Florida State University Law Review

Volume 18 | Issue 2 Article 5

Winter 1991

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ARE NEW PROCEDURES CORRECTION ENOUGH FOR FLORIDA'S CHILD ABUSE REGISTRY STATUTE?

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BRADLEY MCGEE, aged two, died on July 28, 1989. It was widely reported that he died after being repeatedly dunked in a toilet by a parent frustrated by the difficulties of potty training the child. One year later, a Polk County jury convicted a Department of Health and Rehabilitative Services social worker of felony child abuse and failure to report the suspected child abuse of McGee.[1] The employee received a sentence of three years probation.[2]

On June 24, 1990, an alligator attacked a Tallahassee child who had been swimming in a small lake during a Sunday afternoon outing with his mother. An onlooker, concerned that the mother should have heeded warnings of an alligator in the lake, reported the mother to the child abuse registry.[3] A newspaper account indicated that the woman who claimed to have made the report was accompanied at the lake by an abuse registry counselor.[4] In a follow-up story, the mother was quoted as complaining that the incident had been printed without sufficient investigation on the part of the newspaper. That story noted:

> [The Tallahassee Democrat Managing Editor] said it would have been preferable to run Tuesday's story with [the mother's] version, had it been available. But he defended publishing the story without it.
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> "When the incident became the subject of a formal complaint to the Abuse Registry we felt we had to run the story," [the editor] said. "We regret that our considerable effort to talk to [the mother] was unsuccessful."[5]

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1. Tallahassee Democrat, June 16, 1990, at 1A, col. 3; *see* FLA. STAT. § 415.513(1) (1989)(failure by certain persons to report suspected child abuse is a second degree misdemeanor).

2. Tallahassee Democrat, July 7, 1990, at 1A, col. 6.

3. FLA. STAT. §§ 415.502-.514 (1989). The mechanics of the system are the focus of this article and are discussed beginning with section I, *infra*. The enabling statute is administered by the Florida Department of Health and Rehabilitative Services (hereinafter "the Department").

4. Tallahassee Democrat, June 26, 1990, at 1C, col. 3.

5. *Id.*, June 27, 1990, at 1B, col. 4.

These two incidents are hardly the only ones concerning child abuse and the child abuse registry, both of which have been prominent topics in the media during the last several years. The stories are illustrative, nonetheless, of the increased exposure of and pressure on Florida's child abuse registry statute.[6]

The McGee case may prove influential in causing more reports from those statutorily required to report child abuse[7] and in causing child protective investigators who are on the front line of abuse investigations to err on the side of more reporting in an effort to avoid criminal liability. The Tallahassee incident illustrates the problem with preserving a truly confidential system. If the quotation from the editor is any indication, a hint of registry involvement may be enough to precipitate the publishing of a story that might otherwise have been delayed or never published.

Florida's child abuse registry statute represents an effort to balance the legitimate interests of parents, the need for protection of children, and the efficient operation of a state intervention program. In 1990, the legislature tinkered with the statute and readjusted this balance. The 1990 amendments[8] must be examined in the light of existing judicial interpretations and judicial challenges to the pre-amendment statute[9] and with a view toward analyzing significant changes and remaining problems in the legislation. Although the 1990 legislature stopped far short of reconstructing the statutory scheme, significant changes in definitions and procedure, especially as related to due process, could have a profound effect on the future of the operation of the registry system.

I. THE CHILD ABUSE REGISTRY STATUTE IN PERSPECTIVE

Before examining the effects of the 1990 amendments in detail, it will be useful to present an overview of Florida's child abuse registry statute both in terms of its provisions and in terms of its practical administration. Because the 1990 amendments did not alter the basic legislative scheme, this introductory overview concerns itself only with providing orientation for the detailed work to follow.

The legislature created the abuse registry system "in an effort to prevent further harm to the child or any other children living in the

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6. FLA. STAT. §§ 415.502-.514 (1989).

7. *Cf.* FLA. STAT. § 415.504(1) (1989).

8. Ch. 90-50, §§ 5-10, 1990 Fla. Sess. Law Serv. 64, 72-82 (West)(to be codified at FLA. STAT. §§ 415.503, .504, .505, .51).

9. *See* Complaint for Damages, Injunctive Relief and Declaratory Judgment, N.L. v. Coler, No. 90-40069 MP (N.D. Fla. Apr. 12, 1990) (seeking among other relief to have sections of the statute declared unconstitutional on due process grounds).

home and to preserve the family life of the parents and children, to the maximum extent possible, by enhancing the parental capacity for adequate child care."[10] In concept, then, the reporting system is intended to identify children who have been harmed in the home and to prevent further harm. Although the statement of purpose emphasizes issues connected with the family, the statutory scheme goes beyond the home and into the day care center and the school setting. Furthermore, while there are legislatively mandated procedures and methods which attempt to address the goal of preserving family unity, investigation of reports may also lead to dependency proceedings under Chapter 39 or criminal prosecutions.[11] Analysis of the statute, both before and after the 1990 session, will reveal whether the legislature has constructed a scheme that will accomplish its commendable purpose in an effective and constitutionally permissible manner.

A registry of reported and classified cases of child abuse or suspected child abuse[12] and a procedure for investigation of those reports[13] comprise the basic structure of the system. The list of persons required to report suspected child abuse includes most medical personnel or hospital personnel engaged in admissions and treatment; other health or mental health professionals;[14] spiritual healers; school teachers, officials, and personnel; social workers, day care workers, and other professionals involved in child care or child care institutions; and law enforcement officers.[15] The report is made to a "central abuse registry and tracking system" on a "statewide toll-free telephone number."[16] The reports of persons in the occupations listed must be confirmed in writing within forty-eight hours of call-in.[17] The legislature intended, however, that reports also be made by persons not in the listed occupations.[18]

This reporting requirement is the teeth of the statute, and it is strengthened by making the failure to report abuse by persons re-

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10. FLA. STAT. § 415.502 (1989).

11. *Cf. id.* §§ 39.40-.418 (dependency proceedings); *id.* §§ 39.46-.474 (termination of parental rights); *id.* §§ 827.01-.08 (criminal child abuse).

12. *Id.* § 415.504.

13. *Id.* § 415.505.

14. *But cf.* State v. Groff, 409 So. 2d 44 (Fla. 2d DCA 1981)(psychiatrist with reason to believe that a patient is abusing the patient's daughter not statutorily obligated to notify HRS). Although this case deals with reporting requirements imposed by section 827.07(4), Florida Statutes (1975), the statutes are quite similar in concept. *Groff*, however, turned on an interpretation of the phrase "serving children," which does not appear in section 415.504(1), Florida Statutes (1989).

15. FLA. STAT. § 415.504(1) (1989).

16. *Id.* § 415.504(2)(a).

17. *Id.* § 415.504(2)(b).

18. *Id.* § 415.504(4)(a)("any person" can make a report).

quired to make such a report, or the prevention of another from reporting, a second degree misdemeanor.[19] As a result, those who work closely with children and those who administer their health care have a strong incentive to spot physical abuse or neglect. In placing the burden on such persons, the statute provides a mechanism for monitoring serious abuse or neglect, and for identifying signs of undetected or potential harm. However, the stringent reporting requirement also encourages intervention in the area of parental discipline, where investigation of an unfounded report can lead to great disruption for the individual and for the family.

Persons not required to report abuse do not have to identify themselves when making a report.[20] The absence of such a requirement increases the possibility of anonymous calls from estranged spouses, exspouses, or from disgruntled or interfering neighbors. The possibility of such informers, although certainly not forbidden by the confrontation clause, is repugnant.[21] Distaste must, of course, be weighed against the desire to protect children. The statute is throughout a conscious balance of interests and of burdens and benefits.

Child protective investigators conduct the inquiry into incidents of alleged child abuse.[22] After investigation, the Department classifies the report and gives the results to the alleged perpetrator.[23] Before the 1990 amendments, the Department used the classifications of "unfounded," "indicated," and "confirmed," depending upon whether there was sufficient evidence to conclude that there had been child abuse and whether a perpetrator could be identified.[24]

The Department places a confirmed perpetrator's name in the abuse registry for fifty years.[25] This disqualifies the perpetrator from holding certain jobs, especially those related to children, the aged, and the disabled, either as a state employee or under state contract.[26] The statute does provide procedures for obtaining a waiver of disqualification, which could help avoid the emotional and other burdensome effects of a confirmed report.[27]

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19. *Id.* § 415.513(1).

20. *Compare* Mo. REV. STAT. § 210.145.3 (Vernon Supp. 1990) (anonymous reports allowed though recorder shall attempt to obtain name) *with* CAL. PENAL CODE § 11167(a) (West 1982 & Supp. 1990) (report *shall* include name of reporter).

21. The confrontation clause gives defendants in criminal prosecutions the right to face their accusers and the right to effective cross-examination of witness called against them. *See, e.g.*, California v. Green, 399 U.S. 149 (1970).

22. FLA. STAT. § 415.504(4)(b) (1989).

23. *Id.* § 415.504(4)(c).

24. *See id.*

25. *Id.* §415.504(4)(c).

26. *See id.* §§ 415.504(4)(d)3.6, 415.51(4)-(6).

27. *Id.* §415.504(4)(d)(5).

The Department has developed an extensive manual to guide in the investigation of reports and the classification of reports upon completion of the investigation.[28] While supervisors monitor the process throughout, individual investigators seek out facts and make the classification. The Department does not require extensive training for these individuals, and they can vary greatly in level of experience.[29]

Under the law before the 1990 amendments, when a report was classified as confirmed and a perpetrator was named, the Department allowed the individual an opportunity to apply for internal departmental review of the decision.[30] There was, however, no statutory right to be present at this review, and neither the rules nor the statute prohibited the supervisor who worked on the case from sitting on the reviewing committee. If the classification remained unchanged, the perpetrator had the right to request an administrative hearing under the provisions of Chapter 120.[31]

To implement fully the legislative purpose of "preserv[ing] the family life of the parents and children,"[32] the statute created child protection teams in addition to child protective investigators. These teams provide medical and psychological support services in situations which may portend serious family problems and significant threat of future harm to the child.[33] Other sections addressed taking a child into protective custody[34] and the appointing of guardians ad litem for judicial proceedings and guardian advocates as a protection separate from dependency.[35]

The statute also addresses specialized legal issues arising out of the abuse registry system. Persons acting in good faith in performing acts authorized or required by the statute are immune from criminal or civil liability.[36] The statute protects certain employees from reprisal or discharge and creates a private cause of action for compensatory and punitive damages to redress work place reprisal against the person reporting.[37]

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28. FLORIDA DEP'T OF HRS, PAMPHLET NO. 175-1, CHILD PROTECTION SERVICES INVESTIGATION DECISIONS HANDBOOK (1988)[hereinafter HANDBOOK].

29. Neither the statute nor the *Handbook*, *supra* note 28, mandate any minimal level of training.

30. FLA. STAT. § 415.503(d)(5) (1989).

31. *Id.*

32. *Id.* § 415.502.

33. *See id.* § 415.5055.

34. *Id.* § 415.506.

35. *See id.* §§ 415.508, .509.

36. *Id.* § 415.511(1)(a).

37. *Id.* § 415.511(2).

Anticipating that privileges created by the evidentiary code could inhibit reporting, investigation, and proceedings contemplated by the statute, the statute removes all but the attorney/client privilege.[38] The other privileges, including the marital and mental health professional/client privileges, have been abolished with respect to both reporting requirements and giving evidence in judicial proceedings related to child abuse.[39]

In addition to the potential criminal liability for the failure of certain persons to report alleged abuse, the 1989 statute makes knowing, willful disclosure of confidential information a second degree misdemeanor.[40] The act also provides that making a false report or advising another to do so is a second degree misdemeanor. The false report must be made knowingly and willfully; reporters acting in good faith are exempted.[41] While the "false reporting" statute might provide some protection against malicious reporting, as long as the system requires investigation of anonymous reports, the protection is minimal. One envisions prosecution only of those who have bragged openly of harassing others with false reports.

II. ANALYSIS OF THE 1990 AMENDMENTS

A. The Definition of Child Abuse or Neglect

Central to the workings of the registry are the questions of which persons and what acts are subject to its regulation. The 1989 statute defined child abuse or neglect as "harm or threatened harm to a child's physical or mental health or welfare by the acts or omissions of the parent or other person responsible for the child's welfare."[42] In keeping with the purpose of the statute, this definition is broader than similar definitions in statutes concerning dependency, termination of parental rights, and criminal child abuse.[43] A full understanding of the definition requires analysis of the terms "harm" and of "other person responsible for the child's welfare."[44]

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38. *Id.* § 415.512.
39. *Id.*
40. *Id.* § 415.513(2).
41. *Id.* § 415.513(3).
42. *Id.* § 415.503(3).
43. Section 39.01(2), Florida Statutes, defines abuse as a "willful act" causing or likely to cause significant mental or emotional impairment. Sections 827.03 and 827.04, Florida Statutes, define child abuse and aggravated child abuse in terms of actual effects of willful acts, knowing or culpable negligence, or malice, and make gradations of severity of offense based in part on the severity of harm.
44. FLA. STAT. § 415.503(3) (1989).

1. *Definition of "Harm"*

The extensive statutory definition of harm included injury resulting from excessive corporal punishment; drug dependency of newborns; sexual abuse; exploitation; abandonment; failure to supervise properly; and failure to provide proper food, clothing, shelter, and health care.[45] The 1990 amendments added "exposure to drugs which causes physical, mental, or developmental problems."[46] Undoubtedly, the most difficult definition to interpret has been "[i]njury sustained as a result of excessive corporal punishment."[47] The statute refines that definition by defining "physical injury" as "death, permanent or temporary disfigurement, or impairment of any bodily part."[48]

The practical problem with these definitions of harm and physical injury, which *a fortiori* significantly affect the definition of child abuse or neglect, has been the treatment of corporal punishment administered as discipline. Other states have addressed the problem directly. Missouri, for example, in its definition of abuse, provides that "discipline including spanking, administered in a reasonable manner shall not be construed to be abuse."[49] South Carolina is even more explicit, excluding "corporal punishment" or "physical discipline" from the definition of "excessive corporal punishment" if administered (1) by a parent or person in loco parentis; (2) to restrain or correct; (3) in a reasonable manner and with moderate force; (4) without causing lasting damage; and (5) without reckless or grossly negligent behavior.[50] In Florida, the question of when a spanking, whether by a parent or a school official, constitutes abuse has been the subject of administrative and judicial decision. A few examples will serve to give an idea of the parameters established for defining physical abuse in this area and of the problems this definition presents.

Since permanent or *temporary* disfigurement[51] may constitute physical injury, which in turn will constitute harm when corporal punishment has been applied, and since spankings may leave bruises, the question has arisen as to whether a bruise is *per se* evidence of child abuse.

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45. *Id.* § 415.503(9).

46. Ch. 90-50, § 5, 1990 Fla. Sess. Law Serv. 64, 73-74 (West)(to be codified at FLA. STAT. § 415.503(9)).

47. FLA. STAT. § 415.503(9)(a)(1) (1989).

48. *Id.* § 415.503(14).

49. MO. REV. STAT. § 210.110(1) (Vernon 1983 & Supp. 1990).

50. S.C. CODE ANN. § 20-7-490(C)(1) (Law. Co-op. 1985).

51. FLA. STAT. § 415.503(14) (1989).

Two district courts of appeal have considered the issue of the evidentiary value of a bruise and the length of time it lasts.[52] The Department had developed an internal policy that "required investigators to confirm reports of excessive corporal punishment in all cases where bruises remained visible at least twenty-four hours later . . ."[53] In fact, some investigators have apparently used a one hour rule rather than a twenty-four hour rule.[54] The issues posed by application of the twenty-four hour rule are (1) whether such evidence can be conclusive, and (2) whether there can be confirmed child abuse if bruising is the only evidence of harm from corporal punishment.

Both District Court of Appeal cases involved spankings administered as discipline by school personnel. In *B.L.*, the hearing officer had found that the spanking of two students, otherwise properly administered, had left bruises lasting approximately one week.[55] The Department ruled that the accused party had used excessive force when punishment inflicted bruises lasting six to seven days.[56] A divided court upheld the Department's order, but in *dicta* noted that due process prohibited the application of a "six- or seven-day 'bruising rule'" to establish a conclusive presumption.[57] The court affirmed, however, ruling in part that bruising lasting six or seven days could be accepted as evidence of excessive corporal punishment, and in this case was sufficient evidence to sustain a confirmed classification.[58]

Judge Thompson delivered a sharp dissent. He noted that the statute granted authority for the use of corporal punishment in schools and prevented local school boards from prohibiting the use of corporal punishment.[59] He found significant that the punishment "was applied with an appropriate instrument and it was applied in the usual manner. There was no evidence that the punishment was given in anger or with ill will, malice, or intent to injure."[60]

According to Judge Thompson, the record revealed that the Department had used the six- or seven-day rule to create an irrebuttable pre-

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52. B.L. v. Department of HRS, 545 So. 2d 289 (Fla. 1st DCA 1989), *review denied*, 553 So. 2d 1164 (Fla. 1989); B.R. v. Department of HRS, 558 So. 2d 1027 (Fla. 2d DCA 1989); *see also* J.C. v. Department of HRS, 561 So. 2d 457 (Fla. 2d DCA 1990); D.J. v. Department of HRS, 15 Fla. L.W. D2052 (2d DCA Aug. 10, 1990)(reaffirming *B.R.*).

53. *B.R.*, 558 So. 2d at 1028.

54. *See B.L.*, 545 So. 2d at 291 (implying that agency official employed one-hour rule).

55. *Id.* at 290.

56. *Id.*

57. *Id.* at 291-92.

58. *Id.*

59. *Id.* at 293(Thompson, J., dissenting)(citing FLA. STAT. §§ 230.23(6)(c) (1989)).

60. *Id.*

sumption.[61] Given the "[v]arying degrees of susceptibility to bruising [that] exist" among children,[62] he argued that basing a finding of excessive force solely upon application of this rule amounted to an arbitrary and capricious deprivation of the appellant's rights.[63] This is particularly true, he noted, in cases where the only evidence comes from the parents, who report the alleged abuse eight days after it happened, and claim that the bruise lasted for seven days.[64] In such a case, apparently "[n]o amount of competent substantial evidence can overcome the irrebuttable presumption of excessive force that the parents' testimony creates."[65]

Beyond his objection to the use of a presumption, Judge Thompson did not fully explain his opinion on the evidentiary significance of the length of time a bruise remains visible. A complete understanding of his dissent became crucial when the Second District adopted the dissent as its opinion. In December of 1989, the Second District decided the case of *B.R.*,[66] which also involved spanking a student. Two school employees had each given a child two swats with a paddle. The hearing officer did not find evidence of excessive punishment other than bruising, but indicated that he felt bound by the twenty-four hour rule.[67] A unanimous court found the conclusive presumption of the twenty-four hour rule impermissible.[68] The court adopted the Thompson dissent in *B.L.* as its opinion, and "acknowledge[d] apparent conflict with" the First District's opinion in *B.L.*[69]

According to the *B.L.* majority, the hearing officers below did not use a conclusive presumption. The court stated that "the hearing officers' conclusions are obviously based solely on the evidence presented."[70] Judge Thompson believed, however, that the hearing officers *had* applied an arbitrary and capricious presumption. Both sides agreed that such a presumption would be unconstitutional; the dispute was over whether one had actually been used. The *B.L.* majority stated that establishment of a conclusive presumption solely on the basis of a six- or seven-day rule would "amount[] to a denial of due process."[71]

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61. *Id.* at 292.
62. *Id.*
63. *Id.*
64. *Id.* at 293.
65. *Id.*
66. 558 So. 2d 1027 (Fla. 2d DCA 1989).
67. *Id.* at 1028.
68. *Id.* at 1029.
69. *Id.* at 1029.
70. 545 So. 2d 289, 291 (Fla. 1st DCA 1989).
71. *Id.* at 292 (citing Public Health Trust v. Valcin, 507 So. 2d 596 (Fla. 1987)(footnote omitted)).

The Second District's interpretation of both *B.L.* opinions clouds the issue. That court believes it is in conflict with the proposition that certain evidence of bruising is relevant and admissible. It held that "as a matter of law . . . there is *no rational connection* between the length of time a bruise remains visible and the ultimate fact of excessive corporal punishment."[72] The apparent conflict it acknowledged, combined with the holding in *B.R.*, indicate that, in the Second District, evidence of length of time is not admissible to prove excessive force.

On the other hand, the Second District stated that "[w]hether corporal punishment is excessive must be proved in each case by competent, substantial evidence, and all relevant issues presented must be considered without resort to arbitrary presumptions fixed by the passage of time."[73] This statement suggests that the Second District objected only to the use of a conclusive presumption based on length of time, but would still admit evidence of bruising itself. This position is eminently more reasonable than excluding the evidence altogether, in that whatever weaknesses exist in the evidentiary value of the length of time that a bruise remains visible should go to the weight, rather than the admissibility, of the evidence.

After the decision in *B.L.*, the Department formally amended its position, receding from a *per se* test.[74] Instead, the Department returned to criteria presented in an earlier case.[75] There, the Department had declared that the factors to be considered in establishing excessive corporal punishment were

> (a) the nature and severity of the injury;
> (b) the location of the injury;
> (c) whether the perpetrator's action resulted in other injury to the child;
> (d) the age of the child;
> (e) the manner in which the injury was inflicted;
> (e) the appropriateness of the discipline to the seriousness of the offense.[76]

Comparison with the Missouri and South Carolina statutes indicates that other legislatures have addressed corporal punishment directly.[77] The fact that Florida has not suggests strongly that there has

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72. 558 So. 2d at 1029 (emphasis added).
73. *Id.*
74. *See* Department of HRS v. Z.S., 11 Fla. Admin. L. Rep. 4756, 4757 (1989).
75. *Id.* at 4759-60.
76. Department of HRS v. S.K.H, 9 Fla. Admin. L. Rep. 6509, 6511 (1987).
77. MO. REV. STAT. § 210.110(1) (Vernon 1983 & Supp. 1990); S.C. CODE ANN. § 20-7-490(C)(1) (Law Co-op 1988).

been no attempt to establish a separate standard for corrective punishment. On the other hand, the judicial glosses on the statute that have just been discussed indicate that courts are reluctant to find that routine spanking, which may leave some bruising, is child abuse, despite the philosophical opposition of some people to all corporal punishment of children.

The present state of the law appears to be that the fact of bruising and the severity thereof may be one of a number of factors which can lead to the classification of an event as confirmed child abuse. The two district courts to have examined the issue so far disagree over the evidentiary significance of the length of time that a bruise has lasted. Moreover, when the fact-finding of a formal administrative hearing has been presented to the Department, it is free to apply the law independent of the hearing officer's recommendation to the facts that have been found.[78] The Department is a state-wide agency, and administrative hearings on abuse registry classifications are held throughout the state. Consequently, conflict between the districts leaves uncertain whether a spanking in Tampa will be considered under the same standard as one in Tallahassee. Nor does one know what the Third, Fourth, or Fifth Districts might decide. As the agency charged with interpreting this statute, the Department remains somewhat vague as to the route it will take to reconcile these conflicts, and apparent unevenness exists, as the following cases will demonstrate.

In *Department of Health and Rehabilitative Services v. R.C.M.*,[79] a father disciplined his son by spanking him with three blows of a belt, causing a welt. The welt disappeared in a few hours, but a small bruise remained.[80] The mother was fearful that someone might see the bruise and kept the child home from school.[81] When the child returned to school, he told his classmates of the incident.[82] The child later showed an investigator other bruises, which the evidence revealed were caused by incidents unrelated to parental discipline, and the investigator concluded that the report should be confirmed.[83] The hearing officer recommended that the report be expunged completely.[84] The Department found that the confirmed classification should be al-

78. FLA. STAT. § 120.57(1)(b)(10) (1989).
79. 11 Fla. Admin. L. Rep. 6033 (1989).
80. *Id.* at 6037.
81. *Id.* at 6037-38.
82. *Id.* at 6038.
83. *Id.* at 6038-39. The hearing officer indicated that the child had a history of exaggerating about the frequency and severity of the discipline he received, in an apparent effort to impress his classmates. *Id.* at 6036.
84. *Id.* at 6041.

tered, but that the fact there was an attempt to avoid investigation supported a classification of "indicated."[85]

In *Department of Health and Rehabilitative Services v. M.A.*,[86] the Department refused to accept a hearing officer's recommendation that a report be expunged, ordering that it should remain confirmed.[87] In effect, while there were a "bruise and welt marks" on the child, the hearing officer concluded as a matter of law that under the circumstances this did not constitute child abuse.[88] The Department chose to apply the facts differently, relying in part on *B.L.* for the proposition that "[b]ruises constitute temporary disfigurement,"[89] and noting that the statute makes no allowances for different ethnic practices in discipline (the family was of Arabic origin).[90]

The *M.A.* case illustrates a practical problem created by the use of the administrative process as a forum for fact-finding and application of law. M.A. and A.A., the parents, appeared *pro se*.[91] They carried their effort to change the classification to the independent hearing officer, and the agency, exercising its power to interpret the law,[92] effectively left the parents where they had begun before the hearing. Only resort to judicial review, a radical step for ordinary persons not threatened with actual loss of employment by the ruling, allows a review completely independent of potential agency bias. Consequently, it is difficult to test the agency's interpretation of legal issues sufficiently by appeal to the judiciary in order to establish clear parameters for these definitions.

The lack of uniformity among the Department's decisions is illustrated in *Department of Health and Rehabilitative Services v. K.M.*[93] There, the hearing officer concluded that:

> In the instant case, the evidence of record shows only that a concerned mother spanked her daughter for misconduct which she felt merited swift and convincing punishment. The minor temporary blemish on T.'s body, seen by the counselor, and relied upon by [the

85. *Id.* at 6033. An indicated finding has the effect of keeping a record on the registry for seven years without identifying a perpetrator, and without the disqualification resulting from a confirmed classification. FLA. STAT. §§ 415.504(4)(c), .504(4)(d)(3)(b) (1989).

86. 12 Fla. Admin. L. Rep. 187, 188 (1990).

87. *Id.* at 189.

88. *Id.* at 193.

89. *Id.* at 189.

90. *Id.* The hearing officer indicated that spanking is a regular form of discipline in Arabic homes.

91. *Id.* at 190.

92. FLA. STAT. § 120.57(d) (1990).

93. 11 Fla. Admin. L. Rep. 6026 (1989).

> investigator] to support his classification of "confirmed" does not serve to fulfill the agency's burden to prove, by a preponderance of the evidence, that the punishment imposed by Respondent was "excessive."[94]

Despite the presence of a bruise, the Department adopted this recommendation.[95]

Finally, the case of *Department of Health and Rehabilitative Services v. J.W.*[96] demonstrates how the decision as to whether spanking is excessive can vary greatly with the decision-maker. A father spanked his two-year-old in connection with a plan of discipline to keep the child from continually getting out of bed at bedtime. He had never spanked the child before the incident, had not spanked him after the incident, and was following a plan that the parents had agreed upon. The spanking left rather considerable bruises, but caused no significant impairment.[97] The hearing officer acknowledged that "all evidence which would tend to afford insight into this event must be examined without regard for any presumption based upon the duration of the injury in terms of its physical manifestation," citing both *B.L.* and *B.R.*[98] Still, he recommended, and the Department agreed,[99] that the report remain confirmed because:

> [w]hen taking into account the nature and severity of the bruises, especially considering the child's age, J.W.'s use of corporal punishment on this occasion is seen to be excessive. This is an unfortunate outcome given that everyone who remarked about this case pointed out the fine relationship between the father and his child, but the law under which this case is examined looks upon that relationship in a more discrete fashion incident by incident, not allowing the overall quality of that bond to dictate the outcome.[100]

The *J.W.* decision brings the problem in defining excessive corporal punishment into sharp focus. If the Legislature intends to discourage all corporal punishment, which it might wish to do, the statutes should clearly embody that goal. As it stands, the individual investigator, the individual hearing officer, and above all the Department through its review of recommended orders, must struggle with their

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94. *Id.* at 6032.
95. *Id.* at 6026a.
96. No. 90-0336C (Div. of Admin. Hearings Apr. 5, 1990).
97. *Id.* at 2-3.
98. *Id.* at 10.
99. Department of HRS v. J.W., No. 90-0336C (June 5, 1990).
100. No. 90-0336C (Div. of Admin. Hearings Apr. 5, 1990).

own prejudices and what each perceives public policy to be. In *J.W.*, all evidence pointed to a mistake in assessing the effect of a spanking by a father who had never spanked the child before. The evidence did not suggest that the mistake had impaired the child, or that it portended the "tip of the iceberg" of a growing problem. There was no attempt to hide the facts.[101] Still, the Hearing Officer interpreted the law as unremitting and requiring a confirmed finding. Later analysis will discuss this problem in the context of due process.[102]

2. *Definition of "Other Person Responsible for the Child's Welfare"*

The statute defines "other person responsible for a child's welfare" as legal guardians or custodians, foster parents, employees of public and private schools or day care centers, and employees or legally responsible persons of homes and facilities.[103] The 1990 amendments did not alter this definition.

The Florida "other person" language emphasizes legal responsibility (guardians, directors of facilities) and in loco parentis relationships (school employees, foster parents, caretakers). Thus, if abuse happens at the hands of one other than a parent or "other person," it is not child abuse for the purpose of the child abuse registry statute. This omission undermines the purpose of the statute.

In *D.A.O. v. Department of Health and Rehabilitative Services*,[104] for example, an uncle who had had sex with his niece for a six-year period (beginning when the uncle was thirteen and the niece five) did not commit child abuse for the purpose of the registry under circumstances where he lived with the mutual grandmother, but the child did not, although she visited the house frequently.[105] Also excluded was a man who performed oral sex on a fifteen-year-old boy because the man had no relationship with the child as defined by the statute.[106]

3. *Amendments to the Definition of "Child Abuse"*

The legislature made two changes which increased the number of those affected by the section. In addition to parents, an "adult household member" is now among those who can commit child abuse for

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101. *Id.* at 4-5 (child delivered the next morning to nursery school and father admitted using corporal punishment).

102. *See infra* text accompanying notes 157-66.

103. FLA. STAT. § 415.503(13) (1989).

104. 561 So. 2d 380 (Fla. 1st DCA 1990).

105. *Id.* at 381-82.

106. P.N. v. Department of HRS, 562 So. 2d 810, 811 (Fla. 2d DCA 1990).

the purposes of the child abuse registry.[107] Furthermore, the legislature has added the language "or, for purposes of reporting requirements, by any person."[108]

While it may be argued that these additions do not go far enough, it is clear that the legislature has struggled with the question of whom Florida wishes to monitor with its abuse registry statute. Jurisdictions by no means agree in this respect. California, for example, defines child abuse, at least as it relates to physical injury and not neglect, as "physical injury which is inflicted by other than accidental means on a child *by another person.*"[109] Missouri's scheme encompasses "[t]hose responsible for the care, custody, and control of the child,"[110] including "but not limited to the parents or guardian of a child, other members of the child's household, or those exercising supervision over a child for any part of a twenty-four hour day."[111]

Florida's other abuse registry, which protects aged or disabled adults, defines abuse as "infliction of physical or psychological injury . . . or the failure of a caregiver to take reasonable measures to prevent [such injury]."[112] The 1990 Legislature has changed that language to make explicit that *nonaccidental* injury (as opposed to preventable accidental injury) inflicted "by a relative, caregiver, or adult household member" will now constitute abuse for the purpose of that registry.[113] Whereas the previous statute emphasized institutional care as the setting for abuse, the 1990 amendments enlarged the scope of culpability to include relatives and to encompass the household setting (while narrowing the scope of actionable injuries to accidents).

As analogous activity with respect to the adult abuse registry suggests, these additions to the definition of child abuse must be considered a careful attempt to define more precisely the scope of child abuse for the purposes of the child abuse registry. The addition of "adult household member" should enlarge the scope significantly. It would not, presumably, have affected the case of *D.A.O.*,[114] where

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107. Ch. 90-50, § 5, 1990 Fla. Sess. Law Serv. 64, 74 (West) (to be codified at FLA. STAT. § 415.503(1)).

108. Ch. 90-50, § 5 (to be codified at FLA. STAT. § 415.503(1)). The full definition of child abuse is "harm or threatened harm to a child's physical or mental welfare by the acts or omissions of a parent, adult household member, or other person responsible for the child's welfare, or, for the purposes of reporting requirements, by any person." *Id.*

109. CAL. PENAL CODE § 11165.6 (West 1976 & Supp. 1990) (emphasis added).

110. MO. ANN. STAT. § 210.110(6) (Vernon 1983 & Supp. 1990).

111. *Id.*

112. FLA. STAT. § 415.102(1) (1989).

113. Ch. 90-50, § 1, 1990 Fla. Sess. Law Serv. 64, 65 (West) (to be codified at FLA. STAT. § 415.102(1)).

114. 561 So. 2d 380 (Fla. 1st DCA 1990).

the child was not a member of the uncle's household. Nor would it affect a situation such as that presented in *P.N.*,[115] where the abuser was a person "unconnected" to the child. Apparently, Florida continues to make a conscious choice to exclude such interactions, unlike California, whose statute extends to "any person."[116] Still, sexual abuse by adult siblings or step-parents, aunts, uncles, and roommates of parents will now be included. Moreover, physical abuse by household members other than parents is now subject to a report.

The new language broadening reporting requirements to include all perpetrators[117] could have a significant effect. The amendment suggests that the legislature has decided that *all* suspected child abuse should be reported so that it can be decided after investigation how to react and whether the abuse is covered by the abuse registry scheme.

The legislature has created potential conflict between these amendments and other subsections of the definitions section. While courts may well give little consideration to these theoretical conflicts, recent decisions have suggested that, at least with respect to spanking, there is some judicial impatience with the way in which the statute is being administered.[118] Specifically, the legislature failed to include "adult household member" and the "purposes of reporting" phrase to the definition of child abuse in other sections upon which it depends or in which it is implemented. Thus, although the statute still defines an "abused or neglected child" as one harmed or threatened with harm by "the parent or other person responsible for the child's welfare," the same subsection now requires reporting of abuse committed "by any person."[119] It would be difficult to find or report child abuse or neglect in a situation where, by definition, there was no abused or neglected child. The mandatory reports of section 415.504(1) are required when the person "knows, or has reasonable cause to suspect, that a child *is an abused or neglected child*" (emphasis added). If the definitions are strictly applied, the reporters might observe child abuse, but because of the identity of the abuser, not be required to report because of the unamended definition of abused child. Any criminal sanctions for failure to report in such a case could be avoided by courts invoking requirements for strict construction of criminal statutes. Similarly, the definitions of harm and of "other person re-

115. 562 So. 2d 810 (Fla. 2d DCA 1990).

116. CAL. PENAL CODE § 11167(a) (West 1982 & Supp. 1990).

117. Ch. 90-50 § 5, 1990 Fla. Sess. Law Serv. 64, 72 (West) (to be codified at FLA. STAT. § 415.503(1)).

118. *See, e.g.*, *supra* text accompanying notes 52-73.

119. Ch. 90-50, § 5, 1990 Fla. Sess. Law Serv. 64, 72 (West) (to be codified at FLA. STAT. § 415.503(1)).

sponsible" have remained unchanged. Child abuse requires harm, but harm can be attributed only to parents or "other persons responsible."[120]

Such inconsistencies will likely become more significant where criminal liability is at issue. By failing to integrate the amendments throughout the existing statute, the legislature might have compromised the state's efforts to fight the very real problem of child abuse in our society.

B. New Procedures for Initiating the Investigation

Amendments to the section that establishes the mechanics of the registry reveal some of the concerns that in the past have attended investigations. Formerly, upon receipt of a report, the agency made an immediate check of prior reports, then conducted triage to determine whether a report merited immediate onsite investigation. Under any circumstances, investigation began within twenty-four hours.[121] The amended statute now requires, in addition, that investigators at the onset disclose to the subject of the investigation:

> a. The names of the investigators and identifying credentials from the department.
> b. The purpose of the investigation.
> c. The possible consequences of the investigation.
> d. How the information provided by the subject may be used.
> e. The description of the risk assessment process and placement of a child.
> f. That the child, the child's parent or guardian, a perpetrator named in a proposed confirmed report, and legal counsel for the aforementioned persons have a right to a copy of the report at the conclusion of the investigation.
> g. That persons who are entitled to receive a copy of the report also have the right to submit a written comment or rebuttal which may be made a part of the report.
> h. That subjects may have additional appeal rights which will be explained in writing when appropriate and necessary at the conclusion of the investigation.
> i. That the court will appoint a guardian ad litem to represent the interest of the child should dependency proceedings result from the investigation.

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120. *Id.*
121. FLA. STAT. § 415.504(4)(b) (1989).

j. The telephone number and name of a department employee available to answer questions.[122]

The import of these changes can be seen from a review of the registry process. Investigations begin with a report to the registry. An investigator is dispatched to the site to conduct interviews.[123] Upon completion of the investigation, under the statute as it existed before October 1, 1990, the Department would classify the report as "confirmed," "indicated," or "unfounded."[124] The agency kept unfounded reports in the registry for one year, indicated reports for seven years, and confirmed reports for fifty years.[125] Unfounded reports were indexed by the child's name only; no one in unfounded or indicated reports was identified as a perpetrator. Confirmed reports did indicate a perpetrator, and confirmed abusers faced a disqualification from a number of jobs.[126]

The Department notified the subject of the potential sanctions only after classification of the report.[127] That notice would also inform confirmed abusers of their right to request that the Department review the report with an eye towards amendment or expunction.[128] There was no redress for those accused in indicated or unfounded reports.[129] The accused could request a Chapter 120 hearing upon the Department's refusal to amend, or, if the Department refused to act, after thirty days.[130]

Thus, under the pre-amendment statute, the subject of an abuse investigation might have little or no idea what the consequences of the investigation might be until the report was classified.[131] In fact, there is a certain incentive for an investigator not to reveal too much to the

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122. Ch. 90-50, § 6, 1990 Fla. Sess. Law Serv. 64, 75 (West) (to be codified at FLA. STAT. § 415.504(4)(c)(1)).

123. FLA. STAT. § 415.504(b) (1989).

124. *Id.* § 415.504(4)(c).

125. *Id.*

126. *See id.* § 415.51(4) (1989).

127. *Id.* § 415.504(d)(1).

128. *Id.* § 415.504(d)(2) (1989).

129. *Id.*

130. *Id.* § 415.504(5).

131. *See id.* §§ 415.505(2)(a)(b), .506. It is clear that the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), are not required in this investigation, absent custody or other coercive circumstances. *See* State v. Brydon, 626 S.W.2d 443 (Mo. Ct. App. 1981); *cf.* Baltimore City Dep't of Soc. Serv. v. Bouknight, 110 S. Ct. 900 (1990) (no fifth amendment right to bring child into court in protection proceedings context); Beckwith v. United States, 425 U.S. 341 (1976) (*Miranda* warnings not required for non-custodial interrogations performed by IRS investigators). Missouri was the innovator in requiring substantial warnings to subjects at the initial stage of investigation. *See* Comment, *Changes in the Missouri Laws of Child Abuse: Changes for the Better?*, 32 ST. LOUIS U.L.J. 549 (1987).

subject. Often the simplest way to develop evidence necessary to prove abuse is by admission of the perpetrator. For example, if a school reports that a child has received a serious injury to his or her face from an unexplained cause, and if the child is reluctant to talk with the investigator for fear of additional punishment, there may be no competent substantial evidence to support a confirmed classification, the liberal hearsay rule of administrative proceedings notwithstanding.[132]

These amendments illustrate the constant tension found in the legislative scheme. The abusive parent who might otherwise have responded to the investigator's question, "Do you know how Johnny's face was hurt?", with "I knocked the smart alec for sassing me; I do it all the time!" may now think twice, and the result could be less protection for the child. Conversely, parents formerly willing to cooperate with an overly zealous investigator, and who thereby ran some risk of having their child taken into protective custody to prevent problems perceived by the investigator but not by the parents, may now understand the possible consequences of the investigation and be able to protect their rights as parents better. The Department needs to remember that it administers the statute for the protection of children, not to establish how children should be raised.[133]

C. New Procedures for Classification and Review

In addition to the new language mandating initial "warnings" by protective investigators, the revised section 415.504 makes a significant change in the classification system. Under the 1989 statute, reports were classified as "unfounded," "indicated," or "confirmed." This classification took place at the investigative level; therefore, the first opportunity for direct input from the subject of the investigation into the decision-making process came after classification had been made, when, in the case of confirmed reports, the perpetrator was given the opportunity to request review of the decision by the Department. Thus, a confirmed report, classified without an opportunity to be heard, could be entered into the system, and remain there throughout the process of internal departmental review, administrative hearing, and judicial review, only to be changed at some later stage in the process.

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132. *Cf.* FLA. STAT. §§ 120.57(1)(b)(10), .58(1)(a) (1989); *see also K.M.*, 11 Fla. Admin. L. Rep. 6026, 6031 (1989).

133. The United States Supreme Court has consistently held that the fourteenth amendment protects freedom of personal choice in family matters. *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

The 1990 amendments introduced two slight but significant changes. Two classifications are renamed: "confirmed" has been changed to "proposed confirmed"[134] and "indicated" to "indicated-perpetrator undetermined."[135] In the case of "indicated-perpetrator undetermined," the change is cosmetic, presumably to reduce the guilt by implication of those named in the report.

The introduction of "proposed confirmed" is of greater significance, for a second change modifies fundamentally the process of classification. As with "confirmed" cases, those affected by the "proposed confirmed" classification are given notice of the right to review by the Department. The notice must also include a statement of the facts relied upon in proposing the classification and the nature of the alleged offense.[136] In addition to receiving this information, the alleged perpetrator may now request a review to *determine* the classification, rather than to modify a classification already made.[137] The effect may be slight, but the timing with respect to the abuse registry is very different. The fact that a report has received preliminary classification as "proposed confirmed" is reported to the registry,[138] but even after a determination that the "proposed confirmed" should be "confirmed," until requested review is completed, the report is not placed on the registry.[139]

Even requests for review to the Department may take substantial time. Although the right to administrative hearing ripens after thirty days of departmental action, one would be reluctant to abandon the opportunity for internal review even if it took more than thirty days to complete. Such review does routinely take considerably longer than thirty days. After departmental review, the process of an administrative hearing can take many months. Under the amended statute, subjects of "proposed confirmed" reports whose cases will eventually end up classified as "unfounded" or "indicated-perpetrator undetermined" will not be subject to job disqualification during the period of time necessary to modify the proposed confirmed classification.[140]

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134. Ch. 90-50, § 5, 1990 Fla. Sess. Law Serv. 64, 74 (West) (to be codified at FLA. STAT. § 415.503(10)).

135. Ch. 90-50, § 5, 1990 Fla. Sess. Law Serv. 64, 73-74 (West) (to be codified at FLA. STAT. § 415.503(6), .503(16)).

136. Ch. 90-50, § 6, 1990 Fla. Sess. Law Serv. 64, 76 (West) (to be codified at FLA. STAT. § 415.504(4)(d)(3)(a)).

137. *Id.*

138. Ch. 90-50, § 7, 1990 Fla. Sess. Law Serv. 64, 78 (West) (to be codified at FLA. STAT. § 415.505(1)(f)).

139. Ch. 90-50, § 6, 1990 Fla. Sess. Law Serv. 64, 77 (West) (to be codified at FLA. STAT. § 415.504(4)(d)(5)).

140. FLA. STAT. § 415.504(4)(d)(3) (1989).

D. Child Protective Investigations

1. The teacher connection

Section 415.505 establishes procedures and objectives for the child abuse investigation. In general, the section dictates that investigations will begin promptly,[141] that the investigation will make a determination of the risk to the child and possible services that may improve the situation, and that the Department will inform the state attorney in the case of deaths or may inform in the case of "proposed confirmed" reports. A separate section provides for immediate removal of the child from the home in cases where prompt action is deemed necessary.[142]

Institutional abuse is singled out for separate treatment.[143] As before, the Department must immediately investigate institutional personnel, including school teachers, and notify the state attorney.[144] The state must conduct a criminal investigation, either jointly with the child protective investigation or independent of it.[145]

This process has put a special burden on institutional personnel. The Department may recommend criminal charges to the state attorney, except in cases of death, aggravated abuse, or sexual battery, where reporting is mandatory.[146] As we have seen in reviewing judicial decisions concerning "spanking,"[147] teachers have been in the front lines of those availing themselves of all rights provided by the system. Moreover, the present action in the United States District Court for the Northern District of Florida challenging the constitutionality of the abuse registry scheme,[148] though in form a class action, is being brought through teachers' unions.[149]

Teachers do in fact face a special burden under the child abuse registry statute. Although a confirmed report does not statutorily disqualify a person from teaching in a public school, many school

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141. Investigation begins either immediately or within 24 hours depending on initial risk assessment.

142. FLA. STAT. § 415.506.

143. FLA. STAT. § 415.505(2) (1989). The legislature made no changes to section 415.505(1)(i), which mandates special procedures for interviewing at school alleged victims of non-institutional (e.g., parental) abuse.

144. FLA. STAT. 415.505(2)(a) (1989).

145. *Id.*

146. *Id.* § 415.505(1)(h).

147. *See supra* notes 52-76 and accompanying text.

148. N.L. v. Coler, 90-40069-MP (N.D. Fla. Apr. 12, 1990). *See infra* text accompanying notes 157-161.

149. *Id.*

districts are reluctant to retain teachers initially confirmed as perpetrators and have suspended them during the pendency of review. The change in classifications and accompanying procedures may relieve teachers from being placed on involuntary leave during the review process. These teachers would have formerly been classified as confirmed perpetrators, and thereby faced immediate suspension, essentially on the judgment of the investigator alone.[150] Furthermore, the amendments to section 415.505 suggest that the investigations themselves have been a source of controversy: new language mandates that the Department of Health and Rehabilitative Services and the Department of Education develop protocol for investigations in schools and procedures for investigation and training of investigators.[151]

2. New Right to Counsel During Questioning

The 1990 amendments to section 415.505 establish a remarkable new procedural protection:

> The alleged perpetrator shall be entitled to legal representation, at his or her expense, during questioning in connection with the investigation, but the absence of counsel shall not prevent the department from proceeding with other aspects of the investigation including interviews with other persons. Legal counsel shall be bound by the confidentiality of § 415.51.[152]

The interjection of a right to counsel into the system represents a considerable procedural safeguard against self-incrimination in a statute that clearly has criminal overtones. However, it is curious that the procedural protections provided by the amendments to section 415.504[153] do not expressly require that the investigator inform the alleged perpetrator of this right upon commencing the investigation. It seems extremely unlikely that the legislature intended to require "warning,"[154] but not to require notification of the right to counsel.

This new addition raises a number of questions, which ultimately must be answered in the courts. Again, there is no fifth amendment right to counsel with respect to civil investigations.[155] The investigator

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150. *See* Ch. 90-50, § 7, 1990 Fla. Sess. Law Serv. 64, 78 (West) (to be codified at FLA. STAT. § 415.505(1)(f)).

151. *Id.* (to be codified at FLA. STAT. § 415.505(1)(b)(5)). The mandate is qualified, however, by the legislative recognition that the departments must work "within existing resources." *Id.*

152. *Id.* (to be codified at FLA. STAT. § 415.505(1)(a)).

153. Ch. 90-50, § 6, 1990 Fla. Sess. Law Serv. 64, 75 (West) (to be codified at FLA. STAT. § 415.504(4)(c)(1)).

154. *Id.*

155. *See supra* note 131.

has no power to make an individual reveal information, but if a person cooperates to the point of making admissions which may later be incriminating, there is no constitutional protection against the use of those statements.[156] The legislature might, however, have created a statutory "*Miranda* warning" in child protective investigations. If so, the courts would ultimately determine whether statements made under questioning without proper warning would be admissible in administrative hearings, and/or in dependency proceedings, and/or criminal proceedings. If the investigator must notify the alleged perpetrator of the right to counsel, the courts might also have to decide how long the investigator must wait to question an alleged perpetrator after giving notice. Unlike the true *Miranda* situation in which custody is involved, the alleged perpetrator is free to go as he or she pleases. It seems unlikely that a subject could avoid questioning entirely by refusing to acquire counsel. On the other hand, the right is useless without reasonable time to engage the services of an attorney.

The addition of the right to counsel at questioning is certainly the most dramatic change made by the 1990 amendments. Although it will take some time for the effects of the change to be felt, several questions await answers. First, how many people will actually choose to exercise this rather expensive right? Second, if counsel is involved immediately, will counsel remain involved throughout the investigation and review process? Third, will the presence of counsel have an impact on the frequency with which reports are initially classified proposed confirmed? Only experience will provide the answers.

IV. Problems with the Child Abuse Registry Legislation

The merest glance at the historical summary of any section of the child abuse registry statute reveals that the Florida legislature has been attentive to the needs of the statute. First enacted in 1963, the legislation has been amended regularly in the past two decades, and every year since 1984 has seen some amendment to the statutory scheme. Still, there remains significant problems in a system which allows administrative intervention into family life in an effort to protect children in settings where that very intervention might be threatening harm.

A. Constitutional Perspectives

The plaintiffs in *N.L. v. Coler*[157] have attacked the child abuse registry statute directly on constitutional grounds. Named plaintiffs in

156. *Id.*
157. 90-40069-MP (N.D. Fla. Apr. 12, 1990)

the class action are a "confirmed" perpetrator and persons whose names are implicated in "indicated" reports.[158] The complaint is based on the theory that sufficient interests are involved to require an opportunity to be heard before classification is made and, in the case of "indicated" reports, to require an opportunity to challenge the classification.

Although *N.L. v. Coler* was filed before the procedural protections provided by the 1990 amendments were in place, the new procedural protections created by those amendments do not moot the issue of how much process is due in an administrative setting. The United States Supreme Court has held that the nature of the process required to satisfy the Fourteenth Amendment must be considered in relation to the right being affected.[159] A "confirmed" child abuser faces the deprivation of a constitutionally protected liberty interest: the right to work in certain occupations.[160] Since anyone investigated as an alleged perpetrator runs some risk of being classified as "confirmed," any investigation might impinge upon a liberty interest.[161]

If the statute does implicate a liberty interest, it must provide sufficient procedural protections to satisfy federal due process concerns.[162] Under the amended law, the Department makes no classification of "confirmed" until the alleged perpetrator has been given the opportunity to request review by the Department. A person classified as "indicated-perpetrator undetermined," however, enjoys no such right of review. Because the statute forbids release of any names in an indicated-perpetrator undetermined case, this classification affects no substantial rights and only the improper release of information could adversely affect a person by creating the appearance of involvement with child abuse.[163] One could argue that the absence of available procedures for challenging an "indicated-perpetrator undetermined" report, combined with the prospect of potential disclosure renders the statute unconstitutional.

If "indicated-perpetrator undetermined" reports do not impinge upon significant rights, however, the statute need contain sufficient

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158. *Id.*

159. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976) (must weigh importance of private interest, protective value of procedure, and governmental interest).

160. This is certainly true for public employment. *See* Arnett v. Kennedy, 416 U.S. 134, 151-52 (1973)(plurality opinion)(citing Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972)).

161. *Cf.* Bell v. Burson, 402 U.S. 535 (1971) (prior hearing required for driver's license suspension where accident liability is at issue).

162. *Mathews*, 424 U.S. at 332-33.

163. *See* Complaint, N.L. v. Coler, at 10-14 (alleging that disclosure and improper disclosure have injured plaintiffs).

procedures only with respect to "proposed confirmed" reports. After the 1990 amendments, the statute provides that the report be given to the alleged perpetrator and that "written comment or rebuttal" will be made a part of the report.[164] The new legislation provides that a "proposed confirmed" report confirmed after review will not appear on the registry as a confirmed report until after resolution of any requested administrative hearing.[165] There is no provision, however, for the person to appear before the Department secretary or before committees appointed by the secretary to review the reports. Indeed, in actual practice, those who supervise child protective investigators, and who have reviewed recommendations with them, may sit on the committees assigned the task of providing requested review. In effect, the Department is represented at this review while the alleged perpetrator is not.

Defenders of the legislative scheme would argue that there can be no impingement of rights until after the opportunity for a fact-finding hearing. Again, the question would seem to revolve upon whether damage has been done by forcing the individual to resort to the expense of an administrative hearing without any prior chance to be heard before classification is made, as, for example, in the case of a probable cause hearing.[166]

In addition to questions concerning procedural due process, one might raise a colorable constitutional challenge to the legislation based on the vague definition of harm. Although the First District has found that the statute was not penal for the purposes of ex post facto prohibitions,[167] the court noted that section 415.504 "may arguably have a

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164. Ch. 90-50, § 6, 1990 Fla. Sess. Law Serv. 64, 75 (West) (to be codified at FLA. STAT. § 415.504(4)(c)(1)(g)).

165. FLA. STAT. § 405.515(1)(f) (1989).

166. On October 30, 1990, the United States District Court for the Northern District of Florida (Paul, J.) rendered an order on several motions in the *N.L.* case. Of significance to the foregoing discussion is the court's granting in part the parties' cross-motions for summary judgment. Specifically, Judge Paul found that with respect to "indicated" reports, section 415.504, Florida Statutes, is facially unconstitutional in that fails to provide sufficient facial safeguards. He also noted that the 1990 amendments have not cured the defect. With respect to "confirmed" reports, the court found that the statute contained sufficient procedures to satisfy the demands of due process. Although the order does not use the term "proposed confirmed," and is not explicit concerning the possible effect of the 1990 amendments, the order appears to be addressing the statute both with and without those amendments. A complete analysis of the effect of this order on the abuse registry system is premature at this time. Given the interlocutory nature of the order, and the potential for a large damage award, the state will in all likelihood appeal the order at some point. Furthermore, the court resolved only the procedural due process issues raised in the complaint.

167. W.M. v. Department of HRS, 553 So. 2d 274 (Fla. 1st DCA 1990), *rev. denied*, 564 So. 2d 490 (Fla. 1990).

'penal effect.'"[168] If this "penal effect" were significant enough to require due process, then a strong argument could be made that the statute is unconstitutionally vague. The controversy over what constitutes "harm" with respect to child discipline demonstrates the difficulty of knowing in advance whether a spanking administered in a customary manner will leave some sort of bruise and whether that bruise may be sufficient temporary disfigurement to qualify as physical abuse and excessive corporal punishment. It is basic to the validity of penal statutes that ordinary people using their customary experience must be able to distinguish between actions which are prohibited and those which are not.[169] Arbitrary enforcement cannot be encouraged.[170] "While the test for vagueness is more lenient for [a noncriminal] administrative rule than for a penal statue, the requirement that a person of common intelligence be properly apprised of the conduct proscribed by the rule remains intact."[171] In *Bertens*,[172] for example, the court found unconstitutionally vague a rule that led to the suspension of a fifth-grader for giving two nonprescription vitamin pills to friends in violation of a regulation requiring that "medicine" be given to a staff member when brought to school.[173] The court held that to include nonprescription vitamins as "medicine" rendered the statute impermissibly vague.[174]

If neither the statute nor the courts prohibit corporal punishment, but a person must guess at whether any resulting minor bruises will render the corporal punishment excessive, then the statute is susceptible to being held unconstitutionally vague.

B. Problems of Administering the Child Abuse Registry Statute

The 1990 amendments have made significant procedural advances which will aid administration of the abuse registry statute. Still, administration of the statute continues to face significant practical problems, such as its potential use to harass and embarrass. Even when reports are made in good faith, however, there is often a tension between the value systems of the individuals involved in the investigation and the views of those investigated.

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168. *Id.* at 278.

169. Bertens v. Stewart, 453 So. 2d 92, 93-94 (Fla. 2d DCA 1984).

170. *See* Kolender v. Lawson, 461 U. S. 352, 357 (1983); *see also* State v. Bussey, 463 So. 2d 1141, 1144 (Fla. 1985); Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources, 453 So. 2d 1351, 1353 (Fla. 1984).

171. *Bertens*, 453 So. 2d at 94.

172. *Id.*

173. *Id.*

174. *Id.* at 95.

The grizzly story of Bradley McGee recounted at the beginning of this study involved a departmental employee who was found to have been negligent with respect to investigation and reporting. Such threat of prosecution is sure to influence child protective investigators to err on the side of more stringent classification. While there may be no civil liability for mistakes,[175] the fate of the social worker in the McGee case must be chilling to all who work in the field. Moreover, investigators are not police officers trained to do criminal investigation, but they do, unlike police officers, make a decision based on their own investigations. Thus, the nature of the tasks undertaken by these investigators may lead to significant problems in administering a difficult statute.

Consequently, the child abuse registry statute has settled on a very uneasy compromise between individual and family rights and child protection. A review of administrative decisions in this area reveals just how varied are the conclusions of investigators and the reactions of the Department to recommended orders. One case supplies an especially good view of the tension at the boundaries of this process.

In *Department of Health and Rehabilitative Services v. B.D.M.*,[176] the hearing officer found that B.D.M. had left her two-year-old daughter alone in her infant car seat around five o'clock in the afternoon in a parking area about fifty yards from the after school day care center where the mother's other daughter was waiting.[177] The mother left the motor running to keep the car warm on a cold day.[178] At that time of day, it normally took two to seven minutes for the mother to walk to the center and return with the other daughter.[179] The incident was reported, investigated, and classified "confirmed." Based on the evidence, the hearing officer recommended that the report be expunged.[180]

Although the Department secretary generally accepted the hearing officer's recommendations, he rejected "any implication that a single act or omission" could never constitute abuse,[181] and, based on the fact that hearing officer wrote of the incident that "[a]t most, [the

175. *See* DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189 (1989); Comment, *Abused Children and State-Created Protection Agencies: A Proposed Section 1983 Standard*, 57 U. CIN. L. REV. 1419 (1988).

176. 12 Fla. Admin. L. Rep. 2170 (1990).

177. *Id.* at 2173.

178. *Id.*

179. *Id.*

180. *Id.* at 2174.

181. *Id.* at 2171.

mother] exercised poor judgment,"[182] reclassified the report as "indicated."[183]

This case shows the frustration inherent in the system. If B.D.M.'s actions constituted statutory neglect, what classification is left for malnutrition, or, for example, continually leaving toddlers while going out to drink? Furthermore, because the statutory relief outside the Department is under Chapter 120, the Department remains able to change the result after the citizen has received what appears to be his or her "day in court." The only completely independent forum is appellate review.

C. *Suggestions for Reform*

Two reforms might address the basic problem above. One would be to give the Division of Administrative Hearings final order authority for hearings requested pursuant to section 415.504. In this way the citizen would not be subjected to double scrutiny by the Department. Because of the nature of administrative hearings, only findings of fact in the hearing officer's recommended order are binding on the Department.[184] The administrative hearing is perceived as a "day in court"; however, as such it can be deceptive, because the Department has the final authority. An independent review at the fact-finding stage would better preserve the citizen's day in court. The hearing officer would still give due deference to departmental interpretations of the statute, and the Department would remain free to appeal cases it felt were wrongly decided.

A second reform was suggested in a bill[185] by Senators Eleanor Weinstock[186] and George Stuart[187] and included the following provision: "A person who challenges a classification of a proposed confirmed report by requesting an administrative hearing and who prevails in such challenge shall be awarded costs of litigation including reasonable attorney's fees and expert witness fees." Such a fees provision would do much to remove the heavy burden placed on those accused of child abuse.

As the system stands, there is little incentive for abuse investigators to ponder close calls. In fact, as the case of *B.D.M.*[188] illustrates, it is

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182. *Id.* at 2173.

183. *Id.* at 2171.

184. A hearing officer's findings of fact must be supported by competent, substantial evidence in order to be binding on an agency. FLA. STAT. § 120.57(1)(b)(10) (1989).

185. The bill, SB 790 (1990), would have amended FLA. STAT. § 415.504(4)(d)(5).

186. Dem., West Palm Beach.

187. Dem., Orlando.

188. *See supra* text accompanying notes 176-83.

very easy to make a "proposed confirmed" classification based an abundance of caution or solipsistic notions of proper child care. The statute screens the investigator from all liability as long as action is taken in good faith.[189] Moreover, testing the Department's classification in an administrative hearing is expensive. It is a reasonable assumption that many persons, disturbed though they may be, simply do not pursue their cases.[190]

A fees provision would allow many more persons realistic access to the process afforded to test "proposed confirmed" classifications, and increased litigation would have the effect of clarifying the edges of the child abuse definition. The threat of attorney and expert fees in cases where unsupportable "proposed confirmed" classifications were put forth would be a very definite incentive for the Department to monitor its investigators and their supervisors carefully to ensure that the definitions were understood and implemented consistently and uniformly. Under this model, any ambiguities in this "near penal" statute could be worked out in a context much like that of the criminal system where attorneys are regularly provided for indigents and where penalties are sufficiently severe to force even those of modest means to employ counsel.

Provision for public reimbursement of attorney's fees could, of course, prove to be expensive. Such compensation could further strain the already tight departmental budget by requiring the agency to hire more attorneys, possibly at the expense of more child protective investigators. The Department may well find itself reacting with overly cautious classifications. In the present state of affairs, however, these may be liabilities which the public should accept in order to make the statute less susceptible to uneven administration.

V. CONCLUSION

The 1990 legislature has made quite significant changes in the child abuse registry statute. Procedures which require that those reported as abusers be given detailed notice concerning the investigation process and the opportunity to obtain counsel before questioning should help to lessen the chance of overzealousness or unfair treatment. Allowing the resolution of challenges to a proposed classification before placing names on the registry avoids the injustice of having an innocent indi-

189. FLA. STAT. § 415.511 (1989).

190. The plaintiffs in *N.L.* allege that there are approximately 50,000 confirmed cases and 400,000 indicated cases on the abuse registry. *See* Complaint, N.L. v. Coler, 90-40069-MP at 3 (N.D. Fla. Apr. 12, 1989).

vidual incorrectly listed as an abuser for a considerable period of time.

This study has presented for consideration two further reforms. It suggests that the Division of Administrative Hearings be given final order authority over those cases where an individual requests administrative review of a proposed confirmed classification. In the case of a statute with penal overtones, fairness requires review independent of the agency which makes the initial decision at a point in the process before judicial review. Second, the study proposes that those who successfully challenge the Department's proposed confirmed classifications be awarded attorney's fees. In this way, the individual will be less discouraged to pursue the remedies afforded out of a concern for expense. The increased scrutiny will also help to clarify the parameters of this important and controversial statute.