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EDITOR'S NOTE

After the successful inaugural symposium issue, the UC Davis Journal of Juvenile Law and Policy now embarks on its sixth academic year of publication. The Journal continues to provide readers with works addressing a spectrum of legal issues.

In this issue, Kai-Ching Cha discusses the recent Supreme Court case *Ferguson v. City of Charleston* in *In Utero Exposure to Crack Cocaine: The Swinging Pendulum and the Implications for the Maternal Fetal Conflict*. She also argues for protecting maternal health as an effective means of protecting fetal health.

Virginia Sawyer Radding explores the child welfare system's inadequacies of safeguarding children who are removed from their homes. In *Intention v. Implementation: Are Many Children, Removed From Their Biological Families, Being Protected or Deprived?*, she discusses solutions to the current problems.

This issue also includes an update on the Journal's discussion of California's Proposition 21, which deals with juvenile criminal justice. Maggy Krell and Rebecca Gardner examine the proposition's constitutionality and focus on a case that has reached the California Supreme Court. In addition, we devote the Children's Section on the Children's Online Privacy Protection Act with our staff's investigation.

These pieces touch upon different subjects, but they all remind us of the importance of keeping the children's interests in mind. Joining them are the recurring Case Summaries and Websites sections. We hope that you will enjoy the winter issue.

Karen Yiu

In Utero Exposure to Crack Cocaine: The Swinging Pendulum and the Implications for the Maternal Fetal Conflict

KAI-CHING CHA*

Introduction

On March 21, 2001, the United States Supreme Court decided *Ferguson v. City of Charleston*.[1] The case concerned the constitutionality of a program developed by a public hospital, in conjunction with local law enforcement, which attempted to improve fetal health by incarcerating pregnant women who test positive for cocaine use.[2] Under this program, the hospital tested pregnant women without first obtaining consent or a warrant, and without obtaining probable cause or individualized suspicion.[3] Maternity patients testing positive for cocaine for the first time were given a choice between incarceration or drug treatment.[4] However, the hospital reported subsequent positive test results or failure to complete drug treatment to law enforcement.[5] The Supreme Court held that the program was unconstitutional. Despite public health concerns, pregnant drug addicts are still entitled to Fourth Amendment protections.[6]

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[1] Ferguson v. City of Charleston, 121 S. Ct. 1281 (2001).
[2] *See id.* at 1284, 1290.
[3] *See id.* at 1284.
[4] *See id.* at 1285.
[5] *See id.*
[6] *See id.* at 1293; Ellen Goodman, *'Fetal Rights' May Give Birth to Injustice*, L.A. TIMES, Mar. 26, 2001.

Pro-choice advocates celebrated this decision; however, a closer examination reveals dicta that may also give pro-life supporters cause to celebrate. In his concurrence, Justice Kennedy explained that a state using legitimate procedures may exercise its powers to protect fetal health by punishing pregnant women who use cocaine.[7] Therefore, as long as the program complies with the Fourth Amendment search and seizure requirements, states may imprison pregnant cocaine users.

The week following the *Ferguson* decision, the Journal of the American Medical Association ("JAMA") published a review concerning the effects of prenatal cocaine exposure on fetal and infant growth, development, and behavior.[8] The authors surveyed and critically evaluated the existing literature within the medical community.[9] They found no positive correlation between in utero cocaine exposure and its many historically associated developmental defects.[10] According to the authors, the previous studies were unable to separate the effects of cocaine exposure from the effects of other factors such as poverty, prenatal exposure to alcohol, tobacco, marijuana, or quality of the child's environment.[11]

In light of the most recent medical research and the dearth of pregnancy specific drug treatment, state-sponsored programs incarcerating pregnant women for using cocaine are problematic. Rather than improving the health of the fetus, the net result of incarceration is poorer health for both the mother and her expected infant.[12] The programs themselves

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[7] *See Ferguson*, 121 S. Ct. at 1293 (Kennedy, J., concurring).

[8] *See* Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure*, 285 JAMA 1613, 1619 (2001) (explaining that after controlling for exposure to tobacco and alcohol, the effects of prenatal cocaine exposure on physical growth and development are not shown).

[9] *See id.* at 1614 (describing the MEDLINE search for all human studies published from 1984 until October 2000).

[10] *See id.* at 1619.

[11] *See id*. at 1621, 1624.

[12] *See* Helene Cole, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990) ("Pregnant women in jail are routinely subject to conditions that are hazardous to fetal health, such as gross overcrowding,

are premised on the ideological separation of the interests of the fetus from its mother. If states, courts, and legislators want to promote and improve fetal health and well-being, they should concentrate on improving maternal health and well-being. Improving the health of the mother and fetus will improve the health of each.

Background

In order to understand *Ferguson* and the issue of legal intervention during pregnancy, it is first necessary to examine the history of the medical community's understanding of the effect of cocaine exposure on fetal development. Second, it is important to assess the dearth of pregnancy specific, or cocaine specific, drug treatment programs available to women during the mid-1980's when the media saturated the American public with reports concerning the adverse effects of crack cocaine exposure on prenatal and postnatal growth and development. Finally, it is necessary to examine the ideological separation of the pregnant woman from her fetus that contributed to the policy at issue in *Ferguson*.

The Swinging Pendulum of the Crack Epidemic

Medical research concerning the effects of in utero cocaine exposure has performed a gradual turn-around. In the mid-1980's, preliminary studies reported a positive correlation between prenatal cocaine exposure, lower birth weights, and higher incidents of physical abnormalities.[13] In addition, studies found that prenatal exposure to cocaine resulted in developmental defects that persisted long after birth.[14] However, more than a decade later, at a conference hosted by

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24-hour lock-up with no access to exercise or fresh air, exposure to tuberculosis, measles, and hepatitis, and a generally filthy and unsanitary environment.").

[13] *See* Ira J. Chasnoff et al., *Cocaine Use In Pregnancy*, 313 NEW ENG. J. MED. 666, 669 (1985). Strokes and seizures may occur and malformation of the kidneys, genitals, intestines and spinal cord may develop. *Id*. at 668-69.

[14] *See id.* at 669 (explaining that at birth babies display signs of crack exposure, such as tremors, irritability and lethargy).

the New York Academy of Sciences, the consensus was that the effects of cocaine exposure on infants were subtle and not necessarily permanent.[15] Even more recently, in March 2001, JAMA published a meta-analysis article finding no consistent correlation between cocaine exposure and fetal or infant growth and development.[16]

Ira Chasnoff's seminal 1985 study documented the deleterious effects of crack cocaine on newborns.[17] The study compared twenty-three infants born to women who used cocaine during pregnancy to thirty infants born to women who did not use cocaine.[18] The results of this study were widely disseminated to the American public despite their preliminary nature and the small number of subjects.[19] The media portrayed crack babies as hopelessly doomed and severely, irreparably developmentally disabled.[20] During this period,

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[15] *See* COCAINE: EFFECTS ON THE DEVELOPING BRAIN, at xi (John A. Harvey & Barry E. Kosofsky eds., 1998) [hereinafter EFFECTS ON THE DEVELOPING BRAIN] (explaining that although the "Crack Baby Syndrome" appears to be real, the effects are subtle).

[16] *See* Frank, *supra* note 8, at 1619 (concluding that effects of prenatal cocaine on physical growth and development are not shown after controlling for exposure to tobacco and alcohol).

[17] *See* Chasnoff, *supra* note 13, at 666 (finding that cocaine-using women had higher rate of spontaneous abortion and cocaine-exposed infants exhibited depressed interactive abilities and significant impairment in organizational abilities); *see also* RACHEL ROTH, MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS 142 (2000) (explaining that Chasnoff's 1985 study was widely publicized and is currently credited for starting the "crack baby" myth).

[18] *See* Chasnoff, *supra* note 13, at 666-67.

[19] *See* Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999, 1017-18 (1999) (stating that in 1986, widespread coverage was given to the effects of prenatal exposure to cocaine, despite the preliminary nature of the research). The public was saturated with media reports on crack cocaine: in 1986, *Time* and *Newsweek* each ran five "crack crisis" cover stories. *Id.* at 1017; s*ee also* INTEPRETING THE PATTERNS 101 (explaining that *Newsweek* devoted more coverage to crack than it had to any national issue since Vietnam and President Richard Nixon's resignation).

[20] *See* John Lagone, *Crack Comes to the Nursery; More and More Cocaine-Using Mothers are Bearing Afflicted Infants*, TIME, Sept. 19, 1988, at 85; Claudia Wallis, *Cocaine babies; addicts bear ailing infants*,

both the medical community and the mainstream media widely accepted that prenatal exposure to cocaine resulted in higher incidence of infant mortality, physical abnormalities, and behavioral and intellectual deficiencies.[21]

During the late 1980's and early 1990's, a couple of disturbing trends surfaced. The first documented trend was a study in 1989 on publishing bias.[22] This study found that medical journals were five times more likely to publish a paper finding a causal connection between prenatal cocaine exposure and developmental defects, compared to a paper finding no causal connection.[23] In addition, the study reported that papers that found no connection tended to verify cocaine use and employed control groups more frequently, indicating that these papers were not rejected for scientific reasons. Rather, it seemed that if the publishers did not agree with the results, they assumed that the study had been performed incorrectly.[24]

Another disturbing trend was documented in 1990, when researchers collected urine samples from over seven hundred pregnant women enrolled in prenatal care in Pinellas

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TIME, Jan. 20, 1986, at 50 (explaining that the availability of crack raises "the specter of a whole generation of drug-damaged children").

[21] *See* Cole, *supra* note 12, at 2666 (explaining that the effects of cocaine use are severe: including increased infant mortality, in utero strokes, spontaneous abortion, and abruptio placentae). On average, cocaine-exposed babies have lower birth weights and smaller head circumference compared to unexposed infants. *Id*. Physical abnormalities include deformed kidneys and neural tube defects. *Id.* Behavioral deficiencies include withdrawal symptoms that make them more irritable and resistant to bonding, and intellectually, cocaine-exposed infants are more likely to experience learning disabilities. *Id*.; *see also* Anastasia Toufexis, *Innocent Victims: Damaged by the Drugs Their Mothers Took, Crack Kids Will Face Social and Educational Hurdles and Must Count on Society's Compassion*, TIME, May 13, 1991, at 56.

[22] *See* Gideon Koren et al., *Bias Against the Null Hypothesis: The Reproductive Hazards of Cocaine*, 8677 LANCET 1440, 1441 (1989).

[23] *See id.* at 1441 (revealing that the likelihood of publication for a negative study was negligible whereas a positive study had a fifty-seven percent chance of getting published).

[24] *See id.* (explaining that the subconscious message may be that if a study did not detect an adverse effect of cocaine, when common knowledge is that cocaine is a bad drug, then the study must be flawed).

County, Florida.[25] Researchers found an equal percentage of black and white pregnant women tested positive for drugs and alcohol.[26] Moreover, pregnant women treated by private physicians used drugs or alcohol at a similar rate as pregnant women treated at public health clinics.[27] Despite the similarities in frequency of drug use, black women were ten times more likely to have their positive test results reported to law enforcement.[28] The one factor where pregnant black women differed from pregnant white women was in their choice of drug. Black women tended to test positive for cocaine, whereas white women tested positive for marijuana.[29]

By the late 1990s, the medical community started to shift its position. A conference sponsored by the New York Academy of Sciences reported that crack cocaine had subtle, and not necessarily permanent, detrimental effects on physical growth and mental and emotional development.[30] This later

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[25] *See* Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1203 (1990) (stating that urine was collected from each of the five Pinellas County Health Unit clinics, and from twelve private obstetric practices). The twelve private practices provided prenatal care to seventy percent of all pregnant women who obtained private health care in Pinellas County. *Id.*

[26] *See id.* at 1204 (finding that 15.4% of white women, compared to 14.1% of black women tested positive in urine tests screening for alcohol, opiates, cocaine, and marijuana).

[27] *See id.*

[28] *See id.* (stating that the percentage of white women reported for drug use was 1.1%, whereas the percentage of black women reported for drug use was 10.7%).

[29] *See id.* (explaining that there was a higher rate of cocaine use among the reported black women and a high rate of marijuana use among the white women).

[30] *See* John A. Harvey & Barry E. Kosofsky, *Preface* to EFFECTS ON THE DEVELOPING BRAIN, *supra* note 15, at xi. The proceedings from this event are published, however, they are not peer reviewed. Scientists noted that the resilient nature of the developing brain compensates for a lot of neurological damage. However, once a situation is overly stressful, the compensatory mechanisms may start to break down, and effects of in utero exposure to cocaine may become apparent. *See* Gideon Koren, et. al., *Long Term Neurodevelopmental Risks in Children Exposed In Utero to Cocaine*, *in* EFFECTS ON THE DEVELOPING BRAIN, *supra* note 15, at 306, 309 (stating that tremendous brain plasticity and optimal environmental

research found that no single intrauterine factor was capable of determining a physical or behavioral outcome.[31] Rather, factors such as poverty, lack of prenatal care, poor nutrition, alcohol, tobacco, and environment all contribute significantly to developmental defects.[32] However, during this period, scientists also cautioned that while the effects of prenatal cocaine exposure may be subtle, they were still significant as well as costly.[33]

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health conditions may overcome primary and secondary effects of cocaine on neurodevelopment); *Round Table 2. Consensus on Postnatal Deficits: Comparability of Human and Animal Findings*, *in* EFFECTS ON THE DEVELOPING BRAIN, *supra* note 15, at 153, 153.

[31] *See* John A. Harvey & Barry E. Kosofsky, *Preface* to EFFECTS ON THE DEVELOPING BRAIN, *supra* note 15, at xi (explaining that human studies indicate that maternal cocaine use, and the concomitant use of other illicit and licit drugs, as well as genetics and environment combine to create many cocaine-exposed phenotypes).

[32] *See* Claudia A. Chiriboga, *Neurological Correlates of Fetal Cocaine Exposure*, *in* EFFECTS ON THE DEVELOPING BRAIN, *supra* note 15, at 109, 110 (explaining that the net effect of any single drug is substantially diminished once studies take into account factors such as poor nutrition, social chaos, poor parenting, and multiple drug exposures including, alcohol and tobacco); Deborah Frank, *Round Table 6. Where Do We Go From Here and How Do We Get There?*, *in* EFFECTS ON THE DEVELOPING BRAIN, *supra* note 15, at 348, 352 (explaining that while cocaine-exposed children do not look a lot worse than unexposed children, all of the children look awful and they get progressively worse as poverty corrodes them); John A. Harvey & Barry E. Kosofsky, *Preface* to EFFECTS ON THE DEVELOPING BRAIN, *supra* note 15, at xi (explaining that genetics, environment, and maternal health are all critical factors working together to contribute to brain development and behavioral maturation); *see also* Sharon Begley, *Hope for 'Snow Babies': A Mother's Cocaine Use May Not Doom Her Child After All*, NEWSWEEK, Sept. 29, 1997, at 62 (reporting that a study in Philadelphia found that cocaine-exposed children from an impoverished neighborhood scored seventy-nine on IQ tests, three points lower than their peers, however the United States average ranges from ninety and one hundred and nine).

[33] *See* Barry M. Lester et al., *Cocaine Exposure and Children: The Meaning of Subtle Effects*, 282 SCIENCE 633, 634 (1998) (explaining that the effects are subtle in that they are of small magnitude as shown in IQ findings, however, the special education services for these children is still anticipated to cost up to $352 million per year).

Most recently, in March 2001, JAMA published a paper debunking the crack baby myth.[34] The study reviewed existing medical research and concluded that there has been no demonstrated effect of cocaine on prenatal physical growth after controlling for exposure to tobacco and alcohol.[35] The article explained that the samples studied are usually drawn from economically disadvantaged populations with high developmental risk even without any exposure to cocaine. Therefore, interpreting the effects of cocaine is difficult.[36] Researchers admonished heath-care providers not to ignore cocaine use in pregnancy.[37] However, the results of this article indicated that the previous research has been unable to detect adverse consequences of prenatal cocaine exposure independent of exposure to tobacco, alcohol, marijuana, and the quality of the child's environment.

While the medical community has not maintained a consistent position on the effects of cocaine addiction on fetal development, they have held a consistent position regarding how to address this public health issue. The American

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[34] *See* Frank, *supra* note 8, at 1613 (reviewing the existing medical literature concerning in utero exposure to cocaine).

[35] *See id.* at 1619. The study also synthesized studies examining cognition, language skills, motor skills, and behavior, attention, affect and neurophysiology. *See id.* at 1614. The authors concluded that crack cocaine exposure in utero does not appear to affect developmental scores independently for the first six years; that findings are mixed regarding early motor development but any effect appears to be transient and may reflect tobacco exposure; and that exposure may be associated with modest alternations of certain physiological responses to behavioral stimuli that are of unknown clinical importance. *See id.* at 1613; *see also* Wendy Chavkin, *Cocaine and Pregnancy – Time to Look at the Evidence*, 285 JAMA 1626 (2001) (explaining that the currently published data do not persuasively demonstrate that in utero exposure to cocaine has major adverse developmental consequences in early childhood, and certainly not ones separable from those associated with other exposures and environmental risks).

[36] *See* Frank, *supra* note 8, at 1615.

[37] The JAMA article did not endorse the use of crack cocaine during pregnancy. *See id*. at 1621 (explaining that physicians should use cocaine as a marker to identify mothers and children at-risk for poor health and impaired caregiving due to factors ranging from infectious diseases to domestic violence).

Medical Association (AMA) and other medical organizations have all advocated for improving maternal health as the best and most effective method to improving fetal health.[38] The medical community has become outspoken in their support for drug treatment and rehabilitation.[39] At the same time, they have spoken out against programs which incarcerate drug addicted pregnant women in order to promote fetal health.[40]

In Utero Cocaine Exposure and the Availability of Drug Treatment

Since 1985, over two-hundred women in thirty states have faced criminal prosecution for using cocaine and other psychoactive substances during pregnancy.[41] Most of these

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[38] *See* Cole, *supra* note 12, at 2670 (recommending that the AMA Board of Trustees adopt the position that criminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate; and pregnant substance abusers should be provided with rehabilitative treatment appropriate to their specific physiological and psychological needs); American Society of Addictive Medicine, *Public Policy of ASAM: Chemically Dependent Women and Pregnancy*, *at* http://www.asam.org (last visited Apr. 9, 2001) (advocating, as of September 25, 1989, for state and local governments to avoid "any measures defining alcohol or other drug use during pregnancy as 'prenatal child abuse' and . . . prosecution, jail, or other punitive measures").

[39] The AMA as well as the NARAL Foundation filed amicus briefs supporting the plaintiffs in *Ferguson v. City of Charleston*. *See* Brief of Amicus Curiae American Medical Association, Ferguson v. City of Charleston, 121 S. Ct. 1281 (2001) (No. 99-936) [hereinafter AMA's Amicus Brief]; Brief of Amici Curiae the NARAL Foundation et al., Ferguson v. City of Charleston, 121 S. Ct. 1281 (2001) (No. 99-936) [hereinafter NARAL's Amicus Brief]. In addition, the Lindesmith Center filed an amicus brief in support of the petition for certiorari in *Whitner v. South Carolina*. Brief of Amici Curiae The Lindesmith Foundation et al., *Whitner v. South Carolina*, 492 S.E.2d 777 (1997) (No. 24468), *reprinted in* 9 HASTINGS WOMEN'S L.J. 139 (1998) [herinafter Lindesmith's Amicus Brief].

[40] *See* Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM. J. OF PUB. HEALTH 483, 486 (1990) ("The American Academy of Pediatrics has recently stated that it is unethical for physicians to perform drug screening for the primary purpose of detecting illegal use.").

[41] Frank, *supra* note 8, at 1614; *see also* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1420 (1991) (explaining that poor

women have been low-income women of color with untreated drug addictions.[42] The public health and medical communities do not support programs incarcerating expectant addicts. Rather, both firmly advocate for accessible prenatal care combined with drug treatment and rehabilitation as methods for combating adverse effects of in utero cocaine exposure. At the same time, both communities acknowledge the limited availability of drug treatment specifically designed for pregnant addicts.

Studies demonstrate that incarceration programs result in poorer health for both the fetus and the mother.[43] First, threats of incarceration dissuade pregnant addicts from seeking any kind of medical treatment including prenatal care.[44] Second, prison is an extremely unhealthy place for

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women, who are disproportionately black, are in closer contact with government agencies and their drug use is therefore more likely to be detected).

[42] Paltrow, *supra* note 19, at 1002. *See also* The Lindesmith Center, *Cocaine & Pregnancy*, *at* http:///www.lindesmith.org/cites_sources/cites.html (last visited Apr. 2, 2001) (explaining that African-American and Latina women constituted eighty percent of those prosecuted for delivering drug-exposed children and were also much more likely than Caucasian women to be reported to child welfare agencies for prenatal drug use).

[43] *See* AMA's Amicus Brief, *supra* note 39, at 10, 21 (explaining that the threat of incarceration and incarceration itself results in substance-abusing, expectant mothers avoiding medical treatment or unable to care for their children).

[44] *See id.* at 10 (explaining that pregnant women will inevitably avoid medical care if their physicians are compelled to report positive urine test results to law enforcement); NARAL's Amicus Brief, *supra* note 39, at 9 n.4 (explaining that during the formation of the policy Dr. Chasnoff cautioned the Charleston Solicitor that "such a punitive policy would steer women away from treatment and prenatal care . . . and that the policy would not improve fetal health"); Karol Kaltenbach & Loretta Finnegan, *Prevention and Treatment Issues for Pregnant Cocaine-Dependent Women and Their Infants*, *in* EFFECTS ON THE DEVELOPING BRAIN *supra* note 15, at 329, 329 ("the threat of involvement with legal and child protection authorities keeps many drug-dependent women from seeking prenatal care"); Michelle Szalavitz, *War on Drugs, War on Women*, ON THE ISSUES MAGAZINE, Aug. 1999, at 42 (reporting that a recent study funded by The Robert Wood Johnson Foundation determined that laws that seek to punish

expectant mothers.[45] Pregnant women have a higher miscarriage rate in prisons due to a multitude of factors, such as inadequate oxygen, nutrition, or exercise.[46] In addition, incarcerating a pregnant drug addict serves no purpose since the presence of drugs in prisons is well documented.[47]

Instead, prenatal care is considered an effective means of improving fetal health for pregnant cocaine addicts.[48] Prenatal care educates women on the importance of maternal nutrition and the risks associated with drug use.[49] This education can significantly reduce the risk of harm to infants because improving maternal nutrition helps to improve maternal health even if cocaine use continues.[50] In addition, the use of cocaine is highly correlated with the use of harmful

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the mothers of babies who test positive for drugs tend to drive women underground and away from prenatal care).

[45] *See* Cole, *supra* note 12, at 2667 (reporting that according to prison health experts, "prisons are 'shockingly deficient' in attending to the health care needs of pregnant women").

[46] *See* Edith L. Pacillo, *Expanding the Feminist Imagination: An Analysis of Reproductive Rights*, 6 AM. U. J. GENDER SOC. POL'Y & L. 113, 125 (1997) ("incarcerated pregnant women are far more likely to experience miscarriages than the general population of pregnant women . . . [and] are unlikely to receive adequate medical or prenatal care").

[47] *See* Cole, *supra* note 12, at 2667.

[48] *See* Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 514 (1992) ("research has shown that the chances for a healthy baby significantly increases the sooner in the pregnancy the mother seeks medical care").

[49] *See* AMA's Amicus Brief, *supra* note 39, at 14-15 (explaining that rather than drug use, socioeconomic and lifestyle factors associated with drug use may cause many of the adverse outcomes seen in drug-exposed infants). For example, drug addicted pregnant women usually gain less weight during pregnancy compared to their non-drug addicted peers because cocaine is an appetite suppressor. *See* Chiriboga, *supra* note 32, at 112 (explaining that poor weight gain during pregnancy, which reflects poor maternal nutrition, exerts significant and independent detrimental effects on neonatal motor performance). "[P]renatal care has been shown to reduce the incidence of low birth weight among drug-exposed infants by 18 to 50 percent." AMA's Amicus Brief, *supra* note 39, at 17.

[50] *See* Lindesmith's Amicus Brief, *supra* note 39, at 146-47 (explaining that prenatal exposure to adverse environmental factors associated with poverty, such as poor nutrition, can profoundly affect infant health).

legal substances such as alcohol and cigarettes.[51] Prenatal care that focuses on reducing consumption of cigarettes and alcohol optimizes fetal health because, while the exact effects of in utero cocaine exposure are unclear, it is clear that prenatal exposure to alcohol and tobacco have adverse effects on fetal growth and infant development. It has been established that smoking cigarettes during pregnancy increases the risk of miscarriage, premature, birth, sudden infant death syndrome, and low birth weight.[52] Furthermore, fetal alcohol syndrome is the leading known cause of mental retardation and one of the three leading causes of birth defects.[53]

Drug treatment helps to mitigate the effects of prenatal cocaine exposure in two ways.[54] It helps pregnant addicts end their cocaine habit and become better parents.[55] Women who have completed drug treatment are able to provide a more supportive parenting environment for their children that helps to mitigate the effects of prenatal cocaine exposure. Studies also demonstrate that during pregnancy, cocaine addicted women are often highly motivated to enter drug treatment.[56]

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[51] *See* AMA's Amicus Brief, *supra* note 39, at 15.

[52] *See* LYNDA BECK FENWICK, PRIVATE CHOICES, PUBLIC CONSEQUENCES 131 (1998) (discussing the effects of prenatal exposure on infant growth and development); Frank, *supra* note 8, at 1620-21 (explaining that prenatal exposure to tobacco has been associated with infant mortality, moderate impairment of cognitive functioning, a range of behavioral problems, as well as low birth weight).

[53] AMA's Amicus Brief, *supra* note 39, at 15 (explaining that fetal alcohol syndrome is currently the leading known cause of mental retardation and one of the three leading causes of birth defects).

[54] *See id.* at 20 (explaining that maternal drug treatment is necessary to the healthy development of a child at whatever point possible).

[55] *See* Ira J. Chasnoff et al., *Prenatal Exposure to Cocaine and Other Drugs; Outcome at Four to Six Years*, *in* EFFECTS ON THE DEVELOPING BRAIN, *supra* note 15, at 314, 325 ("Within the home environment, a correlation was found between the mother's continuing drug use and the child's IQ and behavioral problems at 6 years of age"); *Round Table 2*, *supra* note 28, at 153, 156 (explaining that regarding environmental factors, maternal IQ and home environment have stronger effect on a child's development at three years than prenatal cocaine exposure).

[56] *See* AMA's Amicus Brief, *supra* note 39, at 19-20; Wendy Chavkin, *Mandatory Treatment for Drug Use During Pregnancy*, 266 JAMA 1556, 1559 (1991) ("Pregnancy has been described as a 'window of opportunity'

Taking advantage of this motivation may have positive results because women who are self-motivated have better success in drug treatment.

Despite the known positive benefits of drug treatment in the late 1980's, the Charleston County Substance Abuse (CCSA) treatment program provided no programs specifically geared towards treating women, pregnant women, or cocaine users.[57] In addition, the public hospital Medical University of South Carolina's psychiatric department provided no substance abuse treatment for indigent women.[58] Medical University of South Carolina (MUSC) did not begin to provide substance abuse treatment to indigent pregnant women until 1991, and women-only substance abuse treatment programs with child-care services were not available in Charleston, South Carolina until 1994.[59]

The lack of pregnancy-specific drug treatment is significant for several reasons.[60] Pregnant drug addicts have

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for treating addiction. Three quarters of the interviewed women reported concern for their child as a major motive for initiating treatment, and 80% reported concern as the motive for decreasing or stopping drug use during pregnancy.")

[57] *See* NARAL's Amicus Brief, *supra* note 39, at 13.

[58] *See id.*

[59] *See id.* at 13-14. This situation was not unique to South Carolina. In 1990, a survey of the seventy-eight drug treatment programs in New York City found that while fifty-four percent rejected pregnant women, and sixty-seven percent rejected Medicaid patients, eighty-seven percent rejected pregnant Medicaid patients addicted to crack cocaine. *See* Chavkin, *supra* note 40, at 485. In addition, less than half of the programs which accepted pregnant addicts provided prenatal care and only two provided child care. *See id.* Similar difficulties were found in Chicago, where out of nine in-patient drug treatment programs, seven accepted pregnant women, but none of these programs accepted Medicaid or offered any substantial financial aid. The minimum monthly cost for these programs was $12,000. *See* Oberman, *supra* note 48, at 517.

[60] In addition to the lack of treatment programs for pregnant women and pregnant drug addicts, in the late 1980's there was also a corresponding reduction in budget for federally funded social programs for poor women and children. *See* Paltrow, *supra* note 19, at 1027 (explaining that the outcry over cocaine damaged children and their irresponsible mothers coincided with the end of eight years of Regan-era budget cuts). Between 1977 and 1984, reduction in funds resulted in the elimination of federally-

unique characteristics that make it difficult for them to fit into traditional drug treatment programs.[61] These addicts often have other children.[62] Child care and transportation to a drug treatment facility are necessary components to a drug treatment program which will be able to retain pregnant addicts.[63] In addition, it is especially important for pregnant addicts to receive prenatal care, and parenting and nutrition classes.[64]

Furthermore, many women addicted to crack cocaine have histories of past physical or sexual abuse.[65] Many of

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mandated comprehensive health clinic, including well-baby, prenatal and immunization clinics. *See id*.

[61] *See* Kaltenbach & Finnegan, *supra* note 44, at 330 (stating that multiple factors such as poverty, homelessness or inadequate housing, lack of education, domestic violence, social and emotional problems, all contribute to adversely affecting maternal as well as fetal health and well-being); Stephen R. Kandall & Wendy Chavkin, *Illicit Drugs in America: History, Impact on Women and Infants, and Treatment Strategies for Women*, 43 HASTINGS L. J. 615, 627 (1992) ("male oriented drug treatment programs were often not supportive and sometimes even were hostile to women clients, employed a confrontational 'therapeutic style' uncomfortable for women").

[62] *See* Thea Weisdorf, et al., *Comparison of Pregnancy-Specific Interventions to a Traditional Treatment Program for Cocaine-Addicted Pregnant Women*, 16 J. SUBSTANCE ABUSE TREATMENT 39, 40 (1999); *see also* Kaltenbach & Finnegan, *supra* note 44, at 330 (explaining that a large percentage of substance-abusing women are single heads of households).

[63] *See* NARAL's Amicus Brief, *supra* note 39, at 13 (explaining that lack of child care for women without a spouse, partner, or support system to care for their children forces women to either forego treatment or risk leaving children unattended).

[64] *See* Kaltenbach & Finnegan, *supra* note 44, at 329 ("drug-dependent women tent to neglect their general health and are often non-compliant with prenatal care"); Wendy Chavkin et al., *Drug-Using Families and Child Protection: Results of a Study and Implications for Change*, 54 U. PITT. L. REV. 295, 321 (1992) [hereinafter *Results of a Study and Implications for Change*] (explaining that treatment programs need to teach parenting skills because many drug-using pregnant women grew up in families where they were inadequately parented themselves).

[65] *See* Kaltenbach & Finnegan, *supra* note 44, at 330 ("Drug-dependent women have experienced a high incidence of physical abuse, childhood rape, and sexual molestation, and a majority have moderate to severe depression."); Kathleen Jantzen et al., *Types of Abuse and Cocaine use in Pregnant Women*, 15 J. OF SUBSTANCE ABUSE TREATMENT 319, 321

these women may also be involved in abusive adult relationships.[66] Traditional drug treatment programs do not provide counseling for past physical or sexual abuse, resulting in a higher rate of relapse for these women.[67]

In addition to past history of sexual or physical abuse, drug addicted women tend to suffer from depression and low self-esteem.[68] They also tend to have a high incidence of pregnancy as a result of their low self-esteem.[69] Therefore, drug treatment, in order to be truly effective, must address the multitude of issues that are specific to drug-dependent pregnant women. Pregnant substance abusers need drug treatment programs that provide medical care to pregnant women, as well as therapy directed at helping these women come to terms with any past or present physical and sexual abuse, and counseling to help combat depression.[70]

(1998) (finding women with a history of cocaine use reported a forty-one percent rate of abuse in childhood, and a forty-nine percent rate of abuse in adulthood). A large percentage of substance-abusing women have substance-abusing parents. *See* Kaltenbach & Finnegan, *supra* note 44, at 330. "[C]hemically dependent parents are not necessarily the perpetrators of childhood sexual abuse which suggests that their chemical dependence rendered them inadequate protectors of their daughters, perhaps exposing them to particularly high risk environments." *Results of a Study and Implications for Change*, *supra* note 64, at 317-18.

[66] *See Results of a Study and Implications for Change*, *supra* note 64, at 297 (reporting a study that found a strong correlation among violence during pregnancy, a pregnant woman's use of drugs and alcohol, and her male partner's drug use).

[67] *See* NARAL's Amicus Brief, *supra* note 39, at 15 ("Women with alcohol and drug problems report high rates of violence, including rape, incest, and domestic violence . . . [and] suppression of past violent experiences is identified . . . as major relapse trigger.").

[68] *See* Kaltenbach & Finnegan, *supra* note 44, at 330 (stating that the majority of drug dependent women have moderate to severe depression); Oberman, *supra* note 48, at 512.

[69] *See* Oberman, *supra* note 48, at 512 (explaining that women with low self esteem have more difficulty in refusing unwanted sexual advances, or on insisting upon the use of contraception during sexual relations).

[70] Some health-care providers also advocate housing assistance, job preparation and training, GED classes, and tutoring so that women upon completion of their drug treatment are able to improve their standard of living. *See Results of a Study and Implications for Change*, *supra* note 62, at 321. While implementing all of these programs is undoubtedly

The Maternal Fetal Conflict

The maternal fetal conflict was first developed in the abortion debate when supporters of the right to life movement pitted the rights of the fetus directly against the rights of the mother.[71] Ideologically, the fetus and the pregnant mother are viewed as two different entities with opposing interests.[72] In the abortion debate, the idea is that the mother does not adequately protect the interests of her fetus, hence third party intervention is required.[73] Legislation that facilitates the incarceration of pregnant women for drug abuse is a natural extension of this viewpoint.

In the case of pregnant women who abuse drugs, the maternal fetal conflict allows judges to view the mothers as interested in obtaining and ingesting cocaine, while viewing the fetus as interested in being born healthy and without any developmental defects.[74] These drug-addicted pregnant

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expensive, there are cost effective ways to implement pregnancy-specific drug treatment. *See* Weisdorf, *supra* note 60, at 44 (explaining that improved outcomes through pregnancy-specific treatment was achieved at no additional cost compared to traditional treatment).

[71] Commentators have also identified technology as one of the factors contributing to the ideological separation of the fetus from the mother. *See* April Cherry, *Maternal Fetal Conflicts, the Social Construction of Maternal Deviance, and Some Thoughts about Love and Justice*, 8 TEX. J. WOMEN & L. 245, 248 (1999) ("From the view of a sonogram, a fetus can look like an autonomous being, imbued with both legal and moral rights; a being in need of an advocate to protect it from a potential enemy.").

[72] *See* Katherine Beckett, *Fetal Rights and "Crack Moms": Pregnant Women in the War on Drugs*, 22 CONTEMP. DRUG PROB. 587, 587 (1995) ("the attempt to hold women liable for prenatal conduct rests on the idea that the fetus is a separate person, possessing rights that conflict with those of the mother"); Dawn Johnsen, *Shared Interests: Promoting Healthy Births without Sacrificing women's Liberty*, 43 HASTINGS L.J. 569, 576 (1992).

[73] *See* Johnsen, *supra* note 70, at 576 ("government's role is to protect the fetus from the pregnant women by using the law to compel her to act in ways that a court, legislature, physician, or other appointed third party deems optimal for fetal health").

[74] Patricia Williams describes it as the state being more concerned with the idea of the child, than the actual child, or the actual condition of the woman whose body the real fetus is a part. *See* Patricia Williams, *Fetal*

women are considered social deviants.[75] They are not qualified to be mothers because their criminal activities threaten, rather than nurture, their children. The traditional image of motherhood is a woman who will selflessly devote herself to the best interests of her child.[76] Drug addicts are not selfless; instead they are selfish in their pursuit of drugs. Therefore, the state is the proper and more qualified advocate for representing the interests of the child.[77]

The policy at issue in *Ferguson v. City of Charleston* directly results from the medical community's original position regarding the effects of prenatal cocaine on fetal and infant growth and development, the lack of effective drug treatment options for pregnant crack addicts, and the ideological separation of the mother from her expected child. The policy emphasized cocaine use, required the drug testing of all poor women, and incarcerated anyone failing to remain cocaine-free during pregnancy. This was all despite the medical community's changing opinion about the effects of prenatal cocaine on infants, evidence that demonstrates the adverse effects of alcohol and tobacco exposure on fetal growth and development, and the lack of local, pregnancy, and cocaine-specific treatment.

Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts, 42 U. FLA. L. REV. 81, 92 (1990).

[75] *See* Cherry, *supra* note 71, at 256-57 (explaining that while many gender norms are implicit, dominant culture clearly expresses maternity norms in numerous ways); *see also* Oberman, *supra* note 48, at 548 (characterizing the image of the pregnant drug user as a betrayer, whose interests are diametrically opposed to those of her fetus, and who will intentionally harm her fetus unless the state stops her).

[76] *See* Cherry, *supra* note 71, at 257 (explaining that women are socially defined as good, nurturing, and altruistic mothers).

[77] *See id.* (explaining that once drug-addicted pregnant women are seen as selfish, uncaring, and stupid, they are therefore inappropriate decision-makers for their fetuses and become subject to physical and judicial control).

Ferguson v. City of Charleston

In 1989, the Medical University of South Carolina developed a policy which called for the drug testing of pregnant women suspected of using cocaine.[78] The hospital reported positive test results from this drug testing to law enforcement for women who refused drug treatment or failed drug treatment. The purpose of the policy was to improve fetal health, and the threat of incarceration was supposed to motivate cocaine-addicted mothers to attend drug treatment. Ten women who were incarcerated under this program challenged the policy on Fourth Amendment grounds.[79] They claimed that the drug testing qualified as a search under the Fourth Amendment and was performed without consent, or a warrant, and without individualized suspicion. The Fourth Circuit upheld the policy based on the special needs doctrine of the Fourth Amendment.[80] The Supreme Court overruled the Fourth Circuit and held that the special needs doctrine did not exempt the policy from the warrant requirements, or the individualized suspicion requirements of the Fourth Amendment.[81]

The state of South Carolina is unique because state common law has declared a viable fetus a "child" within the meaning of the state's child abuse and endangerment statute.[82] Therefore, South Carolina common law has defined the viable fetus as a child, entitled to the state's legal protection.[83] One of the results of this unique state law is *Ferguson v. City of Charleston*.

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[78] *See* Ferguson v. City of Charleston, 121 S.Ct. 1281, 1284-85 (2001).

[79] *Id.* at 1286. The case was argued before the United States Supreme Court by Priscilla J. Smith, of the Center for Reproductive Law and Policy, as well as Catherine Weiss, of the ACLU.

[80] *See* Ferguson v. City of Charleston, 186 F.3d 469, 479 (4th Cir. 1999).

[81] *See Ferguson*, 121 S. Ct. at 1292.

[82] *See* Whitner v. State, 492 S.E.2d 777, 778 (S.C. 1997) (holding that the word "child" in South Carolina's child abuse and endangerment statute includes viable fetus).

[83] *See* Paltrow, *supra* note 19, at 1004 (explaining that South Carolina "took an unprecedented legal leap" by recognizing full legal personhood for a viable fetus).

In the fall of 1988, staff members of MUSC became concerned about an apparent increase in the use of cocaine in prenatal treatment patients.[84] In April 1989, MUSC began to order drug screens on urine samples of maternity patients suspected of using cocaine. If a patient tested positive, MUSC staff referred her to CCSA for counseling and treatment. Despite the referrals, the incidence of cocaine use among prenatal patients did not decrease. Frustrated with the lack of results, in August 1989, Nurse Shirley Brown heard that Greenville law enforcement was arresting pregnant users of cocaine on the theory of child abuse.[85] Nurse Brown asked the MUSC's general counsel to contact Charleston Solicitor Charles Condon to offer MUSC's cooperation in prosecuting mothers whose children tested positive for drugs at birth.

Solicitor Condon developed a task force to draft a policy and plan for prosecuting pregnant women who tested positive for cocaine.[86] This policy was in effect from 1989 until 1994.[87] Under the policy, MUSC would test patients for cocaine using a urine drug screen if a patient met one or more of nine criteria.[88] None of the criteria provided either probable

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[84] *See Ferguson*, 121 S. Ct. at 1284.

[85] *See id.* As a result of the *Whitner* decision, pregnant mothers could be arrested for child abuse in the city of Greenville.

[86] *See id.* at 1285. The task force included representatives from MUSC, the police, County Substance Abuse Commission and the Department of Social Services. *Id.* MUSC adopted the policy entitled "Policy M-7" dealing with the subject of Management of Drug Abuse During Pregnancy. *Id*.

[87] *See* Christine M. Bulger, Book Note, *In the Best Interest of the Child? Race and Class Discrimination in Prenatal Drug Use Prosecutions: Private Choices, Public Consequences: Reproductive Technology and the New Ethics of Conception, Pregnancy, and Family*, 19 B.C. THIRD WORLD L.J. 709, 729 (1999) (explaining that the policy ended as a condition of settlement with the Department of Health and Human Services which had commenced an investigation of possible civil rights violations). In addition, the National Institutes of Health agreed that MUSC had embarked on an experiment designed to test a hypothesis that the threat of prison time would stop pregnant women from taking drugs and improve fetal health. *See id.; see also* Jessica M. Dubin, *Court Decision:* Ferguson v. Charleston, 27 J.L. MED. & ETHICS 279, 281 (1999).

[88] *Ferguson*, 121 S. Ct. at 1285 n.4. The criteria were as follows: (1) No prenatal care; (2) Late prenatal care after 24 weeks gestation;

cause to believe that the women were using cocaine, or reasonable suspicion of cocaine use.[89] Once a patient tested positive, the policy provided for education and referral to a substance abuse clinic.[90] However, most importantly, the policy added the threat of law enforcement intervention to provide the necessary leverage to make the policy effective.[91] MUSC and the Charleston Solicitor's office considered this threat of incarceration essential to the program's success in improving fetal health by getting and retaining women in drug treatment.[92]

The program involved law enforcement at two points. The first was when MUSC identified drug use during pregnancy.[93] The second point was when MUSC identified drug use during or after labor. If a patient tested positive for cocaine use during pregnancy, the police were notified and the patient arrested only after testing positive for cocaine a second time or after missing an appointment with a substance abuse counselor.[94] If a patient tested positive for cocaine during or after labor, the police were immediately notified and the

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(3) Incomplete prenatal care; (4) Abruptio placentae; (5) Intrauterine fetal death; (6) Preterm labor of no obvious cause; (7) Intrauterine growth retardation of no obvious cause; (8) Previously known drug or alcohol abuse; (9) Unexplained congenital anomalies. *See id.*

[89] *See id.* at 1287-88 (explaining that neither the district court nor the Fourth Circuit concluded that any of the nine criteria provided either probable cause to believe that they were using cocaine, or even the basis for a reasonable suspicion of such use); Brief of Amici Curiae American Civil Liberties Union et al. at 6, *Ferguson v. City of Charleston*, 121 S. Ct. 1281 (2001) (No. 99-936) (explaining that few of the nine factors are closely associated with cocaine use)[hereinafter ACLU's Amicus Brief]. The fact that a pregnant woman misses prenatal visits, has a prior history of alcohol abuse, or experiences medical difficulties is not positively correlated with cocaine use. Rather, these criteria are more indicative of poverty than cocaine use. *Id.*

[90] *See Ferguson*, 121 S. Ct. at 1285.

[91] *See id.*

[92] *See id.*

[93] *See id.*

[94] *See id.* In the initial stages of the policy, a positive test was immediately reported and the police promptly arrested the patient. *See id*. at 1285 n.5.

patient was promptly arrested.[95] The different offenses law enforcement could charge these cocaine addicted pregnant women with depended upon the stage of pregnancy.[96]

The *Ferguson* plaintiffs were ten women who were arrested after testing positive for cocaine.[97] Four of the ten were arrested during the initial implementation of the policy and were never offered the opportunity to receive drug treatment.[98] The other six were arrested after the policy was modified in 1990, and either failed to comply with the terms of the drug treatment program or tested positive a second time. The plaintiffs challenged MUSC's policy, claiming that the warrantless and nonconsensual drug tests conducted for criminal investigatory purposes violated the Fourth Amendment.[99]

The City of Charleston argued alternatively that as a matter of fact, the plaintiffs consented to the searches, and as a matter of law, the searches were reasonable under the special needs doctrine.[100] Charleston argued that the special needs doctrine allowed for warrantless, nonconsensual searches if the state had a special non-law-enforcement purpose. In *Ferguson*, the purpose was to promote fetal health by getting and retaining pregnant women in drug treatment.

The district court rejected the special needs argument because the medical university did not do the searches for a purpose independent from law enforcement.[101] However, the district court submitted the factual defense regarding consent

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[95] *See id.* at 1285. In 1990, the policy was modified to give the patient a choice of selecting substance abuse treatment over arrest. *Id.*

[96] *See id.* The offenses were as follows: twenty-seven weeks into pregnancy or less: simple possession; twenty-eight weeks or more: possession and distribution to a person under age eighteen (the fetus); delivery while testing positive for illegal drugs, charged additionally with unlawful neglect of a child. *Id*.

[97] *See Ferguson*, 121 S. Ct. at 1286; ACLU's Amicus Brief, *supra* note, at 2 (stating that thirty women were arrested pursuant to the MUSC policy, and all but one or two were African American).

[98] *See Ferguson*, 121 S. Ct. at 1286.

[99] *See id.*

[100] *See id.*

[101] *See id.*

to the jury, and the jury found that the plaintiffs had consented to the search. The petitioners appealed to the Fourth Circuit.

The Fourth Circuit affirmed the policy under the special needs doctrine and did not address the issue of consent.[102] The court held that the searches were reasonable under the special needs doctrine because the MUSC personnel conducted the urine drug screens for medical purposes wholly independent from an intent to aid law enforcement efforts.[103] The Fourth Circuit found that the interest in curtailing pregnancy complications and medical costs associated with maternal cocaine use outweighed the minimal intrusion on the privacy of the plaintiffs.[104]

The United States Supreme Court overruled the Fourth Circuit and rejected expanding the scope of the special needs doctrine.[105] The Court held that the policy did not fall within the special needs exception to the warrant requirement of the Fourth Amendment because of the extensive involvement of law enforcement.[106] In its analysis, the Court distinguished between the immediate and ultimate purposes of the policy. It found that while the ultimate purpose of the program was to protect fetal health by getting pregnant drug addicts into treatment, the immediate purpose of the policy was to generate evidence for law enforcement.[107] The Supreme Court explained that law enforcement always serves a broader social purpose or objective. Therefore, the Fourth Circuit's expanded interpretation of the special needs doctrine would render any nonconsensual suspicionless search constitutional as long as it defined the search in terms of its ultimate public policy goal. The Court found this expanded special needs doctrine unacceptable, as the effects would reach beyond urine tests of pregnant drug addicts, or even beyond pregnant

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[102] *See* Ferguson v. City of Charleston, 186 F.3d 469, 479 (4th Cir. 1999).
[103] *See id.*
[104] *See id.*
[105] *See Ferguson*, 121 S. Ct. at 1292.
[106] *See id.* at 1292.
[107] *See id.* at 1291. The Court considered the law enforcement threat the direct and primary purpose of the program. *Id.* This distinction was critical to the Court.

women.[108] The Fourth Circuit's interpretation of the special needs doctrine would affect any nonconsensual suspicionless search, and would remove the protections of the Fourth Amendment if the purpose of the search was ultimately to address a particular need of the state.[109]

In a separate opinion, concurring with the majority, Justice Kennedy limited the scope of the majority decision.[110] In dicta, Justice Kennedy stated that the state has a legitimate interest and concern over the grave risk to the life and health of a fetus and later child caused by maternal cocaine ingestion.[111] Therefore, Justice Kennedy explained, "South Carolina can impose punishment upon an expectant mother who has so little regard for her own unborn that she risks causing [her child] lifelong damage and suffering."[112] Justice Kennedy clarified that the medical profession may adopt Constitutional criteria for testing expectant mothers for cocaine use in order to provide prompt and effective counseling to the mother and to take proper medical steps to protect the child.[113] If prosecuting authorities discover this information utilizing procedures in compliance with the requirements of the Fourth Amendment, and prosecution follows, the testing is not invalidated.

The implications of the Fourth Circuit's interpretation of the special needs doctrine was that pregnant women are no longer entitled to the protection of the Fourth Amendment because of the potential harm to fetal health. In its decision overruling the Fourth Circuit, the Supreme Court upheld the protections of the Fourth Amendment for pregnant drug addicts. The Supreme Court held that despite the potential harm to the fetus from cocaine exposure, and the interests that

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[108] *See id.* at 1292.
[109] *See id.* at 1293.
[110] *See id.* (Kennedy, J., concurring).
[111] *See id.* at 1294.
[112] *See id.* at 1295 (explaining that the state acts well within its powers and civic obligations by taking special measures to give rehabilitation and training to expectant mothers with this tragic addiction or weakness).
[113] *See id.*

the state has in protecting fetal health, drug addicted mothers are still entitled to Fourth Amendment protections.

Analysis

Although *Ferguson* seems like a step in the right direction, the decision still declines to resolve the maternal fetal conflict. Examining Justice Kennedy's concurrence, we can see that the Court still deems it acceptable to pit the interests of the child against the interests of the mother. Justice Kennedy is concerned with improving the health of the child, but not by improving the health of the mother. Rather than reconciling the interests of the mother and child, and mandating that states have an affirmative responsibility to provide for both the health of the mother as well as her child, the Supreme Court perpetuates the portrayal of the innocent child, who is victim to his drug-abusing, criminal mother. The Supreme Court additionally condones the use of state power to punish drug-addicted mothers in order to protect the health of "innocent" children.

The Supreme Court's perpetration of the maternal fetal conflict and its endorsement of incarceration programs is problematic for several reasons. It is well documented that incarceration programs do not improve fetal health and often have the opposite effect. The major medical drawback to punitive policies with constitutional search procedures is that incarceration programs dissuade pregnant addicts from getting any prenatal care for fear that they will be incarcerated or for fear that their children will be taken away from them. Pregnant drug addicts are the women who are the most in need of medical attention and prenatal care. A regular program of prenatal care and improved maternal nutrition are two of the most effective methods for mitigating the effects of prenatal cocaine exposure.

In addition, punishment programs ignore the medical reality of drug addiction. Designing a program with an incarceration component implies that pregnant drug addicts are physically able to make a choice between using drugs or not using drugs. This ignores the fact that drug addicts, by

virtue of their addiction, cannot simply choose not to use drugs. Addiction is a medical condition and addicts are unable to exercise the power of choice, despite the threat of incarceration.

Ferguson also fails on a legal basis because in 1962, the Supreme Court held that drug addiction was a disease rather than a crime.[114] In addition, in most states drug use is a misdemeanor, but pregnant women are getting prosecuted for felonies such as distribution of drugs to a minor.[115] Therefore, women prosecuted for felonies based on their pregnant status are receiving more punishment than non-pregnant women.[116]

Finally, incarceration programs that focus on mothers who use cocaine are under-inclusive. While the effects of in utero cocaine exposure are still unknown, it is clear that cocaine use alone does not result in severe developmental and intellectual defects. The so-called "crack babies" from the mid-1980s were a byproduct of a mix of factors that included tobacco, alcohol, poverty, poor maternal health, lack of prenatal care, and cocaine. Imprisoning a pregnant cocaine addict does nothing to address these other problems.

At the same time, decisions to punish drug-addicted mothers for child abuse and child endangerment impliedly grant the right to be born free of exposure to illicit substances to the fetus.[117] The state grants this right to a fetus, while simultaneously placing the cost of this right squarely on the shoulders of mothers who can least afford to pay for this right.[118] Rather than helping the mother fulfill her duties by providing accessible prenatal care or gender-specific drug

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[114] *See* Robinson v. California, 370 U.S. 660, 666-67 (1962).
[115] *See* Roberts, *supra* note 41, at 1420, 1445 n.136.
[116] *See* Paltrow, *supra* note 19, at 103 (explaining that it is pregnancy, not the illegality of the substance that makes women vulnerable to state control and punishment).
[117] *See* ROTH, *supra* note 16, at 194 (explaining that fetal rights include the right to be born free of hazards).
[118] *See id.* (explaining that states are burdening women with the responsibility of bringing healthy babies to term, even when these women lack the resources to do so).

treatment, states punish drug-addicted mothers with incarceration and prosecution.

The purpose of the JAMA study is not to advocate using crack cocaine during pregnancy. The New York Academy of Science proceeding points out that most of these children are born already so disadvantaged, that adding cocaine exposure adds little substantive effects. However, in order to do something effective about the problem of prenatal drug exposure, it is necessary to view the mother and the fetus as one continuous entity. If lawmakers want to create a new right for the unborn to be born without exposure to drugs, they should create corresponding rights for women guaranteeing pregnant women access to prenatal care, adequate nutrition, and pregnancy specific drug treatment programs. Resolution of the maternal fetal conflict is one of the most effective ways to improve the health of the fetus.

Courts, legislators, and lawmakers should view the woman and her fetus as one continuous entity. Advancing the interests of one advances the interests of the both. The best way to make significant strides in improving fetal health is to substantively improve maternal well being. Programs providing prenatal care, good maternal nutrition, and pregnancy-specific drug treatment will do more to advance the cause of fetal heath than programs emphasizing incarceration.

Conclusion

Some may consider *Ferguson* a victory because the Supreme Court held that even pregnant drug addicts are entitled to the protections of the Fourth Amendment. The *Ferguson* decision, however, does not go far enough. Justice Kennedy's concurrence endorses the idea that a fetus is separate from its mother, and requires the protection of the state. The concurring opinion limits the *Ferguson* decision and in dicta, explains that a state using legitimate information gathering devices is acting within its powers when it punishes drug addicts.

Rather than focusing on punishment, legislators and policymakers should emphasize the continuity of the mother and the fetus. In order to treat and improve fetal health, legislators and politicians should take some interest in maternal health. In the words of Patricia Williams: "I do not believe that a fetus is a separate person from the moment of conception. How could it be? It is so interconnected, so flesh-and-blood-bonded, so completely part of a woman's body. Why try to carve one from the other? Why does the state have no interest not just providing for, but improving the circumstances of, the woman, whether pregnant or not?"[119]

[119] Williams, *supra* note 74, at 92.

Intention v. Implementation: Are Many Children, Removed From Their Biological Families, Being Protected or Deprived?

VIRGINIA SAWYER RADDING*

Introduction

The abuse and neglect of children understandably evokes a widespread impassioned belief that something should be done to end child maltreatment. Because of differing philosophical perspectives, however, no universal consensus exists as to what that "something" is. The ongoing debate has produced a system that not only rescues children from extremely abusive homes, but also pulls from their homes children who would be better served by efforts more specifically tailored to family rehabilitation. Too many children who had *not* been subject to *extreme* forms of maltreatment have suffered avoidable deprivation of their families. This analysis serves to shed light on the deficiencies of current attempts to help abused and neglected children and to provide suggestions to enhance the efficiency and effectiveness of future efforts.

The majority and dissent opinions in the United States Supreme Court case of *Santosky v. Kramer*[1] reflect the current tensions between at least two of the principal approaches to child welfare efforts: the Parental Preference Doctrine and the pursuit of the best interests of the child. Justice Blackmun,

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[1] 455 U.S. 745 (1982) .

delivering the opinion for the Court, focused on "this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."[2] Justice Blackmun characterized a natural parent's "'right to 'the companionship, care, custody, and management of his or her children'" as "an interest far more precious than any property right."[3] He concluded that this right "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[4]

Dissenting Justice Rehnquist conceded the importance of parents' interests in raising their own children, asserting "few consequences of judicial action are so grave as the severance of natural family ties."[5] He held as equally significant, however, "the often countervailing interests of the child," further stating "a stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being."[6] That Justice Rehnquist would characterize the child's interest as "often *countervailing*" alludes to a modern belief that the best interests of the child are "independent from that of the parent" and distinct from that child's place within the context of a family.[7] Justice Rehnquist did adopt Justice Blackmun's statement that "the child and his parents share a vital interest in preventing *erroneous* termination of their natural relationship."[8] He clarified, however, that the child's interest in this regard exists only to the extent that the relationship would not be harmful to him.[9]

Neither of the philosophical approaches explained in *Santosky* satisfactorily answers the indispensable questions: What is actually in the best interests of the child? How are the

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[2] *Id*. at 753.
[3] *Id*. at 758-59.
[4] *Id*. at 753.
[5] *Id*. at 787 (Rehnquist, J., dissenting).
[6] *Id*. at 788-89.
[7] "To countervail" is defined as "to thwart by opposing force; to avail against," WEBSTER'S COLLEGIATE DICTIONARY 232 (1947).
[8] *Santosky*, 455 U.S. at 760 (emphasis added).
[9] *Id.* at 790.

potential for and level of harm determined? Other questions arise in the midst of the complicated balancing that must occur between the rights of the parent, the child, and society. What is the appropriate level of intrusion by the State into the family? How is the tension between meeting "*both* the child's need for a stable loving home and the maintenance of his earlier family ties"[10] best addressed? When are children protected, and when are they actually being subjected to "unfair and untimely disruptions of their relationships with their parents?"[11]

The California Supreme Court in *In re B.G.* underscored the importance of avoiding parent-child disruptions, quoting California's Third Appellate District as stating:

> [a]lthough a home environment may appear deficient when measured by dominant socioeconomic standards, interposition by the powerful arm of the public authorities may lead to worse alternatives. A juvenile court may possess no magic wand to create a replacement for a home which falls short of ideal.[12]

A child may be subjected to years of bouncing among temporary living situations.[13] Emotional bonds with parents, siblings, grandparents and extended family may be destroyed, and the child is not guaranteed a replacement family through adoption.[14] Practically speaking, severing a child's ties to his natural parents result in the child's loss of his rights to be

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[10] Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 396 (1996) (emphasis in original).

[11] Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1191 (1999).

[12] *In re* B.G., 523 P.2d 244, 254 (Cal. 1974) (quoting *In re* Ray*a*, 255 Cal. App. 2d 260, 265 (1967)). Justice Blackmun echoed these concerns in *Santosky*, stating that "even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare." *Santosky*, 455 U.S. at 766 n.15.

[13] *See generally In re. B.G.*, 523 P.2d at 247-48.

[14] Cahn, *supra* note 11, at 1190.

supported by them and to inherit from them. Unless adopted, the child can no longer expect a future as something other than one of society's dependents and, in fact, is raised in a world of dependency.[15]

This paper addresses the difficult questions posed for those abused and neglected children covered by section 300 of the California Welfare and Institutions Code who have been subjected to abuse other than *extreme* abuse, whether physical or psychological, including sexual abuse.[16] Under section 300, a county social worker who reasonably believes that a child is in immediate need of medical care, is in immediate danger of physical or sexual abuse, or whose health or safety is threatened, may remove that child from her parents' custody.[17] However, before removing the child, a social worker must consider whether services reasonably could be provided "to eliminate the need to interfere with parental custody."[18] The author argues that some removal and failure to reunify occurs due to ill-defined standards, misdirected funding, and ineffective provision of services. While many instances of intrusion into the sanctity of the family are legitimate and necessary, some, however well-intentioned and seemingly justified, are actually unwarranted, avoidable, and detrimental.

The author explores the conflicting philosophies driving the various approaches to child welfare. A summary of the historical progression of State child welfare intervention follows in Part II, briefly discussing catalysts, motivations,

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[15] *Santosky*, 455 U.S. at 761 n.11.

[16] This paper does not consider instances of extreme physical, psychological, and sexual abuse for which The Adoption and Safe Families Act of 1997 has stated that reasonable preservation and reunification efforts are not required, i.e., "aggravated circumstances" such as parental abandonment, torture, chronic abuse, sexual abuse of the child, or serious bodily injury or homicide of any of his/her children. 42 U.S.C. § 671(a)(15)(D) (2000).

[17] Catherine A. Caputo & Diane L. Webb, In re Sade C.*: How Much Process is Due Indigent Parents in Appeals of Dependency Proceedings That Adversely Affect Parental Rights?*, 32 U.S.F. L. REV. 197, 199 (1999).

[18] *Id.*

and results. Specific attention is focused on the existing mandates of the Adoption and Safe Families Act (ASFA).[19] Part III exposes the societal forces of poverty and racial bias as undercurrents increasing the momentum of family disruption. The author examines the resource mismanagement and time constraints that undermine efforts of agencies and families to meet children's needs. Finally, Part V offers solutions to enable the Child Welfare System to more effectively and efficiently protect children's health and safety and provide for their best interests.

Part One
Background: The Philosophical Tensions

Two divergent philosophies have historically driven the various efforts aimed at the protection of children from familial abuse and neglect. First, the Parental Preference Doctrine, explained and relied on in *Santosky*, upholds parents' established right to freedom of personal choice in family matters.[20] Parents have a fundamental liberty interest, protected by the Fourteenth Amendment of the United States Constitution, in the care, custody and management of their children.[21] While described as a "superior right against all others,"[22] however, the parental right is protected only insofar as the State is able to protect its own compelling interest in the health, welfare, and safety of its children.[23] Thus, another undeniable consideration is the Parens Patriae Doctrine, in which the State as ultimate protector may safeguard children by invading the familial sanctum to separate abusive and

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[19] Publ. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.); *see* Mary O'Flynn, *The Adoption and Safe families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243, 255 (1999).
[20] *Santosky*, 455 U.S. at 753.
[21] *Id*.
[22] *In re* A.B., 719 N.E.2d 348, 358 (Ill. App. Ct. 1999); *In re* M.J., 732 N.E.2d 790, 795 (Ill. App. Ct. 2000).
[23] Gregory A. Kelson, *In the Best Interest of the Child: What Have We Learned from Baby Jessica and Baby Richard?*, 33 J. MARSHALL L. REV. 353, 373-74 (2000).

neglectful parents from their children.[24] The State's children constitute a valuable resource in that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[25]

Now, after a long evolution, recognition of and respect for children's rights has added to the complexity of child protection efforts.[26] For an extended period, courts did not honor independent rights for children. [27] Then as the parens patriae doctrine grew in popularity and application, the needs of children received greater attention and respect. Their interests came to be considered separately from those of adults.[28] Over several centuries, children evolved from being viewed solely as chattel to being considered worthy of protection and rescue from poverty and exploitation.[29]

Children's rights have steadily expanded as the growing recognition of their individual interests have de-emphasized parental rights.[30] In 1967, the United States Supreme Court theorized in *In re Gault* "that children may be entitled to the same due process protections afforded adults."[31]

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[24] *Id.* at 373.
[25] Prince v. Massachusetts, 321 U.S. 158, 168 (1944).
[26] Sharon J. Fleming, *Custody Standards in New Mexico: Between Third Parties and Biological Parents, What is the Trend?*, 27 N.M. L. REV. 547, 573 (1997).
[27] *Id*.
[28] *Id*.
[29] *Id*. at 573 n.186.
[30] *Id*. at 564 ("However, while the name of the ['best interests of the child'] doctrine has remained the same, the presumptions behind the doctrine have changed. As a basis for the 'best interests' standard, the parental rights presumption has become less favored in New Mexico and other jurisdictions. Instead, there has been an increased emphasis on both relationships criteria and children's rights in child custody determinations.").
[31] *In re Gault*, 387 U.S. 1, 13 (1967); *see also* Fleming, *supra* note 26, at 573 n.188 ("The United States Supreme Court case *In re Gault*, 387 U.S. 1 (1967), is generally considered to have begun a new era in which the children's rights movement gained momentum. The Supreme Court recognized that children may be entitled to the same due process protections afforded adults.").

Three more recent United States Supreme Court cases have recognized children's liberty interests in expression, religion, and privacy as balanced against the interests of both the parents and the State.[32] Additionally, in 1979, the United States Supreme Court, in *Belloti v. Baird*, asserted that "a child, merely on account of his minority, is not beyond the protection of the Constitution."[33] The Court further stated that its cases showed that "children generally are protected by the same constitutional guarantees against governmental deprivations as are adults."[34]

Therefore, in addition to the interests of either the natural parents or the state, the child's interest has become a vital concern, often considered separately from the interests of the child's parents and third parties.[35] Unfortunately, the phrase "child's bests interests" is one that is frequently used, despite remaining ill-defined.[36] Some critics of the modern casual and frequent usage of "best interests of the child" claim

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[32] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Wisconsin v. Yoder, 406 U.S. 205 (1972); Fleming, *supra* note 26, n.143 (citing Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969)).

[33] Bellotti v. Baird, 443 U.S. 622, 633 (1979).

[34] *Id*. at 635, stating in entirety: "Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account of children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'" (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971)).

[35] Fleming, *supra* note 26, at 568, 578.

[36] Kelson, *supra* note 23, at 371. *But see* Fleming, *supra* note 26, at 557, wherein Fleming credits New Mexico with having statutorily mandated a "best interest" test based on the following five criteria, judicially creating the sixth:

> (1) the wishes of the child's parent/s as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interest;
> (4) the child's adjustment to his home, school, and community
> (5) the mental and physical health of all individuals involved; and
> (6) the potential negative effect that a custody change may have on a child.

that it does not provide enough protection for parental rights.[37] Others point out that the standard is too vague because guiding criterion is nonexistent, leaving its application vulnerable to biases.[38] Still others argue that the child's best interest cannot be evaluated independently from consideration of the primary adults. They propose that analysis should be conducted within the framework of the parent/child relationship and the child's needs evaluated within the context of her family relationships.[39] Professor Naomi R. Cahn of George Washington University Law School expresses this latter viewpoint as follows:

> Moreover, a sole focus on parent or child, or even a focus solely on the parent/child relationship, overlooks the child as a family and a community. A family includes not just parent(s) and a child, but also siblings, grandparents, and other relatives. In determining removal, foster care placement, reunification, and adoption, the child's interests must include a consideration of her relationships with these other people.[40]

In former California Civil Code section 4600,[41] the California legislature attempted to provide a remedy through the Family Law Act by requiring, specifically as a part of considering the child's best interests, that the "least detrimental" placement be chosen for the child.[42] The California Supreme Court in *In re B.G.* interpreted the new

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[37] Kelson, *supra* note 23, at 372.
[38] *Id*.
[39] Cahn, *supra* note 11, at 1212.
[40] *Id*. at 1210.
[41] "Family Code section 3041 is a recodification 'without substantive change' of former Civil Code section 4600, subd. (c). . . ." Guardianship of Stephen G., 40 Cal. App. 4th 1418, 1423 (1995); *see also* Guardianship of Simpson, 67 Cal. App. 4th 914, 928 n.10 (1998).
[42] CAL. FAM. CODE § 3041 (Deering 2000) ("Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it must make a finding that an award of custody to a parent would be *detrimental* to the child, *and* the award to a nonparent is required to serve the *best interests* of the child . . . .") (emphasis added).

rule as requiring the court to find that parental custody of the child would be "detrimental to the child" *and* that placement elsewhere was "required to serve the best interests of the child."[43] The "least detrimental placement away from a child's parents" was defined by the Court "as one which is 'essential to avert harm to the child.'"[44]

Part Two
Legislative History: The Swinging Pendulum

The compelling forces of a State's right to protect its children and the modern concern for children's best interests combined to pull societal sentiment away from viewing children as parents' property. This shift in society's values resulted in a series of policy changes in the development of child welfare efforts that have vacillated between removal of children from maltreatment and family preservation.

In 1974, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), marking the beginning of active federal involvement in child welfare policy.[45] The child welfare policy of the CAPTA era "focused primarily on removal of children from unsafe environments rather than on prevention services or family reunification."[46]

Then, in 1977, the United States Supreme Court in *Smith v. Organization of Foster Families for Equality & Reform* scrutinized the Child Welfare System of New York and found that the sole emphasis on removal of mistreated children had unacceptable consequences.[47] Children were remaining in foster care for several years, in large part due to funding incentives, lack of reunification services, and social

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[43] *In re* B.G., 523 P.2d 244, 255 (Cal. 1974).
[44] Fleming, *supra* note 26, at 567 n.156 (quoting *In re* B.G., 523 P.2d 244, 258 (Cal. 1974)).
[45] O'Flynn, *supra* note 19, at 248.
[46] *Id*. at 249.
[47] Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 833-38 (1977).

worker bias against reunification.[48] Many children experienced multiple placements with various poorly trained foster parents, some of whom inflicted additional abuse.[49] The Court found not surprising, therefore, that nationwide evidence indicated high rates of psychiatric disturbance among children in foster care.[50]

Congress, responding to this untenable situation, ratified the Adoption Assistance and Child Welfare Act of 1980 (CWA).[51] To prevent children from being adrift in foster care, the Legislature adopted the alternative approach of placing a strong emphasis on family preservation and reunification.[52] Federal funding incentives now had a new purpose: "to prevent unnecessary removal of children from families, to provide family preservation services, to reunify families when possible and to shorten the time spent in foster care by promoting adoption . . . ."[53] The states now had to make "reasonable efforts to prevent the removal of children from their families and to promote reunification of children with their biological families."[54]

The CWA required that reasonable efforts be made for reunification but did not define what constituted "reasonable efforts."[55] Once again, ambiguity allowed different

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[48] *Id.* at 834-37; O'Flynn, *supra* note 19, at 249.
[49] *Smith*, 431 U.S. at 836-37.
[50] *Id.* at 836 n.40 (quoting Leon Eisenberg, *The Sins of the Fathers: Urban Decay and Social Pathology*, 32 AM. J. OF ORTHOPSYCHIATRY 5, 14 (1962).)
[51] Pub. L. No. 96-272, 94 Stat. 500 (codified in 42 U.S.C. §§ 620 et seq. and 670 et seq.); *see* O'Flynn, *supra* note 19, at 250.
[52] O'Flynn, *supra* note 19, at 250.
[53] *Id.* at 251.
[54] *Id.* at 252.
[55] Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children From the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 453-55 (1997) [hereinafter *Poverty*]. After presentation of the indefiniteness of the "reasonable efforts" term, the authors set forth Minnesota's standard as follows: "the juvenile court is required to determine if services were:

(1) relevant to the safety and protection of the child;
(2) adequate to meet the needs of the child and family;
(3) culturally appropriate;
(4) available and accessible;

interpretations and inconsistent results.[56] Biases or misperceptions could work against the desires and efforts of parents to reunify with their children.[57] Conversely, if a case worker or judge strongly favored parental rights, a child could be put at risk in being left with or returned to an abusive or neglectful parent.[58] In fact, several news reports recounted stories of children whom agencies had failed to remove from or had returned to dangerous homes, only to be killed or maimed as a result.[59] These incidents incited public outrage and political pressure to swing the policy pendulum back towards separating the child from the parents.[60] A responsive Congress passed the Adoption and Safe Families Act in 1997.[61]

The ASFA has two main goals: to better define the "reasonable efforts" requirement; and to diminish "foster care

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(5) consistent and timely; and
(6) realistic under the circumstances."

[56] O'Flynn, *supra* note 19, at 253.

[57] *See* Santosky v. Kramer, 455 U.S. 745, 762 (1982) ("Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge"); s*ee also* O'Flynn, *supra* note 19, at 253 (giving various examples of questionable use of discretion and intrusion of personal values in judgment such as unjustifiably excusing inadequate agency efforts as not being within the child's bests interests; or judicial discounting of visits and communications as demonstrating lack of affection).

[58] Cahn, *supra* note 11, at 1197 ("the reasonable efforts requirement in the 1980 legislation had been interpreted by many jurisdictions as a requirement that agencies undertake all possible efforts to reunify or preserve the family unit, without regard to the welfare of the children."); *see also* O'Flynn, *supra* note 19, at 254. *See generally* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989); S.S. ex rel. Jervis v. McMullen, 225 F.3d 960 (8th Cir. 2000).

[59] O'Flynn, *supra* note 19, at 254.

[60] *Id*.

[61] *Id*.; s*ee also* Cahn, *supra* note 11, at 1191, 1196 ("In the hearings that culminated in the 1997 ASFA legislation, witnesses repeatedly emphasized the problems resulting from the provisions in the 1980 law that required reasonable efforts be made to reunify troubled families. Witnesses to the hearings… recounted the physical, emotional, and sexual abuse visited upon children as a result of their return to the custody of biological parents…").

drift" by promoting adoption.[62] To address the first goal, the ASFA makes plain that "reasonable efforts" does not mean "all possible efforts to reunify or preserve the family unit."[63] The ASFA specifies that "aggravated circumstances" of "abandonment, torture, chronic abuse, and sexual abuse" obviate the need for family preservation or reunification efforts.[64] "Finally, the Act clarifies that children's safety concerns are the paramount consideration in any family preservation, foster care, or adoption efforts."[65]

The ASFA includes two strategies to further the second goal of facilitating permanency for children who have been removed from their homes. First, it mandates accelerated time periods within which agencies must either reunify the family or permanently terminate the parents' rights in order to free the child for adoption.[66] In summarizing the new expedited process, Professor Cahn explains that now a state must "seek to terminate parental rights for children who have been in foster care for fifteen out of the previous twenty-two months."[67] "Time-limited family reunifications services," as specified in the ASFA, are provided "only during the 15-month period that begins on the date that the child . . . is considered to have entered foster care."[68] In addition, the state must hold a permanency hearing within the first twelve months (decreased from eighteen months) of a child's entry into foster care.[69] Cahn also points out that "as an additional

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[62] O'Flynn, *supra* note 19, at 254; Cahn, *supra* note 11, at 1197.
[63] *Id.* (relating testimony at hearings preceding ASFA's enactment that many jurisdictions had interpreted "reasonable efforts" as "all possible efforts to reunify or preserve the family unit, without regard to the welfare of the children").
[64] O'Flynn, *supra* note 19, at 254-55.
[65] Cahn, *supra* note 11, at 1198.
[66] *Id.* at 1197.
[67] *Id.*
[68] 42 U.S.C. § 629a(a)(7) (2001); *see also*, O'Flynn, *supra* note 19, at 257 (listing also the services provided, but stating that "these services and funding are currently inadequate").
[69] Cahn, *supra* note 11, at 1197.

method of promoting adoption, the legislation authorizes financial incentives of up to $6,000 per child adopted."[70]

Part Three
Societal Context: The Influence of General Inequities

Society's advance in the area of child welfare is evident in its philosophical expansion and the swinging evolution of its child welfare policy. Children's best interests, in addition to parental rights and States' interests, now are being respected. Legislators, heedful of the dire consequences of previous mistakes, have attempted to draw the policy pendulum to a midpoint through the double-pronged approach of the ASFA. Unfortunately, poverty and race, two insidious but avertable societal forces, prevent the pendulum from coming to rest. Thus, in the midst of many legitimate rescues, inequitable State intrusion into the established sanctity of the family continues.

The Role of Poverty

Poverty and child maltreatment are interwoven in many respects.[71] Deans Daan Braveman and Sarah Ramsey of Syracuse University College of Law describe this tragic tapestry as follows:

> Poverty is associated with insufficient, unsafe housing and even homelessness. Poverty is linked with poor nutrition, a lack of medical care, inadequate daycare, poor educational facilities, and psychological feelings of

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[70] *Id*. at 1197-98; O'Flynn, *supra* note 19, at 265.

[71] *Poverty*, *supra* note 55, at 461; Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 739-41 (1998) (describing the particular daily difficulties in child-rearing that poverty imposes on women, increasing the likelihood that they will lose their children, either temporarily or permanently, to State intervention); O'Flynn, *supra* note 19, at 265; *see also*, Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 586 (1997).

> helplessness and stress. Any one of these conditions could support an allegation of specific harm. Poverty is also linked to physical abuse. Analyses of date from the Second National Family Violence Survey show, for example, that the high rate of abusive violence among single mothers appears to be a function of the poverty that characterizes mother-only families.[72]

Not surprisingly, then, a large percentage of families involved in the Child Protection System are living in poverty.[73] Poor families' high representation in the system may be due not only to the reality of their circumstances, but also to the fact that poor people are more regularly visible to the government and are more likely to be reported for maltreatment.[74] They are more likely to utilize services such as public clinics,[75] emergency rooms, and public transportation.[76] Their private lives are more likely to be displayed to governmental building inspectors and governmental financial assistance.[77] Furthermore, as

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[72] *Poverty*, *supra* note 55, at 461.

[73] Cahn cited an Illinois study which found that almost ten percent of children were removed because of "environmental neglect," which term refers to inadequate food, shelter and clothing "rather than any deliberate actions on the part of the parent; and another twelve percent were removed for lack of supervision." Cahn, *supra* note 11, at 1198-99. *See also* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 833 (1977); Appell, *supra* note 71, at 584.

[74] Appell, *supra* note 71, at 585; *Poverty*, *supra* note 55, at 461 (citing the National Center on Child Abuse and Neglect, Study Findings: *Study of National Incidence of Child Abuse and Neglect*: 1988, 5-25 to 5-29 (1988)) (noting that children from families with incomes under $15,000 were reported maltreated at five times the rate of other children).

[75] *Poverty*, *supra* note 55, at 462 (citing a study that suggests "a substantial underreporting of abuse in middle and upper-income households because private medical providers are less likely to report abuse." Robert L. Hampton & Eli H. Newberger, *Child Abuse Incidence and Reporting by Hospitals: Significance of Severity, Class and Race*, *in* COPING WITH FAMILY VIOLENCE: RESEARCH AND POLICY PERSPECTIVES 212, 215 (Gerald Hotaling et al. eds., 1988)).

[76] Appell, *supra* note 71, at 584; Murphy, *supra* note 71, at 739.

[77] Appell, *supra* note 71, at 585; Cahn, *supra* note 11, at 1199-1200.

Professor Annette Appell[78] explains, "[t]hese mothers do not have access to affordable childcare. They depend on informal kinship and community networks for babysitting."[79] In doing so, poor mothers may be at risk for being accused of neglecting their children.[80]

The Role of Race

Race also plays a significant role in the disruption of families through State intervention. While "there is no correlation between race and rates of child maltreatment," a disproportionately large percentage of families involved in the Child Welfare System are people of color.[81] For instance, although the general population is comprised of fifteen percent African-American children, they represent thirty-nine to forty-two percent of the foster care population.[82]

Such inequality has a strong likelihood of rendering parental rights termination proceedings "vulnerable to judgments based on cultural or class bias," according to Justice Blackmun.[83] Incriminating statistics bear this out. The U.S. Department of Health and Human Services has determined that among families having similar characteristics, African-American children are much more likely to be placed in foster care and remain there longer than white children.[84] Significantly, seventy-two percent of abusive or neglectful white families within the system receive in-home services as compared to only forty-four percent of such African-American families.[85] Appell reports:

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[78] As of 1997, Annette R. Appell was an assistant law professor for the University of South Carolina Law School.
[79] Appell, *supra* note 71, at 585.
[80] *Id*. at 585-86.
[81] *Id*. at 584 & n.35 (citing ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-3) 7-8 (1996).
[82] *Id*. at 584 n.35.
[83] Santosky v. Kramer, 455 U.S. 745, 763 (1982).
[84] Cahn, *supra* note 11, at 1198.
[85] *Id*. at 1212.

> Studies have shown that although African-American women and white women of all income levels use drugs and alcohol at similar rates (with higher rates for white women), African American women are drug-tested during delivery more often than white women, and when both are tested, black women are reported to child welfare authorities for prenatal drug use at a significantly higher rate than their white sisters.[86]

Cultural differences with regard to appropriate childcare contribute to the reflected racial bias in intervention. For example, as in low-income families, kinship care is prevalent in nonwhite communities; however, when compared to a white middle-class norm of Mother as primary care-giver, this custom may be viewed as an abrogation of maternal duty.[87] The age at which children are deemed competent to care for younger siblings vary significantly among ethnic groups.[88] Additionally, studies have revealed differences among African-American, Hispanic, and white subjects on ratings of specific child maltreatment indicators.[89] Consequently, families may be held to a narrow standard that is conceptually foreign to them, indifferent to their communal network, or beyond their financial capacity.

Part Four
Specific System Failures:
The Death of Intention in Implementation

Within the broader social context of poverty and racial bias, the Child Welfare System directly fails many maltreated

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[86] Appell, *supra* note 71, at 588.
[87] *Id*. at 586.
[88] James M. Gaudin, Jr., *Child Neglect: A Guide for Intervention, U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, National Center on Child Abuse and Neglect, at* http://www.calib.com/nccanch/pubs/usermanuals/neglect/define.cfm (last visited Nov. 5, 2001).
[89] *Id*.

children by not effectively addressing the needs of families capable of rehabilitation. Mandated time constraints may be causing more detriment than accomplishing good, particularly in circumstances of substance abuse.[90] Programs are ill-designed or sorely lacking in number.[91] Funding is being misdirected[92] so that services necessary to preserve deserving families are unavailable to them. In fact, one-fourth of the cases involving substantiated maltreatment may receive no services at all.[93] Exacerbating that unfairness are judicial findings that the "reasonable efforts" requirement has been satisfied specifically because of current service unavailability.[94] Additionally, caseworkers' ability to provide needed assistance suffers due to inadequate training and monitoring, unmanageable caseloads, uncorrected biases, and inaccessible resources.[95]

The creators of the ASFA, in pursuit of the worthy goal of permanency for abused and neglected children, drafted a two-pronged approach apparently intended to promote and facilitate adoption. The increased-adoption effort is fueled by the strong influence of funding incentives for states and is driven by accelerated time lines for termination of parental rights. First, rather than adequately supporting rehabilitative services to reunify families, the ASFA makes money available to a state based on the number of foster child adoptions it

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[90] Cahn, *supra* note 11, at 1201-02; O'Flynn, *supra* note 19, at 247.
[91] O'Flynn, *supra* note 19, at 262.
[92] Executive Summary, *Protecting Children From Abuse & Neglect*, 8 THE FUTURE OF CHILDREN NO. 1 (Spring 1998), *at* http://www.futureofchildren.org/pubs-info3133/pubs-info.htm?doc_id=78916 (last visited Nov. 5, 2001) [hereinafter *Executive Summary*]; *see also* O'Flynn, *supra* note 19, at 246.
[93] *Executive Summary*, *supra* note 92.
[94] *Poverty*, *supra* note 55, at 456 (citing *Foster Care, Child Welfare, and Adoption Reforms, 1988: Joint Hearings Before the Subcomm. On Pub. Assistance and Unemployment Compensation of the House of Representatives Comm. on Ways and Means and the Select Comm. on Children, Youth, and Families*, 100th Cong. 252 (1988) (testimony of Rep. George Miller, Chairman, Select Comm. on children, Youth, and Families).
[95] *Executive Summary*, *supra* note 92.

completes.[96] Specifically, a state may receive several thousand dollars per foster child adoption that exceeds a certain number in a fiscal year.[97]

The other prong of the ASFA, expedited termination of parental rights, has especially far-reaching consequences. In addition to the previously mentioned poverty and racial bias in the Child Welfare System, substance abuse by parents is another major reason children enter foster care.[98] The U.S. General Accounting Office determined that between 1986 and 1996, eighty percent of abuse and neglect cases involved single mothers with substance abuse problems.[99] The same office also found that among the children in the U.S. Child Welfare System, two-thirds had at least one parent who engaged in substance abuse.[100] The U.S. Department of Health and Human Services reported that in up to seventy percent of child neglect cases, substance abuse is a factor.[101] Even with such information available, the ASFA provides neither funding nor coordination with other social service systems to address parental substance abuse.[102] To the contrary, money for substance abuse treatment has actually decreased.[103] The Child Welfare League of America (CWLA) reported that "half of all states spend no child welfare funds for substance abuse treatment."[104]

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[96] O'Flynn, *supra* note 19, at 265.
[97] *Id.*
[98] *Id.* at 258.
[99] *Id*. at 245.
[100] *Id*. (citing U.S. GENERAL ACCOUNTING OFFICE GAO//HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS, THE CHILD WELFARE SYSTEM, AND FOSTER CARE OUTCOMES 4 (1997)).
[101] Gaudin, *supra* note 88.
[102] O'Flynn, *supra* note 19, at 259.
[103] *Id*. at 246 (citing U.S. DEP'T OF HEALTH AND HUMAN SERVS., BLENDING PERSPECTIVES AND BUILDING COMMON GROUND, A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILD PROTECTION, App. C at 1, *available at* http://aspe.dhss.gov/hsp/subabuse99/subabuse.htm (last visited Mar. 9, 1999)).
[104] *Id*. at 263 (citing U.S. GENERAL ACCOUNTING OFFICE, GAO/HEHS-98-182, FOSTER CARE: AGENCIES FACE CHALLENGES SECURING HOMES FOR CHILDREN OF SUBSTANCE ABUSERS 5 (1998)).

The time limits set by the ASFA are unrealistic for families with addicted parents. According to 1998 findings by the CWLA, "only ten percent of child welfare agencies were able to find substance abuse treatment programs for needy clients within thirty days."[105] Even if much-needed effective drug programs were available, allowing parents to avoid being wait-listed or denied admittance, addictions are not subject to a quick fix.[106] Furthermore, as Mary O'Flynn, J.D., explains in her analysis of ASFA, "success rates are higher for those [substance abusers] who remain in treatment for greater lengths of time."[107] Consequently, while children should not languish in temporary living arrangements, the mandated time constraints themselves may be unattainably short for some worthy families.[108] Under the ASFA, children can become "available for adoption by strangers in little more than a year,"[109] even when parents are cooperative and the children would like to return home.[110]

Many of the programs that are available are ineffectively designed. Most substance abuse treatment programs are designed for men rather than women.[111] Female addiction often stems from mental illness and sexual abuse, and existing programs are not tailored to adequately address these underlying issues.[112] A second essential consideration for a mother in drug rehabilitation is the importance of her

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[105] *Id*. at 261.
[106] *Id*. at 258 ("Drug dependency has been described as a chronic, relapsing condition for which there is no fast cure, but rather a lifetime process of recovery. Cessation of services in the time-limited manner overlooks the importance of continued support that could mean the difference between relapse or recovery for the parent"); *see also*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., BLENDING PERSPECTIVES AND BUILDING COMMON GROUND, A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILD PROTECTION 1 (1999), *available at* http://aspe.dhss.gov/hsp/subabuse99/chap1.htm (last visited Nov. 5, 2001).
[107] O'Flynn, *supra* note 19, at 263.
[108] *Id*. at 258.
[109] *Id*. at 247.
[110] Cahn, *supra* note 11, at 1201.
[111] O'Flynn, *supra* note 19, at 262.
[112] *Id*.

children to her.[113] Again, drug treatment facilities do not sufficiently address female parental concerns and rarely provide for childcare. As a result, women may drop out of treatment programs, or attempt to avoid them to keep their children out of foster care.[114] When such an attempt proves futile, a downward spiral may begin: the children are taken away from the addicted mother until she "gets straight;" she falls into a depression and self-medicates; and finally she loses her children permanently.

Caseworkers also are severely hampered by inadequate funding, in turn negatively affecting chances for family preservation.[115] The problem as summarized by the Packard Foundation is that "caseworker decisions about specific cases are the heart of the child protection, but the CPS system has only a limited capacity to tailor its response to individual conditions."[116] First, the lack of resources often prevents caseworkers from being able to provide families with services necessary for their reunification.[117] Competitive salaries that presumably would entice and retain more professionally trained workers are not offered. The Packard Foundation reported in 1998, "Fewer than one-third of [Child Protection Service's] direct staff hold social work degrees. In 1995, the median salary for caseworkers with master's degrees in social work was under $33,000."[118]

Therefore, as many agencies are understaffed and overworked, less time is available to each worker to thoroughly assess the risk to the child, evaluate family needs and make appropriate referrals to services.[119] The caseload of many workers is so great that the temptation exists to resort to a "cookie cutter approach" and the use of generic forms rather

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[113] *Id.*; *see also*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 106, at 6.
[114] *See also* O'Flynn, *supra* note 19, at 262; U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 106, at 5.
[115] Cahn, *supra* note 11, at 1214.
[116] *Executive Summary*, *supra* note 92.
[117] Cahn, *supra* note 11, at 1217.
[118] *Executive Summary*, *supra* note 92.
[119] Appell, *supra* note 71, at 601.

than develop a customized reunification plan collaboratively with the parents.[120] Additionally, as previously discussed, needs may be "defined according to what services are currently available."[121] Underfunding also results in lack of proper and ongoing training and monitoring of staff.

Part Five
Solutions: The Recommended Treatment

Current funding merely applies a dressing to the wound of child abuse. Abused and neglected children continue to hemorrhage into foster care. Child protection efforts, to work more effectively and efficiently for the children who could unnecessarily lose their families, should use a "purse-string" suture to heal the wound at its source. A "purse-string" suture would surround the open area and draw it closed from various angles.[122] Likewise, ample funding should be applied directly to all of the various underlying challenges of child protection. Standards should be clarified and working definitions established for uniformity and consistency. Family poverty should be reduced and adequate services provided. Programs should be available in sufficient number and redesigned to effectively address the problems of the population they are attempting to assist. When low-risk abuse and neglect is identified, as early as possible, an individualized, customized plan to address the problems should be collaboratively developed with the family. Efforts to assist maltreated children should

> [s]ecure for each child the care and guidance, preferably in the child's own home, that will serve the moral, emotional, mental, and physical welfare of the child and the best interests of the community; [and] to preserve and strengthen the child's family ties unless

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[120] *Id*.
[121] *Id*.
[122] Conversation with Dr. Aenor J. Sawyer, Pediatric Orthopedic Surgeon, Webster Orthopedic Medical Group, in Stanford, Cal. (Apr. 29, 2001).

> efforts to preserve and strengthen the ties are likely to result in physical or emotional damage to the child . . . .[123]

This premise directs a balance in protecting the child's best interest, the sanctity of the family and the interests of the State. However, to implement the mandate requires a uniform definition of what constitutes "reasonable efforts" and "best interests."

New Mexico has proposed a good "best interest" test, which should be adopted as presented here with slight modification and without regard to order of importance.[124] When trying to determine what is in the best interests of a child, a State should consider: (1) the parents' wishes as to the child's placement; (2) the child's wishes as to her placement; (3) the child's interaction and interrelationship with any person who may significantly affect the child's best interests, e.g., parents and siblings; (4) the child's adjustment to her home, school, and community; (5) the mental and physical health of all individuals involved; and (6) the potential negative effect that a change in the child's living arrangements will have on her.[125]

Under Minnesota's "reasonable efforts" standard, "the juvenile court is required to determine if services were: (1) relevant to the safety and protection of the child; (2) adequate to meet the needs of the child and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances."[126] A similar standard should be adopted if drafted to eliminate the possibility that the fourth criterion could be interpreted as meaning that reasonable efforts are deemed satisfied if the service is *not currently* available or accessible. Also, a seventh criterion should require amending the ASFA to

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[123] Charles Talley Well, Jr., *Protecting Alaska's Children from Neglect: The Appropriate Legislative Response to* In re S.A. *and* R.J.M. v. State, 14 ALASKA L. REV. 501, 520 (1997).
[124] Fleming, *supra* note 26, at 557.
[125] *Id.*
[126] *Poverty*, *supra* note 55, at 455 n.69.

incorporate time parameters specifically directed towards accommodating the particular realities of substance abuse recovery. The standard as a whole requires a customization of the child protection efforts to each individual case and consistently should be so interpreted.

With the law's purpose and these new standardized working definitions in mind, focus should be placed on long-term benefit. The State could satisfy its compelling interest in protecting its vulnerable minor citizens from poverty-induced child abuse and neglect by dedicating public money to assist impoverished families.[127] Professor Cahn suggests that monies spent "well before a child is removed, at the time of initial identification of risk, could prevent escalation of the abuse or neglect as well as a foster care placement."[128] The CWLA states that, with services, eighty percent of families in the system can be taught the skills they need to live together safely.[129] Significantly, commentators point out that no additional monies need be added to the Child Protection System's coffers, if funds earmarked for foster care were thus redirected.[130] The Packard Foundation reports that "governments spend an estimated $813 per case on investigations, $2,702 on services to families, and $22,000 per case each year on residential and foster care."[131] Based on similar figures, Cahn points out that "[g]iven the disparities between the amount of money expended when a child remains in her home as opposed to being placed in foster care, maintaining in-home placements could be supported without additional money."[132] Therefore, funds should be redirected to provide family support, life-skills training, and basic material needs. Where necessary for the safety and well-being of the child, these poverty-based services should include:

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[127] *Poverty*, *supra* note 55, at 463; Cahn, *supra* note 11, at 1213 ("Given the relationship between poverty and neglect, more public welfare funds and better support for poor working parents might obviate the need for any involvement with the abuse system.").
[128] Cahn, *supra* note 11, at 1213.
[129] O'Flynn, *supra* note 19, at 267.
[130] *Poverty*, *supra* note 55, at 463; Cahn, *supra* note 11, at 1213-14.
[131] *Executive Summary*, *supra* note 92.
[132] Cahn, *supra* note 11, at 1213.

housing; food; transportation assistance; parenting skills; employment and housing searches; coordination with public services; domestic violence intervention; anger management; and child care for working parents.[133]

Full consideration of the issues requires acknowledgement of Littell's and Schuerman's statement regarding their research on family preservation services.[134] Even though they found that "in the studies reviewed so far, rates of [foster care] placement in the groups provided family preservation services were quite low,"[135] they stated that they would not conclude that the services could be credited with the results.[136] Their reasoning was that "we cannot be sure what would have happened to these cases in the absence of services."[137] This author believes that where the results are good, and children are being helped within their families, we need not experiment with these children's lives to prove that the results otherwise would be bad.

Substance abuse programs are another area within the Child Protection System sorely in need of improvement in funding, availability, design, and implementation. Available substance abuse programs need to be much more plentiful,[138] not only because of the unrealistic time constraints of the ASFA in this regard, but because treatment for addiction can be effective.[139] The implications of treatment effectiveness are significant. Where substance abuse is the sole criterion for child removal, parents among the estimated one-third who

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[133] *Id*. at 1214.

[134] JULIA H. LITTELL & JOHN R. SCHUERMAN, *A SYNTHESIS OF RESEARCH ON FAMILY PRESERVATION AND FAMILY REUNIFICATION*, *at* http://aspe.os.dhhs.gov/hsp/cyp/fplitrev.htm. (last visited Nov. 5, 2001).

[135] *Id*. Littell and Schuerman reported the results of a study conducted on the intensive, in-home service Families First program in Davis, California, as follows: "One year after intake, 25 percent (15) of the 59 children in the in-home services group were placed compared with 53 percent (26) of 49 children in the comparison groups (a statistically significant difference)."

[136] *Id*.

[137] *Id.*

[138] O'Flynn, *supra* note 19, at 260.

[139] *Id*. at 263.

succeed under substance abuse treatment on their first try[140] could be reunited with their children. Treatment programs designed for women and addressing a full range of needs are particularly effective, resulting in high rates of successful completion, reunification and long-term abstinence.[141] Additionally, the U.S. General Accounting Office reports that "[d]rug treatment administrators believe treatment is more likely to succeed if the full range of needs are addressed."[142] Therefore, the additional substance abuse treatment programs should be specifically aimed at the population they serve. Programs should be designed with women's needs in mind and incorporate services such as child care, parenting classes, housing, and employment searches.

Finally, in order to provide the necessary assistance for prevention of removal and to facilitate reunification, case workers need help. More workers need to be drawn to the profession while standards are raised for professional qualifications.[143] Pay scales must be raised to a competitive professional level.[144] Once in the field, the workers should receive ongoing training and monitoring both externally and as provided by more experienced staff members. Continuing education should emphasize standards for consistency and work to eradicate existing biases negatively impacting the child welfare community. Monitoring of case management is essential not only for inexperienced workers but also for

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[140] *Id.*

[141] *Id.* at 263-64 ("Treatment models focusing on women and providing multidisciplinary services are among the most effective. A 1995 study by the Center of Substance Abuse and Treatment found that seventy-five percent of women receiving treatment who completed the program remained drug-free. Sixty-five percent of their children were returned from foster care, and school performance of eighty-four percent of the children who participated with their mothers improved. Another study evaluated a random sample of sixty women one year after discharge from treatment and found seventy-two percent of women reported abstinence from alcohol and other drugs.").

[142] *Id*. at 261 (citing U.S. GENERAL ACCOUNTING OFFICE, GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS, THE CHILD WELFARE SYSTEM, AND FOSTER CARE OUTCOMES 4 (1997)).

[143] *Executive Summary*, *supra* note 92.

[144] *Id*.

veterans who may become desensitized or "burned out" in a highly stressful field. Funds must be made available to develop, implement, and maintain staff training and monitoring programs.

A greater number of caseworkers should result in a lighter workload so that they can devote more time and specific attention to each case. Caseworkers would then be able to fulfill the requirement of working collaboratively with each family to devise a customized prevention or reunification plan. Collaborative efforts may foster cooperation of the parents and diminish their hostility against State intrusion. They may also design plans to accommodate cultural variations in child-rearing.[145]

One successful program for plan customization is Family Group Conferencing, which is based on the Maori method of dealing with familial problems and is being emulated in a growing number of areas.[146] The Department of Human Services of Hawaii has implemented its own modified version known as 'Ohana Conferencing, founded and coordinated by Laurie Arial Tochiki, who serves as Assistant Dean of the University of Hawai'i William S. Richardson School of Law. Dean Tochiki explains that 'Ohana Conferencing is a collaborative effort of both nuclear and extended family members, agency and court representatives and perhaps other professionals. Family members are sought out, informed of the situation and invited to take part. Participants gather together in a room where the caseworker explains the problem, the expectations of the agency and the requirements of the court. This information is posted on large pieces of paper around the room for reference by all throughout the conferencing. Then the institutional agents leave the room for the family members to devise their own plan. Once the family's plan is approved by the agency, it is

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[145] *Id*.

[146] MARK HARDIN, ET AL., FAMILY GROUP CONFERENCES IN CHILD ABUSE AND NEGLECT CASES: LEARNING FROM THE EXPERIENCE OF NEW ZEALAND (1996).

reduced to a writing, which each participating family member signs.[147]

Dean Tochiki believes that this plan is very successful for several reasons: everyone in the room is provided with the same information regarding the problems and the agency expectations, which minimize rationalization and manipulation.[148] The family knows its own strengths and draws upon them, whereas focus on the negatives may distract caseworkers. The process is empowering as the family pulls together and governs itself. Healing often occurs as various members may openly acknowledge attributes of one another. Finally, the participation of each family member with an equal voice, culminating in a signed agreement, fosters investment in the program and a commitment to it.

Conclusion

That children should be safe from serious physical and psychological harm, and substantial risk of such harm, is universally agreed within the Child Protection System. The various players within that arena also agree that children need and are entitled to stability, security and permanency. However, some children brought into the system actually suffer serious harm, deprivation, and impermanence in the unnecessary loss of their families. The misapplication of public funds, unrealistic mandates, misdirected, or unavailable programs and human resources all have serious and pervasive consequences.

Braveman and Ramsey argue, based on the U.S. Supreme Court decision of *DeShaney v. Winnebago County Department of Social Services*,[149] "If the state decides to intervene, it may have a constitutional obligation to provide assistance in the home, rather than remove the children from

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[147] Interview with Dean Laurie Arial Tochiki, Assistant Dean, William S. Richardson School of Law, University of Hawai'i (July 2000).
[148] *Id*.
[149] 489 U.S. 189 (1989).

the family."[150] In *DeShaney*, a child was beaten so severely by his father that he was rendered "profoundly retarded" after the social services department, aware of repeated abuse, provided only minimal guidance and monitoring.[151] The Court held that the State was not liable for a child's detriment because "it placed [the child] in no worse position than that in which he would have been had it not acted at all . . . ."[152] The *DeShaney* Court, however, also posited that its decision may have been different had the State placed the child in foster care, implying a greater State obligation to the child once that child has entered foster care.[153]

In the circumstances presented in this paper, the State *is* intervening and *is* leaving some children in worse positions than they were before. Their familial problems are not being fairly addressed and, as a result, they are suffering unnecessarily from the loss of their families. The State should guard against detrimental intervention and accept its affirmative obligation of providing *effective* assistance for the benefit of abused and neglected children. Society should take the next step in its evolution by redirecting its public funding to truly support the bests interests of its children.

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[150] *Poverty*, *supra* note 55, at 464.
[151] *DeShaney*, 489 at 192-93.
[152] *Id.* at 201.
[153] *Id.* at 201 n.9; *see also Poverty*, *supra* note 55, at 463.

Preface to Note

In the Winter 2000 issue, the Journal featured staff pieces debating the arguments for and against California's Proposition 21. In February 2001, the Fourth Appellate District of the California Court of Appeal ruled a section of the proposition unconstitutional in a case involving juveniles accused of assaulting elderly migrant workers. The case prompted the Journal to reexamine the constitutionality of Proposition 21 in anticipation of the Court's upcoming decision. At the time of this issue's publication, the case is under review in the Supreme Court of California.

The Constitutionality of Proposition 21

MAGGY KRELL* AND REBECCA GARDNER**

Introduction

In response to high-profile juvenile crimes and a perceived fear of increasing youth offenses, in March 2000, California voters passed the Gang Violence and Juvenile Crime Prevention Act of 1998. Also known as Proposition 21, the Act was intended to deter youth violence and ensure that serious juvenile offenders would receive serious punishments.[1] Plastered with images of children shooting other children at schools, the media imprinted terrifying incidents of youth violence in the consciousness of Californians.[2] Voters responded by enacting Proposition 21.

Critics worried that Proposition 21 would dilute the juvenile justice system and ultimately harm juveniles and the rest of society.[3] Moreover, critics argued that the proposition would give prosecutors excessive authority to file charges against children in adult courts,[4] granting them "unfettered

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[1] CAL. PENAL CODE § 182.5 (West Supp. 2001).
[2] Sasha Abramsky, *Hard-Time Kids*, THE AMERICAN PROSPECT, Aug. 27, 2001, at 16.
[3] *Id.* at 18.
[4] *Id.*

access in avoiding juvenile court."[5] They feared that automatic transfers and unilateral prosecutorial discretion would lend to arbitrary decisions made by prosecutors.[6]

On the other hand, advocates of Proposition 21 depicted the Act as a tough-on-crime measure.[7] They asserted that juvenile crime had been on the rise over the last decade.[8] Proposition 21 was drafted specifically to decrease juvenile crime and penetrate criminal street gangs, which are often organized by juveniles.[9]

Since Proposition 21 became effective, a number of petitioners have challenged its constitutionality. The California Courts of Appeal have split on the constitutionality of a provision granting prosecutors discretion to charge certain juveniles in adult courts.[10] The Supreme Court of California has heard oral arguments in *Manduley v. Superior Court*.[11]

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[5] LISA J. DAMIANI, ASS'N OF TRIAL LAWYERS OF AMERICA, *Rehabilitation in the Juvenile System Versus Adult State Prison – Keeping the Juvenile offender in Juvenile Court*, 2 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1, 3 (2001).

[6] Abramsky, *supra* note 2, at 20.

[7] *See Analysis by the Legislative Analyst*, *in* SECRETARY OF STATE, STATE OF CALIFORNIA, VOTER INFORMATION GUIDE, MARCH 7, 2000 PRIMARY ELECTION 48 (2000), *available at* http://primary2000.ss.ca.gov/VoterGuide/(describing arguments supporting Proposition 21).

[8] *See Proposition 21: Text of Proposed Law*, *in* SECRETARY OF STATE, *supra* note 7, at 119. [hereinafter *Proposition 21*].

[9] *See Analysis by the Legislative Analyst*, *supra* note 7, at 48.

[10] People v. Simmons, 113 Cal. Rptr. 2d 778 (Ct. App. 2001) (Third Appellate District holding California Welfare and Institutions Code section 707(d) constitutional); Bravo v. Superior Court, 108 Cal. Rptr. 2d 514 (Ct. App. 2001), *review granted*, Bravo v. Superior Court of Kern County, 31 P.3d 1268 (Cal. 2001) (Fifth Appellate District holding section 707(d) constitutional); Resendiz v. Superior Court, 107 Cal. Rptr. 2d 62, *opinion withdrawn by order of ct.*, Resendiz v. San Diego County Superior Court, No. S098656, 2001 Cal. LEXIS 5469 (Cal. Aug. 8, 2001) (Fourth Appellate District holding section 707(d) unconstitutional); Manduley v. Superior Court, 104 Cal. Rptr. 2d 140 (Ct. App. 2001), *review granted*, Manduley v. Superior Court of San Diego County, 21 P.3d 1188 (Cal. 2001) (Fourth Appellate District holding section 707(d) unconstitutional).

[11] Manduley v. Superior Court, 104 Cal. Rptr. 2d 140 (Ct. App. 2001), *review granted*, Manduley v. Superior Court of San Diego County, 21 P.3d 1188 (Cal. 2001).

This note will highlight some of the provisions of Proposition 21 and survey the changes that these provisions mandate. This note will then review the Fourth Appellate District's decision in *Manduley*[12] and the court's holding that Proposition 21 violates the separation of powers doctrine. Finally, this note will analyze the various constitutional arguments attacking prosecutorial transfers and the challenges currently being raised against Proposition 21. The contention that Proposition 21 violates due process is the most meritorious of these challenges.

The Controversy of Proposition 21

California is not the only state that has enacted stricter statutes against juvenile defendants. Since 1992, forty-five states have revamped their juvenile offender law to enforce stiffer penalties for juvenile crime.[13] Various state measures allow juvenile courts to waive jurisdiction, direct certain juvenile offenders to adult court, and lower the age at which minors are eligible for adult prisons.[14] Although these measures encounter controversy, forty-eight states currently use waivers to transfer juveniles to adult court.[15] Moreover, many state courts have upheld juvenile transfer laws despite the constitutional criticisms they have received.[16]

Before the implementation of Proposition 21, California used a judicial waiver. This means that upon a hearing, the court could determine whether or not a juvenile was "fit" for juvenile court.[17] In this process, the district attorney could remove a case to adult court, but had the burden of presenting evidence warranting the transfer, such as

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[12] *Id*.
[13] Margaret Talbot, *What's Become of the Juvenile Delinquent*, N.Y. TIMES MAGAZINE, Sept. 10, 2000, at 15.
[14] *Id*. at 17.
[15] Lisa Beresford, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime?*, 37 SAN DIEGO L. REV. 783, 788 (2000).
[16] DAMIANI, *supra* note 5, at 7.
[17] *Id.* at 3.

the facts of the particular crime, the juvenile's criminal background, and the juvenile's age.[18] The adolescent defendant was allowed to have a lawyer present to rebut the presumption of unfitness and argue for retaining the juvenile in the juvenile court system.

Complex and multifaceted,[19] the Gang Violence and Juvenile Prevention Act of 1998 eliminates the hearing process by courts.[20] Pursuant to section 26 of the Act, prosecutors can charge juvenile defendants in adult court under a variety of circumstances.[21] Currently, a prosecutor can elect to charge a minor as an adult when she believes that the juvenile is worthy of adult punishment under the law. The prosecutor does not have this discretion in murder or certain sex offense cases, because under section 18 of the proposition, the accused minors who are fourteen or older are automatically transferred to adult courts.[22]

Proposition 21 also includes provisions attacking crime involving gangs. According to drafters of the proposition, "gang-related crimes pose a unique threat to the public because of gang-members' organization and solidarity."[23] They also find that gang-related felonies should be punished more severely, such as life imprisonment without the possibility of parole for convicted culprits who murder while engaging in gang-related activities.[24]

Proposition 21 increases the penalty for gang-related crimes[25] and allows any crime committed in furtherance of a

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[18] *Id.* at 4.
[19] *See Proposition 21*, *supra* note 8, at 119-31. The Act amended, added, and repealed a number of sections of the California Penal Code and of the California Welfare and Institutions Code.
[20] DAMIANI, *supra* note 5, at 4; *see also* CAL. WELF. & INST. CODE § 707(d) (West Supp. 2001).
[21] *See* § 707(d).
[22] *See* CAL. WELF. & INST. CODE § 602(b) (West Supp. 2001).
[23] *Proposition 21*, *supra* note 8, at 119.
[24] *Id.*
[25] CAL. PENAL CODE § 186.22 (West Supp. 2001).

criminal street gang to be tried in adult court.[26] Specifically, the new California Penal Code section 186.5 states that

> any person who actively participates in any criminal street gang . . . and who willfully promotes, furthers, assists, or benefits any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony. . . .[27]

This provision is intended to give law enforcement agencies the authority necessary to breakdown the street gang system and bring peace to communities in cities such as Los Angeles and Bakersfield, where neighborhoods have been taken over by the illegal activities of criminal street gangs.[28] As Proposition 21 has been effective for only nearly two years, cases challenging the proposition have just recently surfaced in California appellate courts.

Manduley v. Superior Court: A Case Study of Constitutional Challenge to Proposition 21

In February 2001, the Fourth Appellate District of the California Court of Appeal became the first court to hold that California Welfare and Institutions Code section 707(d), which Proposition 21 amended, was unconstitutional.[29] In *Manduley v. Superior Court*, the majority found that the proposition's grant of prosecutorial discretion violated the California Constitution's separation of powers clause.[30] The

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[26] CAL. PENAL CODE § 182.5 (West Supp. 2001).
[27] *Id.*
[28] *Proposition 21*, *supra* note 8, at 119.
[29] Manduley v. Superior Court, 104 Cal. Rptr. 2d 140, 142 (Ct. App. 2001), *review granted*, Manduley v. Superior Court of San Diego County, 21 P.3d 1188 (Cal. 2001).
[30] *Id.* at 142. The Fourth Appellate District made a similar ruling in Resendiz v. Superior Court, 107 Cal. Rptr. 2d 62 (Ct. App. 2001), *opinion withdrawn by order of court*, Resendiz v. San Diego County Superior Court, No. S098656, 2001 Cal. LEXIS 5469 (Cal. Aug. 8, 2001).

California Supreme Court granted review of the case[31] and heard oral arguments in December 2001.[32] Pursuant to the Court's internal mandates, the Court is set to render a decision within ninety days after oral arguments.[33]

In *Manduley*, San Diego County prosecutors used the powers granted under Proposition 21 to charge Manduley and seven other youths in adult court for the July 2000 assault and robbery of five migrant workers.[34] Manduley and the other youths were subject to Proposition 21 for a variety of reasons. First, the adolescents fell under the purview of Proposition 21 because of the alleged robbery.[35] Second, the alleged assault involved the use of pipes, a pellet gun, a rock, and a pitchfork, which could produce great bodily harm.[36] Third, some of the victims were at least sixty-five years of age.[37] Fourth, and perhaps more importantly, the prosecutor had charging discretion because the alleged beatings were characterized as a hate crime.[38]

At trial, Manduley and the other defendants contested the sufficiency of the accusatory pleadings filed against them in adult criminal court.[39] After the trial court overruled the defendants' demurrers,[40] the youths sought review from the Fourth Appellate District. The appellate court found for the youths and issued a writ of mandate ordering the lower court to sustain their demurrers.[41]

The majority ruled in the juvenile defendants' favor, finding that section 707(d) violated the separation of powers

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[31] Manduley v. Superior Court of San Diego County, 21 P.3d 1188 (Cal. 2001).
[32] Supreme Court Minutes, Wednesday, December 5, 2001, Los Angeles, California 2076, *available at* http://www.courtinfo.ca.gov/courts/minutes/documents/SDEC0501.DOC.
[33] CAL. S. CT. INTERNAL OPERATING PRACTICES & P. pt. 10(x).
[34] *Manduley*, 104 Cal. Rptr. 2d at 142.
[35] *See* CAL. WELF. & INST. CODE § 707(b)(3) (West 1998 & Supp. 2001).
[36] *See* § 707(b)(14).
[37] *See* CAL. WELF. & INST. CODE § 707(d)(2)(iv) (West Supp. 2001).
[38] *See* § 707(d)(2)(iii).
[39] *Manduley*, 104 Cal. Rptr. 2d at 142.
[40] *Id.*
[41] *Id.* at 152.

doctrine by allowing the executive branch to curtail the judiciary's sentencing options.[42] The pre-Proposition 21 system for charging juveniles provided the judiciary the power to hold fitness hearings regarding the vast majority of alleged youth offenders. In contrast, section 707(d) allows such hearings only at the district attorney's discretion. According to the court, the separation of powers doctrine does not permit the prosecution's "unchecked authority to prescribe which legislatively-authorized dispositional schedule will be available to the court if the charges are found true."[43]

In finding section 707(d) unconstitutional, the court rejected the People's argument under *Davis v. Municipal Court*.[44] In *Davis*, the California Supreme Court found that when a prosecutor prosecuted the accused of an offense that could be charged as either a felony or a misdemeanor, the prosecutor could decide charging a felony or a misdemeanor.[45] This was so even when the decision will reduce a court's dispositional alternatives.[46] The Court upheld the discretion, because it found that diversion programs often limited eligibility depending upon a defendant's alleged offense.[47] The court also found that prosecutors are often presented with facts that could support either a misdemeanor or felony charge.[48] The Court reasoned that accepting *Davis*'s separation of powers argument would either deny diversion programs for misdemeanor offenders or severely limit prosecutorial charging discretion.[49]

In rejecting the application of the *Davis* rationale to section 707(d), the majority in *Manduley* reasoned that section 707(d) actually presents a prosecutor with two separate choices: (1) what charges to bring and (2) whether to allow the court to apply a juvenile disposition or an adult sentencing

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[42] *Id*. at 143.
[43] *Id.* at 149.
[44] 757 P.2d 11 (Cal. 1988).
[45] *Id.* at 19.
[46] *Id.*
[47] *Id.* at 21.
[48] *Id*.
[49] *Id.*

scheme.[50] *Davis* protected the prosecution's first choice, the charging discretion embodied in section 707(d).[51] However, because the second choice is not an inevitable extension of the first, the court concluded that *Davis* did not protect section 707(d).[52] Indeed, the majority found that the court could not uphold the second choice because, unlike the prosecutorial discretion at issue in *Davis*, it interfered with and restricted the judiciary's dispositional authority.[53]

In addition to rejecting *Davis*, the court also refused to uphold section 707(d) based upon similar juvenile statutes in other states.[54] The court reasoned that the other statutes were upheld because they contained features which section 707(d) lacks.[55] For example, some systems give adult courts the discretion to transfer juveniles back to juvenile courts.[56] Additionally, some systems also give adult courts the power to make any disposition of a juvenile's case that a juvenile court could make.[57]

Disagreeing with the majority, the dissent in *Manduley* argued that section 707(d) does not violate the separation of powers doctrine.[58] Because juveniles do not have a constitutional right to a juvenile disposition, the dissent reasoned that "the Legislature can restrict, qualify, or deny the privilege of juvenile treatment as it sees fit."[59] Justice Nares classified Proposition 21 and section 707(d) as a "narrow and limited refinement of the juvenile justice system" because California voters did not give prosecutors veto power over judicial decisions.[60] Furthermore, the dissent found that this

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[50] *Manduley*, 104 Cal. Rptr. 2d at 150.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 151.
[54] *Id.*
[55] *Id.*
[56] *Id.* (comparing Proposition 21 to the statutory scheme at issue in *Hansen v. State*, 904 P.2d 811 (Wyo. 1995)).
[57] *Id.* (comparing Proposition 21 to the discretionary direct filing statute at issue in *People v. Thorpe*, 641 P.2d 935 (Colo. 1982)).
[58] *Id.* at 153 (Nares, J., dissenting).
[59] *Id.* at 154.
[60] *Id.* at 155.

refinement was a constitutional delegation of power to the executive branch because district attorneys had the discretion to remove juveniles from the juvenile justice system during the charging stage. The dissent maintained that section 707(d) does not interfere with the judicial functions and does not violate the separation of powers doctrine because this removal occurred before the court's judicial obligations began. [61]

The dissent also pointed out that *Davis* would apply to *Manduley* because *Davis* upheld the validity of prosecutorial discretion prior to the exercise of the court's jurisdiction.[62] The dissent reasoned that if mandatory filing in adult criminal court does not violate the separation of powers doctrine, the narrowly crafted discretion in section 707(d) certainly should not either.[63]

On December 5, 2001, the California Supreme Court heard oral arguments on the constitutionality of Proposition 21's section 707(d).[64] In anticipation of the hearing, various groups filed amicus briefs on behalf of Manduley and the other youths, including the American Civil Liberties Union of Southern California and the California Teachers Association.[65] These organizations argued that Proposition 21 violates the "single subject" rule of the California Constitution.[66] At the hearing, the California Supreme Court addressed both the single subject rule and the alleged separation of powers violation.[67] Pursuant to the California Supreme Court Internal

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[61] *Id*.
[62] *Id.* at 156.
[63] *Id.* at 158.
[64] Supreme Court Minutes, Wednesday, December 5, 2001, Los Angeles, California 2076, *available at* http://www.courtinfo.ca.gov/courts/minutes/documents/SDEC0501.DOC.
[65] Press Release, American Civil Liberties Union of San Diego & Imperial Counties, ACLU Urges California Supreme Court to Overturn Prop 21 (Sept. 6, 2001), *available at* http://aclusandiego.org/overturn__prop21.html.
[66] *Id.*; *see also Proposition 21*, CITY NEWS SERVICE, Sept. 6, 2001.
[67] Robert Jablon, *State Supreme Court Hears Arguments on Anti-Crime Bill*, ASSOCIATED PRESS, Dec. 6, 2001, *available at* http://www.ocregister.com/news/6prop21cci.shtml.

Operating Practices and Procedures,[68] the Court is expected to hand down a decision by early March 2002.

Analysis

Manduley raised two constitutional challenges to Proposition 21: violation of the separation of powers doctrine and violation of the single subject rule. In addition to these two arguments, the uniform operation of law provision and the due process clause of the California Constitution question the constitutionality of Proposition 21. Among all these challenges, the due process clause presents the strongest argument that the proposition is unconstitutional.

Separation of Powers

Proposition 21's alleged violation of the separation of powers doctrine emerges from the prosecutors' authority to determine the court in which to try juvenile defendants. Traditionally, the judiciary has had the discretion to make this decision. Proposition 21, however, handed this choice to prosecutors, who represent the executive branch.

In *Manduley*, the court asserted that the proposition divests the judiciary branch of the discretion to transfer juveniles back to juvenile court.[69] Nevertheless, section 707(d)(4) preserves some discretion on behalf of the court:

> In any case where the district attorney . . . has filed . . . against a minor in a court of criminal jurisdiction . . . the *magistrate shall make a finding* that reasonable cause exists to believe that the minor comes within the provisions within this subdivision. If reasonable cause is not established, the criminal court shall transfer the case to the

[68] CAL. S. CT. INTERNAL OPERATING PRACTICES & P. pt. 10(x).
[69] *Id.*

> juvenile court having jurisdiction over the matter.[70]

In other words, the judiciary has some right to find that there was no probable cause for the district attorney to file against the juvenile in adult court and thereby transfer the case back to juvenile court.

As the *Manduley* majority held the entire section 707(d) unconstitutional,[71] the court suggests that section 707(d)(4) does not provide enough constitutional safeguard. The court's holding implies that despite the court's later determination of reasonable cause, the prosecutors' initial authority to file charges first infringes upon the judiciary's functions. The Fifth Appellate District of the California Court of Appeal most likely disagrees with the *Manduley* court on this issue.[72] In *Bravo v. Superior Court*, the juvenile defendants were accused of murder.[73] Proposition 21 was applicable to Vidal Bravo, one of the defendants, because of the nature of the alleged crime and the prosection's allegation that he committed murder as a gang member.[74]

In denying Bravo's challenge to Proposition 21, the Fifth Appellate District found that section 707(d)(4) provides a means of judicial oversight of the prosecutors' decisions to charge juveniles in adult or juvenile courts.[75] The court implies that even in the absence of an original determination, the opportunity for judicial supervision might adequately preserve the judiciary's role.[76] *Bravo*'s assertion that Proposition 21 does not entirely forfeit judicial control appears to be more persuasive than the *Manduley* majority's perspective because section 707(d)(4) ensures that while

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[70] CAL. WELF. & INST. CODE § 707(d)(4) (West Supp. 2001), *emphasis added.*

[71] *Manduley*, 104 Cal. Rptr. 2d, 140 143 (Ct. App. 2001), *review granted*, Manduley v. Superior Ct. of San Diego County, 21 P.3d 1188 (Cal. 2001)

[72] See Bravo v. Superior Court, 108 Cal. Rptr. 2d 514, 522, *review granted*, 31 P.3d 1268 (Cal. 2001).

[73] *Id.* at 516.

[74] *Id.* These were only two of the prosecution's allegations. *Id.*

[75] *See id.* at 526.

[76] *Id.* at 527.

prosecutors enjoy the discretion, the judicial branch has the last say.

The Fourth Appellate District's view is vulnerable to another argument. *Bravo* and *People v. Simmons*[77] both found that voters could take the decision-making role from the judiciary to the executive branch. The *Bravo* court furthered Justice Nares's dissenting opinion by arguing that, because the legislature created the juvenile justice system, voters may confine or alter it as they see fit.[78] Moreover, the court did not see the discretionary filing authority as something that traditionally belongs to either the executive branch or the judiciary.[79] Therefore, voters, who are considered part of the legislature, could shift the power from one branch to another without infringing upon the power of either branch.[80] Consequently, even though the new provision affects sentencing, it does not violate the separation of powers doctrine.[81]

In *People v. Simmons*, defendant Theotis Simmons was sixteen when he allegedly robbed a store.[82] He was charged as an adult under the relevant provisions of Proposition 21.[83] Like Bravo, Simmons unsuccessfully challenged the constitutionality of the Proposition 21.[84] The Third Appellate District of the California Court of Appeal disagreed with the *Manduley* majority that there was a difference between choosing the charges to bring and selecting the court.[85] Both decisions are fairly assigned to prosecutors to best enforce California law. The separation of powers doctrine does not guarantee the judiciary the right to choose the courts. Instead, rules enacted by the legislature have always determined where a case is to be tried.

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[77] 113 Cal. Rptr. 2d 778 (Ct. App. 2001).
[78] *Bravo*, 108 Cal. Rptr. 2d at 519.
[79] *Id.*
[80] *See id.* at 522.
[81] *Id.* at 520; *see also Simmons*, 113 Cal. Rptr. 2d at 788.
[82] *Simmons*, 113 Cal. Rptr. 2d at 781.
[83] *Id.* at 782.
[84] *Id.*
[85] *See id.* at 788.

Single Subject Rule

Manduley also challenged Proposition 21 based on an alleged violation of the single subject rule.[86] Under the California Constitution, the single subject rule does not allow an initiative measure that covers more than one subject to be sent to electors or be effective.[87] Because Proposition 21 changed many provisions of California Penal Code and California Welfare and Institutions Code, it might conflict with the single subject rule. Apparently, Manduley and other litigants are not alone in pursuing this claim. Despite the intentions of Proposition 21's drafters, opponents of Proposition 21 argue that the proposition is unconstitutional, because it violates the single subject rule by amending both the California Welfare and Institutions Code and the California Penal Code. [88]

However, both *Bravo* and *Simmons* ruled that Proposition 21 did not violate the single subject rule.[89] Both courts found that the proposition satisfies the standard that "all of its parts are 'reasonably germane to each other' and to its general purpose."[90] The courts came to the conclusion after briefly reviewing the substance of the proposition's provisions.[91] To the *Simmons* court, the inclusion of statistics on and descriptions of the juvenile crime situation in the proposition's text help to make all the provisions relevant to each other.[92] The courts' analysis shows that the standard for the single subject rule is relatively broad. Hence, Proposition 21 is likely to survive constitutional challenge on this issue.

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[86] *See* CAL. CONST. art. II, § 8(d).
[87] *Id.*
[88] *See* Kristin Simms Cross, *When Juvenile delinquents are Treated as Adults: The Constitutionality of Alabamba's Automatic Transfer Statute* 50 ALA. L. REV. 155, 158 (1998); s*ee also* Maggy Krell, *Think Before You Transfer: An Assessment of the Automatic Transfer of Juveniles to Adult Courts*, 5 U.C. DAVIS J. JUV. L. & POL'Y 39, 43 (2000).
[89] *Simmons*, 113 Cal. Rptr. 2d at 785; *Bravo*, 108 Cal. Rptr. 2d at 526.
[90] *Simmons*, 113 Cal. Rptr. 2d at 783 (citing Brosnahan v. Brown, 651 P.2d 274 (Cal. 1982)); *Bravo*, 108 Cal. Rptr. 2d at 523.
[91] *Simmons*, 113 Cal. Rptr. 2d at 784; *Bravo*, 108 Cal. Rptr. 2d at 524.
[92] *Simmons*, 113 Cal. Rptr. 2d at 785.

Equal Protection

Although *Manduley* did not specifically address this issue, Proposition 21 raises concerns under the equal protection provisions of the California Constitution.[93] The proposition may cause similarly situated juveniles to be treated differently for no specific statutory reason. A review of some out-of-state cases and comparison of state statutes illustrate the constitutional challenge that the proposition confronts.

In *State v. Mohi*,[94] the Supreme Court of Utah evaluated a provision almost identical to Proposition 21. In that case, the court struck down a prosecutorial waiver, which gave prosecutors the right to prosecute juveniles as adults when they were alleged to have committed certain serious crimes.[95] The Utah Supreme Court found that the prosecutorial waiver provision violated the uniform operation of the laws rule because it allowed identically situated minors to be treated vastly differently from one another:[96]

> By the very terms of the statute, they are accused of the same offenses and fall into the same age range. There is absolutely nothing in the statute to identify the juveniles to be tried as adults; it describes no distinctive characteristics to set them apart from juveniles . . . who remain in juvenile jurisdiction.[97]

Furthermore, the majority found that the goal of decreasing juvenile crime was not satisfied by the arbitrary distinctions.[98] The majority described the Utah provision as

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[93] CAL. CONST. art. IV, § 16.
[94] 901 P.2d 991 (Utah 1995).
[95] *Id.* at 994.
[96] *Id.* at 995.
[97] *Id.* at 997.
[98] *Id.*

"arbitrary and unbridled" and asserted that it results in "uncircumscribed discretion" on the part of the prosecutor.[99]

Like the statute that the Utah high court evaluated, Proposition 21 gives prosecutors discretion to press charges without specifying which juveniles are to stay in juvenile court and which juveniles are to be transferred. It is conceivable that under this system, similarly situated juveniles could be treated differently. However, the uniform operation of laws provision of the California Constitution does not lend to such a rigid interpretation.[100] The California provision merely states that all laws of a general nature have uniform operation.[101] Although the Utah Supreme Court's reasoning suggests a possible constitutional criticism of Proposition 21, the difference between the language of the operation of law provisions of the two states' constitutions renders the *Mohi* ruling not readily applicable to Proposition 21. Even if the two provisions were substantially similar, California is not bound to follow Utah's approach.

Moreover, other state courts have evaluated similar provisions and reached different conclusions. In *People v. Johnson*, the Colorado Court of Appeals ruled that Colorado's statute allowing direct filing of criminal charges against a juvenile in the district court "did not violate the constitutional provision on uniformity of the laws."[102] In that case, the seventeen-year-old defendant was convicted of murder in criminal court pursuant to a burglary he committed with a co-defendant, which resulted in a fatal shooting.[103] Citing *Mohi*, the defendant argued that like Utah's law, the Colorado statute was unconstitutional because it allowed similarly situated juveniles to be treated differently.[104] The court rejected this claim by noting that Utah's uniform operation of law provision was broader than Colorado's in that it only requires the minimum standard of applying the law similarly

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[99] *Id.*
[100] CAL. CONST. art. IV, § 16.
[101] *Id.*
[102] People v. Johnson, 987 P.2d 855, 861 (Colo. Ct. App. 1999).
[103] *Id.* at 863.
[104] *Id.* at 858.

throughout the state's jurisdiction.[105] In addition, the court asserted that uniformity of laws only required the statute be applied equally throughout all Colorado jurisdictions.[106]

California's uniform operation of laws provision is more similar to its Colorado counterpart than its Utah counterpart. The California and Colorado statutes provide a broader and more generalized scope than the Utah statute. When evaluating a potential claim that Proposition 21 conflicts with the California Constitution's uniform operation of laws, a court is probably more likely to follow the Colorado court's analysis.[107] Rather than applying equal protection rigidly and formalistically to cases with similarly situated juveniles, the court should allow for Colorado's more fluid approach.

Due Process

Finally, critics have argued that Proposition 21 violates the due process clauses of both the California[108] and United States[109] Constitutions by automatically transferring juveniles to adult court absent a hearing.[110] The juvenile's right to evaluation in the juvenile court has been a cornerstone of juvenile due process rights.[111] In *State v. Robert*, the Supreme Court of Appeals of West Virginia evaluated a claim challenging the constitutionality of West Virginia's juvenile transfer statute.[112] Rather than couching his claim in the uniform operation of law provision, the defendant argued that West Virginia's law violated the due process and equal

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[105] *Id*.
[106] *Id*.
[107] *Id*.
[108] CAL. CONST. art. 1, § 15, cl. 7.
[109] U.S. CONST. amend. V; U.S. CONST. amend. XIV.
[110] *See, e.g.*, People v. Simmons, 113 Cal. Rptr. 2d 778, 789-90 (Ct. App. 2001).
[111] *See* Kent v. United States, 383 U.S. 541, 662 (1996) ("There is no place in our system of law for reaching a result of such tremendous consequences without necessary ceremony . . . without a hearing, without effective assistance of counsel, without a statement of reasons . . .").
[112] State v. Robert, 496 S.E.2d 887 (W. Va. 1997).

protection clauses of both the state and federal constitutions.[113] The court asserted that "a statutory scheme which entirely divests and deprives a circuit court of its ability to meaningfully consider . . . the suitability and amenability of a juvenile for the rehabilitative purposes of the court's juvenile jurisdiction" might violate the juvenile's constitutional rights to equal protection and due process of law.[114] However, the court ultimately rejected the defendant's constitutional claim because West Virginia's statute allows the district court to return minors to juvenile court.

Proposition 21 deprives the accused juvenile of the right to be assessed for the purposes of amenability to juvenile rehabilitation by someone other than the juvenile's adversary before the charges are actually filed.[115] The right to a hearing prior to being transferred ensures due process before adult charges are filed. A criminal court may not be in as proper a position as a juvenile court to determine whether good cause for transfer has been shown. As the West Virginia Court articulated in *Robert*, "a statutory scheme which deprives the court . . . of its ability to consider and weigh personal factors going to the suitability . . . of a juvenile for purposes of rehabilitation" may violate the juvenile's due process right.[116] Although it might be possible for the criminal court to transfer the juvenile back to juvenile court, the assessment may be more appropriate before the transfer takes place. Section 707(d)(4) of the California Welfare and Institutions Code, as Proposition 21 amended, allows the court to remand a case back to juvenile jurisdiction. However, the transfer by the prosecutor's initiative deprives the juvenile of any chance to be assessed for amenability to rehabilitation before charges are filed. Due process may require the right to an evaluation before the transfer takes place.

Nevertheless, the *Simmons* court held that section 707(d) survives due process challenge.[117] The court reasoned

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[113] *Id.* at 888.
[114] *Id.* at 892.
[115] Talbot, *supra* note 26, at 40.
[116] State v. Robert, 496 S.E. 2d 887, 890 (W. Va 1997).
[117] People v. Simmons, 113 Cal. Rptr. 2d 778, 792 (Ct. App. 2001).

that because there is no constitutional right to juvenile courts for minors and the legislature had a rational goal in enacting the proposition, there is no due process violation.[118] Still, stripping the juvenile of the right to oppose the jurisdiction where the prosecutor chooses to charge should require more than just a rational review. Though not literally a constitutional right, being charged as a juvenile is an important part of the criminal justice system which produces drastic consequences when taken away. Such consequences require due process.

While the *Manduley* court has asserted that Proposition 21 violates separation of powers, the proposition's infringement upon the minor's right to due process should be more offensive to the Constitution. As the dissent astutely points out in *Manduley*, the judicial process is not interfered with once the juvenile is charged.[119] District attorneys have always had wide discretion in deciding the types of charges to file and the punishments to seek.[120] Extending this discretion over juveniles does not impinge the judicial branch's authority over the trial process.

The separation of powers argument is also less persuasive than the due process argument because it is detached from the interests of the juvenile. It is an attack on the delegation of power from the judicial branch to the executive branch. Devoid of the impact the law has on juveniles, the separation of powers argument criticizes the abstract government framework effected by the proposition while ignoring the actual language of the proposition preserving judicial authority. The due process argument, on the other hand, asserts the positive rights of a juvenile to be afforded a process before being transferred to adult court by an adversary.

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[118] *Id.* at 791.

[119] Manduley v. Superior Court, 104 Cal. Rptr. 2d 140, 156 (Ct. App. 2001).

[120] *Id.*

Conclusion

This note has highlighted some of the major constitutional challenges to Proposition 21, asserting that the due process argument is the strongest. Since the operation of Proposition 21 has been relatively short-lived, it is still difficult to assess how criminal courts and prosecutors have carried out their new power. Meanwhile, the constitutionality of the initiative continues to be the operative issue on the minds of both supporters and opponents. The California Supreme Court will soon resolve some of the constitutional questions by handing down the *Manduley* decision. Hopefully, the Court will carefully consider all arguments.

Children's Section on Children's Privacy on the Internet

For this issue of the Journal, the Children's Section focuses on the Children's Online Privacy Protection Act, (COPPA). Specifically, the Journal staff examined how websites are adjusting their privacy practices in order to comply with the COPPA. During our visits to various children's sites and general audience sites, we examined their privacy policies and information practices to determine if the websites comply with the COPPA. In addition, staff interviews with Tess Koleczek,* several parents, and a middle school teacher provided us with invaluable insight into how the COPPA affects both website operators and children under the age of thirteen.

Background

Congress passed the COPPA in 1998, giving the Federal Trade Commission (FTC) the authority to formulate and promulgate rules concerning the online privacy of children.[1] According to the FTC, the COPPA's goal is to "place parents in control over what information is collected from their children online."[2] The first rule set forth by the FTC pursuant to THE COPPA went into effect on April 21,

* J.D., 1998, Franklin Pierce Law Center; B.A. in Political Science, 1989, College of St. Catherine. Tess Koleczek has been interested in privacy issues since she graduated from law school in 1998. As the data protection manager at Netscape, she assisted in bringing Netscape's KidsZone into compliance with the COPPA. Ms. Koleczek also worked at Zero-Knowledge, a company that provides tools and strategies to protect the personal privacy of individuals and businesses that access the Internet.

[1] 15 U.S.C. § 6505(a) (1994).

[2] FEDERAL TRADE COMMISSION, FREQUENTLY ASKED QUESTIONS ABOUT THE CHILDREN'S ONLINE PRIVACY PROTECTION RULE, *available at* http://www.ftc.gov/privacy/coppafaqs.htm.

2000.[3] The FTC Rule is directed at children's websites that collect personal information from children who are under thirteen years old.[4] However, the FTC Rule also applies to general audience websites that possess actual knowledge that they are collecting information from kids who are under age thirteen.[5]

Though it is sometimes difficult to determine whether a general audience site must comply with the COPPA, the FTC's definition of actual knowledge provides some guidance. Actual knowledge will be present, for example, where an operator learns of a child's age or grade from the child's registration at the site or from a concerned parent who has learned that his child is participating at the site. In addition, although the COPPA does not require operators of general audience sites to investigate the ages of their site's visitors, the FTC notes that it will examine closely sites that do not directly ask age or grade, but instead ask "age identifying" questions, such as "what type of school do you go to: (a) elementary; (b) middle; (c) high school; (d) college." Through such questions, operators may acquire actual knowledge that they are dealing with children under thirteen.[6]

In order to comply with the rule promulgated by the FTC, website operators collecting personal information from children must follow certain procedures. Such procedures include:

(1) Posting prominent links on websites to provide notice of how the sites collect, use, and/or disclose the personal information they receive from children.[7]

(2) Notifying parents when the sites wish to collect information from their child and obtaining

[3] Children's Online Privacy Protection Rule, 16 C.F.R. § 312.1 (2001).
[4] 16 C.F.R. §§ 312.2-.3.
[5] 15 U.S.C. § 6502(b)(1) (1994).
[6] Children's Online Privacy Protection Rule, 64 Fed. Reg. 59,888, 59,892 (Nov. 3, 1999).
[7] 16 C.F.R. § 312.4.

parental consent prior to collecting, using, and/or disclosing such information.[8]

(3) Not conditioning a child's participation in online activities on the provision of more personal information than is reasonably necessary to participate in the activity.[9]

(4) Allowing parents the opportunity to review and/or have their child's information deleted from the operator's database and to prohibit further collection from the child.[10]

Compliance Issues

With the exception of a few websites, most of the children's sites that Journal staff visited complied with the COPPA.[11] The majority of the most popular children's sites, including disney.com, have put a great deal of time and money into complying with the COPPA and the FTC Rule.[12] Most of the problems with compliance arise when websites ask children to register in order to access the site.[13] During the registration process, the sites we visited often asked for personal information such as age. Under the FTC Rule, sites cannot collect such information from children if they are under the age of thirteen without first obtaining parental consent.[14]

boycrazy.com, one of the sites we accessed, asked for the age, name, email address, and sex of the user. Though we registered as a child under the age of thirteen, the site did not ask for parental consent prior to collecting our registration information. Therefore, boycrazy.com is currently not in compliance with the FTC Rule.

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[8] 16 C.F.R. § 312.5.
[9] 16 C.F.R. § 312.7.
[10] 16 C.F.R. § 312.6.
[11] *See* Table 1, *infra* pp.88-89 (listing the websites visited by the Journal staff with details on websites' collection practices).
[12] Interview with Tess Koleczek, in Davis, Cal. (Nov. 2, 2001) [hereinafter Koleczek].
[13] *Id.*
[14] *See* 15 U.S.C. § 6502(b)(1) (1994).

Another site, eCRUSH.com, asked us for similar information during the registration process. The website attempts to block those under the age of thirteen from their site by telling registrants they only allow those thirteen and over to access the site. However, when we entered a birth date that indicated we were under the age of thirteen, the site allowed us to change the birth date to one that indicated we were thirteen or older. Thus, it seems that children under the age of thirteen may easily circumvent eCRUSH.com's attempt to block them out by merely changing the birth date they entered to an acceptable one.

Compliance issues also arise in the registration processes employed by general audience websites. Such sites can have compliance problems when they ask questions during the registration process that allow them to significantly narrow down the age of the registrant.[15] For example, the registration information contained on the United Airlines website[16] asks registrants to list the last school they attended. This type of question allows the operators of the site to gauge the age of registrants. However, most sites refrain from asking questions that allow them to narrow down the age of users in order to avoid compliance problems under the COPPA.[17]

Privacy concerns do not always arise during the registration process.[18] Websites often do not just collect basic registration information. Rather, sites typically build entire user profiles using click stream data and cookie data. When such profiles are built, user age is not necessarily identified because sites use cookie data as a tracking device.[19] Cookies themselves cannot transmit personal information about an individual unless that individual provides such information to a website operator who then saves the information to a

[15] Koleczek, *supra* note 12.
[16] United Air Lines, *at* http://www.ual.com.
[17] Koleczek, *supra* note 12.
[18] Koleczek, *supra* note 12.
[19] Koleczek, *supra* note 12.

cookie.[20] If users are not providing any personal information that websites can save to cookies, website operators do not have to comply with the COPPA.[21] In these situations, website operators can escape compliance, because they can legitimately claim that they have no direct knowledge of the age of the users they are tracking with cookie data.[22]

Operator Concerns: Verifiable Consent

Website operators are typically concerned with the manner in which they should obtain verifiable parental consent.[23] The FTC suggests that website operators obtain consent via telephone, fax, postal mail, credit card, or e-mails that contain a digital signature or digital certificate technology.[24] E-mail not outfitted with digital certificate technology is not typically allowed as a form of verifiable parental consent, because it is easy for children to send disguised e-mails that appear to come from their parents.[25] Postal mail, on the other hand, is often more reliable than e-mail that is not equipped with digital certificate technology.[26] However, many critics and supporters of the COPPA agree that obtaining consent through slow methods such as postal mail cuts against the instantaneous quality that makes the Internet so attractive.[27]

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[20] David Whalen, *The Unofficial Cookie FAQ*, at § 1-1, *at* http://www.cookiecentral.com/faq#1.1.
[21] Koleczek, *supra* note 12.
[22] *Id.*
[23] Pamela Mendels, *New Serious Side to Child's Play on the Web*, N.Y. TIMES, Nov. 27, 1998, at A20.
[24] 1 FEDERAL TRADE COMMISSION, FREQUENTLY ASKED QUESTIONS ABOUT THE CHILDREN'S ONLINE PRIVACY PROTECTION RULE, *available at* http://www.ftc.gov/privacy/coppafaqs.htm.
[25] Mendels, *supra* note 23, *at* A20.
[26] Koleczek, *supra* note 12.
[27] Mendels, *supra* note 23, *at* A20.

FTC Enforcement

The FTC may hold violators of the COPPA liable for $11,000 per violation.[28] The FTC considers various factors in assessing penalties, including the number of children involved, the type of information collected, how the information was used, and whether the information was given to third parties.[29] Until recently, it appeared that the FTC did not have the time or the resources needed to seek out every violator of the COPPA.[30] However, actions instituted by the FTC in the past few years indicate that it takes the collection of personal information from children very seriously.

Prior to the enactment of the FTC Rule, the FTC brought enforcement actions against various website operators pursuant to section 5 of the FTC Act.[31] Under section 5 of the FTC Act, the FTC is authorized to prevent unfair or deceptive actions that affect interstate commerce.[32] In 1999, Geocities and the FTC reached a settlement agreement based on charges that the website deceptively collected personal information from children and adults.[33] In 1999, the FTC also settled an enforcement action against the Young Investor website for deceptively promising to maintain the anonymity of children and teens using the site.[34]

More recently, the FTC brought an action against Toysmart.com under section 5 of the FTC Act for misrepresenting to consumers that the site would not share

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[28] 1 FEDERAL TRADE COMMISSION, FREQUENTLY ASKED QUESTIONS ABOUT THE CHILDREN'S ONLINE PRIVACY PROTECTION RULE, *available at* http://www.ftc.gov/privacy/coppafaqs.htm.

[29] *Id.*

[30] Koleczek, *supra* note 12.

[31] 15 U.S.C. § 45(a) (1994).

[32] *Id.*

[33] Press Release, Federal Trade Commission, Internet Site Agrees to Settle FTC Charges of Deceptively Collecting Personal Information In Agency's First Internet Privacy Case (Aug. 13, 1998), *available at* http://www.ftc.gov/opa/1998/9808/
geocitie.htm.

[34] Press Release, Federal Trade Commission, Young Investor Website Settles FTC Charges (May 6, 1995), *available at* http://www.ftc.gov/opa/1999/9905/younginvestor.htm.

personal information with third parties.[35] The FTC also filed an amended complaint against Toysmart.com alleging that the site collected personal information from children under the age of thirteen without obtaining parental consent.[36] Toysmart.com and the FTC reached a settlement agreement, which ordered Toysmart to immediately destroy all of the information it collected in violation of the COPPA.[37] This marked the first time the FTC pursued a website operator for a violation of the COPPA.[38]

These actions instituted by the FTC indicate that the Commission is serious about protecting the privacy of children using the Internet. The practices engaged in by Geocities, the Young Investor website, and toysmart.com constituted major violations of the COPPA. However, it remains unclear whether the FTC will be able to catch and remedy all minor violations of the COPPA given the fact that the Internet is such a vast medium. [39]

Viewpoints

The Journal staff interviewed parents with children under the age of thirteen and a middle school teacher to gain their perspectives on the issue of children's Internet privacy. The interviews provided us with a better understanding of the role the Internet plays in the lives of children. We began with the following set of questions, but found that the interviews often progressed beyond their framework:

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[35] Federal Trade Commission, *FTC Announces Settlement With Bankrupt Website, Toysmart.com, Regarding Alleged Privacy Violations*, *available at* http://www.ftc.gov/opa/2000/07/toysmart2.htm.

[36] First Amended Complaint, Federal Trade Commission v. Toysmart.com, LLC, No. Civ.A.00-CV11341RGS (D. Mass. 2000), *available at* http://www.ftc.gov/os/2000/07/toysmartcomplaint.htm.

[37] Federal Trade Commission, *FTC Announces Settlement With Bankrupt Website, Toysmart.com, Regarding Alleged Privacy Violations*, *available at* http://www.ftc.gov/opa/2000/07/toysmart2.htm.

[38] *Id.*

[39] Koleczek, *supra* note 12.

Do your children access the Internet often?

Do you think children are even aware of the fact that some of the websites they visit are collecting information about them?

Have you discussed privacy concerns with your children?

Have they discussed any of their concerns about their privacy when using the Internet with you?

Do you think children's privacy is an issue Congress needed to address through legislation?

Are you aware that you can view the privacy policies of the sites that your children are accessing?

Do you think protection similar to that provided in the Act should be extended to teens and adults?

MICHELLE SIMMONS
Mother of three daughters, ages two, five, and six

"We have not hooked our girls' computer to the Internet for several reasons. The COPPA is clear in the ideal, but the children of today know more about how to by-pass all these regulations than do parents such as myself. Our oldest [daughter] is allowed to visit some children's sites on our computer with us. She never goes on the Internet without complete supervision.

The Internet is a vast world where there are no checks and balances. Everyone can be whoever or however old they wish to say they are. Without face to face contact there is no way to prove or disprove ages that are fed into the computer. The truth of information fed into the computer cannot be substantiated. It is impossible to legislate the Internet to protect children from being used for profit in the information

gathering process. The only real solution is to have the Internet in your home be monitored at all times by parents."

IMELDA LOZA
Mother of three sons, ages four, nine, and twelve

Ms. Loza prefaced her interview by saying, "I whole heartedly believe in freedom of speech. On the other hand, as a mother, I believe in some sort of statutory or authorized privacy protection." She went on to tell us that her children do not access the Internet very often, but her family has discussed the privacy concerns that can accompany the use of the Internet. However, she does not believe that children are generally even aware of the fact that some of the websites they visit may be collecting personal information from them. Ms. Loza, like a number of parents whose children access the Internet, was not aware that it is possible to view the privacy policies of the websites her children access. In closing, she indicated that she supports the COPPA because she feels that children's privacy is an issue that should be addressed through legislation. She also supports the extension of similar legislation to teens.

PARENT[40]
Father of three children, ages five, ten, and eleven

The older kids in this family access the Internet twice a week, and the five-year-old accesses the Internet once a month. A parent is always with the children when they are on the Internet. This father has discussed privacy concerns with his children, advising them not to send personal information over the Internet. However, the children have not discussed with their father their concerns about their privacy when using the Internet. This father does not think his children are aware of the fact that some of the websites they visit are collecting information about them. As a result, he believes that

[40] This parent requested to remain anonymous.

children's privacy is an issue that needs to be addressed through legislation. According to this father, "anyone can use the Internet in inappropriate ways because the Internet is an unregulated, interactive media." Therefore, he supports the extension of Internet privacy protection to teens and adults.

However, this father is not sure that the Act succeeds in protecting kids. For example, one of his children wanted to use America Online (AOL) Instant Messenger, but he was too young to do so according to the AOL guidelines. Somehow, though, his child was still able to access Instant Messenger. This father said, "Websites do not have any way of knowing if the parents are the ones giving the consent." Thus far, in this father's opinion, the regulation has not been effective in accomplishing its goal of protecting children.

EILEEN KEANE
Fourth Grade Teacher at Birch Lane Elementary School
Davis, California

Ms. Keane currently has five computers with Internet access in her classroom. Her students can access the Internet provided that their parents have signed the Davis Joint Unified School District On-Line User Contract. The contract addresses privacy concerns in a section entitled "Network Etiquette and Privacy."

When asked whether she has discussed privacy concerns with her students, Ms. Keane shared a story about one of her students. She stated, "I have a student who told me that he was chatting with someone he'd met in a chat room at home. I reminded him not to give out personal information." Ms. Keane also indicated that most of the children in her class do not have an idea that sites are collecting information from them.

Journal staff also asked Ms. Keane whether protection similar to the COPPA should be extended to adults and teens. She said, "I suppose protection should be the same for teens. However, adults should have the freedom to choose whether to disclose personal information." Ms. Keane also asked her

students to articulate their feelings about the COPPA. She indicated that her students think privacy protection is important for children and teens. However, her students also respect freedom of speech and the right of individuals to choose whether they wish to disclose personal information.

Table 1: Sites Visited by the Journal Staff

Site Address	**Is personal information collected from kids under age thirteen?**	**Method of obtaining parental consent**	**Does the site block out kids under age thirteen?**	**Does the site comply with the COPPA?**
www.boycrazy.com	Yes.	The site did not obtain parental consent prior to collecting personal information.	No.	No, because site did not obtain consent prior to collecting personal information
www.cyberkids.com	Yes.	Fax. The site provides a permission form that parents may fax to the site's toll-free number.	No.	Yes.
www.coolplays.com	No.	No consent needed because the site collects no personal information.	No.	Yes.
www.disney.com	Yes.	E-mail notification is sent to parents who may then give consent via e-mail.	No.	Yes.

www.eCRUSH.com	Yes.	The site does not attempt to obtain parental consent because it excludes kids under age thirteen from the site.	Yes, it attempts to.	Maybe. The site's attempt to block out those under the age of thirteen can be easily circumvented. [1]
www.nick.com (Nickelodeon)	Yes.	E-mail, fax, mail.	No.	Yes.
www.sikids.com (Sports Illustrated for Kids)	Yes.	The privacy policy did not contain any information about how the site obtains parental consent.	No.	Maybe. The site does not seem to pro-actively seek parental consent before collecting personally identifiable information from children.
www.yahooligans.com	Yes.	When someone under thirteen attempts to register with the site, the site asks the child to have their parent set up a Yahoo Family Account in order to obtain consent.	No.	Yes.

[1] *See supra* p. 80.

Recent Court Decisions Impacting Juveniles

Introduction

The purpose of the case summaries section is to provide an overview of selected court decisions involving the interests of juveniles decided between March 1, 2001 and August 31, 2001. The cases summarized here include decisions of the United States Supreme Court, Federal Circuit Courts of Appeals, Federal District Courts, individual state Supreme Courts, and the California Courts of Appeal. Following these case summaries is an article highlighting a recent United States Supreme Court case.

United States Supreme Court Decisions

📖 *Nguyen v. INS*
533 U.S. 53 (2001).
The petitioner was born in Vietnam to a mother, a Vietnamese citizen, and the co-petitioner father, a United States citizen. At the age of six, the petitioner became a legal permanent resident of the United States, where his father raised him. When he was twenty-two, the petitioner pled guilty to two counts of sexual assault on a child. As a result, the Immigration and Naturalization Service ordered deportation. While awaiting appeal, the petitioner's father obtained an order of parentage from a Texas state court. Nevertheless, the petitioner's INS appeal was dismissed and his citizenship claim was rejected because he failed to comply with 8 U.S.C. § 1409 (1952), also known as the Aliens and Nationality Act. The Act provides that a child born abroad and out of wedlock to a mother who is a United States citizen and a father who is not, automatically acquires the mother's American citizenship. However, if the father is an American citizen and not the mother, the

father must take one of three steps before the child turns eighteen years old in order for the child to be eligible for United States citizenship. Under § 1409(a)(4)(A)(B)(C), these steps are: legitimization, declaration of paternity, or adjudication of paternity by a competent court. The co-petitioner father's failure to satisfy any of these requirements rendered the petitioner ineligible for citizenship. On appeal to the Fifth Circuit, the petitioner argued that § 1409 violates the Equal Protection Clause of the Fourteenth Amendment because it provides different citizenship rules for children born abroad and out of wedlock based upon whether the citizen parent is the mother or father. The Fifth Circuit rejected the petitioner's claim. The Supreme Court affirmed. The Court held that gender-based classification does not violate the Equal Protection clause so long as it serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives. The Court found that the government possesses important interests in ensuring the existence of a biological parent-child relationship and in ensuring that there is a real and consistent relationship between parent and child. In addition, the Court stated that the bond between a mother and her child, which is created at the moment of birth, is unlike the relationship between an unwed father and his child. For this reason, the government automatically grants citizenship to the children of United States citizen mothers, but not to the children of unwed, United States citizen fathers. Finally, the Court found that the means chosen by Congress, via § 1409, substantially related to that end and imposed only a minimal obligation on the parties involved.

📖 *Ferguson v. City of Charleston*
121 S. Ct. 1281 (2001).
A South Carolina state hospital operated by the Medical University of South Carolina (MUSC) subjected several pregnant patients to an involuntary drug-screening, urine test. The urine test was part of a program which tested patient drug use and reported the results to law

enforcement officials. Petitioners, arrested after testing positive for cocaine, sued MUSC in District Court, arguing that the program violated their Fourth Amendment right to the prohibition of nonconsensual, warrantless, and suspicionless searches. The jury found for MUSC. On appeal, the Fourth Circuit affirmed, holding that in exceptional circumstances, "special needs" may justify a search policy designed to serve non-law enforcement ends. The Fourth Circuit stated that MUSC's interest in curtailing pregnancy complications and medical costs resulting from cocaine use among pregnant women constituted a "special need" which outweighed the "minimal intrusion" on the privacy of the patients. In March, the Supreme Court reversed and ruled that MUSC's drug testing program did not fit into the "special needs" category. The Court held that the program's primary purpose was not to treat the women, but to use the threat of arrest to force them into substance abuse treatment. Thus, MUSC's interest in deterring pregnant women from using cocaine did not outweigh the general rule that an official, nonconsensual search is unconstitutional if not authorized by a warrant.

Federal Circuit Courts of Appeals Decisions

📖 *Johnson v. Bd. of Regents of the Univ. of Ga.*
263 F.3d 1234 (11th Cir. 2001).

In the first 160 years of its existence, the University of Georgia admitted no African-American students. In order to comply with Title VI of the Civil Rights Act of 1964 and to avoid discrimination in admissions, the University adopted a three-prong admission process in which the second prong awarded a point credit to non-white applicants. Three white women sued the University after being denied admission to the freshman class. The women challenged the University's use of race in the freshman admission process as a violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI. The district court held that the University's admission

policy was unlawful and entered summary judgment in favor of the women. In its ruling, the court found that student body diversity is not a compelling interest sufficient enough to withstand the strict scrutiny that courts must apply to government decision-making based on race. However, the court refused to grant a prospective injunction that would have forbidden the University from ever considering race or gender in its admissions process. On appeal, the Eleventh Circuit affirmed the lower court's ruling in its entirety. Additionally, the Eleventh Circuit noted that by granting preferential treatment based on race, the University failed to fully and fairly examine each applicant. Thus, the court stated that the University's policy actually impeded the goal of student body diversity.

🕮 *Earls v. Bd. of Educ.*
242 F.3d 1264 (10th Cir. 2001).
The Tecumseh Public School District in Colorado required students to consent to a random urinalysis test in order to participate in competitive extra-curricular activities, such as the academic team, band, and the cheerleading squad. Two students filed suit against the Board of Education and the Tecumseh Public School District, arguing that the drug test violated their Fourth Amendment right to unreasonable searches. The District Court for the Western District of Oklahoma granted summary judgment in favor of the school district. The court held that the policy did not violate the students' rights under the Fourth Amendment because the students' right to be free from drug testing did not outweigh the School District's interest in curtailing drug use among high school students. On appeal, the Tenth Circuit reversed, holding that the policy was unconstitutional because drug use among students in the Tecumseh Public School District was minimal. The Tenth Circuit stated that in order to enforce the drug testing policy, the school district needed to have shown two things: identifiable drug use among a sufficient number of the students who would be tested; and that the random drug testing would actually redress the students' substance abuse problems.

🕮 *Rayburn v. Hogue*
241 F.3d 341 (11th Cir. 2001).
The State of Georgia placed two brothers, aged ten and five, into a foster home and allowed their biological mother to visit her children periodically. Within a month, since the foster care began, the mother complained to the mother complained to the Department of Family and Children's Services (DFCS) that she believed her children were being abused in the foster home. DFCS investigated and found her claims to be without merit, so the children remained in the home. Later, the mother made another abuse allegation, but DFCS did not investigate further due to the mother's lack of specific information. Eventually, the state court returned the brothers to their mother. A medical examination of the five-year-old showed that he had probably been sexually abused while in the foster home, but there was no evidence that the foster parents were involved in the abuse.

The brothers filed a civil rights action under 42 U.S.C. § 1983 against the foster parents and DFCS in the Northern District of Georgia. They alleged violation of their substantive and procedural due process rights under the Fifth and Fourteenth Amendments. The district court granted summary judgment for the State on all counts. Meanwhile, the district court found that the foster parents acted under color of law and were not entitled to qualified immunity. On appeal, the Eleventh Circuit reversed and vacated the district court's finding. The court held that the foster parents were not state actors for purposes of § 1983. The court reasoned that the state's regulation of foster care did not encourage or sanction child abuse in any way. More importantly, the Eleventh Circuit found that the foster parents did not pass the nexus/joint action test. The court also found that the state's extension of immunity to foster parents did not transform the foster parents into state actors.

Federal District Court Decision

📖 *Lofton v. Kearney*
157 F. Supp. 2d 1372 (S.D. Fla. 2001).
Two gay men in Florida were denied the right to adopt children based on a Florida statute which prohibits homosexuals from adopting due to their sexual orientation. One of the men was a registered nurse and a certified long-term foster parent. The other man was a clinical nurse specialist and served as legal guardian of the minor he sought to adopt. The men sued the Secretary of Florida's Department of Children and Families and the district administrator responsible for enforcement of the statute, arguing that the adoption ban violated their constitutional right to equal protection under the Fourteenth Amendment. Specifically, they alleged that the provision violated their fundamental rights to family privacy, intimate association, and family integrity. They also claimed that they had a constitutional right to the care, custody, and control of the minors. The district court recognized that family units do not derive solely from biological ties. The court reasoned that the emotional bonds between parent and child develop outside of blood relationship through the intimacy of daily association. Nevertheless, the court held that non-biological relationships do not grant gay men a fundamental right to privacy, intimate association, or family integrity, because such relationships do not foster an expectation of family unit permanency. According to the court, family unit permanency is demonstrated by elements traditionally recognized as characteristic of the family, such as a biological connection. Furthermore, the court determined that the Florida statute served a legitimate state interest, because it found a child's best interest is to be raised by a married mother and father. The court also found that the men did not have a fundamental right to adopt, nor did the children have a fundamental right to be adopted, because the court viewed adoption as a private right created by the state. Therefore, the men had no equal protection claim to the care and custody of the minors.

State Supreme Court Decisions

📖 *In re C.R.H.*
29 P.3d 849 (Alaska 2001).
A minor was born in Anchorage to a mother from the Native Village of Nikolai and a father from the Native Village of Chickaloon. The minor was placed under custody of her maternal relatives in Nikolai when the Department of Health and Social Services (DHSS) determined that she was "a child in need of aid." The Nikolai Village filed a motion to intervene and have the case transferred to a tribal court. Under the Indian Child Welfare Act (ICWA), state courts must transfer certain child custody cases to tribal courts unless either the parents or the tribe objects, or there exists good cause to decline the transfer. However, based on a prior ruling by the Alaska Supreme Court, the superior court denied the motion to transfer, finding that Public Law section 280 gives the state exclusive jurisdiction over matters involving the custody of Indian children. On appeal, the Alaska Supreme Court held that there was no common law basis for concluding that § 1911 of the ICWA conflicted with Public Law section 280. The supreme court determined that the language and structure of § 1911 reflected intent of Congress to allow all tribes to be able to accept transfer of jurisdiction to state courts regardless of section 280. Therefore, the supreme court ruled that under § 1911(b), federally recognized Alaskan tribes could accept transfer of jurisdiction. The case was remanded to the superior court to determine whether there was good cause to transfer the minor's case to the Nikolai Village tribal court.

📖 *Taylor v. Taylor*
47 S.W.3d 222 (Ark. 2001).
A chancery court in Arkansas awarded a divorced couple joint-custody of their two minor children, one of whom suffered from an undiagnosed developmental disability. The father petitioned for full custody on the grounds that the mother was cohabitating with her female partner in the

presence of the children. The chancery court issued a temporary custody order to the mother which provided she restrict her partner from living in the home or taking care of the children. Upon the mother's request, the chancery court modified the order to allow the mother's partner to care for the children on the nights the mother worked. The mother's continuance still depended of primary custody of the children, however, still depended upon her partner's removal from the home. The mother appealed to the Arkansas Supreme Court and argued that her partner's presence in the household was indeed in the best interest of the children. The supreme court disagreed and affirmed the chancery court's decision that the non-cohabitation restriction was in the children's best interest. The supreme court reasoned that the restriction reduced the possibility that children could be subjected to a single parent's sexual encounters, regardless of whether that parent is homosexual or heterosexual.

🕮 *In re Randy G.*
28 P.3d 239 (Cal. 2001)
A school security guard in California observed a minor in an off-limits area of campus. The guard noticed that the minor was adjusting his pocket and acting nervous. Later that day, the guard pulled the minor from his classroom and questioned him for approximately ten minutes. The minor then consented to a search and pat-down, during which the guard found a knife. The district attorney filed a petition against the minor pursuant to California Welfare and Institutions Code section 602, alleging a violation of California Penal Code section 626.10 for carrying a knife with a locking blade on school grounds. The minor filed a motion to suppress evidence of the knife, arguing that he was detained without cause when the school officials called him out of his classroom in violation of his Fourth Amendment rights. The trial court denied the motion to suppress. The minor appealed to the California Court of Appeal, arguing that the applicable standard of reasonable suspicion had not been met for the search. The appellate court agreed that the applicable standard in search and

seizure cases is reasonable suspicion. However, the appellate court concluded that the standard was met because the minor violated a school rule by being in an off-limits area of campus and was nervously adjusting his pocket. On appeal, the California Supreme Court did not decide whether the record supported the finding of reasonable suspicion. Instead, the supreme court determined there was a lower standard for school officials due to the officials' need for greater discretion in addressing the special needs a school. This lower standard would consider whether the school official's conduct was arbitrary, capricious, or undertaken for purposes of harassment. The supreme court stated that under this standard, courts should balance the state's substantial interest in school safety against the minor's limited control over his person during school hours. Considering that the need for effective discipline in the school, the court held that detaining the minor did not offend the Fourth Amendment.

🕮 *T.M v. State of Florida*
784 So. 2d 442 (Fla. 2001).
Three juveniles were cited for violating a Florida curfew ordinance. At trial, the juveniles argued that the ordinance was unconstitutional because it infringed upon certain fundamental rights, was vague and overly broad, and was inconsistent with state law. The trial court held that the ordinance was unconstitutional because parents have a right to raise their children without the undue intrusion of the state. The trial court also found that the state did not incorporate the public policy interests underlying the curfew ordinance in the least restrictive manner possible. The District Court of Appeal reversed, holding that parents do not possess a fundamental right to allow their children to be in public places at night without supervision. On appeal, the Florida Supreme Court found that the district court erred in applying "heightened scrutiny" when they should have applied "strict scrutiny" in reviewing the governmental interest advanced by the curfew ordinance. Therefore, the court quashed the district court's ruling and

remanded the case to the district court for further proceedings.

🕮 *Sain v. Cedar Rapids*
626 N.W.2d 115 (Iowa 2001).
A student at Jefferson High School in Iowa received a full, five-year scholarship to play basketball at Northern Illinois University (NIU), a member-school of the National Collegiate Athletic Association (NCAA). The NCAA requires students who wish to compete in college athletics to satisfy various academic requirements prior to graduating from high school. NIU revoked the student's scholarship after he did not meet the academic standards set by the NCAA. The student sued the Linn County School District arguing that the revocation of his scholarship resulted from poor academic counseling by his high school guidance counselor. He argued that by improperly advising him, the counselor committed the torts of negligence and negligent misrepresentation. The trial court granted the Linn School District's motion for summary judgment, holding that school districts have discretion over academic matters and they have no duty to comply with the regulations of the NCAA.
The Iowa Supreme Court reversed, holding that the guidance counselor was an information provider and could be held liable for his failure to provide the student with accurate academic advice. Although academic advice has not traditionally been construed as a business transaction, the court made an exception in this case, noting that high school counselors have a special relationship with their students. Moreover, the court reasoned that the guidance counselor should have known that the student relied on his advice to make an important decision, which had significant and long lasting consequences for his life.

🕮 *In re the Welfare of the Children of Coats*
633 N.W.2d 505 (Minn. 2001).
The petitioner's four children were removed from her home after a long history of abuse and neglect. A series of review hearings established that the mother was not

following her case plan to regain custody of the children, and the Department of Child and Family Services, (DCFS), filed a petition to terminate her parental rights. The mother was notified of the date for the pretrial hearing, but she failed to show up at the proceeding. Therefore, the trial court issued a default judgment terminating her parental rights. The mother filed a motion asking the district court to reconsider, or to vacate the default judgment pursuant to Minnesota Rule of Civil Procedure 60.02. Under this rule, before granting a default judgment, the court must consider the following: whether the defendant has a reasonable defense on the merits of the case; whether there is a reasonable excuse for her failure to appear; whether she acted with due diligence after learning about the default judgment; and whether the other side will be substantially prejudiced if the motion to vacate is granted. The trial court denied relief, but the Minnesota Court of Appeals overturned the district court's default judgment. The appellate court reversed, concluding that the mother's due process rights were violated because she might not have received proper notice that her parental rights could be terminated for failing to appear at a pretrial hearing. The Minnesota Supreme Court reversed, finding that the mother's due process rights were not violated because her case did not satisfy Rule 60.02 as outlined above. The trial court had indeed acted in the best interest of the children by terminating their mother's parental rights. Specifically, the supreme court ruled that the mother did not have a reasonable defense against termination of her parental rights nor did she have a reasonable excuse for not attending the pretrial hearing. Furthermore, the Supreme Court stated that the appellate court should not have even considered the due process rights issue because the mother had not raised that issue on appeal.

🕮 *J.B. v. M.B.*
2001 N.J. LEXIS 955 (Aug. 14, 2001).
A married couple underwent in vitro fertilization due to the wife's infertility. The couple signed a standard

agreement with the fertility clinic, which stated that in the case of divorce and unless otherwise ordered by the court ownership of the embryos would be relinquished to the clinic. The couple eventually divorced and disagreed as to what to do with the seven pre-embryos that remained in the clinic's storage. The husband wanted to preserve the pre-embryos for use or donation while the wife wanted them destroyed. The trial court granted the wife's motion for summary judgment, and the New Jersey Court of Appeals affirmed. On appeal, the New Jersey Supreme Court affirmed for three reasons. First, the court stated that the parties had the right to change their mind about disposition of the pre-embryos up to the point of use or destruction of any stored embryos. Second, the court found that no contract existed between the parties with respect to preserving the embryos. Third, the court balanced the parties' interests and reasoned that the wife's interest not to procreate was stronger than the husband's interest because the husband was already a father and was fertile. However, the court noted that if the party seeking to preserve the embryos had been infertile, it might have reached a different result.

🕮 *In re Ryan D.*
777 A.2d 881 (N.H. 2001).
A juvenile in New Hampshire pled guilty to reckless conduct and criminal mischief. As a part of his plea agreement, the state agreed not to disclose the juvenile's name or address to the public. Subsequently, the juvenile learned that the Dover District Court was reconsidering its decision to withhold his name and address from the public, and he filed an objection with the court. The district court ruled that state law permitted disclosure of the minor's name and address by the media but did not require the court to disclose such information to the public. On appeal, the New Hampshire Supreme Court affirmed.

California Courts of Appeal Decisions

🕮 *In re Eduardo C.*
108 Cal. Rptr. 2d 924 (Ct. App. 2001).
A minor pled guilty to a charge of battery on school grounds. The minor was placed on probation and pursuant to section 186.30 of California Penal Code, which Proposition 21 added, the minor was ordered to register with the local police department as a gang member. The minor requested review of the order by the Los Angeles Superior Court. He argued that the order violated his constitutional rights, because he was never informed that he would have to register as a gang member, as a consequence of pleading guilty. On appeal, the Second Appellate District held that the probation report did not contain substantial evidence to support imposition of the reporting requirement under section 186.30. The report failed to indicate: (1) whether the minor was previously convicted of a violation qualifying for treatments; (2) whether he received a sentence enhancement; or (3) if the battery was gang related. In this situation, because the minor did not satisfy all three factors, he could not be ordered to register as a gang member.

🕮 *Wilson v. County of San Diego*
111 Cal. Rptr. 2d 173 (Ct. App. 2001).
A minor was placed in the Polinsky Children's Center, a county-run facility, after he was allegedly beaten by his grandfather with whom he had lived. The minor ran away from the Center and was subsequently struck by a car and seriously injured. The minor sued San Diego County for negligence and negligent infliction of emotional distress. He argued that the California Tort Claims Act bars liability against public agencies and their employees except when provided by statute. He argued that under section 300.2 of California Welfare and Institutions Code, the county had a statutory duty to prevent him from running away. The superior court held that section 300.2 does not impose such a duty on the county and in fact requires public agencies to place dependent minors in non-secure

facilities, like the Polinsky Children's Center. Additionally, the court found that the Center's child care worker's manual did not constitute an administrative regulation within the meaning of the California Tort Claims Act. Thus, the manual did not impose a mandatory duty on the county or its employees. The Fourth Appellate District affirmed.

📖 *People v. Englebrecht*
106 Cal. Rptr. 2d 738 (Ct. App. 2001).
Because the trial court determined the petitioner and twenty-seven other defendants were active members of the Posole street gang, the trail court enjoined them from certain activities within a section of the city of Oceanside, including associating with other gang members and carrying weapons. Prior to a bench trial, the petitioner was released from the injunction. Nevertheless, the petitioner appealed, objecting to the court's determination that he was a gang member, and contesting the injunction's application on a variety of grounds. The district attorney argued that the petitioner's case should be dismissed since the injunction no longer applied to him. The Fourth Appellate District agreed to hear the petitioner's appeal anyway, noting that gang injunctions are of "broad interest" to the public and challenges to their legality are "likely to recur." The appellate court held that the petitioner did not have a constitutional right to a jury trial because the injunction did not limit his physical liberty, but merely limited the petitioner's activity within a specific geographic area. The appellate court rejected the petitioner's argument that the scope of the injunction was overly broad and unnecessarily infringed on protected family relationships. The appellate court held the injunction only limited conscious expression of gang affiliation. The appellate court also found that the injunction was not an unconstitutional limitation on freedom of speech. In addition, the appellate court rejected both the trial court's definition of "active gang member" and the definition proposed by the petitioner, but upheld the trial court's determination that the petitioner

was an active gang member. The appellate court agreed that opposing counsel should have provided clear and convincing evidence, rather than a preponderance of the evidence, to show that he was an active gang member.

Case Spotlight:
Good News Club v. Milford Central School

121 S. Ct. 2093 (2001).

JOHANNA KIM

When reconciling religion and First Amendment rights to free speech in a public school context, the impressionability of children would seem to weigh upon Establishment Clause concerns. Nevertheless, courts in recent years have reached different conclusions on this issue. In *Good News Club v. Milford Central School*,[1] the United States Supreme Court faced the issue of reconciling religion and First Amendment rights of free speech within the public school context. The Court explained that it never intended to take Establishment Clause jurisprudence to the extreme extent of barring religious activity during after school hours simply because such activity took place on school premises where school students could be present.[2]

At controversy in the *Good News Club* was Milford Central School's community-use policy that allowed district residents to use its building after school for "instruction in any branch of education, learning, or the arts."[3] The policy also made the school available for "social, civic, recreational, and entertainment uses pertaining to the community welfare provided that such uses shall be nonexclusive and shall be opened to the general public."[4] The Fourniers, residents of Milford, New York, sponsored the Good News Club, a private Christian organization for children ages six to twelve.[5] In

[1] 121 S. Ct. 2093 (2001).
[2] *See id.* at 2104.
[3] *Id.* at 2098.
[4] *Id.*
[5] *See id.*

accordance with the school's policy, the Fourniers submitted a request to hold the Club's weekly meeting on school premises during after school hours.[6] Milford denied their request on the grounds that the group intended to use the premises for religious worship, which was banned under the community-use policy.[7]

The Fourniers filed suit under 42 U.S.C. § 1983 alleging that the school violated their right to free speech under the First and Fourteenth Amendments.[8] The district court granted summary judgment in favor of Milford, and a divided panel of the Second Circuit affirmed the decision.[9] Due to the conflict in the Court of Appeals, over whether speech could be excluded from a limited public forum based on the religious nature of the speech, the Supreme Court granted certiorari.[10]

In making its case, Milford raised the impressionability of children as a major concern with regards to the Establishment Clause.[11] It cited a number of cases to support this contention. For example, in *Lee v. Weisman*,[12] the Supreme Court indicated that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[13] The Court, however, distinguished this case from the Good News Club situation. In *Lee*, the event in question was the offering of invocation and prayers at a graduation ceremony that graduation middle school students were required to attend.[14] The Good News Club, on the other hand, was using the school premises for non-school activities, and because it

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[6] *See id.*
[7] *See id.*
[8] *See id.* at 2098.
[9] *See id.* at 2099.
[10] *See id.*
[11] *See id.* at 2103.
[12] 505 U.S. 577 (1992).
[13] *See id.* at 592.
[14] *See id*. at 586.

was a private organization, the government was not sponsoring its activities.[15]

Milford also mentioned *Edwards v. Aguillard*[16] in support of its position. The Court in *Edwards* held that a Louisiana law requiring public schools to have a lesson on creationism accompany the teaching of evolution violated the Establishment Clause.[17] The Court mentioned that students in a school setting were vulnerable to pressure because they could view their teachers as role models.[18] Furthermore, because class attendance was mandatory, impressionable students could perceive the effects of state advancement of religion.[19] Nevertheless, in *Good News Club*, the Court once again distinguished *Edwards*. The Court focused on the fact that members of the Good News Club taught children who were not required to attend after the school day was over. As such, the school was not actually advancing religion, and so the impressionability of students would not weigh upon Establishment Clause concerns.[20]

The Court also distinguished *Illinois ex rel. McCollum v. Board of Education*,[21] where the Court previously found state endorsement of religion in an optional religious class situation. In *McCollum*, students had the option of attending a religious class in the public school during the school day. The teachers were hired and paid by religious organizations and yet subjected to the approval of the school superintendent.[22] In *McCollum*, the Court found that "the operation of the State's compulsory education system . . . assisted and was integrated with the program of religious instruction carried on by separate religious sects."[23] In *Good News Club*, however, there was no integration or cooperation between the Milford

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[15] *See Good News Club*, 121 S. Ct. at 2105.
[16] 482 U.S. 578 (1987).
[17] *See id.* at 596-97.
[18] *See id.* at 584.
[19] *See id.*
[20] *See Good News Club*, 121 S. Ct. 2093, 2105 (2001).
[21] 333 U.S. 203 (1948).
[22] *See id.* at 208.
[23] *See id.* at 209.

School District and the Club.[24] The Club's activities took place after the hours in which students were required to be at school under the compulsory attendance laws of the state.[25]

In support of its argument that the impressionability of children even after school is important, Milford cited *School District of Abington Township v. Schempp*.[26] In *Schempp*, the Court found Pennsylvania's practice of allowing public schools to read Bible verses at the beginning of each school day unconstitutional.[27] However, this case was also distinguishable from the present situation, however, because it involved an activity during the school day, while the Good News Club activities were to take place after school.[28]

Milford also turned to the Equal Access Act[29] as evidence that Congress recognized the impressionability of elementary school children to misperceive government endorsement of religion. Nonetheless, the Act made no explicit recognition of some special vulnerability of children.[30] The Equal Access Act applied only to public secondary schools, and elementary schools were mentioned nowhere in the Act.[31] Therefore, the Court declined to find any meaning from Congress's decision not to address elementary schools.[32]

Overall, the Court in *Good News Club* simply did not believe the facts of the case supported the conclusion that the Club's activities would violate the Establishment Clause. There existed no mandatory attendance policy for the Club's meeting. The Club meetings were to be held in a high school resource room and a middle school special education room, not in an elementary school classroom.[33] Moreover, the instructors in this case were not schoolteachers, and the

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[24] *See Good News Club*, 121 S. Ct. at 2105.
[25] *See id.*
[26] 374 U.S. 203 (1963).
[27] *See id.*
[28] *See Good News Club*, 121 S. Ct. at 2105.
[29] 20 U.S.C. §§ 4071-74 (2001).
[30] *See id*.
[31] 20 U.S.C. § 4071(a).
[32] *See Good News Club*, 121 S. Ct. at 2106.
[33] *See id.* at 2098, 2106.

children participating in the club ranged in age from six to twelve.[34] The Court indicated that even if it delved into the minds of schoolchildren in this situation, there was a miniscule danger of misperception by the children.[35] The Court noted that the children would be aware of the need to obtain their parents' permission before they would be allowed to attend the Club and participate in the Club's activities.[36] Therefore, young children would not see endorsement in this situation.[37] Or in the alternative, the danger that the children could misperceive the endorsement of religion was not any greater than the danger that these children could see a hostility toward the Club's religious viewpoint if it was excluded from this public forum.[38]

The Court declined to extend Establishment Clause jurisprudence to a proscription of religious activity based on "what the youngest members of the audience might misperceive."[39] In this situation, there were countervailing constitutional concerns of other residents in the community.[40] Those concerns included the free speech rights of the Club and all of its members.[41] The Court found that the school district already violated those rights when it prohibited the Club from meeting on the school premises because of its religious viewpoint.[42] The Court was convinced that in this case there was no significant possibility that elementary school children could witness the Good News Club's activities and percieve endorsement. Therefore, the Club concluded that permitting the Club to meet on the school's premises would not have violated the Establishment Clause.

With the *Good News Club* decision, the Court sent a clear message that the state and its institutions must be neutral

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[34] *See id.* at 2098.
[35] *See id.* at 2106.
[36] *See id.*
[37] *See id.*
[38] *See id.*
[39] *See id.*
[40] *See id.*
[41] *See id.*
[42] *See id.* at 2107.

towards religion. In effect, the Court broadened its earlier holdings by firmly establishing that religious organizations must receive equal access and treatment in public forums. Although the religious groups claimed victory, the decision may lead to the closure of limited public forums. Or it may lead to greater access for religious organizations and serve to silence constitutional challenges in such arenas such as President George W. Bush's faith-based initiatives. Either way, the decision will have profound consequences.

Websites on Juvenile Issues

Journal staff reviewed the following sites to establish a few signposts on the Internet that we hope will aid our readers during their research. The listed websites provide detailed information on a vast array of issues concerning juvenile law and policy. They are followed by some of our other favorite websites.

- **Center for Effective Discipline**
  http://www.stophitting.com
  The Center for Effective Discipline is a non-profit organization providing educational information on the effects of corporal punishment on children and alternatives to its use. The Center for Effective Discipline also coordinates the National Coalition to Abolish Corporal Punishment in Schools (NCACPS) which shares information on the progress of banning corporal punishment. Additionally, the site provides legal information and news articles regarding the issue of corporal punishment.

- **Childwatch International Research Network**
  http://www.childwatch.uio.no
  Childwatch International is a non-profit, non-governmental network of institutions involved in children's research. The network "aims to initiate and coordinate research and information projects on children's living conditions and the implementation of children's rights as expressed in the UN Convention on the Rights of the Child." With an ultimate goal of promoting, initiating, and disseminating international and interdisciplinary research leading to a "real improvement in the well-being of children," Childwatch International seeks to ensure that children's perspectives are heard. The site includes a list of news publications, activities and conferences, as well as various child-related links.

- **International Association of Justice Volunteerism**
  http://www.justicevolunteers.org
  The International Association of Justice Volunteerism (IAJV) is committed to the "improvement of the juvenile and adult criminal justice system through citizen participation." IAJV's initial goal of localizing volunteer efforts in North America has become an international movement. Among its other goals, IAJV strives to "promote excellence in justice volunteerism to disseminate information; provide educational resources and training aids; and to bring to a higher understanding the importance of justice volunteerism." The IAJV website includes information on how to become a volunteer, information about annual training forums, and a quarterly newsletter about justice volunteer activities.

- **Juvenile Justice in California**
  http://ca.lwv.org/jj/jjsystem.htm
  Prepared by the League of Women Voters of California, this site provides an introduction to the California Juvenile Delinquency System, featuring details on detention programs, probation and parole. Additionally, it shares proposals for changes to the California Juvenile System and provides an overview of minorities in the juvenile justice system. The site also includes links for finding effective prevention and intervention programs and links to the role of California schools in the juvenile justice system.

- **National Center for Juvenile Justice**
  http://www.ncjj.org
  The National Center for Juvenile Justice (NCJJ) is a private, non-profit organization that serves as a resource for independent and original research on topics directly and indirectly related to the field of criminal justice. In keeping with NCJJ's mission of "effective justice for children and families," its website provides FAQ sheets on a wide range of issues, including confidentiality, family

court, female offenders, legislation, parental responsibility, and probation.

- **National Crime Prevention Council**
  http://www.ncpc.org
  The goal of the National Crime Prevention Council (NCPC) is to create "safer and more caring communities by addressing the causes of crime and violence, and reducing the opportunity for more crime to occur." It seeks to "create healthy and safe environments for children" and "enable individual adults to apply their skills and energies to crime prevention." The NCPC site includes Internet publications and sells books about safety. Additionally, the site provides links to websites regarding youth and teen crimes.

- **National Exchange Club Foundation**
  http://preventchildabuse.com
  According to its website, the National Exchange Club (NEC) Foundation has helped more than 140,000 children and 100,000 families eliminate child abuse in their daily lives. The NEC Foundation strives to counter child abuse by working directly with parents through a parent aide program. In addition to information on the program, the NEC Foundation website offers information about child abuse, other preventative programs, and locations of exchange club centers. The site also includes links to other websites featuring information about the prevention of child abuse and neglect.

- **National Foundation for Abused and Neglected Children**
  http://www.gangfreekids.com
  The National Foundation for Abused and Neglected Children (NFANC) is a non-profit organization dedicated to the prevention of child abuse and neglect. NFANC strives to improve the administration of juvenile justice in America by producing and distributing various publications, program materials, posters, and informational

and policy reports on a variety of crime prevention and community building subjects. The site includes links to child welfare sites, information on shaken baby syndrome and gangs, in addition to a section providing tips for kids and parents suggesting various ways for children to stay out of trouble and for parents to be aware of their children's surroundings.

- **National Youth Gang Center**
  http://iir.com/nybc
  The purpose of the National Youth Gang Center is to "expand and maintain the body of critical knowledge about young gangs and effective response to them." The Center assists state and local jurisdictions in the collection, analysis, and exchange of gang-related information, including demographics, legislation, literature, research and program strategies. The Center also coordinates the activities of the Office of Juvenile Justice Delinquency Prevention's Youth Gang Consortium. The Center's website provides information about national conferences and training links. The National Youth Gang Center also operates a list service, "GANGINFO," which deals with gang-related questions, youth gang prevention, and gang identification and activity.

- **The Polly Klaas Foundation**
  http://www.pollyklaas.org
  With a mission to "make America safe for children," Polly Klaas Foundation is dedicated to preventing crimes against children. It assists in the recovery of missing children and provides support for the legislative and regulatory protection of children. The Polly Klaas Foundation website provides a rotating banner profiling pictures and information on missing children, and allows access to free child identification kits and safety tips. The site's public education section provides resources and information to help prevent child abduction, as well as tips for parents and children on how to keep kids safe, a California sex offender ID line, and a section informing parents on what they should tell their kids about abduction.

OTHER FAVORITE BOOKMARKS

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

- **Juvenile Justice Magazine**
  http://www.juvenilejustice.com
  The Juvenile Justice Magazine is an on-line publication aimed toward juvenile justice professionals involved in youth services, human services, law enforcement, probation, parole, and court administration. The magazine includes articles on topics ranging from female offenders, teen fatherhood, and the debate between prevention and incarceration.

- **National Center for Youth Law**
  http://www.youthlaw.org
  The National Center for Youth Law works to protect children from the harms of poverty and to improve the lives of children who live in poverty. The National Center for Youth Law advocates to protect abused and neglected children, expand children's access to health care, improve child support collection, increase access to housing for families with children, and secure public benefits to meet the needs of children and youths.

- **National Foundation to Prevent Child Sexual Abuse**
  http://www.childsexualabuse.org
  The National Foundation to Prevent Child Sexual Abuse strives to help identify, fund, develop, and promote practical measures for the prevention of child abuse. The organization places primary interest in the areas of child safety programs, development of techniques to screen for pedophiles, and programs to identify and raise the level of abuse disclosure.

- **The National Children's Advocacy Center**
  http://www.ncac-hsv.org
  A non-profit agency providing prevention, intervention and treatment services to physically and sexually abused children and their families, the National Children's Advocacy Center has become a "leader in the field of prevention and intervention of child maltreatment." The Center's website features on-line

publications, professional educational and training services, and safety tips for parents on general prevention and child development issues.

- **The Center on Juvenile and Criminal Justice**
  http://www.cjcj.org
  The Center on Juvenile and Criminal Justice is a non-profit organization with a mission to reduce society's reliance on the use of incarceration as a solution to social problems. The Center's website includes reports on youth crime and prevention features articles relating to crime levels in schools.

- **National Adoption Information Clearinghouse**
  http://www.calib.com/naic
  The National Adoption Information Clearinghouse (NAIC) serves as a national resource for information on all aspects of adoption. The NAIC website provides information for professionals as well as the general public. The website also provides sections tailored to specific individuals such as birth relatives, adoptees, professionals, and parents.

- **America's Promise: The Alliance for Youth**
  http://www.americaspromise.org
  America's Promise was created in order to challenge the country to make youth a national priority. In addition to including an annual report and opportunities for involvement with the program, the website offers bulletins updated twice a week along with various press releases.

- **Child Trends, Inc.**
  http://www.childtrends.org
  Child Trends is a non-profit organization that studies children, youth and families. Its website includes research briefs on issues ranging from welfare and poverty to adolescent childbearing. The site also lists current Child Trends projects.

- **Pandora's Box**
  http://www.prevent-abuse-now.com
  Pandora's Box is a website providing over 270 pages of child protection and abuse prevention information. The website includes information on offenses such as Internet crimes, abductions, sex offenders, and teen violence. Additionally, the site provides domestic violence and victim assistance links.

To share your thoughts on this section or to have your website reviewed in a future issue of the Journal, please contact Jamie Diemecke at jldiemecke@ucdavis.edu.