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MIGRANT CHILDREN UNDER CHILD WELFARE SERVICE JURISDICTION: WHO WILL GUARD THE GUARDS THEMSELVES?

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INTRODUCTION

California has the largest agricultural economy in the United States.¹ Providing more than half the nation's fruits, nuts, and vegetables, California is also the number one dairy-producing state, and the number two cotton producer.² Agriculture in California provides 1.2 million jobs.³

Migrant farm workers plant, maintain, harvest, and process our food.⁴ "The migrant lifestyle is a family affair and a family risk."⁵ Migrant children perform twenty-five percent of all farm labor.⁶ Unfortunately, "agriculture has surpassed mining as the nation's most hazardous occupation."⁷ A 1990 New York survey found that one-third of farm worker children had received job-related injuries in the previous year.⁸

Children of migrant families are disproportionately represented in substantiated national abuse and neglect statistics,⁹ and frequently have

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¹ CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, 1997 CALIFORNIA AGRICULTURE: CELEBRATING MORE THAN 50 YEARS AS THE NATION'S #1 AGRICULTURAL STATE, available at http://www.cdfa.ca.gov/agfacts/calif_ag.html (last visited Sept. 27, 1998).

² *Id.*

³ Press Release, Senator Dick Monteith, Agriculture Vital to California's Economy (July 25, 1997), available at <http://www.sen.ca.gov/ftp/sen/district/sd-12/press-release/agri.txt> (on file with San Joaquin Agricultural Law Review).

⁴ Mary Jane Eshleman & Ruth Davidhizar, *Life in Migrant Camps for Children - A Hazard to Health*, 4 JOURNAL OF CULTURAL DIVERSITY 13 (1997).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ National Center For Farmworker Health, *America's Farmworker's Homepage*, at <http://www.ncfh.org/aboutfws.htm> (last visited Feb. 5, 2001).

⁹ Oscar W. Larson et al, *Migrants and Maltreatment: Comparative Evidence from Central Register Data*, 14 CHILD ABUSE AND NEGLECT REGISTER 375 (1990). (This report was the result of a series of studies on the abuse and neglect of migrant farm worker children. Twenty-five thousand migrant children were included in the aforementioned studies, which continued over a three-year period and were conducted in five states. If there was any possibility that a migrant child would be erroneously classified as maltreated, that child was eliminated from consideration. The research staff conducting the studies verified the identity of all maltreated children.)

un-met health needs.¹⁰ One would suppose that county child welfare service agencies monitor these at-risk children, particularly in the heavily agricultural counties of the Central Valley, but this appears not to be the case. What could happen if child protective services removed abused or neglected migrant children from their families? Could the very system, which would protect them, re-victimize them instead?

This article poses the argument that current California child welfare services do not adequately protect the rights and lives of migrant children to the standards by which non-migrant children are protected, and that California social service practice is inadequate to deal with the unique migrant family situation. Simple changes in California child welfare service law could better serve migrant families, be cost-effective, and support California's agriculture.

I. PROTECT CALIFORNIA'S MIGRANT CHILDREN, PROTECT CALIFORNIA'S AGRICULTURE

A. *Migrant Families in California Agriculture*

A migrant farm worker is defined as an individual who is agriculturally employed on a temporary basis away from his or her permanent residence.¹¹ California has about 1.3 million migrant residents, seasonal farm workers and family members.¹² This population is greater than the combined total migrant populations of thirty-seven U.S. States.¹³ Fresno County has approximately 230,000 migrant and seasonal farm workers, while Kern County has 120,000.¹⁴ Best estimates place the number of migrant and seasonal dependents nationwide at 409,000.¹⁵ California has over half of these dependents.¹⁶

¹⁰ Eshleman, *supra* note 4, at 14.

¹¹ 29 U.S.C. § 1802(8)(A) (1996).

¹² US DEPARTMENT OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, AN ATLAS OF STATE PROFILES WHICH ESTIMATE NUMBER OF MIGRANT AND SEASONAL FARM WORKERS AND MEMBERS OF THEIR FAMILIES 13 (March 1990) [hereinafter ATLAS OF STATE PROFILES].

¹³ *Id.* (Those states include: Alabama, Arizona, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.)

¹⁴ *Id.* at 28-29.

¹⁵ PHILLIP MARTIN, MIGRANT FARMWORKERS AND THEIR CHILDREN, ERIC DIGEST NO. ED 376 997, Nov. 1994, available at <http://aelliot.ael.org/~eric/digests/edorc947.html>

B. Migrant Families' Lives

The details of migrants' lives reveal exactly how much their children may be at risk. "In return for their labor, the majority of farmworkers earn annual wages of less than \$7,500."¹⁷ In 1986, the average education level for a migrant head of household was six years.¹⁸

Migrant farm worker children are legally eligible to perform crop work at the age of twelve, although the law allows exemptions for ten- and eleven-year-olds.¹⁹ Agriculture is the only labor activity which legally allows workers to be under the age of sixteen.²⁰ In 1988, one-third of farm workers surveyed in six states had their children performing crop work.²¹ A 1992 Government Accounting Office (GAO) report noted that in addition to the one-third of migrant children performing field work for pay, additional children accompanied their parents in the fields, even though they are not legally allowed to be present, but because no alternate child care was available.²²

There is very little nationally recorded migrant housing information.²³ One migrant housing camp study indicated that migrant worker housing frequently lacks clean drinking water, bathing facilities, and safe food storage areas.²⁴ In 1980, available farm worker housing units could only accommodate thirty percent of migrant housing needs.²⁵ Private housing available to migrant families is expensive and often lacks proper sanitation facilities, while traditional housing, such as apartments or homes, often far outstrips a migrant family's financial

(last visited Aug. 2, 1998).

¹⁶ ATLAS OF STATE PROFILES, *supra* note 12, at 28-29; *see also* MIGRANT STUDENT INFORMATION NETWORK AT WEST ED, MIGRANT EDUCATION PERFORMANCE REPORT, PART A (showing that the California Migrant Education Program in the 1996-1997 school year had 219,846 students. Ninety-three percent of these students were 18 or younger), *available at* http://irc.wested.org/msin/report_0009.asp?region=03&long=1 (last visited July 23, 1998).

¹⁷ National Center For Farmworker Health, *supra* note 8.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² GARY HUANG, HEALTH PROBLEMS AMONG MIGRANT FARMWORKERS' CHILDREN IN THE U.S., ERIC DIGEST 357907 (1993), *available at* http://www.ed.gov/databases/ERIC_Digests/ed357907.html (last visited Nov. 9, 1998).

²³ *See* Sonia M. Leon Reig, *Preface* to ATLAS OF STATE PROFILES, *supra* note 12.

²⁴ *See* Eshleman, *supra* note 4, at p. 14.

²⁵ National Center For Farmworker Health, *supra* note 8.

resources.²⁶

Migrant farm workers and their children face a wide range of occupational hazards. Injuries and deaths of migrant children most often occur due to farm machinery, pesticides, farm animals, falls, and drowning.²⁷ According to the GAO, child deaths in agriculture account for twenty-five percent of child fatalities across *all* industries employing children.²⁸

Lack of adequate drinking water is common, leading to heat stroke in warm climates like the Central San Joaquin Valley. Some workers in Arizona choose not to drink enough water since using toilet facilities cuts down their work time, or toilet facilities are not properly serviced.²⁹ Children are more susceptible to heat illness than are adults.³⁰

Pesticide exposure is a serious issue for migrant children and families.³¹ An estimated 300,000 farmworkers per year suffer pesticide-related illness or injury.³² Reported pesticide poisonings in selected Central Valley counties for the years 1991-1996 totaled 2021.³³ This data only reflects acute symptom reports, not chronic afflictions, and poisonings are considered under-reported since migrants fear employer intimidation or job dismissal.³⁴ Children “absorb more pesticide per pound of body weight” than do adults.³⁵ The long-term adverse effects on developing bodies of pesticide exposure may not yet be known.

Some migrant children are frequently ill due to malnutrition and general neglect, prenatal chemical exposures, as well as direct and indirect exposures to hazardous substances in the fields.³⁶ “The infant

²⁶ *Id.*

²⁷ SHELLEY DAVIS, *Child Labor in Agriculture*, ERIC Clearinghouse on Rural Education and Small Schools, EDO-RC-96-10 (Feb. 1997).

²⁸ UNITED STATES GENERAL ACCOUNTING OFFICE, *Child Labor In Agriculture*, HEHS-98-193, 26 (1998), available at <http://www.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=f:he98193.txt.pdf>.

²⁹ HUMAN RIGHTS WATCH, *FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS*, Section III (2000), available at http://www.hrw.org/reports/2000/frmwkr/frmwkr006-02.htm#P481_76726 (last visited May 9, 2001).

³⁰ *Id.* (citing EPA Publication 750B92001 *A Guide to Heat Stress In Agriculture*).

³¹ Eshleman, *supra* note 4, at 14.

³² SHELLEY DAVIS, *CHILD LABOR IN AGRICULTURE*, ERIC® Clearinghouse on Rural Education and Small Schools, EDO-RC-96-10 (Feb. 1997).

³³ MARGARET REEVES ET AL., *FIELDS OF POISON - CALIFORNIA FARMWORKERS AND PESTICIDES 7* (1999) (Kern County: 534; Fresno County 515; Tulare County: 399; San Joaquin: 200; Kings: 167; Merced: 127; Madera: 79), available at <http://www.panna.org/panna/resources/documents/fieldsAvail.dv.html>.

³⁴ *Id.* at 6, 7.

³⁵ HUANG, *supra* note 22.

³⁶ Gerdean G. Tan ET AL., *MIGRANT FARM CHILD ABUSE AND NEGLECT WITHIN AN*

mortality rate among migrant farmworkers is 125 percent higher than among the general public.”³⁷

Childhood anemia rates in the San Joaquin Valley in 1993 were 31 percent for Kings County and 22.9 percent in Merced County.³⁸ The state average in 1993 was 19.3 percent for children under five.³⁹ “Alcohol, drug abuse, and family violence is common.”⁴⁰

General health care for migrant families is fragmented because of mobility, poverty, language barriers, superstitions such as folk maladies,⁴¹ and limited education.⁴² Pesticide exposure in particular can cause multiple symptoms and chronic complaints, causing incorrect diagnoses by the physician.⁴³

Very young migrant children presented for medical care typically suffer from infectious disease and malnutrition, while slightly older children have dental problems in addition to infectious diseases.⁴⁴ The most frequently seen condition for females fifteen to nineteen years old is pregnancy.⁴⁵ The estimated parasitic infection rate for migrants is eleven to fifty-nine times higher than that of the general U.S. population.⁴⁶ The death rate for migrant farmworkers from influenza or pneumonia is 20 to 200 times greater than in the general population.⁴⁷

Migrant parents with an ill child must miss vitally needed work themselves to care for or transport the child for care. The child also misses work, which can be essential to the family’s survival.⁴⁸ Concentration on housing, food, shelter, and transportation for work is the common focus of migrant families, often at the sacrifice of basic

ECOSYSTEM FRAMEWORK, 40 JOURNAL OF APPLIED FAMILY AND CHILD STUDIES, 84, 85 (1991).

³⁷ CALIFORNIA RESEARCH BUREAU, FARMWORKERS IN CALIFORNIA 31 (1998), at <http://www.library.ca.gov/crb/98/07/98007a.pdf>.

³⁸ *Id.* at 28-29.

³⁹ *Id.*

⁴⁰ Eshleman, *supra* note 4, at 14.

⁴¹ Edgar Leon, Ph.D, *The Health Condition of Migrant Farm Workers* 4 (1997), at <http://www.geocities.com/Athens/9022/MigrantHealth.txt> (last visited Feb. 1, 2001).

⁴² Eshleman, *supra* note 4 at 14.

⁴³ OREGON DEPT. OF HUMAN RESOURCES, OREGON HEALTH DIVISION, HEALTH ISSUES AMONG MIGRANT/SEASONAL FARM WORKERS, 48 NO. 10 CD SUMMARY (May 11, 1999), at <http://www.ohd.hr.state.or.us/cdsum/1999/ohd4810.pdf> (last visited Feb. 1, 2001).

⁴⁴ Eshleman, *supra* note 4, at 14.

⁴⁵ See HUMAN RIGHTS WATCH, *supra* note 29.

⁴⁶ Huang, *supra* note 22.

⁴⁷ *Id.*

⁴⁸ Tan ET AL., *supra* note 36 at 87.

health care.⁴⁹ When medical treatment is received, the level of treatment may be less complete than that delivered to non-migrant children.⁵⁰ Poor education and language barriers may prevent migrant parents from understanding the signs of chronic or serious illness.⁵¹ Other factors are low expectation of treatment success, payment issues,⁵² and general community bias against migrant workers.⁵³

Nationwide migrant studies have determined that poverty predisposes families to abuse and maltreatment of offspring.⁵⁴ Specifically, families with incomes of less than \$7,000 annually have a maltreatment incidence of 27.3 children per thousand compared to a rate of 10.5 children per thousand for the general population.⁵⁵ Physical neglect is the most frequently identified form of abuse in migrant families.⁵⁶ A Migrant Clinicians Network survey found that 20 percent of farmworker women surveyed had experienced either physical or sexual abuse, and that 50 percent of these women were pregnant at the time.⁵⁷

Long work hours, substandard living conditions and isolation from regular society can create an atmosphere of no escape for migrant families.⁵⁸ Often there is no social framework for support.⁵⁹ Social isolation and child abuse are also directly correlated.⁶⁰

The federal government spends about \$600 million per year on specific migrant and seasonal farm worker programs.⁶¹ These programs are Migrant Head Start, the Migrant Education Program, Migrant Health and the Jobs Partnership Training Act.⁶² However, despite these

⁴⁹ *Id.* at 86.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 87.

⁵⁴ Larson, *supra* note 9, at 375.

⁵⁵ *Id.* at 376.

⁵⁶ Tan ET AL., *supra* note 36, at 86.

⁵⁷ Excerpted from Domestic Violence in the Farmworker Population, Migrant Clinicians Network, at <http://www.migrantclinician.org./services/famvio.html> (last visited Feb. 1, 2001).

⁵⁸ Tan ET AL., *supra* note 36, at 86.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ PHILIP MARTIN, FARM LABOR, IMMIGRATION, AND WELFARE (2000), at http://migration.ucdavis.edu:80/rmn/ChangingFace/cf_oct2000/Martin_farm.html (last visited Feb. 3, 2001).

⁶² URBAN INSTITUTE, FINAL REPORT - SERVICES FOR MIGRANT CHILDREN IN THE HEALTH, SOCIAL SERVICES, AND EDUCATION SYSTEMS 3 (1993).

programs, migrant families still have multiple service needs that often reach critical levels,⁶³ and no inter-agency referral tools are in place in California to identify and protect abused or neglected migrant children.⁶⁴

The Department of Health and Human Services (HHS) notes that local migrant health and education programs commonly refer their client base to other local agencies, but there is no feedback mechanism to determine delivery of these services, and record keeping is incomplete.⁶⁵ This HHS report stated:

This lack of targeted funding, coupled with the difficulty in collecting information on the characteristics of the migrant family, makes it difficult to determine the social service needs of the population. For example, is the need for alcohol and drug abuse treatment programs among migrants more or less prevalent than in the general population? Would foster care respond to a need of the migrant family if, for example, a child were unable to travel with his/her family due to illness or disability? At best, only anecdotal information is available to answer these questions.⁶⁶

II. MIGRANT FAMILIES AND CHILD WELFARE SERVICES INTERVENTION — AN ISSUE OF CONTINUING PUBLIC IMPORTANCE

A. *How Current Child Welfare Practice is Supposed to Protect California's Migrant Families*

The California Department of Social Services (DSS) and California's fifty-eight county child welfare agencies are responsible for investigating reports of abuse and neglect of children, and providing services to families to remedy the abuse or neglect.⁶⁷

Hypothetically, a migrant farmworker child might:

Work in the fields, even operating heavy equipment, twelve to fourteen hours per day;

⁶³ See *id.* at 11.

⁶⁴ See *id.* at 48.

⁶⁵ *Id.*

⁶⁶ *Id.* at 11.

⁶⁷ The DSS defines child abuse as the non-accidental commission of injuries on a child, including emotional, physical, severe physical, or sexual abuse. Neglect is defined as failure to provide the care and protection necessary for a child's healthy growth and development. Exploitation is defined as forcing a child into performing functions beyond his capabilities or capacities. California Department of Social Services [hereinafter CDSS] Manual of Policies and Procedures, Section 31-002(c)(7), (n)(1) and (e)(9), respectively.

Bathe in a runoff ditch (contaminated by pesticides and/or containing gray water);

Sleep in a tent or in an overcrowded trailer in a bed with other children in pesticide contaminated clothing;

Not always have potable water for drinking;

Have only chemical toilets or no toilets at all;

Play or work near his or her parents in the fields twelve to fifteen hours per day, near heavy equipment and pesticides;

Have congenital or chronic illness exacerbated by exhaustion, malnutrition and/or chemical exposure;

Be left alone at the housing camp, or in the care of other children;

Not receive regular medical or dental checkups;

Be in school sporadically, or not at all.

In a non-migrant setting, a child reported to be living under such conditions would likely be immediately removed from his or her home by a county child welfare services agency for gross neglect.⁶⁸

A child welfare services action on behalf of this hypothetical migrant child, however, would be fraught with these critical problems:

The child would be moved to a foster care home or facility. Visitation with the parents might be difficult due to parental work schedules and transportation, and the family's constant relocations.

Mailing of social worker and court documents to the parents might not be possible, requiring additional in-person social worker visits to the camp or field. Social work would be costly and intensive for each family.

Social workers performing home inspections might be visiting numerous encampments to track the seasonal worker family. If the family moved outside the jurisdictional county, case transfers between counties would be necessary. This might be a repeating scenario. Court calendars and social work could not keep up with the migrant family's moves.

The parents would lose precious work time to make required court and counseling appointments, or would simply forego such appearances, causing termination of parental rights.

Due to work or moving, the parents might appear to not be executing their social services case plan, resulting in termination of services and the possible severance of parental rights.

The parents might decide to leave the child in foster care, where he or she is properly nourished and housed, again effectively terminating the family relationship.

⁶⁸ Confidential child welfare services case in which a family lived under a bridge in an automobile. California juvenile cases are confidential under CAL. WELF. & INST. CODE § 827 (Deering 2000).

In inquiring whether any special programs for tracking migrant children under social service jurisdiction is performed at the state level, the DSS responded that the State of California “does not set policies or procedures for a specific population . . . [and] . . . does not track immigration status in its data collection system.”⁶⁹

The DSS referred the authors to the counties’ social service agencies for questions of service to migrant farm worker families. “Because child welfare services are county operated programs we think you would benefit most by raising and discussing your questions with county administrators in those counties dealing with the largest number of immigrants and migrant farm workers.”⁷⁰

Social workers interviewed in Fresno and Merced Counties stated that they do not have procedural requirements or practices for identifying migrant children under their care. The social workers interviewed stated that they could recognize a migrant child, but also stated that migrant population centers are not a focus of attention for their service agencies.⁷¹

Two and one-half years of exhaustive research by the authors have found no mention of child protective services plans, programs or studies, at the state or federal level, although many migrant children could be considered a “model” of abuse and neglect. The Bureau of Labor Statistics admits that it does not even interview youth agricultural workers under the age of fourteen, nor does it question parents about whether their younger children work.⁷² California agricultural worker surveys interviewed only those eighteen years of age and older.⁷³ This creates an enormous paucity of information regarding our youngest workers. The authors wonder if a “don’t ask, don’t tell” attitude exists among state and federal agencies regarding abused and neglected migrant children.

It cannot be overstated that administering a migrant family’s social services case would be extremely difficult, and that current social

⁶⁹ E-mail from Teresa Conteras, Manager, Placement Policy Unit, Foster Care Policy Bureau, California Department of Social Services (Aug. 20, 1998) (on file with San Joaquin Ag. Law Review).

⁷⁰ *Id.*

⁷¹ August and September 1998, confidential interviews.

⁷² U.S. DEPT. OF LABOR, Report on the Youth Labor Force Chapter 5 at 52 (2000), at <http://stats.bls.gov/opub/rylf/pdf/chapter5.pdf> (last visited Feb. 4, 2001).

⁷³ CALIFORNIA INSTITUTE FOR RURAL STUDIES, SUFFERING IN SILENCE: A REPORT ON THE HEALTH OF CALIFORNIA’S AGRICULTURAL WORKERS 35 (2000), at <http://www.calendow.org/publications/AgrWorkersSurveyver012301.pdf> (last visited Feb. 5, 2001).

work models would all but guarantee the termination of migrant parents' parental rights. However, are California's child agricultural workers exempt from the right to a safe and healthy life? How can state and federal standards for the protection of children be reconciled with the poverty-stricken, ever-changing lives of migrant farm worker families?

B. Reasonable Efforts to Keep Families Together

Spurred by record numbers of children spending years in foster care systems, Congress enacted the Adoption Assistance and Child Welfare Act (The Act) in 1980⁷⁴. The Act provided standards for state child welfare services foster care systems,⁷⁵ requiring that in *each* protective services case the States perform "reasonable efforts" to preserve the family when a child is at imminent risk of being removed from his or her home.⁷⁶ California and federal law required the supervising court to determine if (1) reasonable efforts had been made to prevent or eliminate the need for removing the minor child from his or her home and (2) to state on the record the facts that led the court to order removal.⁷⁷

Also required is a case plan for each family under social services jurisdiction.⁷⁸ The plan must delineate services to specifically address the needs of the individual family, regardless of any obstacles in providing the services, or the anticipated efficacy of such measures.⁷⁹ Reunification plans routinely include scheduled visitation between parents and children.⁸⁰

The Adoption and Safe Families Act of 1997 amended the Act.⁸¹

⁷⁴ Pub. L. No. 96-272, 94 Stat. 501 (1980).

⁷⁵ 42 U.S.C. §§ 620-628 (1989), §§ 670-679(a) (1997).

⁷⁶ 42 U.S.C. § 671(a)(15)(A) (1997).

⁷⁷ 42 U.S.C. § 671(a)(15)(B) (1997); CAL. WELF. & INST. CODE § 361(c) (Deering 2000).

⁷⁸ 42 U.S.C. § 675(1) (1994).

⁷⁹ *In re Ronell A.*, 53 Cal.App.4th 1352 (1996).

⁸⁰ CAL. WELF. & INST. CODE §§ 361.5(a)(2) and 366.21(e). "Welfare and Institutions Code section 361.21 is the California statute governing visitation between a dependent child and his/her parent(s), guardian(s), and sibling(s)." Section 361.21 provides in pertinent part: "In order to maintain ties between the parent or guardian and any siblings and the [dependent] minor, and to provide information relevant to deciding if, and when, to return a minor to the custody of his or her parent or guardian, or to encourage or suspend sibling interaction, any order placing a minor in foster care, and ordering reunification services shall provide as follows: (a) Visitation shall be as frequent as possible, consistent with the well-being of the minor."

⁸¹ Background statement of H.R. 867, the "Adoption Promotion Act of 1997":

House Ways and Means Committee testimony pointed to larger numbers of children in foster care than when the original Act was passed. They looked for solutions to social workers who were forced to reunite families regardless of the peril to children.⁸² Rendering services to incorrigible parents was represented as a cause for record numbers of children in foster care.⁸³ Committee testimony on this bill detailed the efforts of social workers to reunite children with parents who lacked the ability or interest to have their children returned to them.⁸⁴ The theory behind the 1997 amendments was to place the safety and well being of the child as the foremost concern, therefore eliminating long stays in the foster care system.⁸⁵

The original "reasonable efforts" requirement was also amended by the Adoption and Safe Families Act.⁸⁶ "Reasonable efforts" now mean that the child's health and safety shall be the paramount concern, not that all efforts shall be made to preserve the family.⁸⁷ No longer is the reasonable efforts finding required unconditionally. Now, children whose parents have caused the death of a sibling, or committed a felony assault on the child or a sibling, shall not be afforded reasonable

"The Adoption Assistance and Child Welfare Act of 1980 required that States make 'reasonable efforts' both to prevent the unnecessary removal of maltreated children from their families and, if children are removed, to reunify the children with their families. Over the past 17 years, neither Federal law nor regulation has clarified 'reasonable efforts' to preserve families. As a result, there has been considerable confusion about when these efforts should be bypassed or discontinued and the child placed for adoption . . . States would not be required to make reasonable efforts to reunify a family in "aggravated circumstances" as defined in State law." House Ways and Means Committee Action No. FC 5-A, April 24, 1997, at http://www.house.gov/ways_means/fullcomm/105cong/fc-5act.htm (last visited Feb. 2, 2001).

⁸² *The Adoption Promotion Act of 1997: Hearings on H. R. 867 Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong., 1st Session, Serial 105-10 at 25 (Apr. 8, 1997).

⁸³ *Id.* at 21 (statement of David Camp, Congressman). "The 'reasonable efforts' provision has become a cumbersome albatross around the necks of social workers and judges."

⁸⁴ *Id.* at 56.

⁸⁵ *Id.* at 8.

⁸⁶ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 101 (codified in 42 U.S.C. § 671(a)(15)) (1997).

⁸⁷ Adoption Promotion Act of 1997, *supra* note 82, at 37 ("We also believe it is necessary to provide illustrations of the circumstances in which concerns about a child's health and safety take precedence over family preservation or reunification." Statement of Dr. Olivia Golden, Acting Assistant Secretary, Children and Families, U.S. Department of Health and Human Services, p. 29-30.)

efforts.⁸⁸ The statute does not require that a parent be duly convicted in a criminal proceeding. This portion of the statute suggests a lack of due process protection for the parent.

“Family preservation services” are now defined in the Adoption and Safe Families Act as services to help children return to their families, where safe and appropriate, and not just to preserve an original family, but also services which will aid the placement of a child for adoption or some other permanent living situation.⁸⁹ The Adoption and Safe Families Act also shortened reunification service delivery time requirements to fifteen months.⁹⁰

Mirroring the new reasonable efforts standard, California practice requires a service plan that outlines whether a child’s case plan is oriented toward returning the child to his or her parents, or arranging legal guardianship or adoption.⁹¹ Service plans with the latter objectives signal eventual termination of parental rights.⁹²

Services oriented toward permanently placing a child elsewhere than with his or her natural parents can hardly be called “family preservation.” For a drug-addicted migrant parent who seriously undertakes to break his or her addiction, the parental rights termination bell could easily toll before the parent can conclusively prove to the agency that he or she is a fit parent.

One cannot help but ask, as well, about the right of the child. What erroneous deprivation could occur under this statutory scheme? Hypothetically, a migrant family is working in a field. Young children accompany their parents, playing hide and seek among the crop rows. The father maneuvers a large piece of machinery along a crop row, or the machine is set to move along the rows without a driver.⁹³ The parents do not see one of the children in its path. The child is killed. Under the new federal legislation, child protective services removes the rest of the children from the family. The juvenile court determines, under *civil* rules of evidence,⁹⁴ that:

⁸⁸ 42 U.S.C. § 671(a)(15)(D) (1997).

⁸⁹ 42 U.S.C. § 629(a)(1)(A) (1997).

⁹⁰ 42 U.S.C. § 629(a)(7) (1997).

⁹¹ CAL. WELF. & INST. CODE § 361.5(f) (Deering 2000).

⁹² 42 U.S.C. § 675(5)(C) (1994).

⁹³ HUMAN RIGHTS WATCH, *supra* note 29.

⁹⁴ CAL. WELF. & INST. CODE § 361.5(f) states that if due to the parents causing the death of a sibling reunification shall not be offered, the court shall include a permanency planning hearing at the time of dispositional hearing. The standard of proof in the dispositional hearing, per CA Rules of Court 1450, is preponderance of the evidence. Also under Section 361.5(c), reunification shall be ordered if “by clear and

Both parents caused the death of the child;
 None of the children were properly supervised or protected in the fields;
 None of the children are properly nourished or medically cared for, and
 The working children should have been in school.

The parents are denied further contact with any of their children, and “reasonable efforts” consist of finalizing the children’s permanent alternate placement (long-term foster care or adoption).⁹⁵ The children’s ties to their parents, and to their siblings and extended family, are permanently severed.

The Supreme Court found the “statist” notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.⁹⁶ However, the 1997 amendments to the Act suggest just this attitude. The new “reasonable efforts” standard undermines the family’s original due process protection, that “reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.”⁹⁷ A more subtle point, as yet untested, is that when the parents’ rights to the child are severed, the child’s liberty interest⁹⁸ to the totality of his or her family is also lost.

Exhaustive research has found no published state or federal decisions to date challenging whether federally required child welfare service “reasonable efforts” have been made with regard to any migrant child or family. The long-term legal effects of the Adoption and Safe Families Act on all families under child welfare services jurisdiction are yet to be seen.⁹⁹

convincing evidence, . . . reunification is in the best interest of the minor.” Therefore, the decision to *not* reunify a family is based on the lower standard of preponderance of the evidence, while a ruling to offer reunification is at the *higher* standard of proof: Clear and convincing evidence.

⁹⁵ 42 U.S.C. § 671 (a)(15)(C) (1997); CAL. WELF. & INST. CODE § 361.5(f) (Deering 2000).

⁹⁶ *Parham v. J. R.*, 442 U.S. 584, 603 (1979).

⁹⁷ 42 U.S.C. § 671(a)(15) (1997).

⁹⁸ *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (Stevens, J., dissenting).

⁹⁹ CENTER FOR AN URBAN FUTURE, *Time Out: Illinois judge deals setback to federal foster care time limits*, CHILD WELFARE WATCH NEWS BRIEF, February 2000, No. 7, available at <http://www.citylimits.org/cuf/fax7.htm> (last visited Feb. 5, 2001).

C. *Migrant Parents' Liberty Interest Right to Their Family, and Termination of Parental Rights*

Potentially at odds with the Adoption and Safe Families Act, the Fourteenth Amendment¹⁰⁰ governs procedural due process when courts terminate a parent's relationship with his or her child.¹⁰¹ The Supreme Court has recognized that families have a great deal at stake when a parent-child relationship is improperly dissolved,¹⁰² and that the liberty interest right of parents should be thoroughly protected against all but the most persuasive circumstances.¹⁰³ Though one is less than a perfect parent, a parent still has a liberty interest to the family,¹⁰⁴ and when a family relationship has already been damaged by abuse or neglect, the parents have an even greater need for procedural protections.¹⁰⁵

Parental rights termination proceedings often involve poor, uneducated parents who are ill equipped to understand or refute complex expert testimony.¹⁰⁶ An uneven struggle can exist between the inexhaustible State and the parent.¹⁰⁷ Failing to make its case in one proceeding, the State has repeated opportunities to strengthen its arguments.¹⁰⁸ With the child already in the physical custody of the county, the parents have almost inestimable odds to overcome.¹⁰⁹ This would most certainly be the case with migrant parents, given the typical educational and financial deficiencies of migrant workers.

The court in *Santosky* noted that court proceedings which aim to sever the parent-child relationship tend to minimize probative facts which favor continuing that relationship.¹¹⁰ In the event of an erroneous decision, the parents face the complete destruction of their family¹¹¹. If they do not prevail, there is no further right to any contact of

¹⁰⁰ U.S. CONST. amend. XIV, § 1 (stating that "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.").

¹⁰¹ *Lassiter v. Department of Social Services*, 452 U.S. 18, 33 (1981).

¹⁰² *Santosky v. Kramer*, 455 U.S. 745, 763 (1982).

¹⁰³ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

¹⁰⁴ *Bellotti v. Baird* 443 U.S. 622, 638 (1979).

¹⁰⁵ *Santosky*, *supra* note 102, at 760-61.

¹⁰⁶ *Lassiter*, *supra* note 101, at 30.

¹⁰⁷ *See id.* at 47 (Blackmun, J., dissenting).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Santosky*, *supra* note 102.

¹¹¹ *Id.* at 766.

any kind with their child.¹¹²

III. HOW TO PRESERVE CALIFORNIA'S GREAT AGRICULTURAL RESOURCE

A. *Adequate Liberty Interest Protection*

The Constitution does not present a “blueprint” or specific language that will achieve proper procedural protections. In order to provide adequate due process protection for migrant and non-migrant children alike, new state legislation is needed. Such legislation should:

- Require immediate investigation of all potential relatives for emergency placement of any child at the time the child is removed from his or her home.
- Establish and mandate sibling and extended family visitation as a “right” of any minor under the detention or jurisdiction of the State of California.
- Institute continuing notification and facilitation of visitation rights to a detained child, his or her siblings and the extended family.

B. *Emergency Response: Relative Contact and Relative Placement*

While it is a nightmare for a child to be abused or neglected by his or her parents, the nightmare is compounded when the child is moved from his home, and contact with parents and the rest of the child's family is curtailed. The Supreme Court has recognized that the value of the family relationship stems from emotional attachments as well as promotion of a way of life.¹¹³ This is dramatically changed for the child who is removed from his home and thrown into a completely foreign world. A migrant child could possibly suffer even more greatly if his parents were financially compelled to continue their travels, leaving their child behind, or abandoning the child completely.¹¹⁴

Current child welfare statutes do not fully recognize the importance of immediate contact and placement with relatives in emergency response actions. Welfare and Institutions Code Section 309(a) states:

Upon delivery to the probation officer of a minor who has been taken into temporary custody under this article, the probation officer shall immediately investigate the circumstances of the minor and the facts sur-

¹¹² Lassiter, *supra* note 101, at 39 (Blackmun, J., dissenting).

¹¹³ Lehr v. Robertson, 463 U.S. 248, 261 (1983).

¹¹⁴ DAVID WERNER, NOTHING ABOUT US WITHOUT US-DEVELOPING INNOVATIVE TECHNOLOGIES FOR, BY AND WITH DISABLED PERSONS, Chapter 32, at 207, available at <http://www.dinf.ne.jp/doc/othr/dwe001/dwe00142.htm> (last visited Feb. 5, 2001).

rounding the minor's being taken into custody and attempt to maintain the minor with the minor's family through the provision of services¹¹⁵

Section 309 also states:

If an able and willing relative . . . is available and requests temporary placement of the child pending the detention hearing, the social worker shall initiate an emergency assessment of the relative's suitability.¹¹⁶

The social worker is not *required* to establish contact with the child's extended family as part of emergency response procedure, or to place the child with a relative. If the extended family is *unaware* that social services is removing the child, there is no opportunity for the relative to act. This procedural omission fails to preserve the child's family at the outset.

If the child is not returned home at the detention hearing and no relative comes forward, the child is placed in a county facility or foster home.¹¹⁷ The child may or may not be placed with siblings who have also been removed, or have any relative contact other than a telephone call with parents.¹¹⁸ For migrant parents living in a plastic and cardboard hut,¹¹⁹ a phone call might not even be possible. As some facilities are overcrowded or inappropriate for long-term stays, the child may be moved, sometimes repeatedly, causing even greater instability.¹²⁰

The court in *Moore v. East Cleveland* noted that in times of trouble the extended family rallies around¹²¹ — a child protective services action would be no exception. Many fewer children might be emotion-

¹¹⁵ CAL. WELF. & INST. CODE § 309(a) (Deering 2000) (emphasis added).

¹¹⁶ CAL. WELF. & INST. CODE § 309(d) (Deering 2000) (emphasis added).

¹¹⁷ CAL. WELF. & INST. CODE § 315 (Deering 2000) (stating in pertinent part: "If a minor has been taken into custody . . . the juvenile court shall hold a hearing . . . as soon as possible, but in any event before the expiration of the next judicial day after a petition has been filed.")

¹¹⁸ CAL. WELF. & INST. CODE § 308 (Deering 2000) (stating in pertinent part: "The county welfare department shall make a diligent and reasonable effort to ensure regular telephone contact between the parent and a child of any age, prior to the detention hearing, unless that contact would be detrimental to the child. The initial telephone contact shall take place as soon as practicable, but no later than five hours after the child is taken into custody.")

¹¹⁹ See *Conlan v. DOL*, 76 F.3d 271 (1996).

¹²⁰ LEGISLATIVE ANALYST, CHILD ABUSE AND NEGLECT IN CALIFORNIA, JAN. 1996, PART IV, available at <http://www.lao.ca.gov/cw11096d.html#A7> (last visited Feb. 5, 2001) (stating that one third of California's foster children have experienced three or more foster care placements).

¹²¹ *Moore v. East Cleveland* 431 U.S. 494, 505-06 (1977).

ally upset in out-of-home placements if they were placed immediately with familiar, caring relatives. The child's family would be preserved by actually keeping the child a part of it. The extended family could support, direct, and influence the parents as well. This is true family reunification.

In a recent DSS report mandated by the California Legislature, it was resolved that:

[w]hen kin are available and able to meet the safety and developmental needs of the children, they are a very important resource for child welfare workers in placing sibling groups . . . [R]elatives often express[] a commitment to care for the children until they [come] of age and [] only 23% of children initially with kin experienced another placement within three to five years as compared to 58% of children in non-relative foster homes.¹²²

Section 361.3 of the Welfare and Institutions Code directs the court to order the parent to disclose the identities and addresses of the child's relatives.¹²³ However, this does not occur until after the child has been detained, the initial detention hearing has been held, and the child is already in an emergency placement. Here again, the social worker is directed to consider a request from a relative for placing a child, though a request does not assure a placement with the relative.¹²⁴ Current procedures do not guarantee or require a relative placement.

When the removal of a child from his or her parents is necessary, the social worker should *immediately* collect contact information on all of the child's relatives, contact those relatives, and seek to place the child or sibling group with one of them as a standard emergency response procedure, whether that relative is in this state, or in another state or country.¹²⁵ One would expect the migrant nature of a child's family might make it much more difficult to contact relatives for placement. The authors wonder if this is one of the reasons migrant children are not tracked or served by county social service agencies. Regardless, California law already requires that the child's relatives be identified and made part of the child's case record.¹²⁶ The additional

¹²² REPORT TO THE LEGISLATURE, SIBLING GROUPS IN FOSTER CARE PLACEMENT BARRIERS AND PROPOSED SOLUTIONS, at 6 (June 1997) [hereinafter SIBLING GROUPS].

¹²³ CAL. WELF. & INST. CODE § 361.3(a)(8) (Deering 2000).

¹²⁴ CAL. WELF. & INST. CODE § 361.3(a) (Deering 2000).

¹²⁵ CAL. WELF. & INST. CODE § 368, allows the court to deliver a dependent child to another state if the parent or guardian is there, or to a child welfare official in the foreign country where the parent or guardian is located.

¹²⁶ CAL. WELF. & INST. CODE § 361.3(a) (Deering 2000).

de minimus government cost to make actual contact with these relatives for the purpose of emergency placement should be the standard.

C. Sibling Group Placement

A related factor in emergency response relative placement is the greater likelihood that migrant siblings could be placed together as a group. As of July 2000, there were over 99,000 children in California in welfare and probation supervised foster care placements.¹²⁷ Sixty percent of them were siblings, but 41 percent (58,000) were not living in the same foster home.¹²⁸ Forty-eight percent of siblings in foster care (28,000) do not live with relatives.¹²⁹

A recent report to the Legislature on sibling groups stated that separation of siblings in foster care is usually an “administrative expediency.”¹³⁰ “Placement is made on what is easiest for the placing agency, rather than based on the child’s best interests and needs, and may be tantamount to ‘government neglect.’”¹³¹ A nineteen-year-old former California foster child stated:

My only remaining family bond was taken away when my twin sister and I were separated in foster care at age seven. We have lived separately all this time, I didn’t have her to depend on and now I don’t feel like we are sisters anymore [T]he [California Dependency] system should not have allowed this to happen to us.¹³²

That report also stated that a child’s best interest must always be judged according to what is in the long-term best interest of that child as part of a sibling group and that

the “best interest” determination should always include serious consideration of the lifelong importance of the sibling relationship.¹³³

The erroneous deprivation of the child’s relationship with siblings is avoided when a sibling group is immediately placed with a relative. “There is also the obvious benefit of living with other family members whom the child knows and trusts – they are ‘already family.’”¹³⁴

¹²⁷ CENTER FOR SOCIAL SERVICES RESEARCH, UNIVERSITY OF CALIF., BERKELEY, *Caseload Highlights from CWS/CMS*, Jan. 2001, available at <http://cssr.berkeley.edu/jancase.pdf> (last visited Feb. 5, 2001).

¹²⁸ SIBLING GROUPS, *supra* note 122, at 4.

¹²⁹ *Id.* at 5.

¹³⁰ *Id.* at 13-14.

¹³¹ *Id.*

¹³² *Id.* at cover.

¹³³ *Id.* at 16.

¹³⁴ *Id.* at 30.

The Child Welfare League of America has found that “a child’s sense of identity and self-esteem is reinforced from knowing their family history and culture.”¹³⁵

When sibling groups are placed in separate foster homes, the siblings may be adopted separately, resulting in permanent separation.¹³⁶ Once a child is adopted, the adoptive parents have no legal obligation to ensure that the child visits his or her natural siblings.¹³⁷

While it may be harder to place sibling groups together in foster homes, emergency relative placement as a mandated first objective would likely accommodate more sibling groups. Long-term costs and savings are hard to estimate, since less than half the siblings in care in California are placed with relatives. Savings in counseling services to support children, upset and frightened by separation from parents and siblings, cannot be calculated. As an example, a set of teenaged twins in separate placements seventy miles apart have repeatedly run away from their placements to be together.¹³⁸ It is beyond the scope of this comment to estimate the number of siblings who endeavor to be together in a similar manner.

The potential impact on migrant sibling groups is equal to, if not greater than, that of non-migrant siblings, since physical parental availability could be almost nil. It is entirely possible that a migrant child’s siblings could be his only family contact.

D. *Mandatory Sibling and Extended Family Visitation*

Welfare and Institutions Code section 16002 specifies legislative intent to strengthen the minor’s family ties, including placing siblings together.¹³⁹ If this is not advisable, child welfare services must make ongoing efforts to provide frequent sibling interaction.¹⁴⁰ Again, California law does not reach far enough. California Welfare and Institutions Code Section 362.1(b) only states that the court shall make a finding if sibling visitation should *not* be allowed. Both sections, however, are silent on a child’s *right* to visitation with siblings, and silent on the child’s *right* to visitation with his or her extended family. The closest reference is to the mandatory social study for the child, in Wel-

¹³⁵ *Id.*

¹³⁶ *Id.* at 17.

¹³⁷ *Id.*

¹³⁸ Confidential telephone interview between author and parent of twins (December 22, 1998).

¹³⁹ CAL. WELF. & INST. CODE § 16002(a) (Deering 2000).

¹⁴⁰ *Id.*

fare and Institutions Code Section 358.1(c): “[w]hether the best interests of the child will be served by granting reasonable visitation rights with the child to his or her grandparents, in order to maintain and strengthen the child’s family relationships.”¹⁴¹

California Welfare and Institutions Code section 362.1(a) outlines the terms of visitation which must be included in the family’s case service plan.¹⁴²

Visitation shall be as frequent as possible, consistent with the well-being of the minor . . . to maintain ties between the parent or guardian and any siblings and the minor, and to provide information relevant to deciding if, and when, to return a minor to the custody of his or her parent or guardian.¹⁴³

The DSS Manual of Policies and Procedures makes the following requirement regarding sibling visitation in the child’s case record:

(c) Documentation of reasons why a child in out-of-home placement is not placed with sibling(s) and diligent efforts to overcome barriers of placing the siblings together.

(1) Documentation of the appropriateness of sibling contact, including unsupervised contact, diligent efforts to overcome barriers of visitation between siblings not placed together, and, if appropriate, a schedule of planned sibling contacts and visits with the child.

(d) Documentation of the justification for any exceptions allowed regarding contacts or visits¹⁴⁴

“Research has shown conclusively that regular visits between parents and children is the most important factor in ensuring that children are returned home.” “[V]isitation is ‘critical’ and ‘vital’ to family bonding and maintenance”.¹⁴⁵

In a recent decision, the court discovered that the Kern County Social Services policy on visitation was to allow no visitation between very young children and their parents.¹⁴⁶ By not providing visitation with the parent, the social services agency “virtually assured the erosion (and termination) of any meaningful relationship” between the parent and child.¹⁴⁷

¹⁴¹ CAL. WELF. & INST. CODE § 358.1(c) (Deering 2000).

¹⁴² CAL. WELF. & INST. CODE § 362.1(a) (Deering 2000).

¹⁴³ CAL. WELF. & INST. CODE § 361.2 (Deering 2000).

¹⁴⁴ Cal. Dept. of Social Services, Manual of Policies and Procedures, § 31-075.3 (1998).

¹⁴⁵ *Winston ex. rel. Winston v. Children and Youth Services of Delaware County*, 984 F.2d 1380, 1389 (3rd Cir. 1991).

¹⁴⁶ *In re Dylan T.*, 65 Cal.App.4th 765 (1998).

¹⁴⁷ *Id.* at 769 (citing *In re Monica C.*, 31 Cal. App. 4th 296, 307 (1995)).

The *Dylan* court stated that a showing of clear and convincing evidence should determine denial of visitation with parents, if such contact were detrimental to the child. The *Dylan* court wisely noted that if Kern County's policy is to deny visitation for very young children, "this is an issue of continuing public importance."¹⁴⁸ A policy of this type can only be described as reprehensible, and one that violates constitutional protection.

The DSS Division 31 Handbook requires visitation between a detained child and his or her parents as follows:

The social worker shall arrange for visits between child and the parent(s)/ guardian(s) named in the case plan no less frequently than once each calendar month for children receiving family reunification services.¹⁴⁹

In contrast to Kern County's visitation policy, the Merced County Human Services Agency manual of policy and procedure, in use in 1994, outlined its visitation policy:

1. After a child is detained, the SW [social worker] must coordinate an initial supervised visit within one week of the detention.
2. Minimum visitation in the ER [emergency response] mode is once a month.
- ...¹⁵⁰
4. Weekly visits should only occur if:
 - a. The child's return home is imminent.
 - b. The visits are at the unsupervised level.
 Both of these factors must be present for weekly visits.¹⁵¹

The current Merced manual of policy and procedure gives no visitation procedure.¹⁵²

The Supreme Court in *Poe v. Ullman* stated:

This [Due Process] 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.¹⁵³

¹⁴⁸ *Id.* at 770 n.3.

¹⁴⁹ Cal. Dept. of Social Services, Manual of Policies and Procedures, Division 31, § 31-340.1 (1998).

¹⁵⁰ *Id.* (emphasis added).

¹⁵¹ Merced Co. Human Services Agency, Red Book Procedures, Version RED2.7WF, p. II-15-16.

¹⁵² *Id.* at p. II-14 (Rev. April 1996).

A detained child is entirely dependent upon the court to order visitation with his or her family and relatives, and entirely dependent upon the social worker to facilitate that visitation. The quality and quantity of visitation literally determines the detained child's future emotional relationship with his or her parents and relatives, and his family's future in court, regardless of whether the child is able to articulate the need for family contact. The authors find the current visitation standards severely lacking.

Legislation should require sibling and extended family visitation plans at the time of detention. The juvenile court should establish and oversee the visitation plans for each minor. In order to delineate an immediate family visitation plan by the court, the social worker would need the extended family information at the time of the detention hearing. This information would be available if the above emergency relative placement procedure were in place.

The court would monitor the visitation frequency during the jurisdiction of the minor, and the extent and frequency of visitation would become a pivotal part of the "reasonable efforts" finding in the court record. Using the family contact information¹⁵⁴ the social worker would 1) prepare and maintain a list of the minor child's siblings and extended family; 2) officially notify the minor, all siblings, and all relatives, of their right to immediate and ongoing visitation; and, 3) facilitate such visitation as part of the child's social service plan. The court would decide any exceptions only after a showing of good cause. At each subsequent hearing, the visitation aspect of the case plan would be reviewed and official notification would again be made to all siblings and relatives not specifically excluded for good cause.

The emergency response family contact provision, combined with the expanded visitation standards, would enable juvenile court judges to make true, well-informed decisions regarding the actual familial relationship during a child's detention.

As shown previously, current social work practice as a whole does not lend itself to the proper delivery of service for migrant families specifically. These proposed protections are basic, however, and should be integrated into whatever model is ultimately used in the service of these families.

¹⁵³ *Moore v. East Cleveland*, 431 U.S. 494 (1977) (quoting *Poe v. Ullman*, 431 U.S. 494, 496 (1961)(Harlan, J., dissenting)).

¹⁵⁴ CAL. WELF. & INST. CODE § 361.3(a)(8) (Deering 2000).

E. Additional factors

General social work practices may themselves erode the child's familial relationships. Fresno County Juvenile Court Judge A. Dennis Caeton fined the Fresno County social services agency for administrative delays causing continuances of juvenile court hearings, filing at least sixty such sanctions against the county.¹⁵⁵ Judge Caeton and the Fresno County Juvenile Court Presiding Judge Robert Oliver believe that each delay spells more time of separation for children and their parents.¹⁵⁶ A child's stability should not hang in the balance simply waiting for social worker reports to be filed with the court.

Continuing the child's natural family relationship is not always considered prudent or appropriate in social service practice. Particularly when the long-term plan for the child is adoption, administrative procedure may dictate "weaning" the child from his or her natural family, so the child can become accustomed to the new, permanent family. Consequently, California social service practice may provide *physical* safety for children, but does not necessarily ensure their emotional well being.

F. Issues Regarding Proposed Social Work Practice Reforms

Enacting the above requirements would include the cost of preparing and passing legislation. Social worker practice issues include added time and resources to perform these additional duties. The "up-front" social work would increase, including training, maintaining contact records, and preparation and mailing of notification forms. Visits with siblings and extended family members would markedly increase, and would add to the social worker's case work. In the case of a migrating farmworker family, innovations in maintaining contact with the family would be required in order to properly manage a migrant child welfare case at all.

Not all family members may be suitable for contact or care, and confidentiality of the child's whereabouts may be deemed necessary to ensure protection of the child. However, Section 388 of the Welfare and Institutions Code is the statutory mechanism already in place for modifications of existing orders pertaining to the child.¹⁵⁷

¹⁵⁵ Karen McAllister, *Judge Fines Fresno County Social Workers for Delays*, FRESNO BEE, Oct. 13, 1997 at A1.

¹⁵⁶ *Id.*

¹⁵⁷ CAL. WELF. & INST. CODE § 388 (Deering 2000).

The government's interest in reducing the number of children in out-of-home placement and reducing a child's emotional upheaval should far outweigh these costs. It should also be the government's interest to at least attempt application of child protective standards to migrant families. It is beyond the scope of this comment to place a dollar value on the improved emotional well being of a child, whether migrant or non-migrant. Justice Stevens correctly stated, in his dissenting opinion in *Lassiter v. Department of Social Services*:

The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.¹⁵⁸

IV. RECOMMENDATIONS

Congress should enact legislation requiring the states, or to direct research to:

Track the health and welfare of migrant farmworker children, and the children of migrant farmworkers who enter the child welfare system;
Investigate the feasibility of integrating and applying child welfare service standards to farmworker families;

Develop specialized approaches to the application of migrant child protective services;

Immediately investigate all potential relatives for emergency placement of all children at the time of detention;

Establish and mandate sibling and extended family visitation as a "right" of any minor under detention or jurisdiction of the states;

Require continuing notification of visitation rights, and facilitation of visitation, for a detained child, the child's siblings and extended family;

Require failure to place a child with a relative at the time of detention to be justified by a finding of good cause at the time of detention; and

Tie successful enactment of these requirements to receipt of child welfare service funds.

The State Supreme Court should require all judges who hear juvenile dependency matters to attend training regarding "reasonable efforts" for migrant families, enabling judges to fully address the partic-

¹⁵⁸ *Lassiter v. Department of Social Services*, 452 U.S. 18, 60 (1981) (Stevens, J., dissenting).

ular problems associated with social work practice and reunification of migrant farm worker families.

Trial attorneys should recognize that a child's liberty interest right to his or her familial relationship, unprotected by current social service practice, suggests potential litigation for counties and the State under Government Code section 820, which limits the immunity of social workers in tort actions.¹⁵⁹

Attorneys should argue that current California child welfare practice may violate any child's constitutionally protected procedural due process. The California Court of Appeals found that the failure to raise due process issues at the juvenile court made the issue untimely at appeal.¹⁶⁰ Attorneys should advance, at the time of detention and throughout the term of court jurisdiction, the liberty interest rights of detained children, their siblings, and extended family members to contact, visitation, and immediate relative and sibling group placement.

California farmers should support and encourage statutory protection of migrant families' ties when such families are involved in child welfare services actions, and should demand appropriate social work practices be applied to at-risk migrant families.

CONCLUSION

Procedural deficiencies, both in identifying at-risk migrant children, and in guaranteeing true family preservation to their families, allow the dire circumstances of migrant families to continue. However, accomplishing adequate protections for migrant children must be achieved without jeopardizing California's agricultural industry.

This article has endeavored to demonstrate the lack of due process protections for all California children. The authors advocate proper protection for any at-risk child, and in no way intend to target specific groups or ethnicities.

New legislation would provide the fundamental protections to prevent mishandling of all children and families under social services jurisdiction.

Relative placement in emergency response situations would provide essential stability for a child. Placement procedures that maintain the integrity of sibling groups will protect the special, life-long bond between siblings. Relative involvement and preserved sibling groups can only be cultivated and sustained by child welfare services agencies.

¹⁵⁹ CAL. GOV'T CODE § 820.21 (Deering 2000).

¹⁶⁰ *In re CASEY D.*, 70 Cal. App. 4th 38, 46 (1999).

These procedures can decrease the need for long-term support services, and have a positive impact on the California General Fund. These legislative proposals, taken together, could become the bulwark to ensure that the liberty interest of California children is a statutory, as well as substantive, right.

Finally, all children should have a recognized constitutional right to the liberty interest in their parents, siblings, and extended family. One should not just tally the public cost to ensure full due process protections for all of California's children. One should ask, is it the *right* thing to do?

*Sed Quis Custodient Ipsos Custodes? But Who Will Guard the Guards Themselves?*¹⁶¹

¹⁶¹ Juvenal (50 A.D. - 130 A.D.)