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## Which Side Are You On?

James G. Dwyer

*William & Mary Law School*, [jgdwye@wm.edu](mailto:jgdwye@wm.edu)

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## Which Side Are You On?



By [James G. Dwyer](#)  
*Response Essays*  
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**D**ebate about child protection policy among scholars and professionals generally reflects two diametrically opposed views about state child protection services (CPS) agencies. Some see the agencies as too readily separating children from parents in overreaction to reports of abuse or neglect, whereas others see the agencies as more concerned about making parents happy than about children’s welfare. Diane Redleaf is clearly in the former category; from her perspective, CPS is “treacherous and error-prone,” “continuously separat[ing] children from their parents,” operating “in secret,” routinely trampling “family rights.”

As is often the case when starkly different views of the same phenomenon persist, there is at least some basis in reality for both views. Redleaf offers anecdotes in support of a claim that CPS caseworkers are systematically and without cause coercing parents into sending their children away to live with relatives following

maltreatment reports. Instead of walking away or giving parents a procedurally proper hearing by initiating formal judicial proceedings, caseworkers use threats to induce parents to accept a “safety plan” that entails temporarily placing the child with relatives.

Argument by anecdote is a dangerous approach to advocacy. An opponent typically can easily pick apart the anecdotes or offer up contrary anecdotes. And many people are susceptible to being persuaded by such argument even though it is illogical to draw inferences about systemic problems from isolated examples. What one wants in this field is data presenting a picture of the system as a whole, so that any policy changes respond to sufficiently widespread phenomena rather than to anomalous occurrences. Are there a large number of cases in which CPS separates children from parents without sufficient reason?

Focusing on a few specific cases actually creates an impression that the answer is “no.” Particularly so when one omits facts that might spoil the impression one is trying to make. In Redleaf’s case in chief, *Hernandez*, the agency’s basis for removing from parental custody a child who suffered an arm fracture was not just the mother’s inconsistent statements about whether the child was walking yet (a fact that a wrist fracture would not change), but also the facts that “Jaymz had an unexplained, older bruise above his left eyelid,” “the parents gave conflicting reports about who was home at the time of the incident,” and “the parents denied that anything was in the crib, but [the caseworker] observed objects in the crib.” *Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 477 (7th Cir. 2011). The courts ultimately concluded that the initial removal was reasonable, in light of those facts, but that the child should have been returned to parental custody after medical professionals concluded that the injury was consistent with an accidental fall from a crib. *Id.* at 478-83. The case does stand as an example of CPS wrongfully coercing parents into accepting a safety plan that entails having a child stay with relatives. It was wrongful because the agency threatened something it was incapable of doing in that case (placement of the child in formal foster care with strangers). A fuller picture of the facts, though, makes the agency’s actions more understandable. There was insufficient evidence to bring the case to court, as is often true even when child abuse has occurred, but there were several red flags that made the agency wary about closing the case.

Absent statistics about how often agencies are coercing parents with empty threats of non-kin foster care, it would be helpful to have a clear picture of how caseworkers and other players in the child welfare system operate, what incentives they have, and what precise legal rules constrain their actions and decisions. That picture, along with some anecdotes, might support an impression that it is happening systematically, as Redleaf speculates. But even if so, the proper response might not be simple or clear, because any alternative rules or practices might raise other concerns—in particular, leaving too many children in danger or forcing agencies to take more drastic action.

We know CPS agencies are generally overburdened, so caseworkers are not roaming about hoping to find more children to add to their caseload. We know the actual rate of maltreatment exceeds the rate at which CPS receives reports of maltreatment, and it greatly exceeds the rate at which CPS is able to substantiate reported maltreatment. So it is implausible to suppose that many CPS intrusions into family life are entirely unwarranted. Softer responses to maltreatment reports have developed in part to minimize CPS workload and in part to minimize the trauma for children and parents following a report. One of those softer alternatives is a safety plan parents can choose instead of going to court for formal hearings and adjudication of abuse or neglect charges against them.

As I discuss in my new book *Liberal Child Welfare Policy and Its Destruction of Black Lives* (Routledge 2018), there is ample reason to fear CPS caseworkers will too often choose soft responses in cases where they could reach a finding of maltreatment, seek an adjudication in court, and take stronger measures to protect a child. They might do this to avoid upsetting parents and to spare themselves from having to prepare for and attend court hearings, find and monitor foster parents, and so on. And the result might be to leave children in danger (e.g., because relatives with whom a child is placed will not adequately protect the child from parents or are not themselves adequate caregivers). Objective studies of “Differential Response,” the latest policy innovation in child protection practice, whose basic thrust is to offer parents voluntary services rather than to do formal investigations, show that CPS agencies in many states have diverted a shockingly high percentage of maltreatment cases onto the soft “assessment track” rather than the more formal and coercive investigative track, with the result that more children suffer a recurrence of abuse or neglect.

Redleaf's concern is the opposite—that caseworkers are inclined toward a heavy-handed, intrusive approach, always seeking to prolong oversight of parents and separation of children from parents, using devious informal means when unable to initiate formal proceedings. She does not suggest what motivation caseworkers or their supervisors would have for routinely doing this. One motivation might be the noble one of protecting a child when their gut rather than hard evidence tells them the child is in danger. I am not certain we should be alarmed about caseworkers acting on their instincts in such situations, though their instincts are certainly fallible. Another motivation might be more self-serving—avoiding lawsuits should they return a child to parental custody and the child is subsequently seriously maltreated. But such lawsuits are far less likely than suits by parents of the sort Redleaf recounts, charging CPS with violating parents' rights. Whereas parents are generally able to ask a lawyer to sue on their behalf when they feel wronged, children generally are not. The lawsuits parents have brought have clarified the law for agency directors and caseworkers, so that wrongful continuation of state custody and coercion of parents into “voluntary” safety plans should no longer occur in the jurisdictions where courts have issued decisions like that in *Hernandez*.

In sum, though Redleaf might be correct in suggesting there is today, despite rulings like *Hernandez*, a widespread problem of illicit coercion of parents, she does not document that or make it seem plausible. Nor does she make clear when, in her view, coercion is illicit rather than appropriate. If an agency *could* make a formal finding of maltreatment, secure a court removal order, and place a child in foster care with non-relatives, conditioning reunification on parental compliance with a plan of treatment and services, is it wrong to offer the parents a more informal approach predicated on their acceptance of temporary placement with relatives? Redleaf fails to address what the alternative would be to the practice of giving parents such a choice. Would it be to require in all cases formal investigation, court proceedings, and a permanent record of findings—in other words, elimination of softer responses? If so, would that be better for parents on the whole?

More importantly, which regime is best for children? Redleaf devotes little attention to the child welfare impact of the practice she describes. Was Jaymz Hernandez harmed by being placed in the custody of relatives for ten days, for eight of which his mother was able to stay with them? Is there evidence of other children incurring harm of any sort as a result of coerced safety plans? As with others who criticize CPS for being

overly intrusive, Redleaf manifests a parent-focused view of the child welfare system. And though interests of children and parents are intertwined and overlapping to some extent, they are not entirely unified in any family. Simplistic assertions that children belong with their parents, or suffer when separated from parents, are not helpful to adjudication of individual cases nor to policy making. Direct, sophisticated, research-informed attention to children's developmental needs and experience is essential.

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## ALSO FROM THIS ISSUE

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### Lead Essay

- **When the Child Protective Services System Gets Child Removal Wrong** by Diane Redleaf

Diane Redleaf describes how Child Protective Services operates, using one particularly troubling case as a focus. Yet millions of children are named as suspected victims of abuse every year, and many of these end up being removed from their families, whether temporarily or permanently. Redleaf describes how parents may be subject to strong tactics to secure removal—and how these tactics can easily affect the innocent.

### Response Essays

- **Which Side Are You On?** by James G. Dwyer

James G. Dwyer says that Child Protective Services may already err in favor of the parents. Child separations are never an easy call, but the incentives at hand, Dwyer argues, are likely already arranged such that in general children are not removed from a home more often than they should be. Indeed it's quite possible that the opposite is true, Dwyer says.

- **Children and the Shadow of the Law** by Walter Olson

Walter Olson finds that the problems with Child Protective Services are of a kind with problems that affect many other agencies of government. He draws readers to consider these similarities and proposes several ideas that aim at reform. On many of his points, transparency and accountability emerge as key considerations. Bureaucrats seldom want these, but bureaucracy quickly grows abusive without them.