activities described in the protocol, the risk and anticipated benefit to the research subjects, and their age, maturity, status, and condition.³¹⁹

This provision does not preclude IRBs from making parental consent alone sufficient, even if it is entirely self-serving. Its purpose appears instead to authorize reliance on an alternative mechanism when parents

C.F.R. § 46.405 (regarding research posing greater than minimal risk but prospect of direct benefit to child), § 46.406 (regarding research posing greater than minimal risk and no prospect of direct benefit to child); § 46.407 (giving effect to parental consent to children’s participation even when the sole justification for the research is that it might produce general knowledge as to a serious problem affecting children). “Permission” is unhelpfully defined as “agreement,” 45 C.F.R. § 46.402 (c), and the regulations specify no procedure for obtaining such agreement, information that must be given parents, or substantive limit on parents’ power to agree on children’s behalf. Cf. Doriane Lambelet Coleman, *The Legal Ethics of Pediatric Research*, 57 DUKE L. J. 517 (2007) (suggesting child maltreatment law might serve as the check on parental proxy consent to children’s involvement in medical research). However, that Subpart is entitled “Additional Protections for Children,” and states that IRBs must satisfy it “[i]n addition to other responsibilities assigned to IRBs under this part,” which include ensuring “legally effective informed consent of the subject or the subject’s legally authorized representative.” 45 C.F.R. § 46.116(a)(1).

³¹⁶ See 45 C.F.R. § 46.402(b).

³¹⁷ 45 C.F.R. § 46.408(a).

³¹⁸ 45 C.F.R. § 46.408(c).

³¹⁹ 45 C.F.R. § 46.408.

refuse, making their consent unnecessary, so researchers can go forward. And it trusts IRBs' judgment regarding the appropriateness of an alternative, guided only by quite vague standards, yet their members are unlikely to have child-welfare expertise.³²⁰ This is especially problematic given that TCR does contemplate including children in experiments and research that pose greater than minimal risk to the children and that might offer no prospect of benefit to the children studied or experimented on themselves.³²¹

One final potential safeguard is a categorical rule TCR contains for children in state custody. Though seemingly targeting juvenile detention, as an analogue to the special regulatory protections for adult prisoners, its language could encompass any children removed from parental custody and placed in a state facility, including foster care.³²² 45 C.F.R. § 46.409(a) states:

Children who are wards of the state or any other agency, institution, or entity can be included in research approved under § 46.406 or § 46.407 [involving greater than minimal risk and no likelihood of benefit to the children] only if such research is: (1) Related to their status as wards; or (2) Conducted in schools, camps, hospitals, institutions, or similar settings in which the majority of children involved as subjects are not wards.

That provision goes on to require appointment of “an advocate” for each child in this special circumstance, when a child is a ward of the state. The advocate should serve throughout the research process, act in the child’s best interests, and have the necessary preparation to do that, and they should be independent of the state agency and of the researchers.³²³ Such appointment is a good thing, but the provision does not make the advocate’s consent prerequisite to a child’s participation, and it does not expressly accord the advocate any other authority. Further, it applies only to research an IRB views as presenting “no prospect of direct benefit” to the children enrolled in the study.³²⁴ In the world of family-preservation policy, there is much wishful thinking about possible benefits to children,

³²⁰ *Id.*; see also Robert J. Katerberg, *Institutional Review Boards, Research on Children, and Informed Consent of Parents: Walking the Tightrope Between Encouraging Vital Experimentation and Protecting Subjects’ Rights*, 24 J.C. & U.L. 545, 574–75 (1998).

³²¹ Minimal risk is “the probability and magnitude of physical or psychological harm normally encountered in the daily lives, or in the routine medical, dental, or psychological examination of healthy persons.” 45 C.F.R. § 46.303(d).

³²² 45 C.F.R. § 46.409.

³²³ *Id.*

³²⁴ *Id.*

and IRB members are likely to be as susceptible to this as anyone else.³²⁵ The rule above for protecting children in situations where parental consent is not a “reasonable requirement” likewise calls for IRB speculation about possible benefit to children, in its explanation of what constitutes an “appropriate mechanism” of protection, so the wishful-thinking trap lies there as well.³²⁶

The tendency to undue optimism and lack of expertise among IRB members also make it worrisome to rely on IRB judgment as to the level of risk an experiment or study poses, with no opportunity for advocates for children to object. In some child welfare situations, level of risk is the obverse of or dependent on the potential for benefit.³²⁷ For example, if wishful thinking leads an IRB to exaggerate the prospects of a child’s safely returning to parental custody, it will at the same time lead the IRB to underestimate the danger of prolonged foster care and delayed—perhaps even prevented—real permanence.³²⁸ If an IRB exaggerated the likelihood of an incarcerated woman permanently changing her pattern of behavior after bonding with a baby in prison, as advocates for prison nurseries encourage legislators to do when they cite flawed recidivism studies,³²⁹ it would thereby also underestimate the danger to the child of attachment disruption as a result of the mother returning to drugs, abusive boyfriend, gang, prison, etc. after exit from prison.³³⁰

E. Preventing Coercion

Parents themselves might be disserved by state experimentation with different responses to maltreatment or by studies of those responses. An innovative program or process might be traumatizing or less effective at parental rehabilitation relative to the existing approach, and research could add to the practical and psychological demands on parents brought into the child protection system or might support policy decisions adverse to the parents in some way. Indeed, one might doubt that parents are always benefited by having children returned to their custody, if they are not able to regulate their conduct toward the children. Even some who retain legal-parent status might actually be made worse off thereby, if they will never be able to fulfill the parental role adequately yet will be subject to prolonged state coercion and shaming because of that status. Conceivably, some might regret participating in research used to support a policy they come to see as harmful to their children.

³²⁵ Coleman, *supra* note 315, at 599.

³²⁶ 45 C.F.R. § 46.409.

³²⁷ See, e.g., Coleman, *supra* note 315, at 566–67.

³²⁸ *Id.*

³²⁹ See *supra* notes 84–85 and accompanying text.

³³⁰ See, e.g., *id.* at 607.

Parents' consent to their own participation in a novel program or in research is therefore also normatively significant.³³¹ Yet their capacity and volition might be substantially compromised. 45 C.F.R. § 46.116(a)(2) requires that researchers "minimize the possibility of coercion or undue influence," but the situation is rife with inherent coercion if reunification with children – and possibly avoidance of criminal charges – depend on appearing fully cooperative with courts, CPS, and anyone to whom those state actors refer parents.

V. BUILDING A MORE ROBUST ETHICAL FRAMEWORK

This Part considers additional strategies to accomplish what deliberation by politicians, judgment of politically-appointed agency heads, peer review, and IRB review have not: a cautious, evidence-based approach to innovating in social services and robust checks against publication of bad research. The proposals are, for the most part, novel and intended to initiate conversation. The primary consideration in developing ideas here is likely effectiveness; questions of political feasibility are left to others.

Trying to fit social services innovation into an experiment/research framework would be especially jarring, but the core problem is, as in some areas of medicine, that entities charged with providing a certain fundamental good to humans who have pressing needs are inclined, in the face of ongoing failure, to try any new approach they think might be the magic pill they have been lacking. Absent adequate institutional check on that inclination – specifically, ensuring a sound research foundation and protections for impacted persons – those entities are apt to make things substantially worse for the very persons they are supposed to serve. Bad research is not a problem in and of itself, any more than is bad legal or historical scholarship if everyone ignores it. Bad research is a problem because it is fueling the first problem, proliferation of misguided innovation. This Part first considers checks on innovation that might render bad research innocuous, then considers ways to prevent bad research in case this is necessary as an indirect way of addressing the core problem, if direct ways are incomplete or less feasible.

A. *Treating Innovation as Experimentation subject to Pre-Approval and Study*

Two direct ways to guard against ill-advised social-services experimentation would be (1) create a new mechanism for prior approval and (2) bring systemic social-services innovation under the TCR rubric – requiring IRB review and approval – by expanding the concept of research

³³¹ *Id.* at 611.

or mandating that innovation occur – as with new pharmaceuticals – within a study setting. This subpart focuses on interventions substantially impacting non-autonomous persons, because current safeguards in legislative and rulemaking processes are particularly inadequate for them, as discussed above.³³²

Something of the first sort, such as a national clearinghouse or state-level ombuds offices with substantial powers, should be feasible; there are existing models of these discussed below. There is, however, a recursive agency problem inherent in appointing people to protect non-autonomous persons; those choosing the protector might not themselves reliably act in the interests of the non-autonomous persons in making the selection. The second approach confronts a line-drawing challenge, but this might be surmountable. Innovation in social service is usually a matter of overt system-wide policy change, when some major player claims to have found the cure for a social disease necessitating government intrusion in private life, rather than informal experimenting at the retail social-work level. The Administrative Procedure Act (“APA”) provides a model for limiting protections to more significant changes.³³³

1. A New Screening Mechanism

At least when it greatly impacts non-autonomous persons, social-service innovation should undergo screening beyond that which legislatures and agency leaders currently provide. Additional screening processes and substantive standards could be effective.

i. Impact Studies

Within existing decision processes, better and more public information might improve outcomes. Federal and state governments could adopt omnibus laws requiring that some or all types of proposed legislation or regulation undergo a scientifically rigorous vulnerable-persons impact study, akin to studies of fiscal or environmental impact commonly done today, with the results made publicly available.³³⁴ If taxpayers and endangered species warrant such protection, certainly non-autonomous and other unempowered humans do as well.³³⁵

³³² See *supra* Part IV.

³³³ See *infra* notes 394–97 and accompanying text.

³³⁴ Cf. FERNANDO HOCES DE LA GUARDIA & JENNIFER STURDY, BEST PRACTICES FOR TRANSPARENT, REPRODUCIBLE, AND ETHICAL RESEARCH 44 (2019), https://publications.iadb.org/publications/english/document/Best_Practices_for_Transparent_Reproducible_and_Ethical_Research_en_en.pdf [https://perma.cc/3596-TVHH].

³³⁵ *Id.*

As the FDA does before approving testing of new drugs on humans,³³⁶ those conducting this study would assess what evidentiary basis proponents of new legislation or regulation have for it. Of course, animal studies are not possible with social services, but often new interventions have features of several other experiences that have been studied. For example, they might entail prescribing addiction programs for parents, so proponents should present and address research on success of addicted adults in different programs. Or they might entail separating children long-term from parents, disrupting foster-care placement that have been nurturing and stabilizing for a child, or diversion of children into informal kin care, and then proponents should be required to address explicitly what that research might say about the likely impact of the new innovation on children. Requiring public agencies to disclose their empirical basis for predictions of impact could counteract the self-interest some have in approving or promoting new programs. Ideally, the study would be done by an entity independent of any agency that would be implementing the new rules or spending new funds. An example of this type of NGO review in child welfare is the Prevention Services Clearinghouse, developed pursuant to the Family First Act, which is staffed by professional social scientists and tasked with rating maltreatment-prevention programs and services as “well-supported, supported, promising, or does not currently meet criteria.”³³⁷

ii. Ombudsperson

A specialized government entity independent from the legislature and the governing executive agency, if assigned a fiduciary mission and the power to challenge or even block proposed innovations in programming and procedures, could be of great value for non-autonomous persons. Today, fifteen or so U.S. states have an ombuds office for children, and in some other states there is an ombuds office within the state agency administering foster care that fields complaints from any parties.³³⁸ All states have a public ombuds office for elderly persons residing in long-

³³⁶ OFF. OF INSPECTOR GENERAL, DEP’T OF HEALTH & HUMAN SERVICES, FDA’S REVIEW PROCESS FOR NEW DRUG APPLICATIONS: A MANAGEMENT REVIEW i (Mar. 2003).

³³⁷ *Welcome*, TITLE IV-E PREVENTION SERVICES CLEARINGHOUSE, <https://preventionservices.abtsites.com/> [<https://perma.cc/86SS-Z3CQ>] (last visited Oct. 25, 2021).

³³⁸ See Alison Graham, *Virginia’s First Children’s Ombudsman to Fill Gap in Social Services Accountability*, ROANOKE TIMES (July 1, 2021), https://roanoke.com/news/local/virginias-first-childrens-ombudsman-to-fill-gap-in-social-services-accountability/article_d8fb0d58-d918-11eb-afcc-3f3059d02e06.html [<https://perma.cc/LZ4F-KZDC>].

term care facilities.³³⁹ The powers such ombudspersons possess vary.³⁴⁰ At a minimum, they receive complaints from protected persons or from other private parties aware of harms to protected persons, and they can convey concerns to agency personnel and legislative or executive decision makers, serving in a formal or informal mediator role to help resolve the complaints. In some states, the ombuds office for children can, in theory: a) directly investigate and issue opinions in conflicts between children and state agencies, b) review agency policies and practices, c) recommend new regulations or legislation, and/or d) bring legal action to enforce the rights of a child.³⁴¹ Many such offices, though, receive such meager funding that the state's commitment to the beneficiary populations appears nominal.³⁴²

Assuming occupants of such offices are truly devoted to the population they serve, knowledgeable, sophisticated in consuming research, and in possession of sufficient resources, then ideally the ombudsperson's approval would influence decisions whether to implement new ideas and could even be a necessary condition for adopting any innovation. For example, should the Casey foundation lobby state legislatures to authorize yet another approach to family preservation (or to strengthen or weaken certain presumptions or priorities or timelines in foster care rules) the legislatures would refer the proposal to the children's ombudsperson, and the bill should never be put to a legislative vote without approval from that office. If that gives too much power to the ombudsperson, their declining to approve might simply trigger additional processes – such as more robust committee hearings – before the proposal could come to a vote. With programs already in place or agency exercise of existing discretion, the ombudsperson should have authority to examine and assess the program or action, with full access to agency records, and to introduce reform legislation or regulation or bring court action to enjoin continuation of what is being done.

An ombudsperson office so designed would be a marked improvement over the currently prevailing regime, in which vulnerable persons are often unrepresented in the processes for creating policies that will impact them. Creating such an office should not entail great expense

³³⁹ See *Nursing Home Ombudsman*, NURSING HOME ABUSE CTR. <https://www.nursinghomeabusecenter.com/elder-abuse/ombudsman/> [<https://perma.cc/SF9N-EN5S>] (last visited Oct. 25, 2021).

³⁴⁰ Graham, *supra* note 338.

³⁴¹ See, e.g., CONN. GEN. STAT. §§ 46a-13l, 13m, 13o (duties include evaluating agency procedures for service delivery to children and recommending changes; powers include inspecting agency records, issuing subpoenas to public or private actors, and filing legal action in court or agency to enforce child's rights, investigate complaints children submit, and advocate for children, recommend changes to state policy, and propose legislative reform); WASH. REV. CODE § 43.06A.030.

³⁴² See MOIRA KATHLEEN O'NEILL, PULLING BACK THE CURTAIN: STATE CHILDREN'S OMBUDSMEN AT WORK 126–27, 131–32, 136–38, 175–76 (2011).

– indeed, it would likely pay for itself by preventing public spending on ill-advised experimentation.

iii. Addressing the Agency Problem

The conundrum with an ombuds office for non-autonomous persons, and with a clearinghouse reviewing programs for such persons, is that those persons typically have no say in who fills the office and are unable to hold the office occupant accountable.³⁴³ The legislature or agency that cannot be trusted to safeguard the interests of those persons, against forces pushing other agendas, also cannot be trusted to select the office holders. Further, anyone installed might be vulnerable to removal following any controversial decision, or to capture by the likes of Casey. Even family members might not be reliable watchdogs, overseeing an ombudsperson for children or for incompetent adults, as they might have conflicts of interest with the non-autonomous individuals. This is one instance of a general problem with appointing agents for principals unable themselves to select and monitor the agent.

Solutions to the agency problem developed in the corporate context suggest strategies for dealing with it in the ombuds or clearinghouse context. One is transparency: a possible procedural fix is to require that both selection of ombudspersons or clearinghouse staff and decisions by those officials be transparent and subject to public input.³⁴⁴ Legislatures should publish names of nominees for the positions and invite public comment, enabling organizations and scholars who focus on the interests of the protected group to weigh in, as occurs with federal judicial appointments. There could be public “interviewing,” with Q&A sessions. Such vetting is an incomplete fix, given that legislators might be no more capable of discerning objectively which of competing views about a candidate’s merits is accurate than they are of discerning which of competing views about new social-service policies is more accurate. A further step would be to mandate that an ombudsperson, once in office and carrying out its functions, publish written explanations for decisions to support or oppose particular legislation or agency rule making, with reference to any empirical research relied upon, so that the public can critique the reasoning. Concern for reputation and public respect does not guarantee objective, rational, and independent decision making, but it should have some constraining effect. Another general fix for the agency

³⁴³ Lauren D’Ambra, *Appendix E: Survey of Ombudsman Offices for Children in the United States*, OFF. JUV. JUST. & DELINQUENCY PREVENTION (June 5, 1996), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/walls/appen-e.html> [<https://perma.cc/N3LZ-NHL6>].

³⁴⁴ See generally Paul G. Mahoney, *Mandatory Disclosure As A Solution to Agency Problems*, 62 U. CHI. L. REV. 1047 (1995).

problem is performance incentives, though performance metrics might be difficult to develop in the social-service context.

iv. Specifying Standards for Approving Experimental Programs/Policies

Both an impact study and ombuds review, as well as legislative and administrative decision making, might be enhanced by guidance on what substantive standard to apply. TCR's special rule for prisoners – who are dependent, vulnerable, and limited in their ability to appeal to outside support – suggests one possibility for children in foster care, whose temporary caregivers are also under the thumb of state actors.³⁴⁵ It might also be appropriate for incompetent adults under a guardianship or in state custody. Under it, an experimental practice must hold out reasonable probability of benefiting the subjects, to an extent outweighing any costs, and costs must be measured *in light of available alternatives*.³⁴⁶ Further, risks for subjects must be ones people not in the same constrained environment would be willing to take. This heuristic might guide judgment about, for example, how promising a new approach to parental rehabilitation must be in order to justify holding children in foster care waiting to see the outcome (i.e., considering how long we adults would wait for such persons if interested in forming a family with them). Other potentially pertinent protections are procedural, such as proscribing large rewards for consent to participation that could compromise volition, which supports the distrust of parental agreement noted above.³⁴⁷ A further requirement is less clearly translatable – namely, that the procedure for selecting participants must be “immune from arbitrary intervention” by persons who have power over the potential subjects.³⁴⁸ But in the child welfare realm this might mean, for example, strengthening prohibitions on treating children differently on the basis of their race in ways that delay or deny adoption.

³⁴⁵ Cf. Naomi Schaefer Riley, *Bureaucrats Are Ripping Foster Families Apart*, NATIONAL REVIEW (Oct. 29, 2020), <https://www.nationalreview.com/magazine/2020/11/16/bureaucrats-are-ripping-foster-families-apart/> (discussing vulnerability of foster children to arbitrary public-agency action and the helplessness of foster parents to advocate for the children); ETHICAL CONSIDERATIONS FOR RESEARCH INVOLVING PRISONERS: FEDERAL REGULATORY LANDSCAPE, INSTITUTE OF MEDICINE COMMITTEE ON ETHICAL CONSIDERATIONS FOR REVISIONS TO DHHS REGULATIONS FOR PROTECTION OF PRISONERS INVOLVED IN RESEARCH 79 (Lawrence O. Gostin et al. eds., 2007), available at <https://www.ncbi.nlm.nih.gov/books/NBK19883/> [<https://perma.cc/UWB3-9TG4>].

³⁴⁶ See 45 C.F.R. § 46.306(a)(2)(iv); see also 45 C.F.R. § 46.305(a)(3); Bailey v. Lally, 481 F.Supp. 203, 223–24 (D. Mary. 1979).

³⁴⁷ 45 C.F.R. § 46.305(a)(2), (6).

³⁴⁸ 45 C.F.R. § 46.305(a)(3), (4).

2. Treat Social Services Experimentation as Research

Another omnibus law might require that some types of new programs or processes be instituted only within a formal research framework, subject to expert vetting, piloting, and informed-consent requirements.³⁴⁹ Certainly, some parent-protective measures Part II described were analogous to introduction of new drugs or medical devices. The state effectively experiments on children when, for example, it decides as to newborns of incarcerated women: “Well, we’ve been sending these children out to the community to live with relatives, and we know that generally goes very poorly for them. We know most would be far better off if instead immediately placed for adoption. But rather than take steps toward more adoptions, let’s try putting the babies into the prison with their mothers and see what happens.”³⁵⁰ Likewise, when the state responds to maltreatment stemming from severe and chronic parental drug abuse by reasoning: “Well, we know the traditional approach typically leads ultimately to termination of parental rights in these cases, and so that children who are infants when removed would probably generally be better off if we did up-front triage and placed many more immediately for adoption. But let’s instead try holding all children in foster care for even longer and applying the drug-court model to parents, and we’ll see how that goes.”³⁵¹ That is akin to experimenting with new protocols for administering existing drugs (increased duration or dosage), which require pre-implementation review entailing presentation of reliable evidence to support predictions about positive effects.³⁵² These novel interventions with children were less promising and more dangerous than many new drugs, dietary supplements, and protocols requiring FDA approval. Yet they have proliferated without research support, and once various state and local governments have sunk public funds into creating them they are very difficult to undo.

Alternatively, TCR’s definition of research might be amended explicitly to encompass some novel social-service interventions

³⁴⁹ See 21 C.F.R. § 50.3(b).

³⁵⁰ Cf. Justin Jouvenal, *Raising Babies Behind Bars*, WASH. POST (May 11, 2018), <https://www.washingtonpost.com/news/local/wp/2018/05/11/feature/prisons-are-allowing-mothers-to-raise-their-babies-behind-bars-but-is-the-radical-experiment-in-parenting-and-punishment-a-good-idea/> [https://perma.cc/Y2GB-3FUJ].

³⁵¹ Cf. Suzanna Fay & Elizabeth Eggins, *PROTOCOL: Family treatment drug courts for improving parental legal and psychosocial outcomes*, CAMPBELL SYSTEMATIC REVIEWS (Aug. 14, 2019), <https://onlinelibrary.wiley.com/doi/full/10.1002/cl2.1024> (describing lack of “methodologically rigorous review” of family drug courts despite their proliferation across the country).

³⁵² See 21 C.F.R. § 312.30.

undertaken on a system-wide basis by an agency that maintains case records and compiles data, to impose greater protections and scientific caution and rigor. The legal distinction between “practice” or “treatment” and “research” is now murky.³⁵³ It seems to turn on whether interventions are adopted for categories of persons rather than individualized and whether those applying them aim to learn something that could be relevant to treatment of other persons in the future.³⁵⁴ TCR provisions addressing conflicts of interest state:

Research means a systematic investigation, study or experiment designed to develop or contribute to generalizable knowledge relating broadly to public health, including behavioral and social-sciences research. The term encompasses basic and applied research (e.g., a published article, book or book chapter) and product development (e.g., a diagnostic test or drug).³⁵⁵

Federal regulations specific to human-subject research take a similar approach, defining research as a “systematic investigation, including research development, testing, and evaluation, designed to develop or contribute to generalizable knowledge.”³⁵⁶ While not itself authoritative, a document that greatly influenced development of the federal regulations and has guided scholarly analysis of research ethics – the Belmont Report³⁵⁷ – offers further explanation by distinguishing “research” from “practice”:

³⁵³ See Yuan, *supra* note 258, at 47 (contending that the distinction is obsolete in medicine, which today uses a “precision medicine and learning healthcare model, whereby data and refinements of treatment methods made in the course of clinical care are continuously fed back to improve care of individual patients and contribute to the sum of medical knowledge”); Nancy M.P. King, *The Line Between Clinical Innovation and Experimentation*, 32 SETON HALL L. REV. 573, 573 (2002).

³⁵⁴ See Yuan, *supra* note 258, at 67.

³⁵⁵ 42 C.F.R. § 50.603.

³⁵⁶ 45 C.F.R. § 46.102; *see also* *Vodopest v. MacGregor*, 913 P.2d 779, 784–85 (1996) (“Medical research includes a class of activities designed to develop or contribute to generalizable knowledge and generalizable knowledge consists of theories, principles, or relationships (or the accumulation of data on which they may be based) that can be corroborated by accepted scientific observation and inference.”).

³⁵⁷ *Federal Policy for the Protection of Human Subjects* (‘Common Rule’), HHS OFF. FOR HUM. RSCH. PROTS. <https://www.hhs.gov/ohrp/regulations-and-policy/regulations/common-rule/index.html> [<https://perma.cc/YR7A-25YT>] (last visited Oct. 25, 2021) (“The current U.S. system of protection for human research subjects is heavily influenced by the Belmont Report, written in 1979 by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.”).

For the most part, the term "practice" refers to interventions that are designed solely to enhance the well-being of an individual patient or client and that have a reasonable expectation of success. The purpose of medical or behavioral practice is to provide diagnosis, preventive treatment or therapy to particular individuals. By contrast, the term "research" designates an activity designed to test an hypothesis, permit conclusions to be drawn, and thereby to develop or contribute to generalizable knowledge (expressed, for example, in theories, principles, and statements of relationships). Research is usually described in a formal protocol that sets forth an objective and a set of procedures designed to reach that objective. When a clinician departs in a significant way from standard or accepted practice, the innovation does not, in and of itself, constitute research. The fact that a procedure is "experimental," in the sense of new, untested or different, does not automatically place it in the category of research.³⁵⁸

Thus, in federal regulations, the distinction appears to have two components: (1) individual vs. group focus and (2) concern just for the current patient versus an aim of creating new knowledge applicable beyond the current patient.³⁵⁹ The first is clearly present when the child welfare system jumps on a new bandwagon. As to the latter, the concepts "systematic," "designed to," and "generalizable" are key, and consistent with the Belmont Report's reference to "formal protocol," "test an hypothesis," and "generalizable knowledge."³⁶⁰ Neither source defines "systematic," but dictionary definitions suggest it means following a consciously-chosen methodology in applying an intervention and in recording results.³⁶¹

In experimenting with different behavioral interventions in reaction to family dysfunction, state and private agencies do typically develop a methodology for application, such as a set of procedures memorialized in a statute, administrative regulation, or an agency policy manual.³⁶² The agencies intend from the outset to take a new approach with a large number of people in a broad range of circumstances, expecting overall positive results.³⁶³ Service providers are required to record outcomes in all cases, compile aggregate data for the entire caseload of the local court or CPS agency, and report the data to state-level agencies, which in turn compile

³⁵⁸ *The Belmont Report*, *supra* note 227, at Part A.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at Part A n.2, Part A, Part C.

³⁶¹ *Systematic*, BLACK'S LAW DICTIONARY (2d ed. online). *See generally* *The Belmont Report*, *supra* note 227; 45 C.F.R. § 46.102.

³⁶² Bruce A. Thyer et al., *Locating Research-Supported Interventions for Child Welfare Practice*, 34 CHILD & ADOLESCENT SOC. WORK J. 85, 87 (2017).

³⁶³ *Cf. id.*

state-wide figures and report them to a federal agency.³⁶⁴ National figures are made available to the scientific community, for further analysis.³⁶⁵ Policy makers routinely review, or solicit input from professionals who routinely review, these compilations to learn what “works” and what does not, in theory deciding whether to continue and grow a new approach based on that information.³⁶⁶ Thus, if being non-systematic means acting randomly and with myopic focus on single cases, or being oblivious to outcomes, that is not the problem with these family preservation programs. It is rather that the whole process is done very badly from a scientific standpoint, and unethically.

In any event, it is somewhat ironic that federal regulations create greater safeguards when innovation is undertaken in a more scientific manner rather than haphazardly and with indifference to results. Restrictions on research do in part protect patients from dangers intrinsic to the kind of formal research that yields published results, such as breach of confidentiality.³⁶⁷ But they also aim to protect persons from physical, psychological, emotional, and dignitary harms that can equally well result from trying untested therapies on individual patients in “practice.”³⁶⁸ The research/practice distinction also partly reflects concern that danger of such harms is greater when researchers have a motivation (e.g., knowledge acquisition) other than just the wellbeing of patients.³⁶⁹ Yet the Belmont Report, after stating that the experimental nature of a treatment does not render its application “research,” tellingly goes on to admonish:

Radically new procedures of this description should, however, be made the object of formal research at an early stage in order to determine whether they are safe and effective. Thus, it is the responsibility of medical practice committees, for example, to insist that a major innovation be incorporated into a formal research project.³⁷⁰

Moreover, the Belmont Report takes the position that “if there is any element of research in an activity,” including whenever research is

³⁶⁴ 45 C.F.R. § 1355.

³⁶⁵ See *Adoption & Foster Care Statistics*, U.S. DEP’T HEALTH & HUM. SERVS., <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/afcars> [<https://perma.cc/HNZ8-YXXK>] (last visited Oct. 30, 2021).

³⁶⁶ *Id.*

³⁶⁷ Katerberg, *supra* note 320, at 557.

³⁶⁸ Coleman, *supra* note 315, at 592.

³⁶⁹ See Yuan, *supra* note 258, at 50.

³⁷⁰ *The Belmont Report*, *supra* note 227, at Part A.

designed to evaluate the safety and efficacy of a therapy, then that activity should undergo review for the protection of the human subjects.³⁷¹

All this said, there must be a way to limit the scope of changes to social service operations that are subject to pre-approval and other safeguards attached to “research,” which add to their cost. The upshot of the foregoing is that the law cannot rationally draw the line based on an illusory conceptual distinction between research and innovative practice. The vague concepts of systematic, design, and generalizable knowledge fail as distinguishing characteristics. Also unhelpful is the Belmont Report’s reference to “reasonable expectation of success,” as if experimentation in a research context is commonly undertaken even when that is absent.³⁷²

A more sensible alternative might be a measure of downside risk for those on whom a new approach is tried, including both severity and likelihood of any potential harm relative to available alternatives.³⁷³ If a proposed approach is a substantial departure from prevailing practice or from other treatments known to have acceptable results, and “risky” to a degree that would make the ordinary competent patient wish for an independent expert’s “second opinion” of its advisability, the service provider arguably should have their plan subjected to pre-implementation expert review. It is beyond this Article’s scope to flesh out a standard in detail. I will simply suggest that “treatments” like placing babies to live in prison for years or holding infants in provisional placements for years with the intent eventually to disrupt whatever relationship they form, should pass any plausible threshold of risk to wellbeing warranting the protections now given to human-subject “research.” They entail “danger” to psychological and emotional health and development within the meaning of the federal statute governing DHHS funding of new programs. As such, they should be subject to pre-implementation efficacy and ethics review by an independent group of child-welfare experts, a process of piloting and gradual extension dependent on documenting positive results, and a meaningful proxy informed-consent requirement. Below is more detail regarding each step.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Cf.* Phoebe Friesen, et al., *Rethinking the Belmont Report?*, 17(7) AM. J. BIOETHICS 15, 17, 19 (2017) (“[S]ome have argued that unique guidelines for innovative practice are needed, especially since disadvantaged groups are particularly at risk of being enrolled. . . . The boundaries around what requires oversight should be defined pragmatically, so that . . . harms to participants are minimized. Oversight should be required for any research or intervention involving novel, significant risks. . . . Regulation ought to be proportionate to novelty and level of risk, rather than derived from intent.”).

i. Pre-Approval

If an unproven program for state response to parental dysfunction (addiction, mental illness, mental disability, incarceration, etc.) is treated as research and entails “more than minimal risk” of detriment to children, it would need pre-approval by an entity with appropriate scientific expertise independent of the program operator.³⁷⁴ That vetting authority should also include in the process a representative for children.³⁷⁵ Approval would require convincing the approving entity that the new program or practice promises an “anticipated benefit” for children and that the “relation of the anticipated benefit to the risk is at least as favorable to the subjects as that presented by available alternative approaches.”³⁷⁶

Reference to alternatives is crucial in connection with parental dysfunction. The state’s aim when it assumes control of a child’s intimate life, which it does in a *parens patriae* rather than police-power capacity, should be to find the best for the child among all possible non-ideal resolutions of a bad situation.³⁷⁷ Yet the only alternative that participants in child welfare policy typically contemplate is the existing or traditional approach – that is, reacting after maltreatment has occurred by holding the child in the limbo of foster care while trying to transform parents. As Richard Gelles and others have documented, CPS social workers operate with a parent-focused, never-give-up mentality.³⁷⁸ Even in comparison with this norm, though, it might be that some proposed innovations could not pass the test – for example, if the only potential benefit that can be substantiated is for parents and the innovations would only increase risk of detriment to children, such as by further prolonging foster care (as some FDCs have done) or by leaving children more often in the custody of high-risk parents (as with DR).

But treating novel family-preservation interventions as research would have the additional effect, under these rules, of forcing state actors to consider the full range of alternatives – in particular, the alternative of placing immediately for adoption children whose parents have little prospect of becoming adequate (reliable, safe, nurturing) caregivers within

³⁷⁴ *Id.*

³⁷⁵ This could be instead of or in addition to vetting by a child ombudsperson, who might not have empirical training.

³⁷⁶ See also 45 C.F.R. § 46.116(d) (“in seeking informed consent the following information shall be provided to each subject or the legally authorized representative: ... disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject...”); 45 C.F.R. § 46.116(b)(4) (requiring disclosure to research subjects of any alternative procedures or courses of treatment that might be advantageous to the subject).

³⁷⁷ See JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 195–200 (2006).

³⁷⁸ See GELLES, *OUT OF HARM’S WAY*, *supra* note 33, at 75–92.

a time consistent with children’s developmental needs (which is shorter with infants than with older children).³⁷⁹ Adoption is as a practical matter – though not always as a legal matter – an available alternative for any newborn or infant in the U.S., and also for a substantial portion of somewhat older children in the maltreatment system.³⁸⁰ It is also available as a legal matter in some cases even at the time of initial state response to parental incapacity or a maltreatment report – that is, whenever CPS is not required to undertake rehabilitative efforts.³⁸¹ In other cases, it becomes legally possible later (e.g., after the child has been in foster care continuously for fifteen months) yet CPS does not even consider it because it is implementing some new family-preservation program or policy, such as FDC or kincare-prioritization.³⁸² Treating that program or policy change as research could force CPS to explain, with evidentiary basis, why adoption is not a better option for many children, all things considered.

An alternative basis for approving “research involving greater than minimal risk” to children is an IRB finding that the research is likely to yield “generalizable knowledge” of sufficient value to outweigh the risk to the children.³⁸³ Some new family-preservation programs could conceivably satisfy that requirement, but most likely could not. Most entail instability for many children during the crucial attachment stage of development, making a tradeoff for new knowledge unacceptable.

Such balancing becomes irrelevant if a proper advocate is appointed for children, and if the advocate (unlike a parent) is subject to the normal obligations of an attorney or other fiduciary, which generally prohibit “vicarious altruism” – that is, approving sacrifice of a ward’s interests to benefit other persons or social causes.³⁸⁴ The advocates would have a duty of loyalty that requires acting solely for the ward’s best interests, which would mean refusing permission to inflict the innovation on children they represent.³⁸⁵ Thus, treating new family-preservation programs as experimentation or research subject to pre-approval would mean they simply could not be undertaken with any children for whom the anticipated benefit, taking into account probability, does not outweigh the downside risk, relative to all available alternative ways of responding to their predicament, including placing them for adoption.

³⁷⁹ Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, *supra* note 38, at 415–35 (2008).

³⁸⁰ *Id.* at 408–09 (2008).

³⁸¹ *Id.* at 437–48.

³⁸² *Id.* at 437.

³⁸³ 45 C.F.R. § 46.406.

³⁸⁴ See Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, *supra* note 38, at 411–12.

³⁸⁵ See Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 995 (2017).

ii. Piloting

A proposed innovation that passes the test described above for approving research should be piloted before widespread adoption. DHHS should authorize only one or a few agencies in the country initially to try an innovative approach to responding to parental incapacity or maltreatment reports. The pilot programs should be subject to immediate and rigorous study to determine at the earliest possible time whether predicted benefits or feared costs have materialized, and the innovation should not be expanded to other jurisdictions unless properly conducted study of the pilot programs shows positive results for the children involved. Expanding only in stages, as with pharmaceutical clinical trials, would guard against the possibility that the first trial was unrepresentative – for example, because a program received extraordinary state attention and funding unlikely to continue or to be replicated elsewhere. At any point when it becomes apparent that measured outcomes for children are or will be negative, their advocates should refuse continuation of their clients' (i.e., the children's) participation.

Given that some innovations have already been introduced and proliferated despite lack of valid study confirming their net benefit, some retrospective work is also required.³⁸⁶ Practices that should still be considered experimental and untested, such as prison nurseries, should spread no further until properly examined. Those that persist despite robust research disproving their promise, such as DR, should be halted; if no other means is feasible, this could occur by LARs for children refusing consent to their participation, as discussed below.

iii. Legitimizing Participation

Any implementation of novel CPS policy subject to TCR should treat children as subjects. If the agency is viewed as the investigator, this requires no alteration of the existing definition; CPS is required to collect information about each child reported for maltreatment or in its custody.³⁸⁷ Even if a new policy involves avoiding or relinquishing custody, by leaving children with parents or non-foster-care relatives, at the point of choosing to do that social workers act upon the child and make a record of having done so.

CPS should not be able to avoid this implication – that children are “subjects” to whom protections apply – including a proxy consent requirement, by themselves opting to be indifferent to a new policy's or program's effects on children. TCR should be amended to broaden “subject” to encompass any persons substantially impacted by research

³⁸⁶ See *supra* Section IV-A.

³⁸⁷ CHILD WELFARE INFO. GATEWAY, *supra* note 67.

interventions. Leading medical-research ethicists have noted the absurd implications of the existing conception, dependent on researcher interest.³⁸⁸ Holly Fernandez Lynch, for example, hypothesizes a study of a new cure for HIV, asking persons with HIV to stop taking current medication that keeps it under control.³⁸⁹ That makes patients' viral levels skyrocket, which endangers any intimate partner they have. Yet if the researchers are interested only in the patients and ignore the partners, the latter are bystanders under current regulations and need not be informed or give consent. Any harm they incur would be a proximate result of the patients' autonomous choice, so they would also have no *ex post* recourse against the researchers.

Illustrations are possible in many areas of life. Imagine researchers interested in whether – and in what percentage of – cases exposing COVID-vaccinated children who attend public school to live COVID virus has any adverse impact on them. The researchers undertake this experiment knowing vaccinated children, even if not themselves adversely affected by exposure, could be carriers, and they know there are some children in every school not vaccinated. Yet the researchers have no interest in any “secondary” effect of the virus exposure – that is, transmission of disease to unvaccinated children. Then the unvaccinated children are not subjects, and consent on their behalf is not required for this test. Neither they, nor their parents, need be informed, at least not by virtue of rules governing research. A non-medical example: imagine a government authorizing location of a pollution-spewing factory in the midst of a residential community, wanting to test the spatial limits of human impact.³⁹⁰ The researchers hired by government ignore residents within a half mile, knowing they are doomed, and start at the half mile mark, moving outward till they find people showing no adverse effects. Those examined, including those for whom there is no effect, are subjects,

³⁸⁸ See, e.g., Eyal, *supra* note 303, at 941 (“it is preposterous that neither the IRB nor any other entity is currently tasked legally to protect [bystanders] against, e.g., study-borne infections”); Lynch, *Minimal or reasonable? Considering the ethical threshold for research risks to nonconsenting bystanders and implications for nonconsenting participants*, *supra* note 207, at 923–32.

³⁸⁹ *Id.* at 923; see also *id.* at 928 (“when the risks look similar, it seems inadequate to justify differential treatment based simply on the fact that researchers directly intervene upon or interact with participants, or use their identifiable information, whereas they do not with bystanders”); Ivan Glenn Cohen, *Organ Donor Intervention Trials and Risk to Bystanders: An Ethical Analysis*, 16 *CLINICAL TRIALS* 463, 464 (2019).

³⁹⁰ See, e.g., Jim Salter, *The Army Sprayed St. Louis With Toxic Aerosol During A Just Revealed 1950s Test*, *INSIDER* (Oct. 4, 2012), <https://www.businessinsider.com/army-sprayed-st-louis-with-toxic-dust-2012-10> [<https://perma.cc/6777-HA4G>].

but the definitely-doomed are bystanders who receive no ex ante protection from research rules.

There must be some threshold of significance, of course, beyond which impact triggers the protections owed a research subject. In the context of child welfare policy, any experimentation in state response to maltreatment reports that affects decision making regarding children's residence (e.g., parents' home vs. foster care) or legal relationships (e.g., fast-track TPR vs. normal timeline vs. extended timeline) should treat children as subjects and directly examine the effect on them. Even when handling of children is driven by parent-focused objectives (e.g., extension of foster-care timelines so long as parents remain engaged in FDC services), the impact on the children can be great, indeed commonly more dramatic than impact on parents.³⁹¹ These decisions can determine whether a child has an opportunity for a flourishing future life or instead suffers attachment failure or even severe permanent neurological damage or early death. And whereas in medicine there is generally testing on non-human animals first before application of a new intervention to humans (eliminating much uncertainty about what the effects will be on humans), with family-preservation innovations children are the involuntary guinea pigs.³⁹² One implication of treating them as research subjects would be that, both for purposes of undertaking the experiment and of studying the results, program administrators or researchers should not include any family unless a reliable (explained below) proxy for the children gives consent.

iv. Concerns

If this view were generalized to all new human-services programs, it would seem far too broad a rule, potentially subjecting every modification of practices by any of thousands of public or private agencies to additional oversight procedures and substantive conditions. This could be crippling, or at least stifling and too costly.³⁹³

Public agencies generally are, however, already subject to procedures for pre-adoption review of proposed substantial changes in policy and practice, under the federal Administrative Procedure Act or one of its state analogues, so the proposals here are mostly about making those procedures

³⁹¹ Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, *supra* note 38, at 415–34.

³⁹² Aysha Akhtar, *The Flaws and Human Harms of Animal Experimentation*, 24 CAMBRIDGE Q. HEALTHCARE ETHICS 407, 409 (2015).

³⁹³ Cf. Emily A. Largent et al., *Patient-Centered Outcomes Research: Stakeholder Perspectives and Ethical and Regulatory Oversight Issues*, 40 IRB: ETHICS & HUMAN RSCH. 1, 7 (2018) (showing that IRB oversight can be a deterrent to research participants as well as to researchers).

more effective.³⁹⁴ Indeed, most programs discussed in Part II should have gone through public comment in state legislatures, when authorizing legislation was considered, and/or in the state's social services agency. The marginal cost of impact studies and ombudsperson and/or clearinghouse review should be modest. The review would naturally take into account the degree of effects that the impact study reveals; the approval process would be less demanding with low-impact changes to agency practice. The APA, by analogy, presumptively requires notice-and-comment regarding any proposed change in regulation but contains a good-cause exception applicable to "situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry to and to the public."³⁹⁵ An agency must explain an invocation of the good-cause exception, and courts can override the agency's judgment if someone challenges it.³⁹⁶ A substantial number of court rulings have addressed the bounds of that exception.³⁹⁷ A standard for waiving the research-protocol requirement could piggyback on that doctrine.

Ethicists have expressed additional worries, even within medicine, about transforming innovative treatments into research projects.³⁹⁸ It could mean injecting into decision-making about individual care the utilitarian aims of research. Laakmann writes:

Transforming an individual from a patient into a research subject fundamentally alters her role in the medical decision-making process and the goals of the intervention. By enrolling in a randomized clinical trial, an individual forfeits decisional autonomy over her ultimate treatment course. And while the goal of a medical intervention in the treatment setting is to further the patient's interests, the goal in the research setting is to expand generalizable knowledge, with the individual subject's interests acting as a side constraint. It is not desirable to compel every individual to accept these conditions in exchange for the opportunity to explore innovative therapies.³⁹⁹

³⁹⁴ See 5 U.S.C. § 551; *Summary of the Administrative Procedure Act*, EPA, <https://www.epa.gov/laws-regulations/summary-administrative-procedure-act> [<https://perma.cc/RBS8-QFGF>] (last visited Dec. 29, 2021).

³⁹⁵ See *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018).

³⁹⁶ 5 U.S.C. § 553(b)(3)(B).

³⁹⁷ See, e.g., *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 768 (4th Cir. 2012); *Zhang v. Slattery*, 55 F.3d 732, 746 (2d Cir. 1995); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992).

³⁹⁸ See, e.g., Laakmann, *supra* note 257, at 944.

³⁹⁹ Laakmann, *supra* note 257, at 916–17; see also ALEX JOHN LONDON, *FOR THE COMMON GOOD: PHILOSOPHICAL FOUNDATIONS OF RESEARCH ETHICS* ch. V (2021).

In the social services realm, we might worry that those studying a new program will push for completion of a piloted intervention even when it appears to be going poorly for some vulnerable persons, in order to have fuller information about program effects and a publishable paper.

However, consent to participation, whether direct or by proxy, need not entail commitment to remain in the trial even if at some point it appears contrary to a person's wellbeing.⁴⁰⁰ Participants should at all times retain the right to exit. Explicitly treating the program as experimental might signal to advocates for vulnerable persons that they should be vigilant and that exit is possible. In addition, in child protection, agency case workers currently are not focusing exclusively on children's interests in the way we assume physicians are focused exclusively on their patients' interests.⁴⁰¹ Case workers generally manifest great sympathy for and dedication to parents and are hardly accountable to children.⁴⁰² Thus, the oversight that research provides is likely to increase rather than diminish attention to children's needs, at least if researchers are required directly to measure child welfare outcomes and not, for example, simply surveying parents about their satisfaction. That said, something less elaborate than the clinical trial model might suffice in many situations, so long as it includes informed consent by an independent advocate for non-autonomous participants and/or a judgment by a body of experts in the field, such as a clearinghouse, that the claims made in support of a proposed new program have an adequate evidentiary basis.⁴⁰³

The additional requirement of piloting any new program before widespread adoption would be new for many agency practices, but starting out small should not increase public costs greatly, or at all if this more rational – rather than scattershot – approach attracts more private foundation support or prevents expenditures on efforts that must later be abandoned (as with IFPS or DR training in jurisdictions that retreated from it).

⁴⁰⁰ Cf. Holly Fernandez Lynch, *The Right to Withdraw from Controlled Human Infection Studies: Justification and Avoidance*, 34 *BIOETHICS* 833 (2020).

⁴⁰¹ See, e.g., Harry Ferguson, *How Children Become Invisible in Child Protection Work: Findings from Research into Day-to-Day Social Work Practice*, 47 *BRITISH J. SOC. WORK* 1007 (2017).

⁴⁰² See, e.g., Conor Friedersdorf, *In a Year, Child-Protective Services Checked Up on 3.2 Million Children*, *THE ATLANTIC* (July 22, 2014), <https://www.theatlantic.com/national/archive/2014/07/in-a-year-child-protective-services-conducted-32-million-investigations/374809/> [https://perma.cc/SQ53-HKJA].

⁴⁰³ Cf. Laakmann, *supra* note 257, at 917 (“Special private boards of medical experts could be set up to evaluate the potential risks and benefits of innovative treatments, much like institutional review boards (IRBs) currently evaluate proposed research protocols.”).

B. Minimizing the Prevalence and Influence of Bad Research

If additional institutional constraints of the sort proposed above are inherently insufficient or politically improbable, indirect protection for social-service recipients could come from injecting greater discipline and objectivity into the research that inspires or is invoked to support experimentation. Social scientists with personal political or ideological biases and illicit motivations will continue to exist and conduct research no matter what regulations anyone imposes, but there might be ways to lessen their opportunities or influence or to induce improved work.

1. Treat all Substantially-Impacted Persons as Subjects

TCR should be amended to require that any study of social service innovations having a foreseeable, substantial impact on non-autonomous persons treat those persons as research subjects. Such impacts would include perpetuation and proliferation of the innovations by appearing to provide proof of positive results. Treating the non-autonomous persons as subjects because of the impact would trigger all TCR protections for human research participants, regardless of whether researchers actually collect information about them.⁴⁰⁴ Even if the innovation itself is not treated as experimentation that must occur within a research setting, as recommended above, so that informed consent to the intervention itself on behalf of those persons would not be required, treating persons substantially impacted by the innovation as subjects of any study of the innovation would provide some safeguard against the danger that bad research will support innovations detrimental to those persons and/or others in their category.⁴⁰⁵ Making IRB approval and informed consent by a proxy for those persons prerequisite to conducting the study (as opposed to the intervention) would provide some check on bad design, conflicts of interest, and the influence of major foundations with ideological commitments to purposes other than the welfare of those non-autonomous persons. In child welfare, this would counteract the tendency of researchers to ignore the impact of new programs on child welfare even though the programs exist in the world known as “child welfare.”

IRB review is no panacea, to be sure, especially regarding protection of vulnerable persons. Current IRB practice incurs criticism of many kinds,⁴⁰⁶ but I suggest reasons below for greater faith in the process after

⁴⁰⁴ 45 C.F.R. §§ 46.101–124.

⁴⁰⁵ Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271, 293 (2004).

⁴⁰⁶ See, e.g., Kimberlianne Podlas, *The New Common Rule Corrects an Old Misunderstanding: Journalistic Investigation, Biographical Interviewing, Legal Research, and Creative and Historical Writing Focusing on Specific People Are Not “Research” “Involving Human Subjects” Requiring IRB Approval*, 44 SETON HALL

amending its mission. In addition, as explained below, if those providing proxy consent have special training, they might act to enhance the process. There would essentially be two stages of substantive study review. First, researchers must convince an IRB that the research design is sound and that they are objective and disinterested scientists. Second, they must convince representatives for children that they should consent to participation, and that proxy consent should also take into account the soundness of study design and the objectivity of the researchers.

2. Mandate Consideration of Impact on Non-autonomous Persons

TCR could mandate that all studies of social service programs substantially impacting non-autonomous persons examine effects on those persons, unless and until good research has conclusively established the effects are positive. Considering again the analogies above to experimentation with new HIV treatments, COVID exposure with vaccinated children, and polluting factories, there are clear reasons to insist on research attention to the impact on those whose wellbeing is at greatest risk.⁴⁰⁷ This is particularly so when those persons are incapable of objecting and when researchers have manifested a tendency to treat those persons as bystanders for informed consent purposes but then claim to derive findings about impact on them based on facts that do not actually support such findings, as has been the case with much research in realm of parent dysfunction, as detailed in Part II.

At some point, it might become superfluous to study certain effects yet again, but the history described in Part II of quick proliferation and later abandonment of family-preservation strategies suggests that in the early years of a new program, the danger is too great that scientifically-

LEGIS. J. 253, 254–56 (2020) (contending that IRBs are over-reaching and unduly restrictive); Sabriya Rice, *Policing the Ethics Police: Research Review Boards Face Scrutiny as Feds Propose New Rules*, MODERN HEALTHCARE (Dec. 1015) (“Critics say studies with serious design flaws that could lead to unethical practices or participant harm continue to win approval because IRBs are too lax, have unqualified members, are riddled with institutional and personal conflicts of interest, and are overwhelmed by the volume of studies they must review.”); *Grimes v. Kennedy Krieger Inst., Inc.*, 782 A.2d 807, 817 (2001) (“IRBs, are, primarily, in-house organs. In our view, they are not designed, generally, to be sufficiently objective in the sense that they are as sufficiently concerned with the ethicality of the experiments they review as they are with the success of the experiments. ... Here, the IRB, whose primary function was to insure safety and compliance with applicable regulations, encouraged the researchers to misrepresent the purpose of the research in order to bring the study under the label of “therapeutic” and thus under a lower safety standard of regulation. The IRB’s purpose was ethically wrong, and its understanding of the experiment’s benefit incorrect. The conflicts are inherent. This would be especially so when science and private industry collaborate in search of material gains.”).

⁴⁰⁷ See discussion *supra* note 390 and accompanying text.

unsophisticated actors in the legal system and in advocacy organizations will seize on a positive report about any feature of the program (e.g., parent satisfaction, fewer days spent in foster care) as a basis for making blanket assertions or conclusions about the beneficial nature of the programs. They should be less likely to mischaracterize something as a child-welfare outcome, or to focus on something other than child welfare as a basis for assessing whether an intervention is beneficial, if a study report directly addresses effects that truly are about children's wellbeing.

This prescription would mean increased scrutiny of vulnerable populations, which can itself pose hazards for them. The intrusion in their lives will naturally be greater the more directly and thoroughly researchers examine their situation and condition. Simply inspecting agency records – for example, CPS records of subsequent maltreatment reports following reunification – is non-intrusive in a physical sense, but that is likely to be too partial or indirect a means of assessing wellbeing.⁴⁰⁸ For example, because much maltreatment goes unreported and a child's wellbeing might suffer considerably even if parental conduct does not rise to the level of maltreatment under state law,⁴⁰⁹ CPS records of substantiated reports are an incomplete measure of child wellbeing. Ideally, researchers would assess children's attachment status, mental health, physical condition, behavioral self-regulation, school performance, etc. Some of that they might determine by looking at assessments others have done, such as the children's psychologists or caseworkers, but sometimes no one will be paying attention to the children's condition, or those who are might be unwilling or legally unable to share information. Given that children are being impacted by the programs, though, the cost of any increased scrutiny seems justified in light of the potential harms that could befall them as a result of the programs themselves. If this mandate poses such an obstacle that some studies are never done, that might not be a bad thing; a bad or misused study is often worse than no study at all.

3. Rigorous Review of Study Design Before Approval

IRBs should be explicitly tasked with review of research design, no longer limiting their vision to protection of subjects' privacy and comfort

⁴⁰⁸ Howard Dubowitz, *Neglect in Children*, 42 PEDIATRIC ANN. 73, 73 (2013).

⁴⁰⁹ Emotional neglect by itself, for example, is unlikely to be reported to CPS or, if reported to CPS, to be treated by the intake officer as warranting any agency response. See Samantha Jacobson, *The Impact of Parental Narcissistic Personality Disorder on Children and Why Legal Intervention Is Warranted*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 315, 336–37 (2018) (describing focus of child protection law and process on physical harms).

in the research setting.⁴¹⁰ Research designs vary considerably by discipline and sub-discipline, but IRBs typically have members from multiple disciplines, and anecdotal evidence of thick-headedness in some IRBs is insufficient to negate the intuition that scientists generally will be a) respectful of work in disciplines other than their own, and b) capable of assessing design of studies similar to those done in their field when done in different substantive areas.⁴¹¹ The methodological flaws Part II identified should, for the most part, be readily identifiable by scientists in many fields other than sociology or social work. Indeed, one need not be a trained researcher at all to spot some defects, such as selection bias or mischaracterization of outcomes.

To motivate IRBs to approach this new task with rigor, some shaming strategies could be adopted – for example, requiring all reports of studies governed by TCR or a state analogue to indicate whether an IRB approved the study and, if so, at which institution. Readers could then report any unwarranted failure to seek approval and call attention to any particular IRB's poor judgment. This might have some reputational effect on the university or other research institution, sufficient to cause the administration to clamp down, and it might also incentivize individual IRB members concerned about their personal reputation. If a further step were needed, names of the members, or at least the chair, of the IRB that gave approval might be mandatorily included in research reports. This publicity would be financially costless. It would, of course, make people more averse to serving on IRBs, but institutions can be incentivized to make this a job expectation along with other unpleasant forms of service that could be subject to public scrutiny. One might also worry that these changes would make IRBs too risk averse, too inclined to reject proposals (to the detriment of scientific knowledge) but that too could be counter-acted by adjustments to the incentive structure – for example, offering financial rewards for helping a research team develop a proposal truly worthy of approval, or requiring IRBs to publish their reasons for rejecting a project. Persons with experience serving on and seeking approval from IRBs can assist in refining such ideas; the intent here is to start a conversation.

Ideally, every IRB evaluating a proposal to study social services for a vulnerable population, such as children, should contain an advocate for

⁴¹⁰ The federal government considered including this mandate from the outset, during deliberations in the late 1970s and early 1980s, and decided not to do so simply because of protests by researchers, as a sort of compromise. See SCHRAG, *supra* note 1, at 70–71. In recent years, the government's challenge is to resist social scientists' call to eliminate IRB review altogether. See NAT'L RSCH COUNCIL, PROPOSED REVISIONS TO THE COMMON RULE FOR THE PROTECTION OF HUMAN SUBJECTS IN THE BEHAVIORAL AND SOCIAL SCIENCES 4 (2014).

⁴¹¹ *Frequently Asked Questions About Institutional Review Boards*, AM. PSYCH. ASS'N, <https://www.apa.org/advocacy/research/defending-research/review-boards> [<https://perma.cc/ND3D-EJMC>] (last visited Oct. 24, 2021).

that population – just as federal law requires a prison advocate on IRBs reviewing prison research.⁴¹² That person should be familiar with all protections for that population in TCR at the time. There might not be enough such advocates capable of detecting problematic research design, so it is worth exploring the alternative of requiring all IRBs to send out proposals for such research to the larger scientific community, soliciting expert input and perhaps offering compensation. They might use either a list of professional researchers around the country who have expressed interest or a clearinghouse. Though Part II cast doubt on the competence or objectivity of many social scientists, it also cited the excellent work of many people who have devoted time to debunking the bad research. Those better people in the field might be expected to pay attention to notices of new study proposals and to prefer identifying problems with proposals before they receive approval.

Substantively, IRBs might push social scientists to be more attentive to the possibility of randomization. A common design flaw that Part II identified, in addition to ignoring impact on non-autonomous persons who are most at risk, is selection bias.⁴¹³ With pharmaceuticals, randomization and double-blinding are usually required. In contrast, very few studies done in the child welfare field to date have involved random assignment, and propensity score matching is either not attempted or not done sufficiently well to generate confidence in conclusions.⁴¹⁴ Selection bias consistently distorts results in a direction supportive of adult rights.⁴¹⁵ It is commonly supposed that randomization is infeasible with research on behavioral interventions or other social services,⁴¹⁶ but it might be feasible in more situations than supposed, and when random assignment is feasible

⁴¹² 45 C.F.R. § 46.304(b) (“At least one member of the Board shall be a prisoner, or a prisoner representative with appropriate background and experience to serve in that capacity . . .”).

⁴¹³ See discussion *supra* Part II.

⁴¹⁴ JAMES BELL ASSOCS., EVALUATION BRIEF: CONDUCTING RANDOMIZED CONTROLLED TRIAL IN CHILD WELFARE PRACTICE SETTINGS: CHALLENGE AND SOLUTIONS 2 (Nov. 2013), <https://www.jbassoc.com/wp-content/uploads/2018/03/Conducting-RCTs-Child-Welfare.pdf> [<https://perma.cc/WHK8-WJG5>]; see Mark Chaffin, *A Statewide Trial of the SafeCare Home-based Services Model With Parents in Child Protective Series*, 129 PEDIATRICS 3, 509 (Mar. 2012).

⁴¹⁵ Julia H. Littell, *Client Participation and Outcomes of Intensive Family Preservation Services*, National Association of Social Workers, 103, 105 (2001).

⁴¹⁶ See Underhill, *supra* note 7, at 182 (“Despite the advantages of randomization, there is often resistance to using this methodological tool. This reluctance often reflects strong normative commitments in favor of (or against) a policy choice--namely, the belief that it would be inequitable to withhold a presumed benefit from one group (or to inflict a presumed harm on one group) on the basis of chance.”).

and ethical it should be encouraged.⁴¹⁷ For example, to study a prison nursery's impact on criminal recidivism, a program could randomly admit only a subset of all women who apply and qualify. The study could then compare long-term recidivism for women who were admitted (including any who drop out or are expelled) and those who were not. This should give lawmakers a more accurate basis for determining whether prison nurseries serve that state interest, as proponents claim.

4. Expand the Concept of Conflict of Interests

TCR also should direct IRBs to look for threats to objectivity beyond just obvious financial conflicts. Studying a program one operates or materially supports should be considered a conflict and at a minimum fully disclosed. On the program side, states instituting innovations should commission independent research – that is, study by people with no existing involvement.

In addition, IRBs should be attentive to funding sources for proposed research.⁴¹⁸ Subjective assessment of particular foundations as biased could be problematic, but IRBs might be directed to inquire into communications the research team has had with the funders, to see if any outcome expectations were conveyed. TCR might require researchers to report any pressure from funding sources to suppress or distort results after a study is completed. Substantial internal sanctions for non-disclosure might be needed. If institutions keep records of concerns surrounding particular funding sources or particular researchers, IRBs can take them into account in assessing new proposals, creating a disincentive for researchers to flirt with foundations known to generate corrupt research.

5. Reduce the Influence of Large Funding Sources

Elizabeth Bartholet observes: “It is extremely dangerous to have one set of wealthy, private players dominating both policy advocacy and research to the degree that they [the Casey Alliance] have. ... [F]undamental change in the dynamics of child welfare research is needed

⁴¹⁷ Cf. Holly Fernandez Lynch et al., *Overcoming Obstacles to Experiments in Legal Practice*, 367 SCIENCE 6482, 1078 (Mar. 6, 2020) (urging use of randomized controlled trials to assess the merits of innovative approaches to legal-service provision); Douglas Mackay, *Government Policy Experiments and the Ethics of Randomization*, 48 PHIL. & PUB. AFFS. 319, 321 (2020) (concluding that “random assignment is permissible when the social science community occupies a state of uncertainty regarding the interventions under study”).

⁴¹⁸ Cf. Underhill, *supra* note 7, at 184 (“Ensuring that studies are done by a party without a stake in the results is an important priority”).

if history is not endlessly to repeat itself.”⁴¹⁹ A possible structural fix to this problem would be to create a wall between advocacy and research. Rules might be adopted prohibiting grant providers from funding research on programs they have themselves promoted in the lobbying branch of their organization, or perhaps going even farther to prohibit organizations that do any advocacy work from funding research in the field. Of course, the rules would need to counteract any efforts to subvert them by corporate redirection or restructuring. These would bear some resemblance to rules precluding entities that engage in lobbying from claiming charitable tax status; those same entities would also be precluded from funding scientific research on the programs for which they lobby. This could alternatively be addressed via IRB review, making conflict of interest on the part of a funding institution a basis for rejecting a study proposal.

Independently of the problem of mixing advocacy and research, it is dangerous for any single source of funding to dominate a field, to such a degree that it is able to dictate to a large extent what gets researched and by whom. Yet it is unclear that monopolizing any research field runs afoul of any existing law, regulation, or ethical guideline. It might be difficult to craft a rule that fairly but effectively addresses the concern, but the federal government could encourage states to adopt practices that lessen the problem. Congress could condition some pertinent funding stream on states’ themselves funding study by an independent evaluator of any pilot program they initiate. Or on states’ giving access for testing of program outcomes to two or more research teams with different funding sources.⁴²⁰ Or federal law could require DHHS approval before programs move beyond the pilot stage, just as the FDA must approve the progress of new drugs from one stage of trials to the next.⁴²¹ And it could direct DHHS to subject any research that has been done on a pilot program to rigorous scrutiny, inviting other experts in the field to assess its design quality and the soundness of the analysis, before DHHS decides whether to rely on it.

6. Rationalizing Consent to Participation in Research

The best fix for the coercive environment in which parents and other vulnerable adults consent to research in the social services field might be education of IRBs, so they appreciate that “subjects who are vulnerable to coercion or undue influence” include: (1) anyone vulnerable to serious legal or financial consequences, at the discretion of authorities supporting the study, should they appear uncooperative, and (2) most CPS-involved

⁴¹⁹ Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, *supra* note 35, at 638–39.

⁴²⁰ *Cf.* Underhill, *supra* note 7, at 185 (discussing example of this in federal oversight of state Medicaid programs).

⁴²¹ *Development & Approval Process*, *supra* note 28.

adults, because they have “impaired decision-making capacity” and/or are “economically or educationally disadvantaged persons,” which might also be true of many persons immersed in other social service programs, such as welfare benefits.⁴²² IRBs should scrutinize more closely anything to which these adults consent.

Lastly, TRC must be amended to direct that in any situation when parents do not have physical custody of a child, including a) whenever a child is in foster care or in the custody of relatives following a maltreatment report or b) whenever parental custody is in issue because of a maltreatment report, experimental programs and research cannot involve the children at issue absent proxy consent by an independent LAR. And that LAR must be someone who is neither a parent nor any other relative of the child, and who has some expertise in the child welfare system at issue. It makes a mockery of the informed-consent requirement, in the case of non-autonomous persons, to rely on agreement by family members with strong interests potentially adverse to those of those persons. IRBs should also ensure LARs are fully informed about the nature of the intervention, the full range of alternative treatments or legal options available, and the design of the study.

VI. CONCLUSION

Child welfare is just one area of social services where ideology or other illicit motives can drive innovation and research to the detriment of vulnerable persons. Similar problems might be found in housing of mentally disabled adults, rehabilitation of prisoners and delinquent juveniles, policing, welfare benefits, treatment of illegal immigrants, and innumerable other fields. The harm to society lies not just in falling short of the truth, but also in the damage done to human lives by government actors who adopt policies and practices as a result of bad research. This harm is ample reason to hold a national conversation about minimizing bad social science and ill-advised programmatic innovation. This Article has aimed to start that conversation.

⁴²² 45 C.F.R. § 46.111(a)(3).