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Dissolving Family Relations: Termination of Parent-Child Relations—An Overview

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DISSOLVING FAMILY RELATIONS: TERMINATION OF PARENT-CHILD RELATIONS—AN OVERVIEW*

*Jacqueline Y. Parker***

I. INTRODUCTION

The vast majority of jurisdictions have statutory provisions permitting termination of parental rights.[1] Usually, statutes contain no formal, direct definition of the phrase "termination of parental rights," although some states define it indirectly by defining either "parent-child relationship"[2] or "parents."[3] For example, in Illinois,

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1. *See* ALASKA STAT. § 47.10.080(c)(3) (1984); ARIZ. REV. STAT. ANN. §§ 8-531 to -544 (1974 & Supp. 1985); CAL. CIV. CODE §§ 232–239 (West 1982 & Supp. 1986); COLO. REV. STAT. §§ 19-11-101, 19-11-103 to -110 (1978 & Supp. 1985); CONN. GEN. STAT. ANN. §§ 17-32d(e), -43a (West Supp. 1985); DEL. CODE ANN. tit. 13, §§ 1101–1113 (1981 & Supp. 1984); FLA. STAT. ANN. § 39.11(2)(d), (7) (West 1974 & Supp. 1985); GA. CODE ANN. §§ 15-11-41, 15-11-51, 15-11-54 (1985); HAWAII REV. STAT. §§ 571-61 to -63 (1976 & Supp. 1984); IDAHO CODE §§ 16-2001 to -2015 (1979 & Supp. 1985); ILL ANN. STAT. ch. 37, §§ 701-1 to -21 (Smith-Hurd 1972 & Supp. 1986); IND. CODE ANN. §§ 31-6-5-2 to -6 (Burns 1980 & Supp. 1985); IOWA CODE ANN. §§ 600A.1–.9 (West 1981 & Supp. 1985); KAN. STAT. ANN. § 38-824(c) (1981); KY. REV. STAT. ANN. §§ 199.601–.617 (Baldwin 1985); LA. REV. STAT. ANN. §§ 13:1600–:1606 (West 1983 & Supp. 1986); ME. REV. STAT. ANN. tit. 22, §§ 4051–4057 (Supp. 1985); MICH. COMP. LAWS ANN. §§ 710.21–.70 (West Supp. 1986); MINN. STAT. ANN. §§ 260.221–.245 (West 1982 & Supp. 1986); MO. ANN. STAT. § 211.477 (Vernon Supp. 1986); MONT. CODE ANN. §§ 41-3-601 to -612 (1985); NEB. REV. STAT. §§ 43-291 to -294 (1984); NEV. REV. STAT. §§ 128.005–.150 (1986); N.H. REV. STAT. ANN. §§ 170C:1–:15 (1978); N.J. STAT. ANN. §§ 9:2-18 to -20 (West 1976); N.M. STAT. ANN. §§ 32-1-1 to -55 (1981 & Supp. 1985); N.Y. FAM. CT. ACT §§ 611–634 (McKinney 1983); N.C. GEN STAT. §§ 7A-289.22–.34 (1981 & Supp. 1985); N.D. CENT. CODE §§ 27-20-44 to -46 (1974 & Supp. 1985); OHIO REV. CODE ANN. § 2151.353 (Page Supp. 1985); OKLA. STAT. ANN. tit. 10, §§ 1130–1134 (West Supp. 1985); OR. REV. STAT. §§ 419.523–.527 (1985); R.I. GEN. LAWS § 15-7-7 (Supp. 1985); S.C. CODE ANN. §§ 20-7-1560 to -1610 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 26-8-36 (1984); TENN. CODE ANN. §§ 37-1-147 to -148 (1984 & Supp. 1985); TEX. FAM. CODE ANN. §§ 15.01–.07 (Vernon 1975 & Supp. 1986); UTAH CODE ANN. § 78-3a-48 (Supp. 1985); V.I. CODE ANN. tit. 5, § 2509 (_____); VA. CODE § 16.1-283 (Supp. 1985); W. VA. CODE § 49-6-5 (Supp. 1985); WIS. STAT. ANN. §§ 48.40–.435 (West Supp. 1985); WYO. STAT. § 14-2-309 (Supp. 1985).

2. *See* ARIZ. REV. STAT. ANN. § 8-531(11) (1974) ("Parent-child relationship includes all rights, privileges, duties and obligations existing between parent and child, including inheritance rights"). *See also* IDAHO CODE § 16-2002(k) (1979); MONT. CODE ANN. § 41-3-603(3) (1985).

> [p]arents means the father or mother of a child and includes any adoptive parent. It also includes the father whose paternity is presumed or has been established under the law of this or another jurisdiction. It does not include a parent whose rights in respect of the minor have been terminated in any manner provided by law.[4]

On the other hand, the Colorado statute provides a direct, concise definition: " 'Termination of the parent-child legal relationship' means the permanent elimination by court order of all parental rights and duties, including residual parental rights and responsibilities . . . ."[5]

As implied by the above phrase, "elimination by court order of all parental rights and duties," termination of parental rights is best defined in terms of its drastic effects. Typically, termination of parental rights results in a total severance of the normal parent-child relationship, rendering the family into strangers. Thus, both the parents' right to custody and control of the child, and the reciprocal duty to support the child, are abolished.[6] This even includes the right to notice of pro-

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3. *See* ARIZ. REV. STAT. ANN. § 8-531(10) (1974); CONN GEN STAT. ANN. § 17-32d(b) (West Supp. 1985); IDAHO CODE ANN. § 16-2002j (1979); ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd Supp. 1986); KAN. STAT. ANN. § 38-802(h) (1981); LA. REV. STAT. ANN. § 13:1600(3) (West Supp. 1983); MINN. STAT. ANN. § 260.015(11) (West 1982); MO. ANN. STAT. § 211.021(5) (Vernon 1983); NEB. REV. STAT. § 43-245(2) (1984); NEV. REV. STAT. § 128.015 (1986); N.H. REV. STAT. ANN. § 170-C:2(VIII) (1978); N.J. REV. STAT. ANN. § 9:6-2 (West 1976).

4. ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd Supp. 1986).

5. COLO. REV. STAT. § 19-1-103(26) (1978). Wisconsin also has a precise definition of termination of parental rights. *See* WIS. STAT. ANN. § 48.40(2) (West Supp. 1985).

6. The effect of termination of parental rights is exemplified by the statutory language of the following states: ALASKA STAT. § 47.10.080(c)(3) (1984) ("terminate parental rights and responsibilities of one or both parents"); ARIZ. REV. STAT. ANN. § 8-539 (1974) ("divest the parent and child of all legal rights, privileges, duties and obligations with respect to each other except the right of the child to inherit and support from the parent"); CAL. CIV. CODE § 232(a) (West Supp. 1986) ("free from the custody and control of either or both of his or her parents"); COLO. REV. STAT. § 19-11-108(1) (Supp. 1985) ("divests the child and the parent of all legal rights, powers, privileges, immunities, duties, and obligations with respect to each other, but it shall not modify the child's status as an heir at law which shall cease only upon a final decree of adoption"); CONN. GEN STAT. ANN. § 17-32d(e) (West Supp. 1985) ("complete severance by court order of the legal relationship, with all its rights and responsibilities"); DEL. CODE ANN. tit. 13, § 1112 (1981) ("all of the rights, duties, privileges and obligations recognized by law between the person or persons whose parental rights are terminated and the child shall forever thereafter cease to exist"); GA. CODE ANN. § 15-11-54 (1985) ("terminates all his rights and obligations with respect to the child and all rights and obligations of the child to the parent arising from the parental relationship, including rights of inheritance"); HAWAII REV. STAT. § 571-63 (1976) ("no judgement . . . shall operate to terminate the mutual rights of inheritance of the child and the parent . . . unless and until the child has been legally adopted"); IDAHO CODE § 16-2011 (1979) ("shall divest the parent and child of all legal rights, privileges, duties, and obligations, including rights of inheritance, with respect to each other"); IND. CODE ANN. § 31-6-5-6(a) (Burns Supp. 1985) ("When the juvenile or probate court terminates the parent-child relationship, all rights, powers, privileges, immunities, duties and obligations, (including any rights to custody, control, visitation or support) pertaining to the relationship are permanently terminated. . . ."); KY. REV. STAT. ANN. §

ceedings for adoption of the child by someone else.[7] The only vestiges of the parent-child relationship that are sometimes statutorily retained are inheritance[8] and religious affiliation.[9]

199.613 (Baldwin 1985) ("all legal relationships between the parents and child shall cease to exist, the same as if the relationship of parent and child had never existed, except that the child shall retain the right to inherit"); LA. REV. STAT. ANN. § 13:1600(4) (West 1983) ("permanent elimination by court order of all parental rights and duties including residual parental rights"); ME. REV. STAT. ANN. tit. 22, § 4056(1) (Supp. 1985) ("divests the parent and child of all legal rights, powers, priviliges, immunities, duties and obligations to each other as parent and child, except the inheritance rights between the child and his parent"); MISS. CODE ANN. § 93-15-109 (Supp. 1985) ("the court may terminate all the parental rights of the parent or parents regarding the child, and terminate the right of the child to inherit from such parent or parents"); MONT. CODE ANN. § 41-3-611(1) (1985) ("divest the child and the parents of all legal rights, powers, immunites, duties and obligations with respect to each other . . . except the right of the child to inherit from the parent"); NEB. REV. STAT. § 43-293 (1984) ("shall divest the parent and child of all legal rights, privileges, duties and obligations with respect to each other and the parents shall have no rights of inheritance with respect to such juvenile"); NEV. REV. STAT. § 128.110 (1986) ("judicially depriving the parent or parents of the custody and control of, and terminating the parental rights of the parent or parents with respect to the child"); N.H. REV. STAT. ANN. § 170-C:12 (1978) ("shall divest both the parent and the child of all legal rights, privileges, duties and obligations . . . . The rights of inheritance of both parents and the child shall not be divested until the adoption of said child"); N.J. STAT. ANN. § 9:2-20 (West 1976) ("no further control and authority over the person of the child"); N.Y. FAM. CT. ACT § 631 (McKinney 1983) ("for the commitment of the guardianship and custody of the child"); N.C. GEN STAT. § 7A-289.33 (Supp. 1985) ("completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent, arising from the parental relationship, except that the child's right of inheritance from his or her parent shall not terminate until such time as a final order of adoption is issued"); N.D. CENT. CODE § 27-20-46 (1974) ("terminates all his rights and obligations with respect to the child and of the child to or through him arising from the parental relationship"); OKLA. STAT. ANN. tit. 10, § 1132 (West Supp. 1985) ("terminates the parent-child relationship, including the parent's right to the custody of the child and his right to visit the child, his right to control the child's training and education, the necessity for the parent to consent to the adoption of the child and the parent's right to the earnings of the child, and the parent's right to inherit from or through the child"); R.I. GEN. LAWS § 15-7-17 (1981) ("the parents of such child shall be deprived, by the decree, of all legal rights respecting the child, and the child shall be freed from all obligations of maintenance and obedience respecting his natural parents"); TENN. CODE ANN. § 37-1-148 (1984) ("terminates all his rights and obligations with respect to the child and of the child to him arising from the parental relationship"); TEX. FAM. CODE ANN. § 15.07 (Vernon Supp. 1986) ("divests the parent and the child of all legal rights, privileges, duties, and powers, with respect to each other, except that the child retains the right to inherit from and through its divested parent unless the court otherwise provides"); UTAH CODE ANN. § 78-3a-48(1)(c)(3) (Supp. 1985) ("permanently terminates the legal parent-child relationship and all the rights and duties, including residual parental rights and duties, of the parent or parents involved"); WIS. STAT. ANN. § 48.40(2) (West Supp. 1985) ("all rights, powers, privileges, immunities, duties and obligations existing between parent and child are permanently severed"); WYO. STAT. § 14-2-317 (Supp. 1985) ("divests the parent of all legal rights, privileges, duties and support obligations with respect to each other except the right of the child to inherit from the parent shall not be affected").

7. *See, e.g.*, GA. CODE ANN. § 15-11-41(c)(1) (1985); IND. CODE ANN. § 31-6-5-3(2) (Burns Supp. 1985).

8. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-539 (1974); CONN. GEN. STAT. ANN. § 17-32d(e) (West Supp. 1985); HAWAII REV. STAT. § 571-63 (1976); KY. REV. STAT. ANN. § 199.613 (Baldwin 1985); ME. REV. STAT. ANN. tit. 19, § 535 (1981). *But see, e.g.*, MICH. COMP. LAWS ANN. §

Termination of parental rights cases arise in two basic contexts. The first context is adoption. Usually, before a child can be adopted, the natural parents' rights must be extinguished either by consent, by special procedures at the adoption proceeding that obviate the need for consent,[10] or in a termination of parental rights proceeding. A typical example of termination of parental rights in the adoption context occurs when a stepparent wishes to adopt the child of his or her spouse. In order to accomplish this, the parental rights of the noncustodial natural parent must first be terminated. In this context, termination of parental rights is not triggered by the need for child protection as it may be a non-neglectful parent's rights that are being terminated.

The second context, which will be the focus of this article, is child protection, where the court has previously taken jurisdiction over a child who has been abused, neglected, or abandoned.[11] Termination of parental rights as a result of child abuse or neglect is common. Consequently, it is typical for states to include termination as a section or subsection of their child neglect laws, rather than putting it in a separate chapter.[12] At times, termination of parental rights is not even a separate statutory procedure, but instead, it is only a possible disposition at a neglect hearing.[13] On the other hand, approximately half of the states require a separate proceeding.[14]

710.60 (West Supp. 1986); MONT. CODE ANN. § 41-3-611(1) (1985); N.C. GEN. STAT. § 7A-289.33 (Supp. 1985); N.H. REV. STAT. ANN. § 170C:12 (1978); OHIO REV. CODE ANN. § 3107.3 (Page 1980); TEX. FAM. CODE ANN. § 15.07 (Vernon Supp. 1986).

9. *See* CONN. GEN. STAT. ANN. § 17-32d(e) (West Supp. 1985); R.I. GEN. LAWS § 15-7-13 (1981).

10. *See, e.g.*, ME. REV. STAT. ANN. tit. 19, § 532 (1981 & Supp. 1985); N.Y. DOM REL. LAW §§ 111(1)(d), 111-a (McKinney 1977 & Supp. 1986). For a discussion on legal injury arising in adoption, see L. WARDLE, C. BLAKESLEY & J. PARKER, FAMILY LAW IN THE UNITED STATES ____ (1986) [hereinafter cited as FAMILY LAW].

11. *See, e.g., In re* Lem, 164 A.2d 345 (D.C. 1960); *In re* McDonald, 201 N.W.2d 447 (Iowa 1972).

12. *See* Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 3, 66 (1975). For a listing of states that have separate statutory chapters, see *id.* at 10–11, 66.

13. *See* WIS. STAT. ANN. § 48.40 (West 1979 & Supp. 1985).

14. *See* ARIZ. REV. STAT. ANN. § 8-537 (Supp. 1985); CAL. CIV. CODE § 232(a) (West Supp. 1986); GA. CODE ANN. § 15-11-51 (1985); HAWAII REV. STAT. §§ 571-61 to -62 (1976 & Supp. 1984); IDAHO CODE § 16-2009 (Supp. 1985); IND. CODE ANN. § 31-6-5-4.1 (Burns Supp. 1985); IOWA CODE ANN. § 232.111 (West 1985); KY. REV. STAT. ANN. § 199.603 (Baldwin 1985); LA. REV. STAT. ANN. § 13:1602 (West Supp. 1986); MISS. CODE ANN. § 93-15-105 (Supp. 1985); MO. ANN. STAT. § 211.452 (Vernon Supp. 1986); NEV. REV. STAT. § 128.090 (1986); N.H. REV. STAT. ANN. § 170-C:10 (1977); N.J. REV. STAT. § 9:2-18 (West 1976); N.M. STAT. ANN. § 32-1-31 (Supp. 1985); N.Y. FAM. CT. ACT §§ 622–623, 625 (McKinney 1983 & Supp. 1986); OR. REV. STAT. § 419.525 (1985); R.I. GEN. LAWS § 15-7-7 (Supp. 1985); S.C. CODE ANN. § 20-7-1572 (Law. Co-op. 1985); TENN. CODE ANN. § 37-1-147 (Supp. 1985); TEX. FAM. CODE ANN. §§ 15.01–.07 (Vernon 1975 & Supp. 1986); WIS. STAT. ANN. § 48.422 (West Supp. 1985); WYO. STAT. § 14-2-308 to -318 (Supp. 1985).

New York is representative of the jurisdictions which separate termination of parental rights proceedings from child neglect proceedings.[15] Although New York is unique in having two separate hearings, one for fact-finding[16] and one for disposition,[17] other states combine this two-step process into a single hearing.[18] Some states also require the provision of social reports that make recommendations to the court on disposition as a prerequisite to the hearing.[19] For example, in New York, a " 'fact-finding hearing' means . . . a hearing to determine whether the allegations required . . . are supported by clear and convincing proof."[20] The allegations required are, first, that the child is under eighteen;[21] second, that the child is in the care of an authorized agency;[22] third, that the authorized agency has made "diligent efforts to encourage and strengthen the parental relationship";[23] and, fourth, that the parent has "failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so."[24] If the fact-finding hearing results in an unfavorable ruling for the parent, a "dispositional hearing" is held "to determine what order of disposition should be made in accordance with the best interests of the child."[25]

It should be noted, however, that even typical statutes like New York's are in a constant state of flux due to rapid changes in the laws regarding neglected children. Not only did over twenty states amend their termination of parental rights statutes between 1974 and 1980,[26]

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15. *Compare* N.Y. FAM. CT. ACT §§ 611–671 (McKinney 1983 & Supp. 1986) (permanent termination of parental rights, adoption, guardianship, and custody) *with* N.Y. SOC. SERV. LAW §§ 411–428 (McKinney 1983 & Supp. 1986) (child protective services).

16. *See* N.Y. FAM. CT. ACT § 622 (McKinney 1983).

17. *See id.* § 623.

18. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 8-536 to -537 (1974 & Supp. 1985); HAWAII REV. STAT. § 571-62 (Supp. 1984); IDAHO CODE § 16-2009 (Supp. 1985); MO. ANN. STAT. § 211.452 (Vernon Supp. 1986); N.H. REV. STAT. ANN. § 170-C:10 (1978); R.I. GEN. LAWS § 15-7-7.1 (1981); WIS. STAT. ANN. § 48.422 (West Supp. 1985).

19. *See, e.g.*, MO. ANN. STAT. § 211.455 (Vernon Supp. 1986); N.H. REV. STAT. ANN. § 170-C:9 (1977); WIS. STAT. ANN. § 48.422 (West Supp. 1985).

20. N.Y. FAM. CT. ACT § 622 (McKinney 1983). Note that this statute had a preponderance of the evidence standard until it was declared unconstitutional in Santosky v. Kramer, 455 U.S. 745 (1982), after which the statute was amended to provide for a clear and convincing proof standard.

21. N.Y. FAM. CT. ACT § 614(1)(a) (McKinney 1983).

22. *Id.* § 614(1)(b) (which means the child was previously declared neglected).

23. *Id.* § 614(1)(c).

24. *Id.* § 614(1)(d).

25. *Id.* § 623. *See also id.* § 631 (court's options at the conclusion of a dispositional hearing).

26. See Comment, *Standards for Termination of Parental Rights*, 26 WAYNE L. REV. 315,

but there has also been a trend toward constitutionalization. For example, the preponderance of the evidence standard, contained in the former version of the above-described New York statute, was declared unconstitutional by the United States Supreme Court in *Santosky v. Kramer*,[27] wherein the United States Supreme Court constitutionally mandated a clear and convincing evidence burden of proof.[28] This decision gave rise to subsequent changes in various statutes. Other major trends reflected in the statutory amendments include avoiding vagueness by providing specific grounds for termination, and avoiding a breach of substantive due process by requiring a showing of harmful effect on the child as opposed to merely focusing on bad parental conduct.[29] The trend is also to avoid lack of notice by allowing a parent whose child has been adjudicated neglected in a care and protection proceeding to make a plan with the social service agency for remedying the neglect that will otherwise result in termination, and to avoid leaving the child in "limbo" status by setting out time limits for determining whether the child will be returned to the parent or have his or her parental rights terminated.[30]

Historically, the legal response to child abuse has gone through three stages: punitive, protective, and rehabilitative. The earliest case of penal response to child abuse in this country appears to have occurred in the Massachusetts Bay Colony in 1655.[31] It involved a master's maltreatment of a twelve-year-old apprentice who died as a result of the beatings the master inflicted.[32] The master was convicted of manslaughter and ordered to be "burned in the hand," and to forfeit all of his goods.[33] Such "treatment" of child abuse, while punishing the abusing party, also resulted in great financial and emotional hardship for the family, including the child on whose behalf criminal action was instituted.

Today, the criminal law generally is a disfavored legal mechanism for dealing with child abuse. There are significant practical problems with utilization of the criminal law, including the higher level of proof

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326–28 (1980).

27. 455 U.S. 745 (1982).

28. *Id.* at 769.

29. For a discussion of substantive due process, see *infra* notes 48–113 and accompanying text. For a discussion of void for vagueness standards, see *infra* notes 156–85 and accompanying text.

30. *See* Coleman, *supra* note 26, at 328–29. *See also infra* notes 114–85 and accompanying text.

31. *See* Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. REV. 293, 303–04 (1972).

32. *Id.* at 303.

33. *Id.* at 304.

required in criminal court than in civil court, and the added difficulty of establishing a requisite level of intent demanded as an element of the crime.[34] Moreover, use of the criminal law does not change any of the underlying causes of child abuse nor offer significant rehabilitative advantages.[35] In fact, criminal prosecution may serve to add to the hostility of an abusive parent.[36]

The second major response to the law was protective—the removal of the child victim from the home of the abusive parent. Two cases in the Massachusetts Bay Colonies in the 1670's involved children removed from their homes because their parents were found to be "unfit."[37] During the last two centuries, the law has gone through two phases of the removal response to child abuse. The first child-saving efforts were institutional.[38] Beginning in the 1820's, juvenile reformatories, asylums, industrial schools, and "refuges" were opened. Initially the result of private action, these institutions later were imitated by the states. Well into the twentieth century, the major state response to child abuse was to remove the victims of child abuse from their homes and place them in protective institutions. Ironically, this method of intervention often involved the criminal laws, and frequently the institutions where the neglected or abused children were committed were criminal institutions.[39]

The second "phase" of protective response by the government to child abuse was to place the abused child in a private home.[40] Actually, the use of private placement is at least as old as the institutional state response to child abuse. In fact, the use of apprenticeship to a master by indenture was the principal method of child care for dependent or orphaned children until the middle of the nineteenth century.[41] However, until the "refuge" movement began in the 1820's, public authorities rarely intervened in family life to protect children from parental neglect or abuse and, when governments began responding systematically to child abuse as a problem, they adopted the institutional response.[42] By the 1850's, there were stirrings of anti-institutional reform. Part of this involved the "moral disinfectant" movement to place

34. *See generally*, Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679 (1966); Note, *Child Maltreatment: An Overview of Current Approaches*, 18 J. FAM. L. 115 (1979).

35. *See generally* Paulsen, *supra* note 34.

36. *See* Note, *supra* note 34, at 135–36.

37. Thomas, *supra* note 31, at 304.

38. *Id.* at 306.

39. *Id.* at 312.

40. *Id.* at 306.

41. *Id.* at 303.

42. *Id.* at 306.

poor and neglected city children in foster homes out of the cities.[43] It partook of a "back-to-nature farm-purification" mysticism. Nevertheless, until the middle of the twentieth century, the institutional response was the predominant response to child neglect and abuse. For instance, during 1900, the New York Society for the Prevention of Cruelty to Children, a quasi-governmental social agency, placed six children in private homes; 2407 were placed in institutions.[44]

The problem with both phases of the "protective" response is that it compounded the injury to the victimized child. It added to the damage and trauma of attack by a parent the additional trauma of separation from the family.[45] The most recent approach of the law to the problem of child abuse has been the rehabilitative or reconstructive approach.[46] This approach recognizes that child abuse is merely one manifestation of overall parental and family failure. It recognizes the child's need for continuity of parental supervision, and takes into account the damage and trauma done to a child when he or she is removed from the home. The rehabilitative approach is predicated on the idea that if the family is a valuable unit worth preserving, if parental care is to be preferred over institutional or foster parent supervision, and if child abuse is a remediable problem, the state should devote its resources and legal attention to rehabilitating the family and solving the problem of child abuse rather than merely protecting the child from incidents of abuse.

Thus, the law has gone through three stages of development in reaching the currently favored response to child abuse. Initially, the law was used as a sword to punish the offender. Next, the law was invoked as a shield to protect the victim. Now it is being proposed that the law be used as a supportive service to rehabilitate the family as a whole. As each new approach has developed, the law has *grown* (more than changed) to accommodate the new approach. The law today is the cumulative product of this evolution.[47] Presently, criminal laws universally prohibit and penalize child abuse, Juvenile Court Acts provide additional "protective" child removal mechanisms, and some recent legislation and administrative regulations now emphasize the current trend toward family rehabilitation as a response to child abuse. Unfortunately, however, termination of parental rights is still sometimes a necessary response, especially if rehabilitation efforts have failed.

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43. *Id.* at 307.
44. *Id.* at 311.
45. *See* Note, *supra* note 34, at 143.
46. *Id.* at 135–36.
47. *See* Paulsen, *supra* note 14.

II. CONSTITUTIONAL ISSUES: SUBSTANTIVE DUE PROCESS

As discussed, termination of parental rights is a procedure with far-reaching consequences because it is both absolute and irrevocable. Upon termination a parent loses not only physical custody of the child, but also the right to visit or even communicate with the child.[48] The question that arises is what governmental interests are sufficiently compelling or important to justify the extreme remedy of a permanent separation of parents from their natural children. Unfortunately, the answer to this question was avoided by the United States Supreme Court in *Doe v. Delaware*,[49] where the Court dismissed the case on procedural grounds. The Court, in dismissing the case, failed to address the question of whether Delaware's termination of parental rights statute deprived parents of their liberty interests without substantive due process by destroying family integrity without first requiring a showing that parental misconduct was causing harm to their children.[50] Thus, it is still unsettled whether substantive due process under the fourteenth amendment requires that a state statute link parental unfitness to a showing that this unfitness is causing a harmful effect on the child. The better view seems to be that due process forbids termination of parental rights, a fundamental family-based right, absent a compelling interest as evidenced by findings of harm to the child.

The fourteenth amendment substantive due process issue is best discussed by first addressing the states' interests, then addressing the parents' interests, and finally addressing the child's interests. Because the following sections are organized conceptually in order to eliminate

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48. *See* Santosky v. Kramer, 455 U.S. 745, 749 (1982).

49. 450 U.S. 382 (1981).

50. *See Doe*, 450 U.S. at 382. A closely related issue was before the Court recently. In *In re* Baby Girl S., 628 S.W.2d 261 (Tex. Civ. App. 1982), *cert. granted sub nom.* Kirkpatrick v. Christian Homes of Abilene, Inc., 459 U.S. 1145, *vacated*, 460 U.S. 1074 (1983), a biological father was denied custody of his out-of-wedlock child under a Texas statute requiring the father show legitimation is in the child's best interest if the mother does not consent to a biological father's legitimation petition. The mother refused to consent to the petition because she felt that adoption was the best option for the child. *Id.* at 263. The Texas Civil Court of Appeals rejected both of the father's theories. First, the appeals court ruled that the lower court did not abuse its discretion in finding that legitimation was not in the child's best interest because the statute furthers the best interest of an out-of-wedlock child. *Id.* Second, the court upheld the constitutional validity of the statute despite attacks on both due process and equal protection grounds. The court reasoned that the gender-based classification for establishing status as a parent is substantially related to an important government interest in furthering the best interest of the child. *Id.* The United States Supreme Court initially granted certiorari in the case based on constitutional questions presented. Kirkpatrick v. Christian Homes of Abilene, Inc., 459 U.S. 1145 (1983). However, the Court subsequently vacated and remanded the Texas decision for further resolution of state-law questions. Specifically, the Court remanded for a determination of whether under Texas law, the "petitioner could have obtained and may still obtain a decree designating him as the father of his child." Kirkpatrick v. Christian Homes of Abilene, Inc., 460 U.S. 1074, 1075 (1983).

the arguments for each of these parties, the footnote to this sentence provides the substantive due process cases by state, so as to demonstrate which statutory language has been upheld.[51]

A. States' Interests

The states' interest is based on the need for child protection when

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51. It should be kept in mind that most of these state cases preceded the United States Supreme Court's opinion in *Santosky*, which was the first case that definitively stated that there is a fourteenth amendment due process-based fundamental right to family integrity. *See Santosky*, 455 U.S. at 753 (parents have a fundamental liberty interest in the care, custody, and management of their child); Alsager v. District Ct., 545 F.2d 1137 (8th Cir. 1976), *aff'g*, 406 F. Supp. 10 (S.D. Iowa 1975) (parents were denied substantive due process where the state failed to prove the threshold of harm essential to giving the state a sufficient compelling interest to justify termination of parental rights); Sylvander v. New England Home for Little Wanderers, 444 F. Supp. 393 (D. Mass.) (Massachusetts statute that only requires showing of termination being in the child's best interest, but fails to require a showing of parental unfitness, may be unconstitutional), *aff'd*, 584 F.2d 1103 (1st Cir. 1978); Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976) (right to family integrity is a fundamental right so that Alabama provisions allowing termination of parental rights upon a summary showing of neglect violated both the child's and the parents' constitutional rights); Miller v. Alabama Dep't of Pensions and Sec., 374 So. 2d 1370 (Ala. Civ. App. 1979), (statutory language "best interest and welfare" of child upheld); *In re* David B., 91 Cal. App. 3d 184, 154 Cal. Rptr. 63 (1979) (statutory language allowing termination where the parent is not able to care for the child because of mental illness was upheld despite the state's failure to demonstrate any acts of neglect or abuse); *In re* J.S.R., 374 A.2d 860 (D.C. 1977) (statute containing best interests standard without linking best interests to a showing of parental unfitness was upheld); People *ex rel.* Nabstedt v. Barger, 3 Ill. 2d 511, 121 N.E.2d 781 (1954) (upheld statute that permitted termination of parental rights on the ground of parent's mental illness); Horlock v. Oglesby, 249 Ind. 251, 231 N.E.2d 810 (1967), (statutory provision allowing the termination of parental rights of fathers who failed to support their children despite the ability to do so upheld), *appeal dismissed*, 390 U.S. 718 (1968); *In re* Brookes, 228 Kan. 541, 618 P.2d 814 (1980) (failure to incorporate the doctrine of using the least restrictive alternative does not render the termination of parental rights statute unconstitutional); Winter v. Director, 217 Md. 391, 143 A.2d 81 (upheld statutory provision allowing termination of parental rights solely on ground of the best interests of the child), *cert. denied*, 358 U.S. 912 (1958); Dickson v. Lascaris, 53 N.Y.2d 204, 208, 423 N.E.2d 361, 363, 440 N.Y.S.2d 884, 886 (1981) (it is the " 'generally accepted view that a child's best interest [is to be] raised by its parent unless the parent is disqualified by gross misconduct' ") (quoting *In re* Spence-Chapin Adoption Serv., 29 N.Y.2d 196, 204, 274 N.E.2d 431, 436, 324 N.Y.S.2d 937, 944 (1971) (interests of parent and child ordinarily converge)); *In re* Anonymous, 79 Misc. 2d 280, 359 N.Y.S.2d 738 (1974) (upheld provision that allows termination of parental rights if parent is imprisoned); *Ex parte* Walters, 92 Okla. Crim. 1, 221 P.2d 659 (1950) (upheld statutory language that permitted termination if child was without proper care); *In re* William L., 477 Pa. 322, 383 A.2d 1228 (upheld statute allowing termination of parental rights on the ground of the parent's continued incapacity causing the child to be without essential parental care and the inablility of alleviating the source of the incapacity even though the statute did not require any showing of physical or verbal harm), *cert. denied sub nom.* Lehrman v. Lycoming County Children's Servs., 439 U.S. 880 (1978); State Dep't of Human Servs. v. Ogle, 617 S.W.2d 652 (Tenn. Ct. App. 1980) (upheld statutory provision that allows appointment of guardian ad litem in termination of parental rights proceedings for a child's parent who is judged incompetent); Crawford v. Crawford, 569 S.W.2d 505 (Tex. Civ. App. 1978) (upheld statutory provision allowing termination of parental rights on the ground that the parent endangered the child); *In re* R.J.M., 266 S.E.2d 114 (W. Va. 1980) (upheld statute that did not require use of the least restrictive alternative before terminating parental rights).

parents fail to fulfill their role. It is estimated that each year there are over 800,000 cases of child neglect and 200,000 cases of physical abuse, resulting in the deaths of 2000 children.[52] Only a "distinct minority" of these cases involve actual child abuse[53] in the sense of the child being intentionally beaten as opposed to being neglected. As a result of abuse or neglect, over 30,000 children nationwide are removed from their homes each year, particularly from poor families.[54] Because most of these children end up under foster care for extended periods of

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52. *See* Note, *Application of the Vagueness Doctrine to Statutes Terminating Parental Rights*, 1980 DUKE L.J. 336, 337. Actually, the numbers may be much higher. Despite underreporting, estimates by child-protection organizations of how many American children are sexually abused each year range from 100,000 to 1,000,000. *See* DeFrancis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, FED. PROBATION, Sept. 1971, at 15, 17. Although the U.S. Department of Health, Education, and Welfare reports at least 2,000 deaths, its estimate of the number of abused children is over 1,000,000. *See* Schwartz & Hirsh, *Child Abuse and Neglect: A Survey of the Law*, 1982 MED. TRIAL TECH. Q. 293, 295.

The American Humane Association's national study of child abuse reported 1,955 cases of child sexual abuse in 1976. N.Y. Times, May 13, 1982, at C10, col. 2. By 1980, that figure had risen to approximately 25,000 and, contrary to what may have been believed, over 50% of these incidents may have involved violence. *See id.* (quoting Dr. Gene G. Abel, Director of the Sexual Behavior Clinic, New York State Psychiatric Institute at Columbia-Presbyterian Medical Center, New York, N.Y.). A 1981 study done by the American Humane Association reported that "[t]here were 850,980 reports of child abuse and neglect documented nationwide during 1981, which represents an increase of 206 percent since 1976." AMERICAN HUMANE ASSOCIATION, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 20 (1981) (report available at the American Humane Ass'n, Child Protection Division, 9725 East Hampden Avenue, Denver, Colo. 80231) The U.S. National Center on Child Abuse and Neglect stated that about 1,000,000 children were reported as suspected child abuse or neglect cases in 1979. U.S. DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT ____ (1981).

53. *See* Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599, 606, 609 (1973).

54. *See* Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child*, 78 MICH. L. REV. 645, 660, 689 (1980). The American Humane Association reports that "[t]he number of child abuse and neglect reports processed by child protection service agencies in 1981 was 850,980." AMERICAN HUMANE ASSOCIATION, *supra* note 52, at 20. In 1981, 48% of the cases were reported closed after the investigation; 44% were "open for protective services" and 5% were "currently under investigation." *Id.* at 21. Casework counseling was the most frequently provided service. 81% of the cases opened for services received casework counseling while 43% received some type of long-term support services; court action was initiated in 18% of the cases, and short-term crisis services were provided in 15% of the cases. *Id.* 4% of the cases reported indicated that the only activity which had occurred was the investigation by the protective services caseworker; however, services were expected or planned. *Id.* Another study by a Denver child abuse team "found that in only 10 percent of their cases, the children had to be permanently removed from the home. In the remaining 90 percent, the children were returned to home within 8 or 9 months of the incident after both they and their parents received treatment." Mondale, *Child Abuse Symposium, Introductory Comments*, 54 CHI.[-]KENT L. REV. 635, 637 (1980). The statistic that as many as 2,000 children die each year was also discussed by former Vice President Walter Mondale. *Id.* at 636. Although the Department of Health, Education, and Welfare reports at least 2,000 deaths, its estimate of the number of abused children is over 1,000,000. Schwartz & Hirsh, *supra* note 52, at 295.

time, termination of parental rights is provided as a means of "freeing the child for adoption."[55]

The states' role as superparent, commonly known as *parens patriae*,[56] can be traced to English common law. In *Eyre v. Shaftsbury*,[57] the Court of Chancery explained that the King, as protector of all his subjects, is concerned about those unable to care for themselves because of their youth or incapacities.[58] The modern concept of *parens patriae* has several widely recognized justifications. First, because a child by definition lacks capacity and experience, it is necessary that someone else be ultimately responsible for the child's basic needs. An obvious example is orphaned children.[59] Second, because society as a whole has a stake in the children who will soon be its adult citizens, society has an interest in assuring the child's welfare as well as acculturation to its political values. Finally, a child who is not raised properly may later become a delinquent. Thus, *parens patriae* serves as the historical doctrinal foundation for protecting young children from abuse and neglect.

Modern theories of psychology lend additional weight to the historical doctrine of *parens patriae*. It is widely accepted that children who are abused often become abusers, largely because that is the only role model they have.[60] Moreover, the psychiatrists Joseph Goldstein, Anna Freud, and Albert Solnit have written two influential books in which they stress the need for maintaining the child's relationship with the child's "psychological parent."[61] Thus, they oppose removal of the child from his or her family unless the child is in actual or serious danger. Once a child has been removed from the home or voluntarily placed in foster care, if a foster parent becomes established as the new "psychological parent," Goldstein, Freud, and Solnit would be opposed

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55. *See* N.Y. SOC. SERV. LAW § 384-b(1)(b) (McKinney 1983). As one commentator asserts, "[a]lthough no one knows exactly how many proceedings are initiated, it appears that at least 20,000 new petitions are filed annually." Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel after Lassiter v. North Carolina*, 15 FAM. L.Q. 205, 205 (1981).

56. Literally this term means father of the country. The term refers to the state's sovereign power of guardianship over persons under disability. *See* BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

57. 24 Eng. Rep. 659 (1722). For an article on the history of *parens patriae*, see Note, *The Parens Patriae Theory and Its Effects on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894 (1966).

58. *Eyre*, 24 Eng. Rep. at 666.

59. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 119, § 1 (West Supp. 1985).

60. *See, e.g., Studies Find Sexual Abuse of Children is Widespread*, N.Y. Times, May 13, 1982, at C10, col. 1.

61. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979); J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

to reuniting the child with his or her natural parents.[62] Although it is not possible to determine exactly how long it takes to develop a psychological parent-child relationship, Goldstein, Freud, and Solnit posit that a child's sense of time is different than that of adults.[63] At the point that a child has developed a new "psychological parent," they would require termination of the natural parents' rights in order to protect the integrity of the new family, even if the reason for the initial disruption of the natural family was not due to the fault of the parent.[64] Thus, parental fitness is not the important criterion, and a parent who has lost touch with his or her child because of a long illness is in no better position than one who has been at fault. Goldstein, Freud, and Solnit's theories, despite having been adopted by several courts,[65] have also been severely criticized[66] for a variety of reasons, especially for not using empirical data to support their psychoanalytic theories, for confusing the issue of separation with that of parental deprivation, and for failing to recognize that a child may have several psychological parents.

Apart from the common law and psychological theory, there is a long constitutional tradition of state intervention into family life on the behalf of children. Examples include compulsory education,[67] compulsory vaccination and medical treatment,[68] and the prohibition of child labor.[69] The United States Supreme Court's opinion in *Prince v. Massachusetts*[70] gracefully articulates the states' interest in regulating the relationship between the parents and the child in order to protect the

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62. *See* Wald, *supra* note 54, at 648–49.

63. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 8–10 (1973).

64. *Id.*

65. *See, e.g.*, Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976); *In re* Kim Marie J., 59 A.D. 716, 398 N.Y.S.2d 374 (1977).

66. *See, e.g.*, Katkin, Bullington & Levine, *Above and Beyond the Best Interests of the Child: An Inquiry Into the Relationship Between Social Science and Social Action*, 8 L. & SOC'Y. REV. 669 (1974).

67. *See* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925).

68. For example, states have been allowed to order blood transfusions over parents' religious objections. *See* People v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); Morrison v. State, 252 S.W.2d 97 (Mo. App. 1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962); Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961); Santos v. Goldstein, 16 A.D.2d 755, 227 N.Y.S.2d 450, *appeal dismissed*, 232 N.Y.S.2d 1026 (1962); *In re* Brooklyn Hospital, 45 Misc. 2d 914, 258 N.Y.S.2d 621 (1965); *In re* Clark, 21 Ohio Op. 2d 86, 185 N.E.2d 128 (C.P. Ct. 1962). A state can also impose a compulsory smallpox vaccination law under its police power. *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

69. *See, e.g.*, Terry Dairy Co. v. Nalley, 146 Ark. 448, 225 S.W. 887 (1920); *In re* Spencer, 149 Cal. 396, 86 P. 896 (1906); Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N.E. 229 (1909); New York v. Chelsea Jute Mills, 43 Misc. 266, 88 N.Y.S. 1085 (1904).

70. 321 U.S. 158 (1944).

child:

> It is cardinal with us that the custody, care and nuture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter. But the family itself is not beyond regulation in the public interest . . . . [R]ights of parenthood are [not] beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parents' control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.[71]

Thus, there can be no doubt that the state may properly act to protect children of tender years from parental neglect.[72]

B. Parents' Interests

In *Santosky v. Kramer*,[73] the United States Supreme Court, for the first time in the context of termination of parental rights, declared that parents' "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the fourteenth amendment."[74] The Court further clarified this substantive due process interest of the parents, stating:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State . . . . The fact that important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding does not justify denying the *natural parents* constitutionally adequate procedures.[75]

Thus, after *Santosky*, it is clear that the right to integrity of the family is among the most fundamental rights under the Fourteenth Amendment.[76]

Prior to *Santosky*, cases such as *Pierce v. Society of Sisters*,[77] in which the Court declared unconstitutional a statute requiring parents to send their children to public schools,[78] were used by advocates both in support of and in opposition to the establishment of a fourteenth

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71. *Id.* at 166 (footnotes omitted).
72. *See id.* at 166–67.
73. 455 U.S. 745 (1982).
74. *Id.* at 753.
75. *Id.* at 754 n.7.
76. *Id.* at 753–54.
77. 268 U.S. 510 (1925).
78. *Id.* at 534–35.

amendment fundamental right to family integrity. Advocating the fundamental right to family integrity, the Court in *Pierce* stated: "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[79] Those opposing the establishment of a fundamental right to family integrity and the compelling state interest standard of review which it triggers, argued that *Pierce* merely required a reasonable relationship test, pointing to language in that case which stated:

> Under the doctrine of *Meyer v. Nebraska*, . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.[80]

Assuming that *Santosky* has settled this debate on the side of a fundamental right to family integrity, the key question for the attorney representing the parents is what constitutes a state interest sufficient to defease the parents' right to custody of their children. There is authority to support the contention that only the need to protect children from neglect or harm is sufficient to permit intervention. According to the United States Supreme Court in *Stanley v. Illinois*,[81] "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[82] Thus, it seems that a practitioner representing a parent seeking to retain custody, faced with a showing of parental misconduct without a showing that there is a resultant harm to the child, has at least a strong argument that the parents should, nevertheless, retain custody.[83]

The main problem for an attorney in this position is that harm may be difficult to prove or disprove. It may not be clear whether a mother's right to her children may be terminated because she drinks alcohol excessively or is living with someone to whom she is not married.[84] Similarly, what is the status of a mother whose misconduct is

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79. *Id.* at 535.

80. *Id.* at 534–35.

81. 405 U.S. 645 (1972).

82. *Id.* at 651.

83. *See, e.g.*, Dasovick v. A.B., 259 N.W.2d 636, 638 (N.D. 1977) ("A showing of parental misconduct without a showing that there is resultant harm to the child is not sufficient.").

84. *See, e.g.*, ILL. ANN. STAT. ch. 40, § 1501(D)(k) (Smith-Hurd Supp. 1986) ("habitual drunkenness or addiction to drugs"); *id.* § 1501(D)(j) ("open and notorious adultery or fornication"); *see, e.g.*, In re Adoption of S., 291 N.W.2d 364 (Minn. 1980) (sexual misconduct should not

forging checks in order to buy things for her children? Because the judge making the decision has much discretion, these cases are difficult to predict.

The position of a California court in *In re* T.M.R.,[85] provides an example of how harm might be evaluated. In this case, the trial court's order declaring an imprisoned mother's children free from her custody and control was reversed when the court held that the neglect provision was intended to apply only where a child was made a dependent of the juvenile court because he or she had been cruelly treated or neglected, and not to the situation where there was no one to care for the child when his or her parents were arrested.[86] The federal district court case of *Alsager v. District Court* [87] suggests a measure for how much harm is enough harm to constitute a compelling state interest:

> Due process requires a certain threshold of harm to the child to justify termination. In this regard, the Court accepts plaintiffs' argument that to sustain its compelling interest burden, the state must show that the consequences, in harm to the children, of allowing the parent-child relationship to continue are more severe than the consequences of termination.[88]

The *Alsager* test, that "more harm is likely to befall the child by staying with his [or her] parents than by being permanently separated from them,"[89] however, provides less protection for parents than the standards adopted by some state courts that focus on actual harm or present danger.[90]

It would probably be violative of the parents' rights to reach into the hospital and remove a mother's newly-born child because of her

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constitute a ground for termination if it is not likely to have an adverse effect on the welfare of the child). *But see* Booth v. Heenepin County Welfare Bd., 253 Minn. 395, 91 N.W.2d 921 (1958) (sexual immorality of mother who had relationships with married men was sufficient for termination of parental rights).

85. 41 Cal. App. 3d 694, 116 Cal. Rptr. 292 (1974).

86. *Id.* at 700–01, 116 Cal. Rptr. at 295–96.

87. 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976).

88. *Id.* at 23.

89. *Id.* at 24.

90. *See, e.g.*, Custody of a Minor (No. 2), 378 Mass. 712, 719, 393 N.E.2d 379, 384 (1979). The Massachusetts Supreme Court stated:

> The gist of the appellant's argument is that a finding of parental unfitness and subsequent transfer of child custody to the department must be based on evidence of existing neglect or mistreatment and not merely on the fear, however well-founded, that a firstborn child would suffer harm. Although we agree that there must be a finding of a current parental unfitness before the State may assume custody of a child, . . . we decline to restrict the evidence in the manner that the appellant suggests.

Id. (citation omitted). *See also* Custody of a Minor (No. 1), 377 Mass. 876, 389 N.E.2d 68 (1979) (upheld removal of newborn from mother based on mistreatment of her other children).

past behavior, but not necessarily in a situation in which she mistreated her older children.[91] Usually, those courts willing to consider future harm require the trial judge "to articulate his [or her] findings in regard to the emotional and physical welfare of the child in light of the parent's alleged misconduct."[92] In one case, the evidence showed that a thirteen-year-old boy was living with his mother in unconventional living conditions which included the mother and son sleeping next to each other on a small rug.[93] The court held that unless the state could prove that the child was actually suffering or was likely to suffer physical or emotional harm, there was no reason to disturb the basic security of the family relationship.[94] Similarly, in a Massachusetts case,[95] the court clearly indicated that a parent's problems must be listed in detail and must be directly related to the child's safety and well-being.[96]

Thus, although it now appears clear that there is a fundamental right to family integrity which triggers the compelling state interest test, case law of individual states must be analyzed carefully in order to discern what types of harm justify state intervention.[97] It is worth noting that at least one case held that parents' rights to custody of their children is so axiomatic that it predates the state and the Constitution.[98] On the other hand, the extent of constitutional protection for parental interests in family integrity depends upon the facts and circumstances regarding the parent-child relationship. For example, foster parents have a less-weighty interest[99] and natural parents who show no continuing interest in their children may also receive less protection.[100]

C. *Child's Interests*

Generally, by the time the termination proceeding occurs, the child already has been removed from the parents' home pursuant to a

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91. *See In re* T.M.R., 41 Cal. App. 3d 694, 116 Cal. Rptr. 292 (1974).

92. *See, e.g., In re* Jonathan, 415 A.2d 1036, 1039 (R.I. 1980).

93. *Id.* at 1038.

94. *Id.* at 1039.

95. *Minor (No.2)*, 378 Mass. 712, 393 N.E.2d 379 (1979).

96. *Id.* at 712, 393 N.E.2d at 385.

97. For a list of state cases, see *supra* note 51 and accompanying text.

98. *See* State v. Robert H., 118 N.H. 713, 393 A.2d 1387 (1978). For an argument that the state "does not need to grant parents authority they already have and which is, under our political theory, prior to the state itself," see Hafen, *Puberty, Privacy, and Protection: The Risks of Children's Rights*, 63 A.B.A. J. 1383, 1388 (1977). *See also* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977) (the natural family has its "origins entirely apart from the power of the State, whereas the foster family has its source in state law and contractual arrangements.").

99. *See, e.g.*, Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977). For a further discussion of *Smith* and the nature of the procedural due process rights of foster parents, see *infra* notes 131–40 and accompanying text.

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

care and protection proceeding[101] and has been placed in a temporary foster home.[102] The purpose of the termination of parental rights proceeding is to free the child for adoption, thereby giving the child a permanent home. This proceeding is necessary because the parents have failed to rehabilitate themselves to the point where they can provide an adequate home. That the child's life will become more stable after termination, however, "is a hazardous assumption at best."[103] Even those children who eventually are adopted[104] may spend years in state institutions or foster homes.[105] Therefore, in *Santosky v. Kramer*, the United States Supreme Court described the child's interest as not necessarily adverse to the parents. The parents and the child both share an interest in avoiding erroneous termination.[106] However, "[f]or the child, the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo."[107]

Although an "uneasy status quo" is not ideal and usually involves the child living in a foster home with the natural parents retaining only visitation rights, children have a liberty interest in preserving their natural family. Psychiatrists have recognized that interference with the emotional ties of unfit parents and their child may be extremely painful for the child.[108] Thus, the family unit is also important to the child.

The effect of this state-imposed system of "protective" displacement of children from their parents is well summarized by Professor Michael S. Wald:

> It is now the prevailing ethic among child care experts that foster care has been overused as a means of protecting children. Although still widely used, foster care is considered generally to be a worse alternative than leaving a child in the home. This negative attitude toward foster care is based on several factors.
>
> In part it rests on the theoretical work of child psychiatrists like Anna Freud and John Bowlby asserting that separation from parents has

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101. *See* ARIZ. REV. STAT. ANN. § 8-533.5 (1974); CAL. CIV. CODE § 232(a)(1) (1982 & Supp. 1986); DEL. CODE ANN. tit. 13, § 1103(5) (1981 & Supp. 1984); HAWAII REV. STAT. § 571-61(b)(1)(E) (Supp. 1984); KY. REV. STAT. ANN. § 199.603(3)(d) (Baldwin 1985).

102. *See, e.g.*, CAL. CIV. CODE § 232(a)(1) (1982 & Supp. 1986); NEV. REV. STAT. § 128:108 (1986).

103. *Santosky*, 455 U.S. at 765 n.15. *See also Smith*, 431 U.S. at 837 ("[E]ven when it is clear that a foster child will not be returned to his natural parents, it is rare that he achieves a stable homelife through final termination of parental ties and adoption into a new permanent family.") (citations omitted).

104. *Santosky*, 455 U.S. at 765 n.15

105. *Id.*

106. *Id.* at 765.

107. *Id.* at 765–66.

108. *See* Comment, *Due Process and the Fundamental Right to Family Integrity: A Re-Evaluation of South Dakota's Parental Termination Statute*, 24 S.D.L. REV. 447 (1979).

an extremely negative impact on children, even children from "bad" homes. In addition, there is a substantial body of clinical findings identifying harms associated with foster care. It seems clear that most children are strongly attached to their parents and that "so far as the child's emotions are concerned, interferences with [parental] tie[s], whether to a 'fit' or 'unfit' psychological parent, [are] extremely painful." . . .

Moreover, children often view foster home placement as a punishment for something they did wrong . . . .

. . .The quality of foster parent homes also varies considerably . . . Moreover, children in foster care frequently are subjected to multiple placements, destroying the continuity and stability needed to help a child achieve stable emotional development. This may, in fact, be the most damaging aspect of foster care.

One other harm of foster care relates not to the endangered child but to other children in the family. The removal of one child may make the other children worry that they will be the next to go.[109]

The notion that there is *in fact* a reciprocal bond between parent and child that gives rise not only to the legal right of parents to raise their children, but the right of children to be raised by their parents is also strongly supported in contemporary professional literature. As one writer concluded, after surveying the child development literature:

> From the viewpoint of a child's psychological and emotional well-being and happiness, parental decisions enjoy major advantages over those of outside authority . . . . [T]he family is a relatively decentralized and personalized institution that usually generates feelings of mutual psychological attachment and trust among its members; the parents, both as participants in and leaders of the family, are thus likely to receive the emotional support of their children. Moreover, the child, particularly when young, acquires his core of values and goals from his parents. "In the final analysis, the home represents the ultimate and definitive repository of adult authority where he is concerned." Under these circumstances, parental decisions and the values underlying them are apt to reflect the child's judgments as well, thereby acquiring legitimacy in the child's eyes.[110]

Moreover, even children who are adopted at a young age suffer some psychological harm from not knowing their natural parents.[111]

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109. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Terminations of Parental Rights*, 28 STAN. L. REV. 623, 644–46 (1976) (footnotes omitted).

110. Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1385–86 (1974) (quoting J. HORROCKS, THE PSYCHOLOGY OF ADOLESCENCE 150 (3d ed. 1970)).

111. *See generally* _ SOROSKY, _ BARRAN & _ PANNOR, THE ADOPTION TRIANGLE 207–14 (1978); _ TRISELIOTIS, SEARCH OF ORIGINS (1973).

Consequently, children have both a liberty and a psychological interest to be raised by their natural parents, [112] as long as the harm caused by the parents does not outweigh these interests.[113]

III. CONSTITUTIONAL ISSUES: PROCEDURAL DUE PROCESS AND EQUAL PROTECTION

Once it is determined that parties have a substantive due process interest, the question always becomes: "What process is due?" There are three major contexts in which procedural due process issues have been litigated in relation to termination of parental rights. The first is the void for vagueness problem.[114] Because there are so many ways in which parents can harm their children, it is very difficult to draft a termination of parental rights statute. Some statutes use general terms like parental unfitness, while others attempt more specific lists of grounds.[115] In recent years, there has been a trend toward describing the grounds more specifically, most likely in order to withstand a fourteenth amendment due process vagueness attack.[116] A more complete discussion of the vagueness issue will appear in the next major section.

The second major procedural due process issue involves the rights of parents to be represented by counsel at termination of parental rights hearings. According to the United States Supreme Court, in *Lassiter v. Department of Social Services*,[117] there is no constitutional right to counsel, although thirty-three states and the District of Columbia do provide counsel for parents.[118] *Lassiter*, however, may be limited to its very narrow factual setting which involved "a mother under [a] lengthy sentence for murder who showed little interest in her son."[119]

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112. *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979).

113. *See* Alsager v. District Ct., 406 F. Supp. 10, 23 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976).

114. *See* Doe v. Delaware, 450 U.S. 382 (1981); Alsager v. District Ct., 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976); Davis v. Smith, 266 Ark. 112, 583 S.W.2d 37 (1979). For a more complete discussion of the void for vagueness doctrine, see *infra* notes 156–85 and accompanying text.

115. *See* FAMILY LAW, *supra* note 10, ch. ___ (chapter on termination of parental rights).

116. *Id.*

117. 452 U.S. 18 (1981).

118. *Id.* at 34 (Stewart, J.).

119. *Id.* (Burger, C.J., concurring). The majority opinion emphasized: "The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise." *Id.*

Besides the 33 state statutes, lower federal courts and state courts have almost always found a right to counsel in termination of parental rights cases. *See, e.g.*, Brown v. Grey, 476 F. Supp. 771 (D. Nev. 1979) (due process requires the state to appoint counsel whenever an indigent parent is defending against termination of parental rights); V.F. v. Alaska, 666 P.2d 42 (Alaska 1983) (where the rights of indigent parents were found even more compelling in a termination proceed-

The mother had expressly declined to appear at an earlier custody hearing and had not even bothered to consult with the attorney who was retained to represent her.[120]

A third procedural due process issue involves the question of the appropriate burden of proof to be applied at termination of parental rights proceedings. Clear and convincing evidence was established as the constitutionally mandated burden of proof by the United States Supreme Court in *Santosky v. Kramer*.[121] The Court reasoned that a termination of parental rights hearing not only infringes on a fundamental liberty interest, but also seeks to end it.[122] Therefore, the loss of parental rights would be grievous; moreover, the interest in reaching an accurate decision is high.[123] As such, the interest of the state in using a peponderance standard was greatly outweighed by the interests of the parents: "In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight."[124] The Court's holding was influenced by the imbalance in the ability of the state, compared to that of the parent, to marshall its case.[125] The Court also relied on the similarity between the fact-finding stage of a termination hearing and a criminal trial.[126] In addition, the Court noted that both

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ing); Flores v. Flores, 598 P.2d 893 (Alaska 1979) (the Alaska constitution gives indigent parents a right to appointed counsel); Shappy v. Knight, 251 Ark. 943, 475 S.W.2d 704 (1972); Danforth v. State Dep't of Health & Welfare, 303 A.2d 794 (Me. 1973); *In re* Friesz, 190 Neb. 347, 208 N.W.2d 259 (1973); *In re* C.M., 158 N.J. Super 585, 386 A.2d 913 (1978) (mother did not clearly, convincingly, and intelligently waive her right to have counsel present at the signing of a form authorizing termination of parental rights); Crist v. New Jersey Div. of Youth & Family Servs., 128 N.J. Super. 402, 320 A.2d 203 (1974), *modified*, 135 N.J. Super 537, 343 A.2d 815 (1975); *In re* Chad S., 580 P.2d 983 (Okla. 1978); State v. Jamison, 251 Or. 114, 444 P.2d 1005 (1968); *In re* R.I., 445 Pa. 29, 312 A.2d 601 (1923); *In re* Hernandez, 25 Wash. App. 447, 607 P.2d 879 (1980) (at a voluntary relinquishment hearing, no procedural due process rights are infringed by the failure to provide an attorney for the mother).

120. *Lassiter*, 452 U.S. at 21.

121. 455 U.S. 745 (1982).

122. *Id.* at 759.

123. *Id.* at 761–64.

124. *Id.* at 758.

125. *Id.* at 763. The Court stated:

> In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. . . .
>
> The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense.

Id. at 762–63.

126. *Id.* at 764.

> Unlike criminal defendants, natural parents have no "double jeopardy" defense against repeated state termination efforts. If the State initially fails to win termination, as New York did here, it always can try once again to cut off the parent's rights after gather-

the child's and the parents' interests would be harmed by an erroneous decision.[127] Finally, the Court held that the clear and convincing evidence standard was in harmony with both the state's *parens patriae* interest in "promoting the welfare of children" and in reducing administration costs.[128] Four justices dissented, warning against federal intervention in state family law.[129] Over thirty states had adopted the clear and convincing evidence standard prior to *Santosky*[130] and the remainder are likely to change their laws in its wake, making the clear and convincing evidence standard the norm.

Procedural due process issues have also arisen in the closely associated area of what procedural rights *foster* parents should have prior to removal of a foster child from their home. In *Smith v. Organization of Foster Families for Equality and Reform*,[131] it was determined that while foster parents may have a constitutionally protected liberty interest in the integrity of the foster family unit stemming from the psychological relationship with the child, the pre-removal procedures employed by the State of New York and the City of New York were constitutionally sufficient. The plaintiffs, a group of foster parents, argued that they had a liberty interest as foster parents and that the relevant provisions and regulations governing removal of the child from the foster home provided insufficient protection of their fourteenth amendment due process guarantees.[132] The state regulations at issue provided that following a removal order, the foster parents were entitled to an administrative hearing; the removal order, however, was not stayed pending the hearing[133] In addition, the City of New York allowed foster parents to receive a full trial-type hearing prior to removal

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ing more or better evidence. Yet even when the parents have attained the level of fitness required by the State, they have no similar means by which they can forestall future termination efforts.

Id. (citation omitted).

127. The Court emphasized:

[T]he parents and the child share an interest in avoiding erroneous termination. . . . For the child, the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo. For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family. A standard that allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity.

Id. at 765–66.

128. *Id.* at 766. The Court also noted that even a hearing to suspend a driver's license, which is much less important than losing one's child, commands a clear and convincing burden of proof. *Id.* at 767–68.

129. *Id.* at 770–91 (Rehnquist, J., Burger C. J., White, J., O'Connor, J., dissenting).

130. *Id.* at 767. For a list of the state statutes and court decisions, see *id.* at 749 n.3.

131. 431 U.S. 816 (1977).

132. *Id.* at 820.

133. *Id.* at 829–30. *See* N.Y. Soc. Serv. § 400 (McKinney Supp. 1976–1977).

if the child was being transferred to another foster home; this procedure was inapplicable when the child was to be returned to the natural parents.[134] The plaintiffs argued that these procedures insufficiently protected their interests as foster parents. While the Court found that the foster family is much more than "a mere collection of unrelated individuals"[135] because of the emotional attachments that derive from the intimacy of daily association,[136] the Court also stated that there are important distinctions between a foster family and a natural family. The natural family has its own roots and authority, but the foster family is derivative of the power of the state because it is created by a contract between the state and the family.[137] The Court also reasoned that any procedural protection afforded the foster parents infringes on the substantive liberty of the natural parents.[138] In upholding the state's procedure for transferring a foster child, the Court refused to find any deprivation of a due process liberty interest where foster parents were provided with a pre-removal conference and post-removal hearing whenever a child had been placed with foster parents for eighteen months or longer.[139] In short, the Court held that nonnatural parents, as third-party custodians, acquire rights only derivatively by virtue of the child's best interests being considered.[140]

In addition to procedural due process arguments involving vagueness, right to counsel, burden of proof, and the right of foster parents to pre-removal notice, other issues often arise. A New York case held that it was a denial of due process not to allow the natural mother to testify on her own behalf at a termination proceeding.[141] A Utah case held that the informality of the termination of parental rights proceeding does not permit the abridgement of basic constitutional provisions of due process, especially the opportunity to cross-examine witnesses and to rebut evidence.[142] Other procedural due process theories that have been raised, albeit unsuccessfully, include denial of notice of appeal,[143] denial of attendance at the termination hearing,[144] and denial of a sep-

134. *Smith*, 431 U.S. at 831. *See* New York City Human Resources Administration, Department of Social Services—Special Services for Children, SSC Procedure No. 5 (Aug. 5, 1974).

135. *Smith*, 431 U.S. at 844–45.

136. *Id.* at 844.

137. *Id.* at 845–46.

138. *Id.*

139. *Id.* at 847–56.

140. *Id.* at 838–47.

141. *In re* Roy Anthony A., 59 A.D.2d 662, 398 N.Y.S.2d 277 (1977).

142. State *ex rel.* S____ J____, 576 P.2d 1280 (Utah 1978).

143. *See In re* Shutts, 29 Or. App. 121, 563 P.2d 1221, *aff'd*, 30 Or. App. 909, 569 P.2d 26 (1977) (no due process requirement of service of notice of appeal).

144. *See In re* F.H., 283 N.W.2d 202 (N.D. 1979) (an unmarried, incarcerated father did not have the right to be personally present at the termination of parental rights hearing because

arate dispositional hearing.[145] The most common of these alternative due process theories, however, is that the statute creates an irrebutable presumption. For example, in a 1976 California case, the appellate court found that a statutory provision that allowed a presumption to arise out of the failure of the mother to communicate with the child for a period of six months did not violate due process.[146] The court reasoned that intent to abandon the child may be presumed because of the lack of communication.[147] In fact, it would be easy to rebut the presumption merely by maintaining communication. Therefore, the inference is both rebuttable and logically related to the intent to abandon the child. Several other courts have ruled on similar cases involving presumptions.[148]

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he was represented by counsel).

145. *See In re* Sylvia M., 82 A.D.2d 217, 443 N.Y.S.2d 214 (no constitutional violation for failure to provide a separate dispositional hearing where the ground for termination of parental rights was mental illness), *modified*, 83 A.D.2d 925, 443 N.Y.S.2d 214 (1981), *aff'd*, 57 N.Y.2d 636, 439 N.E.2d 870, 454 N.Y.S.2d 61 (1982).

146. *In re* Rose Lynn G., 57 Cal. App. 3d 406, 129 Cal Rptr. 338 (1976).

147. *Id.* at 419, 129 Cal. Rptr. at 346.

148. *See, e.g., In re* Michele C., 64 Cal. App. 3d 818, 135 Cal. Rptr. 17 (1976) (provision allowing termination of parental rights of natural parent convicted of a felony is constitutional "if the felony of which such parent or parents were convicted is of such nature as to prove the unfitness of such parent or parents to have the future custody and control of the child"); People v. Ray, 88 Ill. App. 3d 1010, 411 N.E.2d 88 (1980) (where parent had been convicted of causing the death by abuse of one child, the irrebuttable presumption of unfitness served a compelling state interest), *appeal dismissed*, 452 U.S. 956 (1981). Keeney v. Prince George's County Dep't of Social Servs., 43 Md. App. 688, 406 A.2d 955 (1979) (statute did not create an irrebuttable presumption violative of incarcerated father's rights because it provided for rebuttal of the presumption given delineated circumstances); *In re* LaFlure, 48 Mich. App. 377, 210 N.W.2d 482 (1973) (statutory provision found unconstitutional because inadequate nexus between the proven fact that the child was temporarily outside the custody of the parent and the presumed fact that the situation warranted permanent termination of parental rights); *In re* Anonymous, 104 Misc. 2d 985, 429 N.Y.S.2d 987 (Sur. Ct. 1980) (termination of parental rights based solely on imprisonment for a felony conviction does not infringe due process rights). *But see In re* Miller, 105 Misc. 2d 41, 430 N.Y.S.2d 1007 (Fam. Ct. 1980) (lumping paroled prisoners with incarcerated prisoners so as to preclude parolees from participating in decisions concerning their children's custody violates due process rights).

But cf. In re Millar, 35 N.Y.2d 767, 320 N.E.2d 865, 362 N.Y.S.2d 149 (1974) (mem.) (the termination order was affirmed but the court of appeals noted that it would be preferable to have more evidence of the connection between the parent's mental illness and the ability to take care of the child).

For an interesting article on the use of presumptions for determining the fitness of mentally retarded parents, see *generally* Note, *The Constitutionality of New York's Parental Termination Statute as Applied to the Mentally Retarded Parent: Equal Protection and Due Process Objections*, 46 ALB. L. REV. 271 (1981). This student commentator stated:

> In addition, welfare agencies and courts may not irrebuttably presume that members of a particular class of parents are inadequate and neglectful unless the characterization is founded on fact and is true of all parents in that class. An irrebuttable presumption that all mentally retarded parents neglect their children is based upon mistaken and archaic notions about mentally retarded people. This label "mentally retarded" denotes a group of

The equal protection clause, which prohibits statutes from treating similarly situated people or activities discriminatorily,[149] has also been used to attack termination of parental rights statutes. These cases have involved a variety of theories including discrimination against unwed fathers on the basis of gender,[150] and against natural parents on the basis of imprisonment,[151] on the basis of mental illness or mental retardation,[152] on the basis of poverty,[153] and on the basis that the child was

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people who have the common characteristic of lower levels of intellectual functioning than the average person. Contrary to popular belief, mentally retarded people are not similar in all areas of functioning. A significant number of social scientists, psychologists and other professionals agree that some mentally retarded parents can provide adequate care for their children. Empirical studies show that mental retardation does not preclude a person from performing necessary parenting skills. The equal protection clause has been interpreted to invalidate legislative notions of role-typing. It is both professionally and legally impermissible to classify all mentally retarded persons alike. Therefore, a presumption that all mentally retarded parents neglect their children is unfounded, and a statute based on this premise is unacceptable.

Id. at 286–87 (footnotes omitted). *See also* Prygoski, *When a Hearing Is Not a Hearing: Irrebuttable Presumptions and Termination of Parental Rights Based on Status*, 44 U. PITT. L. REV. 879 (1983).

149. U.S. CONST. amend. XIV, § 2.

150. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979) (termination statute found to be an unconstitutional denial of the unwed father's equal protection rights); Miller v. Miller, 504 F.2d 1067 (9th Cir. 1974) (termination statute held to be an unconstitutional denial of the unwed father's equal protection rights); J. v. Superior Court, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979) (unmarried, natural father, no alleged discrimination); *In re* Coffee, 59 Cal. App. 3d 593, 130 Cal. Rptr. 887 (1976) (natural father wins because there was no showing that his failure to support was willful, thus no decision on equal protection issue); *In re* Ahmed, 44 Cal. App. 3d 810, 118 Cal. Rptr. 853 (1975) (no denial of equal protection because grounds for terminating fathers' rights are different from those for terminating mothers' rights); *In re* Patti Ann N., 104 Misc. 2d 263, 428 N.Y.S.2d 178 (Fam. Ct. 1980) (court found there was a deprivation of the natural father's rights and declared the statute unconstitutional); *In re* Walker, 468 Pa. 165, 360 A.2d 603 (1976) (court declared that the statute was an unconstitutional denial of natural father's rights on discrimination theory).

151. *See, e.g.*, Chandler v. Cochran, 247 Ga. 184, 275 S.E.2d 23 (father in prison, the statute is upheld), *cert. denied*, 454 U.S. 872 (1981); *In re* Baby Boy L., 231 Kan. 199, 643 P.2d 168 (1982) (statute upheld; unmarried incarcerated father who had never supported the child); *In re* Miller, 105 Misc. 2d 41, 430 N.Y.S.2d 1007 (Fam. Ct. 1980) (declared statute unconstitutional as applied to parolees but not as applied to parents still in prison); *In re* Guardianship ———, 107 Misc. 2d 900, 436 N.Y.S.2d 546 (Fam. Ct. 1980) (upheld statute; imprisoned parent).

152. *See, e.g.*, *In re* Appeal in Maricopa County Juvenile Action, 27 Ariz. App. 420, 555 P.2d 679 (1976) (mentally ill parent; no denial of equal protection); *In re* W., 29 Cal. App. 3d 623, 105 Cal. Rptr. 736 (1972) (upheld statute; poverty and mental illness); *In re* J.C., 242 Ga. 737, 251 S.E.2d 299 (statute authorizing termination of parental rights of parent whose only shortcoming is lack of mental ability to give necessary care to the child does not violate the right of equal protection), *appeal dismissed sub. nom.* Crane v. Carroll County of Family & Children Servs., 441 U.S. 929 (1978); Helvey v. Rednour, 86 Ill. App. 3d 154, 408 N.E.2d 17 (1980) (statute that provided for termination of parental rights of mentally ill parent who is not likely to recover in the foreseeable future held unconstitutional violation of mother's equal protection rights); *In re* Atkins, 112 Mich. App. 528, 316 N.W.2d 477 (1982) (upheld statute; mental illness); *In re* Sylvia M., 82 A.D.2d 217, 443 N.Y.S.2d 214 (upheld statute; mental illness), *modi-*

already in foster care.[154]

In conclusion, constitutional defenses to termination of parental rights cases appear to be much more common than statutory defenses. Both substantive and procedural due process theories are frequently raised. As illustrated by the above discussion, a plethora of procedural due process theories have developed. Because the right of parents to the care and custody of their children is so fundamental to our legal system, it is likely that new variations of these constitutional theories will be heard for many years.[155] However, while these theories are of fairly recent vintage, one constitutional argument that is now firmly entrenched is that a statute is void for vagueness.

IV. VOID FOR VAGUENESS

Because termination of parental rights statutes are often phrased generally,[156] they are especially prone to void for vagueness attacks. The constitutionally objectionable aspect of a vague statute is that it fails to provide sufficient notice to a potential offender regarding the types of behavior that will result in legal sanctions.

There are two established tests for vagueness. The first test is

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fied, 83 A.D.2d 925, 443 N.Y.S.2d 214 (1981), *aff'd*, 57 N.Y.2d 636, 439 N.E.2d 870, 454 N.Y.S.2d 61 (1982); *In re* Ursula P., 108 Misc. 2d 181, 437 N.Y.S.2d 225 (Fam. Ct. 1981) (upheld statute; mental illness); *In re* N. Children, 107 Misc. 2d 763, 435 N.Y.S.2d 1018 (Fam. Ct. 1981) (upheld statute; mentally ill or mentally retarded); *In re* Daniel A.D., 106 Misc. 2d 370, 431 N.Y.S.2d 936 (Fam. Ct. 1980) (upheld statute; mentally ill or mentally retarded); *In re* Gross, 102 Misc. 2d 1073, 425 N.Y.S.2d 220 (Fam. Ct. 1980) (court applied strict scrutiny to declare statute unconstitutional; mentally ill or mentally retarded); State Dep't of Human Servs. v. Ogle, 617 S.W.2d 652 (Tenn. App. 1980) (upheld statute; mental illness). *See also* Note, *supra* note 148. The author commented on the applicability of New York's termination statute to retarded parents:

> In conclusion, by failing to require support services before terminating parental rights due to mental retardation, section 384-b is not drawn as the least burdensome alternative. In effect, the statute punishes parents for their mental status by allowing parental rights to be terminated without a showing of fault. Therefore, section 384-b violates equal protection under a strict scrutiny test.

Id. at 287 (footnotes omitted). *See also* N.Y. SOC. SERV. LAW § 384-6 (McKinney 1983 & Supp. 1986); Note, *Terminating Parental Rights: Mental Illness Disquised as Permanent Neglect, In re Hime Y.*, 2 PACE L. REV. 125 (1983).

153. *See In re* Eugene W., 29 Cal. App. 3d 623, 105 Cal. Rptr. 736 (1972) (upheld statute; poverty and mental illness); State v. Anonymous, 179 Conn. 155, 425 A.2d 939 (1979) (upheld statute; poverty); *In re* Bibbers, 50 N.C. App. 332, 274 S.E.2d 236 (1981) (upheld statute; poverty).

154. *See In re* Carl N., 91 Misc. 2d 738, 398 N.Y.S.2d 613 (Fam. Ct. 1977) (upheld statute which contained different criteria for terminating the parental rights of parents whose children were already in foster care than for those who had retained custody of their children).

155. One case even raised a right to privacy theory. *See id.* (parents' right of privacy outweighed by state's interest in the well-being of the child).

156. *See supra* notes 186–231 and accompanying text for a discussion of the grounds for termination of parental rights.

known as the common intelligence, common knowledge, or ordinary intelligence test.[157] While the common intelligence test appears to be appropriate when non-fundamental rights are implicated, the second test appears to be more appropriate when constitutional rights, like the fundamental right to family integrity, are at issue.

The second test was established by the United States Supreme Court in *Grayned v. City of Rockford*,[158] a first amendment case which attempted to identify the important values offended by vague laws. The first prong of the test is synonymous with that of the ordinary intelligence test—notice: "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[159]

While the first important value identified by *Grayned* is to avoid trapping the innocent by giving notice, the second is to prevent arbitrary and discriminatory enforcement. Lack of explicit standards impermissibly delegates basic policy matters to state enforcement officials for resolution on a case by case, subjective basis.[160]

The third important branch of the *Grayned* test is concerned with an "inhibit[ion]. . .of [protected] freedoms."[161] Just as an ordinance may permit persons to be punished for merely expressing unpopular views, a termination of parental rights statute may permit parents to be punished for merely having an unconventional lifestyle. Thus, it is possible that a vague statute will produce a "chilling effect" on constitutionally protected lifestyles.

The *Doe v. Delaware*[162] case provided a good setting for an application of the *Grayned* test to a termination statute because it involved the only termination of parental rights statute that reached the United States Supreme Court on the vagueness issue. At issue was a Delaware statutory provision that permitted termination of parental rights upon a finding that the parents were "not fitted"[163] and that a termination would be in the child's "best interests."[164] Neither the term "not fitted" nor the term "best interests" were defined anywhere in the Delaware

157. The landmark case applying this test to a civil statute is Small v. American Sugar Refining Co., 267 U.S. 233, 241–42 (1925) (federal statute prohibiting the sale of sugar at unjust, unreasonable, and excessive prices, was "unintelligible" because the market value of sugar is subject to fluctuation).

158. 408 U.S. 104 (1972).

159. *Id.* at 108.

160. *Id.* at 108–09.

161. *Id.* at 109.

162. 450 U.S. 382 (1981).

163. *See* DEL. CODE ANN. tit. 13, § 1103(4) (1975) (amended 1980).

164. *See id.* § 1108(a) (1975) (amended 1983).

Code, nor was the statutory vagueness cured by judicial construction. Nevertheless, the United States Supreme Court, by dismissing the case on jurisdictional grounds,[165] failed to address the vagueness issue.

In acknowledgment of the difficulty of foreseeing all the conceivable ways in which parents may be "unfitted for parental duties," most states avoid this definitional problem as well as the constitutional notice problem by providing for a "child neglect" or "child dependency" proceeding at which the shortcomings of the parent are specifically identified.[166] In cases where such provisions have been held to be constitutional as applied, the parent was invariably given definite information as to particular complaints against him or her and what was required to avoid termination of parental rights.[167] For example, in a 1977 Iowa Supreme Court case,[168] welfare workers had been counseling the mother for over five years. The juvenile court approved an ultimatum nine months prior to the termination proceedings and specifically set out the conditions that the mother had to meet in order to avoid termination of her parental rights. These conditions included maintaining sobriety, retaining employment, and other conditions which were necessary to properly performing her parental responsibilities.[169] As the mother had adequate notice of her responsibilities under the statute, the supreme court ruled against her constitutional argument.

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165. *Doe*, 450 U.S. at 382.

166. *See, e.g.*, OHIO REV. CODE ANN. § 2151.414(a)(2) (Page Supp. 1985). For a fuller discussion of dependency and neglect proceedings, see *generally* FAMILY LAW, *supra* note 10.

167. *See* Miller v. Alabama Dep't of Pensions and Sec., 374 So. 2d 1370 (Ala. Civ. App. 1979) (statutory words "unfit," improper," "neglect," allegedly vague; statute upheld because juvenile court judge and Department of Pensions and Security told mother specifically what she had to do); *In re* V.A.E.Y.H., 199 Colo. 148, 605 P.2d 916 (1980) (statutory language that home was "injurious" to "welfare" of child was allegedly vague; statute upheld because mother had received a specific list of conduct deemed "injurious" over one year prior to the termination proceeding); *In re* Souza, 204 Neb. 503, 283 N.W.2d 48 (1979) (upheld statute); *In re* J.F.C., 577 P.2d 1300 (Okla. 1978) (upheld statute providing for an order stating specific deficiencies six months prior to final termination); *In re* Keyes, 574 P.2d 1026 (Okla. 1977) (statutory language "care and protection necessary for the child's physical and mental health" upheld against vagueness attack because terms have common meaning and parents had specific knowledge of alleged deficiencies for over a six-month period), *appeal dismissed*, 439 U.S. 804 (1978); State v. McMaster, 259 Or. 291, 486 P.2d 567 (1971) (statute constitutional because mother continued behavior that she was specifically warned would result in the termination of her parental rights); *In re* William L., 477 Pa. 322, 383 A.2d 1228, *cert. denied*, 439 U.S. 880 (1978) (statute constitutional because state has burden of showing that parent had notice but failed to change conditions anyway); Sanchez v. Texas Dep't of Human Resources, 581 S.W.2d 260 (Tex. Civ. App. 1977) (upheld statute); McGowen v. State, 558 S.W.2d 561 (Tex. Civ. App. 1977) (upheld statute); *In re* Aschauer, 93 Wash. 2d 689, 611 P.2d 1245 (1980) (statutory language "proper parental control" or "proper maintenance, training and education," not unconstitutionally vague because mother had been given specific information about what conduct was prohibited).

168. *In re* Hochmuth, 251 N.W.2d 484 (Iowa 1977).

169. *Id.* at 489.

On the other hand, statutes have been found to be unconstitutionally vague as applied where court orders have not clarified the parents' deficiencies more specifically than the statute. For example, one court[170] found that the mother's failure to attend counseling sessions at the department of social services could not be a basis for termination of parental rights because the court's order in adjudication of neglect contained no directions for the parent to follow so that she might correct the problems leading to termination.[171] Similarly, in another case,[172] a court overturned a termination of parental rights order because the prior adjudication did not give the mother notice of the conditions giving rise to the order. The court noted that "mere confinement in a mental hospital, while necessitating custody of a child being placed elsewhere, does not constitute failure to give a child the necessary parental care or protection required for his mental or physical health."[173] Finally, a federal district court, in declaring a state's statute unconstitutional, reasoned that the parents "were not given a factual basis from which to predict how they should modify past conduct, their 'parenting', to avoid termination."[174]

Courts may also find that the words "unfit" and "best interest," without further elaboration or definition either in the statute, court order, or plan made by the parents and social services agency, fail to provide sufficient notice. For example, one state supreme court complained:

> What is a proper home? A correct home? A suitable home? A fit home? An appropriate home? A home consistent with propriety? Is propriety to be determined ethically, socially, or economically? Or on the basis of morality? Or prosperity? Is the standard a maximum, a minimum, a mean or an average?[175]

At least one federal judge has been similarly dismayed:

> When is a home an "unfit" or "improper" place for a child? Obviously, this is a question about which men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views. Because

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170. *In re* Crooks, 262 N.W.2d 786 (Iowa 1978).

171. *Id.* at 788–89.

172. *In re* Baby Girl Williams, 602 P.2d 1036 (Okla. 1979).

173. *Id.* at 1040.

174. Alsager v. District Court of Polk County, 406 F. Supp. 10, 20 (S.D. Iowa 1975), *aff'd per curiam*, 545 F.2d 1137 (8th Cir. 1976).

175. Davis v. Smith, 266 Ark. 112, 122, 583 S.W.2d 37, 43 (1979). *Accord* Linn v. Linn, 205 Neb. 218, 286 N.W.2d 765 (1980) (Nebraska termination of parental rights statute declared unconstitutionally vague under the ordinary intelligence test because it failed to define "best interests and welfare of children").

these terms are too subjective to devote a sufficient warning to those individuals who might be affected by their proscription, the statute is unconstitutionally vague.[176]

The quotations above not only illustrate the first danger of vagueness, insufficient notice, but also the second danger—broad delegation of highly discretionary decision making to enforcement officials.[177] The high probability of arbitrary enforcement is also illustrated by a study that analyzed the factors influencing the decision whether to provide a child with certain services within the child's own home or remove the child to foster care.[178] In this study, three child welfare professionals, each of whom had a minimum of five years experience, were given the same files for ninety-four children. Each was asked to decide whether the child should be removed from parental custody. The three child welfare professionals agreed in less than one-half of the cases.[179] More importantly, when each was asked to indicate the factors that influenced his or her decision, they did not even identify the same factors as being significant.[180]

Consequently, what is in the child's "best interests" usually depends on who is making the decision. As one author noted:

> Indeterminate standards also pose an obviously greater risk of violating the fundamental precept that like cases should be decided alike. Because people differ and not two custody cases are exactly alike, the claim can be made that no process is more fair than one requiring resolution by a highly individualized, person-oriented standard. But with an indeterminate standard, the same case presented to different judges may easily result in different decisions. The use of an indeterminate standard means that state officials may decide on the basis of inarticulated (perhaps unconscious) predictions and preferences that could be questioned if expressed. Because of the scope of discretion under such a standard, there is a substantial risk that decisions will be made on the basis of values not widely shared in our society, even among judges.[181]

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176. Roe v. Conn, 417 F. Supp. 769, 780 (M.D. Ala. 1976).

177. The cases enumerated in Grayned v. City of Rockford, 408 U.S. 104, 109 n.5 (1972), in support of this danger of arbitrary enforcement are not confined to first amendment cases. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 718 (1978). Professor Tribe wrote: "[A] vague law need not reach activity protected by the first amendment. . . . [T]his indefiniteness runs afoul of due process concepts which require . . . that the discretion of law enforcement officials, with the attendant dangers of arbitrary enforcement, be limited by explicit legislative standards." *Id.*

178. *See* _. PHILLIPS, _. SHYNE, _. SHERMAN & _. HARING, FACTORS ASSOCIATED WITH PLACEMENT DECISIONS IN CHILD WELFARE 69–84 (1971) [hereinafter cited as _. PHILLIPS].

179. *Id.*

180. *See* R. MNOOKIN, CHILD, FAMILY AND STATE 490 (1978) (discussing _. PHILLIPS, *supra* note 178).

181. *Id.*

Thus, alleging discriminatory enforcement may be a good defense for a parent at a termination of parental rights proceeding or at its appeal. Moreover, at least one federal court applied "chilling effect" analysis in a termination of parental rights case involving an allegedly vague statute.[182] The federal court for the southern district of Iowa feared that the fundamental right to family integrity might be chilled by causing people to change their lifestyle in order to conform with the values of the state enforcement officials.[183] This too may be a valuable defense for an attorney defending a parent in a termination of parental rights proceeding. On the other hand, more specifically worded statutes, such as California's,[184] appear to be less susceptible to a void for vagueness attack. There is the danger, however, that a statute that is worded too specifically may "hamstring" the mechanisms created to protect children because the particular abusive or harmful conduct of certain parents is not specified in the statute. Because of the wide variety of statutory language as well as the broad judicial discretion accorded the application of the statutes to individual facts, it is necessary to research carefully the cases in a particular jurisdiction.[185]

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182. *Alsager*, 406 F. Supp. 10, 18 (S.D. Iowa 1975), *aff'd per curiam*, 545 F.2d 1137 (8th Cir. 1976).

183. *Id.* at 18–19.

184. *See* CAL. CIVIL CODE § 232 (West Supp. 1986). Section 232 provides for termination of parental rights if (1) there is a failure to communicate with or support the child with the intent on the part of the parent to abandon the child; (2) there has been a dependency proceeding in which the child was found to have been cruelly treated or neglected and the child has been in foster care for at least one year prior to the termination proceeding; (3) if the parent suffers a disability defined as physical or mental incapacity which renders the parent unable to adequately care for the child because of habitual use of alcohol or any controlled substance; (4) the parent is convicted of a felony and the crime of which such parent was convicted is of such a nature as to prove the unfitness of such a parent to have the future custody of the child; or (5) the parent has been certified to be mentally deficient or mentally ill by either the State Director of Health (or his equivalent) or by the testimony of two physicians and the mental defect is found to render the parent incapable of supporting or controlling the child. *Id.* § 232(a).

185. *See* Syrovatka v. Erlich, 608 F.2d 307 (8th Cir. 1979) (upholding rejection of untimely challenge to adoption proceeding dispute evidence of inadequate notice), *cert. denied*, 446 U.S. 935 (1980); *Roe*, 417 F. Supp. 769 (M.D. Ala. 1976) ("no proper parental care" held unconstitutionally vague); *Alsager*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976); Lovell v. Department of Pensions and Sec., 356 So. 2d 188 (Ala. Civ. App. 1978) (21 days' notice is adequate); Davis v. Smith, 266 Ark. 112, 583 S.W.2d 37 (1979) ("a proper home" declared unconstitutionally vague); Marten v. Thies, 99 Cal. App. 3d 161, 160 Cal. Rptr. 57 (1979), *application denied*, 446 U.S. 1320 (because of "imminent danger" to child if notice was given, removal of a child from the home of pre-adoptive parents without prior written notice did not violate procedural due process), *cert. denied*, 449 U.S. 831 (1980); *In re* Sherman M., 39 Cal. App. 3d 40, 113 Cal. Rptr. 847 (1974) ("habitually intemperate" not unconstitutionally vague); *In re* Melkonian, 152 Cal. App. 2d 250, 313 P.2d 52 (1957) (felony of such a nature as to prove unfitness, not unconstitutionally vague); *In re* C.S., 200 Colo. 1304, 613 P.2d 1304 (1980) ("best interests and welfare of the child" not unconstitutionally vague); *In re* D.A.K., 198 Colo. 11, 596 P.2d 747 (not unconstitutionally vague to provide termination of parental rights of a parent who has subjected the child to "mistreatment and abuse"), *appeal dismissed*, 444 U.S. 987 (1979); *In*

V. STATUTORY GROUNDS AND PROCEDURES

Probably in anticipation of or in reaction to fourteenth amendment

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re Five Minor Children, 407 A.2d 198 (Del. 1979) (language "not fitted" not unconstitutionally vague), *juris. noted,* 445 U.S. 942 (1980), *appeal dismissed,* 450 U.S. 382 (1981); *In re* J.S.R., 374 A.2d 860 (D.C. App. 1977) ("best interests of the child" not unconstitutionally vague); *In re* Camm, 294 So. 2d 318 (Fla.) (not unconstitutionally vague because of statute's failure to give a specific list of grounds for termination), *cert. denied,* 419 U.S. 866 (1974); Chandler v. Cochran, 247 Ga. 184, 275 S.E.2d 23 (upheld language allowing termination of parental rights if parent failed to provide financial support after divorce), *cert. denied,* 454 U.S. 872 (1981); Helvey v. Rednour, 86 Ill. App. 3d 154, 408 N.E.2d 17 (1980) (statute permits consent by guardian ad litem if parent suffers from mental retardation and is not likely to recover in the foreseeable future); *In re* Ladewig, 34 Ill. App. 3d 393, 340 N.E.2d 150 (1975) (upheld "unfitness" standard as not being unconstitutionally vague); Abell v. Clark County Dep't of Pub. Welfare, ___ Ind. App. ___, 407 N.E.2d 1209 (1980) (service of process by publication is constitutionally insufficient notice where social service agency knows the parent's address); *In re* Kelly, 262 N.W.2d 781 (Iowa 1978) (unconstitutional for lack of notice to terminate parental rights on the ground of abandonment when that ground did not appear in the pleadings); *In re* Brooks, 228 Kan. 541, 618 P.2d 814 (1980) ("unfit" not unconstitutionally vague; statute valid as construed); *Linn,* 205 Neb. 218, 286 N.W.2d 765 (1980) (subsection allowing guardian ad litem to determine that best interests of child required termination of parental rights declared unconstitutionally vague); *In re* Metteer, 203 Neb. 515, 279 N.W.2d 374 (1979) (inability to perform parental responsibilities and provide proper parental control not unconstitutionally vague); *In re* D.L.H., 198 Neb. 444, 253 N.W.2d 283 (1977) (upheld statute allowing termination of parental rights on grounds of habitual use of intoxicating liquor or drugs resulting in detriment to the child's health, morals, or well-being); State *ex. rel.* Health & Social Services Dep't v. Natural Father, 93 N.M. 222, 598 P.2d 1182 (1979) (lack of statutory definition of "care and control" not unconstitutionally vague); *In re* Sylvia M., 82 A.D.2d 217, 443 N.Y.S.2d 214, *modified,* 83 A.D.2d 925, 443 N.Y.S.2d 214, *aff'd,* 57 N.Y.2d 636, 439 N.E.2d 870, 454 N.Y.S.2d 61 (1982) (not unconstitutionally vague when statute allows termination because mental illness of parents puts children in danger of becoming neglected or without proper care); *In re* Anthony L. "CC", 48 A.D.2d 415, 370 N.Y.S.2d 219 (1975) (permanent neglect provision upheld where no parental plan and child in custody of Department of Social Services for the statutory one-year period); *In re* Carl N., 91 Misc. 2d 738, 398 N.Y.S.2d 613 (1977) (failure to plan for child's future does not mean to conceptualize a plan, but to effectuate it, so statute's requirement of a plan, as construed, was not unconstitutionally vague); *In re* J.Z., 190 N.W.2d 27 (N.D. 1971) (phrase "without proper parental care or control" not unconstitutionally vague); *In re* T.M.H., 613 P.2d 468 (Okla. 1980) (it is unconstitutional to fail to give parents adequate notice of conditions that must be corrected); State *ex rel.* Juvenile Dep't of Multnomah County v. Wade, 19 Or. App. 314, 527 P.2d 753 (1974), *appeal dismissed,* 423 U.S. 806 (1975) (upheld statute allowing termination because of unfitness due to mental illness); *In re* William L., 477 Pa. 322, 383 A.2d 1228 (not unconstitutionally vague to allow termination of parental rights when parent "has caused the child to be without essential parental care, control, or sustenance necessary for his physical or mental well being" and if the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent), *cert. denied sub nom.* Lehrman v. Lycoming County Children's Servs., 439 U.S. 880 (1978) and Beatty v. Lycoming County Children's Servs., 439 U.S. 880 (1978); *In re* B.E., 287 N.W.2d 91 (S.D. 1979) ("neglected" and "dependent" are not unconstitutionally vague); *In re* V.D.D., 278 N.W.2d 194 (S.D. 1979) (upheld phrase "proper care" as not unconstitutionally vague); *In re* D.T., 89 S.D. 590, 237 N.W.2d 166 (1975) (upheld constitutionality of statute despite vagueness attack); State Dep't of Human Servs. v. Ogle, 617 S.W.2d 652 (Tenn. Ct. App. 1980) (statute allowing guardian to consent to adoption not unconstitutionally vague); Gonzalez v. Texas Dep't of Human Resources, 581 S.W.2d 522 (Tex. Civ. App. 1979), *cert. denied,* 445 U.S. 904 (1980) (upheld language that permits termination if parent allows the child to be subjected to known danger); D.E. v. State, 525 S.W.2d 933 (Tex. 1975) ("endanger[ing] the physical or emo-

due process problems, almost half of the states amended their termination of parental rights statutes between 1974 and 1980.[186] Currently, abandonment is the most common ground for termination.[187] It may not be necessary to demonstrate intent to abandon.[188] Six months is generally sufficient to establish abandonment.[189] In a few states, the

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tional well-being of the child" is not unconstitutionally vague standard); *In re* Neglected Child, 130 Vt. 525, 296 A.2d 250 (1972) ("without proper parental care" not unconstitutionally vague); *In re* Hernandez, 25 Wash. App. 447, 607 P.2d 879 (1980); *In re* R.J.M., 266 S.E.2d 114 (W.Va. 1980) (no need to use less restrictive alternative); *In re* A.M.K., 105 Wis. 2d 91, 312 N.W.2d 840 (Wis. Ct. App. 1981) (upheld statute allowing termination if child is without proper parental care).

186. *See* Coleman, *Standards for Termination of Parental Rights*, 26 WAYNE L. REV. 315, 328 (1980). Over half of the statutes were amended between 1970 and 1975. *See* Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L. Q. 67 (1975). According to Katz, Howe, and McGrath, the most frequently appearing grounds in 1975 for terminating parental rights were abandonment (37 statutes), neglect (35 statutes), parental consent (24 statutes), and parental moral unfitness (20 statutes). *Id.*

187. The following statutes list "abandonment" of a child as a ground for termination of parental rights: ALASKA STAT. § 47.10.010(a)(2)(A) (Supp. 1985); ARIZ. REV. STAT. ANN. § 8-533(B)(1) (Supp. 1985); ARK. STAT. ANN. § 56-128(D) (Supp. 1985); CAL. CIV. CODE § 232(a)(1) (West Supp. 1986); COLO. REV. STAT. §§ 19-3-111(3), 19-11-105(1)(a) (1978 & Supp. 1985); CONN. GEN. STAT. ANN. § 17-43a(a)(1)(b) (West 1975 & Supp. 1985); DEL. CODE ANN. tit. 13, § 1103(3) (1981); D.C. CODE ANN. § 16-2354(b)(1) (1981); FLA. STAT. ANN. § 39.01(1) (West Supp. 1985); GA. CODE ANN. § 15-11-51(a)(1) (1985); IDAHO CODE § 16-2005(a) (1979); ILL. ANN. STAT. ch. 40, § 1501(1)(D)(a) (Smith-Hurd Supp. 1986); IOWA CODE ANN. § 600A.8 (West 1981); KAN. STAT. ANN. § 38-1583(d) (1985); KY. REV. STAT. ANN. § 199.603(1)(a) (Baldwin 1985); ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2)(b)(iii) (Supp. 1985); MINN. STAT. ANN. § 260.221(b)(1) (West 1982 & Supp. 1986); MISS. CODE ANN. § 93-15-103(3)(a) (Supp. 1985); MO. ANN. STAT. § 211.447(2)(1) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-609(1)(b) (1985); NEB. REV. STAT. § 43-292(1) (1984); NEV. REV. STAT. § 128.105(1) (1986); N.H. REV. STAT. ANN. § 170-C:5(I) (1978); N.M. STAT. ANN. § 40-7-36 (Supp. 1985); N.Y. SOC. SERV. LAW § 384-b(4)(b) (McKinney 1983); N.D. CENT. CODE § 27-20-44(1)(a) (1974); OLKA. STAT. ANN. tit. 10, § 1130(A)(2) (West Supp. 1985); OR. REV. STAT. § 419.523(4) (1985); PA. STAT. ANN. tit. 23, § 2511(a)(1) (Purdon Supp. 1986) (the court need only find failure "to perform parental duties"; no specific finding of abandonment necessary); R.I. GEN. LAWS § 15-7-7(d) (Supp. 1985); S.C. CODE ANN. § 20-7-490(c)(4) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 26-8-36 (1984); TENN. CODE ANN. § 37-1-147(c) (Supp. 1985); TEX. FAM. CODE ANN. § 15.02(1)(G) (Vernon Supp. 1986); UTAH CODE ANN. § 78-3a-48(1)(b) (Supp. 1985); VT. STAT. ANN. tit. 33, § 632(a)(12)(A) (1981); VA. CODE § 16.1-283(D) (Supp. 1985); WASH. REV. CODE ANN. § 13.34.030(2)(a) (West Supp. 1986); W. VA. CODE § 49-6-5(b)(4) (Supp. 1985); WIS. STAT. ANN. 48.415(1) (West Supp. 1985); WYO. STAT. § 14-2-309(a)(ii) (Supp. 1985).

188. As the following statutes show, it is not always necessary to prove intent to abandon the child for the purposes of termination of parental rights: CAL. CIV. CODE § 232(a)(1) (West Supp. 1986); KY. REV. STAT. ANN. § 199.603(2) (Baldwin 1985); MICH. COMP. LAWS ANN. § 712A.19a(b) (West Supp. 1986); N.H. REV. STAT. ANN. § 170-C:5(I) (1978); N.Y. SOC. SERV. LAW § 384-b(5)(a)–(b) (McKinney 1983).

189. The following statutes require a minimum showing of acts and omissions that amount to abandonment for a period of no more than six months: ARIZ. REV. STAT. ANN. § 8-533(B)(1) (Supp. 1985); ARK. STAT. ANN. § 56-128(D)(2) (Supp. 1985); CAL. CIV. CODE § 232(a)(1) (Supp. 1986); DEL. CODE ANN. tit. 13, § 1101(1) (1981); D.C. CODE ANN. § 16-2354(b)(1) (1981); MICH. COMP. LAWS § 712A.19a(b) (Supp. 1986); MISS. CODE ANN. § 93-15-103(3)(a) (Supp. 1985) (if the child is less than three years old); MO. ANN. STAT. § 211.447(2)(1) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-102(3)(d) (1985); NEB. REV. STAT. § 43-292(1) (1984);

actions or omissions amounting to abandonment may be manifested by the parent for a period of less than six months.[190]

A ground closely related to abandonment is physical incapacity. This ground may be stated generally or more specifically. When stated more specifically, it usually includes alcohol and drug addiction[191] or incarceration for as little as two years.[192]

Apart from the separation caused by imprisonment, the mere fact of conviction of a crime, especially one that is related to the care of children, may be sufficient ground for termination of parental rights under some statutes.[193] Termination statutes also include non-criminal

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NEV. REV. STAT. § 128.012(2) (1986); N.H. REV. STAT. ANN. § 170-C:5(I) (1978); N.M. STAT. ANN. § 40-7-36(A)(2) (Supp. 1985) (three months if under six years of age; six months if over six years of age); N.Y. SOC. SERV. LAW § 384-b(4)(b) (McKinney 1983); OR. REV. STAT. § 419.523(4) (1985); PA. STAT. ANN. tit. 23, § 2511(a)(1) (Purdon Supp. 1986) (need find only failure "to perform parental duties" for six months—no specific finding of abandonment necessary); R.I. GEN LAWS § 15-7-7(d) (Supp. 1985); S.D. CODIFIED LAWS ANN. § 26-8-36 (1984); UTAH CODE ANN. § 78-3a-48(1)(b) (Supp. 1985); VA. CODE § 16.1-283(D)(2) (Supp. 1985); WIS. STAT. ANN. § 48.415(1)(a)(2) (Supp. 1985).

190. TENN. CODE ANN. § 37-1-102(1) (Supp. 1985) (four months); WIS. STAT. ANN. § 48.415(1)(a)(1)–(2) (West Supp. 1985) (60 days in some instances; six month minimum in other instances); WYO. STAT. § 14-2-301 (Supp. 1985) (3 months).

191. ARK. STAT ANN. §§ 56-128(B), (E) (Supp. 1985); CAL. CIV. CODE § 232(a)(3) (West Supp. 1986); COLO. REV. STAT. § 19-11-105(2)(e) (1978 & Supp. 1985); ILL. ANN. STAT. ch. 40, § 1501(D)(k) (Smith-Hurd Supp. 1986); KAN. STAT. ANN. § 38-1583(b)(3) (Supp. 1985); LA. REV. STAT. ANN. § 13:1601(F)(2) (West 1983); MISS. CODE ANN. § 93-15-103(3)(d)(i) (Supp. 1985); MO. ANN. STAT. § 211.447(2)(2)(H) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-609(2)(d) (1985); NEB. REV. STAT. § 43-292(4) (1984); NEV. REV. STAT. § 128.106(3) (1986); N.Y. SOC. SERV. LAW § 384-b(7)(d)(i) (McKinney 1983) (the affected parent must be hospitalized as a result); OR. REV. STAT. § 419.523(2)(c) (1985); R.I. GEN. LAWS § 15-7-7(b)(3) (Supp. 1985); TENN. CODE ANN. § 37-1-147(e)(4) (Supp. 1985); UTAH CODE ANN. § 78-3a-48(1)(a)(iii) (Supp. 1985); VA. CODE § 16.1-283(B)(2)(b) (Supp. 1985); W. VA. CODE § 49-6-5(b)(1) (Supp. 1986).

192. *See* ARIZ. REV. STAT. ANN. § 8-533(B)(4) (Supp. 1985) ("a period of years"); COLO. REV. STAT. § 19-11-105(2)(g) (1973) ("long-term confinement of the parent"); MONT. CODE ANN. § 41-3-609(2)(e) (1985) ("long term confinement"); R.I. GEN. LAWS § 15-7-7(b)(1) (Supp. 1985) ("extended period"); TENN. CODE ANN. § 37-1-102(1)(B)(i) (Supp. 1985) ("more that two (2) years"); WIS. STAT. ANN. § 48.415(3)(a) (West Supp. 1985) ("at least 2 years within the [preceding] 5 years"); WYO. STAT. § 14-2-309(a)(iv) (Supp. 1985) ("incarcerated for conviction of a felony"). *See also* Walker v. Ramsey County Welfare Dep't, 287 N.W.2d 642 (Minn. 1979) (no time limit stated).

For two articles critical of termination of parental rights, see Note, *Mothers Behind Bars: A Look at the Parental Rights of Incarcerated Women*, 4 ENG. J. ON PRISON L. 141 (1977); Note, *On Prisoners and Parenting: Preserving the Tie that Binds*, 87 YALE L.J. 1408 (1978).

193. ARK. STAT. ANN. § 56-128(F)(4) (Supp. 1985); CAL. CIV. CODE § 232(a)(4) (Supp. 1986); ILL. ANN. STAT. ch. 40, § 1501(1)(D)(f) (Smith-Hurd Supp. 1986); IND. CODE ANN. § 31-6-5-4.1 (Burns Supp. 1985); KAN. STAT. ANN. § 38-1583(b)(5) (Supp. 1985); LA. REV. STAT. ANN. § 13:1601(A)(1) (West Supp. 1986); NEV. REV. STAT. § 128.106(5) (1986); N.Y. SOC. SERV. LAW § 384-b(8)(b) (McKinney 1983); OKLA. STAT. ANN. tit. 10, § 1130(A)(5) (West Supp. 1985); TENN. CODE ANN. § 37-1-102(1)(B)(i) (Supp. 1985); UTAH CODE ANN. § 78-3a-48(1)(a)(iv) (Supp. 1985); WIS. STAT. ANN. § 48-415(5)(a) (West Supp. 1985); WYO. STAT. § 14-2-309(a)(iv) (Supp. 1985).

or immoral activities, such as adultery, as possible grounds for termination of parental rights.[194]

Even general "unfitness"[195] appears as a ground in some statutes. This term would probably be subject, however, to attack as it appears to be unconstitutionally vague.[196] Therefore, many statutes contain a list of specific items, such as mental incapacity, which are merely indicative of unfitness.[197] At least twenty-seven states specify mental illness as a ground for termination of parental rights.[198] Most states limit termination orders solely on the basis of general grounds such as parental unfitness by requiring a finding that the termination be in the best interest of the child.[199]

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194. *See, e.g.*, ARK. STAT. ANN. § 56-128(A) (Supp. 1985); CAL. CIV. CODE § 232(a)(3) (West Supp. 1986); COLO. REV. STAT. § 19-11-105(2)(b) (1973); ILL. ANN. STAT. ch. 40, § 1501(1)(D)(i), (j) (Smith-Hurd Supp. 1986) (depravity; open and notorious adultery or fornication); MINN. STAT. ANN. § 260.221(b)(4) (West Supp. 1986).

195. *See, e.g.*, DEL. CODE ANN. tit. 13, § 1103(5) (1975) (amended 1980). The amended version of § 1103(5) cures any void for vagueness problem by specifying that the parents "are not able, or have failed, to plan adequately for the child's physical needs or his mental or emotional health and development . . . ." *Id.* tit. 13, § 1103(5) (1981).

196. For a discussion of the void for vagueness doctrine, see *supra* notes 156–85 and accompanying text.

197. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-533(B)(3) (Supp. 1985); ARK. STAT. ANN. § 56-128(F)(1) (Supp. 1985); CAL. CIV. CODE § 232(a)(6) (West Supp. 1986); COLO. REV. STAT. § 19-11-105(2)(a) (1973); DEL. CODE ANN. tit. 13, § 1103(4) (1981); HAWAII REV. STAT. § 571-61(b)(1)(F) (Supp. 1984); IDAHO CODE § 16-2005(d) (1979); N.Y. SOC. SERV. LAW § 384-b(4)(c) (McKinney 1983).

198. *See* ARIZ. REV. STAT. ANN. § 8-533(3) (Supp. 1985); CAL. CIV. CODE § 232(a)(6) (West Supp. 1986); COLO. REV. STAT. § 19-11-105(2)(a) (1973); DEL. CODE ANN. tit. 13, § 1103(4) (1981); HAWAII REV. STAT. § 571-61(b)(1)(F) (Supp. 1984); IDAHO CODE § 16-2005(d) (1979); KAN. STAT. ANN. § 38-1583(b)(1) (Supp. 1985); KY REV. STAT. ANN. § 199.603(3)(a) (Baldwin 1985); LA. REV. STAT. ANN. § 13:1601(F)(2) (West 1983); MISS. CODE ANN. § 93-15-103(3)(d)(i) (Supp. 1985); MO. ANN. STAT. § 211.447(2)(2)(a) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-609(2)(a) (1985); NEB. REV. STAT. § 43-292(5) (1984); NEV. REV. STAT. § 128.106(1) (1986); N.H. REV. STAT. ANN. § 170-C:5(IV) (1978); N.J. STAT. ANN. § 9:2-19 (West 1976); N.Y. SOC. SERV. LAW § 384-b(4)(c) (McKinney 1983); N.C. GEN. STAT. § 7A-289.32(7) (1981); OR. REV. STAT. § 419.523(2)(a) (1985); R.I. GEN. LAWS § 15-7-7(b)(1) (Supp. 1985); S.C. CODE ANN. § 20-7-1572(b) (Law. Co-op. 1985); UTAH CODE ANN. § 78-3a-48(1)(a)(ii) (Supp. 1985); VA. CODE § 16.1-283(B)(2)(a) (Supp. 1985); WIS. STAT. ANN. § 48.415(3)(a) (West Supp. 1985).

199. *See* ALASKA STAT. § 47.10.82 (Supp. 1985); CAL. CIV. CODE § 232(b) (West Supp. 1986); COLO. REV. STAT. §§ 19-3-111(1.1), 19-11-105(3) (Supp. 1985); CONN. GEN. STAT. ANN. §§ 17-43(d)(4)–(5), 45-61a (West Supp. 1985); DEL. CODE ANN. tit. 13, § 1108(a) (1981); D.C. CODE ANN. 16-2353(a) (1981); HAWAII REV. STAT. § 571-63 (1976); IDAHO CODE § 16-2005(e) (1979); ILL. ANN. STAT. ch. 37, § 705-9(2) (Smith-Hurd Supp. 1986); IND. CODE ANN. § 31-6-5-4 (Burns Supp. 1985); IOWA CODE ANN. § 600A.4(4) (West 1981); KY. REV. STAT. ANN. § 199.603(1) (Baldwin 1985); LA. REV. STAT. ANN. § 13:1601(E)(4) (West 1983); ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2)(a) (Supp. 1985); MO. ANN. STAT. § 211.447(2) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-607(3) (1985); NEV. REV. STAT. § 128.105 (1986); N.H. REV. STAT. ANN. § 170-C:1 (1978); N.Y. FAM. CT. ACT § 614(1) (McKinney 1983); N.Y. SOC. SERV. LAW § 384-b(1)(b) (McKinney 1983); N.C. GEN. STAT. § 7A-289.31 (1981); OHIO REV. CODE ANN. § 2151.353(A)(4) (Page Supp. 1985); OKLA. STAT. ANN. tit. 10, § 1130(A)(3) (West Supp.

Other grounds for termination are deprivation or neglect, which are sometimes stated generally[200] or are sometimes described more specifically in terms of physical, emotional, or moral harm to the child.[201] These grounds resemble those for care and protection proceedings in which the juvenile court initially takes jurisdiction over the child.[202] Under the termination statutes, however, there is usually a criterion that the risk of injury to the child is likely to continue.[203]

1985); PA. STAT. ANN. tit. 23, § 2511(b) (Purdon Supp. 1986) ("needs and welfare of the child"); S.C. CODE ANN. § 20-7-1570 (Law. Co-op. 1985) ("welfare of the child"); S.D. CODIFIED LAWS ANN. § 26-8-36 (1984); TENN. CODE ANN. § 37-1-147(d) (Supp. 1985); TEX. FAM. CODE ANN. § 15.02(2) (Vernon Supp. 1986); UTAH CODE ANN. § 78-3a-48(1)(a) (Supp. 1985); VT. STAT. ANN. tit. 33, § 657(3) (Supp. 1985); VA. CODE § 16.1-283(A) (Supp. 1985); WIS. STAT. ANN. § 48.426(2) (West Supp. 1985). *See also In re* Larson, 312 Minn. 210, 251 N.W.2d 325 (1977).

200. *See* ARIZ. REV. STAT. ANN. § 8-533(B)(2) (Supp. 1985); CAL. CIV. CODE § 232(a)(2) (West Supp. 1986); ILL. ANN. STAT. ch. 40, § 1501(1)(D)(d) (Smith-Hurd 1986); MISS. CODE ANN. § 93-15-103(3)(e) (Supp. 1985); N.D. CENT. CODE § 27-20-44(1)(b) (1974); WIS. STAT. ANN. § 48.415(2)(a) (West 1985).

201. *See* ALASKA STAT. § 47.10.010(a)(2)(B) (1985); ARK. STAT. ANN. § 56-128(H) (Supp. 1985); COLO. REV. STAT. § 19-11-105(3) (1978); CONN. GEN. STAT. ANN. § 17-43a(a)(3), (4) (West Supp. 1985); DEL. CODE ANN. tit. 13, § 1103(5)(a)(1) (1981); D.C. CODE ANN. § 16-2353(b)(2) (1981); FLA. STAT. ANN. § 39.01(27) (West Supp. 1986); GA. CODE ANN. § 15-11-51(a)(2) (1985); IDAHO CODE § 16-2005(b) (1979); KAN. STAT. ANN. § 38-1583(b)(4) (Supp. 1985); KY. REV. STAT. ANN. § 199.603(3)(c) (Baldwin 1985); LA. REV. STAT. ANN. § 13:1600(7)(b) (West 1983); MINN. STAT. ANN. § 260.221(b)(2) (West 1986); MO. ANN. STAT. § 211.447(2)(2)(d) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-102(3) (1985); NEB. REV. STAT. § 43-292(3) (1984); NEV. REV. STAT. § 128.014(2) (1986); N.H. REV. STAT. ANN. § 170-C:5(II) (1978); N.Y. FAM. CT. ACT § 614 (McKinney 1983) (defines permanently neglected child); N.Y. SOC. SERV. LAW §§ 384-b(7)(a), (c) (McKinney 1983); OR. REV. STAT. § 419.523(3) (1985); PA. STAT. ANN. tit. 23, 2511(a)(2) (Purdon Supp. 1986); S.C. CODE ANN. § 20-7-490(B) (Law. Co-op. 1985); TENN. CODE ANN. § 37-1-147(d) (Supp. 1985); TEX. FAM. CODE ANN. § 15.02(1)(D) (Vernon Supp. 1986); VT. STAT. ANN. tit. 33, § 656(a) (1981); W. VA. CODE § 49-6-5(b)(5) (Supp. 1985); WYO. STAT. § 14-3-202(a)(vii) (Supp. 1985).

202. For a fuller discussion of this initial intervention procedure, see FAMILY LAW, *supra* note 10, ch. ___ (chapter on child abuse and neglect).

203. *See* ALASKA STAT. § 47.10.080(c)(3) (1985); ARIZ. REV. STAT. ANN. § 8-533(B)(3) (Supp. 1985); CAL. CIV. CODE § 232(a)(7) (West Supp. 1986); COLO. REV. STAT. § 19-11-105(1)(b)(III) (1978); DEL. CODE ANN. tit. 13, § 1103(5)(a)(2) (1981); GA. CODE ANN. § 15-11-51(a)(2) (1985); ILL. ANN. STAT. ch. 40, § 1501(1)(D)(d) (Smith-Hurd Supp. 1986); IND. CODE ANN. § 31-6-5-4(2) (Burns Supp. 1985); KAN. STAT. ANN. § 38-1583(a) (1985); KY. REV. STAT. ANN. § 199.603(1)(b) (Baldwin 1985); LA. REV. STAT. ANN. § 13:1601(B)(2) (West 1983); MO. ANN. STAT. § 211.447(2)(2)(d) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-609(1)(c)(ii) (1985); NEB. REV. STAT. § 43-292(5) (1984); NEV. REV. STAT. § 128.107(3) (1986); N.H. REV. STAT. ANN. § 170-C:5(III) (1978); N.Y. FAM. CT. ACT § 614(1)(d) (McKinney 1983); N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 1983); N.C. GEN. STAT. § 7A-289.32(3) (Supp. 1985); N.D. CENT. CODE § 27-20-44(1)(b) (1974); OHIO REV. CODE ANN. § 2151.353(4) (Page Supp. 1985); OKLA. STAT. ANN. tit. 10, § 1130(A)(3) (West Supp. 1985); OR. REV. STAT. § 419.523(2) (1985); PA. STAT. ANN. tit. 23, § 2511(a)(2) (Purdon Supp. 1986); R.I. GEN. LAWS § 15-7-7(c) (Supp. 1985); S.D. CODIFIED LAWS ANN. § 26-8-36 (1984); TENN. CODE ANN. § 37-1-147(d)(1)(B) (Supp. 1985); VA. CODE § 16.1-283(B)(2) (Supp. 1985); WASH. REV. CODE ANN. § 13.34.180(5) (West Supp. 1986); W. VA. CODE § 49-6-5(a)(6) (Supp. 1985); WIS. STAT. ANN. § 48.415(2)(c) (West Supp. 1985).

A closely associated ground is child abuse,[204] which is sometimes stated generally,[205] although phrases such as "inflicting physical or mental injuries on the child,"[206] "cruelty or violence,"[207] "placing the child in life-endangering situations,"[208] or "unexplained serious injury"[209] are often used. In addition, at least fourteen states and the District of Columbia specify sexual abuse as a ground for terminating parental rights.[210]

Interestingly, most of the major changes in termination statutes show a trend toward guaranteeing parents that they will receive more specific notice.[211] This has been achieved both by including lists of grounds such as mental incapacity, instead of broad standards such as

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204. *See, e.g.*, CAL. CIV. CODE § 232(a)(2) (West Supp. 1986); ILL. ANN. STAT. ch. 40, § 1501(1)(D)(f) (Smith-Hurd Supp. 1986); N.Y. SOC. SERV. LAW § 384-b(4)(e) (McKinney 1983).

205. *See* MISS. CODE ANN. § 93-15-103(3)(b) (Supp. 1985); PA. STAT. ANN. tit. 23, § 2511(a)(2) (Purdon Supp. 1986); S.D. CODIFIED LAWS ANN. § 26-8-6(1) (1985).

206. *See* ALASKA STAT. § 47.10.010(a)(2)(F) (Supp. 1985); ARIZ. REV. STAT. ANN. § 8-531(1) (Supp. 1985); D.C. CODE ANN. § 16-2301(23) (1981); FLA. STAT. ANN. § 39.01(2) (West Supp. 1986); GA. CODE ANN. § 15-11-51(a)(2) (1985); IND. CODE ANN. § 31-6-7-13(b)(1) (Burns Supp. 1985); IOWA CODE ANN. § 232.116(3)(a) (West 1985); KAN. STAT. ANN. § 38-1583(b)(2) (1983); LA. REV. STAT. ANN. § 13:1600(1) (West 1983); MINN. STAT. ANN. § 260.221(b)(4) (West Supp. 1986); MO. ANN. STAT. § 211.447(2)(2)(d) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-102(3)(a) (1985); NEV. REV. STAT. § 128.106(2) (1986); N.Y. SOC. SERV. LAW § 384-b(8)(a) (McKinney 1983); OKLA. STAT. ANN. tit. 10, § 1130(A)(5) (West Supp. 1985); S.C. CODE ANN. § 20-7-1572(1) (Law. Co-op. 1985); TENN. CODE ANN. § 37-1-147(d)(1)(A) (Supp. 1985); VT. STAT. ANN. tit. 33, § 682(2) (Supp. 1985); VA. CODE § 16.1-283(B)(1) (Supp. 1985); W. VA. CODE § 49-6-5(b)(5) (Supp. 1985); WIS. STAT. ANN. § 48.415(5) (West Supp. 1985); WYO. STAT. § 14-3-202(a)(ii) (Supp. 1985).

207. *See* CAL. CIV. CODE § 232(a)(2) (West Supp. 1986); IDAHO CODE § 16-2002(e) (1979); KAN STAT. ANN. § 38-1583(b)(2) (Supp. 1985); LA. REV. STAT. ANN. § 13:1601(A)(2) (West 1983); NEV. REV. STAT. § 128.106(2) (1986); N.J. STAT. ANN. § 9:2-19 (West 1976); OR. REV. STAT. § 419.523(2)(b) (1985); R.I. GEN. LAWS § 15-7-7(b)(2) (Supp. 1985); TENN. CODE ANN. § 37-1-102(10)(B) (Supp. 1985).

208. *See* COL. REV. STAT. § 19-11-105(2) (1978); MONT. CODE ANN. § 41-3-609(2)(c) (1985); NEV. REV. STAT. § 128.014(5) (1986); N.Y. SOC. SERV. LAW § 384-b(8)(a) (McKinney 1983); TENN. CODE ANN. § 37-1-102(19) (Supp. 1985); VT. STAT. ANN. tit. 33, § 682(6) (1985); VA. CODE § 16.1-283(B)(1) (Supp. 1985).

209. *See* IOWA CODE ANN. § 232.116(3)(b) (West 1985).

210. *See* ALASKA STAT. § 47.10.010(a)(2)(D) (Supp. 1985); COLO. REV. STAT. § 19-11-105(2)(b) (1978); D.C. CODE ANN. § 16-2301(23) (1981); FLA. STAT. ANN. § 39.01(2) (West Supp. 1985); IOWA CODE ANN. § 232.116(3)(a) (West 1985); KAN. STAT. ANN. § 38-1583(b)(2) (Supp. 1985); LA. REV. STAT. ANN. § 13:1600(1) (West 1983); MO. ANN. STAT. § 211.447(2)(2)(c) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-102(3)(b) (1985); NEV. REV. STAT. § 128.106(2) (1986); N.Y. SOC. SERV. LAW § 384-b(8)(b) (McKinney 1983); OR. REV. STAT. § 419.523(2)(b) (1985); S.C. CODE ANN. § 20-7-490(c)(2) (Law. Co-op. 1985); VT. STAT. ANN. tit. 33, § 682(3)(b) (Supp. 1985); VA. CODE § 16.1-228(A)(4) (Supp. 1985); WIS. STAT. ANN. § 48.415(2m) (West Supp. 1985).

211. For a discussion of the procedural due process void for vagueness problem, see *supra* notes 156–85 and accompanying text. The constitutionally objectionable aspect of a vague statute is that it fails to provide sufficient notice to a potential offender as to what types of behavior will result in legal sanctions. For a listing of the statutes that provide for notice and a hearing, see id. [illegible]

unfitness, as well as by focusing on the actions of the parents after the child has been taken under the jurisdiction of the court in a care and protection proceeding. Consequently, failure to communicate with the child placed in temporary foster care[212] or to make progress toward rehabilitation[213] are now common prerequisites for termination of parental rights. Similarly, statutes may require that parents formulate a plan for rehabilitating themselves,[214] and some even mandate that social services be given to parents in an effort to rehabilitate them before resorting to termination.[215] In one case, the mother alleged failure to provide services as a defense, but the court rejected this defense, holding that it was the mother "who had to mend her ways, and she knew it"[216] and that she "never at any time requested aid or assistance from the Division of Family Services . . . ."[217] Another similar trend is toward establishing time limits for either returning the child to the then-rehabilitated parents or else freeing the child for adoption or a permanent foster care home by terminating parental rights.[218] This procedure

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212. *See* ARIZ. REV. STAT. ANN. § 8-533(B)(1) (Supp. 1985); CAL. CIV. CODE § 232(a)(7) (West Supp. 1986); ILL. ANN. STAT. ch. 40, § 1501(1)(D)(n) (Smith-Hurd Supp. 1986); N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 1983).

213. *See* ARK. STAT. ANN. § 56-128(F) (Supp. 1985); COLO. REV. STAT. § 19-11-105(1)(b)(I) (1978); CONN. GEN. STAT. ANN. § 17-43a(a)(2) (West Supp. 1985).

214. *See* ILL. ANN. STAT. ch. 40, § 1501(1)(D)(m) (Smith-Hurd Supp. 1986); N.Y. SOC. SERV. LAW § 384-b(7)(e),(f) (McKinney 1983).

215. *See* COLO. REV. STAT. § 19-11-105(2)(i) (1978); KAN. STAT. ANN. § 38-1583(b)(7) (Supp. 1985); LA. REV. STAT. ANN. § 13:1601(F)(4) (West 1983); MINN. STAT. ANN. § 260.221(b)(5) (West Supp. 1986); MISS. CODE ANN. § 93-15-103(3)(d)(ii) (Supp. 1985); MO. ANN. STAT. § 211.447(3)(b) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-609(1)(c)(i) (1985); NEB. REV. STAT. § 43-292(6) (1984); NEV. REV. STAT. § 128.107(1) (1986); N.H. REV. STAT. ANN. § 170-C:5(III) (1978); N.Y. FAM. CT. ACT § 614(c) (McKinney 1983); N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 1983); N.C. GEN. STAT. § 7A-289.32(3) (Supp. 1985); OHIO REV. CODE ANN. § 2151.353(A)(4) (Page Supp. 1985); OKLA. STAT. ANN. tit. 10, § 1130(A)(3) (West Supp. 1985); OR. REV. STAT. § 419.523(2)(e) (1985); PA. STAT. ANN. tit. 23, § 2511(a)(5) (Purdon Supp. 1986); R.I. GEN. LAWS § 15-7-7(b) (Supp. 1985); S.D. CODIFIED LAWS ANN. § 26-8-35.2 (1984); VA. CODE § 16.1-283(B)(2)(c) (Supp. 1985); WASH. REV. CODE ANN. § 13.34.180(4) (Supp. 1986); W. VA. CODE § 49-6-5(b)(3) (Supp. 1985); WYO. STAT. § 14-2-309(a)(iii) (Supp. 1985).

216. State *ex rel.* T.G. v. H.G., 532 P.2d 997, 999 (Utah 1975).

217. *Id.*

218. *See, e.g.*, CAL. CIV. CODE § 232(a)(2) (West Supp. 1986). Section 232(a)(2) provides:

> [A person] [w]ho has been neglected or cruelly treated by either or both parents [is entitled to be declared free from the parent's custody and control], if the child has been a dependent child of the juvenile court under any subdivision of Section 300 of the Welfare and Institutions Code and the parent or parents have been deprived of the child's custody for *one year* prior to the filing of a petition pursuant to this section. Physical custody by the parent or parents for insubstantial periods of time shall not serve to interrupt the one year period.

Id. (emphasis added). *See also id.* § 232(a)(7) (provides for termination when the child has been in custody of an agency for a one-year period and the parent continues to be unfit with no prospect for rehabilitation); DEL. CODE ANN. tit. 13, § 1103(5)(a) (1981) (provides for termination when

may be unconstitutional, however, as evidenced by a holding of a Maryland appellate court that struck down a statutory presumption that it was in the best interests of a child to grant an involuntary termination when the child had been in continuous foster care for two years or longer.[219]

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child has spent one year in custody of an agency and there is little likelihood that conditions leading to placement will be remedied); ILL. ANN. STAT. ch. 40, § 1501(1)(D)(m),(n) (Smith-Hurd Supp. 1986) (provides for termination when child has spent one year in placement and parent has made no reasonable effort, reasonable rehabilitative progress, or maintained reasonable contact with child or formulated a plan to achieve return of the child); IND. CODE ANN. § 31-6-5-4 (Burns Supp. 1985) (termination following six months in placement and judicial finding that parent failed to improve with little likelihood of improvement in the future); IOWA CODE ANN. § 232.116(4)–(6) (West 1985) (may terminate if placement has lasted one year and there is clear and convincing evidence that child will be harmed if returned home, or placement has lasted six months to one year and evidence that child will be harmed plus lack of contact with the child when there was an opportunity to have contact; however, statute contains specific exceptions giving the court discretion not to terminate, e.g., if a relative has custody or if child is over ten years old and objects to termination); LA. REV. STAT. ANN. § 13-1601(D) (West 1983) (provides for termination if child has spent one year in the custody of an agency and little likelihood that conditions leading to placement will be remedied); ME. REV. STAT. ANN. tit. 22, § 4055(B)(2) (Supp. 1985) (provides for termination when child is in custody of agency and court finds by clear and convincing evidence that the parent is either unwilling or unable to protect child from jeopardy, that there is little likelihood that the situation will be changed, and that termination is in the best interest of the child); MINN. STAT. ANN. § 260.015(18) (West 1982) (no specific time requirement but termination of parental rights allowed when parents fail to be rehabilitated after services have been provided); MISS. CODE ANN. § 93-15-103(3)(c) (Supp. 1985) (termination after one year if no contact with child and no plan for resuming parental duties); MO. ANN. STAT. § 211.447(2) (Vernon Supp. 1986) (provides for termination if the child is out of parental custody for six months or under judicial jurisdiction for one year and parents have failed to be rehabilitated despite reasonable efforts made by state to aid parents to correct deficiencies listed in original petition); PA. STAT. ANN. tit. 23, § 2511(a)(5) (Purdon Supp. 1985) (termination after six months and no plan to regain custody of the child resulting in judicial finding that parents are not likely to improve and termination is in best interests of the child); R.I. GEN LAWS § 15-7-7(c) (Supp. 1985) (termination after at least six months and finding of no possibility of resuming parental duties); S.C. CODE ANN. § 20-7-1572(2) (Law. Co-op. 1985) (termination after six months plus parental failure to be rehabilitated); TENN. CODE ANN. § 37-1-147(d)(1) (Supp. 1985) (termination after one year plus parental failure to be rehabilitated and need to place child in permanent home); VA. CODE § 16.1-283(C) (Supp. 1985) (termination after one year and no reasonable rehabilitative progress); WIS. STAT. ANN. § 48.415(2) (West Supp. 1985) (termination if child not in parents' custody plus cumulative period of one year and substantial neglect or willful refusal to be rehabilitated, or cumulative period of two years plus inability to be rehabilitated).

219. *See* Washington County Dep't of Social Servs. v. Clark, 296 Md. 190, 461 A.2d 1077 (1983). The price of not having a time limit in the statute, however, may be an interminable child neglect/custody case. For instance, the following is a description of one particular child's circumstances:

> There is no requirement in Kansas law that proceedings to terminate parental rights be commenced within a specified time after removal of a child from his or her parents. Although Susie either should not have been removed initially or should have been returned promptly after the problem of sexual abuse was adequately controlled, once she had been out of the home for a substantial length of time return became less feasible. A decision either to sever parental rights to free her for adoption or to return her home needed to be made. However, no court action was taken to ensure a permanent placement until a peti-

Statutes may be silent as to what procedures are to be accorded parents and children in a termination of parental rights hearing.[220] At least thirty-four states, however, do provide for notice and a hearing.[221] More than the majority of states statutorily also provide counsel for the parents,[222] and this seems to be the trend. In addition, a few states provide counsel for the child[223] and still others provide for the appoint-

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> tion to terminate parental rights was filed almost two years after Susie's removal from home. The petition was not heard until eight months after filing. In the fall of 1977, the judge found that the parents were not unfit. Instead of returning Susie to one of her parents, however, the judge ordered continued placement in foster care. In the fall of 1979, more than two years after the decision in the first severance action, a second petition for severance was filed by the state. By the time it was heard the next spring, Susie had been in foster care for five years. *A statutory requirement that a petition to terminate parental rights be filed within a specified time after placement in foster care would have hastened permanent placement for Susie.* To properly protect parental rights, as well as the best interests of children, such a statute must be part of a scheme which also prevents undue intervention in family life and unnecessary removal of children from their homes . . . .

Reynolds & Lacoursiere, *Interminable Child Neglect/Custody Cases: Are There Better Alternatives?* 21 J. FAM. L. 239, 254–55 (1982–83) (emphasis added).

220. *See, e.g.*, ARK. STAT. ANN. § 56-128(H)(5) (Supp. 1985); S.C. CODE ANN. § 20-7-1580 (Law. Co-op. 1985).

221. *See* ALASKA STAT. § 47.10.030(b) (1984); ARIZ. REV. STAT. ANN. § 8-535(A) (Supp. 1985); DEL. CODE ANN. tit. 13, § 1107(a) (Supp. 1984); D.C. CODE ANN. § 16-2357(b) (1981); FLA. STAT. ANN. § 39.11(6)(a) (West Supp. 1986); HAWAII REV. STAT. § 571-61(b)(3) (Supp. 1984); IDAHO CODE § 16-2007 (1979); IND. CODE ANN. § 31-6-5-3(8) (Burns Supp. 1985); IOWA CODE ANN. § 600A.6 (West 1984); LA. REV. STAT. ANN. § 13:1602(B) (West Supp. 1986); MINN. STAT. ANN. § 260.231(3) (West 1982); MO. ANN. STAT. § 211.453 (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-607(1) (1985); NEB. REV. STAT. § 43-291 (1984); NEV. REV. STAT. § 128.060 (1986); N.H. REV. STAT. ANN. § 170-C:7 (1978); N.Y. FAM. CT. ACT § 616 (McKinney 1983); N.Y. SOC. SERV. LAW § 384-b(1)(e) (McKinney 1983); N.C. GEN. STAT. § 7A-289.27(a) (Supp. 1985); N.D. CENT. CODE § 27-20-45 (Supp. 1985); OHIO REV. CODE ANN. § 2151.353(B) (Page Supp. 1985). OR. REV. STAT. § 419.525(1) (Supp. 1985); PA. STAT. ANN. tit. 23, § 2513(b) (Purdon Supp. 1985); R.I. GEN. LAWS § 15-7-7 (Supp. 1985); S.D. CODIFIED LAWS ANN. § 26-8-13 (1984); TENN. CODE ANN. § 37-1-127 (1984); UTAH CODE ANN. § 78-3a-48(2) (Supp. 1985); VT. STAT. ANN. tit. 33, § 647(b) (1981); VA. CODE § 16.1-263(A) (1982); WASH. REV. CODE ANN. § 13.34.070(1) (Supp. 1986); W.VA. CODE § 49-6-1(b) (1980); WIS. STAT. ANN. § 48.42(2)(a) (West Supp. 1985); WYO. STAT. § 14-2-313 (Supp. 1985).

222. *See* COLO. REV. STAT. § 19-1-106(d) (Supp. 1985); IDAHO CODE § 16-2009 (Supp. 1985); IND. CODE ANN. § 31-6-5-3(7) (Burns Supp. 1985); IOWA CODE ANN. § 232.113(1) (West 1985); KY. REV. STAT. ANN § 199.603(8) (Baldwin 1985); LA. REV. STAT. ANN. § 13:1602(c) (West 1983); ME. REV. STAT. ANN. tit. 19, § 533-A(3)(A) (Supp. 1985); MO. ANN. STAT. § 211.462(1) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-607(2) (1985); NEV. REV. STAT. § 128.100(2) (1986); N.H. REV. STAT. ANN. § 170-C:10 (1978); N.Y. SOC. SERV. LAW § 384-b(1)(e) (McKinney 1983); N.C. GEN. STAT. § 7A-289.23 (Supp. 1985); N.D. CENT. CODE § 27-20-49(c) (Supp. 1985); OHIO REV. CODE ANN. § 2151.414(A) (Page Supp. 1985); OR. REV. STAT. 419.563(1) (1985); S.D. CODIFIED LAWS ANN. § 26-8-22.2 (1984); VA. CODE § 16.1-266(c) (Supp. 1985); WASH. REV. CODE ANN. § 13.34.090 (West Supp. 1986); W. VA. CODE § 49-6-2(a) (Supp. 1985); WIS. STAT. ANN. § 48.42(4)(c) (West Supp. 1985); WYO. STAT. § 14-2-318(a) (Supp. 1985).

223. *See* ALASKA STAT. § 47.10.050(b) (1984); CAL. CIV. CODE § 237.5(b) (West 1982); COLO. REV. STAT. §§ 11-11-103(3), 19-1-106(e) (Supp. 1985); CONN. GEN. STAT. ANN. § 17-[illegible] (West Supp. 1985); GA. CODE ANN. § 24A-1730(b) (1985); IND. CODE ANN. § 31-6-7-2(a)

ment of a guardian ad litem.[224]

Although the United States Supreme Court requires clear and convincing evidence of the grounds for termination,[225] four state statutes still provide preponderance of the evidence as the required burden.[226] On the other hand, twenty-three state statutes mandate the clear and convincing standard of proof[227] and one even requires proof beyond a reasonable doubt.[228] An order terminating parental rights has the effect of "completely and permanently terminat[ing] all rights and obligations"[229] although sometimes the order may be limited to only

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(Burns 1980); IOWA CODE ANN. § 232.113(2) (West 1985); LA. REV. STAT. ANN. § 13:1602(c) (West 1983); MO. ANN. STAT. § 211.462(1) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-607(3) (1985); NEV. REV. STAT. § 128.100(1) (1986); N.D. CENT. CODE § 27-20-49(c) (Supp. 1985); OR. REV. STAT. § 419.563(1) (Supp. 1985); S.D. CODIFIED LAWS ANN. § 26-8-22.2 (1984); TENN. CODE ANN. § 37-1-126 (1984); VT. STAT. ANN. tit. 33, § 653 (1981); VA. CODE § 16.1-266(B) (Supp. 1985); WASH. REV. CODE ANN. § 13.34.090 (West Supp. 1986); W. VA. CODE § 49-6-2(a) (Supp. 1985); WYO. STAT. § 14-2-318(a) (Supp. 1985).

224. *See* ALASKA STAT. § 47.10.50(a) (1984); ARIZ. REV. STAT. ANN. § 8-535(D) (West Supp. 1985); CONN. GEN. STAT. ANN. § 17-43a(a) (West Supp. 1985); HAWAII REV. STAT. § 571-62 (1976); IDAHO CODE § 16-2007 (1979); KY. REV. STAT. ANN. § 199.603(9) (Baldwin 1985); MINN. STAT. ANN. § 260.155(4)(a) (West 1982); MISS. CODE ANN. § 93-15-107 (Supp. 1985); MO. ANN. STAT. § 211.462(1) (West Supp. 1986); MONT. CODE ANN. § 41-3-607(3) (1985); NEB. REV. STAT. § 43-292(6) (1984); NEV. REV. STAT. § 128.100(1) (1986); N.H. REV. STAT. ANN. § 170-C:8 (1978); N.C. GEN. STAT. § 7A-289.23 (1981); N.D. CENT. CODE § 27-20-48 (1974); OHIO REV. CODE ANN. § 2151.281 (Page Supp. 1985); TENN. CODE ANN. § 37-1-149 (1984); VT. STAT. ANN. tit. 33, § 653 (1981); VA. CODE § 16.1-266 (Supp. 1985); WASH. REV. CODE ANN. § 13.34.100 (Supp. 1986); WYO. STAT. § 14-2-312 (Supp. 1985). For a discussion of the function of guardians ad litem, see Deardurff, *Representing the Interests of the Abused and Neglected Child: The Guardian Ad Litem and Access to Confidential Information*, 11 U. DAYTON L. REV. 649 (1986).

225. Santosky v. Kramer, 455 U.S. 745, 769 (1982) ("clear and convincing evidence" is minimum standard of proof that is constitutionally permissible at a termination of parental rights hearing).

226. *See* COLO. REV. STAT. § 19-3-111(1.1) (Supp. 1985); IND. CODE ANN. § 31-6-7-13(a) (Burns Supp. 1985); KY. REV. STAT. ANN. § 199.603(1) (Baldwin 1985); NEV. REV. STAT. § 128.090(3) (1986).

227. *See* ALASKA STAT. § 47.10.080(c)(3) (1984); ARIZ. REV. STAT. ANN. § 8-537(B) (West Supp. 1985); CONN. GEN. STAT. ANN. § 17-43(a) (West Supp. 1985); D.C. CODE ANN. § 16-2359(f) (1981); IDAHO CODE 16-2009 (Supp. 1985); ILL. ANN. STAT. ch. 37, § 705-9(2) (Smith-Hurd Supp. 1986); IOWA CODE ANN. § 600A.8 (1981); KAN. STAT. ANN. § 38-1583(a) (Supp. 1985); LA. REV. STAT. ANN. § 13:1603(A) (1983); ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2) (Supp. 1985); MINN. STAT. ANN. § 260.241(1) (West 1982); MISS. CODE ANN. 93-15-109 (Supp. 1985); MO. ANN. STAT. § 211.447(2)(2) (Vernon Supp. 1986) ("clear, cogent, and convincing evidence"); N.H. REV. STAT. ANN. § 170-C:10 (1978); N.Y. SOC. SERV. LAW § 384b(3)(g) (McKinney 1983) ("clear and convincing proof"); N.C. GEN. STAT. § 7A-289.30(e) (1981); N.D. CENT. CODE § 27.20.44(2) (1974); OHIO REV. CODE ANN. 2151.35 (Page Supp. 1985); S.D. CODIFIED LAWS ANN. § 26-8-22(5) (1984); TENN. CODE ANN. § 37-1-147(d) (Supp. 1985); VA. CODE § 16.1-283(B) (Supp. 1985); WASH. REV. CODE ANN. § 13.34.190(1)(a) (West Supp. 1986) ("clear, cogent, and convincing"); W. VA. CODE § 49-6-2(c) (Supp. 1985); WYO. STAT. § 14-2-309(a) (Supp. 1985).

228. *See* LA. REV. STAT. ANN. § 13:1603(A) (West 1983).

229. N.C. GEN. STAT. § 7A-289.33 (1981).

one parent.[230] Finally, the statute may specify that the order is appealable.[231]

VI. STATUTORY DEFENSES: FAILURE TO PROVIDE REHABILITATIVE SERVICES

Aside from failure to prove the statutory grounds and violation of constitutionally required procedures, a recurring statutory or common law defense to an action for termination of parental rights is failure by the social service agency to provide services that will help to reunite the family. Given the high regard that protection of the natural family unit holds in the public policies of most states, many states require that rehabilitative services be tried and failed as a precondition to filing a successful petition for termination of parental rights.

There are several variations of this requirement. In Alaska, a social service agency must offer to provide all reasonable services necessary to protect the child in the home before it may file for termination of parental rights.[232] The juvenile court subsequently reviews the adequacy of the services that were provided.[233] Similarly, Rhode Island specifies that the parent against whom the termination of parental rights action is filed, must have failed to provide proper care despite reasonable efforts by the agency to rehabilitate the family.[234] Minnesota has a slightly less stringent requirement, merely directing the court to consider the adequacy and propriety of the services provided.[235] On the other hand, Maine has a slightly more stringent requirement.[236] The social service agency must not only arrange rehabili-

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230. *See, e.g.*, ALASKA STAT. § 47.10.080(c)(3) (1984); ARIZ. REV. STAT. ANN. § 8-538(C) (1974); CAL. CIV. CODE § 238 (West 1982); COLO. REV. STAT. § 19-11-108(1) (Supp. 1985).

231. *See* ALASKA STAT. § 47.10.080(i) (1984); ARIZ. REV. STAT. ANN. § 8-236 (West Supp. 1985); ARK. STAT. ANN. § 56-135 (Supp. 1985); CAL. CIV. CODE § 238 (West 1982); COLO. REV. STAT. § 19-11-109 (1978); CONN. GEN. STAT. ANN. § 45-68k (West 1981); DEL. CODE ANN. tit. 13, § 1109 (1981); D.C. CODE ANN. § 16-2362(b) (1981); GA. CODE ANN. § 15-11-64 (1985); HAWAII REV. STAT. § 571-63 (1976); IDAHO CODE § 16-2014 (1979); IND. CODE ANN. § 31-6-7-17 (Burns Supp. 1985); IOWA CODE ANN. § 600.14 (West 1981); KAN. STAT. ANN. § 38-1591 (Supp. 1985); KY. REV. STAT. ANN. § 199.617 (Baldwin 1985); LA. REV. STAT. ANN. § 13:1604 (West 1983); MO. ANN. STAT. § 211.477(5) (Vernon Supp. 1986); MONT. CODE ANN. § 41-3-612 (1985); NEV. REV. STAT. § 128.120 (1986); N.H. REV. STAT. ANN. § 170-C:15 (1978); N.C. GEN. STAT. § 7A-289.34 (1981); N.D. CENT. CODE § 27-20-56(1) (1974); OKLA. STAT. ANN. tit. 10, § 1130(C) (West 1985); OR. REV. STAT. § 419.561 (1985); S.D. CODIFIED LAWS ANN. § 26-8-58.1 (1984); TENN. CODE ANN. § 37-1-159 (Supp. 1985); UTAH CODE ANN. § 78-3a-51 (1977); VA. CODE § 16.1-296 (Supp. 1985); W. VA. CODE § 49-6-2(e) (Supp. 1985); WIS. STAT. ANN. § 48.43(6) (West Supp. 1985).

232. *See* ALASKA STAT. § 47.17.030(d) (1984).

233. *See id.* § 47.10.083.

234. *See* R.I. GEN. LAWS § 15-7-7(b)(3) (Supp. 1985).

235. *See* MINN. STAT. ANN. § 260.155(7)(5) (West 1982).

236. *See* ME. REV. STAT. ANN. tit. 22, § 4041 (Supp. 1985).

tative services for the parents, but it must also notify the parents in writing of the child's address when the child is removed from the home and facilitate visitation between the natural parents and the child.[237] Periodic detailed discussion of the reasons for the child's removal, of what specific improvements must be made before the child will be returned, and of what services are available must also be provided.[238]Oregon also requires social service agencies to make reasonable efforts to rehabilitate and reunite the family.[239] Nevertheless, in one case, the court did not require the agency to fulfill this statutory duty prior to ordering termination of parental rights because if found that the father's lack of mental capacity made the situation hopeless.[240] This case appears to create an exception to the requirement of providing rehabilitative services for instances where such efforts would be futile and would unnecessarily delay improving the child's situation.

The requirement of providing rehabilitative services, except when there is little hope of improvement, seems to be the trend. This can be illustrated by the fact that at least one state, New Hampshire, has adopted this duty by case law when it was not required by statute.[241] There were, however, welfare regulations requiring rehabilitative services upon which the court partially relied in reaching its holding.[242] The social worker had met with the father on one previous occasion, but had not consulted with the prior social worker. Therefore, the social worker never realized that health problems were the source of the father's deficiencies.[243] It is significant that the court placed the burden of proof on the state to prove beyond a reasonable doubt that the agency had complied with its own regulations requiring that "every effort" be made to rehabilitate the family.[244]

Instead of merely mandating that rehabilitative services be provided, at least seven states require that the social service agency sub-

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237. *See id.*

238. *See id.*

239. *See* OR. REV. STAT. § 419.523(2)(e) (1985).

240. *See In re* McDaniel, 46 Or. App. 65, 610 P.2d 321 (1980). One commentator strongly disagrees:

> Furthermore, studies have shown that of the mentally retarded parents who do provide proper care for their children, many have had the benefit of homemaker or social work services. This indicates that mentally retarded persons are capable of benefiting from rehabilitative programs, refuting the notion that support services would not be effective.

Note, *The Constitutionality of New York's Parental Termination Statute As Applied to the Mentally Retarded Parent: Equal Protection and Due Process Objections*, 46 ALB. L. REV. 271, 287 (1981) (footnotes omitted).

241. *See* State v. Robert H., 118 N.H. 713, 393 A.2d 1387 (1978).

242. *Id.* at 718–19, 393 A.2d at 1390–91.

243. *Id.* at 718, 393 A.2d at 1390.

244. *Id.* at 720, 393 A.2d at 1391.

mit, usually to a court, a written plan for accomplishing this goal.[245] For example, in Virginia,[246] when a child has been removed from the home of his natural parents, a foster care plan must be filed with the court within sixty days of the disposition.[247] Included in the plan must be a description of the services that will be provided, the visitation that will be allowed, the reason for the type of placement given the child, and what the parents must do in order to obtain the return of their child.[248]Instead of a "plan," two jurisdictions, the District of Columbia and the State of Washington, require the submission of a "social study."[249] Aside from the nomenclature, however, the requirements are the same as those required by the Virginia plan just described except that the agency must also encourage maximum contact between the child and natural parents and it must investigate and minimize any possible harmful effects the removal of the child from the natural parents might have on the child.[250]Another variation of this same theme is Florida's requirement of a "performance agreement."[251] What is unusual about the Florida "performance agreement" is that if any of the numerous detailed provisions are violated by the social service agency, the court may find the agency in contempt, may order the agency to file a plan for how it will comply with the performance agreement, or may even require the agency to show cause why the child should not be reunited immediately with the natural parents.[252]A case interpreting a New York statute provides an illustration of what might happen when an agency frustrates a court's expectation that the agency will provide and act on a plan. In *In re Suzanne*,[253] a New York statute[254] required that the agency make "diligent efforts" to rehabilitate the family.[255]

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245. *See* D.C. CODE ANN. § 16-2319 (1981); FLA. STAT. ANN. § 409.168(4) (West Supp. 1986); IOWA CODE ANN. § 232.102(5) (West 1985); ME. REV. STAT. ANN. tit. 22, § 4041 (Supp. 1986); N.Y. SOC SERV. LAW § 384-b(7)(f) (McKinney 1983) (requirement of plan read into requirement of "diligent efforts" in *In re* Suzanne, 102 Misc. 2d 215, 423 N.Y.S.2d 394 (Fam. Ct. 1979)); VA. CODE § 16.1-281 (Supp. 1985); WASH. REV. CODE ANN. § 13.34.120 (West Supp. 1986).

246. *See* VA. CODE § 16.1-281(B) (Supp. 1985) (specific time for when the agency plans to return child must be stated and if agency decides that it is not possible to return child, reasons must be given for discontinuing as well as for type of permanent placement the agency proposes).

247. *Id.*

248. *Id.*

249. *See* D.C. CODE ANN. § 16-2319 (1981); WASH. REV. CODE ANN. § 13.34.120 (West Supp. 1986).

250. *See* D.C. CODE ANN. § 16-2319(c)(2) (1981); WASH. REV. CODE ANN. § 13.34.120(2) (West Supp. 1986).

251. *See* FLA. STAT. ANN. § 409.168(3)(a) (West Supp. 1986).

252. *Id.* § 409.168(3)(g)(2).

253. 102 Misc. 2d 215, 423 N.Y.S.2d 394 (Fam. Ct. 1979).

254. NEW YORK SOC. SERV. LAW § 384-b(7)(f) (McKinney 1983).

255. *Suzanne*, 102 Misc. 2d at 218, 423 N.Y.S.2d at 397.

The agency, according to the court, failed to investigate and formulate plans for services.[256] Giving "short shrift" to the agency's excuse that such plans and services would be difficult to provide, the court denied the petition to terminate the parent's rights, reasoning that the agency failed to prove by a preponderance of evidence that it had met its statutory duty.[257] It may be that this case is a better illustration of judicial abhorrence toward removing children from natural parents when the primary deficiency is poverty than it is of the requirement of a plan.[258] In any event, it seems safe to conclude that many states place the burden, either preponderance of the evidence,[259] clear and convincing evidence,[260] or beyond a reasonable doubt[261], on the agency to demonstrate that it has reasonably attempted to rehabilitate and reunite the family. Thus, alleging failure to fulfill this duty to provide rehabilitative services may provide a viable defense against involuntary termination of parental rights.

256. *Id.* at 220–22, 423 N.Y.S.2d at 398–99.

257. *Id.* at 222, 423 N.Y.S.2d at 399.

258. Another example of such abhorrence is *In re* Jonathan, 415 A.2d 1036 (R.I. 1980). In this case, a thirteen-year-old boy was living in one dirty room where he had to sleep on the floor. The apartment had no bathing facilities nor a refrigerator, but a neighbor's refrigerator was used and the boy bathed at his sister's. The mother provided meals and supervision and used a laundromat. The court ruled that serious harm was not proven by clear and convincing evidence. *Id.* at 1039. *See also* Weaver v. Roanoke Dep't of Human Resources, 220 Va. 921, 265 S.E.2d 692 (1980).

259. *See, e.g., Suzanne*, 102 Misc. 2d 215, 423 N.Y.S.2d 394 (Fam. Ct. 1979). Recall that Santosky v. Kramer, 455 U.S. 745 (1982), has constitutionally mandated a clear and convincing evidence standard by declaring unconstitutional the mere preponderance of the evidence standard in the New York termination of parental rights statute. Thus, it is now clear that a state must prove its allegations against a parent by at least clear and convincing evidence. Query whether this means that an agency must prove that it made "diligent efforts" by clear and convincing evidence.

260. *See, e.g., Jonathan*, 415 A.2d 1036 (R.I. 1980).

261. *See, e.g., Robert H.*, 118 N.H. 713, 393 A.2d 1387 (1978).