

# Differential Response: A Misrepresentation of Investigation and Case Fact Finding in Child Protective Services

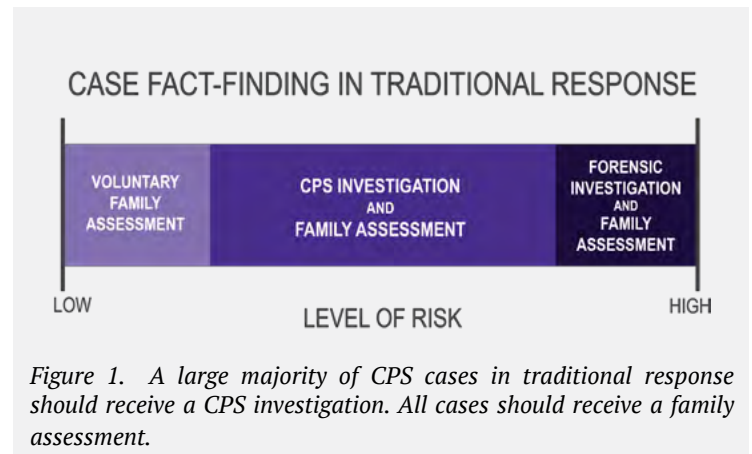
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Traditionally, a host of necessary case fact-finding responsibilities and activities has been used by public Child Protective Services (CPS) agencies to ensure that they can achieve mandates to protect children from maltreatment as well as to strengthen and preserve the families of at-risk children. The primary CPS case fact-finding activities include risk assessment, investigation (both CPS and forensic), and family assessment. Information collected while engaged in any one of these three activities will often be relevant and important to the others. However, each case fact-finding activity also requires specific inquiry to elicit information that is essential to achieve its distinct purpose.

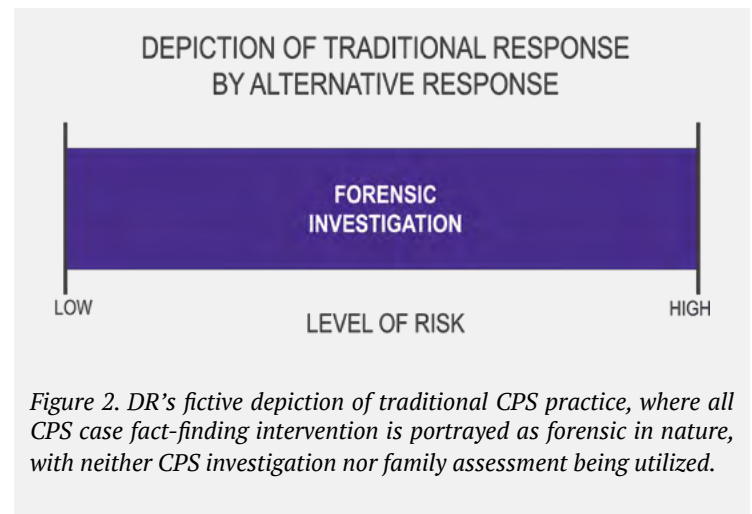
In traditional CPS practice, all children and families referred for suspicion of child maltreatment, with few exceptions, will be screened to determine the appropriateness of accepting the case to collect additional information. Cases not screened out as inappropriate should receive a safety and risk assessment, an investigation (a large majority to receive CPS investigation and a small percentage to receive forensic investigation), and a comprehensive family assessment. The risk assessment and the investigation, though most often completed in collaboration with families, are non-voluntary, mandated responsibilities of CPS. The family assessment, by its nature, requires voluntary family participation in most cases.

CPS case fact finding to assess and document potential maltreatment is essential to ensuring the effective assessment of child safety, case planning, and service delivery. A small proportion of referrals (perhaps 10%) that can be clearly and quickly determined as presenting little or no inherent risk can be served voluntarily without posing a significant threat to child safety. These cases do not require a formal investigation. The largest proportion of cases, those of indeterminate and moderate risk, receive CPS investigations, while a small proportion of cases, those at highest risk, receive forensic investigations, usually in collaboration with law enforcement or Child Advocacy Centers (CACs). In traditional CPS, family assessments are completed with all families. (Occasionally, very low-risk cases with singular and specific needs require little additional assessment. See Figure 1.)

One of the foundations of differential response (DR) reform has been its distortion of the traditional and historical model of CPS practice, particularly distortions in the DR literature about approaches to case fact finding. A significant portion of the DR literature suggests that prior to DR reform, CPS



case fact finding was a sedulous process in which all referrals to CPS were subjected to one monolithic assault of case fact finding – the “investigation.” In this literature, all CPS investigative activity is depicted as forensic investigation, (see Figure 2) when, in fact, only a small percentage of CPS cases warrants a forensic investigation to ensure child safety and to meet judicial requirements.



Many DR advocates falsely portray CPS investigation as a monolithic approach to case fact finding, depicting it as “inflexible,” “adversarial,” “judgmental,” “legalistic,” “intrusive,” and “threatening” (Hughes et al., 2013, p. 505). Although some of these terms—e.g., adversarial, legalistic, intrusive, and threatening—can apply to the forensic investigation necessary for the few CPS cases involving suspected criminal conduct, this is not so for the majority

of CPS cases. In this majority of cases, non-forensic CPS investigation is the appropriate approach to case fact finding, a reality that is confounded in DR's erroneous depiction of traditional CPS practice.

That said, because of CPS legal, moral, and practical responsibilities to ensure children's safety and well-being in cases of intrafamilial child maltreatment, parental participation in CPS activity is not, and cannot be, voluntary. Therefore, any CPS intervention into family life has the potential to be both threatening and aversive to parents. However, the extent of the perceived threat to parental autonomy will depend upon the type of investigation needed to fulfill case fact-finding objectives and responsibilities. Because neither CPS investigations nor family assessments are forensic in nature, their fact-finding approaches will be most successful when parents can be engaged and empowered to collaborate in fact finding as the first step toward accurately identifying family needs and strengths and planning appropriate interventions. DR advocates have not acknowledged the inherently less threatening nature of CPS investigation or its capacities for parent engagement and collaboration without the threat of incarceration or coercion that exists with forensic investigation. By depicting all CPS investigations as if they were forensic in nature and qualitatively adversarial, DR is able to justify the need for an "alternative" response for the majority of CPS cases—an approach that can be voluntary, non-threatening, collaborative, and engaging with families, rather than the DR figmental and pejorative depiction of a typical CPS investigation. This "new" approach in DR is often called a "family assessment."

In fact, no initial fact-finding intervention by CPS can be voluntary for families. CPS must collect information pertaining to suspected child maltreatment irrespective of parents' willingness or inclination to engage with the process. Thus, as previously explained, any non-voluntary CPS intervention, whether called an investigation, family assessment, or anything else, will initially be threatening and possibly perceived as aversive by parents. With good social work practice, however, CPS workers can engage parents and promote collaboration, thereby empowering parents over time.

Of significant concern is that the DR reform literature does not acknowledge the general utility of family assessment in traditional CPS practice, even though family assessment is a fundamental and essential activity for all CPS cases. Because of lack of understanding of this necessity, plus lack of acknowledgment of the historic use of family assessment in traditional CPS, DR advocates inappropriately identify family assessment as a new, unique, and defining case fact-finding approach applicable only in the alternative track, which in some states is even named the "family assessment track."

Thus, two major misconceptions of DR reform – that all CPS investigations are forensic in nature without goals of collaboration and family engagement; and, that family assessments have utility only for low-risk cases—form the foundation of the original DR two-track model.

CPS case fact finding is a unique and sophisticated child welfare intervention. It was developed over several decades in response to the need in CPS to balance social work goals of both ensuring child safety and strengthening and preserving families. A child's right to safety and well-being is the paramount responsibility of child welfare practice. But family health and the integrity and support of parental rights are important responsibilities of child protective services, contingent only on their compatibility with child safety. In a small minority of CPS cases, child safety cannot be achieved without family disruption and even, at times, termination of parental rights; however, most often child safety and well-being can be achieved by strengthening families and empowering parents, using social work interventions of engagement and collaborative case planning, including CPS investigations.

In sum, the rich diversity of viable CPS responses needs to be carefully understood and preserved. The variety of manifestations of child maltreatment, the varying degrees of risk among CPS referrals, the differing strengths and areas of concern identified in parents and families, the various applicable manifestations of child and family law, and the scope of alternative responses necessary and available to address this variety of presenting variables have together shaped the contours of traditional CPS practice, including the range of case fact-finding strategies in today's public CPS systems that adopt best practices.

## **Legal Framework of Child Protection**

In 1923, the United States Supreme Court first interpreted the "liberty" provision of the Constitution to include protections for family life (*Meyer v. Nebraska*). In essence, it affirmed that parents, rather than state authorities, are primarily responsible for child-rearing decisions. Over the past 100 years, the Court has repeatedly upheld the basic principal that parents have a constitutional right to the care, custody, and control of their children. Reciprocally, children have a constitutionally protected interest in the benefits of a day-to-day relationship with their parents, generally free from interference by governmental actors such as child protective service workers and courts. Even when parents are abusive or neglectful, the Supreme Court has held that parents retain a "vital" interest in parenting their children (*Santosky v. Kramer*). At the same time, the government has an "urgent" interest in protecting children from child maltreatment, and it may act to protect that interest (*Lassiter v. Department of Social Services*). Thus, the Constitution requires that these interests of parent, child, and state must be balanced when a parent is abusive

or neglectful. Best traditional practice in public CPS has evolved to reflect this balance.

All states and the District of Columbia have enacted laws to protect the state's interest in the welfare of its children. As a result, children have statutory rights to be free from parental maltreatment. To incentivize certain child welfare practices and programming, the federal government has established an elaborate series of funding schemes to encourage states to adopt particular approaches to child welfare. A basic tenet of child welfare practice, which has been enshrined in federal funding statutes since the enactment in 1974 of the Child Abuse Prevention and Treatment Act, is that child protection agencies must make reasonable efforts to preserve families after child maltreatment has occurred.

## DR and CPS Investigation

DR operates from a premise that traditional CPS has been too aggressive in investigating allegations of child maltreatment using approaches typical of forensic investigation and, in doing so, has alienated parents rather than engaged them. For this reason, DR proponents assert that investigation to determine what has happened in a family should be eliminated in favor of a family assessment in an increasing percentage of CPS cases. Because DR is ideologically driven, there is no consistent formulation in the DR literature of a methodology or algorithm to distinguish the levels of risk appropriate to warrant cases being assigned to the alternative track. Thus, some states refer only lower-risk cases to the alternative track, and others profess goals of assigning to the alternative track all cases except those requiring forensic investigation. Over its history, traditional CPS has developed a series of case fact-finding approaches and applications necessary to ensure proper case adjudication and service planning. These include screening, investigation, family assessment, and risk assessment. However, the DR literature's idiosyncratic and dissembling use of the terms "investigation" and "family assessment" cause considerable confusion, both in understanding and in implementing DR reform.

As explained previously, the DR reform literature suggests that a family assessment track be developed as an alternative to their fictive depiction of the monolithic, adversarial "investigation" that is inaccurately portrayed as traditional CPS practice. Because CPS investigation is not acknowledged as a unique and specific form of CPS case fact finding, this leaves a forced choice in the DR model between a voluntary family assessment track and a forensic investigation track. As a result, the grey area consisting of families of moderate to higher risk, who are inappropriate for forensic investigation, is increasingly assigned to the voluntary assessment track, resulting in increased child morbidity and maltreatment recidivism over time. (See articles in this issue by Mark Hudson and Kathryn Piper. See also Figure 3.) Additionally, the use of family assessment

only for lower-risk cases prohibits effective case planning for a majority of CPS cases.

## The Elements of Real Traditional Response

### Screening

When a family is referred to CPS for suspicion of child maltreatment, the agency first makes the decision to screen the case in or out. Screening a case out occurs when, in the judgment of the screener, the family circumstances described by the referent do not warrant CPS intervention. According to DePanfilis (2005), the function of CPS screening is to determine whether the information provided by the reporter meets the statutory and agency guidelines for child maltreatment and to determine whether a child is at significant risk of imminent or future harm. For example, parental substance abuse, in and of itself, may not meet the agency's criteria and may be screened out, unless there is information to suggest that parental substance abuse has resulted in maltreatment of a child or presents a high risk of imminent or future harm. Statistics from *Child Maltreatment 2013* show that in fiscal year 2013, 39% of the 3.5 million cases of suspected child maltreatment were screened out. Some states screen in 100% of referrals, while other states screen out as many as 83% (Department of Health and Human Services, 2015).

Screening a case in means the information provided in the referral is of enough concern that CPS must accept the case for additional case fact finding to determine the following: whether a child has been maltreated, the degree of risk for future maltreatment, whether a case should be opened for services, and whether other protective measures are necessary. This additional fact-finding activity is the CPS investigation. It is important to understand that cases are screened into CPS for one reason only: because CPS has determined that additional information is necessary to evaluate or corroborate the existing risk of child maltreatment. This is the only justification for state intrusion into family life and interference with parental child-rearing rights and prerogatives. Thus, some level of investigation is initiated for all cases screened into traditional CPS to collect the additional information necessary to do a thorough risk assessment for child maltreatment and to determine whether services are needed.

### Investigation

In CPS traditional response, the investigation will take one of two forms: a CPS investigation or a forensic investigation. It is important to be clear about the purpose of a CPS investigation and, conversely, what it is not intended to accomplish. A CPS investigation by a child welfare agency is intended to determine whether a child has experienced harm in the form of child maltreatment and whether there is significant risk of future harm. A CPS investigation is

not intended to punish a perpetrator of maltreatment. Rather, it is intended to ascertain whether a child has been harmed by abuse (e.g., physical, sexual, or psychological), by neglect (e.g., the failure to provide adequate food, clothing, education, shelter, medical care), or by the failure to eliminate a known risk of harm (e.g., as when a mother refuses to take steps to protect a child from her boyfriend's physical or sexual abuse), thereby making it possible to assess the risk of future maltreatment.

A CPS investigation by a child welfare agency is not intended to result in criminal charges against a perpetrator of child maltreatment. However, CPS may initiate a forensic investigation separate from the CPS investigation (often in collaboration with law enforcement), and the law enforcement portion of that joint investigation may result in criminal charges. Because the focus of the CPS investigation by the child welfare agency is to protect the child and not to punish the parent, a number of constitutional rights implicated in forensic investigation are not implicated in non-forensic CPS investigations.

A forensic investigation seeks to determine whether a criminal law has been broken and is conducted most often with law enforcement personnel or by Child Advocacy Centers (CACs), with the expectation that the case may be adjudicated in criminal court—either exclusively or simultaneously with a child protection proceeding. The Child Abuse Prevention and Treatment Act (CAPTA, 1974, 2010) mandates that state CPS agencies cooperate with law enforcement. Thus, some cases—typically those involving sexual abuse or physical abuse resulting in more serious injuries—are investigated jointly by CPS and law enforcement. However, the vast majority of cases screened into CPS receive only a CPS investigation. Research by Cross and his colleagues demonstrated that CPS-exclusive investigations were conducted in 72% of cases of alleged physical abuse and 55% of alleged sexual abuse cases (Cross, Finkelhor, & Ormrod, 2005).

Because of the more stringent rules applicable to criminal cases (e.g., higher burden of proof and stricter application of the rules of evidence), a forensic investigation will be more adversarial and threatening to parents or suspected perpetrators than will a CPS investigation. However, in CPS investigation cases requiring legal action, the vast majority of such cases will be adjudicated in juvenile or family court. The establishment of juvenile courts, a reform undertaken during the Progressive Era in the United States, allows cases involving children to be adjudicated in a court setting where the purpose is to ensure the safety and well-being of juveniles and their families, rather than in a venue specifically intended to adjudicate criminal behavior. This is significant for several reasons.

First, child protection proceedings are civil, not criminal. A child protection proceeding cannot result in a person being

incarcerated, and physical liberty is not at stake. Because juvenile proceedings are civil in nature, and because of the evolution of the law to adapt to the unique concerns of children, these proceedings are handled much differently than criminal cases. For example, in juvenile or family courts, the standard of evidence is typically lower. Whereas the prosecution must prove a criminal charge that could result in incarceration by the “beyond a reasonable doubt” standard, a child protection case may typically be proven by a preponderance of the evidence (i.e., 51%). Additionally, the procedural rules for proving a child protection case in juvenile or family courts are generally less stringent, often admitting evidence that would not be allowed in a criminal prosecution. For instance, in a child protection case, the court's rules against hearsay may be more flexible, some opinion evidence that would be inadmissible in a criminal trial may be used in some child protection proceedings, and some rules relating to documentary evidence may be less stringent. In some jurisdictions, the rules of evidence simply do not apply at all to certain phases of a child protective proceeding.

CPS investigation has evolved to take advantage of these stark differences between criminal courts and juvenile and family courts. The purpose and goal of the adjudication of criminal culpability are punishment of the perpetrator of child maltreatment. However, the purpose of a child protection proceeding is to ensure a child's safety and well-being and, in the vast majority of cases, attempt to remedy the problems that led to the adjudication, maintaining children in their parent's custody or returning them to their family as soon as the home is determined to be safe.

When the state seeks to criminally punish a perpetrator of child maltreatment rather than to ensure a child's protection, it utilizes a forensic investigation with its inherent characteristics of coercion, threat, and adversarial interface. One clear example of this difference is the questioning techniques used. Parents in child protective proceedings investigated by CPS are interviewed in order to understand the child's history and the family's functioning. By contrast, law enforcement interrogates a suspect with the goal of obtaining evidence of a criminal act, including eliciting a confession to a violation of the criminal law. Some proponents of DR have either misunderstood or misconstrued traditional CPS investigative process as universally forensic in nature, thereby falsely constructing a rationale for not investigating a majority of CPS cases. This tack further confuses the issue by frequently asserting that the intent and practice of CPS investigations aim to punish parents.

Because CPS workers can collect essential case information without having to meet the strict standards of evidence collection and preservation required for admissibility in criminal court proceedings—without having to use the adversarial methods of evidence collection required to meet



criminal court standards, without the same high burden of proof, and with court goals of child safety and well-being rather than punishment—CPS investigation of suspected maltreatment can be a less formal, more collaborative, and clearly remedial fact-finding process than forensic investigation. Thus, CPS workers can use less threatening, less adversarial, or less rigid case fact-finding strategies and still be assured that the information will be appropriate for court purposes, if that becomes necessary.

Because CPS investigation methods and strategies were developed and evolved within these realities, their utilization in CPS case fact-finding remains the most essential and effective method of case fact-finding for low- and moderate-risk cases in juvenile and family court jurisdictions, and they are therefore a cornerstone of CPS practice. The history of the evolution of CPS investigative practice in the social work profession has been one of developing less adversarial, coercive, and threatening methods of case fact finding. Because CPS workers are able to utilize these less adversarial investigative methods, the potential for collaborative and empowering family assessment is preserved, or even enhanced, as the caseworker moves the case process from the investigation phase to family assessment.

### **Family Assessment**

According to DePanfilis (2005), the family assessment in CPS is a comprehensive process that identifies and weighs factors that affect safety, permanence, and well-being for children and youth. Whereas a CPS investigation seeks to determine what happened, a family assessment seeks to understand why the maltreatment occurred and the conditions that contributed to and sustain it, to provide the most effective and relevant services to ensure a child's safety, permanency and well-being in the family.

Family assessment forms the foundation for all decisions and activities in child protective services. It is an essential and ongoing component of case management and service delivery in all open cases. Assessment begins at intake and does not end until the case is closed. Just as investigation is not unique to the DR traditional track, family assessment is not unique to the alternative track. DR sets up a false dichotomy in which families are selected to receive either an investigation or a family assessment. This fictive dichotomy obscures the fact that these are not mutually exclusive CPS activities. In fact, both investigation and family assessment are essential features of CPS involvement in nearly all CPS cases.

In completing a family assessment, CPS collects all the necessary and relevant information regarding the family's personal and social environments and family dynamics to inform social work interventions, including the following: the contributors to maltreatment and risk (e.g., a parent is addicted to drugs, has a mental illness, has been a victim

of intimate partner violence, is economically challenged, has been subjected to institutional racism or cultural marginalization, or cannot meet the family's basic needs); the effects on the children (e.g., developmental level and developmental needs, behavioral and emotional problems, medical and health care needs, exposure to trauma); and the services or advocacy deemed necessary to alleviate underlying causes (e.g., substance abuse or mental health treatment, information about child development, assistance getting to a shelter or to medical care, empowering a family's strengths, or advocating for social justice and remediation). With information provided by the CPS investigation regarding imminent or long-term risk of maltreatment, the family assessment will determine what interventions will be needed to make it possible for children to remain safely in their own families.

When removal of a child from the home is necessary to ensure the child's safety, information from a family assessment is used to determine a child's placement needs and identify the best available placement resources; determine whether children can be or should be reunified with their families; identify the most appropriate permanent family placement for children who must be permanently removed from their families; and determine whether a family's case can be safely closed without raising the risk of maltreatment recurrence.

Family assessment is essential for all CPS cases and should involve all relevant family members—perpetrators, non-offending caregivers, child victims and their siblings, and often, extended family members or others with high levels of personal involvement with the family. Participating in the assessment of problems, needs, and strengths can be an educational and empowering process for families, helping them learn constructive ways to meet family members' needs and resolve problems and challenges

Even in family situations where forensic investigation is necessary and a perpetrator may be criminally prosecuted, the family assessment should be completed to develop a service plan for the non-offending parent and children and for the rehabilitation of the offending parent, when appropriate. Without the collection of essential information through both CPS investigation and family assessment in all cases screened into CPS for suspicion of child maltreatment, we will be able neither to achieve goals of child safety, permanence, and well-being nor family health and integrity.

### **Summary**

Because DR rhetoric does not acknowledge the existence, nature, and fundamental role that CPS investigation plays in child welfare practice, it provides only two choices, or tracks, for cases screened into CPS for additional case fact finding: family assessment or forensic investigation. Family assessment is promoted as voluntary and de-emphasizes case fact finding regarding potential maltreatment

dynamics, essential information for the determination of risk. Further, it is used only in alternative, non-investigation-track cases, in spite of its universal necessity and utility for all CPS cases. As discussed, DR advocates depict all CPS investigation as forensic investigation, coercive and threatening, and ignore the historical use and special utility of CPS investigations, including their capacity for parental engagement, empowerment, and collaboration. Without the option of CPS investigation, the DR model needlessly forces a binary choice between voluntary cooperation by the parent and an extremely coercive forensic investigation.

As a result of this forced choice in states adopting DR, it is likely that over time families with higher and higher risk levels will be tracked into voluntary family assessment to avoid the fictive depiction that the only alternative choice to voluntary family assessment is a coercive and threatening forensic-like investigation (See Figure 3).

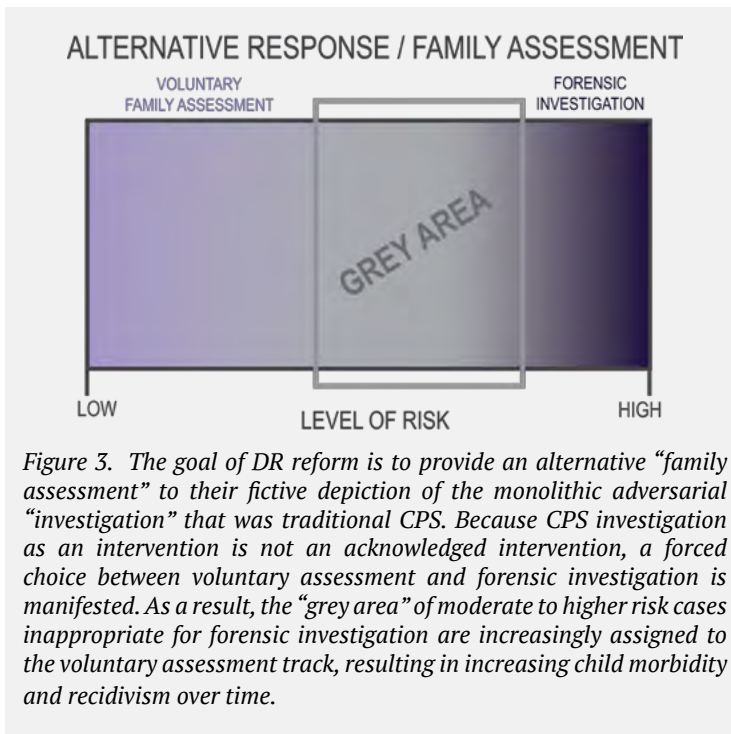


Figure 3. The goal of DR reform is to provide an alternative “family assessment” to their fictive depiction of the monolithic adversarial “investigation” that was traditional CPS. Because CPS investigation as an intervention is not an acknowledged intervention, a forced choice between voluntary assessment and forensic investigation is manifested. As a result, the “grey area” of moderate to higher risk cases inappropriate for forensic investigation are increasingly assigned to the voluntary assessment track, resulting in increasing child morbidity and recidivism over time.

This is a problem because, as Loman and Siegel point out (2012), the alternative response track is effective primarily for those families living in poverty, who are reported for circumstances where it is difficult to distinguish child neglect from poverty. They also contend that the family assessment track may be too limited an approach for families with more complex needs, such as domestic violence, substance abuse, serious mental illness, and chronic involvement with CPS, and that families in these circumstances may need more intensive and authoritative CPS intervention.

Moreover, since DR practice forces a choice between voluntary parental involvement and forensic investigation, it fails to recognize that most CPS cases are best suited for a CPS investigation. Without this third alternative, we

can also expect over time to see increasing numbers of cases that do not receive appropriate protective services, accompanied by increases in rates of recidivism and child morbidity.

## Conclusion

The history of child welfare reform in this country exhibits swings in federal and state legislation, administrative rule, and CPS practice, with alternating emphasis on child safety or family preservation. Unfortunately, these historical swings are played out as simplistic political and bureaucratic attempts to address the inherently complex dilemma of balancing parental rights and privileges, children’s need for and interest in safety and competent parenting, and the state’s fiduciary responsibility to intervene in family life to protect children from harm. Within this paradigm, DR reform can be understood as a well-intentioned swing toward emphasizing parents’ rights. Unfortunately, this well-intentioned effort, with its simplistic dogma and charismatic promotion, paves a familiar and disastrous road. But hell for children served by CPS has two faces: it affects not only children who are inappropriately removed from their homes, causing disruption of family life, assault on parents’ rights, and emotional and developmental harm to children, but also children inappropriately left in homes at high risk of imminent harm from child maltreatment, who face an almost certain future of injury, neglect, and emotional harm.

CPS needs a well-supported, scientifically vetted range of alternative responses to the complicated presentation of suspected child maltreatment. DR is a well-intended attempt to provide alternative responses for referrals of suspected child maltreatment to counter those CPS agencies that are too reliant on intrusive interventions. Unfortunately, DR advocates and researchers have misunderstood, misconstrued, and miscommunicated the strengths and weaknesses of existing CPS practice, undermined CPS capacity to collect essential case information to perform risk assessment and effective investigation, and promoted DR as a scientifically vetted model of practice, a claim that has not been supported by outcome research. It is way past time that we stop these swings of inappropriate emphasis on one or the other horns of the CPS dilemma, and develop models that reflect and integrate the inherent complexities of CPS practice. The first step in this effort is to acknowledge the relevance and effectiveness of CPS investigation as the cornerstone of the integration of extant complexities. The second step is to develop more effective and ethically legitimate technologies and methods of CPS case fact finding for both investigation and family assessment in CPS practice. Such a focus of financial resources and practice reform by persons committed to improving the lives of children and families served by CPS would pay enormous dividends.

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