DEFAULT PRESUMPTIONS IN LEGISLATION: IMPLEMENTING CHILDREN'S SERVICES

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INTRODUCTION

As powerful but largely hidden elements in legislation, default presumptions mediate the inevitable gap between statutory mandates and implementation. They regulate the inertial tendencies of general rules, in much the same way that default settings structure the applications of computer programs. They seek to reduce internal statutory tensions by establishing an ordinal hierarchy among potentially conflicting purposes. Their message to implementors is roughly this: "Apply rule #1 unless there are good reasons to apply the contrary rule #2." A related message speaks directly to any uncertainty about which rule to apply in concrete instances: "In case of doubt, use rule #1 rather than rule #2."[1]

The challenge of implementation is to identify and operationalize the critical switching points between these layered rules. In practice the "good reasons" that are implied by legislative mandates are rarely spelled out in concrete detail. Instead, their definition is delegated to a variety of authorities, from whom conflicting interpretations can be expected.[2] Such authorities include not only the usual bureaucrats, but also professional experts, courts, community groups, and economic markets. In social service settings, for example, the contours of "good reasons" will vary considerably, depending on whether they are shaped by intake workers, trained social welfare clinicians, citizen review boards, or court-appointed monitors or judges.[3]

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1. It should be noted that there can be degrees of good reasons, more or less explicitly recognized, just as there can be degrees of doubt to overcome before making a shift in presumptions.

2. *See generally* Children and Family Sevices Act, ILL. COMP. STAT. ANN. ch. 20, § 505 (Smith-Hurd 1993) [hereinafter CFS Act].

3. For a discussion of these various perspectives, see MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY 13-16 (1980) (identifying the selective use of rules by different public policy actors).

Drawing attention to default presumptions may clarify certain endemic features of administrative action. In the literature on policy implementation, some commentators are distressed by the apparently widespread failure of enforcers to "follow the rules."[4] The public is generally convinced today that bureaucracies invariably go astray in carrying out their mandates.[5] Furthermore, judicial challengers to administrative action have perfected the art of casting suspicion on implementation procedures whenever the outcomes fail to align tightly with their reading of the statutes. Without a clear understanding of default structures within legislation, however, the roots of administrative discretion remain elusive. This analysis looks back to the nature of mandates themselves, and to the implicit formulae through which mandates seek to resolve fundamental value tensions and empirical uncertainties.

There are several reasons why legislation invariably fails to specify the "good reasons" that serve as switching points between competing presumptions. To be sure, most statutory language inherently remains stranded at a level of generality well above the details of individual applications.[6] But legislatures may lack consensus on what circumstances constitute "good reasons." Moreover, the intrinsic indeterminacies of individual cases make it impossible to put most reasons into full operational form. Lawmakers can nonetheless agree on the presumptive order of rules, leaving boundary questions for another day. Implementors can likewise forge ahead by construing their own behavior patterns in accordance with default presumptions.

I. State Services for Children: The Case of Illinois

This Article explores the strategic power of default presumptions by reviewing a typical, complex statutory system: a group of Illinois statutes that outline substantive and procedural frameworks for implementing children's services mandates. The Illinois agency charged with carrying out these goals is the Department of Children and Family Services (DCFS). Its multiple

4. *See infra* notes 20 and 28; *see generally* Eugene Bardach & Robert A. Kagan, Going by the Book (1982).

5. *See generally* James Q. Wilson, Bureaucracy: What Government Agencies Do and Why They Do It (1989).

6. For an introduction to problems of statutory design, see Guido Calabresi, A Common Law for the Age of Statutes (1982), and James Willard Hurst, Dealing with Statutes (1982).

responsibilities are summarized near the beginning of the statute that created the department in 1963, and include the following functions:

> 1. protecting and promoting the welfare of children . . .[;]
> 2. preventing or remedying . . . neglect, abuse, exploitation or delinquency of children;
> 3. preventing the unnecessary separation of children from their families . . .[;]
> 4. restoring to their families children who have been removed, by the provision of services to the child and the families;
> 5. placing children in suitable adoptive homes, in cases where restoration to the biological family is not possible or appropriate;
> 6. assuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot be placed for adoption;
> 7. providing supportive services and living maintenance . . . [to] children who are pregnant and unmarried; and
> 8. providing shelter and independent living services for homeless youth.[7]

A. *Sources of Ambiguity*

One need not look far into this legislation to discover what some analysts refer to as statutory "ambiguity."[8] The multiple mandates in Illinois delineate distinct and potentially competing tendencies without setting clear operational boundaries. There are some indicators of rough priorities; certain functions are called for "wherever possible" or "when necessary," thus mandating an apparent hierarchy of presumptions.[9] These signals create implementation dilemmas for agencies like DCFS, which must try to construct actual switching points between competing tendencies. In addition, it is noteworthy that the Illinois statutes are often most explicit when delegating the application of priorities to procedural bodies outside DCFS, including the courts, expert planning boards, or committees with interest-group representation.[10] The disparate aims and agendas of such groups, however,

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7. CFS Act § 505/5(3).

8. For a summary of variables in implementation, see the classic article by Paul Sabatier & Daniel Mazmanian, *The Implementation of Public Policy*, 8 POL'Y STUD. J. 538 (1980). *See also* IMPLEMENTATION OF CIVIL RIGHTS POLICY 1-17 (Charles S. Bullock III & Charles M. Lamb eds., 1984) (providing a useful discussion of ambiguity and specificity).

9. *See supra* note 7.

10. *See, e.g., infra* notes 35-36.

may impede the emergence of consistent priorities within the administrative system.

Practically any combination of the above mandates can come into mutual conflict. The first two provisions, for example, raise inevitable questions about the proper allocation of scarce public resources between protective or remedial services, on the one hand, and preventive services on the other.[11] Provisions two and three ask the state to prevent harms to the safety of children and the integrity of families, two interests that can be mutually exclusive.[12] Similarly, provisions four and five authorize DCFS actions that are polar opposites: restoring children to their original family setting, and placing them permanently in new homes.[13] Provision six mandates a service, for a residual group of cases, that is inconsistent with services under provisions four and five.[14]

The ideal resolution of all such conflicts is for DCFS to preassign all children and families to "appropriate" categories of service. But just how definitive can these assignments really be, given the prevailing state of knowledge and limited staff resources? DCFS faces serious challenges in carrying out its potentially conflicting mandates if it cannot rely on some neutral system for classifying—*before* acting—the thousands of individual cases with which it must deal. In effect, the ambiguities of implementation would disappear only if children and families came to the department with appropriate categories of service already embossed on their case records.

It is important to see how such ambiguities derive from the statutes themselves and not simply from classification "mistakes" by DCFS personnel. The problem originates with the inherent gap between general categories contained in statutes, and concrete cases handled by public agencies, a gap created by the lack of self-executing criteria for validating agency classifications. As a matter of abstract logic, the mandates will often resolve such conflicts by stipulating, for example, that children should be removed from families only when "necessary,"[15] and should be kept from their families only so long as restoration is "not possible or appropriate."[16] But this language begs the whole process

11. *See* CFS Act § 505/5(3).
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*

of concrete application; general categories never come close enough to actual cases to eliminate the crucial role for individualized judgment.

That such judgments are notoriously complex, and subject to endless challenges from different professional and philosophical perspectives, makes this ambiguity all the more serious for policy implementation. In any given case, the parties to a dispute accuse the other side of simply making "mistakes" in classification, whether based on inexperience, incompetence, or malicious intent. But there are no clear public criteria—certainly, none contained in the statutes—that can either confirm the allegation of error, or defend the original judgment. Each side in a dispute may therefore, in good faith, profess fidelity to the mandates because the statutes provide no proofs for particular judgments made under their general authority.

The statutes appear to address this type of ambiguity by establishing procedures for bringing closure to the labelling of individual cases. Over the past three decades, legislation has increasingly shifted authority to the courts for reviewing classifications that trigger the choice among alternative services.[17] These judicial determinations cannot be distinguished from those of DCFS officials by their demonstrated accuracy (because there is no external measure of accuracy in such cases) nor by their standard of expertise (because the courts deliberately elevate adversarial proceedings over expert knowledge). The distinction is simply that legislatures have chosen the judicial process as the final authority for resolving this major source of ambiguity in public responsibilities.[18]

Studies elsewhere have shown how judicial procedures may inject new levels of conflict into public policy, even as they reduce one kind of ambiguity.[19] Integrating the courts in the policy implementation stream can impose new burdens of time, personnel, and lost service opportunities—costs that may further weaken the ability of the entire service system to carry out its substantive mission.[20] Such costs are difficult to measure directly, however, and even more difficult to balance against the chief advantage which proponents claim for the courts, the protection of

17. *See generally* JOEL F. HANDLER, THE CONDITIONS OF DISCRETION (1986).
18. *See id.*
19. *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985).
20. *See generally* Joel F. Handler & Julie Zatz, *The Implementation System: Characteristics and Change, in* NEITHER ANGELS NOR THIEVES 66 (Joel F. Handler & Julie Zatz eds., 1982).

individual rights. The statutes themselves are silent on potential tradeoffs between procedural fairness and substantive service goals; the former is treated as the *sine qua non* for children's services programs.

Not all types of statutory ambiguity can be formally resolved by delegation to procedural mechanisms. To illustrate, let us return briefly to the problem of allocating state resources between the first two service goals cited above from the basic CFS statute. Over time, newer legislation has underscored the goal of preventive services for children and families, often in response to federal guidelines for grants-in-aid.[21] But exactly how much prevention can the state expect to deliver, given the current level of clinical knowledge, limits on resources, and concerns about state intrusion in private life? Is anything less than complete prevention a sign of policy failure, or must Illinois be content with preventing social problems "whenever possible," viewed against a penumbra of general constraints? By redirecting administrative efforts to programs defined by targeted *inputs* rather than measurable *outcomes*, prevention goals substantially alter the criteria for policy implementation. An optimal level of inputs (measured by either cost or quality) remains unspecified in the mandates; it falls to the implementation process to discover—by trial and error—what that level ought to be.

One can appreciate the ambiguities resulting from such mixed service strategies in this brief summary of statutory goals for the DCFS Division of Youth and Community Services, which was established in 1982 to "develop a State program for youth services which will assure that youth who come into contact . . . with the child welfare and the juvenile justice systems will have access to needed community, prevention, diversion, emergency and independent living services."[22] Among the specific goals of the Division are to:

> (1) maintain children and youths in their own community;
> (2) eliminate unnecessary categorical funding of programs by funding more comprehensive and integrated programs;
> (3) encourage local volunteers and voluntary associations in developing programs aimed at preventing and controlling juvenile delinquency;
> (4) address voids in services and close service gaps;

21. *See* Adoption Assistance Act Amendments of 1989, 42 U.S.C. §§ 620-28; Pub. L. No. 103-66, § 13711 (recent amendments strengthening preventive service).

22. CFS Act § 505/17.

> (5) develop program models aimed at strengthening the relationships between youth and their families. . .;
> (6) contain costs by redirecting funding to more comprehensive and integrated community-based services. . . .[23]

In the context of state and federal policy in the 1970s, this set of goals represented a clear change of program philosophy, and it is perhaps best interpreted at that broadest level of generality. The overall signal was to redirect public resources away from existing categorical programs, and from the support of institutionalized treatment settings. Furthermore, there was little effort to disguise the expectation that such changes would thereby reduce expenditures.

As far as guiding DCFS efforts and providing measurable criteria for evaluating DCFS performance, these guidelines focus almost exclusively on service inputs and benign intentions. They call for "more . . . services" embracing the new philosophy of community treatment: programs "aimed at" prevention, control, and the strengthening of family relationships; programs that "address" gaps in services[24]—all of this resting on the explicit presumption that costs can be contained at the same time. It is nonetheless assumed that programs shaped by these guidelines can "assure" that troubled youth will "have access to needed . . . services."[25]

Perhaps the most explicit message in all this is the mandate to contain future costs;[26] at least, this objective sets a rough quantitative standard for weighing future DCFS performance. The remaining mandates are highly indeterminate, beyond suggesting a new general orientation for agency initiatives. Programs addressing service "integration," for example, could follow any of several dozen possible meanings of that phrase.[27] Likewise, mandates for "community-based" services leave ambiguous how such services are to be organized, and what specific outcomes they are expected to achieve.[28]

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23. *Id.* § 505/17(a).
24. *Id.* § 505/17(b).
25. *Id.* § 505/17.
26. *Id.* § 505/17(a)(6).
27. *Id.* § 505/17(a)(2),(6),(b)(3). *See* WAYNE F. ANDERSON ET AL., MANAGING HUMAN SERVICES 535-36 (1977) (cataloguing the meanings attached to service integration).
28. CFS Act § 505/17(a)(6),(b)(3). The most influential implementation theory of the 1970s postulated the loss of statutory control in direct proportion to the dispersion of administrative authority through decentralized structures. *See* JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION 143-46 (3d ed. 1984) (arguing that the integration of technical implementation with policy aims can minimize loss of control). For a discussion

Notwithstanding the increasing emphasis on formal procedures and general intentions in current mandates, it is equally important to note the grandiose expectations that public efforts will actually resolve some of the central problems facing children and families. Thus the mandates on youth services are prefaced with the bold assurance that "needed services" shall be provided.[29] Besides listing approved categories of service, however, the statute gives no definition of "need." Statements of this sort inevitably raise public expectations, and they often form the centerpiece of lawsuits challenging state agencies for ignoring legal mandates. If public responsibilities are ambiguously defined in statutes, there will be no way in principle to prove that such criticisms are wrong.

One can find other examples of lofty rhetoric in mandates, which may be put to strategic advantage by critics trying to compel the state to provide more services. Preambles and general statements of purpose are the typical repositories of ambitious language. Here, for example, is how the Illinois Juvenile Court Act explains its larger mission:

> The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his or her own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community. . . .[30]

Although the word "preferably" casts some doubt on the confident tone of this statement, the commitment seems robust and unqualified. It all depends, of course, on how one ultimately defines "moral, emotional, mental, and physical welfare" as well as "best interests." Many advocates of children's services, especially those associated with the child development movement of the 1960s, are prepared to use such ambitious statements as the central evaluative standard, after investing them with content from their own particular views on child welfare. In this case, they could take special comfort from additional language in the opening paragraphs, declaring that "every child has a right to services necessary to his or her proper development, including health,

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of alternative models for community-based services, see generally PETER MARRIS & MARTIN REIN, DILEMMAS OF SOCIAL REFORM (2d ed. 1982).

29. CFS Act § 505/17.

30. Juvenile Court Act of 1987, ILL. COMP. STAT. ANN. ch. 705, § 405/1-2(1) (Smith-Hurd 1993).

education and social services."[31] Of course, few experts can agree on precisely what the final outcomes ought to be because of the varying definitions of children's needs.[32]

B. *Statutory Delegation of Specificity*

Most of the ambiguities discussed in the preceding section also involve problems of specificity. After all, it is not until implementing agencies confront concrete problems that hidden tensions in general language stand revealed; this is the difference between statutory "ambiguities" and outright contradictions. As noted above, a common statutory technique for reconciling potentially conflicting goals is to introduce phrases like "whenever desirable and possible" or "when appropriate" to indicate that administrative agencies are expected somehow to eliminate confusion at the level of everyday practice. This technique preserves the logical consistency of the mandates, but raises serious questions about public knowledge and authority at the level of individual cases.

Now separate the issues of ambiguity from another group of problems created by the tendency of statutes to dwell in abstractions. Even without the potential conflicts created by multiple goals, most statutes concerning children's services delegate to administrative agencies or the courts the task of interpreting key phrases.[33] Words like "abuse" and "neglect" cannot be precisely defined in concrete terms, and they are joined in the mandates by such standard phrases as "the welfare of children," "suitable adoptive homes," "adequate care," and "supportive services." All these terms elude translation into more easily administered measures. They are inherently different from criteria found in public assistance legislation, for example, which often contain quantitative formulae for determining service eligibility.[34]

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31. *Id.* § 405/1-2(3)(b).

32. For a good discussion of the multiplicity of ways to define children's needs, see generally GARY B. MELTON, CHILD ADVOCACY (1983).

33. *See, e.g.*, ILL. ADMIN. CODE tit. 89, § 300.20 (1992).

34. For a discussion of conditions for statutory specificity, see IMPLEMENTATION OF CIVIL RIGHTS POLICY, *supra* note 8, at 6-7; Sabatier & Mazmanian, *supra* note 8, at 544-48. The point is not that one always needs strict quantitative measures, but that there be something that can be measured—money, for example, as opposed to more ethereal substances. The notorious problems in defining "disability" under social security programs are quite similar to the problems in child welfare decision making. *See generally* DEBORAH A. STONE, THE DISABLED STATE (1984). DCFS's own extensive list of criteria for identifying child physical abuse, *see* ILL. ADMIN. CODE tit. 89, § 300.20 (1992), is the exception that

The preeminent examples of truly specific standards in children's statutes concern *procedural* matters: investigations of child abuse generally must begin within twenty-four hours after a report;[35] reviews of case plans for foster children must be conducted every six months.[36] This striking fact adds to the mystery surrounding the increasingly procedural character of public responsibilities. For some reason, American society finds it easier to mandate specific details about a broad principle like procedural "fairness" than about substantive measures of child welfare.

The issue of specificity in children's services comes down to the following questions. Who needs services? What kinds, and for what length of time? Suppose that one can somehow distinguish individual children who should remain with their families (with the aid, perhaps, of family preservation services) from those who need to be removed for their immediate or long-term protection: how many Illinois children are there who need either form of assistance, and how do we find them? Once we have established who should be treated, precisely what should the state be authorized to do toward meeting its respective goals of family preservation and child protection? What are the criteria of success that should lead to termination of services—neither too soon nor too late?

None of these questions can be answered by the mandates. All are to be decided, more or less openly, in the course of administrative implementation. The statutes do, however, impose numerous limitations on state officials in carrying out public responsibilities. The most important constraint concerns the distinction between voluntary and involuntary services. In essence, the statutes narrow the problem of deciding who should receive services by providing two procedural routes of entry into the service system: voluntary clients who consent to receive services,[37] and involuntary clients whose need for services must be vetted in the judicial process.[38] The same two mechanisms—client consent and judicial findings—are used to set limits on two key im-

proves the rule: too many specifics in implementing rules lead to endless questions about precisely what the rule makers intended to leave out.

35. Abused and Neglected Child Reporting Act of 1975, ILL. COMP. STAT. ANN. ch. 325, § 5/7.4 (Smith-Hurd 1993) [hereinafter Abused and Neglected Child Reporting Act].

36. CFS Act § 505/6a.

37. *See id.* § 505/5(1).

38. *See* Juvenile Court Act of 1987, ILL. COMP. STAT. ANN. ch. 705, § 405/2-10(2) (Smith-Hurd 1993) [hereinafter Juvenile Court Act].

plementation issues as well: precisely which services are to be provided,[39] and for what period of time?[40]

This procedural emphasis in children's legislation allows lawmakers to defer collective agreement on the elusive substantive criteria that could bring greater clarity to the children's services system. Instead of determining as a society which people need services, Illinois delegates that decision to potential clients—and to the courts, as the final, unappealable authority regarding who else should be brought into the system. For a host of practical reasons, state departments like DCFS are charged with a prodigious amount of preparatory work for both of these procedures. But their most significant judgments about individual cases are provisional only, subject to veto or review by one or both types of authority.

In the final analysis, what can one say about the results of this intricate system? Do the right people, in effect, become eligible for services, and are appropriate services actually provided for optimal periods of time? The mandates themselves cannot answer these questions; having delegated the definition of key terms to procedural mechanisms, the statutes retain no criteria specific enough to evaluate the outcomes actually achieved.

At the highest level of generality, one finds numerous mandates that have obviously not been fulfilled. By law the state is committed to the principle that "[e]very child has a right to services necessary to his or her proper development."[41] Other mandates require that troubled youth will have "access" to community services, and that children will be protected "in all situations in which they are vulnerable to child abuse or neglect."[42] But the lack of operational specificity throughout the statutes means that there are no self-evident criteria for determining whether these goals have actually been accomplished. In the absence of specific legislative standards, critics are free to supply their own definitions of optimal results, while defenders of the current system argue that resources are being stretched as far as possible, given prevailing constraints on administration action.[43]

39. *See* Abused and Neglected Child Reporting Act § 5/2; CFS Act § 505/5.
40. *See* Juvenile Court Act § 405/2-10.
41. *Id.* § 405/1-2(3)(b).
42. Abused and Neglected Child Reporting Act § 5/2; CFS Act § 505/17.
43. *Cf.* B.H. v. Johnson, 715 F. Supp. 1387, 1393-94, 1397-98 (N.D. Ill. 1989) (holding that children in custody of state social service agency had substantive due process claim to

The judicial process—as the final interpreter of statutory language in our legal culture—takes on a pivotal, declaratory role in deciding officially whether legal mandates are being fulfilled. No evaluative study of administrative performance can claim the same authority as the courts in this regard, even though information available to courts can scarcely be deemed any richer than what researchers already know. As with everything else in the public arena of children's services, the issue of administrative success or failure soon becomes a procedural question. Much of what happens in the legislature and in administrative departments is deeply influenced by this distinctive method for reaching a final reckoning.

C. *The Role of Uncertainty*

The lack of specificity in statutes should not be lightly dismissed as simple carelessness on the part of legislators. Nor is the remedy likely to come from closer legislative attention to policy details. If the mandates do not say in precise, operational terms what every child's true needs are, they surely reflect deeper societal uncertainties and ambivalence. Although behavioral and other scientific research has taught us a great deal about children over the past several decades, it has also uncovered the extent of our ignorance in understanding what makes children healthy, happy, successful human beings.[44] What we do not know casts a large shadow over collective social responsibilities, forcing everyone to reconsider what can be accomplished in public life.

Even if the scientific community were able to find agreement on major substantive questions in child welfare, there remains a powerful resistance in American culture to constructing social policy for families on technocratic principles. In recent years, professional authority in many fields has come under popular suspicion[45]—as if to say, in our pluralistic society, that a lot of knowledge might be even more dangerous than a little. The inevitable result has been significant restrictions on the scope of

receive adequate food, shelter, clothes, medical care, and minimally adequate training, but no right to placement in least restrictive setting or sibling visitation).

44. For a representative summary, along with an optimistic if cautious reform agenda, see generally DAVID A. HAMBURG, TODAY'S CHILDREN: CREATING A FUTURE FOR A GENERATION IN CRISIS (1992).

45. *See* David J. Rothman, *The State as Parent, in* DOING GOOD: THE LIMITS OF BENEVOLENCE 69, 82-84 (Willard Gaylin et al. eds., 1981) (arguing that there now exists a widespread and acute suspicion of supposedly benevolent institutions).

legal mandates,[46] no matter how successful the incremental search for knowledge about children.

This is not to conclude that the public sphere has abandoned normative ambitions. The residents of Illinois and other states still demand solutions to urgent problems of children and families, conceived at a fairly high level of abstraction. Almost no one, for example, seriously challenges the state's responsibility to find an effective remedy for physical and sexual abuse of children.[47] Virtually all agree that something needs to be done about so-called "troubled youth," even though assessments of underlying causes and remedies may differ widely. But there remains a critical gap between the generality of common goals and acceptable technologies for implementing those goals. In this sense, elliptical legislation is less the cause than a symptom of popular disillusionment with public services.

D. *The Role of Default Presumptions*

Beyond the explicit language of mandates, statutes like those in Illinois rest on critical presumptions about available social technologies for achieving the larger goals of children's services.[48] These presumptions are so broad as to be untestable in any rigorous fashion; indeed, they seem to respond more to the *lack* of established scientific theories for solving the problems of children and families. Each presumption represents social values that the public is reluctant to sacrifice, even if no one can describe the specific evidence (and therefore the limits) for implementing those values. The critical points where such conflicting presumptions come together are impossible to define in more than general language, and are thus deferred to various procedural bodies (increasingly, to the courts) for application.

The dominant presumption behind the Illinois legislation is that social services can be effective tools for solving at least some problems of children and families. The mandates do not say exactly which services are effective in specific situations. Indeed, empirical studies measuring the effectiveness of therapeutic encounters are still quite modest in their results, and they cannot

46. *See* HANDLER, *supra* note 17.

47. *See* HAMBURG, *supra* note 44, at 81-82.

48. *Cf.* Richard Gaskins, *Comprehensive Reform in Child Welfare: The British Children Act 1989*, 67 SOC. SERVICE REV. 1, 7, 9, 11 (1993) (discussing presumptions of noninterference, parental authority, and community initiative in British legislation).

begin to ground operational program criteria on objective evidence in any rigorous fashion. But while a lack of settled documentation haunts the implementation structure, it neither proves nor disproves the broader efficacy of a service strategy.

Questions are nonetheless raised about that strategy by alternative approaches centered on income supports, structural changes in the economic and social systems, more aggressive use of criminal sanctions, or a stronger system of cultural and moral education.[49] For each of these alternative strategies, the fragmentary empirical evidence is, at best, inconclusive.[50] Despite an air of scientific detachment surrounding debates among all these approaches, most of the discussion is based on broad presumptions rather than hard evidence. Some commentators presume, for example, that structural economic change is the only logical resort when social services prove insufficient to solve the problems of children and families.[51] Others fall back on strengthening the criminal law, or on emphasizing moral education.[52] It is not unusual for theorists to contrast the ideals of one policy strategy with the disappointing realities of another. Such attacks are frequently launched against legislation that assumes the efficacy of social services—from both ideological left and right.[53]

Within the broader social service framework, Illinois mandates contain other implicit theories used to bridge uncertainties of knowledge and public values. One of these theories may be called the presumption of parental fitness, which holds in effect that children's best interests are actually served by the custodial family, unless the courts (and, in emergencies, DCFS personnel) have specific reasons for finding otherwise. Under this theory, which addresses imponderable qualities in the relations between adult and child, the custodial parent does not have to demonstrate fitness; rather the intervening state must show unfitness, if the child is to be removed from the family for its own protec-

49. *See* W. NORTON GRUBB & MARVIN LAZERSON, BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN 11-40 (1982).

50. *See* HAMBURG, *supra* note 44, ch. 1.

51. *See* GRUBB & LAZERSON, *supra* note 49, at 297-307 (arguing for restructuring American institutions on a progressive liberal model).

52. *See id.* at 286-97 (describing values central to American institutions).

53. *See* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1977) (representing the ideological left); LAURENCE D. HOULGATE, THE CHILD AND THE STATE: A NORMATIVE THEORY OF JUVENILE RIGHTS 129-37 (1980) (representing the ideological right).

tion.[54] Considering the inherent vagueness of the concepts "fitness" and "best interests," it can make a large difference where the onus of proof is placed for allowing changes in the status quo.

What sorts of reasons are good enough to overturn the presumption of parental fitness? The mandates give us very few specifics. The presence of cocaine in the bloodstream of a newborn child is automatic evidence of unfitness,[55] as are "two or more findings of physical abuse . . . under the Juvenile Court Act"[56] and "desertion of the child for more than 3 months" prior to formal termination proceedings.[57] By contrast, the following conditions may not be sufficient reasons for defeating the presumption of parental fitness: alcohol-caused damage in newborn infants, a single finding of physical abuse, and desertion for discontinuous periods of less than three months. It all depends on how agencies and courts interpret the general language dominating the remaining list of unfitness criteria: "failure to maintain a reasonable degree of interest . . . as to the child's welfare," "failure to protect the child from conditions within his environment injurious to the child's welfare," "other neglect of, or misconduct toward the child," among other grounds.[58]

These criteria are certainly elastic enough to accommodate a wide range of concerns about parental conduct. A judiciary determined to intervene at every turn could find nearly universal parental unfitness across the Illinois population, given the vagueness of statutory criteria. The presumption of parental fitness is therefore potentially quite volatile, subject to shifting trends in judicial behavior. In recent years, however, constitutional law has sought to strengthen the presumption by requiring judges to base all judgments of parental incapacity on an especially compelling degree of evidence.[59] The close attention to procedural details in many state statutes—in contrast to the generality of

54. The opposite presumption has been explored in several articles. *See* Hugh LaFollette, *Licensing Parents*, 9 PHIL. & PUB. AFF. 182, 184-85 (1980); Claudia P. Mangel, *Licensing Parents: How Feasible?*, 22 FAM. L. Q. 17, 18-22 (1988).

55. *See* Adoption Act of 1959, ILL. COMP. STAT. ANN. ch. 750, § 50/1D(k) (Smith-Hurd 1993) [hereinafter Adoption Act of 1959].

56. *Id.* § 50/1D(f).

57. *Id.* § 50/1D(c).

58. *Id.* § 50/1D(b),(g),(h).

59. *See* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (requiring plaintiff to prove by "clear and convincing evidence" in cases involving termination of parental rights); In re Enis, 520 N.E.2d 362, 365 (Ill. 1988) (applying the *Santosky* standard).

substantive standards—reflects a growing legislative concern with steering the implementation of broad presumptions into the judicial domain.

Whatever it means in practice, the presumption of parental fitness rests on an implicit theory that parents actually do meet the best interests of their children, unless someone has sufficient evidence to demonstrate clearly and convincingly that they do not. There is no conceivable empirical evidence to sustain this overall theory; nor are there testable theories sufficient to validate the "good reasons" for overcoming the presumption. In addition, there are no conclusive empirical studies of judicial behavior to establish how the judicial system itself operates, as an independent variable, to shape the fluid boundary between parental autonomy and state responsibility to intervene.

A second theme in the Illinois mandates is an assumption that public surveillance, investigation, and preemptive action are effective social tools for combatting physical abuse of children. This theory and its attendant methods, drawing on the police powers of the state, raise important questions of policy coordination with the two presumptions already discussed (the efficacy of social services and parental fitness). But the theory itself can be isolated and assessed as yet another broad, untested, perhaps untestable premise lurking behind the statutes.

This strategy for child protection gained rapid acceptance in the United States during the early 1970s as the major premise behind new laws promoting the reporting and investigation of child abuse. As several studies have noted, the problem of child physical abuse vaulted onto the public agenda around that time, following on medical speculation about a "battered-child syndrome."[60] Much as if a new contagious disease had been discovered, the identification of this social problem prompted legislatures to mandate an immediate solution. Statutes soon appeared, fortified by federal guidelines tied to grants-in-aid, to facilitate or require the reporting of suspected cases to child welfare authorities.[61] Reporting was to be followed by mandatory investigations and, in appropriate cases, the temporary or perma-

60. *See, e.g.*, BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE 13 (1984) (describing the publication of medical research on battered-child syndrome as a catalyst for widespread media attention).

61. *See* Child Abuse Prevention, Adoption, and Family Services Act of 1988, 42 U.S.C. §§ 5101, 5106a to 5106c (1988) (providing grants to states for child abuse, neglect prevention and treatment programs).

nent removal of children from homes where the abuse was substantiated.

Of course, preventive measures soon became part of the public response to child abuse, championed by social workers eager to restore public confidence in the efficacy of social services.[62] The strategy of reporting, investigating, and removing children has a close intuitive connection to the goal of protecting children at risk, as the rapid spread of abuse reporting laws would indicate. If children are suffering, we need to find out who they are, to confirm the nature of their condition, and to remove them from harmful environments. But the theory behind these statutes, more precisely, is that mandatory reporting laws are effective ways of identifying abused children; investigations are effective ways to confirm their condition; and removal is an effective form of damage control. "Effectiveness" is not to be judged simply by the mechanical completion of the entire three-stage process; the question is whether the appropriate children come to the attention of authorities, whether investigations accurately reveal the child's present condition, and whether removal occurs in the optimal kinds of cases.

Given the controversial empirical evidence surrounding these laws, it seems unlikely that anyone could ever test the effectiveness of this overall strategy.[63] Without independent measures of how many (and precisely which) children are abused and in need of intervention, and of how many children need to be removed from custodial homes for their physical protection, it is impossible to measure how well the underlying theory works in practice. Do the right children come to the attention of child welfare authorities? Do the authorities misread home conditions and remove children whose long-term welfare would be better served by remaining with the family? The statutory theory itself gives no special insight into the program's effectiveness. This leaves only judicial review as a procedural criterion for measuring the success of policy implementation, to which the statute can assign presumptive authority.

62. *Cf.* Richard J. Light, *Abused and Neglected Children in America: A Study of Alternative Policies*, 43 HARV. EDUC. REV. 556, 595 (1973) (deprecating the likelikood of success of three policies proposed to curb maltreatment of children).

63. *See* David Finkelhor, *Is Child Abuse Overreported?*, PUB. WELFARE, Winter 1990, at 22, 23-24 (noting definitional problems with term "substantiation" and difficulties of obtaining reliable and valid data on substantiation of abuse charges).

It is tempting to defer to the theory's own procedural formula of success, under which the mechanisms for mandatory reporting are allowed to define the "appropriate" cases for investigation. On this approach, simply completing the investigatory process determines the appropriate cases for removal. As with the other major theories previously discussed, essentially unanswerable substantive questions about policies for abused children can thus be lost in the haze of procedures, the literal execution of which becomes a substitute for elusive empirical measurements of effectiveness.

In short, instead of trying to document when social service strategies are effective with the "right" people and for the "right" results, statutes may implicitly endorse the procedurally-correct delivery of services as an end in itself. Instead of inquiring whether public authority promotes the best interests of children, one can simply ask whether the state followed applicable procedural rules in challenging the presumption of parental fitness. Instead of learning whether state intervention is an effective tool for protecting abused children, one can ask whether reporting rules are being strictly observed and whether investigations are promptly completed and correctly supervised by court review.

E. *The Interplay of Default Presumptions*

In its general approach to analyzing statutes, this Article has taken the view that legal mandates are neither transparent criteria for evaluating the performance of implementing agencies, nor the source of testable, substantive premises for validating specific policies and programs. These conclusions do not rule out that statutes can still serve normative functions, or that they can be an important influence on administrative action.

Statutes do not even approximate deductive or scientific first principles, but they still have much to say about how the vast uncertainties in public knowledge are to be structured. In the absence of clear, specific directions on how implementing agencies are to handle individual cases, statutes send strong signals about how to resolve implementation problems. In effect, they identify the course of action that does *not* need the backing of evidence. Like the default settings in computer programs, they provide residual guidance for how to proceed in the *absence* of sufficient reasons for deviating from the path of least resistance.

Even if no one knows precisely what a child needs for healthy development, states are nonetheless willing—on normative grounds—to stipulate certain broad presumptions. Indeed, the greater the ignorance, the broader those presumptions need to be. The Illinois presumption of parental fitness illustrates this concept: it tells us what to think in the absence of strong evidence to the contrary. It directs us to presume, contrary to common sense, that parental choices always conform to the child's best interests. Under this implicit theory, no one has to prove that parents in fact make the best choices; but the state has to prove that they do not, before it can intervene.

Nested within this overriding presumption are the exceptions defined by law: cases of documented physical abuse, laboratory evidence of illegal drugs, impressionistic evidence of parental neglect, among others.[64] These exceptions, in turn, are also organized like presumptions. They point the entire law in a new direction, but do not indicate the ultimate destination. Intervention suddenly becomes possible and obligatory; indeed, an inchoate "right to receive services" instantaneously succeeds the "right to be let alone."[65]

Statutes thus operate more like shifting vectors than stable points of reference. Assuming one can uncover sufficient evidence by investigating abuse complaints, the statutory prescription suddenly changes direction and tells the implementing authority to presume henceforth that the child's interests are best served by removal. Under current state regulations, however, this new presumption is itself subject to reversal. Using language taken from the federal statutes and from a loose collection of court opinions, state intervention to protect children can itself be challenged, among other reasons, for failing to pursue the "least restrictive" placement.[66] Federal civil rights laws remain a potential source of additional restrictions on state protective ac-

64. *See* Adoption Act of 1959 § 50/1D.

65. *See* Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (discussing the Fourth Amendment's basic protection for the "right to be let alone").

66. The Department of Children and Family Services is committed by its administrative rules to placing children in the "least restrictive setting which most closely approximates a family and in which the children's needs will be met." ILL. ADMIN. CODE, tit. 89, § 302.390(e)(1)(1992). This language conforms to federal guidelines in the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 675(5)(1988). In itself, the "least restrictive alternative" phrase has an elliptical logic; it omits to say "least restrictive" with respect to what set of boundaries or constraints. That context is partly supplied by interpreting the phrase as a subordinate presumption to the mandate of state authority to intervene. What is still missing (even in the Illinois formulation) is any operational gui-

tion, by strengthening the set of presumptions associated with procedural due process.[67]

From the perspective of default structures, one may abandon the utopian idea that clairvoyant statutes can define optimal outcomes for all future cases involving children and families. Statutory ambiguity and lack of specificity now appear in a somewhat different light. The only clarity and specificity we need concerns the turning points where statutory presumptions may be shifted. The implementation process can thus be interpreted as an organized search for sufficient reasons to deviate from the default settings declared (or implied) by legislation.

When public agencies doubt they have enough evidence to justify intervention, they are expected to leave things the way they found them. In other words, statutes send broad messages designed to accommodate boundless ambiguity. They tell us, whenever implementors are the least bit uncertain, to assume that social services are effective, that parents make the correct choices, that coercive intervention can reduce child abuse, and that public intervention should follow the least restrictive alternative.

II. Implementation of Default Structures

State officials can read the statutes like everyone else. How, then, might one explain the nearly universal criticism that mandates get distorted on their way to implementation?[68] Do the bureaucrats in state agencies substitute their own notions or values for those of the popular will?

This argument has played an important part in public policy analysis over the past several decades, and also in the emergence of the judicial system as a neutral force for making state bureaucracies more accountable.[69] Although bias can undoubtedly creep into policy implementation at both management and street levels, the conditions described above in this Article sug-

dance on how the tradeoff between services and restraints should be calculated in individual cases.

67. *See* Artist M. v. Johnson, 917 F.2d 980, 988 (7th Cir. 1990) (holding that the availability of state administrative review procedures does not necessarily foreclose federal civil rights cause of action).

68. *See, e.g.*, Pressman & Wildavsky, *supra* note 28, at 147 (noting that the fewer the steps involved in carrying out the program, the fewer the opportunities for distortion).

69. *See, e.g.*, Mashaw, *supra* note 19, at 24-28 (explaining the development of administrative law as mirroring three successive models of administrative legitimacy).

gest that bureaucrats face a most daunting task, which can generate implacable critics no matter how it is carried out. The bureaucrat's task is to find a way to balance a series of shapeless presumptions: to find the elusive points of repose where the responsibility to provide social services crosses over into violations of family privacy, where family autonomy turns into intolerable abuse of children, and where child protection violates the right to treatment in the "least restrictive alternative."

These dividing lines are not spelled out in statutes; they are postulated to exist, but not in any operational form. Wherever the lines are finally drawn, they invite adversarial response from critics who would move the lines elsewhere. Should agencies provide more services, or intervene less in family life? If they intervene less, are they able to do enough to protect vulnerable children? And if they act more forcefully, will they end up making children even more wretched than before? Critics of child welfare services are currently polarized on each of these issues.[70]

Administrative agencies take their cue first from legislation, which is the traditional source of substantive goals for implementation. Child welfare legislation sends the rather insistent message that the aim is to provide services to prevent bad things from happening to children: "Do what it takes to ensure that children are protected from abuse, that they avoid the paths of criminality and dissolution, and that they find homes (when 'appropriate') with devoted custodial parents." But because the statutes do not include specific advice on how to reconcile all these demands, the messages do not tell public agencies how much of any one thing is enough—or too much.

This opens the door to a countervailing set of messages, delivered primarily by federal court judges and advocates of civil rights, but increasingly incorporated directly in legislation. The dominant theme is restraint on state power: do what you may have to do, but do it properly and with full respect for the privacy and individuality of children and families. Indeed, this message is not merely an invention of the courts, but responds to pervasive values in American society. Restraints on state action have been present in child welfare legislation throughout the past century; what is different now is that the message has grown much

70. *See* HAMBURG, *supra* note 44, at 324-33.

stronger—at precisely that moment when the volume of state social services has been expanding.

Messages from both directions meet at the level of administrative practice. From this standpoint, there is really little difference in the institutional source of each message: the democratic legislature or the elitist judiciary; the "politicized" legislature or the "neutral" judiciary. The procedural drift in legislation guarantees that the judicial message will reach the agency through the medium of statutes, quite apart from further pressures coming from liability rules and constitutional principles. Goals of legal restraint, due process, and dignitary rights have no special priority over goals of actively changing the environment for children, from the standpoint of policy implementation.[71] The two sets of goals come together as competing forces in a delicate equilibrium.

Despite these unresolved conflicts in children's services, a better understanding of default mechanisms offers an alternative to the generally pessimistic policy literature. That literature tends to interpret any gap between statutory goals and administrative action as a clear mark of policy failure. Statutes do often appear to be out of harmony with implementation results, but the reasons need not be reduced to bureaucratic irrationality and incompetence. Statutes themselves play a significant role in the bureaucratic fumbling that accompanies implementation of children's policies. Contributing to the appearance of policy failure are all the elements of ambiguity and lack of specificity described above. But this Article's interpretation of statutes as a series of default structures traces responsibility back still further: to the multiple, competing presumptions that our society cannot avoid building into public mandates.

71. This is not true from either the legal or moral perspective, where constitutional rights always preempt statutory law, and "rights" in general always trump mere social "interests."