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AID FOR WOMEN V. FOULSTON: THE CREATION OF A MINOR'S RIGHT TO PRIVACY AND A NEW PRELIMINARY INJUNCTION STANDARD

INTRODUCTION

Forty-six percent of teens aged fifteen to nineteen have had sex at least once.[1] This startling statistic raises the question of how the state, which has an interest in protecting its youth, should deal with underage sex. Some people argue for promoting abstinence, others argue for providing contraceptives; some argue for education in schools, others for parental education. There are a variety of ways to deal with the problem, and some are more controversial than others. Kansas Attorney General Phill Kline found one of the most controversial ways to protect teenagers from the harms of sex, implemented it in an attorney general opinion, and faced the inevitable public critique and lawsuits over his choice of protection.

In 2003, Attorney General Kline issued an advisory opinion requiring doctors, teachers, police officers, counselors, and other similarly situated professionals to report all instances of consensual underage sex to the state's social service department.[2] Not surprisingly, those required to report brought suit seeking to enjoin the enforcement of his opinion. In *Aid for Women v. Foulston*,[3] the Tenth Circuit Court of Appeals was presented with the constitutionality of Attorney General Kline's advisory opinion.

This note will discuss the case in its entirety, various issues surrounding it, the precedent set by the Tenth Circuit Court of Appeals, and the motivation behind Attorney General Kline's interpretation. Part I will address the factual background of *Aid for Women* and the main legal issues involved. Part II will discuss *Aid for Women*, including the trial court decision and the remanded case. Part III will examine the precedent set by *Aid for Women*, arguing that the court was correct in recognizing a minor's right to privacy for the first time, but improperly applied

1. JOYCE C. ABMA ET AL., TEENAGERS IN THE UNITED STATES: SEXUAL ACTIVITY, CONTRACEPTIVE USE, AND CHILDBEARING, 2002 1 (Nat'l Ctr. for Health Statistics, Vital and Health Statistics, Series 23, No. 24, 2004), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_024.pdf.

2. *See* 2003 Kan. AG LEXIS 22, at *3, 18-19 (2003). Attorney General Kline refers to consensual sex between two underage partners as "the rape of a child." Press Release, Office of Kansas Attorney General Phill Kline, Statement of Attorney General Kline Concerning Federal District Court Ruling in Underage Reporting Case (Apr. 18, 2006), http://www.kansas.gov/ksag/Press/2006/0418_underage_reporting.htm. He is referring to the fact that anytime one person under the age of sixteen has sex in Kansas it is statutory rape. If two people under sixteen have sex this is statutory rape as well.

3. 441 F.3d 1101 (10th Cir. 2006).

and limited the preliminary injunction standard by assuming all government action taken pursuant to a statutory scheme is necessarily in the public interest. Part IV attempts to explain the motivation behind the Kline opinion and the repeated connection academia makes between this case and the ongoing abortion debate. Part IV further explores the cost of the lawsuit and why Phill Kline appealed the grant of a preliminary injunction, but failed to appeal the permanent injunction.

I. BACKGROUND

A. K.S.A. § 38-1522—The Reporting Statute

Kansas law requires certain professionals[4] who have "reason to suspect that a child has been injured as a result of . . . sexual abuse" to "report the matter promptly" to the Kansas Department of Social and Rehabilitation Services (the "SRS").[5]

"Sexual abuse," as used in the reporting statute, is defined as "any act committed with a child which is described in article 35, chapter 21 of the Kansas Statutes Annotated . . . ."[6] Article 35 criminalizes a variety of sexual activity, including voluntary sexual activity involving minors under sixteen.[7] Therefore, a professional subject to the reporting statute must notify the SRS when there is evidence of injury resulting from sex-

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4. Professionals required to report include:

> Persons licensed to practice the healing arts or dentistry; persons licensed to practice optometry; . . . licensed psychologists; . . . licensed clinical psychotherapists; licensed professional or practical nurses examining, attending or treating a child under the age of 18; teachers, school administrators or other employees of a school which the child is attending; . . . licensed professional counselors; licensed clinical professional counselors; registered alcohol and drug abuse counselors; . . . licensed social workers; firefighters; emergency medical services personnel; . . . juvenile intake and assessment workers; and law enforcement officers.

KAN. STAT. ANN. § 38-1522(a) (2006).

5. *Id.*

6. § 38-1502(c).

7. § 21-3502(a)(2). For example, article 35 criminalizes:

> [E]ngaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age: (1) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or (2) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

§ 21-3503(a); and:

> engaging in voluntary: (1) Sexual intercourse; (2) sodomy; or (3) lewd fondling or touching with a child who is 14 years of age or older but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved and are members of the opposite sex.

§ 21-3522(a). It is important to note that this statute makes voluntary sexual activity between minors under sixteen illegal in Kansas. *Id.* Where "consensual" is used in this paper and in the statutes, read "voluntary," as minors under sixteen are not legally capable of consenting, as regards sex or contracts.

ual conduct involving minors under sixteen, voluntary or not.[8] Failure to make such a report is a misdemeanor.[9]

B. Reporting and Investigation Policies of the SRS

Reports of sexual abuse are usually made to the SRS.[10] When a report of alleged abuse is made, an intake screener collects information from the reporter about the minor, the alleged perpetrator, and the minor's caretaker.[11] The screener then determines whether "the department has the statutory authority to proceed and whether the interests of the child require further action to be taken."[12] Where the report does not meet the statutory definitions or "indicates lifestyle issues which do not directly harm children,"[13] "the department may determine the case will not be accepted for investigation and assessment (the report is 'screened out')."[14] There are several situations in which the SRS screens out reports of abuse.[15] Among the listed situations is "[m]utual sexual exploration of age-mates (no force, power differential, or incest issues)."[16] Cathy Hubbard, the SRS Program Administrator for the Protection Unit of Child and Family Services, testified that "one reason such cases are not investigated further is because it is impossible to identify which child is the victim and which is the perpetrator."[17]

The information provided in any screened out report is entered into a database (Family and Child Tracking System) which allows the SRS to check for any prior reports made or any other evidence that would indicate a need for further inquiry.[18] No information is provided to the police department and no SRS services are provided.[19] At trial, the SRS regional director Jean Hogan testified that she was unaware of any criminal proceedings brought as a result of a screened out report.[20] The SRS's policy of screening out voluntary underage sexual activity is long-

8. *See* Aid for Women v. Foulston, 441 F.3d 1101, 1106-07 (10th Cir. 2006); *see also* 2003 Kan. AG LEXIS 22, at *3 (2003).

9. § 38-1522(f).

10. § 38-1522(c). The Reporting Statute provides for different procedures of reporting when the office is closed or the abuse occurred in an SRS institution, but generally the report is made to the SRS. § 38-1522 (c), (d).

11. *Aid for Women*, 427 F. Supp. 2d at 1098.

12. KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, CHILDREN AND FAMILY SERVICES POLICY AND PROCEDURE MANUAL §§ 1300, 1360 (July 2006) (on file with author) [hereinafter SRS MANUAL].

13. *Id.* §§ 1360, 1361.

14. *Id.* § 1360.

15. *Id.* § 1361.

16. *Id.* § 1361(b). The SRS testified that they consider "age-mates" to be persons within three years of each other. *Aid for Women*, 427 F. Supp. 2d at 1098 n.4.

17. *Aid for Women*, 427 F. Supp. 2d at 1099.

18. SRS MANUAL, *supra* note 12, § 1370.

19. *Aid for Women*, 427 F. Supp. 2d at 1098.

20. *Id.*

standing, and there is no evidence that the legislature ever intended to change that policy.[21]

C. The Function of the Attorney General and Attorney General Opinions

The state attorney general is a member of the executive branch and acts as the legal representative for the state.[22] As such, he or she is responsible for the prosecution and defense of all actions, civil and criminal, in which the state is a party.[23] In addition, the attorney general is required to answer questions put to him or her by all county attorneys or any member of the legislative or executive branch.[24] Such opinions are not binding on the judiciary, although they are given special consideration as persuasive authority.[25] Nonetheless, "the opinions of the attorney general have in no sense the effect of judicial utterances."[26]

In Kansas specifically, "[t]he Attorney General . . . is not only allowed to, but also required to render an opinion on his interpretation of the law . . . ."[27] However, final interpretation of the law is an exclusive judicial function that cannot be infringed upon by the executive or legislative branches.[28] Thus, an attorney general opinion in Kansas "cannot effectively amend legislation by reinterpreting its language through an 'advisory' opinion."[29] Furthermore, Kansas attorney general opinions are not binding on district or county attorneys in Kansas.[30]

As a member of the executive branch, the attorney general is charged with the task of enforcing the laws as they are written, refraining from interpreting the law in any significant way.[31] Of course, with every act of enforcement comes an act of interpretation, as the attorney general must interpret and understand the laws he or she is implementing. However, the attorney general, in enforcing the laws, is bound by the interpretations set forth by the courts.[32] Thus, any enforcement actions must be consistent with the common law of the jurisdiction in question.[33] Attorney General Kline is bound by the common law of Kansas, the Supreme Court, and the Tenth Circuit Court of Appeals in rendering opinions and enforcing existing laws like the Kansas Reporting Statute.

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21. *Id.* at 1099.
22. State v. Finch, 280 P. 910, 911 (Kan. 1929).
23. KAN. STAT. ANN. § 75-702 (2006).
24. *Id.* § 75-704.
25. 7 AM. JUR. 2D *Attorney General* § 11 (2006).
26. *Id.*
27. Aid for Women v. Foulston, 427 F. Supp. 2d 1093, 1103 (D. Kan. 2006).
28. *Aid for Women*, 427 F. Supp. 2d at 1103-04.
29. *Id.*
30. *Id.* at 1106.
31. *See id.* at 1103-04.
32. *See id.*
33. *See id.*

D. Conflicting Attorney General Advisory Opinions

The reporting statute has been subject to two contradictory attorney general opinions since its enactment in 1982.[34] In 1992 Attorney General Robert Stephan opined that the reporting statute "does not require reporting of all suspected child abuse; it requires reporting in situations where there is 'reason to suspect the child has been injured' as a result of abuse."[35] Stephan recognized that sexual abuse included voluntary sex between age-mates under sixteen.[36] However, he construed the statute strictly against the state and opined that the statute only required reporting "where there is 'reason to suspect the child has been *injured*' as a result of abuse."[37] Stephan examined the legislative history of the statute, which indicated that the legislature took affirmative steps to add "injuries resulting from" to the statute's language, and determined that the legislature intended reporting only where injury was present.[38] He left the definition of injury broad, noting that emotional injury would suffice, but refused to find mere evidence of consensual sexual relations injurious as a matter of law.[39]

The reporting statute was interpreted again in 2003 when Senator Mark Gilstrap from the 5th District of Kansas asked Attorney General Phill Kline "under what circumstances does an abortion doctor need to report rape and or sexual abuse on a minor?"[40] In Phill Kline's response, he opined that all sex between minors is injurious as a matter of law, and therefore any evidence of sexual abuse, including voluntary sexual activity between age-mates under sixteen, must be reported to the SRS.[41]

Attorney General Kline's conclusion that "the act of rape, whether forcible or 'statutory,' is an act that is inherently injurious and harmful" was "limited to the specific offenses involving sexual intercourse with a female under the age of 16."[42] His opinion was based largely on cases "from at least 42 states" that "have unanimously held that sexual abuse of a child is so inherently injurious to the victim that harm, or intent to

34. KAN. STAT. ANN. § 38-1522.

35. 1992 Kan. AG LEXIS 48, at *3-4 (1992).

36. *See id.* at *3.

37. *Id.* at *3-4 (emphasis added).

38. *Id.* at *8-9. Attorney General Stephan had some difficulty in determining the meaning of injury as there was no definition in the statute, nor in the legislative history. *Id.*

39. *Id.* at *9-10. Attorney General Stephan also noted that case law did not consider pregnancy, the chief indicator of sexual activity, an injury but rather a natural condition. *Id.* (citing Carter v. Howard, 86 P.2d 451, 455 (Or. 1939)). They further found this determination consistent with Kansas law, which provides no cause of action for the birth of a normal, healthy child. *Id.* at *10 (citing Byrd v. Wesley Med. Ctr., 699 P.2d 459 (Kan. 1985); Johnson v. Elkins, 736 P.2d 935, 939 (Kan. 1987)).

40. Letter from Mark S. Gilstrap, Kansas State Senator, 5th District, to The Honorable Phill Kline, State of Kansas Attorney General (Jan. 13, 2003) (on file with author). Senator Gilstrap asked for the opinion at the request of one of his constituents. E-Mail from Mark S. Gilstrap, Kansas State Senator, 5th District, to author (Sept. 28, 2006) (on file with author).

41. 2003 Kan. AG LEXIS 22, at *2-3 (2003).

42. *Id.* at *5-6, *8 n.15.

harm, is inferred as a matter of law."[43] In addition, Kline relied upon cases tending to show that statutory rape laws are for the "protect[ion] [of] juveniles from improvident acts."[44] From this general premise, Attorney General Kline inferred that consensual sex between minors is "injurious as a matter of law."[45]

Attorney General Kline noted the broad consequences of his opinion.[46] Aside from mandatory reporting requirements for abortion doctors faced with a pregnant minor, other situations that would trigger a mandated reporter's obligation include any time there is evidence of sexual activity.[47] Thus, included professionals must report to the SRS when a minor seeks medical attention for a sexually transmitted disease, prenatal care for a pregnant minor, and a teenage girl who seeks birth control and discloses that she has already been sexually active.[48]

Attorney General Kline ended his opinion with a reminder that the function of the judiciary is to interpret laws as they are written and intended, and not to legislate from the bench.[49]

II. *AID FOR WOMEN V. FOULSTON*[50]

A. Initial Trial Court Action

About four months after Attorney General Kline issued his opinion, a group of affected medical professionals brought suit in the United

43. *Id.* at *11 (citing Mfrs. & Merchs. Mut. Ins. Co. v. Harvey, 498 S.E.2d 222, 226 n.1 (S.C. 1998) and cases cited therein). *Harvey* involved whether a grandparent's insurance policy covered them for the molestation of their five grandchildren. The court held that intent to harm the child could be inferred from the act, and therefore the incidents were not "accidents" as the defendant's claimed, and therefore were not covered. *Harvey*, 498 S.E.2d at 226-27. The "cases cited therein" all dealt with a similar problem, that is, whether insurance carriers were required to pay for an adult's sexual abuse of minors. 2003 Kan. AG LEXIS 22, *11-13 (2003). The inclusion of "harm, *or* intent to harm" is no mistake. *Id.* at *11-12 (emphasis added). None of the cited cases inferred harm, but rather intent to harm. Thus, attributing truth to the latter part of the disjunctive clause is the only correct reading. It is a matter of common sense that harm and intent to harm are separate concepts—mere intent to harm cannot, without further action, actually harm a person.

44. 2003 Kan. AG LEXIS 22, at *18-19 (2003) (citing Michael M. v. Superior Court, 450 U.S. 464, 469 (1981); State ex. rel. Hermesmann v. Seyer, 847 P.2d 1273, 1279 (1993)). The citations provided for these cases are inaccurate on many levels (one case simply does not exist, another cites to forty plus pages to support an integral proposition that can only be supported by a very strained reading of the case law). Thus, assessing the validity of the Kline opinion's use of precedent is difficult at best.

45. 2003 Kan. AG LEXIS 22, at *18 (2003).

46. *Id.* at *19. He also noted that the opinion spoke to concerns not raised by Senator Gilstrap's question, which was specific to abortion doctors. Letter from Mark S. Gilstrap, Kan. State Senator, 5th Dist., to The Honorable Phill Kline, State of Kansas Attorney Gen. (Jan. 13, 2003) (on file with author).

47. 2003 Kan. AG LEXIS 22, at *19 (2003). Mandated reporters include anyone listed in the statute.

48. *Id.* Other instances of evidence of sexual activity which mandate reporting undoubtedly exist, such as any time a student seeks a teacher's or counselor's advice on sexual activity already performed, but these are the three instances Attorney General Kline specifically noted in his opinion. *Id.*

49. *Id.* at *19-20.

50. 441 F.3d 1101 (10th Cir. 2006).

States District Court for the District of Kansas seeking a preliminary injunction and declaratory relief against enforcement of the Kline interpretation.[51]

The plaintiffs sought relief on three grounds: 1) the reporting statute as interpreted is unconstitutional because it fails to give plaintiffs fair notice of when reporting is required; 2) the reporting statute as interpreted inhibits the minor's ability to obtain contraception and prevents them from obtaining abortions confidentially; and 3) the reporting statute as interpreted is unconstitutional because it violates a minor's right to informational privacy without serving a "legitimate, compelling or important state interest."[52] The trial court ultimately granted the preliminary injunction.

B. Tenth Circuit Review

The Kansas Attorney General's office appealed the grant of a preliminary injunction to the Tenth Circuit Court of Appeals.[53] The Tenth Circuit found that the plaintiffs had standing to assert both their own and their minor patients' rights, but held that the issuance of a preliminary injunction was an abuse of discretion and remanded for a trial on the merits.[54] The court held that the plaintiffs did not stand a "substantial likelihood of success on the merits" on the minor privacy claim, as minors do not have a reasonable expectation of privacy in their criminal sexual conduct.[55]

Generally, in order to obtain a preliminary injunction,

> a plaintiff must establish: (1) a substantial likelihood of success on the merits, (2) that the plaintiff will suffer irreparable injury if the preliminary injunction is denied, (3) that the threatened injury to the plaintiff outweighs the injury to the defendant(s) caused by the preliminary injunction, and (4) that an injunction is not adverse to the public interest.[56]

However, in *Continental Oil Co. v. Frontier Refining Co.*,[57] the Tenth Circuit adopted the reasoning of the Second Circuit in holding that the "substantial likelihood of success requirement" for a preliminary injunction may be lowered to a "fair grounds for litigation" standard when the other three requirements for a preliminary injunction are met.[58] The Court qualified this reduced standard in *Heideman v. South Salt Lake*

51. Aid for Women v. Foulston, 327 F. Supp. 2d 1273, 1275 (D. Kan. 2004).
52. *Aid for Women*, 327 F. Supp. 2d at 1280.
53. *Aid for Women*, 441 F.3d at 1106.
54. *Id.* at 1121.
55. *Id.* at 1118.
56. *Id.* at 1115 (citing Dominion Video Satellite, Inc. v. EchoStar Satellite Corp., 269 F.3d 1149, 1154 (10th Cir. 2001)).
57. 338 F.2d 780 (10th Cir. 1964).
58. *Continental Oil Co.*, 338 F.2d at 781-82.

City[59] in holding "where . . . a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the less rigorous fair-ground-for-litigation standard should not be applied."[60]

In *Aid for Women*, the Tenth Circuit assumed for the first time that "all governmental action taken pursuant to a statutory scheme is 'taken in the public interest.'"[61] As such, the *Heideman* rule was inapplicable, and the heightened "substantial likelihood of success" standard was applied.

Starting with the first element, the court held that the plaintiffs had not met their burden of showing a "substantial likelihood of success on the merits" for two reasons.[62] First, because voluntary sexual activity between age-mates is criminal in Kansas, the minor patients were effectively put "on notice" that their activities were not protected by the right to privacy.[63] Thus, "minors may not have any privacy rights in their concededly criminal sexual conduct."[64]

The court found support for this holding in a line of Tenth Circuit cases holding that "a validly enacted law places citizens on notice that violations thereof do not fall within the realm of privacy. Criminal activity is . . . not protected by the right to privacy."[65] Both *Nilson v. Layton City*[66] and *Stidham v. Peace Officer Standards and Training*[67] involved plaintiffs who claimed that their privacy rights had been violated by disclosure of prior sexual misconduct.

In *Nilson*, a police officer disclosed information to a news reporter about Nilson's prior conviction for sexual abuse.[68] The plaintiff's claim was rejected, in part because "[l]aws proscribing sexual abuse place [the plaintiff] on notice that violations thereof do not fall within the constitutionally protected privacy realm."[69] In *Stidham*, a peace officer claimed that his employer violated his right to privacy by disclosing allegedly false accusations that he had raped a young woman.[70] While noting the sensitive nature of the information, the court concluded once again that

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59. 348 F.3d 1182 (10th Cir. 2003).

60. *Heideman*, 348 F.3d at 1189 (quoting Sweeney v. Bane, 996 F.2d 1384, 1388 (2d Cir. 1993)) (internal quotation marks and citation omitted).

61. *Aid for Women*, 441 F.3d at 1115 n.15.

62. *Id.* at 1117.

63. *Id.* at 1118.

64. *Id.* at 1117.

65. *Id.* (quoting Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir. 1995)); *see also* Stidham v. Peace Officer Standards & Training, 265 F.3d 1144, 1155 (10th Cir. 2001); Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) ("Validly enacted drug laws put citizens on notice that this realm is not a private one. Accurate information concerning such unlawful activity is not encompassed by any right of confidentiality . . . .").

66. *Nilson*, 45 F.3d at 370.

67. *Stidham*, 265 F.3d at 1149.

68. 45 F.3d at 370-71.

69. *Id.* at 372.

70. 265 F.3d at 1149.

"a validly enacted law places citizens on notice that violations thereof do not fall into the realm of privacy."[71] Since consensual sex between minors is illegal in Kansas, the court concluded that the minors did not enjoy a privacy right in their criminal sexual conduct.[72]

Second, the court concluded that even if the reasoning from *Nilson* and *Stidham* did not apply, the plaintiffs had not "'clearly and unequivocally' shown that the balance between their privacy rights and the government's interests in requiring reporting is substantially likely to weigh in their favor."[73]

Typically, if a plaintiff can demonstrate a legitimate expectation of privacy, they must still show that the "balance between their privacy interests and the government's interests in requiring [disclosure] is substantially likely to weigh in their favor," and that there are less intrusive means of achieving the desired end.[74] However, the court found that when dealing with the privacy rights of minors, the test to apply is whether disclosure of confidential information "serves any significant state interest . . . that is not present in the case of an adult."[75] Thus, a balancing test must be performed between the state's interest and the minor's countervailing privacy rights.[76]

The court found that the balance weighed in the state's favor.[77] First, the state has a compelling interest in enforcing its criminal laws.[78] Since sexual activity between minors under sixteen is illegal in Kansas, the state has a significant interest in obtaining information that will lead to the arrest of those in violation of the law. Second, the state has a strong *parens patriae* interest in protecting minors.[79] By providing the state with information regarding sexual abuse, the state is better equipped to advance the best interests of minors.[80] Third, the state has a significant interests in promoting the health of its citizens, and even more so when dealing with minors.[81] "Reporting instances of illegal sexual abuse

71. *Id.* at 1155 (quoting *Nilson*, 45 F.3d at 372). Justice Herrera's dissenting opinion took issue with the reliance on these cases. He found them factually distinguishable as both *Nilson* and *Stidham* involved "rights of privacy information regarding the plaintiffs' own criminal conduct. In contrast, the reporting statute at issue here requires an infringement of the privacy rights of victims, and not just perpetrators, of criminal conduct." Aid for Women v. Foulston, 441 F.3d 1101, 1125 (10th Cir. 2006) (Herrera, J., dissenting). Justice Herrera's dissent was followed, in part, by the Indiana Court of Appeals in *Planned Parenthood of Indiana v. Carter*, 854 N.E.2d 853, 877 (Ind. Ct. App. 2006).

72. *See Aid for Women*, 441 F.3d at 1118.

73. *Id.* at 1118-19.

74. *Id.*

75. *Id.* at 1119 (plurality opinion) (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977)).

76. *Aid for Women*, 441 F.3d at 1119.

77. *See id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

enables the state of Kansas to protect the health of its citizens, especially children."[82]

Finally, two factors serve to diminish the privacy rights of the plaintiffs' minor patients.[83] First, the underlying sexual conduct is criminal.[84] Even assuming that the minors have a legitimate expectation that their "concededly criminal" conduct will not be revealed, the court found this diminished the minor's privacy interest in such activity.[85] Second, "the fact that the privacy rights asserted are . . . [those] of minors diminishes the strength of those rights somewhat."[86] Since the state has broader authority to regulate the conduct of minors than of adults, their privacy rights in personal sexual activity are not as strong as adults, thus diminishing their privacy interests.[87]

The court was careful to state that it was not deciding exactly how the balance would come out, rather noting that these factors merely reduced the likelihood of success for the plaintiffs, such that they could not show a "substantial likelihood of success on the merits."[88] Accordingly, the court held that the preliminary injunction was granted in error.[89]

The court ended its discussion by criticizing the trial court for failing to address the remaining elements of a preliminary injunction.[90] First, the district court did not address "whether there would be irreparable injury in the absence of this preliminary injunction."[91] Second, in regard to the third factor (whether the threatened injury to the plaintiff outweighs the injury to the defendants caused by the preliminary injunction), "the district court did not even identify any possible harm to the Defendants from the injunction."[92] As to the plaintiffs, the court merely stated that even a limited disclosure of such personal information could have "large implications" for the well-being of minors.[93] "'[L]arge implications' is not equivalent to harm, and such vague language does not indicate the sort of analysis properly involved in evaluating this factor."[94] Finally, the district court failed to engage in an explicit analysis of whether the preliminary injunction would be adverse to the public inter-

82. *Id.* at 1120.
83. *Id.*
84. *Id.*
85. *See id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *See id.* at 1120-21. The remaining elements are: (2) the plaintiff will suffer irreparable injury if the preliminary injunction is denied, (3) the threatened injury to the plaintiff outweighs the injury to the defendant(s) caused by the preliminary injunction, and (4) the injunction is not adverse to the public interest. *Dominion Video Satellite, Inc.*, 269 F.3d at 1154 (citing Utah Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061, 1065-66 (10th Cir. 2001)).
91. *Aid for Women*, 441 F.3d at 1120.
92. *Id.* at 1121.
93. *Id.* (quoting *Aid for Women*, 327 F. Supp. 2d at 1288).
94. *Aid for Women*, 441 F.3d at 1121.

est.[95] Rather, it simply stated that "the parties operated under the 1992 advisory opinion for a substantial period of time without discernable problems."[96] Thus, the district court abused its discretion in failing to analyze the remaining three factors to the liking of the Tenth Circuit Court of Appeals.[97]

The Tenth Circuit agreed with the district court that the Plaintiffs had standing to litigate their claims and raise the privacy interests of their minor patients, but denied the preliminary injunction and remanded the case for further proceedings consistent with their opinion.[98]

C. Remanded Case

On remand, the United States District Court for the District of Kansas granted permanent injunctive and declaratory relief for the plaintiffs, thus preventing the enforcement of Attorney General Kline's interpretation of the reporting statute.[99]

The court took a decidedly different approach to deciding the case this time, focusing heavily on the interpretation of the reporting statute itself and taking special care to cure the defects of the previous decision.[100]

First, the court found the reporting statute "clear[ly] and unambiguous[ly]" required reporting only where there is evidence of injury as a result of sexual abuse.[101] The court examined the statute by breaking it into two separate components.[102] The statute recognizes "that a mandatory reporter must identify two things: 1) there is reason to suspect that the child has been injured; and 2) the injury resulted from sexual abuse."[103] Under the Kline interpretation, mandatory reporters would only have to identify that sexual abuse had taken place, keeping in mind that consensual sex between age-mates under sixteen is "sexual abuse" in Kansas.[104] Under Attorney General Kline's reading, the court opined, "the requirement of an 'injury' in the reporting statute is rendered meaningless."[105]

The court noted that the legislature, through the language of the statute and the intentional inclusion of "injury," "acknowledged that not

95. *Id.*
96. *Id.* (quoting *Aid for Women*, 327 F. Supp. 2d at 1288).
97. *Aid for Women*, 441 F.3d at 1121.
98. *Id.*
99. Aid for Women v. Foulston, 427 F. Supp. 2d 1093, 1116 (D. Kan. 2006).
100. *Id.* at 1101, 1114-16.
101. *Id.* at 1101.
102. *Id.*
103. *Id.*
104. *See id.* at 1101-02.
105. *Id.* at 1102. The reporting statute states: "(a) When any of the following persons has reason to suspect that a child has been injured as a result of . . . sexual abuse, the person shall report the matter promptly [to the SRS]." KAN. STAT. ANN. § 38-1522(a) (2006).

all illegal sexual activity involving a minor necessarily results in 'injury.'"[106] Strictly adhering to the canons of statutory construction, the court held that mandatory reporting of sexual abuse of a minor is only required where accompanied by evidence of injury.[107]

In addition to violating the plain language of the statute, the court found that Attorney General Kline's interpretation, "wrongly redefine[ed] the common understanding of both state agencies [SRS] and mandatory reporters by denoting all sexual activity to be 'inherently injurious.'"[108] For these reasons, the court refused to accept Attorney General Kline's interpretation of the statute and declared that reporting was required only where there is evidence of injury as a result of sexual abuse.[109]

III. ANALYSIS

A. The Precedent

The Tenth Circuit's decision had a minimal effect on the immediate parties since the trial court quickly granted a permanent injunction. The precedent set, however, is substantial. The court explicitly recognized a minor's right to informational privacy for the first time and altered a significant body of existing law regarding preliminary injunctions in the Tenth Circuit. This section will address these two issues, arguing that though the court was correct in extending privacy rights to minors, the preliminary injunction standard should not have been altered.

1. Minors' Right to Informational Privacy

The competing interests involved in granting minors a right to informational privacy both hold great importance, and neither can be easily dismissed. On the one hand, minors should be protected as much as possible from the evils of sexual abuse. On the other, we want to respect minors' right to keep personal information private, away from the scrutiny of the courts and government. Both interests have a long line of legal support, and balancing the interests is a difficult task.[110]

The Kansas district court's opinion on remand gives many reasons why denying minors a right to privacy under these circumstances would be injurious to their health and well being. The court aptly noted that by requiring disclosure to the government, minors will be dissuaded from

106. *Aid for Women*, 427 F. Supp. 2d at 1102.

107. *See id.* at 1103.

108. *Id.* at 1104.

109. *Id.* Since the reporting statute covers areas beyond sexual abuse, i.e. physical, mental or emotional abuse, this opinion should have the effect of requiring reporting only when there is evidence of injury, regardless of the injury's source. *See* KAN. STAT. ANN. § 38-1522.

110. *See* Miriam E. C. Bailey, Note, *The Alpha Subpoena Controversy: Kansas Fires First Shot in Nationwide Battle over Child Rape, Abortion and Prosecutorial Access to Medical Records*, 74 UMKC L. REV. 1021, 1032 (2006).

obtaining medical attention, such as prenatal care, contraceptives, and psychological services.[111]

The court further noted that the "evidence supports a finding that mandatory reporting of all illegal underage sexual activity will harm those minors who are actual victims of 'sexual abuse' as defined by the SRS's working definition."[112] That is, by "overwhelming state agencies" with reports of every incident of sexual activity between minor age-mates, the true victims of sexual abuse will be lost in the files.[113] Vital resources will be wasted on gathering reports that will be screened out in the end anyway.[114]

The most telling examples of the harms inherent in denying minors some degree of privacy came from the various experts testifying at trial. Oddly enough, experts on both sides of the lawsuit testified that minors might be dissuaded from seeking medical attention and advice if their private information were unprotected from government scrutiny.[115]

The decision of the Kansas district court exemplified the benefits of a minor's limited right to informational privacy, and adequately accounted for the paramount nature of each competing interest. Limiting mandatory disclosure to those situations in which injury is suspected ensures that, where there is harm, a minor will be afforded the protection

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111. *Aid for Women*, 427 F. Supp. 2d at 1107.

112. *Id.* at 1108.

113. *Id.* at 1109.

114. *See id.* One can imagine the immense number of calls the SRS would receive each day if the Kline interpretation was followed. Beyond the prevalence of sexual activity between minors, those opposed to the Kline interpretation might give him exactly what he wants, and take the slightest evidence of sexual activity as a chance to report, with a mind for overburdening the SRS to the point that they simply cannot function and legislative action is required. As a matter of fact, California faced this precise problem when the legislature amended the sexual abuse statute to include any act of intercourse involving a woman under the age of eighteen. *See* Planned Parenthood Affiliates of Cal. v. Van de Kamp, 181 Cal. App. 3d 245, 272 (Cal. Ct. App. 1986). Just like Kansas, the reporting statute referred to the criminal sexual abuse statute for the definition. *See id.* The California state child protective services became so overwhelmed with reports that the legislature had to amend the statute one year later, noting that they would not have amended the criminal definition of sexual abuse had they realized it would require "reporting of promiscuous activity of females under the age of 18 years . . . [which would] divert the investigative attention away from real child abuse cases." *See Id.* When the California Attorney General reinterpreted the reporting statute to mandate reporting of such sexual activity, suit was brought, and the courts invalidated his interpretation for essentially the same reasons as the Kansas courts did in *Aid for Women*. *See id.* Surprisingly enough, counsel for the plaintiffs apparently did not find this case, and none of the courts involved mentioned or cited it. The defendants did find this case, however, but cited to it only to support the proposition that minors do not have informational privacy rights in their criminal conduct under the United States Constitution, but only under the California Constitution which has much broader privacy rights. Reply Brief of Appellants, Aid for Women v. Foulston, No. 04-3310, 2004 WL 3172399 (10th Cir. 2004).

115. *Aid for Women*, 427 F. Supp. 2d at 1110-11. Defense experts Dr. Shadigan and Dr. Josephson both testified that minors might avoid visiting doctors for fear of reporting, and that the legal system might do more harm than good to their minor patients. *See id.* Of course, the plaintiff's experts gave similar testimony. *See id.* at 1109-10. For those who find humor in litigation debacles, the remanded case provides a plethora of damning expert testimony. *See id.* at 1110-13. Some of this expert testimony is discussed below.

that only the state can provide, while simultaneously providing minors a confidential environment to seek out needed medical help and advice. If Kline's interpretation was followed, minors would be chilled from seeking out medical care and the advice of their mentors[116] for fear of investigation and public disclosure of sensitive, personal information. As the Kansas district court aptly noted, such a result is not in the best interest of children.[117]

2. A New Standard for Preliminary Injunctions

The Tenth Circuit altered a substantial body of law regarding the issuance of a preliminary injunction. By assuming that all governmental action taken pursuant to a statutory scheme is in the public interest, the court not only went against precedent, it also afforded the legislature and the attorney general a protection never before seen in the Tenth Circuit.

In *Aid for Women*, the court "presum[ed] that all governmental action pursuant to a statutory scheme is 'taken in the public interest.'"[118] This was a drastic departure from previous cases dealing with the less rigorous fair-ground-for-litigation standard, which explicitly analyzed the statutory scheme to determine whether it was "taken in the public interest."[119]

Beyond the departure from precedent, the court's interpretation of this lowered standard fails to account for the plain language of the rule. If the court were correct in assuming that all governmental action taken pursuant to a statutory scheme is in the public interest, there would be no need to include, "in the public interest." This added qualification only reiterates what is already assumed. In fact, the determination of whether Attorney General Kline's interpretation of the statute was in the public interest was a key factor in the trial court's final decision. On remand, the court went into great detail describing why the Kline interpretation was actually *adverse* to the public interest, ultimately holding that it did more harm than good.[120]

In addition, canons of statutory construction provide that "[e]very word in a statute must be given effect and meaning, and no part is to be

116. Teachers, psychiatrists, counselors, and many other non-medical professions are considered mandatory reporters. KAN. STAT. ANN. § 38-1522 (2006).

117. *Aid for Women*, 427 F. Supp. 2d at 1107.

118. 441 F.3d at 1115 n.15.

119. *See, e.g., Heideman*, 348 F.3d at 1189 (discussing the public interest involved in adoption of the statute); Sal Tinnerello & Sons, Inc. v. Town of Stonington, 141 F.3d 46, 52 (2d Cir. 1998) (It is clear "that the Town of Stonington, by enacting an ordinance for the purpose of 'providing for safe and efficient collection of solid waste,' was acting in the public interest."); N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 n.7 (2d Cir. 1995) (discussing the public interest involved in the statute); Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1339 (2d Cir. 1992) (holding "the 'likelihood of success' prong need not always be followed merely because a movant seeks to enjoin government action"); Plaza Health Labs. v. Perales, 878 F.2d 577, 580-81 (2d Cir. 1989) (the government action was clearly in the public interest).

120. *Aid for Women*, 427 F. Supp. 2d at 1112-13.

held meaningless if it can be reconciled with the rest of the statute."[121] Of course, we are not dealing with a statute here. Nonetheless, the rules of statutory construction can provide a meaningful analogy. By assuming public interest in all governmental action, the court rendered "public interest" meaningless, even though it very well could be reconciled with the whole. Thus, the court's assumption violates the plain meaning of the rule.

Perhaps most importantly, the court's assumption failed to address the true issue at bar.[122] The issue was whether Attorney General Kline's *interpretation* of the statute violated the United States Constitution.[123] There was no concern that the statute itself was unconstitutional. Thus, there was no true "statutory scheme" at issue.[124] In this way, the court may have inadvertently given the judicial power of interpreting laws to the executive branch via the attorney general's office. That is, since Attorney General Kline's opinion was treated as a statutory scheme in this case, future attorney generals may cite *Aid for Women* when defending the constitutionality of their opinions. With such precedent in their arsenal, future attorney generals will be assured that preliminary injunctions will only be issued where there is a substantial likelihood of success on the merits. Adding this protection to their ability to interpret laws effectively usurps the judicial branch of its sole power, interpretation of the law.

In *Aid for Women*, this error proved harmless because the plaintiffs received the relief they sought. However, this precedent may prove to have negative consequences in the future.[125] The court shielded the legislature from judicial oversight by assuming that everything it does pursuant to a statutory scheme is in the public interest. As such, any plaintiff seeking a preliminary injunction against the enforcement of a statute must meet the substantial likelihood of success standard, regardless of how repugnant the statute is, or how heavily the balance of hardship tips

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121. Plesha v. Edmonds, 717 N.E.2d 981, 986 (Ind. Ct. App. 1999).

122. The Court may not be at fault here, as the plaintiffs apparently argued that the lessened standard should be applied as, "the action of requiring automatic reporting is not in the 'public interest.'" *Aid for Women*, 441 F.3d at 1115 n.15. Thus, the plaintiffs failed to frame the issue properly, and the court was bound to address their arguments and not create their own.

123. *Id.* at 1108.

> The complaint sought 'declaratory and injunctive relief . . . against application of the reporting statute to incidents of consensual sexual activity between . . . a minor under 16 and a person of similar age [where Plaintiffs] conclude . . . that the sexual activity has not caused the minor injury.

Id.

124. Attorney General Kline's interpretation of the statute is not to be considered a statutory scheme: "The Attorney General cannot amend the statute by an advisory opinion . . . in accordance with the general principles of the separation of powers, the executive department cannot generally usurp or exercise judicial or legislative power." *See Aid for Women*, 427 F. Supp. 2d at 1104 (citing State *ex rel.* Stephan v. Finney, 836 P.2d 1169, 1181-82 (Kan. 1992)).

125. This assumption has already been applied in *Graham v. Henry*, No. 06-CV-381-TCK(FHM), 2006 U.S. Dist. LEXIS 65880, at *12 (D. Okla. Sept. 14, 2006).

in the plaintiffs' favor. This is a dangerous precedent. Affording the legislature such an added protection allows it to take action adverse to the public interest without the checks and balances integral to our system of governance, with full knowledge that the courts are substantially limited in their ability to review.

IV. THE UNDERLYING MOTIVATIONS—COMING TO AN UNDERSTANDING OF *AID FOR WOMEN* AND THE KLINE OPINION

A. Academia's Interpretation

The limited literature there is analyzing *Aid for Women* links the case and the Kline opinion to the ongoing abortion debate in Kansas and across America.[126] While this connection is not immediately apparent, a review of the political history of Kansas, Phill Kline, and some other key players brings this connection into full view.

B. Recent Political Developments in Kansas

Although Kansas is traditionally a highly conservative state, both morally and politically,[127] "the state has largely withstood pressures to curtail women's abortion rights."[128] Prior to 1991, Kansas had been a paradigm of traditional Republicanism, concentrating mainly on low taxes and keeping the government out of people's lives.[129] Kansas Republicanism was of a "moderate" or "progressive" sort; Dwight Eisenhower, William Allen White and Alf Landon all came from Kansas, and are decidedly "moderate" Republicans when viewed against today's Republican Party.[130] More importantly, Kansas has historically been "ahead of the crowd on women's rights."[131] Kansas was one of the early states to accept women's suffrage and reform its abortion laws prior to *Roe v. Wade* in 1973.[132] Wichita was once known as the only place in the plains region where a woman could get a late-term abortion, mostly from the famous, or infamous, Dr. George Tiller.[133]

126. Recent Cases, *District Court Grants Preliminary Injunction Against Enforcement of State Law Requiring Reporting of All Sexual Activity by Minors.* – Aid for Women v. Foulston, *327 F. Supp. 2d 1273 (D. Kan. 2004)*, 118 HARV. L. REV. 778, 782 (2004) [hereinafter Recent Cases]. *See generally* Bailey, *supra* note 110.

127. *See* THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA 34-35 (2004) ("Kansas today is a burned-over district of conservatism where the backlash propaganda has woven itself into the fabric of everyday life.").

128. Recent Cases, *supra* note 126, at 782.

129. Andrew Corsello, *This Man Will Do Anything to Stop Abortion*, GQ, Nov. 2005, 254, at 258. Not a single Democrat has been sent to the U.S. Senate from Kansas since 1932. FRANK, *supra* note 127, at 89.

130. *See* FRANK, *supra* note 127, at 89.

131. *Id.* at 89-90.

132. *Id.* at 90; *see also* Corsello, *supra* note 129, at 258.

133. *See* FRANK, *supra* note 127, at 90.

In the eighties, Kansas' state legislature was dominated by moderate Republicans.[134] In 1990, however, the voters elected a Democratic majority to the Kansas House for the second time since World War II.[135] This might have prompted what proved to be the end of moderate Republicanism in Kansas.

1. "The Summer of Mercy"

In 1991, a popular uprising led by Operation Rescue, a pro-life group known for its aggressive anti-abortion tactics, changed the political climate of Kansas forever.[136] Operation Rescue aimed to take advantage of the cultural contradiction evident in Wichita—George Tiller's abortion clinic placed directly in the center of "a population that is world-famous for its spiritual enthusiasm"—by committing acts of civil disobedience and widespread protests all over Wichita.[137] This was not the first protest Operation Rescue had organized. In 1988 they protested in Atlanta, and then again in Los Angeles in 1990.[138] This time, however, something was different.

At the suggestion of the Wichita Police Department, George Tiller and other abortion doctors in the area decided to close down for a week and wait the protests out.[139] This proved to be a disastrous move. All over the country pro-life groups saw the shutdown of the abortion clinics as a "miracle, a sign from God, and a blessing" on Operation Rescue's campaign and flocked to Kansas to participate.[140] What was intended to be a one-week campaign lasted for a month and a half.[141] At the climax of the protests, over twenty-five thousand people showed up to a rally at the Wichita State University football stadium.[142]

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134. *Id.* at 91.

135. *Id.*

136. *Id.* at 92. Operation Rescue has been credited with incorporating "confrontational social protests [into the] pro-life movement," and turning "what had been a small, ragtag group of easily ignored protesters into a genuine movement, an aggressive national campaign that put the anti-abortion cause back onto America's Page One" which "eventually became one of the biggest social protest movements since the antiwar and civil rights campaigns of the 1960s." MARK ALLAN STEINER, THE RHETORIC OF OPERATION RESCUE: PROJECTING THE CHRISTIAN PRO-LIFE MESSAGE 5 (2006) (quoting CHRISTOPHER LEVAN, LIVING IN THE MAYBE: A STEWARD CONFRONTS THE SPIRIT OF FUNDAMENTALISM 25-26 (1998)). Operation Rescue essentially began the practice of "rescue missions" where "a hundred . . . or more people go to an abortion clinic and either walk inside to the waiting room, offering an alternative to the mothers, or sit around the door of the abortion clinic before it opens to prevent the slaughter of innocent lives." *Id.* at 7 (quoting Randall Terry, founder of Operation Rescue, found in OS GUINNESS, THE AMERICAN HOUR: A TIME OF RECKONING AND THE ONCE AND FUTURE ROLE OF FAITH 171 (1993)).

137. *See* FRANK, *supra* note 127, at 92.

138. *Id.* The Kansas protest "was the group's largest and arguably most pivotal" protest of its kind. STEINER, *supra* note 136, at 9.

139. FRANK, *supra* note 127, at 92.

140. JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR 324 (1998).

141. *See id.* at 324, 333.

142. FRANK, *supra* note 127, at 92.

The traditional moderate Republicans of Kansas were horrified.[143] The Kansas legislature acted quickly, preparing legislation to prevent these protests in the future, mandating stiff penalties for blocking clinics and ensuring that abortions would be legal in Kansas even if *Roe v. Wade* was overturned.[144] The legislation cleared the Kansas House of Representatives, but the Kansas Senate blocked it before it became law.[145]

In the 1992 elections, 83% of the committee members elected in the Republican primary were pro-life.[146] In Sedgwick County, "some 19 percent of the new precinct committee people responsible for throwing out the old guard actually had arrest records from the Summer of Mercy."[147] The pro-life movement of Operation Rescue during the Summer of Mercy effectively allowed conservative Kansas Republicans to conquer the legislature.[148]

Among those placed in the Kansas House of Representatives was Phill Kline.[149] During his eight years in the House of Representatives, he drafted and helped pass a total of five bills limiting abortion rights, including the law forbidding abortions after the twenty-second week of pregnancy.[150] Later, in his position as Attorney General for the state of Kansas, he subpoenaed the medical records of George Tiller's abortion office in Wichita for evidence of abortions performed in violation of this law.[151]

Even with the strongly anti-abortion legislature and the numerous bills passed limiting a woman's ability to have an abortion, pro-life activists were still unhappy.[152] This brings us to the 2002 Kansas Attorney General race that put Phill Kline in the Attorney General's office.

2. The Attorney General Race and the Kline Opinion

Anti-abortion activists in the state grew frustrated with the rising abortion rate in Kansas[153] and the inability to succeed in either the courts or legislature.[154] Thus, rather than use the legislative process to achieve

143. *Id.* at 92-93.
144. *Id.* at 94.
145. *Id.*
146. RISEN & THOMAS, *supra* note 140, at 334.
147. FRANK, *supra* note 127, at 95-96.
148. *Id.* at 96.
149. Corsello, *supra* note 129, at 258.
150. *Id.*
151. Alpha Med. Clinic v. Anderson, 128 P.3d 364, 369 (Kan. 2006); Corsello, *supra* note 129, at 258. This case is discussed in more detail below.
152. *See* Recent Cases, *supra* note 126, at 782.
153. The abortion rate in Kansas grew 15% between 1996 and 2000. *See* TRENDS IN ABORTION IN KANSAS, 1973-2000, 2003 ALAN GUTTMACHER INST. 2, *available at* http://www.agi-usa.org/pubs/state_ab_pt/kansas.pdf [hereinafter GUTTMACHER INST.]; *see also* Recent Cases, *supra* note 126, at 782 n.38.
154. Recent Cases, *supra* note 126, at 782. Of course, they had some success in the legislature, as previously discussed. However, the rise of abortion in recent years is evidence of the apparent failure of the new laws in place. *See* GUTTMACHER INST., *supra* note 153.

their goals, pro-life supporters sought an attorney general they could trust to place pressure on abortion doctors through the re-interpretation of pre-existing laws.[155] As it played out, the 2002 race for Attorney General focused primarily on abortion, with both candidates arguing that he alone could provide better enforcement of the existing laws regulating abortion.[156] With the support of abortion activist groups,[157] Phill Kline won the Attorney General position and immediately began his moral crusade against abortion.[158]

3. *Alpha Medical Clinic v. Anderson*[159]

In the same year that Attorney General Kline issued the Kline opinion, he "subpoenaed the entire, unredacted files of 90 women and girls who obtained abortions" at two Kansas abortion clinics in order to investigate "potential violations of two specific statutes . . . *K.S.A. 65-6703*, which deals with abortions performed at or after 22 weeks gestational age, and *K.S.A. 2004 Supp. 38-1522*, which governs mandatory reporting of suspected child abuse."[160] The petitioners filed a motion to quash the subpoenas, but the state trial court judge, Judge Richard Anderson, denied the motion and ordered the petitioners to produce the 90 unredacted patient files.[161]

The petitioners filed a petition for mandamus with the Kansas Supreme Court only two days before the files were to be released. The Kansas Supreme Court held that the subpoenas were unenforceable as issued.[162] The court ordered Judge Anderson to permit the inquisition "only if [he] is satisfied that the attorney general is on firm legal

155. *See* Recent Cases, *supra* note 126, at 782-83.

156. *Id.* Tim Potter, *Abortion Dominates Attorney General Race*, WICHITA EAGLE, Oct. 5, 2002, at I; *see also* Jim Sullinger & Steve Kraske, *Kline Names Abortion Protest Figure to Staff*, KAN. CITY STAR, Jan. 28, 2003, at B1.

157. Potter, *supra* note 156, at I.

158. Attorney General Kline quickly appointed Bryan J. Broan to the consumer protection division. Mr. Broan was arrested seven times during the Wichita Summer of Mercy Protests. *See* Sullinger & Kraske *supra* note 156, at B1.

159. 128 P.3d 364 (Kan. 2006).

160. *See Alpha Med. Clinic*, 128 P.3d at 369-70; 2003 Kan. AG LEXIS 22 (2003). During his tenure in this legislature, Attorney General Kline also co-sponsored a law that prevents the release of any identifying information relating to victims of sex-crimes. *See* Bailey, *supra* note 110, at 1029; KAN. STAT. ANN. § 45-221 (a)(10)(F) (2006). While Attorney General Kline claims that he specifically requested all patient-identifying information to be redacted from the files in order to comply with this law, the Kansas Supreme Court noted that he changed his position midway through the proceedings in *Alpha Medical Clinic*. *Compare Alpha Med. Clinic*, 128 P.3d at 378, *with* Press Release, Office of Kansas Attorney General Phill Kline, Statement by Attorney General Kline Concerning Latest Action in Judicial Inquiry of Child Rape and Illegal Late-Term Abortion (Mar. 16, 2005), *available at* http://www.accesskansas.org/ksag/Press/2005/0316_statement_abortion.htm; Bailey, *supra* note 110, at 1029.

161. *Alpha Med. Clinic*, 128 P.3d at 370.

162. *Id.* at 924.

ground."[163] The court further required the redaction of all patient identifying information from the files.[164]

Attorney General Kline claims that the subpoenas were issued to "investigat[e] into alleged cases of child rape, failure to report child rape and violations of the state's late-term abortion statute."[165] This cause is valid and noble, and it is the province of the Attorney General to investigate violations of the law. However, it is not clear that the subpoenas were truly aimed at "smoking out" child rapists and those who fail to report. For if "they had been, Kline would be going after the medical records of girls who had their babies as zealously as he went after those who aborted."[166] Of course, the subpoenas might provide valuable information leading to the arrest of child rapists, but his selective application of the laws on abortion clinics alone is, at the very least, suspect.[167]

C. Coming to an Understanding of the Kline Opinion

One cannot blame a publicly elected official for appeasing his constituents through lawful means, and Attorney General Kline is no exception.[168] The political climate of Kansas, the attorney general race and his deeply held religious beliefs[169] all play a part in both why he got elected and why he interpreted the reporting statute the way he did. Ultimately, to understand *Aid for Women v. Foulston* is to understand the Kline opin-

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163. *Id.*

164. *Id.* at 924-25.

165. Press Release, Office of Kansas Attorney General Phill Kline, Attorney General Phill Kline Takes Possession of Medical Records (Nov. 1, 2006), *available at* http://www.ksag.org/Press/2006/1101_medicalrecords.htm.

166. Corsello, *supra* note 129, at 261.

167. The *Alpha Medical Clinic* decision also involved contempt proceedings brought against Attorney General Kline for attaching redacted portions of the District Court hearing transcript and later discussing the brief and its attachments at a press conference. *Alpha Med. Clinic*, 128 P.3d at 380. This was in direct violation of District Court Judge's order requiring all filing to be made under seal and further restricting disclosure of the transcript. *Id.* The Supreme Court of Kansas found Attorney General Kline's initial responses "troubling." *Id.* at 928. He admitted to knowingly violating Judge Anderson's order in attaching the sealed court records to the brief because "he believed it to be necessary to further his arguments," and held a press conference "merely because he determined that petitioners had painted his previous actions in an unflattering light." *Id.* He then permitted his staff to provide copies of the sealed transcript "to anyone who requested them." *Id.* The court stated, "[i]n essence, Kline has told this court that he did what he did simply because he believed he knew best how he should behave, regardless of what this court had ordered, and that his priorities should trump whatever priorities this court had set." *Id.* at 928. Lucky for Attorney General Kline, his lawyer, former Attorney General Stephan (the author of the initial attorney general opinion interpreting the reporting statute) "wisely altered the tone of Kline's response." *Id.* at 929. "He characterized whatever mistakes Kline may have made as honest ones and said that his client was acting in good faith . . . [and] made a classic 'no harm, no foul' argument:" any harm that arose from the disclosure of sealed material did not effect the soundness of the outcome of the case. *Id.* Ultimately, the court concluded that "despite the attorney general's initial defiant tone, he should not be held in contempt" as no prejudice resulted from his conduct. *Id.*

168. Attorney General Kline was not reelected in the 2006 midterm elections. *See* Press Release, Office of Kansas Attorney General Phill Kline, Statement by Attorney General Phill Kline (Nov. 7, 2006), *available at* http://www.accesskansas.org/ksag/Press/2006/1107_Statement.htm.

169. Corsello, *supra* note 129, at 258-59 (noting that Kline keeps a bible on his desk, reads scripture before work everyday, and wears his religion on his sleeve).

ion, and to understand the Kline opinion is to understand where it came from. Hopefully some light has been shed on this decidedly strange case.

D. The Cost of the Lawsuit

Complete figures are not available for the cost of this lawsuit. However, experts in the first trial court decision alone cost $230,609.98.[170] The highest paid expert was Dr. Vincent M. Rue, who received $152,701.25 but never testified.[171] In the remanded case, the court noted that he did not testify and his participation in the matter was largely a mystery, although some other experts indicated that he was involved in organizing the team of experts.[172]

As for the other experts, who received over $77,000 for their testimony, none provided any support for Attorney General Kline's position.[173] Dr. Josephson was paid $15,225 to testify that mandatory reporting might deter some minors from seeking medical help, that he himself does not report all consensual sexual activity between age-mates under sixteen, and that if the plaintiffs' expert Dr. Kellogg were doing every examination, he might feel more comfortable with discretionary reporting.[174] Of course, the court found his testimony "inconsistent and therefore unreliable. In fact, his own practice and opinion as to what should be reported is not as broad as the reporting requirements of the Kline Opinion."[175]

Dr. Shadigan was paid $18,900 dollars for equally damning testimony.[176] She testified that mandatory reporting might do more harm to the minor than the sexual activity itself and that she does not report all such illegal activity herself.[177] Several other experts were paid for their services, but did not make it into the trial court's decision.[178] Ultimately, the experts for the defense were "unreliable" at best, but damning to the case at worst.

Of course, these figures do not reflect the cost for the appeal, the Attorney General Office's time and resources, the court's time, and the cost to the defense.

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170. Litigation Fees Paid – December 9, 2004 through December 31, 2005, http://www.ksag.org/Press/2006/12-31-05contractpayments.htm [hereinafter Litigation Fees Paid].

171. *Id.* Dr. Rue is an anti-abortion researcher who co-directs the Florida Group Institute for Pregnancy Loss. Bob Ellis, *South Dakota Abortion Task Force Hears Testimony*, DAKOTA VOICE, Apr. 6, 2006, http://www.dakotavoice.com/200511/20051122_3.html (last visited Jan. 19, 2007).

172. Aid for Women v. Foulston, 427 F. Supp. 2d 1093, 1110 n.14.

173. Litigation Fees Paid, *supra* note 170; *Aid for Women*, 427 F. Supp. 2d at 1110-13.

174. *Aid for Women*, 427 F. Supp. 2d at 1110-11.

175. *Id.*

176. Litigation Fees Paid, *supra* note 170; *Aid for Women*, 427 F. Supp. 2d at 1110-12.

177. *Aid for Women*, 427 F. Supp. 3d at 1110-12.

178. Dr. Shunn – $1,075; Dr. Yarbrough – $1,895; Dr. Swanson – $9,733.63; Dr, Meeker – $7,605. Litigation Fees Paid, *supra* note 170.

E. All for Nothing

Attorney General Kline took the outcome of this case as a victory:

> In bringing this lawsuit . . . plaintiffs contended that the reporting statute is unconstitutional. The judge found that the statute was clear and did not violate equal protection, vagueness, or decisional privacy rights. The constitutionality of the statute has been upheld.
>
> We have defended the constitutionality of the law successfully. The judge made his ruling in light of the earlier finding by the Tenth Circuit Court of Appeals that the state has a substantial interest in protecting its children.[179]

While this statement is not a lie, *per se* (except for the claim that the plaintiffs' challenged, "that the statute is unconstitutional"[180]) it borders on absurdity. The court did not speak to equal protection and did not speak to the constitutionality of the statute.[181] There was no claim of a violation of equal protection rights at all. As a matter of fact, a recent Harvard Law Review article criticized the plaintiffs for failing to assert the equal protection claim.[182]

Attorney General Kline's delusions aside, he did not win this case. That much is clear. His interpretation of the statute was held unconstitutional, and he was enjoined from enforcing it as interpreted. But, he did not appeal the case to the Tenth Circuit. Perhaps he did not leave any issues to be appealed, perhaps he realized the futility of the fight, perhaps he was convinced by the court's decision. No one knows.

All this leads to important questions: Why did Phill Kline appeal the preliminary injunction? What goals did he have in mind? He knew that regardless of the outcome, the case would return to the same District Court Judge in Kansas who would undoubtedly come to the same conclusions. He risked the possibility of precedent seriously adverse to his

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179. Press Release, Office of Kansas Attorney General Phill Kline, Statement of Attorney General Kline Concerning Federal District Court Ruling in Underage Reporting Case (Apr. 18, 2006), *available at* http://www.accesskansas.org/ksag/Press/2006/0418_underage_reporting.htm. Of course, the court did make their determination in light of the states substantial interest in protecting its children – enforcing the Kline Opinion would be *adverse* to their best interests, and thus the permanent injunction was granted. *Aid for Women*, 427 F. Supp. 2d at 1107 (stating "[h]ow is the best interest of the child served by not seeking health care in either circumstance? Clearly, it is not.").

180. Statement of Attorney General Kline Concerning Federal District Court Ruling in Underage Reporting Case (Apr. 18, 2006), http://www.accesskansas.org/ksag/Press/2006/0418_underage_reporting.htm; *Aid for Women*, 427 F. Supp. 2d at 1095 (asserting that "[p]laintiffs seek to prevent enforcement of Kansas Attorney General Phill Kline's application of the state mandatory reporting statute, through an Attorney General's opinion, to consensual underage sexual activity."). Attorney General Kline missed the issues – perhaps that speaks to his ultimate defeat.

181. *Aid for Women*, 427 F. Supp. 2d *passim*.

182. Recent Cases, *supra* note 126, at 783 n.44 ("[A]n argument could be made that enforcing Attorney General Kline's opinion would violate the equal protection rights of young women" as only the female's name would be turned over to state agencies.).

point of view (a minor's right to informational privacy being one) and stood to win very little. At the very least, one would expect him to appeal the case to the Tenth Circuit again, but he simply did not.

Perhaps he honestly believed that he won the case. The only press release he issued after the District Court's final decision is quoted above, and indicates he felt victorious.

Of course, to attribute such a ridiculous point of view to a man as intelligent as Phill Kline would be unfair. In all likelihood, he probably felt the chances of victory were slim, the cost would be high, and any possible outcome would not be worth the expense. In light of the trial court record, replete with expert testimony tending to show his interpretation was actually injurious to the health of minors, he might have been correct in assuming he would not win. Regardless of the Tenth Circuit's apparent sympathy for his interpretation, the facts and record that would be relied upon could hardly have supported a reversal. The damning expert testimony, the existence of a minor's right to privacy, and the strength of the plaintiffs' arguments would prove a significant hurdle to victory. Ultimately, all we know is that he did not appeal the decision, and his interpretation will never have the force of law.

CONCLUSION

No one can deny that Phill Kline thinks he is working his hardest to protect the children of Kansas. That being so, he doesn't always choose the best methods of protection. Forcing disclosure of teenage sex will only serve to dissuade impressionable, fearful youth from seeking medical help and advice from their elders. Everyone wants to curb teenage sex and the unwanted pregnancies that come with it, but in so doing human nature must be taken into account before policies are implemented that may look noble on their face, but only lead to disastrous results in the end.

Underneath the lawsuits, critiques, anger and rhetoric revolving around this case is a problem that sits deep in the American public—the abortion debate. Somewhere during the debate, people lost their sense, lost their reason, and began relying on absolutes. One is either pro-choice or pro-life, and it seems that whatever stance is taken, the arguments grow more and more absolutist in nature as time goes on.[183]

This case is a paradigm example of what happens when an attorney general grabs hold of this absolutist mentality and runs for the finish line. Teenage sex leads to pregnancy, pregnancy leads to abortion, abortion is bad, and therefore all teenage sex is bad. We know this can't be true. The last thing in one's mind when Romeo and Juliet made love for the first time was the awful, inherently injurious nature of consensual teen

183. *See* Corsello, *supra* note 129, at 259.

sex. Many parents met, made love, and had children, all before they were 18. And some of them are still together, and happy. The legislature appreciated this fact, and took steps to acknowledge it. Thus, where teenage sex causes injury to one of the parties, it should be reported for further investigation—to protect the children *when they need protection.* By getting sucked into the rhetoric of absolutes, the children who need the most protection are actually being harmed. Fortunately, the courts are here to curb this line of thinking and come to reasoned decisions effectuating the noblest of intentions.

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