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## Recent Amendments to the Texas Child Abuse Statutes: An Analysis and Recommendation.

Antoinette M. Pollock

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## RECENT AMENDMENTS TO THE TEXAS CHILD ABUSE STATUTES: AN ANALYSIS AND RECOMMENDATION

ANTOINETTE M. POLLOCK

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Approximately one million children are abused by their parents each year and more than two thousand die as a result of injuries suffered.<sup>1</sup> The problem of child abuse is no longer hidden and relegated to understaffed, overwhelmed agencies as it was prior to 1967;<sup>2</sup> in response to growing

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1. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, DEP'T OF HEALTH, EDUCATION AND WELFARE, CHILD ABUSE AND NEGLECT REPORTS 7 (1979).

2. See Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse*

public and professional awareness, states have reformed their child protective systems and child abuse reporting laws.<sup>3</sup> Drafters of child abuse legislation face the difficult task of accommodating the freedoms of parent and child, while ensuring the necessary exercise of state authority.<sup>4</sup> The United States Supreme Court has upheld the fundamental right of family integrity,<sup>5</sup> and has recognized there exists a private realm of family life into which the state cannot enter.<sup>6</sup> A parent's interest in directing the upbringing and education of his child is constitutionally protected.<sup>7</sup> When

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and Neglect, 23 VILL. L. REV. 458, 458-59, 1977-1978 [hereinafter cited as *Child Abuse and Neglect*].

It was only in the 1960's that the plight of the 'battered' and 'maltreated' children was first brought to public attention, largely through the efforts of three physicians, Doctors C. Henry Kempe, Ray Helfer, and Vincent J. Fontana. By 1967, every state had enacted legislation requiring physicians to report child abuse.

*Id.* at 458-59. See generally V. FONTANA, *THE MALTREATED CHILD* (1964); 1 *THE BATTERED CHILD* (R. Helfer & C. Kempe eds. 1968); Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 711 (1966).

3. H.R. REP. NO. 685, 93d Cong., 2d Sess. 2, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 2763, 2765 (legislative history of Child Abuse Prevention and Treatment Act, P.L. 93-247); see, e.g., ILL. ANN. STAT. ch. 23, §§ 2061, 5035 (Smith-Hurd Supp. 1979); LA. REV. STAT. ANN. § 46:56 (West Supp. 1980); TEX. FAM. CODE ANN. §§ 17.01-.05 (Vernon 1975) (amended 1979).

4. See *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (due process must be afforded before dissolution of family relationship); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (separate rights of parent, state, and child delineated). See generally Singleman, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1064 (1974) [hereinafter cited as *Child Neglect Proceedings*].

5. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (law making children of unwed fathers wards of state upon death of mother held unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479, 485, 495-96 (1965) (law prohibiting use of contraceptives unconstitutionally intrudes upon right of marital privacy); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (statute prohibiting parents from sending children ages eight through sixteen to private school held unconstitutional).

6. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 651 (1974) (rule requiring pregnant teacher to take maternity leave held unconstitutional); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (concept of personal liberty and restrictions on state action under fourteenth amendment held broad enough to encompass a woman's decision to terminate pregnancy); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (state's interest in child's education subordinate to parents' religious beliefs). But see *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (child labor law prohibiting aunt from allowing her minor ward to distribute religious literature upheld); *Ginsberg v. New York*, 390 U.S. 629, 640-41 (1968) (statute restricting sale of pornography to minor upheld). See generally Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 808 (1978).

7. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (custody, care, and nurture of child reside first in parents); *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925) (liberty of parents to direct upbringing); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty guaranteed by fourteenth amendment denotes right to marry, establish home, and

a child is subjected to or threatened with serious physical or emotional harm, however, the right of a parent to deal with his child as he sees fit becomes subordinate to the state's interest in protecting the child.<sup>8</sup> If necessary the state, as *parens patriae*,<sup>9</sup> may intervene to remove the child from the dangerous situation, abrogating any right the parent has to custody.<sup>10</sup> In taking such action the state's purpose is twofold: to protect the child from his parent and to enforce the state's own interest in having the child raised as a healthy, law-abiding citizen.<sup>11</sup>

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bring up children). See generally U.S. CONST. amend. XIV, § 1. The Texas Family Code outlines the rights, duties, and powers of a parent. See TEX. FAM. CODE ANN. § 12.04 (Vernon Supp. 1980). The rights enumerated in this section include the right to physical possession of the child; right to its services and earnings; and the right to inherit from the child. *Id.* § 12.04(1),(5),(9). The powers of a parent include the power to consent to marriage, to enlistment in the armed forces, and to medical, psychiatric, and surgical treatment; the power to represent the child in a legal action and make significant legal decisions concerning the child; and the power to receive support payments for the child and to hold or disburse any funds for the benefit of the child. *Id.* § 12.04(6)-(8). A parent's duties under this section involve the duty of care, control, discipline, protection, and training of the child; the duty of support, including providing the child with clothing, food, shelter, medical care, and education; and the duty to manage the estate of the child, except when a guardian has been appointed. *Id.* § 12.04(2)-(4). Included in this section is any other right, privilege, duty, or power existing between parent and child by law. *Id.* § 12.04(10).

8. See, e.g., *Meek v. Pittenger*, 374 F. Supp. 639, 652 (E.D. Pa. 1974) (state's interest superior to interests of parents or wishes of children); *Fladung v. Sanford*, 75 P.2d 685, 687 (Ariz. 1938) (parental authority over infants subordinate to overruling direction of state); *Wilson v. Mitchell*, 111 P. 21, 25 (Colo. 1910) (state's power supreme concerning welfare of its future citizens). See generally *Child Neglect Proceedings*, *supra* note 4, at 1064. While it is true parents generally act in the child's best interest, history and common experience dictate this is not always the case. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (parents opposed to medical doctor's advice for child's best interest); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (parents compelled child to work contrary to child labor law). The parent-child relationship is not a property or contract right, but a status that can be altered or abrogated by the state acting in furtherance of societal concerns for the protection of children. See *Child Neglect Proceedings*, *supra* note 4, at 1062.

9. The concept of *parens patriae* has its historical origins in the English constitutional system and the power of the King as sovereign. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972). In the United States the *parens patriae* function of the King passed to the States. *Id.* at 257. The term literally means "parent and country" and traditionally refers to the role of the state as sovereign and guardian of persons under its protection. *West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir. 1971), *cert. denied sub. nom. Colter Drugs, Inc. v. Charles Pfizer & Co.*, 404 U.S. 871 (1971). Thus, the concept of *parens patriae* is closely linked to that of sovereignty and has been most frequently applied where a state seeks to prevent or repair harm to its quasi-sovereign interests. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972).

10. See *Carqueville v. Woodruff*, 153 F.2d 1011, 1012 (6th Cir. 1946); *In re Stuart*, 114 F.2d 825, 832 (D.C. Cir. 1940); *Orezza v. Ramirez*, 507 P.2d 1017, 1021 (Ariz. Ct. App. 1973); *Child Neglect Proceedings*, *supra* note 4, at 1065.

11. See *Child Neglect Proceedings*, *supra* note 4, at 1065; cf. *Wisconsin v. Yoder*, 406

The child's interest is separate from that of his parent or the state.<sup>12</sup> This separate interest includes the right to participate with others in an intimate relationship.<sup>13</sup> Permanent removal of a child from his intimate family relationship will not always be in the child's best interest.<sup>14</sup> The state, therefore, must be extremely cautious before removing a child from the environment to which he is psychologically attached.<sup>15</sup> The child's best interest should be the primary concern.<sup>16</sup>

In view of the delicate balancing of interests involved, child protection laws must be extensive and detailed in order to withstand constitutional challenge.<sup>17</sup> Forty-two states have recently amended their laws and procedures to require more adequate guidelines for reporting and investigating

U.S. 205, 233-34 (1972) (state's interest in compulsory education outweighed by parent's fundamental right to direct religious upbringing of children); *Meek v. Pittenger*, 374 F. Supp. 639, 652 (E.D. Pa. 1974) (state must show compelling interest before restricting free choice in education); *Wilson v. Mitchell*, 111 P. 21, 26 (Colo. 1910) (absent exceptional circumstances parents right to custody may not be taken away).

12. See *Bellotti v. Baird*, — U. S. —, —, 99 S. Ct. 3035, 3048, 61 L. Ed. 2d 797, 813-14 (1979) (Court recognized minor's separate interest to choose an abortion and held statute giving parents absolute veto unconstitutional); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977) (constitution protects minor's right to bear child from unwarranted governmental or parental interference); *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (parent's interest versus child's interest); *Wisconsin v. Yoder*, 406 U.S. 205, 230-31 (1972) (Amish child's separate interest in religious beliefs outweighed state's interest in educating children). The child's separate interest may sometimes coincide with the interests of his parent or the state. He is, however, still entitled to express his views in any significant decision affecting his future. See *Garvey, Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 820 (1978).

13. See *id.* at 804. Traditionally, family privacy has been addressed as an issue of spousal and parental rights; the Supreme Court, however, has intimated that children as well may have a constitutional interest in the family relationship which is protected by the due process clause. *Id.* at 804; see, e.g., *Bellotti v. Baird*, — U.S. —, —, 99 S. Ct. 3035, 3043, 61 L. Ed. 2d 797, 807-08 (1979); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976).

14. See *Garvey, Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 804-05, 821 (1978). "State intervention almost necessarily interferes with 'the emotional attachments that derive from the intimacy of daily association.'" *Id.* at 821; see *Smith v. OFFER*, 431 U.S. 816, 844 (1977).

15. See *Quillon v. Walcott*, 434 U.S. 246, 253 (1978) (court granted adoption giving full recognition to family unit already in existence); *Smith v. OFFER*, 431 U.S. 816, 862 (1977) (Stewart, J., concurring) (state's attempt to break up natural family over objection held a denial of due process without some showing of unfitness).

16. See, e.g., *In re Winship*, 397 U.S. 358, 367 (1970); *In re Gault*, 387 U.S. 1, 35-38 (1967); *In re H.D.O.*, 580 S.W.2d 421, 423 (Tex. Civ. App.—Eastland 1979, no writ). "The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child . . ." TEX. FAM. CODE ANN. § 14.07(a) (Vernon 1975). See generally *Child Abuse and Neglect*, *supra* note 2, at 459.

17. See *Child Abuse and Neglect*, *supra* note 2, at 459.

child abuse, to afford due process guarantees to a parent whose child is temporarily removed from his custody, to provide a guardian ad litem for the child, to upgrade central registries and ensure confidentiality of records, and to mandate professional training and public education efforts.<sup>18</sup> The Sixty-sixth session of the Texas Legislature, in response to a constitutional challenge,<sup>19</sup> has amended the Texas Family Code in the area of child abuse.<sup>20</sup> This comment examines the adequacy of Texas' child protection laws in light of the recent amendments.

### I. AREAS ADDRESSED BY AMENDMENT: AN ANALYSIS AND EVALUATION

#### A. Chapter 17: Emergency Procedures in Suit by Governmental Entity

1. *Due Process Requirements.* No person may be deprived of life, liberty, or property unless afforded adequate notice and a hearing before an impartial tribunal.<sup>21</sup> Although some earlier cases have held to the con-

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18. H.R. REP. NO. 685, 93d Cong., 2d Sess. 2, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 2763, 2765 (legislative history of Child Abuse Prevention and Treatment Act, P.L. 93-247); *Child Abuse and Neglect*, supra note 2, at 460-61; see, e.g., CONN. GEN. STAT. ANN. §§ 17-38a to 38c (West Supp. 1979); IOWA CODE ANN. §§ 232.67-.77 (West 1979-1980); VA. CODE § 63.1-248.6C (Supp. 1979).

19. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1190-95 (S.D. Tex. 1977), *rev'd sub nom.* *Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979). In *Sims* a welfare worker took possession, under an ex parte order issued in Harris County, of three children, one of whom had allegedly been the victim of child abuse. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1184 (S.D. Tex. 1977). *rev'd sub nom.* *Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979). Through the use of an additional ex parte order, a unilateral transfer of the suit to Montgomery County, and nonaction on the part of the judge, the state maintained custody of the children for six weeks without providing an adversary hearing even though the parents insisted on such hearing. *Id.* at 1184. The state tried to establish a temporary managing conservatorship for one of the children. *Id.* at 1185. A three-judge federal court enjoined any further state proceedings and challenged the constitutionality of ten parts of the Texas Family Code. *Id.* at 1185. The United States Supreme Court reversed the judgment of the federal court on the grounds that the *Sims* had adequate recourse to litigate their claims in the pending state court proceedings, thus warranting abstention by the federal court. See *Moore v. Sims*, — U.S. —, —, 99 S. Ct. 2371, 2382-83, 60 L. Ed. 2d 994, 1009-10 (1979). The unconstitutionality of Texas' procedure as determined by the federal court, however, remains undisputed. See *id.* at —, 99 S. Ct. at 2387 n.14, 60 L. Ed. 2d 1015 n.14 (Stevens J., dissenting).

20. See TEX. FAM. CODE ANN. §§ 11.10, 17.01-.08, 18.01-.06, 34.011, 34.07, 34.08 (Vernon Supp. 1980).

21. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (students must be afforded notice and opportunity to be heard prior to suspension); *Bell v. Burson*, 402 U.S. 535, 542-43 (1971) (driver's license may not be taken without hearing); *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970) (welfare benefits may not be terminated without notice and hearing). See generally U.S. CONST. amend. XIV, § 1.

trary,<sup>22</sup> the Supreme Court has been careful to allow for extraordinary circumstances<sup>23</sup> justifying postponement of the hearing until after the event has taken place.<sup>24</sup> In *Boddie v. Connecticut*<sup>25</sup> the Court held prior notice and hearing were subject to waiver when some valid governmental interest justifying postponement is at stake.<sup>26</sup> Minimal requirements of due process must precede permanent termination of parental rights.<sup>27</sup>

Protection of a child in an emergency is a definite governmental interest and requires prompt action.<sup>28</sup> Since the seizure of a child in an emergency involves only a temporary deprivation, courts allow temporary state custody of the child pending reasonable notice and hearing within a reasonable time.<sup>29</sup> The emergency procedure for taking temporary custody of a child must, nonetheless, carefully guard the due process rights of the parent while providing necessary protection of a child's physical health and safety.<sup>30</sup> Prior to amendment, Texas' emergency custody procedures

22. See, e.g., *Parker v. Parker*, 350 P.2d 1067, 1069 (Colo. 1960) (ex parte order granting temporary custody of children to father held void without notice); *Gitsch v. Wright*, 211 P. 705, 706 (Utah 1922) (order awarding temporary custody to mother without notice to father held invalid); *Leonard v. Willcox*, 142 A. 762, 768 (Vt. 1928) (in application for temporary order judicial proceedings held not authorized without notice).

23. See *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.* at 895.

24. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (hearing should be held within limits of practicability); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (due process requires hearing at a meaningful time); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950) (due process requires a hearing appropriate to the nature of the case).

25. 401 U.S. 371 (1971).

26. *Id.* at 378-79.

27. See *In re Winship*, 397 U.S. 358, 367 (1970); cf. *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (student's entitlement to public education may not be taken away for misconduct without minimal procedures required by the due process clause).

28. "In regard to the constitutional status of the relationship between the state, children, and parents, '[i]t is clear that the [state] has an interest in the health and education of children that in many respects is superior to the interests of parents or the wishes of children.'" *Meek v. Pittenger*, 374 F. Supp. 639, 652 (E.D. Pa. 1974); see *Wilson v. Mitchell*, 111 P. 21, 25 (Colo. 1910); Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1383-84 (1974).

29. See *Dannelly v. Dannelly*, 417 S.W.2d 55, 59 (Tex. 1967) (order contemplating only temporary interruption of custody to be followed with proper notice, appropriate pleadings, and full hearing held proper); *Dewitt v. Brooks*, 143 Tex. 122, 128, 182 S.W.2d 687, 691 (1944) (summary proceeding without notice valid if subject to parents' right to full hearing in subsequent proceeding); *Casteel v. Mandel*, 415 S.W.2d 512, 514 (Tex. Civ. App.—Dallas 1967, no writ) (order proper where father granted subsequent hearing on question of permanent custody); cf. *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972) (Court outlines circumstances when hearing may be held after seizure).

30. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1192-93 (S.D. Tex. 1977); *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979);

under chapter seventeen of the Family Code were unconstitutional because of due process deficiencies.<sup>31</sup> The legislature amended the entire chapter, thereby establishing a constitutionally adequate procedure for taking custody of a child in an emergency.<sup>32</sup>

2. *Emergency Custody.* The state may take custody of a child in an emergency by court order, under section 17.02, as amended.<sup>33</sup> A temporary restraining order or attachment of the child will issue if the court is satisfied by sworn petition or affidavit that there is "immediate danger to the physical health or safety of the child" and that there is not time for an adversary hearing.<sup>34</sup> Even without a court order, a child may be taken into emergency custody in four instances.<sup>35</sup> In the first instance, a representative of the Texas Department of Human Resources (DHR), a law enforcement officer, or a juvenile probation officer who finds a child in a situation endangering physical health or safety is authorized to take the child into custody and deliver him without delay to the person entitled to possession.<sup>36</sup> A child may be taken into custody if the official has personal

*Child Abuse and Neglect*, *supra* note 2, at 459.

31. See *Sims v. State Dept. of Pub. Welfare*, 438 F. Supp. 1179, 1192-93 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979). The court pointed out the following constitutional deficiencies in chapter 17:

- (1) § 17.02 failed to require the ex parte hearing to be held immediately after possession of a child is taken by the state and the language assumed such hearing would result in a finding that temporary custody was necessary.
- (2) § 17.03 failed to require the state to make all reasonable efforts to serve notice on the parents of the ex parte hearing.
- (3) § 17.05 failed to require the state to hold a full adversary hearing before possession of a child taken by the state could be retained by the state beyond ten days.
- (4) § 17.06 failed to require a full adversary hearing at the expiration of the ex parte order, if the state sought to retain a child beyond ten days.

*Id.* at 1192-93. See generally 1975 Tex. Gen. Laws, ch. 476, § 44, at 1270.

32. Compare TEX. FAM. CODE ANN. §§ 17.01-.08 (Vernon Supp. 1980) with 1975 Tex. Gen. Laws, ch. 476, §§ 44-45, at 1270.

33. See TEX. FAM. CODE ANN. § 17.02 (Vernon Supp. 1980).

34. See *id.* This standard was approved by the court in *Sims* as much more adequate than standards held unconstitutional in other jurisdictions. *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1192 n.14 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979); see *Roe v. Connecticut*, 417 F. Supp. 769, 778-79 (M.D. Ala. 1976) ("when its welfare requires" held too vague); *Alsager v. District Court*, 406 F. Supp. 10, 19 (S.D. Iowa 1975) ("when detrimental to physical or mental health or morals of child" held too vague).

35. See TEX. FAM. CODE ANN. § 17.03(a)(1) (Vernon Supp. 1980).

36. See *id.* The previous law was silent on this subject. See 1975 Tex. Gen. Laws, ch. 476, §§ 44-45 at 1270. Under the new law, for example, if an enforcement officer encounters a child wandering through a train switching yard, he now has statutory authority to remove the child from the dangerous situation and take him to the person entitled to possession. See Bird, *The Texas Family Code Under Fire* (Aug. 1979) (scheduled for publication in Texas Bar Journal).



knowledge of facts or has received information that would lead a reasonable person to believe a child's physical health and safety is endangered.<sup>37</sup> Finally, custody may be taken upon the voluntary delivery of the child by his parent or guardian to the state.<sup>38</sup>

3. *Ex Parte Hearing.* When a child is placed in the custody of the state under emergency circumstances, section 17.03 provides that a suit affecting the parent-child relationship must be filed without unnecessary delay and a hearing must be held no later than the first working day after the child is taken into custody.<sup>39</sup> Although due process does not require an immediate hearing,<sup>40</sup> courts have held the state's interest in protecting the alleged abuse victims does not justify the resulting usurpation of parental rights when the hearing is held later than one day after seizure.<sup>41</sup> The Texas Legislature found this requirement unworkable since judges may not be immediately available during times other than normal business hours.<sup>42</sup> The legislature deemed the "next working day" requirement a more practical solution and further provided for circumvention of the prescribed time limit.<sup>43</sup> The necessity of this particular clause is questionable;<sup>44</sup> however, the statute, as amended, provides a practical and constitutionally adequate procedure.

4. *Voluntary Relinquishment of Child.* A child delivered voluntarily into state custody by his parent or guardian may be held up to sixty days, within which time a suit affecting the parent-child relationship must be filed by the person taking the child into custody.<sup>45</sup> This procedure has

37. See TEX. FAM. CODE ANN. § 17.03(a)(3)-(4) (Vernon Supp. 1980).

38. See *id.* at § 17.03(a)(2).

39. See *id.* at § 17.03(b), (c).

40. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (opportunity for hearing must be afforded within the limits of practicability); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (opportunity for hearing at a meaningful time and in a meaningful manner); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950) (notice and opportunity for hearing appropriate to nature of case).

41. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1192 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979).

42. See Bird, *The Texas Family Code Under Fire* (Aug. 1979) (scheduled for publication in Texas Bar Journal).

43. See TEX. FAM. CODE ANN. § 17.03(c) (Vernon Supp. 1980). This new section provides that if a court is unavailable on the first working day, the hearing shall be held on the first working day after the court becomes available, but not later than the third working day after the child is taken into possession. *Id.* The maximum amount of time a child may be held without a hearing under this clause is five days; if the child is seized on Friday, the third working day would be the following Wednesday.

44. *Ex parte* hearings are usually held within twenty-four hours of seizure under the present practice in Texas. Telephone interview with Gail Dalrymple, District Attorney's Office, Bexar County, Texas (Sept. 23, 1979).

45. See TEX. FAM. CODE ANN. § 17.03(f) (Vernon Supp. 1980).

been subject to serious criticism because it allows irresponsible parents to "dump" their children into the state's custody.<sup>46</sup>

Escape from a probable harmful situation is often in the child's best interest.<sup>47</sup> When no serious threat to the child's physical health or safety exists,<sup>48</sup> however, extended separation from his home and family is very likely to have adverse effects.<sup>49</sup> Separated from familiar surroundings<sup>50</sup> and placed with strangers in a foster home,<sup>51</sup> the child remains in a state of insecurity. The child may develop emotional attachments to the persons with whom he associates daily during the interim between separation from and return to his parent.<sup>52</sup> When the parent-child relationship is terminated permanently, the child is sometimes removed from his temporary surroundings to another new environment.<sup>53</sup> To uproot the child again, once custodial rights are determined, infringes upon his right to family privacy.<sup>54</sup> The child is entitled to expeditious determination of the location of his future home.<sup>55</sup> Conversely, filing suit too soon may result

46. Telephone interview with Gail Dalrymple, District Attorney's Office, Bexar County, Texas (Sept. 23, 1979). *See generally Child Abuse and Neglect, supra* note 2, at 462-63 (self-help for parents must be encouraged).

47. *See Child Abuse and Neglect, supra* note 2, at 485.

48. For example, when the parents merely cannot afford to provide adequate care for the children.

49. *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 19, 20, 33, 40-42 (1973); N. WEINSTEIN, *THE SELF-IMAGE OF THE FOSTER CHILD* (1962); *Child Abuse and Neglect, supra* note 2, at 484.

50. Separation from parents can be experienced as a profound rejection, or the child can introject into his own self-image the parental inadequacy that led to the removal. As a result, the child may see separation from his parents as punishment. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 19, 20, 33, 40-42 (1973).

51. The conditions of foster care are frequently not conducive to a child's emotional well-being. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 23-26 (1973).

52. The state takes no action to rehabilitate the parent until after the suit affecting the parent-child relationship. Telephone interview with Gail Dalrymple, District Attorney's Office, Bexar County, Texas (Sept. 23, 1979). The suit may end in restoration of custody of the child to his parent, a complete termination of all parental rights, or, most often, establishment of a managing conservatorship of the child. *See* TEX. FAM. CODE ANN. §§ 14.01, 15.05, 15.07 (Vernon 1975). When a managing conservator is appointed, the state offers counselling and parenting classes to the parent and supervises periodic home visits. *Id.*

53. Telephone interview with Gail Dalrymple, District Attorney's Office, Bexar County, Texas (Sept. 23, 1979).

54. *See* *Smith v. OFFER*, 431 U.S. 816, 842 (1977) (relational interest involved in foster homes also subject to due process protection); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (child's interest includes right to participate with others in an intimate relationship). *See generally* Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 810 (1978).

55. *See generally Child Abuse and Neglect, supra* note 2, at 488-89.

in an unfair determination of custodial rights.<sup>56</sup> The parent needs time to recover financially or regain a better emotional perspective before he can adequately assert his rights in a hearing. Two months is a reasonable period of time from the parent's point of view. The parent's interest in this situation has a correlative relation to the interest of the child: a fair determination of custody is in the child's best interest as well.<sup>57</sup> The sixty day statutory period, therefore, presents a fair compromise between the competing interests at stake.<sup>58</sup>

5. *Placement of Child.* Section 17.03 further provides for the immediate return of a child to the person entitled to possession if, after a hearing, the court is not satisfied there is a continuing danger to the child's physical health or safety.<sup>59</sup> Although section 17.03 expressly prohibits the placement of a child in temporary custody in a jail or juvenile detention facility,<sup>60</sup> no specification is made as to where a child should be placed.<sup>61</sup> In practice the child is usually kept in a children's shelter, sent to an appropriate relative, or placed in a foster home if he is of tender years.<sup>62</sup> It is necessary and appropriate for the Family Code to expressly direct the placement of children held temporarily by the state. Therefore, legislative action must be taken to ensure that the right to proper and expedient placement of a child in a healthy environment is protected. One solution to this problem would be for the legislature to expressly provide that abused children be placed in temporary family shelters.<sup>63</sup>

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56. See *Newton v. Burgin*, 363 F. Supp. 782, 788 (W.D. N.C. 1973). Both parties need time to prepare for a hearing. The state must investigate, and the parents must obtain character witnesses and prepare rebuttal. See *id.* at 788.

57. See *id.* at 788.

58. See TEX. FAM. CODE ANN. § 17.03(f) (Vernon Supp. 1980).

59. See *id.* § 17.03(d).

60. See *id.* § 17.03(g). Many states forbid such placement as wholly inappropriate to the purposes and philosophy of child protective services. See, e.g., IOWA CODE ANN. § 232.21 (West Supp. 1979-1980) (children requiring detention shall be separated so far as practicable from children requiring shelter); NEV. REV. STAT. § 62.170(4) (1977) (children must be entirely separate from adult criminals); S.C. CODE § 15-407 (1976) (children not to be confined with adults). See generally *Child Abuse and Neglect*, *supra* note 2, at 487.

61. See TEX. FAM. CODE ANN. § 17.03(g) (Vernon Supp. 1980). This subsection provides: "When a child is taken into possession under this section, that child shall not be held in a jail or juvenile detention facility." *Id.*

62. Telephone interview with Gail Dalrymple, District Attorney's Office, Bexar County, Texas (Sept. 23, 1979).

63. The legislature has already made provisions for temporary shelter for victims of family violence. See TEX. REV. CIV. STAT. ANN. art. 695p (Vernon 1980). The purpose of the law is to provide a family-oriented environment for the victims. See *id.* § 1. The law provides for a maximum of twelve shelter centers throughout the state. Each is to receive no more than \$50,000 a year, and there shall be no more than one shelter per county. See *id.* § 3. The shelter centers, under this law, must provide "temporary lodging and some social services for adults and children who have left or been removed from the family home be-

6. *Adversary Hearing.* Under section 17.04 a full adversary hearing must be held ten days after the emergency seizure of a child or within ten days of the issuance of an ex parte order directing his seizure, unless the child has already been returned to his parent.<sup>64</sup> This section also requires a full adversary hearing within ten days of the filing of a suit affecting the parent-child relationship.<sup>65</sup> If sufficient evidence is produced at this hearing to satisfy a person of ordinary prudence and caution that there is danger to the physical health or safety of the child, appropriate temporary orders under section 11.11 of the Code<sup>66</sup> must be issued; if not, the child shall be returned to the person entitled to possession.<sup>67</sup> Due process entitles a parent to adequate notice and a full adversary hearing within a reasonable time.<sup>68</sup> What constitutes a reasonable time is determined by considering the interests of each party.<sup>69</sup> The interests of the child will be

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cause of family violence." See *id.* § 4(a). Victims of child abuse may be placed in these shelters. See *id.* § 2(2)(A). Express direction for such placement should be incorporated in section 17.03 of the Texas Family Code. Provision for special services to accommodate the needs of abuse victims in these shelters should also be incorporated in section 17.03.

64. TEX. FAM. CODE ANN. § 17.04(a) (Vernon Supp. 1980).

65. See *id.* § 17.04(3). This section cures the possibility of "stacking" ex parte orders with a resultant deprivation of longer than ten days. Under the old statutory scheme a ten day ex parte order could issue to seize a child in an emergency. See 1975 Tex. Gen. Laws, ch. 476, § 45, at 1270. A second ten day ex parte order could be obtained upon the filing of a suit affecting the parent-child relationship. See TEX. FAM. CODE ANN. § 11.11(a)(4) (Vernon 1975). Since the Code provided only that an adversary hearing be held upon the expiration of the ex parte order, see 1975 Tex. Gen. Laws, ch. 476, § 45, at 1270, the second ex parte order operated as an extension resulting in a minimum twenty day period during which the parent was deprived of custody without an adversary hearing. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1193 (S.D. Tex. 1977), *rev'd sub nom.* *Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979). The new statutory language provides that in no instance shall deprivation of custody without an adversary hearing extend beyond ten days. See TEX. FAM. CODE ANN. § 17.04 (Vernon Supp. 1980).

66. See *id.* § 11.11 (Vernon 1975). Under this section the court may issue an order of temporary conservatorship or temporary support of the child, may attach the body of the child or issue a writ ne exeat prohibiting removal of the child beyond the jurisdiction of the court, may issue an order restraining a party from molesting the child, or may order custody of the child be taken by the court or a person designated by the court. All of the temporary orders are governed by the rules governing temporary restraining orders and temporary injunctions in civil cases generally. *Id.* § 11.11; see TEX. R. CIV. P. 680-693a.

67. See TEX. FAM. CODE ANN. § 17.04(b) (Vernon Supp. 1980).

68. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1193 (S.D. Tex. 1977), *rev'd sub nom.* *Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979); *cf.* *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972) (purchasers of goods on a conditional sales contract entitled to notice and hearing before attachment); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (natural father entitled to notice and hearing before adoption of child); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950) (trust beneficiaries with participating interests in collective trusts entitled to notice of proposed disposition of trust).

69. *Cf.* *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (property owner deprived of the right

better represented if there is time to investigate his living conditions before the hearing;<sup>70</sup> and in most cases, the parent needs time to prepare his own case to rebut the state's allegations and to obtain character witnesses.<sup>71</sup> Five days have been held the minimum time within which either party could prepare for a hearing to determine the fitness of the parent.<sup>72</sup> Extending the period to ten days, although constitutionally acceptable,<sup>73</sup> is an unnecessary prolongation of the separation of a child from his parent. A ten day separation may be a serious event in the life of a child.<sup>74</sup> The legislature should reevaluate the reasonableness of the ten day period with a view toward the competing interests described above. In order to avoid future constitutional challenge to Texas' emergency procedure, further amendment to this section is recommended.

7. *Notice.* For notice to be adequate, due process requires all reasonable efforts be made by the state to serve the parent.<sup>75</sup> Section 17.07 does not specifically provide for all reasonable efforts;<sup>76</sup> rather, it requires notice be given in accordance with section 11.09 of the Family Code<sup>77</sup> and

to enjoy his goods without notice or hearing); *Bell v. Burson*, 402 U.S. 535, 540-41 (1971) (licensee subject to additional expense awaiting suspension hearing); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (welfare recipient deprived of very means by which to live awaiting hearing).

70. See *Newton v. Burgin*, 363 F. Supp. 782, 788 (W.D. N.C. 1973); cf. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950) (judicial inquiry need not precede government seizure of misbranded drugs); *Fahey v. Maloney*, 332 U.S. 245, 253-54 (1947) (bank conservator appointed without a hearing in order to preserve credit during investigation of qualifications); *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 315-17 (1908) (contaminated food seized and destroyed without advance hearing in order to protect public).

71. See *Newton v. Burgin*, 363 F. Supp. 782, 788 (W.D. N.C. 1973). The hearing court has more information about the parent and does not have to rely on the facts surrounding a single incident alleged in the petition. *Id.* at 788.

72. See *id.* at 788.

73. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1193 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 93 S. Ct. 2371, 60 L. Ed. 2d 994 (1979).

74. Cf. *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (suspension from school for ten days held not de minimus but a serious event in the life of a child). See also *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring). The formal and procedural requirements of a hearing depend on the importance of the interests involved. *Board of Regents v. Roth*, 408 U.S. 564, 570 n.8 (1972).

75. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1193 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979). See generally *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

76. See TEX. FAM. CODE ANN. § 17.07 (Vernon Supp. 1980).

77. See *id.* § 11.09 (Vernon 1975). This section outlines the persons entitled to notice and provides that notice be given as in other civil cases, except that it may be given by certified mail return receipt requested. *Id.* § 11.09.

the Texas Rules of Civil Procedure.<sup>78</sup> The new provision for notice is constitutionally adequate because the Texas Rules of Civil Procedure require that reasonable notice be given.<sup>79</sup> The legislature deliberately refrained from making the notice requirement in the Family Code more specific for fear that such language would be interpreted as something more than "all reasonable efforts."<sup>80</sup>

#### B. Section 11.10: Appointment of Attorney

1. *For the Child.* In a child abuse proceeding the child's interest is distinct from that of either his parent or the state.<sup>81</sup> Under the doctrine of *parens patriae*, the state is charged with protecting the interest of the child.<sup>82</sup> As an interested party, however, the state might lose sight of the fact that the child's best interest may best be served by rehabilitating the parent and keeping the family intact.<sup>83</sup> The opposition in a child abuse proceeding is a battle for custody between the parent and the social worker who seeks removal;<sup>84</sup> the helpless child is caught in the middle. The true adversary nature of such hearing must be recognized.<sup>85</sup> Without

78. See *id.* § 17.07 (Vernon Supp. 1980).

79. Bird, *Texas Family Code Under Fire* (Aug. 1979) (scheduled for publication in the Texas Bar Journal); see TEX. R. CIV. P. 686 ("such reasonable notice given in such manner as the court may direct").

80. Bird, *Texas Family Code Under Fire* (Aug. 1979) (scheduled for publication in the Texas Bar Journal).

81. See *Child Abuse and Neglect*, *supra* note 2, at 522-30; *cf. In re Gault*, 387 U.S. 1, 28-30 (1967) (child has same right to due process as adult); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1087 (E.D. Wis. 1972) (person detained on grounds of mental illness has interest separate from state).

82. See, e.g., *Meek v. Pittenger*, 374 F. Supp. 639, 652 (E.D. Pa. 1974); *Fladung v. Sanford*, 75 P.2d 685, 687 (Ariz. 1938); *Wilson v. Mitchell*, 111 P. 21, 25 (Colo. 1910); *cf. West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079, 1089 (2d. Cir. 1971) (protecting consumers from sale of certain antibiotics), *cert. denied sub nom. Colter Drugs, Inc. v. Charles Pfizer & Co.*, 404 U.S. 871 (1971); *Board of Supervisors v. United States*, 408 F. Supp. 556, 563 (E.D. Va. 1976) (protecting residents of county from air and water pollution); *Gibbs v. Titelman*, 369 F. Supp. 38, 54 (E.D. Pa. 1973) (protecting consumers from unfair bargaining practices involving installment sales contracts). See generally *Child Neglect Proceedings*, *supra* note 4, at 1064; Weiss, *The Emerging Rights of Minors*, 4 U. TOL. L. REV. 25, 26 (1972); Comment, *A Recommendation for Court-Appointed Counsel in Child Abuse Proceedings*, 46 Miss. L.J. 1072, 1075-77 (1975).

83. See Comment, *Recognition and Protection of the Family's Interests in Child Abuse Proceedings*, 13 J. FAM. L. 803, 806 (1973-1974); Comment, *A Recommendation for Court-Appointed Counsel in Child Abuse Proceedings*, 46 Miss. L.J. 1072, 1093 (1975).

84. See Redeker, *The Right of an Abused Child to Independent Counsel, and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521, 528 (1977-1978). The attorney representing the parents must protect his clients from being stigmatized as "child abusers," despite the consequences to the child. *Id.* at 528.

85. The hearing is not a usual two-sided controversy; rather, it involves solving a three-

meaningful representation of the child's interest, the adversary hearing cannot properly effectuate the legal test of what is in the best interest of the child.<sup>86</sup> A major breakthrough for children's rights occurred with the United States Supreme Court's decisions *Kent v. United States*<sup>87</sup> and *In re Gault*.<sup>88</sup> *Kent* and *Gault* held that juveniles were guaranteed the "essentials of due process and fair treatment" in criminal proceedings which could result in the juvenile's loss of liberty.<sup>89</sup> These decisions guaranteed minors the right to a hearing, representation by counsel, the opportunity to confront and cross-examine witnesses, and the privilege against self-incrimination.<sup>90</sup> Applying the guarantees of *Kent* and *Gault*, the Supreme Court later expanded these rights to hearings wherein the minor's delinquency was to be determined by the juvenile court.<sup>91</sup> These guarantees are no longer limited to criminal proceedings, but are present in any proceeding that may result in a loss of liberty.<sup>92</sup> The only issue is whether the assistance of counsel is necessary to afford a fair hearing.<sup>93</sup> Further impetus for states to require appointment of counsel for a child in an abuse proceeding was passage of the Federal Child Abuse Prevention and Treatment Act<sup>94</sup> by Congress in 1974. To be eligible for federal funding of

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sided problem where one of the three sides involves a fundamentally interested and vulnerable minor child. See Levin, *Guardian Ad Litem in a Family Court*, 34 MD. L. REV. 341, 349 (1974). Independent counsel for the child is necessary to ensure that his best interests are presented to the court. Without such counsel, the usual partisan advocacy between the parents and the state, as *parens patriae*, can result in the child being treated as nothing more than a chattel, often with tragic results. Comment, *A Recommendation for Court-Appointed Counsel in Child Abuse Proceedings*, 46 Miss. L.J. 1072, 1093 (1975).

86. The right to counsel is based on the incompetence of the layman to protect his interests in a judicial proceeding. See *Gideon v. Wainwright*, 372 U. S. 335, 344-45 (1963); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Therefore, an even stronger argument can be made concerning a child's inability to protect his interest or even make his interest known in a child abuse or termination proceeding without the aid of counsel. See generally Comment, *A Recommendation for Court-Appointed Counsel in Child Abuse Proceedings*, 46 Miss L.J. 1072, 1092 (1975).

87. 383 U.S. 541 (1966).

88. 387 U.S. 1 (1967).

89. *In re Gault*, 387 U.S. 1, 30 (1967); *Kent v. United States*, 383 U.S. 541, 561-62 (1966).

90. See *In re Gault*, 387 U.S. 1, 33, 46, 55-57 (1967); *Kent v. United States*, 383 U.S. 541, 561-62 (1966).

91. See *In re Whittington*, 391 U.S. 341, 344 (1968).

92. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971). "Little, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either 'civil' or 'criminal'. The court carefully has avoided this wooden approach." *Id.* at 541.

93. See *Danforth v. State Dep't of Health, Educ. & Welfare*, 303 A.2d 794, 799 (Me. 1973); *Child Neglect Proceedings*, *supra* note 4, at 1079-80; 5 TEX. TECH. L. REV. 857, 862 (1974).

94. See 42 U.S.C.A. § 5101 (West 1977 & Supp. 1979). The federal act authorized the

child protective agencies, states are required to provide a guardian ad litem to represent the interests of the abused and neglected children in judicial proceedings.<sup>96</sup> The Texas Family Code, as amended, provides for the appointment of an attorney ad litem to represent the interests of the child.<sup>96</sup>

2. *For the Parent.* The 1979 amendment fails to provide appointment of counsel for the indigent parent, whose fundamental interests are equally at stake. In criminal proceedings the right to counsel for a parent alleged to have abused or neglected his child is well-established.<sup>97</sup> A parent's right to counsel in juvenile or family court, however, is not as widely recognized.<sup>98</sup> The denial of this right presents a serious problem. The rationale for providing court-appointed counsel to an indigent parent parallels that of court-appointed counsel for a child.<sup>99</sup> Significant differences exist, however, suggesting an even stronger case for court-appointed counsel for the indigent parent.<sup>100</sup> The parent is placed in an adversarial role

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Secretary of Health, Education and Welfare to establish the National Center on Child Abuse and Neglect as a clearinghouse for information and research. *Id.* § 5101. The statute also authorizes grants to states to help improve their child protective services. *Id.* § 5103.

95. See 42 U.S.C.A. § 5103(b)(2)(G) (West 1977).

96. See TEX. FAM. CODE ANN. § 11.10 (Vernon Supp. 1980). Subsections (d) and (e) were added to read as follows:

(d) In any suit brought by a governmental entity seeking termination of the parent-child relationship or to be named conservator of a child, the court shall appoint an attorney ad litem to represent the interests of the child as soon as practicable to ensure adequate representation of the child's interest.

(e) An attorney appointed to represent a child as authorized by this section is entitled to a reasonable fee in the amount set by the court which is to be paid by the parents of the child unless the parents are indigent.

*Id.*

97. See, e.g., CONN. GEN. STAT. ANN. 54-81a (West 1960); MD. CTS. & JUD. PROC. CODE ANN. § 3-821 (Supp. 1979); N.M. STAT. ANN. § 13-14-25(F) (1976).

98. Courts are divided on whether parents have a constitutional right to counsel in such proceedings. Compare *In re Ella B.*, 285 N.E.2d 288, 290, 334 N.Y.S.2d 133, 135-37 (1972) (indigent respondent parents in child protective proceedings have right to assigned counsel since they face possible loss of custody of child) with *In re Robinson*, 87 Cal. Rptr 678, 680 (Ct. App. 1970) (no right to appoint counsel in civil dependency proceeding), *cert. denied sub nom. Kaufman v. Carter*, 402 U.S. 964 (1971).

99. See Comment, *A Recommendation for Court-Appointed Counsel in Child Abuse Proceedings*, 46 Miss. L.J. 1072, 1094 (1975). The fair hearing requirement of due process includes right to counsel. This right is based on the incompetence of a layman to protect his interests in a judicial proceeding. In the same way that a child needs counsel to represent his interest, a parent's interest must be adequately represented in a child abuse proceeding. The best interests of the child can only be realized through independent representation of all interests involved. When a parent cannot afford such representation, due process requires counsel be appointed. See *id.* at 1092, 1094.

100. See *id.* at 1094; *Child Neglect Proceedings*, *supra* note 4, at 1080.



against the power of the state,<sup>101</sup> and despite the civil nature of the proceeding, the parent, in effect, "stands 'accused.'"<sup>102</sup> He faces not only the loss of custody of his child, but also the possibility of criminal charges.<sup>103</sup> The parent's concern for the liberty of the child, as well as for care and control of the child, is a fundamental interest and right that should not be infringed without the opportunity for a hearing, and assigned counsel if the parent cannot afford a lawyer.<sup>104</sup> Even if these more extreme events do not occur, the intrusion on family rights through the proceeding itself, and the possibility of probation or other agency supervision of the home situation, put the liberty of a parent in a child protective proceeding at stake.<sup>105</sup> The due process requirement of a fair hearing cannot be achieved unless the indigent parent is provided court-appointed counsel.<sup>106</sup> The failure to provide court-appointed counsel effectively denies the indigent parent the right to fully participate in litigation involving his fundamental rights.<sup>107</sup> In Texas restoration of the family unit is viewed as being in the child's best interest.<sup>108</sup> Thus, in every situation involving custody, termination of parental rights is the last resort; the state's ultimate goal is to reunite the family.<sup>109</sup> It is imperative that counsel be provided to the parent as a statutory right in order to attain the goal by ensuring

101. "In a neglect proceeding the full panoply of traditional weapons of the state are marshalled against the defendant parents." *Danforth v. State Dep't of Health, Educ. & Welfare*, 303 A.2d 794, 799 (Me. 1973). A gross imbalance of experience and expertise would exist, therefore, if the indigent parent was not allowed the assistance of court-appointed attorneys. Without counsel the indigent parent, often uneducated and unsophisticated in the law, would be at a loss when faced with problems of procedure and evidence, and would be effectively denied the right to a fair hearing. *See Child Neglect Proceedings, supra* note 4, at 1080.

102. *See Child Abuse and Neglect, supra* note 2, at 514.

103. *See* TEX. FAM. CODE ANN. § 22.04 (Vernon Supp. 1980); Comment, *A Recommendation for Court-Appointed Counsel in Child Abuse Proceedings*, 46 Miss. L.J. 1072, 1094 (1975).

104. *In re Ella B.*, 285 N.E.2d 288, 290, 334 N.Y.S.2d 133, 136 (1972); *See* Comment, *Due Process for Parents In Emergency Protection Proceedings Under the Texas Family Code—Suggestions for Improving the System*, 15 Hous. L. Rev. 709, 726 (1978).

105. *See Child Abuse and Neglect, supra* note 2, at 514-15.

106. *See In re Ella B.*, 285 N.E.2d 288, 290, 334 N.Y.S. 2d 133, 136 (1972) (to deny legal assistance in such circumstance constitutes violation of due process rights); *Child Neglect Proceedings, supra* note 4, at 1080 (due process requires counsel be provided for indigent parents).

107. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)); *see* Comment, *A Recommendation for Court-Appointed Counsel in Child Abuse Proceedings*, 46 Miss. L.J. 1072, 1094 (1975).

108. Telephone interview with Gail Dalrymple, District Attorney's Office, Bexar County, Texas (Sept. 23, 1979).

109. *Id.*

all interests are fairly presented.

3. *Review of Placement.* When a suit affecting the parent-child relationship ends in appointment of the Texas Department of Human Resources (DHR) as managing conservator,<sup>110</sup> DHR places the child in foster home care, in group home care, or in institutional care.<sup>111</sup> Statutory directives for placement of a child after a determination of parental rights, under chapters fourteen and fifteen of the Family Code, end with the appointment of DHR as managing conservator.<sup>112</sup> Further determination of the child's future was thus left to the discretion of DHR under these provisions. The procedure at this conclusionary stage of the child protective process was significantly improved by the legislature's addition of chapter eighteen to the Texas Family Code in 1979.<sup>113</sup> This chapter provides for a hearing in the court of continuing jurisdiction to review such placement periodically, not earlier than five and one-half months and not later than seven months after the date of the last hearing.<sup>114</sup> This provision for review is progressive and in keeping with recommendations of the American Bar Association.<sup>115</sup> The benefits of such review are apparent. The court is required to keep abreast of the child's changing situation to take appropriate action immediately upon determination that the child's best interest requires such action.<sup>116</sup> A greater responsiveness is

110. See TEX. FAM. CODE ANN. § 14.01 (Vernon 1975).

111. See *id.* § 18.01(a) (Vernon Supp. 1980). DHR is also responsible for the child's placement when appointed managing conservator in an affidavit of relinquishment of parental rights. *Id.* § 15.03 (Vernon 1975 & Supp. 1980).

112. See *id.* §§ 14.01-.10, 15.01-.07 (Vernon 1975 & Supp. 1980).

113. See *id.* §§ 18.01-.06 (Vernon Supp. 1980). See generally Boskey & McCue, *Alternative Standards for the Termination of Parental Rights*, 9 SETON HALL L. REV. 1, 44 (1978); O'Grady-Gregoire, *Something Old, Something New: The Juvenile Act Relating to Dependency and Termination*, 14 GONZ. L. REV. 359, 364 (1979).

114. See TEX. FAM. CODE ANN. § 18.01(b) (Vernon Supp. 1980).

115. See ABA INSTITUTE OF JUDICIAL ADMINISTRATION, JUVENILE JUSTICE STANDARDS PROJECT: STANDARDS RELATING TO ABUSE AND NEGLECT, Standard 7.1, at 135-61 (1977), cited in Boskey & McCue, *Alternative Standards for the Termination of Parental Rights*, 9 SETON HALL L. REV. 1, 44 (1978). "Once the child is in placement outside of its home, the Institute's standards require review of the child's situation every six months." *Id.* at 44.

116. See TEX. FAM. CODE ANN. § 18.06 (Vernon Supp. 1980). At the conclusion of a placement review hearing the court may, in accordance with the best interest of the child, order:

- (1) that the foster care, group home care, or institutional care be continued;
- (2) that the child be returned to his or her parent or guardian;
- (3) if the child has been placed with the Texas Department of Human Resources under a voluntary agreement, that the department institute further proceedings to appoint the department as managing conservator or to terminate parental rights in order to provide permanent placement for the child or to make the child available for adoption;
- (4) if the parental rights of the child have already been terminated or the depart-

demanded from all parties involved; therefore, the child benefits.<sup>117</sup> Chapter eighteen also provides that ten days notice of the hearing be given to all interested parties<sup>118</sup> and that each of these parties be allowed to present evidence at the hearing.<sup>119</sup> Access to all significant facts surrounding the child's situation is afforded the court by this procedure.<sup>120</sup> When the child is returned to the custody of his parent, no review of that placement is required under chapter eighteen.<sup>121</sup> This provision harmonizes with DHR's goal of maintaining the family unit and its philosophy that return to his natural family is the ultimate best interest of the child.<sup>122</sup>

### C. Sections 34.01 to 34.03: Reporting Child Abuse

Reporting child abuse initiates the child protective process.<sup>123</sup> If a case of suspected child abuse or neglect is not reported, neither the police nor the child protection agency can become involved, nor can emergency pro-

ment has custody, care, and control of the child under an affidavit of relinquishment of parental rights naming the department as managing conservator, that the department attempt to place the child for adoption; or

(5) the Texas Department of Human Resources to provide services to ensure that every effort has been made to enable the parents to provide a family for their own children.

*Id.*

117. See O'Grady-Gregoire, *Something Old, Something New: The Juvenile Act Relating to Dependency and Termination*, 14 GONZ. L. REV. 359, 364 (1979).

118. See TEX. FAM. CODE ANN. § 18.03 (Vernon Supp. 1980), which provides: The following persons are entitled to at least 10 days' notice of a hearing to review a child placement and are entitled to present evidence and be heard at the hearing:

- (1) The Texas Department of Human Resources;
- (2) The foster parent or director of the group home or institution where the child is residing;
- (3) Each parent of the child;
- (4) The managing conservator or guardian of the person of the child; and
- (5) Any other person or agency named by the court to have an interest in the welfare of the child.

*Id.*

119. *Id.*

120. See Boskey & McCue, *Alternative Standards for the Termination of Parental Rights*, 9 SETON HALL L. REV. 1, 44 (1978).

121. See TEX. FAM. CODE ANN. § 18.04(a) (Vernon Supp. 1980).

122. Telephone interview with Gail Dalrymple, District Attorney's Office, Bexar County, Texas (Sept. 23, 1979). See generally *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485, 495-96 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); Comment, *Due Process and the Fundamental Right to Family Integrity: A Reevaluation of South Dakota's Parental Termination Statute*, 24 S.D. L. REV. 447, 450 (1979).

123. See *Child Abuse and Neglect*, *supra* note 2, at 464.

tection measures be taken, nor can a treatment plan be developed.<sup>124</sup> Reflecting the importance of reporting in an adequate child protection system, the federal act,<sup>125</sup> as a prerequisite for special funding, requires states to provide for the reporting of known and suspected child abuse or neglect.<sup>126</sup> The purpose of reporting is to foster the protection of the children, not to punish those who maltreat them.<sup>127</sup> It is essential then, that reporting statutes encourage reports and provide detailed procedural guidelines.

The Texas Family Code encourages reporting of suspected child abuse in three ways.<sup>128</sup> Initially, both civil and criminal immunity is granted to good faith reporters.<sup>129</sup> Persons reporting in good faith, therefore, are not deterred by fear of being sued unjustly for libel, slander, defamation, invasion of privacy, or breach of confidentiality.<sup>130</sup> Second, evidence of abuse or neglect may not be excluded in a judicial proceeding on the ground of privileged communication.<sup>131</sup> The attorney-client privilege, however, is not abrogated by this section.<sup>132</sup> Setting aside the attorney-client privilege would destroy the confidence and trust between an attorney and client necessary for a fair trial and could be an unconstitutional denial of the due process right to counsel.<sup>133</sup> Finally, failure to report

124. See *Child Abuse and Neglect*, *supra* note 2, at 464.

125. See 42 U.S.C.A. § 5101 (West 1977 & Supp. 1979).

126. See *id.* § 5103(b)(2) (West 1977).

127. See *Child Abuse and Neglect*, *supra* note 2, at 464. In most cases criminal intent is absent; therefore, child protective laws have no provision for criminal court prosecution. When the child has died or been severely harmed, or when the child has been abused while in an institution, however, criminal prosecution may be appropriate. Child protection laws recognize that such cases should be referred for, or coordinated with, a criminal prosecution. *Child Abuse and Neglect*, *supra* note 2, at 464; MODEL CHILD PROTECTION ACT §§ 7, 16(l), (m), (n), (o), (Aug. 1977 draft) (provides referral of certain cases for criminal prosecution). This act was drafted by the National Center on Child Abuse and Neglect, United States Department of Health, Education and Welfare. See *Child Abuse and Neglect*, *supra* note 2, at 479 n.129.

128. See TEX. FAM. CODE ANN. §§ 34.03, .04 (Vernon 1975) & 34.07 (Vernon Supp. 1980).

129. See *id.* § 34.03.

130. See *Child Abuse and Neglect*, *supra* note 2, at 475.

131. See TEX. FAM. CODE ANN. § 34.04 (Vernon 1975).

132. See *id.*

133. See V. DE FRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970's, at 12 (rev. ed. 1974); *Child Abuse and Neglect*, *supra* note 2, at 478. Since the child should have been protected and sufficient evidence obtained long before an attorney is assigned to a case, abrogation of the attorney-client privilege is probably unnecessary. In those few instances in which the attorney learns of abuse or neglect while representing the family in other matters, the attorney-client privilege would not attach. The privilege does not apply to future criminal activity known to the attorney. It is fair to assume that child abuse and neglect would fall under such exemption. See generally ABA CODE OF PROFESSIONAL RE-

known or suspected child abuse or neglect is a misdemeanor under the Family Code,<sup>134</sup> thus providing the third impetus to reporting. A successful child protection reporting system is achieved through the willing cooperation of professionals and the public; however, enforceable provisions are necessary for those who refuse to accept their moral obligation to protect endangered children in accordance with reporting requirements.<sup>135</sup>

The reporting law in Texas is significantly improved by amendment to chapter thirty-four of the Family Code.<sup>136</sup> As amended, section 34.011 provides that a form, promulgated by DHR, be distributed to all licensed hospitals in the state for the reporting of suspected occurrences of child abuse.<sup>137</sup> Such report form will be available for use by "hospital employees, physicians, patients, and other persons."<sup>138</sup> Specific provision for confidentiality of the report form is made in this section.<sup>139</sup>

Several important advantages are realized by this form provision. A written report, made after an initial phone call, may provide a way to update the circumstances of the alleged child abuse.<sup>140</sup> A written report also makes the reporter more careful and provides added assurance the report will be investigated.<sup>141</sup> A final factor in favor of the written reports is that proof of early observations of the child is facilitated when agency records are nonexistent, hard to locate, or vague.<sup>142</sup> Requiring written reports has been proven to discourage reporting in some jurisdictions.<sup>143</sup> The new Texas law presents an excellent compromise to this problem.<sup>144</sup> Reluctant reporters will not be discouraged since use of the written report

SPONSIBILITY, DR 4-101(c)(3); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 95 (2d ed. 1972).

134. See TEX. FAM. CODE ANN. § 34.07 (Vernon Supp. 1980).

135. See *Child Abuse and Neglect*, *supra* note 2, at 480. A further encouragement, probably more effective, is the prospect of a "civil lawsuit for damages arising from failure to report." Such liability exists because of the mandatory reporting law. *Child Abuse and Neglect*, *supra* note 2, at 481.

136. See TEX. FAM. CODE ANN. §§ 34.011-.07, .08 (Vernon Supp. 1980).

137. See *id.*

138. See *id.*

139. See *id.*

140. See *Child Abuse and Neglect*, *supra* note 2, at 490.

141. See *Child Abuse and Neglect*, *supra* note 2, at 490.

142. Under ordinary rules of evidence these relevant records would be admissible under the "business records" exception to the rule against hearsay. See FED. R. EVID. 803(6). The exception only applies, of course, if the usual rules of evidence are complied with. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 313 (2d ed. 1972).

143. Many states have, therefore, dispensed with written reports because of the possibility reluctant reporters will be discouraged from reporting outweighed the benefits of a written report. See, e.g., ARIZ. REV. STAT. ANN. § 8-546.01(c)(2) (1974); N.J. STAT. ANN. § 9:6-8.10 (West 1976); VA. CODE § 63.1-248.6C (Supp. 1979).

144. See TEX. FAM. CODE ANN. § 34.011 (Vernon Supp. 1980).

form is not mandatory; however, the system will benefit each time a form is actually completed and returned to DHR.<sup>145</sup> It would be even more advantageous to the reporting system, however, if these forms were provided to teachers, law enforcement officers, juvenile probation officers, and other child protection workers.<sup>146</sup> The statute should also provide for distribution of the forms to schools, police departments, and other child-related agencies. Use of the form should be expressly encouraged, not only to the above institutions, but also to all potential reporters. To effect a better system the report form should be used in all instances except when it discourages a particular reporter.<sup>147</sup> The reporting law in Texas, while more comprehensive than some jurisdictions,<sup>148</sup> could be even more complete. The legislature should follow the lead of other states and add to the reporting law provisions for the establishment of a hotline telephone system.<sup>149</sup>

A centralized hotline should be established to simplify the reporting process. The telephone number of the hotline should be widely publicized and qualified personnel should be available at all hours of the day or night to answer the phones.<sup>150</sup> Information and assistance can be provided to callers through a hotline system.<sup>151</sup> Advice on the law and child protection procedures and assistance in diagnosis and evaluation can be given by a qualified professional hotline staff.<sup>152</sup> The addition of this recommended statutory provision would be a further step toward establishing an accurate, efficient, and effective reporting system for the prevention and treatment of child abuse in Texas.

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145. See generally *Child Abuse and Neglect*, *supra* note 2, at 490-91.

146. See Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 658 (1978).

147. See *id.* at 490-91.

148. Compare TEX. FAM. CODE ANN. §§ 34.01-.04, 34.06 (Vernon 1975) and *id.* §§ 34.011, 34.02, 34.05, 34.07, 34.08 (Vernon Supp. 1980) (all persons required to report; civil and criminal penalty for failure to report) with ALA. CODE § 26-14-3 to -5 (1977) (provides only criminal liability for failure to report) and IND. CODE ANN. § 12-3-4.1-2 (Burns Supp. 1974) (provides only criminal liability for failure to report) and MICH. COMP. LAWS § 722.633(1) (Cum. Supp. 1977) (provides only civil liability for failure to report).

149. See, e.g., ARK. STAT. ANN. § 42-818(A)(2) (Supp. 1975); IOWA CODE ANN. § 235A.14(3) (West 1979-1980); N.Y. SOC. SERV. LAW § 422(2) (McKinney Supp. 1978-1979).

150. See *Child Abuse and Neglect*, *supra* note 2, at 490. See generally TEX. REV. CIV. STAT. ANN. art. 695p, § 5(b)(3)(b) (Vernon Supp. 1980).

151. See *Child Abuse and Neglect*, *supra* note 2, at 490.

152. See *Child Abuse and Neglect*, *supra* note 2, at 490. Staff answering the telephones should have social work or comparable qualifications. Several states have established reporter hotline systems through legislation. See, e.g., ARK. STAT. ANN. § 42-818(A)(2) (Supp. 1975); IOWA CODE ANN. § 235A.14(3) (West Supp. 1979-1980); VA. CODE § 63.1-248.6C (Supp. 1979).

## D. Section 34.05: Investigation and Report of Receiving Agency

Investigation of suspected child abuse is another area of the child protection laws in which the careful exercise of state authority is imperative.<sup>153</sup> The United States Supreme Court has strongly emphasized the fundamental right of the family unit to be free from unwarranted intrusion by the state.<sup>154</sup> In *Camara v. Municipal Court*<sup>155</sup> and *See v. City of Seattle*,<sup>156</sup> intrusion into the home or private commercial premises for health and safety inspections was not allowed.<sup>157</sup> The Court reasoned that the fourth and fourteenth amendment protections were applicable because of the possible criminal sanctions which accompany the inspections, despite the fact the investigation was neither personal in nature nor aimed at the discovery of criminal evidence.<sup>158</sup> These decisions should control in cases involving investigation of child abuse; in fact, the need for due process is even more apparent in view of the personal nature of such investigations.<sup>159</sup>

In Texas the investigation includes a visit to the home of the suspected victim of abuse and a physical and psychological examination of each child in that home.<sup>160</sup> Under prior law, these examinations could be conducted by court order without a prior hearing even over the objection of a

153. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1192 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979); *Child Neglect Proceedings*, *supra* note 4, at 1070-71; *cf. Terry v. Ohio*, 392 U.S. 1, 18-19 (1968) (defendant entitled to fourth amendment protection against unwarranted search as he walked down city street).

154. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1953); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 512 (1925).

155. 387 U.S. 523 (1967).

156. 387 U.S. 541 (1967).

157. See *Camara v. Municipal Court*, 387 U.S. 523, 530-32, 534 (1967); *See v. City of Seattle*, 387 U.S. 541, 545-46 (1967).

158. See *Camara v. Municipal Court*, 387 U.S. 523, 530-32, 534 (1967); *See v. City of Seattle*, 387 U.S. 541, 545-46 (1967). See also U.S. CONST. amends. IV, XIV.

159. See *Child Neglect Proceedings*, *supra* note 4, at 1072-73.

Although in *Camara* and *See* the investigations were not personal in nature nor aimed at collecting evidence for possible judicial proceedings, these are clearly the objectives of a neglect proceeding. . . . The parents arguably are not initially subject to criminal sanctions when a neglect investigation originates, nevertheless, this may be the ultimate result.

*Child Neglect Proceedings*, *supra* note 4, at 1072-73. But see *Wyman v. James*, 400 U.S. 309, 317-19 (1971). "The home visit is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding." *Wyman v. James*, 400 U.S. 309, 323 (1971).

160. See TEX. FAM. CODE ANN. § 34.05 (Vernon Supp. 1980).

parent.<sup>161</sup> This procedure was judicially determined to be a violation of the parent's due process rights.<sup>162</sup> The child's right to be protected from harm, however, constitutes another important interest.<sup>163</sup> The new law accommodates both of these interests. When there is no immediate danger to the child's physical health and safety, section 34.05(c) provides that notice and hearing precede a court order allowing a psychological examination.<sup>164</sup> In an emergency situation, however, the child may be removed from the home immediately without prior hearing pursuant to chapter seventeen of the Code.<sup>165</sup>

This area of the Texas child protection law would be improved with the addition of a provision, similar to statutes in some other states,<sup>166</sup> authorizing photographs and x-rays to be taken without parental permission. Photographs and x-rays provide valuable investigative tools for the identification of child abuse and neglect cases.<sup>167</sup> Absent statutory authority, hospitals, child protection workers, and law enforcement officials are hesitant to take photographs or x-rays without parental permission.<sup>168</sup> The

161. See 1971 Tex. Gen. Laws, ch. 902, § 1, at 2790. This statute provided in pertinent part:

If admission to the home, school, or any place where the child may be or permission of the parents . . . for the physical and psychological or psychiatric examinations cannot be obtained, then the . . . court, upon cause shown, shall order the parents . . . to allow entrance for the interview, above examinations, and investigation.

*Id.*

162. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1191 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979). Physical and psychological or psychiatric examinations are an "unconstitutional intrusion by the state into the private realm of family life." *Id.* at 1191. See generally *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 512 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

163. See TEX. FAM. CODE ANN. § 14.07(a) (Vernon 1975); *Child Abuse and Neglect*, *supra* note 2, at 459.

164. See TEX. FAM. CODE ANN. § 34.05 (Vernon 1975 & Supp. 1980).

165. See *id.* § 34.05(d). This section provides that "[i]f, before the investigation is complete, the opinion of the investigators is that immediate removal is necessary to protect the child from further abuse or neglect, the investigators shall file a petition pursuant to Chapter 17 of this Code for temporary care and protection of the child." *Id.* § 34.05(d).

166. See, e.g., COLO. REV. STAT. § 19-10-106 (1978); N.Y. SOC. SERV. LAW § 416 (McKinney 1976); OHIO REV. CODE ANN. 2151.421 (Baldwin 1978).

167. See *Child Abuse and Neglect*, *supra* note 2, at 483; Fontana, *The Maltreated Children of Our Times*, 23 VILL. L. REV. 448, 452-53 (1978). Photographs and x-rays preserve evidence to support subsequent child-protective decision-making and possible court action. Further, x-rays are useful for the detection of telltale past injuries. See *Child Abuse and Neglect*, *supra* note 2, at 483.

168. *Child Abuse and Neglect*, *supra* note 2, at 483; Fraser, *A Glance at the Past*, a



Code should expressly authorize these officials to take x-rays or photographs without parental permission when they reasonably suspect abuse or neglect.<sup>169</sup> To encourage the use of such a provision, reimbursement for the costs of photographs and x-rays should also be provided at public expense.<sup>170</sup>

## II. AREAS UNADDRESSED BY AMENDMENT

Analysis of the previously discussed amendments illustrates that some of the constitutional infirmities of the Texas Family Code have been cured. The legislature, however, failed to address two significant areas of the Code that require immediate attention. Specifically, the statutory provisions for confidentiality of reports<sup>171</sup> and the establishment of a central registry<sup>172</sup> are constitutionally inadequate.<sup>173</sup> A discussion of the problems in each area and recommendations for legislation follows.

### A. Section 34.08: Confidentiality

Section 34.08 provides that all reports developed in the investigation of suspected child abuse are confidential and may be disclosed only for purposes consistent with objectives of the Family Code.<sup>174</sup> The underlying

*Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 671-72 (1978).

169. Today fourteen states permit the taking of color photographs and x-rays in cases of suspected child abuse with or without the parent's consent. See ARIZ. REV. STAT. ANN. § 13-3619 (1978); ARK. STAT. ANN. § 42-810 (Supp. 1975); COLO. REV. STAT. § 19-10-106 (1978); FLA. STAT. ANN. § 827.07(4)(c) (West Supp. 1979); ILL. ANN. STAT. ch. 23, § 2056 (Smith-Hurd Supp. 1979); IOWA CODE ANN. § 235A.11 (West Supp. 1979-1980); MICH. STAT. ANN. § 25.248(6)(2) (Supp. 1979-1980); OHIO REV. CODE ANN. § 2151.421 (Baldwin 1978); OR. REV. STAT. § 418.764 (1977) (photographs only); PA. STAT. ANN. tit. 11, § 2207 (Purdon Supp. 1979-1980); VA. CODE § 63.1-248.13 (Supp. 1979); WASH. REV. CODE ANN. § 26.44.050 (Supp. 1978) (photographs only); W. VA. CODE § 49-6A-4 (Supp. 1979); WYO. STAT. § 14-2-117(c) (Supp. 1979). Another four states mandate that such color photographs and x-rays be taken. See MO. ANN. STAT. § 210.120 (Vernon Supp. 1979); N.J. STAT. ANN. § 9:6-8.31g (West Supp. 1979-1980); N.Y. SOC. SERV. LAW § 416 (McKinney 1976); S.C. CODE § 20-10-70 (Supp. 1977).

170. Some state statutory schemes presently contain this provision. See, e.g., ARK. STAT. ANN. § 42-810 (Supp. 1975); IOWA CODE ANN. § 232.77 (West Supp. 1979); W. VA. CODE ANN. § 49-6A-4 (Supp. 1979).

171. See TEX. FAM. CODE ANN. § 34.08 (Vernon Supp. 1980).

172. See *id.* § 34.06 (Vernon 1975).

173. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1191-92 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979).

174. See TEX. FAM. CODE ANN. § 34.08 (Vernon Supp. 1980). This provision resulted from the stimulus of the federal act which requires a state to provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, the parents, or the guardian, in order to qualify for funding. See 42 U.S.C.A. § 5103(b)(2)(E) (West

basis of this mandate is valid. These records contain the most private aspects of personal and family life.<sup>175</sup> The rights and sensibilities of the families named therein must be protected.<sup>176</sup> Whether or not the information is true, improper disclosure could stigmatize the future of all those mentioned in the report.<sup>177</sup> In practical application, however, this section is constitutionally deficient.<sup>178</sup> When access is denied to the subjects of the reports, due process is violated.<sup>179</sup> A parent is entitled to be fully apprised of the nature of any accusation to be made by the state.<sup>180</sup> Family access may be denied only when the source must remain confidential or

1977).

175. See Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 733 (1978).

176. See *id.* at 738; *Child Abuse and Neglect*, *supra* note 2, at 508.

177. See Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 733 (1978); *Child Abuse and Neglect*, *supra* note 2, at 508. One social worker voiced this concern:

I find too often in my practice that names and case records travel between one agency within a city or within a state. There seems to be a careless concern over where we as workers are feeding information obtained by hearsay. . . . I feel uncomfortable knowing that my house insurance or my car insurance is dependent upon some suspected report of child abuse.

Proceedings of the 1974 Annual Meeting of the American Human Association in Boston, Massachusetts, *quoted in* Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 733-34 (1978) (unpublished material on file in National Center on Child Abuse and Neglect (DHEW)).

178. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1191 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979); Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 733-34 (1978).

179. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1191 (S.D. Tex. 1977) (no compelling reason found to deny family access to fruits of investigation or conclusion reached), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979).

180. See Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 736 (1978). In another article Besharov expresses this view as follows:

As a matter of fundamental fairness, if not constitutional right, persons alleged to abuse or neglect their children ought to know what information a government agency is keeping about them. Subjects of a report should have access to it because 1) they have a right to know what allegations against them have been recorded by a public agency, even though the record is confidential, and 2) only if they know what is in the record can they pursue their right to have the record amended, expunged, or removed from the registry and other agency files.

*Child Abuse and Neglect*, *supra* note 2, at 510-11. See generally *In re Gault*, 387 U.S. 1, 33-35 (1967); *Alsager v. District Court*, 406 F. Supp. 10, 24 (S.D. Iowa 1975).

the need for confidentiality has been judicially determined.<sup>181</sup>

The statute is equally deficient in its failure to specifically outline to whom access may be made available.<sup>182</sup> Despite the need for confidentiality, the information in these reports must be available to those who need to make critical, child protective decisions.<sup>183</sup> Theoretically, any person who must decide whether a child is abused or neglected would find information about prior suspicious occurrences and treatment efforts helpful in reaching a decision.<sup>184</sup> Guarding against unauthorized disclosure be-

181. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1191 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979); Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 734 (1978); *Child Abuse and Neglect*, *supra* note 2, at 509. The practice in Texas, after the *Sims* decision, has been to allow the family access to the records, except as to the identity of the complaining party. Reports of cases of abuse that are determined invalid are held for six months in the local child welfare offices, then destroyed. Potential, validated, or uncertain reports are held for three years. Telephone interview with Judy Janek, Supervisor of Child Welfare Services, Texas Department of Human Resources (Sept. 23, 1979). Statutory mandates are still necessary to ensure that Texas' practice remains constitutional.

182. See Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 738-42 (1978); *Child Abuse and Neglect*, *supra* note 2, at 501. The present procedure in Texas limits access to the reports to members of the child protective agency. Telephone interview with Judy Janek, Supervisor of Child Welfare Services, Texas Department of Human Resources (Sept. 23, 1979).

183. See Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 739-40 (1978); *Child Abuse and Neglect*, *supra* note 2, at 508. In general, the states take two approaches to limiting access to these records. Some states make the records confidential, but authorize the responsible state agency to issue regulations allowing some persons access. See ILL. ANN. STAT. ch. 23, §§ 2061, 5035.1 (Smith-Hurd Supp. 1979); *Child Abuse and Neglect*, *supra* note 2, at 508. Others enumerate who may have access in the statute itself. See, e.g., D.C. CODE ANN. § 16-2331(b) (Supp. 1978-1979); IOWA CODE ANN. § 235A.15 (West Supp. 1979-1980); TEX. FAM. CODE ANN. 34.08 (Vernon Supp. 1980).

184. See *Child Abuse and Neglect*, *supra* note 2, at 509 n.271. This includes physicians, law enforcement officers, and child protection officials. For instance, a physician seeing a bruised or emaciated child in a hospital emergency room is not only faced with the decision of whether to report, the physician must also decide if the situation is so critical as to require the child to be placed in protective custody. The difficulty of the decision is enhanced by the risk that he may never see the child or his family again. In this situation, it can be crucial for the physician to know about prior treatment efforts and prior history of the family. See Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 739-40 (1978). A number of states give access to child protection records to all persons required to report suspected abuse. See, e.g., ALASKA STAT. § 47.17.040(b) (1979); MD. ANN. CODE art. 27, § 35A(i) (Supp. 1979); MASS. ANN. LAWS ch. 119, § 51E (Michie Law. Co-op. 1975 & Supp. 1979).

comes impossible if access is given to such a large number of strangers.<sup>185</sup> More importantly, such widespread availability to personal and family data unreasonably compromises the right of privacy of the children and the families involved.<sup>186</sup> The statute should carefully designate that access be given to certain professionals who have responsibility for making decisions about protective custody,<sup>187</sup> and direct access should be limited to only these statutorily authorized individuals.<sup>188</sup>

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185. See Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 738, 741 (1978).

186. See *Child Abuse and Neglect*, *supra* note 2, at 508. The danger also exists that many of those given access to such information would not know how to evaluate it intelligently. *Child Abuse and Neglect*, *supra* note 2, at 509.

187. See Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 739 (1978). The August 1977 draft of the Model Child Protection Act is careful to describe the professionals who should have access to records, in the context of their need to make immediate child protective decisions:

- (i) A local child protective service in the furtherance of its responsibilities;
- (ii) A police or law enforcement agency investigating a report of known or suspected child abuse or neglect;
- (iii) A physician who has before him a child whom he suspects to be abused or neglected;
- (iv) A person legally authorized to place a child in protective custody when such person requires the information in the report or record to determine whether to place the child in protective custody;
- (v) An agency having the legal responsibility or authorization to care for, treat, or supervise a child or a parent, guardian, or other person responsible for the child's welfare who is the subject of the report;
- (vi) A court, upon its finding that access to such records may be necessary for the determination of an issue before such court;
- (vii) A grand jury, upon its determination that access to such records is necessary in the conduct of its official business.

MODEL CHILD PROTECTION ACT § 24(b)(i)-(vii) (Aug. 1977 draft).

188. Some states provide access be given to administrators, legislators, and researchers who are pursuing their official or professional responsibilities to plan, monitor, audit, and evaluate services or to conduct other research. See, e.g., FLA. STAT. ANN. § 827.07(7) (West Supp. 1979); ME. REV. STAT. ANN. tit. 22, § 3860 (Pamph. Supp. 1965-1979); NEB. REV. STAT. § 28-1506 (1975). The better practice seems to be to expunge identifying information in the records before it is made accessible to these individuals. The draft model act provides for access to:

- (ix) Any appropriate state or local official responsible for administration, supervision, or legislation in relation to the prevention or treatment of child abuse or neglect when carrying out his official functions; and
- (x) Any person engaged in bona fide research or audit purposes, provided, however, that no information identifying the subjects of the reports shall be made available to the researchers unless it is absolutely essential to the research purpose, suitable provision is made to maintain the confidentiality of the data, and the head of the state department or local agency gives prior written approval.

### B. Section 34.06: Central Registry

Most states have established a central register of child abuse cases for diagnostic purposes and to monitor statistical systems.<sup>189</sup> A properly operated central register can:

- 1) assist in diagnosis and evaluation by providing or locating information on suspicious occurrences and prior treatment efforts;
- 2) improve the handling of child abuse and neglect cases by providing convenient consultation on case handling to workers and potential reporters;
- 3) refine diagnosis and encourage further reporting by providing feedback to those who have made reports;
- 4) measure the performance of the child protection service by monitoring follow-up reports;
- 5) coordinate community-wide treatment efforts by monitoring follow-up reports;
- 6) facilitate research, planning, and program development by providing statistical data on the nature and handling of reports; and
- 7) encourage the reporting of suspected child abuse and neglect by providing a focus for public and professional educational campaigns.<sup>190</sup>

Almost all of the central registers in existence fail to fulfill their stated diagnostic, monitoring, and statistical functions.<sup>191</sup> Most states, including Texas, simply legislate that there shall be a central registry and make no provision for implementation of a functional system.<sup>192</sup> As a result of understaffing and insufficient space to store reports, all but a few registers are unused and unusable.<sup>193</sup> The records in most registers are incomplete, inaccurate, and out-of-date.<sup>194</sup> Most do not fulfill their research and statistical purposes because they provide one-dimensional statistical summa-

MODEL CHILD PROTECTION ACT § 24(b)(ix), (x) (Aug. 1977 draft).

189. See, e.g., FLA. STAT. ANN. § 827.07(7) (West Supp. 1979); HAWAII REV. STAT. § 350-2 (1976); NEB. REV. STAT. § 28-1506 (1975). See generally *Child Abuse and Neglect*, supra note 2, at 501. State establishment of a central register is recommended in the federal act. See 42 U.S.C.A. § 5101(b)(2) (West 1977).

190. *Child Abuse and Neglect*, supra note 2, at 503.

191. See *Child Abuse and Neglect*, supra note 2, at 503-04 (quoting data on file at the National Center on Child Abuse and Neglect, Dep't of Health, Educ. & Welfare, Washington, D.C.).

192. See TEX. FAM. CODE ANN. § 34.06 (Vernon 1975); Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 694 (1978); Fraser, *Towards a More Practical Central Registry*, 51 DEN. L.J. 509, 515-16 (1974).

193. See *Child Abuse and Neglect*, supra note 2, at 503-04.

194. See *Child Abuse and Neglect*, supra note 2, at 504.

ries that contain only the roughest profile of limited segments of the protection process.<sup>195</sup>

In addition to the failure to accomplish its goals and thereby justify its existence, the central register may unconstitutionally infringe upon the rights of children and families involved in the reports.<sup>196</sup> In *Goss v. Lopez*<sup>197</sup> the Supreme Court held " 'where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the [Due Process] Clause must be satisfied."<sup>198</sup> The court in *Sims v. State Department of Public Welfare*<sup>199</sup> found the method Texas used to implement the statutory provision for a central register was "an unconstitutional infringement on the rights of parents."<sup>200</sup> The court's decision seemed to be rooted in its concern that persons listed in the register were not given notice of their being in the register, were not given access to the data, and had no opportunity to have material in the register amended, expunged, or updated, and that cases were labelled as "proven" based merely on social worker investigations, without judicial review.<sup>201</sup>

Subsequent to the *Sims* decision Texas modified its operation of the central register.<sup>202</sup> Under the present procedure a report of suspected child abuse received by a local agency is referred immediately to the central register in Austin. Once received, the information is "de-identified" and entered into the computer. The only identifiable data in the computer are adjudicated cases and cases in which temporary protective custody has been taken. Except for these cases, the only purpose served by the register is statistical. In its thus constitutional mode of operation the central register presently serves no other useful purpose.<sup>203</sup> The permanency of its present form of operation is uncertain; child protective workers already contemplate some new implementation of the registry sys-

195. See *Child Abuse and Neglect*, *supra* note 2, at 504.

196. See *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1192 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979); TEX. FAM. CODE ANN. § 34.06 (Vernon 1975).

197. 419 U.S. 565 (1975).

198. *Id.* at 574.

199. 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979).

200. See *id.* at 1192; TEX. FAM. CODE ANN. § 34.06 (Vernon 1975).

201. See *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1192 (S.D. Tex. 1977), *rev'd sub nom. Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979).

202. Telephone interview with Judy Janek, Supervisor of Child Welfare Services, Texas Department of Human Resources (Sept. 23, 1979).

203. The above information on the operation of the Texas central register was obtained from Judy Janek, Supervisor of the Child Welfare Services, Texas Department of Human Resources in a telephone conversation on September 23, 1979.

tem.<sup>204</sup> Thus, it is imperative the Texas Legislature outline specific guidelines in the statute, so the registry system can be effectively implemented before the child protective agency reverts back to its unconstitutional practices.<sup>205</sup>

To ensure the register is both constitutional and effective, the guidelines for implementation must be detailed.<sup>206</sup> The statute must provide that the individual have the means to ascertain what information about him is recorded and how it is used.<sup>207</sup> The subject of any report must be afforded a statutory right to correct and amend a record of identifiable information about himself.<sup>208</sup> Reliability of recorded data must be assured by legislating methods to update and keep current the data on file.<sup>209</sup> Fi-

204. "With the Supreme Court's reversal of *Sims* we anticipate that the names will go back into the computer." Telephone interview with Judy Janek, Supervisor of Child Welfare Services, Texas Department of Human Resources (Sept. 23, 1979). The United States Supreme Court reversed *Sims* on procedural grounds and held that the federal court should have abstained from rendering its decision as the constitutional issues could have been properly raised in the state court. See *Moore v. Sims*, — U.S. —, 99 S. Ct. 2371, 2378, 60 L. Ed. 2d 994, 1010 (1979).

205. See generally Besharov, *Putting Central Registers To Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 743-44 (1978); *Child Abuse and Neglect*, supra note 2, at 507.

206. See generally *Child Abuse and Neglect*, supra note 2, at 507.

207. See Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 Chi.-Kent L. Rev. 687, 736 (1978).

208. See Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 743-44 (1978). The procedure for amending the records varies among various jurisdictions. Some jurisdictions seal or expunge data when the child reaches a certain age. See ARIZ. REV. STAT. ANN. § 8-546.03(A), (B) (1974); ARK. STAT. ANN. § 42-818 (Supp. 1975); COLO. REV. STAT. § 19-10-114 (1978); D.C. CODE ANN. § 16-2335 (Supp. 1978-1979); MASS. ANN. LAWS ch. 119, §§ 51 (B) (5), (F) (Michie Law. Co-op 1979); MICH. STAT. ANN. § 25.248(7)(2) (Supp. 1979-1980); N.Y. Soc. SERV. LAW § 422(4) (McKinney Supp. 1978-1979); PA. STAT. ANN. tit. 11, § 2214(n) (Purdon Supp. 1979-1980); TENN. CODE ANN. § 37-1208 (Supp. 1979); VT. STAT. ANN. tit. 13, § 1356 (Supp. 1979). Others take action at a specified time after a report is made. See FLA. STAT. ANN. § 327.07(8) (West Supp. 1979); MD. ANN. CODE art. 27, § 35A(i) (Supp. 1979); S.C. CODE § 20-10-140 (Supp. 1977). Some jurisdictions destroy or expunge records when investigations determine the reports are unfounded. See ARK. STAT. ANN. § 42-818 (Supp. 1975); IOWA CODE ANN. § 235A.1-14, .22-.24 (West Supp. 1979-1980); MICH. STAT. ANN. § 25.248(7)(2) (Supp. 1979-1980); N.H. REV. STAT. ANN. § 169:44 (1977); PA. STAT. ANN. tit. 11, § 2214(l) (Purdon Supp. 1979-1980); VT. STAT. ANN. tit. 13, § 1356 (Supp. 1979); WYO. STAT. § 14-2-124 (1977).

209. See Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 736 (1978). The absence of updated or follow-up reports indicating whether the initial report was valid is an infringement on the civil rights of the individuals listed in the register. Unverified reports are an unsound basis for diagnosis or evaluation by researchers; further, there can be no monitoring of the child protective agency's performance. An increasing

nally, the statute must provide criminal and civil penalties for unauthorized use of the recorded data.<sup>210</sup>

To further ensure the constitutional operation of a central register, the statute should enumerate the few individuals to whom access will be allowed.<sup>211</sup> Information that may be provided for research purposes should also be guided by statutory provision.<sup>212</sup> These provisions must meet legitimate concerns for the privacy interest of the subjects of the reports.<sup>213</sup>

A final recommended provision to the proposed statute is a procedure providing feedback to the person making the report.<sup>214</sup> Reporting systems are fragmented and impersonal procedures;<sup>215</sup> however, very personal interests are involved. The reporter is often hesitant and reluctant to report his suspicions even though they seriously affect the welfare of a child.<sup>216</sup> The success of the reporting system depends, to a great extent, upon the satisfaction of the reporter who is interested in knowing his report has procured tangible results.<sup>217</sup> He will then be more willing to report in the future. Feedback will also increase the accuracy of the data contained in the register by providing a "double check" on the accuracy of the information recorded.<sup>218</sup> Before an upgraded central register system is estab-

number of states require periodic progress reports in order to update register records. To protect family rights, the child protective agency is required to report to the central register within a specified time, often sixty days, its determination of whether the report was unfounded. *Id.* at 744-45.

210. *See id.* at 736; Fraser, *A Glance at the Past, a Gaze at the Present, a Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 673 (1978) (criminal only).

211. *See* MODEL CHILD PROTECTION ACT § 24(b)(i)-(vii) (Aug. 1977 draft). The desired limited access to individual reports of suspected child abuse does not parallel the access desired for central registers. If child abuse and neglect records are to be used to improve service through monitoring and research, data must be available to legislators, administrators, policy-planners, and researchers. *See* Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 741 (1978). The information made available, however, must be de-identified, its confidentiality carefully safeguarded, or strict provision made against its unauthorized use. *See* MODEL CHILD PROTECTION ACT §§ 24(b), (d) (Aug. 1977 draft).

212. *See* MODEL CHILD PROTECTION ACT § 24(e) (Aug. 1977 draft).

213. *See* Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 741 (1978). Only when personal identification is essential to the research purpose should information be disclosed to outsiders. In addition to this strict limitation, provision must be made that the information will not be shared with others. *Id.* at 741.

214. *See id.* at 742.

215. *See id.* at 742.

216. *See id.* at 742. The reporter may feel isolated in his efforts to protect the child because of the impersonal nature of the reporting system. *Id.* at 742.

217. *See* Ireland, *A Registry on Abuse*, 13 CHILDREN 113, 120 (1966).

218. *See* Besharov, *Putting Central Registers to Work: Using Modern Management*



lished, concrete decisions should be made as to its desired function.<sup>219</sup> Then, all pertinent requirements to ensure efficient, effective operation of a central register while protecting the privacy and liberty rights of children and families should be outlined in the statute.

### III. CONCLUSION

The delicate balancing of interests involved in every child protection law makes the drafting of these laws a challenging task. Most states have learned from experience that their respective legal frameworks for child protection are incomplete, ineffective, and even unconstitutional.<sup>220</sup> Despite the problems, states have undertaken the challenge and reevaluated their laws in an effort to develop a cooperative community structure that provides the needed services effectively and compassionately.<sup>221</sup> The emerging second generation of laws is still not without its shortcomings; its promise, however, is great.<sup>222</sup>

The legal framework of child protection laws in Texas has been reevaluated in several areas.<sup>223</sup> In each instance the legislature has addressed a certain problem and competently effected a vehicle for the efficient implementation of the necessary changes.<sup>224</sup> The legislature must face the challenge presently before it and undertake immediate action to resolve the still existent problems in the Texas Family Code, especially in the areas of reporting and maintaining records of child abuse. A good law is the first step in the development of a network of prevention and treatment services that meets the needs of the community.

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*Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 742 (1978).

219. *See id.* at 749-50.

220. *Child Abuse and Neglect*, *supra* note 2, at 459-60.

221. *See Child Abuse and Neglect*, *supra* note 2, at 460.

222. *See Child Abuse and Neglect*, *supra* note 2, at 519.

223. *See* TEX. FAM. CODE ANN. §§ 11.10, 17.01-.08, 18.01-.06, 34.011, 34.05 (Vernon Supp. 1980).

224. The Texas Family Code, as amended by the legislature, is now capable of withstanding constitutional challenge. As pointed out in the text, however, some areas addressed by the amendment must be reevaluated. Provision for directing placement of a child taken into temporary custody by the state is recommended. The ten day period within which an adversary hearing must be held for a parent whose child has been summarily seized should be reduced to five. Appointment of an attorney for the indigent parent in a child abuse proceeding is advised. All potential reporters, not only hospital personnel, should be encouraged to submit written reports. Provisions for a telephone hotline and authorization of photographs and x-rays would also significantly improve the reporting law.