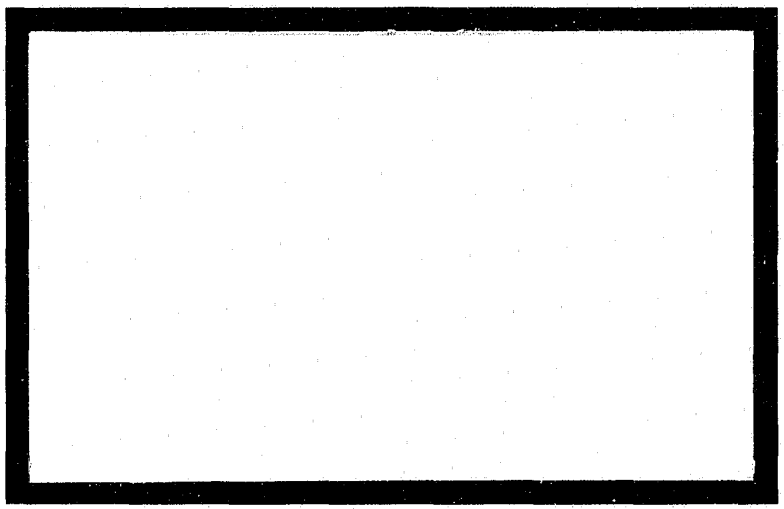

CONFIDENTIALITY, DUE PROCESS AND THE BUSINESS OF CENTRAL REGISTRIES: LEGAL AND POLICY CONSIDERATIONS

MARCH 1988

BY

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Among the basic legal issues questions concerning the operation of Central Registries of reports on suspected child abuse and neglect are due process requirements of entering data, expunging inappropriate data, and maintaining both confidentiality and appropriate access to the data. In order to properly examine these issues, it is first necessary to clarify what the business of central registries is. The duties associated with the managing of Central Registries can then be examined, and a framework for analyzing Central Registry policy can then be offered. Having stated the theory and practice of Central Registry management, legal precedents and issues can be placed in proper context. Some of these legal issues and precedents include the definition of child abuse and neglect, the degree of certainty required to maintain a record within a registry, the process for reaching the decision to substantiate or to expunge, the way in which different data usage may affect due process requirements, possible misuses of Central Registry data, and remedies for misuses. All of these considerations are discussed in turn in the following material.

THE BUSINESS OF CENTRAL REGISTRIES

As discussed in other materials produced by the National Center for State Courts, several functions have been posited for Central Registries.

Central Registry Functions

The National Center on Child Abuse and Neglect addressed the role of Central Registries in its 1983 publication, Child Protection: A Guide for State Legislation. The model statute provides that "there shall be a Central Registry of child protection cases maintained in the statewide office. Through the recording of appropriate information, the Central Registry should be operated in such a manner as to enable the office and to evaluate regularly the effectiveness of the child protection system." The commentary points out that many states had experience by 1983 in operating Central Registries, most required by state law. Existing registries were established to perform a variety of functions including: case management (monitoring or tracking of cases); case diagnosis; evaluation of the operation of the child protection system; and the production of a variety of statistics for use by researchers and program managers.

Again in the commentary for Child Protection: A Guide for State Legislation,a position is taken that Central Registries are not useful for "diagnosis" but are useful for state child welfare management. The argument is made that: "in almost all states, a centralized list of 'substantiated' cases of child maltreatment is least used to help 'diagnose' a suspected case of child maltreatment. Since, by law, 'unsubstantiated' cases are expunged from this list, access by physicians or others looking for a 'history' on the 'child/family' to

help reach a current conclusion, is generally unrewarding. The data necessary to meet this function encumbers the system with data at all levels above the caseworker which is unnecessary. Therefore, the guide recommends that this function is not appropriate for a Central Registry. By eliminating this function, the rules and access to the Central Registry data can be simplified, the operation of the system can be less costly, the rights and privacy of citizens are more easily protected, and the effectiveness of the Central Registry in meeting its other functions can be enhanced."* The authors of Child Protection: A Guide for State Legislation then proposed that by statute the centralized information system (Central Register) should perform the following functions:

1. Maintain information on all reports of suspected child abuse and neglect received by the system in the state.
2. Reflect the results of the investigations of all reports of suspected child abuse and neglect received.
3. Reflect the management of all cases of child abuse and neglect.
4. Produce statistical information reflecting the operation of the child protection system in the state in a timely fashion.
5. Contain such other information which the department determines to be in furtherance of the purposes of this act.

* Not considered, apparently, is the need for caseworkers in various jurisdictions to be able to determine if more than one case file is open on a family, or has been opened. Sooner or later, state caseworkers and those working with them, have to be able to cross-check records.

With respect to item 3, as just one example, it is unlikely that management of cases can be thoroughly evaluated without uniform, easily accessed identifiable case materials.

Two lawyers whose comments on policy matters carry great credibility have called for a similar role by Central Registries. In a 1987 speech about "Child Abuse and Neglect Reporting Laws; an Analysis of 20 Years of Positive Development, Present Areas of Controversy and Directions for Further Reform," Howard A. Davidson of the American Bar Association wrote that "States should assure that collected information about reports of allegedly maltreated children be centrally analyzed, and the system fine-tuned based on what this data shows." Douglas J. Besharov, in his 1978 law review article on "Putting Central Registries to Work; Using Modern Management Information Systems to Improve Child Protective Services" put facilitating management planning by providing statistical data as the number one task of the Central Registry system. Besharov also influenced the Federal guidelines as a Director of the National Center on Child Abuse and Neglect, meaning that some of the consistency found in these views may represent the continuing influence of his opinion, as much or more than the consistency of experience among practitioners.

In his law review article, Besharov also clarifies the essential need for child abuse and neglect data.

> *"(T)hose who say that there should be no Central Registries - either because registers are dangerous or because they do not work - misunderstand a register's nature and functions. A Central Register fundamentally is nothing more than an index of cases handled by an agency or a number of agencies.*

Those who advocate the abolition of Central Registers do not realize that all agencies - as bureaucratic institutions - must have an index of cases if they are to function coherently. Without an index, or register, there would be no way of knowing whether a case was currently being handled by an agency without polling every member of the agency staff each time a letter or referral arrived at the agency. Every worker then would have to consult his own individual index of cases or rely on his memory. Such a chaotic arrangement would cause far greater harm to children and families needing help than would a centralized index.

Thus, there can be no question about the need for some type of register; no service agency could function without a master index. There is reason to dispute how a register should be organized and operated, who should have access to it, what functions it should perform, and especially whether it should be state-wide in scope.

Central registers take on the character - either good or bad, successful or unsuccessful - according to the data they contain, how the data is maintained, who has access to the data, and how those who have access to the data use it." (Besharov, 1978 at 692.)

Ownership of the Data

Just as with any public or private agency which requires data, the "ownership" of that data rests with the agency. As Besharov points out, no institution can operate without being able to maintain its records and use these records for appropriate purposes. In order to understand

whether data is being used appropriately or not, it is necessary to look at the duties associated with information gathering by a child protective services agency.

DUTIES ASSOCIATED WITH INFORMATION ON SUSPECTED CHILD ABUSE OR NEGLECT

For data to be used and useful in child protection, data acquired must be accurate, accessible, confidential (in terms of both privilege and non-disclosure requirements), and "fair" in the sense that due process in obtaining, storing and releasing the data helps assure that the requirements of the system, including accuracy, access and confidentiality are met.

Use of Data for Clients

By statute, Protective Services agencies are assigned responsibility for protecting a class of individuals, children, usually with the condition imposed that protection must take place whenever possible within the family setting. In order for protection to take place, there must be reports of suspected child abuse or neglect, records of those reports, and records of the response taken to protect children over time. Only in this way can it be determined whether or not a given level of concern is justified, whether appropriate intervention was taken, and whether the results for the child, the family and society were those desired or not. There are many potential uses for such data by an agency including review of reports of abuse and neglect by foster parents or applicants to be foster parents, applicants to be adoptive parents, and reviews of failures to react appropriately including situations in which over-reaction has taken place. Virtually no evaluation can take place, however, without access to such records by more than the individual who created the record for the agency.

The accuracy of the records of the agency determines their utility. Without complete and accurate records, none of the evaluation on management tasks suggested is possible. Accuracy is one of the justifications for making it possible for parents to have access to records involving their family so that erroneous information does not remain on a record. But the risk of error exists from a variety of perspectives: records may wrongly ascribe responsibility or records may not reflect vital data. For example, if a child's aliases are not included in a record, high risk of harm to a child may remain undetected.

Privilege

As Weisberg and Wald have clarified, legal concerns about confidentiality can be divided into laws on privilege and laws on non-disclosure. When potentially private information is shared between individuals, whether or not in the employ of an agency or acting in a professional capacity, it may or may not be possible to have such information related in court. The principle which limits testimony about husband or wife against the other, testimony by a medical professional without permission of a patient, repeating of information provided during a religious confessional, or information covered by other statutory guidelines which prohibit repeating the information in court as part of testimony, is known as "privilege". For example, some courts have ruled that information involving therapy of a sexual abuse victim is absolute and may not be introduced into court for any purpose. A recent United States Supreme Court ruling makes clear that at the very least, the relevancy of such therapeutic information would be considered carefully before its admission would be allowed (Pennsylvania v.

Ritchie). On the other hand, much of the information appearing in social services records may not be covered under any form of "privilege" as much of this information will be gathered through the ordinary business activities of the agency as part of investigation or investigatory activities, administrative activities, or research. There would be no reason for much of this information to be brought into court where the testimony or privilege could be asserted. On the other hand, release of identifying information under any of these categories, might fall within the developing law of "non-disclosure".

Non-Disclosure

Again referring to Weisberg and Wald (1984), laws on non-disclosure laws are distinct, with complete understanding of the difference betwen the concepts still developing. (P)artly because they are new, and partly because their major effect lies outside judicial proceedings, legal literature has paid relatively little attention to the purpose and operation of these laws, and no attention at all to the relationship to evidentiary privileges. Yet, the non-disclosure statutes have grown tremendously in number and scope in recent years, and the statutes probably have far more effect on the lives of most people than privilege laws." The authors then outline some of the distinctions between privilege and non-disclosure laws. They point out that while privilege laws:

"generally attempt to protect confidential information generally in a relationship between a professional and her client or patient from the demands of judicial fact finding, non-disclosure laws focus on a different relationship: the one between a private individual and large institutions and agencies - usually governmental but sometimes private -

*that provide such necessities as food, welfare income, medical care, psychiatric care, insurance and credit. * * * A non-disclosure law, where applicable, will unequivocally operate to bar an employee at a receiving agency from disclosing information about child abuse and neglect, other than information required under the mandatory reporting law, to a child protection agency engaged in a preliminary investigation without any immediate plans to go to court. By the language, most non-disclosure laws would appear to prevent a covered person from testifying in a court proceeding as well. Although most non-disclosure laws contain exception to this absolute bar which we discuss below, these exceptions are often different from those found in privilege laws. Thus, confusion may arise where a professional called to testify in court is covered by both a privilege law and a non-disclosure law and the two laws yield different answers to the judge who must determine whether the professional may be forced to disclosure his client's confidences."*

The authors elaborate that a second difference is that "while privilege laws on their face normally apply to specified professionals, non-disclosure laws apply to anyone in the receiving agency or institution who has any access to confidential information."

Weisberg and Wald conclude with three more distinctions between privilege and non-disclosure laws: they are enforced differently, privilege laws apply only to information freely and confidentially communicated by a client to a professional for the purpose of obtaining service whereas non-disclosure laws frequently apply to any information the institution or agency receives from the client, and "finally, while

a client may implictly waive her protection under a privilege law by allowing the information to be disclosed to a third party, a client protected by a non-disclosure law will usually not be deemed to have waived that protection except by some formal method of authorizing disclosure established by statute or regulation." Depending on the nature of the case, a common law approach to recovery may be based on a claim of slander, defamation or "outrageous conduct".

Due Process in Obtaining and Storing Governmental Information

Recognition that there must be some oversight and control of the use of information on private individuals held by governmental agencies, is reflected in federal legislation such as the Freedom of Information Act and the Privacy Act. Both the existence of incorrect information, and the unnecessary, inappropriate use of such information must be considered as due process issues. The interests at stake include protection against unnecessary stigmatization and deprivation of a personal property right, for example, with respect to potential employment in child care.

At the same time, due process must be considered not only as it applies to those named as individuals responsible for a child's neglect or abuse. The child's interests must be reflected in the due process analysis of records management and must include considerations of the need to maintain an accurate record of how a child came to be endangered, protections against inappropriate expungement, and assurances that those requiring the information to protect the child will not be denied access to such information.

LEGAL PRECEDENTS AND ISSUES

The law offers many approaches and raises many questions concerning the creation and operation of Central Registries. Among these issues are due process considerations, the definition of abuse applied, what level of proof or confidence is required, the actual process used in entering and maintaining reports, the process for removing reports, access to Central Registry data, and remedies for Central Registry failures. For some of these issues, judicial rulings have begun to appear, and often relate specifically to the function of registries. When available, these decisions are included in the discussion which follows. In one early decision, Sims v. State Dept. of Public Welfare, etc. (1977; hereinafter Sims), a court was so upset with a statutory child protection scheme, that it ruled that to the extent the Texas Central Registry purported "in any way to be a clearinghouse of child abuse information without a judicial determination . . . it is . . . unconstitutional." at 1192. The entire Texas statute was subsequently replaced, and the Sims case was reversed on Federal abstention grounds in 1979 under a different name. As will be seen below, most courts are concerned not that Central Registries are per se unconstitutional, but that they be lawfully regulated and managed. Indeed, even the Sims court concluded its own analysis by stating a more limited view, i.e., "(W)e feel that the current use of a Central Registry for child abuse reports is unconstitutional" (at 1192)

Due Process

When determining whether or not a procedure or activity of government is acceptable under current legal analysis, the nature of the interest affected by the activity, the risk of an erroneous deprivation25 of the interest under the procedures used, the likely utility or value of any safeguards added, and the costs or burdens of adding safeguards should all be considered (Mathews v. Eldridge). In order to make this assessment with respect to Central Registries, the use to which the registry is put is a significant focus. At the end of this section, the use of Central Registries for various "clinical" purposes such as diagnosis and screening, for research, and for management, are discussed in turn.

The actual process for entering, maintaining, and removing data is another factor in the legal due process analysis. The standard of proof or level of confidence needed in each stage is another typical legal element in deciding whether due process is being observed. All of these elements, in turn, must be considered in relationship to what is meant by child abuse. Thus, the nature of the interest involved in Central Regiatries is not singular. An adult or other individual named in C.P.S. records as accountable for the child's safety has potential property and personal interests associated primarily with their reputation, but also related to the interest in being a parent and interest in being employed in child care. A child's interest in being in a registry is one of personal safety, welfare, and protection from further harm. Protection from harm or unacceptable hazard recurring is the theoretical focus of all Central Registries. On this basis, the

analysis of the nature of interests involved in Central Registries for child protection begins with the definition of child abuse and neglect.

Defining Child Abuse and Neglect

Extensive definitions of the various kinds of child abuse and neglect for the purpose of drafting state child abuse and neglect reporting laws are provided in Child Protection: A Guide for State Legislation, published in 1983 by the National Center on Child Abuse and Neglect, Children's Bureau, Administration for Children, Youth and Families of the Office of Human Development Services. Among the definitions provided are the following:

A) "Child" means a person under the age of eighteen.

B) An "abused or neglected child" means a child's physical health is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare, or whose mental health is harmed or threatened with harm.

C) "Harm" to a child's health and welfare occurs when the parent or other persons responsible for his welfare;

(i) inflicts, or allows to be inflicted, upon the child, physical or mental injury, including injuries sustained as a result of excessive corporal punishment; or

(ii) commits or allows to be committed, a sexual act with a child; or

(iii) allows, encourages, or forces a child to solicit for or engage in prostitution; or engage in the filming, photographing, videotaping, posing, modeling, performing before a live audience, where such acts involve exhibition of a child's genitals or any sexual act with a child; or

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Edward B. McConnell
President

November 15, 1988

Ms. Alice Liu
Acquisition Department
U.S. Department of Justice
National Institute of Justice
Box 6000
Rockville, MD 20850

Dear Ms. Liu:

Enclosed is the publication you requested. This publication is a supplement to the main report, entitled Central Registries for Child Abuse and Neglect: A National Review of Records Management, Due Process Safeguards, and Data Utilization, which is enclosed as well.

Sincerely,

Victor E. Flango

Victor E. Flango
Project Director

/jr

Enclosures

NEW TITLES INQUIRY

NCJ # 114329 DATE 12/6/88

DUE DATE 12/9/88

TITLE Confidentiality, Due Process, and the Business of Central Registries: Victims

SUBJECT AREA

SPECIALIST Janet Sosa

Pub: Nat'l Center for State Courts

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(iv) fails to meet the following needs of the child though financially able to do so or offer financial or other reasonable means to do so:

- such food, clothing or shelter necessary for the child's health or safety

- education as defined by state law

- adequate health care (adequate health care includes any medical or non-medical remedial health care permitted or authorized under state law); or

(v) abandons the child as defined by state law; or

(vi) fails to provide the child with adequate care or supervision necessary for the child's health and safety; or leaves the child unattended over a period of time causing a risk of harm to the child's health or safety.

D) "Allows to be inflicted" or "allows to be committed" means the parent or the person responsible for the child's welfare knows or has reasonable cause to suspect the child has been harmed and did nothing to prevent or stop it.

E) "Sexual Act" means:

(i) any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is emission of semen; or

(ii) any sexual contact between genitals or anal opening of one person with the mouth or tongue of another person;

(iii)any intrusion by one person in the genitals or anal opening of another person, including the use of any object for this purpose, EXCEPT that, it shall not include acts intended for a valid

medical purpose; or (iv) the intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, buttocks) or the clothing covering them, by the child or the perpetrator, EXCEPT that it shall not include acts which may reasonably be construed to be normal caretaker responsibilities, interactions with, or affection for a child or acts intended for a valid medical purpose or

(v) the masturbation of the perpetrator's genitals in the presence of a child; or (vi) the intentional exposure of the perpetrator's genitals in the presence of a child, such exposure is for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose; or (vii)any other sexual act potentially perpetrated in the presence of a child, for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose.

(F) "threatened harm" means a substantial risk of immediate harm

(G) "a person responsible for a child's welfare" includes the child's parents; guardian; foster parents; step-parents; step-parent with whom the child lives; an employee of a public or private residential home, institution or agency; or other person legally responsible for the child's welfare in a residential setting.

(H) "physical injury" means death, permanent or temporary disfigurement or impairment of any bodily organ or function.

(I) "mental injury" means an injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment in his ability to function within his normal range of performance and behavior, with due regard to his culture.

(J) "institutional child abuse and neglect" means situations of known or suspected child abuse or neglect with a person responsible for a child's welfare as a foster parent, employee or volunteer of a public or private residential care facility, institution, or agency providing around-the-clock care for children.

In addition, definitions of probable cause, reasonable corporal punishment, and similar concepts are provided. Extensive commentary is provided in Child Protection: A Guide for State Legislation to explain why the various definitions were chosen.

In 1987, definitions of child maltreatment were discussed by a review panel concerned with possible over-reporting of child abuse and neglect in the United States. Co-sponsored by the American Public Welfare Association, The National Legal Resource Center for Child Advocacy and Protection of the American Bar Association, and the American Enterprise Institute, the conferees' final position paper states that:

> "Most existing definitions . . . are broad and imprecise. Potential reporters and child protective workers need clearer and more specific guidelines to help their decision-making.
>
> While statutory reform would be helpful, existing laws can be clarified through a combination of more specific administrative rules and better training materials (consistent with judicial precedents)." (Child Abuse and Neglect . . . Consensus Document).

Recognizing that better application of current definitions is more fruitful than again changing definitions which have been developed and

changed repeatedly, is an important point which is often missed in current debates about child abuse records. Assessment of trends, consensus about what level of harm requires intervention, and consistency of application can actually be undermined by a pre-occupation with "naming" child abuse. The parallels to the concept of "negligence" are several. First there is the essential importance of actual facts for application of the concept to occur. Negligence and child abuse are terms whose true impact is felt in many instances only when the terms represent a conclusion of law. As another parallel, even without a firm result, the label applied can allow "situations" to be counted. The number of negligence cases being filed can be counted reasonably well, even though the determination of actual resultant legal negligence and liability must await negotiations or court actions. Indeed, more than one commentator has argued that once a certain level of precision is reached, further attempts to refine the definition of child maltreatment become essentially non-productive.

Howard Davidson, Director of the ABA's National Legal Resource Center for Child Advocacy and Protection, reviewed reporting laws in 1987 and specifically examined questions of inprecision and definition;

> *"This brings me to the issue of the "catch-all" part of the definition in most reporting laws which generally requires reporting when there is suspected; "failure to provide proper parental care (or control)", "failure to provide adequate food, clothing, shelter, subsistance, supervision . . . ", "negligent treatment", "harm to the child's health and welfare", etc.*
>
> *In the 1970's there were several state and federal court*

challenges to such definitions, in that they were alleged to be unconstitutionally vague and over-broad (i.e., that they did not put the parents "on notice" for those behaviors which would lead to them having their kids taken away). Most of these challenges were rejected. Of those laws found to be unconstitutional, none were reporting laws, but rather dealt with some aspect of court intervention such as the grounds for involuntary termination of parental rights. Justification for upholding the "catch-all" laws has been that proper parenting is not amenable to concise definitions, and that laws cannot pinpoint and specifically define every instance of child abuse and neglect. As Sanford Katz pointed out in a 1977 law journal article, the broader definitions permit a greater utilization of a "case-by-case approach to a subjective phenomenon imprecise by nature." To put it another way, child maltreatment laws are generally written as explicitly as possible to accomplish the purpose intended: child protection." (Davidson) 1987.

Some of the current judicial decisions reveal that reasonable consensus is still developing as child abuse and neglect is given the attention the subject merits. Whatever the words used for the conclusion that child abuse has occured, however, the facts are essential. In one case, a beating with a belt was expunged from the central registry by a serving officer and the expungement upheld on hearing appeal (Appeal of E.S.). In another decision, a beating with a cord was expunged by the hearing officer, but the expungement decision

was overturned (D.P. v. Com). In the first case, the beating in the lower back produced a slightly raised welt with no bruising or bleeding. After the beating with a cord in the second case, the child had a 2" laceration of the back, a 1 1/2" laceration on one side, 3 open wounds on one leg, and scrapes and scars on the face from new and old beatings for bad grades (D.P.v Com). The actual facts produce a picture while "suspected child abuse" leaves an unformed and unspecified vision.

Even with closely related facts, community standards and changing values may produce different legal conclusions: in one case leaving a 6-year-old to care for a 1-year-old was an "indicated case" (Stoops v. Perales), and another case was not neglect when a 1-year-old and 2-year-old were left for at least 1/2 hour (Augustine v. Berger). A possibly distinguishing fact is that the mother in the first case was known to frequently forget her address. Just as the question of when leaving a child constitutes unacceptable "endangerment", the courts have recognized that behavior which does not produce specific injury in a specific instance may nevertheless justify a finding of neglect. In contrast, in a case where a court order to transfuse a child was never necessary because the hematocrit level never reached a critical point, there was no evidence of "imminent danger" to the child. Therefore, the Central Registry report was expunged. As these decisions show, an important current protection in the use of central registries can be the right to challenge the application of a particular definition of child abuse and neglect to the facts of the case. Over time, more and more consistency in child abuse and neglect intervention and records can be expected to develop from this and other mechanisms of review.

The Level of Confidence or Proof Required of Central Registry Data

An instrument, and marker, for balancing interests in the legal process is the burden of proof required for a given decision to be made. When any governmental entity in the United States attempts to convict and jail an individual, proof beyond a reasonable doubt is generally required and is justified by citing the disparity between the power of the state and the individual. Also to be noted is the relative importance of the individual's constitutional right of liberty versus the general need of governments to maintain order. In most civil matters, on the other hand, when two private parties dispute, one side prevails over another when the evidence merely makes it more likely than not that it should. Not only the different types of proceedings, but the stage of proceedings affects the burden of proof or degree of confidence required. "Probable cause" is sufficient to cause a warrant to be issued or an arrest to be made, but it is not enough to convict. As Bourne and Newberger argued in 1977, the standard of proof required to identify a family that should be offered voluntary services should be a lesser standard than that required for court intervention.

When a related question arose on a direct appeal in New York, the standard for maintaining an entry in the Central Registry was held to be "some credible evidence". Standards of "fair preponderance of the evidence" and "preponderance of the credible evidence" were specifically rejected. The case at issue involved an altercation between a social worker and a sixteen-year-old in a group home. (Ebanks v. Perales). (1985). However, a higher standard of proof might be imposed for using the incident to suspend or fire the worker. The following sections look at the relationship between the point at which an incident is being used

for a decision and the due process issues associated with the particular interests at stake.

Reporting

The philosophy of child abuse and neglect reporting in the United States has consistently been premised on the notion that "mere suspicion" must be the standard if an essentially hidden phenomenon is to be uncovered. Deprivation, sexual abuse and even physical abuse are not always immediately visible in their cause or effect. An "early warning" may precede subsequent, irreversible harm. The view which justifies an initially broad net in responding to dangerous situations to children is similar to the public health approach to disease which views "false positives" as less concerning than "false negatives" as long as identification is a relatively benign procedure. Some believe that an investigation of a report is inevitably more like a criminal investigation than a public health proceeding and, therefore, inevitably traumatic. Others counter that emotional trauma can and should be reduced by better training, funding and accountability, while non-investigation can mean not only emotional trauma but severe physical injury or even death. It is pointed out that relatively few of the nearly two million child abuse and neglect reports made in the United States are ever criminally investigated. Moreover, the argument is that adults can respond to system-trauma and buffer children, but without intervention, nothing buffers the child maltreated by caretakers.

The working definition of <u>suspicion</u> today is "usually described as 'reasonable cause to suspect', that the child has been abused or neglected" or "reasonable cause to believe." (Child Abuse and Neglect . . . Consensus Document). While a suspicion may lead to a report, when

should the report be entered in the Central Registry? Should every report become part of the Central Registry, even before it is confirmed? Arrest records, for example, remain part of police files even though many or most individuals arrested are not convicted. The way in which the registry is used and the expungement procedures governing removal of any appropriate cases can obviate the issue of when data should go to a Central Registry and, therefore, this discussion is covered more fully under the sections which follow on expungement and data management.

Substantiating or Founding a Report for the Offices of a Central Registry

Without understanding the use to which an entry in a Central Registry would be made, it is not possible to completely analyze how much certainty should be required to sustain, substantiate, or found a report. When the Registry represents primarily a compilation of active CPS files, meaning that there is some evidence to believe a child has been abused or endangered, and the agency is working with the case, courts have required a rather minimal standard of proof.

In Ebanks vs. Perales, noted previously, a New York appellate court ruled "some credible evidence" is the standard for upholding maintenance of a record in the Central Registry. Similarly, in the case of Maroney vs. Perales the appellate court ruled that where a minor suffered cuts and bruises there was "some credible evidence" of abuse. The Maroney v. Perales court rejected the parental argument that this was reasonable corporal punishment on the facts. Interestingly, the court went on to hold that there was "substantial evidence" presented and, therefore, more than the credible evidence required. Pennsylvania

courts have indicated that due process requires only that CPS establish "that the report is accurate", and the court will review only to determine if "constitutional rights were violated, an error of law was committed, or evidence capriciously disregarded". While not disagreeing with these requirements, a later Pennsylvania decision also found that "substantial evidence" existed to uphold the determination of the agency and the hearing officer.

A striking contrast to this approach has been offered by the Social Program Evaluation Group of Ontario, Canada which has termed registers "highly controversial" (Bala). The Ontario group has proposed creation of two separate registers, one for research, and one a register of child abusers. Placement of the names of abusers would occur only after confirmation of abuse based on:

1. "a conviction for a criminal offense involving child abuse; or
2. a written admission by the abuser; or
3. a finding by a judge of the Provincial Court (Family Division) that, on the balance of probabilities (civil standard) the individual has abused a child; or
4. a finding by any court or tribunal of competent jurisdiction that, at least on a civil standard of proof, the individual has abused a child." (Bala, at page 138)

Such a standard would be much greater than currently imposed on arrest records in the U.S. by Constitutional law, even though some states legislatively limit access for such purposes as employee screening. (Victims of Crime Proposed Model Legislation) The "research register" would have no identifying information and hence no safeguards. How

follow-up research, longitudinal studies, and field experiments might be done with non-identifying data is left unstated. Also left unstated is the degree of confidence required before an agency can maintain an open case file, or whether an agency can share evidence with another that a child was injured or jeopardized in a certain way. The proposed Ontario reform highlights the importance of deciding "for what" a register will be used before deciding the burden of proof or credibility required for substantiating a report or maintaining a record.

The Process for Reaching a Decision to Substantiate

The purpose of child abuse and neglect reporting laws is to cause an evaluation of a child's position to be undertaken. If the police become involved, then an investigation for possible crime also takes place. Sometimes, a medical, social work, or mental health evaluation produces evidence of a crime, but these latter professionals are trained and licensed in diagnosing and treating individuals, not as police or prosecutors.

Early emphasis on the investigation of child abuse and neglect reports was placed on investigating <u>every</u> case. Given that historically it has proven difficult to assure that adults will intervene on behalf of children, this emphasis is understandable. More recently, the need to triage cases on a more objective basis has become clear as increasing numbers of reports have been met with inadequate resources or even decreases in funding. Thus some cases are ruled out at the moment of the report as inappropriate for child protection, but perhaps appropriate for another service such as housing, income maintenance, the police or another agency. Some cases must receive priority response by child protection services just on the basis of the information stated.

Another group of referrals needs investigation, but, based on available data, may be briefly deferred for cases with higher priorities.

The initial decision to investigate or not, assuming state law allows discretion in deciding which cases to investigate, is usually based on a telephone, or occasionally, a written report. There appear to be no data for determining how many cases are investigated on scene, but it would be difficult to imagine an effective investigation where the child is not seen. Once a report is substantiated, notification to a person named as responsible for the child's hazard may be sent first, or there may be automatic review of the facts supporting substantiation by a supervisor. Some states provide for automatic expungement if the report is not immediately substantiated. Connecticut, for example, automatically expunges unsubstantiated reports within two weeks.

Required to act within the guidelines provided by a state supreme court in Petition of Bagley, New Hampshire's process for reaching a decision to substantiate a case includes all of the following steps:

1. The report is "screened" to determine if an initial evaluation will take place;
2. An initial evaluation either founds or unfounds a report;
3. An adult named as the responsible party for a "founded" report is notified;
4. If a request for removal is received, a district supervisor for protective services reviews the case and can:
   A. remove the report
   B. order a further evaluation;
5. If the district supervisor upholds the report over an

objection, then a pre-hearing conference is held under supervision of an area administrator;

6. If a person named as responsible in the report still wishes to appeal, then both a fair hearing and appeal in the court system is an available alternative.

Appeals on behalf of a child named as a victim generally depend on a department's willingness to pursue the issue. The standard for keeping a file open in New Hampshire is "probable cause." The Petition of Bagley decision affected this process by setting forth the following analysis: an entry in a Central Registry is a "adjudication" of a status and, therefore, affects a "liberty interest" of adults included within the Registry. Therefore, a written notice of a founded report must be sent to a named adult setting forth: (a) the nature of the report and reasons for the report being upheld; (b) the right to have access to the details of the report; (c) the right to challenge the report in administrative and other hearings.

As seen in the following discussion of expungement, states vary widely in their view of "how much process is due", and New Hampshire represents one of the most demanding and costly approaches.

The Process of Expungement

Closely related to substantiation, as seen in the Petition of Bagley is the process of expungement. The issues which can be raised with respect to expungement include: automatic expungement, notification to a named "responsible" person, the general process for seeking or obtaining expungement, rules of evidence and procedures for expungement, and appeals outside of social services.

Automatic Review and Expungement

Automatic expungement of unsubstantiated reports is not required by case law, although some states are taking this approach. Colorado does not let unsubstantiated reports enter the Central Registry. (Colorado Revised Statutes Section 19-10-114(2)(a) as amended to 1986). Connecticut removes unsubstantiated reports within two weeks of entry. Either approach creates essentially the same result. The arguments in favor of this approach include that: automatic expungement reduces inefficiency while allowing greater focus on substantiated cases, there is less risk of harm to innocent persons, there is less need for expungement appeals. Arguments against this approach include the following: studies have shown that a certain percentage of "unsubstantiated" cases actually reflect an inability to find the family, are cases in which protective services were offered and accepted even though no "substantiation" occurred, or are cases originally "unsubstantiated" which reappear and are substantiated later. There is an absence of documentation of the true cost of "false positive" findings of child abuse and neglect, and large scale research on this issue will be more difficult if Central Registries are blocked in keeping such data. The "innocent" child faces a greater variety of more serious risks than the "innocent" adult if the wrong decision is made in the case. Finally, investigative reports on large numbers are maintained in police files, and are used to track down difficult cases even when most reports do not lead to prosecution or conviction. Examples would be the need for such investigative files in the tracking of serial murderers, complex conspiracies, and other difficult to investigate matters. Child protective investigative reports are no more

threatening and should be less threatening to most individuals, since few individuals are criminally prosecuted for child abuse. The same need to be able to resurrect old files and correlate reports from different jurisdictions exists in both agencies, however.

Notification

Two widely differing approaches to notification are represented by decisions in New Hampshire and Minnesota. (Petition of Bagley; Bohn v. County of Dakota). The New Hampshire Supreme Court in Petition of Bagley, and the Eighth Circuit Court of Appeals in Bohn v. County of Dakota agreed that there are protectable interests of family privacy and parental reputation in the maintenance of child protective services reports. Both courts stated a concern that the parents might be exposed to "public opprobrium". The New Hampshire court was concerned about accidental release of records, but more specifically was concerned that "the information in the Central Registry apparently will prevent Mrs. Bagley from obtaining a day care license". (Petition of Bagley at 338) The New Hampshire Supreme Court noted that there had been telephone notification, and that an administrative review panel had sustained the finding of "neglect" . . . or hazardous living". (Petition of Bagley at 339). The court found confusion in the decision as to whether or not Mr. Bagley's drinking, an incident involving discharge of firearms inside the house by Mr. Bagley, or an arsenal of loaded weapons maintained by Mr. Bagley was the reason for founding the report and then denying Mrs. Bagley the day care license.

Remanding the case for a new hearing, the New Hampshire Supreme Court also imposed the following notice provisions prospectively:

"In the future, when the division determines that a report

> *of child abuse or neglect is 'founded, problem resolved,' the division must provide written notice to the person determined to be the perpetrator of the incident of abuse or neglect. The notice must set forth the nature of the report and the reasons underlying the division's determination. In addition, the notice should identify the perpetrator as such. Finally, the notice should inform the perpetrator of his right of access to the information stored by the division, as well as his right to challenge the determination in an administrative hearing. If a determination is upheld after a hearing, the division must provide the perpetrator with a written statement of the reasons for the decision to be upheld."* Petition of Bagley at 340.

The New Hampshire Supreme Court, while citing Bohn v. County of Dakota, based its ruling on the constitution of the State of New Hampshire.

The Eighth U.S. Circuit of Appeals made its analysis based on an earlier United States Supreme Court decision, Mathews v. Eldridge, cited above and briefly described at the beginning discussion and overview on "due process." There was no issue in Bohn v. County of Dakota, hereinafter Bohn, of denying the parents a day care license. Actual notice of the complaint was provided by the continued involvement of a social worker who was offering to work with the parents voluntarily. As in the petition of Bagley, however, the parents essentially disputed that any abuse had occurred based on the incident in question. An additional concern in this case was the failure of the Dakota County Department of Social Services to explicitly tell the parents that the proper way to obtain a review was through the State Administrative

Procedures Act. Much of the court's focus was on the failure of the parents' attorney to use available law properly. There is a suggestion that the result might have been different if the parents had represented themselves, and the same "alleged oral misdirection" by various state or county officials had actually been proven. The Eighth Circuit Court of Appeals then concluded:

> *"Our thorough review of these statutes and regulations persuades us that the procedures for fact-finding and review satisfy the three-pronged test in Mathews. The first factor, the private interest affected by the official action, suggests that the procedures are adequate. Although, as we have observed, Mr. and Mrs. Bohn's interest in their family's solidarity and reputation as they relate to the family's vitality is a protectible interest, it is counterbalanced by the children's interest in continued freedom from abuse or neglect.*
>
> * * *
>
> *Essentially, the state makes a finding (which is treated confidentially), offers supportive social services, and monitors the progress of the family. Under this statute taken alone, the finding is not published, the child is not ordinarily taken from the parents, and the parents are not ordinarily prosecuted. Thus, the statute is designed as a preventative measure to minimize the damage which vulnerable children might suffer from familial conflict. Because the statute effectively mediates between the private interests, we cannot say it is constitutionally defective on the first Mathews factor.*
>
> *The second Mathews factor for evaluating the constitutional*

adequacy of these procedures is the risk of error and the potential value of additional procedural protections. Although Minn. Stat. Ann. Section 626-556 does not incorporate an adversary hearing with cross-examination and representation by counsel, we do not believe such procedures are constitutional prerequisites under the circumstances.

* * *

The ex post procedures for review are fully adequate to test the veracity of the County Department's finding in that these procedures substantially incorporate truth-testing measures long approved by our legal system. We note that ex post procedures have previously been approved by the courts in cases which bear comparison with the case at bar. Thus, the Second Circuit recently declared, "Where a pre-deprivation hearing is meaningful, the State satisfies its constitutional obligation by providing the latter." In cases which require fast action to protect the interests of children, e.g., Duchesne v. Sugarman 566 F.2d 817, 826 (2d Cir. 1977), or where an ex ante intervention by the state was based on a generally reliable ex ante finding, such procedures have been upheld. Moreover, reasoning by negative example, ex post procedures are generally disapproved where the state's only post-termination process lies in an independent tort action. In this case, the statute's tort remedy is amply supplemented by the full procedural protections embodied in the state A.P.A. and supporting rules. In addition, we believe that the interjection of fuller procedural protections at an earlier state in the process would be unduly time-consuming and

cumbersome, and might well reduce important protections which the state legislature designed for otherwise vulnerable children. Third, we consider the government's interests, including the burdens imposed by additional procedural protections. The government has a strong interest in protecting powerless children who have not attained their age of majority but may be subject to abuse or neglect. To the extent that pre-investigation procedural protections might delay or frustrate the protection of these children, we believe the government's interest might be impaired. In addition, although the pecuniary cost of such additional protection might not be great, to the extent that it would be duplicative of ex post procedures we have discussed at length, whatever cost would be entailed would be wasteful.

The failure to use proper legal remedies also frustrated parents who sought a writ of mandamus when a declaratory judgement instead was required. (Missouri v. Gladfelter).

While Petition of Bagley and Bohn v. County of Dakota place respectively less or more emphasis on the rights of children relative to Central Registries, other courts have examined more limited aspects of Central Registry or child abuse report management. A New York decision held that the passage of a 90-day period before a decision to "indicate" a report was not enough to require expungement (Rasberry v. Perales). A Pennsylvania decision, Cruz v. Commonwealth of Pennsylvania, Department of Public Welfare, (hereinafter Cruz) addresses several details concerning evidentiary practice in expungement hearings. The Cruz court rejected the argument that the hearing officer, who refused to expunge the report, should not have conducted an in camera questioning of the

abused child and her brother. The Cruz court also ruled that neither a medical nor psychological evaluation were required on the facts presented. Finally, it was ruled that there is no statute of limitations on child abuse reports.

In reviewing the various issues thus far associated with expungement hearings, the following can be listed:

(1) What constitutes actual and adequate notice;

(2) The type of appeal hearings offered: administration entirely within the agency versus a fair hearing similar to that required by an Administrative Procedures Act;

(3) The availability of court review;

(4) The evidentiary and procedural rules at each stage of an expungement appeal;

(5) The overall fairness of the process when viewed by looking at these factors together. (Ebanks v. Perales, Maroney v. Perales, Stoops v. Perales). A number of New York cases which ended in expungement being denied, were emphasized by a decision in which petitioners were denied expungement, and also had court costs awarded against them.(Hoover v. Waters) From visits to various Central Registries in the United States, it is evident that many cases are automatically expunged, while others are expunged at one or more levels of review. Not all records should be expunged no matter how vigorously they are appealed, and the possibility of unwarranted appeals should also have a remedy as seen by the action of a New York court of Appeals. (Hoover v. Waters). Remedies for misuse of Central Registry data as contrasted to misuse of the appeals process are discussed below.

DATA USAGE

Central Registry data are not necessarily utilized to its full potential. Central Registries are still new enough that theory and practice are quite separate in many locations. To the extent that certain uses have been theorized, these are discussed whether or not uses have occurred that have led to reported legal decisions. These possible uses include:

1. To permit cross-checking of records and to adjust the clinical index of suspicion, or to otherwise aid in the evaluation or diagnosis of cases on a clinical basis;
2. To permit more efficient management of a state's social services system by providing data for managers and legislators on case loads and comparable information;
3. To permit fundamental and evaluation research on the causes, consequences and effective interventions for child abuse and neglect;
4. To prevent a wrongly accused person from being charged or sued, or to provide background information which will provide mitigating factors in a sentencing;
5. To refuse an adoption;
6. To refuse to license an individual for day care, foster care, or similar child care employment;
7. To aid criminal investigations.

Modern Data Systems Management of Child Protective Services

Maintaining client records by means of central filing systems, increasingly computer-based, is the norm for private and public

businesses today. More efficiency and accuracy in billing, personnel management, budgeting and planning, are among the reasons for these changes. Each advance in computerized client files has brought with it discussions, and sometimes reforms, to balance the need for confidentiality with cost-effective service. See, for example, the newsletter ("RX Confidentiality" published by The National Commission on Confidentiality of Health Records). The tension between the need to keep governmental agencies open to public scrutiny and accountable, while at the same time shielding individuals from inappropriate "public opprobrium" is seen respectively in the federal Freedom of Information Act (1970) and the federal Privacy Act (1974). The former opens governmental records for certain purposes, while the latter limits and sanctions release of certain confidential data about individuals.

One state appellate decision has appeared on the conflict between public accountability and individual privacy in child abuse cases (Gillies and The Denver Post v. Schmidt, (Hereinafter Gillies). In Gillies, a newspaper reporter was concerned with failures by various public and private agencies in their duties to protect children, and sought access to meetings of the local child protection team. After an appellate court ruled against the reporter, and his newspaper, state legislation attempting to balance these interests of the public availability and privacy was enacted (Colo. Rev. Statutes. Section 19-3-308 (6)d-(i) as enacted in 1977). When a state is responsible for oversight of a child protective services system, there is little reason to doubt that a Central Registry of active files can be maintained to assure efficient business operation of the laws of the United States. The real questions are, who within and outside the agency may use these

records, and for what purposes? For example, few would question that an improperly obtained or released record might (Kleman v. Charles City P. D. et al) and perhaps someday will lead to successful law suits.

However, in one case in which an agency was sued for outrageous conduct in the release of an individual's name during the investigation of reported suspected child abuse, the trial court eventually ruled that the complaining individual was himself responsible for the only release of data. The court then awarded court and attorney's fees against the plaintiff.

Closely related to the need for modern management of child protective services through effective data systems, are the issues associated with research in child protection. There are a variety of methods for child protective research, including surveys, case studies and reports, experiments, and evaluations, but the largest and most costly interventions practiced in the United States are the state child protective services agencies themselves. The large number of children seen by such agencies also increases the prospects for meaningful outcome data if careful research is done. One of the most needed types of research is longitudinal. Not being able to identify children and families over the long term would essentially defeat the possibility of conducting prospective or retrospective-prospective research. Large scale evaluations are made more difficult to the extent that selected study populations cannot be identified for clarification of results or interventions. Other constraints operate to insure the safety and propriety of using data for research, such as the federal legislation establishing human subject guidelines, apply to the use of Central Registries. Given the opportunity of progress offered, and the need,

the use of Central Registries for research and evaluation should not be denied where misuse can not be shown. An analogous situation may be that of public health records. Notwithstanding current concern about sexually transmitted disease records, especially those concerning HIV infection, the most important U.S. case in which victims of an infectious disease were harmed by the way records were used did not involve disclosure. Instead, there was a failure to disclose public health records. During the infamous Tuskogee experiment, victims of syphilis were left untreated for many years so that a "natural history" of the disease could be studied. In effect, confidentiality was tight enough that the victimization of individuals served could not be detected.

Clinical Diagnosis

The reported consensus of opinion is that case files, especially in the form of Central Registries, have rarely proven useful in deciding to confirm or disconfirm a case of child abuse or neglect. Anecdotal accounts in the experience of the author and others at the Kempe National Center, however, suggest that at least in exceptional cases cross checking produces results which would not have occurred without a means to look for similar or related incidents. As this article was being written, a case of an infant brain damaged in a day care center was referred for consultation. The nature of the injury made if medically improbable, but possible, that an accident had occurred. A variety of problems including contradictory statements by adult witnesses, made local authorities unsure as to how to proceed. During the investigation it was revealed that another child had died in the same day care center, and the injuries appeared to be strikingly

similar. The index of suspicion was properly raised, and the investigation of both the new and the old cases was pursued more vigorously. A second, somewhat similar case, was staffed for another state during the re-drafting of this report. In public health and law enforcement, the painstaking review of minutiae is known to be necessary for the exceptional factual situations occasionally encountered.

Before discarding the possible importance of central registry files for clinical evaluation, therefore, it must be recognized that the concept of risk assessment in child protective services is just now undergoing extensive development. It is almost as if the concept was just now being discovered. At a risk assessment conference organized by American Association for Protecting Children November 30 and December 1, 1987, in Denver, Colorado, many new approaches to risk assessment were offered in the papers presented. The earliest date cited in a "Survey of Literature on Risk Factors" distributed at the conference was for 1966 but 19 of 29 papers were from the 1980's. There is further reason to believe that understanding of risk assessment is increasing. For example, data presented by Christopher Baird of the National Council on Crime and Delinquency supported his contention that risk assessment in protective services will prove more reliable than any results from 20 years of research in corrections, and indeed his opinion was that results compare to those from actuarial tables used by insurance companies. To the extent that shared child protective files allow a state agency to effectively assess the risk for children, even if they are moved within a state or state to state, it seems unlikely that the child protective uses of Central Registries will be overturned by courts.

Prevention or Amelioration of Harm to Adult Litigants and Child Defendants

It is not always obvious or discussed, but Central Registry records can be sought to exonerate adults from wrongdoing and to help argue in mitigation of a crime at the sentencing of a young victim-offender. In K. v. K. a New York divorce custody matter, both parents sought expunged child abuse investigation files of the New York Society for the Prevention of Cruelty to Children. Father was twice alleged to have abused a child, but twice the case was deemed unfounded. The court ruled that the statutory investigative scheme intended no stigma from the mere fact of the investigation, and therefore no access to the interview records or the interview of the social worker would be granted. Depending upon the perspective of the particular adult inappropriately accused, this was either a good or bad decision.

An argument can be made that the best protection for baseless allegations is a record of the thorough investigation establishing an individual's non-culpability. In Matter of Damon A.R., a minor's attorney was granted access to a New York Society for the Prevention of Cruelty to Children report concerning the investigation of suspected child neglect, to aid in preparation of the minor's defense. The court ruled that the minor has an unqualified right of access to the reports of his own abuse or neglect.

Screening for Adoption

While no cases litigating the use of Central Registry files for screening potential adoptive parents were found, such screening is practiced in some states and seems to raise a different issue from that of screening other licensees for child care. The property right to be

paid for child care should not be seen as the same right as that of a potentially adoptive parent to possess a child. To fail to make this distinction would codify a property right in children. Before any potentially adoptive adult becomes the adoptive parent of an already existing or planned child, all the law and equity should favor the person of the child. Only if procedures can be shown to be inimical to the child's interests, should the courts question procedures designed to assure that a child's prospective adoption will be safe. The death of an adoptive child in White Bear Lake, Minnesota as documented by the Los Angeles Times (Sunday, February 28, 1988 pg. 1 and Monday, February 29, 1988 pg. 1) epitomizes the possible risk to adoptive children, who nevertheless have a major stake in having a permanent placement, if it can be a safe and nurturing placement.

Screening for Licensing to Provide Child Care Services

This complicated area has received special attention with the exposure of dangerous child care settings (Hollingsworth, 1986; Hechler, 1988) and the controversy around how best to deal with such situations. With 8.7 million children of working mothers, by 1980, many needing day care, the problem of assessing adequate care is great (Preventing Sexual Abuse in Day Care Centers, 1985).

One approach that has been suggested and implemented in some locations, is to screen for prior abuse, neglect, to related incidents in the record of the licensing applicant. A 1985 report states, however, that:

> "Licensing employment screens typically reveal 5%-8% of the applicants have any criminal record whatsoever. For many

> reasons, it is quite likely that only a miniscule number of sex abusers with criminal records would be detected by screening all day care employees." (Emphasis in the original: Preventing Sexual Abuse in Day Care Centers, 1985;)

At page 2, the same study states that only fingerprinting, at an estimated $25 per applicant cost, would help assure the accuracy of such checks. The FBI reports that only 8% of all fingerprints submitted (for everything from cab drivers to bankers) will be returned with any criminal history at all. (Preventing Sexual Abuse in Day Care Centers, at page 17) A state average of 5% suggested by the same authors to be a reasonable yield of state screens (Preventing Sexual Abuse in Day Care Centers, at page 17). These figures are larger than those found by most Central Registries as determined in visits by the National Center for State Courts.

The legal issues of "employer's access to sex offense, criminal history record information" were explored in a publication of the United States Department of Justice done cooperatively with the National Asssociation of Attorneys General and the American Bar Association Criminal Justice Section. Their conclusion is that "(T)he Supreme Court has recognized no constitutional right to privacy in arrest records." (Victims of Crime: Proposed Model Legislation, pg. X-47). One question to be analyzed is the degree to which suspected child abuse and neglect records are analogous to criminal arrest records.

As discussed previously, most states take a "reasonable cause to suspect" or "reasonable cause to believe" standard for substantiation of a suspected case and entry into or maintenance in a Central Registry.

Some states accept "some credible evidence" as enough to uphold an entry. These standards are less than the stated requirement of the criminal justice system in the United States which is "probable cause". The very use of the words "probable cause" suggests awareness of a need for care, and there is vast legal literature on the subject which makes the use of this phrase very technical. In avoiding such requirements, a state will legitimately argue that its Central Registry is used much as other non-criminal records are used, such as public health and non-abuse social welfare records, for provision of a generally accepted service.

The distinction between criminal record screening and Central Registry screening is also made by Howard Davidson.

> *"Any proposal to use the Civil Child Abuse Registry for employment screening is likely to be met with strong opposition from civil liberties groups concerned about the fact that a registry entry can be made on a suspected 'perpetrator' of childmaltreatment by government social services personnel merely on the basis of a cursory investigation by an untrained caseworker or an anonymous report. The stigma associated with being entered in the registry, it is argued, is not justified because of the lack of due process of law. These registries were set up to track abused children, not adults who might be applying for jobs."*

Left open, of course, is what due process guarantees would be satisfactory for using registries for a different purpose than originally intended.

The Ontario, Canada, panel reviewing its Central Registry concluded that there was a value in screening for job applicants in a Central Registry. Somewhat ironically, however, the panel concluded

that the only way to do so was to set up two registries: one in which the focus would be on identified perpetrators and the other which would be for anonymous evaluation and research. Since the province apparently has no equivalent in scope and responsibility to a state child protective services, this solution may be appealing in Canada. It would leave American states with no modern central management of identifiable protective services records. The American states which continue to use the Central Registry for screening to deny licenses, a property right, will have to step up all due process requirements sooner or later beyond what is required for the usual clinical file system. To deny a person a license inevitably will require attention to issues of notice, appeals processes, the burden of proof required, and similar due process concerns. Some agencies may wish to clearly separate the latter system from the Central Registry, or invoke more stringent due process where licensing decision is to be made based on a positive screening. The most certain basis for challenging use of a Central Registry entry would be the creation of an "irrebuttable presumption" (Stanley v. Illinois) that entry in a child abuse registry is sufficient to deny a license. There must be an opportunity to demonstrate fitness or provide other evidence to overcome a presumption that will lead to taking of a right or entitlement. To deny a license, a state agency would have to review the facts on the record, consider the evidence offered in rebuttal to such facts and then weigh all the issues and evidence in order to meet current law on property rights and licensing.

Criminal Investigation Using Central Registries

The issue of access to Central Registries for the purpose of criminal investigations and prosecutions has not appeared as an issue

for discussion on law journals and has arisen only occasionally in case decisions. In Iowa v. Jackson, however, the issue was raised on appeal by an individual criminally prosecuted for abuse. Iowa statutes provided (1) that a copy of a report of suspected child abuse should be sent to the local county attorney and (2) that the Central Registry is confidential except for limited access, not including access by criminal authorities. The appellant's argument was that providing the earlier copy of the report to the county attorney was inconsistent with the statutes provisions on confidentiality. The court agreed that the county attorney could not subsequently have access to the registry, but the court also ruled that the subsequent confidentiality does not encapsulate the county attorney from receiving the earlier report.

A number of states allow courts to determine whether Central Registry data must be provided in a specific matter. This approach was upheld specifically in Illinois, when a defendant sought access to the registry. In Illinois v. Erp the court approved a statute which provides for in camera inspection to determine whether information is relevant, and public disclosure necessary for resolution of an issue before the court. (See also Pennsylvania v. Ritchie).

Management of Protective Services

The idea that a protective services agency should have the ability to maintain identified files is apparently so little in question that only the Sims court has even considered the issue, finally remarking that the Texas Central Registry was not being properly utilized. (Sims v. State Department of Public Welfare, etc, 1192). Besharov's succinct observation is that bureaucratic agencies "must have an index of cases if they are to function coherently". (Besharov 692). By implication,

anyone who moves to deprive a protective services agency from maintaining an index of cases within its jurisdiction is also acting to destroy the coherency of protective services management.

The most recent and thorough evaluation of "confidentiality laws and state efforts to protect abused and neglected children" (Weisberg and Wald) concludes that too little confidential information is currently available to protective services agencies. They argue that:

> *"The only truly workable substantive standard that would strongly favor disclosure over confidentiality and would insure certainty is the simple one that a court may order a professional to disclose any information that may prove relevant to determining whether a parent has abused or neglected his child."*

The authors make clear that what is "relevant" is information concerning possible child abuse and neglect. The test of relevancy is the same as that used for defendants who seek data from confidential therapeutic files. (Pennsylvania v. Ritchie). It would seem that there is no adequate basis to deny protective services agencies a list of case records for purposes of routine management.

Research

Closely related to the use of records for management, is the issue of evaluation and basic research on child abuse and neglect. Much of the progress made in medicine, public health, mental health, income maintenance, probation, and comparable human agency services can be related to research using records with varying degrees of identification or anonymity. Indeed, the most notorious misuse of such records involved not a breach of confidentiality but the failure to disclose the

names of victims (of syphilis) which meant that the victims were not treated when cures became available. As a result of the keeping of the names of syphilis victims unavailable, so that treatment never took place, federal human subject research guidelines were enacted. These guidelines govern all human subject research activity by agencies which received federal funds. The federal controls are a powerful protection for individuals who are part of a study so long as the guidelines are followed.

The Tuskogee affair offers a different perspective from the usual expectation that accidental release of records will cause stigmatization. If anything, the problem with current Central Registries is that concerns about confidentiality make longitudinal research, which requires identification of individuals, extremely difficult. (Donald F. Kline, Ph.D. Personal Communication March 22, 1988. Also see Kline, 1987.) For example, many Central Registries automatically expunge the names of child abuse victims once a certain age, such as eighteen, is reached. Future use of this information to study criminal careers, difficulties in employment, marriage, or parenting, is made more expensive and difficult. To the extent that such expungement takes place, the use of data found in a Central Registry for most types of retrospective-prospective research questions becomes extremely difficult. The same expungement provisions also mean that criminal defendants will find it more difficult to prove earlier abuse and argue diminished capacity at subsequent trials or argue in mitigation at sentencing hearings.

Remedies for Misuse of Central Registry Data

It is possible to imagine several different types of individuals or parties who might be damaged by misuse of Central Registries. These include children not protected, parents or other family members whose personal or property interests might be affected, and the suspect or "responsible person" whether within or outside the family. Common law, state statutes, state constitutions, and federal law all offer alternative remedies for misuse of registry data.

Thus far, children, those whom the registry was designed to help protect, have not generally been able to litigate failures in the use of registries. The failure to adequately investigate or take a child out of biological home, however, has begun to be litigated. For example, possible liability was found in Estate of Bailey By Oare v. Co. of York, currently on appeal to the U.S. Supreme Court, where a social worker replaced a child in the biological home despite evidence of abuse and continuing risk. In a different case, the defense of immunity was accepted but the federal court held open the possibility of liability for failure to investigate and remove in the future if it were clearly established in law that children were injured after inadequate investigation. (Jensen v. Conrad). Until now, however, no case has been decided in which a failure to review agency files specifically resulted in liability being imposed.

Cases in which reports were received indicating a lack of safety of a foster placement, and nevertheless a child was placed or left in the foster home, have led to liability in both state and federal courts (Dole v. N.Y.C. Department of Social Services; Koepf v. York; Vonner v. Louisiana; Elton v. Co. of Orange).

With respect to children, but more generally with respect to others who may be affected by Central Registry data, Central Registries must guard against release of irrelevant information, release of information to unauthorized persons, and release of information without the approval of the subject or another legal authorization. Various cases, including Sims, Bagley, and Bohn show that adults whose parental or day care licensing interests have been affected, have been able to change the outcome of decisions or change the way in which Central Registries are administered if they fall short. As the dicta of Kleman v. Charles City, P.D. makes clear, unauthorized release of Central Registry data may be a statutory violation and lead to monetary damages. By 1984, 47 of 50 states provided specific criminal sanctions for release of Central Registry data, all of which also create a civil liability by a specific statute or through the doctrine of negligence per se. The three states which appear not to have a specific provision are Idaho, Kansas and North Carolina.

SUMMARY

Central registries are still changing, much as child protective services continue to change. As a link to the concepts of modern data management and as an a simple but probably indispensable listing of all children being served by an agency, the notion of central registries is still a very flexible one. Discussions of central registries are a stimulus for administrators and commentators on protection services to think about modern data management as a means to improve clinical services.

Just as reporting laws have impacted the field of protective services by their existence, revealing a larger social, medical and

legal problem than had been previously recognized, central registries encourage questions as to how well protective services are being managed. What is the cost of services per substantiated case in the registry? Are cases closed reappearing in the central registry because of later neglect or maltreatment? Only by answering questions like these, can protective services be improved.

From a legal perspective, "how much process is due" depends on the particular way in which a registry is being used. Registries used primarily for case management and non-identifying research, for example, require relatively few safeguards beyond what is normally required of confidential governmental records. On the other hand, screening for denial of rights to a property license to provide care for children carries with it a need for more rigorous procedures of notice, review, and appeal. Research which involves identified cases will fall in between these extremes of "due process" as that term has been employed here, and be controlled in part by the separate laws and regulations governing human research.

A poorly run system of case monitoring and follow-up cannot give protective services important management data, evaluation research, or the possibility of clinical checks in difficult cases. On the other hand, legal and policy mechanisms exist to assure the interests of all and to permit the operation of a thoroughly adequate and modern protective services data management system.

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