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JUST INTERVENTION: DIFFERENTIAL RESPONSE IN CHILD PROTECTION

Cynthia Godsoe*

It is widely agreed that the child protection system is broken—it neither effectively prevents child maltreatment nor engages parents. Compounding these failures, the system is often described as unnecessarily adversarial and stigmatizing, leaving many children and families worse off after intervention and deeply distrustful of the state agency tasked with helping them.¹ In an effort to address these flaws, numerous scholars and experts have called for a public health approach to child maltreatment, the subject of this symposium.² Such an approach would entail preventive and community-wide interventions based on an assessment of proven risk factors rather than the current

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¹ These state agencies have various names in different locations, but for the sake of simplicity I will refer to these agencies as child protective services (CPS). For accounts of their failures, see generally Cynthia Godsoe, *Parsing Parenthood*, LEWIS & CLARK L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950222 (examining the various flaws of the statutory scheme governing child welfare); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006) (arguing for a more collaborative approach in child protection).

² The symposium, *Reforming Child Protection Law: A Public Health Approach*, took place at Brooklyn Law School on April 13, 2012.

post hoc and crisis-driven intervention based upon vague standards of maltreatment.

One promising innovation in this regard is a multi-tiered or differential response to child maltreatment. Under this model, families deemed at lower risk for maltreatment are not investigated, as in the traditional child protection system, but rather are referred to voluntary community services. Only those families deemed at high risk for maltreatment are subject to mandatory interventions and court involvement in the traditional adversarial model. A differential response approach, in theory at least, allows for less stigmatizing and more effective interventions for at-risk families and results in greater cost-effectiveness and fewer new reports of maltreatment.

This piece outlines the differential response model and how it differs from traditional child protection interventions. It then discusses its benefits, in particular, its procedural justice value to better engage parents and communities in addressing child maltreatment and bolster the legitimacy of the child protection system. This piece concludes, however, that differential response will not significantly change our approach to child protection for two reasons: (1) the entry point for differential response is usually a report of child maltreatment, rather than an effective preventive risk assessment, and (2) the institutional design and approach to risk of child protective services ("CPS") agencies limit their ability to effectively work with families.

I. THE DIFFERENTIAL RESPONSE MODEL

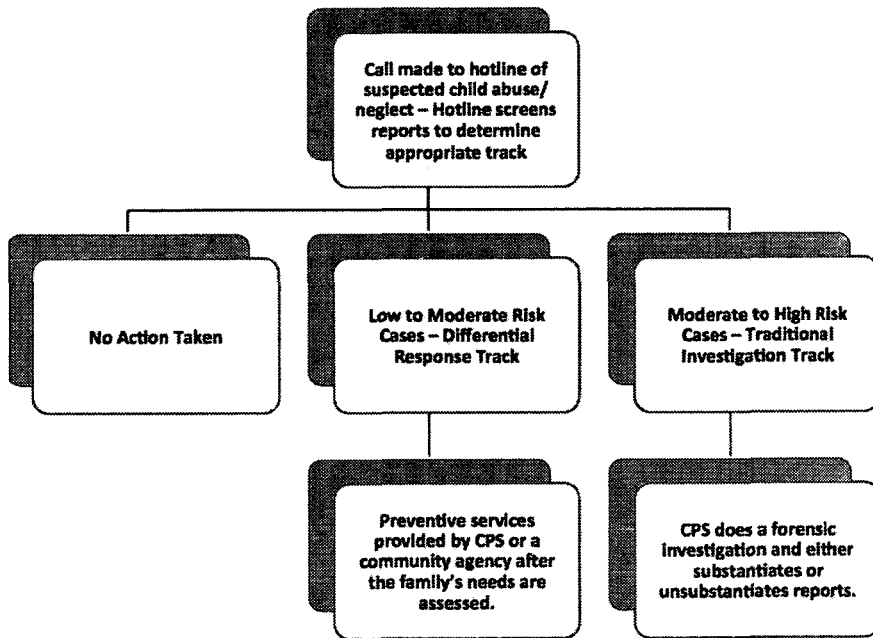
Differential response has been implemented to some degree in over twenty states in the last fifteen years.³ Some states have

³ For a relatively recent list of states' differential response programs, see *Current Projects*, AM. HUMANE ASS'N, <http://www.americanhumane.org/children/programs/differential-response/current-projects/> (last visited Oct. 12, 2012); *Differential Response Approach: State Enacted Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/state-legislation-differential-response.aspx> (last updated Feb. 2012).

Differential response first grew out of work by Jane Waldfogel and other members of the Harvard Executive Session task force studying child

pilot projects in certain counties; for instance, Connecticut started one in March of this year and New York City is set to begin one soon, while others have statewide programs, including Minnesota, Missouri, North Carolina, Washington, and Hawaii.⁴

Diagram 1



States have implemented this two-tiered model for various reasons. For instance, some states hoped to address the over

protection in the late 1990s. *See generally* Jane Waldfogel, *Rethinking the Paradigm for Child Protection*, FUTURE CHILD., Spring 1998, at 104 (proposing a community-based partnership for child protection, one aspect of which is a differentiated response tailored to a family's situation and based on risk level).

⁴ LISA MERKEL-HOLGUIN ET AL., NATIONAL STUDY ON DIFFERENTIAL RESPONSE IN CHILD WELFARE 13 (2006), *available at* <http://www.americanhumane.org/assets/pdfs/children/pc-2006-national-study-differential-response.pdf>. Minnesota was one of the first states to implement differential response statewide and now seventy percent of child maltreatment cases in the state are handled on the assessment track. *Id.* at 43 (citing Carole Johnson et al., *Child Welfare Reform in Minnesota*, 20 PROTECTING CHILD., nos. 2 & 3, 2005, at 55, 58).

inclusion of families in CPS for poverty-related reasons,⁵ while others aimed to increase services available to at-risk families.⁶ These goals are inextricably related because many families are in need of services to meet basic needs, including food, clothing, rent, or utilities assistance—services that they often did not receive, or at least not in a timely fashion, under the traditional CPS system.⁷ Another service that has proven effective for families is home visiting, which usually entails a nurse or other professional visiting first time and/or at-risk mothers during pregnancy and after birth to support them.⁸ However, home visiting is difficult to successfully implement under the traditional investigation model as parents are, with reason, concerned that the professionals visiting them will be required to report on their conduct as part of the investigation. Other states have implemented differential response in an effort to best prioritize resources—focusing investigations on those families

⁵ See, e.g., GARY L. SIEGEL ET AL., INST. OF APPLIED RESEARCH, *DIFFERENTIAL RESPONSE IN NEVADA: FINAL EVALUATION REPORT 6* (2010) [hereinafter *NEVADA REPORT*], available at <http://www.iarstl.org/papers/NevadaDRFinalReport.pdf>; CASEY FAMILY SERVS., CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES *DIFFERENTIAL RESPONSE SYSTEM 4* (2010) [hereinafter *CONNECTICUT REPORT*], available at http://www.ct.gov/dcf/lib/dcf/drs/pdf/cfs_executivereport_drsfinalreprint.pdf.

⁶ For instance, in California, ninety-two percent of reports of maltreatment were closed after initial contact by CPS staff, with no services provided to the families, yet many of these families were re-reported shortly afterwards. Sofya Bagdasaryan et al., *Implementation of California's Differential Response Model in Small Counties*, 23 PROTECTING CHILD., nos. 1 & 2, 2008, at 40, 41.

⁷ David Thompson, et al., *The Parent Support Outreach Program: Minnesota's Early Intervention Track*, 23 PROTECTING CHILD., nos. 1 & 2, 2008, at 23, 27.

⁸ Symposium panelist David Olds outlined his efforts to replicate one particularly successful home visiting model, the Nurse-Family Partnership. See ANDY GOODMAN, ROBERT WOODS JOHNSON FOUND., *THE STORY OF DAVID OLDS AND THE NURSE HOME VISITING PROGRAM 6* (2006), available at http://www.rwjf.org/content/dam/farm/reports/program_results_reports/2006/rwjf13780. The program has had very successful results including, over decades in one location, forty-eight percent lower incidence of child abuse and neglect for children fifteen years of age and fifty-six percent fewer medical visits due to childhood injuries for children ages two and younger. *Id.*

accused of the most serious abuse and neglect—and fill in gaps in preventive and early intervention services. States have also tried differential response to engage families in helping themselves⁹ and to involve the community in addressing child maltreatment, thus reducing the stigma of CPS involvement.¹⁰ Finally, some states have implemented differential response to improve caseworker satisfaction or to address racial disproportionality in the child protection system.¹¹

To these myriad ends, differential response differs in some significant ways from the traditional CPS system, as illustrated by Diagram 2. Traditional child protective services take a law enforcement approach, focusing on forensic investigation and the gathering of evidence to prove allegations of neglect or abuse. The terminology used is quasi-criminal, such as “perpetrator” or “respondent” and “victim,” and services are mandatory,

⁹ See, e.g., Patricia Schene, *The Child Welfare Response Continuum: Chronic Issues That Have Plagued Child Protection*, AM. HUMANE ASS'N 12 (Nov. 2010), available at <http://www.americanhumane.org/children/professional-resources/program-publications/differential-response/presentations-from-past.html> (noting that one of the many rationales for differential response is that the volume of maltreatment reports nationwide consistently far exceeds the capacity of CPS to investigate and address them in the traditional fashion).

¹⁰ See, e.g., Amy Conley & Jill Duerr Berrick, *Implementation of Differential Response in Ethnically Diverse Neighborhoods*, PROTECTING CHILD., nos. 1 & 2, 2008 at 30, 34 (outlining this policy in Alameda County, California).

¹¹ For instance, Hawaii implemented differential response both to address the negative performance of its child protection system and to reduce disproportionality. See PowerPoint & Audio Recording: Theresa Costello & John Walters, Key Elements of a Differential Response Approach: The Hawaii Experience at National Resource Center for Permanency and Family Connections Teleconference (Dec. 8, 2010), available at <http://www.nrcpfc.org/teleconferences/12-08-10.html>. Florida is one of several states that implemented differential response in part to address caseworker dissatisfaction and turnover. See MERKEL-HOLGUIN ET AL., *supra* note 4, at 28. Caseworker turnover is a significant problem in child protection. See, e.g., U.S. General Accounting Office, HHS Could Play a Greater Role in Helping Child Welfare Agencies Recruit and Retain Staff 5, 11–18 (GAO-03-357, 2003), available at <http://www.gao.gov/new.items/d03357.pdf> (estimating that thirty to forty percent of child protection caseworker positions turnover annually).

whether ordered by an agency or by a court. As a result, the relationship between parents and agency caseworkers is almost always adversarial.

Diagram 2

Traditional CPS	Differential Response
Forensic investigation	Assessment
Finding of neglect or abuse Blaming and punitive	No finding of neglect or abuse Needs-focused and service-oriented
Adversarial process Agency experts make the decisions about families	Engagement process Families are partners in decision-making
Services are mandatory and often court-monitored	Services are voluntary
One-size-fits-all approach	Flexible and a continuum of services/at least two pathways

Most states use a risk assessment tool to place families in one track or another, although some must follow statutory or regulatory eligibility protocols.¹² Eligibility for the assessment track varies among jurisdictions, although all exclude the most serious cases (those alleging sex abuse and serious physical abuse). Most jurisdictions include cases that could be substantiated on an investigation track but are deemed “lower risk”; however, a few jurisdictions, such as certain California counties, put only unsubstantiated cases on the assessment track (cases which would have received no services under the traditional CPS model).¹³ Various jurisdictions exclude cases

¹² For instance, a Nevada statute mandates investigation in any report of maltreatment involving a child under six years old. NEVADA REPORT, *supra* note 5, at 16. For an illuminating outline of the problems with using risk assessment instruments in the traditional child protection context, see Marsha Garrison, *Taking the Risks out of Child Protection Risk Analysis*, 21 J.L. & POL’Y 5 (2012).

¹³ See Conley & Berrick, *supra* note 10, at 30 n.1 (describing

involving abandonment, failure to thrive, chronic neglect, drug-exposed infants, other children in foster care, or reports made by law enforcement and medical personnel. Past CPS involvement can be cause for placement on the investigation track, especially if a parent was “uncooperative” in the past.¹⁴ The most common cases on the assessment track are educational neglect, lack of supervision, and other neglect cases.¹⁵

States differ in their focus on specific types of cases. For instance, some exclude families with young children from being placed on the assessment track, while others prioritize these families for the assessment track.¹⁶ It is well documented that families with young children are more at risk for neglect. For instance, recent federal government statistics show that the rate of maltreatment was highest for children between birth and age three, and declined as the child grew older.¹⁷ Yet while some

California’s alternative definition of differential response which excludes substantiated cases from the assessment track).

¹⁴ This is the policy, for instance, to which Ohio is transitioning. See Nat’l Ctr. for Adoption Law & Policy, *Ohio Differential Response*, CAPITAL U. L. SCH., <http://law.capital.edu/adoption/ar2/> (last updated 2011); CAREN KAPLAN & AMY ROHM, OHIO ALTERNATIVE RESPONSE PILOT PROJECT 10–11 (2010), available at http://law.capital.edu/uploadedFiles/Law_Multi_Site/NCALP/2010_Executive_Summary_Final_AIM_Team.pdf.

¹⁵ See, e.g., JOANNE RUPPEL ET AL., N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., DIFFERENTIAL RESPONSE IN CHILD PROTECTIVE SERVICES IN NEW YORK STATE: IMPLEMENTATION, INITIAL OUTCOMES AND IMPACTS OF PILOT PROJECT 41 (2011) [hereinafter NEW YORK REPORT], available at http://www.ocfs.state.ny.us/main/reports/CPS%20Differential%20Response%20Evaluation%20Final%20Report_%20Jan%202011.pdf (noting that eighty-five percent of cases on the assessment track in New York pilot counties were inadequate guardianship cases).

¹⁶ Nevada excludes young children by statute and Virginia by policy, while in other jurisdictions case worker practice may result in fewer cases with young children being referred. See NEVADA REPORT, *supra* note 5, at 16. Regarding the latter tendency in Minnesota, see David Thompson et al., *supra* note 7, at 26. Alameda and Contra Costa counties, on the other hand, focus on these families. See Conley & Berrick, *supra* note 10, at 34–35.

¹⁷ JILL GOLDMAN ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE 24 (2003), available at <http://www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf> (discussing 2000 data).

state CPS agencies are wary of this risk and accordingly exclude these families from differential response, others see an opportunity to intervene effectively with these families, who are particularly in need of help.¹⁸ Similarly, some states exclude cases of any type involving domestic violence, while others have focused their differential response efforts on precisely those cases.¹⁹ All states allow for families to be moved between the tracks and most include periodic risk assessments for this purpose.

Educational neglect cases are particularly appropriate for an alternative track, since it is questionable whether educational neglect should even be considered neglect.²⁰ Over half of the

¹⁸ For instance, one differential response worker in Nevada was very frustrated when discovery of a baby in the home necessitated her returning an environmental neglect or “dirty house” case to the investigation track:

I was so upset that I had to give that [case] back. Because I knew The house was completely filthy . . . [and] they were cooking off camping stoves. . . . And the CPS worker did not do anything to change that situation. And I feel like it was a disservice that I couldn't keep it. Because at least we could have helped them find donations, get a washer, help them get their power back on. There was nothing [CPS] did. . . . [CPS] wanted it back, but [we in differential response] could have helped so much.

NEVADA REPORT, *supra* note 5, at 144.

¹⁹ New York State pilot counties excluded domestic violence cases, at least at the start of their differential response programs, while other counties, such as Olmstead County, Minnesota, developed a specialized assessment track just for those cases. NEW YORK REPORT, *supra* note 15, at 24; GARY L. SIEGEL & TONY LOMAN, INST. OF APPLIED RESEARCH, EXTENDED FOLLOW-UP STUDY OF MINNESOTA'S FAMILY ASSESSMENT RESPONSE: FINAL REPORT 53 (2006) [hereinafter MINNESOTA REPORT].

²⁰ JESSICA GUNDERSON ET AL., VERA INST. OF JUSTICE, RETHINKING EDUCATIONAL NEGLECT FOR TEENAGERS: NEW STRATEGIES FOR NEW YORK STATE 22 (2009), *available at* <http://www.vera.org/files/Rethinking%20Educational%20Neglect.pdf> (internal citations omitted) (discussing how educational neglect cases can be positively addressed through differential response). Educational neglect is defined by the federal government as the failure to enroll a child in school, chronic truancy, or inattention to special education needs. ANDREA J. SEDLAK ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS A-19 (2010), *available at* http://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf

states do not include it in their statutory definitions of neglect, preferring to address truancy outside of the child protection system.²¹ Those states that do address educational problems through the child protection system are increasingly recognizing that school absences rarely represent a safety risk, that absenteeism is often not the result of parental failures but rather of other school problems,²² and that it is a waste of child protective workers' time and other resources to investigate or prosecute these cases.²³ The fact that in some jurisdictions, such as New York State, the majority of these cases involve teenagers makes the child protection system even more inappropriate a forum in which to address them.²⁴ In fact, some caseworkers feel

_jan2010.pdf. Truancy, particularly of older children, is a complex problem that is often caused by numerous contributing factors other than parental responsibility. BRANDY R. MAYNARD ET AL., THE CAMPBELL COLLABORATION, INDICATED TRUANCY INTERVENTIONS: EFFECTS ON SCHOOL ATTENDANCE AMONG CHRONIC TRUANT STUDENTS 10-11 (2012), *available at* <http://www.campbellcollaboration.org/lib/download/2136/>.

²¹ See Philip Kelly, *Where Are the Children?: Educational Neglect Across the Fifty States*, RESEARCHER, Fall 2010, at 41, 47; *Child Welfare's Back Alley: "Educational Neglect"*, NAT'L COAL. FOR CHILD PROT. REFORM CHILD WELFARE BLOG (June 21, 2010, 6:10 PM), <http://www.nccprblog.org/2010/06/child-welfares-back-alley-educational.html>.

²² These can include learning disabilities, bullying, and inappropriate class settings or services. See Nat'l Coal. for Child Prot. Reform, *Child Welfare's Back Alley: "Educational Neglect"*, NCCPR CHILD WELFARE BLOG (June 21, 2010, 6:10 AM), <http://www.nccprblog.org/2010/06/child-welfares-back-alley-educational.html> ("Generally, 'educational neglect' is the tip of nothing except some kind of school problem, often one that is not the parent's fault."); see also HEDY N. CHANG & MARIAJOSÉ ROMERO, NAT'L CTR. FOR CHILDREN IN POVERTY, PRESENT, ENGAGED, AND ACCOUNTED FOR: THE CRITICAL IMPORTANCE OF ADDRESSING CHRONIC ABSENCE IN THE EARLY GRADES 11-17 (2008), *available at* http://www.nccp.org/publications/pdf/text_837.pdf (discussing the various causes of chronic absences).

²³ See GUNDERSON ET AL., *supra* note 20, at 6-8, 12 (outlining some counties where schools report parents for neglect when they are unable to reach them on the telephone and when investigations reveal that there is no neglect involved, and citing one county-specific study showing that no case reported only for educational neglect included any immediate safety concern); Kelly, *supra* note 21, at .

²⁴ GUNDERSON ET AL., *supra* note 20, at 10. In New York City, the number is even higher, with teenagers making up sixty-one percent of

that investigating these cases alienates families and hurts the image of CPS in the community, making it harder to effectively intervene in cases where there is a valid safety concern.²⁵

II. PROCEDURAL JUSTICE BENEFITS

Evaluations of differential response have consistently found significant benefits including fewer future reports of child maltreatment; an increase in the amount and timeliness of services available to families; greater long-term cost-effectiveness; and increased worker satisfaction.²⁶ The evaluations range greatly in scope and methodology, with only a few using a formal experimental design with experimental and control groups.²⁷ Most others had a “quasi-experimental design” consisting of data evaluation and focus groups, and interviews or surveys of self-selected family members and workers engaged in

educational neglect reports. Alex Berg, *Should Parents Be Punished for Teenage Truancy?*, HUFFINGTON POST (June 8, 2010, 5:53 PM), <http://huff.to/aYap6v>.

²⁵ GUNDERSON ET AL., *supra* note 20, at 37–38 (recommending differential response for educational neglect cases involving teenagers).

²⁶ See, e.g., NEVADA REPORT, *supra* note 5, at iii, 71–77, 105–06; MERKEL-HOLGUIN ET AL., *supra* note 4, at 44–45 (reporting positive results in Minnesota); THE CTR. FOR CHILD & FAMILY POLICY ET AL., MULTIPLE RESPONSE SYSTEM (MRS) EVALUATION REPORT TO THE NORTH CAROLINA DIVISION OF SOCIAL SERVICES (NCDSS) 3–4, 25–26 (2004) [hereinafter NORTH CAROLINA REPORT], available at http://www.ncdhhs.gov/dss/publications/docs/mrs_eval_rpt_6_30_06_all_combined.pdf. An assessment, rather than investigation, track has shown similarly positive results for status offenders. For instance, New York City’s Family Assessment Program (FAP) resulted in a fifty-five percent decrease in status offense cases referred to Family Court in just a few years. CLAIRE SHUBIK & AJAY KHASHU, VERA INST. OF JUST., A STUDY OF NEW YORK CITY’S FAMILY ASSESSMENT PROGRAM 10 (2005), available at http://www.vera.org/download?file=51/323_595.pdf.

²⁷ NAT’L QUALITY IMPROVEMENT CTR., DIFFERENTIAL RESPONSE IN CHILD PROTECTIVE SERVICES: A LITERATURE REVIEW 23, 37 (2009), available at <http://www.differentialresponseqc.org/assets/docs/qic-dr-lit-review-sept-09.pdf> [hereinafter LITERATURE REVIEW]. Minnesota is one of the few states that has been evaluated with a formal experimental design. *Id.*

both systems.²⁸ All of the evaluations compared future reports from those families engaged in the alternative versus the traditional pathways. Although few evaluations focused on procedural justice or organizational concerns, several did make some findings in this regard, as outlined further below.

Scholars have demonstrated that people's subjective impressions of the fairness of state actors and processes affect their views of a system's legitimacy more than outcomes do.²⁹ Tom Tyler has identified four factors forming these subjective impressions: (1) voice and opportunity to be heard; (2) neutrality of the decision maker; (3) trustworthiness of the decision maker; and (4) treatment of people with dignity and respect.³⁰ The first factor entails offering interested parties a chance to express their views and concerns. Factor two includes lack of bias, consistency in the application of rules, and transparency of the process.³¹ The third factor hinges on whether the parties feel that the authority "was sincerely trying to do what was right" and was motivated to help the parties.³² The last factor asks both whether the parties were treated with politeness and respect and whether the system as a whole respects people's rights.³³ When people believe a system is procedurally just, they are more likely to defer to the authority, even where the outcome is not favorable to them. Thus, purely procedural measures can increase both the symbolic legitimacy and the effectiveness of a system.³⁴ The state's inevitable lack of resources makes voluntary compliance with a system particularly important.³⁵

²⁸ See *id.* at 23–28 (outlining the various methodologies used).

²⁹ See, e.g., Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 237–38 (2008); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in Federal Courts*, 63 HASTINGS L.J. 127 *passim* (2011).

³⁰ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 163–64 (1990).

³¹ Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 5.

³² *Id.*

³³ *Id.* at 6.

³⁴ See, e.g., Bernard E. Harcourt, *Punitive Preventive Justice: A*

Procedural justice studies have primarily focused on people's interactions with the police or court systems, but the same analysis is very applicable to CPS. CPS is a government system that has particularly weak legitimacy—it is widely perceived to be unfair and likely biased on race and class lines. In short, it is viewed as failing both at keeping children safe and at assisting families to stay together.³⁶ Caseworkers, judges, and others often treat parents poorly. Even the caseworkers themselves frequently report low levels of job satisfaction, due to the feeling that they are not really helping families and the punitive focus of the traditional CPS investigation track. Because both personal experiences and awareness of others who have suffered procedural injustice decrease the legitimacy of systems,³⁷ this negative public view of CPS is particularly pronounced in communities with high rates of CPS involvement—communities where CPS should seek to be the most engaged.³⁸ CPS' negative image both expresses bad messages about the state's valuation of poor families, particularly those of certain races, and impedes the system from effectively intervening when necessary.³⁹ Thus,

Critique, in PREVENTIVE JUSTICE (Andrew Ashworth & Lucia Zedner eds., forthcoming) (manuscript at 17 n.61), available at <http://ssrn.com/abstract=2065981> (suggesting that statistical discrimination by law enforcement can have negative effects on both crime reduction and other community values such as “self-respect among profiled groups” and “community relationships”).

³⁵ Tyler & Fagan, *supra* note 29, at 240–41.

³⁶ See, e.g., GUNDERSON ET AL., *supra* note 20, at 13 (outlining the intrusion of a traditional child protective investigation and the resulting stigma, even where there is no finding of abuse or neglect). One reason for the perception of unfairness may be the inevitably subjective judgments and high level of discretion which child protection entails. Discretion, particularly when it is perceived to be used in biased ways, undermines the rule of law. See Hollander-Blumoff & Tyler, *supra* note 31, at 9–10.

³⁷ Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 222 (2005).

³⁸ Studies have found that the procedural justice impact of experiences with state actors is asymmetrical—a bad experience hurts legitimacy significantly more than a good experience helps. Tyler & Fagan, *supra* note 29, at 241 n.41.

³⁹ See, e.g., DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE ix, 11–46, 74–75, 243–44 (2003). For instance, doctors

engaging families and communities in child protection is both a means to child safety and an end in itself—to have the system be, or at least appear to be, fairer.

Differential response has tremendous potential to engage families and communities. Every study has found that families in the assessment track felt more respected, listened to, helped, and generally positive about their experience with CPS.⁴⁰ This is particularly so for parents who had previously experienced the investigation track.⁴¹ As one such parent reported, “[t]he caseworker treated us with respect and never made us feel like she was accusing us of anything.”⁴² Others expressed similar appreciation for differential response: “My caseworker was awesome. She saw I wasn’t a bad mother. I just needed a little help to get back on the right track. And I love her for that,”⁴³ and “The way [the worker] listened to me and gave me advice

sometimes do not report instances of suspected maltreatment because they know the alternative to staying home—the child protection and foster care systems—are often worse.

⁴⁰ See, e.g., NEVADA REPORT, *supra* note 5, at 60 (finding that ninety-one percent of parents felt their caseworkers listened to them carefully and eighty-eight percent believed the worker attempted to understand the parents’ situation). Numerous studies also found that differential response increased positive perceptions of child protective interventions in the community. See LITERATURE REVIEW, *supra* note 27, at 32, 40.

⁴¹ In Illinois, families on the assessment track with previous CPS experience felt that their differential response caseworkers were more available and listened to them, whereas the investigation track workers were judgmental and rushed, failing to listen or explain things. See Tamara Fuller & Megan Paceley, “*They Treated Me Like a Real Person*”: *Family Perspectives on Effective Engagement Strategies*, AM. HUMANE ASS’N 27–37 (2011), available at <http://www.americanhumane.org/assets/pdfs/children/differential-response/they-treated-me-like-a-real.pdf>; Carole Johnson et al., *Child Welfare Reform in Minnesota*, 20 PROTECTING CHILD., nos. 2 & 3, 2005, at 55, 59; see also NEW YORK REPORT, *supra* note 15, at v (finding that a majority of parents who had a prior CPS experience felt more positive about their experience in the assessment track).

⁴² See Fuller & Paceley, *supra* note 41.

⁴³ L. ANTHONY LOMAN ET AL., INST. OF APPLIED RESEARCH, OHIO ALTERNATIVE RESPONSE PILOT PROJECT EVALUATION: FINAL REPORT 93 (2010) [hereinafter OHIO REPORT], available at <http://www.americanhumane.org/assets/pdfs/children/differential-response/pc-dr-ohio-section2-final-evaluation-report-1.pdf>.

on how to get out of my dilemma was amazing.”⁴⁴ Families felt that differential response workers truly wanted to help families, rather than judge or separate, them. Typical was this Nevada family’s reaction: “Our experience with [differential response workers] was wonderful! They both went out of their way to help me and my family in every possible way they could.”⁴⁵ Differential response’s positive treatment of families also helped reduce the likelihood of child maltreatment, as more parents accepted services and felt more “hopeful, grateful and encouraged” and less stressed after an assessment track intervention. In contrast, parents on the investigation track felt more stressed and depressed after CPS intervention.⁴⁶

Caseworkers also felt that families in the assessment track were more engaged and cooperative.⁴⁷ For instance, in one study, caseworkers noted that forty-four percent of parents in the investigation track were uncooperative at the first meeting versus only two percent in the assessment track.⁴⁸ This cooperation has direct results on caseworkers’ abilities to help families and prevent child maltreatment. As one Nevada caseworker said about her experience working in differential response: “Families don’t believe you are actually going to help them. And when you do, they are flabbergasted.”⁴⁹ In Minnesota, a caseworker noted similar benefits: “[Differential response] really takes the blame out of the [child protective process] and families are much more willing to voice their concerns rather than minimize and hide.”⁵⁰ Workers in North Carolina concluded that differential

⁴⁴ NEVADA REPORT, *supra* note 5, at 95.

⁴⁵ *Id.*

⁴⁶ MINNESOTA REPORT, *supra* note 19, at 54.

⁴⁷ *See id.* at 10, 58. Workers themselves express greater job satisfaction under a differential response model. *See* OHIO REPORT, *supra* note 43, at 115–19 (finding that 38.9% of the differential response workers in that state said that differential response made it more likely for them to stay in child protection, thus decreasing worker turnover).

⁴⁸ Jane Waldfogel, *Prevention and the Child Protection System*, FUTURE CHILD., Fall 2009, at 195, 201 (citing a survey of differential response workers in Minnesota).

⁴⁹ NEVADA REPORT, *supra* note 5, at 87.

⁵⁰ MINNESOTA REPORT, *supra* note 19, at 54.

response renders their jobs both more effective and more rewarding; it allows them, “‘finally’ to do social work the way that they were taught to do it,” and trains them “to treat families the way they themselves would like to be treated.”⁵¹ These procedural justice benefits have led many workers across numerous states to conclude that a differential response model would result in improved child protection outcomes, even if no additional services were provided to families.⁵²

There are a number of reasons why differential response reaps such procedural justice rewards. First, in differential response, information is openly shared and the family is involved in decision making.⁵³ Thus, rather than a caseworker developing a service plan and simply telling the parent what to do, the family meets with a caseworker and together they devise a plan to assist the family. As one worker put it: “I’m not going to tell them what they need to do [on the assessment track]. I just go to suggest options that they have and let them determine which one is the best for them.”⁵⁴ Second, the system focuses on identifying a family’s strengths and needs, rather than blaming or punishing. To this end, there is no finding of abuse or neglect and children are not referred to as “victims” and parents as “offenders.” Even relatively subtle changes in language and attitude can have a large impact on a parent’s view of the system.⁵⁵ Traditional CPS practice entails a worker making an unannounced visit to the home to “catch the parent off guard” or speaking to the children at school, away from the parent.

⁵¹ NORTH CAROLINA REPORT, *supra* note 26, at 25.

⁵² MINNESOTA REPORT, *supra* note 19, at 54; OHIO REPORT, *supra* note 43, at 107; NEVADA REPORT, *supra* note 5, at 60 (noting that the “[f]amily-driven goals [developed in differential response] are more effective than the agency deciding what should happen.”).

⁵³ See SHUBIK & KHASHU, *supra* note 26, at 4, 18 (noting that the move to an assessment approach for status offenders has reaped similar procedural justice rewards as youth and parents involved in the system are both interviewed and consequently feel more “listened to” and “respected”).

⁵⁴ JILL DUERR BERRICK ET AL., CAL. SOC. WORK EDUC. CTR., DIFFERENTIAL RESPONSE AND ALTERNATIVE RESPONSE IN DIVERSE COMMUNITIES: AN EMPIRICALLY BASED CURRICULUM 71 (2009), available at <http://www.csulb.edu/projects/ccwrl/Differential%20Response%201023.pdf>.

⁵⁵ OHIO REPORT, *supra* note 43, at 61.

Differential response practice, conversely, mandates contacting the parent to set up a mutually convenient time when the worker can speak to the parent and children together.⁵⁶ This one change alone has substantially increased parents' satisfaction with the system. The third reason underlying differential response's procedural justice is that services on the assessment track are voluntary (at least theoretically), in contrast to the mandated, and sometimes court-ordered, services on the investigation track. Families reported particularly appreciating this aspect of the program, along with the nonjudgmental approach it embodies.⁵⁷ Finally, differential response uses nongovernmental community-based agencies, sometimes as the lead agency, thus avoiding the mistrust and antagonism often associated with CPS.

III. INSTITUTIONAL DESIGN LIMITATIONS

Despite these benefits, this piece concludes on a cautionary note by contending that the institutional design of most differential response programs will impede the model's potential to really change the system across-the-board. There are two key reasons: (1) the entry point and (2) child protective agencies' skewed approach to risk.

The entry point for differential response programs is a report of child abuse or neglect. Thus, the program is not truly preventive and likely not truly representative of a risk of child maltreatment.⁵⁸ One promising exception is Minnesota's Parent Support Outreach Program ("PSOP"). PSOP was developed as a third explicitly preventive track for reports of abuse and neglect which were screened out.⁵⁹ Parents are allowed to self-

⁵⁶ NEW YORK REPORT, *supra* note 15, at 9-10. See also BERRICK ET AL., *supra* note 54, at 60 (supporting the idea that differential response practice mandates setting up mutually convenient times and meeting with parents and children together).

⁵⁷ BERRICK ET AL., *supra* note 54, at 136.

⁵⁸ Families in certain communities, particularly low-income communities, are more likely to be reported, possibly because of their exposure to more government surveillance (housing and welfare workers, etc.) and possibly because of bias. See GOLDMAN ET AL., *supra* note 17, at 33-34.

⁵⁹ See TONY LOMAN ET AL., INST. OF APPLIED RESEARCH, MINNESOTA

refer to PSOP, and community agencies and welfare offices are also allowed to refer families. Within a few years of its inception, forty-five percent of the families in the program had been referred from sources other than an abuse/neglect report.⁶⁰

The other and more significant impediment to differential response reaching its full potential is the culture and approach to risk at child protective agencies. This piece argues that child protective agencies are so risk-averse—because of a complex mix of media, political, and other pressures—that they cannot implement differential response rationally or effectively.⁶¹ This results in a number of limitations. First, reports show that the assessment track is consistently underutilized, with workers unwilling to put eligible cases on that track.⁶² For instance, in New York, the State Office of Children and Family Services had

PARENT SUPPORT OUTREACH PROGRAM: FINAL REPORT 1-2 (2009) [hereinafter MINNESOTA PSOP REPORT], available at <http://www.americanhumane.org/assets/pdfs/children/differential-response/pc-dr-mn-parent-support-outreach.pdf>. The program was largely successful for participating families and CPS because it provided various services, including poverty- and employment-related services, in the context of supportive relationships between PSOP workers and families, thereby improving the flow of reports into CPS. See *id.* at 90; see also Thompson et al., *supra* note 7, at 28 (noting PSOP's explicitly preventive aim and effort to intervene in families at an earlier point).

⁶⁰ See MINNESOTA PSOP REPORT, *supra* note 59, at 4-5.

⁶¹ Agency cultures are slow to change due to the size of bureaucracy and entrenched nature of a long term agency goal or mission. See Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 29-30 (2009). In fact, numerous states have noted shifting agency cultures as a significant challenge in implementing differential response. See Bagdasaryan et al., *supra* note 6, at 51. Given this, it is not surprising that some states found that the workers with the most favorable attitude towards differential response were those who were younger and newest to child protective work. See MINNESOTA REPORT, *supra* note 19, at 50.

⁶² Workers do, however, become more comfortable referring cases after they have worked with the program for some time. See CONNECTICUT REPORT, *supra* note 5, at 17. For instance, North Carolina showed a ten percent increase in cases referred to differential response after a few years of the program. LITERATURE REVIEW, *supra* note 27, at 25. Relatedly, working in differential response can make caseworkers more "risk tolerant." OHIO REPORT, *supra* note 43, at 106.

to mandate that CPS agencies in the pilot counties refer a certain (thirty to forty) percentage of cases to the assessment track and specify that this had to include cases other than educational neglect cases.⁶³ Despite data showing that the assessment track is just as safe as the investigatory approach, many workers persist in believing that it is less safe.⁶⁴ The resultant reluctance to refer families to the assessment track may be particularly strong for families perceived to be at greater risk, such as those with very young children.⁶⁵ This reluctance is also reflected on a larger scale; numerous states are unwilling to expand differential response pilot projects into statewide programs and a handful of states considered differential response but concluded that it was too “risky” despite the data showing otherwise.⁶⁶

Second, CPS workers are much more likely to switch families from the assessment to the investigation track than vice versa. In fact, in some states, agency policy only allows reassignment from the assessment to the investigation track.⁶⁷

⁶³ NEW YORK REPORT, *supra* note 15, at 16.

⁶⁴ *Id.* at 99.

⁶⁵ NEVADA REPORT, *supra* note 5, at 147. Other experts have concluded that these same families are particularly likely to benefit from a differential response system. *Id.*

⁶⁶ For instance, Nevada’s differential response system is underfunded so that only about twenty percent of maltreatment cases can go to the assessment track, although a majority of cases qualify for it. *See id.* at iv. States considering differential response and then deciding not to implement even a pilot project include Delaware and Texas. *See* LITERATURE REVIEW, *supra* note 27, at 5.

⁶⁷ *See* KAPLAN & ROHM, *supra* note 14, at 11. Switching from the assessment track, which does not entail a finding of abuse or neglect or any court involvement, raises serious questions about confidentiality and the information gathered during the “nonjudgmental” assessment process. It appears that most, if not all, states routinely transfer information learned during the assessment process to the investigation case. *See, e.g.,* SOC. WORK RESEARCH CTR., COLORADO YEAR 1 SITE VISIT FINAL REPORT APPENDICES 28 (2012) (specifying that assessment track workers should transfer their case notes and other information to investigation track workers when a case is transferred). In some cases, the family may have the same worker on both tracks. *See, e.g., Frequently Asked Questions – Family Assessment Response*, CONN. DEP’T OF CHILDREN & FAMILIES, <http://www.ct.gov/dcf/lib/dcf/drs/>

Thus, what was intended to be a fluid and individualized process really becomes a one-way ratchet to the investigation track.⁶⁸

Third, the assessment track services are not truly voluntary in many jurisdictions. If parents refuse services that are offered, they are switched to the investigation track, sometimes by agency or other mandates, and sometimes just by the common practice of caseworkers.

Fourth, the (often warranted) mistrust of CPS in certain communities may be too great to allow for a successful differential response system that includes CPS. For instance, community agency staff for differential response in California say they only gain a family's trust by explicitly disassociating themselves from CPS: "[o]ur goal is to keep CPS out of your house We tell them that we are not tied to CPS. We're here to keep you out [of the system]."⁶⁹ Another worker similarly concluded that, "If [CPS is] knockin' on the door with us are we going to look like the bad guys too? . . . [I]t's hard to overcome that community stereotype."⁷⁰

Finally, there is the difficulty—impossibility?—of an agency engaged both in investigating and prosecuting abuse and neglect cases, and in supporting families through an assessment approach. Numerous scholars have pointed out the impediments

docs/far_frequently_asked_questions.doc (last updated Mar. 7, 2012).

⁶⁸ This dynamic is based upon the skewed approach to risk outlined above, as well as the tendency for many supervisors to view differential response as a "passing fancy" in child protection, as they have seen other innovations come and go. KAPLAN & ROHM, *supra* note 14, at 9; *see also* NORTH CAROLINA REPORT, *supra* note 26, at 30 (noting strategies to combat many workers' perception that differential response is "simply another initiative" rather than a true systems change).

⁶⁹ Conley & Berrick, *supra* note 10, at 37; *see also* BERRICK ET AL., *supra* note 54, at 48 (noting that jurisdictions use different terminology to distinguish themselves from CPS. Alameda County, for instance, calls its caseworkers in the differential response program "family advocates" or "home visitors").

⁷⁰ Bagdasaryan et al., *supra* note 6, at 50; *see also* NEVADA REPORT, *supra* note 5, at 97 (noting that the likely reason that family satisfaction is higher among the assessment track families working with community-based organizations is that workers at those organizations do not carry any "CPS baggage").

to agencies effectively pursuing multiple goals.⁷¹ The cognitive dissonance of investigation/prosecution, on the one hand, and support of families, on the other makes successfully carrying out these two functions particularly challenging.⁷² Accordingly, the false dichotomy of safety versus family support and prevention persists.

CONCLUSION

A full exploration of organizational and legal design solutions to these problems is beyond the scope of this Article. Any solution, however, will require both significant political will⁷³ to remedy child protection's skewed assessment of risk and a thoughtful division of duties between CPS and non-CPS agencies.⁷⁴ Until then, differential response will not reach its full potential but instead will likely result only in tinkering at the margins of our current entrenched and problematic approach to child protection.

⁷¹ See, e.g., Biber, *supra* note 61, at 28–30; Jonathan Todres, *Assessing Public Health Strategies for Advancing Child Protection: Human Trafficking as a Case Study*, 21 J.L. & POL'Y 93 (2012). A similar concern about agency performance when charged with two conflicting goals led to, for instance, the division of the former Immigration and Naturalization Service into three agencies: the U.S. Citizenship and Immigration Services (administering immigration); U.S. Immigration and Customs Enforcement (investigating and enforcing immigration laws against non-citizens); and U.S. Customs and Border Protection (handling border control). Biber, *supra* note 61, at 33–34.

⁷² RICHARD WEXLER, NAT'L COAL. FOR CHILD PROT. REFORM, *THE ROAD LESS TRAVELED BY: TOWARD REAL REFORM OF CHILD WELFARE IN MISSOURI* 46–51 (2d ed. 2003); cf. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009) (arguing for the separation of the investigative/advocacy and the adjudicative roles in prosecutor's offices).

⁷³ Caren Kaplan & Lisa Merkel-Holguin, *Another Look at the National Study on Differential Response in Child Welfare*, 23 PROTECTING CHILD., nos. 1 & 2, 2008 at 5, 6 (noting that a challenge for the implementation of differential response is “possess[ing] the political will to sustain” it).

⁷⁴ These solutions, of course, have their own limitations. For instance, splitting child protection functions among multiple agencies would incur increased transaction costs. I would argue, however, that the benefits of these solutions would outweigh such limitations.