

## Children's Section: Aging Out of Foster Care

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Over 20,000 children between the ages of 18 and 21 emancipate or “age out” of the foster care system annually.<sup>1</sup> Many youth exit the system after numerous placement changes while in foster care and lack a strong network of support to assist them in transitioning to adulthood. Without the proper resources to maintain self-sufficiency, emancipated foster youth often experience homelessness and incarceration. The Children's Section highlights the struggles of two youth who chronicled their experiences in aging out of foster care. Christine McKenna's story was first published in *Represent*, a bi-monthly publication based in New York City written by current and former foster care youth. William Dominguez's story was featured in youth-run newspaper *LA Youth*, based in Los Angeles, through the Foster Care Writing and Education Project. These two stories are followed by a guide to navigating financial aid for foster youth, written by Michael McPartlin, a financial aid manager at the City College of San Francisco. This article provides crucial, current information for professionals working with emancipating foster youth pursuing a college education.

The Children's Section also includes two scholarly book reviews and a piece involving the Indian Child Welfare Act and recent California case law. The section concludes with recent case summaries and legislation pertaining to the fields of dependency, delinquency, health and education law.

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<sup>1</sup> U.S. Department of Health and Human Services, Administration for Children and Families, *Adoption and Foster Care Analysis Reporting System (AFCARS) Report: Preliminary FY [fiscal year] 2003 estimates as of April 2005*, available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report10.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report10.pdf).

**PHOENIX RISING****I MADE IT, BUT I NEEDED ALL THE HELP I COULD GET**

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By Christine McKenna<sup>\*</sup>

When I was getting ready to emancipate from foster care on my 18<sup>th</sup> birthday, I couldn't wait to be free, to spread my wings and fly. When I thought of life after care, I imagined a beautiful two-bedroom apartment, a cat, a wonderful day job, school in the evenings, parties and dates galore. I would always have money to spend.

In other words, I had no clue what was in store for me.

I sometimes compare my emancipation from Los Angeles' foster care system to the release of a bird who's been kept in a cage for too many years. Once released a bird is bound to do one of two things: stay in the cage even though the door is now open, terrified of the world they're supposed to enter, or fly around chaotically, never knowing where to nest, where to call home. I took both routes.

**How Much Toilet Paper Lasts a Month?**

At first I tried to do the responsible thing, I really did. I got myself into a program at the YWCA, where I lived with six other females who had all recently left care. We roomed in a huge house, kind of like a college dorm. Then I sort of lied on a resume – don't try this at home, kids – to get a part time job as a secretary at a law firm. I also started going to Santa Monica College full time. I convinced myself that I was fine, that I could do this independent thing, it was no big deal. But I also knew that I had no idea what I was doing.

No one had ever sat down and taught me how to balance a checkbook, how to handle college (which, contrary to popular belief, is nothing like high school!), I had no idea

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how much toilet paper could last a month. Things like that were always just there in the group home. I never wondered how they got there. And I didn't even know how to socialize with people who hadn't also been in foster care.

Growing up, the only kids I got to hang out with were as messed up as I was. I didn't know how to interact with people who thought it was weird to run screaming up and down the halls just because you were bored, or throw fruit across the dining hall if you weren't allowed seconds.

### **I Moved 3,000 Miles**

I started to doubt whether I could survive this independence. This emancipation. I now understood why some slaves kept working for their masters even after they were freed. They had been given no more to cope in the real world than I had when I left care.

Eventually it occurred to me that maybe I would do better living farther away from my family. I imagined that they were just waiting for me to fail, and I was determined to prove them wrong. The problem was, I really was struggling, and I didn't want them to see that. I wanted to struggle my way to success somewhere far away from them, where they wouldn't see the times I stumbled while trying to stand on my own two feet. So I made the quick decision to move to New York. I had always wanted to live there.

This is the part where the bird who's been let out of his cage starts to fly all willy nilly with no sense of direction. Now mind you, I told nobody about my decision to move because I knew they would talk me out of it, because this was an extremely stupid and impulsive plan. I was determined to do this on my own, with no help from anyone, even if it meant falling flat on my face in a pond of quicksand. I thought the only way to be truly independent was to never ask for help. Damn my stupid 18-year-old way of thinking!

So I arrived off the bus in a New York City summer with nowhere to stay and no money. I kept telling myself, "It's all going to work out."

### **I Would Not Ask for Help**

How I was going to get through it and why it was going to work out I didn't let myself think about, for fear that I would crack. I felt suddenly tempted to call my mentor, Pamela, back in California, to bail me out of yet another jam I had gotten myself into. But then I decided that I was an adult now, and I had gotten myself into this, and I would not ask for help.

In the end though, I did accept help, but from a stranger instead of someone I knew. A lady saw me crying on the steps of the YWCA (how ironic) and when she asked me what was wrong and I told her she did the sweetest thing. She got me a room for the night at the Y.

The next day a police officer told me about a shelter called Covenant House, which was for kids under 21. Now I know it sounds ridiculous, but I still had that pride thing going on and I was completely against the idea of going to a shelter. In my twisted way of thinking, going to a shelter seemed another way of failing to be independent. I hadn't traveled over 3,000 miles to just end up back in a state's care. Or perhaps I had, because that's exactly what happened.

### **Stuck at the Homeless Shelter**

I entered Covenant House three days after I arrived in New York. I was struck with how similar this place was to my previous group homes. I was sleeping on a floor with close to sixty females, and we had to be in bed by 9:30 p.m. Once again I was dependent on others to take care of me, and it made me upset. I was 18! I felt like I should be making it on my own.

At Covenant House they put me in their psychiatric day treatment center because in foster care I had been diagnosed with many psychiatric illnesses. That meant I was not allowed to work. Instead, they wanted me and all the other "patients" in the program to sit on our fat asses and collect SSI money from the government, which is basically welfare for the mentally ill.

Ooooh, I was so pissed. I wanted to work! I wanted to go to school! I wanted to be a productive member of society!! I wanted to be independent! I knew I could work, I mean there was nothing wrong with me physically or mentally – that I could see anyway – so what excuse did I have not to work? To me not working was like giving up on being independent altogether, something I refused to do.

### **I Wanted Out**

Because I usually end up doing what I want in the end anyway, I secretly began working at DreamYard, a not-for-profit organization that has a youth program I was part of in California. I started working at their New York branch. I became really close to my bosses, Tim and Jason, in the few months I worked there. I was like the lost little child they could help, and I needed their help badly. Accepting their support and company and encouragement and even, at times, money was when I began to believe that people could help me without taking away my sense of independence. Becoming independent, I began to see, was a long, slow, gradual process, and I needed all the help I could get. But I still couldn't wait to get there.

Before long, I wanted to move out of Covenant House. I felt really antsy, like I needed a change, and I wanted to try being on my own again. So I found a room for rent in Queens through a room finder's agency. The room cost way more than I could afford but I just had to have it. I wanted to move on.

Everyone, including Tim and Jason and the staff at Covenant House, tried to talk me out of it. It was amazing. I had all these people I had only known for less than three months trying to save me from myself just because they cared. But in my severe state of not-thinkingness, I was sure that the only reason everyone wanted me to not move was because nobody really wanted me to be independent. It didn't occur to me until much later that maybe they just wanted me to think about the decision I was making before I did something I would undoubtedly regret. So I moved.

### **Scraping for Rent Money**

I regretted it almost immediately. There was no way my part time gig at DreamYard could pay for this \$400 a month room which was more like a walk-in closet. Thank God I have friends – Tim and Jason – who each paid for a month's rent. Otherwise I would have known the true definition of being homeless and helpless. (Covenant House said they wouldn't take me back if I left.) I was nearing my second month in this hell of a place and once again becoming antsy and claustrophobic and running out of friends when another good person offered me help.

A worker from Covenant House who I kept in contact with off and on told me that the check from the government I never wanted but would now kill to get my hands on finally came through, and that even though she really wasn't supposed to help me find a place to live anymore, she told me there was an opening at a residential treatment program for mentally ill adults where I could have my own studio apartment. Normally I would have frowned at this – you know me, doing so well at the self-sufficient thing – but strike me dead if I didn't want to hop right through the phone and plant a big wet one right on her!

### **Supervised Housing Program, My Savior!**

So I moved into the program. In some ways it was a lot like being in foster care all over again. Staff kept an eye on me. Staff slept with the residents when they weren't supposed to. There was a lot of drama among the residents.

Still, I had my own apartment, I paid rent, well, sort of, and I had no curfew. It was a good combination of being independent and supported. I figured that if I didn't take it as an opportunity to get my crap together here, I would always be running and falling flat on my face.

I was only allowed to stay in the program for three years. When I was coming up on my second year there, I knew it was time to start planning for my future. The staff were

there to help with these things, but I still wanted to prove to myself that I could handle this without any, or much, help.

### **Preparing for Independence – Yet Again**

So I started the process of applying for Section 8, which is a government program that allows people with low incomes – that's me – to find apartments they can afford.

While I waited to see if I would get approved for Section 8, I tried not to think too much about living completely on my own. It made me panic. I decided to do this one step at a time, never thinking about more than what I was doing in a particular step: Apply, wait, acceptance letter, wait, interview for an apartment, wait, another acceptance letter, wait, voucher. Thinking about more than the step I was on caused me to have a panic attack. I knew I couldn't hide from my fears of being on my own for long, but I was willing to put it off for as long as I possibly could.

### **I Found an Apartment**

After I received my voucher I went through the apartment hunting ritual still trying not to think. I quickly found a really nice studio in the Bronx (OK, so what if a matchbox would've looked great to me!) and immediately started the process of making this apartment my home, which had a lot of steps to it. Somewhere between having the apartment approved by a worker and picking up the paperwork that would let me move in, the realization that this was it hit me so hard that I was paralyzed with fear.

Suddenly I wasn't so sure I could do it. I mean, I had already emancipated once in California and look how well that had turned out for me. I was sure that this would never work either, and I began to think that maybe I could never be on my own.

I was scared to talk to anyone except my therapist about how I was feeling. I didn't want to disappoint anybody, and I wanted to prove I could be independent. But suddenly I wanted nothing more than to make it stop. I realized that I didn't want to move, I wanted to stay where I was safe, at the

residential treatment home for mentally ill adults. I wasn't ready for the world outside that bubble I lived in.

### **But Could I Make It?**

My therapist was the one who pretty much snapped me out of it. She said that I had basically two choices: I could either stay dependent on others to take care of me but still b-tch about how nobody treated me like an adult, or I could gather up my courage, face my fear, and just do it. I would never know what I was capable of doing until I just did it.

She reminded me that I had already survived so much in my 21 years on this earth, more than most people do in their entire lives, and that I could get through this. She was right. I could do this. It might be scary and paralyzing and everything else I feared it would be, but it would also be awesome! I love new adventures, and I realized this was just one of a million more I would have to go through in my life.

### **One Year Later...**

Well, it's been over a year since I moved into that apartment by myself, and surprisingly, I'm still there. I've survived a fire in the kitchen (totally not my fault), a flood (OK, my fault), a broken refrigerator, two roommates, kitten births and deaths, and having (and losing) the love of my life. I knew it wouldn't be easy, but I just didn't think it would be this hard. When you're in care, you think that leaving care is going to make all your problems go away. What you don't realize is how you'll have a whole set of new ones.

There are days when I want to move back to the apartment program for mentally ill adults, where I was at least partly taken care of. Some days I just want to stay underneath the covers because facing each day means buying cat food, or having to replace another light bulb, or harassing the landlord to finally fix my bathroom sink. Some days I wonder if all the fighting I did to become independent was even worth it.

But then there are days when I look around and just go, "Wow," because this apartment and this life is mine. I've created it. For better or for worse (or until the end of my lease)



it's all mine and I will fight to the death to keep it. And now I can see how getting here – to a place where I'm more or less independent – required me to be brave enough to accept help, and to let myself actually depend a bit on people who could help me.

When I think about that, I think that no one is really ever completely independent, and who would want to be? Knowing how to help and be helped by others is part of being an adult. Like take right now. I'm broke. So if any of you kind souls would like to give a donation to the Feed Christina Fund, who am I to turn that down? Just write my editor, and she'll tell you who to make the checks payable to. Hey, OK, I'm kidding, but I thought it'd be worth a try.

## MY LIFE ON THE STREETS

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By William Dominguez\*

Maybe you have seen those smelly homeless guys asking for money. But did you ever stop to think that one of them might actually be a teenager? I spent a year and nine months on the streets. What I saw and experienced, no teenager should have to go through.

I grew up in an abusive family. When I was a little kid, I would stay out as long as I could around my neighborhood and at the park to avoid getting beat by my dad. When I was 5, my dad burned me on the stove and I was put into foster care.

I spent eight years in one foster home in the San Fernando Valley. I liked it. It was actually a normal family. We had dinner together. But I'd still get sick of it sometimes because I was the middle child and would get blamed for everything. I also got into fights with my foster parents over stupid things like my room being clean or homework. Sometimes I would run away for weeks and go to a friend's house. I was used to running away. The streets were like my home.

But when I was 13, I was taken out of my foster home. Social workers said there wasn't enough food or clothes and supposedly my foster dad was beating my little brother and sisters. I was sad to leave and surprised because I didn't think those things were true. I was placed in a group home where I lived with five other foster youth.

Going to a group home after spending so long in one place was hard. I didn't like how the group home staff didn't care when I told them I was getting picked on by the other kids because I was the new kid in the house.

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I was in three group homes over the next month but from each one I went AWOL, Absent Without Leave. I would hang out on the streets by myself until I got stopped by police for being out past curfew. The cops would bring me back to the group home, but the staff wouldn't take me back.

### **Running Away Was My First Instinct**

Then I was placed at a group home in Pasadena. It was cool because the staff listened to my problems. I stayed there for a year until I got caught with weed. They said they were going to kick me out. I thought that was unfair because it was nothing big. It was only weed. I was mad so I went upstairs, packed my bag and left. I took the bus to my friend's house in downtown L.A. As always, I didn't know how long I was going to be on my own.

I liked it at first. The freedom, drugs and everything were freakin' great. My friend's mom told me I had to get a job to help with rent. I tried to get a fast-food job or anything I could get. I filled out applications and asked if they had openings. But no one wanted to hire a kid with no education and who was a runaway. So after a few months, my friend's mom kicked me out.

I went to MacArthur Park near downtown. It was cold and smelled really bad. There were a lot of drug addicts and jumpings. I'd make friends and they would be like, "You wanna get high?" I started doing crack cocaine and other drugs like crystal meth, coke and speed. I had never used those drugs before, but when I was on drugs, I didn't worry about falling asleep, getting caught or eating.

When I wasn't high I would go to the library and go to sleep far away in the corner. Sometimes on Sundays I would go to the park and play basketball.

At night I would sleep in the jungle gym, in the slide that was a tube, because it was warmer. When it rained I would sleep under the freeway bridge. Once in a while I could get a good night's sleep. But other nights I couldn't because I was worried about getting caught by the police. Every now

and then I would hear gunfire and it would keep me up at night.

My clothes were dirty and ripped. I smelled like piss and body odor. I would eat out of garbage cans or steal food. Before I started living on the streets I was a good 135 pounds. I lost a lot of weight. I looked like a twig. I would go a few days without eating. For the first couple days I would be starving, but on the third day the hunger went away and I couldn't feel anything.

### **'Can I Borrow a Dollar?'**

I had to beg for money. I would ask for 50 cents or a dollar. I'd say, "Can I borrow a dollar so I can catch the bus?" I asked guys with their wives or girlfriends because they were more likely to help a kid out. Some people would look at me and say, "What a waste" or "Get the hell away from me, you bum." The ones who felt sorry for me would give me money and say "Poor kid." On a good day, I made \$40 to \$60. I'd go get something to eat. Then I'd buy drugs, alcohol and cigarettes with the rest of it. I smoked a lot of cigarettes and crystal meth. Drugs were more important than food. That's how it is for addicts.

It was scary at times. One time I was hanging out with this guy who had done a stupid drug deal. Later, we were sitting on a park bench and the guy he'd ripped off came back and started shooting at us. I ducked and fell to the ground. It was an adrenaline rush. I saw my life flash before my eyes. Luckily, we didn't get hurt.

While I was homeless, I thought of myself as nothing. I had no feelings whatsoever. I couldn't see myself still alive because of all the drugs I was doing, all the stuff I was seeing, all the people I was ripping off. I was breaking into houses and robbing them. I was afraid I would get caught. I thought I would overdose or get killed. Seeing little kids with their families was hard. I wished I had a family of my own.

I don't remember exactly when or how old I was, but I moved to the San Fernando Valley because it was familiar. I also had friends from middle school there. Once or twice a

week I would shower or get something to eat at a friend's house. I made sure to go to different friends' houses so they wouldn't find out I was homeless. I'd tell them, "No one's at my house and I don't have a key."

My best friend got me into a crew. A crew is like a gang but you can get out when you want and they do smaller crimes like tagging. Being in the crew meant a lot to me. They were like family. They gave me food, a place to take a shower and sometimes a place to sleep. I would sometimes tag with them. They gave me the name AWOL after I told them how I ran away.

But one day I was asleep at a park and the cops came by. They saw me and ran my name through the police computer. I came up as a runaway so they took me in. I was mad because I was used to staying on the streets and living on my own. I had been on the streets for a year. I didn't want to go back to a group home.

After that, I was in and out of 13 group homes. I'd run away or get kicked out for having dirty drug tests. Each time I left I thought, "Here we go again." I would stay on the streets for one or two months, sleeping in parks or churches, then I would turn myself in. I don't remember much about this time because I don't want to and my memory is messed up.

I do remember that I went back to my crew for help. But they turned their backs on me. They said they weren't going to help me because I had lied to them about God knows what. But my best friend from the crew, Tommy, knew I hadn't lied so he let me stay with him. But I felt like I was interfering with his life. I was wearing his clothes and eating his food. I felt bad, so I left and was all alone again.

One night I woke up in the middle of the night crying, wishing I had a family to go to. I regretted leaving Tommy's house. I thought about selling myself for food and money, but I didn't.

I hit a breaking point when I was at a party with Tommy. I got in a fight and some guy came behind me and stabbed me in the side. That was it. I called my social worker

and got the number for a runaway shelter in Hollywood. I stayed there for two months. I went to Narcotics Anonymous to get help with my drug problem, went to therapy and got my stab wound healed.

Then I was put in a foster home in Pacoima near San Fernando. But my rival crew was in the area. I got into fights and got threats every day. They'd say, "I'm gonna kill you. Get the hell out of this neighborhood." My foster mom didn't do a thing about it. So I ran away from there, too.

I felt really jacked up in the head when I realized I was going to be on the streets again. I was really scared that I would go back to my old ways of drugs and alcohol. After spending so long on the streets I felt like I had lost my mind. I had been stabbed. I had been shot at. I had seen people get shot and die or die from an overdose. I was tired of it. I started stealing and cutting myself and trying to overdose. I wanted to get caught. I wanted to die.

After just a week, I got picked up by the cops one night because I was falling asleep in a shopping center in West Hills. They asked, "What are those marks on your arms?" I told them I was feeling suicidal so they took me to the hospital. I was happy because I had food, a shower every day and a warm bed to sleep in.

Because of my running away and drug history, I was sent to a locked-down group home in Culver City called Vista Del Mar. I stayed there for more than a year. Sometimes I would act like I was back on the streets. I wouldn't sleep or eat for a few days and sometimes I did drugs. I still get the cravings to do drugs, but I've stayed clean.

### **Finally, Someone Believed In Me**

One time when I was 18 they pissed me off to the point where I just walked out the front door. One of the staff stopped me by the gate. But they didn't kick me out. I don't know why. I guess they saw something in me. They said, "William, we know what you're going through. We're going to work with you." I guess they knew I was frustrated. I was 18 in a locked-up facility with no family, no freedom. They

thought I was a good person. Holy crap. That made me feel weird. If they had kicked me out, I would have been on the streets for good.

A few months later I graduated from Vista. When I found out I was going to transitional housing, which is where older foster youth live, I had nightmares where I was back on the streets. I had been a screwup my whole life. I was worried that I'd screw up and get kicked out.

In transitional living I get more freedom. I can go out for 24 hours on the weekend and spend the night at a friend's house. It's still hard because I'm not used to having a roof over my head, being able to eat three square meals a day and having people that care about me, like the staff and my friends. I still sometimes want to AWOL but I don't. I'm older and wiser. I know I have no place to go to.

For the first time, I have plans for the future. I want to go to a trade school to learn roofing. I also want to get my own place soon. Then I'll have all the freedom I want. I know I won't return to drugs. I don't want to end up like my biological father in prison.

Like they say in the movie *Friday*, "You win some, you lose some, but you live. You live to fight another day." My past is part of me. It will follow me wherever I go, but hopefully it will be put in the past. Sometimes I don't regret living on the streets because it made me wiser. I know what I have to do to survive. I'm going to get a job and be somebody.

*L.A. Youth Editor's note: After completing his story, William left his transitional living home without leaving a forwarding address. L.A. Youth does not know whether he has a place to live or is homeless again.*

## **OVERVIEW OF FINANCIAL AID & RELATED PROGRAMS AVAILABLE FOR FORMER FOSTER YOUTH**

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By Michael McPartlin<sup>\*</sup>

Financial aid programs are available from federal, state, and institutional sources for former foster youth to attend college. In addition, the federal Chafee Grant program initiated in the 2003-04 school year is also available specifically for former foster youth as long as the youth has not turned 22 years of age prior to the start of the school year, which begins July 1<sup>st</sup>.

In most cases, former foster youth students will be considered high-need applicants for financial aid funds. The critical difference in what the student will receive rests upon when the student applied for aid (March 2<sup>nd</sup> is the recommended date for California residents to apply for the next school year) and how quickly the student responds to the school to complete their financial aid application. Although these guidelines apply to all students, they are particularly important for former foster youth to understand so they apply early for aid and follow up directly with the school financial aid office staff to finalize their award. Some aid funds are limited. These limited funds can represent a large portion of the total aid package. Typically these limited funds are awarded on a first-come, first-served basis. In California, the message is a simple one: File the FAFSA (Free Application for Federal Student Aid) and a CAL Grant GPA Verification form by March 2<sup>nd</sup> to receive the best financial aid package.

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<sup>\*</sup> Michael McPartlin has worked in a variety of leadership positions in the financial aid field over the past 23 years. Currently he is a financial aid manager at City College of San Francisco (CCSF). He chairs a Foster Youth Advisory Committee at CCSF which addresses coordination of services for and retention of foster youth.



The starting point for applying for aid is completion of the FAFSA. This free application must be used to be considered for federal and most state aid funds. In addition, eligibility for the Chafee Grant also relies on the results of the FAFSA. Although processing time may vary between schools, the FAFSA is sent first to the federal processing center which typically takes at least several weeks before the eligibility results are available to the school. When the FAFSA results are available (referred to as a Student Aid Report or SAR) to the school, the financial aid office will either award the student or notify them of what else is needed to complete the application. The key concept to convey to youth is that once the FAFSA has been processed by the federal processor, it is up to the school to finalize completion of the financial aid application. Questions should be directed to school aid staff from this point on.

A person who has been in the foster care system need only provide information about *themselves*, as long as they indicate in the FAFSA that they were a ward/dependent of the court (Question 53 in paper FAFSA). This applies in cases where the youth aged out at 18 from foster care. If this is not the case, the youth should be referred to the college's financial aid office to determine if parent information may also need to be provided. School aid officials can, on a "professional judgment" basis, make individual exceptions to the federal requirement for parent data. In such cases, the youth will be asked to document why parent information should not be provided. The school aid office will indicate under what circumstances this exception is made. This exception is made by each school individually and must be reaffirmed each year the student applies for aid. An approval made by one school does not automatically apply to other schools the student is considering. Each school must be contacted separately for the approval to be made by each respective school.

## Key Financial Aid Programs

### *Federal Pell Grant*

This is the primary federal grant aid program for students. For the 2006-07 school year, the maximum grant is \$4,050 for full-time students who enroll for the full school year. Students can receive a smaller amount of this grant if they enroll less than full-time or for less than a full school year. This is a program that is available throughout the school year so students who apply after the March 2<sup>nd</sup> priority date will receive the same amount as those who apply early.

### *Chafee Grant*

This is a federally funded program solely for former foster youth. The program is administered by the California Student Aid Commission (CSAC) in conjunction with the California Department of Social Services (SDSS). In order to qualify, the student must have been in foster care or been eligible for foster care between ages 16 and 18, not have reached their 22<sup>nd</sup> birthday as of July 1<sup>st</sup> of the award year, and submit a Chafee application to CSAC. In addition, a FAFSA must be filed to verify financial need. SDSS will verify foster youth status to CSAC. The school the student attends will verify financial need to CSAC once the financial aid file is complete. Only after these steps have been taken can the Chafee payment(s) be made. The Chafee Grant award is up to \$5,000 per school year. The student needs to be enrolled at least half-time and be meeting the financial aid office academic progress standard to receive funds each term. The award is renewable each school year until the age limit is reached.

The funding is limited so applying early is critical for consideration. For the 2005-06 award-year, the federal government had to establish priority criteria, as there were not enough funds to award Chafee grants for all the applications received. Those priority criteria may be continued for future years, but as of the date of this article, no decision has been made confirming if that will be the case for the 2006-07

award-year. The awarding priority criteria for 2005-06 in descending order are:

1. Is the youth a single parent? If not, proceed to (2).
2. Will the youth become ineligible for Chafee the next award year due to the age limit? If not, then proceed to (3).
3. Does the youth have financial need of at least \$5,000?

For the 2005-2006 award-year, when a student did not meet one of these three priority criteria but some funds remained, final priority was based on the date of receipt of the Chafee application. Thus, students who submitted a Chafee application after August 15, 2005, were not awarded a Chafee Grant for the upcoming award year. These recent events stress the importance of identifying and encouraging youth to **apply early** for all the programs referenced.

There may be some additional Chafee awards made based on schools returning payments for students that are no longer eligible (due to dropping below half-time enrollment or lack of academic progress). Should this occur, the priority deadline date for receipt of the Chafee application may be adjusted to a later date until all funds have been expended.

#### *State CAL Grant Program*

This program is available to California residents only. The primary deadline date to apply is March 2<sup>nd</sup> prior to the next school year. For example, students need to apply by March 2, 2006, for the 2006-07 school year. There is a second opportunity to apply on September 2<sup>nd</sup> but this applies only to students that will attend a California Community College for the school year. The CAL Grant program is very important for foster youth just graduating from high school as they are guaranteed to receive the grant if they apply by March 2<sup>nd</sup>, have financial need, and verify they had a GPA of at least a 2.0. This is known as the **Entitlement CAL Grant**. This guarantee is available up to 1 year after the student has graduated from high school. After that, the student can apply for the more limited CAL Grant known as a **Competitive**

**CAL Grant.** This award is not guaranteed as funds are limited. As the CAL Grant award can be worth more than \$8,000 per school year depending on the cost of the school, the stakes are quite high. All efforts need to be made to have foster youth apply by March 2<sup>nd</sup>.

Proposed legislation at the state level is being pursued currently to exempt foster youth from the March 2nd deadline requirement. Should this pass, a rolling award notification process would be established just for former foster youth. Although this is an important step forward for access, there are other aid programs that have limited funding. For these other programs, applying by March 2nd will still be necessary.

#### *Federal Work-Study Program*

This is a federal aid jobs program. Funding varies from each school and is limited. The student indicates interest on the FAFSA by answering yes that they are interested in work-study. The student works no more than on a part-time basis for an hourly wage to be determined by the school. Hours tend to be more flexible than a regular part-time job. Earnings from work-study are excluded from consideration for financial aid when the student reapplies for aid the next school year. On-campus student employment programs are an excellent opportunity for the student to form a better bond with the school.

#### *Federal SEOG (Supplemental Educational Opportunity Grant)*

This is a federal grant aid program. Funding varies from each school and is limited, and applying early is important for consideration. Although the federal maximum award allows up to \$4,000, given the limited funding, awards tend to range from \$500 to \$1,500 per school year. First consideration is given to students eligible for a Federal Pell Grant.

*Federal Subsidized Loan*

A school participates either in the Stafford Loan or Direct Loan option. The basic loan terms are the same with either option including a maximum amount available per school year. Funds are available throughout the school year. "Subsidized" refers to an interest subsidy provided by the federal government which makes the loan interest-free while the student remains enrolled in school at least half-time. Six months after the student ceases to be at least half-time, repayment on the loan begins. Repayment terms are flexible giving the student up to ten years to repay. If total loan debt is significant, the student can renegotiate repayment up to 25 years. Student borrowing is expected at the 4-year university/college level. Declining to borrow loans does not result in increased consideration for grant funds typically. Community colleges, given their lower cost, typically discourage borrowing unless absolutely necessary. Currently a first-year student can borrow up to \$2,625. Once 30 or more units are completed, \$3,500 can be borrowed as a sophomore. Students at the junior or senior level can borrow up to \$5,500 per school year. Loan maximums will increase as of the 2007-08 school year but the total amount an undergraduate can borrow will still be capped at \$23,000.

*Federal Unsubsidized Loan*

Also offered either under the Stafford or Direct Loan option, the distinguishing feature to this loan type is that the interest charge on the loan begins to accrue to the borrower immediately once loan funds are disbursed. A FAFSA needs to be processed to be considered for this loan but there is no need-based requirement to qualify. Typically a student applies for this loan type if they can not qualify for a subsidized loan or if they still have costs not covered by their financial aid award. The student has the option to pay the interest on an unsubsidized loan while in school or defer the interest payment until 6 months after leaving school. Deferring making the interest payment makes this loan more expensive to pay back over time. The combination of subsidized and

unsubsidized borrowing can not exceed \$46,000 as an undergraduate.

#### *Federal Perkins Loan*

This loan is administered directly by the school the student attends. The loan maximum varies by school based primarily on the repayments made to that school by previous borrowers. A number of community colleges have little or no funds available in this program due to high default rates from prior borrowers. Repayment terms are similar to that of the Federal Subsidized Loan program and in some cases are more generous, including a longer grace period before repayment begins and loan forgiveness based on type of occupation. This loan is need-based, so the FAFSA must be filed to show that the student has the requisite financial need for the loan.

#### *Financial Aid in California College Systems*

In addition to these federal and state aid programs, key financial aid programs exist in the different college systems within California. California Community Colleges offer a program called the BOGW (Board of Governors Fee Waiver) which waives the student's enrollment fee of \$26 per unit. The California State University system offers the SUG (State University Grant) which primarily can be used to pay for some or all of their main fee charges. In limited cases, the award may be a direct cash payment to the student. The University of California system offers the UC Grant which can pay some or all of the student's main fee charges. Independent schools frequently offer school-funded grant awards that are greater than the federal or state grant award amounts. Proprietary schools may, on a limited basis, have small grant awards to offer as well.

The best approach to take is to inquire about all possible aid programs as it is typical for a school to offer a combination of grant, loan, and student employment programs in a 'package.' The student then can decide which parts of the financial aid package to accept or decline once an award offer is made based on their needs and expected costs.

## **TURNING BACK THE CLOCK: THE LOSS OF TRIBAL JURISDICTION OVER INVOLUNTARY JUVENILE DEPENDENCY PROCEEDINGS**

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By Sarah Martinez\*

“There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”<sup>1</sup> This language from the Indian Child Welfare Act of 1978 (ICWA) captures the U.S. Congress’ intent in preventing the mass removal of Indian children from their reservations, families and culture. Native American activism for self-determination and for tribal sovereignty during the 1960’s and 1970’s provided the impetus for this congressional action. Despite such efforts to revive tribal sovereignty and jurisdiction over tribal matters, recent case law regarding involuntary juvenile dependency proceedings over Indian children in California reflects a change in traditional tribal jurisdiction.

Legislative history provides some relevant context into ICWA and the conflict of laws between state jurisdiction and tribal jurisdiction over involuntary juvenile dependency proceedings.

During the 1950’s, President Eisenhower initiated a termination policy, which was “designed to eliminate the reservations and assimilate the Indians into the mainstream. [Although momentary, this was a] totally destructive, digression from the continuing resurgence of tribal government development.”<sup>2</sup> This policy attempted to end the traditional treatment of tribes as sovereign nations, undermining existing and future tribal claims based on valid treaties with the U.S. federal government. In the same spirit,

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\* J.D. Candidate, 2008, University of California, Davis; B.A. American Studies, University of California, Berkeley.

<sup>1</sup> 25 U.S.C. § 1901 (2006).

<sup>2</sup> VINE DELORIA, JR., *AMERICAN INDIANS, AMERICAN JUSTICE* 102-103 (University of Texas Press) (1983).

Congress passed Public Law 280 (“P.L. 280”) in 1953, which permitted certain states, including California, to assume criminal<sup>3</sup> and some civil<sup>4</sup> subject-matter jurisdiction over tribal matters. Such policies diluted tribal sovereignty, broadened individual state control over tribes, and minimized federal protection of tribal rights. A long history of disenfranchisement in addition to these policies sparked the contemporary fight for self-determination among Native American communities.

Tribal self-determination efforts resulted in progressive changes in the law, which benefited tribes and promoted tribal sovereignty. Such changes resulted after immense pressure from Indian activism and mobilization during the late 1960’s and early 1970’s. In 1968, Congress passed the Indian Civil Rights Act. Some provisions in this Act removed state jurisdiction over certain tribal matters, returning jurisdiction to the tribes. One provision requires “consent of the tribe” for state assumption of civil jurisdiction over certain cases, and thus repealed parts of Public Law 280.<sup>5</sup>

Beginning in November of 1969, a small but dedicated group of urban Indian activists occupied Alcatraz Island in the middle of the San Francisco Bay to protest federal policy and its neglect of Native American communities and reservations. The nineteen-month occupation was a catalyst for a decade-long resurgence in Indian activism, most of which was aimed at reclaiming tribal sovereignty. In 1970, President Nixon successfully urged Congress to repeal the termination policy of the 1950’s “because termination is morally and legally unacceptable... [and] the mere threat of termination tends to discourage greater self-sufficiency among Indian groups.”<sup>6</sup>

The Indian Child Welfare Act of 1978 was one in a series of laws designed to curb the practice of unwarranted removals of Indian children by the state. Prior to ICWA, an

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<sup>3</sup> 18 U.S.C. § 1162 (2006).

<sup>4</sup> 28 U.S.C. § 1360 (2006).

<sup>5</sup> 25 U.S.C. § 1322 (2006).

<sup>6</sup> VINE DELORIA, JR., *AMERICAN INDIANS, AMERICAN JUSTICE* 20 (University of Texas Press) (1983).



alarming number of Indian children were removed from their families and placed in non-Indian foster homes and adoption placements.<sup>7</sup> Apart from dependency proceedings, from the late 1800's to the mid-1900's, Indian children were forcibly removed from their families to attend boarding schools and then subjected to "'normal' techniques employed by school authorities to achieve the desired deculturation/reculturation."<sup>8</sup> These institutions served to assimilate Indian children and eliminate their Indian identities.

Native American families unsuccessfully resisted such removals to boarding schools "based in a firm understanding that the process was consciously genocidal."<sup>9</sup> Article two of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide identifies one act of genocide as "forcibly transferring children of the group to another group."<sup>10</sup> After tribes voiced these concerns to the federal government regarding mass removal of Native American children from their homes and reservations, Congress recognized that such removals threatened the very existence of Indian tribes and that ICWA's passage was critical.

Congress passed ICWA to protect the best interests of Indian children by establishing minimum federal standards for the children's removal from their families.<sup>11</sup> Tribes are now a more integral part of dependency proceedings. Tribes exercise exclusive jurisdiction over Indian children who are wards of a "tribal" court.<sup>12</sup> Preferential adoption placement, in the absence of good cause, is given to family members, other members of the child's tribe, or other Indian families.<sup>13</sup> Tribes

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<sup>7</sup> 25 U.S.C. § 1901 (2006).

<sup>8</sup> WARD CHURCHILL, *KILL THE INDIAN, SAVE THE MAN: THE GENOCIDAL IMPACT OF AMERICAN INDIAN RESIDENTIAL SCHOOLS* xix (City Lights Books) (2004).

<sup>9</sup> *Id.* at 18.

<sup>10</sup> Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), at 174, U.N. Doc A/RES/260(III) (Dec. 9, 1948).

<sup>11</sup> 25 U.S.C. 1902 (2006).

<sup>12</sup> 25 U.S.C. § 1911 (2006).

<sup>13</sup> 25 U.S.C. § 1915 (2006).

are also given the right to petition any state court of competent jurisdiction to invalidate placement or contest termination actions if such proceedings violate ICWA provisions.<sup>14</sup> In any involuntary proceeding, where the court has reason to know that an Indian child is involved, the party pursuing removal must notify the child's parent or guardian and the child's tribe of their right of intervention.<sup>15</sup>

One particular provision of ICWA gives tribes exclusive jurisdiction over any child custody proceeding in a state court involving an Indian child, "except where such jurisdiction is otherwise vested in the State by existing Federal law."<sup>16</sup> With regard to civil subject-matter jurisdiction:

[states s]hall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country ... to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State...<sup>17</sup>

P.L. 280 has been construed as one such law that vests jurisdiction in the state and limits tribal jurisdiction.<sup>18</sup> California is one of six mandatory P.L. 280 states.<sup>19</sup>

Legal scholars have construed that P.L. 280's purpose "was primarily to address the criminal problems within Indian

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<sup>14</sup> 25 U.S.C. § 1914 (2006).

<sup>15</sup> 25 U.S.C. § 1912 (2006).

<sup>16</sup> 25 U.S.C. § 1911 (2006).

<sup>17</sup> 28 U.S.C. § 1360(a) (2006).

<sup>18</sup> *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005).

<sup>19</sup> 28 U.S.C. § 1360 (2006).

country rather than its civil dilemmas.”<sup>20</sup> The U.S. Court of Appeals for the Ninth Circuit also concluded that:

The original impetus for P.L. 280 was a perceived need to extend state criminal jurisdiction to certain California reservations; by the time the bill was passed, it had mushroomed into a general measure conferring a degree of state criminal and civil jurisdiction on several states. However, civil jurisdiction was extended almost as an afterthought.<sup>21</sup>

Similarly, the lack of adequate tribal law enforcement institutions on some reservations to address criminal matters supports the argument that “Congress’s primary motivation in enacting the legislation seems to have been a desire to remedy the lack of adequate criminal-law enforcement on some reservations.”<sup>22</sup>

Recent case law in California has further defined the relationship between ICWA and P.L. 280. The Court of Appeals for the Ninth Circuit held in *Doe v. Mann* that involuntary termination of an Indian’s parental rights fell within PL-280’s scope.<sup>23</sup> This court formulated a three-part test to distinguish between exclusive and concurrent tribal jurisdiction under ICWA:

1. Determine if the dependency proceeding involves an Indian child who resides or is “domiciled”<sup>24</sup> on the reservation;<sup>25</sup>

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<sup>20</sup> Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 AM. U. L. REV. 1627, 1665 (1998).

<sup>21</sup> *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 661 (9th Cir. 1975).

<sup>22</sup> *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 560 (9th Cir. 1991).

<sup>23</sup> *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005).

<sup>24</sup> 25 U.S.C. §1911(a) (2006).

<sup>25</sup> *Doe v. Mann*, 415 F.3d at 1048.

2. Determine whether the dependency proceeding is “any child custody proceeding”<sup>26</sup> under ICWA and further qualified by California jurisdiction where the child has suffered or is at substantial risk of physical harm<sup>27</sup> or has been or is at substantial risk of sexual abuse;<sup>28</sup> and
3. Categorize the state dependency law as either criminal (the state of California has jurisdiction), civil regulatory (the tribe has exclusive jurisdiction), or civil adjudicatory<sup>29</sup> (the state of California has jurisdiction<sup>30</sup>).

The Ninth Circuit found that involuntary child dependency proceedings fell under the *civil adjudicatory* category, where federal law reserved jurisdiction to the P.L.280 states rather than to the tribe.<sup>31</sup> Unlike taxation and gambling, considered *civil regulatory*, “[i]n contrast, California's child dependency proceedings focus, not on public activities but on the status of individual Indian parents and children,”<sup>32</sup> and were therefore classified as civil adjudicatory. This court interpreted P.L. 280’s language regarding state jurisdiction over “private parties”<sup>33</sup> to include cases where the state becomes a party to a case, such as in involuntary child dependency proceedings.

The Ninth Circuit also reasoned in *Doe v. Mann* that since the tribe in that case did not assert its sovereignty by trying to reassume jurisdiction over the proceeding,<sup>34</sup> the court would not divest the state of jurisdiction.<sup>35</sup> The court stated that ICWA became law 25 years after P.L. 280, and “had Congress wanted to divest Public Law 280 states of this

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<sup>26</sup> 25 U.S.C. § 1911(a) (2006).

<sup>27</sup> CAL. WELF. & INST. CODE § 300(b) (2006).

<sup>28</sup> CAL. WELF. & INST. CODE § 300(d) (2006).

<sup>29</sup> *Doe v. Mann*, 415 F.3d at 1048-49.

<sup>30</sup> 25 U.S.C. § 1911(a) (2006); 28 U.S.C. § 1360(a) (2006).

<sup>31</sup> *Doe v. Mann*, 415 F.3d 1038, 1049 (9th Cir. 2005).

<sup>32</sup> *Id.* at 1059.

<sup>33</sup> 28 U.S.C. § 1360(a) (2006).

<sup>34</sup> 25 U.S.C. §§ 1911(a), 1918 (2006).

<sup>35</sup> *Doe v. Mann*, 415 F.3d at 1067.

jurisdiction, surely it would have done so on the face of ICWA.”<sup>36</sup> However, in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the U.S. Supreme Court ruled that:

When a State seeks to enforce a law within an Indian reservation under the authority of [P.L. 280], it must be determined whether the state law is criminal in nature and thus fully applicable to the reservation, or civil in nature and applicable only as it may be relevant to private civil litigation in state court.<sup>37</sup>

The U.S. Supreme Court made a *two-part* distinction between criminal laws, over which California had a broad jurisdictional reach, and laws that are civil in nature where the state has a much narrower reach. Such precedent characterized P.L. 280 states as having “very limited” civil jurisdiction over private disputes among Indians.<sup>38</sup>

The Ninth Circuit court, however, broadened state jurisdiction over civil proceedings in its decision in *Doe v. Mann* despite precedent which preserved tribal sovereignty over civil disputes. The court stated that “resting our analysis simply on the Supreme Court’s references to private disputes would create a tortured result that is at odds with the overall structure of ICWA, as well as with the history of Public Law 280 and California child dependency proceedings.”<sup>39</sup> The Ninth Circuit’s three-part test reflects a shift from the Supreme Court’s prior *two-part test* (between criminal and civil subject matter). Further sub-classification indirectly takes more from tribes.

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<sup>36</sup> *Id.* at 1064.

<sup>37</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 202 (1987). This case has been statutorily superseded in part, only with regard to Indian gaming with the passage of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2006).

<sup>38</sup> *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146, 147 (9th Cir. 1991).

<sup>39</sup> *Doe v. Mann*, 415 F.3d at 1059.

Tribal activism also led to the creation of the notice provision in ICWA,<sup>40</sup> which requires states to give notice to tribes to afford them the opportunity to assert exclusive jurisdiction over child dependency proceedings. A California state statute<sup>41</sup> also requires the state to provide notice to tribes for the removal of an Indian child for dependency proceedings for which the tribe has reassumed exclusive jurisdiction.<sup>42</sup> Despite the purpose of notice for promoting tribal self-determination, a recent California decision demonstrates the vulnerability of this provision.

In *In re X.V.*, 132 Cal. App. 4th 794 (Cal. Ct. App. 2005), the California Court of Appeal for the 4th Appellate District rejected evidence of gross violations of the notice requirement to tribes, to determine the child's Indian background, because the parents failed to raise objections of the violations at trial and on appeal. Five-month-old X.V. was removed from her parents' custody due to reports of domestic violence in the home and a history of her parents' drug abuse. After the state began dependency proceedings, her father notified the State that he had Sioux and Blackfeet heritage. The state Agency ("the Agency") did not notify the Bureau of Indian Affairs (BIA) or any Indian tribe of the proceedings. Nevertheless at the detention hearing the court found ICWA inapplicable and ordered adoption as a permanent plan.<sup>43</sup>

X.V.'s mother appealed because the Agency did not comply with ICWA notice requirements.<sup>44</sup> The court conditionally reversed the judgment and instructed the trial court to direct the Agency to give proper ICWA notice to the appropriate tribes and ordered the court to reinstate its judgment if no tribe intervened.<sup>45</sup> A social worker interviewed X.V.'s paternal grandmother. She reported possible Cherokee, Sioux, and Blackfeet heritage and the Agency sent separate

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<sup>40</sup> 25 U.S.C. § 1912(a) (2006).

<sup>41</sup> CAL. WELF. & INST. CODE § 305.5(a) (2006).

<sup>42</sup> 25 U.S.C. § 1918 (2006).

<sup>43</sup> *In re X.V.*, 132 Cal. App. 4th 794, 798-99 (Cal. Ct. App. 2005).

<sup>44</sup> *In re X.V.*, 132 Cal. App. 4th at 799.

<sup>45</sup> *Id.*

notices to the BIA and to at least 10 relevant tribes,<sup>46</sup> of which only four responded that X.V. was ineligible for enrollment. The lower court then found that ICWA was inapplicable, since the notice given to certain tribes did not result in a positive match. X.V. was not identified as an Indian child and therefore was found ineligible for ICWA jurisdiction. The court reinstated the previous judgment terminating parental rights with no objections.<sup>47</sup>

X.V.'s parents subsequently challenged the termination of their parental rights because of "irregularities in the ICWA notices."<sup>48</sup> The paternal grandmother stated that she told the social worker the names of her father and mother. The notices sent to the BIA and to all relevant tribes were inaccurate because they listed the wrong names of her tribal ancestors and because the social worker did not ask whether any of her relatives were alive in 1906 or 1924 in connection with the "1906 Final Roll" or registries from other states.<sup>49</sup> The Agency contended that "California courts should draw the line someplace" and that X.V.'s parents should have raised objections at the special hearing on remand.<sup>50</sup> The appellate court affirmed the trial court's ruling to terminate parental rights.

In *In re Louis S.*, 117 Cal. App. 4th 622 (2004), a similar notice problem arose. There, the court held that notices containing misspelled and incomplete names, among other problems, were insufficient and that it was an error to conclude that ICWA did not apply.<sup>51</sup> In *Alicia B. v. Superior Court of San Diego County*, 116 Cal. App. 4th 856 (2004), the appellate court ruled that new evidence raised on appeal to support the record with ICWA notices is not barred and that "the court must review the actual notices sent by HHSA

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 799-800.

<sup>48</sup> *Id.* at 800-801.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *In re Louis S.*, 117 Cal. App. 4th 622, 629 (Cal. Ct. App. 2004).

[Health and Human Service Agency].”<sup>52</sup> The decision in *In re X.V.* demonstrates a departure from prior interpretation of the importance of ICWA’s notice requirement, in light of these previous cases.

The California appellate court also dealt with similar notice issues under ICWA in *Dwayne P. v. Superior Court*, 103 Cal. App. 4th 247 (2002). Here, the court ruled that:

Because the court’s duty continues until proper notice is given, an error in not giving notice is also of a continuing nature and may be challenged at any time during dependency proceedings ... Though delay harms the interests of dependent children in expediency and finality, the parents’ inaction should not be allowed to defeat the laudable purposes of the ICWA.<sup>53</sup>

This holding is inconsistent with the court’s decision in *In re X.V.* The court in *In re X.V.* distinguishes the procedural setting in *Dwayne P.* from *X.V.* It reasons that *Dwayne P.* concerned the parents’ first appellate challenge to the adequacy of the ICWA notice as opposed to *In re X.V.*’s second challenge.<sup>54</sup> The court also reasoned that these cases are factually distinguishable.

The *X.V.* court reasoned that it could not consider this challenge since *X.V.*’s parents were not present at the final hearing, failed to object, and therefore forfeited their right to appeal.<sup>55</sup> *Dwayne P.*, however, states that the parents’ inaction “should not be allowed to defeat the laudable purposes of the ICWA.”<sup>56</sup> In *In re X.V.*, the state’s interest in expediency in dependency proceedings trumped the otherwise valid

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<sup>52</sup> *Alicia B. v. Superior Court of San Diego County*, 116 Cal. App. 4th 856, 865 (Cal. Ct. App. 2004).

<sup>53</sup> *Dwayne P. v. Superior Court*, 103 Cal. App. 4th 247, 261 (Cal. Ct. App. 2002).

<sup>54</sup> *In re X.V.*, 132 Cal. App. 4th at 803.

<sup>55</sup> *Id.*

<sup>56</sup> *Dwayne P. v. Superior Court*, 103 Cal. App. 4th at 261.



objections of X.V.'s parents and the importance of proper ICWA notice requirements as mandated by federal law.

Under ICWA, X.V.'s parents and his rightful tribe(s) had the right to petition the court to invalidate the termination of parental rights "upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act [25 U.S.C. §§ 1911, 1912, and 1913]."<sup>57</sup> Section 101 applies to state court proceedings for termination of parental rights or for foster care placement of the Indian child. Most significantly, this section gives "the Indian custodian of the child and the Indian child's tribe ... [the] right to intervene at any point in the proceeding."<sup>58</sup> The court in *In re X.V.* dismissed proof of insufficient notice requirements which violated section 102<sup>59</sup> because the child's parents failed to raise objections at a special hearing on appeal. The court declared ICWA as inapplicable<sup>60</sup> for reasons mentioned above (for example, X.V. was not formally registered as an Indian child). Even though section 103 applies to voluntary proceedings, ICWA permits the invalidation of an adoption effective for at most two years.<sup>61</sup>

These recent California decisions have set the stage for P.L. 280 states' broader jurisdiction over child dependency proceedings as opposed to exclusive tribal jurisdiction. The legislative intent behind the passage of ICWA was to broaden, not stifle, tribal jurisdiction over child dependency proceedings. However, recent case law regarding the two sovereigns, the P.L. 280 state and the tribe, seems to have rendered one party superior. The departure from the original purposes of ICWA for promoting tribal self-determination and sovereignty toward interpretations favoring broader state jurisdiction downplays ICWA's significance to Native American communities.

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<sup>57</sup> 25 U.S.C. § 1914 (2006).

<sup>58</sup> 25 U.S.C. § 1911(c) (2006).

<sup>59</sup> 25 U.S.C. § 1912(a) (2006).

<sup>60</sup> *In re X.V.*, 132 Cal. App. 4th at 799-800.

<sup>61</sup> 25 U.S.C. § 1913(d) (2006).

**BOOK REVIEW:**

**LAURENCE D. HOULGATE, CHILDREN'S RIGHTS, STATE INTERVENTION, CUSTODY AND DIVORCE: CONTRADICTIONS IN ETHICS AND FAMILY LAW (THE EDWIN MELLEN PRESS 2005). 255 PP. HARDCOVER (CLOTH), \$109.95**

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By Paul J. Levesque \*

As the title suggests, this book investigates a variety of topics associated with children and the law. It is a compilation of essays previously published from 1975-1999, with three new essays. While there is limited synthesis drawing the essays together, the individual chapters provide a useful starting point for a discussion on their given topic.

This book is divided into four sections, each containing three chapters. The first section is a cohesive discussion of the constitutional rights of children, identifying competing and inconsistent standards applied by the courts, such as “a change in the conception of the child from ‘a person who has fundamental rights’ to ‘a person who is always in some form of custody’” (p. 27). Houlgate concludes this section by proposing that the personhood of children should “be understood as a right-in-trust” (p. 45). One is left on one’s own to consider how this idea presented in chapter three might be developed and applied to other issues discussed in the book.

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\* Paul J. Levesque is Assistant Professor of Christianity and Comparative Religion at California State University, Fullerton. Dr. Levesque was a Theodore T. Basselin Scholar in the Honors Program of the School of Philosophy at The Catholic University of America, Washington, D.C., completing both B.A. (1984) and M.A. (1985) degrees in Philosophy. He holds a Ph.D. in Religious Studies (1995), awarded *summa cum laude* from the Katholieke Universiteit Leuven, Belgium. In addition to being active in the American Academy of Religion, Dr. Levesque holds membership in the American Philosophical Association and Society for the Study of Social Problems.

The second triad of chapters is more loosely connected under the broad heading of "State Intervention in the Family." Encompassed under this section are a general discussion on family privacy, and a thoughtful discussion of the conditions under which an abused child should be removed from the home, as well as an interesting reflection on establishing grounds for children to have rights to liberty. The chapter on children's rights (chapter six) revisits a key question raised in chapter three, namely, why and under what circumstances can children be treated differently than adults under the law. In editing this collection of essays, a more explicit and interwoven connection between the two chapters would have been useful. Parts of chapter three were originally published as an article in 1999 and the acknowledgement page states that chapter six was previously published in 1982, while a later footnote explains that the "chapter is based on an essay that was first published in 1975" (p. 101, note 193). This same footnote attempts to update the chapter by listing several articles and books on children's liberty rights published since then. Regardless of the limited synthesis, chapter six provides an important review of paternalism and argues that paternalism must be "based on a clearly established need" (p. 114) before it can restrict children's rights. Houlgate also identifies "the capacity for rational choice" (p. 109) that is believed to correlate with age as grounds to deny certain liberty rights, "not to impose a *burden* on them but to provide them with a *benefit* of protection and guidance" (p. 113).

The third section is united under the umbrella of "custody disputes." With the first topic, child custody in divorce, Houlgate searches for "an approach that will allow custody decisions to be made in a way that is not damaging to the child and that at the same time offers fair treatment to the competing parents" (p. 125). He argues that the previous court standards of "the tender years presumption" (p. 122) that gives preference to maternal custody if other factors are equal, and "best interests of the child" (p. 123) do not meet his criteria. Houlgate prefers some type of mediated agreement that both parents will accept. If such a process fails, then "an automatic ruling of joint physical and legal custody" (p. 132) should

follow, or enforcement of the parent's "last friendly agreement" if one exists. While it would have been nice to have a discussion as to how the theoretical framework suggested in chapters three and six have a bearing upon child custody, this chapter does provide helpful material for further reflection. The second topic is the custody of frozen embryos. In this chapter issues such as the right to procreate and the right not to procreate, including under what methods, are interwoven with an attempt to find a guiding principle to resolve custody disputes of embryos. Dismissing both principles, namely the principles of justice and inter-personal utility, Houlgate concludes that the answer is for a couple to make a contract stipulating disposal or custody of embryos in the event of a separation or divorce. This contract should be binding unless both parties agree to changes. Yet, Houlgate's final conclusion is that every contract is "always subject to judicial review, and the burden is on the court through a preponderance of evidence to show that the grant of custody is not in the best interests of the future child" (p. 159). Much remains left unresolved, except for his affirmation – by appealing to the right to privacy – that contracts shall not "compel a woman to procreate. She cannot be required to undergo transplantation of the embryos" (p. 154).

The final topic of this section is surrogate mother custody rights. Houlgate investigates various philosophical ethical systems to find a grounding for "the biological preference principle" (p. 163), i.e., "in a contest for custody between a biological parent and one who has no biological relationship to the child, the state should prefer the biological parent" (p. 163). Houlgate argues that the principle of utility and not natural law or natural rights provides the best grounding for biological preference. Houlgate further acknowledges that "the biological preference principle does not establish an absolute or an unconditional right of the biological parents to the custody of their biological children" (p. 182). Other factors such as a parent's ability to care for the child or an existing contract must be weighed.

The last section of the book leaves the legal realm and focuses solely on ethical questions related to the family. The

first chapter in this section was written solely for this book and provides continuity between itself and the next chapter. The focus of these two chapters is to develop an ethics of personal relationships.

First, he concludes that personal relationships do not have “an essential characteristic or feature that makes it impossible to apply the principles of traditional theory” (P. 198). This seems reasonable, but his arguments leading to this conclusion strip personal relationships of more than is needed. He argues that “individuals in personal relationships are no more unique or particular than individuals in impersonal relationships” (p. 188). He rather brusquely equates the historical uniqueness of a personal love relationship with that of the impersonal relationship of a patient and his longtime doctor (pp. 191-192), and overemphasizes the similarity between *describing* a plumber and *describing* a spousal dining partner (192-198). Second, he wishes to develop theoretical principles that apply to personal relationships, specifically family relationships.

After logically arguing against a deontological ethics of right as a foundation for a family ethics, Houlgate explains his preference for act-centered utilitarian ethics that holds, “in a given situation in which I am caught in a conflict between giving help to a member of my family and giving help to a stranger, I should give help to the former because the rule *FB* [family beneficence] tells me that it is probable that this act maximizes utility” (p. 216). Because this type of utilitarian ethics is centered on the act, family beneficence can be broken when in a particular case following the rule would not maximize utility (p. 217). This section is appealing, but limited in both the objections it considers and alternative candidates it entertains for a theory of personal relationships; for example, the ethics of Levinas might provide a stronger alternative.

The final chapter considers the ethics of divorce, dividing his discussion between couples with children and childless couples. He relies in part on Bertrand Russell's 1929 writing against the divorce of couples with children, except for

grave cause. Numerous issues are raised; all of which are candidates for the reader's affirmation or argumentation. For example, perhaps Houlgate is too hopeful that a stable home can be created for a child when the parents would prefer to divorce but stay together for the sake of the child.

Despite its lack of cohesion and occasional editorial oversights (e.g., there is a misspelling on the back cover and "recently" on page 172 refers to a 1984 publication), this book is eminently readable and provides reasonable ideas to ponder.

**BOOK REVIEW:**

**PETER W. GREENWOOD, CHANGING LIVES: DELINQUENCY PREVENTION AS CRIME-CONTROL POLICY (THE UNIVERSITY OF CHICAGO PRESS 2005). 224 PP. HARDCOVER (CLOTH), \$37.00.**

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By Neha Marathe\*

Peter Greenwood's book *Changing Lives: Delinquency Prevention as Crime Control Policy* is the third volume in the series *Adolescent Development and Legal Policy*, edited by Franklin E. Zimring. As the former director of RAND Corporation's criminal justice research program, Greenwood has considerable experience conducting quantitative evaluations of delinquency prevention programs.

Greenwood's book is divided into two parts. Part I, titled "The Nature and Effectiveness of Crime Prevention," provides the reader with some background information about the definition and evolution of delinquency prevention within the broader field of criminological research. Greenwood then describes prevention programs that have been successfully implemented and replicated in practice, and examines other programs that have been replicated despite evidence of their failure in preventing future delinquent behavior.

In Part II, titled "Prevention and Policy," Greenwood describes the various methodologies researchers use to evaluate prevention programs and argues that cost effectiveness analysis is the most effective method of measuring program outcomes. He then proposes that Human and Health Services (HHS) should be the government agency primarily responsible for developing and operating delinquency prevention programs, while criminal justice agencies should act only when immediate public protection becomes an overriding concern (p. 179). Greenwood

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\* J.D. Candidate, 2007, University of California, Davis; B.A. Political Science, University of California, Berkeley.

concludes the book with suggestions for how the modern juvenile court can also play an active role in delinquency prevention.

In chapter one, Greenwood sets out three tasks that this book seeks to accomplish: “define the key terms and organizational structures that are needed to support and advance the development and dissemination of effective prevention strategies and programs,” “carefully evaluate and organize the evidence of what works,” and “identify key linkages between the accumulated body of evidence and public policy” (p. 5). Greenwood successfully accomplishes the first two tasks in Part I, but comparatively, falls short in accomplishing the third in Part II.

Since the field of delinquency prevention is so vast and often extends into fields outside criminal justice such as health and education, it is especially helpful that Greenwood states at the outset exactly what his book will focus on – “interventions that attempt to change the antisocial proclivity or life-course trajectory of individually targeted youth” (p. 6). The second chapter provides a historical account of delinquency prevention, highlighting the tendency in the field to jump quickly from one practice to the next without thorough evaluation of existing practices. Greenwood also describes the three levels of interventions in this chapter: primary interventions that target the general population, secondary interventions that focus on high-risk youth, and tertiary interventions that target youth that have already committed crimes. The third chapter then discusses the challenges in quantitative evaluation of prevention programs. Researchers often cannot randomly assign participants to treatment and comparison groups, and as a result cannot obtain findings that are “completely immune to alternative explanations for differences between treatment and comparison observations” (p. 34). Greenwood then provides an extensive list of reports that synthesize evaluation studies’ results and rate prevention programs based on those results.

The first three chapters provide a solid foundation for readers that are new to delinquency prevention research, but



may be largely review for professionals in this field. These chapters are written with exceptional clarity and Greenwood effectively leads the reader from one concept to the next. Greenwood weaves the concepts described in the first three chapters into his analysis of effective preventive programs in chapter four and ineffective prevention programs in chapter five. In chapter three, he describes two reports' rating systems in further detail, the Blueprints report by the Center for the Study and Prevention of Violence at the University of Colorado and the Surgeon General's report on youth violence. He then uses these two reports' ratings in chapters four and five to describe programs that are effective and ineffective.

Chapter four describes prevention programs that have been described by the Blueprints and/or Surgeon General's Report as "promising" or "proven." Greenwood describes programs for infancy and early childhood, elementary-school-age children, adolescents, and programs for adjudicated delinquents. Within each category, he discusses primary, secondary and tertiary-level programs. In chapter 5, Greenwood discusses the failures of programs such as DARE (Drug Abuse Resistance Education), boot camps, and Scared Straight. He also describes the competition for funding between proven programs at the prenatal and infancy level (discussed in chapter four), which employ trained nurses to conduct home visits, and unproven programs, which employ non-medical personnel. He lists several reasons for why these unproven programs have thrived: political momentum gained from the support of a network or organizations and political supporters, the difficulty of separating a program's specific impact on crime from its other purposes, and unchallenged "junk" science that is often "paraded as valid by some public officials" (p. 111-112).

By discussing the specific cost and benefits of the most promising programs (p. 73), Greenwood effectively dispels the myth that prevention programs cannot be quantitatively evaluated. He encourages service providers and program funders to carefully study past programs' effectiveness when adopting new programs or strategies, and to avoid "the 'flavor of the month' phenomenon, which conjures up new and

supposedly promising programs on the strength of their novelty rather than proven track record” (p. 116).

In chapter six, Greenwood sets out to explain cost effectiveness analysis (CEA) further and compare it to cost benefit analysis and effect size analysis. CEA allows researchers to compare the impacts of expenditures on different types of interventions that share the same basic goals through the cost-effectiveness ratio – the “incremental price of obtaining a unit crime-prevention effect (such as in dollars per crime) using a particular crime-prevention program compared with the use of an alternative program” (p. 121). To illustrate CEAs in practice, Greenwood gives two examples – the Controlling Cocaine study and the Three Strikes study, both conducted by the RAND corporation. However, these two studies have little if anything to do with juvenile delinquency prevention. The CEA discussion gets lost in the midst of Greenwood’s arguments about drug control policy and sentencing laws. Greenwood provides only a brief discussion of a CEA study comparing delinquency prevention with harsher sentencing. It would have been more effective to focus on this study as the crux of the chapter and then use the other two studies only for illustrative purposes, but Greenwood appears to have done the opposite. As a result, a chapter that starts out with a strong didactic tone discussing the use of CEA studies in delinquency prevention digresses into being used as a platform to discuss other public policy issues. However, Greenwood concludes the chapter well by advising local officials how CEA studies can and why they should be utilized to allocate resources efficiently among competing programs to serve a community’s unique needs.

Greenwood illustrates the politics of crime control by discussing the passage of the 1994 Federal Crime Act in chapter seven. One of the House bills allocated \$7 billion in federal grants to individual prevention programs (p. 161). Because these grants would serve mainly urban areas with high crime rates, the larger bill came under severe attack as “pork-barrel politics,” illustrating how attaching prevention programs to a larger crime bill can unfortunately be a political liability. The Appropriations Act in 1996 amended the 1994

bill drastically, and almost all the funds allocated to individual prevention programs were cut and replaced with block grants to local law-enforcement agencies. The lack of rigorous scientific evidence backing the prevention programs that the Office of Juvenile Justice and Delinquency Prevention (OJJDP) was funding at the time made prevention programs an easy target for attack. Greenwood states that “lack of credible evaluation was found to be the Achilles’ heel of recent crime-prevention efforts,” (p. 164) supporting his earlier argument that thorough evaluation of existing programs is crucial to bolster the idea that prevention is a legitimate solution to crime control. Greenwood ends the chapter by comparing the missions, capabilities and constituencies of HHS, the Department of Justice and the Department of Education. He makes a strong argument for why the most effective intervention with the least stigma to the youth of being labeled as a “deviant” can be best accomplished through HHS agencies rather than other departments. Although the transitions from one section to the next in this chapter are rather choppy, Greenwood’s arguments are better contextualized in this chapter than the previous one.

The last chapter of the book offers a cursory yet informative discussion on current programming in juvenile courts and how courts can still be involved in prevention efforts. Greenwood argues that juvenile courts are in a unique position to stay aware of the latest developments in delinquency prevention, to distinguish between youth that can be diverted to other programs and those that require formal proceedings, to consider programming needs and not just sanctions for the youth, and to identify programs that are performing well consistently and those that are faltering (p. 193-194).

Overall, Greenwood’s book is a good resource for community service providers seeking guidance in implementing new prevention programs. It succinctly describes programs that have been replicated and highlights poor and hasty choices that providers have made in the past in selecting unproven programs over proven models.

## RECENT COURT DECISIONS AND LEGISLATION IMPACTING JUVENILES

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### DEPENDENCY


📖 *Leshko v. Servis*  
423 F.3d 337 (3d Cir. 2005)

Dauphin County Social Services removed Karen Leshko from her mother and placed her with a foster family, the Servises. When Leshko was two and a half years old, Judy Servis placed Leshko in the kitchen sink to wash her and left the room. Leshko pulled a pot of very hot water onto herself, burning herself severely. Servis did not seek treatment for the child for over 12 hours.

When Leshko turned 18 years old, she brought a claim against Dauphin County Social Services, the county, county officials, and her foster parents, pursuant to 42 U.S.C. § 1983 and state tort law, for deprivation of her Fourteenth Amendment right to be free from physical harm. Leshko appealed the district court's dismissal of her § 1983 claim against the Servises to the U.S. Court of Appeal for the Third Circuit, specifically appealing the court's holding that foster parents were not state actors liable under § 1983.

The Third Circuit considered *West v. Atkins*, 487 U.S. 42 (1988), to decide whether the Servises' behavior was attributable to the state. *West* concerned a doctor employed part-time by the state who performed actions that were traditionally and exclusively reserved to the state – giving medical care to inmates. *West*, 487 U.S. at 54-56. The Third Circuit ruled that, in contrast to *West*, hands-on care which can be performed by private and public agencies, by families, and by private organizations, was not the exclusive province of the government. The court also distinguished the care of inmates from the care of foster children on factual grounds, reasoning that Leshko's care was not delivered in an institutional setting,

that neither federal nor Pennsylvania's constitutions require that the state provide care for foster children, and that exclusive responsibility for finding placements for foster children was a comparatively new state function. The court affirmed that foster parents are not state actors for purposes of liability under § 1983.

 *In the Interest of T.R.*  
705 N.W.2d 6 (Iowa 2005)

David and Laura, gave birth to their son T.R. in 1995. Over the next two years David became concerned about Laura's ability to care for T.R. because of her mental health and substance abuse problems. When David filed for divorce, the court granted him temporary custody of T.R. In 1999, David was diagnosed with leukemia and died the following year. After David's death, the state of Iowa filed a petition alleging that T.R. was a child in need of assistance. The Iowa district court for Osceola County awarded Laura custody of T.R. and ordered her to complete a substance abuse program. After Laura refused to participate in the program, the court awarded custody to T.R.'s paternal grandparents and ordered the county to start proceedings to terminate Laura's parental rights.

Laura appealed the court's order and the state of Iowa moved to dismiss Laura's appeal as interlocutory. The Iowa Supreme Court granted the State's motion to dismiss the appeal. The court stated that like appeals from all other lower court orders, the right to appeal a juvenile court order arises only after the lower court order is final. In order to be granted an exception to this general rule, a party must show that the lower court's ruling involves his or her substantial rights, that such ruling will materially affect the final decision, and that an interlocutory appeal would better serve the interests of justice. Laura's appeal failed to meet those requirements. Additionally, the Court noted that T.R. would be better served by having an appellate court review the entire case rather than


subjecting him to additional uncertainties by reviewing the lower court's decision in a piecemeal fashion.

📖 *In Re. L.L.*

616 S.E.2d 392 (N.C. Ct. App. 2005)

L.L. was removed from her parents shortly after birth after a court found that her older sibling had been abused and neglected. The Johnson County Department of Social Services (JCDSS) placed L.L. in foster care with the Maples. The Johnson County district court ordered JCDSS to work towards reunifying L.L. with her parents. The court also issued an order for an expedited Interstate Compact on the Placement of Children to discover if L.L. could be placed with her relatives, the Spears. After the Maples expressed concerns over L.L.'s placement with the Spears because of their large family and limited income, the court ordered L.L. to be placed in the custody of the Maples, but repeated that JCDSS continue to work towards reunification with L.L.'s parents.

Although the court did not enter a written order until nearly nine months after its decision, both parties appealed the order shortly after the hearing. Because their appeals were filed before the order was actually entered, the North Carolina appellate court ruled that it could not consider them. Instead, the court reversed the earlier order which had placed L.L. in the custody of the Maples holding that the delay in entering the written order was prejudicial to JCDSS and L.L.'s parents. The appellate court noted that L.L.'s placement with the Maples was contrary to the plan of permanent reunification for L.L. because JCDSS had no method of requiring the Maples to take part in reunification efforts. The appellate court also found that the trial court failed to make adequate factual findings to justify not giving placement priority to L.L.'s relatives.

 *In re P.L.*

134 Cal. App. 4th 1357 (Cal. Ct. App. 2005)


A California appellate court held that a foster mother acting as a de facto parent does not have standing to appeal a dependency hearing order. P.L. was born in 2003 to a woman who tested positive for methamphetamine. When the child was ready to be released from the hospital, the mother was not found. P.L. was then placed in foster care with the appellant. At the jurisdiction hearing, at which P.L.'s birth mother was not present, the court removed P.L. from her birth mother's custody and placed the child in the director of the Department of Children's Services' (DCS) custody. At a six-month review hearing, the court recommended the child for adoption. Appellant expressed interest in adopting P.L., but later voiced concerns about her own health and said it would be better for the child to be placed in a two-parent home instead. She stated she wanted to be in the child's life as a surrogate grandmother. In early 2005, DCS found a couple eligible to adopt P.L. When DCS informed the appellant, she said she wished once again to adopt P.L. DCS decided to proceed with adoption to the couple, and appellant filed a motion to be granted de facto parent status. In the interim period, the appellant did not allow the prospective adopting couple to visit P.L. Appellant was granted de facto parent status, and attended a placement review hearing where she objected to P.L.'s placement with the couple. The court found that DCS had not abused its discretion in seeking to place P.L. in the new home, and that the adoption was in the child's best interest.

Appellant appealed the court's order alleging the change in placement was not supported by substantial evidence. The appellate court did not consider her appeal because it found that since the appellant was not an aggrieved party, she had no standing to appeal the lower court's order. The court noted that a de facto parent has limited rights, and may participate in hearings, but has "no legal standing to complain of the decision to place the child ... since she has no right to custody or continued placement as a mere de facto

parent.” *In re P.L.*, 134 Cal. App. 4th 1357, 1361 (Cal. Ct. App. 2005).



**DELINQUENCY**

 *State v. Limon*  
280 Kan. 275 (Kan. 2005)


Limon was convicted of criminal sodomy pursuant to K.S.A. section 21-3505(a)(2). KAN. STAT. ANN. § 3505(a)(2) (2005). Another Kansas statute, known as the unlawful sexual relations statute, applies to voluntary sexual intercourse, sodomy, or lewd touching when at the time of the incident, (1) the victim is a child of 14 or 15, (2) the offender is less than 19 years of age and less than 4 years older than the victim, (3) the victim and offender are the only parties involved, and (4) the victim and offender are members of the opposite sex. KAN. STAT. ANN. § 21-3522 (2005). Limon's status and conduct met all of the requirements of the second statute except for the fourth requirement. Limon argued that the unlawful sexual relation statute violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution because defendants prosecuted under this statute received far shorter prison terms and other less harsh consequences, when the acts involved victims of the opposite sex. The trial court rejected Limon's argument and, applying the Kansas criminal sodomy statute, sentenced him to 206-month prison term, a 60-month post-release supervision period, and required Limon to register as a persistent sexual offender. (In contrast, if Limon had been convicted under the Kansas involuntary sexual relations statute, he would have faced between thirteen to fifteen months in prison and would not have been required to register as a sex offender.) The Kansas Court of Appeals affirmed the trial court's decision. After the Kansas Supreme Court denied Limon's petition for review, Limon filed a petition for writ of certiorari to the U.S. Supreme Court.

At the time his petition was pending, the U.S. Supreme Court issued its decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). *Lawrence* involved two adult men accused of violating a Texas statute prohibiting two people of the same sex from engaging in certain sexual conduct. The U.S. Supreme Court

held that the Texas statute was unconstitutional because it violated the Due Process Clause of the Fourteenth Amendment. Justice O'Connor concurred but would have found the statute unconstitutional under the Equal Protection Clause rather than the Due Process Clause. The Supreme Court granted Limon's petition, vacated the judgment and remanded the case to the Kansas Court of Appeals for consideration in light of the *Lawrence* decision.


The Kansas Court of Appeals issued a fractured opinion, but the majority affirmed Limon's conviction and sentence, holding that *Lawrence* was factually and legally distinguishable from Limon's case. The majority held that factually, *Lawrence* involved consensual conduct between adults, and that legally, the *Lawrence* majority held that the Texas statute violated the Due Process Clause, while Limon brought an Equal Protection claim. Limon then filed a petition for review in the Kansas Supreme Court.

The Kansas Supreme Court applied the rational basis test to determine whether the statute in issue was unconstitutional. Under the rational basis test, the court held that the statute must implicate legitimate goals, and that there must be a rational relationship between the means chosen by the legislature and those goals. The court concluded that there was no rational basis for the Kansas unlawful voluntary sexual relations statute. The court held that the appropriate remedy to rectify the unconstitutionality of the statute was to strike the words "and are members of the opposite sex" from the statute rather than nullifying the entire statute. The court also held that Limon's conviction and sentence pursuant to K.S.A. section 21-3505(a)(2) was a violation of his right to equal protection under the laws.

 *N.W. v. State*  
834 N.E.2d 159 (Ind. Ct. App. 2005)

Plaintiff N.W., a minor, was walking near the scene of a burglary during the early hours of the morning. Upon being called to the burglary scene, the police officer on duty spotted

N.W., walking with a companion and asked the couple to stop. During the initial pat-down, the officer removed a pellet gun from N.W.'s waistband. While the officer was removing the pellet gun, N.W. put his left hand in his own pocket. This alarmed the officer on duty and in attempt to potentially disarm N.W., the officer discovered a pack of cigarettes containing marijuana in N.W.'s left hand. The State filed a petition charging N.W. with possession of marijuana and he was placed on probation. N.W. contested the charge alleging that the search was illegal under the Fourth Amendment of the U.S. Constitution. The Indiana appellate court held that although the Fourth Amendment generally prohibits warrantless search and seizure, there is an exception to the warrant requirement if a police officer has a "reasonable fear of danger." *Williams v. State*, 754 N.E.2d 584, 588 (Ind. Ct. App. 2001). If the officer has a reasonable fear of danger to himself or others, he may conduct a carefully limited search of the suspect. The appellate court reasoned that since this particular incident was in the vicinity of a burglary, an inherently dangerous crime, and since the plaintiff matched the identity of the suspect, the officer's search was reasonable and thus the trial court's admittance of the marijuana into evidence was lawful.

 *C.B. v. People*  
122 P.3d 1065 (Colo. Ct. App. 2005)

When C.B. was a minor, he received a two-year deferred adjudication for a delinquent act of sexual assault on another minor. After completing the deferred adjudication and fulfilling the terms of his probation, C.B. brought an action in a Colorado trial court to seal the arrest and criminal records. The trial court granted the petition to seal. The Colorado appellate court held that the trial court incorrectly relied on the statute pertaining to the sealing of general criminal records, rather than another Colorado statute pertaining specifically to juvenile delinquency proceedings. The proper statute states that a juvenile proceeding is a non-criminal matter and that

courts should follow the expungement provisions set forth in that statute. COLO. REV. STAT. § 19-1-306 (2005). The expungement provision then states that “[a]ny person who has been adjudicated for an offense involving unlawful sexual behavior as defined in § 16-22-102(9), is not eligible to petition for an expungement of a juvenile record.” *Id.* The appellate court held that the Colorado General Assembly intended to distinguish between adjudication and *deferred* adjudication. The statutory language denies the expungement option specifically to adjudicated juveniles. Because of the procedural differences between adjudication and deferred adjudication, the court concluded that the statute does not apply to a minor who has successfully completed a deferred adjudication.




*In re Welfare of R.V.*

702 N.W.2d 294 (Minn. Ct. App. 2005)

In October 2003, the Hennepin County district court adjudicated R.V., a minor delinquent and placed him on probation for one count of unlawful possession of a firearm. Over the next eighteen months, he violated the rules of his probation by leaving the house without parental consent, skipping school, and missing the required gun-program meetings. The district court, in December 2003, held a revocation hearing, ultimately reinstating the probation and placing R.V. on electronic home monitoring. In May 2004, his probation officer issued an arrest-and-detention notice. After R.V. was arrested, he attended the probation-revocation hearing and did not waive his right to a hearing or admit probation violations. However, he did waive his right to have a hearing within seven days so that a thirty day evaluation could be conducted. Following the evaluation, the district court proceeded in July, under the mistaken impression that R.V. had admitted to probation violations and had waived his right to a contested hearing. The court sentenced him to complete a twelve-month stay at County Home School. R.V. filed an appeal alleging deprivation of his right to a hearing.


The district court vacated its opinion and held another hearing, reaching the same decision by revoking R.V.'s probation. R.V. appealed arguing that the revocation violated his right to due process, that the court should have applied the three-step *Austin* probation revocation analysis, and that the court did not issue sufficient written findings in support of its disposition. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980).

The Minnesota appellate court held that the lower court had not violated R.V.'s due process rights. The court noted that the Due Process Clause of the U.S. Constitution guarantees a juvenile: the right to timely written notice of the specific charges or factual allegations against the juvenile, the right to be advised of the right to retained or appointed counsel, the right to cross-examine and confront adverse witnesses, and the right to assert the privilege against self-incrimination. *In re Gault*, 387 U.S. 1, 33-34, 41, 55-56, 87. The court also held that Minnesota juvenile delinquency statutes provide guidelines for juvenile probation that comply with the adult statutory requirements and that accord more protection to juveniles than the *Austin* analysis applied to adult probation violators. However, the court remanded R.V.'s case because the district court's written findings on public safety, the juvenile's best interests, the adequacy of the present custodial arrangement, and the suitability of the ordered placement were insufficient.

**EDUCATION** *Zayas v. Puerto Rico*

No. 05-2376, 2005 U.S. App. LEXIS 28323 (1st Cir. Dec. 21, 2005)

Arianna M. Zayas-Frontera suffered from numerous learning and emotional disabilities. Plaintiffs, Arianna's parents, filed a claim alleging that defendant Department of Education of the Commonwealth of Puerto Rico had failed to satisfy the Free and Appropriate Education (FAPE) requirement under the Individuals with Disabilities Education Act (IDEA) when it refused to enroll Arianna at a private school that the parents claimed was appropriate, given Arianna's disabilities. The Department responded that the public school placement it chose would fully meet Arianna's needs. After the U.S. district court conducted a bench trial and inspected both schools, the court held that Arianna would not be able to benefit from the opportunities available at the Department's selected placement. The court considered several factors in making this determination: Arianna's emotional needs, the fact that Arianna had been out of school for nearly four years, her need for constant supervision and an in-school psychologist, her adverse reaction to an exploratory placement at the public school, and the fact that she had communicated thoughts of hurting herself. The U.S. Court of Appeals for the First Circuit agreed that temporary placement in the private school for a transitional period was appropriate. The First Circuit also held that the Department of Education was responsible for all costs associated with the child's provisional placement at the private school.

 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*  
426 F.3d 1162 (9th Cir. 2005)

The U.S. Court of Appeals for the Ninth Circuit held that Seattle School District's use of race as a factor in assigning students to schools was constitutional. Under Seattle School District's current "open choice" plan, the school

district assigns each student to the high school of their choice when possible. If too many students select a particular school as their top choice, however, the district determines final assignments using certain tiebreakers, including whether the student's older sibling attends the school and the student's race. The district only considers the student's race if the oversubscribed school is racially imbalanced. The plaintiffs brought suit against the district claiming that this policy violated their children's rights under the Washington Civil Rights Act, the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the Civil Rights Act of 1964.

Applying the strict scrutiny test, the Ninth Circuit held that the school district had two compelling interests in using race to assign students to schools. First, the district sought "the educational and social benefits that flow from racial diversity." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1174 (9th Cir. 2005). Secondly, the district sought to avoid the harms that result from "racially concentrated" schools. *Id.* The court relied heavily on *Grutter v. Bollinger*, in which the U.S. Supreme Court concluded that a university had a compelling interest in promoting the educational benefits that come with racial diversity. *Grutter v. Bollinger*, 539 U.S. 306 (2003). In applying the five-part analysis set out in *Grutter*, the court concluded that the Seattle School District's use of race in school assignments was narrowly tailored to "achieve its compelling interests."<sup>1</sup> *Parents Involved in Cmty. Sch.*, 426 F.3d at 1193. Importantly, the district had also considered alternatives to the use of race in the school assignment process, but "permissibly rejected them." *Id.* at 1191.

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<sup>1</sup> The court decided that the first element in the five-part analysis, the requirement that an admissions policy be "individualistic and holistic", did not apply to the facts in the Seattle case. *Parents Involved in Cmty. Sch.*, 426 F.3d at 1180. "[T]he contextual differences between public high schools and selective institutions of higher learning make the first of the *Grutter* hallmarks ill-suited for our narrow tailoring inquiry." *Id.* at 1184.

📖 *M.M. v. Sch. Bd. of Miami-Dade County Fla.*  
437 F.3d 1085 (11th Cir. 2006)

Plaintiffs, parents of child C.M., appealed the dismissal by the U.S. district court of their complaint filed pursuant to the Individuals with Disabilities Education Act (IDEA). C.M. was born with profound bilateral sensorial hearing loss and received auditory-verbal therapy (AVT) to learn to communicate orally. The Miami-Dade County Early Intervention Program paid for the treatment until the child reached the age of three and became eligible for special education services from the Miami-Dade School Board. The Board developed an Individualized Education Plan (IEP) that did not provide AVT but instead provided for verbotonal therapy (VT), also a recognized and well-established means to teach hearing-impaired students to speak. C.M.'s parents believed that their child needed AVT to fully access her education and did not consent to the IEP. C.M.'s parents kept C.M. enrolled in private school and private AVT. They challenged the IEP in the due process hearing conducted before an Administrative Law Judge (ALJ), and requested reimbursement from the Board for the private AVT. The ALJ held that he was not authorized to award the plaintiffs' reimbursement request. Subsequently, the plaintiffs filed a federal complaint. The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal but remanded the case with directions to modify the dismissal as one for failure to state a viable claim for relief under the IDEA. The court applied the two-part test that the U.S. Supreme Court established in *Board of Education v. Rowley*, 458 U.S. 176 (1982), to determine whether a student has been denied a Free and Appropriate Public Education (FAPE). The Eleventh Circuit held that the Board's IEP satisfied the FAPE requirement because (1) the Board complied with the procedures set forth in the IDEA and (2) an IEP that provided for VT instead of AVT was reasonably calculated to enable the child to receive educational benefits. The court reasoned that although C.M.'s parents believed that AVT was the program best suited to provide their child with a quality



education, there was no entitlement to the “best” program under the IDEA.

📖 *L.E. v. Ramsey Bd. of Educ.*  
435 F.3d 384 (3d Cir. 2006)

The parents of child with an autistic-like disorder brought an action against the Ramsey Board of Education (New Jersey), alleging violations of the Individuals with Disabilities Education Act (IDEA). The parents claimed that their son was denied a free appropriate public education (FAPE) in the least restrictive environment due to an invalid assessment of his individual needs and due to a policy against the integration of disabled students. The parents alleged that the providers of supplemental services at the school where their son was placed by the Board were not necessarily qualified.

The U.S. district court granted summary judgment denying the parents relief. The district court found that the Individualized Education Plan (IEP) adopted by the Board did provide a FAPE in the least restrictive environment. While L.E.'s appeal to the U.S. Court of Appeals for the Third Circuit was pending, the U.S. Supreme Court held that the “burden of proof in an administrative hearing in challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). Prior to *Schaffer*, the Third Circuit placed the burden of demonstrating compliance with the IDEA on the school district. In light of *Schaffer*, the court held that this burden of proof now rested on L.E. and that L.E. had failed to carry the burden of showing that the IEP was inadequate. The court however upheld the partial reimbursement to L.E. for their son's additional speech therapy, because their son needed more speech therapy than the Board had provided.

📖 *Bush v. Holmes*  
919 So.2d 392 (Fla. 2006)

The Florida State Legislature established the Opportunity Scholarship Program (OSP) to support students' enrollment in private institutions with public funds. The Florida Supreme Court found this voucher program unconstitutional under the Florida Constitution on two grounds. First, the court argued that the Florida state constitution only allowed public funds to be used within the public education system and not alternative private programs. The court held that OSP violated the state's constitutional requirement by diverting funds earmarked for the public schools into vouchers for private primary schools. Secondly, the court noted that the state constitution required that the public schools "uniformly" maintain a high quality education system. The OSP system offered no statutory oversight to ensure that the private schools receiving public funds through vouchers would provide an education similar in quality to Florida's public schools. The court struck down the voucher system under the OSP as unconstitutional effective as of the 2006-2007 school year.

## HEALTH

📖 *Ayotte v. Planned Parenthood*  
126 S. Ct. 961 (2006)

In *Ayotte v. Planned Parenthood*, decided on January 18, 2006, the U.S. Supreme Court held that New Hampshire's Parental Notification Prior to Abortion Act ("the Act") was unconstitutional in part. Justice O'Connor delivered the opinion for a unanimous court. The Act, enacted in 2003, prohibits physicians from performing an abortion on a pregnant minor until 48 hours after written notice of such

abortion is delivered to her parent or guardian. The Act does not require notice for an abortion necessary to prevent the minor's death if there is insufficient time to provide notice. The Act also allows a minor to petition a judge to authorize her physician to perform an abortion without parental notification. The Act does not allow physicians to perform abortions without notice in medical emergencies unless the physician is certain that death is imminent. This does not take into account the small percentage of pregnant minors who need immediate abortions in order to prevent serious health problems.

Respondents obstetrician and gynecologist and three reproductive health service clinics brought suit claiming that the Act was unconstitutional because it failed to provide an emergency health exception. The United States Court of Appeals for the First Circuit declared the entire Act unconstitutional. The U.S. Supreme Court held that invalidating the entire Act is not necessary as the lower courts could issue a declaratory judgment and an injunction prohibiting only the statute's unconstitutional application, provided that the New Hampshire state legislature would have preferred part of the statute enforced, rather than entire invalidation. The case was remanded to the lower courts to determine if the legislative intent allows for the statute to be invalidated in part or nullified in whole.

 *Pardini v. Allegheny Intermediate Unit*  
420 F.3d 181 (3d Cir. 2005)

Plaintiff Georgia Pardini had cerebral palsy. The Alliance for Infants and Toddlers (AIT) developed an Individualized Family Service Plan (IFSP) pursuant to the Individuals with Disability in Education Act (IDEA) for Georgia that included conductive education to help her cope with her disability. Conductive education is a holistic approach designed to develop problem solving skills among children with central nervous system disabilities. When Georgia reached age three, she was required under the IDEA

to transition from the IFSP to an Individualized Education Program (IEP). During this transition process, the Alleghany Intermediate Unit, a county administrative body, decided not to include Georgia's conductive education in her new IEP. Not wishing these services to be discontinued, Georgia's parents appealed.

The question presented to the Third Circuit was whether the IDEA requires that students transitioning from an IFSP to an IEP retain the right to receive disputed services while appeals are pending. The IDEA's "stay-put" provision, 20 U.S.C. § 1415(j), requires that students maintain their current educational placement while disputes over educational resources are resolved. The U.S. District Court held that the IFSP provided services under a *medical* model and could not be considered an educational placement under the "stay-put" provision. The Third Circuit overruled the decision finding that to maintain Georgia's current educational placement as mandated by IDEA, the services provided by the IFSP must continue until the IEP disputes are resolved. The Third Circuit rejected that the "stay-put" provision did not protect the IFSP services because of the plan's medical model design. The court explained that this decision is consistent with the purpose of IDEA's "stay-put" provision of ensuring a smooth transition for students while IEP disputes are resolved.