

## **Practitioners Section: Representing Undocumented Minors in U.S. Courts**

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This portion of the Journal of Juvenile Law & Policy presents experiences of practitioners providing direct representation to undocumented minors in the United States. The Journal has selected three attorneys to provide their insights on practicing in this particular area of juvenile law.

Lisa Frydman, a staff attorney at Legal Services for Children in San Francisco, describes her experience obtaining legal relief for a minor placed in removal proceedings while applying for a Special Immigrant Juvenile Visa. Christopher Nugent, Community Services Team Administrator at Holland & Knight LLP in Washington, D.C., provides a narrative on his visit to Conakry, Guinea to gather witness testimony for establishing his client's asylum eligibility. Martha Rickey, children's attorney at the Florence Immigrant & Refugee Rights Project in Arizona, discusses the limited rights accorded to undocumented children in United States immigration proceedings and the need for legal representation for minors throughout this process.

The practitioners' accounts are followed by an article written by Professor Deborah Anker, Director of the Harvard Law School Immigration and Refugee Clinical Program. The article discusses *Escobar v. Gonzales*, a recent decision of the Court of Appeals for the Third Circuit, and the serious implications this case may present for children applying for asylum protection. *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005).

The Practitioners Section is followed by recent case summaries and legislative updates pertaining to the fields of delinquency, dependency, education, and health law, including a spotlight on the California Special Election held in November 2005.

## HUMBLLED

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By Lisa Frydman<sup>\*</sup>

Working with unaccompanied immigrant children for the past three plus years, I am struck, and often humbled, by my clients' bravery and strength. Emma is one such client. Emma's story is a one of tremendous strength, character, and the will to overcome. It is also a story conveying some of the many injustices undocumented immigrant children face in the United States (hereinafter U.S.) as a result of our unjust immigration laws and policies.

Emma is one of thousands of immigrant youth brought to the U.S. as very young children. Some of these children do not speak their native language. Others have never visited their native country since leaving. Still, others think they are American and do not learn of their undocumented status until years after their arrival, typically when they begin thinking about getting a driver's license or applying to college. Under current immigration law, most of these youth are unable to legalize. The DREAM Act or similar legislation would make a tremendous difference to thousands of undocumented youth who are raised and educated in the U.S.

Emma's parents were heavily involved in a large U.S.-based Nicaraguan gang. Her stepfather was one of the leaders. Throughout her childhood and early adolescence, she was physically, verbally, and sexually abused. Emma's stepfather demanded that she deliver drugs for him starting at about the age of ten. If she refused, he would beat her. When she tried to run away, he forced her to return home. Being the oldest of three girls, Emma tried to protect her younger sisters. She took the brunt of the abuse as a result.

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When Emma was fourteen, the police busted the gang, arresting over one hundred gang members and affiliates, including Emma. The District Attorney's office (DA) directly filed a case on Emma, trying her case in the adult criminal system rather than the juvenile delinquency system. Emma was forced to testify against her mother and stepfather. She pled guilty to significant criminal charges, despite the fact that she was only fourteen and was forced into delivering drugs for her stepfather. Emma was advised that there could be immigration consequences if she pled guilty, but she did not understand what those consequences would be. All she understood at the time was that her family had been destroyed and that she was in jail and wanted to get out.

Emma entered the foster care system after being released from jail. She was in foster care for a number of years until a child welfare worker (CWW) finally realized that Emma was undocumented and that her status could cause her problems. Emma's CWW contacted the Florida Immigrant Advocacy Center (FIAC) and asked for assistance for Emma who would soon turn eighteen. FIAC determined that Emma was eligible for Special Immigrant Juvenile Status (SIJS) and immediately began preparing her application.<sup>1</sup>

Meanwhile, Emma moved in with her boyfriend and gave birth to a child. One night at three or four o'clock in the morning, armed officers from the Immigration and Naturalization Service (INS)<sup>2</sup> pounded on Emma's door. They handcuffed Emma. She begged them not to take her because her son was only an infant and he was nursing. The officers arrested Emma despite her pleas and took her to an immigration detention center. Emma's INS arrest was made years after the criminal case against her. The horror that Emma believed was finally behind her was only just

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<sup>1</sup> Under 8 U.S.C. §1101(a)(27)(j) a special immigrant juvenile is a child who has been declared a dependent on the juvenile court and found eligible for long term foster care due to abuse, neglect, or abandonment, and for whom it has been determined that it is not in her best interests to be returned to her home country.

<sup>2</sup> The INS has since been dissolved and replaced by the Department of Homeland Security in accordance with the Homeland Security Act.

beginning. FIAC and Emma's godmother moved mountains to get her released from detention and back to her son. The INS was not interested in the humanitarian issue – that Emma's milk was drying up and that her infant was separated from his mother. The INS only agreed to release Emma after a former congresswoman became involved.

INS placed Emma into removal proceedings (deportation proceedings) under 8 U.S.C. §1229(a). 8 U.S.C. § 1229(a) (2005). Emma finally understood the immigration consequences of the plea that she had agreed to in her criminal case. INS charged Emma as being inadmissible to the U.S. based on her illegal entry and her criminal conviction, despite the fact that Emma was very young when she was brought to the U.S., she did not participate in the decision to come, and her conviction was a direct result of the same abuse and neglect that made Emma eligible for SIJS in the first place. I inherited Emma's case at the point that she had been granted the SIJ visa<sup>3</sup> but was in removal proceedings.

I was touched by Emma from the moment I met her. An incredible mother, a young woman with passion and great hopes despite everything she had been through, and a mentor and friend to her younger sisters. She was also a computer student and was studying to take the GED exam. Emma's son had several serious medical conditions and Emma was constantly taking him to doctors and hospitals. I felt how deeply wrong on a human and legal level it would be for Emma to be ordered removed. I was not concerned about the illegal entry charge because that charge is waivable for special immigrant juveniles. See 8 U.S.C. § 1255(h) (2005). It was the

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<sup>3</sup> The SIJ visa makes a child immediately eligible to adjust her status to that of a lawful permanent resident. Consequently, a youth who is eligible for SIJS would generally file the petition for the visa together with the petition for permanent residency. However, the process is bifurcated for children in removal proceedings because immigration judges cannot adjudicate visa applications - only the benefits arm of the immigration agency - now Citizenship and Immigration Services (CIS) (formerly INS) can.

conviction I was concerned about – whether she would be charged as a controlled substance trafficker.<sup>4</sup>

Emma and I began discussing her options and prospects for success. She told me that she woke up nightly with the fear that she would be deported to a country she had not visited in more than a decade, and where she feared her son would not receive the ongoing medical treatment he needed. She was also terrified of repercussions by her stepfather's family in Nicaragua because of her testimony against him.

The more I spoke with Emma and thought about her case, the more insane it seemed that after all the trauma she had survived – the ongoing abuse, the dangerous and chaotic environment in which she was raised, time in jail, testifying against her mother and stepfather under pressure, her mother being in jail for many years, being bounced around different foster homes, and having a son with serious medical problems – that she could be deported for acts she committed between the ages of ten and fourteen and under force. Emma was a victim, not a criminal.

Emma and I were able to get her conviction expunged. One of the Florida laws under which Emma was charged was later found unconstitutional by the Florida Supreme Court. That particular law had been the hook the prosecutor used to directly file on Emma. Additionally, because Emma did not understand the true immigration consequences of her plea, the plea was not properly entered. Though the conviction was expunged, Emma was still not off the hook. She still faced adversarial removal proceedings with an uncertain outcome. The attorney for the Department of Homeland Security could have lodged a controlled substance trafficker charge against Emma, or the judge could have denied Emma's request for adjustment of status on discretionary grounds.

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<sup>4</sup> Under 8 U.S.C. §1182(a)(2)(C), any alien who the Attorney General knows or has reason to believe "is or has been an illicit trafficker in any controlled substance...or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance..." is inadmissible.

Luckily for Emma and her family neither of those things happened. Today she is a lawful permanent resident of the U.S. She is finally able to truly leave the past behind her and focus on healing and on the future. While Emma's case was ultimately successful, the way she was treated by the INS and the extraordinarily adversarial process she endured to become a resident were unduly harsh.

Abused, abandoned, and neglected children are more likely to get into trouble with the law than other youth. Emma's situation was somewhat different because she had no choice – she was forced into committing the acts for which she was punished. Additionally, she was charged with an adult “crime” rather than a juvenile “delinquency.” Many different crimes make a person inadmissible under immigration law. Most juvenile delinquencies do not make a person inadmissible. Delinquencies, however, can be the basis for a discretionary denial of various immigration benefits. This policy is fundamentally unfair. We should be protecting abused, abandoned, neglected immigrant youth, not criminalizing them and threatening them with deportation.

## 123 HOURS

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By Christopher Nugent\*

I panicked as the Air France plane began to taxi down the runway at Dulles Airport ultimately bound for Conakry, Guinea, West Africa. You lived as a lawyer always questioning what more could you do for a client? You subscribed to the untenable philosophy that you should fight a case as if your life were on the line, I chided myself. Now's your chance.

And so commenced my six-day journey to the outer limits of fear – ironically, to gather evidence to help establish our pro bono client Malik Jarno's own "well-founded fear of persecution" for asylum eligibility in the United States. Malik is a teenage mentally disabled refugee orphan facing deportation to Guinea. He had been detained by immigration officials in adult jails for almost three years until December 23, 2003 when Department of Homeland Security (DHS) Under Secretary Asa Hutchinson released him from custody to a refugee shelter pending a new asylum trial. Over seventy members of Congress and scores of national organizations had intervened urging DHS to agree to a grant of asylum for Malik. While such disinterested folks believed in Malik wholeheartedly, DHS refused their pleas, casting doubt on Malik's identity and asylum claims. Thankfully, my law firm allowed me to undertake this business trip, considering that the stakes for Malik remain as high as in one of our pro bono death penalty cases.

Upon arrival in Conakry, my fear subsided somewhat. At least I was not immediately detained by customs agents who could have easily flagged me for arrest and expulsion given Malik's notoriety, I thought. I was free to be in

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Conakry. I promptly hired a local driver, interpreter, handler and bodyguard to be as efficient, effective and safe as I could be. I only had 123 hours before my departure to piece together any illuminating shards of Malik's past life and his future fate if deported.

I felt ridiculous when explaining to residents that I had traveled six thousand miles for Malik, but one child, when I saw the excruciating hardship they faced in Guinea, one of the poorest countries in the world ruled under the autocrat "President" Lansana Conte. The chronic lack of electricity and running water was just another fact of life for them like arbitrary arrest and disappearance by the police. However, people surprisingly still were willing to help Malik – even at their own peril.

I secured written statements prepared on my laptop computer from ten new witnesses from all sectors of society. I unfortunately can't reveal these witnesses by name due to the very real threat of reprisals they face at the hands of the government. Two of the witnesses in fact knew Malik and his family when he was a child. They recognized photographs I brought from the United States of Malik with members of Congress, commenting that he was bigger and fatter now than as a child. His childhood friend, in fact, cried when he saw that Malik was alive – and cried when he returned with us to the massacre site in Kaporu Rails for the first time since the spring of 1998 to discover that his home had been razed. Four witnesses knew Malik's father to be the Chief Imam of the Grand Mosque of Kaporu Rails and a religious and political opposition leader who was arrested, imprisoned and killed during this conflict.

Three other witnesses attested to the life-threatening plight mentally disabled youths like Malik experience, when forced to live on the streets of Conakry without any legal protections or services. Several witnesses described the total lack of due process, jail conditions and torture Malik would face if arrested and detained upon return. One witness in fact had been jailed without charges, without counsel, without a judicial proceeding – for years. Faith in God reportedly got

him through this ordeal even while he witnessed fellow inmates die from abuse, torture and neglect. All witnesses advised against deporting Malik to Guinea since he would experience an accelerated death by government persecution.

During this evidence-gathering, the fear of omnipotent President Conte was palpable among the Guinean citizenry. I was chided about photographing or videotaping in public lest these activities attract the police's attention. I saw many citizens' scars of torture; the tragic decimation of Malik's home and his dad's mosque; and, in these troubled times, the very embarrassing, if not shameful, construction of the new United States Embassy on the very land where people's homes and lives were destroyed in Kaporu Rails.

Many folks warned me against traveling with this treasure of evidence since the government would confiscate it upon my departure from Conakry as they had done to many researchers. So, I had two and a half pounds of document sent to the United States for an exorbitant fee.

At Conakry airport, I had to pass through layers of security. When the first customs official invasively asked me for the names and numbers of people I had stayed with, I told him that they were checked in with my baggage. Passing through the metal detector, another agent commented that I looked "tres blanc et malade" – very white and sick. I responded that I had stomach problems – which was the truth since I couldn't adjust to Guinean cuisine and one can live on Coca Cola alone only for so long. At the last check-point, right before boarding the plane, I noticed government agents confiscate other materials from other travelers ahead of me. I smiled and was friendly to the agent, who thankfully did not confiscate any of my film – containing hundreds of photographs and hours of footage.

Upon return to my own homeland, Malik confided that he had been unable to sleep during my trip since he was afraid that I would be killed in Guinea. Frankly, I had no time to worry at all while in Guinea, and I consoled him. DHS has given no formal opinion on the evidence and the case will go to trial. At least I know for myself and for Malik that I have

seen and experienced the core truths of his case. I thank so many heroic people in Guinea for educating me first-hand while risking their lives for Malik. Clearly, this is not what a pro bono asylum case should ever require but I am grateful that it did because otherwise, I would never have been able to get so close to the raw fear and tragic realities that my asylum-seeking clients flee from in the first place.

## IS IT LAW, OR IS IT IMMIGRATION LAW?

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By Martha H. Rickey\*

During law school, I worked for the admissions office recruiting new students and helping out at 1L orientation. I remember the nervous student who came up to me after a panel discussion to ask, what exactly is the difference between civil law and criminal law? She said nobody ever said what the difference was and she just didn't get it. I hadn't thought about it really, but quickly came up with an answer that sounded right: that under criminal law they can throw you in jail but under civil law all they can do is levy a fine. A light seemed to go on in the student's eyes and she looked relieved. She thanked me and went on to the next free pizza meeting.

Like most quick answers, mine was inadequate. Civil law seeks redress and criminal law metes out punishment. In my practice, I still don't know how to differentiate the two. For me, things boil down to "law" and "immigration law."

Immigration law in the United States operates in a strange parallel universe where most constitutional protections and accepted legal standards do not apply. Immigration proceedings are defined as civil proceedings and so immigration consequences are by definition not punishment. However, the government can and does arrest you, fingerprint you, throw you in jail, hold you indefinitely, forcibly separate you from your family and community, call you an "illegal alien" and a "criminal," and summarily deport you from the United States of America. But it is not "punishment." In

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criminal proceedings, indigent defendants receive public defenders. In civil proceedings, the government funds legal aid to the poor. In immigration removal proceedings, individuals are left to fend for themselves, even if they are unaccompanied children.

Several months ago, I attended a training on identifying victims of human trafficking. Most of the attendees were local police or federal Immigration and Customs Enforcement (ICE) officers. The discussion turned ugly when the trainers suggested that law enforcement has a role to play in identifying and helping victims of trafficking, even the undocumented. A policewoman said, "Look, these are illegal aliens. They are criminals. If I see a gang-banger get shot, sure, I'll call an ambulance, but I'm not going to hold his hand." The response that the Trafficking Victims Protection Act is also enforceable law fell on deaf ears. The majority in that room believed that any violation of the Immigration and Nationality Act is a crime and that law enforcement has no time to enforce a statute that would provide benefits to criminals. Their world was law, not immigration law.

Many people don't recognize the limited rights and resources available to the children that our government is trying to deport. Children have a right to counsel in state child abuse and neglect proceedings, and some federal funding is conditioned on the states appointing a guardian ad litem in these cases. However, the United States is one of only two countries in the world that has not ratified the U.N. Convention on the Rights of the Child, ("Convention"), Nov. 20, 1989, 28 I.L.M. 1448. Article 3 of the Convention requires consideration of the "best interests of the child" in all "actions concerning children." The Ninth Circuit Court of Appeals recently found that deporting an undocumented parent for a single DUI conviction did not "concern" his children, who were United States citizens, such that their best interests need be the government's primary consideration. *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006 (9th Cir. 2005). Again, there is law, and there is immigration law.

Many removals cannot really be called proceedings. For example, thousands of Mexican children are summarily removed from the United States each year before anyone asks if they are being trafficked into slavery or suffering abuse or violence in their home country. Of the children who actually make it to immigration court, the vast majority will not know if they qualify for relief without someone to assist them. Recently in Arizona, ICE officials drove unaccompanied children from Border Patrol stations straight to an immigration court where they were forced to answer charges and accept orders of removal. From there, ICE transferred the children into the custody of the Office of Refugee Resettlement (ORR). Some of these children qualified for relief, and I was able to get some of their cases reopened. While we argued about fingerprints, a government trial attorney actually said that she could not think of a single case in which an unaccompanied minor with relief had to proceed alone!

Children in removal proceedings have no right to free legal representation. The 2002 Homeland Security Act requires ORR to develop “a plan . . . on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests” of the unaccompanied alien children in their custody. 6 U.S.C. § 279(b)(1)(A) (2005). The proposed Unaccompanied Alien Child Protection Act of 2005, S.119, provides that ORR “may” appoint a guardian ad litem for an unaccompanied child, and that ORR “should” ensure that these children have competent legal counsel. Unaccompanied Alien Child Protection Act, S. 119, 109th Cong. (2005). Nonetheless, section 202(f) of the legislation makes clear that the United States is not required to pay for counsel to any unaccompanied alien child. S. 119, 109th Cong. § 202(f) (2005). United Nations High Commissioner for Refugees (UNHCR) Goodwill Ambassador Angelina Jolie’s generosity provided start-up funds for the National Center for Immigrant and Refugee Children, which seeks to ensure that all non-detained children in immigration proceedings have legal representation. However, the Center can only train and recruit private attorneys to do this work for free; it does not fund direct legal representation. When there is no private attorney

willing to work for free, the child goes forward alone. Many children simply disappear. Can we blame them?

Immigration law is a psychotic mix of benefits and exclusions, that requires an unaccompanied minor to be detained in a state-licensed shelter until, if he is lucky, he is kicked out onto the sidewalk on his eighteenth birthday. The language used in the immigration debate is politicized code. Is it undocumented worker or illegal alien? Detention facility or prison? Amnesty or earned legalization? The immigration code allows us to treat people like criminals while pretending that denial of immigration benefits is a non-punitive civil matter.

The amnesty hot-button debate further confuses civil and criminal law. Amnesty is a process by which undocumented immigrants with no criminal convictions can regularize their status, and in the past has included a hefty fee. One of the biggest advantages of an amnesty program is avoiding the massive effort and expense of finding and deporting millions of essentially law-abiding illegal aliens. The principal beneficiary of an amnesty program is then the United States taxpayer.

It is a sad state of affairs when we have “law” and “immigration law.” Comprehensive immigration reform should remove immigration law from its civil and criminal house of mirrors. We must restore respect for our law by providing free basic legal services to people in removal proceedings, and conform the law to accepted legal standards such as “best interests of the child.” The United States is a country of immigrants, not platitudes. When we remove a would-be immigrant, we remove one of our own. It’s time the law reflected that humanity.

**ESCOBAR V. GONZALES: A BACKWARDS STEP FOR CHILD  
ASYLUM SEEKERS AND THE RULE OF LAW IN PARTICULAR  
SOCIAL GROUP ASYLUM CLAIMS**

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By Matthew D. Muller, Deborah E. Anker, and Lory Diana Rosenberg<sup>\*</sup>

Eldin Escobar was left by his parents in his native Honduras and forced from an early age to share a crude dwelling lacking heat, beds, or toilets with his extended family. There was often no food, and Eldin's relatives regularly beat him brutally with belts, ropes and cables, across the face and on his hands. These beatings clearly were serious harms, and constituted violations of Eldin's core human rights to physical security and life.

At the age of nine, Eldin ran away and began living on the streets of Honduran villages and cities. During his time on the streets, Eldin was attacked by members of various street gangs, who robbed and beat him. Eldin also witnessed numerous gang attacks against other children, some of them fatal. The gangs tried to recruit Eldin and told him they would kill him when he repeatedly refused to join. The police offered Eldin no protection from the gangs – in fact, certain members of the police demanded that Eldin rob and steal for them and threatened him with violence when he declined. After one occasion on which gang members again threatened to kill Eldin if he did not join their gang, Eldin fled to Mexico. He continued living on the streets there for a time and eventually fled to the United States in 2001, at the age of thirteen.

The extreme and life-threatening conditions Eldin faced (again, constituting serious violations of core human

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rights) are well-documented. An expert on Honduras has testified that street children there are marginalized by the general population, blamed – often unjustly – for committing crimes, and targeted for vigilante justice. Homeless children are at a high risk of gang violence according to the expert, are forced to commit crimes for gangs and the police, and are exploited financially and sexually. These conditions have been confirmed by U.S. Department of State Country Reports.<sup>1</sup> According to one report, 549 street children were killed in Honduras in 2002 alone.<sup>2</sup> Of all the countries the Department of State examined in the most recent reporting year, only seven had conditions approaching the level of violence and abuses suffered by street children in Honduras.<sup>3</sup> Expert testimony and the most recent State Department reports verify that Eldin would continue to face the extreme and life-threatening conditions that prompted his flight from Honduras.<sup>4</sup>

Once in the United States, Eldin applied for asylum relief, claiming persecution – which includes situations where the state is unwilling or unable to protect an individual from persons unaffiliated with the government<sup>5</sup> – on account of his membership in the “particular social group” of Honduran

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<sup>1</sup> See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2004) (Honduras report), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41765.htm>.

<sup>2</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2004) (Honduras report), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18336.htm>.

<sup>3</sup> See generally BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2004); see also Petition for Rehearing En Banc at 9, *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005) (No. 04-2999), on file with Holland & Knight, LLP.

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., *In re O-Z- & I-Z-*, 22 I. & N. Dec. 23, 27 (BIA 1998) (finding persecution where the government failed to adequately respond to complaints of anti-Semitic attacks). The Third Circuit has confirmed this principle in published decisions as recently as this year. See, e.g., *Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005).

street children. As Eldin argued, this particular social group consists of a highly discrete subgroup comprising Honduran children who are homeless and forced to live on the street, this including only a fraction of total child population in Honduras.

To establish eligibility for asylum, applicants must show that they were persecuted or face a well-founded fear of future persecution “on account of” one of five grounds set forth in the asylum statute: race, religion, nationality, political opinion, or membership in a particular social group (MPSG).<sup>6</sup> In key respects, the first four grounds of persecution are specific applications of the general MPSG ground. This relationship among the grounds was recognized by the Board of Immigration Appeal (Board or BIA) twenty years ago in its seminal MPSG decision *In re Acosta*,<sup>7</sup> a decision which has not only shaped this area of law domestically but internationally as well.<sup>8</sup> Applying the doctrine of *eiusdem generis* – the principle that “general words used in enumeration with specific words should be construed in a manner consistent with the specific words”<sup>9</sup> – the Board held that a particular social group (PSG) is “a group of persons all of whom share a common immutable characteristic . . . that the members of the group either cannot change or should not

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<sup>6</sup> INA § 208(b), 8 U.S.C. § 1158(b) (2005) (providing that the Attorney General or Secretary of Homeland Security may grant asylum to individuals they determine to be “refugees”; INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2005) (defining “refugee”). Additionally, a person is eligible for withholding of removal protection if her or his “life or freedom would be threatened” on account of the same five grounds. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2005). *See also* United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6529 (Refugee Convention) (setting forward the international refugee definition, including the MPSG ground of persecution); DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 13-15 (1999).

<sup>7</sup> 19 I. & N. Dec. 211 (B.I.A. 1985) (*rev’d in part on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)).

<sup>8</sup> *See, e.g.*, *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689, 736 (noting that the Board examined the social group ground “in a manner that reflects classic discrimination analysis” and adopting its analysis in part).

<sup>9</sup> *Acosta*, 19 I. & N. at 233.

be required to change because it is fundamental to their identities or conscience.”<sup>10</sup>

In *Acosta*, the Board set forward “sex,” “color,” and “kinship” as examples of immutable characteristics that a person cannot or should not be required to change. As the BIA noted, its *Acosta* decision “preserve[d] the concept that refuge is restricted to individuals who are either unable by their own actions or as a matter of conscience should not be required, to avoid persecution.”<sup>11</sup> In Eldin’s case, youth and homelessness were characteristics that he could not change in order to avoid persecution. As such, Honduran street children are properly considered a social group and fall squarely within *Acosta*’s immutability paradigm.<sup>12</sup> Furthermore, Eldin’s claim is not undermined by the temporary nature of youth as a characteristic included in the PSG Honduran street children. The Board has had occasion specifically to address youth as a component of a PSG. It concluded in *In re Kasinga* that youth is a characteristic that may define a PSG because that status “cannot be changed” by the individual.<sup>13</sup> Although the applicant in *Kasinga* would eventually “age out” of her status, the Board found youth to be an integral component in defining the social group. Street children, like the applicant in *Kasinga*, will eventually grow older, but for the duration of childhood their status as youths is fundamental and immutable. It is not a requirement for protection that a

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<sup>10</sup> *Id.*

<sup>11</sup> 19 I. & N. Dec. at 234.

<sup>12</sup> It is clear from cases applying *Acosta* that the temporal nature of childhood does not undermine a claim. In some cases, the fact of prior status or activity as a child constituted the basis for a social group even after the applicant reaches adulthood. *See, e.g.,* Lukwago v. INS, 329 F.3d 157, 179 (3d Cir. 2003) (finding that “former child soldiers who have escaped LRA captivity fits precisely within the BIA’s own recognition that a shared past experience may be enough to link members of a ‘particular social group’”). It is also worth noting that children are universally recognized by society and the legal system as a “group” that requires protection. For example, labor laws and immigration laws extend protection to individuals on the basis of their status as children. *See, e.g.,* INA 1504(c)(2), 8 U.S.C. §1229b(b)(2) (2005) (extending protection to child domestic violence survivors).

<sup>13</sup> 21 I. & N. Dec. 357, 366 (BIA 1996).

refugee face a permanent threat of persecution in her home country. The temporary nature of an age-based PSG mirrors the temporary nature of asylum relief. Any concerns about diminishing risk of persecution due to changed status over time can be adequately addressed by provisions allowing asylum protection to be withdrawn once a threat has passed.<sup>14</sup>

The immigration judge (IJ) recognized Eldin's particular social group but denied his claim on credibility grounds. On appeal to the BIA, Board member Frederick Hess found that Eldin had not claimed membership in a cognizable PSG but did not reach the issue of credibility, thus leaving the PSG issue as a pure matter of law for the Third Circuit Court of Appeal (circuit court) on review. The court's decision in *Escobar v. Gonzales*<sup>15</sup> rejected Eldin's PSG claim, setting forth a PSG test effectively requiring absolute permanency of circumstances and differentiation from all other people or groups in all other countries. The court found that "youth alone [is not] a sufficient permanent characteristic, disappearing as it does with age" and that the particular social group in which Eldin claimed membership was defined by characteristics too vague and all-encompassing such that "a legitimate distinction cannot be made between groups of impoverished children who exist in almost every country."<sup>16</sup>

The court's reasoning is problematic in several respects. First, although the circuit court decision correctly acknowledged *Acosta* as controlling authority, it failed to apply the immutability analysis to the claimed particular social group; instead it presented a novel test articulated nowhere in *Acosta* or other agency authority.<sup>17</sup> Second, the court reached

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<sup>14</sup> See INA § 208(c)(2), 8 U.S.C. § 1158(c)(2) (2005) (provided that asylum status may be terminated if due to a "fundamental change in circumstances" an individual no longer meets the refugee criteria).

<sup>15</sup> 417 F.3d 363 (3d Cir. 2005).

<sup>16</sup> *Escobar*, 417 F.3d at 367.

<sup>17</sup> The court stated that although "[i]t may well be conceded that young individuals from Honduras face extremely depressing, bleak prospects. . . the record fails to show any realistic differences between these children and those of Guatemala or Sao Paulo or hundreds of other locations across the globe." *Escobar*, F.3d at 367. This statement is factually erroneous, as the record reflects that the conditions faced by the street children in

a decision based primarily on policy considerations of unlimited asylum availability, which should properly be left to Congress and the executive branch.<sup>18</sup>

Even if it were legally relevant, the court's apparent concern that recognizing the social group of Honduran street children will cause an unmanageable flow of asylum applicants is factually mistaken. Similar concerns were raised about the breadth of the social group recognized in *Kasinga*, but the INS has acknowledged that it "has not seen an appreciable increase in the number of claims based on FGM."<sup>19</sup> As discussed earlier, conditions as severe as those suffered by Honduran street children have been documented in only a handful of countries. Even if a large number of such asylum applicants wanted to flee to the United States, the vast majority would fail to arrive due to the practical and legal disabilities suffered by child asylum seekers.

Those few who, against all odds, do arrive in the United States to apply for protection must still establish individual eligibility for asylum. PSGs frequently encompass large groups – as do other grounds such as race and nationality – but members of the group must still meet other requirements to receive asylum status, namely that they (1) were or face a well-founded fear of being, (2) persecuted, (3) "on account of"

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Honduras – including ongoing attacks and killings of street children by gangs, police, and vigilantes – are more extreme than those existing in all but a few other countries. See Petition for Rehearing En Banc, *supra* note 4 at 10 (observing that the immigration statute and relevant interpretative documents make "absolutely no mention of the size or uniqueness of a 'particular social group'").

<sup>18</sup> See, e.g., *INS v. Ventura*, 537 U.S. 12 (2002) ("judicial judgment cannot be made to do service for an administrative judgment' . . . Nor can an 'appellate court . . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency'" (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943))); Petition for Rehearing En Banc, *supra* note 4 at 12 ("if Congress concludes that the current law grants asylum to too many persons, it is free to modify that law, but it is not this Court's function to make such policy determinations").

<sup>19</sup> U.S. Citizenship and Immigration Services (formerly the Immigration and Naturalization Service), *Questions and Answers on the R-A- Rule* (Dec. 7, 2000), available at <http://uscis.gov/graphics/publicaffairs/questsans/rarule.htm>.

their membership in a particular social group. These additional requirements serve as significant filters on eligibility for classification as a refugee and for asylum eligibility. Rather than relying on these additional statutory restraints, the Court of Appeals for the Third Circuit devised a novel “outer limit” requirement within the parameters of the particular social group determination that goes beyond *Acosta*’s immutability tests. This is contrary not only to the Board’s *Acosta* principles, but to the Third Circuit’s own seminal ruling in *Fatin v. INS*<sup>20</sup> in which the court “concluded that the Board’s construction of ‘particular social group’ in *Acosta* was reasonable and adopted it.”<sup>21</sup>

The Third Circuit’s unexplained and unprincipled departure from agency precedent is all the more troubling because it comes at a time of growing consensus and coherence among the circuit courts, virtually all of which have embraced the Board’s immutable characteristic formulation.<sup>22</sup>

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<sup>20</sup> 12 F.3d 1233 (3d Cir. 1993).

<sup>21</sup> *Escobar*, 417 F.3d at 367; see also *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (BIA 1990) (holding that recognizing a PSG comprising homosexuals in Cuba was not tantamount to awarding relief to all members of that group because each individual must satisfy additional elements of the asylum statute).

<sup>22</sup> See *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir.1993); *Singh v. Gonzales*, 406 F.3d 191, 196 n.5 (3d Cir. 2005); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. INS*, 341 F.3d 533, 546 (6th Cir.2003); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir.1998); *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005) (noting that the petitioners “correctly contend that family can constitute a social group” and citing cases that reached this determination using *Acosta*’s immutability formulation); *Hamzehi v. INS*, 64 F.3d 1240, 1246 (8th Cir. 1995) (*Godbold, dissenting*) (noting where the majority had not discussed the issue that the *Acosta* framework is the law governing MSPSG determinations); *Ochoa v. Gonzales*, 406 F.3d 1166, 1170 (9th Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187, 1198 (10th Cir. 2005); *Garcia v. United States AG*, 143 Fed. Appx. 217, 222 (11th Cir. 2005) (unpublished opinion) (quoting the *Acosta* MSPSG formulation and stating that the court defers to the Board’s permissible interpretation of ambiguous statutory language). *But see Saleh v. United States Dep’t of Justice*, 962 F.2d 234, 240 (2d Cir. 1992) (holding that a PSG “encompasses a collection of people closely affiliated with each other, who are actuated by some common impulse or interest” (citations omitted)).

In key cases involving broad social groups, the Seventh, Ninth, and Tenth Circuit Courts of Appeal have adopted and correctly applied *Acosta*.<sup>23</sup> In so doing, these courts have recognized that though a PSG may be broad – as are all the other grounds in the statute and Refugee Convention – others elements in the refugee definition appropriately limit and individualize the availability of asylum protection. The Third Circuit should reconsider its departure from established law and join the other circuits in mainstream developments leading toward a clear and principled particular social group jurisprudence.<sup>24</sup>

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<sup>23</sup> *Orejuela v. Gonzales*, 423 F.3d 666, 673 (7th Cir. 2005) (finding that an “educated, landowning class of cattle farmers” constituted a particular social group); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (holding that the applicant had been persecuted “on account of” membership in a particular social group whether that PSG was framed as comprising “Somalian females, or a more narrowly circumscribed group,” and that this holding represents “the only plausible construction” of controlling asylum law); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (noting that the proper narrowing focus was not on whether either gender delineates a PSG – “which both [genders] certainly do” – but on whether individual asylum applicants were persecuted on account of their membership in such a PSG).

<sup>24</sup> For additional recent developments relating to the MPSG ground of persecution, particularly claims involving family as a PSG, see the briefs and memoranda posted at <http://www.gbls.org/immigration/>.

**PROPOSITION 73**

In November 2005, California voters were asked to approve or deny Proposition 73 which requires physicians to notify a minor's parent or legal guardian 48 hours before performing an abortion on the minor. Parental consent is not required, but parents must receive notice 48 hours prior to the procedure. The minor may apply for a waiver from a judge, and a physician may perform an abortion without notification in a medical emergency. The measure also requires that physicians report abortions performed on minors to the State of California, and that the State is obligated to compile statistics on these reports.

The measure expressly amends the California Constitution with the addition of Section 32(a) to Article I. The amendment defines abortion as "the use of any means to terminate pregnancy...with the knowledge that the termination will, with reasonable likelihood, cause the death of the unborn child, a child conceived but not yet born."

In 1987, the California Legislature amended state law through Assembly Bill 2274 to require that minors obtain parental consent for an abortion, but the amendment was challenged in court. *American Academy of Pediatrics v. Van de Kamp*, 214 Cal.App.3d 831 (Cal. Ct. App. 1989). After ten years, the California Supreme Court struck down AB 2274 entirely, holding that it violated a minor's constitutional right to privacy. *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307 (Cal. 1997). While the issue of parental consent has been adjudicated, the constitutionality of notice alone has not been addressed by state courts.

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<sup>1</sup> The official title, summary, legislative analysis, and arguments in favor and against California's Proposition 73, 74, and 76 can be found at <http://www.ss.ca.gov/elections>.

Proponents of Proposition 73 state that their main concern is the safety of the minor and not the elimination of abortion. They argue that minors need assistance to make important health decisions, and claim that the 48-hour waiting period ensures that parents have a realistic opportunity to consult with their daughter and explore her options before she makes an irrevocable decision.

Opponents of the legislation argue that parental notification laws do not address the goals of keeping minors safe or promoting family communication. They maintain that the real outcome of these laws is delayed medical care for the most vulnerable minors, and that the law puts the minor at risk for serious health complications.

On November 8, 2005, Proposition 73 was rejected by the voters in a narrow contest with 52.6% voting “No” and 47.4% voting “Yes.”

#### **PROPOSITION 74 & PROPOSITION 76**

Californians voted on two proposals affecting education in the November Special Election – Propositions 74 and 76. Proposition 74, dubbed the teacher tenure initiative, seeks to streamline the process by which teachers are dismissed. Proposition 76, called the Live Within Our Means Act, would weaken the existing minimum guarantee of school funding, among other changes to the state budgeting process.

Proposition 74 would change the teacher dismissal process in two ways. First, it would lengthen the probationary period for new teachers from 2 to 5 years. This would lengthen the period during which districts can easily dismiss new teachers. Secondly, the proposition would make it significantly easier to terminate tenured teachers, requiring that a teacher need only acquire two consecutive, negative evaluations to be dismissed.

Proposition 76 would change protections set in place to guarantee a minimum level of education funding. Due to Proposition 98, the education budget is currently adjusted

every year based in part on three factors – the previous year’s education budget, the growth of the student population, and the growth in personal income. Proposition 76 would give the governor greater latitude in declaring a fiscal emergency and in making cuts to specific expenditures, including education. Once made, these cuts would permanently lower the minimum guarantee of funding and the state would not have to pay the money back, as required under current law.

On November 8, 2005, Proposition 74 was rejected by voters of whom 55.1% voted “No” and 44.9% voted “Yes.” Proposition 76 was also rejected by the voters by a wider margin. Only 37.9% of California voters voted “Yes” while 62.1% voted “No.”

**RECENT COURT DECISIONS AND LEGISLATION IMPACTING JUVENILES**

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**HEALTH**

 H.R. 3021, 109th Cong. (2005)  
Pub. L. No. 109-19, 119 Stat. 344 (2005)

On July 1, 2005, President Bush signed House Resolution 3021 into Public Law 109-19, reauthorizing the extension of funding and authority for the Temporary Assistance for Needy Families (TANF) block grant program, mandatory child care programs, abstinence education under the Maternal and Child Health Services block grant, and 12-month Transitional Medical Assistance through September 30, 2005. The original 1996 law was set to expire in September 2002 and has been temporarily extended several times. Congress has taken no final action on long-term authorization of this law.

The House Ways and Means Committee has however approved a long-term re-authorization bill H.R. 240 on March 15, 2005 that would increase the hourly work week eligibility requirement for adult recipients from 30 to 40 hours a week and increase funding for child care by \$1 billion over the next five years, for a total of \$5.8 billion annually. The Senate Finance Committee approved reauthorization legislation S. 667 on March 9, 2005 that would require most adult recipients to work 34 hours per week to receive benefits, and would increase child care subsidies by \$6 billion over the next five years, for a total of \$10.8 billion. Both bills put an increased focus on the non-custodial parent to provide economic and social support for their children. The bills modify the child support enforcement program to provide federal cost-sharing for child support collected from non-custodial parents. The bills also establish “responsible fatherhood” initiatives to address concerns ranging from employment to social skills, and continue the abstinence education block grant at \$50

million per year. Lastly, they provide \$200 million per year in TANF funds for marriage promotion grants. S. 667 requires that participation in marriage promotion activities be voluntary and that programs consider domestic violence concerns.

 California AB 1633  
2005 Cal. Stat. 641

Governor Arnold Schwarzenegger signed into law Assembly Bill 1633 on October 7, 2005. Currently, young people in foster care are permitted to remain in care beyond the age of 18 if they are attending high school or the equivalent level of vocation or technical training on a full-time basis, and reasonably expect to complete the program before their nineteenth birthday. AB 1633 extends this option to foster youth who are working towards a high school equivalency certificate and reasonably expect to receive such a certificate before the age of 19.

AB 1633 also benefits children who enter foster care with severe physical and mental disabilities. Many of these children are eligible to receive federal benefits but are currently not receiving them because they do not have anyone to assist them with the complex application process. AB 1633 requires the Department of Social Services to establish a Foster Care Social Security and Supplemental Security Income Program that requires each county welfare department to screen all children in their care to determine their eligibility for federal disability benefits and guide them through the application process. The program also requires county welfare departments to maintain the child's benefits account while the child remains in foster care. AB 1633 ensures that the youth will leave foster care with \$2,000, providing the young person with an easier transition into independent living.

 California SB 12, California SB 965  
2005 Cal. Stat. 235

Governor Arnold Schwarzenegger signed into law Senate Bills 12 and 965 on September 15, 2005. These bills establish the most rigorous nutrition standards in the country for food and beverages sold on public school campuses in California from kindergarten level to the 12th grade. SB 12 applies to foods sold individually in vending machines, in school stores, or as part of a school fundraiser. The bill establishes limits on fat and sugar content and portion size with standards going into effect on July 1, 2007. SB 965 defines school beverage standards for high schools, eliminating the sale of soda and other sweetened beverages on high school campuses in California. Similar standards had already been established for elementary and middle schools through SB 677, signed into law in 2003. Half of beverages sold on high school campuses must meet these standards by July 1, 2007, and all beverages must meet these standards by July 1, 2009.

**DEPENDENCY**

 *Doe v. Mann*  
415 F.3d 1038 (9th Cir. 2005)

Mary Doe, a member of the federally recognized Elem Indian Colony in Lake County, California, called the Department of Social Services (DSS) after her daughter told her that she had been sexually assaulted by a minor male cousin. Her daughter was also an Elem Indian Colony member and resided in her great-aunt's home at the time. DSS removed Mary's daughter from the reservation, terminated Mary's parental rights for failure to protect her daughter, found a foster home placement for Mary's daughter, and approved commencement of adoption proceedings to the foster family. This process was completed despite the Elem Indian Colony's resolution to have Mary's daughter placed for adoption with Mary's brother and sister-in-law. Mary challenged Lake County Superior Court's jurisdiction to terminate her parental rights and approve adoption proceedings in the United States District Court for the Northern District of California. The Ninth Circuit Court of Appeals affirmed the district court's holding that California's jurisdiction over this proceeding was proper.

The Indian Child Welfare Act (ICWA) confers exclusive jurisdiction over child custody proceedings involving an Indian child residing or domiciled on the reservation to the tribe, "except where such jurisdiction is otherwise vested in the State by existing federal law." 25 U.S.C. §§ 1901-1963, § 1901(a) (2005). The ICWA was established in response to the large scale removal of Indian children from their communities and heritage. An existing federal law, popularly known as Public Law 280, gives six states, including California, broad jurisdiction over criminal offenses and limited jurisdiction over civil adjudicatory (not regulatory) causes of actions occurring on Indian reservations. 18 U.S.C. § 1162(a) (2005), 28 U.S.C § 1360(a) (2005).

The Ninth Circuit held that California's child dependency statute falls squarely within Public Law 280's

civil jurisdiction, because the statute is adjudicatory in nature and not regulatory, and thus limits ICWA's exclusive jurisdiction over child custody proceedings. The court added that Congress, and not the courts, may limit Public Law 280's jurisdiction if it determines such a limit is necessary to preserve tribal sovereignty over Indian children.

 *Kenny A v. Perdue*  
356 F. Supp. 2d 1353 (D. Ga. 2005)

The class-action plaintiffs, foster children in Fulton and DeKalb Counties in Georgia, brought suit against the counties for their failure to provide the children with adequate and effective legal representation in deprivation proceedings and termination-of-parental-rights (TPR) proceedings in violation of their due process rights under the Georgia Constitution and state law. The plaintiffs alleged that the number of child advocacy positions funded by the counties was inadequate, resulting in extremely high caseloads for the attorneys and ineffective representation for the foster children.

The evidence presented in the trial court demonstrated that Fulton and DeKalb counties averaged a caseload of 439.2 and 182.8 child clients per attorney, respectively. In contrast, the National Association of Counsel for Children recommends that no child advocate attorney should maintain a caseload of over 100 child clients at one time.

The United States District Court for the Northern District of Georgia held that foster children had a statutory and a constitutional right to counsel in all deprivation proceedings, including, but not limited to, TPR proceedings. The court further found that there was sufficient evidence present here to warrant a determination of whether the children were receiving ineffective assistance of counsel because their fundamental liberties were at stake. In response to the counties' argument that a state bar complaint would provide an adequate legal remedy in this situation, the court found that the Georgia State Bar Association does not have the authority to award the type of class-action relief that the plaintiffs are

seeking in this lawsuit. The court held that declaratory relief would be an appropriate remedy and that protecting interests of the foster children far outweighs the fiscal burden the state would incur if forced to hire additional child advocate attorneys.

📖 *Sara M. v. Superior Court*  
36 Cal. 4th 998 (Cal. 2005)

Three children were removed from their mother, Sara M., on the grounds that she had failed to provide them with basic life necessities and that she was unable to care for them due to her substance abuse. The children were declared dependents of the court and in January 2003, the court began reunification services to reunite the family.

Over the next six months, the mother failed to comply with her drug dependency treatment and reunification plans, and did not visit or contact her children. Pursuant to section 366.21(e) of the California Welfare and Institutions Code, which states that, “[i]f the child was removed initially under subdivision (g) of Section 300 and the court finds by clear and convincing evidence that the whereabouts of the child are still unknown, or the parent has failed to contact and visit the child, the court may schedule a hearing pursuant to Section 366.26 within 120 days,” the juvenile court terminated reunification services after six months and scheduled a hearing to establish a permanent plan for the children. CAL. WELF. & INST. CODE §366.21(e) (2005).

The mother appealed the ruling, arguing that because her children were removed under sections 300(b) (failure to protect) and 300(c) (serious emotional damage), and not under 300(g) (parent’s whereabouts are unknown), the court did not have the power to terminate reunification services. The California Court of Appeal for the Fifth Appellate District reversed and reinstated reunification services for an additional six months. The California Supreme Court reversed the judgment of the appellate court and held that the statute should be interpreted to permit a court to terminate reunification

services and schedule permanency hearings when it determines that the parent has failed to contact or visit the child for six months after the reunification services have begun, regardless of whether jurisdiction was originally granted under section 300(g). The Court reasoned that the statute had historically been interpreted in this manner in prior appellate decisions and by the California Judicial Council.



*In re Josiah Z.*

36 Cal. 4th 664 (Cal. 2005)

In June 2002, the Kern County Superior Court declared two-year-old Josiah and infant Gabriel dependents of the court after Gabriel tested positive for drugs at birth. The court removed the children from their parents, and after both parents failed to reunify with the children, the court set a hearing to establish a permanent placement for the children. At the permanency hearing, the court denied the paternal grandparents' request for placement because both grandparents had prior criminal records and the grandmother's own children had been declared juvenile dependents due to her neglect. Trial counsel for the children decided to appeal on the children's behalf. The California Court of Appeal for the Fifth Appellate District appointed new counsel to represent the children at the appellate level and trial counsel took on the role of the guardian ad litem pursuant to the Child Abuse Prevention and Treatment Act. 42 U.S.C. § 5101 (2005). In dependency hearings, the role of the guardian ad litem is to evaluate the needs of the child and his or her living situation and to make recommendations to the court that serve the child's best interests.

Appellate counsel then requested funds to visit the children so that she could assess their living situation because she believed that pursuing an appeal would not be in the best interests of her clients. The guardian ad litem disagreed and felt that an appeal should be pursued. The appellate court denied appellate counsel's request for travel funds. The California Supreme Court reviewed the case and concluded

the following: (1) appellate counsel has the power to dismiss a child's dependency appeal based on the child's best interests and the Court of Appeal has the power to consider and rule on that motion even though it may involve post-judgment evidence, (2) appellate counsel may seek funds to meet with her clients to investigate a potential motion to dismiss an appeal, and (3) appellate counsel may only file a motion to dismiss the appeal after receiving authorization from the child's guardian ad litem. Because the children's guardian ad litem disagreed with appellate counsel's desire to dismiss the appeal in this case, the Court affirmed the appellate court's denial of appellate counsel's request for funds.

 *Elisa B. v. Superior Court*  
37 Cal. 4th 108 (Cal. 2005)

Elisa B. and Emily B. shared a committed relationship and discussed having children together after they began to cohabitate. Since each partner wanted to experience child birth, they agreed to both have children and raise a family together. Each woman began the insemination process and gave birth. Elisa gave birth to one child and Emily gave birth to twins. Before the children were born, Elisa agreed to be the primary financial provider of the home and Emily was to assume the role of the stay-at-home parent, since Elisa's earning power was much greater than Emily's. They acted as co-parents under such agreed terms and subsequently decided to separate. Elisa supported Emily and the twins for some time but later declined to continue financial support. Emily then brought suit against Elisa to recover child support for their twins. Elisa claimed that she was not the biological mother of the twins and therefore was not obligated to continue financial support.

The California Supreme Court held that since Elisa actively assisted in Emily's pre and post-pregnancy, Elisa was subject to section 7611(d) of the Uniform Parentage Act (UPA). CAL. FAM. CODE § 7611(d). Elisa received the twins into her home and openly held them out as their natural parent,

meeting the statutory definition of a presumed mother. In this case and a companion decision, *Kristine H. v. Lisa R.*, the California Supreme Court reasoned that in the best interests of the child, he or she has a right to be supported by two parents instead of only one, regardless of both parents being women. *Kristine H. v. Lisa R.*, 37 Cal. 4th 156 (Cal. 2005).

In another companion case, *K.M. v. E. G.*, the California Supreme Court ruled that the child may only have one legal mother. *K.M. v. E.G.*, 37 Cal. 4th 130 (Cal. 2005). The distinguishing fact between this case and *Elisa B.* was that the lesbian partner of the birth mother was not seen as receiving the children into her home and holding them out as her own children.

**EDUCATION**

 *Schaffer v. Weast*  
126 S. Ct. 528 (2005)

The United States Supreme Court held that when guardians disagree with the disability plan that a school has created for their child, the guardians bear the burden of persuasion of showing that the offered disability plan is inadequate. The Individuals with Disabilities Act (IDEA) requires schools to provide services to disabled children based on a child's individualized education program (IEP). 20 U.S.C. § 1400 (2005). The purpose of the IEP is to address the educational needs of disabled students by evaluating their current educational performance, setting measurable educational goals, and detailing the special services the students can utilize from the school. If a guardian disagrees with the student's IEP plan, he or she can challenge it through an impartial due process hearing conducted by an administrative law judge. However, the IDEA is silent on which party bears the burden of persuasion in the due process hearing.

In this case, Brian Schaffer suffered from learning disabilities and speech-language impairments. His parents contacted Montgomery County Public Schools System (MCPS) to obtain a suitable placement for Brian, but were not satisfied with either of the two placement options that MCPS offered. Brian's parents enrolled him in a private school and initiated a due process hearing seeking compensation for the cost of Brian's private schooling. Justice O'Connor, speaking for the 6-2 majority in *Schaffer*, wrote that absent any legislation to the contrary, the burden of persuasion in the due process hearing should be consistent with the way burdens of persuasion are traditionally applied—the plaintiff bears the burden regarding the essential aspects of his or her claim. The burden of persuasion thus lies on Brian's parents as the party seeking relief. Similarly, if a school district wished to amend a student's IEP plan and the student's guardians did not agree

with the amendment, the school district would bear the burden of persuasion at the due process hearing.

In her dissent, Justice Ginsberg argued that it is more appropriate for the school district, as the proponent of the current IEP, to bear the burden of persuasion in the due process hearing. She noted that typically guardians have less information and fewer resources than school districts to make an effective case against a proposed IEP. Justice Breyer also dissented, stating that each individual state should decide which party bears the burden of persuasion. He argued that inconsistencies will not be problematic because in most instances, the burden placement will be inconsequential to the hearing's final ruling.

Chief Justice Roberts took no part in the consideration or decision of the case.

#### No Child Left Behind lawsuit

Connecticut filed a law suit against the federal government in August, becoming the first state to legally challenge the 2002 No Child Left Behind (NCLB) law. Connecticut's suit, which will be heard in a federal district court in Hartford, takes the federal government to task for failing to fund programs required by the new law, particularly in the area of state assessments. Connecticut argues that the education law explicitly prohibits the government from making unfunded mandates. "No matter how good its goals, and I agree with the NCLB's goals, the federal government is not above the law," said Richard Blumenthal, the state's attorney general. Sam Dillon, *U.S. Is Sued By Connecticut Over Mandates on School Tests*, *N.Y. Times*, Aug. 23, 2005, at B1.

Previous attempts to sue the government over unfunded mandates have failed. But legal analysts are more optimistic about the possibility for success in this case because the language in the NCLB law is explicit about funding. The law stipulates that "[n]othing in this chapter shall be construed to...mandate a State or any subdivision thereof to spend any

funds or incur any costs not paid for under this chapter.” 20 U.S.C. § 7907 (2005).

Connecticut seeks a waiver from the annual testing required by the law, arguing that the new requirement will add little to the state’s existing testing program (which assesses students every other year) and will cost the state millions of dollars. Connecticut is also seeking flexibility around the requirement that Special Education and English Language Learner students be tested at grade level.

📖 *Doe v. Kamehameha Schools/Bishop Estate*  
416 F.3d 1025 (9th Cir. 2005)

The Ninth Circuit Court of Appeals held, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, that a private school’s refusal of admittance to a non-Native Hawaiian applicant based on race alone is unlawful. 42 U.S.C. § 1981 (2005). The ruling overturns a district court summary judgment in the school’s favor, finding that the admissions policy was a valid remedial, race-based affirmative action program.

John Doe is a non-aboriginal applicant to the Kamehameha School who twice applied to the school and was twice denied admission. John was considered a “competitive applicant” after the initial phase of application, but was declined admission after completing the second phase, the Ethnic Ancestry Survey, in which he acknowledged his non-aboriginal status.

The Kamehameha School was established in 1887 and receives no federal funding. The school’s admissions process is partially based on race; the school’s policy expressly states that students of pure or part aboriginal blood will be given first preference.

The court applied the standard of scrutiny used to analyze claims brought pursuant to Title VII. Under this standard, the Kamehameha School must present evidence that the student was rejected, or that another student was chosen in

his place for a legitimate nondiscriminatory reason. The court determined, in the absence of any other basis of rejection, Doe was rejected solely on the basis of race. This policy was neither a valid affirmative action plan, nor could it be justified on the basis of preference of a “tribal entity” as opposed to race, as native Hawaiians are not equivalent to Indian tribes on the mainland.

📖 *Benjamin G. v. California Special Ed. Hearing Office*  
131 Cal. App. 4th 875 (Cal. Ct. App. 2005)

Benjamin G.’s parents sought an assessment from the Long Beach Unified School District to determine Benjamin’s special education eligibility under the Individuals with Disabilities Education Act (IDEA) and California education statutes. At the time of suit, Benjamin was ten years old. The district determined that Benjamin was eligible for special education placement at Lowell School. His parents accepted the eligibility finding, but not the placement, and requested that their expert observe the Lowell School. The district denied this request and would not allow Benjamin’s parents to observe the placement prior to the district’s administrative hearing on their case. Benjamin’s parents appealed this decision in Los Angeles County Superior Court. The court dismissed the petition because Benjamin and his parents had not exhausted administrative relief. The California Court of Appeal for the Second Appellate District reversed the superior court’s finding, stating that under California Education Code section 56329(b), Benjamin’s parents had a right to conduct the observation prior to the administrative hearing and that the observation is not contingent upon conducting an educational assessment. Cal. Ed. Code § 56329(b) (2005).

📖 California High School Exit Exam – *Chapman* settlement

In a class action lawsuit, disabled students brought a cause of action against the California Department of

Education to amend the California High School Exit Exam (CAHSEE) so that it would not discriminate against disabled students. The affected students claim that CAHSEE does not give disabled students the proper procedures, appeals, or alternate modes of assessment needed for them to pass or bypass the CAHSEE. The parties reached a settlement agreement on August 26, 2005 that entailed proposing legislation to allow some disabled students who planned to graduate in 2006 to be excused from the CAHSEE requirements. To be eligible for the exemption, disabled students must take the CAHSEE twice after their sophomore year of high school and at least once during their senior year. These students are also required to take available supplemental instructions to prepare for the test.

To comply with the *Chapman* settlement agreement, the California legislature passed Senate Bill 586 (SB 586) and Assembly Bill 1531 (AB 1531). SB 586, introduced by Senator Gloria Romero, would exempt students with special needs from the CAHSEE requirement. The bill is similar to the remedy set in the *Chapman* settlement, except the bill allows special needs students to be eligible without taking supplemental instructions and applies to the graduating classes of both 2006 and 2007. This bill was subsequently vetoed by Governor Arnold Schwarzenegger on October 7, 2005. The Governor claims that the bill unduly expanded the *Chapman* settlement and gave too much discretion to the local school districts. To satisfy the *Chapman* settlement, the California Legislature may override the Governor's veto with a two-thirds majority or it may introduce a new emergency bill when the legislature reconvenes in January 2006.

 *California Teachers Association v. Arnold Schwarzenegger*  
No. 05CS01165 (Cal. Super. Ct. filed Aug. 8, 2005)

The California Teachers Association (CTA) is bringing a cause of action in the California Superior Court of Sacramento County against Governor Arnold

Schwarzenegger. The CTA is claiming that Governor Schwarzenegger has breached a relief agreement made during California's 2004-2005 fiscal emergency. This January 2004 agreement allowed the state to give schools \$2 billion less than what Proposition 98 requires. Proposition 98, which was originally passed by voters in 1988, gives California's public schools and community colleges a constitutional minimum funding guarantee. This funding requirement is calculated from the past years spending on education and the states current gross revenue. The CTA claims that despite increased revenue from the 2004-2005 fiscal year, the Governor reduced educational spending by \$3.8 billion, \$1.8 billion more than the stipulations in the relief agreement. CTA also claims that in the 2005-2006 fiscal year, the Governor has reduced school funding by \$1.3 billion below the guaranteed minimum. The CTA is bringing suit to recover the \$3.1 billion that they believe Proposition 98 and the Governors promise guarantees.

**DELINQUENCY**

 *United States v. McQuade Q.*  
403 F.3d 717 (10th Cir. 2005)

The defendant McQuade Q., a juvenile, was initially charged with two counts of aggravated sexual abuse. The first count charged him with raping a thirteen year old girl and the second count charged him with raping an eleven year old girl. The Government moved to proceed against McQuade Q. as an adult under the Juvenile Delinquency Act. 18 U.S.C. § 5032 (2005). During the evidentiary hearing, the district court held that the transfer of the minor to adult status would be in the interest of justice.

The defendant appealed on three grounds: (1) The court failed to recognize the minor's improvement at Santa Fe County Youth Detention Center, (2) the court failed to find that the first four factors under §5032 weighed in favor of juvenile treatment and rehabilitation, and (3) the court placed excessive emphasis on the lack of psychological therapy in juvenile treatment facilities.

The Tenth Circuit Court of Appeals rejected the claims and stated that the district court placed adequate weight on all § 5032 factors. The court found that § 5032 merely instructs courts to use the four factors as a guide, but there is no particular prescription in the section that instructs how to weigh the given factors. The court said that although McQuade Q. had made major behavioral improvements, his incarceration had not corrected his psychological problems. The Tenth Circuit held that the district court did not abuse its discretion in transferring McQuade Q. to adult status.

 *Uritsky v. Gonzales*  
399 F.3d 728 (6th Cir. 2005)

At the age of 17, Alexander Uritsky pled guilty to third degree sexual conduct for having sexual intercourse with a

fourteen-year-old girl. Under Michigan state law, Uritsky was sentenced to two years of probation, fines, and costs. The sentencing also included an assignment of “youthful trainee status.” Between the age of 17 and 20, the “youthful trainee status” can be revoked at any time and criminal proceedings can be initiated.

Uritsky is a native of Ukraine, a former citizen of Israel, and had only recently become a permanent resident of the United States. The Immigration and Nationality Act (INA) states that “any alien who is convicted of an aggravated felony at any time after admission is deportable.” 8 U.S.C. § 1227(a)(2)(A)(iii) (2005). Citing this statute, the Department of Homeland Security charged Uritsky with removability. The Board of Immigration Appeals ordered him to be removed from the United States, and Uritsky appealed stating that “youthful trainee status” did not constitute a conviction under the INA.

The statutory definition of “conviction” has two requirements: the alien must have pled guilty to the charge and the alien must have received a form of punishment. 8 U.S.C. § 1101(a)(48)(A) (2005). Uritsky both pled guilty to the charge of third degree sexual conduct and received a judgment of probation. Since both requirements of the statutory definition were met, and because youthful trainee status is an irrevocable finding, the Sixth Circuit Court of Appeals held that the designation of this status constituted a conviction for immigration purposes.



*Juan H. v. Allen*

408 F.3d 1262 (9th Cir. 2005)

Fifteen year old Juan H. and his brother, Felix Merendon, lived within the same trailer park as two rival gang members, Ramirez and Magdaleno. Although there were frequent disputes between the two groups, the conflict came to a peak when an unknown person or persons fired shots into Juan H.’s home. After two hours, Merendon confronted Ramirez and Magdaleno about the shooting. Although the two

individuals denied any knowledge of the event, Merendon pulled a gun from his pants and shot Ramirez. During this event, Juan H. did not engage in conversation with the two rival members or make any gestures confirming his gang identity. While fleeing the scene with his family, Juan H. was arrested and convicted of first degree murder under the theory of aiding and abetting.

Three elements must be proven to convict Juan H. of first degree murder under the theory of aiding and abetting: (1) he knew that Merendon planned to commit the willful, deliberate and premeditated act of murder, with malice aforethought, (2) he specifically intended to encourage or facilitate Merendon's unlawful conduct, and (3) he acted in a manner to aid, promote, encourage, or instigate the murders. *People v. Beeman*, 35 Cal. 3d 547, 674 (Cal. 1984). The Ninth Circuit Court of Appeals reversed the trial court's denial of habeas relief. The Ninth Circuit Court of Appeals found insufficient evidence that Juan H. was either aware of his brother's intentions or that he acted in a manner that would have facilitated the murders.

 *In re Joshua J.*

129 Cal. App. 4th 359 (Cal. Ct. App. 2005)

Joshua J., a juvenile on probation, was walking in a Fresno neighborhood when an officer stopped him and a companion. The officer testified that Joshua resembled an adult man wanted on a felony warrant. Because of the resemblance, another officer on the scene detained Joshua and his companion, ordered them to sit on a curb, asked them their names and probation status. The officers then performed a pat-down search, looking for weapons on their persons. While performing the pat down, the officer found a bulge in Joshua's pocket, which Joshua confessed was a bag of marijuana. After Joshua was arrested, he admitted that he was on probation. After charges were filed against Joshua for marijuana possession, Joshua filed a motion to suppress the evidence, which the juvenile court denied. The California Court of

Appeal for the Fifth Appellate District reversed this decision because they agreed with Joshua that the officers had no reason to detain him or to perform a pat-down search. The court found that Joshua's probationary status was unknown to the officers until after they seized the marijuana and therefore his status was not a justification for the search. In cases involving adult parolees, "parolee" status cannot justify a search if the status was unknown to the officers at the time. The appellate court applied this case law to juveniles, and ruled that the marijuana was unlawfully seized.

 *In re Alex N.*

132 Cal. App. 4th 18 (Cal. Ct. App. 2005)

Alex N. was initially convicted of second degree burglary, first degree burglary, lewd conduct with a minor, and oral copulation with a minor. He made frequent escapes from his placement and committed misdemeanor petty theft, two misdemeanor batteries, and first degree burglary. In October 2002, he was committed to the California Youth Authority (CYA). When considering alternative placements, the juvenile court was unwilling to transfer Alex as a result of his sex offenses. Alex's counsel accepted this judgment, but asked the court to either dismiss the sex offense counts or make the CYA commitment based solely on the recent burglary charge, to prevent Alex from being required to register as a sex offender.

The California Court of Appeal for the Sixth Appellate District held that the juvenile court erroneously believed it lacked the discretion to not aggregate the sustained sex offense petition as part of Alex's CYA commitment. The appellate court also held that the juvenile court failed to exercise its discretion to set a lesser period of confinement for a juvenile than the amount of time given to an adult under similar charges. CAL. WELF. & INST. CODE § 726(c) (2005). The court noted that Section 731 provides an additional restrictive rule for CYA commitments in particular; the minor may not be held in excess of the term "set by the court based upon the

facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court.” CAL. WELF. & INST. CODE § 731(b) (2005).

