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Children’s Welfare and the State’s Fiduciary Responsibility



By [James G. Dwyer](#)
The Conversation
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In the not too distant past, the prevailing practice of child protection agencies was to do a formal investigation of every “valid” report of child maltreatment and reach a formal finding as to whether the report was “founded.” If yes, then the caseworker would bring the case to court, where parents are subjected to a trial-like “adjudication” and, if found to have committed abuse or neglect, ordered by the court to undertake rehabilitative efforts as a condition for retaining or regaining custody of a child. A *valid* report is one that relates facts that, if true, constitute abuse or neglect. A *founded* report is one as to which the investigating agent is able to amass sufficient evidence that the reported facts are true. A caseworker’s conclusion that a report is unfounded does not amount to a determination that the report was invalid or false; it simply means that, as is quite often the case when young children are victims of maltreatment, not enough evidence admissible in court could be collected.

Nothing Ms. Redleaf states in her initial essay, or in her response supports the proposition that there are a significant number of hotline reports that are deemed valid when in fact they are not. She therefore gives us no reason to believe her insinuation that CPS is often contacting families on the basis of unwarranted or invalid reports. She also does not respond to my point that the National Incidence Study, now conducted four times, has repeatedly shown that the rate of actual child maltreatment greatly exceeds the rate at which children are reported to CPS as maltreated.

Ms. Redleaf also does not address the question I posed about whether she would prefer a return to the previously prevailing practice described above, in which all valid reports lead to formal investigation and a lasting record, which would on the whole amount to far more intrusion into family life than the current regime. In the current regime, a substantial percentage of valid reports are handled more informally and do not result in a record of maltreatment even if abuse or neglect has in fact occurred. For example, after my home state of Virginia adopted a differential response (DR) system, the number of abuse and neglect petitions filed in the Richmond, Virginia Juvenile and Domestic Relations Court dropped by around 75%. As someone who is child-focused, I worry that diverting a major portion of valid reports to informal approaches, in which parents are legally free to decline offered services yet still avoid having a record of maltreatment, leaves a great number of children in danger. The same was true when police used to take a “soft touch” approach to domestic violence reports; this left victims vulnerable to recurrent abuse. I would prefer an investigation of all valid reports.

And, in fact, studies conducted on Differential Response by independent researchers (as opposed to those funded by the Casey Family foundations, the primary lobbyist for DR), with which Ms. Redleaf appears to be unfamiliar, concluded that this parent-friendly policy innovation is in fact resulting in more recurrence of maltreatment. In roughly half of all cases put on the “assessment track,” in which a caseworker offers help but does not conduct an investigation or make a record finding, the parents were reported again for maltreatment. For an excellent presentation of the research, see Elizabeth Bartholet, “Differential Response: A Dangerous Experiment in Child Welfare,” *42 Fl. St. Univ. Law Rev.* 573 (2015). In contrast, and belying Mr. Olson’s reference to foster care as “one of the most dangerous risk factors of all,” rates of abuse and neglect in foster care are minuscule by comparison—one quarter of one

percent annually (Children’s Bureau, “Child Welfare Outcomes 2010–2014: Report to Congress” (2017))—and “foster care removal generally serves children’s best interests in terms of such factors as risk of violence to children, child ‘risk behaviors,’ child quality of life, and other measures of safety and well-being.” (Mersky, Joshua P. and Colleen Janczewski. “Adult well-being of foster care alumni: Comparisons to other child welfare recipients and a non-child welfare sample in a high-risk, urban setting.” *Children and Youth Services Review* 35(3) (2013): 367-76)

The research Casey funded, which might be what Ms. Redleaf was referring to, did not study child welfare outcomes from DR but rather parent satisfaction. Casey, like Ms. Redleaf, is parent-focused, and from that perspective what matters primarily is whether parents are happy and respected. Ms. Redleaf aims to disguise the likely conflict of interests between parents and children when a valid maltreatment report reaches the desk of a CPS caseworker, by referring repeatedly to “family rights” and legal representation for “the family,” but readers should understand her to be referring to parents’ supposed rights and parents’ having lawyers. I wonder if she would support appointment of separate legal representation for the child in all the instances where she believes parents should have a lawyer advocating for them.

Ms. Redleaf’s repeated suggestion that I endorse a “hunch” standard for CPS action is an evasion and a strawman argument. I referred to caseworker instinct only in explaining why I was not alarmed by the *Hernandez* case in the way that Ms. Redleaf expects readers to be alarmed. Any reasonable, objective, experienced caseworker in the same position would, I believe, also have had lingering reservations about returning the child to parental custody, and urging parents to allow the child to stay in the home of an extended family member, with mom present, for some additional days, simply does not alarm me as an advocate for children. Ms. Redleaf makes no reference in her response to the effect on the child, but rather focuses on the imagined effect on the parents. She also fails to address the point I made that the courts properly addressed what was in fact illicit about the caseworker’s conduct in that case. Caseworkers in that jurisdiction are no longer permitted to threaten removal to formal foster care when they know they lack the evidence necessary to make that happen. So is there still a problem in the states encompassed by the 7th Circuit? Ms. Redleaf does not tell us. Would she prefer that whenever caseworkers do have enough evidence to go to court that they always and automatically do so, instead of offering parents an informal approach entailing the child’s staying with relatives? Is it always

better for parents to endure court proceedings rather than have to choose “the lesser of two evils” presented by CPS? If her point is simply that all jurisdictions should adopt the *Hernandez* ruling that CPS caseworkers should not be making empty threats to secure parental agreement to safety plans, then we do not disagree.

Ms. Redleaf’s efforts to portray CPS practice as wildly arbitrary in an anti-parent direction rely on misleading characterizations. The “*Dupuy* litigation (part I)” was about child abuse findings against child care workers, not parents. In addition, the federal court in that case did not find that there was no abuse in a “staggering” percentage of cases in which CPS found abuse “indicated” with respect to child care workers. It found that in 75% of cases in which such workers appealed such a preliminary finding, which is a subset of all cases in which such workers are charged, the agency ultimately was unable to satisfy the higher standard of evidence that it faced on appeal, in part because “the indefensible delays... allow memories to fade and, therefore, evidence to become unreliable.” *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1136 (N.D. Ill. 2001). *Valmonte v. Bane* was about parents as to whom CPS had deemed a maltreatment report founded or “indicated,” but again the court did not find that a great percentage of those parents were ultimately proven not to have committed maltreatment, but rather simply that in the subset of cases in which parents appeal the agency finding, CPS is unable to meet the higher evidentiary standard that applies in an administrative appeal. Moreover, that subset of cases is likely very small; in child protection practice generally, parents rarely appeal agency findings, and those rare cases are likely to be the ones in which parents’ attorneys perceive that the agency decision is most susceptible to challenge—that is, outlier cases. Or they are cases in which the parents are working or aim to work in professions involving care of children, and those parents might not be representative. More careful treatment of empirical findings is essential to sound policymaking and advocacy in the child welfare field.

I do applaud Ms. Redleaf for urging “a new and more appropriately tailored theory of the state’s proper role in protecting children.” I presented such a theory at length in my 2006 book *Children’s Relationship Rights* (Cambridge University Press). I cannot reproduce it in this space. The upshot is that the state acts as a fiduciary for children when it creates legal relationships between children and persons who wish to serve as parents, whether that occurs in an adoption proceeding or via biology-based parentage law, and the state continues to act as a fiduciary for the child in continually,

albeit implicitly, reaffirming its choice of legal parents. In that fiduciary capacity, the state should be cognizant of children's interests that align and intertwine with those of parents, but it should also recognize that the interests of parent and child can diverge. When it has substantial reason to believe there is a substantial divergence, it should act to protect the child, period. Parents have no substantive moral right that the state make any decision concerning a child that is contrary to the child's welfare, all things considered.

That said, proper procedural rules and evidentiary standards protect children as well as parents from CPS interference with family life that is not needed for children's sake. So again Ms. Redleaf and I might not come out very differently on questions of what procedures CPS should have to follow, and what CPS practices should be proscribed. We certainly agree that caseworkers are being asked to do several kinds of tasks for which they are not properly trained. It would be helpful, though, if she would clarify precisely what legal regime she would like to govern CPS response to maltreatment reports. If she would require that CPS have "definite and articulable evidence" before doing anything to protect a child, then it would seem she does favor a formal investigation in every case. It would also be helpful if she would explain why her position, whatever it is, is generally best for children, with reference to peer-reviewed studies of the various aspects of the phenomenon of child maltreatment and the state's response to it.

ALSO FROM THIS ISSUE

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.