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# Parental Rights and Family Integrity: Forgotten Victims in the Battle against Child Abuse

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# Comment

## Parental Rights and Family Integrity: Forgotten Victims in the Battle Against Child Abuse

### Part I: Introduction

Reverend and Mrs. Fowler and two of their children, Frank and Ligia, ages eleven and six respectively, left their home on the evening of March 8, 1993, to attend choir practice at their Plattsburgh, New York church. Frank, already upset about not being allowed to go to a basketball game with his older sister that evening because of his display of hyperactive behavior that afternoon, began to throw a temper tantrum in the car. He verbally abused his parents, and refused to wear his seatbelt, while screaming and kicking the back of his father's seat.[1] After telling him numerous times to calm down, Reverend Fowler stopped the car, and opened the back door, at which point Frank began kicking him while he attempted to fasten his seat belt.[2] After slapping Frank twice on the leg to no avail, Reverend Fowler finally slapped him on the right side of his face. Frank sat up and put on his seat belt, and the family proceeded to choir practice.[3]

The school nurse heard from one of Frank's friends that he was out of school for four days because of a bruise on his face caused by his father. The nurse called the New York State

1. *See* Fowler v. Robinson, No. 94 – CV – 836, 1996 WL 67994, at *1 (N.D.N.Y. Feb. 15, 1996).

2. *See id.*

3. *See id.*

Central Register of Child Abuse and Mistreatment.[4] This generated a hot line report to the Clinton County Department of Social Services which started an investigation of suspected child abuse.[5]

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4. *See id.* at *2. New York Social Service Law requires mandatory reporting for certain individuals. Section 413 of the New York Social Service Law provides in part:

> The following persons and officials are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child, or when they have reasonable cause to suspect that a child is an abused or maltreated child where the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity and states from personal knowledge, facts, conditions or circumstances which, if correct, would render the child an abused or maltreated child: any physician; registered physician assistant; surgeon; medical examiner; coroner; dentist; dental hygienist; osteopath; optometrist; chiropractor; podiatrist; resident; intern; psychologist; registered nurse; hospital personnel engaged in the admission, examination, care or treatment of persons; a Christian Science practitioner; school official; social services worker; day care center worker; provider of family or group family day care; employee or volunteer in a residential care facility defined in subdivision seven of section four hundred twelve of this chapter or any other child care or foster care worker; mental health professional; substance abuse counselor; alcoholism counselor; peace officer; police officer; district attorney or assistant district attorney; investigator employed in the office of a district attorney; or other law enforcement official.

N.Y. SOC. SERV. LAW § 413 (McKinney 1992 & Supp. 1997).

5. *See Fowler*, 1996 WL 67994, at *2. Section 415 of the New York Social Services Law provides in part:

> Reports of suspected child abuse or maltreatment made pursuant to this title shall be made immediately by telephone or by telephone facsimile machine on a form supplied by the Commissioner. Oral reports shall be followed by a report in writing within forty-eight hours after such oral report. Oral reports shall be made to the statewide central register of child abuse and maltreatment . . . . Written reports shall be made to the appropriate local child protective service . . . and shall include the following information: the names and addresses of the child and his or her parents or other person responsible for his or her care, if known; . . . the child's age, sex and race; the nature and extent of the child's injuries, abuse or maltreatment, including any evidence of prior injuries, abuse or maltreatment to the child or, as the case may be, his or her siblings; the name of the person or persons alleged to be responsible for causing the injury, abuse or maltreatment, if known; family composition, where appropriate; the source of the report; the person making the report and where he or she can be reached; the actions taken by the reporting source, including the taking of photographs and x-rays, removal or keeping of the child or notifying the medical examiner or coroner . . . . Written reports from persons or officials required by this title to report shall be

On or about April 22, 1993, caseworkers from the Clinton County, New York Department of Social Services had all three Fowler children, ages eleven, eight, and six, removed from their classrooms to a locked room. Despite Frank's request to telephone his parents, the children were prevented from leaving the locked room, and caseworkers proceeded to interrogate the children without their parents or counsel present.[6] Though the children apparently made no accusation of child abuse during the interview,[7] two caseworkers signed depositions charging the father with the crime of assault in the third degree,[8] and child physical abuse.[9] Reverend Fowler was arrested on April 23, 1993.[10] Following the arrest, and after threatening to remove the children, the two caseworkers allegedly coerced the parents into signing a document in which the parents pledged that they would not have any punitive or disciplinary physical contact with any of their children. They also allegedly coerced Reverend Fowler into agreeing to attend mental health counseling for child abuse.[11] On July 7, 1993, Reverend Fowler was acquitted of the criminal charge of assault in the third degree.[12]

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admissible in evidence in any proceedings relating to child abuse or maltreatment.

N.Y. SOC. SERV. LAW § 415 (McKinney 1992).

6. *See Fowler*, 1996 WL 67994, at *3.

7. *See id.*

8. *See id.* at *4.

9. *See id.* New York Social Services Law defines an abused child as follows:

"Abused child" means a child less than eighteen years of age whose parent or other person legally responsible for his care

(i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(iii) commits, or allows to be committed, an act of sexual abuse against such child as defined in the penal law.

N.Y. SOC. SERV. LAW § 371(4)(b) (McKinney 1992).

10. *See Fowler*, 1996 WL 67994, at *4.

11. *See id.*

12. *See id.*

Reverend and Mrs. Fowler subsequently brought a section 1983[13] action against six employees of the Clinton County Department of Social Services for "false arrest, malicious prosecution, false imprisonment, denial of equal protection, infringement of First Amendment rights, denial of due process, denial of liberty rights, failure to intervene, supervisory liability and failure to train and supervise."[14] The district court denied two of the defendants' motions for summary judgment for false arrest and malicious prosecution, one defendant's motion for summary judgment for supervisory liability and another defendant's motion with respect to failure to train and supervise caseworkers.[15] Defendants' motions for summary judgment were granted "with respect to the plaintiffs' claims [against social services] for false imprisonment, denial of equal protection, infringement of First Amendment rights, denial of due process for injury to reputation, denial of liberty right for interference with right to family integrity, and failure to intervene."[16]

This case is an example of the difficulty experienced when dealing with the competing interests of "the privacy rights of the family in the important area of child rearing" and the "obligation and right of responsible government to deal effectively with the stark reality of child abuse in our society . . . ."[17] The effects of the tension between these two interests and the social policies behind them can be tragic, and often chilling, when the

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13. *See id.* at *1. A Section 1983 suit is a civil action brought when the plaintiff believes that his or her Constitutional rights have been violated. 42 U.S.C. § 1983 (1994) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Id.*

14. *Fowler*, 1996 WL 67994, at *1.

15. *See id.* at *19.

16. *Id.*

17. Franz v. Lytle, 997 F.2d 784, 789 n.10 (10th Cir. 1993).

reports and/or charges filed are found to be false.[18] The problem of providing the government enough latitude to deal effectively with genuine child abuse, without harming innocent families, is exaggerated when courts find that the government's obligation is not an affirmative one.

Consider the case of *DeShaney v. Winnebago County Department of Social Services*,[19] where the Wisconsin County Department of Social Services received complaints that a child was being abused by his custodial father.[20] Although Social Services took various steps to protect the child, they did not remove the child from the home and place him in protective custody.[21] The father beat his son so severely that the child suffered permanent brain damage leaving him profoundly retarded.[22] The child's mother brought an action under 42 U.S.C. § 1983.[23] She alleged that by failing to intervene, the department had deprived her child of his liberty interest in bodily integrity, violating his substantive due process rights under the Fourteenth Amendment.[24] The court held that there was no due process violation because the Fourteenth Amendment "imposes no duty on the State to provide members of the general public with adequate protective services."[25] With regard to the claim alleging deprivation of liberty, the court made clear that "[w]hile the State may have been aware of the dangers that [the child] faced, it played no part in their creation, nor did it do anything to render him more vulnerable to them."[26]

While *Fowler* illustrates the unnecessary and arbitrary actions taken by social workers, *DeShaney* points out the need for balance. The *Fowler* court recognized the potential damage social workers can cause through their authority and influence to

18. In *Fowler*, the Reverend's reputation in his church community was called into question (the social workers had acquired a parishioners' list and intended to contact various parishioners), he was arrested on false charges, while his children were subjected to questioning about the integrity of their parents' behavior. *See Fowler*, 1996 WL 67994, at *3-4.

19. 489 U.S. 189 (1989).

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.* at 193.

24. *DeShaney*, 489 U.S. at 193.

25. *Id.* at 189.

26. *Id.* at 190.

bring criminal charges. The ability to bring criminal charges often carries the gravest consequences of any choice that child protective services workers can make, next to depriving a parent of custody.[27] The government's need to provide investigatory authority works in direct contrast to the manner in which it is applied. In *DeShaney*, the governmental authority was wrongfully applied through omission, and the conflict is shown between the availability of that authority and its application in a situation where the welfare of a child is thought to be at risk. The misapplication of that authority in *Fowler* violated the parents' and children's right to be "let alone," or their "family integrity." Wrongfully applied governmental authority has consistently led to Fourth and Fourteenth Amendment concerns about the violation of family integrity.[28] The focus in resolving this dilemma, regardless of whether authority was abused, should not just be on providing families an adequate remedy for wrongful government intrusion, to the extent that a Fourth or Fourteenth Amendment right has been violated. The more pressing dilemma is how to *prevent* the constitutional violations that lead to those actions. The right framework must be provided to which an agency can refer when exercising its authority, rather than concentrating on justifying the result through the granting of qualified or absolute immunity to the wandering official. This type of "front end" approach towards balancing governmental interest with family rights requires more than what the courts have ultimately provided in dealing with agencies' arbitrary actions. Without a definitive declaration of what family rights are in the area of child rearing, discipline, education, and other areas of family life that parents have traditionally directed, the courts will be obliged to resort to balancing tests and whatever "clearly established" constitutional privileges have been declared when agencies decide to impose on those traditions. Consequently, the discussion of intrusion of family integrity contrasted with balancing state authority will

27. *See Fowler*, 1996 WL 67994, at *18. The Court also referred to Albright v. Oliver, 510 U.S. 266, 312 (1994) (Stevens, J., dissenting), which states that few powers that the State possesses which, if arbitrarily imposed, "can harm liberty as substantially as the filing of criminal charges."

28. *See* Cathleen A. Cleaver, *Parental Rights: Who's Children Are They?* FRC Code: PV95J1PN (Sept. 20, 1995) <http://www.frc.org/frc/perspective/pv95j1pn.html>.

ultimately focus on the need for legislative action that declares what rights are clearly established and which should be left to common law balancing tests.

As a foundation for this analysis of these competing interests, Part II will report on the current status of child abuse laws and investigatory efforts.[29] Part III will examine the current view by the courts as to what kinds of violations of family or parental rights are actionable, and the effects of *not* recognizing certain traditional parental rights as "clearly established" and fundamental in Section 1983 actions.[30] Finally, Part IV will weigh the effectiveness of the existing common law balancing tests against the latest proposed legislative remedy as a potential solution for protecting the family without jeopardizing the welfare of children and, at the same time, avoiding needless litigation. The analysis will argue in favor of the legislative approach as the most practical and attainable means for families to maintain their right to exercise their constitutional rights, thereby maintaining family integrity.[31]

## Part II: Background

As part of the U.S. Department of Health and Human Services, Congress enacted legislation to establish an agency called the National Center on Child Abuse and Neglect [hereinafter "NCCAN"].[32] The mission assigned to the NCCAN is multi-fac-

29. *See infra* text accompanying notes 32-88.

30. *See infra* text accompanying notes 89-300.

31. *See infra* text accompanying notes 301-377.

32. *See* 42 U.S.C. § 5101 (1994). "The Child Abuse Prevention, Adoption, and Family Services Act of 1988," later amended as, "The Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992," *see* Pub. L. No. 102-295, § 102, 106 Stat. 187 (1992), and then, "The National Child Protection Act of 1993," *see* Pub. L. No. 103-209, § 1, 107 Stat. 2490 (1993), amended again in 1996 to incorporate this statute along with several others to enable the NCCAN to perform several key functions in the area of child abuse and neglect. As late as 1992, the congressional findings under the Act included:

(1) each year, hundreds of thousands of American children are victims of abuse and neglect with such numbers having increased dramatically over the past decade;

(2) many of these children and their families fail to receive adequate protection or treatment;

(3) the problem of child abuse and neglect requires a comprehensive approach that—

eted.[33] Its main purpose, however, is to conduct research on the causes, prevention and identification of child abuse and neglect.[34] Another function of the NCCAN is to maintain and dis-

(A) integrates the work of social service, legal health, mental health, education, and substance abuse agencies and organizations;
(B) strengthens coordination among all levels of government, and with private agencies, civic, religious, and professional organizations, and individual volunteers;
(C) emphasizes the need for abuse and neglect prevention, investigation, and treatment at the neighborhood level;
(D) ensures properly trained and support staff with specialized knowledge, to carry out their child protection duties; and
(E) is sensitive to ethnic and cultural diversity;
(4) the failure to coordinate and comprehensively prevent and treat child abuse and neglect threatens the futures of tens of thousands of children and results in a cost to the Nation of billions of dollars in direct expenditures for health, social, and special educational services and ultimately in the loss of work productivity;
(5) all elements of American society have a shared responsibility in responding to this national child and family emergency;
(6) substantial reductions in the prevalence and incidence of child abuse and neglect and the alleviation of its consequences are matters of the highest national priority;
(7) national policy should strengthen families to remedy the causes of child abuse and neglect, provide support for intensive services to prevent the unnecessary removal of children from families, and promote the reunification of families if removal has taken place;
(8) the child protection system should be comprehensive, child-centered, family-focused, and community-based, should incorporate all appropriate measures to prevent the occurrence or recurrence of child abuse and neglect, and should promote physical and psychological recovery and social re-integration in an environment that fosters the health, self-respect, and dignity of the child[.]

Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992, Pub. L. No. 102-295, § 102, 106 Stat. 187 (1992).

33. 42 U.S.C. § 5105 (1994).

34. 42 U.S.C. § 5105 provides in part:

[t]he Secretary shall, through the Center, conduct research on—
(A) the causes, prevention, identification, treatment and cultural distinctions of child abuse and neglect;
(B) appropriate, effective and culturally sensitive investigative, administrative, and judicial procedures with respect to cases of child abuse; and
(C) the national incidence of child abuse and neglect, including—
(i) the extent to which incidents of child abuse are increasing or decreasing in number and severity;
(ii) the relationship of child abuse and neglect to nonpayment of child support, cultural diversity, disabilities, and various other factors; and
(iii) the incidence of substantiated reported child abuse cases that result in civil child protection proceedings or criminal proceedings,

seminate information relating to the incidence of child abuse and neglect, as well as to identify effective prevention and treatment programs implemented by the states.[35] The NCCAN does this through a national clearinghouse it has established.[36] In April of 1996, in conjunction with the Administration on Children, Youth and Families and the NCCAN, the Department of Health and Human Services [hereinafter, "DHHS"] published the results of the Third National Incidence Study of Child Abuse and Neglect, referred to as, NIS-3.[37] The key objective for this study was to provide an update of the status of child abuse in the nation, and to measure any increase or decrease in the incidence of child abuse and neglect since the last study was performed in 1986 - 1987.[38] The results published are based on over 5,600 professionals in 842 agencies across forty-two counties participating in the study.[39] The results revealed that there has been a substantial and significant increase in the incidence of child abuse and neglect since 1986.[40]

Two standards were used to categorize children in the study: the Harm Standard[41] and the Endangerment Standard.[42]

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including the number of such cases with respect to which the court makes a finding that abuse or neglect exists and the disposition of such cases.

*Id.* § 5105(a).

35. *See* 42 U.S.C. § 5104(b) (1994).

36. *See* 42 U.S.C. § 5104(a).

37. *See* ANDREA J. SEDLAK, PH.D. & DIANE D. BROADHURST, M.L.A., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *Executive Summary of the Third National Incidence Study of Child Abuse and Neglect* (NIS-3)(Sep. 1996). The first incidence study (NIS-1) was conducted in 1979 and 1980 and published in 1981. The second study (NIS-2) was conducted in 1986 and 1987 and published in 1988. The third (NIS-3) study's data was collected in 1993 and 1994 and results were published in 1996 after two years of analysis. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See* SELDAK, *supra* note 37 at 12. The Harm Standard considers children to be maltreated only if they already experienced harm from abuse or neglect. *See id.* at 5. The Harm Standard was used in all three national incidence studies, and generally requires that an act or omission result in demonstrable harm. *See id.* at 12. According to NIS-3, an estimated 1,553,800 children in the United States were abused or neglected under the Harm Standard in 1993. This represented a sixty-seven percent increase since the previous study, which indicated a total of 931,000 children in 1986. *See id.* The categories of abused or neglected children that fit under the Harm Standard were sexually abused, physically neglected, emotionally neglected, and physically abused children. *See id.* at 13.

Under the Harm Standard, the total number of abused and neglected children was two-thirds higher in this study as compared to the last study.[43] "The 1993 estimate of the number of children who were endangered by maltreatment (but not yet harmed) was more than four times the 1986 estimate."[44] The conclusion was that the risk of the child experiencing harm-causing abuse or neglect in 1993 was one and one-half times greater than it was in 1986.[45] Overall, DHHS reported that 1,012,000 children were victims of child abuse and neglect in 1994, representing a twenty-seven percent increase since 1990, when approximately 800,000 children were found to be victims of maltreatment.[46]

According to the NCCAN, in 1994, various State child protective agencies across the United States referred an estimated two million reports of maltreatment for investigation.[47] The National Child Abuse and Neglect Data System [hereinafter, "NCANDS"][48] indicated that those reports involved approximately 2.9 million children.[49] Of the reports that were substantiated, fifty-three percent were due to neglect, twenty-six percent to physical abuse, fourteen percent were associated with sexual abuse, five percent were caused by emotional abuse

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42. *See* Seldak, *supra* note 37 at 12. The Endangerment Standard, used in both NIS-2 and NIS-3, includes all children who meet the Harm Standard but adds others as well. It includes "children who were not yet harmed by maltreatment." *See id.*

43. *See id.*

44. *See id.* at 14.

45. *See id.* at 5-6. "The term 'child abuse and neglect' means the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child by a person who is responsible for the child's welfare, under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary. . . ." 42 U.S.C. § 5106g(4) (1994). *See* Seldak, *supra* note 37 at 5-6.

46. *See* National Clearinghouse on Child Abuse and Neglect, *Child Abuse and Neglect Statistical Fact Sheet* (Publication No. 11-11111).

47. *See id.*; *see also infra* note 52.

48. *See Reports from the States to the National Center on Child Abuse* (1996). The NCANDS is the primary source of information on abused and neglected children known to the state child protective services (CPS) agencies. The Child Abuse Prevention and Treatment Act requires that the NCCAN establish such a system of data collection and analysis. *See* 42 U.S.C. § 5104(1) (1996).

49. *See* U.S. Department of Health and Human Services, Child Maltreatment 1994: *Reports from the States to the National Center on Child Abuse* (1996) at ix. This number includes reports of maltreatment that may have been repeated and counted more than once during the year. *See id.* at 2-1.

and three percent were the result of medical neglect.[50] Over one million children were victims of either "substantiated" or "indicated" maltreatment in 1993.[51] In 1994, forty-eight states reported that 1,011,628 children were determined to have been victims of abuse and neglect.[52] In 1990, the number was 798,318 children.[53] That represents almost a twenty-seven percent increase in the number of "substantiated" or "indicated" maltreatment cases from 1990 to 1994.[54] In 1994, forty-nine states reported that approximately 1.63 million investigations of alleged abuse were conducted.[55] More than fifty-six percent of those investigations were found to be "not substantiated," and four percent were found to be "intentionally false."[56] About thirty-seven percent were found to be either "substantiated" or "indicated."[57]

Because of the growing number of state hot lines and awareness programs to inform the public on how to report suspected child abuse, the number of reports has increased substantially in the last several years.[58] The problem of child abuse has appeared to be a growing problem in America,[59] and consequently, more people are reporting suspected cases based upon their own personal criteria of what they believe child

50. *See* National Clearinghouse on Child Abuse and Neglect, *Child Abuse and Neglect Statistical Fact Sheet* (Publication No. 11-11111). Nineteen percent of the substantiated reports of maltreatment were due to other forms of maltreatment than listed here, and some children were victims of more than one type of maltreatment. *See id.*

51. *See* NCCAN, *In Fact . . . Answers to Frequently Asked Questions on Child Abuse and Neglect* (Publication No. 11-11159). "Substantiated" and "not substantiated" are terms used by thirty-nine of the States that participated in the research, while fifteen States used the term "indicated" to signify that there was reason to *suspect* child abuse or neglect, but that the subsequent investigation failed to find any proof that would meet the standards of evidence required by state law or policy. *See id.*; *see also* National Research Council, *Understanding Child Abuse and Neglect* (Washington, DC: National Academy of Sciences, 1993).

52. *See* U.S. Department of Health and Human Services, Child Maltreatment 1994: *Reports from the States to the National Center on Child Abuse* (1996) at ix.

53. *See id.*

54. *See id.*

55. *See id.* at 2-2.

56. *See* U.S. Department of Health and Human Services, Child Maltreatment 1994: *Reports from the States to the National Center on Child Abuse* (1996) at ix.

57. *See id.*

58. *See* CHRISTOPHER J. KLICKA, THE RIGHT CHOICE 252, 268 (1993). Although the hot lines can be used for a good purpose, they can also be used to harass.

59. *See* Seldak, *supra* note 37.

abuse or neglect or "maltreatment" to be.[60] In particular, cases of false child abuse reports have been on the rise for families that do not "fit the mold" of the neighborhood or community in which they are a part.[61] For example, families that follow a particular religious conviction are more vulnerable to the scrutiny of neighbors, law enforcement officials and Child Protective Services [hereinafter, "CPS"] when sending their children to a private school or when educating their children at home. Most social workers in CPS are obligated to investigate a report of suspected child abuse within twenty-four or forty-eight hours, even if the tip is anonymous with no apparent foundation.[62] This causes upheaval in homes, especially when social workers are uneducated concerning the law and constitutional rights of families, and because of what they may personally believe the rights of the parents to be.[63] Because of the substantial number of cases classified as unfounded, estimated to be anywhere from fifty to sixty percent, perhaps the shocking numbers reported by the NCCAN of abused or neglected children needs to be questioned.[64] One source estimated that in 1989 alone, over one million families were falsely accused of child abuse.[65] That number represents more than the total number of children identified by DHHS as having been abused by the harm standard in 1986, and sixty-five percent of the total number reported to have been abused in 1993.[66] Another source indicated

60. *See* CHRISTOPHER J. KLICKA, *supra* note 58.

61. *See id.*

62. *See id.* As a result, families are being subjected to intimidating confrontations with child welfare agents.

63. *See id.* at 264. One incident in Kansas involved a caseworker from the Social Rehabilitative Service who insisted that she had the right to come into a home to investigate a report. After the family refused to allow the investigation, the worker checked with her superior who admitted that she had no authority to enter the home. Surprised, the worker admits to the family's attorney that no one had ever refused her entry before. *See id.*

64. *See* CHRISTOPHER J. KLICKA at 267-269, *supra* note 58. One social worker in Chicago commented that well over fifty percent of all referrals were discovered to be "unfounded," and that many cases end up classified as unfounded after families are broken apart and children put in foster homes. She added that many hospitals and health care centers are in "the business of always finding child abuse," and that many younger social workers are encouraged to go on "fishing expeditions." *Id.*

65. *See id.* at 274 (quoting MARY PRIDE, THE CHILD ABUSE INDUSTRY, 13-14 (1989)).

66. *See* Sedlak, *supra* note 37.

that in 1987, there were 1,306,800 false child abuse reports which represents over half of the reported cases.[67] If the number of false reports has grown proportionately with the total number of reports of suspected child abuse, the percentage of unfounded or false reports could actually be greater than sixty-five percent.[68] However, there is data available which suggests that while the total *number* of reports is growing each year, the *percentage* of false or unfounded reports is also on the rise.[69] Since the terms, "maltreatment," "abuse" or "neglect" can now be applied to so many situations, no objective standard seems to be controlling. A common allegation raised is the "thin child" accusation, as well as the "lingering colds" accusation,

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67. *See* CHRISTOPHER J. KLICKA, *supra* note 58 at 275 (quoting RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 86-88 (1990)). Wexler reported that out of every 100 reports of suspected child abuse, at least fifty-eight are false; twenty-one are poverty cases; six are sexual abuse; four are minor physical abuse; four are unspecified physical abuse; three are emotional maltreatment; three are "other maltreatment;" and only one is major physical abuse. *See* RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 86-88 (1990). Child Protection Services in Cobb County Georgia received 4,196 reports of child abuse in 1991. *See* CHRISTOPHER J. KLICKA, THE RIGHT CHOICE (1993). Only 879 (21%) were confirmed. *See id.* In New Hampshire, during the same year, the Department of Child and Youth Services documented 6,434 reports of abuse with 86.2% of the reports (5,524) turning out to be false. *See id.*

68. *See* U.S. Department of Health and Human Services, *supra* note 52 at 2-2. NIS-3 claims a sixty-seven percent increase in children abused in the United States from 1986-1993; *see also* Christopher J. Klicka, *supra* note 67 at 268: One social worker after closing a fabricated case of child abuse admitted that ninety percent of all the cases she handled turned out to be "unfounded."

69. In New Hampshire, fifty-four percent of reports were false in 1984 (2,041 out of 3,855). *See id.* at 273. In 1990, eighty-six percent (4,907 out of 5,616) were false. *See id.* Dr. Douglas Besharov of the American Enterprise Institute for Public Policy Research published the following:

> Much of the present high level of intervention is unwarranted and some is demonstrably harmful to the children and families involved. More than sixty-five percent of all reports of suspected child maltreatment—involving over 750,000 children per year—turn out to be "unfounded". . . . The present level of over-reporting is unreasonably high and is growing rapidly. There has been a steady increase in the number and percentage of "unfounded" reports since 1976, when approximately only thirty-five percent of reports were "unfounded."

*Id.* at 274; *see also* Douglas Besharov, *Doing Something About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 HARVARD J.L. & PUB. POL'Y 556 (1985).

often heard during flu season.[70] The false allegation of "lack of supervision" is one of the most common phrases that accompanies charges of educational neglect against those that school their children at home.[71]

Many social workers have become disheartened with the abuse of authority in their own departments, and have helped give birth to a new term now being applied to the child welfare system: "the child abuse industry."[72] "The war against child abuse has become a war against children. Every year, we let hundreds of children die, force thousands more to live with strangers, and throw a million innocent families into chaos. We call this 'child protection.'"[73] Social workers are not the only people aware of the number of false cases of child abuse propelled by CPS all over the country. After an investigation that included interviews with over 250 social workers, therapists,

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70. *See* KLICKA *supra* note 67 at 260. An anonymous caller's report in Wisconsin, evidently in disagreement with the parents' religious beliefs and practices, was documented as follows:

> The caller was concerned because the children were all thin and thought that removal of food was possibly a form of discipline. The caller thought this discipline may have been a practice of the parents' religion which was thought to have been *Born Again*. The caller thought that these parents give a lot of money to the church and spend little money on groceries. The caller's last, somewhat passing concern, was that [the mother] home schools her children.

*Id.*

71. *See id.* at 258. The following is an attorney's account of a report made in Michigan by an anonymous caller:

> A home school family was reported by an anonymous tipster who claimed the children were not supervised, the children did not attend school, the boys ran around barefoot, an old rusty car was in their yard, the boys slept in the attic, and one boy liked to kill mice.. . . I talked with the child welfare agent who said she would prosecute the family for neglect and get a search warrant. She also wanted a special study done on the child who killed mice because she thought he might have a psychological problem. We were able to prove to the social worker that the children were being legally home schooled, that there was no rusty car in the yard (except their own functional, slightly rusty car parked in the driveway), and the children did not sleep in the attic. As far as lack of supervision, I told the agent the charge was false, and the children have the right to play in their own yard. In regard to killing mice coming from a nearby swamp, we had no apologies but wondered at the competence of the agent. As a result, the case was closed.

*Id.*

72. *See id.* at 268; *see also* MARY PRIDE, THE CHILD ABUSE INDUSTRY (1989).

73. *See* KLICKA *supra* note 67 at 268.

judges, doctors and families, the San Diego county Grand Jury issued a fifty-six page report in 1992 indicating that the child protection system was, "out of control, with few checks and little balance."[74] The Grand Jury found that the system had developed a mind-set that child abuse is rampant and biased toward proving allegations instead of finding the truth. They further reported that, "[i]n too many cases, Child Protective Services cannot distinguish real abuse from fabrication, abuse from neglect, and neglect from poverty or cultural differences."[75] Of the

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74. *See id.* at 270 (quoting Okerblom Wilkins, *Child Protection System Ripped*, THE SAN DIEGO UNION TRIBUNE, February 7, 1992, at A1, A19).

75. *See id.* (quoting Okerblom and Wilkens, *Child Protection System Ripped*, THE SAN DIEGO UNION TRIBUNE, Feb. 7, 1992, at A1, A19). Dr. Friedlander, a medical expert who now makes herself available to help families who have been falsely accused of child abuse, documented the following account on her Internet Web site:

> In late March, I went to court in another state to help a working-class family which had contacted me through this home page. A 2-year old girl had obvious nonspecific vulvovaginitis, with a mix of flora on gram stain which included some gram-negative diplococci, mostly extracellular. The child was just getting over chickenpox, which might have triggered the vulvovaginitis. The pediatrician, a self-styled expert on child sexual abuse, found an "apparent healed laceration" at the 2-3 o'clock position in the hymen, no further description. Cultures and DNA probes were negative for gonorrhea. Cultures of all family members, including the grandfather, a former chief flight mechanic on a Navy ship, were negative for gonorrhea. The child denied any sexual stuff during the medical exams. The child struggled and cried a lot during the child abuse exams and cultures. A smear of the 'purulent' exudate showed no white cells, only a lot of epithelial cells. Afterwards, she talked about 'monsters' and 'doctor monsters,' and said, "the monster(s) put a bone in my mouth and the hair choked me" (the cotton-tipped swabs, dummies) and said, "the monster had a mask" (duh).
>
> On the strength of this evidence, the Department of Human Services told the court, "the perpetrator has been identified" as the grandfather, the evidence being that he owned a Halloween mask. They told him that if he admitted his crime and got counseling, the child would be restored to the mother. The entire family refused. I was the sole medical witness for the defense, which I took for free.
>
> I poked around the medical library, confirmed and improved on what I already knew, and was able to testify that (1) 3% of girls had a little nick in the hymen at the 2-3 o'clock position, just naturally, and around 20-30% of three-year-old girls have such innocent nicks ('apparent healed lacerations,' I thought), which are no more indicative of trauma than is a double-chin; (2) relying on a gram stain in this situation was totally unacceptable as a means of diagnosing gonorrhea, and the bugs were probably Neisseria sicca or one of [its] kin, common commensals, which tend to be extracellular while gonorrhea bacteria are usually mostly intracellular; (3) the CDC guidelines specifically direct physicians NOT to rely on a gram stain in this situation;

300 cases that were reviewed, 250 (83%) needed corrective action or reevaluation, and an estimated sixty percent involved innocent families.[76]

Because of the increased national involvement of CPS into the affairs of otherwise normal, healthy families, several organizations have formed to provide support for families who fall victim to over-zealous agencies in search of child abuse.[77] These organizations also lobby for legislation that would force CPS to regard parental rights and privacy that fall within the realm of the Fourth and Fourteenth Amendments of the United States Constitution. Many are looking for legislative relief because, in their view, the courts have been unwilling or unable to provide relief for families which have been traumatized by CPS investi-

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(4) if this were gonorrhea, there would have been white cells in the exudate, and the abundance of epithelial cells suggested 'resolving chickenpox' to me; (5) the negative culture and DNA probes satisfied me that this was almost certainly not gonorrhea; (6) there are published, empirical criteria for the physical examination of a girl suspected of having been sexually abused, and the 'expert' had utterly failed to address or meet these; (7) often you never find the cause of vulvovaginitis in a child. (I should have had the statistic, which is 70%; I'm sorry I didn't.)

We won.

From now on, I am available as a medical expert in other cases in which I'm convinced that an allegation of child abuse is false. As always, I do not charge truly innocent defendants. Please place links to my page as you think would be useful.

Edward Robert Freidlander M.D., *False Allegations of Child Abuse*, (visited Oct. 4, 1997) <http://www.worldmall.com/erf/abuse.html>.

76. *See* KLICKA *supra* note 67 at 271. The jury also found that "patently erroneous testimony" by physicians from the Center for Child Protection at Children's Hospital, which examines most of the local children suspected of being abused, "played a significant role" in several cases in which children were removed from their homes. *Id.* at 272.

77. Some of these organizations are: *Victims of Child Abuse Laws* (VOCAL): P.O. Box 7653 Vallejo, California 94590; *National Association of State VOCAL Organizations* (NASVO); 1-800-745-8778; *The Coalition of Parents*: 1-800-478-9410; *The Family Research Council*: 700 13th Street N.W. Suite 500, Washington, D.C. 20005; *National Law Center for Children and Families*: 4103 Chain Bridge Road, #410, Fairfax, VA 22030-4105, (703) 691-4626; *National Coalition for Protection of Children and Families*: 800 Compton Road, Suite 9244, Cincinnati, OH 45231; (513) 521-6227; *Victims of Child Abuse Laws*: 930 G Street, Sacramento, CA 95814; *Families for Freedom of York*, Pennsylvania, Box 338, Dover, PA 17315; *The Institute for Children*: 1-617-491-4691; *Children's Rights Project of the American Civil Liberties Union*: 132 West 43rd Street, New York, N.Y. 10036; *Center for Constitutional Rights*: 666 Broadway, New York, N.Y. 10012.

gatory abuse.[78] However, with forty-three states reporting that 1,111 child fatalities resulted from maltreatment in 1994 alone,[79] a solution must be presented that protects both the families as well as those children who are true victims of abuse or neglect.

In its first report in 1990, the U.S. Advisory Board on Child Abuse and Neglect,[80] "concluded that the problem of child mal-

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78. *See* KLICKA *supra* note 67 at 271. "The Juvenile Court system, which should be the ultimate check in the system, 'is not fulfilling its role.'" The jury found that the judge does not appear 'to offer an even playing field in which the judicial officer serves as a neutral arbiter of the facts.'" *Id.* (quoting Okerblom and Wilkens, *Child Protection System Ripped*, THE SAN DIEGO UNION TRIBUNE, Feb. 7, 1992, at A1, A19). "Rarely, the jury said, does a judge demand a 'high standard of performance' from the Social Services staff. The judges 'are viewed and appear to view themselves as pro-child which translates to pro-DSS,' it said." *Id.* (quoting Abrahamson, *Child Protection System in S.D. Scored by Grand Jury*, THE LOS ANGELES TIMES, Feb. 7, 1992, at A1, A28-A29). Six bills were approved by the California Judicial Committee to try and deal with the problem of child abuse and family reunification. Melissa Kludjian, aide to Senator Richard G. Polanco said in Jun. of 1996:

> We decided major reform was needed when you have 100 to 200 children killed per year in California .... We realize that there's a lot of accusations that prove false and can really tear up families. But when you weigh the two, in the senator's eyes, you'd like to do the investigation and put the questions to rest versus not doing it and finding a child dead later.

*See* Jonathan Kerr, *California: Legislature Tackles Flood of Child Abuse, Family Reunification Measures*, West's Legal News, Jun. 24, 1996, *available in* 1996 WL 341225.

79. *See* U.S. Department of Health and Human Services, Child Maltreatment 1994: *Reports from the States to the National Center on Child Abuse* (1996), at 2-9. The rate of child fatalities in the reporting States was approximately 2 per 100,000 children younger than 18 years of age. *See id.*

80. The U.S. Advisory Board on Child Abuse and Neglect was formed under the Child Abuse and Treatment Act, amendments of 1988, and consists of 15 members appointed by the Secretary of Health and Human Services. *See* 42 U.S.C. § 5102 (1994) which provides in part:

> the Secretary shall appoint members from the general public who are individuals knowledgeable in child abuse and neglect prevention, intervention, treatment, or research, and with due consideration to representation of ethnic or racial minorities and diverse geographic areas, and who represent—
>
> (1) law (including the judiciary);
> (2) psychology (including child development);
> (3) social services (including child protective services);
> (4) medicine (including pediatrics);
> (5) State and local government;
> (6) organizations providing services to disabled persons;
> (7) organizations providing services to adolescents;
> (8) teachers;

treatment in the United States had escalated to the level of a national emergency based on the alarming increase in the number of abuse and neglect reports and the negative consequences" for children and society in general.[81] In its fifth report made in April of 1995, Deanne Tilton Durfee, Chairperson for the Board wrote:

> The cruel realization that parents and caretakers can kill their own children has been difficult for our Nation to face. Indeed, many who make policies, direct programs, and deliver services to children and families have found it difficult to accept. Yet, this is reality.
>
> For so many who question the importance of providing preventive services to high risk families, especially those with small children, let this report serve as a reminder of what the tragic outcome of indifference may be. For those who believe that the child protection system is overly intrusive, let us recall how we might have wished there had been a meaningful intervention before the death of a helpless young victim. Let us also ask how a strong community support system — friends, family, neighbors — could have helped assure the safety of a preschool child who was never seen outside the home until autopsy.[82]

The 1995 summary went on to report that Phil McClain's research at the Centers for Disease Control and Prevention [hereinafter, "CDC"] suggested that 5.4 out of every 100,000 children age four and under die as result of abuse and neglect.[83] That number, estimating conservatively, may be as high as 11.6 per 100,000 children due to the misclassification of child deaths.[84] In its study, members of the U.S. Advisory Board met in June of 1994 with members of the Family Violence Program[85] at the

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(9) parent self-help organizations;
(10) parents' groups;
(11) voluntary groups;
(12) family rights groups;
(13) children's rights advocates.

42 U.S.C. 5102(c) (1994).

81. *See* Administration for Children and Families, U.S. Dep't. of Health and Human Services, *A Nation's Shame: Fatal Child Abuse and Neglect in the U.S., A Report of the U.S. Advisory Board on Child Abuse and Neglect* at xxi (1995).

82. *Id.* at xv.

83. *See id.* at xxiv-xxv.

84. *See id.*

85. *See id.* at 151. The Family Violence Program began in 1987 and was the result of a hearing held at the prison in 1985 dealing with the relationship between

Bedford Hills Women's Correctional Facility in Bedford Hills, New York to try and understand the effect of CPS and social services on their personal experience as abused children and as perpetrators of abuse.[86] In her own words, this was one woman's story:

> My terror and rage led to the death of my 6-week-old son. I make no excuses for my acts. What I share with you is an effort to understand myself and others, and perhaps in some way to find even a small degree of forgiveness in myself.
>
> What I want this Board to know is two things: first, that my son's death was tragic; and second, that it was not until a series of investigations of the events that any meaningful intervention worked for the rest of my five children.
>
> My husband first had sex with me when I was 4 years old, and later he had sex with me and my children. My life and my children's lives have always been hard. On the day my son died, I had gone to a place where I was high on pills and alcohol at least 80 percent of the time. I was disgusted with everything and furious. The more I drank, the angrier I got.
>
> In my craziness that day, I was trying to run away from my husband with my children. The baby's zipper got stuck. I was panicking because I thought he was coming home, and when my son cried, I struck him. I was so out of control I didn't even realize he was dead. He was quiet. I dressed him and put all the kids in the car and started driving around.
>
> I attempted to kill us all by driving over an embankment into Sheepshead Bay. All I succeeded in doing was banging up the car, and my husband found us. I was never arrested for the death of my son or charged, but my husband and I were later charged with and found guilty of sexual abuse. The irony is that they thought my son died as a result of whiplash.
>
> I share these things with you because there were no interventions for me as a child. I was tortured physically and sexually for as long as I can remember. I never knew what normal was or

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incarcerated women and domestic violence. The goal was, "to provide women with a safe and supportive environment to help them identify and address experiences of violence and victimization in their lives." Women participate voluntarily and must complete an 8-week orientation session to join. The program is currently the only one of its kind in the country. *See* U.S. Dep't. of Health and Human Services, *A Nation's Shame: Fatal Child Abuse and Neglect in the United States, A Report of the U.S. Advisory Board on Child Abuse and Neglect* at 153.

86. *See* Administration for Children and Families, U.S. Dep't. of Health and Human Services, *supra* note 81 at 151.

> could be. I am a woman and a mother who hurts deeply inside, but I am not a monster. I am a hurting soul. I have a wounded soul, and perhaps the deepest pain is that I became just like all of those people in my life that tortured me.[87]

The advisory board's report made clear how intricate the problem of child abuse really is.[88] Sociologically, economically, legally, and emotionally challenging, the problem we are experiencing as a society is not single but multi-faceted. Therefore, this problem cannot be solved merely through expanded government agency intervention.

## Part III - The Current View in the Courts

### Meyer v. Nebraska[89]

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[90]

#### The Fourteenth Amendment liberty interest

> [w]ithout doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[91]

This pronouncement of the United States Supreme Court in *Meyer v. Nebraska*[92] was one of the first opportunities the Court used to deal with parents' fundamental right to raise their children.[93] In striking down a Nebraska law prohibiting the teaching of any subject in any language other than English prior to the eighth grade, the Court refused to give place to governmen-

87. *See id.* at 151-52.
88. *See id.* at xxvii-xxxvi.
89. 262 U.S. 390 (1923).
90. U.S. CONST. amend. XIV, §1.
91. *Meyer*, 262 U.S. at 399.
92. 262 U.S. 390 (1923).
93. *See id.* at 399-400.

tal methods or means that conflict with the Constitution.[94] The importance of such insistence becomes clear in contrast to possible alternatives. Plato, in his *Ideal Commonwealth* states:

> [t]hat the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent . . . The proper officers will take the offspring of the god parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.[95]

Implementing its ideas that were "wholly different from those upon which our institutions rest," Sparta, as the Court pointed out, gathered its seven year old males into barracks and entrusted their education and training to official guardians.[96]

The Court in this case expressly stated that the Due Process Clause of the Fourteenth Amendment established as fundamental the parents' right to "establish a home and bring up children."[97] The parent-child relationship and the obligations and rights inherent in it were affirmed as protected by the Constitution.[98] The Court, in this affirmation, afforded parents substantive due process rights in the upbringing of their children.

*The Right to Privacy*

Two years after the decision in *Meyer*, Justice McReynolds held in *Pierce v. Society of the Sisters*[99] that Oregon's Compulsory Attendance Act was unconstitutional in requiring that

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94. *See id.* at 401.

95. *See id.* at 401-02. If we had ended up recognizing the state's honorable goal of maximizing the quality of its citizens physically, mentally or morally without insisting that its means of achieving that end strictly comport with our Constitution, the end result might well have been the implementation of Plato's philosophy.

96. *Meyer*, 262 U.S. at 399.

97. *See id.*

98. *See id.* at 400. "The Ordinance of 1787 declares: 'Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life . . ." *Id.*

99. 268 U.S. 510 (1925).

"every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years . . . send him 'to a public school . . . .'"[100] In recognizing "that the Act of 1922 unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control,"[101] the Court pointed out that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[102]

With the parent-child relationship and the right of parents to direct the upbringing of their children recognized by the Court as firmly established under the Fourteenth Amendment, the issue of a family's right to privacy had just started to develop under *Meyer* and *Pierce*, but did not progress until almost a generation later.[103] In 1944, the Court finally had an opportunity to address that issue in *Prince v. Massachusetts*.[104] Sarah Prince, a Jehovah's Witness, was convicted of violating Massachusetts' child labor laws by having her nine-year-old niece, Betty, sell magazines on the street.[105] Sarah insisted that Massachusetts was interfering with the "rightful exercise of her religious convictions."[106] The Court was able to reaffirm the privacy rights of parents without compromising an important state interest.

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.[107]

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100. *Id.* at 530.

101. *Id.* at 534-35.

102. *Id.* at 535.

103. *See* David M. Wagner, *Meyer, How You've Grown: The Strange Transformation of the Supreme Court's Privacy Doctrine, (reprinted in* FAMILY RESEARCH COUNCIL: AT THE PODIUM (Apr. 21, 1994)) <http://www.frc.org/frc/podium/pd94f1gr.html> (visited Nov. 3, 1997).

104. 321 U.S. 158, 165-66 (1944).

105. *See id.* at 159-60.

106. *See id.* at 159.

107. *Prince*, 321 U.S. at 166 (citations omitted).

Though this clearly reaffirms parental rights toward their children, the Court brought the issue of privacy into play by referring to "the private realm of family life."[108] However, the Court carefully balanced its reaffirmation of parental rights by declaring that in areas that concern child welfare, such as "the crippling effects of child employment," the State could act to protect children by "limiting parental freedom and authority."[109]

When an Amish family, based on their religious convictions, chose to remove their children from public school after the eighth grade, the Supreme Court found that the state's "high responsibility for education of its citizens" was not more compelling than a parent's liberty interest in directing the education of their children.[110] The Court in *Wisconsin v. Yoder*[111] stated that "[e]ven more markedly than in *Prince* . . . this case involves the fundamental interest of their children."[112] As in *Prince*, the Court mentioned again that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[113]

By recognizing certain relationships as protected, other family rights have been declared fundamental, in cases like *Skinner v. Oklahoma.*[114] The *Skinner* Court, in addressing the unconstitutionality of a law requiring sterilization as a criminal punishment, recognized marriage and procreation as the basic rights of man, and "fundamental to the very existence and survival of the race."[115] In *Skinner*, the relationship between husband and wife was recognized through the Equal Protection Clause of the Fourteenth Amendment,[116] rather than through

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108. *Id.*

109. *Id.* at 167-68.

110. Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972).

111. *See id.*

112. *Yoder*, 406 U.S. at 232.

113. *Id.* at 233-34.

114. 316 U.S. 535, 536 (1942).

115. *See id.* at 541.

116. *See id.*; *see also* Kenneth L. Karst, *Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

> [The] right of procreation . . . rests more securely . . . on the interest in status and dignity . . .. The Choice to be . . . a parent is, among other things,

the Due Process Clause. Though the justification the Court used was different than in *Pierce*, the same relationship was being protected through an implied constitutional right.

The first case in which the Court discussed the right of "privacy" in the context of a protected relationship was *Griswold v. Connecticut.*[117] In affirming the principles and doctrines of *Meyer* and *Pierce*, the Court struck down a Connecticut statute that prohibited any person from using "any drug, medicinal article or instrument for the purpose of preventing conception."[118] The Court used the First, Fourth, Fifth and Ninth Amendments[119] to describe what it called "zones of privacy,"[120] older than the Bill of Rights.[121] Justice Goldberg in his concurring opinion wrote:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental."[122]

He felt strongly that the right to privacy was firmly founded in the Constitution:

> Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family — a relation as old and as fundamental as our entire civilization — surely does not show that the Government was meant to have the power to do so.[123]

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> a choice of social role and of self-concept. For the state to deny such a choice is for the organized society to deny the individual . . . the presumptive right to be treated as a person, one of equal worth among citizens.

*Id.* at 32.

117. 381 U.S. 479 (1965).

118. *Id.* at 479-80.

119. *Id.* at 484. "The Ninth Amendment . . . was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that specific mention of certain rights would be interpreted as a denial that others were protected . . .." *Griswold*, 381 U.S. at 488-89.

120. *See id.* at 484.

121. *See id.* at 486.

122. *Id.* at 493 (Goldberg, J., concurring ) (citations omitted).

123. *Id.* at 495-96.

The Fourth Amendment's assurance of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"[124] was finally attached to protected relationships defined in *Griswold* seven years prior to *Wisconsin v. Yoder*.[125] Though the Court in *Griswold* was clearly interested in protecting the marital relationship, it did not forget the family or parental rights: "[t]he entire fabric of the Constitution and the purposes that clearly underline its specific guarantees demonstrate that the rights to marital privacy and to marry and to raise a family are of similar order and magnitude as the fundamental rights specifically protected."[126]

*The Effects of a New Privacy Doctrine on Parents and Children*

There is no doubt that *Griswold* was part of an overall sexual revolution that was occurring in America and that its effects in protecting the privacy of the marriage relationship extended not just to the family in general, but far beyond.[127] In *Eisenstadt v. Baird*,[128] decided only seven years later, the Court afforded a new class of relationships protected under the Constitution: that of unmarried people.[129] The Court, in a seven-to-one decision, declared a Massachusetts statute unconstitutional under the Equal Protection Clause; the statute had prohibited the distribution of any drug or device to unmarried persons for the prevention of conception, thereby providing dissimilar treatment for married and unmarried people.[130] David Wagner, Director of Legal Policy at the Family Research Council in Washington, D.C. considered the effects of *Eisenstadt* on the privacy rights of families today.[131] In discussing the extension of the Equal Protection Clause to the unmarried, Wagner claims that the decision

124. U.S. CONST. amend. IV.
125. *See supra* note 110.
126. *Griswold*, 381 U.S. at 495 (Golberg J., concurring).
127. *See* David M. Wagner, *supra* note 103.
128. 405 U.S. 438 (1972).
129. *Id.*
130. *See id.* at 438-39.
131. *See* Wagner, *supra* note 103.

> completely contradicted the rhetoric in *Griswold* about marriage: whereas *Griswold* had cited the special, sacred nature of the marital relationship as a basis for finding a privacy right, *Eisenstadt* heaped scorn on the notion that marriage is anything special, and affirmed instead the continuing legal and metaphysical separateness of spouses.[132]

Wagner follows the evolution of the privacy doctrine through *Roe v. Wade*,[133] decided only a year after *Eisenstadt*, and suggests that through *Roe*, the Court

> marked the final repudiation of the old relational approach to privacy . . . and inaugurated an era in which privacy stands for a sort of erotic hyper-individualism: an individual's right to define him- or herself, especially through sexual activity, free from all binding commitments, and free from all encumbrances other than those that the individual freely and continuously chooses.[134]

But what does this have to do with the privacy rights of the family and the parent-child relationship?

Wagner points out that Justice McReynolds in the 1925 *Pierce* case coupled parents' rights with parents' duties in preparing children "for additional obligations."[135] However, through the evolution that *Griswold*, *Eisenstadt*, and *Roe* brought, the Family Research Council suggests that "the growth of two overlapping trends in public policy have significantly undermined parental authority and family autonomy."[136] Laws that have given minors access to abortion and birth con-

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132. *See* Wagner, *supra* note 103. We started in the 20's with *Meyer*, *Bartels*, *Pierce*, and *Farrington*, which affirmed a right of privacy for protected relationships, namely, those of the family . . . we moved on to *Skinner*, the sterilization case from 1942, where we saw that the privacy doctrine had survived the death of substantive due process and was still available to protect "marriage and procreation." Then we saw *Griswold*, where procreation drops out of the picture, and finally, *Eisenstadt*, where marriage drops out of the picture. The privacy right has by this point become a constitutional right to reject the values that it was originally designed to protect.

*See* Wagner, *supra* note 103.

133. 410 U.S. 113 (1973).

134. *See* Wagner, *supra* note 103.

135. *See id.*

136. Cathleen A. Cleaver & Greg Erken, *Parental Rights: Who Decides How Children are Raised?* (August 1996) <http://www.frc.org/frc/fampol/fp96hpa.html>.

trol without parental approval[137] actually begin to position the parents' fundamental right in directing the upbringing of their children, against the newly established rights of the child to direct his or her own upbringing.[138] The first trend then, is an assumption that children should be treated as "short adults," i.e., as individuals that are fully capable and legally entitled to make decisions about their upbringing,[139] while the "second trend involves the state's increasing propensity to substitute its judgment for that of parents in matters relating to the upbringing and education of children."[140]

These trends, as well as the laws for which children's rights advocates are lobbying,[141] directly challenge the "long-standing philosophical and legal understanding that with the parental responsibility to *protect* their children from harm comes the parental right to *direct* their children's upbringing and education."[142] If this proposition is true, government agencies such as CPS will carry out their duties on behalf of the child and his or her rights, rather than in harmony with long established fundamental rights of parents, protected by the Fourth and Fourteenth Amendments.

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137. *See, e.g.*, MO. ANN. STAT. § 188.028 (West 1996); *see also* PA. STAT. ANN. tit. 18, § 3206 (West 1997); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

138. See id.

139. *See id.*

140. *See id.*

141. The American Library Association [hereinafter, "ALA"] is formally opposed to any restrictions on a child's ability to check out any item, regardless of pornographic content or parental objections. *See* Cathleen Cleaver, *supra* note 136 (citing AMERICAN LIBRARY ASSOCIATION, INTELLECTUAL FREEDOM MANUAL 43 (4th Ed. 1992)). The ALA has also refused to allow parents to view the check-out records of their minor children on the basis of children's privacy rights. *See id.* According to the United Nation's Children's Fund (UNICEF), the U.N. Convention on the Rights of the Child "defines the minimum standards for civil, economic, social, cultural, and political rights of children." *See* Cathleen A. Cleaver, Greg Erken, *supra* note 136 (quoting United States Committee for UNICEF, Q&A on the Convention on the Rights of the Child (1996)).

142. Cathleen A. Cleaver, Greg Erken, *supra* note 136. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children." Parham v. J.R., 442 U.S. 584, 602 (1979) (quoting 1 W. BLACKSTONE, COMMENTARIES 447 (1870); 2 J. KENT, COMMENTARIES ON AMERICAN LAW 190 (1827)). *See also infra* note 325.

*Privacy Now Being Defined More Narrowly for Parents*

In January 1995, the United Nations Convention's monitoring committee, charged with monitoring the progress that ratifying nations have made in complying with the Convention's standards, reported "that England's parental 'opt-outs' for sex education violated 'the right of the child to express his or her opinion,' and corporal punishment was deemed incompatible with 'the child's right to physical integrity.'"[143] In the light of the growth in suspected child abuse reports, problems like those David and Nancy Newkirk encountered will occur more and more when social workers who agree with the views expressed by the United Nations monitoring committee are in charge:

> During the 1989-1990 school year, Daniel and Nancy Newkirk from East Lansing, Michigan, discovered that their eight-year-old son Jason was being psychologically counseled by an unlicensed, untrained guidance counselor against their express wishes. The case began when Jason's teacher told the Newkirks that their son wasn't "interacting" with classmates as she thought he should. The parents agreed to let their son "play games" (like checkers) with the guidance counselor but flatly refused to allow any psychological counseling.
>
> Despite this apparent understanding, the counselor began subjecting Jason to "The Talking, Feeling, and Doing Game, a Psychotherapeutic Game for Children." While the manufacturer of this game warns that it is intended for use "only by mental health professionals," the counselors had no such training.
>
> Questions posed to young Jason from the game included:
>
> - *Tell something about your mother that gets you angry.*
> - *What do you think about a boy who sometimes wished that his brother were dead?*
> - *What is the worst thing you can say about your family?*
>
> After the counseling began, the Newkirks noticed changes in their son's attitude, and he began complaining to his parents about his sessions with the counselor. The Newkirks confronted the school, but were told that the relationship between the boy and the counselor was "confidential." They then had a psychiatrist examine Jason, who diagnosed the boy as having suffered emotional dam-

143. Cleaver, *supra* note 136 at n.28 (quoting Committee on the Rights of the Child, Eighth Session, *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and North Ireland* (1995)).

age from the sessions, including separation anxiety disorder and panic attacks.[144]

The Newkirks filed suit in July 1991 in U.S. District Court against the school district and some of the school staff involved.[145] The court's ruling was surprising and without much explanation. In March 1993, the U.S. District Court ruled against the parents on the basis that their allegation of a violation of their privacy rights did not state a claim under the Federal Constitution.[146] On appeal, the Sixth Circuit Court of Appeals affirmed,[147] and the U.S. Supreme Court denied certiorari, leaving the Newkirks with no further remedy.[148]

In *Brown v. Hot, Sexy and Safer Productions*,[149] students were required to attend a school-wide sexually explicit Acquired Immune Deficiency Syndrome (hereinafter, "AIDS") awareness assembly given by Hot, Sexy, and Safer, Inc.[150] Ronald and Suzanne Brown brought suit in Federal District Court, alleging violations of due process, the free exercise clause, and their right to an educational environment that is free from sexual harassment.[151] They further alleged that the school district and the employees of Hot, Sexy, and Safer, Inc. violated their privacy right to direct the upbringing of their children according to their views,[152] which is a constitutionally protected fundamen-

144. *See* Cathleen A. Cleaver & Greg Erken, *Parental Rights: Who Decides How Children Are Raised?* (Aug. 1996) <http://www.frc.org/frc/fampol/fp96hpa.html> (citing Newkirk v. Lansing, 1995 WL 355664 (6th Cir, 1995) (per curiam), *cert. denied*, Newkirk v. Fink, 116 S.Ct. 380 (1995)).

145. See *Newkirk* 1995 WL 355664.

146. *See id.*

147. *See id.*

148. *See id.*

149. 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 116 S.Ct. 1044 (1996).

150. *See id.* at 529.

151. *See id.*

152. The complaint alleged that Suzi Landolphi, contracted through Hot, Sexy, and Safer, Productions Inc. (wholly owned by Landolphi):

> 1) told the students that they were going to have a 'group sexual experience, with audience participation;' 2) used profane, lewd, and lascivious language to describe body parts and excretory functions; 3) advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex; 4) simulated masturbation; 5) characterized the loose pants worn by one minor as 'erection wear;' 6) referred to being in 'deep sh—' after anal sex; 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up; 8) encouraged a male minor to display his 'or-

tal right,[153] and "thus can only be infringed upon a showing of a 'compelling state interest.'"[154] They lost their case before the First Circuit Court of Appeals in Massachusetts, alleging that the school's opt-out policy was not followed, and the Supreme Court denied certiorari.[155] The United States Court of Appeals found that the acts alleged are not "conscience shocking," and therefore the Browns failed to state a claim.[156] The court explained that the state had to have engaged in "extreme or intrusive physical conduct."[157] "While the defendants' failure to provide opt-out procedures may have displayed a certain callousness towards the sensibilities of the minors, their acts do not approach the mean-spirited brutality" seen in other cases.[158] With regard to the violation of the alleged fundamental privacy right, the court found that the doctrines established in both *Meyer*[159] and *Pierce*[160] were established prior to jurisprudence being developed on what we know today as the "right to pri-

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gasm face' with her for the camera; 9) informed a male minor that he was not having enough orgasms; 10) closely inspected a minor and told him he had a 'nice butt.'

*Id.* at 529.

153. The court indicated that a "right is 'clearly established' if, at the time of the alleged violation, '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Brown*, 68 F.3d at 531 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). The court also acknowledged that "the custody, care and nurture of the child reside first in the parents," *id.* at 533 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)), and that parents had a liberty interest "to direct the upbringing and education of children under their control." *Brown*, 68 F.3d at 533 (quoting *Pierce*, 268 U.S. at 534-35).

154. *Brown*, 68 F.3d at 532.

155. *See* Brown v. Hot, Sexy and Safer Prod., Inc. 116 S.Ct. 1044 (1996) (mem.).

156. *See Brown*, 68 F.3d at 532. The court indicated that there are two theories under which a plaintiff can bring a substantive due process claim: 1) the demonstration of an identified liberty interest protected by the Fourteenth Amendment; and 2) the state's conduct must "shock the conscience." *Id.* at 531.

157. *Id.* at 531. The court also refers to *Rochin v. California*, 342 U.S. 165 (1952), where the standard for conscience shocking claims was established. There, the court held that the government could not use evidence that was obtained by pumping a defendant's stomach against his will because that kind of conduct is so egregious that it "shocked the conscience" and offended even "hardened sensibilities." *Brown*, 68 F.3d at 531 (quoting *Rochin*, 342 U.S. at 172).

158. *See id.* at 532; *see also* Souza v. Pina, 53 F.3d 423, 427 (1st Cir. 1995); Pittsley v. Warish, 927 F.2d 3, 6 (1st Cir. 1991).

159. 262 U.S. 390 (1923).

160. 268 U.S. 510 (1925).

vacy." Further, the court noted that "the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny."[161]

*Parents' Fourth and Fourteenth Amendment Standing Diminished*

In *H.R. v. State Department of Human Resources*,[162] a Houston County Department of Human Resources (hereinafter, "DHR") received an anonymous report of child abuse and neglect on November 5, 1991.[163] A second report was received by the department the very next day.[164] A social worker, Donna Jones, was assigned to the case on December 3, 1991.[165] Jones went to the home and explained to the mother that they had received complaints of child abuse and neglect, and that she needed to talk to the children and to see the home.[166] The mother refused to allow Ms. Jones to interview the children.[167] As a result, on January 15, 1992, Jones petitioned the Juvenile Court to "assume jurisdiction . . . and order access to these children as well as any psychological or medical exams necessary to complete this investigation."[168] This request was made pursuant to an Alabama statute which provides that when consent to investigate the home or interview the child cannot be obtained, "a court of competent jurisdiction, *upon cause shown*, shall order the parents or persons in charge of any place where the

161. *Brown*, 68 F.3d at 533. The court further explained that in its mind, though the *Meyer* and *Pierce* cases stand for the premise that the state does not have the power to "'standardize its children' or to 'foster a homogeneous people,'" neither do parents have a fundamental constitutional right to dictate the curriculum at the public school to which they choose to send their children. *Id.* at 533. The court draws a distinction between the state prohibiting a parent from teaching their child German or sending him or her to a parochial school and the parent saying to the state, "[y]ou can't teach my child subjects that are morally offensive to me." *Id.* at 534.

162. 612 So. 2d 477 (Ala. Civ. App. 1992), *cert. denied*, No. 1920126 (Ala. Feb. 5, 1993).

163. *See id.* at 477-78.

164. *See id.* at 478.

165. *See id.*

166. *See id.*

167. *See H.R.*, 612 So. 2d at 478.

168. *Id.*

child may be to allow the interview, examinations and investigations" by DHR.[169]

At the hearing to determine whether there was "cause shown," the referee indicated that she considered the receipt of a report or complaint, anonymous or not, sufficient "cause shown" under the statute.[170] Based on the reports received from DHR, the Juvenile Court entered an Order for DHR to enter the home and complete its investigation.[171] The mother contended that the order for entry into her home was given without probable cause and was therefore in violation of her right against unreasonable search and seizure under the Fourth Amendment.[172] The Alabama Supreme Court responded by saying:

> [t]he "cause shown" was unsworn hearsay and could, at best, present a mere suspicion. A mere suspicion is not sufficient to rise to reasonable or probable cause . . . . [T]he case worker cannot be empowered to enter private homes, poor or rich, without reasonable cause to believe that the charged acts are occurring. Such an entry is in pursuit of an investigation which may or probably will result in a criminal charge or in removal of custody of children. We consider that the legislature did not intend to authorize an unconstitutional act . . . .[173]

Recent cases have shown that social workers believe they *are* empowered to enter homes on a tip, anonymous or otherwise, which becomes their "cause shown."[174] As a rule, the

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169. *Id.*

170. *See id.* at 479.

171. *See id.* at 478.

172. *See* H.R., 612 So. 2d at 478. The Fourth Amendment of the U.S. Constitution provides: "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by an Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

173. *See id.* at 479-80. Here the Alabama Supreme Court recognized the right to privacy as protected by the Fourth Amendment. *See id.* DHR's petition to show "cause shown" had simply indicated that there had been two anonymous reports provided over the phone regarding certain conditions or events alleged to have existed or occurred in the mother's home. *See id.* at 479.

174. *See* Cathleen A. Cleaver, *Parental Rights: Whose Children Are They?* (Sept. 20, 1995) <http://www.frc.org/frc/perspective/pv95j1pn.html>.

> A steady drumbeat of Child Protective Services tragedies reveals an increasing nonchalance about the sanctity of the family unit on the part of government social workers who take children from their homes on little more than rumors. This "loot first and ask questions later" approach reflects the height

lower courts are not upholding the U.S. Supreme Court's earlier decisions concerning the fundamental rights of parents to guide the upbringing of their children.[175] Whether the action involves a school guidance counselor, social worker, outside sex education consultant, or as will be discussed later, local law enforcement officials, parental standing is being increasingly challenged.[176]

In the Kansas case of *Franz v. Lytle*,[177] police Officer Lytle was dispatched to investigate a report "of a child who was possibly in need of care."[178] A neighbor, Ms. Brickley, first called the Kansas Social and Rehabilitative Services [hereinafter, "SRS"] which told her to call the police because there was no caseworker available.[179] When Ms. Brickley called the police, she told them that "her neighbor's two year old daughter,

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of arrogance, and does untold damage to the very souls CPS was designed to protect. Tragically, however, there are real cases of intra-family abuse and neglect. But in too many such cases, protective government agencies completely fail to intervene. That our child protection system needs improvement is apparent, but no case of under-enforcement can support a blanket sanction of over-enforcement so obtrusive as to be self-defeating.

*Id.*

175. *See, e.g.*, notes 149-161.

176. *See id.*

177. 997 F.2d 784 (10th Cir. 1993).

178. *Franz*, 997 F.2d at 785.

179. *See id.* at n.1. With respect to reporting of child abuse, the Kansas Code for Care of Children provides in part:

(a) When any of the following persons has reason to suspect that a child has been injured as a result of physical, mental or emotional abuse or neglect or sexual abuse, the person shall report the matter promptly as provided in subsection (c) or (e).

(b) Any other person who has reason to suspect that a child has been injured as a result of physical, mental or emotional abuse or neglect or sexual abuse may report the matter as provided in subsection (c) or (e).

(c) Except as provided by subsection (e), reports made pursuant to this section shall be made to the state department of social and rehabilitation services. When the department is not open for business, the reports shall be made to the appropriate law enforcement agency. On the next day that the state department of social and rehabilitation services is open for business, the law enforcement agency shall report to the department any report received and any investigation initiated pursuant to subsection (a) of K.S.A. 38-1524 and amendments thereto. The reports may be made orally or, on request of the department, in writing .. . .

(f) Willful and knowing failure to make a report required by this section is a class B misdemeanor .. . .

KAN. STAT. ANN. § 38-1522 (1996).

Ashley Franz, was unsupervised, wet, and unclean."[180] Officer Lytle was then dispatched to investigate the report.[181] When he arrived, Ms. Brickley told him that Ashley had a severe diaper rash and stank from constantly being urine-soaked.[182] Officer Lytle asked Ms. Brickley to remove Ashley's diaper, and then he proceeded to take five or six photographs,[183] of what was characterized by the officer later as a "very severe rash."[184] This was done without either parent being notified.[185] Officer Lytle then went to inform Mrs. Franz, Ashley's mother, that he had just examined Ashley and that she would be contacted by SRS.[186] According to the report Officer Lytle later made, he was investigating "a possible molesting case" and was concerned about leaving the children at the home because this might be a potential molestation case. The officer also reported that he "was

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180. *See Franz*, 997 F.2d at 785.

181. *See id.* Section 38-1523 of the Kansas Code for Care of Children provides in part:

> *Investigation for child abuse or neglect.* The state department of social and rehabilitation services and law enforcement officers shall have the duty to receive and investigate reports of child abuse or neglect for the purpose of determining whether the report is valid and whether action is required to protect the child from further abuse or neglect. If the department and such officers determine that no action is necessary to protect the child but that a criminal prosecution should be considered, the department and such law enforcement officers shall make a report of the case to the appropriate law enforcement agency.

KAN. STAT. ANN. § 38-1523(a) (1996).

182. *See Franz*, 997 F.2d at 785.

183. *See id.* The Kansas Code for Care of Children, forbidding the photographing of minors taken into custody except in certain instances, raises a question of lawfulness concerning the taking of photographs of a child who is not yet in custody for purposes of a warrantless search. The Code provides in part:

> (a) Fingerprints or photographs shall not be taken of any person under 18 years of age who is taken into custody for any purpose, except:
>  (1) As authorized by K.S.A. 38-1611 and amendments thereto; or
>  (2) If authorized by a judge or district court having jurisdiction.
> (b) Fingerprints or photographs taken under subsection (a)(2) shall be kept regularly distinguishable from those of persons of the age of majority.
> (c) Fingerprints and photographs taken under subsection (a)(2) may be sent to a state or federal repository only if authorized by a judge of the district court having jurisdiction.

KAN. STAT. ANN. § 38-1518 (1996).

184. *See Franz*, 997 F.2d at 785.

185. *See id.*

186. *See id.*

shown the bruising of the vaginal area by the female caller."[187] He was then advised by his captain that he should return with a female officer and take the child for a medical examination to determine the cause of the bruising and "alleviate the problem of protective custody."[188]

After telephoning a former neighbor and cousin of the Franz's who also stated that Ashley was unsupervised and always urine-soaked,[189] both Officer Lytle and Officer Jeanette Schlabach returned to the Franz residence in full uniform and carrying side arms.[190] Being the only one home, Mrs. Franz complied with their request to examine Ashley by removing her pants, laying her down on the floor and spreading her legs apart as ordered.[191] Officer Lytle touched Ashley's vaginal area to check for soreness and swelling and he believed he saw some discoloration in the area.[192]

After Mrs. Franz explained that she had been trying to "potty train" Ashley, Officer Lytle gave her the choice of either voluntarily taking her up to have her examined in the emergency room or having Ashley taken into protective custody.[193] Mrs. Franz called her husband, at which point Officer Lytle explained to him that Ashley did have "some type of discoloration, bruises, whatever it is on her legs and around her vaginal area and we need to have it checked."[194] Mr. Franz came home, and they were all escorted to the hospital where Ashley was examined. The hospital report indicated that the reason for admission was possible sexual assault.[195] The attending physician concluded that Ashley had "mild redness to labial folds, no tears, bruising, or edema."[196] The officers apologized.

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187. *Id.*

188. *Id.*

189. *See Franz*, 997 F.2d at 785.

190. *See id.* at 785.

191. *See id.* The application of the Fourth Amendment restrictions to warrantless searches without probable cause remains constant with the exception of exigent circumstances, consent and "any of the recognized exceptions to the warrant requirement." *Id.* at 786.

192. *See id.* at 785.

193. *See Franz*, 997 F.2d at 785.

194. *Id.* at 786.

195. *See id.* at n.5.

196. *Id.* at 786.

The parents brought a section 1983 action[197] alleging Fourth and Fourteenth amendment violations of invasion of privacy, trespass, and deprivation of liberty.[198] Officer Lytle appealed the denial of his motion for summary judgment for qualified immunity from the parents' claims.[199] He made his appeal on the basis that the court failed to draw a distinction between the conduct of a police officer investigating a report of possible child abuse and neglect and that of a social worker that needs neither probable cause nor a search warrant.[200] In fact, Officer Lytle asked that the court declare that police officers should be granted the same latitude as social workers investigating reports of child abuse.[201] He contended that the society's need to protect its children outweighs the plaintiff's interests in privacy.[202] At issue was, "whether, at the time defendants acted, it was clearly established law that a child abuse investigation conducted by police officers is subject to the probable cause or warrant requirements."[203] The district court drew a comparison between law enforcement officers being trained in the requirements of probable cause and warrants and social workers who "have no such fluency of the legal standards."[204] In responding, the court of appeals affirmed and relied heavily on the analysis used by the district court in reaching its conclusion.[205]

Lytle made a motion for summary judgment claiming that he was entitled to qualified immunity. The court denied this motion. Officer Lytle appealed the Franzs' claim of Fourth Amendment violations based on invasion of privacy, trespass and deprivation of liberty.[206] Officer Schlabach was granted qualified immunity from allegations of violating the Franzs' Fourteenth Amendment rights to familial integrity without due process and interference with property. The Franzs voluntarily

197. *See id.* at 784.
198. *See Franz*, 997 F.2d at 786.
199. *See id.* at 784.
200. *See id.* at 784-85.
201. *See id.* at 786.
202. *See id.* at 785.
203. *Franz*, 997 F.2d at 786; *see also Franz*, 791 F. Supp. at 830.
204. *Franz*, 791 F. Supp. at 831; *see also Franz*, 997 F.2d at 786.
205. *See Franz*, 997 F.2d at 784.
206. *See id.* at 786.

chose to dismiss those allegations on appeal.[207] With respect to Officer Lytle, however, the court of appeals agreed with the district court that he had been conducting a criminal investigation through searches "aimed at uncovering incriminating evidence of sexual abuse by one or both of the parents."[208] The court noted that this was exactly the type of conduct that was proscribed by the Fourth Amendment without consent or exigent circumstances, and that no reasonable officer would have believed the searches he conducted to have been lawful based solely on the information provided.[209] Even if the facts did indicate probable cause, no exigency existed to prevent Officer Lytle from obtaining a warrant, nor could he have reasonably believed that the Franzs had given consent to the searches.[210]

The court of appeals relied upon *Anderson v. Creighton*[211] in addressing Officer Lytle's argument that he should have been given the same latitude as that of a social worker in investigating reports of child abuse and thus protected by qualified immunity.[212] *Anderson* is similar to the present case in that it also involved a warrantless search without probable cause or exigent circumstances.[213] The court stated that the test for the application of qualified immunity is whether the court can conclude that a reasonable officer in the same position at the time of the alleged violation, "schooled in the governing principles of the Fourth Amendment, [would believe] he was acting in

207. *See id.* at n.6.

208. *Franz*, 997 F.2d at 786 (quoting *Franz*, 791 F. Supp. at 831).

209. *See Franz*, 997 F.2d at 786.

210. *See id.* at n.7.

211. 483 U.S. 635 (1987).

212. *See Franz*, 997 F.2d at 787 (quoting *Anderson*, 483 U.S. at 639-40). *Anderson* centered around a suit brought against an FBI agent resulting from a warrantless search of a home. Justice Scalia explained in that case that the common law remedy of qualified immunity solves the competing policies of permitting damages suits against government officials for constitutional violations and yet still providing a shield from fear of personal monetary liability to avoid inhibiting officials from doing their jobs. *See Anderson*, 483 U.S. 635. The test courts use, then, for determining when to award damages in denying official qualified immunity, is whether the right of the officials is alleged to have violated is already recognized as "clearly established," and then, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640.

213. *See Franz*, 997 F.2d at 787.

accord with those principles. If so, his conduct was lawful, and he is entitled to qualified immunity."[214]

However, the test only addresses one half of the argument, and the court in *Franz* went on to consider how a social worker fits into the scheme.[215] The court started with "the cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions."[216] The court opined that a full-scale search is "reasonable" if there is a showing of probable cause accompanied by a belief that the information possessed reveals that a crime has been committed, and that the evidence of that crime will be found in the place to be searched.[217] The absence of probable cause can only be justified by those "well-delineated exceptions of consent,"[218] exigent circumstances or *administrative searches*.[219] Despite the facts of this case, which clearly show that Officer Lytle proceeded as a law enforcement officer conducting a criminal investigation, he argued that the warrantless search that he conducted fell within the administrative search exception.[220]

Though the court fully addressed its rejection of the defendant's claim that his conduct should be considered against the same standard as that of a social worker's under similar circumstances, it still felt compelled to deal with the secondary issue that this claim created – whether social workers are relieved of the probable cause and warrant requirement when investigating cases of child abuse or neglect, thereby relieving Officer Lytle of any warrant requirement.[221] Officer Lytle relied on a balancing test that the United States Supreme Court developed in *Skinner v. Railway Labor Executives' Ass'n*:[222]

> Our cases establish that where a Fourth Amendment intrusion serves special governmental needs, *beyond the normal need for*

214. *Id.* at 787; *see also Anderson*, 483 U.S. at 641.
215. *See Franz*, 997 F.2d at 788-89.
216. *Id.* at 787 (citations omitted).
217. *See id.* at 788; *see also* Beck v. Ohio, 379 U.S. 89, 91 (1964).
218. *Franz*, 997 F.2d at 788 (citations omitted).
219. *See id.* at 788 (citations omitted).
220. *See id.*
221. *See id.*
222. 489 U.S. 602, 619-20 (1989).

> *law enforcement*, it is necessary to balance the individual's privacy expectations against the Government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.[223]

Armed with the authority of the Supreme Court, Officer Lytle argued that society's interest in protecting children from abuse supplants the need for the probable cause requirement, as shown by the law requiring police officers to report child abuse.[224] However, the court of appeals supported the district court's finding that the "defendant's focus was not so much on the child as it was on the potential criminal culpability of her parents. That focus is the hallmark of a criminal investigation. In contrast, a social worker's principal focus is the welfare of the child."[225] This is the distinction that justified a policy providing for a less stringent requirement of probable cause in those searches classified as administrative, or those performed by Social Services.[226] The court also pointed out that a warrant or probable cause requirement imposed on a social worker would hinder his ability to investigate.[227]

### *The Court Has Yet to Rule on Parents' Fundamental and Substantive Due Process Rights*

In addition to being relieved of the warrant and probable cause requirements, social workers are frequently afforded qualified immunity.[228] The effects of this immunity on parental rights are enormous. *Chayo v. Kaladjian* is an example of such effects and of how law enforcement officials virtually receive the same privilege when assisting, rather than initiating, an investigation.[229] In November of 1990, Mrs. Chayo had her daughter,

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223. *Franz*, 997 F.2d at 788 (citations omitted).

224. *See id.*

225. *See id.* at 791.

226. *See id.*

227. *See id.* at 789.

228. Qualified immunity shields government officials from liability when their conduct does not violate "clearly established" constitutional or statutory rights, and when a reasonable person would not have known those rights to be "clearly established." It also encourages officials to continue to promote public interest in vigorously exercising official authority to that end. *See* Chayo v. Kaladjian, 844 F. Supp. 163 (S.D.N.Y. 1994); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

229. *See Chayo*, 844 F. Supp. at 166.

Rachel Lea, x-rayed as a result of an injury to her head.[230] The x-rays showed a minor skull fracture.[231] Two months later, Mrs. Chayo brought her other daughter, Chaya Mushka, to the same Medical Center for more x-rays, this time for a bruise on Mushka's forehead that her mother claimed was the result of a fall from her high chair.[232] A 2221 report[233] was filed with the New York Department of Social Services Central Register of Child Abuse and Maltreatment by the Medical Center that afternoon.[234] The New York City Human Resources Administration, Child Welfare Administration (hereinafter, "HRA/CWA") received the referral from the Central Register.[235] Supervisor Rickson conferred with the Child Protective Manager and "decided that the Chayo children had to be examined at a hospital that evening. They also concluded that it was too late . . . to get a court order."[236] They believed that the allegations in the 2221 Report were serious enough[237] as to waive the requirement for parental consent or a court order.[238] When two caseworkers arrived, Mrs. Chayo let them in and cooperated when asked about her daughters' injuries. The officers requested a physical examination of the children. Mrs. Chayo allowed the caseworkers to look for bruises and other potential signs of abuse.[239] No additional signs were found, but the caseworkers still insisted on bringing the children to a hospital for medical examination.[240]

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230. *See id.*

231. *See id.*

232. *See id.*

233. A 2221 report is a report of suspected child abuse and maltreatment. *See id.*

234. *See Chayo*, 844 F. Supp. at 166. New York has established a statewide central register to receive reports of child abuse and maltreatment. A single statewide telephone number exists for the general public that operates twenty-four hours per day, seven days a week. In addition, a special unlisted express telephone number is provided to those who are mandated by law to report alleged child abuse or maltreatment. *See* N.Y. SOC. SERV. LAW § 422(2) (McKinney 1992); *see also supra* note 4.

235. *See Chayo*, 844 F. Supp. at 166.

236. *Id.*

237. *See id.* The Report indicated that both Chaya and Rachel Lea had been brought in for skull x-rays, and that Chaya's injuries were inconsistent with the mother's explanation. No information was provided in the report relevant to treatment or results of the medical examination. *See id.*

238. *See id.*

239. *See Chayo*, 844 F. Supp. at 166-67.

240. *See id.* at 167.

Unwilling to wait for Mr. Chayo, the caseworkers allowed her to call a family friend, Rabbi Lieberman, to accompany her. When Rabbi Lieberman arrived, he opposed the removal of the children from the home.[241] The supervisor requested police assistance.[242] Shortly thereafter, two police officers arrived, along with the family attorney, and Mr. Chayo.[243] The attorney insisted that the children could not be examined without a court order or parental consent.[244] After seeing the 2221 Report and speaking with the captain, "the police agreed to aid in the removal of the Chayo children."[245] The caseworkers refused to inform the Chayos as to which hospital the children would be taken until later that evening.[246] At approximately 4:00 a.m., the supervisor, Ms. Rickson, was informed that the examinations revealed no evidence of child abuse and thus instructed the caseworkers to return the children to their home.[247]

The district court found that the social workers were protected by qualified immunity.[248] Recognizing the broad discretion given to social workers, the court emphasized the on-going struggle: "[I]f [social workers] err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child."[249] According to the court, the test for determining if the caseworkers acted reasonably is "if the official[s] have been presented with evidence of serious ongoing abuse and therefore have reason to fear imminent recurrence."[250] The caseworkers' actions were based on the 2221 Report,[251] which the court determined was a reasonable basis for their decision.

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241. *See id.*
242. *See id.*
243. *See id.*
244. *See Chayo*, 844 F. Supp. at 167.
245. *Id.* at 167.
246. *See id.*
247. *See id.* at 167.
248. *See id.* at 168; *see also supra* note 228.
249. *Chayo*, 844 F. Supp. at 169 (citation omitted).
250. *Id.* (quoting Robison v. Via, 821 F.2d 913, 922 (2d Cir. 1987)).
251. *See Chayo*, 844 F. Supp. at 168. The Report specifically stated:

> Mushka has bruising on the top of her forehead and on her back. Ch[ild] was brought to [doctor] today for a skull x-ray. Mo[ther] claims ch[ild] had fallen from a high chair. Injuries are inconsistent with explanation. Recently, Rachel was brought to [doctor] for skull x-ray (Nov. '90). Mo[ther] explained that ch[ild] fell from a bunk bed. Ch[ild] had a fractured skull.

The court found that although the caseworkers had stated to the mother that they did not believe the children were in danger, that statement was of limited importance.[252] "To remove children, caseworkers need not 'believe' that child abuse is ongoing and that danger is imminent; caseworkers need only have been 'presented with evidence' of abuse and have 'reason to fear' that danger is imminent."[253] The plaintiffs contended that "imminent danger" was not adequately defined in the regulations, "that the risk assessment factors[254] [were] not prioritized, and that the appropriate hours for investigating child abuse [were] not specified."[255] The court indicated that because the plaintiffs had not identified any case law that suggested

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So[urce] feels ch[ildren] are being abused by parents at home and is very concerned for ch[ildren's] safety.

*Id.*

252. *See id.* at 169.

253. *Chayo*, 844 F. Supp. at 169 (quoting *Robison*, 821 F.2d at 922). The New York Family Court Act states, however:

> Where there is probable cause to believe that an abused or neglected child may be found on premises, an order under this section may authorize a person conducting the child protective investigation, accompanied by a police officer, to enter the premises to determine whether such a child is present. The standard of proof and procedure for such an authorization shall be the same as for a search warrant under the criminal procedure law.

N.Y. FAM. CT. ACT § 1034 (McKinney 1983).

> A peace officer, acting pursuant to his special duties, police officer, or a law enforcement official, or an agent of a duly incorporated society for the prevention of cruelty to children or a designated employee of a city or county department of social services may take or keep a child into protective custody . . . without an order . . . and without the consent of the parent . . . regardless of whether the parent . . . is absent, if (i) the child is in such circumstance or condition that his continuing in said place of residence or in the care and custody of the parent or [legal guardian] presents an imminent danger to the child's life or health; and (ii) there is not time enough to apply for an order under section one thousand twenty-two.

N.Y. FAM. CT. ACT § 1024 (McKinney 1983); *see also* N.Y. SOC. SERV. LAW § 417 (McKinney 1994).

254. The Regulations of the Department of Social Services state:

> Risk assessment means an evaluation of elements that pertain to and influence a subject of the report, other persons named in the report and any other children in the household in order to assess the likelihood that such child[ren] named in the report or in the household will be abused or maltreated in the future.

N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(w) (1997) (emphasis omitted).

255. *Chayo*, 844 F. Supp. at 171.

that these defects rose to the level of constitutional violations, they would not be regarded as such.[256]

The court agreed that the plaintiffs have a Fourteenth Amendment liberty interest in not being separated as a family, and in being free from a medical examination without consent.[257] However, the court found that an exception exists; there is no violation of due process, when duties are performed in an emergency as was the case in *Chayo*.[258] The deprivation of a constitutional right must have occurred without due process of law. Therefore, the police officers were not liable because, the court said, "the Caseworkers had sufficient reason to believe that the Chayo children might be in imminent danger as a result of ongoing child abuse . . . . Consequently, the plaintiffs were not deprived of due process by this temporary removal."[259]

Various jurisdictions have reaffirmed the well-settled rule that parents have a protected liberty interest in the care and custody of their children, while simultaneously reinforcing limitations on those parental rights in order to serve the state's interest in protecting children.[260] Courts are finding that

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256. *See id.*

257. *See id.* (citing van Emrik v. Chemung County Dept. of Soc. Serv., 911 F.2d 863, 865 (2d Cir. 1990); Duchesne v. Sugerman 566 F.2d 817, 824-25 (2d Cir. 1977)).

258. *See Chayo*, 844 F. Supp. at 171. "The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner .. . .'" *Id.* (quoting Parratt v. Taylor, 451 U.S. 527, 540 (1981), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986)). The Court indicated that "at a meaningful time and in a meaningful manner" does not always require "the State to provide a hearing prior to the deprivation of property." *Chayo*, 844 F. Supp. at 171 (quoting Armstrong v. Manzo, 380 U.S. 545 (1965)).

259. *Chayo*, 844 F. Supp. at 171. Even though law enforcement officials are normally held to a higher standard, their actions were justified as long as the caseworkers' actions were deemed reasonable. *See id.*

260. *See Chayo*, 844 F. Supp. at 171; *see also* Defore v. Premore, 863 F. Supp. 91, 94 (N.D.N.Y. 1994) (stating that the right to family integrity was not "clearly established" for purposes of qualified immunity to a Section 1983 action); *van Emrik*, 911 F.2d at 866 (finding reasonable the removal of a child from the home during a child abuse investigation when child suffered broken leg that was characterized by attending physician as "very suspicious" of child abuse, and after caseworkers consulted with superiors and obtained court order to remove the child); *Robison*, 821 F.2d at 922 (finding reasonable the removal of children from parents' home "if the officials have been presented with evidence of serious ongoing abuse and therefore have reason to fear imminent recurrence"); *Brown*, 68 F.3d at 533; *see also supra* note 143; Frazier v. Bailey; 957 F.2d 920, 929 (1st Cir. 1992)

"although the Constitution guarantees a generalized right of family integrity under the Fourteenth Amendment, the contours of [the] substantive due process rights [of parents] are not well-defined."[261] As parental rights are increasingly being challenged, courts are being asked to define these rights more clearly.[262] Two recent decisions have evolved out of the supreme courts of North Dakota and Iowa respectively: *Raboin v. North Dakota Department of Human Services*[263] and *Hildreth v. Iowa Department of Human Services*.[264] In *Raboin*, "Social Services received a report from a person expressing concern that the Raboins were striking their children with objects as a form of discipline."[265] The Raboins had six children who were all under the age of eleven in October of 1994, when the report was made.[266] An assessment worker investigated the alleged abuse, filed a written report, and concluded that "there was probable cause to believe child abuse had in fact occurred."[267] She indicated that Brandon, age ten, relayed to her that "he was swatted on the butt twenty times 'five years ago' because he swore a lot and as a result he 'received a black and blue mark for a couple minutes' . . . . The second oldest child, Andrew, age 9, told Brown he received seventeen whacks on the butt for kicking his little sister."[268] There was no other indication in the report that any of the children had "ever suffered serious physical harm or emotional trauma from the spankings."[269] The

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(ruling a social worker accused of ignoring exculpatory evidence and programming children to falsely accuse a parent of sexual abuse could not be said to have violated clearly established constitutional law, and reversing trial court in not granting qualified immunity to social worker); Doe v. Hennepin County Community Serv. Dep't, 858 F.2d 1325, 1329-30 (8th Cir. 1988) (providing qualified immunity to officials, and declaring Minnesota statute did not give parents a constitutional protected liberty or property interest in social services prior to child being removed).

261. *Defore*, 863 F. Supp. at 95 (citing Doe v. Louisiana, 2 F.3d 1412, 1417 (5th Cir. 1993)).

262. *See Defore*, 863 F. Supp. at 95.

263. 552 N.W.2d 329 (N.D. 1996).

264. 550 N.W.2d 157 (Iowa 1996).

265. *Raboin*, 552 N.W.2d at 331.

266. *See id.* at 330-31.

267. *Id.* at 331.

268. *Id.* at 334.

269. *Id.*

Supreme Court of Iowa noted that it was undisputed that the Raboin children were "healthy, happy, and well-adjusted."[270]

Although the state's attorney concluded there was no basis to bring charges, the Raboins, claiming their religious freedom had been infringed upon, were forced to file a written request for review by the department in order to reverse the finding of probable cause.[271] At the formal administrative hearing, the Raboins testified that they used corporal punishment only as a last resort and never out of anger.[272] Furthermore, they stated that "they gave their children 'a lot of love' to make sure they knew that they were 'accepted,' while providing 'structure' and 'affection' with lots of 'verbal praise.'"[273] The hearing officer filed a written recommendation, following the hearing, that the finding of probable cause should be reversed with a notation made in the department's child abuse information index.[274] The director of the department rejected that recommendation and upheld the finding of probable cause.[275] The appeal then went to the district court, which upheld the department's finding.

The Supreme Court of North Dakota, in reviewing the department's decision to determine whether the agency's findings of fact were supported by a preponderance of the evidence,[276] examined the definition of the terms "abused child" and "harm" as defined under North Dakota law:[277]

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270. *Raboin*, 552 N.W.2d at 330.

271. *See id.* at 331, 335. The Raboins asserted that their methods of discipline were based on their religious beliefs and that the department was violating their constitutional right to practice those beliefs and that the finding of probable cause violated N.D. CENT. CODE § 500-25.1-05.1(2) (1989), which provided in part: "[p]robable cause to believe that child abuse or neglect is indicated may not be determined where the suspected child abuse or neglect arises solely out of conduct involving the legitimate practice of religious beliefs by a parent or guardian." *Id.* at 335. This section was amended effective January 1, 1996, to read: "[a] decision that services are required may not be made where the suspected child abuse or neglect arises solely out of conduct involving the legitimate practice of religious beliefs by a parent or guardian." N.D. CENT. CODE § 500-25.1-05.1(2) (1989 & Supp. 1997).

272. *Raboin*, 552 N.W.2d at 334.

273. *Id.*

274. *See id.*

275. *See id.* at 331.

276. *Raboin*, 552 N.W.2d at 333.

277. *See id.* at 333-34.

> "Abused child" means an individual under the age of eighteen years who is suffering from serious physical harm or traumatic abuse caused by other than accidental means by a person responsible for the child's health and welfare, or who is suffering from or was subjected to any act involving that individual in violation of sections 12.1-20-01 through 12.1-20-08.[278]
> "Harm" means negative changes in a child's health which occur when a person responsible for the child's health and welfare: . . . [i]nflicts, or allows to be inflicted, upon the child, physical or mental injury, including injuries sustained as a result of excessive corporal punishment[.][279]

The court then found after reviewing the entire record that there was "no evidence from which a reasonable person could conclude the Raboins [had] committed child abuse as defined by these statutes. There is simply no evidence the Raboin children have suffered serious physical harm or traumatic abuse from the spankings administered by their parents in disciplining them."[280] The court further stated that a reasonable person would not conclude that a slight bruise on the buttocks could cause a "serious 'negative change in a child's health.'"[281] Although the Raboins brought parental rights into issue under the umbrella of free exercise of religion,[282] the court indicated that it did not need to address or resolve this issue because it had already determined that the Raboins' conduct did not support a finding of probable cause to indicate child abuse under North Dakota law.[283]

However, the court in *Hildreth*, dealt with the issue of corporal punishment as it relates to parental rights.[284] As in

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278. N.D. CENT. CODE § 50-25.1-02(2) (1989); N.D. CENT. CODE § 12.1-20-01(1) (1989) provides:

> a. When the criminality of conduct depends on a child's being below the age of fifteen, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than fourteen;
> b. When criminality depends on the victim being a minor, it is an affirmative defense that the actor reasonably believed the victim to be an adult.

N.D.CENT. CODE § 12.1-20-01(1) (1989).

279. N.D.CENT. CODE § 50-25.1-02(4) (1989).

280. *Raboin*, 552 N.W.2d at 334.

281. *Id.* at 335 (citing N.D. CENT. CODE § 50-25.1-02(4)).

282. *Id.* at 335 (citing N.D. CENT. CODE § 50-25.1-05.1(2)).

283. *See Raboin*, 552 N.W.2d at 335.

284. *See Hildreth*, 550 N.W.2d at 159 (citations omitted).

*Raboin*, Tracey Hildreth also claimed that the Iowa Department of Human Services infringed upon his right to exercise his religious beliefs and therefore violated his First Amendment rights under the United States Constitution.[285] His daughter, Amanda, was eight years old at the time the complaint was made.[286] As a non-custodial parent, Tracey Hildreth was scheduled to pick Amanda up for visitation on February 8, 1993. He had asked her to bathe and wash her hair to prepare for pictures that were to be taken at a church function that evening,[287] but when he arrived at Amanda's residence, he found that she had neither bathed nor washed her hair, and told her that she would be disciplined for disobeying.[288] When they arrived at the residence, Tracey Hildreth struck Amanda three times on the buttocks with a wooden spoon over her denim jeans, but according to the record, had discussed the reasons for the punishment with her prior to administering it.[289] Two oval red marks were discovered by the mother a few hours later and by the school nurse the following morning.[290]

The Iowa Department of Human Services found that Tracey Hildreth was guilty of child abuse as a result of the spanking.[291] The Iowa statutory definition of child abuse is "[a]ny nonaccidental physical injury, or injury which is at variance with the history given of it, suffered by a child as a result of the acts or omissions of a person responsible for the care of the child."[292] The agency defined "nonaccidental injury" as "[a]n injury which was a natural and probable result of a caretaker's actions which the caretaker could have reasonably foreseen, or which a reasonable person could have foreseen in similar circumstances, or which resulted from an act administered for the

285. *See id.* at 158. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

286. *See Hildreth*, 550 N.W.2d at 158.

287. *See id.*

288. *See id.*

289. *See id.* at 158-59.

290. *See id.* at 159.

291. *See Hildreth*, 550 N.W.2d at 158.

292. IOWA CODE § 232.68(2)(a) (1996).

specific purpose of causing an injury."[293] Physical injury was also expressed by the agency as "a necessary healing process of bodily tissue so as to be restored to a sound and healthy condition. Implicit in the definition of 'physical injury' is a requirement that an external force has initially placed the bodily tissue in an unsound or unhealthy condition."[294]

The administrative law judge found that the father should have known that the "force of the blow might cause the condition that resulted," even though he did not intend to inflict an injury on his daughter.[295] Because the red marks clearly required a healing process, having lasted five days, the judge determined that "such marks imposed in the course of discipline are abusive."[296]

Tracey Hildreth brought his appeal to the district court which reasoned that the statute only required parents to take care not to physically injure the child when administering corporal punishment, and that it was within the power of the state to define child abuse as any nonaccidental physical injury resulting from corporal punishment.[297] The Supreme Court of Iowa reversed the district court and the agency.[298] The court pointed out that it has frequently recognized that parents do have a right to inflict reasonable corporal punishment in rearing their children.[299] The court determined that the agency should have concluded that Tracey Hildreth "could not reasonably have foreseen that the rather limited striking of Amanda's buttocks would produce a physical injury . . . . The laws of physics are such that when even a moderate degree of force is administered through an instrument that makes contact with only a small area of the body, the pressure visited upon that point may be more than will reasonably be anticipated."[300]

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293. *Hildreth*, 550 N.W.2d at 160 (quoting IOWA ADMIN. CODE r. 441-175.1 (1995)).

294. *Id.*

295. *Hildreth*, 550 N.W.2d at 159.

296. *Id.* at 159. Though the mother had testified that the marks could still be discerned after six days, the agency investigator found that after five days she could only observe one faint red mark. *See id.*

297. *See id.* at 160.

298. *See id.*

299. *See Hildreth*, 550 N.W.2d at 159 (citations omitted).

300. *Id.* at 160. Justice Harris wrote for the dissent, "[p]eople are commonly presumed to intend the natural consequences of their acts, and it strikes me as

## Part IV – Analysis

In the absence of a willingness by courts to deal with parental rights head on, the likelihood of parental rights and family integrity prevailing is hit or miss. The risk of not granting qualified immunity for CPS workers all over the country is one that the courts are not willing to take. How far can we allow social workers, who admittedly "have no such fluency of the legal standards,"[301] to break-up innocent families without even the Fourth Amendment constraining them? Are today's courts sending the message that the problem of child abuse is so grave and urgent that the injuries sustained by innocent families are minimal compared to those sustained by a child who is truly being abused?[302] "That our child protection system needs improvement is apparent, but no case of under-enforcement can support a blanket sanction of over-enforcement so obtrusive as to be self-defeating."[303] While the courts tend to grant qualified immunity to social workers who invade family privacy,[304] Congress has made it clear that we need a strong national policy that "should strengthen families to remedy the causes of child abuse and neglect, provide support for intensive services to prevent the unnecessary removal of children from families, and promote the reunification of families if removal has taken place."[305] However, because there is no consistent declaration by courts or by Congress of parental rights when false charges of child abuse are brought by CPS, there is no mandate to educate social workers in order to remedy the lack of "fluency of the legal standards,"[306] as represented by the Fourth Amendment or by "clearly established"[307] fundamental rights.

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preposterous to pretend Hildreth did not expect a physical injury to result from striking the child so hard with a wooden spoon as to leave her marked for days." *Id.* Justice Harris would have found that Tracey Hildreth easily qualifies as an abuser under the Iowa administrative rule. *See id.* at 161; *see also supra* note 292.

301. *Franz*, 791 F. Supp. at 831; *see also Franz*, 997 F.2d at 786.

302. *See supra* notes 225-27 and accompanying text.

303. Cathleen A. Cleaver, *supra* note 174.

304. *See supra* note 228; *see also Fowler*, 1995 WL 67994, at *19; *Newkirk*, 1995 WL 355664; *Brown*, 68 F.3d 525, *supra* notes 149-151; *see* Cleaver, *supra* note 174 and accompanying text; *Franz*, 997 F.2d at 788, *Chayo*, 844 F. Supp. 163; *Defore*, 863 F. Supp. 91.

305. *See supra* note 32 and accompanying text.

306. *Franz*, 791 F. Supp. at 831.

307. *Brown*, 68 F.3d at 531; *see also Anderson*, 483 U.S. at 640.

*The Administrative Search: A Subterfuge*

The Fourth Amendment restrictions on warrantless searches without probable cause allow for the following exceptions: exigent circumstances, consent, or administrative searches.[308] The administrative focus which permits *less* probable cause actually paves the way to qualified immunity in the courts. The question that arises from Fourth Amendment claims that are the direct result of CPS investigatory abuse is whether the administrative exception results in more or less damage to the integrity of families and their Fourth Amendment rights than its counterpart.[309] "[W]e cannot say that the Constitution requires that a visual inspection of the body of a child who may have been the victim of child abuse can only be undertaken when the standards of probable cause or a warrant are met."[310] The administrative search then, exempt from the probable cause or warrant requirements, acts as a subterfuge, providing legal probable cause for a criminal investigation which would otherwise be non-existent. The evidence obtained in the reasonable administrative search now serves as probable cause for the ensuing criminal investigation in obtaining war-

308. *See Franz*, 997 F.2d at 788.

309. The hypothesis that justifies allowing administrative searches to proceed absent exigent circumstances or probable cause must simply be that it is more acceptable to violate the Fourth Amendment if a search is performed by a social worker than by a law enforcement official. A social worker's primary concern is supposed to be the child, not the crime, if there is one. Though a criminal investigation may ensue as a result of an administrative search, founded or unfounded, at least the original focus would have been different. If founded, we as a society want a criminal investigation to follow and for all parties to have qualified immunity in carrying out their duties in order to provide optimum and speedy relief to all children involved. Even if the search appeared invasive, the difference in focus and purpose will eliminate, in the courts' eyes, any Fourth Amendment concern.

310. *Franz*, 997 F.2d at 790 (quoting Darryl H. v. Coler, 801 F.2d 893, 903 (7th Cir. 1986)). The United States Court of Appeals in *Darryl* was deciding whether the district court correctly refused to grant a preliminary injunction. The injunction prohibited a procedure in the Illinois Department of Children and Family Services (DCFS) permitting caseworkers to conduct a physical exam of a child's body for evidence of abuse. The constitutional claims made by the plaintiffs were the privacy rights of the child and of the family in child rearing, "and the obligation and right of responsible government to deal effectively with the stark reality of child abuse in our society, a problem the seriousness of which has only been appreciated fully in recent times and in which the methods of identification and prevention must still be termed developmental." *Coler*, 801 F.2d at 895; *see also Franz*, 997 F.2d at 789 n.10.

rants and further evidence.[311] What happens when the criminal investigation, charging the parents with child abuse or neglect ends up vindicating the parents? What remedy? Realistically, there is no remedy because there was no invasion, because the "Fourth Amendment intrusion serve[d] special governmental needs."[312] Because a social worker can request the assistance of a law enforcement officer without probable cause and without a warrant,[313] the law has effectively given that social worker the freedom and umbrella to operate with either a criminal or administrative focus.

The standard upheld in *Franz* was that Officer Lytle should not receive the same exemptive privilege for his search that a social worker would have received performing the very same search under the same circumstances.[314] The *Franz* court pointed out that the officer's focus was different from that of a social worker's, and that he was in uniform, carried a gun at all times, and informed his superior officer he was investigating a possible child molestation.[315] However, if the neighbor, Ms. Brickley, was successful in having SRS come to her residence rather than the police, what result? As clearly permitted by statute,[316] the caseworker could have easily asked for an officer to accompany her. Not only would the caseworker have been

311. *See Fowler*, 1996 WL 67994, *supra* notes 6-9 and accompanying text.

312. *Franz*, 997 F.2d at 788 (citations omitted).

313. *See supra* note 259; *see also* Article 15 of the Kansas Code for Care of Children which provides in part:

> The state department of social and rehabilitation services and law enforcement officers shall have the duty to receive and investigate reports of child abuse or neglect for the purpose of determining whether the report is valid and whether action is required to protect the child from further abuse or neglect. If the department and such officers determine that no action is necessary to protect the child but that a criminal prosecution should be considered, the department and such law enforcement officers shall make a report of the case to the appropriate law enforcement agency. . .. When a report of child abuse or neglect indicates (1) that the result is serious physical injury to or serious deterioration or sexual abuse of the child and (2) that action may be required to protect the child, the investigation shall be conducted as a joint effort between the department of social and rehabilitation services and the appropriate law enforcement agency or agencies, with a free exchange of information between them.

KAN. STAT. ANN. § 38-1523(a), (b) (1993).

314. *See Franz*, 997 F.2d at 791; *see also supra* note 204.

315. *See Franz*, 997 F.2d at 791.

316. *See supra* note 313.

given qualified immunity, but Officer Lytle would have been merely assisting that caseworker in her investigation. By statute, the caseworker would have had the right and authority to investigate reports of child abuse or neglect.[317] In fact, Officer Lytle, after first visiting the neighbor with Ashley, could have requested that SRS be present to legally perform the exact same investigation conducted by him without any Fourth Amendment repercussions.[318] Moreover, the statements by parents made to social workers in many states are available to a prosecutor to be used against the parent in prosecuting criminal child abuse.[319] The presence of a law enforcement official at the time those statements are made can only help in the initiation of a subsequent criminal prosecution.[320]

*The Court's Refusal to Act Has Led to Proposals by State and Federal Legislators*

An obvious question remaining is whether the latitude provided by the courts to social workers conducting administrative searches has yielded the results that would vindicate the underlying social policy[321] that justifies it. An even more critical issue, however, and also the focus of this analysis, is the lack of an available remedy under this social policy permitting a probable cause exemption. Society is obviously ready to accept Fourth and Fourteenth Amendment violations as non-actionable in those instances where a child's welfare is genuinely at stake, and but for governmental intervention, that child is at risk of further injury or even death. But the courts have gone much further by accepting as non-actionable those instances

317. *See* KAN. STAT. ANN. § 38-1523(a) (1993).

318. *See id.*

319. *See* Scott W. Somerville, Esq., Parents' Rights Are Fundamental, Memorandum from the National Center for Home Education (Mar. 3, 1995) (on file with The National Center For Home Education). The National Center For Home Education (P.O. Box 125, Paeonian Springs, VA 22129) is a division of the Home School Legal Defense Association (HSLDA). Scott Somerville is a staff attorney for HSLDA. *See also* CAL. WELF. & INST. CODE § 827(a) (West 1990); COLO. REV. STAT. § 19-3-207 (1992); N.D. CENT. CODE § 27-20-51(1) (1991); VA. CODE ANN. § 63.1-248.6 (Michie 1995).

320. *See* Somerville, *supra* note 319.

321. *See supra* note 309.

where the abuse that took place was the result of over zealous or wrongfully motivated social workers.[322]

In *Parham v. J.R.*[323], the Court emphasized the significance of parental rights.[324] Still, "the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny."[325] The Court, also concerned with children's well-being, pointed out in *Parham*[326] that:

> [a]s with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests . . . . The *statist* notions that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.[327]

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322. *See* cases cited *supra* note 304.

323. 442 U.S. 584, 602 (1979).

324. Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." 442 U.S. 584, 602 (1979) (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)); *see also* cases cited *supra* notes 89, 99, 104, 110.

325. *Brown*, 68 F.3d at 553; *see also Pierce*, 268 U.S. 510.

326. 442 U.S. 584 (1979). This was a class action suit challenging the basis upon which parents can recommend children be admitted to a psychiatric hospital based on a child's constitutional right of liberty. "The class certified by the District Court . . . consisted 'of all persons younger than 18 years of age now or hereafter received by any defendant for observation and diagnosis and/or detained for care and treatment at any 'facility' within the State of Georgia.'" *See id.* at 587 n.2. One of the plaintiffs, J.R., was a child being treated in a Georgia state mental hospital. *See id.* at 587. He had been declared to be a neglected child who had been removed from his parents by the county when he was three months old. *See id.* at 590. He had been placed in seven different foster homes before he was admitted to Central State Hospital at the age of seven. *See id.* The admission team determined that he was borderline retarded, and that he suffered from an "unsocialized, aggressive reaction of childhood." *Parham*, 442 U.S. at 590.

327. *Id.* at 602-03 (citations omitted).

Yet many state legislatures have been submitting proposals to amend their state constitutions[328] in order to stem the tide of government officials who have indeed "discard[ed] wholesale those pages of human experience that teach that parents generally do act in the child's best interests."[329] The proposals are the result of a growing outcry from parents who have no recourse as the state intrudes further and further inside the family. For example, when a Washington couple grounded their eighth-grade daughter for trying to smoke marijuana and sleep with her boyfriend, she objected and summoned the help of Social Services.[330] The court rescued the girl, and removed her from her parent's home.[331] How can parents exercise their right to direct the upbringing of their children if every time they make an unpopular decision it is undermined by an appeal to a local social worker?

> Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state . . . . Neither state officials nor federal courts are equipped to review such parental decisions.[332]

Because parental rights and the integrity of the family were so taken for granted that they were not enumerated in the Constitution, courts have interpreted those rights differently. But because they are *unenumerated*, many courts are hesitant to overturn legislation that may threaten a constitutional right that is only implied. In *Stanley v. Illinois*,[333] the United States Supreme Court held that "[t]he rights to conceive and to raise one's children have been deemed 'essential, basic civil rights of man,' and are '[r]ights far more precious . . . than property rights.'"[334] The Court goes on to say that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[335]

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328. *See infra* note 338.
329. *Parham*, 442 U.S. at 602-03.
330. *See In re Sumey*, 94 Wash. 2d 757, 770 (1980).
331. *See id.* at 759.
332. *Parham*, 442 U.S. at 603.
333. 405 U.S. 645 (1972).
334. *Id.* at 651 (citations omitted).
335. *Stanley*, 405 U.S. at 651 (quoting *Prince*, 321 U.S. at 166).

*Stanley* was a case involving an unwed father trying to regain custody of his children who were taken from him by the state when their mother died, despite the fact that he had been involved in raising them for eighteen years.[336] This was by no means the result of a child abuse charge or investigation. The Court was not in any way dealing with parental rights as it related to administrative investigations or searches by social workers. Even though the Court declared in *Stanley* that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment,"[337] when those protected rights are "pitted" against the CPS administrative focus, they are no longer fundamental or protected.[338] It is no surprise that so many states have attempted to enumerate in their own state constitutions the right to guide and direct the upbringing of their children.[339] Clearly, Child Protective Services all across the country, as well as our own courts, need clear guidelines to follow that will protect both long established parental rights and our nation's children from abuse.

*The Parental Rights and Responsibilities Act*

A bill that has been recently considered by the United States House of Representatives and Senate is the Parental Rights and Responsibilities Act [hereinafter, "PRRA"].[340] PRRA

336. 405 U.S. at 646.

337. *Id.* at 651 (citing *Meyer*, 262 U.S. at 399).

338. *See Sex, Lies and County Government: Abuse Case Shows it All*, THE SAN DIEGO UNION TRIBUNE, Jul. 19, 1992, at 4C (describing the findings of a San Diego grand jury that discovered that family freedoms were violated in over three hundred cases, and that thirty-five to seventy percent of the children who were taken from their families in San Diego County "should never have been removed from their parental homes."). *See also supra* note 78.

339. *See, e.g.*, H.B. 781 (Ala. 1996) (a proposal to amend the Constitution of Alabama to prohibit the infringement of the right of parents to direct the upbringing and education of their children); H.B. 687 (Haw. 1995) (a bill which gives parents the right to direct the upbringing and education of their children). Similar measures were introduced in California, Colorado, Delaware, Florida, Georgia, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Nebraska, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Virginia, Washington and Wisconsin. *See* Jonathan Kerr, *Conservative Groups Vouch for 'Parental Rights' Bills in Congress, State Legislatures,* WEST'S LEGAL NEWS, May 13, 1996, *available in* 1996 WL 265032.

340. The Act was originally introduced into the House of Representatives on Jun. 28, 1995, by Congressman Steve Largent, *See* H.R. 1946, 104th Cong. (1995), and introduced into the Senate on Jun. 29, 1995 by Senator Charles Grassley. *See*

§ 984, 104th Cong. (1995). The last action taken was on Jun. 25, 1996 when it was referred to committee. At that time, it had 139 cosponsors. *See id.* The Findings and Purposes section in both the House and Senate version provides:

(a) FINDINGS - Congress finds that - -
  (1) The Supreme Court has regarded the right of parents to direct the upbringing of their children as a fundamental right implicit in the concept of ordered liberty within the 14th Amendment to the Constitution of the United States, as specified in Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925);
  (2) the role of parents in the raising and rearing of their children is of inestimable value and deserving of both praise and protection by all levels of government;
  (3) the tradition of Western civilization recognizes that parents have the responsibility to love, nurture, train and protect their children;
  (4) some decisions of Federal and State courts have treated the right of parents not as a fundamental right, resulting in an improper standard of judicial review being applied to government conduct that adversely affects parental rights and prerogatives;
  (5) parents face increasing intrusions into their legitimate decisions and prerogatives by government agencies in situations that do not involve traditional understanding of abuse or neglect but simply are a conflict of parenting philosophies;
  (6) governments should not interfere in the decisions and actions of parents without compelling justification; and
  (7) the traditional 4-step process used by courts to evaluate cases concerning the right of parents described in paragraph (1) appropriately balances the interests of parents, children and government.
(b) PURPOSES - The purposes of this act are –
  (1) to protect the rights of parents to direct the upbringing of their children as a fundamental right;
  (2) to protect children from abuse and neglect as the terms have been traditionally defined and applied in statutory law, such protection being a compelling governmental interest;
  (3) while protecting the rights of parents, to acknowledge that the rights involve responsibilities and specifically that parents have the responsibility to see that their children are educated, for the purposes of literacy and self-sufficiency, as specified by the Supreme Court in Wisconsin v. Yoder, 406 U.S. 205 (1972);
  (4) to preserve the common law tradition that allows parental choices to prevail in a health care decision for a child, unless by neglect or refusal, the parental decision will result in the danger to the life of the child or result in serious physical injury of the child;
  (5) to fix a standard of judicial review for parental rights, leaving to the courts the application of the rights in particular cases based on the facts of the cases and law as applied to the facts; and
  (6) to reestablish a 4-step procedure to evaluate cases concerning the right of parents described in paragraph (1) that –
    (A) requires the parent to initially demonstrate that -
      (i) the action in question arises from the right of a parent to direct the upbringing of a child; and
      (ii) a government has interfered with or usurped the right; and

establishes the fundamental right of parents to direct and provide for the education and religious teaching of their children, and also addresses health care decisions and reasonable corporal discipline.[341] PRRA also allows governmental intervention where a compelling interest exists, but shifts the burden of persuasion to the government, which must demonstrate that "the interference or usurpation is essential to accomplish a compelling governmental interest"[342] and that "the method of intervention or usurpation used by the government is the least restrictive means of accomplishing the compelling interest."[343] The Act also has specific provisions for child abuse and neglect.[344] Those that oppose such a measure believe it would actually hinder child abuse investigators.[345] Supporters of the United Nations Convention on the Rights of the Child,[346] for example, have adopted a concept that government should "[protect] children from the power of parents."[347] People for the American Way [hereinafter, "PAW"] commented on the recently defeated Colorado Constitutional Amendment known as Amendment 17:[348]

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(B) shifts the burden of production and persuasion to the government to demonstrate that –
(i) the interference or usurpation is essential to accomplish a compelling governmental interest; and
(ii) the method of intervention or usurpation used by the government is the least restrictive means of accomplishing the compelling interest.

H.R. 1946, 104th Cong. (1995).

341. *See id.* at § 3(4)(A), (B).

342. *Id.* § 2(b)(6).

343. *Id.* § 2(b)(6)(ii).

344. *See id.* at §§ 2(b)(4), 3(4)(C).

To preserve the common law tradition that allows parental choices to prevail in a health care decision for a child, unless, by neglect or refusal, the parental decision will result in danger to the child's life or result in serious physical injury of the child . . . [t]he term "right of a parent to direct the upbringing of a child" shall not include a right of a parent to act or refrain from acting in a manner that constitutes abuse or neglect of a child, as the terms have traditionally been defined.

H.R. 1946 at § 2(b)(4), 3(4)(C).

345. Kerr, *supra* note 339.

346. *See supra* note 141.

347. *See supra* note 174.

348. *See* Bal. Meas. No. 7, 60th Gen. Assem. (Col. 1996). Out of the 3,231 precincts reporting, 42.3% or 614,275 voted YES and 57.7% or 836,524 voted NO. *See Colorado 'Parental Rights' Amendment Fails,* WEST'S LEGAL NEWS, Nov. 7,

> The PRRA was disguised as protecting "parental rights." However, the amendment would give parents the unqualified right "to direct and control the upbringing, education, values and discipline of their children." In reality, PRRA would have actually preempted state and local laws that protect children and provide health and education services. Communities would have been paralyzed under the threat of lawsuits about virtually all the services and programs they provide. Child protective services would be discouraged from investigating reports of abuse, which could result in more children being placed at risk of harm. Local decisions between parents and educators about curriculum content and text book selection could have been overturned, threatening public schools with chaos and encouraging wholesale censorship of school books by individual right-wing activists.[349]

The organization then also discusses the PRRA[350] indicating that it is unnecessary, and if enacted, would impair the ability of CPS to investigate reports of abuse and neglect and to ensure the safety of children.[351]

The National Education Association [hereinafter, "NEA"] described the PRRA as an unprecedented, anti-democratic effort to impose federal control over local school affairs and claimed that it is disruptive, intrusive, expensive, unnecessary, and a measure that will wreak havoc in the public schools.[352] In their statement, they pointed out that "the Supreme Court has *never* recognized parental rights as fundamental, and the lower courts consistently have refused to apply a compelling state interest test to such claims."[353] NEA claims that this bill does not codify existing law; instead, they claim that it creates

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1996, *available in* 1996 WL 638747; *see also* Jonathan Kerr, *Colorado's Parental Rights Amendment Called Deceptive,* WEST'S LEGAL NEWS, Oct. 14, 1996, *available in* 1996 WL 584475.

349. People for the American Way, *Colorado's 'Parental Rights' Amendment* (Oct. 25, 1996) <http://www.pfaw.org/educa/prraco.htm>.

350. *See supra* note 323.

351. People for the American Way, *Colorado's 'Parental Rights' Amendment* (Oct. 25, 1996) <http://www.pfaw.org/educa/prraco.htm>. *See supra* notes 48-51 and accompanying text.

352. *See Statement of the National Education Association Regarding the Parental Rights and Responsibilities Act* (NEA, Office of the General Counsel) (February 1996).

353. *Id.*

a new fundamental right and will have dire consequences for this country's public schools.[354]

In reality, the issue is one of control. In other words, who will control the nation's children?[355] The conjectures made by the NEA and PAW[356] have little rational basis. For example, the authority of local school boards to make decisions concerning curriculum content will not be altered by the PRRA. The Act may, however, give parents a legal basis for opting their children out of a particular class considered to be harmful.[357] Local principals and school boards are still in charge of the public schools. In his letter to Senator Grassley, James Smith, Associate Executive Director for Advocacy Services for the Iowa Education Association, stated "this bill simply allows parents a greater role in requesting that their children be allowed to opt-out of activities or assignments that are of a particular concern. Control over our school districts would still rest where it really belongs – at the local level."[358] Deanna Dubay, Education Director of PAW, asserts, however "[i]f you play out the possibilities, you'd have a situation where school districts have to customize their entire curriculum and anything the least controversial is weeded out . . . [a]nd parents already have rights in these areas.

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354. *See id.* Some of the assumptions that the NEA makes to support this claim are that the PRRA would force schools to tailor curricula for each student because the Act requires that every district in the country provide special alternative curricula that promotes the race, culture, religion or values of individual parents. Moreover, NEA claims that this would actually give certain parents special rights to make a claim for expanded government benefits, a right that will cost an enormous amount of money. If one extra teacher, for example, had to be placed in each school because of the PRRA, it would cost $3,346,330,650 an amount derived by multiplying the number of public schools in the country (87,110) by the average teacher's salary in the 1994-95 school year ($38,415). *See id.*

355. "What remains largely unconfronted is the pervasiveness of value transmission in the schools. In practice, the choice of values to be transmitted lies not with the child or the child's family, but with the political majority or interest group in charge of the school system." Scott W. Somerville, *Parent's Rights are Fundamental*, Memorandum from the National Center for Home Education (March 3, 1995) (quoting Stephan Arons and Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling,* 15 HARV. C.R.-C.L. L. REV. 309, 316 (1980)); *see also supra* note 145 and accompanying text.

356. *See supra* notes 349, 352.

357. *See* H.R. 1946, 104th Cong. § 3(4)(a)(i) (1995).

358. James A. Smith, *Iowa State Education Association Stands Alone in Favor of the PRRA,* THE HOME SCHOOL REPORT, July-Aug., 1996, 7, 8 (available from the Home School Legal Defense Association, Paeonian Springs, Va.).

It's unnecessary."[359] She also claims that "[s]chools will have to get back to what some see as the academic basics – no values, no sex education, just reading, writing, and arithmetic . . . . [t]he impossible alternative would be to do a custom-designed curriculum for each child."[360] In other words, the choice is either back to basics, or custom-designed curricula, rather than organizations like Ms. Duby's and the NEA directing the education of our nation's children.[361] It is not a hard choice to make for a parent, for a business, for a government, and hopefully, for the nation's educators.

The National Organization for Women [hereinafter, "NOW"] claims that the PRRA would undermine laws that allow minors to choose "health care services, such as family planning, abortion . . . . Further, life saving efforts such as condom distribution programs to prevent the spread of HIV/AIDS could be halted by the passage of this bill . . . [and] place state and local officials charged with the public welfare continually on the defensive."[362] In other words, officials would be accountable to parents, rather than to special interest organizations such as NOW, PAW, and the NEA. Planned Parenthood warns that "this bill would generate absolute confusion and chaos across the country . . . endanger[ing] the health of teens afraid of obtaining parental consent for health and reproductive services," citing a study that found that twenty-five percent of teens would not seek certain types of health care if there were a possibility that their parents would find out.[363]

Another contention is that the bill would make it harder to prevent child abuse. The reality is that the PRRA provides for "reasonable corporal discipline"[364] with absolutely no provision for child abuse: "The term 'right of a parent to direct the upbringing of a child' shall not include a right of a parent to act or refrain from acting in a manner that constitutes abuse or ne-

359. *Kerr, supra* note 348.

360. Cover Story, *The Enemies of Parental Rights Unite,* THE HOME SCHOOL REPORT, July-Aug. 1996, 4, 5 (available from the Home School Legal Defense Association, Paeonian Springs, Va.).

361. *See id.*

362. *Id.*

363. *Id.*

364. H.R. 1946, 104th Cong. § 3(4)(A)(iii), (C) (1995).

glect of a child, as the terms have traditionally been defined."[365] But the Children's Defense Fund [hereinafter, "CDF"] believes otherwise. On July 1, 1996, 200,000 people gathered at a rally organized by CDF at the Lincoln Memorial in Washington, D.C.[366] Their banner read "STAND FOR CHILDREN."[367] Many organizations were represented at the rally. The Revolutionist Communist Progressive Labor Party was passing out newspapers with headlines that read "CAPITALISM NO PLACE FOR KIDS" and "CAPITALISM KILLS."[368] Bumper stickers were also being handed out at the rally with slogans like "earth can no longer afford the rich," "feminism spoken here," "pro-choice: keep abortion safe and legal."[369] Buttons were also available with titles such as "Lesbian Mom," "We're here, we're gay, we're in the P.T.A.," "Fundamentalism stops a thinking mind," "Poverty is violence," and "Unspoken 'traditional family values': abuse, alcoholism, incest. Break the tradition!"[370] According to CDF president Marian Wright Edleman, those who gathered at the rally were committed "to building a just America that leaves no child behind," and "to ensuring all our children have a healthy and a safe passage to adulthood."[371] Denying that parents have the fundamental right to direct the upbringing and education of their children, CDF strongly opposes any parental rights legislation, including the PRRA.[372]

Is it any wonder why parents believe they need legislation in order to be able to continue to direct the education and upbringing of their own children? What is fueling so much of the opposition to the PRRA? If such a bill is so unnecessary, why are organizations working so hard to prevent it? The Home School Legal Defense Association[373] believes that the philosophical underpinning in the movement against parental rights

365. *Id.* § 3(4)(C).
366. *See The Enemies of Parental Rights Unite, supra* note 360.
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.*
371. *The Enemies of Parental Rights Unite, supra* note 360.
372. *See id.*
373. The Home School Legal Defense Association is a legal organization that concentrates on defending home schoolers on any issue relating to a parent's right to home school their children.

> is the conviction that parents do not know what is best for their children. This is an out-growth of the belief that individuals do not know what is best for their lives. Those who oppose the PRRA believe that the intellectual and political elite know what is best for everyone, especially children. After all, as Hillary Clinton tells us, parents alone cannot raise a child, "it takes a village." Parents should provide food and shelter for children, educators should teach children, and social workers should check up on everyone to make sure the best interests of the child are being served. Parents are one part of the system, but they should not try to control or override the other "essential" influences in their children's lives.[374]

The Supreme Court of Washington, en banc, determined in *In re the Welfare of Sheila Marie Sumey*,[375] that

> [I]t is now well established that when parental actions or decisions seriously conflict with the physical or mental health of the child, the State has a *parens patriae* right and responsibility to intervene to protect the child . . . . Although the family structure is a fundamental institution of our society, and parental prerogatives are entitled to considerable legal deference . . . they are not absolute and must yield to fundamental rights of the child or important interests of the State.[376]

The problem was that Sheila Marie was a runaway child because she could not accept the wishes of her parents. The Supreme Court of Washington decided, along with Social Services, that Sheila Marie's desire not to have to deal with her parents' demands was her fundamental right, and that the parents' intruding upon that right was affecting her physical and mental health because it would just cause her to run away from home.[377] The dissent, in examining the grounds for the majority opinion, explained:

> Petitioning juvenile was asked at the court hearing the following:
>
> Q. Could you please tell us why you believe there is a conflict in that home?
>
> A. I just feel that there's a communication gap there . . .
>
> That is the sum and substance of the petitioner's testimony upon which she was taken from her parents' custody over their objec-

374. *The Enemies of Parental Rights Unite, supra* note 360.
375. 94 Wash. 2d 757 (1980); *see supra* note 330.
376. *Id.* at 762 (citations omitted).
377. *See id.* at 767-69.

tions. What standards of conduct had these parents laid down which led to this "lack of communication"? They asked their 15-year-old daughter not [to] use drugs, or associate with those who had furnished the drugs, that she not use alcohol, that she not be sexually active, and that she be in at a reasonable hour. Because of the daughter's unwillingness to follow these obviously reasonable standards, the parents are summarily deprived of custody and the best opportunity to resolve these problems within the family. There was no claim or proof of unfitness or neglect by the parents. There was no claim o[r] proof of any imminent threat of harm or danger to this 15-year-old. The only manifestation of any potential harm to the child was her threat to run away. She had done so once in the past and occasionally stayed overnight with friends without permission.[378]

## Part V – Conclusion

Those most concerned with the welfare and rights of children need to be primarily concerned with a system of justice and laws that guarantees parental rights, for the first right of a child is to have parents who will love, care and nurture enough to ensure that the child ends up a healthy and productive child. "To say that parents have the primary role in raising children is to say that parents are irreplaceable."[379] If that is what we

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378. *Id.* at 769-70 (Brachtenbach, J., dissenting). If the State of Missouri had been able to take children away from their parents when Mormon refugees were fleeing religious persecution in the East, Utah might never have been settled. *See Somerville, supra* note 319, at 7. The Supreme Court of Utah found that family autonomy was the very thing that helps preserve a diverse society:

> [F]amily autonomy helps to assure the diversity characteristic of a free society. There is no surer way to preserve pluralism than to allow parents maximum latitude in rearing their own children. Much of the rich variety in American culture has been transmitted from generation to generation by determined parents who were acting against the best interest of their children, as defined by official dogma. Conversely, there is no surer way to threaten pluralism than to terminate the rights of parents who contradict officially approved values imposed by reformers empowered to determine what is in the "best interest" of someone else's child. In Re J.P., 648 P.2d 1364, 1376 (Utah 1982) (holding that the inherent and retained right of a parent to maintain parental ties to his or her child is constitutionally protected, and that the welfare of a child is the paramount consideration, but it is not the sole consideration, to the exclusion of parental rights).

*Id.*

379. Family Research Council, *How Does the FRC View the Rights and Responsibilities of Parents?* <http://www.townhall.com/frc/faq/faq19.html>.

want to say as a society, parents need the legal and constitutional recognition that will afford them the ability to direct the upbringing and education of their children. The Court has not done it, Social Services has not done it, but statutory recognition of the fundamental rights of parents *will* enable parents to make the decisions about child rearing that only they can and should be making. Without a definitive declaration of what family rights are in the areas of child rearing, discipline, education, and other areas of family life that parents have traditionally directed, the courts will be obliged to resort to balancing tests and whatever "clearly established" constitutional privileges have been declared when government agencies decide to impose on those traditions.

> Even strong two-parent families require strong communities to help pattern for children right[s] habits of the heart. When so many children are languishing without families of their own, community becomes all the more important . . . . It's right and fair to admit that it takes a village, as long as we really mean a local "village" that preserves parent autonomy, instead of a federal plantation that chains both children and families to an all-powerful state.[380]

*Michael Compitello**

380. Jennifer E. Marshall and Deanna Carlson, *The Least of These,* FRC Code: 9V96E4WL, (May 23, 1996) <http://www.frc.org/frc/perspective/pv96e4wl.html>.

* This article is dedicated to my wife Debbie, for the long and loving sacrifices she made for our children.