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COMMENTS

Charting a Course between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process

By the other way there are two crags, one reaching up to the broad heavens with its sharp peak. . . . Here Scylla dwells and utters hideous cries; her voice like that of a young dog, and she herself an evil monster. None can behold her and be glad, be it a god who meets her. Twelve feet she has, and all misshapen; six necks, exceeding long; on each a frightful head; in these three rows of teeth, stout and close-set, fraught with dark death. . . . Never could sailors boast of passing her in safety; for with each head she takes a man, snatching him from the dark-bowed ship.

The second crag is lower, you will see, Odysseus, and close beside the first On it a fig tree stands, tall and in leafy bloom, underneath which divine Charybdis sucks the water down. For thrice a day she sends it up, and thrice she sucks it down,—a fearful sight! May you not happen to be there when it goes down, for nobody could save you then from ill But swiftly turn your course toward Scylla's crag and speed the ship along; for surely it is better to miss six comrades from your ship than all together.¹

To those who are responsible for making and carrying out policies designed to protect children from harm inflicted by their own families, the plight of Homer's ancient sailors will appear familiar indeed.² When the issue is child abuse or neglect, there is a constant tension between the need to identify and rescue children who are in danger in their own homes, and the need to respect and protect family privacy and autonomy. Compelling interests are at stake on

1. HOMER, THE ODYSSEY 182-83 (George Herbert Palmer trans., Riverside Press 1921) (1884)).

2. In fact, the image of Scylla and Charybdis has been invoked by one federal court of appeals faced with weighing the privacy rights of parents against the state's interest in protecting children from harm. See *Hodge v. Jones*, 31 F.3d 157, 164 (4th Cir.), cert. denied, 115 S. Ct. 581 (1994); see also *infra* text accompanying note 314 (quoting the Fourth Circuit's classical allusion).

both sides, and too often it seems that one goal must be sacrificed to the other.³

The problem of child abuse in the United States is an old one,⁴ but the search for solutions in public policies and government programs is relatively new.⁵ Forty years ago, most states had no comprehensive child abuse laws or child protection programs. Today, every state has a complex statutory scheme establishing child protective services agencies and enabling them to receive reports of child abuse and neglect, to investigate homes and families, to petition courts to adjudge a child abused or neglected, and to take actions to protect children that can include the removal of children from their homes and the termination of parental rights.⁶

The growth in state response to child maltreatment has occurred concurrently with—and in many respects, as the result of—an enormous increase in public awareness of child abuse and neglect. By 1982, polling agencies had documented that Americans believed that child abuse was a major and growing social problem in the United States, warranting strong governmental action.⁷ This growth in public awareness of child abuse, and in the policies and programs designed to address it, coincided with the information and technology revolution of recent decades. Computer technology has permitted child protective services agencies to gather and maintain, in an easily accessible manner, large amounts of information on families that receive child protective services. Many states now maintain child maltreatment central registries⁸—databases of child abuse and neglect cases that typically identify the abuser, as well as the child who was harmed.⁹

3. See Douglas J. Besharov, "Doing Something" About Child Abuse, 8 HARV. J.L. & PUB. POL'Y 539, 554 (1985) [hereinafter Besharov, "Doing Something"] ("Government action is often the only way to protect children from death and serious injury. . . . But in seeking to protect helpless children, it is all too easy to ignore the legitimate rights of parents.").

4. See *infra* notes 20-33 and accompanying text.

5. See *infra* notes 34-43 and accompanying text.

6. See *infra* notes 44-85 and accompanying text.

7. Besharov, "Doing Something," *supra* note 3, at 539 (citing National Committee for Prevention of Child Abuse, *A Survey of Public Perceptions of Child Abuse: The State of the Economy, Risk of Involvement in Juvenile and Adult Crime, and What the Individual Can Do To Prevent Abuse* (Working Paper 003, 1982)).

8. This Comment uses the term "child maltreatment" to encompass all types of child abuse—physical, sexual, and emotional—and child neglect. The term "central registry" refers to any centralized database or listing of child maltreatment reports or records that the state child protective services agency maintains pursuant to a state statute.

9. See *infra* notes 86-110 and accompanying text.

In a climate of growing concern about child abuse, it is not surprising that many state legislatures quickly recognized that centralized databases of child abusers could serve as a tool to prevent known or suspected abusers from obtaining employment in occupations requiring unsupervised contact with children, serving as foster or adoptive parents, or otherwise obtaining unsupervised access to a child. Thus, some states have authorized certain categories of persons and organizations, such as child day care center employers and adoption agencies, to use the information on the state's child maltreatment central registries.¹⁰ When this access is available, inclusion in the registry can impede an individual's employment and other opportunities, and can therefore amount to a governmentally imposed deprivation of liberty and property interests. When this occurs, the Fourteenth Amendment's Due Process Clause is implicated.¹¹

This Comment discusses the tension that is created when the need to retain information for the purpose of adequately protecting children conflicts with alleged maltreaters' liberty and property interests in family privacy, family integrity, and employment. The Comment begins by describing briefly the problem of child maltreatment and the early movement toward state intervention in the parent-child relationship.¹² The Comment then describes state statutory schemes for child protective services¹³ and the place of the child maltreatment central registry in a comprehensive statutory scheme.¹⁴ Next, it describes the content and purposes of child maltreatment central registries.¹⁵ The Comment then summarizes the law of procedural due process in the United States. This summary describes the liberty and property interests that the Fourteenth Amendment's Due Process Clause protects,¹⁶ and explains how courts determine whether the procedures accorded individuals deprived of a protected interest are constitutionally sufficient.¹⁷ The Comment identifies the due process issues that arise when child maltreatment registries are

10. See *infra* notes 102-04 and accompanying text.

11. The Due Process Clause states that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

12. See *infra* notes 20-43 and accompanying text.

13. See *infra* notes 44-85 and accompanying text.

14. See *infra* notes 86-97 and accompanying text.

15. See *infra* notes 98-110 and accompanying text.

16. See *infra* notes 111-49 and accompanying text; notes 183-92 and accompanying text; notes 219-32 and accompanying text.

17. See *infra* notes 239-50 and accompanying text.

maintained, and explains how some courts have dealt with these problems.¹⁸ The Comment concludes with recommendations for child maltreatment registry statutes that would protect the due process rights of the persons named on the registries, while ensuring that child protective services agencies retain access to the information they need to protect children adequately.¹⁹

I. CHILD MALTREATMENT AND CHILD PROTECTIVE SERVICES PROGRAMS IN THE UNITED STATES

A. *The Problem of Child Abuse and Neglect in the United States*

Although child abuse has no doubt been occurring for as long as human beings have been reproducing,²⁰ the idea that it is appropriate for government to seek to protect children from their own parents is of relatively recent origin.²¹ The early common law of England considered children to be the property of their fathers,²² and paternal autonomy was very nearly absolute.²³ Thus, in the early days of American history, harsh treatment of children by their parents was beyond the reach of the law.²⁴

The best-known early instance of court intervention into a case of child abuse in the United States occurred in New York in 1874, and involved Mary Ellen Wilson,²⁵ a young orphan who lived with

18. See *infra* notes 150-82 and accompanying text; notes 193-218 and accompanying text; notes 233-38 and accompanying text; notes 283-313 and accompanying text.

19. See *infra* notes 348-57 and accompanying text.

20. See Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 293-99 (1972) (describing child maltreatment in ancient civilizations and the documentation of this maltreatment in sources ranging from the Bible to fairy tales).

21. See generally Besharov, "Doing Something," *supra* note 3, at 540-50 (describing the history of state intervention into families to protect abused children).

22. See 1 WILLIAM BLACKSTONE, COMMENTARIES *452-53.

23. See Thomas, *supra* note 20, at 299. The ancient law of Rome granted fathers complete power over their children: a father "could kill, mutilate, sell, or offer his child in sacrifice." *Id.* at 295. These values were reflected in the early common law of England, where a father's custody of his children was very nearly absolute, regardless of the conditions of the child's life or the child's well-being. *Id.* at 299. The mother's right to the child was subordinated to the father's. *Id.*

24. *Id.* at 300. The English common law that was brought to this country by the colonists permitted "the father [to] rule[] over both his wife and children. Parental discipline of children was both severe and arbitrary. . . . The courts rarely interfered . . ." *Id.*

25. Mary Ellen's case is the subject of one of the child welfare field's most well-loved and oft-repeated legends. *Id.* at 308. According to the legend, Mary Ellen, an eight-year-old orphan, was rescued from her abusive foster family by the American Society for the

a family that ostracized her and beat her regularly.²⁶ Mary Ellen testified to her situation as follows:

My mother and father are both dead. . . . I don't know how old I am. I have no recollection of a time when I did not live with the Connollys. . . . I am never allowed to play with any children, or have any company whatsoever. [Mrs. Connolly] is in the habit of whipping and beating me almost every day. . . . I have no recollection of ever having been kissed by anyone²⁷

The evidence showed that Mary Ellen was indeed the victim of shocking abuse and neglect. She had been beaten to the point of being black and blue.²⁸ She was routinely locked in a bedroom and prohibited from playing with other children, and she was forced to sleep on the floor.²⁹ Mrs. Connolly ultimately was found guilty of assault and battery and was sentenced to one year of hard labor for her treatment of Mary Ellen.³⁰

Public outrage over Mary Ellen's case prompted the organization of the New York Society for the Prevention of Cruelty to Children in

Prevention of Cruelty to Animals (ASPCA), there being no similar organization to offer assistance to children. The ASPCA's attorney succeeded in persuading the court that children are members of the animal kingdom and are therefore entitled to the same legal protections from cruelty as animals. Thus, the child protective services movement in the United States was born. For a recent recital of this legend, see NATIONAL COMMITTEE FOR INJURY PREVENTION AND CONTROL, *INJURY PREVENTION: MEETING THE CHALLENGE 213* (1989) [hereinafter *INJURY CONTROL*]. Additional sources of the legend are noted in Thomas, *supra* note 20, at 308 n.58. While Mary Ellen's case was indeed initiated by the founder of the ASPCA, he undertook the case upon his own initiative, and acted in his individual capacity. *Id.* at 308.

26. Thomas, *supra* note 20, at 309. In an even earlier case, a state court recognized that a state may intrude on the rights of parents when the child's well-being is at stake. In *Ex parte Crouse*, 4 Whart. 9 (Pa. 1839), a young girl had been committed to the Philadelphia House of Refuge by her mother, who claimed the child was incorrigible. *Id.* at 9-10. The child's father argued that the state statute authorizing the commitment and detention of a child without a trial by jury was unconstitutional. *Id.* at 11. In upholding the commitment, the court stated:

It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right, the business of education belongs to it. That parents are ordinarily [e]ntrusted with it is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an inalienable one.

Id.

27. *INJURY CONTROL*, *supra* note 25, at 213 (quoting N.Y. TIMES, Apr. 10, 1874).

28. Thomas, *supra* note 20, at 309-10.

29. *Id.* at 310.

30. *Id.*

1874.³¹ In 1875, the State of New York enacted legislation “that authorized cruelty societies to file complaints for the violation of any laws affecting children and required law enforcement and court officials to aid agents of the societies in the enforcement of these laws”³²—thus creating the first statutory child protective services system in the United States.³³

Despite these early efforts, widespread state action directed at solving the problem of child abuse did not get underway until almost a century later. In 1962, Dr. Henry Kempe coined the term “the battered child syndrome” in an article in the *Journal of the American Medical Association*,³⁴ and the nation’s recognition of and response to child abuse began to change dramatically. By the end of that decade, every state had enacted child abuse reporting laws, which sought to identify the victims of child abuse by requiring certain professionals—such as pediatricians and school teachers—to report suspected child abuse to child protective services agencies.³⁵ Early child abuse reporting laws usually were limited to *physical* child abuse—that is, child battery—and did not attempt to address sexual abuse or child neglect.³⁶ In 1974, the United States Congress enacted the Child Abuse Prevention and Treatment Act,³⁷ which provided funding for states to establish programs to identify and provide protective services to children who were the subjects of *any* type of maltreatment, including child neglect.³⁸

Today, every state has a procedure for receiving reports of child abuse and neglect, investigating those reports, and determining

31. *Id.*

32. (citing An act for the incorporation of societies for the prevention of cruelty to children, ch. 130, N.Y. Laws 65 (1875), *excerpts reprinted in* 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, 1600-1865, at 192 (Robert H. Bremner ed., 1971)).

33. INJURY CONTROL, *supra* note 25, at 213.

34. C. Henry Kempe et al., *The Battered Child Syndrome*, 181 J. AM. MED. ASS’N 17, 17 (1962).

35. Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 FAM. L.Q. 141, 142 (1986). The laws tended to be quite narrow in scope, requiring reports to be made only when children had sustained physical injuries requiring medical attention, and often granting considerable discretion to professionals to decide whether to report. *Id.*; see, e.g., Act of May 24, 1963, ch. 576, 1963 Cal. Stat. 1453 (directing physicians and surgeons to report children who may have been physically abused, unless in the doctor’s discretion making a report would be inconsistent “with the health, care or treatment” of the child) (current version at CAL. PENAL CODE § 11166 (West Supp. 1994)).

36. Meriwether, *supra* note 35, at 142.

37. Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101-5106 (1988)).

38. 88 Stat. 5 (1974) (codified as amended at 42 U.S.C. § 5106 (1988)).

whether child protective services should be provided.³⁹ The number of reports of child maltreatment received by the state agencies that provide these services is staggering. One source estimates that in 1992 almost three million children were reported to state child protective services agencies,⁴⁰ a fifty percent increase in the number of reported children since 1985.⁴¹ An estimated 1.16 million of these reports were substantiated,⁴² representing a ten percent increase in

39. See John E.B. Myers, *A Survey of Child Abuse and Neglect Reporting Statutes*, 10 J. JUV. L. 1, 11-27 (1986) (summarizing the child abuse and neglect reporting statutes of every state); see also *infra* notes 44-85 and accompanying text (describing typical state procedures).

40. Karen McCurdy & Deborah Daro, *Child Maltreatment: A National Survey of Reports and Fatalities*, 9 J. INTERPERSONAL VIOLENCE 75, 81 (1994). The figure provided is necessarily an estimate because widely varying state child maltreatment reporting procedures make it impossible for researchers to obtain a direct count of the number of maltreated children. *Id.* at 76. For example, some states keep records of reports that reflect the number of families involved or of the incidents of maltreatment, rather than the number of children harmed. *Id.* The three million figure cited is an estimate of the number of children affected by maltreatment—not merely the number of incidents—and it was computed as follows:

[W]e calculate the percentage change in reported children for those states providing these numbers. For the remaining states, we calculate the percentage change in reports under the assumption that a similar change would have occurred in the number of children reported for maltreatment. We then compute the mean change of all states with reporting data. Finally, we take the last unduplicated count of reported children in 1986 by the American Association for Protecting Children as the baseline and multiply this number (2,086,000) by the mean percentage change in reports between 1986 and 1992.

Id. at 77 (citation omitted).

41. *Id.* at 77.

42. *Id.* at 83. "Substantiated" means the child protective services agency subsequently determined that there was sufficient evidence to conclude that the treatment of the child amounted to abuse or neglect, according to the state's statutory definitions of these terms. See *infra* note 77 and accompanying text (defining "substantiated" and other terms used by child protective services agencies); note 76 and accompanying text (describing the standard of proof that must be reached in Maryland and New York before a report of child abuse may be classified "substantiated").

The figures cited in this Comment reflect a substantiation rate of about 40%: Only about 4 of every 10 reports of child maltreatment are ultimately determined to meet statutory standards for affirmatively determining that abuse or neglect has occurred. McCurdy & Daro, *supra* note 40, at 83. Authorities are divided on how this statistic should be interpreted. Compare Douglas J. Besharov, *Overreporting and Underreporting are Twin Problems*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE (Richard J. Gelles & Donileen R. Loseke eds., 1993) 257, 260-61 [hereinafter Besharov, *Overreporting*] (arguing that the low rate of substantiation reflects overreporting of child maltreatment, which results from overly broad child abuse reporting statutes) with David Finkelhor, *The Main Problem is Still Underreporting, Not Overreporting*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE (Richard J. Gelles & Donileen R. Loseke eds., 1993) 273, 279 (contending that many reports are classified "unsubstantiated" despite evidence that the child has in fact been harmed). See also Eugene M. Lewit, *Reported Child Abuse and*

just one year in the number of children whose maltreatment was substantiated.⁴³ States have responded to this pervasive and growing social problem by developing child protective services systems—policies and programs designed to identify and protect children who have been, or may become, the victims of abuse or neglect.

B. State Child Protective Services Systems

The typical state child protective services (CPS) system has two key features: a statutory scheme that specifies how the protection of maltreated children is to be accomplished within the state; and an administrative agency—the CPS agency—charged with carrying out the purposes of the statutes.⁴⁴ In most states, the CPS agency consists of a central office, located within the state agency that administers social services, and branch offices that provide local services in municipalities or counties.⁴⁵ The bulk of the investigatory and protective services work is carried out by the local agencies.⁴⁶

The statutory schemes that determine how child protective services are administered vary greatly from state to state.⁴⁷ Howev-

Neglect, 4 FUTURE OF CHILDREN 233, 236 (1994) (“[F]ailure to substantiate a report of child abuse and/or neglect does not indicate that maltreatment did not occur; instead, . . . [it] may reflect the resources available to CPS [child protective services] agencies for investigating reports, the priorities agencies establish for pursuing competing reports, or the evidentiary circumstances of individual cases.”); *infra* notes 57-65 and accompanying text (describing statutory definitions of “abuse” and “neglect”); notes 66-69 and accompanying text (describing the “caretaker” limitation on child protective services agencies’ authority to intervene in child maltreatment situations).

43. McCurdy & Daro, *supra* note 40, at 83.

44. A comprehensive review of the child protective services statutory schemes of every state is beyond the scope of this Comment. The statutes of Maryland, New York, North Carolina, Pennsylvania, South Carolina, and Virginia are used to exemplify the different aspects of child protective services statutory schemes. For a review of child abuse and neglect reporting statutes in all 50 states and the District of Columbia, see Myers, *supra* note 39.

45. See, e.g., N.Y. SOC. SERV. LAW § 423 (McKinney 1992); N.C. GEN. STAT. § 7A-542 (Supp. 1994); 23 PA. CONS. STAT. ANN. § 6361 (1991); S.C. CODE ANN. §§ 20-7-640 & 20-7-650 (Law. Co-op. Supp. 1993); VA. CODE ANN. § 63.1-248.6 (Michie Supp. 1994). States differ in the amount of autonomy they allow local agencies to retain in managing their CPS programs. See *Patterns of Coping: States and Counties*, in Special Issue, *Social Services for Children, Youth and Families in the United States*, 12 CHILDREN & YOUTH SERVICES REV. 39, 39-40 (1990). In all cases, however, the local agencies must carry out activities that are mandated by state statutes, so there is uniformity throughout the state in most significant policies and procedures.

46. See, e.g., N.Y. SOC. SERV. LAW § 423 (McKinney 1992); N.C. GEN. STAT. § 7A-542 (Supp. 1994); 23 PA. CONS. STAT. ANN. § 6362 (1991); S.C. CODE ANN. § 20-7-650(I) (Law. Co-op. Supp. 1993); VA. CODE ANN. § 63.1-248.6 (Michie Supp. 1994).

47. See *infra* notes 48-85 and accompanying text.

er, these schemes share some common elements. Every state has procedures for accepting reports of child maltreatment, investigating those reports, deciding whether child maltreatment has in fact occurred, providing protective services if maltreatment is substantiated, and maintaining records of child abuse and neglect reports and case dispositions. This section briefly describes these critical elements of the typical CPS system.

1. Reports of Child Maltreatment

Every state has statutes that require certain persons to report suspected child maltreatment to the state or local CPS agency.⁴⁸ The state statutes vary as to who must report and what must be alleged before the agency will accept the report for investigation.

Reporting statutes typically define the group of citizens from whom reports will be accepted and specify whether those individuals are required or permitted to report.⁴⁹ Most states have statutes that contain both mandatory and permissive components; that is, they *require* certain professionals—such as pediatricians, teachers, and others who have frequent contact with children—to report, and they *permit*, but do not require, any other individual who suspects a child is abused or neglected to make a report.⁵⁰ In some states, the mandatory reporting duty is extended to all citizens.⁵¹ The reporter

48. See, e.g., MD. CODE ANN., FAM. LAW §§ 5-704 & 5-705 (1991); N.Y. SOC. SERV. LAW § 413 (McKinney 1992); N.C. GEN. STAT. § 7A-543 (Supp. 1994); 23 PA. CONS. STAT. ANN. § 6311 (1991); S.C. CODE ANN. § 20-7-510 (Law. Co-op. Supp. 1993); VA. CODE ANN. § 63.1-248.3 (Michie Supp. 1994); see also Meriwether, *supra* note 35, at 143-49 (describing the components and basic structure of state child abuse reporting statutes).

49. Meriwether, *supra* note 35, at 145-46.

50. See, e.g., N.Y. SOC. SERV. LAW §§ 413 & 414 (McKinney 1992) (*requiring* medical professionals, coroners, school officials, social services workers, day care workers, mental health professionals, and law enforcement officials to report, and *permitting* all others to report); 23 PA. CONS. STAT. ANN. §§ 6311 & 6312 (1991) (*requiring* medical professionals, school administrators, teachers, social services workers, day care workers, foster care workers, mental health professionals, and law enforcement officers to report, and *permitting* all others to report); S.C. CODE ANN. § 20-7-510 (Law. Co-op. Supp. 1993) (*requiring* medical professionals, law enforcement officers, and teachers to report, and *permitting* all others to report); VA. CODE ANN. §§ 63.1-248.3 & 63.1-248.4 (Michie Supp. 1994) (*requiring* medical professionals, social workers, probation officers, school employees, teachers, mental health professionals, law enforcement officers and child day care employees to report, and *permitting* all others to report).

51. See, e.g., MD. CODE ANN., FAM. LAW §§ 5-704 & 5-705 (1991); N.C. GEN. STAT. § 7A-543 (Supp. 1994); S.C. CODE ANN. § 20-7-510 (Law. Co-op. Supp. 1993). These statutes sometimes exempt persons in certain privileged relationships from the reporting requirements. However, many traditionally recognized privileges, such as the husband-wife and physician-patient privileges, are expressly abrogated. See, e.g., MD. CODE ANN., FAM.

is never required to have *proof* that abuse has occurred; usually, a report must be made if the reporter has "reason to believe" or "reasonable grounds to suspect" that child maltreatment *may* have occurred.⁵² Telephone reports are accepted in all states; some states also require that an oral report be followed by a written report within a specified period.⁵³ Many states will accept anonymous reports, provided that the reporter alleges facts that constitute a statutorily sufficient reason to initiate an investigation.⁵⁴

Child protective services agencies are not required to accept all reports of child maltreatment for investigation.⁵⁵ Only those reports containing allegations of behaviors or injuries that meet the state's statutory definitions of child abuse or neglect need be investigated.⁵⁶ State definitions of child maltreatment vary greatly. Most states have separate statutory definitions for physical abuse, sexual abuse, and neglect.⁵⁷ Many states also have a separate definition for emotional

LAW § 5-705(a) (1991) (abrogating all privileges except attorney-client and clergy-parishioner); N.C. GEN. STAT. § 7A-551 (Supp. 1994) (abrogating all privileges except attorney-client); S.C. CODE ANN. § 20-7-550 (Law. Co-op. 1984) (abrogating all privileges except attorney-client and priest-penitent).

52. See, e.g., MD. CODE ANN., FAM. LAW §§ 5-704 & 5-705 (1991); N.Y. SOC. SERV. LAW §§ 413 & 414 (McKinney 1992); N.C. GEN. STAT. § 7A-543 (Supp. 1994); 23 PA. CONS. STAT. ANN. §§ 6311 & 6312 (1991); S.C. CODE ANN. § 20-7-510 (Law. Co-op. Supp. 1993); VA. CODE ANN. § 63.1-248.3 (Michie Supp. 1994).

53. See, e.g., MD. CODE ANN., FAM. LAW § 5-704(b) (1991) (requiring certain reporters—health practitioners, police officers, educators and human services workers—to follow oral reports with written reports); N.Y. SOC. SERV. LAW § 415 (McKinney 1992) (mandating that reporters follow oral reports with written reports).

54. See, e.g., N.C. GEN. STAT. § 7A-543 (Supp. 1994) ("Refusal of the person making the report to give a name shall not preclude the Department's investigation."). State statutes rarely sanction acceptance of anonymous reports expressly, but as a matter of practice most CPS agencies will accept a statutorily sufficient anonymous report. Cf. Besharov, *Overreporting*, *supra* note 42, at 270 tbl. 16.3 (recommending that anonymous reports "not be rejected automatically, but . . . be evaluated carefully").

55. Besharov, *Overreporting*, *supra* note 42, at 268-69.

56. See *id.* For example, if the state's definition of child abuse requires that the child have sustained a serious physical injury, the reporter must specify the serious physical injury he believes the child has sustained—a mere accusation that the Joneses abuse their children is insufficient.

57. See, e.g., MD. CODE ANN., FAM. LAW § 5-701(b) & (p) (Supp. 1994); N.Y. SOC. SERV. LAW § 412 (McKinney 1992); N.C. GEN. STAT. § 7A-517(1) & (21) (Supp. 1994).

A few states have a single statutory definition for "abused or neglected child." See, e.g., S.C. CODE ANN. § 20-7-490(B) & (C) (Law. Co-op. 1984 & Supp. 1993) (defining an "abused or neglected child" as a child who is harmed by the "acts or omissions" of his parent or guardian); VA. CODE ANN. § 63.1-248.2(A) (Michie 1991) (defining an "abused or neglected child" as a child who is subjected to physical or mental injury, neglect of her health, abandonment or sexual abuse; or whose parents are unable to care for her because of incompetence or incarceration). Pennsylvania defines both battery and physical neglect as "child abuse." 23 PA. CONS. STAT. ANN. § 6303 (1991).

abuse.⁵⁸

Some statutory definitions of physical abuse require that the child have suffered specified types of injuries,⁵⁹ while others state that abuse may be indicated by the presence of any serious, non-accidental physical injury.⁶⁰ Most definitions of physical abuse require evidence of actual physical harm to the child,⁶¹ but others proscribe particular actions or behaviors toward children that create a substantial risk of physical harm or are inherently cruel, regardless of whether those actions result in actual physical harm.⁶² Statutory definitions of sexual abuse almost always prohibit sexual acts with children without respect to whether physical harm occurs as the result of the acts.⁶³ Statutory definitions of child neglect typically are written in general terms and focus on acts or omissions of the parent that place the child at risk, whether or not actual harm occurs.⁶⁴ Definitions of emotion-

58. See, e.g., N.C. GEN. STAT. § 7A-517(1)(d) (Supp. 1994).

59. See, e.g., S.C. CODE ANN. § 20-7-490(C) & (F) (Law. Co-op. 1984 & Supp. 1993) (defining "harm" to a child as, *inter alia*, the infliction of physical injury, and defining "physical injury" as "death, disfigurement, or impairment of any bodily organ").

60. See, e.g., MD. CODE ANN., FAM. LAW § 5-701(b) (1991); N.Y. SOC. SERV. LAW § 412 (McKinney 1992); N.C. GEN. STAT. § 7A-517(1) (Supp. 1994); 23 PA. CONS. STAT. ANN. § 6303 (1991); VA. CODE ANN. § 63.1-248.2(A)(1) (Michie 1991).

61. See, e.g., MD. CODE ANN., FAM. LAW § 5-701(b)(1) (Supp. 1994); N.Y. SOC. SERV. LAW § 412 (McKinney 1992); S.C. CODE ANN. § 20-7-490(C) & (F) (Law. Co-op. 1984 & Supp. 1993).

62. See, e.g., N.C. GEN. STAT. § 7A-517(1)(b) & (b1) (Supp. 1994) (including in the definition of abuse: "creat[ing] or allow[ing] to be created a substantial risk of serious physical injury . . . by other than accidental means," and "us[ing] or allow[ing] to be used . . . cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior"); VA. CODE ANN. § 63.1-248.2(A)(1) (Michie 1991) (including the creation of "a substantial risk of death, disfigurement, or impairment of bodily or mental functions" in the definition of "abused or neglected child").

63. See, e.g., MD. CODE ANN., FAM. LAW § 5-701(b)(2) (Supp. 1994); N.C. GEN. STAT. § 7A-517(1)(c) (Supp. 1994); 23 PA. CONS. STAT. ANN. § 6303 (1991); S.C. CODE ANN. § 20-7-490(C)(2) (Law. Co-op. 1984); VA. CODE ANN. § 63.1-248.2(A)(4) (Michie 1991). These statutes often include the creation of child pornography in the list of acts constituting sexual abuse. See, e.g., N.C. GEN. STAT. § 7A-517(1)(c) (Supp. 1994); 23 PA. CONS. STAT. ANN. § 6303 (1991).

64. See, e.g., MD. CODE ANN., FAM. LAW § 5-701(p) (Supp. 1994) (defining "neglect" as "the leaving of a child unattended or other failure to give proper care or attention to a child"); N.C. GEN. STAT. § 7A-517(21) (Supp. 1994) (defining "neglected juvenile" as "[a] juvenile who does not receive proper care, supervision, or discipline . . . ; or who has been abandoned . . . [or] is not provided necessary medical . . . or remedial care; or who lives in an environment injurious to the juvenile's welfare"); VA. CODE ANN. § 63.1-248.2(A)(2) (Michie 1991) (prohibiting parents from "neglect[ing] or refus[ing] to provide care necessary for [the child's] health").

al maltreatment usually require evidence of both inappropriate actions by the child's parent or caretaker *and* actual harm to the child.⁶⁵

The identity of the person who allegedly harmed the child is critical to determining whether the CPS agency will accept a report of child abuse or neglect.⁶⁶ There is a very strong presumption that parents are responsible for protecting their own children, and that government should not intervene in this relationship until it becomes clear that the parents themselves are the source of danger to the child.⁶⁷ Thus, CPS agencies usually are not supposed to investigate child maltreatment allegations unless the child's parent, guardian, or caretaker is named as the person responsible for the maltreatment.⁶⁸ Abuse that is committed by someone outside of the family, such as a neighbor or stranger, is a crime; thus it is considered more appropri-

65. See, e.g., MD. CODE ANN., FAM. LAW §§ 5-701(b)(1) & 5-701(o) (Supp. 1994); N.C. GEN. STAT. § 7A-517(1)(d) (Supp. 1994); S.C. CODE ANN. § 20-7-490(B) & (G) (Law. Co-op. 1984 & Supp. 1993). For example, the North Carolina statute defines an emotionally abused juvenile as "[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker . . . creates or allows to be created serious emotional damage to the juvenile. Serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal or aggressive behavior toward himself or others" N.C. GEN. STAT. § 7A-517(1)(d) (Supp. 1994).

66. Most states distinguish between criminal child abuse and civil child abuse. E.g., compare N.C. GEN. STAT. § 7A-517(1) (Supp. 1994) (defining "abused juvenile" for the purpose of determining the district court's civil jurisdiction over a case of child abuse or neglect) with N.C. GEN. STAT. §§ 14-318.2 & 14-318.4 (1993 & Supp. 1994) (defining the crimes of misdemeanor and felony child abuse, respectively). Child protective services agencies have the authority to intervene only in cases of civil child abuse. See, e.g., N.C. GEN. STAT. § 7A-544 (Supp. 1994).

67. See *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982).

68. See, e.g., MD. CODE ANN., FAM. LAW §§ 5-701(b)(1) & 5-701(p) (Supp. 1994); N.C. GEN. STAT. § 7A-517(5) (Supp. 1994); 23 PA. CONS. STAT. ANN. § 6303 (1991); S.C. CODE ANN. § 20-7-490(B) & (E) (Law. Co-op. Supp. 1993); VA. CODE ANN. § 63.1-248.2(A) (Michie 1991). A "caretaker" need not be a family member or full-time guardian of the child, but he must be in a position of having some responsibility for the child's well-being. For example, in North Carolina, a caretaker is defined as

[a]ny person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, an adult relative entrusted with the juvenile's care, or any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility. "Caretaker" also means any person who has the responsibility for care of a juvenile in a child day care home or child day care facility

N.C. GEN. STAT. § 7A-517(5) (Supp. 1994).

ate for law enforcement agencies, rather than CPS agencies, to investigate.⁶⁹

An individual reporting child maltreatment must provide facts that, if true, could support a finding that the child was abused or neglected according to the state's statutory definitions; if required by statute, the reporter also must allege that the person responsible for the harm to the child was the child's parent, guardian, or caretaker. If a report meets all of these criteria, then in every state the CPS agency must accept the report for investigation.⁷⁰

2. Child Maltreatment Investigations

Once a CPS agency has accepted a report of child abuse or neglect, it must move quickly to determine whether the child in fact suffered maltreatment. The agency does this by conducting a child maltreatment investigation. The nature of the required investigation may vary, and the details of how an investigation is to be conducted are rarely spelled out in the child protection statutes.⁷¹ Typically, the state will require the CPS investigator to interview both the child herself and the child's parent or caretaker, to visit the child's home, and, when appropriate, to obtain additional information from "collateral" sources, such as the child's physician.⁷²

State statutes usually require the agency to initiate an investigation within a specified period of time after the report is accepted. Typically, the agency must commence the investigation within a few days.⁷³ In some states, the statutes also specify the time period in

69. Thus, some states have statutes or regulations directing CPS agencies to refer reports of stranger abuse to law enforcement agencies. *See, e.g.*, N.C. ADMIN. CODE tit. 10, r. 41I.0304(c) (Jan. 1995). The CPS agency may nonetheless become involved in a case of child maltreatment by a stranger or non-caretaker if it appears that the child's parent or caretaker was neglectful in failing to protect the child from harm. *Cf. In re Gwaltney*, 68 N.C. App. 686, 690, 315 S.E.2d 750, 753 (1984) (upholding an adjudication of neglect against a mother who failed to protect her children from sexual assaults by their non-custodial father).

70. *See, e.g.*, MD. CODE ANN., FAM. LAW § 5-706 (1991); N.Y. SOC. SERV. LAW § 424.6 (McKinney 1992); N.C. GEN. STAT. § 7A-544 (Supp. 1994); 23 PA. CONS. STAT. ANN. § 6362 (1991); S.C. CODE ANN. § 20-7-650(C) (Law. Co-op. Supp. 1993).

71. *But see* MD. CODE ANN., FAM. LAW § 5-706 (Supp. 1994) (describing the scope of the investigation and the actions to be taken by the investigator).

72. *See, e.g.*, N.C. GEN. STAT. § 7A-544 (Supp. 1994) (authorizing the CPS agency to "consult with any public or private agencies or individuals" in the course of the investigation); N.C. ADMIN. CODE tit. 10, r. 41I.0305(g) & (h) (Jan. 1995) (directing investigators to interview collateral sources when appropriate).

73. Many states require the agency to initiate the investigation within 24 hours. *See, e.g.*, N.Y. SOC. SERV. LAW § 424.6; 23 PA. CONS. STAT. ANN. § 6368(a) (1991); S.C. CODE

which the investigation must be completed. Typically, this period does not exceed sixty days.⁷⁴

3. Decision-Making: Was the Child Maltreated?

After completing the investigation, the CPS agency must determine whether to substantiate the child maltreatment report. To make this decision, the CPS investigator—individually, in conjunction with a supervisor, or as a member of a professional team—decides whether the findings of the investigation support a conclusion that the child has been maltreated, according to the state's statutory definition of abuse or neglect.⁷⁵ The standard of proof used by the agency in reaching this decision may be quite low. Often, a finding of any "credible evidence" supporting the allegations is sufficient to support the conclusion that the child was maltreated.⁷⁶ If the requisite evidence is found, the report of child maltreatment will be labeled "substantiated" or "indicated."⁷⁷ If the report is substantiated, the

ANN. § 20-7-650(C) (Law. Co-op. Supp. 1993). Virginia requires the local child protective services agency to "[m]ake immediate investigation" upon receipt of a report. VA. CODE ANN. § 63.1-248.6(E) (Michie Supp. 1994). Some states require a more rapid investigation if the report alleges physical or sexual abuse, rather than neglect. See, e.g., MD. CODE ANN., FAM. LAW § 5-706(b) (Supp. 1994) (requiring agency to initiate abuse investigations within 24 hours and neglect investigations within five days); N.C. GEN. STAT. § 7A-544 (Supp. 1994) (requiring the child protective services agency to initiate abuse investigations within 24 hours and neglect investigations within 72 hours).

74. See, e.g., MD. CODE ANN., FAM. LAW § 5-706(g) (1991) (requiring agency to complete investigation within 10 days after receipt of report "to the extent possible," and no later than 60 days after receipt of the report in any case); N.Y. SOC. SERV. LAW § 424.7 (McKinney 1992) (requiring agency to make a determination of "indicated" or "unfounded" within 60 days of receipt of the report); 23 PA. CONS. STAT. ANN. § 6368(c) (1991) (requiring the agency to complete the investigation within 30 days); S.C. CODE ANN. § 20-7-650(C) (Law. Co-op. Supp. 1993) (requiring agency to make a determination of whether the report is "indicated" or "unfounded" within 60 days).

75. See generally Chris M. Mouzakitis, *Intake-Investigative Assessment*, in SOCIAL WORK TREATMENT WITH ABUSED AND NEGLECTED CHILDREN (Chris M. Mouzakitis & Roju Varghese eds., 1985) 199-200 (describing the decision-making process); Barton D. Schmitt & Susan L. Scheurer, *Guidelines for Team Decision and Case Management*, in THE NEW CHILD PROTECTION TEAM HANDBOOK 321 (Donald C. Bross et al. eds., 1988) (describing and providing guidelines for the decision-making process in multidisciplinary child protection teams).

76. See, e.g., MD. CODE ANN., FAM. LAW § 5-701(k) (Supp. 1994) (allowing the agency to designate a report "indicated" upon a finding of "credible evidence, which has not been satisfactorily refuted"); N.Y. SOC. SERV. LAW § 412.12 (McKinney 1992) (defining "indicated report" as a report supported by "some credible evidence").

77. "Substantiated" and "indicated" are the terms most commonly used to describe the agency's determination that sufficient evidence was found to support the conclusion that the child was maltreated. Reports that are not "substantiated" or "indicated" usually are said to be "unsubstantiated" or "unfounded." For statutory definitions of "indicated,"

agency must then determine what further actions should be taken to protect the child.

4. Child Protective Services

Once a report of child maltreatment has been substantiated, state CPS agencies have the statutory authority to intervene in the family for the purpose of protecting the child.⁷⁸ The range of activities that can constitute child protective services is quite wide. In the most severe cases of maltreatment, CPS agencies may remove children from their homes—either temporarily or permanently—if that is the only way to ensure their safety.⁷⁹ At the other end of the spectrum, the case may be closed immediately after the decision to substantiate the report is made.⁸⁰ This means that the agency chooses not to

see MD. CODE ANN., FAM. LAW § 5-701(k) (Supp. 1994) (“‘Indicated’ means a finding that there is credible evidence, which has not been satisfactorily refuted, that abuse, neglect, or sexual abuse did occur.”); N.Y. SOC. SERV. LAW § 412.12 (McKinney 1992) (“An ‘indicated report’ means a report made pursuant to this title if an investigation determines that some credible evidence of the alleged abuse or maltreatment exists.”); 23 PA. CONS. STAT. ANN. § 6303 (1991) (defining “indicated report” as “a report made pursuant to this chapter if an investigation by the child protective service determines that substantial evidence of the alleged abuse exists”); S.C. CODE ANN. § 20-7-490(M) (Law. Co-op. 1984) (“‘Indicated report’ means a report of child abuse or neglect supported by facts which warrant a finding that abuse or neglect is more likely than not to have occurred.”). North Carolina uses the term “substantiated,” see N.C. ADMIN. CODE tit. 10, r. 41I.0306(b) (Jan. 1995), but does not define this term in either the statutes or the regulations.

78. See, e.g., MD. CODE ANN., FAM. LAW § 5-710 (1991); N.Y. SOC. SERV. LAW § 424.10 (McKinney 1992); N.C. GEN. STAT. § 7A-544 (1993); 23 PA. CONS. STAT. ANN. § 6370 (1991); S.C. CODE ANN. § 20-7-650(I) (Law. Co-op. Supp. 1993); VA. CODE ANN. § 63.1-248.6(E) (Michie Supp. 1994).

79. The federal Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.), requires that reasonable efforts be made to retain children in the home. 42 U.S.C. § 671(a)(15) (1988). As a practical matter, many states must contend with overburdened foster care systems, see James P. Gleeson & Lynn C. Craig, *Kinship Care in Child Welfare: An Analysis of States' Policies*, 16 CHILDREN & YOUTH SERVICES REV. 7, 8 (1994) (citing NATIONAL COMMISSION ON FAMILY FOSTER CARE, A BLUEPRINT FOR FOSTERING INFANTS, CHILDREN AND YOUTH IN THE 1990S (1991)), and this can work against removing children from their homes in all but the most severe circumstances. Cf. David Fanshel, *Foster Care as a Two-Tiered System*, 14 CHILDREN & YOUTH SERVICES REV. 49, 50 (“[T]he current period finds the foster care system under siege as social problems generate more cases coming to child protective services agencies in which removal of children from their homes cannot be avoided.”).

80. McCurdy & Daro, *supra* note 40, at 84. For example, a 1988 review of child abuse cases in New York found that 56% of “indicated” cases were closed the same day that they were determined to be “indicated.” *Id.* (citing B. Salovitz & D. Keys, *Is Child Protective Services Still a Service?*, 5 PROTECTING CHILDREN 17 (1988)).

provide any child protective services at all, despite its determination that the maltreatment report should be substantiated.

Between these two extremes lies a continuum of services⁸¹ that can range from low-key monitoring of a family for a short period of time, to agreements between parents and CPS workers to make the home environment safer for the child,⁸² to intensive and very intrusive measures such as family preservation services—the short-term provision of extremely intensive counseling and other services to a family when there is an imminent risk that a child will be removed from the home.⁸³ Whenever possible, CPS agencies enter voluntary agreements with families to cooperate in a child protection plan.⁸⁴ If a family refuses to cooperate, the agency may go to court to obtain an adjudication of abuse or neglect and a court order directing the family to participate in the agency's child protection plan.⁸⁵

II. THE CHILD MALTREATMENT CENTRAL REGISTRY

The CPS agency's duty to accept and investigate child abuse and neglect reports necessarily involves a great deal of documentation and record-keeping. Thus, every state has developed some type of procedure for maintaining records of the reports it receives, the

81. *See, e.g.*, N.C. GEN. STAT. § 7A-647 (Supp. 1994) (describing the range of dispositional alternatives for children determined to be abused or neglected).

82. Such voluntary agreements usually would address issues of parental behavior, such as the need to provide better care and supervision if the problem is neglect, or alternative means of discipline if the problem is abuse. *See, e.g.*, N.C. ADMIN. CODE tit. 10, r. 41I.0306(d) (Jan. 1995).

83. *See generally* PETER J. PECORA ET AL., *THE CHILD WELFARE CHALLENGE* 269-303 (1992) (describing family preservation services).

84. *See, e.g.*, N.Y. SOC. SERV. LAW § 424.10 (McKinney 1992) (stating that the CPS agency may "offer" services to a family after "explain[ing] that it has no legal authority to compel such family to receive said services"); 23 PA. CONS. STAT. ANN. § 6370(a) (1991) (substantially the same); S.C. CODE ANN. § 20-7-650(K) (Law. Co-op. Supp. 1993) ("After the initiation of protective services by the agency, if those receiving services indicate a refusal to cooperate, the agency shall withdraw."); *see also* CHILD WELFARE LEAGUE OF AMERICA, *STANDARDS FOR ORGANIZATION AND ADMINISTRATION FOR ALL CHILD WELFARE SERVICES* 69 (1984) ("No plan can be imposed; the client and the worker must each have a part in making certain choices and agreements.").

85. *See, e.g.*, N.Y. SOC. SERV. LAW § 424.10 (McKinney 1992); 23 PA. CONS. STAT. ANN. § 6370(b) (1991); S.C. CODE ANN. § 20-7-650(K) (Law. Co-op. Supp. 1993). South Carolina's statute expressly prohibits CPS workers from coercing a family's participation in a "voluntary" plan by threatening to go to court. S.C. CODE ANN. § 20-7-650(K) (Law. Co-op. Supp. 1993).

findings of its investigations, and the dispositions of the cases.⁸⁶ Most states maintain some type of central listing, or registry, of the findings of child maltreatment investigations.⁸⁷ This section explores in detail the purposes and functioning of these central registries.

Child protective services agencies maintain registries of the maltreatment reports that they receive for several reasons.⁸⁸ First, it is not uncommon for many separate incidents of maltreatment to occur within the same family.⁸⁹ If all of the incidents are recorded on a single registry, a CPS worker can easily obtain information about a family's history. This information can be helpful at several different points in the investigation and treatment of child abuse. Upon receipt

86. McCurdy & Daro, *supra* note 40, at 81. See, e.g., MD. CODE ANN., FAM. LAW §§ 5-707 & 5-714 (1991 & Supp. 1994); N.Y. SOC. SERV. LAW § 422 (McKinney 1992 & Supp. 1995); N.C. GEN. STAT. § 7A-552 (Supp. 1994); 23 PA. CONS. STAT. ANN. § 6331 (1991); S.C. CODE ANN. §§ 20-7-680 & 20-7-690 (Law. Co-op. Supp. 1993); VA. CODE ANN. § 63.1-248.6(A) (Michie Supp. 1994).

87. As of this writing, 41 states and the District of Columbia have statutes authorizing or requiring central registries of child maltreatment reports. See ALA. CODE § 26-14-8 (1992); ALASKA STAT. § 47.17.040 (1990); ARIZ. REV. STAT. ANN. § 8-546.03 (1994); ARK. CODE ANN. § 12-12-505 (Michie Supp. 1993); CAL. PENAL CODE § 11170 (West Supp. 1994); COLO. REV. STAT. § 19-3-313 (Supp. 1994); DEL. CODE ANN. tit. 16, § 905(c) & (d) (Supp. 1994); D.C. CODE ANN. § 6-2111 (1989 & Supp. 1993); FLA. STAT. ANN. § 415.504(4)(a) (West Supp. 1995); GA. CODE ANN. § 49-5-181 (1994); HAW. REV. STAT. § 350-2(c) (Supp. 1992); IDAHO CODE § 16-1623(c) (Supp. 1994); 325 ILL. ANN. STAT. ch. 5, para. 7.7 (Smith-Hurd 1993); IND. CODE ANN. § 31-6-11-12.1(a) (Burns Supp. 1994); IOWA CODE ANN. § 235A.14 (West 1994); KAN. STAT. ANN. § 38-1520 (1993); LA. REV. STAT. ANN. § 14:403(H) (West 1986); MD. CODE ANN., FAM. LAW § 5-714 (1991); MASS. ANN. LAWS ch. 119, § 51F (Law. Co-op. 1994); MICH. STAT. ANN. § 25.248(7) (Law. Co-op. Supp. 1994); MISS. CODE ANN. § 43-21-257(3) (Supp. 1994); MO. REV. STAT. § 210.145.2 (Supp. 1992); NEB. REV. STAT. § 28-718 (1989); NEV. REV. STAT. § 432.100 (1985); N.H. REV. STAT. ANN. § 169-C:35 (Supp. 1993); N.J. STAT. ANN. § 9:6-8.11 (West Supp. 1994); N.Y. SOC. SERV. LAW § 422 (McKinney 1992 & Supp. 1995); N.C. GEN. STAT. § 7A-552 (Supp. 1994); N.D. CENT. CODE § 50-25.1-05.5 (Supp. 1993); OHIO REV. CODE ANN. § 2151.42.1(F)(1) (Anderson 1994); OKLA. STAT. ANN. tit. 21, § 846(D) (West Supp. 1995); OR. REV. STAT. § 418.765 (1991); 23 PA. CONS. STAT. ANN. § 6331 (1991); R.I. GEN. LAWS § 42-72-7(a) (1988); S.C. CODE ANN. § 20-7-680 (Law. Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. § 26-8A-10 (1992); TENN. CODE ANN. § 37-1-408 (Supp. 1994); TEX. FAM. CODE ANN. § 34.06 (West 1986); UTAH CODE ANN. § 62A-4a-408 (Supp. 1994); VT. STAT. ANN. tit. 33, § 4916 (1991 & Supp. 1993); VA. CODE ANN. § 63.1-248.7(K) (Michie Supp. 1994); WYO. STAT. § 14-3-213 (1994).

88. See Jeanne Giovannoni, *Substantiated and Unsubstantiated Reports of Child Maltreatment*, 11 CHILDREN & YOUTH SERVICES REV. 299, 299 (1989) (stating that the three purposes of child maltreatment reporting laws are "to trigger investigatory action . . . to establish a central registry in order to catch repeated offenders . . . [and] to amass statistical data on the incidence of child abuse").

89. See *id.*; cf. Richard M. Gargiulo, *Child Abuse and Neglect: An Overview*, in CHILDREN AT RISK 1, 23-28 (Renitta L. Goldman & Richard M. Gargiulo eds., 1990) (describing the characteristics of "abusive" parents).

of an initial report, the worker can check the registry to determine whether prior reports have been received about the particular child or family.⁹⁰ Knowing the family's history helps the worker assess the level of risk associated with the report under investigation. Furthermore, when a child's maltreatment is substantiated and the CPS program must determine the best disposition for the child, the family's history can be taken into account.⁹¹

From the perspective of the CPS worker, this purpose is best served if the registry includes both substantiated and unsubstantiated reports. Even if a particular report was unsubstantiated, knowledge that such a report was made still may contribute to the assessment of risk to a particular child—a number of unsubstantiated reports may indicate that a child is in fact in danger and that intervention is warranted.⁹² This is so because to be “substantiated” or “indicated” a report must meet specific statutory and regulatory definitions and requirements, not all of which are related to whether the child actually was harmed.⁹³ For example, if the state statute permits intervention only when a child is harmed by a parent or “caretaker,” reports of abuse by someone who is outside the scope of the statute—such as a nonresident boyfriend or girlfriend of the child's parent—may be deemed “unsubstantiated,” even upon a finding that the child was harmed.⁹⁴ Furthermore, a finding of “unsubstantiated”

90. This helps to explain why a *central* registry is usually desirable. Typically, CPS programs are administered by local agencies. *See supra* notes 45-46 and accompanying text. When records of child abuse or neglect are maintained only at the local level, a CPS worker may have no way of knowing that a particular transient family has a long history of child abuse.

91. *See supra* notes 79-85 and accompanying text (describing the range of possible dispositions). Multiple substantiations of abuse or neglect may indicate that the home is not safe for the child and that an extreme measure such as removal from the home is therefore warranted.

92. *See Hodge v. Jones*, 31 F.3d 157, 166 (4th Cir.) (noting that “a series of ‘unsubstantiated’ or ‘ruled out’ entries for a given child may arouse suspicion of a pattern or practice of emotional and physical harm to a child, warranting further inquiry by the State”), *cert. denied*, 115 S. Ct. 581 (1994). *But see* Besharov, *Overreporting*, *supra* note 42, at 264 (suggesting that, in some cases, a number of unsubstantiated reports indicates that the family is being reported for child abuse inappropriately). *See also supra* note 42 (describing the debate among authorities regarding the meaning of low substantiation rates).

93. *See supra* notes 56-70 and accompanying text; *see also* Finkelhor, *supra* note 42, at 286 n.1 (noting that the terms “unfounded” and “unsubstantiated” are terms of art in the child protective services field that reflect whether statutory requirements have been met; the terms “do not mean ‘false’ or ‘scurrilous,’ as they do in colloquial usage”).

94. *See supra* note 68 and accompanying text (describing statutory definitions of “caretaker”). *See generally* Giovannoni, *supra* note 88 (analyzing substantiated and

may simply mean that the child's physical injuries were insufficient to meet the state's definition of abuse, or that medical evidence of sexual abuse was inconclusive.⁹⁵

The second reason a CPS agency may wish to maintain a central registry is to compile information about the extent and nature of child abuse and neglect within the state.⁹⁶ This information can then be used by the agency in formulating CPS policies, and in making decisions about the level of funding the agency needs and how it should be allocated.⁹⁷

Registries of child abuse and neglect reports typically include, among other things, the name of the child believed to have been abused or neglected, the name(s) of the person(s) suspected of mistreating the child, and the case investigator's determination of whether the report of child abuse was substantiated.⁹⁸ The reports of child maltreatment that are entered into the central registry may be received directly from the individual reporters, or they may be compiled by local CPS agencies and regularly submitted to the central registry.⁹⁹ Some states record *all* reports that are investigated by

unsubstantiated reports).

95. See Besharov, *Overreporting*, *supra* note 42, at 263. Although Professor Besharov argues that low substantiation rates are an indication that child abuse is overreported in the United States, he nonetheless acknowledges that

an unfounded report does not necessarily mean that the child was not actually abused or neglected. Evidence of child maltreatment is hard to obtain and may not be uncovered when agencies lack the time and resources to complete an investigation or when inaccurate information is given to the investigator. Other cases are labeled "unfounded" when no services are available to help the family. And some cases must be closed because the child or family cannot be located. A certain proportion of unfounded reports, therefore, is an inherent—and legitimate—aspect of reporting suspected child maltreatment and is necessary to ensure adequate child protection.

Id. On the other hand, an "unsubstantiated" report could mean that the agency has completely ruled out the possibility of abuse. See *Hodge*, 31 F.3d at 160-61 (describing how a report of child abuse based upon misdiagnosis of a broken arm was classified "unsubstantiated" and "ruled out" after no evidence of abuse was discovered and the cause of the problem was correctly diagnosed as osteomyelitis, an infection).

96. See Giovannoni, *supra* note 88, at 299; see also McCurdy & Daro, *supra* note 40, at 81-82 (using central registry data to estimate the incidence of child maltreatment by state).

97. Cf. McCurdy & Daro, *supra* note 40, at 89-90 (describing the chronic shortage in funding many CPS agencies face, and noting that funding increases rarely keep pace with increases in the rate of maltreatment reports).

98. See, e.g., 23 PA. CONS. STAT. ANN. § 6336 (1991).

99. Some states receive all child maltreatment reports at a central telephone number, and then refer the reports to local agencies for investigation. See, e.g., N.Y. SOC. SERV. LAW § 415 (McKinney 1992); S.C. CODE ANN. § 20-7-640(A) (Law. Co-op. 1984). As a matter of administrative convenience, these states are more likely to record reports directly

CPS agencies on their central registries, whether those reports are subsequently substantiated or not;¹⁰⁰ other states register only substantiated reports.¹⁰¹

In many states, information maintained on the registry is available to other parties, including employers—particularly employers in the child day care business, schools, or health care providers— or agencies that certify foster parents or arrange adoptions.¹⁰² Access

onto the central registry. Other states receive reports through their local child protective services agencies, which make periodic reports of their work to the central agency. *See, e.g.*, MD. CODE ANN., FAM. LAW § 5-714(b) (1991); N.C. GEN. STAT. §§ 7A-543 & 7A-548(a2) (Supp. 1994); VA. CODE ANN. § 63.1-248.6(A) & (E)(6) (Michie Supp. 1994).

100. *See, e.g.*, S.C. CODE ANN. §§ 20-7-650(E) & 20-7-680(B) (Law. Co-op. Supp. 1993); VA. CODE ANN. § 63.1-248.6(E)(7) (Michie Supp. 1994).

101. *See, e.g.*, 23 PA. CONS. STAT. ANN. § 6336(a)(9) (1991).

102. Every state with a central registry allows CPS workers, courts, and law enforcement personnel criminally investigating a particular incident of maltreatment to obtain information from the registry. Fourteen states and the District of Columbia have statutes that allow additional parties to obtain information from the registry. *See* ALA. CODE § 26-14.8 (Supp. 1994); ARK. CODE ANN. § 12-12-506 (Michie Supp. 1993); CAL. PENAL CODE § 11170 (West Supp. 1994); D.C. CODE ANN. § 6-2113 (1989 & Supp. 1993); FLA. STAT. ANN. § 415.51(4)(a) (West 1993 & Supp. 1995); 325 ILL. ANN. STAT. ch. 5, para. 11.1 (Smith-Hurd 1993); IND. CODE ANN. § 31-6-11-12.1(f) (Burns Supp. 1994); IOWA CODE ANN. § 235A.14 (West 1994); MICH. STAT. ANN. § 25.248(7) (Law. Co-op. Supp. 1994); MO. REV. STAT. § 210.145.2 (Supp. 1992); N.J. STAT. ANN. § 9:6-8.10a (West Supp. 1994); N.Y. SOC. SERV. LAW §§ 422.4 & 424-a (McKinney Supp. 1995); TENN. CODE ANN. § 37-1-408 (Supp. 1994); VA. CODE ANN. §§ 63.1-248.7.2 & 63.1-248.8 (Michie Supp. 1994); WYO. STAT. § 14-3-214 (1994).

Nine states permit the state CPS agency to decide whether other parties will be allowed access to the registry. *See* DEL. CODE ANN. tit. 16, § 905(c) & (d) (Supp. 1994); HAW. REV. STAT. § 350-1.4 (Supp. 1992); LA. REV. STAT. ANN. § 14:403(H) (West 1986); MASS. ANN. LAWS ch. 119, § 51F (Law. Co-op. 1994); N.H. STAT. ANN. § 169-C:35 (Supp. 1993); N.C. GEN. STAT. § 7A-552 (Supp. 1994); OHIO REV. CODE ANN. § 2151.42.1(F)(1) (Anderson 1994); S.D. CODIFIED LAWS ANN. § 26-8A-12 (1992); TEX. FAM. CODE ANN. § 34.06 (West 1986).

Sixteen states completely deny access to the registry by other parties. *See* ALASKA STAT. § 47.17.040(b) (1990); ARIZ. REV. STAT. ANN. § 8-546.07 (1994); COLO. REV. STAT. § 19-3-313 (Supp. 1994); GA. CODE ANN. § 49-5-185 (1994); IDAHO CODE § 16-1623(f) (Supp. 1994); KAN. STAT. ANN. § 38-1507 (1993); MD. CODE ANN., FAM. LAW § 5-714(c) (1991); MISS. CODE ANN. § 43-21-257(3) (Supp. 1994); NEB. REV. STAT. §§ 28-719, 28-722, 28-726, 28-727 (1989); OKLA. STAT. ANN. tit. 21, § 846(D) (West Supp. 1995); OR. REV. STAT. § 418.765 (1991); 23 PA. CONS. STAT. ANN. §§ 6334, 6335, 6340 (1991); R.I. GEN. LAWS § 42-72-8 (Supp. 1994); S.C. CODE ANN. § 20-7-690 (Law. Co-op. Supp. 1993); UTAH CODE ANN. § 62A-4a-412 (Supp. 1994); VT. STAT. ANN. tit. 33, § 4916(d) (1991 & Supp. 1993).

The statutes of Nevada and North Dakota are ambiguous. Nevada forbids the release of information "unless the right of the applicant to the information is confirmed and the released information discloses the nature of the disposition of the case or its current status." NEV. REV. STAT. § 432.120 (1985). North Dakota's statute allows the release of information to "public officials and their authorized agents who require such information in connection with the discharge of their official duties." N.D. CENT. CODE § 50-25.1-11

to the registry may be *permissive*—that is, the party may check the registry if it so chooses¹⁰³—or *mandatory*—that is, the party must check the registry before taking some action, such as extending an employment offer or approving an adoption petition.¹⁰⁴

Because significant interests may be adversely affected by inclusion on a child maltreatment registry, an individual may seek to have his name expunged from the registry, particularly when the maltreatment report is unsubstantiated.¹⁰⁵ Many central registries are subject to statutory procedures for expunging reports.¹⁰⁶ In some states, expunction can occur only after the child maltreatment investigation has been completed, and the report remains on the registry during the interim.¹⁰⁷ The initial request for expunction is made to the agency that maintains the registry, and in the event that it is denied, procedures for administrative hearings to review the denial are available.¹⁰⁸ The grounds for expunction vary, but typically the party seeking expunction must show some error in decision-making that undermines the CPS agency's authority to maintain the record in question.¹⁰⁹ After exhausting the ad-

(1989). Either of these statutes could be construed to permit the release of information to public officials who have responsibilities such as approving licenses for day care centers or adoptions.

103. See, e.g., N.Y. SOC. SERV. LAW § 424-a.1(d-1) (McKinney Supp. 1995) (permitting law enforcement agencies to check the central registry before approving an application to designate a residence a "safe home" for children).

104. See, e.g., N.Y. SOC. SERV. LAW § 424-a.1(a) (McKinney Supp. 1995) (stating that licensing agencies for adoptive homes, foster homes, and day care homes shall consult the central registry); VA. CODE ANN. § 63.1-248.7:2(A) (Michie Supp. 1994) (requiring certain employers to check the registry).

105. Not all registries include unsubstantiated reports, but many do. See *supra* notes 100-01 and accompanying text (describing the types of reports included on different states' registries).

106. See, e.g., N.Y. SOC. SERV. LAW § 422.8 (McKinney 1992); 23 PA. CONS. STAT. ANN. § 6341 (1991); S.C. CODE ANN. §§ 20-7-680(E), 20-7-655(G) (Law. Co-op. Supp. 1993).

107. See, e.g., N.Y. SOC. SERV. LAW § 422.8(a)(i) (McKinney 1992); S.C. CODE ANN. §§ 20-7-650(E) & 20-7-680(B) (Law. Co-op. Supp. 1993).

108. See, e.g., MD. CODE ANN., FAM. LAW § 5-715(c) (Supp. 1994); N.Y. SOC. SERV. LAW § 422.8 (McKinney 1992); 23 PA. CONS. STAT. ANN. § 6341 (1991); S.C. CODE ANN. § 20-7-655(G) (Law. Co-op. Supp. 1993).

109. See, e.g., N.Y. SOC. SERV. LAW § 422.8(a)(i) (McKinney 1992) (requiring the commissioner "to determine whether the record . . . should be . . . expunged on the grounds that it is inaccurate or being maintained in a manner inconsistent with this title"); 23 PA. CONS. STAT. ANN. § 6341(c) (1991) (granting an individual whose expunction request has been refused the right to a hearing to determine whether the report should be expunged because "it is inaccurate or . . . is being maintained in a manner inconsistent with this chapter").

ministrative procedures, the individual may seek further review in the courts.¹¹⁰

When a person listed on a central registry contests the listing in court, however, he is not likely to be seeking mere judicial review of an administrative agency's decision. Usually he is seeking a judicial declaration that the listing of his name on the central registry deprived him of a constitutionally protected interest without due process of law. The next part of this Comment describes how procedural due process claims may be brought before the courts of the United States, and summarizes the holdings of several recent due process cases involving child maltreatment central registries.

III. PROCEDURAL DUE PROCESS: CONSTITUTIONAL REQUIREMENTS

The Fourteenth Amendment's Due Process Clause guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law."¹¹¹ The United States Supreme Court has interpreted this clause to mean that states must provide constitutionally sufficient procedures—"procedural due process"—before taking an action that has the effect of terminating an interest in life, liberty, or property that is subject to constitutional protection.¹¹² The Court has established a two-step method for analyzing procedural due process issues: first, a court must determine whether the state has intruded upon a constitutionally protected interest; second, the court must determine whether the procedures attendant upon the intrusion were constitutionally sufficient.¹¹³ This part of the Comment identifies some of the liberty and property interests that have been afforded constitutional protection by the courts of the United States,¹¹⁴ and describes how courts balance individual and state interests to determine whether sufficient procedural protections have

110. See, e.g., S.C. CODE ANN. § 20-7-655(F) (Law. Co-op. Supp. 1993).

111. U.S. CONST. amend. XIV, § 1. The Due Process Clause of the Fifth Amendment restrains the federal government in a like manner. U.S. CONST. amend. V. See generally 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.1 (1986) (describing the requirements imposed on governments by the Fifth and Fourteenth Amendments).

112. Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972).

113. *Id.* at 570-71; see also Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (establishing a three-part balancing test for determining whether procedures are constitutionally sufficient); *infra* note 249 and accompanying text (describing the *Mathews* test).

114. See *infra* notes 116-238 and accompanying text.

been provided when state action impinges upon one of these interests.¹¹⁵

A. Liberty and Property Interests Protected by the Due Process Clause

For over a century, the Supreme Court has sought to define the boundaries of the "liberty" and "property" protected by the Due Process Clause.¹¹⁶ The early understanding of the term "liberty" was simply "freedom from personal restraint."¹¹⁷ In the late nineteenth century, however, the Supreme Court began to expand the scope of personal interests that may properly be considered constitutionally protected "liberty interests." In 1897, the Supreme Court's decision in *Allgeyer v. Louisiana*¹¹⁸ expressly rejected the notion that the Constitution's use of the term "liberty" meant "only the right of the citizen to be free from the mere physical restraint of his person."¹¹⁹ By 1923, the Court's definition of the term "liberty" had broadened to include

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹²⁰

The scope of constitutionally protected interests in property has likewise been expanded by the Court over the years. Today, the understanding of constitutionally protected property interests goes well beyond the traditional understanding of property as one's interest in retaining those things of value that one owns.¹²¹ An individual may have property interests in government benefits,¹²² employ-

115. See *infra* notes 239-313 and accompanying text.

116. See Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 405 (1977).

117. *Id.* at 411; see also 1 WILLIAM BLACKSTONE, COMMENTARIES *134 (defining liberty as "the power of loco-motion . . . without imprisonment or restraint, unless by due course of law").

118. 165 U.S. 578 (1897).

119. *Id.* at 589.

120. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

121. See BLACK'S LAW DICTIONARY 1216 (6th ed. 1990).

122. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 & n.8 (1970) (finding a property interest in welfare benefits).

ment,¹²³ or indeed any right, such as a contract right, that is protected by statutory or common law.¹²⁴

The range of liberty and property interests protected by the Court's due process jurisprudence was at its broadest in the 1970s;¹²⁵ in the years since, the range of personal interests deemed sufficient to require constitutional protection has narrowed.¹²⁶ Nevertheless, many interests that are potentially implicated by the inclusion of an individual's name on a child maltreatment central registry still may be found to be protectible liberty or property interests.¹²⁷ These include liberty interests in family privacy and family integrity,¹²⁸ liberty and property interests in employment,¹²⁹ and in some cases, a liberty interest in reputation and freedom from stigma.¹³⁰

123. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (finding a property interest in government employment that was secured by an implied contract).

124. See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (stating that constitutionally protected property interests "are created and their dimensions are defined by existing rules or understandings" that derive not from the Constitution but from "an independent source such as state law").

125. See *id.* at 570. The *Roth* court stated that, while "there can be no doubt that the meaning of 'liberty' must be broad indeed," *id.* at 572, the reach of that concept is not "infinite," *id.* at 570. See generally *Monaghan*, *supra* note 116, at 420-34 (describing how the Court began to narrow the scope of constitutionally protected liberty interests in 1972).

126. For a thorough treatment of the history of the Court's interpretation of "liberty" and "property" through the 1970s, see *Monaghan*, *supra* note 116, at 411-43.

127. This Comment focuses on the liberty and property interests of individuals whose names appear on child maltreatment central registries as suspected abusers, but the author does not intend to overlook the fact that children also have an important interest that may be implicated by a state's policies regarding its central registry: a liberty interest in freedom from harm. See *Bohn v. County of Dakota*, 772 F.2d 1433, 1438 (8th Cir. 1985) (holding that parents' interests in familial autonomy and privacy are "counterbalanced by the children's interest in continued freedom from abuse or neglect"), *cert. denied*, 475 U.S. 1014 (1986); *cf.* *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (holding that a child's liberty interest in freedom from harm was at stake "at least where school authorities, acting under color of state law, deliberately decided to punish a child for misconduct" by paddling him). Often, however, the interests of children are assumed to be coincident with the interests of their parents. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (stating that "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship").

128. See *infra* notes 131-82 and accompanying text.

129. See *infra* notes 183-218 and accompanying text.

130. See *infra* notes 219-38 and accompanying text.

1. Liberty Interest in the Family and the Parent-Child Relationship¹³¹

Early in the twentieth century, the United States Supreme Court recognized that parents have a constitutionally protected liberty interest in their relationships with their children. In 1923, the Court stated in *Meyer v. Nebraska*¹³² that the Fourteenth Amendment's Due Process Clause protects "the right of the individual . . . to marry, establish a home and bring up children."¹³³ *Meyer* involved a Nebraska statute that prohibited teaching grade school children in any language other than English.¹³⁴ In holding the statute unconstitutional, the Court stated that parents' interest in "control[ling] the education of their own" outweighed the state's interest in socializing children to be American citizens by requiring that instruction be only in English.¹³⁵ Two years after *Meyer*, in *Pierce v. Society of Sisters*,¹³⁶ the Court confirmed that the scope of parents' rights protected by the Due Process Clause is large, and includes the general right to control their children's upbringing.¹³⁷ The *Pierce* Court declared that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."¹³⁸

131. This section gives particular attention to the parent-child relationship, as most cases in the child maltreatment area that raise a claim of a liberty interest in the family involve that relationship. Occasionally a claim will involve a foster family or prospective adoptive family. Claims of liberty interests in those relationships are discussed briefly. See *infra* notes 173-82 and accompanying text.

Courts sometimes do recognize a liberty interest in relationships among extended family members. In *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944), the Supreme Court acknowledged an interest similar to that of "parental right" in the relationship between a child and the aunt who was her guardian. A plurality of the Court held that the right of extended family members to live together was a protected liberty interest in *Moore v. City of East Cleveland*, 431 U.S. 494, 495-96 (1977) (plurality opinion). Should a claim relating to extended family members arise in a case involving a child maltreatment central registry, however, it seems unlikely that the Court would accord more protection to extended family relationships than is typically accorded the parent-child relationship.

132. 262 U.S. 390 (1923).

133. *Id.* at 399.

134. *Id.* at 397.

135. *Id.* at 401.

136. 268 U.S. 510 (1925).

137. *Id.* at 534-35.

138. *Id.* at 535. Like *Meyer*, *Pierce* was a case concerning the education of children. At issue in *Pierce* was an Oregon statute that ordered parents to send their children to public schools. *Id.* at 530-31. The plaintiff in *Pierce*, the Society of Sisters, was a

Courts today readily accept that parents have a liberty interest in the parent-child relationship that is accorded very strong constitutional protection, and that encompasses the parents' right to custody of their children¹³⁹ and control of their upbringing,¹⁴⁰ the right to family integrity,¹⁴¹ and the right to familial privacy.¹⁴²

This fundamental interest in the parent-child relationship is so strong that it continues to exist, and presumptively prevails over state interests, even when there is reason to suspect that a child is being maltreated.¹⁴³ However, the liberty interest in the parent-child relationship is not inviolable,¹⁴⁴ as the child maltreatment cases illustrate. When parents face allegations of child maltreatment, their fundamental liberty interest "does not evaporate,"¹⁴⁵ but the

corporation that operated private schools—no parents were joined in the suit. *Id.* at 531-32. Nonetheless, the Court apparently decided the issue upon the ground of parental rights: "[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.

139. See *Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) ("The bonds between parent and child are, in a word, sacrosanct, and the relationship between parent and child inviolable except for the most compelling reasons."); cf. *Stanley v. Illinois*, 405 U.S. 645, 653 (1972) (holding unconstitutional an Illinois statute that presumed an unwed father was unfit to have custody of his children).

140. *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 390, 399.

141. See *Hodge v. Jones*, 31 F.3d 157, 163 (4th Cir.) (stating that "the sanctity of the family unit is a fundamental precept firmly ensconced in the Constitution and shielded by the Due Process Clause of the Fourteenth Amendment"), *cert. denied*, 115 S. Ct. 581 (1994).

142. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (stating that there is a "private realm of family life which the state cannot enter"); see also *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) ("[T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.' ") (citation omitted).

143. Courts have therefore found that liberty interests in family privacy and autonomy are implicated when allegations of abuse or neglect result in state intervention into a family. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (holding that a liberty interest in the parent-child relationship is implicated when the state seeks to terminate parental rights on the ground of child neglect); *Bohn v. County of Dakota*, 772 F.2d 1433, 1435 (8th Cir. 1985) (stating that the "privacy and autonomy of familial relationships involved" when child abuse is alleged and child protective services are provided "are unarguably among the protectible interests which due process protects"), *cert. denied*, 475 U.S. 1014 (1986).

144. See *Prince*, 321 U.S. at 166 (stating that "the family itself is not beyond regulation in the public interest"); see also *Hodge*, 31 F.3d at 163-64 (stating that "[t]he maxim of familial privacy is neither absolute nor unqualified, and may be outweighed by a legitimate governmental interest"). In *Prince*, the Court found that the state's interest in protecting children from harm is strong enough to warrant intrusion upon the family's right to control the child's upbringing, even when that intrusion implicates the free exercise of religion. *Prince*, 321 U.S. at 166.

145. *Santosky*, 455 U.S. at 753.

parents' interests may properly become the subject of state intrusion.¹⁴⁶ Thus, courts have held that the state may intrude upon this interest to investigate allegations of child abuse and neglect;¹⁴⁷ to provide child protective services where needed;¹⁴⁸ and even to terminate parental rights upon the grounds of child abuse or neglect, provided that the procedures accompanying these actions are constitutionally adequate.¹⁴⁹

It would seem to follow from the decisions recounted above that a liberty interest in the parent-child relationship would at least be implicated when a parent is listed on a child maltreatment central registry, even if the state's interest in protecting children ultimately were seen as stronger. However, the only federal court of appeals that has addressed this issue¹⁵⁰ concluded that the state's maintenance of a central registry does not affect the parent-child relationship sufficiently to warrant the conclusion that a liberty interest is implicated. In *Hodge v. Jones*,¹⁵¹ the Court of Appeals for the Fourth Circuit considered whether the listing of *innocent* parents on the child maltreatment central registry implicated a protected liberty interest in the family. The Hodges became involved with Maryland's child protective services system in January 1989, when they took their three-month-old son Joseph to the hospital because of an unusual swelling in his right arm. The examining physician diagnosed a

146. See *Watterson v. Page*, 987 F.2d 1, 8 (1st Cir. 1993) (stating that "the right to family integrity clearly does not include a constitutional right to be free from child abuse investigations" and citing *Stanley v. Illinois*, 405 U.S. 645, 649 (1972), which noted that the state has a "right—indeed, duty—to protect minor children through a judicial determination of their interests in a neglect proceeding").

147. *Id.*

148. *Bohn v. County of Dakota*, 772 F.2d 1433, 1436-37 (8th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

149. *Santosky*, 455 U.S. at 753-54.

150. The Fourth Circuit Court of Appeals addressed the issue squarely in *Hodge v. Jones*, 31 F.3d 157, 163-64 (4th Cir.), *cert. denied*, 115 S. Ct. 581 (1994). The Sixth Circuit Court of Appeals has also considered a case involving a parent's claim that his Fourteenth Amendment due process rights were violated by the maintenance of his name on a central registry. *Achterhof v. Selvaggio*, 886 F.2d 826, 827-28 (6th Cir. 1989). In that case, the trial court had dismissed the suit after determining that CPS workers were entitled to absolute immunity for the "prosecutorial" action of listing individuals on the registry. *Id.* at 828. The Sixth Circuit reversed the dismissal on the ground that absolute immunity was inappropriate. *Id.* at 831. The court thus did not reach the merits of Achterhof's Fourteenth Amendment claim.

151. 31 F.3d 157 (4th Cir.), *cert. denied*, 115 S. Ct. 581 (1994). Retired Supreme Court Justice Lewis Powell sat by special designation in *Hodge*, and concurred only in the judgment. *Id.* at 160.

fractured ulna.¹⁵² Because the Hodges could not offer an "adequate historical explanation" for how the bone was broken,¹⁵³ the physician made a report of suspected child abuse to the Carroll County, Maryland, department of social services (CCDSS), which initiated a child maltreatment investigation the next day.¹⁵⁴ A CCDSS caseworker found no evidence of abuse, and filed a report with the county that classified the case as both "unsubstantiated" and "ruled out."¹⁵⁵

Meanwhile, the Hodges were unsatisfied with the diagnosis Joseph had received, and took him to two medical specialists.¹⁵⁶ The specialists diagnosed osteomyelitis, a bacterial bone infection.¹⁵⁷ Mrs. Hodge telephoned CCDSS and advised CPS workers that the problem with Joseph's arm had been misdiagnosed.¹⁵⁸ Several days later, Mr. Hodge wrote a letter to CCDSS that reiterated the information about the misdiagnosis and requested copies of the full report of the investigation of the Hodges.¹⁵⁹ The assistant director of CCDSS wrote back to the Hodges, advising them that the report of abuse had been classified "ruled out" and "unsubstantiated," but because of a statutory prohibition against the release of CPS records, the county could not provide copies of the full investigation report to the Hodges.¹⁶⁰

The Hodges' names subsequently were entered into the Maryland Department of Human Resources' Automated Master File (AMF), a computerized database consisting of records of "every Maryland citizen who has received any services, ranging from food stamps to

152. *Id.* at 160.

153. *Id.* (internal quotation marks omitted).

154. *Id.*

155. *Id.* at 160-61. Maryland statutes defined "ruled out" as "a finding that abuse, neglect, or sexual abuse did not occur." *Id.* at 161 n.1 (quoting MD. CODE ANN., FAM. LAW § 5-701(s) (Supp. 1993)). "Unsubstantiated" is defined as a report in which "there is an insufficient amount of evidence to support a finding of indicated or ruled out [abuse or neglect]." *Id.* (quoting MD. CODE ANN., FAM. LAW § 5-701(u) (Supp. 1993)). Shortly before the Hodge investigation, the Maryland Department of Human Resources, which administers the CPS program, had adopted a new two-tiered classification system in which reports are either "indicated" or "unsubstantiated." The new system replaced a four-tiered classification in which reports were "confirmed," "indicated," "uncertain," or "ruled out." However, the change had not yet taken effect when the Hodge investigation took place. *Id.* The worker on the Hodge case apparently used both classifications, "ruled out" and "unsubstantiated," to comply with both systems. *Id.*

156. *Id.* at 161.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (citing MD. ANN. CODE art. 88A, § 5 (1991)).

child protective services," from a local department of social services.¹⁶¹ For the next fifteen months, the Hodges continued to request copies of the full investigation report, and they embarked on a campaign to have all records pertaining to their investigation destroyed and the report on the AMF expunged.¹⁶² CCDSS refused to expunge the report, citing a Maryland statute that required the department to maintain unsubstantiated reports for five years.¹⁶³ Unable to obtain either disclosure of the child protective services agency's records or expunction of the report, the Hodges brought suit in federal court under 42 U.S.C. § 1983.¹⁶⁴ They alleged that CCDSS had violated their Fourteenth Amendment rights to due process; specifically, they claimed that "maintenance of a record of 'unsubstantiated' and 'ruled out' child abuse violated their liberty interest in familial privacy, and that failure to provide notice and a hearing before maintaining that record violated their procedural due process rights."¹⁶⁵ The social services administrators and CPS workers named in the suit offered the defense of qualified immunity.¹⁶⁶ The federal district court rejected this defense and granted interlocutory summary judgment in favor of the Hodges on the issue of liability. The court found that the defendants had

161. *Id.*

162. *Id.*

163. *Id.* (citing MD. CODE ANN., FAM. LAW § 5-707(b) (1984 & Supp. 1987)). As of 1991, Maryland statutes permitted the expunction of "ruled out" reports within 120 days. *Id.* at 161 n.3; see MD. CODE ANN., FAM. LAW § 5-707(b) (1991).

164. *Hodge*, 31 F.3d at 162. Section 1983 creates a federal cause of action when state action deprives an individual of "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (1988).

165. *Hodge*, 31 F.3d at 162.

166. *Id.* The defense of qualified immunity is

an accommodation by the courts to the conflicting concerns of, on one hand, government officials seeking freedom from personal monetary liability and harassing litigation and, on the other hand, injured persons seeking redress for abuse of official power. . . . As such, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action . . . assessed in light of the legal rules that were clearly established at the time it was taken.

Id. (internal quotation marks and citations omitted). Employees of child protective services may assert qualified immunity "in appropriate situations," including the situation of listing an individual's name on a child maltreatment central registry. *Id.* Successful assertion of qualified immunity in this situation would have entitled the defendants to dismissal of the suit. *Id.* at 169 (Powell, J., concurring in judgment).

violated a protected interest in familial privacy that had been clearly recognized by the courts.¹⁶⁷

The Fourth Circuit Court of Appeals reversed, finding first that familial privacy was not a clearly established right at the time of the defendants' actions,¹⁶⁸ and second, that even if such a right were clearly established, the inclusion of the Hodges on the AMF amounted to a "pale shadow briefly cast over" the family¹⁶⁹ and constituted "[s]tate action that affects the parental relationship only incidentally . . . [and] is not sufficient to establish a violation of a [sic] identified liberty interest."¹⁷⁰ According to the court, "[t]he Hodges' utter failure to demonstrate that Defendants' actions were designed to have, have had, or even will have, a significant impact on the parent-child relationship or on their family's ability to function precludes the establishment of a familial privacy infringement of constitutional magnitude."¹⁷¹ Finally, the *Hodge* court stated decisively that it would not extend "penumbral privacy rights" to define a new right to freedom from confidentially maintained child abuse investigation reports.¹⁷²

The liberty interest in the family that the Hodges sought to invoke depended upon the existence of a parent-child relationship. In a few cases, however, litigants have sought to establish that liberty interests in other family relationships are implicated when an individual is listed on a child maltreatment central registry. For

167. *Id.* at 162. The district court also found that the Automated Master File constituted a "central registry" within the meaning of MD. CODE ANN., FAM. LAW § 5-715 (Supp. 1993), and that individuals listed therein were entitled to the procedural safeguards provided in that statute. *Hodge*, 31 F.3d at 161 n.4. Because the defendants failed to provide the procedural safeguards of § 5-715, the finding of liability was premised upon that ground as well. *Id.* at 162.

168. *Hodge*, 31 F.3d at 167. "[G]overnment officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

169. *Hodge*, 31 F.3d at 164.

170. *Id.* (quoting *Pittsley v. Warish*, 927 F.2d 3, 8 (1st Cir.), *cert. denied*, 112 S. Ct. 226 (1991)) (alteration in original). According to Justice Powell, if there is a liberty interest in familial privacy, it is not so clearly established that the defendants would have known that their conduct "violate[d] the Hodges' clearly established federal statutory or constitutional rights of which a reasonable person would have known." *Id.* at 169 (Powell, J., concurring in judgment). Thus, defendants were entitled to qualified immunity from civil damages, which was the issue on appeal. *Id.* (Powell, J., concurring in judgment). According to Justice Powell, there was therefore no need to reach the constitutional issues, and he "prefer[red] not to reach them." *Id.* (Powell, J., concurring in judgment).

171. *Id.* at 164.

172. *Id.* at 167.

instance, in *Wildauer v. Frederick County*,¹⁷³ a foster mother brought suit against a Virginia county department of social services after a child neglect investigation resulted in the removal of foster children from her home and the placement of her name on the state's child maltreatment central registry.¹⁷⁴ Among other things, Wildauer alleged that the county's actions deprived her of constitutionally protected privacy interests.¹⁷⁵ The Court of Appeals for the Fourth Circuit made short work of this claim, noting that Wildauer, as a foster parent, did not have actual legal custody of the children,¹⁷⁶ nor did she have a legal relationship with them that was entitled to the constitutional protection accorded the parent-child relationship.¹⁷⁷

In a recent Pennsylvania case, a litigant asked the state supreme court to hold that a protectible liberty interest in family relationships was implicated when the placement of his name on the state child maltreatment central registry could result in his being denied the opportunity to adopt children in the future.¹⁷⁸ R.'s name was listed on the central registry after his daughter accused him of sexual abuse, and a child maltreatment investigation determined that the report was "indicated."¹⁷⁹ Pennsylvania's central registry statute required adoption agencies to ask the Department of Public Welfare whether a prospective adoptive parent had, during the previous year, been the subject of an "indicated" report of child abuse or neglect, before the agency approved an adoption petition.¹⁸⁰ Thus, R. argued, the

173. 993 F.2d 369 (4th Cir. 1993) (per curiam).

174. *Id.* at 371.

175. *Id.* at 373.

176. *Id.* When children are placed in a foster care arrangement, their parents retain parental rights, while the CPS agency typically acquires legal custody. See *Smith v. Organization of Foster Families*, 431 U.S. 816, 826-28 (1977). The foster parents' right to the child is in the form of a contract right—that is, they have contracted with the CPS agency to provide "substitute family care for a planned period for a child when his own family cannot care for him." *Id.* at 823 (internal quotation marks and citation omitted).

177. *Wildauer*, 993 F.2d at 373. It is generally held that foster parents do not have a protectible liberty interest in their relationships with their foster children. See, e.g., *Kyees v. County Dep't of Pub. Welfare*, 600 F.2d 693, 694 (7th Cir. 1979) (per curiam); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1206 (5th Cir. 1977) (en banc), cert. denied, 437 U.S. 910 (1978); see also *Smith*, 431 U.S. at 846-47 (declining to reach the question of whether there is such a liberty interest, but noting that "[w]hatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated" when natural parents' liberty interests in the same children are at stake).

178. *R. v. Commonwealth*, Dep't of Pub. Welfare, 636 A.2d 142, 148 (Pa. 1994).

179. *Id.* at 144.

180. *Id.* at 148 & n.8; see 23 PA. CONS. STAT. ANN. § 6344(d) (1991).

state's maintenance of his name on the central registry deprived him of his constitutionally protected right to adopt a child.¹⁸¹ The court rejected this argument, stating that

R. does not explain, nor do we perceive how a statute that operates in this way implicates an interest recognized under Pennsylvania law. . . . No liberty interest is implicated because the legislature has not foreclosed the possibility that a person named in an indicated report can seek to adopt a child. No property interest is implicated because R. has no legitimate claim of entitlement to adopt a child; it is no more than an abstract desire on his part.¹⁸²

2. Liberty and Property Interests in Employment

When the government takes an action that may deprive a citizen of employment, a protectible liberty or property interest may be implicated. Most of the cases regarding protectible interests in employment involve government employees, because the most straightforward way the government may become involved in depriving an individual of employment is by refusing to hire him or by discharging him from a government job.¹⁸³ Government actions may also affect an individual's private employment opportunities, and this implicates the Due Process Clause as well.¹⁸⁴

A protectible interest in employment may be in the nature of either a liberty interest or a property interest. A liberty interest in government employment is implicated if a state denies employment to a person for improper reasons,¹⁸⁵ or dismisses an employee based

181. *R.*, 636 A.2d at 148.

182. *Id.* (citations omitted). There was no indication in the facts of the case that R. was actually seeking to adopt a child. *See id.* at 144, 148.

183. *See, e.g.*, *Board of Regents v. Roth*, 408 U.S. 564, 566-67 (1972) (addressing refusal by a public university to rehire a non-tenured faculty member); *Perry v. Sindermann*, 408 U.S. 593, 594-95 (1972) (same).

184. *See, e.g.*, *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238 (1957) (stating that "[a] state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the . . . Fourteenth Amendment"); *see also* Michael R. Phillips, Note, *The Constitutionality of Employer-Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting*, 92 MICH. L. REV. 139, 150-64 (1993) (describing historic instances of governmental "blacklisting" and their implications for private employment).

185. *Roth*, 408 U.S. at 573. The *Roth* court concluded, however, that no liberty interest was implicated in that case. *Id.* *Roth* was an assistant professor at Wisconsin State University who was not rehired after he completed his one-year contract of employment. *Id.* at 566. *Roth* alleged that the university's refusal to rehire him was intended to punish him for making critical comments about the university, and thus was an improper infringement on his right to free speech. *Id.* at 573-75. The Court apparently lent no

on charges imposing “on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities.”¹⁸⁶ The Supreme Court has also held that a liberty interest in employment prohibits a state, “in regulating eligibility for a type of professional employment, [from] foreclos[ing] a range of opportunities ‘in a manner . . . that contravene[s] . . . Due Process.’ ”¹⁸⁷

Constitutionally protected property interests “are created and their dimensions are defined by existing rules or understandings” that derive, not from the Constitution, but from “an independent source such as state law”;¹⁸⁸ thus, an individual may have a property interest in employment if he has a “legitimate claim of entitlement” to the employment that exceeds “an abstract need or desire for it.”¹⁸⁹ Therefore, if a state law or state-granted contract establishes the individual’s right to employment, a property interest in that employment is created.¹⁹⁰

If a state’s child maltreatment central registry is accessible by employers, it may implicate liberty or property interests in either public or private employment. An employer-accessible registry may affect public employment opportunities because the government itself may be the employer for certain positions that require a registry

credence to this argument. *Id.*

186. *Id.* at 573.

187. *Id.* at 574 (quoting *Schwartz*, 353 U.S. at 238).

188. *Id.* at 577. See generally 2 ROTUNDA ET AL., *supra* note 111, § 17.5, at 235 (describing the significance of *Roth* in shaping the Court’s approach to the identification of constitutionally protected property interests).

189. *Roth*, 408 U.S. at 577. The Court found a “legitimate claim of entitlement” in *Perry v. Sindermann*, 408 U.S. 593, 602 (1972), a case considered concurrently with *Roth*. Like *Roth*, *Sindermann* was a non-tenured faculty member in a public university. *Id.* at 594. *Sindermann* “became involved in public disagreements with the policies of the college’s Board of Regents,” and subsequently was not rehired by the university. *Id.* at 594-95. *Sindermann*’s situation differed from *Roth*’s in that his job was subject to a provision in the university’s employment handbook that stated that a faculty member should “feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers.” *Id.* at 600 (internal quotation marks omitted). The Court distinguished *Roth* on this basis and stated that “[a] person’s interest in a benefit is a ‘property’ interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.” *Id.* at 601 (citing *Roth*, 408 U.S. at 577). Finding that *Sindermann* “might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure,” *id.* at 602, the Court held that *Sindermann* was entitled to procedural due process protections, *id.* at 603.

190. See *Perry*, 408 U.S. at 601.

check, such as public school teaching positions.¹⁹¹ It may affect private employment if private employers are either permitted or required to check the registry before hiring for certain positions.¹⁹²

Several courts have considered allegations that an interest in employment was implicated by the placement of a person's name on an employer-accessible child maltreatment central registry. The outcomes in these cases have varied depending upon whether the employment affected was current or prospective. In the cases where only prospective employment was affected, the outcomes have depended upon whether the individual's claim that listing on the registry impaired her employment prospects appeared credible to the court.

In *Angrisani v. City of New York*,¹⁹³ a federal district court determined that a protectible liberty interest was implicated when an individual's existing employment was terminated because he was listed on the state's child maltreatment central registry. Angrisani had been employed for seven years as the supervisor of a group home for troubled boys, when a young resident of the home accused Angrisani of striking him in the face.¹⁹⁴ Angrisani denied this allegation, contending that the report was false and made solely to retaliate against Angrisani for recommending that the youth be "referred out" of the group home.¹⁹⁵ The local child protective services agency determined that the report was "indicated," however, and listed Angrisani on the state central registry.¹⁹⁶ Angrisani subsequently succeeded in getting his record expunged from the registry, after his accuser recanted and the New York Social Services Commission determined that there was no credible evidence to sustain the finding that the report was "indicated."¹⁹⁷ However, the Commission did not reach this decision until May 1985—almost a year after the initial allegations of abuse were made.¹⁹⁸ By that time, Angrisani had lost his job, and he alleged that he was terminated because his name appeared on the central registry.¹⁹⁹ He brought suit against several parties, including the state of New York, claiming that he had been

191. See, e.g., FLA. STAT. ANN. § 415.51(2)(k) (1993 & Supp. 1995).

192. See, e.g., N.Y. SOC. SERV. LAW § 422.4 (McKinney Supp. 1995).

193. 639 F. Supp. 1326 (E.D.N.Y. 1986).

194. *Id.* at 1328-29.

195. *Id.*

196. *Id.* at 1330.

197. *Id.*

198. *Id.*

199. *Id.* at 1334.

deprived of a constitutionally protected interest in employment without due process of law.²⁰⁰

The district court sustained Angrisani's cause of action against the defendants' motion to dismiss.²⁰¹ The court held that no *property* interest in employment was implicated because Angrisani was an employee at will, and thus had no "legitimate claim of entitlement" to his job.²⁰² The court did find, however, that a *liberty* interest in employment was implicated, because the reason for Angrisani's termination had been publicized to other employers.²⁰³

In 1994, the Court of Appeals for the Second Circuit determined that a liberty interest in prospective employment could be implicated by the placement of an individual's name on New York's child maltreatment central registry. In *Valmonte v. Bane*,²⁰⁴ the subject of a central registry report had worked with children in the past, and claimed that she would return to this work were it not for her inclusion on the registry.²⁰⁵ Valmonte was reported for child abuse after she slapped her eleven-year-old daughter in the face as a punishment for stealing.²⁰⁶ The report was recorded on New York's child maltreatment central registry,²⁰⁷ and an investigation revealed that the allegations were true—Valmonte had indeed slapped her daughter.²⁰⁸ The CPS agency determined that this was "excessive corporal punishment" and classified the child abuse report as "indicated."²⁰⁹ Valmonte asked the agency to expunge her name from the central registry.²¹⁰ Her initial request for expunction was

200. *Id.* at 1332.

201. *Id.* at 1331.

202. *Id.* at 1332-33 (citing *Arnett v. Kennedy*, 416 U.S. 134, 151-52 (1974)).

203. *Id.* at 1333.

204. 18 F.3d 992 (2d Cir. 1994).

205. *Id.* at 999.

206. *Id.* at 997. The report was made by employees at the daughter's school. *Id.*

207. *Id.* New York's statute requires that all reports of child abuse or neglect be listed on the central registry immediately upon their receipt, provided that "the allegations, if true, would be legally sufficient to constitute child abuse or neglect." *Id.* at 995; see N.Y. SOC. SERV. LAW § 422(2)(a) (McKinney 1992). The reports are later expunged if they are determined to be unfounded. *Valmonte*, 18 F.3d at 995; see N.Y. SOC. SERV. LAW § 422(5) (McKinney Supp. 1995).

208. *Valmonte*, 18 F.3d at 997. In her complaint, Valmonte stated that she slapped her daughter because "other forms of discipline had not been successful." *Id.*

209. *Id.* New York labels a report "indicated" upon the determination that there is "some credible evidence" in support of the child maltreatment report. *Id.* at 995 (emphasis omitted). Subsequent proceedings in New York Family Court seeking to order the Valmonte family to cooperate in a child protection plan were dismissed "on the condition that the Valmonte family receive counselling." *Id.* at 997.

210. *Id.*

denied, and she was again denied expunction after an administrative hearing.²¹¹

Valmonte brought an action in federal district court under 42 U.S.C. § 1983, challenging the constitutionality of the central registry statutory scheme.²¹² She claimed that she “wish[ed] to obtain jobs in child care, education, and other fields involving children,” but that the listing of her name on the registry prevented her from doing so.²¹³ The CPS agency moved to dismiss the lawsuit.²¹⁴ The district court initially declined to dismiss Valmonte’s due process claims,²¹⁵ but then reversed itself *sua sponte* and dismissed them.²¹⁶

Valmonte appealed the dismissal to the Second Circuit Court of Appeals. The Second Circuit held that the dissemination of names of persons on the central registry to employers and other parties, when “coupled with the defamatory nature of inclusion on the list,” implicated a protectible liberty interest in employment.²¹⁷

Courts’ willingness to afford protection to prospective employment varies and tends to be fact-specific. Two recent decisions by the Pennsylvania Supreme Court demonstrate how a court may be more inclined to recognize a protectible interest in prospective employment when the individual seeking to establish the interest has made a credible claim that she is seeking or will seek employment from an employer with access to the registry.²¹⁸

211. *Id.*

212. *Valmonte v. Perales*, 788 F. Supp. 745, 747 (S.D.N.Y. 1992), *rev’d sub nom. Valmonte v. Bane*, 812 F. Supp. 423 (S.D.N.Y. 1993), *rev’d*, 18 F.3d 992 (2d Cir. 1994).

213. *Id.* at 751 (citation omitted).

214. *Id.* at 747.

215. *Id.* at 755.

216. *Valmonte v. Bane*, 812 F. Supp. 423, 426 (S.D.N.Y. 1993), *rev’d*, 18 F.3d 992 (2d Cir. 1994). The district court reversed itself after realizing that there was no danger of public dissemination of Valmonte’s name as a child abuser. *Id.* at 425. In the initial suit, the court had not understood that access to the central registry was available only to potential child care employers and a limited number of other persons authorized by statute to obtain central registry information. *Id.* The court’s misunderstanding regarding the risk of public dissemination of the information had been dispositive in its conclusion that a liberty interest was implicated, and absent that risk, it determined that Valmonte had no liberty interest at stake and that the case must be dismissed. *Id.*

217. *Valmonte*, 18 F.3d at 994. To find a protectible interest in prospective employment, the court used a “stigma plus”-type analysis. The “stigma plus” analysis is explained in more detail *infra*. See notes 223-27 and accompanying text.

218. In *R. v. Commonwealth, Dep’t of Pub. Welfare*, 636 A.2d 142 (Pa. 1994), the Pennsylvania Supreme Court held that no protectible liberty or property interest in prospective employment was implicated when a father accused of sexually abusing his daughter was listed on the central registry. *Id.* at 148. The court stated, “[t]he Legislature

3. Liberty Interests in Reputation Plus a Deprivation: The "Stigma Plus" Test

In 1971, the Supreme Court appeared to establish that the Fourteenth Amendment's Due Process Clause provides protection against state actions that damage a citizen's reputation. In *Wisconsin v. Constantineau*,²¹⁹ the plaintiff claimed that a statute that permitted police officers to post a notice declaring her to be an alcoholic and forbidding the sale of alcoholic beverages to her was unconstitutional.²²⁰ The Court stated, "where the State attaches a 'badge of infamy' to the citizen, due process comes into play."²²¹ Thus, it concluded, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."²²²

Later, the Court retreated from this position. In *Paul v. Davis*,²²³ the Court stated that damage to reputation is not "by itself sufficient to invoke the procedural protection of the Due Process Clause."²²⁴ The *Paul* Court interpreted the language in *Constan-*

has not barred R. from seeking employment or being hired to a position involving contact with children," and that an interest in employment could not be demonstrated absent a "legitimate claim of entitlement to [a] job." *Id.* (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). R.'s claim to an interest in prospective employment was therefore precluded. *Id.* Four months later, in *A.Y. v. Commonwealth, Dep't of Pub. Welfare*, 641 A.2d 1148 (Pa. 1994), the same court suggested that there might be a protectible interest in prospective employment that is implicated by the child maltreatment central registry, if the person listed on the registry would be precluded from obtaining employment in her chosen field of work. The court stated that, when "the effect of placing appellant's name on [the central] registry was to deny her employment in her field of study," *id.* at 1152 n.7, procedural due process concerns were implicated, *id.* at 1152. The court's analysis skipped over the first question in procedural due process claims: It did not expressly proclaim that A.Y.'s protected liberty interest was found in her employment prospects. However, the court emphasized that A.Y. had trained specifically to pursue a career in family crisis counseling, and that her hope of having such a career would be undermined by her placement on the registry. *Id.* at 1152 n.7. Thus, it appeared that the Pennsylvania court was willing to find a protectible liberty interest in prospective employment, when the facts indicated that an individual truly would be impaired in the pursuit of her chosen field by the inclusion of her name on the registry.

219. 400 U.S. 433 (1971).

220. *Id.* at 434-35.

221. *Id.* at 437 (citing *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952)).

222. *Id.*

223. 424 U.S. 693 (1976).

224. *Id.* at 701. However, states may recognize a liberty interest in reputation alone, or in freedom from stigma, under state constitutions. *See, e.g., R. v. Commonwealth, Dep't of Pub. Welfare*, 636 A.2d 142, 149 (Pa. 1994) (recognizing a liberty interest in reputation under the Pennsylvania constitution).

tineau—“because of what the government is doing to him”—to “refer[] to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law.”²²⁵ Following this interpretation, federal courts of appeals have concluded that *Paul* established a “stigma plus” test, which requires that stigma or damage to reputation be accompanied by some other cognizable interest in order to invoke the protections of the Due Process Clause.²²⁶ To reach the level of “stigma plus,” the individual must show that a state action creates a stigma, and that there is an additional loss associated with the stigma.²²⁷

In *Bohn v. County of Dakota*,²²⁸ the Court of Appeals for the Eighth Circuit relied on damage to reputation, coupled with “protectible family interests,” to find that a liberty interest was implicated when parents were subjected to a child abuse investigation.²²⁹ “By identifying the Bohns as child abusers, investigating the quality of their family life, and maintaining data on them,” the *Bohn* court stated, “the [CPS agency] exposed them to public opprobrium and may have damaged their standing in the community.”²³⁰ Interestingly, the Eighth Circuit did not purport to apply the “stigma plus” analysis in reaching this conclusion. Rather, it discussed the holdings of *Constantineau* and *Paul*, and concluded that *Paul* was distinguishable and *Constantineau* was controlling.²³¹ The *Bohn* court’s

225. *Paul*, 424 U.S. at 708 (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

226. *Paul* did not use the term “stigma plus,” nor did it specify what the “plus” should be; it just suggested that there must be a “plus.” *Id.* at 1000. The “stigma plus” terminology was apparently first used by the Seventh Circuit in *Colaizzi v. Walker*, 542 F.2d 969 (1976). Interpreting *Paul*, that court stated that a “combination of stigma plus failure to rehire/discharge states a claim even if the failure to rehire or discharge of itself deprives the plaintiff of no property interest within the meaning of the Fourteenth Amendment.” *Id.* at 973. In *Neu v. Corcoran*, 869 F.2d 662 (2d Cir.), *cert. denied*, 493 U.S. 816 (1989), the Second Circuit determined that defamation accompanied by “the termination of government employment ‘or deprivation of some other legal right or status’ ” implicated a protectible liberty interest under *Paul*. *Id.* at 667; *see also* *Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994) (citing *Paul* for the proposition that loss of reputation “must be coupled with some other tangible element in order to rise to the level of a protectible liberty interest”).

227. *Valmonte*, 18 F.3d at 999-1000.

228. 772 F.2d 1433 (8th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

229. *Id.* at 1436 & n.4.

230. *Id.*

231. *Id.* The court stated that it was distinguishing *Paul* “[i]n light of the protectible family interests we have set forth.” *Id.* Because the stigma of being labeled a child abuser invoked these compelling interests, the court apparently found the fact pattern in *Bohn* to be more comparable to *Constantineau* than to *Paul*, which involved only “a record of petty crimes.” *Id.*; *see also infra* note 232.

conclusion that a liberty interest was implicated appeared to be based more upon its finding that there were "protectible family interests" involved, rather than upon its discussion of damage to reputation, which was largely relegated to a footnote.²³² Despite the court's declaration that it was not following *Paul*, however, its analysis of both factors certainly appeared to comport with the "stigma plus" test.

Courts have applied the "stigma plus" test to find that a liberty interest is implicated when a person is listed on a child maltreatment central registry that is accessible by parties outside the CPS agency.²³³ In *Valmonte v. Bane*,²³⁴ the Second Circuit Court of Appeals found that the inclusion of Valmonte's name on a central registry did indeed create a stigma: It "brand[ed] her as a child abuser, which certainly calls into question her 'good name, reputation, honor, or integrity.'"²³⁵ Moreover, the *Valmonte* court found that the stigma was not mitigated by the fact that disclosure of registry information was statutorily limited to defined categories of potential employers.²³⁶ The "plus" that triggered the Due Process Clause's protections in *Valmonte* was the fact that placement of Valmonte's name on the child maltreatment central registry "place[d] a tangible burden on her employment prospects. . . . [B]y operation of law, her potential employers will be informed specifically about her inclusion

232. The court stated:

When the County Department found Bohn to be a child abuser, it drove a wedge into this family and threatened its very foundation. The stigma Mr. Bohn suffers as a reported child abuser undoubtedly has eroded the family's solidarity internally and impaired the family's ability to function in the community. In light of these clear adverse effects on familial integrity and stability, we find that Mr. Bohn's reputation is a protectible interest. Because this stigma strikes so directly at the vitality of the family, we find the reputation interest at stake to be clearly distinguishable from the respondent's record of petty crimes in *Paul*, which was tied to no other protectible interest.

Bohn, 772 F.2d at 1436 & n.4. This reads very much like an application of the stigma plus test, with protectible interests in family integrity and functioning providing the "plus."

233. It is unlikely that the "stigma plus" test could ever be invoked when the central registry is not accessible to persons outside of the state CPS agency. The Supreme Court has held that government assertions about an individual must be publicized in some way before they can form the basis of a due process claim. *Bishop v. Wood*, 426 U.S. 341, 348 (1976).

234. 18 F.3d 992 (2d Cir. 1994). The facts of *Valmonte* are set forth *supra*; see notes 204-17 and accompanying text.

235. *Valmonte*, 18 F.3d at 1000 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971))).

236. *Id.*

on the Central Register and will therefore choose not to hire her."²³⁷ The court concluded that the particular statutory scheme in New York, which requires employers to state in writing their reasons for hiring persons named on the central registry, "puts burdens on employers" that result "in a change of that [listed] individual's status significant enough to satisfy the 'plus' requirement of the 'stigma plus' test."²³⁸

B. *How Much Process is Required?*

The preceding discussion described how a state's maintenance of a child maltreatment central registry may implicate liberty and property interests that are protected by the Due Process Clause. Once a court determines that a protectible interest has been implicated, the court will next inquire whether procedures provided to protect the individual from an improper deprivation of the interest are constitutionally sufficient.²³⁹ The Supreme Court set forth the basic test for determining the sufficiency of procedures under the Due Process Clause in *Mathews v. Eldridge*.²⁴⁰ Eldridge was disabled and had received cash benefits from the Social Security Act's disability benefits program for four years when the state agency responsible for disbursing the benefits advised him that it had determined that he was no longer disabled and that payments to him would therefore cease.²⁴¹ Eldridge responded in writing, disputing the agency's findings, but the agency reaffirmed its decision, and subsequently the federal Social Security Administration accepted the state's determination and notified Eldridge that his benefits would be discontinued at the end of July 1972.²⁴² Eldridge brought suit in federal court, challenging the constitutionality of the administrative procedures used to determine that his period of disability had ended.²⁴³ He con-

237. *Id.* at 1001. The *Valmonte* court went on to clarify that the injury associated with the Central Register is not simply that it exists, or that the list is available to potential employers. The deprivation stems from the fact that employers *must* consult the list before hiring Valmonte, and if they choose to hire her must state the reasons in writing to the state.

Id. at 1002.

238. *Id.* at 1002.

239. *See supra* notes 111-13 and accompanying text.

240. 424 U.S. 319 (1976).

241. *Id.* at 324.

242. *Id.*

243. *Id.* at 324-25.

tended that due process required that he receive a full evidentiary hearing *before* the decision to terminate his benefits was made.²⁴⁴

The Supreme Court first determined that Eldridge had a protected property interest in the disability benefits.²⁴⁵ Then, the Court acknowledged that it "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest,"²⁴⁶ and stated that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"²⁴⁷ The Court concluded, however, that the "opportunity to be heard" does not always imply the existence of a right to a full evidentiary hearing. Rather, "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case."²⁴⁸ To determine in a particular case whether the procedures provided were adequate to meet these requirements, the court established a three-part test:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁴⁹

The *Mathews* formula is thus a balancing test that weighs the three interests identified by the Court to determine just how much process is due an individual faced with a particular deprivation.²⁵⁰

The *Mathews* test has been used to determine the sufficiency of the procedures provided parents when they are the subjects of child

244. *Id.* at 325. In making this argument, Eldridge relied upon *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970), which established that a welfare recipient has a right to an evidentiary hearing before benefits are terminated.

245. *Mathews*, 424 U.S. at 332.

246. *Id.* at 333 (citing *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974)).

247. *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

248. *Id.* at 349 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)).

249. *Id.* at 334-35.

250. In *Mathews*, the Court found that Eldridge had received sufficient procedural protections, and that a pretermination evidentiary hearing was not required. *Id.* at 348-49.

maltreatment investigations,²⁵¹ child protective services interventions,²⁵² and proceedings to terminate parental rights.²⁵³ In *Bohn v. County of Dakota*,²⁵⁴ the Court of Appeals for the Eighth Circuit used the *Mathews* test to determine whether the rights of individuals subjected to a child maltreatment investigation and intervention were adequately protected. Bohn was investigated for child abuse after he forcibly broke up a fight between his two sons, and one of the sons sought help from a neighbor.²⁵⁵ The department of social services for Dakota County, Minnesota, subsequently investigated the Bohns, and determined that there was "substantial evidence" of abuse.²⁵⁶ The Bohns disputed this finding, but a child protective services worker was assigned to the case nonetheless. The worker held a series of meetings with the Bohns "in an attempt to remedy the presumed problems stemming from the alleged child abuse."²⁵⁷

The Bohns complained to the CPS agency and requested the opportunity to make their side of the story part of the agency's official record, but the agency refused to allow this.²⁵⁸ The Bohns then filed an action in federal court under 42 U.S.C. § 1983.²⁵⁹ They alleged that the department denied them due process by "failing to provide them with notice of a finding of child abuse, statement of the basis for that finding, and notice of their right to appeal."²⁶⁰ Furthermore, they contended that the administrative procedures provided by the department for contesting or appealing a finding of child abuse were constitutionally deficient.²⁶¹

The court of appeals held that the Bohns had two distinct liberty interests at stake in this case: an interest in "the privacy and autonomy of familial relationships"²⁶² and an interest in their

251. *Bohn v. County of Dakota*, 772 F.2d 1433, 1438-39 (8th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

252. *Id.*

253. *Santosky v. Kramer*, 455 U.S. 745, 754 (1982).

254. 772 F.2d 1433 (8th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

255. *Id.* at 1434.

256. *Id.*

257. *Id.* at 1434-35.

258. *Id.*

259. *Id.*

260. *Id.* at 1434.

261. *Id.*

262. *Id.* at 1435.

reputation.²⁶³ It proceeded to apply the *Mathews* test to determine the sufficiency of the procedures provided to the Bohns.²⁶⁴

Examining the Bohns' private interest first, the court concluded that "Mr. and Mrs. Bohn's interest in their family's solidarity and reputation as they relate to the family's vitality . . . is counterbalanced by the children's interest in freedom from abuse or neglect."²⁶⁵ The court determined that the CPS scheme at issue in the case "effectively mediate[d] between the private interests."²⁶⁶ Next, the court examined the risk of error in the CPS agency's procedures and determined that, because "the County's investigation is intended to be thorough and complex, drawing on the resources of health-related professionals and a variety of county law enforcement and social service personnel," the risk of error was acceptably low.²⁶⁷ Furthermore, it determined that additional or substitute procedures would not be more appropriate or less likely to produce error.²⁶⁸ Finally, it considered the government's interest, which it characterized as "a strong interest in protecting powerless children who have not attained their age of majority but may be subject to abuse or neglect."²⁶⁹ It concluded that "[t]o 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."²⁷⁰ Balancing all of these factors, the court held that the Bohns' interest received adequate protection from the procedures that were provided.²⁷¹

In *Santosky v. Kramer*,²⁷² the Supreme Court considered the sufficiency of the procedures a state provided when it sought to terminate parental rights on the ground of "permanent neglect."²⁷³ A New York statute allowed state courts to terminate parental rights upon a finding of permanent neglect that was supported by a "fair preponderance of the evidence."²⁷⁴ The Court stated decisively that

263. *Id.* at 1436 n.4; see also *supra* notes 228-32 and accompanying text (explaining how the court reached this result).

264. *Bohn*, 772 F.2d at 1438-39.

265. *Id.* at 1438.

266. *Id.*

267. *Id.*

268. *Id.* at 1439.

269. *Id.*

270. *Id.*

271. *Id.*

272. 455 U.S. 745 (1982).

273. *Id.* at 747.

274. *Id.*

a strongly protected liberty interest was implicated when the state sought to terminate parental rights, declaring that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."²⁷⁵ Furthermore, the parents' interest "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."²⁷⁶ The Court then applied the *Mathews* test²⁷⁷ and determined that, given the weight of the private interest at stake, New York's procedures for terminating parental rights were constitutionally insufficient. The specific flaw in the procedures that the Court identified was the standard of proof: The state permitted termination of parental rights upon a finding of neglect that was supported by only a "fair preponderance of the evidence."²⁷⁸ The Court stated: "A standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case. . . . Given the weight of the private interests at stake, the social cost of even occasional error is sizable."²⁷⁹ The Court concluded that due process required that the state meet the burden of producing "clear and convincing" evidence before parental rights could be terminated.²⁸⁰

Recently, several courts have employed the *Mathews* test to scrutinize the procedures used to decide whether to list an individual's name on a child maltreatment central registry.²⁸¹ These courts have found almost uniformly that the procedural safeguards afforded persons listed on the registry were constitutionally insufficient. Typically, the procedures are found to be deficient under the second factor in the *Mathews* test: The risk of error in the procedures provided is perceived to be too great.²⁸² Two recent cases exemplify the typical decisions that courts reach when child maltreatment central registry procedures are constitutionally challenged.

275. *Id.* at 753.

276. *Id.*

277. *Id.* at 758-64.

278. *Id.* at 764. The Court rejected the state's argument that the procedures for terminating parental rights should be evaluated as a "package," *id.* at 757 n.9, because "[r]etrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard," *id.* at 757.

279. *Id.* at 764.

280. *Id.* at 764-70.

281. See, e.g., *Valmonte v. Bane*, 18 F.3d 992, 1003-04 (2d Cir. 1994); *A.Y. v. Commonwealth, Dep't of Pub. Welfare*, 641 A.2d 1148, 1151-52 (Pa. 1994).

282. See *infra* notes 287-96 and accompanying text; notes 308-13 and accompanying text.

In *Valmonte v. Bane*,²⁸³ the Court of Appeals for the Second Circuit found that constitutionally protected liberty interests in employment²⁸⁴ and reputation²⁸⁵ were implicated when Valmonte was listed on the child maltreatment central registry. Based on Valmonte's admission that she had slapped her daughter in the face, the child protective services agency determined that a report of child abuse was "indicated."²⁸⁶ The court applied the *Mathews* test and concluded that New York's procedures for listing individuals on the central registry created an unacceptably high risk of error.²⁸⁷ The Court reached this conclusion even though New York's procedures for maintaining names on the central registry and entertaining expunction requests are quite elaborate.²⁸⁸

283. 18 F.3d 992 (2d Cir. 1994).

284. *Id.* at 1003; *see supra* notes 212-17 and accompanying text.

285. *Valmonte*, 18 F.3d at 999-1002; *see supra* notes 234-38 and accompanying text.

286. *Valmonte*, 18 F.3d at 997.

287. *Id.* at 1003-04.

288. While names listed on the central registry are not available to the general public and are generally kept confidential, there are statutory exceptions to confidentiality: public agencies, law enforcement officers, judicial officers, and others may gain access to the registry. *Id.* at 995. In addition, a New York statute *requires* "certain employers in the child care field to determine whether potential employees are among those listed." *Id.* (citing N.Y. SOC. SERV. LAW § 424-a(1) (McKinney 1992)). When such a request is made, the potential employer is told if the individual is the subject of an "indicated" report. *Id.* at 996. "The state department of social services will not inform the employer of the nature of the indicated report, but only that the report exists." *Id.* If a potential employee is on the list and an employer decides to hire him anyway, the employer must keep "a written record, as part of the application file or employment record, of the specific reasons why such person was determined to be appropriate for working in the child or health care field." *Id.* (quoting N.Y. SOC. SERV. LAW § 424-a(2)(a) (McKinney 1992)).

According to the *Valmonte* court, when the local department of social services in New York determines that a report is indicated, the statute requires the department to notify the individual so labeled, and she has 90 days to request an expunction. *Id.* If she requests the expunction, the state department of social services conducts a two-step review. First, it reviews the facts to determine whether there is "some credible evidence" that the subject of the report committed the acts in question. *Id.* (quoting N.Y. SOC. SERV. LAW § 422(8)(a)(ii) (McKinney 1992)). If it finds credible evidence, it must next "ascertain whether the acts alleged could be 'relevant and reasonably related' to the subject's employment in any child care provider area." *Id.* (quoting N.Y. SOC. SERV. LAW § 422(8)(a)(ii) (McKinney 1992)). There are three possible outcomes of this review: (1) if there is no credible evidence that the subject of the report committed the acts, the record is expunged; (2) if there is some credible evidence that the subject committed the acts, *and* those acts are reasonably related to her employment in child care, the expunction request is denied; and (3) if there is some credible evidence that the subject committed the acts, but they are *not* reasonably related to employment in child care, the report is sealed; that is, it is not expunged, but it may not be disclosed to potential child care employers and licensing agencies. *Id.* (citing N.Y. SOC. SERV. LAW § 422(8)(a)(iii)-(v) (McKinney 1992)).

The court acknowledged that the state "has a strong interest in protecting [children] from the infliction of physical harm by those charged with their care."²⁸⁹ It determined, however, that the procedures afforded Valmonte were constitutionally insufficient, because of "the enormous risk of error that has been alleged by Valmonte and acknowledged by the appellees."²⁹⁰ The court cited the CPS agency's own data, which indicated that about seventy-five percent of individuals who sought expunction from the central registry ultimately were successful in their efforts.²⁹¹ It found further that "[m]uch of this unacceptably high risk of error must be attributable to the standard of proof" used when the initial determination was made to place an individual's name on the registry.²⁹² All that the "some credible evidence" standard demanded of the agency, the court concluded, was that it "present the bare minimum of material credible

If the expunction request is denied after this process, the subject of the report may have an administrative hearing before the state department of social services. *Id.* (citing N.Y. SOC. SERV. LAW § 422(8)(a)(v) (McKinney 1992)). Again, the department of social services must prove, by some credible evidence, that the alleged acts occurred, and it must show that the allegations are reasonably related to employment in the child care field. *Id.* (citing N.Y. SOC. SERV. LAW § 422(8)(c)(i)-(ii) (McKinney 1992)). The same three outcomes as above are possible. If the report still has not been expunged after this hearing, the subject can challenge the agency's decision in court, which will determine the propriety of the decision under an "arbitrary and capricious" standard. *Id.* at 996-97 (citing N.Y. SOC. SERV. LAW § 422(8)(c)(i)-(ii) (McKinney 1992)).

There also is a provision for the subject of the report to receive a "post-deprivation hearing." *Id.* at 997. This hearing is offered after the person is refused employment, or is terminated from current employment, because she is named on the registry. *Id.* If an agency or employer decides not to hire or license an individual named in the registry, it must give that individual a written statement indicating whether its decision was based in whole or in part on the presence of an indicated report. *Id.* (citing N.Y. SOC. SERV. LAW § 424-1(2)(b)(i) (McKinney 1992)). A similar statement is required if the person is fired from her present job. *Id.* (citing N.Y. SOC. SERV. LAW § 424-a(2)(b)(ii) (McKinney 1992)). If the reasons include the person's being named on the register, she is entitled to the post-deprivation hearing. *Id.*; see N.Y. SOC. SERV. LAW § 424-a(2)(c) (McKinney 1992). The question to be determined at the post-deprivation hearing is "whether the applicant . . . has been shown by a *fair preponderance of the evidence* to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report." *Valmonte*, 18 F.3d at 997 (quoting N.Y. SOC. SERV. LAW § 424-a(2)(d) (McKinney 1992)) (emphasis added by court). If the agency fails to sustain this burden of proof, the report need not be expunged, but it must be sealed from employers. *Id.* Finally, if the report is not expunged by any of the administrative procedures that New York offers, it is expunged by operation of law ten years after the youngest child named in the report turns eighteen. *Id.* at 997 (citing N.Y. SOC. SERV. LAW § 422(6) (McKinney 1992)).

289. *Valmonte*, 18 F.3d at 1003 (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

290. *Id.*

291. *Id.* at 1003-04.

292. *Id.* at 1004.

evidence to support the allegations against the subject."²⁹³ The court preferred the "fair preponderance of the evidence" standard, because it "allows for the balancing of evidence from both sides, and gives the subject the opportunity to contest the evidence and testimony presented by the local [department of social services]."²⁹⁴ The court decided that the agency must use the "fair preponderance of the evidence" standard before making its initial determination whether to list an individual on the registry.²⁹⁵ It concluded:

We hold that the high risk of error produced by the procedural protections established by New York is unacceptable. While the two interests at stake are fairly evenly balanced, the risk of error tilts the balance heavily in Valmonte's favor. The crux of the problem with the procedures is that the "some credible evidence" standard results in many individuals being placed on the list who do not belong there.²⁹⁶

The Pennsylvania Supreme Court, in *A.Y. v. Commonwealth, Department of Public Welfare*,²⁹⁷ recently used the *Mathews* test to determine whether procedures provided to an individual seeking expunction from the child maltreatment central registry were constitutionally sufficient. A.Y. had a college degree in psychology and was planning a career in family crisis counseling,²⁹⁸ when she was accused of sexual abuse by a three-year-old girl. A.Y. babysat the child one night, and the next day, the child told her mother that A.Y. had licked parts of her body, including her genitals and buttocks.²⁹⁹ The child subsequently was examined and interviewed at the Family Intervention Center of the local Children's Hospital.³⁰⁰ During the interviews, the child repeated the allegations against A.Y., and demonstrated them on an anatomically correct doll.³⁰¹ The local CPS agency interviewed A.Y., who denied the allegations.³⁰² The agency nevertheless determined that abuse was "indicated" and

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. 641 A.2d 1148 (Pa. 1994).

298. *Id.* at 1152 n.7.

299. *Id.* at 1149.

300. *Id.*

301. *Id.*

302. *Id.*

listed A.Y. on the state's central registry. A.Y.'s requests to have her name expunged were denied.³⁰³

The evidence presented by the CPS agency at the expunction hearing consisted of testimony by the child's mother about statements made by the child, testimony by the caseworker, and testimony by the hospital staff who interviewed the child.³⁰⁴ There was no physical evidence of sexual abuse.³⁰⁵ A.Y.'s evidence consisted of her own testimony, the testimony of character witnesses, and the results of a polygraph test.³⁰⁶

Although the court did not state so expressly, apparently it found that a liberty interest was implicated when A.Y.'s name was placed on the register.³⁰⁷ Therefore, the court proceeded to review the procedures by which the agency denied A.Y.'s expunction request. The court found that the use of hearsay evidence in the expunction hearing rendered the procedures for expunction of reports constitutionally insufficient.³⁰⁸ The court then set forth the requirements mandated by due process when hearsay evidence is used in an expunction hearing: (1) Hearsay testimony of a child victim may be admitted in these hearings, provided the evidence has sufficient indicia of reliability, and the hearsay may be testified to by either the child's parents or professionals who examined the child;³⁰⁹ (2) when corroborated by admissible evidence, the hearsay and the corroboration can "*in toto* constitute substantial evidence which will satisfy the Agency's burden to justify a conclusion of abuse";³¹⁰ and (3) uncorroborated hearsay cannot satisfy the agency's burden unless

303. *Id.*

304. *A.Y.*, 641 A.2d at 1150. The court noted that testimony to hearsay statements is admissible if the " 'time, content, and circumstances of th[e] statement provide sufficient indicia of reliability.' " *Id.* at 1151 (quoting *L.W.B. v. Sosnowski*, 543 A.2d 1241, 1246 (Pa. Commw. Ct. 1988)).

305. It should be noted that the type of sexual abuse alleged would not be likely to create physical evidence.

306. *A.Y.*, 641 A.2d at 1150. The administrative hearing officer received, but did not consider, the polygraph test, as it was not considered admissible evidence in Pennsylvania. *Id.*

307. Pennsylvania's statute would have allowed potential future employers to learn of the "indicated" sexual abuse. *Id.* at 1149-50 n.2. (The statute has since been repealed and modified, *id.* at 1149 n.1; the present statute does not provide for accessibility by employers. See 23 PA. CONS. STAT. ANN. §§ 6334, 6335, 6340 (1991)). There are no facts reported in the case to suggest that A.Y. had in fact experienced a deprivation of employment as a result of being named on the register, so the court apparently found a protectible interest in her employment prospects. *A.Y.*, 641 A.2d at 1152 & n.7.

308. *A.Y.*, 641 A.2d at 1150-52.

309. *Id.* at 1153.

310. *Id.*

several further requirements are met.³¹¹ These requirements are that the statement must have been recorded accurately on audiotape or videotape, that the taped record must disclose the identity of all involved and must include the images or voices of all who were present during the interview, and finally, that the child's statement must not have been made in response to questioning "calculated to lead the minor," nor can it have been "the product of improper suggestion."³¹² Thus, the court found that A.Y. had not received all the protections to which she was entitled, and it remanded the case to the administrative hearing process for reconsideration of the expunction request.³¹³

IV. ANALYSIS AND RECOMMENDATIONS

*There is little, if any, clear guidance in the relevant caselaw that would permit us to chart with certainty the amorphous boundaries between the Scylla of familial privacy and the Charybdis of legitimate governmental interests.*³¹⁴

The underlying assumption of procedural due process jurisprudence, which is reflected in the *Mathews* test, is this: Individuals and the government may both have legitimate interests in the same thing—such as a piece of property, a relationship, or a private liberty—and these competing interests may be irreconcilable. When these interests have as their subject matter an issue as delicate and compelling as the protection of children, the choice of one interest over the other appears to be the choice between two evils indeed. Should one risk the whirlpool of Charybdis, or set a course toward Scylla, knowing full well that devastating loss could result from either decision?

When a state chooses to place an individual's name on a child maltreatment central registry, it is taking an action that potentially could affect that individual's family life, his employment prospects, or even his reputation in the community, if registry information becomes known to the public.³¹⁵ That same action, however, may further any one of three interests that the state may have, including: (1) an interest in maintaining data that could help it to identify children who

311. *Id.*

312. *Id.*

313. *Id.*

314. *Hodge v. Jones*, 31 F.3d 157, 164 (4th Cir.), *cert. denied*, 115 S. Ct. 581 (1994).

315. *See supra* notes 116-238 and accompanying text.

are being abused or neglected over an extended period of time,³¹⁶ (2) an interest in maintaining data about child maltreatment in the state generally, for the purposes of research, policy-making, or funding decisions,³¹⁷ or (3) an interest in establishing a database of individuals who, because of their history of maltreating children, should not be provided opportunities—employment or otherwise—to obtain unsupervised access to children.³¹⁸

Two general statements may help to summarize the cases applying procedural due process principles to the state's maintenance of a child maltreatment central registry. First, the courts have found that due process issues are raised when the state maintains a central registry that is accessible by parties outside of the child protective services agency.³¹⁹ Unless the information on the registry is thus "published," the courts generally have failed even to reach the *Mathews* test, because they have found that no constitutionally protected interest is implicated.³²⁰ Second, when courts have reached the *Mathews* test, the government's procedures usually are found to be insufficient, because they do not adequately protect against the erroneous placement of an accused person's name on the list.³²¹ The courts' identification of the sources of the risk of error could have curious consequences for the child protective services agencies involved in the litigation—as this Comment will discuss in more detail below.³²²

The government's interest in protecting children can justify the entry of CPS workers into private homes to investigate allegations of child maltreatment,³²³ and can even justify severing the parent-child relationship when children's parents have become dangerous to them, or have failed disastrously to provide for their care.³²⁴ In the child

316. See *supra* notes 88-95 and accompanying text.

317. See *supra* notes 96-97 and accompanying text.

318. See *supra* notes 102-04 and accompanying text.

319. Compare *Hodge v. Jones*, 31 F.3d 157, 164-67 (4th Cir.) (finding no protectible interest implicated when the interest was in family relationships and the registry was not accessible), *cert. denied*, 115 S. Ct. 581 (1994) with *Valmonte v. Bane*, 18 F.3d 992, 1002 (2d Cir. 1994) (holding that protectible interests were implicated by an employer-accessible registry).

320. See, e.g., *Hodge*, 31 F.3d at 167; *Wildauer v. Frederick County*, 993 F.2d 369, 373 (4th Cir. 1993) (per curiam).

321. See, e.g., *Valmonte v. Bane*, 18 F.3d 992, 1003-04 (2d Cir. 1994); *A.Y. v. Commonwealth, Dep't of Pub. Welfare*, 641 A.2d 1148, 1150-52 (Pa. 1994); see also *supra* notes 283-313 and accompanying text.

322. See *infra* notes 336-45 and accompanying text.

323. See *Watterson v. Page*, 987 F.2d 1, 8 (1st Cir. 1993).

324. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

maltreatment central registry cases, courts have acknowledged that the government's interest in protecting children can extend to compiling information in a centralized database,³²⁵ and even to making that information available to appropriate parties outside the CPS agency, when to do so may protect children in day care centers, foster care, or other settings from coming into contact with known child abusers.³²⁶

However, when a central registry scheme is challenged, the government's interest is usually outweighed by the liberty or property interests of the individual listed on the registry—*unless* the only private interest implicated by the child maltreatment central registry is one in familial integrity or privacy, in which case the government's interest has prevailed.³²⁷ This is true despite the fact that, among the liberty and property interests discussed earlier in this Comment,³²⁸ the liberty interest in the parent-child relationship is the one that ordinarily would be accorded the most substantial weight.³²⁹ The most probable explanation for this seemingly incongruous result is that courts in these cases are not focusing on the government's narrow interest in maintaining a central registry for the purpose of possibly precluding child abusers from future contact with children through child care employment, adoption, and so forth; rather, the courts are viewing the registry as one tool for achieving the larger government interest of protecting children who are presently suffering abuse or neglect in their own homes.³³⁰ When the whole of the government's interest in protecting children is placed onto the *Mathews* scale, courts readily find that the government's interest—and the government's authority to act on that interest—is substantial and legitimate.³³¹ Because the government's intrusion

325. See *Hodge v. Jones*, 31 F.3d 157, 166-67 (4th Cir.) (describing the uses that a CPS agency may legitimately make of central registry information), *cert. denied*, 115 S. Ct. 581 (1994).

326. See *R. v. Commonwealth*, Dep't of Pub. Welfare, 636 A.2d 142, 151 (Pa. 1994).

327. See *Hodge*, 31 F.3d at 168.

328. See *supra* notes 116-238 and accompanying text.

329. The Supreme Court has stated that "the Constitution protects the sanctity of the family . . . because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). "The rights to conceive and raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . and '[r]ights far more precious than property rights.'" *Bohn v. County of Dakota*, 772 F.2d 1433, 1435 (8th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986) (citations omitted).

330. See *Hodge*, 31 F.3d at 166.

331. Cf. *Prince v. Massachusetts*, 321 U.S. 158, 166-71 (1944) (holding that the government's interest in protecting children outweighs a legal guardian's interest in

into the family is warranted in these situations anyway, the state's use of the child maltreatment central registry as a tool is incidental, and the listing of a parent's name where it will only be seen by child protective services workers is no more than "a pale shadow briefly cast" over the family.³³² In this situation, even if the procedures resulting in the placement of an individual's name on the registry have a high risk of error, the costs of the error are not very significant.

The balance comes out differently when the central registry becomes more than just the tool of the CPS agency. When other parties may obtain access to the registry and that access may result either in the direct loss of a listed individual's employment, or a stigma that puts employment or some other vital interest at risk, the government may lose the case. There are two probable explanations for this. First, perhaps the courts are focusing on a different aspect of the government's interest in these cases.³³³ Logically, the interest that is relevant in these cases should be an interest in preventing people who are known or suspected child abusers from being placed in positions of unsupervised contact with children (on the assumption that they are more likely than others in the general population to harm any child they encounter), rather than an interest in protecting an identified child from present abuse or neglect in her own home.

teaching children to disseminate religious materials on public streets); *Santosky v. Kramer*, 455 U.S. 745, 767 (1982) (recognizing that government's interest in protecting children can extend so far as to allow the state to terminate parental rights).

332. *Hodge*, 31 F.3d at 164. *Bohn*, 772 F.2d at 1433, also illustrates this idea:

Although . . . 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. Statutes like this one [authorizing intervention in the family when abuse is substantiated] must attempt to harmonize this polarity of competing interests 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

Id. at 1438.

333. Unfortunately, the equivocation of "perhaps" is necessary here. The courts that have found the government's interest outweighed in the *Mathews* balance have not elaborated a great deal on the precise nature of the governmental interest that is being weighed. Rather, courts have tended to restrict their consideration of the government's interest to the simple recognition that the government has an interest in protecting children from abuse or neglect. See, e.g., *Valmonte v. Bane*, 18 F.3d 992, 1003 (2d Cir. 1994).

When thus viewed, the government's interest is present, but is more tenuous.³³⁴ It simply is not strong enough to tip the balance decisively when it is weighed against a private interest such as employment.

The second probable explanation for the government's losses in these cases is that it is far easier to make an error in attempting to determine who is likely to harm a child in an occupational setting in the future. Thus, the courts readily conclude that the risk that an individual will be included on the list erroneously is too high in these cases, and they seek to reduce the risk of error.³³⁵

The source of the risk of error can be difficult to identify, however. This difficulty is demonstrated by the applications of the *Mathews* test in the two central registry cases discussed earlier in this Comment, *Valmonte* and *A.Y.* Those cases have a common characteristic that is both subtle and startling: They prescribe remedies that do not cure the problems raised by the facts of the cases. At the same time, the remedies potentially impose substantial new burdens on the CPS agencies, if the agencies want to continue to use their child maltreatment central registries as tools to aid them in identifying and responding to child abuse and neglect.

In *Valmonte*, the New York CPS agency learned that its rather elaborate procedures were not enough in light of the low standard of proof it used to substantiate reports.³³⁶ The Second Circuit's opinion appears only to require that a higher standard of proof be used to determine whether the report is "indicated" *before it may be listed* on the registry—not before determining whether the agency may provide child protective services³³⁷—but it nevertheless places a significant burden on the agency to change its administrative procedures. The facts of *A.Y.* present a dilemma: The child's allegations of sexual abuse are extremely serious and troubling,³³⁸

334. Identifying individuals who are presently abusing children in their own homes is a markedly different task than identifying individuals who *might* abuse children in an occupational setting in the future.

335. See *Valmonte*, 18 F.3d at 992, 1003-04; *A.Y. v. Commonwealth*, Dep't of Pub. Welfare, 641 A.2d 1148, 1152-53 (Pa. 1994).

336. *Valmonte*, 18 F.3d at 1004; see also *supra* note 288 (describing New York's procedures).

337. Read broadly, the *Valmonte* decision would amount to a sweeping, judicially imposed reform of the entire child protective services system in New York. The CPS agency would be prohibited from providing any services at all, even if there were credible evidence of harm to the child, if that evidence failed to amount to proof by a fair preponderance of the evidence that the reporter's allegations were true.

338. See *A.Y.*, 641 A.2d at 1149.

but difficult to prove—the evidence boils down to a swearing contest between a three-year-old child and her babysitter.³³⁹ If A.Y. committed the acts of which she was accused, then she probably is the type of individual that policy-makers have in mind when they allow central registries to be used as a screening device by child care employers and others. If she did not commit the acts, then the placement of her name on a list that likely will have the effect of preventing her from obtaining employment in her chosen profession amounts to an unjustifiable deprivation. The problem for the fact-finder is that this is a case of directly contradictory testimony from the only two people who were present when the acts did or did not occur, and there is no way to be absolutely sure who is telling the truth.³⁴⁰

In each of these cases, the courts seemed to assume that the interest in whose favor the *Mathews* balance tipped could be protected only by sacrificing the other interest. The *Valmonte* court sought to protect Valmonte's interests by requiring that, henceforth, the state of New York meet a higher standard of proof before entering a suspected abuser's name on its central registry.³⁴¹ The Second Circuit's focus on the standard of proof is somewhat curious, though, given the facts of Valmonte's case. Whether Valmonte slapped her daughter in the face was not a disputed issue of fact—she admitted it. On remand, the agency should have little difficulty sustaining its burden under the "fair preponderance of the evidence"

339. See *id.* at 1150.

340. For many years, the common wisdom in the child protective services field has been that when a very young child testifies to sexual acts, the testimony is likely to be true simply because the child otherwise should not have the knowledge required to describe sexual behaviors. See, e.g., Gargiulo, *supra* note 89, at 23 ("When a child tells you that he or she has been sexually assaulted in some fashion, believe them! Most children do not have a frame of reference for the events described unless it actually occurred."). Researchers have documented that sexually abused children "demonstrate atypical sexual knowledge" and may exhibit sexually precocious behavior. Leo P. Cotter & Kathryn Kuehnle, *Sexual Abuse Within the Family*, in *CHILDREN AND FAMILIES: ABUSE AND ENDANGERMENT* 159 (Sandra Anderson Garcia & Robert Batey eds., 1991). Today, there are many ways children may acquire this knowledge without having participated in sexual activity—cable television brings depictions of sexual activity into American living rooms, and even parents who scrupulously control exposure to such materials in their own homes may find that friends, relatives, and babysitters are less cautious. It is also possible that a child has inadvertently witnessed the sexual behavior of her parents or other adults, or that she actually has been abused in the manner she describes, but by someone other than the person she is accusing.

341. *Valmonte v. Bane*, 18 F.3d 992, 1004 (2d Cir. 1994).

standard, and the result for Valmonte should be the same—denial of her expunction request.³⁴²

The court's chosen relief in *A.Y.* similarly failed to provide a certain remedy to the aggrieved person. The Pennsylvania court's changes to the hearsay rules to be used in central registry expunction hearings³⁴³ may be laudable for other reasons,³⁴⁴ but they do not necessarily assure that *A.Y.* will not be listed erroneously—the outcome will still depend upon who is more believable in the swearing contest between the witnesses. Nor do they provide any assurance that the accused's name will not be *removed* from the list erroneously.³⁴⁵

Thus, the remedies prescribed by the courts in *Valmonte* and *A.Y.* seem to miss the mark in providing relief to the plaintiffs in those cases. At the same time, they have a potentially far-reaching effect for the CPS agencies: They may deprive the agencies of information that would be quite useful to them in fulfilling their duty to protect maltreated children.

There is an inherent conflict associated with the use of the child maltreatment central registry as a device for screening individuals to determine whether they should receive certain employment or be permitted to adopt a child. The statutes establishing central registries usually result in registries that appear to be designed to serve as tools for CPS agencies, not as screening devices for employers and others.³⁴⁶ A higher risk of error in procedures is tolerable when the

342. The court's decision to prescribe a remedy that fails to solve the plaintiff's problem raises questions about the court's true concerns with the CPS procedures it scrutinized. Perhaps the court's true concern was that New York's statute allowed a slap in the face to be considered child abuse. If that is undesirable, however, it is a problem with the state's definition of abuse, not with its standard of proof.

343. *A.Y.*, 641 A.2d at 1152-53.

344. The court's requirement of audiotaped or videotaped interviews that account for all persons present during the interviews certainly seems likely to provide better evidence for courts to consider in determining whether hearsay testimony is reliable, and in determining whether a child's allegations of sexual abuse were made without improper leading or coercion by her interviewers.

345. If another child makes similar allegations against *A.Y.* in the future, that would increase the degree of suspicion that *A.Y.* in fact abused children. This may be the only way ever to identify and stop *A.Y.* if she is indeed a child molester.

346. Although a statute occasionally sets forth definite statements of the rights of parties named on the registries, *see, e.g.*, S.C. CODE ANN. § 20-7-690(D) (Law. Co-op. Supp. 1993), and many statutes provide for expunction procedures, *see, e.g.*, 23 PA. CONS. STAT. ANN. § 6341 (1991), the procedures for compiling reports, retaining them, and deciding whether and when to expunge them usually reflect the needs of the agency rather than concern for the due process rights of persons named on the registry, *see, e.g.*, N.C. GEN. STAT. § 7A-552 (Supp. 1994) (stating that the CPS agency shall maintain the registry

very reason for having the list is to give CPS workers another tool to do their jobs effectively than when the goal of the list is to identify individuals *for the very purpose* of depriving them of an interest. When courts hold central registry procedures to be constitutionally insufficient, it is invariably because the registry is being used to deprive an individual of a liberty or property interest, and therefore the risk of error inherent in the procedures is simply unacceptable.³⁴⁷

This is an understandable result for the courts to reach—at the root of due process jurisprudence is the recognition that the government should be cautious before it deprives an individual of a liberty or property interest.³⁴⁸ However, the result poses a substantial cost for the child protective services agencies—and it is a cost that perhaps they need not bear.

When developing a child maltreatment central registry, state policy-makers should bear in mind the purpose and duties of the CPS agency, and design a registry that will meet that agency's needs above all. Policy-makers may wish also to develop procedures for identifying individuals who, because of a history of abusing children, should not be permitted to have unsupervised access to children through their jobs or by serving as foster or adoptive parents. However, policy-makers should recognize that this is a separate goal that may not be completely compatible with the goals of the CPS agency. A single registry system may not be able to meet these disparate goals.

A state that chooses to have a system that is maintained expressly to serve as one component of a comprehensive child protection scheme, and that is only accessible by child protective services workers and law enforcement officials, is unlikely to lose any procedural due process challenges that are raised by individuals whom it lists on the registry. Nevertheless, the state should take care to ensure that it provides confidentiality safeguards, including sanctions

“in order to compile data for appropriate study of the extent of abuse and neglect within the State and to identify repeated abuses of the same juvenile”).

347. See, e.g., *Valmonte v. Bane*, 18 F.3d 992, 1004 (2d Cir. 1994) (concluding that a low standard of proof for substantiating abuse created an “unacceptably high risk” that an individual would be listed on an employer-accessible central registry erroneously); *A.Y.*, 641 A.2d at 1148 (concluding that the acceptance of uncorroborated and possibly unreliable hearsay evidence in an expunction hearing created a risk that expunction would be denied erroneously).

348. See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

for unauthorized releases of information.³⁴⁹ The state may also wish to recognize that personal—if not constitutional—interests in privacy are implicated by the mere maintenance of the registry. Individuals will naturally have strong feelings about being listed, particularly if they believe that the listing is unwarranted.³⁵⁰ Because of the benefits to the agency of retaining unsubstantiated reports of child abuse or neglect on the central registry, this Comment does not recommend that states adopt systems that require the expunction of those reports. However, the state may wish to consider how it could ameliorate the sense of insult to individuals who are listed on the registry. For example, if agency resources permit, the state might allow individuals listed on the registry to file written statements to be maintained along with the registry records, just as credit bureaus allow consumers to file statements about disputed claims.³⁵¹

Registries that are accessible by other parties (“accessible registries”) should be retained separately from the registry used by the CPS agency. A system could be designed in which the agency’s registry served as the source for the information included in the accessible registry, but was not itself accessible by other parties. Too much is required of a single registry when it must serve both the agency and potential employers, adoption agencies, and any others who have access to it.

An accessible registry serves different purposes, and thus should be organized differently from a non-accessible registry. It may be necessary to define “child abuse” differently for the purposes of placing an individual’s name on the accessible registry than for the purpose of initiating a CPS investigation.³⁵² The standard of proof

349. See *Hodge v. Jones*, 31 F.3d 157, 165 (4th Cir.) (noting that Maryland’s statutory sanctions for breaches of confidentiality by CPS workers served to protect the reputations of listed persons), *cert. denied*, 115 S. Ct. 581 (1994).

350. See *id.* at 161 (describing the Hodges’ repeated efforts to have their names expunged from the registry).

351. This is an approach that has already been adopted by at least one state. The Wyoming central registry statute states: “Any person named as a perpetrator of child abuse or neglect . . . in any report maintained in the central registry which is classified as a substantiated report . . . shall have the right to have included in the report his statement concerning the incident giving rise to the report.” WYO. STAT. § 14-3-213 (1995). In one of the cases discussed in this Comment, the subject of a child maltreatment investigation requested the opportunity to make his side of the story part of the official CPS record. *Bohn v. County of Dakota*, 772 F.2d 1433, 1435 (8th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986). This suggests that parties named in these reports might feel their interests are better served or protected when this is an option.

352. For example, it is possible to infer from *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994), that the Court of Appeals for the Second Circuit does not consider slapping one’s

used to determine whether an individual to be listed on an accessible registry has committed the abuse of which he is accused should be higher than the standard that may be used for a non-accessible registry.³⁵³ Furthermore, an accessible registry absolutely must have procedures for notifying individuals that they have been listed on the registry, and for granting individuals the opportunity to request expunction.³⁵⁴ When an expunction request is denied, the state should offer administrative hearing procedures to review the request.

V. CONCLUSION

Child maltreatment central registries, as they currently exist and operate, are subject to valid claims of procedural due process violations if two conditions are met: (1) the information in those registries is made available to others; and (2) the others with access to the registries have the capacity to use the information to deprive the listed persons of some protected interest. The cases that have been decided on this subject reveal that courts generally are concerned, therefore, with being *certain* that persons listed on registries are not listed there erroneously.³⁵⁵ Unfortunately, the decisions do not always reflect either a concern for or an understanding of CPS agencies' need to maintain information for their own purposes, to serve as a tool in meeting their statutory duties to protect children. As a result, some of the solutions the courts have devised when facing these cases create the risk that child protective services systems will be deprived of information they need to function properly.³⁵⁶

Legislators may be called upon by their constituents both to design policies that protect children in their homes and to respond to public concern about child maltreatment in child day care and other settings. To meet the first responsibility, they must design effective CPS systems. To meet the second, they may wish to develop mechanisms by which employers can screen out potential child abusers. Legislators also must strive to be fiscally responsible and

own child in the face to be a sufficiently serious offense to warrant listing an individual on an accessible registry.

353. See *Valmonte*, 18 F.3d at 1004.

354. See *id.* at 1002 (holding that listing on the central registry implicates a constitutionally protected liberty interest); *A.Y. v. Commonwealth, Dep't of Pub. Welfare*, 641 A.2d 1148, 1152 (Pa. 1994) (concluding that the appellant was entitled to protection against erroneous listing).

355. See *Valmonte*, 18 F.3d at 1004; *A.Y.*, 641 A.2d at 1152.

356. Ironically, the solutions are not always clearly helpful to the persons who are listed on the registries. See *supra* notes 336-45 and accompanying text.

develop systems that are efficient. The temptation to use one system to meet both of the above goals is therefore understandable. However, it may not be possible to do this without sacrificing either the needs of the CPS agency or the procedural due process rights of persons listed on child maltreatment registries. Clearly, neither of these results is appropriate.

States that maintain child maltreatment central registries may decide, appropriately, to try to use registry information to screen out known child abusers from certain types of employment. If this decision is made, however, legislators should set two levels of standards for the management of information regarding individuals who are reported to CPS agencies: one level for collecting and safeguarding information that is to be used by the agency itself in its efforts to protect children who have been identified because they have been harmed already, and another level for collecting information for the purpose of labeling certain individuals as child abusers and controlling their access to children that they *may* harm in the future. Problems arise when one registry tries to serve both functions. A distinction should be drawn between records that CPS agencies may maintain for their own purposes only, and those that they may release to other parties.

Circe advised Odysseus that, when caught between the six-headed monster, Scylla, and the whirlpool of Charybdis, one should “swiftly turn your course toward Scylla’s crag and speed the ship along, for surely it is better to miss six comrades from your ship than all together.”³⁵⁷ Undoubtedly this is good advice—unless, perhaps, it is not really necessary to make the choice between the two evils.

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357. HOMER, *supra* note 1, at 183.

