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EDITOR'S NOTE

The summer issue of the UC Davis Journal of Juvenile Law and Policy primarily focuses on two areas of juvenile law: foster care and juvenile criminal justice.

In this issue, Eric E. Thompson discusses foster children's ability to bring private civil rights causes of action under a recent federal statute. In *The Adoption and Safe Families Act: A New Private Right of Action for Children in Foster Care Pursuant to Section 1983*, he provides a legal background of such litigation and shows how case law supports foster children's private right.

The Right to Legal Representation at Service Plan Reviews in New York State deals with the parents' facet in the foster care system. Subha Lembach points out the importance for parents to receive representation at hearings that could greatly impact their parental rights and their children's future. She argues that without representation, parents' due process rights will be violated.

Tammi Wong illustrates the problems of prosecuting juveniles with mental illnesses in criminal court in *Adolescent Minds, Adult Crimes: Assessing a Juvenile's Mental Health and Capacity to Stand Trial*. She advocates resuming a rehabilitation approach in evaluating juvenile justice policy.

Sylvia Junn and Jennifer Rodriguez explore the problems of California's Independent Living Program, which seeks to assist foster children to achieve self-sufficiency upon emancipation from the foster care system. In *Out on Their Own: California's Foster Youth and the Inequalities of the Independent Living Program*, they propose solutions to reform the program.

Related to Junn and Rodriguez's piece, the Children's Section looks into the emancipation process in California. The section features excerpts of interviews of three former foster youths. The interviewees reflect on their personal struggles and provide insights into the system. Like our previous issues, this issue also includes the Case Summaries and Websites sections.

As we conclude another year of publication, I would like to thank the staff members for their hard work. Everyone made a difference to the Journal, and your contributions are appreciated. I would also like to congratulate Rochelle Forbis, the in coming Editor-in-Chief, and next year's editorial board and wish them all the best in the year ahead.

Last but not least, the entire Journal's staff would like to express our gratitude and appreciation to Professor Debbie Bassett, our faculty advisor. Her advice, guidance, and moral support over the years have helped the Journal grow tremendously. We and the rest of King Hall will miss her dearly. Thank you and godspeed.

Karen Yiu

The Adoption and Safe Families Act: A New Private Right of Action for Children in Foster Care Pursuant to Section 1983

ERIC E. THOMPSON*

Introduction

Titles IV-B and IV-E of the Social Security Act define the federal requirements imposed on state child welfare systems in exchange for federal funding of those systems.¹ With one notable exception, these statutes do not contain any explicit provision allowing an aggrieved third party to enforce their mandates through the courts.² Nevertheless, these provisions can be judicially enforceable pursuant to Section 1

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¹ Title IV-B provides funds to the States for the strengthening of child welfare services. *See* 42 U.S.C. §§ 620–29 (1994 & Supp. V 1999). Title IV-E provides reimbursement to the States for foster care maintenance and adoption assistance payments made by the States on behalf of eligible children. *See* 42 U.S.C. §§ 670–79 (1994 & Supp. V 1999). In order for a State to receive these federal funds, both Titles require it to submit a State plan that complies with the enumerated requirements. 42 U.S.C. §§ 622, 671 (1994 & Supp. V 1999).

² An explicit private right of action exists pursuant to 42 U.S.C. § 674(d)(3)(A), which provides that “[a]ny individual who is aggrieved by a violation of § 671(a)(18) [barring racial matching in foster care and adoptive placements] by a State or other entity may bring an action seeking relief from the State or other entity in any United States district court.” 42 U.S.C. § 674(d)(3)(A) (1994 & Supp. V 1999); *see also* Charlie H. v. Whitman, 83 F. Supp. 2d 476, 495 (D.N.J. 2000).

of the Civil Rights Act of 1871, presently codified as amended at 42 U.S.C. § 1983, as long as Congress has evinced its intent to create federal rights and has not foreclosed such a remedy.³ The federal Adoption and Safe Families Act of 1997 (ASFA) amended, *inter alia*, Title IV-E of the Social Security Act that was enacted as the Adoption Assistance and Child Welfare Act of 1980 (AACWA). ASFA requires the States to file a petition to terminate parental rights when a foster child has been placed in out-of-home care for fifteen of the last twenty-two months.⁴ The author argues that this ASFA provision, codified at 42 U.S.C. § 675(5)(E), creates a new private right of action pursuant to § 1983 for foster children whose cases a State has failed to move towards adoption within the mandated deadlines. The first courts to reach the issue have agreed.

Implied Private Rights of Action in Federal Statutes Pursuant to § 1983

When a federal statute does not provide for an explicit private right of action, an aggrieved person may still have a cause of action pursuant to 42 U.S.C. § 1983. Section 1983 imposes liability on anyone who, under color of law, deprives a person “of any *rights*, privileges, or immunities secured by the Constitution and laws.”⁵ In order to seek redress pursuant

³ See Civil Rights Act of 1871, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1994)); *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997); *Wilder v. Va. Hosp. Ass’n.*, 496 U.S. 498, 508-09 (1990). Section 1983 provides, in relevant part: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983 (1994 & Supp. V 1999).

⁴ See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a), 111 Stat. 2115, 2119 (1997) (codified at 42 U.S.C. § 675(5)(E) (1994 & Supp. V 1999)).

⁵ 42 U.S.C. § 1983 (1994 & Supp. V 1999) (emphasis added); see *Blessing*, 520 U.S. at 340 (citing *Maine v. Thiboutot*, 448 U.S. 1 (1980)). An implied private right of action may also be enforceable directly pursuant to a federal statute without resorting to § 1983, but the plaintiff

to § 1983, “a plaintiff must assert a violation of a federal right, not merely a violation of federal law.”⁶ In *Wilder v. Virginia Hospital Ass’n*, the Supreme Court articulated a three-prong test to determine whether a particular statutory provision gives rise to a federal right enforceable pursuant to § 1983.⁷ This test was then reaffirmed by the Supreme Court in *Blessing v. Freestone*.⁸

The Wilder/Blessing Test

Under the three-prong test of *Wilder/Blessing*, there must be three determinations by the court for a federal right to be enforceable under § 1983. First, Congress must have intended the statutory provision in question to benefit the plaintiff.⁹ Second, the statute must unambiguously impose “a binding obligation.”¹⁰ In other words, the provision giving rise to the asserted right must be couched in “mandatory, rather than precatory terms.”¹¹ Third, the statutory provision may not be so “vague and amorphous” that its enforcement would “strain judicial competence.”¹²

A few years after *Wilder* was decided, Chief Justice Rehnquist’s decision for the Supreme Court in *Suter v. Artist M.* appeared to depart from the *Wilder* test, specifically as applied to finding a private right of action within Title IV-E of the Social Security Act. The Court held in *Suter* that

bears the added burden of establishing that Congress intended the remedy. See *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 505, 520-24 (D.N.J. 2001) (discussing in detail the distinction between the *Cort v. Ash*, 422 U.S. 66 (1975), test for finding an implied private right of action under a particular statute and the *Blessing* test for § 1983 actions).

⁶ See *Blessing*, 520 U.S. at 340 (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989)).

⁷ See *Wilder*, 496 U.S. at 509-10 (holding that Boren Amendment provision of Medicaid Act is enforceable).

⁸ See *Blessing*, 520 U.S. at 340-41, 345 (determining that Title IV-D provisions of Social Security Act may be enforceable).

⁹ See *Blessing*, 520 U.S. at 341; *Wilder*, 496 U.S. at 509.

¹⁰ See *Wilder*, 496 U.S. at 509; see also *Blessing*, 520 U.S. at 341.

¹¹ *Blessing*, 520 U.S. at 341 (citing *Wilder*, 496 U.S. at 510-11).

¹² *Blessing*, 520 U.S. at 340-41 (citing *Wright v. Roanoke Redevelop. & Hous. Auth.*, 479 U.S. 418, 431-32 (1987)); see *Wilder*, 496 U.S. at 509.

Congress, when enacting a statute pursuant to its spending power, must “unambiguously confer . . . a right to enforce the requirement[s]” of the statute in order for a plaintiff to seek a remedy pursuant to § 1983.¹³ Distinguishing *Wilder*, the Court held that a private plaintiff could not enforce the AACWA provision, codified at 42 U.S.C. § 671(a)(15), which requires states to make reasonable efforts to “prevent or eliminate the need for removal of the child from the child’s home; and . . . to make it possible for a child to safely return to the child’s home”¹⁴ In effect, the Court imposed the additional requirement of showing legislative “intent to create a private remedy to enforce the ‘reasonable efforts’ clause of the Adoption Act,” without acknowledging that § 1983 provides the necessary remedial authority.¹⁵ The Court reasoned that neither the statutory provision nor the implementing regulations provides sufficient guidance regarding what constitutes “reasonable efforts” and that the benefit to individual children is not unambiguous.¹⁶ *Suter* also included broad language suggesting that statutes such as Title IV-E are unenforceable because they only require that the State prepare and file a plan and that the inclusion of mandatory provisions within a state plan does not create any entitlement to actual implementation of those plan provisions.¹⁷ Most courts, however, subsequently declined to follow Chief Justice Rehnquist’s constrained analysis and any apparent departure from *Wilder*.¹⁸

¹³ *Suter v. Artist M.*, 503 U.S. 347, 356 (1992).

¹⁴ *Id.* at 358; see 42 U.S.C. § 671(a)(15) (1994 & Supp. V 1999).

¹⁵ *Suter*, 503 U.S. at 363-64.

¹⁶ *Id.* at 360-62.

¹⁷ See *id.* at 361-62.

¹⁸ See, e.g., *Wood v. Tompkins*, 33 F.3d 600, 605 n.14 (6th Cir. 1994) (*Suter*’s holding “was not intended to drastically change the *Wilder* standard, nor to radically limit the scope of § 1983”); *Miller v. Whitburn*, 10 F.3d 1315, 1319 (7th Cir. 1993) (“*Suter* . . . is not the death knell of the analytic framework established in *Wilder* . . . *Wilder* guides our analysis here.”); *Ark. Med. Soc’y, Inc. v. Reynolds*, 6 F.3d 519, 525 (8th Cir. 1993) (“*Suter* did not overrule *Wilder*”) (emphasis added); *Stowell v. Ives*, 976 F.2d 65, 68 (1st Cir. 1992) (“Although some respected jurists believe that *Suter* effected a sea change in the Court’s approach to section 1983 . . . we think it is much too early to post epitaphs for *Wilder* and its kin.”); see also

The Suter Fix

Congress, meanwhile, responded to the dicta in *Suter* by amending the Social Security Act to specifically disavow any intent to foreclose private rights of action under state plan provisions.¹⁹ The Amendment states in pertinent part:

In an action brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter*²⁰

Further, the legislative history of the Amendment emphasizes that it was enacted:

to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in the federal courts to the extent they were able to prior to the decision in *Suter*²¹

Thus, in amending the Act, although Congress did not seek to alter the narrow holding of *Suter* that the "reasonable efforts" clause of § 671(a)(15) was unenforceable, Congress did explicitly state its intent that enforcement of such statutory provisions by individual plaintiffs be recognized whenever a private right of action can be supported under pre-*Suter* case

Farley v. Phila. Hous. Auth., 102 F.3d 697, 704 (3rd Cir. 1996) ("The Supreme Court did not *sub silentio* overrule *Wright* in *Suter*.").

¹⁹ See Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 555(a), 108 Stat. 4057-58 (1994) (codified as amended at 42 U.S.C. §1320a-2 (1994 & Supp. V 1999)).

²⁰ 42 U.S.C. § 1320a-2.

²¹ H.R. CONF. REP. NO. 103-761, at 926 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2901, 3257.

law.²² Before *Suter*, numerous courts recognized that private plaintiffs enjoyed a judicial right of action pursuant to § 1983 under other provisions of the Adoption Assistance Act.²³ Subsequent to *Suter*, courts continued to do so — applying the three-prong test articulated in *Wilder* — especially in light of Congress’s action to limit *Suter* to its specific holding.²⁴

Moreover, the Supreme Court subsequently reiterated the *Wilder* test in *Blessing*.²⁵ The three-part *Wilder/Blessing* analysis consequently remains the definitive mode of determining whether plaintiffs have a private right of action under federal statutory provisions pursuant to § 1983, notwithstanding *Suter*.²⁶

²² See *Stanberry v. Sherman*, 75 F.3d 581, 584 (10th Cir. 1996) (stating that any analytical additions announced in *Suter* are “no longer to be followed” in light of § 1320a-2); *Marisol A. v. Giuliani*, 929 F. Supp. 662, 682 (S.D.N.Y. 1996); *Jeanine B. v. Thompson*, 877 F. Supp. 1268, 1283 (E.D. Wis. 1995); cf. *Harris v. James*, 127 F.3d 993, 1002-03 (11th Cir. 1997) (“Section 1320a-2 does not purport to reject any and all grounds relied upon in *Suter*; it purports only to overrule certain grounds — i.e., that a provision is unenforceable simply because of its inclusion in a section requiring a state plan or specifying the contents of such a plan.”).

²³ See, e.g., *Timmy S. v. Stumbo*, 916 F.2d 312, 315-16 (6th Cir. 1990); *L.J. ex rel. Darr v. Massinga*, 838 F.2d 118, 123 (4th Cir. 1988), cert. denied, 488 U.S. 1018 (1989); *Lynch v. Dukakis*, 719 F.2d 504, 510-12 (1st Cir. 1983).

²⁴ See, e.g., *Marisol A.*, 929 F. Supp. at 682-83 (denying motion to dismiss claims brought under §§ 622(b)(9), 627(a) & (b) (repealed in 1994), and § 671(a)(10) & (16)); *Jeanine B.*, 877 F. Supp. at 1283-84 (denying motion to dismiss claims brought under §§ 627 (repealed 1994) and 671(a)); see also *Angela R. v. Clinton*, 999 F.2d 320, 324 (8th Cir. 1993) (determining that *Suter* does not render other AACWA claims frivolous); *Procopio v. Johnson*, 994 F.2d 325, 330-32 (7th Cir. 1993) (applying *Wilder* test to § 675(5)(C)).

²⁵ See *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

²⁶ See *Wesley Health Care Ctr., Inc. v. DeBuono*, 244 F.3d 280, 283-84 (2d Cir. 2001) (applying *Blessing* three-part test to provisions of the Medicaid Act); *Rural Water Dist. v. City of Wilson*, 243 F.3d 1263, 1275 (10th Cir. 2001) (applying *Blessing* test to provision of Consolidated Farm and Rural Development Act); *Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908, 924-26 (5th Cir. 2000) (applying traditional *Wilder/Blessing* three-part test to provision of the Medicaid Act); *Children’s Seashore House v. Waldman*, 197 F.3d 654, 659-60 (3d Cir. 1999), cert. denied, 530 U.S. 1275 (2000) (applying *Blessing* analysis to Medicaid Act provisions);

Enforcing the Adoption and Safe Families Act of 1997

ASFA requires that States file a petition for the termination of parental rights for children who have been in their foster care custody for fifteen of the most recent twenty-two months.²⁷ Concurrently, States are to identify and approve a qualified family for adoption. These actions must be taken unless one of three possible exceptions applies.²⁸ Section 675(5)(E) reads in pertinent part as follows:

(5) The term “case review system” means a procedure for **assuring that** —

(E) in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State **shall** file a petition to terminate the parental rights of the child’s parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), **and**, concurrently, to identify, recruit, process, and approve a qualified family for adoption **unless** —

- (i) at the option of the State, the child is being cared for by a relative;
 - (ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child;
- or

Indianapolis Minority Contractors Ass’n, Inc. v. Wiley, 187 F.3d 743, 750-51 (7th Cir. 1999) (applying *Blessing* factors to federal highway funding statutes); King v. Town of Hempstead, 161 F.3d 112, 114-15 (2d Cir. 1998) (analyzing Housing and Community Development Act under *Blessing* three-prong test).

²⁷ 42 U.S.C. § 675(5)(E) (Supp. V 1999).

²⁸ See *id.*; 45 C.F.R. § 1356.21 (2001).

(iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 671(a)(15)(B)(ii) of this title are required to be made with respect to the child²⁹

To determine whether this ASFA provision creates a federal right that is enforceable under § 1983, all three prongs of the *Wilder/Blessing* test must be satisfied.

There can be little doubt that children in foster care are the intended beneficiaries of ASFA, thereby meeting the first prong. Section 675(5)(E) establishes that the “case review system” — mandated by § 671(a)(16) for “each *child*” for which a State is receiving federal foster care payments — assures that “in the case of a *child*” in foster care for fifteen of twenty-two months the State initiates action toward permanent placement in an adoptive home.³⁰ One of the congressional goals behind ASFA was to move States toward quicker adoptions of children languishing in temporary foster care placements, and the vehicle Congress chose to further that goal was the specific mandate of § 675(5)(E) by which “States [are] required to initiate or join proceedings to terminate parental rights for certain *children* in foster care.”³¹ Section

²⁹ 42 U.S.C. § 675(5)(E) (emphasis added).

³⁰ 42 U.S.C. §§ 671(a)(16), 675(5)(E) (emphasis added).

³¹ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a), 111 Stat. 415, 2119 (1997) (codified at 42 U.S.C. § 675(5)(E) (Supp. V 1999)) (emphasis added); see Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020, 4060 (Jan. 25, 2000) (“[T]he intent of the requirement to file a petition for TPR for certain children was to encourage State agencies to make timely decisions about permanency for children in foster care.”); H.R. REP. NO. 105-77, at 7 (1997), reprinted in 1997 U.S.C.C.A.N. 2739, 2741.

675(5)(E) is clearly “phrased in terms benefiting” these children.³²

Second, under the *Wilder/Blessing* test, the statute must unambiguously impose a binding obligation. The terms of § 675(5)(E) are cast in mandatory rather than precatory terms.³³ Section 671(a) establishes that “for a State to be eligible for payments . . . it *shall* have a plan . . . which — . . . (16) . . . provides for a case review system.”³⁴ Section 675(5)(E) then defines a case review system to include the requirement that “the State *shall* file” timely petitions to terminate parental rights.³⁵ Moreover, the provision of federal funds is expressly conditioned on compliance with this provision and the Secretary of the Department of Health and Human Services is authorized to withhold funds for noncompliance.³⁶

The third prong requires that § 675(5)(E)’s requirements be not too “vague and amorphous” to be judicially enforceable.³⁷ Section 675(5)(E) clearly requires States to have a procedure in place assuring that if a child has been in state custody for fifteen of the most recent twenty-two months, the State must either file a petition to terminate parental rights and concurrently begin to identify and approve a qualified family for adoption, *or* elect not to file a petition and document that one of the three exceptions applies.³⁸ The children entitled to state action pursuant to § 675(5)(E) are readily identifiable. Section 675(5)(F) establishes how the relevant date a child entered foster care is to be determined and the accompanying federal regulations establish how the fifteen out of the most recent twenty-two months time-line is

³² *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 510 (1990).

³³ *See Blessing v. Freestone*, 520 U.S. 329, 341 (1997); *Wilder*, 496 U.S. at 509.

³⁴ 42 U.S.C. § 671(a)(16) (emphasis added).

³⁵ 42 U.S.C. § 675(5)(E) (emphasis added).

³⁶ *See* 42 U.S.C. §§ 671(a)(16) & (b), 674(d); 45 C.F.R. §§ 1356.21(a) & (f), 1356.50 (2001); *see also Wilder*, 496 U.S. at 512.

³⁷ *Blessing*, 520 U.S. at 341; *Wilder*, 496 U.S. at 509-10.

³⁸ 42 U.S.C. § 675(5)(E); *see* 45 C.F.R. § 1356.21(i)(3) (2001).

to be calculated.³⁹ The regulations also specify that the required petition “must be filed by the end of the child’s fifteenth month in foster care.”⁴⁰

The Section’s requirements to file a petition to terminate parental rights and concurrently “to identify, recruit, process, and approve a qualified family for an adoption” are also unambiguous.⁴¹ A petition to terminate parental rights is a legal pleading initiating an action to free a child for adoption, while securing a qualified family to adopt the child is a prerequisite to legally finalizing any adoption. Moreover, “documentation of the steps the agency is taking to find an adoptive family . . . and to finalize the adoption” must be included in the child’s required case plan, and “shall include child specific recruitment efforts such as the use of State, regional, and national adoption exchanges.”⁴² Unless an exception applies, § 675(5)(E)’s core requirement that States file timely petitions for the termination of parental rights and search out adoptive parents for children who have been in foster care for fifteen of the most recent twenty-two months is clear and easily enforceable.

Moreover, even where an exception could apply, the language of the exceptions themselves are not too vague and amorphous to render § 675(5)(E) unenforceable. As an initial matter, in order to benefit from the exceptions in subsections (i)-(iii), the State must “elect not to file” and document the exception upon which it is relying within the fifteen out of twenty-two months time frame.⁴³ As made explicit by the United States Department of Health and Human Services, Administration for Children and Families, when it promulgated the applicable regulations:

³⁹ See 42 U.S.C. § 675(5)(F); 45 C.F.R. § 1356.21(i)(1)(i)(B)-(C); Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews; Technical Corrections, 66 Fed. Reg. 58672, 58676 (Nov. 23, 2001) (to be codified at pt. 1355.36(b)(5)(i)).

⁴⁰ 45 C.F.R. § 1356.21(i)(1)(i).

⁴¹ 42 U.S.C. § 675(5)(E).

⁴² 42 U.S.C. § 675(1)(E).

⁴³ 45 C.F.R. § 1356.21(i)(2).

The State agency *is required either to file a petition for TPR or document an exception to the requirement when a child has been in foster care for 15 cumulative months out of 22 months* States should view the Federal statutory time frames of 15 out of 22 months of a child's stay in foster care as *the maximum length of time that can elapse before a State agency must file a petition or document an exception for TPR* The requirement to file a petition for TPR or to document an exception to the requirement is the State agency's responsibility.⁴⁴

This understanding of the provision is consistent with the statute's references to required case plan documentation, and the related Regulations' direction that the "petition must be filed by the end of the child's fifteenth month in care" or that the State elect not to file based on an exception.⁴⁵ A federal agency's interpretation of its regulations and the statute that it is charged with enforcing is given controlling weight, so long as it does not violate the Constitution or federal statute.⁴⁶ Moreover, a different interpretation would vitiate the mandatory provisions of the statute and the clear legislative intent of ASFA by allowing a State to take *no* action and would thereby impermissibly "render [ASFA] a dead letter."⁴⁷ States would be free to ignore the § 675(5)(E) requirements altogether based on the possibility that an exception might apply, while foster care children languished in foster care indefinitely. Such an absurd result is "to be avoided if [an] alternative interpretation consistent with the

⁴⁴ Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. at 4060, 4062 (emphasis added).

⁴⁵ 45 C.F.R. § 1356.21(i)(1)(i), (i)(2); *see* 42 U.S.C. § 675(1)(E), (5)(E)(ii)-(iii).

⁴⁶ *See* *Stinson v. United States*, 508 U.S. 36, 45 (1993); *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

⁴⁷ *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 514 (1990); *see* 65 Fed. Reg. at 4029 ("[T]he clear intent of ASFA was to speed critical decision-making for all children in foster care.").

legislative purpose [is] available.”⁴⁸ Clearly, a court is competent to enforce the States’ mandated obligations under § 675(5)(E) to either petition for the termination of parental rights so that the adoption process can get underway or elect and document a statutory exception within the required time frame.

The exceptions themselves are also enforceable. The first exception — when “at the option of the State, the child is being cared for by a relative” — requires little additional discussion as it is clearly unambiguous.⁴⁹ Courts are certainly competent to determine whether a State has placed a child with a relative and that it has documented its election not to file a TPR petition as a result.

The second exception explicitly requires a State to have documented in the case plan a “compelling reason” for determining that filing a petition would not be in the best interests of the child.⁵⁰ Although what qualifies as a compelling reason is not fully defined,⁵¹ a court is competent to determine at least whether the required documentation is present in the case plan and the given reason is applicable and available. For example, while documentation in a case plan that a child is sixteen years-old and does not wish to be adopted could qualify as a compelling reason not to pursue adoption,⁵² a court can easily determine that it is not an applicable reason where the child is in fact an infant. Likewise that a child is African-American could not be a legitimate reason to forsake adoption under any circumstances in light of the explicit statutory prohibition against delaying or denying an adoptive placement based on race.⁵³ Thus, while the determination that a State’s reason for why a petition is not in the child’s best interests qualifies as compelling is admittedly best left to the discretion of the State, a court need

⁴⁸ *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

⁴⁹ 42 U.S.C. § 675(5)(E)(i).

⁵⁰ *See id.* § 675(5)(E)(ii).

⁵¹ *See* 45 C.F.R. § 1356.21(h)(3)(i)-(iii) (2001) (containing a non-exclusive list).

⁵² *See id.* § 1356.21(h)(3).

⁵³ *See* 42 U.S.C. § 671(a)(18)(B) (Supp. V 1999).

not go behind that judgment to enforce § 675(5)(E). The compelling reason exception unambiguously requires at a minimum that a legitimate and applicable reason be documented in the case plan and a court is fully competent to enforce such compliance.

The third exception is likewise enforceable. Section 675(5)(E)(iii) allows an exception where services “the State deems necessary for the safe return of the child to the child’s home” have not been “provided to the family of the child consistent with the time period in the State case plan.”⁵⁴ The applicable time period must be in the case plan.⁵⁵ The reunification services the State determines are necessary are also required elements in the case plan.⁵⁶ The court, thus, need only determine whether a State has documented the non-provision of timely reunification services that the State itself determined were necessary as established in the case plan.

Moreover, that the third exception is only available “if reasonable efforts of the type described in § 671(a)(15)(B)(ii) . . . are required to be made,” does not render the exception unenforceable.⁵⁷ Although reasonable efforts is an admittedly somewhat amorphous term, § 671(a)(15)(B)(ii) establishes that “except as provided in subparagraph D, reasonable efforts shall be made.”⁵⁸ For those exceptions at § 671(a)(15)(D) to apply, the State must have “obtain[ed] a judicial determination that such efforts are not required.”⁵⁹ Thus, unless documentation of a judicial determination that reasonable efforts are not required is presented, in which case the third exception is not even available, this conditional clause will be automatically satisfied pursuant to § 671(a)(15)(B)(ii) without

⁵⁴ 42 U.S.C. § 675(5)(E)(iii).

⁵⁵ *Id.*

⁵⁶ *See id.* § 675(1)(B) (“(1) The term ‘case plan’ means a written document which includes at least the following: . . . (B) A plan for assuring that . . . services are provided to the parents, child . . . in order to . . . facilitate [the] return of the child to his own safe home . . .”).

⁵⁷ *Id.* § 675(5)(E)(iii).

⁵⁸ *Id.* § 671(a)(15)(B)(ii).

⁵⁹ 45 C.F.R. § 1356.21(b)(3) (2001); *see* 42 U.S.C. § 671(a)(15)(D)(i)-(iii) (setting forth an inclusive list of offenses to be determined by “a court of competent jurisdiction”).

the need for any determination of what reasonable efforts actually are. Courts are certainly competent to check for documentation of a prior statutorily defined judicial determination. All courts need determine, therefore, to enforce the third exception at § 675(5)(E)(iii) is: (1) whether reasonable efforts are required, which are explicitly required by statute unless there is a documented judicial determination to the contrary; and (2) whether there is documentation that necessary reunification services identified by the State in the case plan were not timely provided pursuant to that plan.⁶⁰

Finally, when a federal statutory right is demonstrated pursuant to the *Wilder/Blessing* test, there is a “presumption that the right is enforceable under § 1983.”⁶¹ Only an “express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement” will overcome that presumption.⁶² Title IV-E of the Social Security Act does not contain any such express provision or “a remedial scheme that is ‘sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.’”⁶³ Just like Title IV-D at issue in *Blessing*, Title IV-E “contains no private remedy — either judicial or administrative — through which aggrieved persons can seek redress.”⁶⁴ The only way that Title IV-E assures that States live up to their foster care plans is through the Secretary’s oversight and ability to cut off or

⁶⁰ 42 U.S.C. § 675(5)(E)(iii) (referring to § 671(a)(15)(B)(ii)).

⁶¹ *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

⁶² *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 520-21 (1990) (quoting *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 423-424) (“‘We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy’ for the deprivation of a federally secured right.”) See *Blessing*, 520 U.S. at 341.

⁶³ *Wilder*, 496 U.S. at 521 (quoting *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981)); see *Blessing*, 520 U.S. at 346.

⁶⁴ *Id.* at 348. The sole exception, discussed at *supra* note 2, is an explicit right of action separately enacted by the Interethnic Adoption provisions of 1996, limited to enforcement of those provisions. See Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808(b), 110 Stat. 1755 (1996) (codified as amended at 42 U.S.C. § 674(d)(3)(A) (Supp. V 1999)).

reduce federal funding.⁶⁵ These are precisely the kind of limited administrative mechanisms that the Supreme Court found to be insufficient “to close the door on § 1983 liability” in *Blessing*.⁶⁶ There is thus no bar to enforcement of § 675(5)(E)’s requirements under § 1983.

In sum, children in foster care have a federal right under § 675(5)(E), that is enforceable pursuant to § 1983, to have a State timely file (or join) a petition to terminate parental rights and begin the required search for an adoptive family, or elect not to file and document an applicable exception. The recognition of such a federal right is consistent with the statute’s legislative intent and history. Congress intended to prevent States from holding children in their custody for prolonged periods without initiating specified actions toward adoption. That the States admittedly have substantial discretion in electing one of the clearly defined exceptions does not vitiate a court’s ability to determine whether the exception was timely documented and is in fact available pursuant to § 675(5)(E)(i)-(iii).

Recent Case Law

Few courts have been presented yet with a claim under § 675(5)(E) or ruled on its enforceability. The provision itself did not become fully effective in most states as to all children in foster care custody until the year 2000 because Congress allowed several transition periods for states to handle their backlog of non-compliant cases.⁶⁷

The first and only court to have fully addressed the rights of foster children under § 675(5)(E) is the Eastern

⁶⁵ See 42 U.S.C. §§ 671(a)(16) & (b), 674(d) (Supp. V 1999); 45 C.F.R. § 1356.21(a) & (f) (2000); 45 C.F.R. § 1356.50 (1999).

⁶⁶ *Blessing*, 520 U.S. at 347-48 (citing *Wright*, 479 U.S. at 428; *Wilder*, 496 U.S. at 521); see also *Suter v. Artist M.*, 503 U.S. 347, 360-61 (1992) (acknowledging that Title IV-E enforcement provisions “may not provide a comprehensive enforcement mechanism so as to manifest Congress’s intent to foreclose remedies under § 1983”).

⁶⁷ See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(c), 111 Stat. 2115, 2119 (1997).

District of Wisconsin in the ongoing class action lawsuit challenging the State of Wisconsin's operation of the Milwaukee County foster care system.⁶⁸ The district court in *Jeanine B. v. McCallum* held that under 42 U.S.C. § 675(5)(E), plaintiffs have a congressionally created right to have the State: (1) "initiate a proceeding to terminate parental rights when a child has been in foster care custody for 15 of the most recent 22 months;" (2) "at the same time, begin to identify, recruit, process and approve a qualified family for adoption;" and (3) "document any exceptions that apply under 42 U.S.C. § 675(5)(E)(i)-(iii)."⁶⁹

The *Jeanine B.* court followed the three-prong analysis of *Blessing* and *Wilder* and held that "ASFA creates rights that the plaintiffs may seek to enforce under Section 1983."⁷⁰ The court found two of the three prongs easily satisfied. The court held that "the clear intent of the law is to benefit children in foster care by ensuring prompt action with respect to termination of parental rights and preparation for adoption[, and that the] provisions of subsection (5)(E) are mandatory, as evidenced by the use of the word 'shall.'"⁷¹ The third prong of the inquiry, however, warranted a more detailed discussion. While the court found that "the core requirement of subsection (5)(E) — timely initiation of proceedings to terminate parental rights — is not so vague and amorphous that its enforcement would strain judicial competence" because the time-lines are provided for in the statute, the court recognized that the exceptions to the provision were more "ill-defined."⁷² What the court found enforceable, however, is the requirement that the State document any allowable exception it is relying on as justification for not filing an otherwise required termination of parental rights petition.⁷³ Thus, while the statute affords the State the discretion to exempt itself from filing a petition under the exceptions listed in § 675(5)(E)(i)-(iii), children

⁶⁸ *Jeanine B. v. McCallum*, 2001 WL 748062 (E.D. Wis. June 19, 2001).

⁶⁹ *Id.* at *5.

⁷⁰ *Id.* at *3.

⁷¹ *Id.*

⁷² *Id.* at *3-4 (internal quotations and citations omitted).

⁷³ *Id.* at *3-4.

have “the right to documentation that the exception does, in fact, apply.”⁷⁴

While the Eastern District of Wisconsin is the first court to fully address the rights of foster children under § 675(5)(E), other courts have recognized that the provision is judicially enforceable. The Middle District of Tennessee, in a decision denying a motion to dismiss claims brought under § 675(5) — which included a claim under § 675(5)(E) although not explicitly discussed in the decision — similarly found that these provisions are enforceable because they were intended to benefit children, their language is mandatory, and they create obligations that are sufficiently specific and definite to be within the competency of the judiciary to enforce.⁷⁵ A recent Magistrate Judge’s decision in the Southern District of Florida likewise recommended that a motion to dismiss a claim pursuant to § 675(5)(E) should be denied pursuant to the *Blessing* analysis.⁷⁶ Interestingly, the district court in that case subsequently eschewed the *Wilder/Blessing* analysis, dismissing all ASFA claims *sua sponte* pursuant to the Eleventh Amendment and *Seminole Tribe*.⁷⁷ The district court held that ASFA created a detailed remedial scheme that precluded the application of the *Ex Parte Young* exception to the Eleventh Amendment bar to suits against state officers even in cases where only prospective injunctive relief was sought.⁷⁸ Without the benefit of briefing on this issue (state defendants had not raised this defense as to ASFA), the district court relied exclusively on a similar decision by the Tenth Circuit in *Joseph A.* applying the Eleventh Amendment bar to other ASFA provisions.⁷⁹ The

⁷⁴ *Id.* at *4.

⁷⁵ *Brian A. v. Sundquist*, 149 F. Supp. 2d 941, 947-49 (M.D. Tenn. 2000).

⁷⁶ *Bonnie L. v. Bush*, No. 00-2116-CIV, 2001 WL 1840843, at *6-9 (S.D. Fla. Apr. 20, 2001), *rev’d*, 180 F. Supp. 2d 1321 (S.D. Fla. 2001).

⁷⁷ *Bonnie L. v. Bush*, 180 F. Supp. 2d 1321, 1330-1331 (S.D. Fla. 2001) (citing Eleventh Amendment and *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)).

⁷⁸ *Id.* at 1328, 1331; *see Ex Parte Young*, 209 U.S. 123 (1908).

⁷⁹ *Bonnie L.*, 180 F. Supp. 2d at 1330-31 (citing *Joseph A. v. Ingram*, 262 F.3d 1113 (10th Cir. 2001), *opinion withdrawn by and substituted with Joseph A. v. Ingram*, 275 F.3d 1253, 1259-65 (10th Cir. 2002)).

cited *Joseph A.* decision, however, has since been superseded after rehearing by the Tenth Circuit's opinion in the same case now holding that the Eleventh Amendment is not a bar to an injunctive claim by foster children to enforce their ASFA rights.⁸⁰ The Florida district court opinion is on appeal.

Conclusion

42 U.S.C. § 675(5)(E) requires that States either file a petition for the termination of parental rights and concurrently begin to identify and recruit an adoptive family, or elect not to file and document an allowable exception. The language and legislative history of ASFA fully supports the conclusion that Congress intended to create a federal right that is enforceable pursuant to 42 U.S.C. § 1983. Whereas the congressional mandate is clear, courts are certainly capable of enforcing whether States have timely filed a petition (or joined a petition) to terminate parental rights, and concurrently begun to identify and recruit an adoptive home, or elected not to file a petition and documented one of the allowable exceptions under the statute. Accordingly, children in foster care custody should be able to assert a claim under § 675(5)(E), and have their right to timely state action towards permanency judicially enforced pursuant to § 1983, as has already been recognized by the first courts to reach the issue.

⁸⁰ *Joseph A. v. Ingram*, 275 F.3d 1253, 1259-65 (10th Cir. 2002).

The Right to Legal Representation at Service Plan Reviews in New York State

SUBHA LEMBACH^{*}

The Right to Legal Representation in Child Abuse and Neglect Proceedings: An Introduction

The Due Process Clause of the Fourteenth Amendment guarantees the right to legal representation in criminal proceedings.¹ Neither the federal or state governments guarantee the right to legal representation in civil proceedings, although the gravity of certain matters assures legal representation. In New York State, a parent has the right to legal representation in a child abuse and neglect proceeding. This guarantee, however, remains vague and parents do not have adequate representation throughout all of the critical junctures while navigating the child welfare system.

For instance, lawyers for parents involved in child welfare proceedings generally do not attend service plan reviews. At the service plan reviews, where the state agency, the child's foster care agency, and a representative for the child make critical decisions about the future of the child. Without representation at these service plan reviews, parents continue to suffer at the whim of the child welfare system without any substantive assistance.

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¹ See U.S. CONST. amend. IV, § 1.

Part I of this Article presents an overview of the child welfare system in New York State. Part II provides a description of service plan reviews and Part III illustrates the practical need for representation at these reviews. Part IV argues that caselaw and due process guarantees require effective legal representation at service plan reviews.

I. Removal of Children on Grounds of Neglect by the New York Administration for Children's Services

A. General Overview of Child Abuse and Neglect Proceedings in New York State

After an allegation of child abuse or neglect is made in New York State, a child protective agency investigates the charge.² Most cases come to the attention of the child protective agency after a referral from the Statewide Central Register of Child Abuse and Maltreatment (Central Register).³ After the Central Register's hotline receives a report, a caseworker determines if the report "could reasonably constitute a report of child abuse or maltreatment."⁴ If so determined, the caseworker sends the report to the local child protection agency for a detailed investigation.⁵

The child protective agency initiates an investigation within twenty-four hours⁶ and sends a preliminary written report on the investigation to the Central Register within seven days.⁷ Within sixty days of receiving the initial report, the child protective agency must determine whether the report was

² N.Y. SOC. SERV. LAW § 423 (McKinney 1992 & Supp. 2001).

³ NYC ADMINISTRATION FOR CHILDREN'S SERVICES, PROTECTING THE CHILDREN OF NEW YORK, A PLAN OF ACTION FOR THE ADMINISTRATION FOR CHILDREN'S SERVICES 16 (1996).

⁴ N.Y. SOC. SERV. LAW § 422(2)(a) (McKinney 1992 & Supp. 2001).

⁵ *Id.*

⁶ N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2 (2002); *see* NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICES, *Child Protective Services/State Central Registrar Frequently Asked Questions*, available at <http://www.ocfs.state.ny.us/main/about/default.htm>. (last visited Apr. 9, 2002).

⁷ N.Y. SOC. SERV. LAW § 424 (McKinney 1992 & Supp. 2001).

“indicated” or “unfounded.”⁸ The report is indicated if “some credible evidence of the alleged abuse or maltreatment exists.”⁹ The report is unfounded if the child protective agency did not find any credible evidence supporting the allegation.¹⁰

The Administration for Children’s Services (ACS), the agency charged with investigating abuse and neglect allegations in New York City, has two alternatives for proceeding with an indicated report. ACS can either offer services to the family or initiate proceedings in Family Court, depending on the caseworker’s evaluation of the situation and what would be in the best interests of the child.¹¹ In initiating Family Court proceedings, ACS can leave the child at home or remove the child if ACS has reasonable cause to fear for the child’s life or health.¹²

In the initial Family Court proceeding, ACS may file for a preliminary order of protection¹³ or may request that the child be returned to his or her home and that services be provided to the family.¹⁴ The court then holds a fact-finding hearing to determine if the allegations against the parents are true.¹⁵ If ACS cannot prove the allegations, the court dismisses the case.¹⁶ If the court determines beyond a preponderance of the evidence that the allegations are true, the court will hold a dispositional hearing and determine what course of action is in the “best interests” of the child.¹⁷ At the dispositional hearing, the court may decide to place the child

⁸ *Id.*; NYC ADMINISTRATION FOR CHILDREN’S SERVICES, A RENEWED PLAN OF ACTION FOR THE ADMINISTRATION FOR CHILDREN’S SERVICES 55 (2001) [hereinafter RENEWED PLAN OF ACTION].

⁹ *See* §§ 422, 424-a.

¹⁰ N.Y. SOC. SERV. LAW § 412(11) (McKinney Supp. 2001).

¹¹ N.Y. FAM. CT. ACT §§ 1031-37 (McKinney 1999 & Supp. 2001).

¹² *Id.* §§ 1021-22, 1024.

¹³ *Id.* §§ 1027, 1029 (providing that a preliminary order of protection can require that the respondent parents have no contact or communication with the child).

¹⁴ *Id.* § 1028.

¹⁵ *Id.* §§ 1044, 1046.

¹⁶ *Id.* § 1052.

¹⁷ *Id.* §§ 1045-46.

outside the home, in a setting such as kinship foster care or stranger foster care,¹⁸ or the court may decide to return the child home, with or without supervision of the parents.¹⁹

B. When the State Can Act

After ACS intervenes in a parent's relationship with his or her child, determines the child to be neglected, and places the child in the foster care system, the State has a burden to engage in diligent efforts to assist the parent in overcoming his or her parental inadequacies so that the parent and the child can be reunited.²⁰ "Diligent efforts" refer to the specific steps that ACS must take to help a parent have his or her child returned.²¹ "Diligent efforts" also refer to the obligation that ACS has to assist the parent in bettering the parent's ability to feed, clothe, and care for the emotional and physical well-being of the child.²² "Diligent efforts" for a homeless, substance abusing father, for example, would probably include requiring drug treatment for the father and finding adequate housing for the child before considering the return of the child to his father.²³

If the parent continually fails to correct the conditions that originally led to the removal of the child for an extended period of time, then the State can terminate his parental

¹⁸ *Id.* § 1052.

¹⁹ *Id.*

²⁰ *In re Jay Scott*, 665 N.Y.S.2d 199, 200-01 (App. Div. 1997); *In re Billie Jean II*, 662 N.Y.S.2d 637, 637 (App. Div. 1997); *In re Albert T.*, 592 N.Y.S.2d 87, 87 (App. Div. 1992) ("The threshold inquiry in any permanent neglect proceeding is whether the petitioning agency has discharged its statutory duty to exercise diligent efforts to encourage and strengthen the parental relationship.").

²¹ See N.Y. SOC. SERV. LAW § 384-b (McKinney 2001); *In re Guardianship of Star Leslie W.*, 470 N.E.2d 824, 827 (N.Y. 1984); Michael A. Riccardi, *Child Protection Agencies Must Tailor Assistance*, N.Y. L.J., Jan. 31, 2001, at 1.

²² Riccardi, *supra* note 21, at 1.

²³ *Id.*

rights.²⁴ The State then considers the child constructively abandoned.²⁵ That is:

[a] child is “abandoned” by his parent if such parent evinces an intent to forego his . . . parental rights and obligations as manifested by his . . . failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency.²⁶

For example, in *In re Scott*, a caseworker from the Department of Social Services tried unsuccessfully to contact the father for a six-month period to persuade him to meet with his children and attend service plan reviews.²⁷ Since failing to visit and communicate with the child meant that the parent was not cooperating with ACS, the court would consider the parent as having failed to rectify the situation that led to the initial removal.²⁸

C. *The Adoption and Safe Families Act*

After the State terminates parental rights because the parent failed to plan for his child’s well-being and correct the conditions that led to removal, the child is placed for adoption.²⁹ The latest in a series of federal laws designed to regulate adoption is the Adoption and Safe Families Act (ASFA).³⁰ Congress enacted ASFA in 1997 with the assumption that “nothing galvanizes an unfit parent like taking

²⁴ *In re Scott*, 665 N.Y.S.2d 199, 200-01 (App. Div. 1997).

²⁵ *Id.*

²⁶ N.Y. SOC. SERV. LAW § 384-b; *see, e.g., In re Scott*, 665 N.Y.S.2d at 200 (finding that the respondent’s failure to contact his children or the child welfare agency for nine months constituted constructive abandonment of the children, permitting the State to seek the termination of parental rights).

²⁷ *See In re Scott*, 665 N.Y.S.2d at 201.

²⁸ *See id.*

²⁹ *In re Billie Jean II*, 662 N.Y.S.2d 637, 638 (App. Div. 1997).

³⁰ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

away a child.”³¹ Thus, one of the primary purposes of ASFA was to expedite permanent placement proceedings and ensure that children are not left in the foster care system for too long.³² ASFA requires that the permanency hearing, where the decision to initiate a termination proceeding is made, to occur within one year of the time ACS has removed the child from the home.³³ The termination proceeding must be initiated when a child has been in foster care for fifteen of the past twenty-two months.³⁴ Thus, parents have little over one year within which to rehabilitate before ACS can place the child for adoption.³⁵ ASFA purports to place children permanently, either with their parents or in an adoptive home, depending on the parents’ ability to promptly comport with the

³¹ Dale Russakoff, *Against the Odds, a Failed Mother Returns to Her Children*, WASH. POST, Jan. 20, 1998, at A1.

³² See *In re Custody & Guardianship of Marino S.*, 693 N.Y.S.2d 822, 825 (1999); 143 CONG. REC. S12,668 (1997) (statement of Sen. Dewine); see also CHILDREN’S DEFENSE FUND, *Adoption and Safe Families Act (ASFA)*, available at <http://www.cdfactioncouncil.org/ASFA.htm> (last visited Apr. 15, 2002) (construing the purpose of Adoption and Safe Families Act as:

ASFA intends to promote adoption and other permanency options by: establishing expedited timelines for determining whether children who enter foster care can be moved into permanent homes promptly; . . . requiring that termination of parental rights proceedings be initiated in additional circumstances — when a child is an abandoned infant, or in cases where a parent has committed murder, voluntary manslaughter, or felony assault of another of his/her children; . . . offering adoption incentive payments for states that increase their adoptions of foster children over a base year. (emphasis omitted)).

³³ Adoption and Safe Families Act of 1997 §302 (codified as amended at 42 U.S.C. § 675(5)(C) (1994 & Supp. V 1999)). The twelve-month period does not necessarily start to run from the time child has been removed from the home, but rather from the earliest of the following: a judicial finding of abuse or the child’s removal from the home. 42 U.S.C. § 675.

³⁴ *Id.*

³⁵ See Gail V. Hamburg, *An Act of Compassion May Require Some Decisive Action to Make it Work*, CHI. TRIB., Jan. 4, 1998, at CN1; Russakoff, *supra* note 31, at A1 (reflecting Congress’s desires to promote family reunification by encouraging parents to rehabilitate quickly and to prevent children from lingering in the foster care system for years without finding a permanent home).

agency's requirements.³⁶ ASFA also distributes incentive money to the states based upon the number of children they have placed in adoptive homes in the past year over a certain baseline number determined by the Department of Health and Human Services.³⁷ Therefore, ASFA effectively promotes placement of the child at the expense of severing existing family ties. The stringent timetable mandated by ASFA requires permanent placement within twenty-two months, which places families in extremely desperate circumstances.³⁸

State child welfare legislation now comports with ASFA³⁹ and States must begin proceedings to terminate parental rights when a child has spent fifteen of the previous twenty-two months in foster care.⁴⁰ States must begin

³⁶ See NYC ADMINISTRATION FOR CHILDREN'S SERVICES, GUIDELINES FOR CHOOSING A CHILD'S PERMANENCY PLAN 4 (2001), available at http://www.ci.nyc.ny.us/html/acs/pdf/asfa_4.pdf (last visited Apr. 15, 2002) [hereinafter GUIDELINES]. The Adoption and Safe Families Act assumes that, after the State terminates parental rights, adoptive parents will be readily available. In 1999, approximately 581,000 children were in the foster care system, of which 121,000 were eligible for adoption. ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE AFCARS REPORT: INTERIM FY 1999 ESTIMATES AS OF JUNE 2001(6) 1, 3 (2001), available at <http://www.acf.dhhs.gov/programs/cb/publications/afcars/june2001.pdf> (last visited Apr. 18, 2002). Only about 42,000 children were adopted each year. *Id.* at 4.

³⁷ Adoption and Safe Families Act of 1997 § 201 (codified as amended at 42 U.S.C. §673(b) (1994 & Supp. V 1999)).

³⁸ GUIDELINES, *supra* note 36, at 4.

³⁹ CHILDREN'S DEFENSE FUND, *supra* note 32.

⁴⁰ *Id.* There are three exceptions to the requirement that termination proceedings must begin if a child has been in foster care for fifteen of the past twenty-two months. These exceptions, examined by the child welfare agency on a case-by-case basis, are:

- (1) the child is in a kinship foster care situation;
- (2) the child welfare agency has a compelling reason indicating that the termination of parental rights would be antithetical to the best interests of the child; and
- (3) the child welfare agency failed to provide the parents with the services mandated in the service plan.

NYC ADMINISTRATION FOR CHILDREN'S SERVICES, ACS PERMANENCY REVIEW GUIDELINES 4 (2001), available at <http://www.ci.nyc.ny.us/html/acs/pdf/asfa.pdf> (last visited Apr. 15, 2002).

proceedings almost immediately in situations involving severe abuse such as abandonment, torture, or the death of a sibling caused by the parent.⁴¹

Critics of ASFA note that it assumes that most parents with children in the foster care system abuse their children when, in reality, the State usually places children in foster care on grounds of neglect – neglect that generally stems from poverty.⁴² Additionally, ASFA gives already powerful child welfare agencies even more power, as if child welfare agencies do not make mistakes in determining whether or not parents are abusing their children.⁴³

II. The Role of Service Plans in New York State Neglect Proceedings

After ACS intervenes, it prepares a service plan for the respondent parents.⁴⁴ Service plans set forth the services that ACS will provide under its “diligent efforts” requirement in assisting the parent to overcome the obstacles preventing reunification⁴⁵ and setting forth expectations the state has for the parent to facilitate the reunification process.⁴⁶ ACS holds service plans to evaluate the current status of the child and to determine how best to care for the child in the future.⁴⁷ The

⁴¹ Hamburg, *supra* note 35, at CN1.

⁴² *Id.*

⁴³ *Id.* (“Aggressively pursuing the termination of parental rights without recognizing the frequency of mistakes or that most parents in the system are negligent but not abusive will hurt families, critics say.”).

⁴⁴ See N.Y. SOC. SERV. § 409-e (McKinney 2001); RENEWED PLAN OF ACTION, *supra* note 8, at 139-40.

⁴⁵ See, e.g., *In re George U.*, 600 N.Y.S. 325 (App. Div. 1993) (involving the permanent neglect of a four-and-a-half-year-old child functioning below a two-year-old level in motor skills and speech and language, the agency had to provide the parents with parenting classes, sign language classes, and counseling as part of the child welfare agency’s responsibilities detailed in the service plan).

⁴⁶ *In re Billie Jean II*, 662 N.Y.S.2d 637, 638 (App. Div. 1997).

⁴⁷ *In re Arlene L.*, 722 N.Y.S.2d 712, 713 (Fam. Ct. 2001).

service plan also serves to inform the parent of the steps he must take in order to have his child returned to him.⁴⁸

For instance, if the State places a child in foster care because the parent engages in spousal abuse, abuses alcohol, and does not adequately supervise his child, a typical service plan will address these concerns.⁴⁹ Such a parent would ordinarily have a service plan requiring him to complete an alcohol abuse program, attend domestic violence counseling, and participate in parenting skills training.⁵⁰ To be reunited with his child, a parent must comport with each and every element of the service plan.⁵¹ Service plans thus play a critical role in child neglect proceedings commenced by the State.

The attendees of the service plan review may include the caseworker from ACS, the foster care agency for the child, the parent, a representative for the parent, the child, and the legal guardian for the child.⁵² At the service plan review, the attendees evaluate the current status of the child and determine what is in the best interests of the child in the future, with the desired goal of reuniting the removed child with his parents.⁵³ After this assessment, ACS notifies the parent as to the outcome of the service plan review and the steps the parent must take to comport with the requirements that must be

⁴⁸ *Id.*

⁴⁹ *See, e.g., In re Tiffany H.*, 656 N.Y.S.2d 792, 794 (Fam. Ct. 1996).

⁵⁰ *In re Billie Jean II*, 662 N.Y.S.2d at 638; *see also* NEW YORK STATE RISK ASSESSMENT FIELD GUIDE: KEY FEATURES OF THE NEW YORK STATE RISK ASSESSMENT AND SERVICES PLANNING MODEL, *available at* <http://www.qinet.org/policy/html/poli21d7.htm> (last visited Apr. 15, 2002).

⁵¹ *In re Billie Jean II*, 662 N.Y.S.2d at 637-38; *In re Albert T.*, 592 N.Y.S.2d 87, 87 (App. Div. 1992) (“[A]lthough respondent cooperated with petitioner’s caseworkers and did make some progress in certain areas, she failed to plan for Albert’s future despite having ample opportunity to do so.”); *In re Michael B.*, 604 N.E.2d 122, 129 (N.Y. 1992) (providing that failure to cooperate with the service plan can lead to a termination of parental rights when clear and convincing evidence proves “abandonment, inability to care for the child due to mental illness or retardation, permanent neglect, or severe or repeated child abuse”).

⁵² *See* SPECIAL CHILD WELFARE ADVISORY PANEL, FINAL REPORT (2000), *available at* <http://www.aecf.org/child/finalrpt.pdf> (last visited Apr. 15, 2002).

⁵³ *In re Lisa Ann U.*, 420 N.E.2d 395, 395 (N.Y. 1981).

satisfied before the agency is deemed to have met the “diligent efforts” standard.⁵⁴ When parents do not meet the requirements set forth in the service plan, the State terminates their rights to their children.⁵⁵ The need for parents to have a thorough understanding of both what takes place at the service plan review and the outcome of the service plan review for parents is a necessary component of the return of the child within the ASFA guidelines.

Courts rely heavily on service plans in deciding whether to terminate parental rights.⁵⁶ In reviewing parental compliance with service plans as a precursor to terminating parental rights, courts acknowledge that service plan reviews should involve an explanation of the service plans’ details and objectives.⁵⁷ Judges cite parental failure to attend service plan reviews in evaluating parental fitness.⁵⁸ For example, noting one mother’s attendance at “only one of three scheduled formal service plan reviews, remaining only approximately two minutes before departing in anger, denying her need for any services,”⁵⁹ the state appellate court terminated the mother’s parental rights.⁶⁰ When parents fail to accept the

⁵⁴ See, e.g., *id.* at 1057 (discussing the detailed service plan created specifically to reunite a mother with her child).

⁵⁵ See, e.g., *In re Anthony S.*, 738 N.Y.S.2d 140, 142 (App. Div. 2002) (holding that terminating a father’s parental rights is not warranted as long as he substantially comports with the requirements of the service plan).

⁵⁶ See, e.g., *In re Jerry XX*, 671 N.Y.S.2d 160, 161 (App. Div. 1998) (relying on child welfare agency’s “extensive evidence of a comprehensive service plan designed to assist respondent in attaining the goal of the return of her children”); see also *In re Amoretta V.*, 643 N.Y.S.2d 694, 695 (App. Div. 1996) (“The record establishes that respondent did in fact fail to comply with petitioner’s plan in serious measure.”); *In re Dixie Lu*, 530 N.Y.S.2d 655, 658 (App. Div. 1988) (noting that “a court may consider whether the parent has utilized the services made available by the agency,” and that “although respondent had a number of contacts with her children, she failed to adhere to petitioner’s plan to enable her to establish bonds with the children and to work toward providing a secure and stable home environment for them”).

⁵⁷ *In re Jerry XX*, 671 N.Y.S.2d at 161.

⁵⁸ *In re Billie Jean II*, 662 N.Y.S.2d 637, 638 (App. Div. 1997).

⁵⁹ *In re Anthony OO*, 685 N.Y.S.2d 494, 495 (App. Div. 1999).

⁶⁰ *Id.* at 496 (citing respondent’s failure to attend service plan reviews and refusal to discuss the service plan with the petitioning agency as two

services set forth in the service plan and offered by the child welfare agency, the court evaluates such behavior as failure to plan, warranting the continued removal of the child or termination of parental rights even if the parents feel that these services are unnecessary.⁶¹

III. The Need for Representation at Service Plan Reviews

A. *The Unequal Balance of Power Between the Administration for Children's Services and Parents*

Without representation at service plan reviews, ACS may trample on parental rights. For example, in *In re Latasha F.*, an incarcerated mother completed two substance abuse programs, a program about infectious diseases associated with drug abuse, two family violence programs, a parenting skills program; and obtained a G.E.D., as well as certification to work in the metal industry and as a teacher's aide.⁶² However, ACS proposed to terminate her parental rights on "failure to plan" grounds.⁶³ Specifically, the agency argued that the mother's reliance on foster care during her incarceration

important reasons demonstrating the respondent's failure to plan, thereby necessitating the termination of parental rights).

⁶¹ *In re George U.*, 600 N.Y.S.2d 325, 326-27 (App. Div. 1993) (sustaining the Family Court's determination that the respondents failed to plan because the parents did not "sufficiently avail themselves of the opportunity to obtain and improve their total communication skills," while acknowledging that neither parent saw a need to improve their parenting skills or to participate in mental therapy); *see, e.g., In re Lisa Z.*, 717 N.Y.S.2d 730, 733-34 (App. Div. 2000) (terminating parental rights in a sexual abuse case because, even after comporting with the requirements of the service plan, the father continued to deny sexually abusing his daughter and the mother did not believe that the father sexually abused the daughter); *see also In re Heather E.*, 656 N.Y.S.2d 410, 411 (App. Div. 1997) (noting that:

a petitioning agency is not required to accommodate an offending parent's refusal to participate in programs necessary to address the condition that caused the removal of the children in the first instance, unwillingness to admit her role in the abuse of a child or failure to deal with the "destructive tendencies" in her life.).

⁶² *In re Latasha F.*, 674 N.Y.S.2d 237, 238 (App. Div. 1998).

⁶³ *Id.*

constituted a failure to plan for the welfare of her child, even though the agency never informed her that continuing foster care was unacceptable.⁶⁴ Fortunately, the state appellate court recognized that:

[t]he efforts of the respondent while in prison to better herself and prepare for the return of her child upon her release . . . establish that she adequately planned for the future of the child. . . . If respondent's plan was inadequate, it was because DSS failed to advise respondent that her plan was unacceptable and to assist her in formulating a plan for her child's future⁶⁵

Had a representative been present at the service plan review setting forth the State's expectations of the mother, she would not have faced the threat of termination of her parental rights. A trained representative would either have known that continued foster care did not rise to the level of planning for the child or, at the very least, informed the mother that the agency considered continuing foster care during her incarceration unacceptable.

In 1986, Professors Sandra A. Garcia and Robert Batey interviewed a substantial number of individuals representing all of the parties involved in child welfare proceedings in Florida.⁶⁶ Parents, caseworkers, social workers, attorneys for parents, attorneys for the child welfare agency, policy makers, politicians, and children's law guardians were all interviewed.⁶⁷ The interviews indicated an overwhelming bias against parents, suggesting the necessity of proper and thorough legal representation for parents.⁶⁸ With regard to

⁶⁴ *Id.* at 238-39.

⁶⁵ *Id.* at 239.

⁶⁶ Sandra A. Garcia & Robert Batey, *Parents, Children and the Courts: The Roles of Counsel for the Parent in Child Dependency Proceedings*, 22 GA. L. REV. 1079, 1080 (1988).

⁶⁷ *Id.*

⁶⁸ *Id.* at 1082 (outlining the parties involved in typical child abuse or neglect proceedings, problems common to the child welfare system, and the role of parents' counsel during these proceedings and noting that:

service plans, the interviews demonstrated that service plans may reflect an attitude that parents are “convicted criminals who should be punished,”⁶⁹ and that:

an overly restrictive “performance agreement” setting down conditions for regaining custody of a child is similar to a sentence. Compliance can be difficult if not impossible because of the same deficiencies — such as poverty, ignorance, substance abuse, and emotional instability — that created the problems. Nevertheless, noncompliance can result in separation for extended periods of time, even permanently. Negative attitudes toward accused parents and the behavioral manifestations of these attitudes reflect both individual and societal biases, as well as a misreading or ignoring of the relevant child protection laws.⁷⁰

When asked about the formulation of these service plans and parental compliance with the plans, agency caseworkers stated that parents and their representatives can offer input in creating the service plan, which is “generally fair and appropriate,”⁷¹ and that service plans provide detailed information to parents on how to regain custody of their children.⁷² Parents are also informed at service plan reviews that parental failure to comply with the service plan is the result of negligence and irresponsibility, but without

[i]t is difficult to conceive of a party in a court proceeding more in need of independent legal representation than a person charged with brutalizing his child. . . . The misdeeds he’s charged with may automatically align the entire court staff against the alleged offender. Who but counsel can stand between the accused and public hysteria?).

⁶⁹ *Id.* at 1083.

⁷⁰ *Id.*

⁷¹ *Id.* at 1088.

⁷² *Id.*

assistance, they may not know what these terms mean.⁷³ Such lack of information necessarily leads to a substantial imbalance of power between the parents and the other parties involved in the service plan review.

Nor does the judicial system safeguard parents against inappropriate service plans drafted by ACS. Legal services lawyers indicate that judges tend to violate the due process rights of parents, merely “rubber-stamp” service plans that child welfare agency creates, and are often impatient or even verbally abusive with parents.⁷⁴ Without considering other possible reasons for non-compliance, such as ACS’s failure to engage in diligent efforts, a judge may review the service plan, observe that parents have not complied with the requirements of the service plan, and then fault parents for their non-compliance.⁷⁵

Without representation at service plans reviews, parental rights naturally succumb to the agency’s broad mandate to control parent-child relations. In detailing the need for the child welfare agency to engage in diligent efforts, the Temporary State Commission on Child Welfare acknowledged that, with regard to parents and the child welfare agency:

[t]he parties are by no means dealing on an equal basis. The parent is by definition saddled with problems: economic, physical, sociological, psychiatric, or any combination thereof. The agency, in contrast, is vested with expertise, experience, capital, manpower, and prestige. . . . The corollary to the agency’s dominant position is that indifference by the

⁷³ *Id.* at 1093 (“Some interviewees . . . reported that failure to inform parents of their right to counsel and not allowing parents to speak in court are routine rights violations . . . Judges also perpetuate the violation of applicable laws by not considering all the facts before them and by not overruling unlawful or unreasonable agency recommendations made at adjudicatory, dispositional, and restitution hearings.”).

⁷⁴ *Id.*

⁷⁵ *Id.*

agency may greatly serve to impede a parent's attempts at reunification.⁷⁶

Because ACS delineates the services a parent must accept and the standards a parent must meet in order to have his child returned,⁷⁷ ACS is in a superior position vis-à-vis the child's parents. Representation for parents would promote the equalization of the relationship between the parent and ACS.

B. Complying with Service Plan Reviews

Parents cannot comport to service plans if they do not understand the goals set forth in the service plans. Agency caseworkers do not necessarily provide parents with an explanation of what the parents must do to have their child returned to them, despite the caseworkers' obligation to do so.⁷⁸ For instance, in *Genesee County Department of Social Services v. Kurt L.*,⁷⁹ the petitioning agency sought a finding of permanent neglect on October 8, 1997, although the child welfare agency did not create a service plan for the father until December 4, 1996.⁸⁰ In fact, until December 22, 1996, the agency did not discuss with him the steps he needed to take to reunite with his child, or help him with realizing his goals.⁸¹ After recognizing that the agency never meaningfully attempted to ascertain the precise nature of the parent's problems or assist him with these obstacles, the court dismissed the child welfare agency's petition.⁸² If the parent had had a representative working with the agency to ensure

⁷⁶ *Genesee County Dep't of Soc. Servs. v. Kurt L.*, 682 N.Y.S.2d 336, 338 (Fam. Ct. 1998) (citing the Temporary State Commission on Child Welfare's 1976 report *Barriers to the Freeing of Children for Adoption*).

⁷⁷ *Id.*; see also *In re Lisa Z.*, 717 N.Y.S.2d 730, 733-34 (App. Div. 2000) (holding that, in a situation involving allegations of sexual abuse, the child welfare agency need not formulate a service plan that permits the father to obtain treatment without admitting to committing sexual abuse and that the service plan for the mother may require her to believe that the father sexually abused his daughter).

⁷⁸ *Kurt L.*, 682 N.Y.S.2d at 338.

⁷⁹ *Id.* at 336.

⁸⁰ *Id.* at 337.

⁸¹ *Id.* at 339.

⁸² *Id.* at 340.

that the agency formulated a service plan and that the resulting plan accurately reflected the circumstances that led to the child's removal from his parent, the agency would have been able to meet its statutory requirement for "consultation and cooperation with the parents in developing a plan."⁸³

In formulating a service plan, ACS has considerable power in directing the parent's conduct. The agency must "determine the particular problems facing a parent with respect to the return of his child and make affirmative, repeated and meaningful efforts to assist the parent in overcoming these handicaps."⁸⁴ This expansive delegation of power allows ACS to evaluate the parent's needs and to effectively dictate what the parent must do to have his child returned to him. Although the agency must engage in "diligent efforts" in assisting parents with completing their service plans,⁸⁵ both the diagnosis of parental needs and the necessary treatment of those problems are largely within the control of the child welfare agency.

Having a representative at service plan reviews would also enable parents to more effectively respond to ACS's diligent efforts requirements because parents would be involved in creating and defining these requirements with the help of their representative. The representative could advocate for parents in setting out the parameters of what the parent must do to have his child returned to him. The representative could also describe in detail what the parent must do to comport with his service plan.

Understanding the implications and demands of a service plan can challenge many parents. Removing a child from the family home because a parent is unfit is a far easier solution than determining what constitutes compliance with a service plan, but is not an adequate solution under the law.⁸⁶

⁸³ N.Y. SOC. SERV. LAW § 384-b(7)(f)(1) (McKinney 2001).

⁸⁴ *Kurt L.*, 682 N.Y.S.2d at 340.

⁸⁵ *Id.*

⁸⁶ See Hamburg, *supra* note 35, at CN1 ("Parents need to be told exactly what they have to do to get their kids back, some experts suggest.").

IV. Effective Assistance of Counsel is Necessary When ACS Removes a Child

Dispositional hearings employ a “best interests” standard with respect to the child in deciding with whom a removed child should be placed.⁸⁷ However, this standard fails to consider what may be in the best interests of the family.

Parents who abuse their children are often as alienated, tortured and desperate as we believe them to be. Mired in poverty and lacking the means or the will to overcome their afflictions, many are susceptible to an array of disorders: apathy and fear, passivity and rage and varying degrees of mental illness and violence. Many turn to sedatives, legal or illegal: booze to numb the pain, crack to erase the wretchedness. Their children suffer.⁸⁸

New York law allows the State to intervene in a parent’s relationship with his child to ensure that the child’s needs are met, as long as such intervention comports with due process requirements.⁸⁹ To meet this due process standard in child neglect proceedings, parents should have effective, comprehensive legal representation throughout the entire process, including during service plan reviews.

⁸⁷ *Id.*

⁸⁸ *Id.* (describing some of the problems with the generalized assumptions in the Adoption and Safe Families Act that result in problematic outcomes in child abuse and neglect proceedings).

⁸⁹ N.Y. FAM. CT. ACT § 1011 (McKinney 2001); *In re Robert E. Fisher*, 361 N.Y.S.2d 596, 597 (Sup. Ct. 1974). *But see In re Spence-Chapin Adoption Serv. v. Polk*, 324 N.Y.2d 196, 199 (N.Y. 1971) (“Child and parents are entitled to be together, unless compelling reason stemming from dire circumstances or gross misconduct forbid it in the paramount interest of the child, or there is abandonment or surrender by the parent.”).

A. Caselaw Provides a Right to Counsel

Because of “a natural parent’s desire for and right to the companionship, care, custody, and management of his or her children,”⁹⁰ New York State provides indigent parents with the right to counsel⁹¹ in all actions to terminate parental rights.⁹² Counsel is assigned to an indigent parent upon his or her first appearance in a proceeding to terminate parental rights.⁹³ Failure to offer indigent parents counsel would violate their due process rights.⁹⁴

Both the United States Constitution and the New York State Constitution prohibit the government from depriving a person of “life, liberty or property without due process of law.”⁹⁵ In *Santosky v. Kramer*, the United States Supreme Court affirmed the well-settled law that due process must be accorded to parents in termination proceedings.⁹⁶ The Court stated that:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State If anything, persons faced with

⁹⁰ *In re Tanise B.*, 462 N.Y.S.2d 537, 540 (Fam. Ct. 1983) (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981)); *see also In re Michael B.*, 604 N.E.2d 122, 127 (N.Y. 1992) (“A biological parent has a right to the care and custody of a child, superior to that others, unless the parent has abandoned that right or is proven unfit to assume the duties and privileges of parenthood, even though the state could find ‘better’ parents.”).

⁹¹ N.Y. FAM. CT. ACT § 262 (McKinney 2001).

⁹² *In re Ella B.*, 285 N.E.2d 288, 290 (N.Y. 1972) (addressing the issue of “whether the Family Court is required to advise an indigent parent, charged with child neglect, that he is entitled to be represented by assigned counsel”); *In re Tanise B.*, 462 N.Y.S.2d at 540.

⁹³ N.Y. FAM. CT. ACT § 262; *In re Alexander L.*, 457 N.E.2d 731, 734 (N.Y. 1983); *In re Tanise B.*, 462 N.Y.S.2d at 540.

⁹⁴ *In re Ella B.*, 285 N.E.2d at 290.

⁹⁵ U.S. CONST. amend. XIV, § 1; N.Y. CONST. art. I, § 6; *In re Lee TT*, 664 N.E.2d 1243, 1249 (N.Y. 1996) (concerning two petitioners that wanted to have the New York State Central Register of Child Abuse and Maltreatment expunge their names).

⁹⁶ *Santosky v. Kramer*, 455 U.S. 745, 752-57 (1982).

forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.⁹⁷

Thus, the Court held that the Due Process Clause of the Fourteenth Amendment mandates a higher standard than proof of clear and convincing evidence before the State may permanently terminate parental rights.⁹⁸

The Court of Appeals of New York has also recognized a parent's fundamental interest in the liberty, care, and custody of his or her child.⁹⁹ In *In re Ella B.*, the court determined that this right was too fundamental to relinquish to the State without the parent having a hearing with assistance of counsel.¹⁰⁰ The court noted the inherent imbalance in experience and expertise between the parties.¹⁰¹ Thus, the court held that failing to afford indigent parents with counsel in termination hearings was a denial of due process.¹⁰² It also determined that it was a denial of equal protection.¹⁰³

Additionally, the right to counsel in proceedings involving the termination of parental rights must involve the effective assistance of counsel.¹⁰⁴ That is, parents are entitled to the meaningful exercise of their right to have an attorney present at termination proceedings.¹⁰⁵ Such effective assistance of counsel involves having attorneys who are zealous advocates, eagerly working to reunite a father with his

⁹⁷ *Id.* at 753-54.

⁹⁸ *Id.* at 767.

⁹⁹ *In re Ella B.*, 285 N.E.2d at 290 (1972).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See *In re Tanise B.*, 462 N.Y.S.2d 537, 541 (Fam. Ct. 1983).

¹⁰⁵ See, e.g., *In re Ella B.*, 285 N.E.2d at 290 (recognizing the importance of having effective assistance of counsel during child neglect proceedings).

child, not merely representing the parents in court because such legal assistance is required.

B. Failure to Provide Representation at Service Plan Reviews Violates Due Process

Failure to provide parents with representation at service plan constitutes a violation of due process. A proceeding leading to the termination of parental rights implicates due process concerns, both procedural and substantive.¹⁰⁶ Procedurally, parents are entitled to meaningful assistance of counsel and have the right to be heard during each step of the Family Court proceedings, just as in criminal proceedings.¹⁰⁷ Substantively, parents have the right to notice of any decisions that will be made by the State regarding their children.¹⁰⁸ Failing to inform parents of the steps outlined in the service plan violates this right to notice because parents may have their rights terminated due to their failure to comply with the service plan requirements of which they had no notice.¹⁰⁹

In evaluating whether the State's failure to ensure representation at service plan reviews violates due process, three factors must be considered: (1) the private interest implicated by state action; (2) the possibility for the State to deprive the parent of this interest improperly because of the procedures used without additional safeguards; and (3) an inquiry into the governmental interest.¹¹⁰ First, the private interest implicated is a parent's right to raise his child as he sees fit.¹¹¹ Parents have supreme rights to their children, as long as they do not maltreat them.¹¹² Second, a high

¹⁰⁶ *In re Chimere C.*, 686 N.Y.S.2d 775, 777 (App. Div. 1999) (holding that the respondent father was denied his fundamental right to due process when he was not allowed to participate in a fact-finding hearing).

¹⁰⁷ *In re Ella B.*, 285 N.E.2d at 290.

¹⁰⁸ *Id.*

¹⁰⁹ *See, e.g., In re Anthony OO*, 685 N.Y.S.2d 494, 496 (App. Div. 1999) (detailing the importance of the service plan in child abuse and neglect proceedings).

¹¹⁰ *In re Lee TT*, 664 N.E.2d 1243, 1250 (N.Y. 1996).

¹¹¹ *In re Dominique L.*, 647 N.Y.S.2d 639, 640 (App. Div. 1996).

¹¹² *Id.*

probability exists that the State will deprive the parent of his rights unless the parent has adequate representation.¹¹³ Third, while the governmental interest in protecting the welfare of the child is high, a parent's private interest is also important.¹¹⁴ Thus, parents should have effective representation at such proceedings.

Several cases have found that termination proceedings implicate important liberty interests. For example, in *In re Dominique L.*, the New York Supreme Court held that the Erie County Family Court violated the due process rights of the respondent in conducting a fact-finding hearing in a termination proceedings absent the respondent and the meaningful participation of the respondent's attorney.¹¹⁵ Likewise, in *In re Ella B.*, the Court of Appeals of New York determined that a parent's right to the care and custody is such an important and fundamental liberty that it cannot be relinquished without procedural protections including the right to be heard through representation by legal counsel.¹¹⁶ Representation at service plan reviews is critical to protecting the due process rights of parents, and the New York State judicial system should ensure that parents in child abuse and neglect proceedings receive both procedural and substantive due process.

¹¹³ *In re Ella B.*, 285 N.E.2d at 290.

¹¹⁴ *In re Dominique L.*, 647 N.Y.S.2d at 640.

¹¹⁵ *Id.* at 639. *But see In re James Carton K., III*, 665 N.Y.S.2d 426, 429 (App. Div. 1997) (finding that the respondent's due process rights were not violated when portions of a fact-finding hearing in a permanent neglect proceeding were conducted in his absence because parental unavailability must be balanced with the child's interest for swift adjudication).

¹¹⁶ *In re Ella B.*, 285 N.E.2d at 290.

Conclusion

The failure of parents to have adequate representation at service plan reviews violates the fundamentals of due process under the United States Constitution. New York State must therefore guarantee representation to parents at service plan reviews in order to provide effective assistance of counsel to parents during child abuse and neglect proceedings.

Adolescent Minds, Adult Crimes: Assessing a Juvenile's Mental Health and Capacity to Stand Trial

TAMERA WONG*

It has been a year filled with pain . . . a student allegedly opened fire with his father's gun at Santana High School in Santee. The six-minute shooting spree killed 14-year-old Bryan Zuckor and 17-year-old Randy Gordon, and wounded 11 students, a teacher and a campus monitor.¹

Charles Williams's classmates characterized him as scrawny, picked on him frequently, and called him "dumb," a "freak," "dork," and "nerd."² On March 5, 2001, the fifteen-year-old opened fire on his classmates in an apparently random shooting spree.³ As he was firing shots, a witness said that Williams possessed an "evil sadistic demeanor."⁴ Williams currently awaits trial in the high-security section of San Diego Juvenile Hall on two counts of murder, thirteen counts of attempted murder, and thirteen counts of assault with a firearm.

The murders committed by Williams mandate inquiry into juvenile offenders' mental capacity to understand criminal

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¹ Ben Fox, *California School Shooting One Year Later*, ASSOCIATED PRESS, Mar. 4, 2002, available at http://news.findlaw.com/ap_stories/other/1110/3-4-2002/200203041015237503.html. (last visited Mar. 4, 2002).

² *Id.*

³ *Shooting Suspect Reloaded 'at Least 4 Times'*, CNN.COM, Mar. 6, 2001, at <http://www.cnn.com/2001/US/03/06/school.shooting/> (last visited Apr. 28, 2002).

⁴ *Id.*

activity and the legal consequences of such action. This case presents the issues of whether Williams suffered an emotional disorder, whether his actions were premeditated or a crime of rage, and whether his actions could have been prevented. Because of the nature of his crimes, the district attorney can automatically charge Williams in adult criminal court under the authority of the California Gang Violence and Juvenile Crime Prevention Act of 1998 (Proposition 21).⁵

Previously, the judicial waiver was used to transfer juvenile offenders to criminal court after a juvenile court fitness hearing.⁶ The juvenile court judge had discretionary authority to decide to waive jurisdiction, basing the decision on an individualized review of the circumstances.⁷ Proposition 21 creates a statutory exclusion that automatically and exclusively charges youths in criminal court if they meet the predetermined age and are arrested for serious offenses.⁸ In addition to statutory transfer, laws have been passed to allow the prosecutor to directly file in criminal court.⁹ Both methods of nonjudicial transfer supersede the juvenile court judge's discretion and directly place the juvenile in the jurisdiction of the criminal court.

⁵ CAL. WELF. & INST. CODE § 602 (West Supp. 2002); *see also* *Proposition 21: Text of Proposed Law*, in SECRETARY OF STATE, STATE OF CALIFORNIA, VOTER INFORMATION GUIDE (2000), available at <http://primary2000.ss.ca.gov/VoterGuide/Propositions/21text.htm> (last visited Apr. 28, 2002).

⁶ Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCH. PUB. POL. & L. 3, 5 (1997).

⁷ *Id.*

⁸ Proposition 21 removes minors age fourteen or older who have committed specified offenses from the jurisdiction of juvenile court, and mandates that they be prosecuted under general law in the criminal court. Some of the offenses include murder, certain sex offenses, rape, and lewd and lascivious acts on a child under age fourteen. CAL. WELF. & INST. CODE § 602; *see also* Melissa Sickmund, MINIMUM TRANSFER AGE SPECIFIED IN STATUTE, 1997 (1999), available at <http://ojjdp.ncjrs.org/ojstatbb/html/qa089.html>.

⁹ Melissa Sickmund, STATES WITH CONCURRENT JURISDICTION, 1997 (1999), available at <http://ojjdp.ncjrs.org/ojstatbb/html/qa088.html>; *see* *Manduley v. Superior Court*, 41 P.3d 3, 32-33 (Cal. 2002) (holding that the provision in Proposition 21 allowing prosecutors to directly file against certain minors in criminal court is constitutional).

The transition towards applying a punitive approach to juvenile offenders ignores the question of whether young people have the cognitive abilities to understand the nature of their crimes and the legal procedures and penalties of their actions. The juvenile justice system provides a unique environment to address the characteristics of young offenders by providing the opportunity for rehabilitation according to individualized assessments. However, with the ease of transfer to adult criminal court, the State moves away from the role of *parens patriae* and towards a punitive approach to juvenile criminals.

By tracking the theoretical pendulum swing from *parens patriae* towards mature minor rhetoric, this comment demonstrates the danger in treating juvenile offenders as adults by ignoring undeveloped mental capacities particular to minors. Looking behind the crime and into the characteristics of young offenders demonstrates that a correlation exists between mental illness, developmental immaturity, and the need for mental health treatment to prevent recidivism. Furthermore, the relationship among these characteristics confirms that juveniles do not have the requisite competency to stand trial in criminal court.

The relationship among the mental health needs of juvenile offenders, their sense of criminal responsibility and their competency to stand trial need to be studied together in order for the juvenile justice system to fulfill its rehabilitative role. In an increasingly penal environment, the unique characteristics of young offenders like Charles Williams must be recognized to determine if the criminal justice environment can successfully solve the problem of juvenile crime. Most youth involved in the juvenile justice system have mental health disorders and lack competency to stand trial according to the *Dusky* standard for evaluating competency.¹⁰ Therefore, this comment argues for a return to rehabilitative theory in re-assessing juvenile justice policy so that it accounts for the

¹⁰ *Dusky v. United States*, 362 U.S. 402 (1960) (setting forth the standard to judge a defendant's competency to stand trial in criminal court).

cognitive, developmental, and mental health characteristics of juvenile offenders.

From *Parens Patriae* Doctrine and Protection of the Child to Mature Minor Theory and Treating Children as Adults

The establishment of juvenile courts in the United States was founded on the Sixteenth Century European education reform movement¹¹ under the doctrine of *parens patriae* (the State as parent). The movement posited that children were persons lacking fully developed moral and cognitive capacities and so justified State intervention to provide for their protection.¹² Focusing on the welfare of the child, Illinois developed the first American juvenile court in 1899.¹³ By the end of the twentieth century, all of the states implemented *parens patriae* policies to address juvenile offenders' lack of full legal capacity.¹⁴

The doctrine of *parens patriae* gave the State the power and responsibility to protect children whose parents failed to provide appropriate care or supervision.¹⁵ By adopting a protective role, State intervention could reform and develop troubled youth into productive citizens.¹⁶ This paternalistic belief stemmed from a moral obligation of the State to act for the benefit of society.¹⁷ Instead of punishing delinquents, the juvenile court judge had a variety of dispositional options to provide treatment in the best interests

¹¹ OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE: A CENTURY OF CHANGE (1999), available at http://ncjrs.org/html/ojjdp/9912_2/juv1.html (last visited Apr. 28, 2002) [hereinafter CENTURY OF CHANGE]

¹² *Id.*

¹³ *Id.*

¹⁴ Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1273 (2000).

¹⁵ CENTURY OF CHANGE, *supra* note 11.

¹⁶ *Id.*

¹⁷ Hartman, *supra* note 14, at 1273-74.

of the child.¹⁸ Such treatment would last until the child was “cured” or became an adult.¹⁹

The central objective of juvenile justice policy is to establish a diversionary mechanism that moves a population amenable to treatment away from punitive justice.²⁰ Diversionary theory²¹ posits that by protecting juvenile offenders from the destructive influence of the criminal justice system, youth can “grow up” in a normal community setting.²² In contrast, commitment to a penal system would educate youth in crime through exposure to hardened, career criminals.²³ Interventionist theory is another rationale for establishing a separate system for juvenile offenders, arguing that juvenile courts create an opportunity to protect the community and cure the child.²⁴

The courts have constantly revisited the diversionary and interventionist interpretations of juvenile courts to justify the maintenance of a separate court system for young offenders. The courts applied a balancing test to weigh the rights of minors against the duty of the State to protect. The Supreme Court found in *Kent v. United States*²⁵ and *In re Gault*²⁶ that minors do have individual rights to self-determination. Nevertheless, the State must protect minors against delinquency and maltreatment, regardless of their

¹⁸ CENTURY OF CHANGE, *supra* note 11.

¹⁹ *Id.*

²⁰ Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477, 2479 (2000).

²¹ Professor Zimring writes that there are two justifications for the development of juvenile courts in the United States. He labels these two policies diversionary and interventionist justifications. Diversionary justifications argue that a separate system would save young people from the negative influence of criminal courts and prison. Interventionist rationale argues that a separate system would save delinquents from crime and truancy. *See id.* at 2480.

²² *Id.* at 2481.

²³ *Id.*

²⁴ *Id.* at 2482-83.

²⁵ 383 U.S. 541 (1966).

²⁶ 387 U.S. 1 (1967).

consent, because minors are labeled legally incompetent to determine what is in their best interest.²⁷

In *Kent*, the Supreme Court held that the juvenile court can waive its jurisdiction and transfer a juvenile defendant to criminal court only after the statutory requirement of a full investigation has been satisfied.²⁸ While the statute gave the juvenile court significant discretion over what factors could be considered in a transfer, the Court found that it did not confer a license for arbitrary procedure.²⁹ The Court further held that a hearing regarding the juvenile's circumstances, effective assistance of counsel, and a statement of reasons were procedural protections to guard "society's special concern for children."³⁰ The Court found that the justification for having a juvenile court is to determine the needs of the child and society and provide guidance and rehabilitation for the child.³¹ Criminal responsibility, guilt, and punishment were not the objective of having a separate system.

The Supreme Court in *Gault* recognized that because of the special cognitive, emotional, and social characteristics of children, the constitutional rights of young people may need extra protection.³² Prior to the *Gault* decision, juvenile criminal matters were treated like civil matters in the juvenile courts, and young offenders did not have due process rights to defense counsel or formal hearings. The Court addressed the proceedings that determine whether a juvenile would be labeled a "delinquent" and subsequently committed to a state institution.³³ The *Gault* Court found that the same procedures available to adult defendants in criminal court should be available in juvenile court, especially when the proceedings led to confinement.³⁴ The Court then reviewed the history of

²⁷ BARRY NURCOMBE & DAVID F. PARTLETT, *CHILD MENTAL HEALTH AND THE LAW* 43 (1994).

²⁸ *In re Kent*, 383 U.S. at 553.

²⁹ *Id.*

³⁰ *Id.* at 554.

³¹ *Id.*

³² *In re Gault*, 387 U.S. 1, 27-28 (1967).

³³ *Id.* at 13.

³⁴ THOMAS GRISSO, *JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE* 6 (Plenum Press 1981).

the juvenile court and determined that the State's role of *parens patriae* did not supersede a juvenile's due process rights in the proceeding in question. The Court concluded that the unique protections of the juvenile court should continue to exist, with the additional guarantees of due process and fair treatment.³⁵

The dilemma that courts face in balancing the minor's capacity for self-determination with the State's duty to protect has recently weighed in favor of the "mature minor."³⁶ In the past two decades, the treatment of juvenile offenders has moved away from individualized case dispositions towards the treatment of juveniles as adult offenders.³⁷ As voters perceived a considerable increase in juvenile crime, the public sentiment concluded that the juvenile justice system treated minor offenders too leniently.³⁸ In the 1980s, some states passed punitive juvenile laws and others removed certain categories of offenders from the juvenile justice system into the adult criminal courts.³⁹ The 1990s saw similar changes in the law to crack down on juvenile crime.⁴⁰ Laws eased the transfer of juvenile offenders to the criminal justice system, expanded sentencing options in juvenile and criminal courts, and modified or removed confidentiality provisions regarding juvenile court records and proceedings.⁴¹ Thus, the underlying theory behind juvenile justice policy is no longer motivated by rehabilitation. Rather it currently focuses on punishment, accountability, and public safety.

The voters' desire to punish juvenile offenders made itself clear when Californians passed Proposition 21.⁴² Proposition 21 allows the automatic direct filing of juvenile cases in criminal court if minors age fourteen or older commit

³⁵ *In re Gault*, 387 U.S. at 30-31.

³⁶ NURCOMBE & PARTLETT, *supra* note 27, at 44.

³⁷ See Grisso, *supra* note 6, at 4; cf. NURCOMBE & PARTLETT, *supra* note 27, at 43 (describing the extension of legal rights reserved for adults to children in the contemporary era).

³⁸ CENTURY OF CHANGE, *supra* note 11, at.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *id.*

⁴² See *Proposition 21: Text of Proposed Law*, *supra* note 5.

certain offenses, including murder and enumerated sex offenses.⁴³ In March 2002, the California Supreme Court upheld the constitutionality of prosecutorial discretion to file charges against a minor in criminal court in *Manduley v. Superior Court*.⁴⁴ In *Manduley*, the Court ruled that because of the serious nature of the crimes committed, juveniles do not have statutory rights to be under the jurisdiction of the juvenile court.⁴⁵ Charles Williams's attorney contends that the consequences of direct filing violate the United States and California constitutional prohibitions of cruel and unusual punishment and separation of powers.⁴⁶ With the ruling in *Manduley*, however, the California Supreme Court has made it clear that Williams will be tried as an adult.

As evidenced by legislation similar to Proposition 21, the public's desire for harsher treatment of juveniles demonstrates the emergence of "mature minor" rhetoric in the new juvenile justice policy. In making minors equally responsible as adults for their actions, the justifications for juvenile court shift away from a philosophy that advocates for a separate, rehabilitative system for young offenders. The Supreme Court has noted that the theoretical underpinnings of the juvenile court are debatable and the purported benefits of a separate system not so apparent.⁴⁷ Nevertheless, imposing a mature minor capacity onto young people gives children and teenagers the legal capacity of adults.⁴⁸ Before the State turns its back on its role as protector, it is worthwhile to examine the characteristics of youth caught in the juvenile justice system and how their maturity levels are distinguishable from adult capacities.

⁴³ See *supra* text accompanying note 8.

⁴⁴ *Manduley v. Superior Court*, 41 P.3d 3, 32-33 (Cal. 2002).

⁴⁵ See *id.* at 15.

⁴⁶ Defendant's Motion to Demurrer at 1, *People v. Williams*, No. CE 211823CC, (Cal. Super. Ct. Mar. 30, 2001), available at <http://www.co.san-diego.ca.us/cnty/cntydepts/safety/defender/demurrer.pdf> (last visited Apr. 28, 2002).

⁴⁷ *In re Gault*, 387 U.S. 1, 17 (1967).

⁴⁸ See Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 12 (1994) (arguing that children's immaturity impairs and legally disables them).

Assessment of the Mental Health Characteristics of Juvenile Offenders

Because of the extreme violence involved in murders such as the ones committed by Williams, advocates for criminal treatment want to see juvenile offenders locked away in prison.⁴⁹ However, the “out of sight, out of mind” argument disregards the status of juveniles as persons whose developing maturity is often times inhibited by mental illness. An assessment of the unique class of needs faced by juvenile offenders will show that the criminal justice system is not the proper avenue for correcting youth crime. By looking at characteristics of the juvenile offender population, it is apparent that the State should retain its *parens patriae* role to address emotional and behavioral problems of young people *before* they commit crimes or to prevent them from being repeat offenders.

In an interview regarding the Williams case, Dr. Johan Kinlan, a child and adolescent psychiatrist and former head of a psychiatry unit for incarcerated children, emphasized the community’s need to identify and address troubled youth like Williams.⁵⁰ Witnesses reported that in the week prior to the shooting, Williams told his friends that he was going to bring a gun to school.⁵¹ He also told his mother’s boyfriend that he wanted to start a shooting spree.⁵² Dr. Kinlan believed that due to a lack of attention and sensitivity towards youth who displayed potential mental health disorders, young people like Williams often went unnoticed.⁵³ Dr. Kinlan stated that kids with learning problems, identified neurological difficulties,

⁴⁹ See Maggie Elvey et al., *Argument in Favor of Proposition 21*, in SECRETARY OF STATE, *supra* note 5, available at <http://primary2000.ss.ca.gov/VoterGuide/Propositions/21yesarg.htm> (last visited Apr. 28, 2002).

⁵⁰ Interview by Gwen Ifill with Dr. Joan Kinlan (Mar. 6, 2001), *Newshour: San Diego Shooting* (PBS Mar. 6, 2001), available at http://www.pbs.org/newshour/bb/youth/jan-june01/shooting_3-6.html (last visited Apr. 28, 2002).

⁵¹ *Shooting Suspect Reloaded ‘at Least 4 Times,’ supra* note 3.

⁵² *Id.*

⁵³ Interview by Gwen Ifill with Dr. Joan Kinlan, *supra* note 50.

previous delinquent activity, and depression were at a higher risk of following through with their threats.⁵⁴

Treating a juvenile like an adult overlooks specific developmental stages in a young person's life that impact his or her behavior.⁵⁵ Dr. Kinlan's identification of the need to address mental illness and emotional disturbance in troubled youth demonstrates the need for competent psychiatric assessments of juvenile offenders. According to the National Mental Health Association (NMHA), the rate of mental disorders among the juvenile justice population is higher than in the general population.⁵⁶ The most common disorders include substance abuse, depression, conduct disorder, attention deficit/hyperactivity disorder, learning disabilities, post traumatic stress disorder, and developmental disabilities.⁵⁷ The NMHA also found that juvenile offenders were disproportionately poor and children of color.⁵⁸ They have histories of problems such as physical and sexual abuse, parental drug and alcohol use, poor school performance, and family discord.⁵⁹

The American Psychiatric Association believes that instead of punishing juvenile offenders, resources should be dedicated to addressing the mental health issues of young people who are amenable to treatment.⁶⁰ Since the juvenile justice system does not fully recognize mental health as an integral part of its rehabilitative method, many juvenile facilities lack the data necessary to recognize that many

⁵⁴ *Id.*

⁵⁵ *Anticrime Bills Would Punish Juveniles While Jeopardizing Psychiatric Assessment*, PSYCHIATRIC NEWS, Sept. 6, 1996, available at <http://www.psych.org/pnews/96-09-06/crime.html> (last visited Apr. 28, 2002).

⁵⁶ NAT'L MENTAL HEALTH ASS'N, CHILDREN WITH EMOTIONAL DISORDERS IN THE JUVENILE JUSTICE SYSTEM, available at <http://www.nmha.org/children/justjuv/index.cfm>. (last visited Apr. 28, 2002).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Anticrime Bills Would Punish Juveniles While Jeopardizing Psychiatric Assessment*, *supra* note 55.

incarcerated youth have mental health diagnoses.⁶¹ In 1997, NMHA and the National GAINS Center for People with Co-occurring Disorders in the Justice System undertook a multi-state study of youth in the juvenile justice system with mental health and substance abuse disorders and the programs in place to serve this population.⁶² The study found that within the states surveyed, most juvenile facilities did not maintain prevalence data to track the mental health characteristics of juvenile offenders.⁶³

Of the available studies, researchers found high rates of mental disorders among youth incarcerated in juvenile facilities.⁶⁴ In a study sponsored by the Office of Juvenile Justice and Delinquency Prevention, over half of the youth that had mental disorders in Texas also suffered from high chemical dependency needs.⁶⁵ The same study determined that sixty-one percent of youth in regional detention centers had at least one psychiatric disorder, and forty-four percent had two or more diagnoses.⁶⁶ Yet, another example of the predominance of mental health and substance abuse problems in the juvenile justice system shows that seventy-two percent of incarcerated youths in South Carolina met the criteria for one or more psychiatric disorders. Also, fifty-three percent of that same group met the criteria of “seriously emotionally disturbed.”⁶⁷

The lack of prevalence studies indicates that the juvenile justice system is not cognizant of the characteristics of its population, and therefore cannot properly provide a rehabilitative environment. The NMHA study found that institutions lacked specific policies for identifying youth with

⁶¹ Joseph J. Coccozza & Kathleen R. Skowrya, *Youth with Mental Health Disorders: Issues and Emerging Responses*, 7 JUV. JUS. J. 1, 5 (2000).

⁶² MICHAEL FAENZA, ET AL., COMMUNITY PERSPECTIVES ON THE MENTAL HEALTH AND SUBSTANCE ABUSE TREATMENT NEEDS OF YOUTH INVOLVED IN THE JUVENILE JUSTICE SYS. 1 (1997).

⁶³ *Id.* at 5.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

mental disorders or substance abuse problems.⁶⁸ Authorities and caretakers used informal processes to identify mental health problems of a youth in crisis. These processes included waiting until a child asked for help, or until an observer pointed out the need for attention.⁶⁹

Equally as important as identifying incarcerated youth with mental disorders, is an analysis of the mental capacity of juveniles and their involvement in what are classified as adult activities. The correlation between juvenile offenders, mental health disorders, and developmental immaturity must be recognized in order to use the juvenile justice system as a rehabilitative mechanism. Because of a minor's susceptibility to mental health problems, the juvenile system needs to properly assess and treat youth and to restore their mental health,⁷⁰ thereby allowing for development at a normal rate. Additionally, the mental capacity of a young person should be distinguished from an adult. This assessment is necessary because developmental immaturity may not be best treated through criminal sanctions.⁷¹

An acknowledgment of developmental immaturity theory will help policy-makers understand both the criminal responsibility and competency of young offenders. The increased involvement of youth in sex, drug use, and violent crime changes the perception of youth as immature decision-makers.⁷² Professors of psychiatry and psychology,

⁶⁸ *Id.* at 6.

⁶⁹ *Id.*

⁷⁰ See *OJJDP Mental Health Initiatives*, OJJDP FACT SHEET (OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, Washington, D.C.), Aug. 20001, #30 (FS-200130), available at <http://www.ncjrs.org/pdffiles1/ojjdp/fs200130.pdf> (last visited Apr. 28, 2002).

⁷¹ See BUILDING BLOCKS FOR YOUTH, *Children in Adult Jails Fact Sheet: Incarcerating Youth with Adult Inmates results in Tragedies*, available at <http://www.buildingblocksforyouth.org/issues/adultjails/factsheet.html>. (last visited Apr. 28, 2002).

⁷² Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 *TEMPLE L. REV.* 1763, 1763 (1995).

Cauffman⁷³ and Steinberg⁷⁴ bring into play psychosocial traits to assess a juvenile's "maturity of judgment."⁷⁵ Moving from the traditional cognitive assessment⁷⁶ of adolescent decision-making, Cauffman and Steinberg include a juvenile's level of responsibility, perspective, and temperance to determine maturity and competence.⁷⁷

Cauffman and Steinberg believe that adolescents may make facially rational choices but that these decisions do not display decision-making competence or maturity of judgment.⁷⁸ One might apply their rationale to a hypothetical involving Charles Williams and his decision to open fire on his high school. Williams probably knew the possible negative consequences of shooting his schoolmates (that someone could get hurt or die, that he would get in trouble, etc.). He likely considered positive consequences that could flow from his actions (satisfaction of a personal vendetta, a sense of empowerment, etc.). From a cognitive point of view, if the positive consequences outweighed the negative, Williams would decide to open fire on the school. This decision, however, does not evidence mature decision-making. Williams made a subjectively rational decision, yet had he exercised the requisite responsibility, autonomy, perspective and temperance, he would have demonstrated a more

⁷³ Elizabeth Cauffman is an Assistant Professor of Psychiatry at the University of Pittsburg.

⁷⁴ Laurence Steinberg is the Laura H. Carnell Professor of Psychology at Temple University and Director of The John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice.

⁷⁵ Cauffman & Steinberg, *supra* note 72, at 1764.

⁷⁶ The cognitive approach for limiting the autonomy of minors is derived from informed consent in the medical field. *Id.* The informed consent doctrine holds that patients can make decisions about their treatment so long as they were made knowingly, competently and voluntarily. *Id.*

⁷⁷ *Id.* at 1764-65. Cauffman and Steinberg identify responsibility as a sense of autonomy, identity, and self-reliance. *Id.* at 1764. Perspective is a sense of morality and context. *Id.* Temperance is the regulation of emotion, avoidance of extremes, and non-impulsivity. *Id.* at 1788.

⁷⁸ *Id.* at 1773.

reasonable, mature sense of judgment.⁷⁹ Therefore, adolescent choice to participate in criminal activity reflects immaturity of judgment despite the display of a seemingly cognitive decision-making processes.⁸⁰

Although adolescents understand the risks involved in their behavior, they still engage in dangerous activities. Adolescents are more likely than adults to give greater weight to anticipated gains than possible losses or negative risks.⁸¹ Relative to adults, adolescents tend to view long term consequences as less important than short term consequences.⁸² Adolescents also rank sensation seeking and social status as high priorities.⁸³ A youth's propensity to take risks may result from misinformation about options and consequences,⁸⁴ or of placing different values on various outcomes.⁸⁵

While Cauffman and Steinberg did not find any conclusive studies on the development of responsibility, they discovered evidence that adolescents have more difficulty in controlling their impulses than adults.⁸⁶ Their findings show that by applying psychosocial traits concurrently with an assessment of cognitive abilities, young people do not demonstrate decision-making behavior comparable to adults. In fact, the traits in question only begin to develop during

⁷⁹ See, e.g., *id.* at 1773-74. Cauffman and Steinberg argue for a complete approach to decision-making competence where emphasis is placed on the interaction between responsibility, perspective and temperance and the use of a minor's cognitive tools. *Id.* at 1765. These three factors, that Cauffman and Steinberg classify as the components of maturity, differ between adolescents and adults. *Id.* at 1788. This disparity, according to Cauffman and Steinberg, may warrant a legal distinction between adults and juveniles. *Id.* at 1774.

⁸⁰ Elizabeth Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 166 (1997).

⁸¹ Grisso, *supra* note 6, at 19.

⁸² Cauffman & Steinberg, *supra* note 72, at 1772-73.

⁸³ *Id.* at 1773.

⁸⁴ *Id.* at 1771.

⁸⁵ *Id.* at 1772.

⁸⁶ *Id.* at 1783.

adolescent years and do not mature until the age of eighteen.⁸⁷ These findings need to be taken into account in assessing whether the courts and prosecutors should treat juvenile offenders like adult offenders.

A Juvenile's Competency to Stand Trial and the Impact of Developmental Immaturity

The maturity of judgment findings affect not only the juvenile's decision to commit the crime, but also the juvenile's competency to stand trial once the crime is committed. Due process and competency to stand trial become greater concerns when juvenile justice policy treats juvenile offenders like adults and prosecutes them in adult courts. Under the *parens patriae* doctrine, a child has the right to custodial care rather than liberty.⁸⁸ Under this rationale, the juvenile court removes some of the procedural rights guaranteed during an adult criminal trial.⁸⁹ In light of the new laws for prosecuting juvenile offenders, the trial process and sentencing of minors relatively parallels adult criminal proceedings. Due process is therefore necessary to ensure that juvenile defendants have the same rights and protections as adults to defend themselves against legal allegations.⁹⁰ One such protection is the right not to be tried unless adequately competent to participate in one's defense. The defendant must be able to understand the nature and effect of the proceedings, provide necessary information for an adequate defense, and assist in that defense.⁹¹

A review of the test for determining a defendant's competency to stand trial and the difficulty in assessing a

⁸⁷ *Id.* at 1776. Cauffman and Steinberg cite well-known child psychoanalyst Erik Erikson's findings on youth and identity. *Id.* at 1776-77. Erikson found that while a young person is trying to find a sense of identity, it is unlikely that maturity of judgment will be exercised. *Id.* at 1776. Erikson's line of thought established that a coherent sense of identity does not emerge before age eighteen. *Id.* at 1777.

⁸⁸ NURCOMBE & PARTLETT, *supra* note 27, at 274.

⁸⁹ *Id.*

⁹⁰ Grisso, *supra* note 6, at 3.

⁹¹ NURCOMBE & PARTLETT, *supra* note 27, at 308.

juvenile's competency illustrates the problems in treating juvenile offenders like adults. The United States Supreme Court set forth the standard test for determining competency to stand trial in *Dusky v. United States*.⁹² This test determines whether the defendant sufficiently demonstrates present ability to consult with an attorney using a reasonable degree of rational and factual understanding of the legal proceedings. Under *Dusky*, the defendant must understand the criminal process and the players in the legal process to be considered competent to stand trial.⁹³ Additionally, the defendant must be able to contribute to his defense.⁹⁴ Finally, *Dusky* requires that a defendant's current capacity to understand consequences and make rational decisions be the focal point of competency evaluation.⁹⁵ Thus, the defendant's state of mind at the time of the offense does not factor into a competency assessment.

Proper assessment of juvenile competency to stand trial pre-institutionalization can be a way to identify juvenile offenders amenable to treatment and prevent unnecessary transfers to adult court. Competency to stand trial is usually assessed through forensic evaluations. The juvenile court retains its rehabilitative role by requiring a more comprehensive forensic evaluation than required of adult defendants.⁹⁶ However, *Dusky* enumerates a functional test that requires the defendant to be evaluated according to present functional ability or impairment to rationally assist legal counsel. A forensic evaluation of juvenile offenders needs to broaden the scope of assessment to account for more than just functional ability.⁹⁷ In addition to evaluating competency to stand trial and mental state at the time of the offense, the juvenile court should mandate that clinicians evaluate the offender's mental health. By requiring a comprehensive evaluation and seeking a composite treatment

⁹² *Dusky v. United States*, 362 U.S. 402, 402 (1960); *see also* *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (stating that *Dusky* provides the standard test for competency to stand trial).

⁹³ *See Dusky*, 362 U.S. at 402.

⁹⁴ *See id.*

⁹⁵ *See id.*

⁹⁶ NURCOMBE & PARTLETT, *supra* note 27, at 306.

⁹⁷ *Id.*

recommendation, the juvenile court retains a rehabilitative role that a criminal system cannot provide.

The issue of juvenile competency to stand trial in adult court led the Juvenile Justice Center to conduct a study rethinking the assessment and competency of juveniles.⁹⁸ The Center emphasizes that the role of mental health professionals is to assist courts' understanding that the commission of a serious crime does not necessarily mean a child meets the requisite competency to stand trial.⁹⁹ The Center recommends that the mental health evaluator reports what stage of development the child is in, what characteristics make the individual a child, the needs of the child, and the risk of adult corrections for the child.¹⁰⁰ A proper assessment of the child's competency to stand trial would include an evaluation of mental illness and intelligence and an assessment of the impact of immaturity on the ability to assist in one's own defense.

Traditionally, competency to stand trial in criminal justice involved mental illness or mental retardation.¹⁰¹ If the court found the defendant incompetent, all states provided for a delay in trial processes while efforts were made to restore competency through treatment for mental incapacity.¹⁰² The problem that arises when the criminal court finds that the child does not have the requisite capacity to stand trial, is that the incapacity may not only be attributed to a mental disorder, but developmental immaturity as well. If developmental immaturity leads to a holding that the minor is incompetent to stand trial, then this particular incapacity *cannot* be "treated" to restore a child to a normal mental state as would have occurred if an adult was tried.

⁹⁸ MARTY BEYER ET AL., JUVENILE JUSTICE CTR., MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT, COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE v, 1-2 (Patricia Puritz et al. eds., 1997).

⁹⁹ *Id.* at 26-33.

¹⁰⁰ *Id.* at 1.

¹⁰¹ *Id.* at 25.

¹⁰² *Id.*

The correlation between age and competency to stand trial also relates to findings of developmental immaturity. Dr. Deborah Cooper conducted a study examining the performance on a standard competency screening measure of children.¹⁰³ Her test group consisted of youths aged thirteen to sixteen sentenced to their first institutional placement in the South Carolina Department of Juvenile Justice.¹⁰⁴ The study utilized a modified version of the adult measure of competency to stand trial. It consisted of multiple choice and short answer questions pertaining to courtroom layout, the functions and roles of court personnel, knowledge of charges and penalties, and knowledge of the functions and roles of judges and attorneys in specific situations.¹⁰⁵ The juveniles took the test without any instruction on the subject matter.¹⁰⁶ Then they watched a videotape providing instruction on juvenile court personnel and proceedings, information about charges and the penalties, and instruction on how to contact and assist their counsel.¹⁰⁷ After receiving the training, the same test was re-administered to the class.¹⁰⁸ In comparing the test results, Dr. Cooper found a correlation between age and competency to stand trial.¹⁰⁹

Dr. Cooper's study found that all age groups, even after legal training, did not manifest an understanding of court proceedings at the level required to demonstrate competency to stand trial.¹¹⁰ While the training video increased the understanding of criminal proceedings for some, the group's scores still did not reach a level indicative of competency.¹¹¹ The study found the most significant increase in competency

¹⁰³ Deborah Cooper, *Juvenile's Understanding of Trial Related Information: Are They Competent Defendants?*, 15 BEHAV. SCI. L. 167 (1997).

¹⁰⁴ *Id.* at 169.

¹⁰⁵ *Id.* at 171.

¹⁰⁶ *Id.* at 174.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 177.

¹¹⁰ *Id.* at 178.

¹¹¹ *Id.*

among the thirteen-years-old subjects.¹¹² On the other hand, the scores for the fourteen, fifteen, and sixteen-years-old age groups did not substantially transform between pre-test and post-test.¹¹³ Of the 112 children surveyed, only two who scored “incompetent” at pre-test achieved scores higher than the point for competency post-test.¹¹⁴ Cooper concluded that children lack the understanding of the legal process necessary for a finding of competency to stand trial.¹¹⁵ Following Cooper’s conclusion, even after being exposed to educational training regarding the legal process, juveniles could not satisfy the test for legal competency under *Dusky*.

Because juveniles cannot be found competent to stand trial, they will fail the *Dusky* element of ability to assist counsel. In juvenile cases presented in criminal courts, the role of the attorney transforms from an agent acting in the children’s best interest to the more traditional role of criminal defense attorney.¹¹⁶ However, the adult-child dyad frustrates the attorney-client relationship necessary for an adequate defense.¹¹⁷ Juveniles often do not understand the role of counsel as an advocate for their interests.¹¹⁸ Instead, because a minor views the lawyer as an adult authority figure, minors have a difficult time understanding how an adult would take their side against other adults in the legal process.¹¹⁹ This distrust may result in the minors withholding important information that the attorney needs to construct the case.¹²⁰

Furthermore, developmental immaturity and the existence of a mental disorder significantly impact a juvenile’s

¹¹² At pre-test, this age group scored significantly lower than the older age groups. After the training, the thirteen-year-olds scored nearly equivalent to the older age groups. *Id.* at 177.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings – Cognitive Maturity and the Attorney-Client Relationship*, 33 U. OF LOUISVILLE J. OF FAM. L. 629, 635 (1995).

¹¹⁷ *Id.* at 643.

¹¹⁸ See *id.* at 644, 647; see also Grisso, *supra* note 6, at 7-9.

¹¹⁹ BEYER, *supra* note 98, at 31.

¹²⁰ Grisso, *supra* note 6, at 16.

ability to assist counsel. Usually, the abilities of sensation, perception, and memory have matured by early adolescence.¹²¹ However, studies have shown that many youths enter the juvenile justice system with pre-existing mental health disorders.¹²² Developmental immaturity and mental disorders inhibit the requisite abilities of sensation, perception, and memory that a defendant needs to communicate with counsel.¹²³ Disorders such as attention deficit/hyperactivity disorder and mental retardation make it difficult for young defendants to accurately remember the trial events and communicate the events in a coherent manner.¹²⁴ Emotional immaturity also affects an adolescent's communication with an adult because of young people's perception of the lawyer as an authority figure rather than an advocate.¹²⁵

Another component of effective communication with counsel requires that the adolescent make strategic decisions on how to proceed with the case. The lawyer must be able to counsel the juvenile on these decisions, and the client, in turn, must make a decision about his or her rights in order to satisfy the *Dusky* competency test. One of the most important decisions is how to proceed with the diversion, detention, transfer, or plea in the case. After assessing the facts as conveyed by the client, the lawyer uses legal expertise to evaluate theories, defenses and alternatives, and then advises the client on the best or most appropriate action. This requires that the client use abstract reasoning and inductive and deductive logical processes, which for a minor, have not fully developed.¹²⁶

The ability of juvenile offenders to have a meaningful understanding of the process is questionable in light of the correlation between age and lack of competency to stand trial.

¹²¹ BEYER, *supra* note 98, at 30-31.

¹²² See FAENZA, *supra* note 62, at 1; BEYER, *supra* note 98, at 31; Coccozza & Skowyra, *supra* note 61.

¹²³ See Grisso, *supra* note 6, at 13-14.

¹²⁴ *Id.* at 7.

¹²⁵ See *id.* at 16.

¹²⁶ Cowden & McKee, *supra* note 116, at 646.

Moreover, a high percentage of mentally retarded or borderline mentally retarded young people in the juvenile justice system contribute to the inability of juvenile clients to assist counsel.¹²⁷ Mental disorders can lower the cognitive maturity level below that of a child's chronological age.¹²⁸ Given that a juvenile's cognitive maturity is not fully developed, the ability to understand the legal alternatives and their consequences is impaired.

Call to Juvenile Justice Policy Makers to Return to Rehabilitative Theory

The current district attorney for San Diego County, Paul Pfingst, believes that the first step in addressing youth violence is to ensure that offenders like Charles Williams are held accountable.¹²⁹ Pfingst believes that predictability of punishment should be made clear to people who contemplate committing crimes.¹³⁰ Although no death penalty exists for juveniles in the United States and no state allows a life sentence without parole for fourteen- and fifteen-year-olds, Pfingst promises a severe sentence for Williams. "[There are] two paths to follow: [o]ne is to make sure that justice is done for the victims in this case who have suffered an enormous tragedy. The other path is to learn."¹³¹ Dr. Kinlan, on the other hand, proposes a front-end solution.¹³² She believes that the solution will recognize that young people tend to be alienated because of a failure to properly identify mental health disorders.¹³³ A strategy to prevent youth crime involves greater participation of parents, school, and community in recognizing mental health problems.

¹²⁷ See Coccozza & Skowrya, *supra* note 122, at 5; NAT'L MENTAL HEALTH ASS'N, *supra* note 56.

¹²⁸ Cowden & McKee, *supra* note 116, at 647.

¹²⁹ Interview by Gwen Ifill with Dr. Joan Kinlan, *supra* note 50.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

If juvenile offenders in criminal court cannot meet the *Dusky* standard for competency to stand trial, juvenile justice policy needs to incorporate development theories to address the unique circumstances of its offenders. Developmental psychology evidence demonstrates that adolescent decision-making abilities, especially in regards to judgment, have not matured to an adult level.¹³⁴ Especially for younger teens, a significant disparity exists between understanding and reasoning, which in turn affects culpability and competency to stand trial.¹³⁵ Developmental delay is common in young offenders who also have intellectual deficits, learning disabilities, emotional disorders, and reduced educational and cultural opportunities.¹³⁶ These characteristics must be examined and accounted for in policy, particularly because of the ease in which juvenile cases are transferred to criminal court.

A return to rehabilitative theory by lawmakers who shape juvenile justice policy will ensure that the unique characteristics of adolescents are accounted for. The central issue in a juvenile delinquency proceeding should therefore focus on determining the child's amenability to treatment.¹³⁷ Assessment needs to include a determination of rehabilitative potential and the specific needs of the individual. One of the factors considered in assessing amenability to treatment is the seriousness of the offense. Most statutes tend to weigh in favor of transfer to criminal court for the commission of serious crimes.¹³⁸ Lawmakers justify the transfer by arguing that youth who commit serious crimes are less likely to be considered amenable to juvenile court disposition.¹³⁹ This objective criterion should not be the determining factor in an offender's evaluation. Additional subjective components to consider include environment and personality, testimony from

¹³⁴ Scott & Grisso, *supra* note 80, at 182.

¹³⁵ *See id.* at 156-72.

¹³⁶ Grisso, *supra* note 6, at 21.

¹³⁷ Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299 (1999).

¹³⁸ BEYER, *supra* note 98, at 25.

¹³⁹ Slobogin, *supra* note 137, at 307.

mental health professionals, and familial and societal factors. Only when no treatment options exist within the juvenile system should the case be transferred to criminal court.¹⁴⁰

Because all children with emotional or mental disorders cannot be released into the community, collaboration between the juvenile justice system and the mental health system should exist to develop intra-system services for youth. A major obstacle in identifying youth with mental disorders is the lack of screening and assessment.¹⁴¹ A large gap in services exists at the front end of the juvenile justice system.¹⁴² Juvenile facilities have few, if any, early identification and early intervention programs to assess the mental health of the offender.

The juvenile facilities that do have successful early intervention and prevention programs provide a comprehensive arrangement of services to serve potential juvenile offenders. For example, South Carolina implemented a statewide School Intervention Program.¹⁴³ This program provides education and intervention services to high-risk students identified by schools and community agencies before they become trapped in the justice system.¹⁴⁴ Some South Carolina counties have diversion programs with immediate assessment, crisis intervention, and family counseling to status offenders.¹⁴⁵ Additionally, the Mental Health/Juvenile Justice Initiative in Orange County, New York, uses a multi-agency approach to meet with youth and family members before admission to a juvenile justice program.¹⁴⁶ The program makes available mental health, substance abuse treatment, and

¹⁴⁰ *Id.* at 299.

¹⁴¹ Coccozza & Skowrya, *supra* note 61, at 4.

¹⁴² FAENZA, *supra* note 62, at 5.

¹⁴³ *Id.* at 15.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* Status offenses are acts that only a juvenile can be arrested for. These include runaway, truancy and violations of liquor laws. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN – OFFENDERS IN JUVENILE COURT, 1994 (1996), available at <http://www.ncjrs.org/txtfiles/offender.txt>.

¹⁴⁶ FAENZA, *supra* note 62, at 17.

intensive case management during intake, supervision, and the investigatory stage of probation.¹⁴⁷

Services for incarcerated youth also lack at the back-end of the system when juvenile offenders are released from custody. Few policies link the services received in detention with similar community services post-incarceration.¹⁴⁸ This tends to have a reverse effect on the treatment the youth received in juvenile justice programs and can lead to recidivism.¹⁴⁹ The NMHA recommends the integration of justice system services with local level services provided by schools, welfare agencies, and community organizations.¹⁵⁰ South Carolina's Bridge program has a successful back-end policy, in addition to its diversion programs, to continue mental health and substance abuse treatment of juvenile offenders.¹⁵¹ The Bridge program provides a year of services in the community after the juvenile has been released from juvenile facilities or inpatient substance abuse treatment.¹⁵² The Bridge program offers specialized services for the individual's needs and goals. These services include alcohol/drug counseling, family-based counseling, health care, education services, and mentoring.¹⁵³ Unless an objective and subjective assessment of the circumstances shows otherwise, youth convicted of non-violent and minor offenses should be diverted from incarceration and into treatment.¹⁵⁴ Juvenile detention placement for these individuals will only increase

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 5.

¹⁴⁹ Donna Walker James, American Youth Policy Forum, REDUCING JUVENILE CRIME, WHAT WORKS – AND WHAT DOESN'T: A FORUM BRIEF (2000), available at <http://www.aypf.org/forumbriefs/2000/fb071400.htm> (last visited Apr. 28, 2002).

¹⁵⁰ NAT'L MENTAL HEALTH ASS'N, *supra* note 56.

¹⁵¹ FAENZA, *supra* note 62, at 15.

¹⁵² *Id.* at 24.

¹⁵³ *Id.*

¹⁵⁴ Slobogin argues that juvenile courts evaluate amenability in terms of culpability and dangerousness. Slobogin, *supra* note 126, at 330. He posits that the definition of amenability should focus on rehabilitation and the reduction of recidivism. *Id.* at 331.

the number of mentally ill youth who will not receive adequate mental health services.¹⁵⁵

Because developmental psychology theories find that juveniles are incapable of adult competency, a separate adjudication and disposition system from the adult criminal courts needs to be maintained.¹⁵⁶ The juvenile court is in a better position to understand the reduced culpability and lower competency to stand trial of young offenders. Systemic procedures should be developed to impede an immediate transfer of juvenile cases to adult court. Especially because youth aged thirteen and younger have the greatest number of incapacities, a blanket legal presumption of incompetency to stand trial should be implemented when their cases face the possibility of transfer to criminal court.¹⁵⁷ Advocates also recommend mandatory competency review of all adolescents before criminal court proceedings are held.¹⁵⁸ This makes competency a question during the judicial waiver proceeding before the case transfers out of juvenile court. Additionally, mandatory competency review prevents immediate transfer in states that have statutory exclusions or allow prosecutors to directly file in criminal court.

While states have decided to treat juveniles as adults for the commission of serious offenses, many questions remain as to the effectiveness of the decision to decrease a juvenile's ability to commit a crime. When do the acts of a child become the acts of an adult? Does a fifteen-year-old boy, tormented by his classmates, have a mental or emotional disorder that would disable him from rational decision-making? Does he or she have the cognitive maturity to form requisite intent for murder and understand the wrongfulness of the crime? The answers to these questions speak to criminal responsibility, but they also place at issue the child's competency to stand trial in an adult court.

¹⁵⁵ See Coccozza & Skowyra, *supra* note 61, at 8-9.

¹⁵⁶ Scott & Grisso, *supra* note 80, at 188.

¹⁵⁷ Grisso, *supra* note 6, at 23.

¹⁵⁸ *Id.*

Developmental immaturity affects the juvenile's ability to understand what is in his or her best interests during trial as well as the ability to communicate effectively with counsel. The transfer of juvenile cases to criminal court assumes that adolescents like Charles Williams have the same competency level as adults to adequately assist in the legal proceedings of their cases. However, the available studies show that age and developmental stages distinguish the capacities of young people from those of adults. The prevalence of mental health and substance abuse needs among juvenile offenders suggests that this population is amenable to non-penal treatment. The studies evidence a greater likelihood of reducing recidivism through an evaluation of treatable factors that contribute to a juvenile's decision to commit a crime. Finally, perhaps that chance to grow up in the outside community is, itself, the best treatment a young person can receive to develop into a mature decision-maker. The integrity and underpinnings of the juvenile justice system therefore need to be maintained and should be revisited in order that cross-system collaborative efforts and more extensive research improve the response to juvenile offenders.

Out on Their Own: California's Foster Youth and the Inequalities of the Independent Living Program

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Introduction

Foster youths aging out of the foster care system face myriad challenges to their independence. Unfortunately, the Independent Living Program (ILP) intended to assist them in learning self-sufficiency skills present obstacles for them. ILP sprang from a desire to help foster youths emancipating from foster care prepare for independent adult living.¹ ILPs are supposed to provide learning opportunities for foster youths to learn about money management skills, prepare for the job market, plan for college, among other things.² In California, counties administer ILPs by running their own county-specific ILPs or contracting with outside entities.³ Funding of ILPs, however, come from a mixture of federal, state, and county

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¹ U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TITLE IV-E INDEPENDENT LIVING PROGRAMS: A DECADE IN REVIEW I-4 (1999).

² See LISA K. FOSTER, CALIFORNIA RESEARCH BUREAU FOSTER CARE FUNDAMENTALS: AN OVERVIEW OF CALIFORNIA'S FOSTER CARE SYSTEM 29-30 (2001).

³ CALIFORNIA DEP'T OF SOCIAL SERVICES, ALL-COUNTY INFORMATION NOTICE NO. I-40-98 (Jul. 22, 1998).

sources. In the federal level, the Foster Care Independence Act of 1999 (FCIA)⁴ provides states with funding for use in assisting foster youths aging out of care into independent adult lives.⁵

California's ILPs are not perfect. Their problems primarily lie in their structure. A disconnection exists between delivery of services through ILPs and accountability for effective programs. Specifically, delivery of benefits to foster youths under California ILPs is inconsistent, resulting in disparate treatment of foster youths residing in different counties. Unfortunately, FCIA compounds the problem. FCIA does not require uniform provision of services throughout a given state, yet simultaneously requires that foster youths benefiting from ILPs be treated fairly and equitably.⁶

As California ILPs differ from county to county, foster youths living in multiple counties for their placements are exposed to inconsistent and ineffective training for self-sufficiency. California has no effective means of ensuring accountability in the delivery of ILP services by counties to foster youths. The State does not have regulations for the administration of ILPs by the counties. In addition, the lack of communication between counties and state agencies results in under-utilization of ILP services and threatens non-compliance with FCIA.

This comment argues that California's ILPs produce unfair and inequitable treatment of foster youths. These problems are serious and must be resolved. Otherwise, California will stand to lose FCIA funding, which will further harm foster youths. Part I explores the background of ILP funding, FCIA, and the California ILP system. Part II describes the problems that exist in California's ILPs. Finally, Part III discusses solutions for reforming California's ILPs to

⁴ Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (1999) (codified as amended in scattered sections of 42 U.S.C.).

⁵ 42 U.S.C. § 677(c)-(d) (Supp. V 1999).

⁶ 42 U.S.C. § 677(b)(2)(B) & (E).

ensure that the State complies with FCIA and provides equal and maximum benefits to foster youths across the State.

I. Background of ILPs

A. Social Background

Every year, approximately 20,000 foster youths transition out of the foster care system and become solely responsible for their own care.⁷ Their transition into adulthood is often difficult. Congress found that foster youths encounter “significant difficulty” transitioning into adulthood.⁸ Foster youths were found to graduate out of foster care with no social⁹ or financial support.¹⁰ Tragically, many foster youths emancipate from foster care into homelessness.¹¹ An estimated forty to fifty percent of former foster youths become homeless.¹² For example, in 1997, more than 12,000 youths living on the streets of Los Angeles County, many of whom aged out of foster care.¹³ In addition to homelessness, foster youths who age out of the system confront other serious problems such as unemployment,¹⁴ bad health, educational

⁷ Foster Care Independence Act of 1999, § 101(a)(3) (codified as amended at 42 U.S.C. § 877(a)(3) (Supp. V 1999)).

⁸ *Id.* at § 101(a)(4) (codified as amended at 42 U.S.C. § 877(a)(4)).

⁹ U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *supra* note 1, at I-2.

¹⁰ *Post-Foster Care Independent Living Programs: Hearing on Foster Care Independent Living Before the House Comm. on Ways and Means Subcomm. on Human Res.*, 106th Cong. (1999) (statement of Mark E. Courtney, Assistant Professor School of Social Work and Institute for Research on Poverty, University of Wisconsin-Madison). Mr. Courtney testified that more than half of foster youths graduate from the foster care system with less than \$250. *Id.*

¹¹ *Id.*

¹² JUVENILE JUSTICE STUDY COMMITTEE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA EDUCATION FUND, *LIFE AFTER FOSTER CARE: JUVENILE JUSTICE IN CALIFORNIA: PART II: DEPENDENCY SYSTEM: FACTS AND ISSUES* ch. VI ¶ 3 (1998), available at <http://ca.lww.org/jjds/chap6.html> (last visited Apr. 21, 2002).

¹³ *Foster Care*, CAL. J., Dec. 1, 1997, at 1.

¹⁴ David Reyes, *Something Lost in Transition for Foster Care Teens*, L.A. TIMES, Feb. 10, 2000, at B1. An Orange County grand jury report found that twelve to eighteen months after leaving foster care, half of former

deficits, severe housing problems, substance abuse, and run-ins with the criminal justice system.¹⁵

In California, the growth rate for children entering foster care far exceeds that of the population of all children in the State.¹⁶ California's foster youths are eligible for state-administered foster care until the age of eighteen, and sometimes until nineteen if they need time to graduate from high school.¹⁷ After that, their state-supported foster care terminates.¹⁸ From the burgeoning population of California foster youths, 3,728 foster youths emancipated from foster care in 1999.¹⁹ Like other foster youths in the country, California foster youths are not prepared for self-sufficiency when they transition out of the system.²⁰

foster youth were jobless, one-third were not high school graduates, and almost half of them had out-of-wedlock children. *Id.*

¹⁵ Richard P. Barth, *On Their Own: The Experiences of Youth After Foster Care*, 7 CHILD & ADOLESCENT SOC. WORK No. 5, Oct. 1990, at 419-20, cited in JUVENILE JUSTICE STUDY COMMITTEE, *supra* note 12, at ch.VI ¶ 3.

¹⁶ LITTLE HOOVER COMMISSION, NOW IN OUR HANDS: CARING FOR CALIFORNIA'S ABUSED AND NEGLECTED CHILDREN (Report No. 152) iii (1999), available at <http://www.lhc.ca.gov/lhcdir/report152.html> (last visited Apr. 21, 2002). In 1999, there were 105,000 foster children in California. *Id.* at ii. Given current trends, that number is expected to top 167,000 by 2005. *Id.* at i.

¹⁷ *Id.* at 99.

¹⁸ *See id.*

¹⁹ CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SAFETY, PERMANENCY, WELL-BEING: CHILD WELFARE OUTCOMES 1999: ANNUAL REPORT IV-27 (1999).

²⁰ According to foster youths testified before the California Assembly Human Services Committee in 1998, ILPs did not sufficiently prepare them for self-sufficiency. LITTLE HOOVER COMMISSION, *supra* note 12, at 99. The California State Office of the Ombudsman for Foster Care conducted focus groups consisting of foster youth that mirror this testimony. Foster youth indicated that state ILPs provide insufficient employment services and job training, fail to give information about higher education programs and funding, and do not provide enough support and services (like housing programs) after emancipation. CALIFORNIA STATE OFFICE OF THE OMBUDSMAN FOR FOSTER CARE, FOSTER CARE OMBUDSMAN YOUTH FOCUS GROUP CONCERNS (2001).

B. Legal Background: FCIA and California's ILPS

Enacted in 1999, FCIA aims at helping foster youths become self-sufficient by doubling federal funds available to the States.²¹ FCIA requires each State to contribute a twenty-percent match to the total allocation of federal ILP funds to that State.²² FCIA requires States to design and implement ILP programs that meet the purposes of the Act and to “[e]nsure that all political subdivisions in the State are served by the program, *though not necessarily in a uniform manner.*”²³ States administering ILPs need to “use objective criteria for determining eligibility for benefits and services under the programs, and for *ensuring fair and equitable treatment of benefit recipients.*”²⁴

While States enjoy flexibility in designing their ILPs, FCIA requires that states be accountable to the Secretary of Health and Human Services for the performance of those programs.²⁵ The Secretary is required to assess various outcome measures relating to state ILPs, and to propose state accountability procedures and penalties for non-compliance with FCIA requirements.²⁶ To acquire federal funds under FCIA, the State must submit a state plan that satisfies FCIA's requirements.²⁷ The state plan must describe the State's

²¹ NATIONAL FOSTER CARE AWARENESS PROJECT, FREQUENTLY ASKED QUESTIONS ABOUT THE FOSTER CARE INDEPENDENCE ACT OF 1999 AND THE JOHN H. CHAFEE FOSTER CARE INDEPENDENCE PROGRAM 12 (2000) (increasing from \$70 million to \$140 million in capped entitlement) [hereinafter NFCAP FAQ].

²² *Id.*

²³ 42 U.S.C. § 677(b)(2)(B) (Supp. V 1999) (emphasis added).

²⁴ *Id.* at § 677(b)(2)(E) (emphasis added).

²⁵ *See id.* at § 677(e) (outlining Secretary of Health and Human Services' authority to impose penalties to states that fail to comply with the FCIA); *see also* NFCAP FAQ, *supra* note 21, at 21.

²⁶ *See* 42 U.S.C. § 677(f)-(g); *see also* Child Welfare League of America, Press Release, Foster Care Independence Act of 1999 (Nov. 23, 1999), available at <http://www.cwla.org/advocacy/indlivhr3443.htm> (last visited Apr. 21, 2002).

²⁷ *See* 42 U.S.C. § 677(b); *see also* NFCAP FAQ, *supra* note 21, at 15.

independent living services, account for its spending of ILP funds, and disclose the effectiveness of that spending.²⁸

In California, the California Department of Social Services (CDSS) distributes FCIA funds to the counties.²⁹ Under the state ILP system, counties may operate their own ILPs, or contract all or part of the services to a service provider.³⁰ Each foster youth is entitled to a transitional independent living plan (TILP) to be developed by his or her social worker.³¹ A TILP is developed by a social worker on behalf of foster youths approaching emancipation from foster care.³² It describes whether the youth is job-ready, and what services and education the youth should acquire in order to transition successfully into adult life.³³ The foster youth is to be provided with a copy of her plan.³⁴ The Children's Services Operations Bureau must then review the foster youth's record to determine whether the youth has completed the plan by age sixteen and a half. In addition, foster youths attend classes intended to assist them prepare for self-sufficiency and administered either by the county of residence or by its contractors.

II. Problems with California's ILPs

FCIA was intended to offer the opportunity for all foster youths to receive equal opportunities to receive the services and programs necessary to successfully live

²⁸ CALIFORNIA DEP'T OF SOCIAL SERVICES, DSS MANUAL CWS, MANUAL LETTER NO. CWS-93-01, at 265 (Jul. 1, 1993) [hereinafter DSS MANUAL CWS].

²⁹ CALIFORNIA DEP'T OF SOCIAL SERVICES, INDEPENDENT LIVING PROGRAM, ALL-COUNTY INFORMATION NOTICE NO. I-40-98, at 1 (July 22, 1998), in California STATE OFFICE OF THE OMBUDSMAN FOR FOSTER CARE, FOSTER CARE INFORMATION RESOURCES 10 (Oct. 2001), available at <http://www.dss.cahwnet.gov/getinfo/acin98/I-40-98.PDF> (last visited Apr. 21, 2002) [hereinafter ILP ALL-COUNTY INFORMATION NOTICE].

³⁰ *Id.*

³¹ DSS MANUAL CWS, *supra* note 28, at 125.

³² *Id.*

³³ *See id.* at 125-26.

³⁴ *Id.* at 126.

independently.³⁵ All fifty-eight counties in California offer independent living or transitional services to foster youths in one fashion or another.³⁶ However, fewer than fifty percent of eligible foster youths receive ILP funding.³⁷ This low percentage rate is the result of unequal treatment under the different ILPs across the State. This inequality spreads in three levels: different services in different ILPs, lack of communication among agencies, and lack of accountability in the system.

A. *Unequal Treatment of Foster Children in the ILP System*

Because counties develop and administer their own ILPs in California, ILPs differ from county to county. Unfortunately, the differences are so significant that foster children in California are treated unequally. The differences lie in the types of the services provided, the administration of ILPs, and counties' individual policies on ILP eligibility. These differences fail to ensure fair and equal treatment of foster children, violating the intent of FCIA.

1. Different Services from Different Counties

ILP services, benefits, and curricula vary greatly among counties. Therefore, the county where a foster youth resides serves as one of the most significant factors in determining the quality and quantity of services he or she receives. Similar to many other states, foster children in California are often characterized by their transient living situations. Studies have shown that fifty percent of foster youths in non-relative placements had three or more placements after one year.³⁸ It is common for foster youths to be placed in homes outside the counties where they lived

³⁵ See 42 U.S.C. § 677(b)(2)(E) (Supp. V 1999).

³⁶ LITTLE HOOVER COMMISSION, *supra* note 16, at 100.

³⁷ ILP ALL-COUNTY INFORMATION NOTICE, *supra* note 29, at 2.

³⁸ Center for Social Services Research, University of California, Berkeley, *Child Welfare Placement Stability from CWS/CMS*, CAL. CHILDREN'S SERVICES ARCHIVE, July 2001, available at http://cssr.berkeley.edu/CWSCMSreports/Highlights/data/stability_CW_Q2_01_V6.pdf (last visited Apr. 21, 2002).

before entering into foster care. Nearly forty percent of foster children aged between fifteen and eighteen are placed out of their home counties in California.³⁹ When foster children move from one county to another county, they are likely to receive different ILP services. The significant differences among ILPs result in unequal treatment of foster youths in ILP system.

For example, Los Angeles County has the largest ILP program in California.⁴⁰ Some foster youths who are the county's dependents and continue to be placed in the county's foster homes are recipients of some of the most generous ILP benefits in the State, such as free laptop computers upon completion of the program and scholarships for college.⁴¹ In contrast, Riverside County, which neighbors Los Angeles County, struggles to provide graduating foster youths with small monetary graduation bonuses when they graduate from high school.⁴² Foster youths from Los Angeles County feel "cheated" and "unlucky" when they are placed in Riverside

³⁹ BARBARA NEEDELL ET AL., FOSTER CARE COHORT REPORTS, *in* CHILD WELFARE SERVICES REPORTS FOR CALIFORNIA (University of California at Berkeley Center for Social Services Research 2002) (on file with authors). The data was retrieved from CDSS RADD-CWS/CMS, a database on statewide information on foster children, in March 2000 under the following criteria: children aged fifteen to eighteen, county of jurisdiction, and county of placement. The data reflects as numbers of January 31, 2001. 6,463 children out of 16,366 children aged fifteen to eighteen placed out of their county of jurisdiction. *Id.* See Foster Care Cohort Reports for similar databases, at <http://cssr.berkeley.edu/CWSCMSreports/cohorts/> (last visited Apr. 21, 2002).

⁴⁰ See CALIFORNIA DEP'T OF SOCIAL SERVICES, COUNTY FISCAL LETTER (CFL) NO. 01/02-13 ON FISCAL YEAR (FY) 2001/02 INDEPENDENT LIVING PROGRAM (ILP) PLANNING ALLOCATION, at 3 (July 19, 2001), available at http://www.dss.cahwnet.gov/getinfo/cfl01/pdf/01-02_13.pdf (last visited Apr. 21, 2002) (showing that Los Angeles County is expected to received \$18,213,236 in ILP funding, which amounts to over forty percent of the total California ILP allocation).

⁴¹ Interview with Los Angeles County ILP graduate, in Sacramento, Cal. (Apr. 2, 2002). The authors have chosen not to include the names of most of the interviewees to protect their identities.

⁴² Interview with Riverside County foster youth, in Sacramento, Cal. (Mar. 2002).

County and lose the benefits of the Los Angeles County ILP, sometimes only weeks before graduating from ILP.⁴³

2. Differences in Program Administration

Furthermore, inequality in program administration contributes to the disparate treatment of foster youths in California. ILPs are administered by different agencies in different areas of the State. This increases differences in the quality of service provision, services offered, and program outcomes. Most ILPs in California are run either by the Community College Foundation (CCF), the county child welfare agencies, or a combination of both CCF and the county child welfare agency.⁴⁴ CCF is an organization that administers various programs relating to education, mentoring, training and support services. CCF's mission is to promote excellence in education through various programs including ILPs.⁴⁵ The California Department of Social Services contracts with CCF and directs a portion of federal and state

⁴³ *Id.* Another example of program inconsistency is between Sacramento and Yolo Counties, two neighboring Northern California counties. Sacramento ILP classes offered by the Community College Foundation are structured on a unit basis, which provides incentives to youth depending on the number of units they have completed. This structure mirrors college courses, offering youth a monetary incentive and potential high school credits for completing three to four unit courses in topics such as money management, life skills, and career development. Yolo County ILP does not offer Community College Foundation classes. The county agency has a completely different structure to their program: offering bimonthly classes on different topics, and providing participating foster youth a standard monetary incentive for showing up to both meetings in a month. Interview with Yolo County ILP participant, Sacramento, Cal. (Mar. 2002). Yolo County ILP pays for graduating seniors to attend a Computer Camp, where foster youth spend a weekend learning computer skills, and return with a free computer. *Id.* However, Sacramento County does not provide this service, so Sacramento seniors placed in Yolo County are left at home while the rest of their peers receive this benefit. *Id.*

⁴⁴ CALIFORNIA YOUTH CONNECTION, THE INDEPENDENT LIVING PROGRAM: FREQUENTLY ASKED QUESTIONS (2002).

⁴⁵ COMMUNITY COLLEGE FOUNDATION, COMMUNITY COLLEGE FOUNDATION STATEWIDE INDEPENDENT LIVING PROGRAM, *in* FOSTER CARE SERVICES BUREAU, CALIFORNIA DEP'T OF SOCIAL SERVICES, MATERIALS FOR ILP INSTITUTE 2001, in Sacramento, Cal (Apr. 16, 2001) [hereinafter ILP INSTITUTE MATERIALS] (on file with authors).

ILP funds to CCF to administer its ILPs at community colleges across the State.⁴⁶ In addition to government funding, CCF may use private or supplemental agency funding. As a result, its programs provide different services and benefits than those provided in programs that state agencies run.

CCF administers ILP programs on the campuses of forty-nine community colleges in California.⁴⁷ CCF has developed a specific curriculum with seven training components for life skills training.⁴⁸ It also administers a College ILP Program and provides yearly training to College ILP coordinators.⁴⁹ Moreover, the College ILP Program requires foster youth participants to complete pre-and post training questionnaires that provide comprehensive assessments and evaluations of workshops and programs offered.⁵⁰ As one of the greatest benefits, foster youths participating in CCF courses have access to all the services offered on community college campuses, such as computer labs, libraries, recreational facilities, counseling, and the experience of being part of a college environment.⁵¹

On the contrary, foster youths participating in ILP programs administered by counties often do not have access to such highly structured programs.⁵² The structure and content of ILP vary between counties, depending on differences in funding, staffing, and partnerships with other organizations and agencies that serve foster youths.⁵³ Some county

⁴⁶ See STATE OF CALIFORNIA, CHAFEE FOSTER CARE INDEPENDENCE PROGRAM: STATE PLAN FOR FISCAL YEARS 2001-2004 186 (2001) (on file with authors) [hereinafter STATE ILP PLAN].

⁴⁷ COMMUNITY COLLEGE FOUNDATION, STATEWIDE INDEPENDENT LIVING PROGRAM: PROGRAM HIGHLIGHTS AND ACCOMPLISHMENTS JULY 1, 2000-JUNE 30, 2001 FISCAL YEAR, at 1 (2001).

⁴⁸ COMMUNITY COLLEGE FOUNDATION, STATEWIDE INDEPENDENT LIVING PROGRAM, *in* ILP INSTITUTE MATERIALS, *supra* note 45, at 1.

⁴⁹ *Id.* at 1-2.

⁵⁰ See *id.* at 2.

⁵¹ See *id.* ILP Students additionally have access to computer and Internet instruction inside mobile buses that visit communities. *Id.*

⁵² Interview with Karen Grace-Kaho, California Foster Care Ombudsman, in Sacramento, Cal. (Mar. 2002).

⁵³ Letter from Frank J. Mecca, Executive Director, County Welfare Directors Ass'n of California, to California Assemblyman Darrell

programs do not use a specific curriculum to teach life skills, and do not use trained educational instructors to teach workshops.⁵⁴ Moreover, some county ILPs do not utilize an assessment and/or evaluation tool.⁵⁵ The State does not mandate use of an assessment tool, but only recommends several different assessment tools for use by the county programs.⁵⁶ Many county ILP programs offer workshops in the county social services building, which lacks the rich resources available on college campuses and may seem to be an uncomfortable location to some foster youths.⁵⁷

3. Different County Policies on Eligibility for ILPs

The third area of differences in California's ILPs concerns county policies that differentiate among foster children in determining eligibility for services. Under some counties' policies, some otherwise eligible foster youths receive no ILP services. This contributes to more disparate treatment of foster children in ILPs, representing inconsistency in the system at its most harmful level.

Shasta County presents an example of this problem. A small rural northern California county, Shasta County does not provide ILP services to any out-of-county youth living within the county, until it receives a check from the foster youth's home county for the cost of providing such services.⁵⁸ ILP money is allocated to counties based on the number of foster youths who are dependents of that county, not the actual amount living in the county.⁵⁹ For Shasta County, which

Steinberg (Apr. 1, 2002) (regarding state bill on adopting regulations of ILPs (AB 1979)) (on file with authors).

⁵⁴ Interview with Karen Grace-Kaho, *supra* note 52.

⁵⁵ *Id.*

⁵⁶ See STATE ILP PLAN, *supra* note 46, at 179.

⁵⁷ Interview with current foster youth, in Davis, Cal. (Mar. 2002). Not surprisingly, many youth surveyed in county programs were not provided with information on higher education options, financial aid information, or college applications in an adequate or timely manner. Interview with Karen Grace-Kaho, *supra* note 52.

⁵⁸ Interview with former foster youth and former staff of ILP from Shasta County, in Sacramento, Cal. (Apr. 2002).

⁵⁹ CALIFORNIA YOUTH CONNECTION, LEGISLATIVE ISSUES 2002.

houses a large number of group homes and an accordingly high number of youths from other counties, providing services to all youths living within the county would be fiscally impossible.⁶⁰ However, the foster youth's county of origin is often reluctant to provide up-front payment, because ILP is a voluntary program, and the county does not have assurance from the county of placement that youths will actually utilize ILP services funded by the payment. As a result, many foster youths who want and can benefit from ILP services are never offered any services because of this policy.

*B. Lack of Communication Impedes
Full Utilization of Services*

Under FCIA, a variety of programs providing different services and information on self-sufficiency should be made available to foster youths.⁶¹ FCIA provides a flexible funding source for the provision of services including education attainment, career exploration, job training and placement, and daily living skills training.⁶² Although county child welfare agencies establish their own ILPs, some of the services are administrated by other agencies, such as housing programs (by the U.S. Department of Housing and Urban Development), employment training and placement (California Employment Development Department), and educational assistance (United States and California departments of education).⁶³

Congress recognized that a holistic approach is necessary to assist foster youths in learning independent living skills.⁶⁴ Youths cannot benefit from information provided on higher education opportunities and financial management if they are struggling to survive because basic needs such as

⁶⁰ Out of 288 youth aged fifteen to eighteen placed in Shasta County, 200 are placements from another county. See NEEDELL ET AL., *supra* note 39.

⁶¹ 42 U.S.C. § 677(b)(3)(F) (Supp. V 1999).

⁶² *Id.* at § 477(a)(1).

⁶³ FOSTER, *supra* note 2, at 5.

⁶⁴ See Foster Care Independence Act of 1999, Pub. L. No. 106-169 § 101(a)(5), 113 Stat. 1822, 1823-24 (1999) (codified as amended at 42 U.S.C. § 877(a)(5) (Supp. V 1999)).

housing and employment are not met.⁶⁵ An abundance of resources exist for providing additional services to foster youths, yet many ILPs have weak communications with the various agencies that provide these services.⁶⁶ Many service providers do not even know about relevant services that may assist the foster youths they are serving.⁶⁷ Hence, many foster youths are never informed of programs that might assist them.

The lack of communication between the various state and county agencies providing these services results in under-utilization of ILP services and inefficient service delivery. This problem is demonstrated in ILP services in education, career, and housing. A study shows that only fifty-five percent of foster youths subjects had completed high school eighteen months after emancipation.⁶⁸ To promote foster youths' academic achievements, a program called Foster Youth Services was created within the California Department of Education to provide educational support and counseling services to foster youths placed in group homes in forty-two counties in California.⁶⁹ Foster Youth Services has had a great positive impact on the academic achievement of participating foster youths.⁷⁰ Although Foster Youth Services and ILP collaborate in some counties to serve transitioning foster youths, in other counties there is little communication between

⁶⁵ *Hearing on Challenges Confronting Older Children Leaving Foster Care Before the House Comm. on Ways and Means Subcomm. on Human Res.*, 106th Cong. (1999) (testimony of Robin Nixon, Director of Youth Services, Child Welfare League of America), available at <http://www.cwla.org/advocacy/indlivtest990309.htm> (last visited Apr. 21, 2002).

⁶⁶ See ORANGE COUNTY GRAND JURY, ORANGE COUNTY IS NO CAMELOT FOR EMANCIPATED YOUTH 17 (2000), available at <http://www.occourts.org/grndjury/GJ2000EMANC.pdf> (last visited Apr. 21, 2002).

⁶⁷ *Id.*

⁶⁸ MARK E. COURTNEY & IRVING PILIAVIN, FOSTER YOUTH TRANSITIONS TO ADULTHOOD: OUTCOMES 12 TO 18 MONTHS AFTER LEAVING OUT-OF-HOME CARE 2 (1998), available at <http://www.ssc.wisc.edu/irp/pubs/nc0198.pdf> (last visited Apr. 21, 2002).

⁶⁹ FOSTER, *supra* note 2, at 15.

⁷⁰ See EDUCATIONAL OPTIONS OFFICE, CALIFORNIA DEP'T OF EDUCATION, REPORT TO THE GOVERNOR AND LEGISLATURE: FOSTER YOUTH SERVICES PROGRAMS 4-5 (2000), available at <http://www.cde.ca.gov/spbranch/essdiv/legreport.pdf> (last visited Apr. 21, 2002).

programs. The reason is that two agencies, the county Department of Social Services and the state Department of Education, administer these programs. One agency often does not know of the other agency's programs; there is no opportunity for interaction either. Consequently, eligible foster youths participating in ILP with educational needs may not receive the services.

In addition to education attainment services, it is important for foster youths to receive career training and job placement services before emancipation. Studies have found that many emancipated foster youths become unemployed or dependent on public assistance.⁷¹ In response to these studies and other concerns, changes were made in the Welfare to Work program to include foster youths as eligible recipients of all job and career related services.⁷² This program provides a great array of services for transitioning foster youths such as subsidized job training, uniform and interview clothing assistance, and free child care.⁷³ Although these services are funded through Cal-Works in every county, many ILPs have not begun collaborating with these programs to supplement their career workshops.⁷⁴ In fact, in some counties, because service providers are unaware of this new program, ILP funds are utilized to provide the same services.

Expending limited ILP funds to provide services that could be funded and provided by another agency cuts down on the available pool of money that can be used for addressing unmet needs, such as funding housing for emancipated youths. As counties can only expend up to thirty percent of their total ILP funding for housing costs,⁷⁵ inefficiency in duplicating services decreases the actual amount of funding available for

⁷¹ ORANGE COUNTY GRAND JURY, *supra* note 67, at 10, 21 app. 3 (summarizing studies' data on emancipated youth with percentages).

⁷² See HEALTH AND HUMAN SERVICES AGENCY, STATE OF CALIFORNIA, ALL COUNTY LETTER ON WELFARE-TO-WORK GRANT PROGRAM ELIGIBILITY (NO. 01-53), at 7 (Aug. 3, 2001), available at <http://www.dss.cahwnet.gov/getinfo/acl01/pdf/01-53.pdf> (last visited Apr. 21, 2002).

⁷³ See *id.* at 18-19.

⁷⁴ Interview with Karen Grace-Kaho, *supra* note 52.

⁷⁵ See 42 U.S.C. § 677(b)(3)(B) (Supp. V 1999).

housing. The services provided by ILPs are incomplete if foster youths' critical and fundamental need for housing is unmet.⁷⁶ A California Department of Social Services employee stated, "The Independent Living Program without housing is like Driver's Ed without a car."⁷⁷ Additionally, if county ILPs do not utilize the Workforce Investment Act services available by registering youths at One-Stop Career Centers, youths will be deprived of an array of other services and long-term help available through the Employment Development Department.

Furthermore, one of the most significant changes to ILP by FCIA was the provision allowing counties to use ILP funding to provide housing to foster youths between the ages of eighteen and twenty-one.⁷⁸ The great need of this population for adequate housing has been widely publicized with studies estimating thirty to forty percent of foster youths become homeless after emancipation.⁷⁹ However, in counties with limited resources and high housing costs, ILPs may not be able to allocate adequate funding to meet the needs of transitioning youths. Some counties, such as Ventura and Sacramento, have successfully made connections with the local Housing Authority to supplement their housing money with resources such as Section 8 vouchers and subsidized housing.⁸⁰ However, in other counties, this collaboration has not yet evolved, and valuable ILP funds are over expended and foster youths are not provided with the full range of housing options. For example, in Los Angeles County, millions of ILP dollars that could have been used to fund housing and help find employment were returned to the State while at any time 500 to 1,000 emancipated foster youths were homeless in the county.⁸¹ In order to meet half of the

⁷⁶ ORANGE COUNTY GRAND JURY, *supra* note 67, at 6.

⁷⁷ *Id.*

⁷⁸ 42 U.S.C. § 677(b)(3)(B) (Supp. V 1999).

⁷⁹ Troy Anderson, *Board Tells CAO to Fix Foster Woes*, L.A. DAILY NEWS, July 18, 2001.

⁸⁰ CALIFORNIA YOUTH CONNECTION, ANNUAL REPORT 2000-2001. Section 8 vouchers are administered by the Housing and Urban Development and are used to pay for housing.

⁸¹ Anderson, *supra* note 79.

anticipated housing need of emancipating foster youths over the next three years, it is estimated that Los Angeles County needs to double the amount of housing programs.⁸² In counties like Los Angeles County, collaboration between ILPs and housing agencies could help to meet the needs of transitioning youths.

C. Lack of Accountability in the System

1. Deficiency in Data Concerning ILPs

Under the provisions of FCIA, a State can lose its funding for non-compliance with the Act.⁸³ In California, it is difficult to determine non-compliance because California does not independently track the effectiveness of ILPs administered by the counties. The reason for the lack of accountability is due to the political struggle between the State and the counties over regulation of ILPs. In California, state ILP standards were created in response to legislation that addressed the need for uniformity and consistency in ILP services.⁸⁴ However, they were never turned into regulations that would give the state authority to ensure program delivery and quality in every county.⁸⁵ Interestingly, in the State FCIA Plan required by the federal government, California cites ILP standards as the sole method of ensuring fair and equitable treatment of ILP benefit recipients.⁸⁶ Yet, because the statewide standards are only guidelines and are not mandatory,⁸⁷ whether the State can ensure that counties use these standards is questionable.

Apart from mandatory regulations, the State lacks specific information on its counties' ILPs, making it difficult

⁸² *Id.* (quoting Gloria Molina, Los Angeles County Supervisor).

⁸³ *See* 42 U.S.C. § 677(e) (outlining penalties for non-compliance of § 677).

⁸⁴ *See* 1999 Cal. Stat. AB1111 (amending CAL. WELF & INST. CODE § 10609.4).

⁸⁵ CALIFORNIA DEP'T OF SOCIAL SERVICES, REPORT TO THE LEGISLATURE: INDEPENDENT LIVING PROGRAM STANDARDS attach. A (2000).

⁸⁶ STATE ILP PLAN, *supra* note 62, at 191-92.

⁸⁷ *Id.* at 192. ("The statewide standards for the Independent Living Program are not mandatory but are instead guidelines for counties to use in developing their ILPs.").

for the State to regulate ILPs. This is demonstrated by the State's lack of information on eighteen to twenty-one year old foster youths. Recognizing that foster youths often need continued additional assistance after emancipation, FCIA extends the age of eligibility for ILP to twenty-one years old.⁸⁸ However, the majority of counties in California have not created a data collection system for former foster youths in this age group. In fact, in many counties, when foster youths turn eighteen and emancipate, their case files in the Child Welfare Services Computer Management System (CWS/CMS), the statewide data system, are closed.⁸⁹ After the case files are closed, no data system tracks the outcomes of youths who leave the foster care system.⁹⁰ Such data would help to evaluate the effectiveness of ILPs. Without this information, the State faces immense difficulty in monitoring compliance of county ILPs.

Existing evaluation programs are inadequate in providing a comprehensive picture of ILPs or a guide for improvements. Currently, the State monitors county programs through a paper-based review. Known as SOC 405-A, the review asks counties to provide a description of their programs and the populations served.⁹¹ A paper-based review that asks a county program to self-evaluate is an inefficient means of gathering information on the services a county is providing. A county may be unwilling to disclose program problems for multiple reasons including: self-interest, fear of publicity, staffing issues, or lack of awareness. When counties are audited, the only ILP aspect that the State checks for compliance with is the completion of the Transitional

⁸⁸ 42 U.S.C. § 1396(w)(1)(A) (Supp. V 1999); *see id.* at § 677(b)(3)(A).

⁸⁹ NFCAP FAQ, *supra* note 21, at 28.

⁹⁰ *See* SANTA BARBARA COUNTY GRAND JURY, A NEW LOOK AT CHILD WELFARE SERVICES findings 14, 15 (2001), *available at* <http://www.sbcgj.org/2001/2001childwelfare.htm> (last visited Apr. 21, 2002) (grand jury finding that the State and Santa Barbara County know little about foster youth after they emancipated).

⁹¹ *See* DEP'T OF SOCIAL SERVICES, STATE OF CALIFORNIA, ALL-COUNTY LETTER NO. 01-72 ON INDEPENDENT LIVING PROGRAM (ILP) ANNUAL STATISTICAL REPORT 1 (2001), *available at* <http://www.dss.cahwnet.gov/getinfo/acl01/pdf/01-72.pdf> (last visited Apr. 21, 2002).

Independent Living Plan (TILP), a standardized form describing programs and services that will be offered to a foster youth and that will be incorporated into the foster youth's case plan.⁹² Because the State checks on FCIA compliance through an audit system, neither SOC 405-A or TILP provide adequate information for evaluating programs or addressing concerns.

2. Deficiency in Legislative and Judicial Remedies

Additionally, California's ILP system lacks effective legislative and judicial remedies to foster youths. The California State Legislature has attempted to solve the ILP accountability problem. State Assemblyman Darryl Steinberg sponsored a bill that required the California Department of Social Services to create state standards for the Independent Living Program.⁹³ While the Legislature's effort to address accountability issues is commendable, the legislative process might not be an efficient method for ILP reform. Proposed legislation often takes long periods of time to become effective. More importantly, legislators are responsive to their constituents. Foster youths constitute one of the most politically disenfranchised groups because of two reasons: their status as non-voting children, and the absence of voting parents who can promote their concerns. As foster youths do not form a traditional constituency, they represent a portion of the population that is often overlooked or ignored.

Not only have legislative remedies failed to adequately address the problems with ILPs, judicial remedies have not been utilized to benefit foster children. As of early 2002, no lawsuits have yet been brought regarding the administration of ILPs in California. The reason for the lack of action in court is not because problems with ILPs do not greatly impact and affect foster youths. Statistics from the California State Foster Care Ombudsman's Office, an office which takes complaints from foster youths and other concerned parties, report that complaints about ILPs are the fourth largest category of

⁹² STATE ILP PLAN, *supra* note 62, at 178.

⁹³ 1999 Cal. Stat. AB1111 (amending CAL. WELF. & INST. CODE § 10609.4).

complaints received.⁹⁴ Instead, the lack of litigation may be due to legal aid organizations' unawareness of the problems youths face with this program and lack of awareness regarding ILPs' importance to foster youths.⁹⁵

III. Solutions to California's Problems

Different services in California's ILPs, lack of communication among agencies, and lack of accountability in the system result in failure to ensure fair and equal treatment of foster children, violating the intent of FCIA. In order to ensure full compliance of the FCIA, reform of California's ILP system is inevitable. Possible solutions include foster youths' participation in the planning of ILPs, legislation imposing regulations and reorganization of the system, and litigation in court. Without reform of the ILP system, the system will continue to treat California's foster youths unfairly and inequitably.

A. Foster Youth Involvement in Program Planning

FCIA requires that States "ensure that adolescents participating in the program under [FCIA] participate directly in designing their own program activities that prepare them for independent living"⁹⁶ Foster youth involvement is particularly essential in evaluating the effectiveness of ILP. Their feedback and comments would greatly help to determine whether the program and curriculum provided meet their needs.⁹⁷ Currently, ILP curricula are not based on any

⁹⁴ See CALIFORNIA STATE OFFICE OF THE OMBUDSMAN FOR FOSTER CARE, UPDATED REPORT MAY 1, 2000 – MAY 1, 2001 (2001) (chart on office complaint types from May 2000 to May 2001). The first three categories are placement, child welfare services/probation issue, and personal rights violations, respectively. *Id.*

⁹⁵ Cf. JANET KNIPE & JOY WARREN, FOSTER YOUTH SHARE THEIR IDEAS FOR CHANGE 8-9 (1999) (finding that attorneys do not pay close attention to foster youth litigants' opinions or keep them in the loop about their cases).

⁹⁶ 42 U.S.C. § 477(b)(3)(H) (Supp. V 1999).

⁹⁷ KNIPE & WARREN, *supra* note 95, at 19-21; see also NFCAP FAQ, *supra* note 21, at 30-32.

scientific findings, but instead are based on what adults, many of whom come from very different backgrounds than the youths they serve, believe would be helpful to transitioning foster youths. Soliciting the input of graduates of ILP and former foster youths is essential to planning a program that truly addresses the needs of program participants.

Foster youths could also be involved in the regulation of ILPs. Current and former foster youths can play valuable roles at all levels of ILP administration because of their personal experiences in and insights into ILP and the child welfare system. The Placement Resources Unit of the Department of Social Services, which oversees ILP, consists of only three regional coordinators: a policy analyst, transitional housing consultant, and a supervisor. Because of the unit's limited resources, program graduates and participants can be utilized to ensure compliance with FCIA. Hiring and training former foster youths to attend ILP as technical assistance consultants to evaluate each county's program will provide the State with valuable information on county programs. It will also provide counties with a source of technical assistance in complying with FCIA requirements. Additionally, ILP program participants should be encouraged to provide feedback to the State on any problems with ILP system. Foster youths benefit from problems being addressed without the time-consuming process of litigation; the State benefits by not needing to expend its limited resources on litigation.

B. Legislative Solutions

Despite arguments of the Legislature's inefficiency and ineffectiveness, the Legislature is the sole branch that can appropriately hold hearings and balance the competing interests. Legislation is the only solution because current administrative solutions and judicial remedies are insufficient in meeting foster youths' needs. Legislation that holds the State accountable for providing a consistent level of services to every ILP-eligible foster youths in California serves as an effective means of addressing the problems. In recent years, the Legislature has supported a number of landmark bills that

have greatly increased the array of services available to emancipating foster youths.⁹⁸ There are generally five approaches to improving California's ILP system through legislation.

First, strengthening the state administrative agency that oversees the Independent Living Program enables the State to provide more oversight to county programs and enforce consequences when counties are not administering programs appropriately. The Placement Resources Unit gathers information primarily by requiring county programs to complete a narrative description of their program and to provide statistics for state use through SOC 405-A.⁹⁹

To improve the quality of oversight the State provides to ILP, legislation should mandate that the State ILP Department be responsible for conducting program visits and providing technical support to struggling or inadequate programs. Legislation should also require the State to provide the ILP department with more financial resources to hire necessary staff. Strengthening the administrative agency would involve providing adequate staff and resources. This way training program evaluators, such as ILP program graduates, could visit programs, interview program participants and non-participants, and inspect curricula in order to evaluate both adequacy and quality of services.

Second, mandatory regulations for standardized services and procedures should be implemented. Without

⁹⁸ See generally AB 2877 (extending Medi-Cal for former foster youth to the age of twenty-one); AB 1261 (expanding eligibility for the Transitional Housing Placement Program to sixteen-to-twenty-one-year-olds); AB 1198 (creating the in care transitional housing program for foster youth aged seventeen to eighteen); AB 686 (requiring attendance in their emancipation court hearing, and that the county social services department prove that certain services and information have been provided to youth before emancipation); AB 427 (STEP program providing option to counties to provide monthly payments to emancipated foster youth as long as they are attending school or working towards the goals outlined in their TILP).

⁹⁹ See Dep't OF SOCIAL SERVICES, STATE OF CALIFORNIA, ALL-COUNTY LETTER NO. 01-72 ON INDEPENDENT LIVING PROGRAM (ILP) ANNUAL STATISTICAL REPORT 1 (2001), available at <http://www.dss.cahwnet.gov/getinfo/acl01/pdf/01-72.pdf> (last visited Apr. 21, 2002).

regulations requiring specific performance from county programs, State evaluation of program effectiveness and adequacy will remain subjective and arbitrary. Additionally, creating mandatory standards or regulations will ensure that all counties are aware of the minimum standards their program must meet to comply with state requirements. Mandatory regulations will expressly state the minimum services a county must provide to each youth participating in ILPs. Some of these services include assistance with housing, higher education options, financial aid information, educational assistance, health insurance, employment training and placement, budgeting and life skills. Standardized procedures in outcome measurements outreach can promote objective evaluation of ILPs.

Third, new legislation should empower state agencies such as the Placement Resources Unit, the Operations branch, or the Foster Care Ombudsman's Office to impose consequences for non-compliance of FCIA. Currently, for county programs that are providing no services or ineffective services, there is no mechanism for forcing the counties to correct their problems.¹⁰⁰ Because non-compliance in a single county could result in a fiscal consequence for the entire State,¹⁰¹ the State should require corrective actions, provide consequences, or award administration of failing county programs to outside agencies. By granting the state administrative agency the ability to enforce consequences or corrective action plans, the State can properly supervise ILPs.

Fourth, to improve the lack of communication of state and county agencies, legislation should facilitate the consolidation of some of the state and county agencies that provide services for foster youths. Improving communication and collaboration between agencies will result in full utilization of available services and more efficient use of FCIA funds. For example, creating a single umbrella agency

¹⁰⁰ Interview with Karen Grace-Kaho, *supra* note 52.

¹⁰¹ See 42 U.S.C. § 677(e)(1) (Supp. V 1999) (requiring Secretary of Human and Health Services to institute penalties against a State for a program's violation of FCIA).

that includes all agencies that provide services to transitioning foster youths could help to achieve utilization and efficiency.

Signs of collaboration have appeared at the local level. Some counties have consolidated agencies to better serve transitioning foster youths. For example, Sacramento County's Great Start Program has created a collaboration between agencies providing housing, employment, educational, life skills, child care, mental health, legal, and medical services for transitioning foster youths.¹⁰² Foster youths can consult a trained Youth Specialist at a local One-Stop community center who knows the available resources and programs and can refer youths to the services that they need.¹⁰³ This model attempts to integrate, rather than isolate, service providing agencies because foster youths need an array of services to be able to live independently. Duplicating this reorganization at both the state and county levels will increase the effectiveness of ILP program and allow the goals of FCIA to be better achieved.

Fifth, the Legislature should create laws mandating the creation of a statewide data collection system for eighteen to twenty-one-year-old former foster youths. FCIA mandated that a portion of state ILP funding must be used to serve the eighteen to twenty-one-year-old population of foster youths.¹⁰⁴ A statewide coordinated data collection system should be created to gather information about on the services provided to eighteen-to-twenty-one-year-old youths, the services' effects on emancipated foster youths, and the services that are needed but are unavailable or unattainable. Creation of a data system will allow programs to make better administrative decisions, and provide the state and federal government with needed information to assess program compliance and outcome measurements. Even though the Secretary of Human and Health Services collects data on ILPs under FCIA,¹⁰⁵ without its own data system, California's ability to effectively evaluate

¹⁰² SACRAMENTO EMPLOYMENT AND TRAINING AGENCY, GREAT START YOUNG ADULT PROGRAM (2000).

¹⁰³ *Id.*

¹⁰⁴ 42 U.S.C. § 677(b)(3)(A).

¹⁰⁵ *Id.* at § 677(f).

ILPs to ensure FCIA compliance remains skeptical. A State database could also contribute to the federal data collection.

C. Judicial Approach

Finally, with concerns over the effectiveness of the executive and legislative branches, the judicial system may be a better mechanism for providing accountability in the foster care system.¹⁰⁶ Marcia Lowry, Executive Director of Children's Rights, Inc. stated, "Lawsuits are an imperfect vehicle, but they are an essential element of what must be a national campaign for reform on behalf of children who are seldom seen and never heard."¹⁰⁷ Moreover, although most foster youths lack the resources or information to initiate suit against the system on their own, they may have more access to legal remedies than legislative remedies because they are assigned attorneys and their cases are under the oversight of the courts.¹⁰⁸ A class action lawsuit seeking declaratory or injunctive relief on behalf of all California foster youths eligible for ILP services might serve to resolve the issues of ILP.¹⁰⁹ It could result in a consent decree that would specify actions that the State will take to resolve the problem.

Critics might argue that bringing suits on behalf of foster children under foster care statutes have been a difficult

¹⁰⁶ See KARIN MALM ET AL., RUNNING TO KEEP IN PLACE: THE CONTINUING EVOLUTION OF OUR NATION'S CHILD WELFARE SYSTEM 19 (2001), available at http://www.urban.org/UploadedPDF/310358_occ54.pdf (last visited Apr. 21, 2002) (claiming that litigation has been the most effective method of change within the foster care system); *Foster Care: Three Experts, Three Views*, in CENTER FOR SOCIAL JUSTICE, MATERIALS FOR CRITICAL PERSPECTIVES ON CHILD WELFARE REFORM: WHO SPEAKS FOR THE CHILD? 2 (Oct. 3, 2001) (opinion of Marcia Robinson Lowry) [hereinafter CRITICAL PERSPECTIVES ON CHILD WELFARE REFORM] (on file with authors).

¹⁰⁷ *To the Editors*, N.Y. REV., July 19, 2001 (letter from Marcia Lowry), reprinted in CRITICAL PERSPECTIVES ON CHILD WELFARE REFORM, *supra* note 106, at 10 (on file with authors).

¹⁰⁸ *Id.*

¹⁰⁹ Such action will likely to be brought under 42 U.S.C. § 1983, a federal statute that allows private individuals to sue state governments for civil rights violations.

task.¹¹⁰ Lawsuits on behalf of foster children have primarily been class action suits that have sometimes taken years to settle and have been criticized for delegating the responsibility of fashioning social policy to judges.¹¹¹ In addition to the difficulties in reaching a satisfactory settlement, obstacles in procedural matters make lawsuits seem less appealing. For foster youth litigants to proceed with their action, the court must recognize a private cause of action under the statute and find that the suit against the government is not barred under sovereign immunity principle of the Eleventh Amendment.¹¹² Nevertheless, two recent court decisions have created precedents that have shown signs of promises for foster youths to litigate in court under FCIA.¹¹³

1. Private Cause of Action Under FCIA

In order for private individuals to sue the State for violation of a statute, the court must find that the statute provides the individuals a private right to action for the violation.¹¹⁴ In *Jeanine B. v. McCallum*, a group of foster children filed a class action suit against Milwaukee County for its foster care system's failure to protect their rights.¹¹⁵ The court held that foster children had private rights of action under a provision of the Adoption and Safe Families Act (ASFA).¹¹⁶ The court found that 42 U.S.C. § 675(5)(E)

¹¹⁰ *Foster Care: Three Experts, Three Views*, *supra* note 106, at 2 (opinions of Nicholas Scoppetta and Nancy Bernstein).

¹¹¹ See *Joseph A. v. Ingram*, 275 F.3d 1253, 1257 (10th Cir. 2002) (more than twenty years of litigation as of 2002); *Jeanine B. v. McCallum*, No. 93-C-0547, 2001 WL 748062, at *1 (E.D. Wis. June 19, 2001) (nine years of litigation as of 2002); *James Traub Replies*, N.Y. REV., July 19, 2001 (replying to Marcia Lowry's letter), reprinted in CRITICAL PERSPECTIVES ON CHILD WELFARE REFORM, *supra* note 106, at 10.

¹¹² See *Bonnie L. v. Bush*, 180 F. Supp. 2d 1321, 1331, 1341-43 (S.D. Fla. 2001), *opinion withdrawn on other grounds and substituted with Joseph A.*, 275 F.3d 1253.

¹¹³ See *Joseph A.*, 275 F.3d 1253; *Jeanine B.*, 2001 WL 748062.

¹¹⁴ See *Jeanine B.*, 2001 WL 748062, at *1.

¹¹⁵ *Id.*

¹¹⁶ *Jeanine B.*, 2001 WL 748062, at *5. ASFA imposed new requirements on the States to promote permanency by requiring States to: (1) file a termination of parental rights petition for children who have been in foster

satisfied the three-prong test of determining whether a statute produces private rights of action.¹¹⁷ As a result, the court granted the plaintiffs' motion for leave to file an amended supplemental complaint.¹¹⁸

The court's recognition that foster children have judicially enforceable rights under ASFA may be a gateway to a court decision that foster children have judicially enforceable rights under FCIA. ASFA and FCIA are analogous in their purposes and the effects of state non-compliance. Both statutes seek to improve the lives and futures of children in foster care by imposing new requirements on States to better provide basic services. While ASFA emphasizes stable placements for foster youths, FCIA stresses on basic skills to prepare foster youths for adult living.¹¹⁹ In terms of penalty, violation of either statute results in reduction in federal funding.¹²⁰

Nevertheless, critics might argue that applying *Jeanine B.* to FCIA might not be easy. In *Wilder v. Virginia Hospital Ass'n*, the court developed a three-prong test to determine whether a statute gives rise to a federal right which is

care for fifteen of the most recent twenty-two months; and (2) to concurrently identify, recruit, and process a family for adoption, unless certain statutory exceptions apply. 42 U.S.C. §675(5)(E) (Supp. V 1999); 45 C.F.R. § 1356.21 (2001). See generally *supra* Eric E. Thompson, *The Adoption and Safe Families Act: A New Private Right of Action for Children of Foster Care Pursuant to Section 1983*, 6 U.C. DAVIS J. JUV. L. & POL'Y 123 (2002) (providing background of ASFA and analysis of foster children's private right to instigate causes of action).

¹¹⁷ See *Jeanine B.*, 2001 WL 748062, at *3.

¹¹⁸ *Id.* at *5.

¹¹⁹ See 42 U.S.C. § 677(a); *In re* Guardianship of B.L.A. & T.A., 753 A.2d 770, 777 (N.J. Super. Ct. Ch. Div. 2000) (citing *In re* Custody & Guardianship of Marino S., 693 N.Y.S.2d at 822, 828-29 (Fam. Ct. 1999) (stating the two purposes of ASFA: "to mandate that children's health and safety must always be paramount concerns of the child welfare system, and [] to expedite permanency planning").

¹²⁰ See 42 U.S.C. § 677(a) & (e) (Supp. V 1999) (reducing fiscal year payments to states for violations of ASFA by up to five percent and setting penalty for violation of FCIA is up to ten percent); 42 U.S.C. §675(5)(E) (1994 & Supp. V 1999).

judicially enforceable under 42 U.S.C. §1983.¹²¹ The court must analyze: (1) whether Congress intended the statute in question to benefit the plaintiff; (2) whether the statute imposes a binding obligation on the State; and (3) whether the statute is too vague and ambiguous to be enforceable by the court.¹²² FCIA appears to pass the first two parts of the inquiry. FCIA was created to benefit foster youths.¹²³ Also, the statute imposed on States a series of new mandatory requirements.¹²⁴ However, convincing the court that FCIA is not too vague to be enforceable may present a challenge. FCIA does not require uniform provision of services; it only requires that foster youths eligible for ILPs be treated fairly and equitably.¹²⁵

On the other hand, FCIA's language might not be interpreted as vague. It could be argued that FCIA helps to achieve flexibility for the States so that they can comply with federal requirements more easily. Detailing more specifics could make it more difficult for States to comply with the law. FCIA indeed provides direction to the States, that they need to administer ILPs in a fair and equitable manner. There are sufficient and unambiguous guidelines for the States in FCIA; the problem, as illustrated in California's ILP system, lies in the State's inability to provide fair and equitable ILPs. Therefore, FCIA should pass muster of the *Wilder* test and foster children can raise private causes of action under FCIA.

2. Absence of Sovereign Immunity Bar for FCIA Actions

The Eleventh Amendment sets forth the principle of sovereign immunity, which refers to the government's

¹²¹ *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 (1990).

¹²² *Id.*; see also Thompson, *supra* note 116, at 128 (arguing that *Wilder's* approach continues to be used in analyzing private right of action under § 1983).

¹²³ See 42 U.S.C. § 677(a) (aiming at helping foster children achieve self-sufficiency).

¹²⁴ See *id.* at § 677(b)(3) (requiring state governors to certify plans to provide foster children with various services, including education, career, and health).

¹²⁵ See *id.* at § 677(b)(2)(B) & (E).

immunity from being sued in court without its consent.¹²⁶ *Joseph A. v. Ingram* presents another class action suit by foster children seeking relief from the state department in charge of foster care.¹²⁷ In its latest ruling on the case, the Tenth Circuit affirmed that the Eleventh Amendment did not bar a lawsuit against state officials.¹²⁸ The court reasoned that when advocates file lawsuits under statutes whose only remedial measures were funding and administrative oversight provisions, sovereign immunity did not apply.¹²⁹

Joseph A. may provide precedent for addressing the sovereign immunity issues arose in a suit filed under FCIA. Although the court's holding only specifically addressed ASFA and AACWA,¹³⁰ FCIA may again be analogized to these statutes in the remedies provisions. Like the remedy of ASFA and the Adoption Assistance and Child Welfare Act of 1980 (AACWA), the only remedial measure under FCIA is assessment of a financial penalty against the State.¹³¹ *Joseph A.* was based on the statutes' lack of any remedies other than financial penalties.¹³² The same reasoning can apply to FCIA. A financial penalty will not remedy the situation for foster youths who have been harmed by non-compliance of FCIA. Foster youths are the real victims of financial penalty on the State. Existing resources available through FCIA are insufficient to meet all of the need for housing, services, and support for emancipating foster youths.¹³³ A financial penalty will reduce the existing FCIA funds, thereby further limiting the resources available to transitioning foster youths. Like

¹²⁶ See U.S. CONST. amend. XI.

¹²⁷ See *Joseph A. v. Ingram*, 275 F.3d 1253, 1257 (10th Cir. 2002).

¹²⁸ *Id.* at 1274.

¹²⁹ See *id.* at 1259-65.

¹³⁰ See *id.* at 1263-64.

¹³¹ 42 U.S.C. § 677(e) (Supp. V 1999). The Secretary of Human and Health Services will issue a financial penalty of between one and five percent of the total state allotment as a penalty for non-compliance. See *Id.*

¹³² *Joseph A.*, 275 F.3d at 1264.

¹³³ Phil Willon, *Ready or Not; Crashing Hard into Adulthood*, L.A. TIMES, Dec. 2, 2001, at A1 (quoting Sylvia Pizzini, Deputy Director, California's Children and Family Services Division). Only about ten percent of California foster youth are expected to receive assistance under the FCIA, because there is not enough funding currently available. *Id.*

ASFA and AACWA, FCIA provides federal oversight and funding control of state systems, the very aspect that influenced the Tenth Circuit in *Joseph A.* Therefore, advocates can analogize the holding of *Joseph A.* in arguing that sovereign immunity is inapplicable to FCIA cases. Passing the hurdles of private right to action and sovereign immunity, foster youths should be able to bring § 1983 actions based on violation of FCIA.

Conclusion

FCIA aims at extending the safety net to foster youths who have aged out of the system so that they can successfully transition into independent adult lives. FCIA seeks to accomplish this by giving the States additional resources to help foster youths. However, California has failed to comply with FCIA. The ILP system's structure differs from county to county. Foster youths unfortunate enough to be transferred to another county may not receive any benefits for essentially accounting reasons. Administration and distribution of critical services should not depend on a factor so arbitrary as the residence of a given foster youth, yet too often it does. Moreover, county and state agencies do not communicate enough on the existence and extent of relevant services, furthering under-utilization of available resources. Additionally, the lack of information collected by the State exacerbates the lack of integration in its ILPs, preventing the State from overseeing the counties and ensuring accountability from them.

Resolving problems of California's ILP system could take place in three levels: instigating foster youth involvement in the process, legislative reform, or bringing private causes of action in court. Among these solutions to California's non-compliance with FCIA, the judicial approach seems the most promising. A private right of action is critical to enable foster youths and their advocates to ensure accountability within the ILP system. Because the court can order consent decrees and apply remedies to an entire class, change wrought in the judicial forum can be sweeping. Finally, to produce real

reform of the foster case system, reform of FCIA should be considered in order to provide States with more explicit guidelines in forming and regulating ILPs. FCIA should hold States responsible for achieving the goal of fair and equitable treatment of foster youths.

Children's Section on Emancipation from Foster Care

In this issue, the Children's Section focuses on the emancipation of foster youths in California. In particular, the Children's Section's staff interviewed three former foster youths to gain their perspectives about the emancipation process. A newspaper article about the emancipation of foster youths in nearby Sacramento County¹ sparked our interest in this topic. The emancipation of foster youths is a particularly important issue in Sacramento County where 350 youths age out of the foster care system each year.

The foster care system provides for all the needs of foster youths until they age out of the system at eighteen.² As a result, foster youths typically lack life skills such as the ability to cook or balance a checkbook.³ These skills prove vital to a youth's ability to transition to independent living. California's legislature recognized that former foster youths are often vulnerable to "homelessness, unemployment, welfare dependency, incarceration, and other adverse outcomes if they exit the foster care system unprepared to become self-sufficient."⁴

In response to the legislature's concerns, California developed the Independent Living Program to serve foster youths between the ages of sixteen and twenty-one.⁵

¹ Mareva Brown, *Path to Freedom After Foster Care*, SACRAMENTO BEE, Jan. 12, 2002, available at <http://www.sacbee.com/content/news/sacramento/story/1452300p-1528876c.html> (last visited Apr. 5, 2002).

² *Id.*

³ *Id.*

⁴ See CAL. WELF. & INST. CODE § 11403.1(a)(1) (West Supp. 2002).

⁵ See CAL. WELF. & INST. CODE § 10609.3 (West 2001); Office of the California Ombudsman for Foster Care. Help After You Emancipate, at <http://www.fosteryouthhelp.ca.gov/Emancipate.html> (last visited Apr. 5, 2002).

California's Governor also allocates stipends to assist the Independent Living Program.⁶ The Independent Living Program helps former foster youths obtain money for school, find jobs and housing, and learn life skills.⁷

California's legislators also recently created an elective Supportive Transitional Emancipation Program (STEP) for California counties. Under this program, former foster youths can receive state support until they are twenty-one if they participate in an educational or training program.⁸ STEP and the Independent Living Program are moves in the right direction for California. These programs assist foster youths with learning the life skills that are essential to independent living. Several of the former foster youths we interviewed, however, believe that California should provide foster youths with even more support and begin preparing them for emancipation at an earlier age.

The former foster youths interviewed by the staff provided us with invaluable insight into the emancipation process. Their candor and enthusiasm helped us gain a better understanding of foster care and the emancipation process. We began with the following set of questions, but the interviews often progressed beyond them:

What are some of the problems with the current emancipation process?

How do you think California could improve the emancipation process?

Do you think that foster parents should teach more practical skills? Would this help with the emancipation process?

⁶ See § 10609.3(c)(1).

⁷ Office of the California Ombudsman for Foster Care, Independence, available at <http://www.fosteryouthhelp.ca.gov/Indep.html> (last visited Apr. 5, 2002).

⁸ See § 11403.1.

JULIANA VASQUEZ'S STORY

Juliana, now twenty years old, lived in the Yolo County foster care system from the ages of sixteen to eighteen. When the County first placed Juliana in the foster care system, she lived in an emergency shelter for three months. At the shelter, someone did Juliana's laundry for her, cooked for her, provided transportation for her, and would even bring her water from the refrigerator. Juliana said if she lived in the foster care system most of her life, she would not have known how to do these things herself. Juliana moved from the shelter to a transitional housing apartment with a girl who ate at McDonald's every night because she did not know how to cook. Because Juliana lived with her parents for most of her life, she knew how to cook and learned other independent skills that she said many foster care youths did not know.

At seventeen, Juliana began preparing for the emancipation process. The County emancipated her when she graduated from high school at eighteen. Juliana called her social worker on her eighteenth birthday, and the social worker advised her not to tell anyone she graduated and was eighteen. After the County learned of Juliana's age, they informed her that she had two weeks to move. Juliana said the County did nothing to help her: "That's when I needed them the most, and they turned their backs on me." Juliana faced homelessness after she left the system. She eventually found refuge with a former foster parent. Juliana said, "I felt like I was thrown out of the system, and I wasn't ready yet."

After leaving the foster care system, Juliana received scholarships and began working at the Foster Care Ombudsman Office in Sacramento. Juliana also resolved her problems with her parents and can now turn to them for support. She noted that most kids not placed in foster care live at home with their parents and can still go to their parents when they need help. Drawing on her experience at the Foster Care Ombudsman's office, Juliana indicated that many foster youths do not have this option once they are emancipated.

Juliana believes that counties should determine the appropriate emancipation age on a case-by-case basis.

Juliana advised foster youths of the benefits of waiting until they are eighteen to go through emancipation because it is hard to be on your own when you are young. Juliana said, "They are waiting for that magical day when they are free. Some kids count the months and the days." Juliana said that the emancipation process usually starts when a youth is fifteen or sixteen, and she indicated that youths often find it difficult to learn self-sufficiency in the short time before they turn eighteen. As Juliana got older, she said she became more independent and learned how to balance a checkbook and how to cook. She thinks learning how to become independent should begin at age twelve or thirteen. Juliana believes that education should come first, and the foster care system should give youths vocational skills if the youths are not as interested in traditional education. She said, "Foster youths need to survive somehow, they need to be able to be self-sufficient." Juliana also posited that foster care youths should participate in hands-on, real world activities. For example, she suggested that foster youths could go to a bank and learn how to open a checking account.

Finally, Juliana indicated that the foster care system is not working. She knows of many youths who are emancipated, thrown out, and then become homeless. Juliana said that social workers, lawyers, and judges should keep the interests of the child in mind. "They're making a decision for that child's life."

JENNIFER RODRIGUEZ'S STORY

“My responses to these questions are shaped both by my own experience living in foster care and going through the emancipation process, and by my work as an advocate for children who are currently in foster care. On my eighteenth birthday, my social worker gave me twenty-four hours notice to vacate my group home. I was terrified and desperate because I was completely unprepared to live independently. I was living in an unfamiliar county, knew no one in the community, had no family, no money saved up, no place to live, no high school diploma, and no clue where I was going to sleep that night or how I was going to eat. I packed everything I owned in two garbage bags and walked out the front door of my group home without looking back. After I left my group home, I became homeless.”

“Eventually, through my own initiative, I found out about a federally funded residential vocational program called Job Corps.⁹ At Job Corps, I received all of the basic necessities that are so essential to any young person being able to support herself: a G.E.D., job training, health care, assistance in finding housing, a readjustment allowance, and an opportunity to meet people who were supportive. These tools provided me with the ability to better my life by becoming self-sufficient. Without the institutional support I received from Job Corps, I would have never been able to eventually attend college and work my way into law school. I would have remained trapped in poverty and dependency and never have realized my strengths and abilities. Many foster youths with whom I currently work lack the type of institutional support that enabled me to become self-sufficient.”

⁹ Job Corps, a free program for sixteen to twenty-four-year-olds, provides young adults with a place to live, medical care, vocational training, and opportunity to earn a G.E.D. Students live on the Job Corps campus while they receive vocational training. Center Training, The Official Job Corps Web Site, at <http://jobcorps.doleta.gov/centrain.htm> (last visited May 6, 2002).

“I believe that there are several problems with the current emancipation process. First, it is unrealistic to emancipate youths at eighteen. Counties emancipate foster youths from the system at eighteen years of age regardless of their individual circumstances or readiness to live independently. In my opinion, it is a myth that eighteen is the magic age at which children who are dependent on the county suddenly acquire the skills, knowledge, and resources that are necessary to navigate the world without any assistance.”

“Another problem with the emancipation process is lack of youth involvement in the process. Considering that the emancipation process concerns preparing youths to take control and responsibility in their lives, it is logical to assume that youths would play a central role in guiding and directing this process. However, in my experience, youths are too rarely involved in making decisions regarding their needs and goals after emancipation. Instead, decisions about what services and resources youths need are often shaped primarily by social workers and other child welfare professionals.”

“In addition, the preparation process for emancipation is too little, too late. Just as youths are emancipated too early, actual preparation for emancipation begins far too late. Foster youths do not often have the opportunity to learn independent living skills. The only opportunity many youths have to gain these skills is through the formal state Independent Living Skills Program.¹⁰ This program offers classes on different topics relating to independent living skills.¹¹ In my experience, however, most programs offer very limited opportunities for hands-on, practical application of these skills. Furthermore, the Independent Living Program only serves youths from ages sixteen to twenty-one.¹² Providing foster youths with independent skills only two years before emancipation begins is far too late. In the typical family, parents offer their children opportunities to assert their independence throughout their childhood. Cramming a

¹⁰ See CAL. WELF. & INST. CODE § 10609.3(c)(1) (West 2001).

¹¹ See *id.*

¹² See *id.*

lifetime of skills and knowledge about the world into the very busy and stressful two years before emancipation is not sound practice.”

“Some of the greatest challenges for foster youths occur after they are emancipated. Foster youths are faced with the formidable challenge of trying to support themselves. They often have no adult guidance and limited resources. Foster youths are often emancipated without any of these basic necessities, making a stressful experience into a crisis. Finding housing is one of the major challenges for emancipating foster youths. Many landlords are unwilling to rent to eighteen-year-old tenants who lack rental histories, references, and credit histories. Also, housing is one of the most expensive commodities in our society and few emancipating foster youths have the financial ability to pay security deposits and first and last months’ rent. Some counties established emancipation housing programs, which provide additional support and reduced rent to foster youths.¹³ However, very few of these programs exist in proportion to the number of youths emancipating from care.”¹⁴

“Understandably, most foster youths are unprepared for the abrupt changes that emancipation brings to their lives. At a time in their lives when foster youths need the most emotional support, guidance and mentoring, they often have none available. Emancipating foster youths need mentors and other sources of emotional support that can support them through this very difficult time.”

¹³ See Brown, *supra* note 1.

¹⁴ *Id.*

ALEXXA GOODENOUGH'S STORY

Alexxa Goodenough, a former foster youth, works at the Foster Care Ombudsman's Office. She is an active participant in the California Youth Connection, an advocacy group that lobbies the California Legislature and holds conferences to educate the public about the need to reform the foster care system. She noted that "the California Youth Connection has increased the public's awareness of the need to fix the foster care system. The Connection's work has produced a ripple effect in the foster care community. People now work harder to understand the importance of foster care. Foster care issues never used to matter to people. They did not see the other side. Now they hear more of the stories and have a better understanding of the need to change the system."

Alexxa believes that California needs to improve the emancipation process in a number of ways. She stated, "Foster youths need to receive more hands-on, practical skills training. Social workers should take a group of foster youths and go through the steps of finding an apartment and getting a job so everything can be done by their eighteenth birthdays. Many emancipated youths do not have apartments by the time they turn eighteen and a large number of them become homeless. The system should be more open to providing jobs and transportation to jobs and helping youths obtain housing."

Alexxa also stressed the importance of the Independent Living Program. However, she believed that California should expand the program to assist more foster youths. "The training should be more practical and more frequently offered to accommodate people's schedules. Right now youths start Independent Living Program classes when they are fifteen or sixteen. The classes are only offered one to two hours per week, so not everyone can take the classes because they conflict with other things. The youths learn things in a classroom setting, such as how to write a check. You can sit here and tell me how to write a check, but that does not help me that much if I do not also know how to deposit a check."

Therefore, the training should occur in real settings, like banks, too.”

Alexxa noted that California could also improve the emancipation process by encouraging the development of better relationships between foster youths and their lawyers and social workers. “There should be more communication among youths, social workers, and lawyers,” she said. “My lawyer quit one week before my case. I wanted to have a hearing so I could help the court see the reality of the foster care situation and the need for change. But I did not get a hearing. If lawyers, social workers, and youths communicate more, it would be easier to have all of the important things, like housing and a job, in place before a youth is out on his or her own.”

Recent Court Decisions Impacting Juveniles

Introduction

The purpose of the case summaries section is to provide an overview of selected court decisions involving the interests of juveniles decided between August 15, 2001, and March 1, 2002. The cases summarized here include decisions of the United States Supreme Court, Federal Circuit Courts of Appeals, Federal District Courts, individual state Supreme Courts, and the California Courts of Appeal. Following these case summaries is a piece highlighting a recent Supreme Court of California case.

United States Supreme Court Decisions

 *Owasso Indep. Sch. Dist. v. Falvo*
534 U.S. 426 (2002).

In February 2002, the United States Supreme Court held that peer grading did not violate the Family Educational Rights and Privacy Act of 1974 (FERPA). During peer grading, students exchange papers, score them according to the teacher's directions, and report the results to the teacher. Under FERPA, the federal government may withhold federal funding from school districts that release a student's educational record without obtaining prior written consent from the student's parent.

Arguing that her children's school district violated FERPA by allowing peer grading, a mother sued the Owasso Independent School District in an Oklahoma district court. The district court granted summary judgment for the School District, holding that student-graded papers did not constitute "education records" protected under the Act. On appeal, the Tenth Circuit reversed the district court's ruling and held that peer grading violated FERPA because

the act of grading constituted an unauthorized release of a student's record.

The Supreme Court reversed the Tenth Circuit, finding that the court erred in concluding that an assignment satisfied the definition of an education record as soon as another student graded it. Analyzing the wording of FERPA, the Court found that student papers were not education records within the meaning of the statute. The Court determined that grades put on papers by other students, at that stage, were not records "maintained by an education agency or institution." Additionally, the Court found that a student grader was not a "person acting for" an educational institution for purposes of the Act. In dicta, the Court cautioned lower courts against interpreting FERPA so broadly that federal law would substantially interfere with detailed aspects of state and local education practices.

 *Brown v. Gilmore*

533 U.S. 1301 (2001).

Virginia public school students and their parents sought injunctive relief from the United States Supreme Court against the continuing implementation of a Virginia statute. The statute mandates a minute of silence at the beginning of each school day in the State's public schools. The applicants sought the injunction pending the Court's disposition of their petition for certiorari that was filed contemporaneously with the application. They challenged the constitutionality of the statute.

Sitting as a single justice, Chief Justice Rehnquist held that an injunction pending certiorari was improper in this case. The Court first recognized the significance of the fact that the applicants were not merely seeking a stay of the lower court's decision, but rather an injunction against the enforcement of a presumptively valid state statute. The Court reasoned that injunctive relief should be used "sparingly and only in the most critical and exigent circumstances," which this was not.

Furthermore, the Court concluded that such an injunction should be ordered only when the legal rights at issue were “indisputably clear.” The Court noted that the rights of the applicants in this case lacked indisputable clarity given the merits of the applicants’ claim as it was set out in the decision of the Court of Appeals. The Court found that the lower court’s identification of a clear secular purpose in the statute established a genuine issue as to whether or not the statute violated the Establishment Clause of the First Amendment. The Court subsequently denied the applicants’ petition for writ of certiorari one month after rendering this decision.

Federal Circuit Courts of Appeals Decisions

Eunique v. Powell

281 F.3d 940 (9th Cir. 2002).

After dissolution of Eudene Eunique’s marriage, the State of California awarded custody of her children to her ex-husband and ordered Eunique to pay child support. By 1998, she had fallen \$20,000 behind in support payments and the arrearage continued to increase. Eunique subsequently applied for a passport to visit family in Mexico. By that time, California had certified Eunique to the Secretary of Health and Human Services as federal law required. Pursuant to a federal statute, the government denied Eunique’s passport application because the certification indicated that she was severely in arrears on her child support payments.

Consequently, Eunique brought an action against the Secretary of State for declaratory and injunctive relief. She alleged that the passport denial unconstitutionally violated her due process rights. She also argued that an insufficient connection existed between the breach of her duty to pay child support payments and the interference with her right to travel.

The district court granted summary judgment to the Secretary. The Ninth Circuit affirmed, holding that the statute and regulation authorizing the denial of passports to

applicants who had not made child support payments did not violate the applicants' due process rights.

The court recognized a constitutional right to international travel. However, the court refused to accept Eunique's argument that this right was fundamental, that only a narrowly tailored statute could restrict it. The court found that given the lesser importance of freedom to travel abroad, there need only be a rational reason for infringing on such rights within the bounds of due process.

In determining whether a rational relationship existed, the court first noted the serious societal problems surrounding failure to pay child support. Second, the court established that the problems involved with parents who failed to provide child support were exacerbated when these parents were out of the country. Third, the court noted that Congress has fiscal concerns about these parents because the public must often foot the bill for unsupported children. Finally, the court emphasized the importance of family and the duty of parents to support their children. For all of these reasons, the court held that the statute was rationally related to a legitimate government interest, and that the Secretary did not violate plaintiff's due process rights.

 *Hale v. Poplar Bluff R-I Sch. Dist.*
280 F.3d 831 (8th Cir. 2002).

Jeffrey Hale, a sixth grade student, suffered from mild cerebral palsy. His school district provided him with homebound educational services during his sixth and seventh grade years. Jeffrey required the services while he recovered from a surgery performed to implant a pump in his abdomen to deliver medication to his spine. After receiving homebound education for almost a year following his operation, the Poplar Bluff School District determined that Jeffrey's home was no longer an appropriate learning environment. The School District requested the Hales bring Jeffrey to school where the same educational services would be provided. When his parents

refused and cooperation between Jeffrey's parents and the School District failed, both parties requested due process hearings to determine the appropriateness of Jeffrey's education.

The school district's administration held the hearing to determine whether the School District violated the Individuals with Disabilities Education Act's (IDEA) stay-put provision by requesting that Jeffrey return to school. The IDEA's stay-put provision requires that during the pendency of due process proceedings, a child must remain in his or her current educational placement until the parties agree otherwise. The due process hearing panel concluded that the School District had not violated the stay-put provision.

Jeffrey and his parents brought an action in district court under the IDEA seeking judicial review of the administrative hearing. On cross-appeals for summary judgment, the Eighth Circuit affirmed the district court on all grounds. The circuit court found that the district court properly exercised its discretion when it determined that the School District violated IDEA's stay-put provision and ordered the School District to pay Jeffrey and his parents compensatory education services in the form of a summer program. The court concluded that the stay-put provision served to remove from schools the unilateral authority they traditionally used to exclude disabled students. After reviewing the impact of the change on Jeffrey, the circuit court affirmed the district court's conclusion that moving the location of Jeffrey's services from his home to the school constituted a change in his "educational placement." In addition, the Eighth Circuit found that the district court properly ordered the School District to provide Jeffrey with extended school-year services for one summer to remedy its IDEA violation. Finally, the circuit court affirmed the district court's denial of additional relief for the IDEA violation.

 *Burton v. Richmond*

276 F.3d 973 (8th Cir. 2002).

Four children brought a 42 U.S.C. § 1983 action against six social workers from the Missouri Division of Family Services (DFS), alleging violations of their substantive and procedural due process rights that resulted from alleged sexual and physical abuse while the children were in foster care. The plaintiffs alleged that the DFS workers violated their rights by placing them in an abusive home without investigating the guardians, failing to investigate their complaints of abuse, and refusing to remove them from the home after the violent criminal history of one foster parent, Jim Huffman, became known. To further complicate the situation, the DFS workers had recommended that the Huffmans be given legal guardianship of the children.

The DFS workers filed a motion to dismiss the children's claims, arguing that qualified immunity barred the entire lawsuit. The district court denied the workers' motion to dismiss and the Eighth Circuit granted review.

On appeal, the circuit court did not rule on the plaintiffs' procedural due process claim because the district court had not addressed this issue. However, the circuit court affirmed the district court's dismissal of the plaintiffs' substantive due process claim. The court rejected the defendants' argument that at the time of the alleged violations, substantive due process did not clearly establish a state protected liberty interest from private harm. The court reasoned that the State could not protect defendants from allegations brought by private actors because the DFS workers had assumed a custodial role and had actively participated in creating a dangerous environment for the children.

The circuit court also upheld the lower court's refusal to dismiss the case on the basis of qualified immunity. The court reasoned that if the plaintiffs could prove their allegations, the DFS workers would have indeed created an abusive situation in which the State could be held liable

for their actions. The court stated that qualified immunity served to protect the government from trivial claims of negligence, yet noted that “this action is precisely the classic situation where that doctrine should not and does not apply.”

 *United States v. F.S.J.*

265 F.3d 764 (9th Cir. 2001).

Police investigated F.S.J., a juvenile, for selling crack and firearms from his home that was located 1,000 feet from middle and elementary schools. Police subsequently arrested and filed charges against F.S.J. under the Juvenile Justice and Delinquency Act. The federal government filed a certification to prosecute F.S.J. in federal court, arguing that a substantial federal interest existed to warrant the exercise of jurisdiction. This certification is a jurisdictional requirement to prosecute juveniles in federal court.

The district court refused to review the U.S. Attorney’s certification, and F.S.J. appealed. Specifically, F.S.J. argued that the court erred when it failed to independently inquire whether his case involved a substantial federal interest. The district court had examined various circuit court decisions holding that certification based on a substantial federal interest is not subject to judicial review. In line with these cases, the district court concluded that a court could only review the certification under limited circumstances. So long as the U.S. Attorney timely files the certification, meets the statutory requirements, and is not affected by any invidious considerations, a court cannot review the certification. Determining that no exception applied to F.S.J.’s case, the district court denied his motion to dismiss.

On appeal, the Ninth Circuit firmly resolved the issue of whether a prosecutor’s determination of a substantial federal interest in a juvenile’s case warranted judicial review. The circuit court found that such certifications were not subject to judicial review unless certain

formalities, including timeliness and signature by the proper official, were not met or if the juvenile alleged the government official made the certification following an unconstitutional motive.

 *Blackard v. Memphis Area Med. Ctr. for Women, Inc.*
262 F.3d 568 (6th Cir. 2001).

Plaintiffs filed suit against the Memphis Medical Center for Women and one of its doctors for performing an abortion on their seventeen-year-old daughter Ashley without parental consent. The plaintiffs asserted claims of battery and tortious interference with family relations under the Tennessee Parental Consent for Abortion by Minors Act. The Act requires that an abortion facility or physician obtain written consent of a parent or guardian prior to performing an abortion on a minor. The Act also provides that where the minor does not wish to seek the consent of a parent or guardian, the minor can petition the juvenile court for a waiver of the consent requirement (otherwise known as a judicial bypass.)

The district court granted the defendants' motion to dismiss, finding that Ashley's parents could not rely on the Act as the basis for their claims. The court found that at the time Ashley obtained her abortion, a temporary restraining order placed on the Act by the circuit court in *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456 (6th Cir. 1999), prevented its enforcement. In *Memphis Planned Parenthood*, the plaintiff argued that the Parental Consent Act was unconstitutional because of flaws in the judicial bypass procedure. Specifically, the plaintiff argued that the procedure presented important unresolved issues of the minor's right to confidentiality and a speedy disposition of her case. The court agreed and granted the plaintiff's motion for a preliminary injunction.

In the case involving Ashley's abortion, the circuit court affirmed the district court's dismissal. Because no judicial bypass procedure existed at the time of Ashley's abortion, the circuit court concluded that the defendants could not be

held liable for failing to obtain the consent of Ashley's parents prior to her abortion as required by the Act.

 *Thomas v. Roberts*

261 F.3d 1160 (11th Cir. 2001).

Alleging that they had been subject to unconstitutional strip searches, thirteen elementary school children in Clayton County, Georgia, sued their teacher, their school's assistant principal and principal, the school district, an officer of the county police, and the County.

The searches occurred after a fifth-grade student reported missing an envelope containing twenty-six dollars he collected from a fundraiser. The student's teacher informed the school's principal of the missing money. Upon the teacher's request, the principal authorized a search of the students.

A police officer, present at the elementary school to teach a Drug Abuse Resistance Education class, conducted the searches of the boys. The officer directed the boys into the school bathroom and ordered the children to pull down their pants and underwear. The officer also told the school children that they would be suspended or sent to jail if they did not do what he asked.

The teacher inspected the female students in the girl's bathroom. She warned the students that they could be sent to juvenile facilities if they did not comply with her requests to lift their skirts, shirts, and bras. Some of the girls also testified that the teacher touched them as she searched for the envelope.

The district court found the strip searches unconstitutional under the Fourth Amendment, but ultimately granted summary judgment to all the defendants on all claims. On appeal, the schoolchildren contended that the lower court erred in: (1) granting summary judgment to the individual defendants based upon qualified immunity; (2) concluding that the school district and the County could not be held liable for the searches; and (3) denying injunctive and declaratory relief.

The Eleventh Circuit affirmed the district court on all three issues. First, the circuit court found the determination of qualified immunity proper because the individual defendants' conduct did not violate any clearly established statute or constitutional right. Specifically, the court concluded that the laws governing student searches were not clearly developed so that the individual defendants should have been aware that they acted illegally when they ordered and performed the searches. Moreover, the court found that neither the school district nor the County could be liable for the actions of the individual defendants. Additionally, the County did not know that an officer visiting an elementary school for drug awareness education purposes would have to conduct such a search. Thus, the County could not be liable for not having a constitutional search policy addressing the situation.

Federal District Court Decisions

 *Curley v. N. Am. Man Boy Love Ass'n*
2002 WL 264958 (D. Mass. 2002).

Defendants, the North American Man Boy Love Association (NAMBLA), moved for reconsideration of certain aspects of a district court order regarding allegations that they conspired to interfere with the civil rights of young boys. After reconsideration, the court granted defendants' motion to dismiss plaintiffs' 42 U.S.C. § 1985(3) claim, but denied reconsideration in all other respects. Plaintiffs were the parents of a ten year-old boy whom two men molested and murdered. Prior to the lawsuit filed against NAMBLA, the State of Massachusetts convicted both men of murder. Plaintiffs succeeded in a civil claim of wrongful death against the two men and brought a civil suit against NAMBLA after police discovered the organization's publications in the home of one of the murderers.

Plaintiffs based part of their claim against defendants on § 1985(3), which criminalizes conspiracies to deprive a person or class of persons from equal protection of the

laws. Citing NAMBLA publications and pronouncements, plaintiffs alleged that defendants promoted opportunities for men to have sexual relations with boys under the age of consent. Specifically, plaintiffs argued that defendants “conspired against boys . . . to deprive them of their rights to be free from illegal sexual contact and to enjoy the equal protection of laws prohibiting sexual assault.” The district court, however, noted that a claim brought under § 1985(3) requires plaintiffs to show an additional element — that defendants conspired against boys because of their membership in a class, and the conspiratorial conduct was propelled by some racial or other class-based, invidiously discriminatory animus.

Plaintiffs argued that males may constitute a protected class for equal protection purposes and that the law frequently recognized minors as a protected class. Therefore, plaintiffs reasoned, males who are minors must constitute a protected class under § 1985(3). The district court noted that while the U.S. Supreme Court has not formally decided whether § 1985(3) protects classes who are not defined by race, the Court has found that the statute was not designed to apply to all tortious, conspiratorial interferences with the rights of others.

After examining plaintiffs’ allegations, the district court determined that plaintiffs did not accuse defendants of discrimination against minor males based on an invidiously discriminatory animus. The court therefore dismissed the § 1985(3) claim against them, but allowed the case to proceed on other grounds.

*Psinet Inc. v. Chapman*

167 F. Supp. 2d 878 (D. Va. 2001).

Plaintiffs, a variety of businesses including online service providers, publishers, membership organizations, booksellers, and others with media interests, moved for summary judgment seeking a final injunction to prevent enforcement of a Virginia statute. The statute criminalizes the use of computers to disseminate material that is harmful to minors. The district court granted the motion, finding that the statute violated the First Amendment and the Commerce Clause.

The court noted that other courts found similar statutes in New Mexico, New York, and Michigan unconstitutional. The court also noted that the Virginia legislature enacted the original statute in response to concerns regarding the proliferation of pornography on the Internet and the ease to which minors could access such information. An amendment to the statute in 1999 expanded the dissemination of such materials via physical spaces, such as books, magazines, or other printed matter, to include “electronic files or messages.” Plaintiffs, all of whom utilized the Internet to further their business goals, feared that their online speech could be considered “harmful to juveniles” under the statute, even though the speech would be constitutionally protected as to adults.

In analyzing plaintiffs’ claims, the court first determined the statute to be a content-based restriction on expression. Therefore, the law had to promote a compelling government interest. The court found the State’s interest in protecting minors from sexually explicit materials to be a compelling one. However, the court determined that the statute lacked narrow tailoring for a number of reasons. In particular, the court found that the verification measures available to avoid prosecution under the statute posed too substantial of a burden on adults who wished to access such information. In addition, the statute lacked available affirmative defenses, making compliance with the law extremely burdensome. Finally, the court found that defendants failed to address the significant burden the law

imposed on bulletin boards, commercial websites and newsgroups that consist primarily of material suitable for minors. Thus, the court held the statute to be unconstitutional under the First Amendment. The court also invalidated the law under the Commerce Clause because website operators cannot yet feasibly limit on-line access by geographic location.

State Supreme Court Decisions

 *Jones v. Arkansas*
64 S.W.3d 728 (Ark. 2002).

While serving time in juvenile detention, fifteen-year-old high school student Blake Jones exchanged letters with his friend Allison Arnold. In addition, Jones composed rap songs and gave them to Arnold to read. Upon release from detention, Jones returned to high school where his friendship with Arnold began to cool. Seemingly in response, Jones composed a violently graphic set of rap lyrics and gave them to Arnold to read during class. After reading the lyrics, Arnold became frightened of Jones and showed the lyrics to school authorities. The State filed a petition against Jones alleging that he committed an act of “terroristic threatening.”

The juvenile court heard the petition, and Jones moved for a directed verdict on the ground that the State had failed to prove the requisite intent to terrorize or cause extreme fright. The juvenile judge denied the motion, finding that the rap lyrics constituted a threat. As a result, the judge sentenced Jones to twenty-four months of supervised probation and seven days in a detention facility.

On appeal to the state supreme court, Jones raised two arguments. First, Jones argued that the juvenile judge erred in denying his motion for a directed verdict because the State did not prove the requisite intent to terrorize or cause extreme fright. The Arkansas Supreme Court declined to reach the merits of that argument, finding that Jones did not properly renew his motion at the end of his case and thus waived his right to bring it up on appeal.

Second, Jones contended that his rap lyrics constituted protected speech under the First Amendment. The supreme court concluded, however, that while the fighting words exception to free speech protection did not apply to the facts of this case, the lyrics nevertheless constituted a “true threat” to Arnold. Because this marked the first time the Arkansas Supreme Court addressed the true threat doctrine, the court needed to articulate a test for determining a true threat. The court opted for an objective test focusing on how a reasonable person would react to such statements using the *Dinwiddie* factors established by the Eighth Circuit. Some of the factors in the non-exhaustive list include: the reaction of the recipient of the threat and of other listeners; whether the threat was conditional; and whether the threat was communicated directly to its victim.

Applying these factors, the court concluded that the lyrics constituted a true threat to Arnold. Arnold reacted with immediate fear to the rap lyrics. The threat was not conditional and Arnold knew of the defendant’s previous time spent in juvenile detention facilities, indicating to her that he could make good on his threat. Therefore, the Arkansas Supreme Court upheld Jones’s sentence.

 *State v. Rodriguez*
559 S.E.2d 435 (Ga. 2002).

Factual findings at trial showed that fifteen-year-old Carlos Rodriguez did not knowingly, intelligently, and voluntarily waive his constitutional rights to counsel and to remain silent when police arrested and questioned him on two counts of murder and two counts of aggravated assault. As a result, the trial court granted Rodriguez’s motion to suppress his statement. The Georgia Supreme Court affirmed.

Prior to the interrogation, police advised both Rodriguez and his mother of the “Advice of Rights to Juvenile.” Police then erroneously told Rodriguez that only his mother possessed authority to exercise his constitutional

rights. After a lengthy discussion about whether talking to the police would help Rodriguez, the minor and his mother signed a waiver. Based on her son's urging, the mother eventually allowed her son to answer questions, but stopped the interview before the police finished their interrogation.

After reviewing a tape and transcript of the forty-seven minute interview, the court found that the police failed to be clear with Rodriguez and his mother regarding the juvenile's rights. Focusing on the totality of the circumstances, the court affirmed the trial court's order granting the motion to suppress Rodriguez's statement during the interrogation. Specifically, the court noted that the police officers gave misleading statements about Rodriguez's level of personal responsibility to decide whether to invoke or waive his rights. Additionally, the court noted that a detective induced the minor into making a statement by telling him that doing so might lead to reduced or dropped charges. Furthermore, the court recognized that Rodriguez was inarticulate during the interview and found the entire interview to be confusing due to a language barrier, simultaneous discussions in English and Spanish, and incomplete translations from one language to another.

 *In re Hambright*

762 N.E.2d 98 (Ind. 2002).

In 1985, Indiana granted Dorothy Hambright custody of the three children she shared with Robert Edwards, Jr., and awarded her child support from Edwards. Edwards fell behind in support payments in excess of \$19,000. When Hambright filed for bankruptcy in 1999, the bankruptcy trustee sought to intervene in the underlying paternity suit, claiming an interest in the arrearages.

The trial court denied intervention, finding it contrary to public policy concerning child support. Specifically, the court found that when a non-custodial parent failed to pay child support, the child sustained a loss in the form of a

reduced standard of living. Therefore, the court concluded that such support payments were owed to the parent so they could be expended for the benefit of the child. The Indiana Court of Appeals reversed, finding that the arrearages constituted Hambright's assets and therefore the trustee could intervene as a matter of right.

The Supreme Court of Indiana reversed the appellate court, holding that child arrearages owed to a custodial parent were not assets of the parent's bankruptcy estate. Instead, like current and future child support, they constituted property held in trust for the benefit of the children. Thus, the trustee in bankruptcy had no interest in them.

 *In re Bailey M.*

788 A.2d 590 (Me. 2002).

A mother appealed from a district court order denying her motion to open child protection proceedings to the public. The Department of Human Services (DHS) had placed the mother's daughters, Bailey M. and Logan, into foster care pursuant to an ex parte preliminary protection order in March of 2000. The DHS sought the order based on evidence that the mother had failed to protect her children from danger and placed them into unsafe situations. Logan died while in foster care. The DHS immediately removed Bailey M. from the foster home and the State filed criminal charges against the foster mother. This case arose from proceedings initiated to determine Bailey's fate.

Because Logan's death generated substantial media coverage and public interest in the DHS's policies and procedures, the biological mother asserted that some of the media attention focused on her and presented her inaccurately. Specifically, the mother claimed the reports falsely stated that she abused her children. Additionally, the mother asserted that DHS's statements claiming she ultimately caused her daughter's death damaged her previously solid reputation in the community. The mother

claimed that the best way for her reputation to be repaired would be to open Bailey's child protection proceedings to the public.

First, the mother contended that the First Amendment grants the public the right to access child protection proceedings. Furthermore, she contended that state law creates a presumption that such proceedings will be open to the public unless the court finds specific unusual circumstances that would justify closure. Finally, the mother argued that even if the statute presumes closure, the law is nevertheless unconstitutionally vague because it fails to sufficiently delineate when the court should open its proceedings. The lower court denied the mother's motion on a variety of grounds and the Supreme Court of Maine affirmed.

The court found that any First Amendment claim the mother had to an open proceeding was outweighed by the child's right to a private hearing and the State's interest in keeping child protection proceedings out of the public view. Moreover, the court determined that the mother lacked standing to assert a third party's First Amendment rights to access the proceeding. The court disagreed with the mother's interpretation of the state statute. The court ruled that given the plain language of the statute and the strong federal policy favoring confidentiality with respect to child abuse cases, the proceeding would be presumptively closed. The court also found that the "void for vagueness" doctrine did not apply in this case because the state statute merely conferred discretion upon the courts as to how child protection proceedings would be run.

 *In re Interest of DeWayne G., Jr., and Devon G.*
638 N.W.2d 510 (Neb. 2002).

The State of Nebraska terminated DeWayne G., Sr.'s parental rights to his sons, DeWayne G., Jr. and Devon, in September 2000. DeWayne Sr. filed a motion requesting a

hearing on whether the State had made reasonable efforts to reunify his children with him under Nebraska law.

During most of his sons' lives, DeWayne G., Sr. remained incarcerated for drug use and parole violations. The Department of Health and Human Services (DHHS) placed DeWayne Jr. and Devon in the State's custody because they had been born with cocaine in their systems. Subsequently, DHHS terminated the biological mother's parental rights to DeWayne Jr. on December 22, 1997, and to Devon on July 16, 1998, approximately nine months after his birth.

In March 2000, DeWayne Sr. filed a motion requesting a hearing to determine whether the State made reasonable efforts to reunify his children with him as required under Nebraska law. In April 2000, DHHS filed a petition to terminate DeWayne Sr.'s parental rights to both children. The juvenile court denied DeWayne Sr.'s motion and granted the State's petition to terminate his parental rights to DeWayne Jr. and Devon. DeWayne Sr. appealed from this order.

The court of appeals reversed, finding that the statute requires a separate hearing on reasonable efforts if requested by a parent. Therefore, the court concluded that the juvenile court erred when it refused to grant DeWayne Sr.'s motion. The State appealed this decision to the Supreme Court of Nebraska.

The State's supreme court found that the plain language of the statute lacked a directive granting a parent or any other party the right to bring a motion requesting a separate hearing on the issue of reasonable efforts to reunify. However, the court concluded that to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-283.01 exists and that termination is in the best interest of the child. The supreme court found several factors in this case satisfied the convincing evidence requirement. First, both children resided in out-of-home placement for fifteen or more of twenty-two

months. Furthermore, DeWayne Sr. made no effort to establish parental rights while not incarcerated and deliberately violated his probation. Therefore, the court reasoned that the best interests of the child required the termination of parental rights when a parent is unwilling or unable to rehabilitate himself or herself within a reasonable time. Consequently, the supreme court reversed the appellate court's order granting DeWayne Sr.'s motion for a hearing and upheld the termination of his parental rights.



In re M.C.H.

637 N.W.2d 678 (N.D. 2001).

M.C.H., who was ten-year-old, appealed from a juvenile court order finding him delinquent after he stole a neighbor's car and crashed it into vehicles parked at a nearby residence. The minor argued that the State failed to present evidence to overcome the common law presumption that children between the ages of seven and fourteen are incapable of committing crimes. The North Dakota Supreme Court, however, found that the State did not need to present evidence to that effect because state statutes precluded the common law.

The court found that the criminal responsibility of children in North Dakota has been defined by statute since 1877. A statute enacted in 1895 provided that children between the ages of seven and fourteen were incapable of committing a crime unless the State presented clear proof that at the time of committing the act or neglect, the children knew its wrongfulness. The North Dakota legislature continues to enact a series of statutes altering the procedures for prosecuting juveniles. Under the State's current statutes, a child may be adjudicated a delinquent by the juvenile courts, but a child between the ages of seven and fourteen may not be adjudicated as an adult for the commission of a crime. The court recognized that the current statutes removed the confusion that previously existed at common law regarding the capacity of children to commit crimes.

Under the State's statutes, the court held that juveniles between the ages of seven and fourteen had no common law right to a presumption of incapacity to commit a crime. Thus, the State was not required to present evidence to overcome the common law presumption of incapacity. Consequently, the court affirmed the lower court's order, finding M.C.H. delinquent.

California Courts of Appeal Decision

In re Marriage of Harris

2001 WL 1326497 (Ct. App. 2001).

Karen Butler appealed a court order extending visitation rights to her daughter's paternal grandparents. Butler married Charles Harris in 1993, but the couple separated one year later. Butler subsequently alleged Harris emotionally and physically abused her on numerous occasions. Shortly after their separation, Butler gave birth to their daughter, Emily. A trial court granted Butler sole legal and physical custody of the girl, gave Harris supervised visitation contingent upon his undergoing psychiatric and drug therapy. The court also granted visitation rights to Harris's parents, Emily's grandparents. Over the next couple of years, Butler sought to limit the grandparents' visitation, at one point moving to another State without notifying them. In 2000, the grandparents sought increased visitation rights. In response, Butler asked for termination of the visitation rights.

The trial court denied Butler's request for an end to court-ordered visitation, finding that Emily's best interests included continued visitation with her grandparents. Butler appealed to the California Court of Appeal, citing *Troxel v. Granville*, 530 U.S. 57 (2000), a recent United States Supreme Court decision that invalidated a Washington nonparental visitation statute. Based on *Troxel*, Butler argued that California Family Code section 3104, which authorized the visitation, was unconstitutional, both facially and as applied.

In considering the facial challenge to section 3104 under the Due Process Clause, the court found the statute to be facially valid. Section 3104, unlike the statute at issue in *Troxel*, implicitly recognizes the presumption that a fit parent acts in her child's best interests. In addition, the statute limits visitation rights to grandparents who have a preexisting relationship with the child resulting in a bond that such visitation would be in the best interests of the child. Finally, the court found that section 3104 allows courts to give special deference to parental autonomy by balancing the interests of a child with the parent's right to exercise parental authority. Therefore, the court declined to find section 3104 in violation of a parent's federal due process rights per se.

Next, the court concluded that the statute was also facially valid under the California Constitution. The court found that section 3104 did not allow a court to grant a grandparent visitation solely upon a finding that it was in the child's best interest. Rather, the statute requires a grandparent seeking visitation to prove by clear and convincing evidence that not granting visitation would be detrimental to the child. The statute also includes a rebuttable presumption that grandparent visitation is not in the best interests of the child if the parent objects to such visitation.

Despite finding section 3104 facially valid, the appellate court ultimately determined that the statute violated both Butler's federal and state constitutional rights as applied to her situation. The appellate court found that the trial court did no more than apply a "bare bones interest test" and did not accord Butler's child-rearing decisions any deference or material weight. The appellate court also concluded that the trial court ignored the statute's rebuttable presumption that required the court to start its analysis with the supposition that Butler's opposition to visitation was in Emily's best interests. Finally, the court held that a court could reject the decision of a fit parent and substitute its view of what was better for the child just because the court believed it would be beneficial for a child to have

contact with his or her grandparents. The grandparents applied for a petition of review to the California Supreme Court. Their petition was granted on January 3, 2002.

Case Spotlight: Manduley v. Superior Court

41 P.3d 3 (Cal. 2002).

KAREN W. YIU

Ever since a majority of voters in California approved Proposition 21 in 2000, the debate on the controversial proposition has continued.¹ Also known as the Gang Violence Prevention Act of 1998, Proposition 21 reformed California's juvenile criminal system in a number of ways.² An important provision of Proposition 21 is the discretionary direct filing provision under California Welfare and Institutions Code section 707(d).³

¹ See generally Maggy Krell & Rebecca Gardner, Note, *The Constitutionality of Proposition 21*, 6 U.C. DAVIS J. JUV. L. & POL'Y 59 (2001); Maggy Krell, *Think Before You Transfer: An Assessment of the Automatic Transfer of Juveniles to the Criminal Courts*, 5 U.C. DAVIS J. JUV. L. & POL'Y 39 (2000); George Mgdesyany, Notes and Comments, *Gang Violence and Crime Prevention Act of 1998*, 3 J. LEGAL ADVOC. & PRAC. 128 (2001); Sara Raymond, Comment, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California's Juvenile Justice System and Reasons to Repeal It*, 30 GOLDEN GATE U. L. REV. 233 (2000); Serena S. Thakur, Note, *Juvenile Sex Offenders: Proposition 21 – The Hope for a Better Solution*, 21 J. JUV. L. 97 (2000); Joshua Tiffée, *Addressing Misconceptions: The Real Effects of Proposition 21*, 5 U.C. DAVIS J. JUV. L. & POL'Y 33 (2000).

² See *Proposition 21: Text of Proposed Law*, in SECRETARY OF STATE, STATE OF CALIFORNIA, VOTER INFORMATION GUIDE, MARCH 7, 2000 PRIMARY ELECTION 119-31 (2000), available at <http://primary2000.ss.ca.gov/VoterGuide/Propositions/21text.htm> (last visited Apr. 24, 2002); see also *Manduley v. Superior Court*, 41 P.3d 3, 27-29 (Cal. 2002) (summarizing Proposition 21's provisions); Krell & Gardner, *supra* note 1, at 62-63 (explaining some of the major provisions of Proposition 21).

³ See CAL. WELF. & INST. CODE § 707(d) (West Supp. 2002); *Proposition 21: Text of Proposed Law*, *supra* note 2, at 128-29. Under section 707(d), instead of the traditional fitness hearings in juvenile courts, juvenile defendants could be prosecuted in criminal (or adult) courts under certain

In February 2002, the Supreme Court of California sought to settle several constitutional issues over section 707(d). In *Manduley v. Superior Court*, the Court upheld section 707(d).⁴ The Court held that section 707(d) did not violate the separation of powers doctrine under the California Constitution, due process and equal protection of law provisions under the United States Constitution and California Constitution, and California's single-subject rule.⁵

Manduley stemmed from an alleged attack on five Mexican migrant workers by eight juveniles in San Diego.⁶ The juveniles, aged fourteen to seventeen, allegedly beat the workers, threw rocks and fired pellet guns at them, and insulted them with racial slurs.⁷ Pursuant to section 707(d), prosecutors filed eight felony charges against the juvenile defendants in criminal court.⁸ The trial court rejected the defendants' challenge to the complaint that section 707(d) was unconstitutional.⁹ On appeal to the Fourth Appellate District of the California Court of Appeal, a divided three-justice panel held that section 707(d) violated the separation of powers doctrine¹⁰ of the California Constitution.¹¹

circumstances. See *Manduley*, 41 P.3d at 17-18; Krell & Gardner, *supra* note 1, at 61-62.

⁴ See *Manduley*, 41 P.3d at 8-9.

⁵ See *id.*

⁶ Maura Dolan & Greg Krikorian, *State Justices Uphold Juvenile Crime Law*, L.A. TIMES, Mar. 1, 2002, at A1.

⁷ *Id.*; Robert Greene, *Proposition 21 Breaches Judicial Independence, Lawyer Tells State Supreme Court*, METROPOLITAN NEWS-ENTERPRISE, Dec. 6, 2001, at 1, available at <http://www.metnews.com/articles/mand120601.htm> (last visited Apr. 24, 2002).

⁸ *Manduley*, 41 P.3d at 9. The charges included assault with a deadly weapon by means of force likely to produce great bodily injury against four victims, willful infliction of injury upon an elder under circumstances likely to result in great bodily harm or death, and robbery. *Id.*

⁹ *Id.*

¹⁰ CAL. CONST. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").

¹¹ *Manduley*, 41 P.3d at 10; see also *Manduley v. Superior Court*, 104 Cal. Rptr. 2d 140, 147 (Ct. App. 2001), *rev'd*, 41 P.3d 3 (Cal. 2002). The appellate court found section 707(d) unconstitutional because it granted

The Court reversed the Fourth Appellate District's decision.¹² Writing for the majority, Chief Justice Ronald M. George found that prosecutors' authority to charge was within the scope of the executive branch's power.¹³ This authority encompassed choosing the forum of prosecution, which affected the availability of sentencing options to courts.¹⁴ The Court found that although the charging authority might affect the judicial branch's sentencing options, prosecutors do not improperly seize the court's power.¹⁵ In fact, the Legislature and voters may take away the court's power to select a particular sentencing option.¹⁶

Furthermore, the Court found that a law did not violate the separation of powers doctrine if it allowed prosecutors to choose to prosecute in criminal or juvenile court *before* actually filing the charges.¹⁷ Although prosecutors' filing decisions affect the availability of sentencing schemes, the Court found that such decisions are "merely incidental to the exercise of the executive function."¹⁸ Therefore, under section 707(d), prosecutors do not impede on the courts' sentencing options *after* an action is commenced.¹⁹ The Court also analogized section 707(d) to its previous decision, that there was no separation of powers violation in prosecutors'

prosecutors the discretionary authority to decide whether the court applied the criminal sentencing scheme or the juvenile dispositional scheme to convicted juvenile defendants. *Manduley*, 41 P.3d at 10; *see Manduley*, 104 Cal. Rptr. 2d at 147.

¹² *Manduley*, 41 P.3d at 33.

¹³ *Id.* at 12-13.

¹⁴ *See id.* at 12.

¹⁵ *Id.*

¹⁶ *Id.* at 13 (citing *People v. Superior Court (Romero)*, 917 P.2d 628, 638 (Cal. 1996)).

¹⁷ *See id.* However, the Court noted that the separation of powers doctrine would be violated if prosecutors could make such decisions *after* filing the charges. *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

discretionary filing decisions affecting defendants' eligibility for pretrial diversion.²⁰

The Court also found that "the prosecutor [did] not usurp any fundamental judicial power" under section 707(d).²¹ Discretionary direct filing by prosecutors is not an exercise of judicial power.²² Moreover, state law mandates that certain crimes be prosecuted in criminal courts even if the perpetrators are juveniles.²³ Determining the forum to prosecute juvenile defendants is not exclusively a judicial decision.²⁴ Therefore, the Court found that section 707(d) did not unconstitutionally delegate power to the executive branch, and that the appellate court erred in its decision.²⁵

Although the appellate decision was only based on the separation of powers theory, the Court resolved other constitutional issues surrounding section 707(d) in *Manduley*.²⁶ The Court also did not find that section 707(d) violated federal²⁷ or state²⁸ due process of law.²⁹ The court did not find that juvenile defendants have "any statutory right to be subject to the jurisdiction of the juvenile court."³⁰ Under most criminal statutes, the juvenile court and the criminal court have concurrent jurisdiction.³¹ Hence, juvenile defendants prosecuted as adult defendants pursuant to section 707(d) do not have any right to have juvenile courts hear and decide their criminal matters.³² Moreover, the Court objected

²⁰ *See id.* at 13-15 (referencing *Davis v. Municipal Court*, 757 P.2d 11 (Cal. 1988)).

²¹ *Id.* at 16.

²² *Id.* at 15.

²³ *Id.* at 16 (citing CAL. WELF. & INST. CODE § 620(b) (West Supp. 2002)).

²⁴ *Id.*

²⁵ *Id.* at 19.

²⁶ *Id.* at 8.

²⁷ U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

²⁸ CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law . . .").

²⁹ *See Manduley*, 41 P.3d at 23.

³⁰ *Id.* at 20.

³¹ *See id.*

³² *Id.* But see *Krell & Gardner*, *supra* note 1, at 75-76 (noting the absence of constitutional right to juvenile court jurisdiction, but cautioning the "dire consequences" of juvenile defendants prosecuted in criminal courts).

to the notion that section 707(d) placed an unfitness limitation on prosecutors' discretion on direct filing.³³

Additionally, the Court did not find a violation of the equal protection clauses of both the United States³⁴ and California³⁵ Constitutions.³⁶ The Court found that section 707(d) "contains no overtly discriminatory classification," which is an element of an equal protection claim.³⁷ Speculations of invidious discrimination or racial inequities are insufficient to establish an equal protection violation.³⁸ Prosecutors' direct filing decisions are not "unfettered" because prosecutors are subject to section 707(d)'s specifications and constitutional constraints.³⁹

The Court also rejected an equal protection violation theory based on the uniform operation of the laws provision⁴⁰ of the California Constitution.⁴¹ The Court found that traditionally, prosecutors decided on filing charges without guidance of "express statutory criteria."⁴² Even though different defendants might receive different treatments under

³³ *Manduley*, 41 P.3d at 21. Section 707(d)(6) mentions the court's authority to commit a convicted juvenile to the Youth Authority as opposed to sentencing the juvenile to state prison. CAL. WELF. & INST. CODE § 707(d)(6) (West Supp. 2002). Because section 707(d)(4) provides an opportunity for the court to determine reasonable cause during the preliminary hearing, the statute does not create an expectation of transfer to criminal court "upon an adverse fitness determination by the court." *Manduley*, 41 P.3d at 21.

³⁴ U.S. CONST. amend XIV, § 1.

³⁵ CAL. CONST. art. I, § 7(a) ("A person may not be . . . denied equal protection of the laws . . .").

³⁶ *Manduley*, 41 P.3d at 23.

³⁷ *Id.* at 24.

³⁸ *Id.*

³⁹ *Id.* at 25.

⁴⁰ CAL. CONST. art. IV, § 16(a) ("All laws of a general nature have uniform operation.").

⁴¹ *Manduley*, 41 P.3d at 26. The Court equated California's equal protection provisions to the Fourteenth Amendment's Equal Protection Clause. *Id.* As the Court found that section 707(d) did not violate the Fourteen Amendment, the Court deemed that there was no state equal protection violation. *Id.*

⁴² *Id.* at 27.

section 707(d), prosecutors' direct filing decisions are not unconstitutionally arbitrary and do not contradict the uniform operation of the laws.⁴³

Finally, the Court found no single-subject⁴⁴ violation under section 707(d).⁴⁵ Proposition 21's provisions related to the common purpose of the proposition, which sought to address problems of juvenile crime and gang-related crime.⁴⁶ Assuming that voters considered and understood the voting materials, the Court did not find that voters were confused or unaware of the changes that Proposition 21 brought to the Three Strikes law.⁴⁷

Two associate justices concurred with the majority but disagreed on its reasoning of the single-subject issue.⁴⁸ Associate Justice Kathryn Mickle Werdegar doubted that some of the newly added felonies qualifying as strikes were reasonably germane to Proposition 21's purpose.⁴⁹ Nonetheless, because most of these offenses satisfied the legal standard, Justice Werdegar agreed that the proposition did not violate the single-subject rule.⁵⁰

Associate Justice Carlos R. Moreno also agreed on the majority's disposition, but for a different reason. Justice Moreno was concerned that by attaching these modifications

⁴³ *See id.*

⁴⁴ CAL. CONST. art. II, § 8(d) ("An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.").

⁴⁵ *Manduley*, 41 P.3d at 33.

⁴⁶ *See id.* at 29-31.

⁴⁷ *Id.* at 31-32. Essentially, Proposition 21 expanded two lists of felonies qualified as strikes under the Three Strikes law. *See id.* at 29-30. *See generally id.* at 28 (summarizing provisions of Proposition 21 that amended the Three Strikes law).

⁴⁸ *See id.* at 33, 35.

⁴⁹ *Id.* at 34 (Werdegar, J., concurring) (finding that the majority's "broad view of the initiative's subject would render virtually any criminal law provision germane").

⁵⁰ *See id.* at 34-35. Justice Werdegar also noted that by changing the lock-in date of the existence of qualifying offenses, offenses that were added to the lists of felonies after the initial lock-in date and before Proposition 21 was passed became strikes under the Three Strikes law. *Id.* at 35. However, this does not violate the single-subject rule. *Id.*

to “a popular anti-juvenile-crime initiative,” the drafters may have used an improper form of logrolling, which the single-subject rule sought to prevent.⁵¹ Still, Justice Moreno found a functional relationship between Proposition 21’s juvenile justice provisions and its addition of certain felonies as qualifying strikes.⁵²

In her dissenting opinion, Associate Justice Joyce L. Kennard argued that Proposition 21 omitted judicial review of the executive branch’s discretion on direct filing.⁵³ Without judicial review or any standards guiding prosecutors’ use of the discretion, there is no check to the executive power.⁵⁴ Consequently, juveniles who are prosecuted in criminal courts, but would receive more appropriate treatment in juvenile courts, have no remedy under section 707(d).⁵⁵

Justice Kennard noted that the court had previously supported judicial review of prosecutors’ decisions on diversion programs.⁵⁶ She then distinguished *Manduley* from *Davis v. Municipal Court*⁵⁷ and found *Davis* unpersuasive.⁵⁸ Furthermore, Justice Kennard reasoned that Proposition 21

⁵¹ *Id.* at 39 (Moreno, J., concurring). Justice Moreno explained that the title and summary of Proposition 21 might not provide sufficient notice to voters of the proposition’s modifications of the Three Strikes law. *Id.* The purpose of the single-subject rule is to avoid voter confusion. *Id.* He found that the Court should enforce the single-subject rule more strictly. *Id.* (“The less rigorously we enforce the single-subject rule, the more we are compelled to rely on implausible assumptions about voters’ understanding of a ballot measure’s intricacies.”).

⁵² *Id.*

⁵³ *Id.* at 40 (Kennard, J., dissenting).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 42 (citing to *People v. Superior Court (On Tai Ho)*, 520 P.2d 405 (Cal. 1974) and *Sledge v. Superior Court*, 520 P.2d 412 (Cal. 1974)).

⁵⁷ *Davis v. Municipal Court*, 757 P.2d 11 (Cal. 1988).

⁵⁸ *Manduley*, 41 P.3d at 43. *Davis* involved diversion, the design of which is not a judicial function. *Id.* However, deciding to try a juvenile in criminal or juvenile court had been a judicial function. *Id.* Therefore, the two cases are distinguishable. *Id.* Justice Kennard also found that under *Davis*’s reasoning, the Legislature could “effectively abrogate all of [the Court’s] previous decisions on separation of powers.” *Id.*

unconstitutionally invaded judicial function.⁵⁹ Therefore, weighing the substance of prosecutors' authority under section 707(d), the effects of the power, and the absence of judicial review, Justice Kennard found that Proposition 21 violated the separation of powers doctrine.⁶⁰

As the Court upheld Proposition 21 in *Manduley*, more juvenile offenders will likely be prosecuted in criminal courts.⁶¹ Despite the proposition's grant of discretionary direct filing, prosecutors should remember that they can continue to file charges in juvenile courts.⁶² Before choosing to prosecute juveniles in criminal court, prosecutors should weigh all circumstances thoroughly and consider the results of their decisions. The public should pay close attention to any possible abuse of discretion on the part of prosecutors.

⁵⁹ *Id.* at 44. Justice Kennard's reasons were: first, history plays a significant role in enforcing the separation of powers doctrine and courts had historically determined juveniles' fitness for juvenile proceedings. *Id.* Second, prosecutors' decisions on direct filing carry such significant consequences that there should be due process protection of a judicial proceeding. *Id.* Third, prosecutors could err in exercising their discretion on direct filing due to incomplete information. *Id.* at 45.

⁶⁰ *Id.*

⁶¹ See Dolan & Krikorian, *supra* note 6, at A1; Mike McKee, *With Few Qualms, California Justice OK Prop 21*, RECORDER, Mar. 1, 2002, at 1 (quoting Steven Mayer's statement that *Manduley* will create a "dramatic and Draconian effect" on juveniles). *But see* Greg Moran, *Tougher Teen Rules Upheld by High Court; 2 High-Profile Cases in County Can Go Forward*, SAN DIEGO UNION-TRIBUNE, Mar. 1, 2002, at A1 (quoting Larry Brown's statement that "[t]here won't be a run on the bank by prosecutors seeking to have juveniles tried as adults").

⁶² For example, the Los Angeles County District Attorney's Office maintains a policy of relying on juvenile courts' fitness hearings procedures in prosecuting juvenile offenders. LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, PROPOSITION 21 DISCRETIONARY DIRECT FILING POLICY (2002), available at <http://da.co.la.ca.us/mr/2001/022101.htm> (last visited Apr. 24, 2002). Under the policy, a discretionary direct filing must be approved by the Head Deputy of the Juvenile Division, who is to consider seven factors in rendering an approval. *Id.* Los Angeles County District Attorney's Office has the highest number of juvenile cases among all counties in California. Dolan & Krikorian, *supra* note 6, at A1.

Although Proposition 21's changes to state law might be incremental and not revolutionary,⁶³ these changes result in important effects. As Justice Kennard explained, Proposition 21 produced significant practical consequences to juvenile defendants.⁶⁴ The prison experience could increase a juvenile's likelihood of committing future criminal offenses.⁶⁵ As Proposition 21 increases the number of felonies that qualify as strikes under the Three Strikes law, a juvenile defendant could face more serious punishment if the juvenile is convicted again in the future.⁶⁶ Even if Proposition 21 could make juvenile rehabilitation more effective in juvenile courts,⁶⁷ the proposition deprives certain juvenile defendants of rehabilitation.⁶⁸

⁶³ Tiffée, *supra* note 1, at 38.

⁶⁴ *Manduley*, 41 P.3d at 41 (Kennard, J., dissenting); *see also* Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 817-22 (2002) (explaining additional consequences of sentencing juvenile convicts to adult prisons).

⁶⁵ *Cf.* Dolan & Krikorian, *supra* note 6, at A1 (quoting Bob Schwartz's comment that studies reveal that juveniles who had gone to adult prison commit more serious and frequent offenses than those who experience the juvenile justice system).

⁶⁶ *Cf.* Linda Greenwood, *Supreme Court Taps Cases To Decide 3-Strikes Issue*, N.Y. TIMES, Apr. 2, 2002, at A16 (explaining that a misdemeanor conviction in California could be considered a felony and hence a third strike under the State's Three Strikes law). Nevertheless, the future of California's Three Strikes law has recently turned somewhat uncertain. In April 2002, the United States Supreme Court decided to consider whether California's Three Strikes law violated the Eighth Amendment by granting certiorari in *Lockyer v. Andrade* and *Ewing v. California*. *Id.*; *see also* *Ewing v. California*, No. 01-6978, 2002 WL 480176 (U.S. Apr. 1, 2002); *Lockyer v. Andrade*, No. 01-1127, 2002 WL 204945 (U.S. Apr. 1, 2002).

⁶⁷ *See* McKee, *supra* note 61, at 1.

⁶⁸ *See Manduley*, 41 P.3d at 41 (Kennard, J., dissenting). Moreover, under Proposition 21, these juvenile defendants are subject to only the criminal approach to justice, which is less effective than the juvenile justice system's utilization of non-legal resources. *See* Symposium, *Creative Problem Solving Conference*, 37 CAL. W. L. REV. 1, 7 (2000) (statement of Bernie Jones); *cf.* Raymond, *supra* note 1, at 262-76 (discussing Proposition 21's failures to reform juvenile justice).

Nevertheless, *Manduley* leaves open the possibility that a criminal court could dismiss a section 707(d) action “in furtherance of justice.”⁶⁹ Even though judicial review might be lacking in checking prosecutors’ discretionary direct filing authority, this might provide courts an opportunity to protect juvenile offenders. While *Manduley* might have put some constitutional issues to rest, litigation on other issues of Proposition 21 will most probably keep the debate alive.

⁶⁹ See *Manduley*, 41 P.3d at 15 n.4.

Websites on Juvenile Issues

Journal staff reviewed the following websites to establish a few signposts on the Internet that we hope will aid our readers during their own research. The listed websites provide detailed information on a vast array of issues concerning juvenile law and policy, from analyses of juvenile crime statistics to effective advocacy programs.

Building Blocks for Youth

<http://www.buildingblocksforyouth.com>

Building Blocks for Youth, a partnership of child advocates, researchers, law enforcement professionals, and community organizers, focuses on minorities in the juvenile justice system. The alliance works together to ensure that policies affecting minority youth are both rational and effective. Building Blocks for Youth publishes its own newsletter containing recent policy research, and provides its website users with the opportunity to subscribe to the newsletter on-line. In addition, the site offers users the ability to research recent as well as past developments in the area of juvenile law.

Children's Injury Law Center

<http://www.childinjurylaw.com>

The Children's Injury Law Center strives to "aggressively represent" injured children and their families. The Center's site provides a good starting point for researching information about asthma, lead paint poisoning, and heart problems in children. Additionally, the site features an overview of recent news items relating to children and the legal field. Recent news items summarized on the site include window blind cord injuries, leukemia clusters, medical malpractice, and lawsuits initiated by children against their foster families.

 **Coalition for Juvenile Justice**

<http://www.juvjustice.org>

The Coalition for Juvenile Justice (CJJ) represents governor-appointed advisory groups within the juvenile court system. The non-profit organization provides the public with training and technical assistance related to the federal Juvenile Justice and Delinquency Prevention Act. In addition, CJJ produces a bimonthly newsletter and presents an annual report to the President and Congress. The CJJ website provides information on upcoming conferences concerning juvenile justice issues, a resource page including fact sheets, and a listing of contact information of juvenile justice specialists.

 **Juvenile Justice Information Center**

<http://www.jjic.org>

The Juvenile Justice Information Center provides comprehensive information and statistics on juvenile justice in California. The website serves as a wonderful source for gathering information on a variety of juvenile justice issues, ranging from the highly debated Proposition 21 to the role race plays in the juvenile justice system. The site also includes a section comparing the myths and facts about juvenile justice, and a section entitled "Legal Rights You Should Know." Designed to improve the public's understanding of the juvenile justice system and promote better public policy, this website does an excellent job of making information accessible and easy to understand.

 **Juvenile Law Center**

<http://www.jlc.org>

The Juvenile Law Center, a non-profit public interest law firm, informs its website's users of current events and developments in juvenile law. Dedicated to juvenile issues, the Center affiliates itself with a number of public agencies to advance the well-being and constitutional rights of at-risk youth. The Center's website details national current legislation and reports on modern developments in juvenile law, including recently decided

cases in the areas of delinquency, dependency, and adoption laws.

 **Kidz Privacy**

<http://www.ftc.gov/bcp/online/edcams/kidzprivacy/index.html>

The Federal Trade Commission (FTC) established the Kidz Privacy website to help implement the 1998 Children's Online Privacy Protection Act. In accordance with the Act, the FTC promulgates rules to ensure that website operators protect children's privacy while kids are on-line. The Kidz Privacy site offers information about the FTC rules as well as the text of the 1998 act. The site's "Adults Only" section gives parents advice for protecting their children when children are on-line. The site's "Just for Kidz" section gives children tailor-made guidance on cautiously surfing the Internet.

 **LII: Legal Information Institute**

<http://www.law.cornell.edu/topics/juvenile.html>

The Legal Information Institute's website gives a comprehensive overview of juvenile law and the federal government's role in the area. The site has a menu of sources which includes federal and state laws and cases. The site also includes a discussion of cases that the New York Court of Appeals decided during the past decade. The LII site also provides a list of references for juvenile law issues, including links to The Juvenile Justice homepage, The National Youth Gang Center, and the Juvenile Justice Coordinating Program.

 **National Criminal Justice Reference Service**

<http://www.ncjrs.org>

A federally sponsored site, National Criminal Justice Reference Service bills itself as an "information clearinghouse" for people involved with criminal and juvenile justice research, practice, and policy. The website provides a variety of links leading to information on courts, drugs, and law enforcement. The site also details a

number of issues relating to juveniles, including adolescent pregnancy, crime in schools, strengthening families, missing and exploited children.

 **The National Law Center for Children and Families**

<http://www.nationallawcenter.org>

The National Law Center for Children and Families (NLC) is a non-profit organization committed to enforcing the laws against illegal pornography. The Center strives to reach its goals by encouraging the protection of children and families from the harmful effect of illegal pornography, and assisting in law enforcement and law improvement. The NLC site provides court briefs of cases relating to federal and state obscenity and child exploitation laws. The site also features an interview with Bruce Taylor, the President and Chief Counsel of NLC, which provides useful information about the legal history of pornography prosecution. According to the site, Taylor has been involved in 700 obscenity cases throughout his career. The website also contains amicus curiae briefs filed by NLC and information on legislation, law enforcement, and filtering.

OTHER FAVORITE BOOKMARKS

The Journal has reviewed websites for over four years. The websites listed below involve a wide array of juvenile justice issues and warrant a second look.

 **American Bar Association**

<http://www.abanet.org>

The American Bar Association's website provides several valuable resources relating to juvenile law and policy. The ABA Center on Children and the Law site (www.abanet.org/child) provides information on child welfare laws and child custody proceedings. The ABA Juvenile Justice Center site (www.abanet.org/crimjust/juvjus) details

information about the National Juvenile Defender Center, juveniles being sentenced to death, and girls in the juvenile justice system.

 **Action Alliance for Children**

<http://www.4children.org>

The Action Alliance for Children website features information about current trends, policies, and other issues affecting children. The site also contains details about *Child Advocate*, the organization's news magazine and links to resources for children and families.

 **Children's Advocacy Institute**

<http://www.acusd.edu/childreissues>

The Children's Advocacy Institute (CAI) works to improve the status and well-being of children by advocating their rights to safe and healthy childhood. As part of the Center for Public Interest Law at the University of San Diego School of Law, CAI represents children in court, state legislatures, and public education programs. The group's website offers a wide variety of information from commentaries to legislation. The site also informs visitors of new issues affecting children, such as playground safety and the impact of domestic violence on children.

 **Children's Defense**

<http://www.childrensdefense.org>

Children's Defense reports daily on news items relating to children. In addition, the organization has recently been named one of America's best charities by *Worth* magazine. The Children's Defense website offers a national perspective of juvenile issues and promotes a number of volunteer opportunities.

 **Kids Peace**

<http://www.kidspeace.org>

Kids Peace advocates programs that help children and adolescents avoid crises before they begin. The website offers a comprehensive magazine that highlights current juvenile issues and opportunities to help this organization.

 **National Center for Missing and Exploited Children**

<http://www.missingkids.com>

The National Center for Missing and Exploited Children offers a support system for families who have lost their children. The website proves beneficial and helpful by posting pictures of missing children, providing a toll-free crisis helpline, sharing methods for reporting child sexual exploitation, and detailing news and events. The site also features success stories to give hope to individuals in crisis, and can be accessed in both English and Spanish.

 **The National Center on Education, Disability and Juvenile Justice**

<http://www.edjj.org>

The National Center on Education, Disability and Juvenile Justice seeks to address the needs of children with disabilities in the juvenile justice system. The organization's website contains information on the Center's research, training opportunities, and resources for parents.

 **National Council of Juvenile and Family Court Judges
Permanency Planning for Children**

<http://www.pppncjfcj.org>

The Permanency Planning for Children Department provides educational and technical assistance to courts in hopes of improving practice in child abuse and neglect cases. The group's website details the organization's current projects, including the Permanent Families Initiative, the Child Victims Model Courts Initiative, and the Expedited Adoption Initiative. The site also provides links to other juvenile law sites, and offers information on publications concerning adoption and court practice in child abuse and neglect cases. The website allows visitors to view chapters of the publications and provides an order form for on-line purchasing.

 **Self-Help Center**

<http://www.courtinfo.ca.gov/selfhelp/juvenile>

Organized by the Judicial Council of California, the Self-Help Center offers many unique services designed mainly for people preparing for court. The Center's website offers self-help search capabilities to help guide individual research projects. Additionally, the site provides free and low cost legal services,

helpful links to other sites, and an on-line activity book to prepare children for court proceedings in California.

 **Youth Law Center**

<http://www.youthlawcenter.com>

The Youth Law Center, a public interest law office, works to protect abused and at-risk children. The Center focuses primarily upon the problems of children living apart from their families in child welfare and juvenile justice systems. The Youth Law Center responds to reports of harm resulting from dangerous, abusive, or neglectful conditions in foster care systems and juvenile institutions. The Center's website provides access to current publications available by mail as well as newsletters and an annual report and newsletters. Additionally, the website provides a list of past and present Youth Law Center cases, and a detailed list of links to other juvenile law websites.

To share your thoughts on this section or to have your website reviewed in a future issue of the Journal, please contact Jamie Diemecke at jldiemecke@ucdavis.edu.