

When the Child Protective Services System Gets Child Removal Wrong



They Took the Kids Last Night is the title and opening line of my just-published book (Praeger, October 31, 2018), drawn from over 30 years of helping families navigate a treacherous and error-prone Child Protective Services system (CPS).

CPS caseworkers continuously separate children from their parents at a monthly rate 300 times greater than the number of the separations at the Mexican border that took place in May 2018. These separations occur day in and day out. They commonly happen in secret and without fanfare. CPS caseworkers take children from their homes, their schools, and from hospitals if the children have been taken for medical care following an injury or medical condition. Children are also separated from parents, and sometimes from their siblings too, at CPS offices and in juvenile/child protection/dependency courthouses.

How It Happens

In 2015 alone, over 7.4 million children were named as suspected victims of abuse or neglect in Hotline calls. Massive bureaucratic triage systems screen out 40% of these calls and send the remaining allegations to field offices for investigation or alternative community responses. Then, CPS investigative caseworkers make findings of abuse or neglect in approximately one-fifth of the screened-in calls, meaning that some 650,000 children a year are labeled abused or neglected at the conclusion of a Hotline investigation. These labels then get registered in a state-administered child abuse register, based on sometimes minimal levels of evidence (“credible evidence” in many states). This is determined by a caseworker and almost never by a judge.

During or as a result of this investigative process, in 2016 alone, 273,539 children were placed into foster care. But much less attention has been paid to the untold number of children who are the subject of coerced “voluntary” separations of families are a common result of CPS Hotline investigations in as many as 37 states, and such separations may constitute an equally large number among those that were initiated directly by CPS.

Unfortunately, statistics on these informal separations, never ratified in a court of law, are not maintained by state or federal agencies in any reliable form. One of the policy issues my book discusses is why safety plans have come to be so pervasive and so tolerated by a country that claims to treat family rights as sacred and the rights of families as fundamental.

It is time to reexamine CPS family separation policies. The public has recently been served a large dose of the visible trauma that children and families experience when they are separated by force. Yet vocal expressions of public sympathies have not reached the parents of children taken into foster care, nor much to those children themselves. But even parents who never have been charged crime and whose sole fault is bad luck can and do lose their children to CPS. While the child protection system operates disproportionately to separate families of color, no one is immune. Indeed, the primary story the book tells, in unfolding day-by-day narrative detail, involves an unexplained fracture that suddenly was found one night in the leg of newborn grandson of a federal judge.

If CPS caseworkers take children from their parents into state or local CPS agency custody, a formal legal process is required, both to authorize the children's removal from their homes and to transfer legal custody to CPS. Once it obtains custody, CPS places children into substitute care (usually a foster home, including with a relative, but also into group homes and residential facilities). Timely court orders—no later than five days after an emergency removal—are constitutionally mandated. To get these court orders, every state has a process that triggers judicial oversight, ongoing formal assigned casework responsibilities for the CPS agency, and federal funding if the child qualifies for federal aid.

But CPS systems have improvised clever tactics to avoid ever presenting a legal case to a judge when they remove a child. There is a long history in many states of using so-called voluntary placement agreements that explicitly aim to avoid the requirement of court orders. In more than thirty states, policies and practices authorize even more informal separations, which are agreements in name only. Innocuously called “safety plans,” these devices are utilized to circumvent the duty to afford due process to the families from whom children are taken.^[1] Safety plans are usually oral directives, issued to parents following a CPS Hotline call, that require parents to give their children over to relatives under threat of forced removal and placement with strangers. These separations are labelled as “voluntary” even when parents are led to believe that entrusting their children to a relative is the only way they can see their kids at all. This informal separation system, operating under the unfettered authority of CPS caseworkers to fashion onerous demands and restrictions upon parents and other family members, creates what I call a “shadow foster care system.”

Litigation, news reports, and research into these practices has [sic] shown them to be prevalent and pervasive, especially in Illinois, Pennsylvania, and Texas (where one-third of the children in the child welfare system were separated from their parents without legal process and under a form of so-called “voluntary” agreement). CPS spokespeople (including CPS attorneys) have defened [sic] safety plans as a lesser intrusion than formal separations and placements into foster care, but have generally avoided answering the question of whether there is a legal basis to demand family separation in the first place.

A Troubling Case and an Important Precedent

Multiple attempts to challenge the exercise of coercive state authority through safety plan demands have been made in Pennsylvania and Illinois, with mixed but growing success. The case of Crystelle and Joshua Hernandez, which established the constitutional standard for the lawful taking of children from their parents in the Seventh Circuit in 2011, is one of the six stories my book narrates in detail. What happened to the Hernandez family could have happened to any family in America. In 2009, when Jaymz Hernandez was 15 months old, his parents Crystelle and Joshua had just moved back to Illinois from Texas. Joshua was an Iraq war veteran and Crystelle was a stay-at-home mom. On September 8, 2008, after living in Illinois for all of three weeks, Crystelle heard, through a baby monitor, that Jaymz had started crying after his nap.

Crystelle ran to Jaymz's room and she saw him on the floor of his room, holding his arm. She naturally concluded he must have fallen out of his crib. The Hernandezes had no idea Jaymz could climb out already. They quickly lowered the mattress to its lowest possible position so that he couldn't get out again.

New to the area, Crystelle took Jaymz to an unfamiliar doctor's office to have his arm checked. Jaymz turned out to have a torus fracture of his right arm. During their visit, the nurse noted Crystelle had said Jaymz couldn't "run or climb." If Crystelle had said such a thing, what she had meant was that Jaymz couldn't run or climb *since the fall*. Unaware of nurse's note until much later, Crystelle had no chance to clarify the point at the time the note was made. A minor scratch above Jaymz's eye and confusing responses as to whether Joshua was home at the time of the fall led the doctor's office called the CPS hotline, viewing the statement that Jaymz couldn't run or climb as a "red flag" for possible child abuse.

A CPS caseworker came to the Hernandez home that afternoon. She saw Jaymz walking, playing with toys, and interacting with his mother as if nothing were wrong. While she reported to her supervisor that Jaymz looked fine and that she didn't know why she had been sent there, the CPS supervisor directed her, over the phone and without ever seeing Jaymz, to take the toddler into state protective custody.

Fortunately, the CPS caseworker placed Jaymz with his great grandmother, though the toddler barely knew her. And the CPS caseworker forbade Crystelle and Joshua from seeing their son while he remained in state protective custody. Luckily, the next day Crystelle was allowed to attend Jaymz's orthopedist appointment to cast Jaymz's arm. The doctor told the CPS caseworker that it "didn't look like abuse." Indeed, the doctor said that abuse *could not* account for the type of fracture Jaymz had; the break could *only* have occurred from a fall.

Later that same day, the local State's Attorney decided that there wasn't enough evidence to file a petition in the local juvenile court to start a case to adjudicate Jaymz as an abused child or to take Jaymz into the formal foster care system. Under Illinois state law, the CPS agency's legal authority to keep Jaymz in protective custody, and away from his parents, lapsed when the State's Attorney decided not to bring the case to a judge. The power to hold a child away from his parents is an emergency police power. Nevertheless, CPS continued to

hold Jaymz away from his parents. The CPS caseworker told Crystelle and Joshua that, despite that State's Attorney's rejecting the case, CPS "still had more investigating to do," and they now had to sign a "safety plan." Jaymz still could not come home and the Hernandezes could not see him unless they signed the safety plan agreement. The CPS caseworker also told them that they had no parental rights.

Naturally, Crystelle and Joshua believed the caseworker and signed the demanded agreement. The agreement allowed them to see their son, and even to stay overnight with him at the relative's home in which he had been placed, as long as a relative supervised all of their contact with Jaymz.

New medical opinions continued to confirm the lack of child abuse. On September 16, 2008, Crystelle and Joshua sought legal help to bring their son home. After their lawyer implored the caseworker to end the restrictions, and as medical evidence in the family's favor continued to mount, the CPS caseworkers ended the safety plan on September 18. Without such attorney intervention, plans often last 60 days or more while investigations continue, even when evidence of parental innocence mounts. The CPS investigation stayed open for another two months, however, closing finally on November 7, 2008, with a finding that the allegations of abuse against the Hernandezes were "unfounded."

Terrible and frightening as it experience was, the experience presents a clear and compelling set of facts for challenging the authority of the state to hold the child in custody without probable cause or exigent circumstances. The coerciveness of the CPS demand, coupled with the representation that the Hernandezes had no legal rights to see their son (and hence were compelled to agree) were glaring too.

Despite the strong evidence that the safety plan the Hernandez parents signed was involuntary, their federal civil rights lawsuit was initially dismissed in federal district court. The 2006 case *Dupuy v. Samuels*, with an opinion by Judge Richard Posner, held that a "mere suspicion" of abuse by a parent, without any evidence yet gathered to support the allegation made to a Hotline, sufficed for CPS caseworkers to make a safety plan demand that required parents to put their children into a relative's care. Suspicion could "ripen," and the hands of CPS workers were not to be tied by the need for *evidence* before they were allowed to "offer" a safety plan. Viewing safety plan choices as "options," the Seventh Circuit declared that parents who were offered such safety plans could simply "call the bluff" of the caseworkers. The opinion pointedly compares parents' options (the choice between having one's children go live with grandma or be taken into foster care) to those of cocktail party guests first offered a martini or a Manhattan, but then told that the only choice was a Manhattan, concluding that even such limited "offers" made them "no worse off." The opinion concluded that safety plans were voluntary. Indeed, using the cocktail party analogy and its language of "offers," the opinion concluded that Illinois' pervasive safety plan practices were so plainly innocuous that they did not reach the threshold showing of a deprivation of liberty sufficient to allow the plaintiffs to state any colorable claim for a constitutional violation impairing family liberty.

The Search for Better Options

No good host forces his guests to drink. Yet CPS caseworkers never offered parents the choice of “no thank you” when they were given the forced choice between putting a child with a relative or having them go live with strangers in a foster home. The *Dupuy* opinion’s cocktail party analogy was thus plainly flawed, as the massive factual record before the district court in the 22-day trial confirms. The evidence—never referenced in the Posner opinion—showed that not one parent ever called a CPS caseworker’s bluff. Every time that a parent was threatened with foster care if they did not agree to separate from their child by enlisting a relative to care for the child during the investigation, the parent “agreed” to the safety plan. The federal trial court had found express coercion was rampant in the Illinois safety plan regime.

Far from a voluntary choice of options, the choice between having a child live with a relative during an investigation or go into foster care (with the possibility of never seeing their child again) is akin to being offered a choice of “your money or your life.” Labeling such choices “offers” of “options” is Orwellian. Yet, in the regime of CPS, safety plans have been largely accepted as though they were voluntary options for the families under investigation. Caseworkers are trained to label safety plans as “voluntary agreements.” In the wake of the *Dupuy* decision, families face an uphill battle in arguing for any entitlement to due process as they lose custodial rights to their child.

Fortunately for the Hernandez family and the plaintiffs who followed them, there was a loophole in the *Dupuy* decision. As plaintiffs’ lawyers working to create a constitutional child welfare system for families, we mounted a series of cases that aimed to turn that loophole into a set of constitutional policies that would, if implemented as required, move the CPS system into a direction of affording due process to families under CPS investigation.

The Posner opinion had posited that families who refused safety plans were “no worse off” for having been offered the “choice” between taking their child into foster care or having the child live with a relative. The loophole arose because when the CPS caseworker demanded the Hernandezes sign the plan, their child had already been taken into protective custody. That made the so-called “options” more plainly coercive. Contrary to the assumption in the *Dupuy* opinion that the parents could “call the State’s bluff” and not be worse off, if the Hernandezes had exercised that “option,” it would mean their child would stay separated from them, and they would not be able to see him at all.

Ultimately, the Hernandezes won reversal of the *Dupuy*-based dismissal of their federal civil rights suit and secured an opinion that was more than a modest corrective to *Dupuy*. First, it clarified that the state bears an immediate duty to release a child from state protective custody as soon as it is clear there was no probable cause to believe the parents had abused the child. And while the Seventh Circuit refused to award damages to the Hernandezes arising from initial seizure of their children, it declared that, henceforth, taking children from their parents without probable cause, without exigent circumstances, and without a court order first, violates the Fourth Amendment. Several other circuits have articulated the same legal standard.

The Seventh Circuit also labeled the Hernandezes safety plan coercive, knocking a gigantic hole into the *Dupuy* opinions conclusory assumption that all safety plans, including those issued without any investigation and upon “mere suspicion,” are uniformly voluntary and thus work no deprivation of liberty.

Despite this landmark ruling, however, practices on the ground in Illinois have not changed significantly. Five subsequent lawsuits in Illinois successfully extended the holding of *Hernandez v. Foster* to the nonconsensual transfer of custody to another parent and the holding of children at hospitals. Still, policies and practices intended to clarify the limited circumstances in which a state can demand a safety plan are yet to be fully implemented. Safety plans continue to be demanded of parents in the absence of evidence showing any serious likelihood of abuse or neglect to the alleged child victim and absent emergency justification for separating the family without a court order.

Juvenile court intervention provides a necessary but insufficient correction to the abuses of power committed in the name of child protection. The Hernandezes story was the shortest of the separation stories told in *They Took the Kids Last Night*. One ordeal lasted 3½ years, and another required a trip to the appellate court before an unfair presumption of guilt for alleged Shaken Baby Syndrome was overturned. The Hernandezes never had to respond to a formal legal action, since the request to file a case against them in the juvenile court was rejected by the prosecutor. Nevertheless, the juvenile court practices my book examines in detail add to the challenges families face when CPS separates them from their children. Parental innocence of wrongdoing provides little protection in the face of pervasive policies that support taking children first and then shift the burden to the families to prove their innocence.

New federal amendments to the Social Security Act pursuant to the recently enacted Family First Prevention Services Act could make the problem of family separation without due process even worse. Federal matching funding soon will become available to support relatives caring for children involuntarily taken from their parents, without requiring any formal judicial review of the validity of the separation in the first place. While advocates like me hope for some stronger federal guidance to reinforce the principle that children cannot be taken from their parents under coercive threats, there is substantial concern about an ever-widening child protection reach into family life. While the Families First Act was intended to support families’ ability to raise their children and avoid foster care placements, it may have the unintended effect of encouraging more safety plan separations into relative care without due process.

Wider public attention and scrutiny to these operations of CPS, both in the formal foster care system and in the shadow foster care system that operates under the radar, is long overdue. If awareness of the trauma inflicted on families by ICE practices at the border leads to a re-examination of that agency and its actions, then perhaps a re-examination is also in order when American resident children, from Alaska and Hawaii to Florida and Maine are taken away too.

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