

Practitioner's Section: Children's Rights

This portion of the *Journal of Juvenile Law & Policy* focuses on issues related to children's rights, with an emphasis on the rights of children with disabilities. The journal selected two attorneys to share their insights on practicing law in this area. This section also presents a review of a book that focuses on the negative side of government intervention on behalf of children.

Jennifer Weiser, a staff attorney at Disability Rights Advocates in Berkeley, Calif., examines public resources available to children with disabilities in private religious schools. Stephen Rosenbaum, a staff attorney for Protection & Advocacy, Inc. in Oakland, Calif., and a lecturer in law, discusses the practicalities of best practices when dealing with a developmentally disabled child from the standpoints of both an attorney and a parent.

In this issue's literature review, Justine Dunlap, associate professor of law at Southern New England Law School, critiques *What's Wrong with Children's Rights*, a book by New York University Law Professor Martin Guggenheim. The review examines Guggenheim's critical view of children's advocates and the role they play in securing rights for children.

The Practitioner's Section is followed by summaries of recent court decisions impacting juveniles in the areas of delinquency, dependency, education, and health care.

THE AVAILABILITY OF PUBLIC RESOURCES FOR CHILDREN WITH DISABILITIES IN PRIVATE RELIGIOUS SCHOOLS

By Jennifer Weiser*

Introduction

In 2005, the Calvary Christian School in Texas accepted Amanda Lairsen, a teenage student with spina bifida. Amanda was the first student with a disability the private school had ever taken. The principal worked with Amanda's family to ensure that she had full access to all of her classrooms and the school's programs. The following year, the board of Calvary Christian decided it was too difficult to have Amanda in the school and informed her father she could not return. The principal reminded the Lairsens of the school's written policy of not educating children with physical, mental, learning, or emotional disabilities.¹ Such policies are common at private religious schools across the nation.²

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¹ The student handbook states, "Calvary Christian School is not equipped to teach children with any of the following conditions: mentally or physically disabled, emotional disturbances, incorrigible behavior, learning disabilities. If a problem in any one of these areas develops, the school reserves the right to drop the student from the rolls."

² See, e.g., Michael Paulson, "Religious Schools Look to Fill Special Education Needs," *The Boston Globe*, June 27, 2005 (describing reluctance of many Jewish and Muslim day schools to accommodate children with

After a quarter century of federal legislation protecting students with disabilities from discrimination, it is hard to imagine how such a blatantly exclusionary policy could be legal. An estimated 12.3% of school-aged children have some type of disability, and the percentage is increasing nationwide.³ While public school districts have a legal obligation to educate *all* students with disabilities within their jurisdiction, private religious schools in some states can choose whether to open their doors to such students since they are exempt from federal anti-discrimination laws.⁴

Although religious schools have no obligation under federal law to educate students with disabilities, many are becoming increasingly aware of the importance of providing an inclusive education that meets the needs of a diverse population. There is a growing recognition that parents of children with disabilities should have the opportunity to send their children to religious school so they can learn about their particular religious or cultural heritage. Religious communities are also beginning to realize that it is anathema to religious values to exclude a whole group of students. The Catholic bishops of the United States, for example, issued the following statement in June 2005: "Catholic schools must ... continue to look for ways to include and serve better the needs of young people in our Church who have special educational and physical needs."⁵ There is also economic motivation on the part of religious institutions to open their schools up to a larger segment of the population.

Some religious schools, however, remain reluctant to accept students with disabilities because of the resources and

special needs because they cannot adequately serve students with disabilities).

³ Parent Reports of Children with Learning Disabilities: 2005, *available at* http://www.kidsdata.org/topictables.jsp?t=38&i=2&ra=3_132.

⁴ Religious schools may not be exempt from *state* anti-discrimination laws, which sometimes provide greater protection than federal law.

⁵ "Renewing our Commitment to Catholic Elementary and Secondary Schools in the Third Millennium," United States Conference of Catholic Bishops, Inc., 2005, *available at* <http://www.nccbuscc.blic.org/bishops/schools.pdf>.

financial costs involved. The Establishment Clause of the United States Constitution prohibits religious schools from applying directly for government funds.⁶ Thus, unlike public schools, religious schools have no claim to reimbursement for any funds expended to provide special education and related services.⁷

What many religious schools may not know is that some assistance is available from their local public school district. While students in private schools are not entitled to the full protection of federal special education law, some public resources exist, which religious schools can and should take advantage of so that they can serve children with disabilities.⁸ This article provides an overview of the obligations of local educational agencies to children with disabilities in private schools so that religious schools that wish to increase their enrollment of students with disabilities are aware of the availability of public resources.

Federal Mandates

Three federal laws apply directly to the rights of students with disabilities. In 1975, Congress enacted what is now called the Individuals with Disabilities Education Improvement Act (IDEIA) to end persistent discrimination in education, such as public schools refusing to educate children with disabilities or giving them a third-rate education.⁹ IDEIA

⁶ See 34 C.F.R. § 76.532 (2006).

⁷ Parents may be entitled to reimbursement if the placement of their child in the school was due to the failure of the public school to provide a free appropriate education. See, generally, *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993) (parents entitled to reimbursement where school district had not provided an appropriate public education, even though they placed their child in a school not approved by the state).

⁸ For example, many Catholic schools in the Archdiocese of Boston rely on local school districts to provide resource teachers to assist with math and reading. Paulson, "Religious Schools Look to Fill Special Education Needs," at 2.

⁹ 20 U.S.C.A § 1400 *et seq.* (2006). When the statute was first enacted it was called the Education for All Handicapped Children Act. It became known as the Individuals with Disabilities Education Act in 1990. With the most recent re-authorization in 2004, the statute was renamed IDEIA.

requires that states and local educational agencies (LEAs) provide a “free appropriate public education” to all children with disabilities.¹⁰ Privately funded schools are not required to provide IDEIA services.

Section 504 of the Rehabilitation Act of 1973 prohibits recipients of federal funds from discriminating against people with disabilities.¹¹ In 1990, Congress passed the Americans with Disabilities Act (ADA), which prohibits disability discrimination in all services, programs, and activities provided or made available in places of public accommodation.¹² The ADA and Section 504 require that schools reasonably accommodate students with disabilities, unless the accommodation would represent an undue hardship.¹³ However, Section 504 applies *only* to schools receiving federal financial assistance, which means most (if not all) religious schools are excluded from the statute’s coverage. Title III of the ADA applies to public accommodations, which include “elementary [and] secondary ... private school[s].”¹⁴ Yet, the statute explicitly exempts “religious organizations or entities controlled by religious organizations, including places of worship.”¹⁵

Responsibilities of Local Educational Agencies to Private School Children with Disabilities

For years, there was ambiguity in special education law regarding the extent of local educational agencies’ obligations to provide services to voluntarily enrolled private school students. With the most recent IDEIA amendments in 2004, Congress made clear that local public school districts must provide special education services to *all* school-age children, regardless of whether their parents voluntarily placed

¹⁰ 20 U.S.C.A. § 1412(a)(1)(A) (2006).

¹¹ 29 U.S.C.A. § 794 (2006).

¹² 42 U.S.C.A. § 12181 (2006).

¹³ 42 U.S.C.A. § 12111(10) (2006).

¹⁴ 42 U.S.C.A. § 12181(7)(J) (2006).

¹⁵ 42 U.S.C.A. § 12187 (2006).

them in a religious or other private educational institution.¹⁶ LEAs must allocate a proportionate amount of federal funds for special education and related services for children with disabilities in private schools based on the number and location of children with disabilities residing within their jurisdiction.¹⁷ They are not required, however, to utilize local and state special education funds for private school students.¹⁸ Public school districts must employ a child-find process, in consultation with private school representatives, to learn the number of children with disabilities in private schools in order to determine the proportionate amount of funding to allocate.¹⁹ The range of services that public schools must make available to private school students with disabilities includes assistive technology, alterations to facilities, and specially trained personnel.

Although the new statute neither requires a free, appropriate education for parentally placed private school children nor increases the amount of federal special education funding that must be allocated to them, the amended law alters the allocation requirements and strives to insure that funding actually is provided. For example, IDEIA incorporates a number of provisions, including timely and meaningful consultation with private school representatives about whom to serve and how to serve them, which previously were found only in the Department of Education regulations.²⁰ It then goes one step further by requiring school districts to obtain written affirmation that a timely and meaningful consultation

¹⁶ 20 U.S.C.A. § 1412(a)(10)(A)(i)(II) (2006) and 20 U.S.C.A. § 1412(a)(10)(A)(ii)(I) (2006).

¹⁷ 20 U.S.C.A. § 1412(a)(10)(A)(i) (2006).

¹⁸ See *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431, 1437 (10th Cir. 1997) (explaining that states need not spend any of their own funds; they need only allocate a proportionate amount of their federal funds). IDEIA in no way prohibits states or LEAs from spending additional state or local funds to provide special education or related services to parentally placed private school children with disabilities in excess of those required by the act, consistent with local law or local policy. See 20 U.S.C.A. § 1412(a)(10)(A)(iv) (2006).

¹⁹ 20 U.S.C.A. § 1412(a)(10)(A)(i)(II) (2006).

²⁰ See 20 U.S.C.A. § 1412(a)(10)(A)(iii) (2006).

took place and by conferring on private schools the ability to file complaints with the state educational agency, and ultimately the United States Department of Education.²¹

Although public schools have discretion to determine whether to provide special education services on site at a child's private school, including a religious school,²² or at a public school site, the legislative history of IDEIA makes it clear that services should be provided as near as possible to the child's private school so as not to unduly interrupt the child's educational experience.²³ The location of services should be discussed during the consultation process among LEA officials, private school representatives, and parents of private school children with disabilities. The public agency may make the final decision after this consultation process.²⁴

Conclusion

There can be no dispute that schools like Calvary Christian School should admit students with disabilities, although not required to by federal law. Providing an inclusive education benefits not only students with disabilities but also their peers and the entire school community. It is also undeniable that religious schools will need to invest time and money to ensure that students with disabilities are appropriately accommodated in school.

²¹ 20 U.S.C.A. § 1412(a)(10)(A)(iv-v) (2006).

²² Even though religious schools cannot directly access government funds for special education services, the Establishment Clause has been interpreted as permitting religious schools to receive onsite services. *See, Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (holding school district could assign publicly paid sign language interpreter to religious school without violating the Establishment Clause).

²³ The House Committee Report states: "local educational agencies should provide direct services for parentally-placed private school students with disabilities (as for most students) on site at their school, unless there is a compelling rationale for such off-site services. Such intent indicates the preference that providing services on site at the private school is more appropriate for the student and less costly in terms of transportation and liability." H.R. Rep. No. 108-77, at 95 (2003).

²⁴ Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Private Schools (March 2006), at 9, *available at* <http://www.ed.gov/policy/speced/guid/idea/faq-parent-placed.doc>.

Given the long history of separation of church and state in our country, religious schools are not entitled to receive all of the government funding available for the education of children with disabilities. With the most recent reauthorization of IDEIA, however, the law is clear that federally funded special education services must be made available to parentally placed private school students with disabilities, including those in religious schools. While religious schools will need to raise funds to supplement the services provided by their local educational agency, they should work cooperatively with public school officials to maximize the help and support they can get from their local school district.

REPRESENTING DAVID: WHEN BEST PRACTICES AREN'T AND NATURAL SUPPORTS REALLY ARE

By Stephen A. Rosenbaum*

*Bakarrik ez egotea*¹

Perhaps it is necessary to be completely removed from one's natural setting to understand what natural supports² really means – as in a visit to *Euskadi*, the Basque Country. The scene was Errenteria, a suburb of Donostia,³ at a folkloric dance contest for the maritime Feast of Our Lady of Carmen. It was a hot July afternoon, and traditionally garbed couples aged 6 to 26 performed intricate *dantzak* accompanied by a small ensemble of tinny woodwinds. At the end of each number, a distinguishable cheer punctuated the air after the applause had subsided. It was not a cry of anguish, but awkward and noticeable. I turned at one point to see a young man who appeared to have a developmental disability, seated with his older parents in the rear. No one seemed to be the least bit perturbed.

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¹ “Not being alone,” in the Basque language, is one of the objectives of Atzegi, a regional association in the autonomous region of northern Spain, which supports “persons with intellectual disability” and their families. Atzegi is a place where families will be listened to, can share feelings and experiences, and support each other as a group in their struggle for rights. Available at <http://www.atzegi.org> (last visited Nov. 23, 2006).

² See, *infra* text accompanying notes 43-54.

³ More commonly known by its Spanish name, San Sebastian.

After the panel of judges deliberated, and trophies were distributed, the emcee, who spoke only in Basque, called out the names of winning duos. More applause. Berets were tossed and skirts unfurled. Nimble encores were performed. At one point, heads turned and the young man who had cried out was walking toward the stage, followed by his parents, who had tears in their eyes. Curious, we asked our fellow audience members, in Spanish, just what was going on. The judges had awarded this young man a trophy for being the most enthusiastic fan. It seems he regularly attended these contests and was as intrigued as first-time tourists like ourselves.

As the crowd was breaking up, parents and friends of dancers held in their hands the gleaming trophies. These same proud parents and friends gathered around The Most Enthusiastic Fan to admire the prize awarded to him. They were not feigning interest, and in fact appeared to know him and his family. It was spontaneous, unprompted and as authentic as the traditional dances, costumes, and language. Now, that's what I call natural support – and not being alone.⁴

As California marks the 30-year anniversary of the Lanterman Developmental Disabilities Services Act,⁵ there is more legal support and social acceptance than ever for including individuals with developmental disabilities in our daily lives. At the click of a mouse, there is an abundance of information about related services, rights, and resources. Yet, the day-to-day decisions are not necessarily easier. As informed parents and professional advocates, we are meant to digest the latest literature, absorb the best practices, fight the fights, rise above the loneliness, and travel the correct path in our search for services and support. From early intervention to

⁴ See, *supra* note 1. Language matters.

⁵ Stats. 1977, c. 1252, p. 4521 § 550. CAL. WELF & INST. CODE § 4500 *et seq.* (West 2005) See, *infra* text accompanying notes 7-19 for a description of the act.

respite care, from residential placement to transition-planning and natural supports, I have traveled that path, strayed from it, and learned a few things along the way.

In this article, I highlight the peculiar difficulties posed for professionals like myself, who advocate on behalf of our own children with disabilities, using the Lanterman Act as a backdrop. Mindful of the best practices to which we all aspire, our advocacy is bracketed by the realities of time, money, bureaucratic behaviors, and human or other subjective factors. And so it was – and is – with my son David. This could be read as a manifesto for understanding and compassion from peers – traits that go as far as legal knowledge, enhanced consciousness, and ideology in helping to shape the model disability rights advocate.

The Lanterman Act: Making It More Than a Piece of Paper⁶

The Individualized Education Program (IEP)⁷ is familiar to most lawyers and lay advocates whose clients are disabled students.⁸ Its less well-known counterpart is the Individual Program Plan (IPP). Just as the IEP determines the placement and constellation of educational services a California youngster⁹ receives, the IPP is the key document

⁶ “Your IPP: It’s Not Just a Piece of Paper” is the name of a PAI consumer publication, written jointly with Capitol People First. The easy-to-read guide explains the Individual Program Plan process, including regional center case management and services coordination for Californians with developmental disabilities. *See also*, the more detailed *Rights Under the Lanterman Act*, available at <http://pai-ca.org/PUBS/503801.htm>.

⁷ The Individualized Education Program is the statement of a disabled student’s educational needs and specific goals and methodologies for meeting them, required under the Individuals with Disabilities Education Act (IDEA), and written by a team of parents, school personnel, and others. 20 U.S.C. § 1401(14) (2006); Cal. Educ. Code § 56340, *et seq.* (West 2005).

⁸ On the IEP experience and suggested advocacy approaches, *see* Stephen A. Rosenbaum, *When It’s Not Apparent: Some Modest Advice to Parent Advocates for Students with Disabilities*, 5 U.C. DAVIS J. JUV. L. & POL’Y 159, 171-86 (2001) (hereinafter, *When It’s Not Apparent*).

⁹ Cal. Educ. Code § 56000 *et seq.* (West 2005), which refers to students as “individuals with exceptional needs,” mirrors the federal IDEA. I have

when it comes to supports and services that persons with *developmental* disabilities receive in their pre-school and adult years, and in all matters outside the schoolhouse door.¹⁰

The Lanterman¹¹ Act is the nationally renowned legislation which, through the IPP, accords Californians with developmental disabilities the right “to make choices in their own lives.”¹² This is accomplished with the aid of a network of quasi-governmental “regional centers” that contract with the state. The determination of necessary services and support is based on “the needs and preferences of the consumer or, when appropriate, the consumer’s family, and shall include consideration of a range of service options proposed by [IPP] participants.”¹³ With my son, we were fortunate to avoid meetings with 20 team members – assorted specialists, program managers, therapists, and psychologists – assembled

previously urged that *all* students should be entitled to an individualized learning plan. *When It’s Not Apparent*, *supra* note 8 at 161, n. 12.

¹⁰ Developmental disabilities, such as mental retardation, autism, epilepsy or cerebral palsy, are manifested before adulthood and reflect a need for lifelong or extended forms of assistance. The disability results in three or more “substantial functional limitations” in “areas of major life activity,” *viz.*, self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living and economic self-sufficiency. See 42 U.S.C.A. § 15002(8) (West 2005) and CAL. WELF & INST. CODE § 4512(1) (West 2005).

¹¹ As Republican State Assembly Member Frank Lanterman’s legacy extends beyond this statute – to other disability rights legislation, and a developmental center and regional center named in his honor – it is fitting to speak of Lanterman the Man, the Act, the Buildings – and coming soon, perhaps, the DVD.

¹² *Id.* at § 4502.1 (West 1998).

¹³ *Id.* at § 4512(b) (West 2006). Services and supports – not cash benefits – are “directed toward the alleviation of a developmental disability or toward [one’s] social, personal, physical, or economic habilitation or rehabilitation ... [or] the achievement and maintenance of independent, productive, normal lives.” The statute lists a dizzying array of possible training, therapies, equipment, and care which must be both effective and cost-effective in meeting one’s IPP goals. *Id.* The services are coordinated by private nonprofit community agencies that operate “regional centers.” *Id.* at § 4620 (West 1998). These centers serve developmentally disabled consumers in 21 geographic regions in California. The services are not based on income, although there may be a co-payment, and are meant to supplement other public and private services and supports. *Id.*

at the table who would attempt to scrutinize, analyze, categorize, and program David. I routinely caution parents about that kind of meeting, where there may be a cast of thousands, and a low level of productivity and candor.¹⁴

Like the federal and state special education statutes, the Lanterman Act is filled with mandates for services and parental and consumer rights.¹⁵ The entitlements for youngsters – and adults – with developmental disabilities are the result of many years of parental activism and lobbying. The text is well crafted, and much of the interpretive jurisprudence is favorable.¹⁶

However, enforcing these provisions requires funding and a good deal of vigilance. In addition to creating regional centers, the California legislature also established a number of “area boards” throughout the state to monitor the state’s federally mandated five-year plan for service delivery and technical assistance to people with developmental disabilities.¹⁷ It also acknowledged the broad authority of the

¹⁴ Size matters, or so it seems with administrators (and sometimes parents), who insist on summoning a gaggle of school personnel to a meeting, at least for a child’s IEP. In the early days of the federal special education law, one commentator observed that “[t]he more parties involved in the plan ... the less likely it is to be meaningful.” Eugene Bardach, “Educational Paperwork,” in David L. Kirp & Donald L. Jensen, eds., *School Days, Rule Days* 128 (1986). The IPP may actually suffer from a lack of attendance, or take the form of a quickly-convened “meeting” on paper.

¹⁵ At the heart of the act, like the (developmental) disability movement itself, is the principle of *choice*. All agencies receiving state funds “shall respect the choices made by consumers or, where appropriate, their parents, legal guardian, or conservator [and] shall provide consumers with opportunities to exercise decision making skills in any aspect of day-to-day living.” CAL. WELF & INST. CODE § 4502.1 (West 2005).

¹⁶ See, e.g., *Ass’n for Retarded Citizens v. Dep’t of Developmental Services*, 38 Cal. 3d 384, 388 (1985) (Lanterman Act is “a comprehensive statutory scheme ... to provide a ‘pattern of facilities and services ... sufficiently complete to meet the needs of each person with developmental disabilities ... [and] to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community [citations]”).

¹⁷ CAL. WELF & INST. CODE § 4543(a) (West 2005). The State Council on Developmental Disabilities is responsible for preparing and monitoring a

state affiliate of the national protection and advocacy system to ensure the legal, civil, and service rights of developmentally disabled individuals.¹⁸ Of course, consumers, parents, and other family members also play an important role in oversight and advocacy of individuals with developmental disability.

Dis-Awareness

On the spectrum of the phenomenon I call “dis-awareness,”¹⁹ at one end is the silence, isolation, or absence of information and communication about disability in the legal community. At the other end is consciousness about, and sensitivity toward, disability.²⁰ A more nuanced dis-awareness comes from the well-meaning, but overly zealous and blithe, professionals and activists, who espouse an *uber*-awareness.

In the end, this latter awareness also suffers from insensitivity and facileness. It sends a message to the families and loved ones of persons with disabilities – who may also be

state plan for the expenditure of federal funds received pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15001 *et seq.* (West Supp. 2006).

¹⁸ CAL. WELF & INST. CODE § 4901(a) (West 2005). The California agency is PAI. *See, generally* <http://www.pai-ca.org>. *See also*, 42 U.S.C. § 15043(a)(1)-(2) (West 2005) (state shall have system to protect and advocate for the rights of individuals with developmental disabilities ... to pursue legal, administrative, and other appropriate remedies). In recognition of bureaucratic realities and the need for oversight and advocacy, the legislature also made a finding “that the mere existence or the delivery of services and supports is, in itself, insufficient evidence of program effectiveness.” CAL. WELF & INST. CODE § 4501 (West 2005).

¹⁹ Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs*, 11 CLIN. L. REV. 271, 285-94 (2005). While the article focuses on shortcomings in law school teaching, scholarship and clinical education, and the attempts at redress, the academic institution can be seen as a microcosm for the profession at large, with respect to dis-awareness.

²⁰ *Id.* For some attorneys who don’t practice in this area, there is a certain glamour or allure. It was both amusing and flattering to receive an email from an ACLU law graduate fellow who wrote in anticipation of her first IEP meeting: “I am just grateful that you are able to talk us through this a little as we suit up for our ‘TV roles as disability rights lawyers.’” E-mail from J.L. (Oct. 17, 2006) (on file with author).

colleagues – that there is one correct model for habilitating,²¹ educating, living, and caring, and it often bears the label of “best practices.” This dis-attitude approaches hubris, and runs counter to the very byword of the disability rights and independent living movements: choice.

This is not a bitter rebuke, but a plea for tempering our ardent advocacy with realism and respect. And, while I write from the perspective of the self-conscious professional wanting to do the right thing for my kid, it is a message that transcends my particular parental status. It is a message for all those who aid disabled²² children in the legal assistance arenas.

Unnatural Environments

Under current state regulations, services to disabled infants and toddlers are to be offered in “settings that are natural or typical for the infant or toddler’s age peers who have no disability, including the home and community settings

²¹ This is akin to *rehabilitating*, although it is about starting – not starting over. In plain English, we might say “skills training.” *Habilitation* is part of the vocabulary one acquires, like *challenging* and behaviors, when entering the world of developmental disability jargon. See CAL. WELF & INST. CODE § 4502(a) (West 1998) and § 4851(a) (West 2006) for a more precise definition.

²² Language matters. For the sake of brevity, variation, and perhaps perversity, I occasionally use “disabled” as an adjective – to the chagrin of purist colleagues who eschew this in favor of “people first” language. While “person with a disability” accentuates the humanity, and not the impairment or disabling condition, some activists and academics use “disability first” language for emphasis, or to reclaim with pride pejorative terms. See Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN’S L.J. 1, 4 n.14 (2004) (hereinafter *Aligning or Maligning?*). See also, Richard Fung, *Looking for My Penis: The Eroticized Asian in Gay Video Porn*, in *Bad-Object Choices*, eds., HOW DO I LOOK? QUEER FILM AND VIDEO 168, n.8 (1991) (“too much time spent on the politics of ‘naming’ can in the end be diversionary”). But see, “Why ‘Voice of the Retarded?’ A Statement About our name,” http://www.vor.net/name_game.htm (last visited Nov. 23, 2006) (leaders aware that maintaining “the retarded” in organization’s name not “politically correct,” but “[t]he ‘buzz’ we are all witnessing relates mostly to debate within disability circles”).

in which children without disabilities participate.’²³ The Parent-Infant Program at Children’s Hospital was not a “natural environment” when my son David was a baby. That term had not yet even entered the early intervention disability lexicon.

Our children are so often reduced to scores and percentiles, levels of performance, and adjudicatory outcomes. At doctors’ visits and IPP team meetings, the reports would always begin, “This young man presents as ...,” and we would read for the umpteenth time about David’s birth weight, his complicated and traumatic delivery, and his hypertonic (or was it *hypotonic*?) muscle tone. The numbers stood out on page 8 of the staff psychologist’s report:

Age equivalent = 0.8 months.

The hospital program, however, was a safe space where one could engage in play-like activities without sensing the pitying glance or curious gaze of those whose children did not need therapeutic interventions. My partner and I could take refuge amongst David’s typically developmentally disabled peers and their typically developed parents. We did not need to offer explanations, or smiles and cheers for the seemingly effortless feats of the non-disabled children who inhabit natural environments.

²³ 17 C.C.R. § 52000(b)(35) (2006). See 34 C.F.R. Pts. 300.114 – 300.118 (2006). “To the maximum extent appropriate, children with disabilities ... are educated with children who are nondisabled.” *Id.* Pt. 300.114(a)(2)(i). We were more prepared, and even eager, to face the integrated school milieu, after having spent earlier years in an admittedly more sheltered setting. Some “best practices” promoters dismiss the “readiness” or sheltered training approach, insisting that there is no need for a disabled person to *practice* before entering the real world. Perhaps the *parents* need more time to adjust. See also, 20 U.S.C. § 1432(4)(G) (2006) (under IDEA, early intervention developmental services are provided, according to a Individualized *Family Services Plan*, for children ages 0-3 at risk of substantial developmental delay). The “inclusion” or “integrated” model was first introduced in the elementary schools and K-12 schools generally, as an interpretation of the “least restrictive environment” principle under IDEA.

After the songs and circle time, the painting and gymnastics, caring and competent adults would watch our children for a bit while we retreated onto worn couches in a back room to munch on store-bought sandwich crèmes and sip weak coffee. We tried to make sense of our world with the help of a facilitator. What followed were tears, hopes, and fears. We were segregated, but protected.

When Respite Isn't Enough

“To relieve parents from the ‘constantly demanding responsibility of caring’ for a child with a developmental disability.” That is one of the stated purposes of in-home respite care, a classic Lanterman Act support (or is it a *service*?). Defined as “intermittent or regularly scheduled temporary non-medical care and supervision provided in the consumer’s own home,” respite care is designed to assist family members in maintaining a disabled youngster at home, thereby avoiding residential placement.²⁴ Some may refer to it as glorified babysitting, but it really requires more extraordinary skills on the part of the caregiver, especially in the case of older youths, for whom it is not “cool” or appropriate to have a babysitter. Under the Lanterman Act, parents in search of respite care have a right to a provider who will attend to their child’s basic self-help needs, safety, and other activities of daily living usually performed by a family member.

The “constantly demanding care” required by a disabled child can be a bit of an understatement. The word “care” does not begin to describe the vast amounts of time parents might spend monitoring the various therapies and appointments. Virtually all parent-child interactions are

²⁴ See 17 C.C.R. § 54302(a)(38) (2006). In legislative findings and an explicit mandate to regional centers, the Lanterman Act declares unequivocally that, for social, educational, and fiscal reasons, developmentally disabled children are best provided for at home with their families. CAL. WELF & INST. CODE § 4685 (West 2005). In particular, the state’s developmental services department and contracting regional centers are to give “very high priority” to developing and expanding services to assist families caring for their children at home. *Id.* at § 4685(c)(1). See also *Williams v. Macomber*, 226 Cal.App.3d 225, 233 (1990) (Lanterman Act declares “in strong terms” need to assist family in caregiving at home).

intentionally and intensively therapeutic.²⁵ It was only later in my fatherhood – when I became a full-time disability rights lawyer – that I learned why a child’s “behaviors” take the plural form and are sometimes euphemistically referred to as “challenges.”

It was so important for us in David’s early years, and as he entered his teens, to have someone relieve us from direct care so that we had time for one another and for our other two children (not to mention outings and invitations, or mundane chores that could not be accomplished with David in tow). By law – and presumably best practice and the natural order of things – respite care was intended to preserve family unity and sanity, and to avoid out-of-home placement.

Yet, no policymaker or ultra-correct advocate takes account of the stress on the family of having some new person come into your home. There is the matter of scheduling: anticipating needs many weeks in advance, making sure a suitable caregiver is available and cramming one’s errands, appointments, or outings into that fixed time block of inadequately allocated respite hours.²⁶ Then there are concerns about the caregiver showing up on time, or at all. And, once you have trained a caregiver who is competent, you worry he will move on because the pay is so paltry (despite our ability to supplement the standard rate), which means having to start over.

²⁵ See, e.g., the experience of the mother of Katie, a Down Syndrome child, who “executed therapy goals every minute of the day ... There was never a moment [Katie] wasn’t stimulated.” Leslie Kaufman, “Just a Normal Girl,” *New York Times, Education Life* 24, 26 (Nov. 4, 2006). “I just didn’t have time for friends,” she explained. *Id.*

²⁶ Each regional center has a policy for allocating respite care hours. See, e.g., *Matter of C.L. v. Central Valley Regional Center 5* (Off. of Admin. Hrgs. No. 2001050032), available at <http://www.oah.dgs.ca.gov> (regional center respite guidelines – using points assigned to consumer’s behavior, care needs, adaptive functioning, and family circumstances to establish level of service – cannot be fixed and inflexible). It has almost become urban legend in the regional center system that service coordinators “hide the ball” from parents on the availability of respite care.

There are no provisions in the act to account for the aches we endured because we couldn't do the normal things that families did together. Or the guilt we felt for not always taking David where we would take our other children. It was not because we were ashamed to bring our son and his behaviors. Rather, each venture outside the home brought a series of (sometimes selfish) questions: What benefit would David derive? What kind of one-on-one care or support could we provide?²⁷ How much would his presence detract from our own enjoyment – or that of his siblings or those around us? Who will read aloud to these people the Developmental Disability Bill of Rights?²⁸

In earlier “unenlightened” times, there would be no agonizing and no regrets about leaving one's disabled child behind – at home, or, more likely, in some far-off red-brick institution with a bucolic or pious name over the entry gate. Today, we have the law, changing social attitudes, and best practices about choice and independence as our guideposts. This does not always jibe with one's own reality. When my partner and I made the difficult decision to consider the “P” word – Placement – I knew this was not what Lanterman or The Movement had intended. Nonetheless, the limited allotment of hours and quality of intermittent respite care was not really enough of a service – and there was no other support, natural or otherwise, to keep David at home.

Building a “Six-Pack”?

What I really meant to write is “Six-Pack”?!@*&^%? The term is disrespectful, degrading, and demoralizing. Yet, it rolls off the tongues of fair housing and disability lawyers when they describe community care facilities that house six

²⁷ Even as I write a final draft of this article, my adult son, at home for Thanksgiving, is not necessarily able to care for or amuse himself for a sustained period of time without interaction or assistance.

²⁸ CAL. WELF & INST. CODE § 4502 (West 2005). *See also* 42 U.S.C. § 15009 (West 2005). Among the articulated rights are appropriate treatment, services, and habilitation “designed to maximize the potential of the individual ... in the setting that is least restrictive of the individual's personal liberty.” *Id.* at § 15009(a)(2).

people – people who are “placed” there by a parent or conservator. For some, these group homes are damned as institutions. To frame the debate in terms of institutionalized vs. community-based, or segregated vs. integrated, however, is misleading and disingenuous. I have yet to find a satisfactory definition of institution.²⁹ As for “the community,” it is a concept susceptible to a variety of interpretations ranging from the cynical to the cryptic, and the abstract to the abstruse.³⁰ It is important to look beyond the four walls and the superficial settings of the facilities to discover the real meaning of inclusiveness and independence.³¹

Yes, children should live at home with their parents and, for adults with disabilities, “supported living” may be the preferred option. Supportive living services help regional center consumers live in their own homes “with support available as often and for as long as it is needed” and “[m]ake fundamental life decisions, while also supporting and facilitating the consumer in dealing with the consequences of

²⁹ Again, size matters. Colleagues litigating for the transfer of more Californians from state developmental centers and other congregate facilities to community-based homes define a large institution as a facility with more than 16 beds. *Capitol People First v. Dep’t of Developmental Services* (Alameda Co. Sup. Ct. No. 2002-038715), Am. Pet/Pfs’ Memo. of Pts. & Auth. in Support of Mo. for Class Cert. 15 (Sept. 29, 2005), available at <http://apps.alameda.courts.ca.gov/fortecgi/fortecgi.exe?ServiceName=DomainWebService&TemplateName=index.html>. I rather belatedly discovered that my office’s standard intake form has a field labeled client’s “living arrangement” in which a *large* group home is defined as more than *three* beds. Does that make it an *institution*?

³⁰ Not everything is rosy in the community, nor everything bleak in institutions. See, e.g., Michele R. Marcucci “Agency is Sued in Rape of Client; Suit: Care Provider Didn’t Ensure Safety,” available at www.mercurynews.com/mld/mercurynews/news/local/16120878.htm (visited Nov. 29, 2006) (supported living agency charged with negligence in rape of woman who has mental retardation) and “Letter to the Editor,” *Sonoma-Index Tribune* (March 4, 2005) (“I was expecting Frankenstein-like treatment at best, and more likely neglect and abuse [when entering developmental center]. I was wrong”).

³¹ San Francisco State University Historian Paul Longmore has wisely observed, in conversation on more than one occasion, that the real goal for the disability rights movement, and our society in general, is not independence, but *interdependence*.

those decisions; building critical and durable relationships with other individuals; choosing where and with whom to live; and controlling the character and appearance of the environment within their home.”³²

I am in total agreement with the Lanterman Act's legislative language and its intent to normalize the residential expectations of persons with developmental disabilities. But, David is not really suited for supported living. It made no sense economically or programmatically to have my son in his own apartment with around-the-clock staffing, given his self-care needs – and that doesn't even take into account his personality. Many adults and youth, like David, like the company of others and actually enjoy communal living, particularly if they are apart, or estranged, from their nuclear or extended family.³³

Yet, the high price of urban real estate and cost of living make for fewer group homes located in desirable metropolises so that a disabled person might be near to family and friends. The funds available to regional center consumers based on state-determined reimbursement rates³⁴ simply do

³² 17 C.C.R. §58614(a) (2000). *See, generally, id.* § 58600, *et seq.*, for regulations governing supported living services schemes.

³³ As a graduate student, I was content to live with five other adults – including my future spouse – in a weathered Queen Anne's house on Lorina Street, sharing meals, celebrations, rituals, and party guests, as well as domestic chores, transportation, rental payments, and even hallowed house meetings. Congregate living doesn't seem to have a bad reputation when it involves non-disabled college students or 20- and 30-somethings, not to mention co-housing residents or seniors.

³⁴ On rate-setting procedures for community-based developmental disability programs, *see* 17 C.C.R. § 56900 *et seq.* (2005). One of the complaints that fellow advocates have expressed about congregate facilities is that they are “staffed.” Ideally, every housing unit, including those officially designated for supported living, would rely on natural supports (*see infra* text accompanying notes 43-54) to accomplish day-to-day tasks and supply all the other comforts of a home. In fact, the residential, respite, vocational, habilitative, and educational service delivery system would totally collapse without staff. That is not to say that hiring and retaining competent paraprofessionals is a simple matter, whether the setting is “integrated” or “segregated.”

not keep pace with mortgages, staff wages,³⁵ or other operational costs. This affects small-scale, community-based homes, as well as apartments or duplexes that might be appropriate for supported living candidates. For those few homes with a vacancy, situated within a reasonable distance and managed by qualified staff, it is difficult to negotiate much family involvement in the day-to-day affairs of a “second residence,” except in the most cursory ways.

As real world costs and other considerations intruded on our dreams and the theoretical models, we were left with few options. After a good deal of politicking and fundraising, we helped build – that is to say, bought and rehabilitated – a home, a state-licensed care facility for *six* people, under the auspices of BUiLD, Inc.³⁶ David and five others now live in a turn-of-the century home (remodeled using universal design principles) set on a modest residential block, with other nuclear family residents and apartment dwellers, and a half-dozen houses down from the Rosa Parks Elementary School. It takes less than five minutes to walk or roll to a bus stop, and perhaps 10 minutes to get to the trendy Fourth Street shopping district.³⁷

The underlying fear of my well-meaning, but misguided, colleagues is that parents may make the wrong

³⁵ A recent innovation in community-based service delivery is the “professional employer organization,” an intermediary designed to ease costs and administrative burdens for provider agencies, professionalize the workforce, and improve wages and work conditions for the individual support workers and caregivers, largely through unionization. For more on this model, see Carol Zabin, *Quality Services and Quality Jobs for Supporting Californians with Developmental Disabilities*, 24 *et seq.*, (UC Berkeley Center for Labor Research and Education 2006), available at <http://laborcenter.berkeley.edu>.

³⁶ Berkeley Youth Living with Disabilities, Inc. (BUiLD) owns and operates a licensed, intermediate care facility. See, generally <http://www.buildhouse.org>.

³⁷ The process was not without obstacles, including some resistance from Not-In-My-Back-Yard neighbors and a retailer who said, “This cannot come in here,” in reference to a wheelchair-using BUiLD resident. The neighbors are now on good terms and the merchant agreed to an out-of-court settlement, including sponsorship of a workshop on anti-discrimination laws for area small businesses.

choice about so-called institutionalization.³⁸ The lack of sensitivity to the feelings of parents in general was decried more than 25 years ago by the first-generation deinstitutionalization-oriented researchers. They noted the irony that activists who championed the human dignity of individuals with mental retardation would at the same time devalue the human dignity of these people's parents.³⁹ What has the potential as a solidarity movement for change can easily deteriorate into stakeholders locked into caricatured and uni-dimensional stances. The activists spend more time sloganeering and vilifying each other than joining in common cause to battle the bureaucratic or fiscal inadequacies of the social services system.⁴⁰ Moreover, little is done by the

³⁸ At a recent PAI staff workshop on litigation strategy, one lawyer participant expressed concern that a parental satisfaction settlement monitoring scheme might result in parents actually preferring a so-called institutionalized living setting to one that is community-based. Again, there is the fear that parents may make the wrong choices.

³⁹ Robinsue Frohboese & Bruce Dennis Sales, *Parental Opposition to Deinstitutionalization: A Challenge in Need of Attention and Resolution*, 4 L. & HUM. BEHAVIOR 1, 2 (1980).

⁴⁰ See, e.g., the evolution of the National Association for Retarded Citizens or ARC (now simply "The Arc") from service provider to advocate for community-based alternatives to institutionalization and the eventual schism among state chapters between parents who supported, and opposed, large-scale removal of persons with developmental disabilities from state institutions. *Id.* at 18, 25-26. The California Association of State Hospital Councils of Parents for the Retarded (CASH/CPR) is one of the oppositional organizations that progressives love to hate. See, generally, <http://www.cashpcr.org>. The de-institutionalization debate was recently reignited over closure of the historic Agnews Developmental Center, with parties such as CASH/PCR and PAI assuming some of their equally historic roles. See, e.g., Michele R. Marcucci, "Abuses Found At Some Group Homes," *Oakland Tribune* (Dec. 21, 2003) (Keep Our Families Together coalition concerned that if "forced to place their loved ones in the community, the health and welfare and safety of those clients is going to be in jeopardy"). See also, Cal. Alliance for Inclusive Communities, Inc., *Advocates Applaud Schwarzenegger Plan To Close Agnews Developmental Center* (closure can serve as "model for developing a comprehensive statewide plan to help these people who are still confined in institutions and don't have to be. People with disabilities should not be forced into segregated institutional care because there is no alternative"). Available at <http://www.caic.org/AgnewsClosure.htm> (last visited Nov. 27, 2006).

advocacy community to bridge the concerns of these two camps, much less genuinely wrestle with competing philosophical or pedagogical views.⁴¹

Support That is Natural and Embracing

With all the emphasis on person-centered planning,⁴² it is easy to ignore the benefits of a *family*-centered approach to planning, even when it does not involve disabled minors. Other social and educational support systems have taken into consideration family strengths, acknowledging them, incorporating them into intervention plans, and building upon them.⁴³

According to this model of family-centered service delivery, family members are in the best position to judge whether services are indeed family centered and to determine if they successfully meet their needs. Professionals must learn to trust families – to trust that they have strengths, they genuinely and deeply care for their children, they are

⁴¹ Joining the institution closure clash was Assembly Human Services Committee Chair Noreen Evans, whose legislative district includes the Sonoma Developmental Center. Evans issued a press release lambasting the Schwarzenegger administration and local regional center for imposing illegal quotas for transferring people from Sonoma, “cast[ing] aside their care needs and the wishes of their families ... because they require changes in services that may jeopardize the quality of care for our developmentally disabled.” “Evans Exposes Administration Cover Up: State Victimized Developmentally Disabled and Their Families” (Oct. 25, 2006), *available at* <http://democrats.assembly.ca.gov/members/a07/press/a072006029.htm>. PAI spearheaded an open letter to the legislature in response, *available at* <http://www.pai-ca.org> (visited Nov. 23, 2006).

⁴² CAL. WELF & INST. CODE § 4646 (West 2005). *See also*, “Your IPP: It’s Not Just a Piece of Paper,” *supra* note 7 and Calif. Dep’t of Developmental Services, *INDIVIDUAL PROGRAM PLAN RESOURCE MANUAL: A PERSON-CENTERED APPROACH* (2000).

⁴³ *See, e.g.*, Reva I. Allen & Christopher G. Petr, *Toward Developing Standards and Measurements for Family-Centered Practice in Family Support Programs*, in G.H. Singer, L.E. Powers & A.L. Olsen, eds., *Redefining Family Support: Innovations in Public-Private Partnership* (1996). The family-centered approach “modifies the view of family members as people who only cause problems and are obstacles to the improvement of clients, and it is consistent with the notion of collaboration as a preferred style of family-professional interaction.” *Id.* at 65.

interested in and capable of growth, and can make effective decisions on their own behalf. They must also actively reinforce the process of sharing information with family members so that their decisions may be as informed as possible.⁴⁴

It would seem to follow from a family-centered approach, or at least family participation in planning, support, and advocacy, that the concept of “natural supports” embraces a family component, particularly for youth and young adults with developmental disabilities. The Lanterman Act characterizes natural supports as those “personal associations and relationships typically developed in the community that enhance the quality and security of life for people.”⁴⁵ It explicitly refers to family, as well as friends, fellow students, co-workers, and “associations developed through participation in clubs, organizations, and other civic activities.”⁴⁶

It is not readily apparent how these natural supports differ from what the act calls a “circle of support.” The latter is “a committed group of community members, who may include family members, meeting regularly with an individual with developmental disabilities in order to share experiences, promote autonomy and community involvement, and assist the individual in establishing and maintaining supports.”⁴⁷ Generally, these individuals are volunteers who are not themselves developmentally disabled.⁴⁸

Added to the statutory and regulatory guidance is this bland recipe from the Department of Developmental Services:

⁴⁴ *Id.* at 74.

⁴⁵ CAL. WELF & INST. CODE § 4512(e) (West 2005).

⁴⁶ *Id.*

⁴⁷ *Id.* at § 4512(f).

⁴⁸ *Id.* No doubt someone somewhere is defending a dissertation in which these nuanced forms of support are discussed and deconstructed. For a tidier and slightly different definition of “circle of support,” See 17 C.C.R. § 58601(a)(1) (2000) (“informal but identifiable and reliable group of people who ... meet and communicate regularly to offer support, at a frequency and in a manner consistent with and appropriate to the [person’s] need”).

There is no single method or easy answer for developing a system of natural supports. It's a matter of supporting and assisting consumers to be in a position to develop associations and relationships. The activity of someone assisting in developing natural supports for a consumer is in devising strategies to bridge the gap between the opportunities for, and development of, natural supports. It may require considerable time to develop and nurture natural supports. But we know if we do nothing, we'll have nothing. The possibilities are endless, given some creativity and willingness.⁴⁹

Does any of the best practices chimera or sermonizing about supports rub off on the educators, therapists, facilitators, and other service providers in the trenches? One college counselor, referring to a young woman with Down Syndrome attending a regular college program, offered this bleak assessment: "Katie thinks she has a million friends, but she is going to leave here and not one student is going to stay in touch."⁵⁰ While this smacks a bit of cynicism or overstatement, there may be some sobering truth.

Our local high school had a "best buddy" club, and for a while David actually had a best buddy. I always found the term a bit patronizing, but these dis-aware high school kids (in the best sense of the word) were earnest and friendly, and there were some fine opportunities for socializing and consciousness-raising. However, after some 15 years of inclusive education in a school district that once had a

⁴⁹ Department of Developmental Services, *Natural Supports ... They're All Around You!* (June 20, 2006), available at http://www.dds.cahwnet.gov/publications/PDF/Natural_Supports.pdf.

⁵⁰ Kaufman, *supra* note 25 at 26. This counselor's skepticism about future friendships is obviously debatable. But, whether those relationships in fact continue, it does not follow that Katie would be better off in classes or social groupings solely with other Down Syndrome students.

partnership⁵¹ with a respected institution of higher education and some of the “full inclusion” pioneers, it is a struggle to get the district and regional center to assemble a meaningful, person-centered, post-secondary transition education program for my son.⁵² The team members sometimes “talk the (augmented communication) talk,” but rarely “roll the roll.”

This does not even begin to address the question about natural support outside of school or when he is issued his certificate of completion next year. When he was younger, David would be invited to birthday parties, and happily at that. That phase soon passed. One long-time classmate would chat him up on the high school campus and various instructional aides became attached – and vice-versa – and took David to a concert or even skiing outside of school hours. But, a series of high-fives and “Hi, Daves” does not a circle of support make. While Katie, the college student with Downs, may lose her natural supports once she graduates, David has no peer right now to hang out with on weekends, not to mention after he leaves his bungalow.⁵³ And will there be a special someone later on to share an iPod[®] headset or someone who will try to hook up with him?

Lessons Learned

What it comes down to is choice. And respecting the choices made by others. It is as easy for me to make

⁵¹ They might use words like “partnering” or “a collaborative” to describe the relationship; I’ll stick with traditional nouns.

⁵² See 20 U.S.C. § 1401(34) and § 1414 (d)(1)(A)(i)(VIII) (2006) (defining transition needs and services for students 16-22 years of age related to training, education, employment, and independent living skills). See also Cal. Educ. Code § 56460(e) (West 2003) (“Planning for transition from school to post-secondary environments should begin in the school system well before the student leaves the system”); *Id.* at § 56462 (West 2003) (description of transition program, resources, and curriculum); See also, California Services for Technical Assistance and Training (CalSTAT), Sonoma State University, *The Transition to Adult Living: A Guide for Secondary Education* (2003), available at <http://www.cde.ca.gov/sp/se/sr/>.

⁵³ Ironically, after being educated in regular classrooms from kindergarten through 12th grade, Dave and his fellow transition ex-included students are located for a better part of the day in a classroom bungalow, that quintessential symbol of segregated special ed.

assumptions about other disabled kids and their parents as it is for parents, lawyers, and other advocates to make assumptions about me and my child. For some the child is a blessing, and for others he is a burden. I expect that adults with disabilities might take exception to these characterizations, as parents of disabled offspring and people with disabilities can and do end up on different sides. And, notwithstanding the romanticized images, not all people with disabilities struggle in solidarity.⁵⁴

Adhering to the professional ethic in an age of expanding disability consciousness and law can be challenging for the attorney-parent – or indeed any parent of a disabled child – when coupled with the mundane realities of daily life. We are advocates and case managers, service providers and natural supporters. Sometimes we work alone, and sometimes we work in concert with others. We welcome advice and support, when appropriate. But, in the end, we simply long to be parents doing what we can to get by.⁵⁵

⁵⁴ “Although the promoters of disability civil rights may pride themselves on being members of a cross-disability movement, there are very real differences in the experience of the teen with cancer, the child who has significant cognitive impairments, and the adult resident of a psychiatric institution.” Massey & Rosenbaum, *supra* note 19 at n. 101.

⁵⁵ This sentiment is reflected in curricular materials for students training to be special education lay advocate trainees in a U.S. Department of Education-funded pilot project. Advocates are actually reminded to respect and understand the complexities of their parent-clients’ lives and to communicate in honest and non-judgmental ways. University of Southern California University Ctr. for Excellence in Developmental Disability-Council of Parent Attorneys & Advocates, *Special Education Advocate Training Demonstration Project Manual* at 4-29 to 4-31 (August 2006 Instructor’s Manual) (on file with author).

BOOK REVIEW:

**A REVIEW OF *WHAT'S WRONG WITH CHILDREN'S RIGHTS:*
STILL A 'SLOGAN IN SEARCH OF DEFINITION'**^{*}

By Justine A. Dunlap^{**}

Government intervention into the lives of families has grown significantly in the last generation. Sometimes this is to the good, *e.g.*, when needed to prevent imminent or continued physical violence within the family.¹ But the intervention can go too far. Children can be removed from – or prevented from returning to – parents who, while imperfect, are not unfit.² Too often removal occurs in poor families of color.³ Too often it occurs as a reflexive action without any real regard to whether it will aid the child being removed.⁴ And it occurs, again too often, under the label of children's rights.

The negative side of government intervention on behalf of children is a primary focus of New York University Law Professor Martin Guggenheim's book *What's Wrong with Children's Rights*.⁵ In this interesting book, Professor

* A slogan in search of a definition is how Hillary Rodham Clinton described the children's rights movement 33 years ago. Hillary Rodham, *Children Under the Law*, HARVARD EDUCATIONAL REVIEW 43 (1973).

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¹ For many years, such intervention was denied based on the notion that the family sphere was a private one. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

² There is, of course, no such thing as a perfect parent, and what constitutes unfitness eludes clear definition. *See infra* at 189 for a discussion of unfitness.

³ Douglas Besharov, *Child Abuse Realities: Over-Reporting and Poverty*, 8 VA. J. SOC. POL'Y & L. 165, 183-187 (2000).

⁴ *See, e.g., In re Nicholson*, 181 F. Supp. 182 (E.D.N.Y. 2001), *supplemented sub nom, Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

⁵ Martin Guggenheim, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* (2005).

Guggenheim is always instructive and often provocative. As a consequence, he has written a book worth reading.⁶

This book review essay will begin by offering an overall assessment of the book.⁷ It will then analyze two separate components of Guggenheim's book. First, it will evaluate Guggenheim's assertion that, absent a demonstration of parental unfitness, parental decision-making regarding their children is "virtually immune from state oversight."⁸ Second, this review will explore Guggenheim's critical view of children's advocates and the role they play in securing rights for children.

The Book: *What's Wrong with Children's Rights*

Professor Guggenheim's book addresses many of the issues relevant to the modern family. He juxtaposes parents' rights, children's rights, and the rights of third parties under a variety of different legal and factual circumstances.⁹ Woven throughout the book is a critique of the current children's rights movement and the child advocates who populate it.

⁶ It is hard to imagine anyone better qualified to write this book than Guggenheim. He is currently the Fiorello LaGuardia Professor of Clinical Law at NYU, teaching and training students in clinical education. His work as a lawyer, which he describes in bits and pieces as is relevant, is inspiring to any lawyer who dreams of making a difference.

⁷ For two reviews of the book, see Kelly Browe Olson, *THE BOOKSHELF: Martin Guggenheim, What's Wrong with Children's Rights*, 44 FAM. CT. REV. 330 (2006), and Theo Leibmann, 231 N.Y.LAW J. 2, *Lawyer's Bookshelf, What's Wrong With Children's Rights* (June 16, 2005).

⁸ Guggenheim, *supra* note 5 at 36.

⁹ Guggenheim, *supra* note 5, *passim*. Oddly enough, Guggenheim spends little energy on the role and rights of the state in this area. The book's index reveals one reference to the doctrine of *parens patriae* and one reference to police power, both of which supply the state's right to intervene into the lives of children and their parents. Guggenheim, *supra* note 5 at 305. The omission of this important interest and its intersection with the rights of parents and children is unfortunate. Although Guggenheim does not spend time specifically discussing *parens patriae* and police power, he does heavily critique state intervention into children's lives. See, e.g., Guggenheim, *supra* note 5 at 250-54.

Guggenheim writes clearly and convincingly on controversial topics. The plain English prose results in an eminently readable book, even to those not schooled in the law of families. The readability flows not just from the clear writing; the book's autobiographic tinge also heightens interest.¹⁰ Thus, we read of some of Guggenheim's personal efforts to affect the law.

Good autobiographies document pain as well as celebrate victories. Guggenheim reports that he believed himself to be the true child advocate, but had that title wrested from him by those he viewed as "enemies of children's rights."¹¹ He now labors under the title of parents' advocate.¹² Such an involuntary role reversal had a lasting impact on Guggenheim, leading him, in part, to write the book.¹³ This revelation demonstrates the influence of labels and the power

¹⁰ See, e.g., Guggenheim, *supra* note 5 at 205-06, 251.

¹¹ Guggenheim, *supra* note 5 at 180.

¹² *Id.* Many "parents' advocates" may rightly view themselves as children's advocates, if one believes that vigorous and effective advocacy for parents benefits children. For instance, as a parent's attorney in the Washington, D.C., child abuse and neglect system many years ago, this author filed a motion for a court order for housing for a mother whose children were then in foster care only because they lacked adequate housing. The government opposed the motion, even though its social workers agreed that the children could be returned if there was adequate housing. See *In the Matter of D.L.*, 113 DAILY WASH. L. RPTR. 1293 (May 6, 1985). As Guggenheim points out, the lack of available, adequate housing is responsible for a large percentage of children remaining in foster care. Guggenheim, *supra* note 5 at 193. This issue underscores the pernicious and often non-child-centered effects of unnecessary removal of children, a problem also addressed by Guggenheim. *Id.* at 192-96. Assuming that the parent and children had housing originally, once the children are removed, the parent may lose eligibility for staying in the housing and/or lose the income necessary to maintain it. Once lost, it can be a Herculean feat to recover, and thus the children remain in care – often at a cost equal to or exceeding what the government would pay in subsidized housing costs for a reunited family. But, as Guggenheim explains, the federal money to the states supporting out-of-home care far exceeds what the government is willing to pay to preserve and reunify families. *Id.* at 189-90. All too often this travesty occurs in the name of children's rights.

¹³ *Id.* at Preface x and 180.

of sound-bites, even in the law. Further, Guggenheim acknowledges times when he was “pleased” that his efforts failed.¹⁴ Guggenheim gives his reader a realistic sense of how lawyers can be personally torn by arguments they make.

The book is well-researched, in addition to being well-written. I have been a practitioner and law teacher in the field of family law and its sub-specialty, child abuse and neglect, for over 20 years. Notwithstanding this academic and practice background, I learned much from this book. For instance, Guggenheim details the history of federal child abuse legislation in a way that takes into account the political context and its long-term impact.¹⁵

Guggenheim starts his book with a historical primer on children’s rights.¹⁶ He sets out the two periods in American history in which there have been identifiable children’s movements. The first spanned approximately 30 years in the late 19th and early 20th centuries. This children’s movement sought to protect children.¹⁷ It led to, among other things, child labor laws and the juvenile court system.¹⁸ The second movement began in the 1960s, along with other movements of liberation; Guggenheim suggests this movement continues today.¹⁹ In contrast to the earlier movement’s focus on protecting children, the current movement has focused on securing rights for children. After this introduction, Guggenheim turns the balance of his attention to the second movement.

He explains that the current movement has discrete components. One component seeks to free children from any special rules whatsoever, imposed because of age. Guggenheim dismisses the “liberationists” with appropriate alacrity by stating the obvious: children are different and in

¹⁴ *Id.* at 286, fn 4.

¹⁵ *Id.* at 181-185.

¹⁶ *Id.* at 1-13.

¹⁷ Guggenheim, *supra* note 5 at 6.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 5.

need of special rules – that is what makes them children.²⁰ Unlike other “disadvantaged” groups to which they are sometimes compared, children need these rules, but they also grow out of the need for such rules, restrictions, and limitations when they become adults.²¹

After dispensing with the largely discredited liberationists, Guggenheim argues that the movement “has less substantive content ... than many would suppose.”²² He also states that the children’s movement lacks a coherent and workable voice. Notwithstanding internal incoherence, Guggenheim notes that the children’s movement has made its mark. This impact, he explains, was evidenced early on in the case of *In re Gault*.²³ This landmark U.S. Supreme Court case afforded minors involved in delinquency proceedings many of the constitutional procedural protections previously granted only to adult criminal defendants.

Gault reflected the Supreme Court’s acknowledgement that the institution of the juvenile court, first established in 1899 to “help” minors who had run afoul of the law, no longer retained the helping qualities it had when it was created by the first children’s movement. The juvenile court could no longer be viewed as solely beneficent, hence the need to now afford rights to children in their interaction with the system.

Guggenheim offers a twist on *Gault*’s impact. Among its legacies, he suggests, was a negative one: the creation of a lawyer-dominated children’s movement focused on rights rather than needs.²⁴ This is a different perspective on *Gault*, a case widely seen as benefiting children. Guggenheim’s view here is one of the book’s numerous strengths – an unusual perspective on some old “truths.”

From *Gault*, then, flowed the armies of children’s lawyers and their more amorphous counterpart, the children’s advocate. Guggenheim is critical of the lawyers who, in

²⁰ *Id.* at 8-12.

²¹ *Id.*

²² *Id.* at Preface xii.

²³ *In re Gault*, 387 U.S. 1 (1967).

²⁴ Guggenheim, *supra* note 5 at 7-8.

addition to “winning” rights for children, made courts the forum of first resort to resolve disputes over children’s rights. Making children into litigious beings has been largely to their detriment, Guggenheim asserts, not a positive step in creating and securing supposed rights.²⁵

Among those who claim the title “child advocate,” Guggenheim reserves much of his ire for those who seek to “protect children” from the constraints imposed by their parents.²⁶ A pernicious effect of the current children’s movement, Guggenheim argues, is to allow children’s interests to be considered apart from their parents’ rights and interests.²⁷ Thus emerges the conundrum created by focusing too intently on children’s rights – as opposed to their needs and interests.²⁸ As children, they are not and, most would agree, ought not be, fully autonomous human beings. Yet the emphasis on rights has resulted in dividing children from their parents, thereby creating a vacuum. As Guggenheim puts it, “[t]he immutable truth of childrearing is that someone has to be in charge.”²⁹

Who takes care of children if they can’t take care of themselves and if their parents are, in some legal fashion, removed from the picture? Although this question is in part rhetorical, its practical answer highlights the problem. The new caregivers are the lawyers, judges, and the state at large, whose enhanced role has become a prominent byproduct of the children’s rights movement.³⁰ So, Guggenheim points out,

²⁵ *Id.* at 13, 245-48.

²⁶ *Id.* at 187.

²⁷ *Id.* at 13, 245.

²⁸ Some would argue that the legal attribution of a need implicitly finds a right. See James G. Dwyer, *A Taxonomy of Children’s Existing Rights in State Decision-Making About Their Relationships*, 11 WM & MARY BILL RTS J. 845, 848-49 (2003). Dwyer’s taxonomy of no fewer than nine different kinds of rights for children (*e.g.*, non-determinative right or imperfectly-tailored right) suggests that Guggenheim is correct in his assessment that, 33 years after Hillary Rodham Clinton first said it, children’s rights is still a slogan in search of a definition. See Dwyer at 853, Guggenheim, *supra* note 5 at 12.

²⁹ Guggenheim, *supra* note 5 at 42.

³⁰ *Id.* at 246.

children's rights and welfare are still controlled by adults, just not the adults who are their parents.

Taking on those who purport to advocate on behalf of children requires a thick skin and some moxie.³¹ But take them on Guggenheim does. He argues that the children's rights movement is at best an empty shibboleth – *e.g.*, “child-centeredness,” at worst, is a falsely trumped-up banner waved at the expense of children and their families used, *inter alia*, as a “subterfuge for the adult's actual motives.”³²

After Guggenheim explains the two distinct children's rights movements, he sets out the “parental rights doctrine.”³³ So intertwined are children's rights and parents' rights, he asserts, that the former cannot be understood without a grounding in the latter. Guggenheim frames his discussion of parents' rights by asking the reader to envision for a moment that parents are not the natural guardians of their children.³⁴ Imagine a society, he says, in which rules must be established to determine who raises any given child.³⁵ One possibility would be to make biology irrelevant. Rather, a state agency matches available children with those who want to be parents. As Guggenheim spins out the Orwellian possibilities inherent in such a scheme, he underscores the “deeply embedded

³¹ Guggenheim himself acknowledges the delicacy of this undertaking. *Id.* at xiii.

³² *See, e.g., id.* at xii and 246.

³³ *Id.* at 18. This discussion assumes, of course, that there is a common understanding of what a parent is. As with the term “family,” the word “parent” has multiple meanings; any formerly common understanding is currently open to discussion and debate. There is the biological parent, the legal parent, and the step-parent. There may be a *de facto* or psychological parent. For each of these categories, there may be one person, a pair, or even more. Then there are persons with parent-like roles, such as legal guardians or family members, who find themselves temporarily or permanently in a caregiving role.

³⁴ *See, e.g.,* D.C. Code § 21-101(a) (2001). “The father and mother are the natural guardians of the person of their minor children.” However, § 21-101(b) provides that another person may be appointed guardian “when it appears to the court that the welfare of the children requires it.”

³⁵ Guggenheim, *supra* note 5 at 18-22.

understanding” that parents naturally come by rights to their children.³⁶

Guggenheim then demonstrates that the parental rights doctrine has, over the past century, become entrenched in the United States constitutional firmament. He highlights the U.S. Supreme Court cases that have assiduously protected the privacy sphere of the family.³⁷ But, as Guggenheim notes, the historical legal shrouding of the family in privacy has had its cost. It was, after all, the theory of family privacy that justified the state’s failure to intervene when husbands beat their wives. Guggenheim acknowledges that the legitimacy of parents’ dominion over children must rest on a better foundation than that which for years sanctioned spousal abuse.³⁸

Guggenheim again expresses his concern that parents’ rights are too often seen as antithetical to children’s interests and needs. In so doing, he emphasizes the symbiotic nature of the parent-child relationship.³⁹ The parental rights doctrine benefits children as well as parents. Here Guggenheim relies on the Supreme Court case *Parham v. J.R.*⁴⁰ for support.⁴¹

In *Parham*, the Court upheld a rather extreme exercise of parental authority – the right of a parent to institutionalize her child in a psychiatric hospital. The *Parham* Court offered a vision of family that “rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children.”⁴² *Parham* is often seen as a parents’ rights case, but can rightfully be viewed as standing

³⁶ Guggenheim, *supra* note 5 at 20.

³⁷ *Id.* at 25-34.

³⁸ Guggenheim, *supra* note 5 at 22-23.

³⁹ *See, e.g.,* Quilloin v. Walcott, 434 U.S. 246 (1978).

⁴⁰ *Parham v. J.R.*, 442 U.S. 584 (1979)

⁴¹ Guggenheim, *supra* note 5 at 35.

⁴² *Parham*, *supra* note 40 at 602.

for the proposition that there are inter-related rights and needs that inure to the parent-child relationship.

Guggenheim's first chapters on parents' rights and children's rights lay the foundation for the rest of his book. He has discrete chapters on, *inter alia*, third-party challenges to parental custody or choices; a child's right to abortion; divorce, custody, and visitation proceedings; how children's rights really serve adults needs; and the child welfare or child protection system. Constant throughout these chapters is Guggenheim's concern that the establishment of children's rights has redounded to their detriment.

The Proper Substantive Standard to Sever Parental Rights – What Does the Supreme Court Require?

Unfitness – Is it the Requisite Standard?

Professor Guggenheim's book is well-researched and, in this author's view, supplies the correct analysis of applicable law and policy. However, in his parents' rights chapter, he makes an assertion that is not directly supported by U.S. Supreme Court jurisprudence. Guggenheim states that "[u]nless parents ... are found to be 'unfit' in court proceedings ... parental childrearing decisions are virtually immune from state oversight."⁴³ Elsewhere he asserts that it is "well established" that fit, "legally recognized" parents can

⁴³ Guggenheim, *supra* note 5 at 36. Guggenheim is not alone in stating that unfitness is the standard. However, a few scholars have resisted this temptation to overstate. See, e.g., Louise A. Leduc, *No-Fault Termination of Parental Rights in Connecticut: A Substantive Due Process Analysis*, 28 CONN. L. REV. 1195, 1210-1213 (1996) and Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 678 (2002). Buss, while acknowledging that the substantive standard by which parents can lose their parental rights was not decided – indeed, was not at issue – in *Santosky*, asserts that the "Court's analysis ... endorsed a high, unfitness-based standard." *Id.* at 678. Likewise, Leduc critically analyzes *Santosky* and its dicta, but nonetheless concludes that it "strongly suggest[s] that a finding of unfitness is constitutionally required in termination of parental rights proceedings." Leduc at 1213. This author is not so confident that, given the issue squarely presented, the Court will in fact ratify that standard. See *infra*, at 199 for a discussion of Supreme Court dicta on this issue.

forestall an adoption.⁴⁴ While perhaps these statements *should* reflect the current state of the law, they do not. The Supreme Court has never held that parents must be found to be unfit prior to state intervention or, even more significantly, the permanent termination of parental rights.

Deciding whether unfitness is – or should be – the requisite standard first requires a look at the word itself. Unfitness is a term easily bandied about but less easily susceptible to a commonly shared definition.⁴⁵ Indeed, one standard dictionary definition borders on the tautological: to be unfit is to be “below a required standard, unqualified, e.g. an unfit parent.”⁴⁶

Domestic relations scholar Homer Clark gives unfitness a definition that recognizes its seriousness. He suggests that “unfitness signifies active conduct by the parent which seriously and repeatedly harms the child either physically or psychologically.”⁴⁷

Others have suggested that unfitness is a proxy for parental fault.⁴⁸ However, some of the saddest cases of parental unfitness involve cases of inability due to mental incapacity in which the parents would not commonly be considered “at fault.” Termination statutes and case law

⁴⁴ *Supra* note 5 at 65.

⁴⁵ See Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J.FAM. L. 757 (1992) for a discussion of the appropriate vagueness of the word unfitness. Genty endorses the flexibility that Guggenheim decries.

⁴⁶ American Heritage Dictionary, 3rd Ed.; See also Jennifer Emily Sims, “Lizzie’s Law”: *Must We Choose Between the Rights of the Parent and Protecting the Child?* 25 N.E. J. ON CRIM. & CIV. CON. 245, 248 (1999). Accord, Homer H. Clark, Jr., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* at 903 (2nd Ed. 1987). “[T]o require evidence that the parent is unsuitable to continue the parental relationship, surely a tautological definition if there ever was one.”

⁴⁷ Homer H. Clark, Jr., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* at 903 (2nd Ed. 1987).

⁴⁸ Susan B. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 FAM. L.Q. 245, 255, n. 74 (1985-86).

explicitly permit termination of parental rights on those grounds.⁴⁹

Given the imprecision of the word unfitness, my disagreement with Guggenheim and others who assert that the standard has been definitively decided may be mere semantics. In order for it to simply be a semantic difference, however, unfitness must be interpreted to be the equivalent of an initial judicial determination of parental neglect. Such a definition of neglect would be inconsistent with many state abuse and neglect laws.⁵⁰

Some states permit an immediate termination of parental rights simultaneously with the initial neglect finding.⁵¹ More commonly, however, a termination is predicated on two things: the actions originally giving rise to a neglect adjudication and a subsequent period of time in which the parent fails to remedy the situation. The original grounds, although sufficient for state intervention, are not tantamount to unfitness. Although this author rejects this conflating of the initial neglect stage with the termination requirements, there is language in Guggenheim's book to suggest that he might not be similarly opposed.⁵² And he is, perhaps, in good company. The Supreme Court has said that a parent can lose a child to the state only after "proof of such unfitness as a parent as amounts to neglect."⁵³ Thus it appears that the court itself may have conflated two standards that are – at least in most states – substantively distinguished.

⁴⁹ See, e.g., D.C. Code § 16-2353 (2001).

⁵⁰ But see *In re J.H.*, 587 A.2d 1009 (Vt 1991). In that case, the Supreme Court of Vermont said that the "parental unfitness test must be met before [the state agency] can initially be awarded custody of a child." *Id.* at 1012. The court declined to overrule that conclusion in *In re C.H.*, 749 A.2d 22 (2000).

⁵¹ See Hershkowitz, *supra* note 48 at 290.

⁵² See Guggenheim, *supra* note 5 at 36.

⁵³ *Stanley v. Illinois*, 405 U.S. 645, 650 (1972).

The Role and Impact of Federal Law, the Constitution, and the U.S. Supreme Court

Family law and its sub-specialty, child abuse and neglect law, are largely a function of state law.⁵⁴ Each state has its own divorce, child custody, child support, and adoption laws. Further, each state has distinct standards for civil child abuse and neglect cases, which are often in a court of special jurisdiction, apart from the more mainstream domestic relations matters. These standards define when a state may intervene into a family's life, when it may take a child from her home, and when it may seek the permanent destruction of the parent-child relationship by terminating parental rights.⁵⁵

For a host of reasons, federal courts have traditionally declined to participate in the substantive area of domestic relations.⁵⁶ Notwithstanding the heavy tilt toward state courts, however, federal law itself increasingly informs a state's child abuse and neglect proceedings in two ways. First, Congress has passed considerable legislation in this area.⁵⁷ Indeed, Guggenheim asserts that, for the past 30 years, federal law has been the "dominant influence in shaping child welfare

⁵⁴ See, e.g., James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision-Making About Their Relationships*, 11 WM & MARY BILL RTS J. 845, 847-49 (2003).

⁵⁵ In some states, parties other than the state may petition for termination of parental rights. See, e.g., FL Stat. 39.802.

⁵⁶ Domestic relations is an area "left to the States from time immemorial, and not without good reason." See *Santosky v. Kramer*, 455 U.S. 745, 770 (Rehnquist, J. dissenting) (1982). Although this language appears in the dissent, it captures a majority view of where domestic relations cases should be heard. See also Susan B. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 FAM. L.Q. 245, 247-249 (1985-86).

⁵⁷ The most recent, significant federal offering is the Adoption and Safe Families Act of 1997 (ASFA), P.L. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.). ASFA, which accelerates the time frames for terminating parental rights, has prompted heated reactions, both pro and con. As a gross oversimplification, it could be suggested that so-called child advocates support it, while those labeled as parents' advocates would generally be considered opposed. See Guggenheim, *supra* note 5 at 191-192.

practice.”⁵⁸ Much of this impact has been achieved through the power of the Congressional purse.⁵⁹

Second, the strong constitutional overlay on family issues has resulted in numerous U.S. Supreme Court cases, extending back in time almost a century. These cases present diverse fact scenarios and issues, but several subcategories emerge.⁶⁰ The following section identifies and analyzes these categories.⁶¹

Family Rights in the Supreme Court

Most of the U.S. Supreme Court cases concerning families have language that is solicitous of the rights of parents concerning their children, and the rights or best interests of children vis-à-vis their parents. Other cases make it plain that these rights are not without limits (*e.g.*, the state or other third parties may, with just cause, interfere with families). Child advocacy groups and parents' rights groups each decry language in the cases that contravenes their positions and positioning. It is worth considering whether an objectively discernable pattern exists.⁶²

Three categories readily emerge.⁶³ The first category consists of the early cases that established the parental rights

⁵⁸ Guggenheim, *supra* note 5 at 83.

⁵⁹ *Id.* at 184-85, 188.

⁶⁰ See *infra* for a discussion of U.S. Supreme Court jurisprudence in this area.

⁶¹ In “*Parental*” *Rights*, *supra* note 43 at 654, Buss suggests that while parental rights cases are generally analyzed as “single block,” they can be divided into two distinct blocks. The author largely agrees with Buss’s division but thinks it is useful to add a third, rather more amorphous category.

⁶² Looking for an objective pattern may be folly, as cases are written, read, and interpreted by persons who come to them with a view. Some persons may try harder than others to set aside that view and some circumstances urge neutrality, not advocacy. So it is that this author comes with a view, but will here endeavor to be as objective as possible in assessing what the Supreme Court has said.

⁶³ There are some cases that best stand in a category unto themselves, and thus are not forced into any of these categories. See, *e.g.*, *Parham v. J.R.*, 442 U.S. 584 (1979), or *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

doctrine. The next category is a series of cases dealing with the rights of unwed fathers. The third category includes cases that deal with the termination of parental rights and foster care.

The first category, the early parental rights cases, sets the doctrinal foundation. These cases, which include *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, involved intact, traditional families that were pushing back against state interference with family decision-making (*e.g.*, parental choices for children).⁶⁴ The court ruled in favor of these parents⁶⁵ as against the state, framing constitutionally protected parents' rights that are "clearer in concept than in detail."⁶⁶ This handful of bedrock cases, spanning from the 1920s to the 1970s,⁶⁷ produced inspiring language. That language is now widely quoted, even in cases where parents' rights are not upheld.⁶⁸

Society changed and so did the facts presented to the Supreme Court to decide issues of family law.⁶⁹ No longer were intact families clashing with state laws and regulations that impinged upon parental choices for children living in the family unit. Once the facts moved beyond a nuclear family hunkering down against intrusion by the state, actual results – as opposed to honeyed dicta – for biological parents were harder to come by.

⁶⁴ See, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

⁶⁵ In *Prince*, it was not a parent but rather a custodial aunt who was disputing the power of the government to forbid her from directing her niece to distribute religious pamphlets. *Prince* at 59.

⁶⁶ Buss, *supra* note 43 at 655.

⁶⁷ *Meyer* and *Pierce* were decided in the 1920s, and the latest of the core quartet, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), was handed down in the 1970s.

⁶⁸ See, *e.g.*, *Lassiter v. Department of Social Services*, 452 U.S. 18, 38 (1981).

⁶⁹ Justice O'Connor noted this societal difference in *Troxel v. Granville*, 530 U.S. 57, 63 (2000), suggesting that it is now "difficult to speak of an average American family."

This societal change led to the second category of key family law cases on parents' rights. These cases have involved unwed and, sometimes, "non-legal" fathers.⁷⁰ Factually, the fathers in these cases, who were seeking to have their parental rights protected, have presented the antithesis of intact families. Generally speaking, these were fathers who were unmarried to the mothers and whose rights were being terminated incident to an adoption by another man.⁷¹ And, as Guggenheim nicely explicates in his book, the law governing unwed fathers is different from the legal principles routinely applied to other parents.⁷²

Significantly, in each of these unwed father cases, the parental wishes of the two biological parents were diametrically opposed; thus, a "loss" for the unwed father was counterbalanced by a "win" for the biological mother who was supporting the legal efforts of her husband.⁷³ Consequently, these cases can be seen as a logical extension of prior Supreme Court jurisprudence protecting intact families, albeit intact families that exclude the biological father.

Clearly these high court cases brought by unwed or putative fathers hoping to establish rights to their children have turned out poorly for those fathers.⁷⁴ Moreover, the negative results for the fathers occurred notwithstanding the absence of proof of paternal unfitness and the presence of

⁷⁰ See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). As unwed or putative fathers, several of these biological fathers were challenging state statutes that declared them legally non-existent in interposing objections to their children's adoption by a stepfather.

⁷¹ In *Michael H.*, *supra* note 70, the biological father and the child were seeking the father's rights to visit, notwithstanding that the child was born during the mother's marriage to another man and the husband was, by statute, the legal father. *Id.* at 115-16.

⁷² Guggenheim, *supra* note 5 at 63-69.

⁷³ In the other categories of cases, the parents have aligned differently: together in the early cases, and separate but not adversarial in the last category.

⁷⁴ In *Caban*, *Quilloin*, and *Lehr*, *supra* note 70, the fathers were unsuccessful in stopping stepparent adoptions.

parental rights dicta.⁷⁵ What is less clear is whether these cases are properly read as a retrenchment of parental rights.

The lone father's victory here is *Stanley v. Illinois*.⁷⁶ But *Stanley* contains an interesting mixture of facts, making it difficult to categorize. Like the other unwed father cases, Stanley challenged a statute that rendered his biological parenthood legally irrelevant. However, *unlike* the other unwed father cases, he was not seeking to interfere with legitimizing an intact family that included the biological mother. Rather, he was seeking to prevent his children, with whom he had lived for significant periods, from becoming wards of the state following their mother's death.

Perhaps, then, *Stanley* is the case that bridges the first two categories of parental rights cases. It is certainly a chronological bridge, decided in 1972, the year of *Wisconsin v. Yoder* (the last of the original parental cases), and before any of the other unwed father cases. Further, it contains factual elements of each set of cases. *Stanley* suggests that even an unwed father can prevail if he: a) has a pre-existing relationship with his children;⁷⁷ b) is fighting against the state, not the other, custodial parent; and c) is not attempting to exercise his parental rights at the cost of an already formed and functioning intact family unit.

The third category of Supreme Court cases dealing with parental rights is not as easily defined as the first two. This third category might best be described as including cases that arise from child abuse and neglect proceedings.⁷⁸ These cases often challenged a decision to terminate parental rights (TPR). Usually these were TPR cases through an official

⁷⁵ See, e.g., *Lehr v. Robertson*, *supra* note 70 at 256, in which the court said: "The intangible fibers that connect parent and child have infinite variety ... It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases."

⁷⁶ *Stanley v. Illinois*, 405 U.S. 645 (1972).

⁷⁷ In the language of the later-decided *Lehr* case, the unwed father has grasped his opportunity interest. *Lehr*, *supra* note 70 at 262.

⁷⁸ Although child abuse and neglect cases predate the second children's movement described by Guggenheim, that movement placed these child welfare or child protection cases in their ascendancy.

termination proceeding filed by the state, not pursuant to a step-parent adoption.⁷⁹ These cases can involve both biological parents or, more often, nominally involve both parents but focus on the previously custodial mother.⁸⁰

The cases in this category are largely about procedural due process. *Santosky v. Kramer* is perhaps the most prominent case in the third category, at least when examining the court's pronouncements on unfitness.⁸¹ In *Santosky*, the court held that the petitioner in a termination of parental rights action must prove the necessary facts by clear and convincing evidence, rather than by a preponderance of the evidence (the regular civil law standard).⁸²

In *Lassiter v. Department of Social Services*,⁸³ the court held that parents have no per se right to legal counsel in termination of parental rights cases, notwithstanding the significance of the rights at stake. The *Lassiter* Court did caution that counsel may be constitutionally required in some particularly complicated cases.⁸⁴ In *M.L.B. v. S.L.J.*,⁸⁵ another case dealing with the procedural rights of parents, the court declared that an impecunious parent may not be denied the right to appeal a termination decision because she cannot afford the costs of the appeal.⁸⁶ Rather, that parent must be permitted to proceed on appeal *in forma pauperis*.

⁷⁹ See, e.g., Genty, *supra* note 45 at 759 for a discussion of the two ways in which parental rights termination proceedings can originate.

⁸⁰ For a discussion of the feminization of the neglect system, see Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOYOLA L. REV. 565, 577-79 (2004), and Elizabeth M. Schneider, BATTERED WOMEN AND FEMINIST LAWMAKING at 157 (2000).

⁸¹ *Santosky v. Kramer*, 455 U.S. 745 (1982).

⁸² *Id.* at 747-48. See *infra* at 200 for a fuller discussion of *Santosky*.

⁸³ *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

⁸⁴ *Id.* at 36-38. In many jurisdictions, counsel (for parent, child, or both) is statutorily mandated. See, e.g., D.C. Code § 16-2304 (b)(1) (2001).

⁸⁵ *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996).

⁸⁶ This termination proceeding was part of a stepparent adoption proceeding, not a state-initiated child abuse proceedings. Admittedly, therefore, its placement in this category is a bit forced. But its similarities

The last case in this category, *Smith v. Organization of Foster Families*,⁸⁷ did not involve a TPR proceeding, but did involve parental rights.⁸⁸ In that case, foster parents challenged New York state law and procedure governing removal of a child from a particular foster home.⁸⁹ They asserted that, after a year together, the foster parents and child became a psychological family with a liberty interest that warranted constitutional protection.⁹⁰

In *Smith*, the U.S. Supreme Court ruled, without dissent,⁹¹ that the procedures currently in place were adequate

with the other cases seem greater than its differences, thus justifying the choice.

⁸⁷ *Smith v. Organization of Foster Families*, 431 U.S. 816, 843-845 (1977). Guggenheim was involved in the *Smith* case, representing the foster parents. It is the case to which he refers when he writes that he was happy not to win. Guggenheim, *supra* note 5 at 286, fn 4.

⁸⁸ The biological parents opposed the foster families' argument, asserting that it came at the cost of state and federal constitutional law protecting families. *Id.* at 839-40. The class of children also imposed increased procedures, asserting that any additional procedures would be contrary to the children's interest. *Id.* at 839. This positioning of lawyers for children, coming in a significant case relatively early on in the second children's movement, illustrates well one of Guggenheim's core points in WHAT'S WRONG WITH CHILDREN'S RIGHTS. The position of the children – *i.e.*, what they assert as their rights or, alternatively, what is in their best interests – is largely, if not exclusively, a function of the beliefs of the lawyers who are appointed to represent them. And a judge who appoints counsel in particular cases may be well aware of the lawyer's general world view regarding children's rights and interests. So it is easy to fathom that, given another set of lawyers, the lawyers for the children – either serendipitously or intentionally – could have come out on the “side” of the foster parents, not the biological parents. See Guggenheim, *supra* note 5 at 159-167 for a discussion of what he considers the unnecessary and sometimes pernicious input of lawyers appointed to represent children. But see Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L. J. 1 (2000).

⁸⁹ *Smith* at 819-20.

⁹⁰ *Id.* at 839.

⁹¹ Justices Stewart and Rehnquist and Chief Justice Burger concurred in the judgment but did not join Justice Brennan's opinion. *Id.* at 817. Justice Stewart wrote a concurrence, joined by Rehnquist and Burger, stating that, rather than “tiptoeing around th[e] central issue,” he would declare that the foster parents had no interest protected by due process. *Id.* at 857-58.

to protect whatever rights existed.⁹² This holding permitted the court to sidestep the issue of whether foster families have an extant liberty interest, even though, in the court's words, the foster parents' position "clearly present[ed] difficulties."⁹³ To hold that foster parents have liberty interests to be protected comes at the cost of the biological parents' "constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right."⁹⁴ Through this prism, recognizing liberty interests is a zero-sum game. To accord the rights to one results in the diminution of another's.

The Danger of Dicta

The Supreme Court has considered many cases, over nearly 100 years, that implicate the rights of parents, children, families, and the state. Of all of these cases, two are commonly cited in support of the proposition that children cannot be taken from their parents unless the parents are unfit.⁹⁵ Those two cases are *Stanley v. Illinois*⁹⁶ and *Santosky v. Kramer*.⁹⁷ Neither of those cases holds that unfitness is the substantive standard to be applied, although both contain dicta that could be so exaggerated.⁹⁸

In *Stanley*, the unwed father challenged an Illinois statute that declared that all unwed fathers were presumptively

⁹² *Id.* at 847.

⁹³ *Id.* at 842.

⁹⁴ *Id.* at 846.

⁹⁵ See, e.g., Genty, *supra* note 45; Vivek Sankaran, *But I Didn't Do Anything Wrong*, 85 MAR MICH.B.J. 22, 24 (2006); Susan B. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 FAM. L.Q. 245, 247-249 (1985-86) (*see supra* note 48). Guggenheim makes this assertion but he does not particularly rely on *Santosky* or *Stanley*.

⁹⁶ *Stanley v. Illinois*, 405 U.S. 645 (1972).

⁹⁷ *Santosky v. Kramer*, 455 U.S. 745 (1982).

⁹⁸ To be sure, there are other cases containing dicta that could also be misconstrued. See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), a case in which the court mandated the right to proceed *in forma pauperis* in appealing a decision to terminate parental rights. There, the court referred to a parent resisting "the brand associated with a parental unfitness adjudication." However, a careful reading of that case demonstrates that this language is dicta.

unfit, thus enabling the state to wrest custody from that father without a hearing.⁹⁹ Significantly, the statutory presumption the court struck down was irrebuttable.¹⁰⁰ The U.S. Supreme Court concluded that the statute violated “the equal protection of the laws guaranteed by the Fourteenth Amendment.”¹⁰¹ These unwed fathers, the court declared, were entitled to individual fitness hearings prior to having their children become wards of the state.

Stanley ratified the strong legacy of constitutional protection shrouding families by granting the unwed father a right to a hearing. It also yielded inspiring language about the relationship between parents and children.¹⁰² What *Stanley* did not yield, however, was a holding that parents must first be found unfit before the child can become a ward of the state.¹⁰³ Although the *Stanley* opinion did refer to parental unfitness, it did so only in the context of describing the state statute being challenged.

Even more frequently cited for the “unfitness proposition” is *Santosky v. Kramer*, a case decided 10 years after *Stanley*. In *Santosky*, the parents challenged a New York state statute that permitted TPR upon a showing of “permanent neglect” by a fair preponderance of the evidence.¹⁰⁴ The court found that level of proof constitutionally inadequate, holding that before “a State may sever completely and irrevocably the rights of parents in their natural child, due process requires

⁹⁹ *Stanley*, 405 U.S. at 650, n. 4.

¹⁰⁰ *Id.* at 650; *Vlandis v. Kline*, 412 U.S. 441, 447 (1973).

¹⁰¹ *Stanley*, 405 U.S. at 649.

¹⁰² Some of the language, it might be argued, was less than inspiring. For instance, the court stated that it “may be ... that most unmarried fathers are unsuitable and neglectful parents.” *Id.* at 654.

¹⁰³ The court itself has described *Stanley* as a case providing procedural, not substantive, protection to “family life.” *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842, n. 47 and accompanying text. Some lower courts have read *Stanley* too broadly. See, e.g., *In re J.P.*, 648 P. 2d 1364, 1374 (Utah 1982) (“[T]he conclusion is inescapable that the [Stanley] Court found a showing of unfitness to be a prerequisite to the severing of parental ties”).

¹⁰⁴ The parent petitioners were represented in the U.S. Supreme Court by Martin Guggenheim. *Santosky*, 455 U.S. at 747.

that the State support its allegations by at least clear and convincing evidence.”¹⁰⁵

Santosky, like *Stanley* before it, is a case about procedural requirements. It sets forth the constitutionally requisite level of evidentiary proof needed to prevail in a TPR proceeding. It does not decide what substantive allegations must be established.

Santosky, however, contains dicta that hint at a mandate of parental fitness. But when assessing what process was due under the three *Mathews v. Eldridge* factors,¹⁰⁶ the court declared that a state victory “entails a judicial determination that the parents are unfit to raise their own children.”¹⁰⁷ When that quoted language is read in context, it appears to be a recitation of what the court believed would occur under New York state law, not the pronouncement of a constitutional necessity. The footnote following that language further demonstrates that the court was not then deciding, nor had it previously decided, the fitness issue: “Nor is it clear that the State constitutionally could terminate a parent’s rights *without* showing parental unfitness.”¹⁰⁸

The quoted footnote language can be traced back to the 1977 case of *Quilloin v. Walcott*.¹⁰⁹ In *Quilloin*, an unwed father objected to the adoption of his child by the child’s stepfather. The biological father contended “that he was entitled to recognition and preservation of his parental rights absent a showing of his ‘unfitness.’”¹¹⁰ Justice Marshall, for the majority, rejected the biological father’s argument. The father’s “substantive rights,” Marshall said, “were not violated by application of a ‘best interests of the child’ standard.”¹¹¹

Rather than referring to the *Quilloin* holding, the *Santosky* Court instead cited language from *Quilloin* that itself

¹⁰⁵ *Id.* at 747-48.

¹⁰⁶ *Id.* at 754-74.

¹⁰⁷ *Id.* at 760.

¹⁰⁸ *Santosky*, 455 U.S. at 760, n. 10.

¹⁰⁹ *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

¹¹⁰ *Id.* at 254.

¹¹¹ *Quilloin*, 434 U.S. at 254.

quotes an earlier case: “We have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without a showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.”¹¹² As hopeful as that language may be to those who endorse the unfitness standard, it is classic dicta that has never been elevated to more.

Thus, those who cite to *Santosky*’s footnote 10 as indicative of a Supreme Court holding of an unfitness standard are stringing together a series of footnotes built upon quotations to declare a principle of substantive due process. This is a shaky foundation. To be sure, these statements could be elevated in future cases; this is how the common law evolves. Here, however, there is no evidence that, as a matter of federal constitutional edict, the law has, in fact, evolved to this point. Further, there is nothing in *Santosky* to suggest an overruling or even an erosion of Justice Marshall’s conclusion in *Quilloin* that an unwed father could permanently lose his rights to his child based on a best interest standard, not an unfitness standard.¹¹³

In sum, neither *Stanley* nor *Santosky* nor any other case permits the clear and unqualified conclusion that the court has declared unfitness to be the substantive standard constitutionally required prior to divesting a parent of his or her parental rights. Rather, as Justice Souter said in his concurrence in *Troxel v. Granville*, it seems plain that the court has “not set out exact metes and bounds to the protected interest of a parent in the relationship with his child.”¹¹⁴

¹¹² *Santosky*, 455 U.S. at 760 (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 (internal quotations omitted)).

¹¹³ *Quilloin* involved an unwed father. Thus its sanctioning of a best interest standard does not resolve the issue for *Santosky*, which did not involve unwed fathers. But nothing in *Santosky* undercuts this decision.

¹¹⁴ *Troxel v. Granville*, 530 U.S. 57, 78 (2000). Given that children’s rights advocates often assert that children were and in many ways still are considered to be the property of their parents (see, e.g., Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992)), Souter’s choice of

Perhaps those scholars who, like Guggenheim, assert an unfitness holding are prescient. Others contend that although the court has not already decided the issue, it will embrace unfitness as the standard when it does.¹¹⁵ Does the parental rights doctrine sprinkled liberally throughout the cases herald the court's coming imprimatur of the unfitness standard? This author thinks not, for two reasons. First, in *Troxel v. Granville*, a supposedly significant "parents' rights" case coming 18 years after *Santosky*, the court was not particularly expansive on parents' rights. This is true notwithstanding a facial victory for parents against grandparents.¹¹⁶

Second, a careful analysis of the parental rights dicta in the various cases reveals that, more often than not, the court is carefully using language that fits within the parental rights doctrine but which promises little in the hard cases. Some of the parental rights dicta may, therefore, be fairly subjected to Guggenheim's complaint about the children's rights movement itself: this is elastic language that can be used by anyone to mean nearly anything.¹¹⁷

To assess the elasticity of this language, it is instructive to look again at *Smith v. Organization of Foster Families for Equality and Reform*. Justice Stewart, in his concurrence in *Smith*, wrote of potential due process violations "if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without a showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."¹¹⁸

property language to describe the parent's relationship to her child is either an unfortunate coincidence or a telling ratification, depending upon which side of the debate one falls.

¹¹⁵ See, e.g., Leduc and Buss, *supra* note 43.

¹¹⁶ Indeed, it has been suggested that *Troxel* represents "concerted restraint," not the broad vindication of "parental authority" that some were expecting. David D. Meyer, *Lochner Redeemed: Family Privacy after Troxel and Carhart*, 48 UCLA L. Rev. 1125, 1189 (2001). See *infra* at 207 for a more detailed discussion of *Troxel* and its unfitness dicta.

¹¹⁷ Guggenheim, *supra* note 5 at 130.

¹¹⁸ *Smith*, 431 U.S. at 862-63 (Stewart, J., concurring).

That scenario presents the easy case. Even the most ardent children's rights advocates believe that intact families should, as a general proposition, be left alone.¹¹⁹ When the difficult cases occur, the Stewart language, which forms the basis for *Santosky's* footnote 10, offers nothing of substance. This is because the most difficult cases are those where termination of parental rights – the complete and permanent severance of the parent/child relationship – is at stake. In nearly all of those cases, the family has already been separated. Thus, the *Smith/Quilloin/Santosky* parental rights language is inapposite because the family is not intact.¹²⁰

Elsewhere, *Santosky* does offer language that acknowledges the plight of the broken family. Justice Blackmun, writing for the majority, states that parents retain a fundamental liberty interest in their children even if they “have lost temporary custody of their child to the State.”¹²¹ This is important language for parents, but later in the same paragraph Blackmun emphasizes that he is talking about procedural due process. “[P]ersons faced with forced dissolution of their parental rights have a more critical need for procedural protections.”¹²² This qualifying language is not surprising, as *Santosky* represented a victory for parents in the area of procedural, not substantive, protections.

¹¹⁹ See, e.g., Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 VA. L. REV. 2493 (1995). Even Woodhouse, a scholar who laments that children are, in Supreme Court jurisprudence and elsewhere, treated like property, agrees that “state intervention in the intact family is to be avoided.” *Id.* at 2493.

¹²⁰ The *Santosky* family was partially intact. It had five children, but the state was seeking to terminate parental rights to only the three who had been removed. The youngest two children resided with the Santoskys, without any allegation of unfitness. *Id.* at 752, fn 5. This illustrates well the factual point made by Guggenheim and others, and experienced by this author in her practice as well. Once children are removed, it is very hard to get them returned. Guggenheim, *supra* note 5 at 206-208. This, then, is the factual corollary to the Stewart dicta. We jealously guard and protect the intact family, but once it becomes separated, the principles and policies afforded to intact families no longer obtain.

¹²¹ *Santosky*, *supra* note 97 at 753.

¹²² *Id.*

Notwithstanding numerous cases with pro-parental rights dicta,¹²³ there is little room for optimism that the U.S. Supreme Court will soon declare unfitness to be the requisite substantive standard. Moreover, as a practical matter, in light of the “elasticity” of the parental rights language, parents’ rights advocates should think carefully about pushing ahead for such a declaration. To go forward, particularly on bad facts,¹²⁴ is to risk not just a contrary decision, but the erasing of the dicta that permit such arguments to be made.¹²⁵

Post Santosky: Forward Progress for Parental Rights?

In 2000, the U.S. Supreme Court handed down *Troxel v. Granville*, a case that pitted the rights of parents against the rights of grandparents.¹²⁶ Justice O’Connor, writing for a plurality, upheld the right of the parent to determine with whom her child should visit, absent a showing of harm.¹²⁷ In so doing, the court struck down the Washington state third-party visitation statute, which O’Connor declared to be “breathtakingly broad.”¹²⁸

¹²³ It is well to remember that the parental rights language appears in cases where parents’ rights do not prevail, as well as in cases where they do.

¹²⁴ Because these cases deal with persons who have not been “model parents” (*Santosky, supra* note 97 at 753), bad facts are often plentiful. So are good ones, but it is the nature of these cases that, once caught up in the system, it is the family’s flaws, not its assets, that get paraded out. Guggenheim, *supra* note 5 at 208.

¹²⁵ It could be argued that this is what happened in *Troxel*. Grandparents who already had visitation pushed for more. The result was the invalidation of the statute giving them rights and Supreme Court reiteration – albeit in a plurality opinion – of the superior rights of parents.

¹²⁶ *Troxel v. Granville*, 530 U.S. 57 (2000). Guggenheim explains that third parties, a legal category into which grandparents fall, can be subdivided. First are those who have been or who wish to be a de facto parent and, second, as illustrated by the grandparents in *Troxel*, third parties who, although never having served in a custodial capacity, seek visitation rights against parental wishes. Guggenheim, *supra* note 5 at 101.

¹²⁷ *Troxel*, 530 U.S. at 63.

¹²⁸ *Id.* at 67. The statute permitted anyone, not just grandparents, to seek visitation. Grandparents had no rights at common law, and the history of the rapid enactment of grandparent visitation statutes over an approximately 20-year period is an interesting one. Guggenheim tells it well. Guggenheim, *supra* note 5 at 112-118. If one, as a supporter of

In some ways, the *Troxel* facts harken back to the first round of parental rights cases, such as *Meyer* and *Pierce*. In both instances, the choices made by parents in intact families were constitutionally protected from outsider interference.¹²⁹ U.S. Supreme Court rhetoric and results alike have been more protective of parental rights in situations where parents and children are currently residing together.¹³⁰

In the process of striking down the Washington third-party visitation statute, Justice O'Connor's plurality opinion offers language supporting the parental rights doctrine. On the importance of letting fit parents be, O'Connor says: if "a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."¹³¹ Elsewhere in the *Troxel* plurality opinion, O'Connor writes that there is a presumption that "fit parents act in the best interests of their children."¹³²

The first quotation's parenthetical equating fitness with adequate care is curious. Certainly it cannot be said that the filing of a child neglect case always amounts to an assertion

grandparents' rights, had hoped for a different result in *Troxel*, the case may be a classic example of the old saying: bad facts make bad law. Unlike grandparents who have been excluded from their grandchildren's lives, the grandparents in *Troxel* were in fact getting visitation with their grandchildren. Their demand for more may have appeared unsympathetically greedy, thus undercutting their position.

¹²⁹ That the "intact" family included a stepparent does not make it less of an intact family for the court's purposes. Indeed, several of the putative/unwed father cases pitted those fathers against an intact family where a stepfather was seeking to adopt. And, in those cases, the stepparent prevailed. See *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983). The stepfather in *Troxel* adopted the children while the case was pending. *Id.* at 62.

¹³⁰ "We have little doubt that the Due Process Clause would be offended if the State were to attempt to force the breakup of a natural family." *Quilloin v. Walcott*, *supra* note 129 at 255.

¹³¹ *Troxel*, 530 U.S. at 68-69.

¹³² *Id.* at 68.

that the parent or parents are unfit.¹³³ As the court has said elsewhere, even parents who have temporarily lost custody of their children to the state do not lose their parental rights.¹³⁴ And, as Guggenheim documents, many child abuse and neglect cases are brought even when the offense is relatively minor.¹³⁵ So the state does intervene short of allegations of parental unfitness.¹³⁶

Although *Troxel* has been lamented by children's rights advocates,¹³⁷ it may not have added much substance to the already existing parental rights doctrine.¹³⁸ The pro-parents' rights language in *Troxel* has obvious limitations. The most obvious limitation of the case is that *Troxel* is a plurality decision.¹³⁹ More substantively, however, even a presumption that fit parents act in the best interest of their children is not akin to declaring that an unfitness finding must precede a termination of parental rights. Therefore, like *Stanley* and *Santosky* before it, the *Troxel* dicta cannot be

¹³³ See text *supra* at 189 for a discussion of unfitness.

¹³⁴ *Santosky*, 455 U.S. at 753.

¹³⁵ Guggenheim, *supra* note 5 at 194.

¹³⁶ It is possible to make the argument that the allegations contained in an initial neglect finding are always akin to an assertion of unfitness. This may be the argument that Guggenheim implicitly advances and would, in some ways, justify his assertion that unfitness is constitutionally mandated. See, e.g., Guggenheim, *supra* note 5 at 77. Although reasonable minds can differ, the author believes that this view is not – and ought not be – legally accurate. However interesting a full exploration of this point might be, it is beyond the scope of this article.

¹³⁷ Guggenheim, *supra* note 5 at 117.

¹³⁸ Guggenheim posits that *Troxel* may, in the long run, advance the cause of third parties against parents. *Id.*

¹³⁹ The plurality consisted of Justices O'Connor, Ginsburg, and Breyer, and Chief Justice Rehnquist. *Troxel*, 530 U.S. at 60. Without O'Connor, the *Troxel* plurality is now down to three. The court's other centrist at the time, Justice Kennedy, dissented. His dissenting opinion offers a valiant attempt to synthesize the court's various pronouncements in the area. He also expressed concern over a categorical holding that harm to the child must always be demonstrated before a custodial parent's decision can be countermanded. *Id.* at 98-101. This hesitation may suggest an unwillingness on Kennedy's part to endorse an unfitness standard. For an interesting analysis of the *Troxel* line-up, see Meyer, *supra* note 116 at 1135-1155.

fairly transformed into constitutional principle that a parent must be proven unfit prior to a termination of parental rights.

Does the Standard Matter?

The risk of error that results from reading piecemeal, selected quotes from the U.S. Supreme Court is obvious. But it is nonetheless worth asking: does it matter that the U.S. Supreme Court has not held that parents must be legally adjudged unfit before their rights to their children are terminated?

For court determinations involving children, two different substantive standards may be at play. The fitness of the parent is one standard, the best interest of the child the other. Fitness is the more exacting requirement.¹⁴⁰ It is more difficult to satisfy a requirement that a child may be placed with someone other than the parent only upon a showing that the parent is unfit; thus unfitness may be conceived as more “pro-parent” than a standard that the child may reside wherever is in her best interests.¹⁴¹

Courts may try to synthesize these two standards. One court has said that “a child’s best interests are presumptively served by being with a parent, provided that the parent is not abusive or otherwise unfit.”¹⁴² Or, as O’Connor phrased it in *Troxel*, “fit parents act in the best interests of their children.”¹⁴³

But in circumstances that resist finessing – again, the hard cases – does it matter which standard is applied? This author’s response is a qualified yes. First, as indicated above, it takes more evidence to prove a parent unfit than it does to show that a child’s best interest repose in a particular place. And as any plaintiff who has ever lost a case for failure to

¹⁴⁰ Guggenheim, *supra* note 5 at 36-41.

¹⁴¹ That fitness is generally considered “pro-parent” is not a view uniformly held but is an example of what Guggenheim calls a “pernicious shift” in the debate: “pro-parent” has been co-opted to mean “anti-child.” Guggenheim, *supra* note 5 at 212.

¹⁴² *In re S.G.*, 581 A.2d 771, 781 (D.C.C.A. 1990).

¹⁴³ *Troxel*, 530 U.S. at 68.

mount the requisite proof knows, standards – both procedural and substantive – matter.

Second, there are numerous cases that suggest that lower courts are making these distinctions.¹⁴⁴ In the widely publicized Baby Jessica case, the Iowa Supreme Court said that “courts are not free to take children from parents simply by deciding another home offers more advantages.”¹⁴⁵ So, in the everyday world of judicial dispute resolution in families, the standards are being differentiated and applied.

The yes is qualified, however. Litigation in family law cases is notoriously slippery. Sometimes an “anything goes” atmosphere prevails, all in the name of serving the child. Evidentiary rules are often honored in the breach.¹⁴⁶ Judges, who often describe child custody cases as the most difficult on their dockets, no doubt want to do right by the child.¹⁴⁷ Given the vagueness inherent in both the unfitness and best interests standards, it is relatively easy for a smart judge to reach the decision she wants under either standard. Moreover, due to the abuse of discretion standard likely to be applied, a careful judge can craft an opinion that is virtually immune on the appellate level.

Of Folk Tales and Family Law

In contrast to Professor Guggenheim's assertion that unfitness is the acknowledged legal standard, which he makes matter-of-factly and without much fanfare, he is more insistent and vocal in his position on children's rights advocates. Throughout *What's Wrong with Children's Rights*, Guggenheim is very critical of children's rights advocates and their rhetoric. For instance, one of his milder critiques is that the rhetoric is a “useful subterfuge” to disguise adult motives.¹⁴⁸ He also accuses the child advocacy legal professional of “unnecessarily contribut[ing] to th[e] pain” in

¹⁴⁴ See, e.g., *Fisher v. Barker Foundation*, 452 A.2d 1183 (D.C.C.A. 1982).

¹⁴⁵ Guggenheim, *supra* note 5 at 96.

¹⁴⁶ See, e.g., *In re J.L.*, 884 A.2d 1072, 1077 (D.C.C.A. 2005).

¹⁴⁷ Guggenheim, *supra* note 5 at 154-157.

¹⁴⁸ Guggenheim, *supra* note 5 at xii-xiii.

difficult cases.¹⁴⁹ Guggenheim makes a good case that the criticism is often warranted. But is all children's rights rhetoric and are all children's advocates equally deserving of the same level of fire?

As a vehicle to criticize children's rights proponents, Guggenheim uses an unorthodox version of an old folk tale. Shortened, it goes like this: a person comes upon a stream filled with babies and, along the stream's banks, she sees people laboring non-stop to remove the babies. The person is asked to help but declines, saying that she prefers to use her energies to travel upstream, find out how the babies are ending up in stream, and put a stop to it at its source.¹⁵⁰

At a typical child welfare conference, the ending of the story differs dramatically.¹⁵¹ The person who comes across those working in the stream says to them: "What you're doing here won't stop the problem, you must go upstream. Your work here downstream doesn't matter." The stream worker who has picked up a baby and put it safely out of the reach of the flowing water then replies: "It matters to that one," and upon picking up another baby, "and to this one."

The purpose of telling this story is to inspire and motivate those toiling in the trenches trying to help individual children. But what does the stream represent? Does its meaning vary? The first time I heard the story at a training conference for lawyers handling child abuse and neglect cases there was little doubt that the speaker, a child abuse investigator, meant the stream to be the endless source of abusive parents, from which children must be saved. In other contexts, one might imagine that the stream could be the foster care system, from which children and parents both need to be saved.

¹⁴⁹ Guggenheim, *supra* note 5 at 89.

¹⁵⁰ Guggenheim, *supra* note 5 at 174.

¹⁵¹ In her years doing child welfare work, this author has heard this parable countless times in a variety of professional settings – though usually with starfish, not babies, as the helpless creatures being saved. Somehow, it works better with the metaphorical starfish.

Both the original and the alternative ending of the folk tale may be, at different times and to different people, true. The Guggenheim ending is at least partially true. Babies will keep turning up downstream until the source of their entry into the water is found and shut off. Until the flow is stanchd, the efforts of the workers downstream will be ineffectual at best.

Guggenheim condemns child advocates as those toiling downstream.¹⁵² He argues that they have “no interest” in going upstream to discover and stop the source.¹⁵³ But child advocates have at least two responses to make in their defense. First, there will always be some children who are abused and in need of protection. Therefore, the stream represents the unfortunate but necessary flow of children through the child welfare/child protection system. Those picking up and tending to the children can help those children ease their way through the system.¹⁵⁴

Second, child advocates might suggest that Guggenheim, if not being entirely hyperbolic, is at least being short-sighted. Surely it is important to go to the head of the stream and stop the problem at its source.¹⁵⁵ But until that is done, and done completely and effectively, there must also be people stationed downstream. As one court has declared, the inability to save all does not excuse the effort to save none.¹⁵⁶

The available responses of the child advocate notwithstanding, many of Guggenheim's criticisms seem accurate. Like Guggenheim, this author has long rued that those who seek to protect the rights of parents are deemed to

¹⁵² Guggenheim, *supra* note 5 at 181.

¹⁵³ *Id.*

¹⁵⁴ See, e.g., Kelly Browe Olson, *THE BOOKSHELF: Martin Guggenheim, What's Wrong with Children's Rights*, 44 FAM. CT. REV. 330 (2006).

¹⁵⁵ Guggenheim and the child advocates he criticizes are likely to view the source differently. For child advocates, the source is likely to be malevolent or incompetent parents. On the other hand, Guggenheim may see the system as malevolent or incompetent for failing to aid poor families. In both versions of the story, however, the parents are conspicuously absent.

¹⁵⁶ See *In re D.I.*, 113 DAILY WASH. L. RPTR. at 1299 (D.C. Superior Court).

be against children.¹⁵⁷ Like Guggenheim, this author has viewed her work on behalf of parents to be work that advances children's interests as well. Moreover, this author has always been suspect of the "true believer" posturing of some child advocates.¹⁵⁸

However, having trained hundreds of lawyers for children and parents, I know there are many lawyers for children who are deeply committed to their clients and who are not – at least not always – anti-parent. And, as the system currently exists, a child's representative, be it a lawyer or lay advocate, who is interested in keeping the child and parent together is the most powerful advocate a parent could have.

Conclusion

Professor Guggenheim's book, *What's Wrong with Children's Rights*, is a welcome, thoughtful, and most provocative addition to the family law literature. Over the past 35 years, Guggenheim has worn many hats: law professor and founder of the NYU juvenile rights clinic, lawyer for hundreds of parents in the child abuse system, and Supreme Court lawyer, to name a few. In each of those roles, he has acquired significant wisdom to share. Those who care about families and children would do well to read his book and take heed.

A note of caution is necessary for those who come to the book wearing the label of child advocate. Be of stout heart. Guggenheim does not go easy on you. But if children are your concern and the rhetoric of children's rights is not

¹⁵⁷ Guggenheim, *supra* note 5 at 176, 192, 212.

¹⁵⁸ It was to counteract this potential that the Washington D.C. Superior Court Office of Counsel for Child Abuse & Neglect, in which I served as both staff attorney and director in the 1990s, required attorneys to represent both parents and children in child abuse and neglect proceedings. We believed that representing each side (in different cases, of course) brought balance to the endeavor and helped underscore that good representation of parents inured to the benefit of children. Unfortunately this policy was later changed, after complaints from those who wanted to represent only children. Some political forces are too powerful to resist forever.

merely a balm for a guilty conscience,¹⁵⁹ this is a book well worth your time. Also be prepared to share your title with Guggenheim. Although he is best known as a parent's advocate, he has made his case that he, as much as and perhaps more than any other, has children's interests firmly in mind.

¹⁵⁹Guggenheim, *supra* note 5 at xiii.

RECENT COURT DECISIONS IMPACTING JUVENILES

DELINQUENCY

 *In re Derek B.*
39 Cal. 4th 535 (2006)

Derek B., a minor, was sentenced following a 2003 misdemeanor violation for assault and battery. Derek B. was a ward of the state at the time of the offense based on a sexual assault committed by him when he was 13. In the instant case, the lower court sentenced the Derek B. to the Youth Authority based on this previous sexual charge, under the California Welfare and Institution Code § 602(a) and ordered that he register as a sex offender upon release, pursuant to California Penal Code § 290(a)(2)(E). On appeal, the California Supreme Court dismissed the registry requirement, holding that § 290(a)(2)(E) applies exclusively to adult offenders.

Cal. Penal Code §290 controls the sex offender registry, providing a list of offenses which require adult offenders to register. Cal. Penal Code § 290(a)(2)(A). Section 290(d)(3) provides a separate, but similar, list for juvenile offenders. The charge in the instant case is not listed under this provision. The lower court, however, required registration based on § 290(a)(2)(E).

The California legislature enacted § 290(a)(2)(E) after the specific listings were in effect. Section 290(a)(2)(E) allows a court to impose registry following conviction for a crime not specifically enumerated if the court finds that the defendant committed the crime with sexual animus. *In re Derek B.* questioned if § 290(a)(2)(E) applies to both adult and juvenile offenders.

In reaching its decision, the court looked specifically at the “conviction” requirement of § 290(a)(2)(E) and found that a juvenile proceeding could never meet this requirement under California case law. The court noted cases dating to 1974

declaring that juvenile adjudications under Welfare and Institutions Code § 602 are not criminal convictions. The court reasoned that without specific language to the contrary, the legislature intended for the term “conviction” in § 290(a)(2)(E) to limit application of the section to adult offenders only.

 *United States v. Juvenile*
451 F.3d 571 (9th Cir. 2006)

The minor defendant in *Juvenile* was accused of conspiring and later carrying out the murder of another youth. At trial, the government moved to prosecute the defendant as an adult under the Federal Juvenile Delinquency Act, 18 U.S.C §§ 5031-5042 (2006). Section 5032 provides the federal standard for transferring a juvenile defendant to adult status when: (1) it is alleged that the juvenile committed the offense after his fifteenth birthday; (2) the offense would be a felony crime of violence if committed by an adult; and (3) it is in the interest of justice to prosecute the juvenile as an adult. The district court in *Juvenile* found that transfer was appropriate, given the callousness of the crime. The district court held it was required to assume the guilt of the defendant under *United States v. Nelson. United States v. Juvenile*, 451 F.3d 571,574 (9th Cir. 2006). In *Nelson*, the court stated that the second statutory requirement to be considered in determining whether a transfer is in the interest of justice is the nature of the alleged offense. *Id.* at 589. In doing so, the court said that the best practice is to assume for purposes of the transfer hearing that the juvenile committed the offense. *Id.* Having assumed guilt, the court found the case met the standards of the interest of justice prong of the transfer test.

On appeal, the Ninth Circuit examined two primary procedural questions stemming from the assumption of guilt: (1) whether the assumption of guilt violated the defendant’s right to due process; and (2) whether the court applied the proper standard under *Nelson*.

The Ninth Circuit first addressed the defendant's claim that the lower court erred in its factual findings. The Ninth Circuit reiterated that such findings by the trial court will be overturned only if clearly erroneous, which they were not in the instant case. The court further found that the assumption of guilt by the district court did not violate the defendant's due process rights, reasoning that the trial process corrects any error in the assumption. The Ninth Circuit was the last federal circuit court to address this question of law, and its holding followed the unanimous holding of the other courts.

The Ninth Circuit ultimately found that, though the district court was *allowed* to assume the guilt of the defendant in a § 5032 hearing, it was not *required* to do so under *Nelson*. Though the court admitted the language of *Nelson* to be confusing, it found that the rule in *Nelson* is discretionary, not mandatory. Because of the confusion regarding the law at the hearing, the circuit court vacated the lower court's ruling and remanded the case for further hearing under the *Nelson* standard.

 *United States v. Jose D.L.*
453 F.3d 1115 (9th Cir. 2006)

Fifteen-year-old Jose D.L. attempted to drive across the United States-Mexico border in a car that contained numerous packages of cocaine. Border patrol agents handcuffed Jose and took him into custody upon discovery of the concealed cocaine. An agent began questioning Jose approximately one hour after he had originally been detained by border patrol. The agent informed Jose that he needed to contact Jose's parents since he was a minor. Jose provided the agent with the telephone number of his aunt, as his parents did not have a telephone. Jose's aunt, Maria Del Rosario Llanes-Angulo, informed the agent that Jose's mother did not have access to a telephone and that she would attempt to contact his father. Llanes-Angulo informed the agent that, if needed, she could be at the border within an hour and a half, and offered to attempt to locate Jose's parents. In addition, she gave Agent Cabrera consent to question her nephew.

Nine minutes after the agent spoke with Llanes-Angulo, Jose was informed of his Miranda rights and his right to have the Mexican consulate notified since he was not a United States citizen. Jose waived both rights orally and in writing. Jose was interviewed for approximately 40 minutes. About 45 minutes after the interrogation ended, an agent notified the Mexican consulate of Jose's arrest at the urging of the United States District Attorney. At around the same time, Jose's father arrived and agents notified him of the charges against his son and gave him a brief opportunity to speak with Jose. At no time did the agents inform Jose's father of his son's Miranda rights. Jose was then transported to the San Diego Juvenile Hall facility. Twenty-three hours after his arrest and after all of the adults had been arraigned for the day, Jose was brought before the magistrate.

Jose D.L. was found to be a juvenile delinquent under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (2006). Despite a Presentence Report recommendation of five years' probation, the court sentenced Jose to serve an additional 10 months in a juvenile detention facility. Jose appealed the finding that he was a juvenile delinquent on the grounds that border patrol agents had violated the act, and Jose's right to due process.

The Ninth Circuit determined that the government violated the JDA in a number of ways. The government failed to "immediately" notify Jose of his legal rights by waiting more than an hour after placing him in custody to advise him of his Miranda rights. The government also failed to notify Jose's parents that he was in custody, and of their son's legal rights. Although agents contended that they had made every effort to contact Jose's parents, the court found that their efforts fell short of what was required. The court said that the agents should have clarified with Jose's aunt whether she or one of Jose's parents would be coming to the border. In fact, the agents had not taken Llanes-Angulo up on her offer to come to the border or get in touch with Jose's parents. Furthermore, the agents failed to leave a callback number for Jose's parents to contact them.

Regardless of whether the government in fact had made sufficient efforts to contact Jose's parents, the court believed the mere nine minute delay between the attempt and the interrogation was not reasonable time in which to allow parental notification. Further, in the absence of parental contact, the court held that the border patrol agents should have advised Llanes-Angulo of her nephew's Miranda rights and offered her an opportunity to speak with him.

The 23-hour delay between Jose's arrest and arraignment also violated the JDA's requirement that a juvenile be presented to a magistrate "forthwith." The government freely admitted that the delay had been due to its own processing. Such a delay was also in violation of the law considering the Ninth Circuit's previous holding that, in general, juveniles in custody should be given priority in the arraignment schedule. *See United States v. Doe I*, 701 F.2d 819, 824 (9th Cir.1983).

The court further held that, if a JDA violation was prejudicial because it led the government to initiate prosecution of Jose, dismissal of charges is the appropriate remedy. This is true even if the government's violations of the JDA did not violate Jose's right to due process. The court held that, although the government had violated the JDA in multiple ways, it did not amount to a violation of Jose's due process rights. The Appeals Court remanded the case to the District Court to determine whether the violation was prejudicial or harmless.

 *Ky. Press Ass'n v. Kentucky*
454 F.3d 505 (9th Cir. 2006)

The Kentucky Press Association (KPA) brought a First Amendment claim against Kentucky and state court officials facially challenging the constitutionality of four provisions of the Kentucky Uniform Juvenile Code. Specifically, KPA sought the right to media access of Kentucky's juvenile court proceedings and the records pertaining to them.

Kentucky Revised Statutes Annotated (K.R.S.) § 610.070(3) (West 2006) states that “the general public shall be excluded” from juvenile hearings, and allows access only to immediate family members of parties before the court, victims and their families, witnesses, attorneys, certain government officials, and “such persons admitted as the judge shall find have a direct interest in the case or in the work of the court, and such other persons as agreed to by the child and his attorney.”

K.R.S. § 610.320(3) states that mental, medical, treatment, psychological, law enforcement, and court records of juveniles “shall not be opened to scrutiny by the public,” with exceptions for law enforcement and court records regarding certain serious offenses.

K.R.S. § 610.330 requires the juvenile court to order that all records pertaining to the particular juvenile proceeding be sealed providing the juvenile meets the relevant prerequisites for expungement.

K.R.S. § 610.340 requires that all juvenile records remain confidential, allowing disclosure only to a limited class of individuals, including “persons authorized to attend a juvenile court hearing pursuant to K.R.S. § 610.070” and in situations “ordered by the court for good cause.”

The Appeals Court held that KPA’s First Amendment claim is not sufficiently ripe for federal court adjudication. The court performed the three-part ripeness inquiry, which includes a weighing of: (1) the likelihood that the harm alleged by the plaintiff will ever come to pass, (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties’ respective claims, and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings. The court determined KPA failed to satisfy each of the parts. First, it is not certain that the Kentucky courts would actually deny KPA the access it seeks since K.R.S. § 610.070(3) allows a judge to grant access to “such persons admitted as the judge shall find have a direct interest in the case or in the work of the court,” and K.R.S. § 610.340 allows juvenile court records to be released

for “good cause.” Secondly, KPA has not challenged the statutes in Kentucky courts, so there is no factual record sufficient to produce a fair adjudication of the merits of KPA’s claim. Finally, there is no hardship to KPA by denying it judicial relief at this time since it is not seeking access to any particular case that requires the present issue to be decided immediately. The court dismissed the appeal on ripeness grounds and remanded the matter to the District Court with instructions that it be dismissed as unripe.

The Appeals Court indicated that a direct challenge by KPA on the question of whether the media enjoys access rights under the “direct interest of the case or in the work of the court” clause of K.R.S. §610.070(3) could potentially be successful, and that it was a crucial question that should still be determined by Kentucky courts. It further stated that the Kentucky courts could reasonably interpret the relevant provisions to “allow for limited access to juvenile proceedings by the media, which arguably has a ‘direct interest in ... the work of the court.’” *Ky. Press Ass’n v. Kentucky*, 454 F.3d 505, 509.

DEPENDENCY

📖 *In re Baby Boy V.*

140 Cal. App. 4th 1108 (Cal. Ct. App. 2006)

Eight months after Baby V. was abandoned at the hospital at birth, her alleged father came forward to request parental rights. Prior to his stepping forward, the Los Angeles County of Children and Family Services (Department) reported that an unsuccessful search had been conducted for Baby V.'s father. On July 7, 2005, the Superior Court ordered Baby V.'s father to be given notice by publication. On September 29, Jesus H. contacted the Department claiming that he thought he was the father of Baby V. He explained that he had been in a relationship with the mother, who had just informed him that he may be the father and should contact the social worker handling the case. The social worker informed Jesus H. that a hearing to terminate parental rights had already been set for November 3, and did not allow Jesus H. any visitation with Baby V. The social worker also did not inform the court that an alleged father had come forward.

On November 3, the Superior Court of Los Angeles County decided to proceed with termination and refused Jesus H.'s request for a paternity test. The court reasoned that Jesus H. had been properly noticed but had failed to come forward and that he had failed to visit the baby. The Appeals Court reversed, rejecting the claim that Jesus H.'s hand-written appeal was inadequate since it did not reference the termination of parental rights. The court also rejected the claim that Jesus H. waived his right to request presumed father status by not requesting it in the lower court. The Appeals Court recognized that Jesus H. came forward as soon as he learned that he was probably the father of Baby V., and that he was forced to wait to take legal action to request his parental rights until the next court date, only to have his rights terminated. Finally, the court rejected the claim that Jesus H. lacked standing to appeal as an alleged father. The court concluded that when a father who commits to parental responsibilities comes forward as soon as he learns about his

baby, unless the father is deemed unfit, a termination of his parental relationship would be a violation of his due process. The court also held that if there is no cause to determine parental unfitness, there is a presumption that the child's well-being is best served by maintenance of a relationship between the father and child.

 *In re Baby Girl M.*

135 Cal. App. 4th 1528 (Cal. Ct. App. 2006)

Baby Girl M., born in February 2005, was authorized for adoption by her mother Carla M. shortly after her birth. The S.'s filed for adoption of Baby Girl M., but Robert, father of Baby Girl M. (as proven by genetic testing), contested the adoption. Robert filed for visitation rights and custody of Baby Girl M. At the Juvenile Court hearing, the S.'s used California Family Code §7825 to prove Robert was unfit to have custody, pointing to his prior felony convictions that included attempted burglary, possession of methamphetamine, and burglary. Section 7825 directs termination of parental rights when the parent has been convicted of a felony wherein the facts "prove the unfitness of the parent" for "future custody and control of the child." *In re Baby Girl M.*, 135 Cal. App. 4th 1528, 1531 (2006). The Juvenile Court terminated Robert's parental rights, claiming he fell within the reach of § 7825.

The Appeals Court reversed, determining that the legislature intended § 7825 to apply only where the facts of the prior felony convictions were determinative of the parent's ability to control and have custody of his or her children. Thus, the court concluded that there must be a "nexus" between the facts underlying the parent's felony convictions and the parent's ability to have child custody and control. *Id.* at 1542. The court reasoned that termination of parental rights is an extreme measure that may violate constitutional rights. Cases where § 7825 has been used to terminate parental rights have been extreme, and where the parent has committed a heinous felony offense. When such a heinous felony offense is committed against family members, there is greater proof

that the parent would be unfit to have child custody. In this case, the facts of Robert's offenses did not demonstrate "violence, lewd behavior, use of the family home, harm to family members, involvement or victimization of minors, or other indicators of parental unfitness," or anything else to show he is unfit as a parent. *Id.* at 1544.

📖 *Mizell v. Arkansas Department of Human Services*
2006 Ark. App. LEXIS 284 (Ark. App. Apr. 26, 2006)

Mizell appealed the termination of her parental rights of her three daughters. Because of her addiction to cocaine, Mizell voluntarily surrendered her children to the state, with the goal of reunification. However, after the suspension of her visitation privileges in March 9, 2005, the Trial Court finalized the termination petition. In her appeal, she claimed that she had been clean for six months and completed a drug-rehabilitation program.

The Appeals Court affirmed the judgment against Mizell because, when in her care, the children were neglected; she failed to consistently maintain contact with her children while they were out of her custody; and she failed to provide proof of stable financial means. Although she had not been on drugs for the six months prior to the appeal, Mizell continued to use drugs in the previous years knowing that it would impact the dependency hearings. The Appeals Court held there were not enough grounds on which to grant custody to Mizell, or to extend the termination proceedings further. Additionally, the court determined that the children adjusted well to their foster homes. Since there was enough evidence to demonstrate that the termination of parental rights was in the best interests of the children, Mizell's rights as a mother were terminated in this proceeding.

EDUCATION

📖 *Heinkel ex rel. Heinkel v. School Bd. of Lee County, Fla.*
2006 WL 2417296 (11th Cir. Aug. 22, 2006)

Freedom to Learn, a nonprofit organization, wanted to celebrate the Day of Remembrance by distributing materials about the day in the public schools. The Day of Remembrance is a day “set aside to remember the 40 million children who have been lost to elective abortion and to remember the pain experienced by women who have had an abortion.” *Heinkel ex rel. Heinkel v. School Bd. of Lee County, Fla.*, 2006 WL 2417296 at 1 (11th Cir. Aug. 22, 2006). Freedom to Learn was asked to present written materials to the School Board of Lee County in order to satisfy its policy regarding distribution of materials at schools. The school board denied Freedom to Learn’s request to distribute materials because of concerns that the materials would “tend to create a substantial disruption in the school environment.” *Id.*

In 2004, seventh-grader Heinkel wished to distribute materials from Freedom to Learn on the Day of Remembrance. When she requested permission to do so, the school denied her request. Heinkel’s parents filed suit on her behalf, and the parties filed cross-claims for summary judgment. Plaintiffs claimed that the policy determining the distribution of materials to children was unconstitutional because they believed the policy did not comply with right to free speech, free exercise of religion, and equal protection. The policy states that standards for approving literature include a provision that “no advertisement shall include political, religious or organizational symbols and shall be non-proselytizing.” *Id.* at 5.

The Eleventh Circuit Court of Appeals found the policy troublesome because it “lacks safeguards to guide and restrain the discretion of the School Board in determining whether and which written materials may be distributed.” *Id.* at 3. The restriction on all political and religious symbols was based on the assumption that all such symbols would create

“substantial disruption.” *Id.* at 3. That the policy did not have rules in place regarding the amount of time permitted to determine whether to allow or deny written materials permitted discriminatory and arbitrary enforcement. The court found the policy facially unconstitutional.

The court determined that the denial to Heinkel was not actually made on the basis of the school board’s policy. The decision was made based on the fact that the materials would create a “substantial disruption in the school environment.” *Id.* at 2. The court previously determined that this was “the appropriate measure for restraint of student expression.” *Id.* at 4. Considering the ages of the students (11-14), the nature of the highly debated material, and the disruption the material would create, the court determined that the school’s principal acted reasonably in denying Heinkel’s request. The Appeals Court reversed the District Court’s judgment to grant summary judgment to the school board on Heinkel’s constitutional challenge and denied injunctive relief. It also affirmed the grant of summary judgment to the school board on Heinkel’s as-applied challenge.”

📖 *Stratechuk v. Board of Education, South Orange-Maplewood School District*
2006 WL 2844449 (3rd Cir. Oct. 5, 2006)

Stratechuk, a parent, alleged that the decision made by the South Orange-Maplewood School District to ban religious music in its public schools was unconstitutional. Stratechuk alleged that “the policy conveys a government-sponsored message of disapproval and hostility toward religion (specifically Christianity) and deprives his children of the right to receive information and ideas.” *Stratechuk v. Board of Education*, 2006 WL 2844449 (3rd Cir. Oct. 5, 2006). Prior to the 2004-2005 school year, religious music was permitted in the schools. The school district thereafter banned all religious music from schools in its new policy. Stratechuk contended that the policy prevented children from playing Christmas music and “conveys the message that Christianity is disfavored.” *Id.*

While the District Court believed that the complaint was based on the school district's official policy, the Appeals Court found the actual policy that Stratechuk described is more restrictive. Therefore, the District Court erred in considering the official policy when granting the school district's motion to dismiss. The Appeals Court reversed and remanded the lower court's decision.

 *Zachary Guiles v. Seth Marineau*
461 F.3d 320 (2d Cir. 2006)

Guiles, a seventh-grader, was forced to censor a T-shirt which criticized the President of the United States. Guiles alleged that his free speech rights were abridged.

Guiles wore the offending T-shirt to school an average of once a week for two months. The T-shirt did not cause any interruptions or fights inside or outside the school. It only became an issue when Guiles wore the shirt on a field trip. A parent-chaperone voiced her objection to the shirt, and Guiles was then given three choices to remedy the problem: turn the shirt inside out, cover some of the images, or change shirts. Guiles returned to school the next day wearing the shirt uncensored. School officials asked Guiles to censor his shirt and, upon his refusal, a discipline referral was filled out and Guiles was sent home. The following day, Guiles once again wore the shirt to school, this time with the "offending" images covered in duct tape, with the word "censored" written on the tape.

Guiles brought suit in federal court, alleging abridgement of his First Amendment rights. The District Court found the images on the shirt to be plainly offensive and inappropriate. The court further held that the school's censorship was proper, but ordered the discipline referral to be expunged from the Guiles' academic record. Both plaintiff and defendant appeal from this decision.

The Appeals Court determined that the lower court inappropriately applied the standard set out in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), when *Tinker v.*

Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), should have governed the case. Guiles' shirt did not depict "lewd, vulgar, indecent, or plainly offensive" images (as *Fraser* addresses), and the *Tinker* standard should have been used. The *Tinker* standard provides that regulation of student expression can only be justified if such expression would materially and substantially disrupt the operation of the school. Under *Tinker*, the court determined that the censorship violated Guiles' free speech rights since his shirt did not disrupt the operation of the school, and therefore ordered that Guiles' disciplinary record be expunged.

📖 *Jane Doe v. East Haven Board of Education*
430 F. Supp. 2d 54 (2d Cir. 2006)

Jane Doe brought this action on behalf of her minor daughter, "A.N.," pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1972). Jane Doe contended that her daughter, after reporting that she was a victim of an off-campus rape by two male students, suffered sexual harassment by her fellow classmates. Title IX allows suit in the case of student sexual harassment only where the defendant acts with deliberate indifference to the known acts of harassment and the harassment is so severe, pervasive, and objectively offensive that it effectively bars the victim access to an educational opportunity or benefit. A jury found for the plaintiff.

On appeal, the East Haven Board of Education argued that Jane Doe failed to establish the three elements required for a Title IX claim: actual sexual harassment, defendant's knowledge of the sexual harassment, and defendant's deliberately indifference response to the student's claims.

The Appeals Court acknowledged that name-calling alone could not amount to sex-based harassment. However, A.N. was subjected to gender-based stereotypes and comments that questioned the veracity of her account. The court determined that a reasonable fact-finder could conclude on such evidence that the harassment would not have occurred

but for A.N.'s gender. Although the board of education did not force A.N. to attend classes where she felt uncomfortable, its failure to effectively act to cease the harassment for five weeks after A.N.'s complaint was clearly unreasonable in light of the circumstances. The defendant's slow response to A.N.'s complaint showed a deliberate indifference to the known sexual harassment.

The Appeals Court found that a reasonable jury could find evidence supporting all of the elements required under Title IX, and affirmed the District Court's judgment.

HEALTH *In re Doe*

924 So. 2d 935 (2006)

In April 2006, the District Court of Appeal of Florida reviewed minor Doe's appeal from an order of the Circuit Court of Alachua County. This order denied the minor's petition for judicial waiver of parental notification of her impending abortion. The Florida Parental Notice of Abortion Act, Fla. Stat. Ch. 390 (2005), requires a physician to notify the parent of a minor before that minor can obtain an abortion. The statute provides for a judicial bypass. Minor Doe argued her petition under two relevant sections of the act: 390.01114(4)(c) and 390.01114(4)(d). The first section stipulates that the court must waive the parental notification requirement if the minor provides clear and convincing evidence of her sufficient maturity to make the decision to have an abortion. The second requires approval if it is in her best interest to waive parental notification.

The lower court did not grant Doe's petition to waive the parental notification requirement because it found that she lacked a sufficient level of maturity. The court relied on the minor's testimony that she lives with her mother and grandmother, and that she is still largely dependent on them for financial, emotional, and physical support. This dependency led the court to believe that she lacked the requisite maturity.

The Appeals Court held that the lower court applied flawed reasoning in its decision, deciding that the court need not find a minor to be completely independent of her guardians in order to decide that the minor possesses a sufficient level of maturity. The court only needs to find that she has "the necessary emotional development, intellect, and understanding to make an informed decision regarding terminating her pregnancy." *In re Doe*, 924 So. 2d 935, 939 (2006). The lower court used too strict of a standard for determining the minor's level of maturity – practically no minor could use the "sufficiently mature" provision of the

statute if the minor must be completely independent of her guardians. The Appeals Court considered a more appropriate test would include analyzing factors such as age, understanding of the medical risks, emotional consequences, consideration of alternatives to abortion, future plans, employment, and seeking advice or support from an adult.

The Appeals Court directed the lower court to grant Doe's petition for judicial waiver, thereby allowing her to use the judicial bypass option.

 *Ayotte v. Planned Parenthood of Northern New England*
126 S. Ct. 961 (2006)

Planned Parenthood filed suit against the State of New Hampshire alleging that the state's Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. §§ 132:24-28 (2003), violates 42 U.S.C. § 1983. The act requires written notice of a minor's request for an abortion to be delivered to the minor's parent or guardian two days before the abortion occurs. The act has three exceptions to this rule: (1) the abortion provider may circumvent parental notification if he or she can certify that there was not enough time to notify the parent because the minor would have died without the abortion, (2) the parent or guardian may certify that he or she has already received notice, or (3) the minor may file a petition with a judge to get a judicial bypass to the parental notification.

Planned Parenthood argued that the act was unconstitutional because it does not have an explicit provision for providing abortions to minors in medical emergencies. Precedent holds that states may not restrict access to medically necessary abortions when the mother's life is in danger. *See Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833, 879 (1992); *Roe v. Wade*, 410 U.S. 113, 164-165 (1973). The New Hampshire District Court found for Planned Parenthood and permanently enjoined the statute because of its unconstitutionality. The Appeals Court affirmed this judgment.

The U.S. Supreme Court granted certiorari to determine if invalidating the entire statute was a necessary remedy. The court generally prefers to only provide a remedy for the unconstitutional portion of a statute, not the statute in its entirety. As the statute in question does not lead to constitutional violations in every scenario in which it will be applied, the Supreme Court held that the District Court unnecessarily enjoined the entire statute. The case was remanded to the lower courts to determine a more appropriate remedy.

📖 *Alejandro A. v. Superior Court of Los Angeles*
2006 Cal.App. LEXIS 3853 (Super. Ct. LA. May 3, 2006)

On August 24, 2001, 16-year-old Alejandro allegedly committed robbery and grand theft of a bicycle. The following month, a mental health expert evaluated Alejandro for placement treatment in the juvenile justice system. Alejandro admitted to the robbery, and was placed on probation in the custody of his parents.

On October 9, 2003, Alejandro was arrested on another charge of robbery. This time, Alejandro was 18, and his past crime of stealing a bicycle was considered a “Three Strikes” prior for the current charge. Despite his 2001 mental health evaluation, this new criminal proceeding was the first time the court considered whether Alejandro was competent to stand trial.

Alejandro filed a motion to vacate judgment of his juvenile case, arguing that there should have been a competency hearing before his confession was admitted. The Superior Court of Los Angeles denied the motion, to which the 2001 mental health evaluation was attached. *Alejandro A. v. Superior Court of Los Angeles*, 2006 Cal.App. LEXIS 3853 (Super. Ct. LA. May 3, 2006) at 4. Another motion was submitted months later with three new mental health evaluations conducted in 2004. The court again denied the motion, unwilling to preclude use of the “Three Strikes” law.

Alejandro's appeal was treated as a petition for writ of habeas corpus, with the purpose of reviewing whether his 2001 conviction should have been vacated by retroactively determining Alejandro's competency in 2001. Because of its continuing jurisdiction in the matter, the Juvenile Court would decide whether Alejandro's due process rights were violated by being tried as a competent defendant at that time.

Dr. Fischer evaluated Alejandro both in 2001 and 2004. His evaluation of Alejandro at age 16 and again at age 19 showed that Alejandro is mentally retarded (with an IQ of 55), is functionally illiterate, has auditory hallucinations, and lacks any "higher intellectual processes." *Id.* at 8. According to Dr. Fischer, Alejandro was not competent to stand trial at any time.

Dr. de Armas and Dr. Malinek both evaluated Alejandro in 2004, along with Dr. Fischer. Dr. de Armas agreed with Dr. Fischer that Alejandro is mentally retarded and unable to stand trial. Dr. Malinek agreed that Alejandro is mentally retarded, but is competent enough to stand trial so long as time is taken to explain everything in "simple terms." *Id.* at 11. Dr. Fischer maintained that Alejandro was not aware of the nature of a trial. In interviews, Dr. Fischer noted that Alejandro "perceived going to prison to be the simple result of being accused of a crime and going to court." *Id.* at 9.

The Superior Court ultimately granted Alejandro's petition, directing the Juvenile Court to make a determination regarding Alejandro's retroactive competency. This year, the Juvenile Court will make such a decision, which could result in Alejandro being ineligible for the "Three Strikes" law if his juvenile offense is vacated.

 *State of Washington, Respondent v. V.G.*
2006 Wash. App. LEXIS 2071 (Wash. App.
Sep. 18, 2006)

V.G., a minor, was charged with possession and consumption of alcohol. She was in drug and alcohol

treatment for another matter when she was arrested and charged. V.G. had previously been charged with second-degree burglary, third-degree theft, and possession of drug paraphernalia.

At sentencing, V.G. was not given the opportunity to address the court, and was sentenced to seven days of detention (credited as time served) and 12 months of community supervision. As a condition of the community supervision, the court required V.G. to attend several educational programs, counseling, outpatient substance abuse treatment, and sex offender and anger management classes. All of these required programs were to be directed by her probation officer.

V.G. appealed from this sentence with regard to (1) her inability to speak at her disposition hearing and (2) the last three requirements of her community supervision: mental health, sex offender, and anger management programs.

The first issue was improperly raised for the first time on appeal. Because V.G. did not object to the denial of her right to allocution, she could not do so on appeal. On the second issue, the Appeals Court held that the Juvenile Court exceeded its authority and imposed a sentence that was, in part, arbitrary and unfair. The Appeals Court determined that, though it is clear from her adjudication history that V.G. is troubled, there is no basis for having her attend mental health, sex offender, or anger management programs. Neither her present charge nor her criminal history served any justification for such requirements.

The Appeals Court reversed the imposition of the anger management and sex offender treatments, but affirmed the other conditions of V.G.'s community supervision, including the mental health treatment.