1982

Standard of Proof in Proceedings to Terminate Parental Rights

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I. INTRODUCTION

T HE FAMILY HAS LONG BEEN RECOGNIZED AT LAW as the basic unit of society.¹ Under certain circumstances, the state must alter the struc-

* The author wishes to acknowledge the conscientious assistance of Professor Robert J. Willey of the Cleveland-Marshall College of Law, Cleveland State University, and of Ms. Enid L. Zafran, Esq., Cleveland State Law Review Editor, 1981-82.

ture of the family by terminating the parents' rights to the custody and control of their children. When doing so, the state must recognize what

Families, 431 U.S. 816 (1977) (upholding some due process rights for foster parents); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion) (zoning ordinance which narrowly defined family as excluding appellant's grandson deprived appellant of liberty); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) (mandatory maternity leave rule held to violate due process); Roe v. Wade, 410 U.S. 113 (1973) (Texas criminal abortion statute held to violate due process); Stanley v. Illinois, 405 U.S. 645 (1972) (where parents had raised children together a statute presuming unwed father was unfit parent violates equal protection); Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute making it a felony to give contraceptive devices to unmarried person held to violate equal protection clause); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish protected by free exercise clause of first amendment from compulsory school attendance statute); Loving v. Virginia, 388 U.S. 1 (1967) (anti-miscegenation statutory scheme held to violate equal protection and due process clauses); Griswold v. Connecticut, 381 U.S. 479 (1965) (statute forbidding use of contraceptives violates right to marital privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (statute providing for mandatory sterilization of habitual criminals violates basic right to marry and procreate); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state statute mandating public school education for all children unconstitutional as it deprived parents of educational choice); Meyer v. Nebraska, 262 U.S. 390 (1923) (statute forbidding the teaching of subjects in a language other than English deprives parents of right of choice in child's instruction). The Supreme Court has become increasingly involved in the family area. See Burt, The Constitution of The Family, 1979 SUP. CT. REV. 329, which states:

Family relations have become a substantial part of the Supreme Court's constitutional concerns. In the 1978 Term alone, the Court addressed the constitutional rights of pregnant children to obtain abortions without parental consent, of illegitimate children to intestate inheritance under state law, of fathers to bar adoption of their illegitimate children, of mothers to obtain federal Social Security support for their illegitimate children, and of husbands to equal claims to alimony from their wives in divorce proceedings.

Id. at 329 (footnotes omitted).

A termination proceeding allows the state to intervene by removing the child from the custody of the parents and placing the child in an environment which should provide more security and safety.

The termination proceeding, therefore, is an essential legal mechanism for assuring to a child his right to a "psychological parent", in cases where his natural parent has failed to establish a loving and caring relationship. While this need of the child to remain with the psychological parent lacks the venerable legal credentials of the natural parent's hereditary right to the child, it is an interest that is being increasingly considered and recognized by the courts.

Ketcham & Babcock, Statutory Standards for the Involuntary Termination of Parental Rights, 29 RUTGERS L. REV. 530, 537 (1976) (footnote omitted). For a discussion of alternatives that still provide the child with contact with the natural family see Derdeyn, Rogoff & Williams, Alternatives to Absolute Termination of Parental Rights After Long-Term Foster Care, 31 VAND. L. REV. 1165 (1968), where the authors argue that, "The absoluteness of termination of parental rights can in some instances be modified to afford stability to the foster or adoptive family, without necessarily costing the child continuity with his or her biological family."

Id. at 1188.
has been termed the fundamental right of family integrity as derived from the due process clause of the fourteenth amendment. Additionally, the state must recognize its duty to provide services to its dependent, neglected, abandoned and abused children, who have a right to live in an environment where they may grow and develop without serious harm being inflicted upon them by their parents.

3 See Note, The Right To Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings, 68 GEO. L.J. 213, 214 (1979) [hereinafter cited as Family Integrity], which states:

A series of Supreme Court decisions dating from the early part of this century indicates that various rights incident to establishing and maintaining family are basic to our society. Members to our society are afforded the constitutional right to marry, to procreate, to decide whether or not to bear or beget a child, to direct the upbringing of the children, and to choose family living arrangements. These decisions of the Supreme Court suggest that, in addition to the specific individual rights of parents, the Constitution protects the right of the family as a unit to be free from arbitrary state interference. Indeed several lower federal courts have explicitly recognized the existence of a fundamental right to family integrity.

Id. at 213-14 (footnotes omitted). See, e.g., Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976) where the court found that "[p]arents have a fundamental right to family integrity." Id. at 15.

The fundamental right of family integrity focuses on the parental rights to custody and control of their children and has been supported by the due process clause of the fourteenth amendment. Stanley v. Illinois, 405 U.S. 645 (1972). "The states right—indeed, duty—to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged here." Id. at 649. See Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976). "It cannot seriously be disputed that the state seeks to further a legitimate state interest when it sets out to protect the welfare of its citizens of tender age." Id. at 22. See also Note, Involuntary Termination of Parental Rights: The Need For Clear and Convincing Evidence, 29 AM. U.L. REV. 771 (1980) [hereinafter cited as Clear and Convincing] (state has special interest in children as they are vulnerable. Id. at 777); Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 STAN. L. REV. 985 (1975) [hereinafter cited as Realistic Standards] (state has an obligation to protect children where parents are inadequate. Id. at 989); Family Integrity, supra, at 216 (state intervenes as a result of its parens patriae authority over children).

4 The state may provide other forms of intervention when it determines that the parental rights need not be terminated. See Clear and Convincing, supra note 3, at 771-72. Child abuse and neglect has become increasingly more disconcerting to scholars as well as to the general public. In order to effectuate the state obligation to care for its children in need, all states have enacted neglect statutes. See Katz, Howe & McGath, Child Neglect Laws in America 9 FAM. L.Q. 1 (1975) (a catalog of these statutes and tables highlighting differences).

It is beyond the purpose of the Note to examine the differences existing among neglect and termination statutes. The issues to be addressed by this Note relate to permanent, not temporary, custody proceedings, for it is in permanent termination proceedings that a parent's rights are forever severed.

The state may attempt to provide therapeutic or other aid to the family prior to termination. See Note, Child Maltreatment: An Overview of Current Approaches, 18 J. FAM. L. 115 (1979), where the author states:
Whenever the state petitions for permanent custody of a child, it is the responsibility of the court to reconcile properly the fundamental right of family integrity with the state's duty to care for its children in need. For the court to grant a petition for permanent custody it must order that the parental rights be permanently terminated. This order ends the parent-child relationship and frees the child for possible adoption. Courts exercise much caution when granting an order for permanent termination because of the irreversible nature of the order. The permanent termination proceeding is governed by state statutes which control the

All states support child protective services to help families with problems that effect the ability to act as a proper parent. Protective services focus on rehabilitation and treatment of the conditions which motivate maltreatment and aim to effect constructive change within the family, and thereby improves the child’s environment. Thus, the child protective services agency has several responsibilities: (1) to intervene when apparent child maltreatment occurs; (2) to investigate and determine facts; (3) to assess the harm and future risk to the child; and (4) “to initiate appropriate services to remedy the situation.”

Id. at 137 (footnotes omitted). But see Note, Parent and Child—Duty of the State to Provide Supportive Services to a Parent Before Terminating the Parent’s Rights, 14 J. Fam. L. 341 (1975) (state not obligated to provide support services to parent before terminating parental rights).

The focus of the state once the parental rights have been terminated will be to locate a stable environment for the child. An adoptive setting would certainly be preferred; however, some children are destined to spend their childhood and adolescence in foster care or institutional placements. See Ketcham & Babcock, supra note 2.

An order for the permanent termination of parental rights is an extreme remedy. It is always hoped that the child will be placed in an environment which will prove to be more secure and consistent than the one from which he has been removed. For a discussion of the rationale for termination see Ketcham & Babcock, supra note 2, at 537-43.

Id. at 543.

See 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 Termination of Parental Rights, 28 STAN. L. REV. 623 (1976) [hereinafter cited as State Intervention].

When parental rights are terminated, the parent loses not only physical custody but also the right to ever regaining custody. Depending on the specific statutory schemes, which vary significantly, the issue of termination can arise in three different types of proceedings: (a) in the dispositional phase of a neglect proceeding; (b) in an adoption proceeding where the issue is whether the natural parent has to consent to the adoption; and (c) in a special hearing at which termination is the only issue. Proceedings under (a) can occur only in conjunction with a finding of neglect, whereas type (b) and (c) proceedings require no prior adjudication of neglect.

numerous factors courts must consider when granting an order for permanent termination.

All states have enacted statutes relating to child abuse, neglect, dependency, abandonment and the termination of parental rights. These statutes require the reporting, to local officials, of child abuse, a very serious problem which can lead to the termination of parental rights. Termination of parental rights statutes also provide guidelines for what the state must prove in order for the court to grant the state's petition for custody. In addition, these statutes usually provide for a certain standard of proof which the state must bear. The court cannot order a termination of parental rights if the state fails to meet the statutory or judicially adopted standard of proof.

Prior to Santosky v. Kramer, decided by the United States Supreme Court on March 24, 1982, three standards of proof were considered appropriate by state legislatures: preponderance of the evidence, clear and convincing evidence, and evidence convincing beyond a reasonable doubt. The decision in Santosky mandates that states use at least clear and convincing evidence as the standard of proof in proceedings to permanently terminate parental rights.

This Note advocates the use of the beyond-a-reasonable-doubt standard of proof in proceedings to terminate parental rights permanently. The Note will commence with background considerations such as the authority of the state to terminate parental rights, the rights of the parties involved in a termination proceeding and a discussion of standards of proof. Consideration will also be given to the factors which should have an impact on the standard of proof in permanent termination proceedings. These factors include: the vagueness of termination statutes, the fundamental right of family integrity, the broad discretionary powers of the courts involved, the need for human service agencies to focus on serving the family as a unit and the symbolic value of the standard of proof. The argument will be made that the use of the beyond-a-reasonable-doubt standard in these proceedings is appropriate given the interests involved, the needs of the child and the realities of what can be called the termination system.

9 For an overview of these statutes, see Katz, Howe & McGrath, supra note 4.
11 See generally Katz, Howe & McGrath, supra note 4.
12 455 U.S. 745 (1982). Santosky dealt with the New York termination statute, and provided the Court with its first opportunity to determine the appropriate standard of proof in termination proceedings. The Court held that at least clear and convincing evidence must be offered to support the termination petition. Dissenting, Justice Rhenquist, joined by Justices White and O'Connor, and Chief Justice Burger, argued that the case dealt with the area of family law, an area traditionally left to the states. Id. at 770-91.
13 Id. at 768-70.
II. State Authority

A. Historical Overview

In the 1700's, legal scholars in the United States developed theories to support the termination of parental rights through state intervention in family matters.\textsuperscript{14} One theory advocated the use of \textit{parens patriae} authority. Literally, \textit{parens patriae} means "parent of the country."\textsuperscript{15} It is a doctrine with roots in English common law that date back to feudal times.\textsuperscript{16} The early application of state authority under this doctrine involved state aid to the poor.\textsuperscript{17} Later, the needs of destitute children were addressed by the state through the rationale of \textit{parens patriae}, which was broadened to include the protection of both infants and needy citizens.\textsuperscript{18}

Another theory for state intervention in the family has been found in the state's police power.\textsuperscript{19} This is the foundation of state authority to provide for the general welfare of all of its citizens, particularly the impoverished, the elderly and minors.\textsuperscript{20} Under this power the legislature is enabled to create guidelines for the protection of these groups. Unlike \textit{parens patriae}, a power inherent in the King's status, the police powers of a democratic state come from the people themselves. Regardless of the rationale relied upon, the state legislatures of the latter nineteenth century were pressured increasingly by social reformers and concerned citizens to enact legislation providing for increased governmental involvement in the affairs of children.\textsuperscript{21} These reformers desired intervention in the family in order for the state to protect the "best interest" of the child.\textsuperscript{22}


Our society because of cultural ethnocentrism and an unwillingness to admit that poor people were entitled to full citizenship, continued to derogate children's right to liberty and parent's right to custody. By calling the statutes "protective" and by borrowing the idea of \textit{parens patriae} the reformers were able to state their task elegantly and to dazzle many observers . . . there is more than a little irony in my use of the words "protective" and \textit{parens patriae}.

\textsuperscript{15} Id. at 205. See also Cogan, \textit{Juvenile Law Before and After the Entrance of Parens Patriae}, 22 S.C.L. REV. 147 (1970).

\textsuperscript{16} For a discussion of the origins of \textit{parens patriae} and a critique of its misuse in the termination area, see Rendleman, supra note 14.

\textsuperscript{17} Id. at 205.

\textsuperscript{18} Id. at 210-11.

\textsuperscript{19} Id. at 223-39.

\textsuperscript{20} Id. at 257. For a critique of the way the state's police power was used, see id. at 257-59.

\textsuperscript{21} For the powers of the state to regulate these classes of people were expanded gradually. These powers were used primarily to regulate the poor and their children. \textit{Id.} at 223-39.

\textsuperscript{22} Id. at 229-44.

While the precise origin of the best-interests standard for state intervention is unclear, it seems to have had its beginnings in English common law. An early example of its use can be found in Blissets case, where Lord Mansfield, adjudicating a custody dispute, declared that if "the parties [disagree] the court will do what shall appear best for the child." This standard provides for a great deal of court discretion. The standard's strength is that it affords courts an opportunity to consider whatever they deem appropriate when determining what a child needs for his protection and care. At a time when social reformers were lobbying for legislation to protect children, the best-interests guideline for court action quickly gained universal acceptance.

The first Juvenile Court, founded in Cook County, Chicago in 1899, represented a union of the theories for state intervention and the social reformer's concerns that children needed special protection. In order to provide adequately for, rather than punish, destitute children, the philosophy of the court stressed the need for both broad discretionary powers to properly adjudicate juvenile actions and the need for limited procedural protections. Critics found reasons to attack the court and its underlying rationale.

B. Modern Concerns

The parens patriae doctrine has been criticized by both scholars and courts. The broad governmental powers arising from it have been used discriminatorily against the poor, whom the doctrine was originally designed to assist. Legislation for children has been used to deprive children of their liberty and parents of their custody rights. While the

23 98 Eng. Rep. 899 (Ch. 1774).
24 Id. at 899.
25 For an indication of the modern use of this standard see Katz, Howe & McGrath, supra note 4, at 66-69. The best interest standard serves to direct the court's attention to the child and away from the parent's right to custody and control.
26 Rendleman, supra note 14, at 256-59.
27 The extent of procedural protection varied widely, however, given the broad statutory language and the lack of resources available to the impoverished, the litigation over this lack of protections was minimal. Id. at 245-47.
28 Rendleman, supra note 14, at 257. "Acting under the police power to regulate and camouflaging its action by chanting parens patriae, the state assumed the power to dissolve . . . the ties between impoverished parents and their children. . . . [I]t is wrong to say that there was any flexibility or balancing of interests in making these decisions." Id. See also Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976).
29 Rendleman, supra note 14, at 257-59.
30 This results from the broad powers enjoyed by the state under parens patriae. See Day, Termination of Parental Rights Statutes And The Void for Vagueness Doctrine: A Successful Attack On The Parens Patriae Rationale, 16 J. Fam. L. 213 (1978). The author discusses Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976) (per curiam) as a successful
state has a duty to care for its dependent, neglected, abandoned and abused children, those advocating the modern trend towards parental autonomy argue that the parens patriae power is too often used in situations where state interference should be kept to a minimum.\(^{31}\)

Courts have rejected the underlying rationale for parens patriae authority.\(^{32}\) Although the state may need a degree of flexibility and discretion when deciding how to best provide for a juvenile in a termination proceeding, there are recognized limits to the exercise of this discretion. The due process clause of the fourteenth amendment provides such a restriction by mandating strong consideration of the fundamental right of family integrity before a court may terminate parental rights.\(^{33}\) An additional argument for limiting the state's intervention in family affairs is based on the lack of evidence supporting beneficial results after state interference.\(^{34}\) The modern approach to termination proceedings focuses essentially on a balancing of the state's, parents' and child's interests.\(^{35}\) This focus constricts the discretion allowed under the parens patriae doctrine and the state's police power. Scholars have criticized the use of these powers because they do not provide a proper balancing of interests.\(^{36}\)

While the best-interests-of-the-child standard provides the proper focus for a termination decision, it has also been arguably subject to arbitrary use. This standard does not clearly indicate the weight the court should apply to factors involved in a decision to terminate.\(^{37}\) A court should not conclude simply that the termination of parental rights is in the child's best interest and then proceed to substitute that judgment for a reasoned analysis of the interests involved.

challenge to the parens patriae rationale due to the vague termination statute involved. The court in Alsager limited the breadth of the state's power by determining that a statute as broad as the one involved could lead to arbitrary decision-making in termination proceedings. But see State v. McMaster, 259 Or. 251, 486 P.2d 567 (1971) (termination statute upheld against vagueness challenge because of the need for broad parens patriae authority). For a critique of the best interest standard and its potential for arbitrary usage see J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973).

\(^{31}\) Realistic Standards, supra note 3, at 989.

\(^{32}\) See Day, supra note 30.

\(^{33}\) Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976).

\(^{34}\) Realistic Standards, supra note 3, at 999.

\(^{35}\) See infra notes 68-83 and accompanying text.

\(^{36}\) See Family Integrity, supra note 3. "Vague statutory standards for removal and low standards of evidentiary proof combine to maximize judicial discretion and minimize substantive protection." Id. at 228. See also In re La Rue, 244 Pa. Super. 218, 336 A.2d 1271 (1976) (best interest standard does not provide sufficient guideline to prevent arbitrary decisions).

\(^{37}\) The standard is interpreted broadly in order to maximize judicial discretion. It is this discretion which causes the most concern among scholars. For a discussion of the need for specificity in determining children's needs see Realistic Standards, supra note 3.
Whether the decision to terminate is based on the use of *parens patriae*, police power or the state's obligation to the child's best interests, the critique of these rationales is the same. While their intent is well-meaning, in practice they provide so much discretion that the interest of the parent may be regarded too lightly. The modern focus on interest balancing and the call for more specificity in termination statutes are direct results of the recognized potential for arbitrary terminations under the broad state authority of the past.

What has remained from the past is legitimate concern for what will benefit the child. What has changed is the strength of the presumption that the child's best interest is served by remaining with his parents. As a fundamental right of family integrity has been acknowledged, the strength of this presumption has increased. The interest-balancing approach continues to acknowledge a state's obligation to care for children but also provides for a reasoned analysis of the parents' interests.

In *Santosky v. Kramer*, the Supreme Court was concerned about the entire process of termination of parental rights. No one doubts the need for state action in certain situations but, because there are fundamental rights at stake, the Court could not allow the termination scheme in *Santosky* to stand unchecked through the use of a low standard of proof. A low standard of proof in these proceedings would only exacerbate the potential for a misuse of state power. Other factors causing concern to the Court included: the state agency's ability to shape the "historical events that form the basis for termination"; vast differences in "litigation resources" between parents and the state; no possible double jeopardy defense available to parents if a termination attempt fails; and parental inability to "forestall future termination" attempts, by the state, if the parents do improve their situation after an initial termination attempt.

A primary thrust of the *Santosky* Court's concerns was the lack of parental resources to fend off a permanent attempt by the state. This is not

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39 Id. at 765-70.
40 Id. at 763, 763 n.13.
41 Id. at 762-64. The respondent State of New York had argued that the standard of proof should not be isolated for the Court's review. They wanted their termination procedures perceived as a "package." Id. at 757 n.9. The Court majority refused to do so because of the number of factors which give the state an advantage in the decisionmaking process, and because: "Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard." Id. at 757.
42 Ketcham & Babcock, *supra* note 2, at 532 (footnotes omitted). The termination proceeding has, as a primary goal, the purpose of ensuring a psychological parent for the child. This ensures continuity in the upbringing of the child and the existence of a stable relationship through which the child is properly socialized. For a discussion of the recommendation that termination orders should be interlocutory and should be rescinded if a stable environment is not found for the child see *id.* at 550-55.
to imply that the Court was not concerned with the rights of the state or of the child. The rights of the parties to a termination proceeding have been the subject of many court opinions and scholarly works. The next Section of this Note analyzes the rights of parents, child and state. The proper balancing of these interests creates a major challenge in a termination decision.

III. The Rights of the Involved Parties

A. Parental Rights

No one seems to be able to agree on a suitable legal explanation of a biological parent’s rights in his child. In the nineteenth century, these rights were likened to property rights, with the child having the status of chattel. Such an analysis seems to have been discarded in this century. The right has also been likened to a trust relationship, conferred by natural law on the biological parent but revocable by the state in certain circumstances. More recently, a parent’s relationship to his child has been conceived of as a compact, with the parent’s rights balanced against certain obligations owed to the child.42

The conceptualization of the parent-child relationship has changed dramatically since the early belief that the child was property. The clearest evidence of this change has been the increased recognition of the child’s rights vis-a-vis the parents.43 However, despite increased recognition of the child’s legal interests, the rights of parents remain strong. Their rights coexist with responsibilities owed to the child.44 Parental rights include: control over living standards, custody of children, control of education, control over inheritance, control over children’s behavior and others.45

The Supreme Court has looked increasingly at the family institution to determine other parental rights and obligations.46 While these rights are deemed important, they are not absolute.47 The state moves to take custody away from the parents when parental obligations have not been properly met.48 This is particularly true when parents violate their right to custody and control by failing in their obligation to provide a safe liv-


43 The Supreme Court has increasingly looked at the nature of these rights and responsibilities. See Burt, supra note 1.

44 Id. at 329.

45 See Burt, supra note 1.


47 Family Law, supra note 47, at 561.
ing environment for the child.49 Such a parental failure results in the state
taking custody. For example, in In re D.L.H.,50 the Supreme Court of
Nebraska upheld the termination of parental rights where the mother
exhibited long-standing alcohol and mental illness problems51 which were
unlikely to subside. The mother’s illness made it impossible for her to
fulfill her parental responsibilities.52 While the court held the mother's
right to custody to be a natural one, it is "not an inalienable right and
the public has a paramount interest in the protection of the rights of a
child."53

In termination proceedings the state must penetrate parental rights
and the fundamental right of family integrity which is protected by the
due process54 and equal protection55 clauses of the fourteenth and ninth
amendments.56 The Supreme Court has determined that these rights
deserve strong protection.57 Despite this need for strong protections, the
Court has not guaranteed the right to counsel for parents in civil pro-
ceedings where child neglect is the primary issue.58 A determination that

49 Burt, supra note 1, at 338.
50 198 Neb. 444, 253 N.W.2d 283 (1977). In D.L.H. the mother was appealing
an order for permanent termination of her parental rights. The court upheld the
order due to her habitual use of intoxicating substances and long history of men-
tal illness.
51 Id. at 446, 253 N.W.2d at 285.
52 Id. at 451, 253 N.W.2d at 287.
53 Id. at 447-48, 253 N.W.2d at 285 (citing State v. Tibbs, 197 Neb. 236, 248
N.W.2d 230 (1976)).
54 See, e.g., Myer v. Nebraska, 262 U.S. 390 (1923) (prohibition of the teaching
of foreign languages violated due process liberty rights of parents and children).
55 See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942) (involuntary compulsory
sterilization violated equal protection).
56 See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (fourteenth and ninth
amendments imply a fundamental right of privacy in married couples vis-a-vis
child-bearing decisions).
57 See supra note 1 and accompanying text.
58 In Lassiter v. Department of Social Servs., 425 U.S. 18 (1981), the Supreme
Court determined that appointed counsel was not required for every indigent
parent involved in a termination proceeding. It was noted, however, that the fact
that process is due a parent, in a termination proceeding, was not disputed by
the parties. The parents’ rights do deserve strong protections. In Santosky, the
court stated:

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. Even when blood relationships are strained,
parents retain a vital interest in preventing the irretrievable destruc-
tion of their family life. If anything, persons faced with forced dissolu-
tion of their parental rights have a more critical need for protection than
do those resisting state intervention into ongoing family affairs.
455 U.S. at 753.

Some situations involve such important potential consequences that the
a child is neglected can lead to a petition for permanent custody and the subsequent termination of parental rights; yet these initial proceedings lack basic safeguards which could be determinative in later, more critical proceedings.

Parental rights are strongly and deeply rooted in American tradition. Because of this belief, courts presume that the best place for the child is with his parents. However, this presumption is rebuttable. Every state has enacted legislation which, in effect, describes when this presumption may be overcome. These statutes describe the circumstances which must exist before the state may remove the child from the family. These circumstances are categorized in terms such as “neglect,” “dependency,” “abuse” or “abandonment.” Some evidence points to parental control of the child as the determinative issue in a termination decision. Under this theory, courts will more frequently allow state intervention in the family when they perceive that the parental right of control is being exercised improperly. Courts that order a termination of parental rights generally focus on the conduct of parents and the best interests of the child. Some scholars have called for courts to focus on the specific harms the child may suffer if he remains in the home rather than on parental behavior. This emphasis on “harms,” it is argued, would ensure more strongly that parental rights are not arbitrarily terminated and would allow the courts

Supreme Court has determined that the right to counsel must exist. This right exists in proceedings to determine delinquency. In re Gault, 387 U.S. 1 (1967). The fact that liberty interests are at stake in other juvenile proceedings has not resulted in a determination of the existence of the right to counsel. For a discussion of the lack of procedural and other safeguards in juvenile actions where delinquency and other adjudications are at issue, see Note, Juvenile Delinquent and Unruly Proceedings in Ohio: Unconstitutional Adjudications, 24 CLEV. ST. L. REV. 602 (1975).

60 Family Law, supra note 47, at 561.
61 Id. at 562.
62 For a survey of the child neglect statutes in all 50 states see Katz, Howe & McGrath, supra note 4. The termination of parental rights is an extreme remedy. It is ordered only after a close examination of all relevant facts and circumstances. Basky, supra note 8, at 4.
63 See Katz, Howe & McGrath, supra note 4.
64 Id.
65 Burt, supra note 1.
But when parents in fact fail to control their child, then their authority no longer commands respect in principle. Parents whose effective authority has failed can rehabilitate themselves and their claim to constitutionally mandated respect only by invoking some extrafamilial authority to buttress their weakened force—a psychiatrist who will institutionalize their child, a teacher who will paddle their child, a judge who will rule their child.
66 See, e.g., Realistic Standards, supra note 3, at 1004-36.
to focus on the child's right to live in a safe environment. Presently, judicial consideration of termination of parental rights involves a balancing of the interests of parent, child and the state.

B. The Rights of the Child

In the past 100 years, children's rights have undergone a dramatic change. For example, in the child custody area the trend is toward giving children a voice in deciding with whom they will live. For purposes of termination analysis, the child's rights must be examined vis-a-vis the parents' rights. In termination proceedings, these rights are balanced.

With the rise of the juvenile court movement, the focus on the child's best interests has become paramount. The child has a right to live in an environment which provides a consistent, loving relationship in order to develop as a productive adult. The court's focus on the child's needs ensures that the child can have such an environment even if he must be removed from his home to a foster placement or adoptive setting. The best-interests guideline provides a broad discretion to a court making such a decision. Arguably, this discretion is needed to protect the child's rights. However, the best-interests standard has been criticized as creating too great a potential for arbitrary termination decisions. Those advocating a constriction of the discretion allowed under this standard have advanced essentially two approaches to the problem: (1) the creation of stricter standards of proof for termination decisions, and (2) enacting less vague termination statutes which focus on the serious injuries a child may suffer

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67 Id. at 990-95.
If the focus of termination statutes was on harms to the child as opposed to parental conduct we would still be addressing the child's needs. To approach the problem from the standpoint of parental behavior has the effect of closely regulating child rearing patterns, when diversity in these patterns should be protected.

Id. at 993. For a discussion of the child's need for a continuous loving relationship, see Ketcham & Babcock, supra note 2.


69 Id. at 157.


71 Ketcham & Babcock, supra note 2, at 537.

72 Id. at 536-40.


74 It has been suggested that a best-interest standard improperly allows a judge or a social worker to make judgments based on personal feelings and values. In re La Rue, 244 Pa. Super. 218, 220-24, 366 A.2d 1271, 1274-76 (1976).

75 See Clear and Convincing, supra note 3.
in an inappropriate family environment rather than on parental conduct.\textsuperscript{76}

Neither of these alternatives specifically rejects the idea that the child's best interests should be considered. However, both would limit the discretionary powers of the court when granting an order for permanent termination. The concern for limiting the discretion in the current termination system does not indicate that the child's rights are becoming less important. Rather, these alternatives stress the modern concerns with safeguarding the right of the child to remain with his parents,\textsuperscript{77} and with providing more procedural protections for the juvenile law system as a whole.\textsuperscript{78}

The modern termination proceeding is viewed as a balancing of the rights and interests involved.\textsuperscript{79} This balancing places different emphasis on the rights of the parent and child in different jurisdictions.\textsuperscript{80} One factor which plays a role in determining how much weight is given to the rights of parent or child is the standard of proof required for termination. All things being equal, when the standard of proof is high it is generally believed that the court is weighing the parents' interest more heavily than the child's.\textsuperscript{81} Because this is a balancing of interests, the converse is also true.

The criticisms of the modern termination system have included concern over the vagueness of termination statutes and the low standards of proof. Given these features of the termination proceeding, even a proper balancing of interests, alone, may not reduce the potential for erroneous decisions.\textsuperscript{82} This is disconcerting to those focusing on the fundamental right of family integrity.\textsuperscript{83} Regardless of which argument is used, however, the state can never ignore its legitimate interest in protecting its children.

C. The State's Interest

The state must be concerned with the welfare of its citizens, including children who, because of their very status, are vulnerable\textsuperscript{84} and who

\textsuperscript{76} See Realistic Standards, supra note 3.


\textsuperscript{78} See, e.g., In re Winship, 397 U.S. 358 (1970); In re Gault, 387 U.S. 1 (1967).

\textsuperscript{79} Clear and Convincing, supra note 3, at 797-99.

\textsuperscript{80} The balancing of interests accords different weights to such elements as parental right to custody and child's right to live in a safe environment. Id.

\textsuperscript{81} Id.

\textsuperscript{82} There are other features of the termination system which should be included in the balancing to arrive at the proper standard of proof. See generally Realistic Standards, supra note 3. See also Ketcham & Babcock, supra note 2.

\textsuperscript{83} See supra note 1 and accompanying text.

\textsuperscript{84} Prince v. Massachusetts, 321 U.S. 158 (1944).
deserve special attention from the state. As a result, all states provide protective services to children and require the mandatory reporting of child abuse. When less intrusive methods fail or when the child is in need of a safer environment, the state may attempt to remove the child from the parents. If temporary custody is taken, the state will place the child in a foster care situation or in an institution. During this time, the responsible state agency will evaluate the family for improvements in its home situation. When improvement is observed, the child may be returned.

The most drastic remedy sought by the state is permanent custody which allows the state to seek an adoptive setting for the child. In order to take permanent custody, the state must petition the court for permanent termination of parental rights. All states have statutes relating to termination.

While the state interest is certainly legitimate, the ease with which the state can intervene in the family has been suspect. Much has been said regarding the authority of the state to effectuate its interests in children. Some legal writers have advocated a constriction of this authority. It is generally perceived that the state's intrusion into the family, where the standard of proof required to terminate parental rights is high, is more limited than when the standard is low. In a termination proceeding, the state must prove, under a certain statutory or judicially adopted standard of proof, that the petition for termination should be granted. The higher the standard of proof, the more difficult it is for the state to prove its case. Hence, the likelihood increases that the state's petition for termination will not be granted. In other words, a higher standard of proof should result in fewer terminations of the parent-child relationship. Thus, the standard of proof which the state must meet in

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65 See Note, Child Maltreatment: An Overview of Current Approaches, 18 J. Fam. L. 115 (1979). These services focus on the treatment of the situations from which maltreatment of the child results. The aim of the services is to change the family environment. Id. at 137.


67 For an overview of issues relating to temporary custody, see Realistic Standards, supra note 3.

68 Ketcham & Babcock, supra note 2, at 543.

69 Katz, Howe & McGrath, supra note 4 (for an overview of statutes of this type).

70 See, e.g., Clear and Convincing, supra note 3; Realistic Standards, supra note 3; State Intervention, supra note 8.

71 See supra notes 14-41 and accompanying text.

72 See Realistic Standards, supra note 3, at 987.

73 The state's ability to intervene in the family is limited by the procedural protections afforded the parents. The standard of proof is one of these protections. See Clear and Convincing, supra note 3, at 798-99. See also Santosky v. Kramer, 455 U.S. 745, 754-55 (1982).
a termination action directly affects the rights and interests of all involved parties.

Prior to *Santosky v. Kramer*, three standards of proof were permitted in termination proceedings: a preponderance of the evidence, clear and convincing evidence and evidence beyond a reasonable doubt. The *Santosky* decision provides that at least clear and convincing evidence must be used in a termination proceeding. This Note will examine the application of all three standards in order to provide at least some examples of judicial use of these standards. Although the preponderance standard is no longer constitutionally permissible, some examples of its use have been incorporated into the analysis in order to demonstrate the inherent problems with the use of this standard. Furthermore, the examples of the use of the preponderance standard underscore the need for procedural protections in termination proceedings and assist in understanding *Santosky v. Kramer*.

**IV. STANDARD OF PROOF**

The state must prove certain facts or circumstances before it can terminate parental rights. These vary from state to state, as does the standard of proof necessary to carry its burden. A distinction must be drawn between what the state must show and how strongly it must be shown. In a discussion of the standard of proof the focus is on the strength

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95 In civil cases the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain. It is customary in this field to attempt to define the quality of persuasion necessary by an expression which unfortunately has no logical or conceptual correlation with the "beyond a reasonable doubt" of criminal cases; the phrase is that there must be a "preponderance of evidence" in favor of the defendant's proposition.
97 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 2496 (3d ed. 1940).
98 Addington v. Texas, 441 U.S. 418, 424 (1979). While the court required the use of clear and convincing evidence, it cautioned that the manner in which these various standards affect the decision-making process may be "unknowable." *Id.* at 424-25.
99 J. WIGMORE, supra note 95, at § 2497. The early formulations of this standard included such descriptions as "a clear impression" and "upon clear grounds." *Id.*
100 455 U.S. at 769-70. For a listing of the standards used in various jurisdictions prior to *Santosky*, see *id.* at 749 n.3.
101 The language of termination statutes is not uniform. These statutes address terms such as dependency, neglect, abandonment, etc. For a review of this language, see Katz, Howe & McGrath, supra note 4.
102 *Id.* at 32-33. While the preponderance standard is no longer a permissible one, this source is valuable for its presentation of the various phraseology used to describe a standard of proof.
of the state's case not on what the state is attempting to prove. The standard of proof represents an allocation of the risk of an erroneous decision to a given party.\textsuperscript{102} For example, in a civil action the preponderance-of-the-evidence standard is used because the risk of an erroneous decision is balanced evenly between the parties; it would be just as damaging to decide wrongly for the plaintiff as it would be to decide wrongly for the defendant. Moreover, the highest standard is used where the greatest potential for erroneous decision lies.

The preponderance-of-the-evidence standard is traditionally used in civil proceedings where the interests at stake may only be monetary.\textsuperscript{103} Where the consequences of the civil action may be more drastic, as in a proceeding for involuntary commitment to a mental hospital, the standard required may be higher\textsuperscript{104} and may also involve constitutional issues. When a fundamental right is at stake, the preponderance standard does not afford adequate protection.\textsuperscript{105}

The clear-and-convincing-evidence standard is considered an intermediate approach to balancing the interests involved in a civil action.\textsuperscript{106} In Tucker v. Marion County Department of Public Welfare,\textsuperscript{107} the court held that a permanent termination order was supported by a preponderance of the evidence.\textsuperscript{108} The mother and grandmother of the children had appealed the order and argued that the clear-and-convincing-evidence standard was the appropriate standard for termination proceedings.\textsuperscript{109} The court found that the use of that standard would provide too great a protection to parental rights and not enough protection to the child who could be returned to "a hostile, if not dangerous, family and home environment."\textsuperscript{110} by a mistaken termination decision. Despite the Tucker court's concern over the use of the clear-and-convincing-evidence standard, a number of states have determined that this stand-

\begin{footnotesize}
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\item Addington v. Texas, 441 U.S. 418 (1979) (clear and convincing evidence needed for involuntary commitment to a state hospital). Where society's interest in the outcome of a judicial proceeding is not great, a lesser standard is appropriate. The Addington court balanced the interests of the state and the individual to determine the appropriate standard. Id. at 425.
\item 441 U.S. at 423.
\item Id. at 424.
\item See Clear and Convincing, supra note 3, at 799 (family is not protected adequately through the use of preponderance standard in a termination proceeding).
\item 441 U.S. at 424. This standard of proof is probably the least understood. Id. at 425. It is used in some civil actions where the interests at stake are greater than monetary and involve a fundamental right. Clear and Convincing, supra note 3, at 794-95.
\item 408 N.E.2d 814 (Ind. App. 1980).
\item Id. at 819.
\item Id.
\item Id. at 820 (relying on Hernandez v. State ex rel. Arizona Dept. of Economic Soc., 23 Ariz. App. 32, 530 P.2d 389 (1975)).
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ard properly balances the interests in termination proceedings. For example, New Hampshire utilizes the clear-and-convincing standard when the state petitions for temporary custody, a less drastic remedy than permanent custody.

The most stringent standard of proof is the beyond-a-reasonable-doubt standard. This is the standard used in criminal proceedings due to the irretrievable loss of one’s liberty resulting from an incorrect decision. While all three standards of proof are used in proceedings to terminate parental rights permanently, the reasonable-doubt standard is used less frequently than the other two. Notably, it is the standard required under the Indian Child Welfare Act and in the states of New Hampshire and Louisiana.

Termination decisions present difficult and serious questions for the court. For example, in In re Cynthia K. the California Appellate Court described involuntary termination “as a drastic remedy which should be resorted to only in extreme cases of neglect or abandonment.” To determine the appropriate standard, a court must weigh not only the interests of the parties but also the practical aspects of proving the contentions of the state. While a court must consider the existence of a constitu-

111 See Santosky, 455 U.S. at 749 n.3 (for a listing of states using clear and convincing evidence in termination proceedings).

112 For a breakdown of state statutes governing temporary and permanent custody proceedings see Katz, Howe & McGrath, supra note 4.

113 J. Wigmore, supra note 95, at § 2497.


117 75 Cal. App. 3d 81, 141 Cal. Rptr. 875 (1977). The Cynthia K. court upheld an order for permanent termination of parental rights based on clear and convincing evidence. Because the issue of which standard should apply was not raised below, the appellate court would not hear the issue on appeal.

118 Id. at 84, 141 Cal. Rptr. at 877.

119 Addington v. Texas, 441 U.S. 418, 429 (1979). One of the concerns of the Addington court when deciding the proper standard of proof in civil commitment proceedings was the type of evidence used in these proceedings—psychological information, etc. The court stated that one of the mechanisms to ensure that an erroneous decision would be corrected would be the interest of concerned family members. Id. This reasoning could not be used in a permanent termination situation since family members lose the right to communicate with the child. Thus, the after-the-fact protection noted in Addington does not exist after a permanent termination proceeding.

In Santosky, the Court’s analysis of the appropriate procedures to be followed in a termination proceeding revolved around three factors described in Matthews v. Eldridge, 424 U.S. 319 (1976). These factors are: the private interests that are affected by the proceeding; the risk of an erroneous decision given the procedures used; and the government’s interest, including the fiscal strain placed on the government by adopting new procedures. Santosky, 455 U.S. at 332-35. The Santosky Court based its determination of the appropriate standard of proof on the
tionally protected right to family integrity, it must also be aware of the adverse effects on the child if it denies a necessary termination. The beyond-a-reasonable-doubt standard is preferable for termination proceedings, and it will be demonstrated in the following Section that this standard protects both the child's interests and the right of family integrity.

V. AN EXAMINATION OF THE BEYOND-A-REASONABLE-DOUBT STANDARD

A. Historical Overview

The beyond-a-reasonable-doubt standard appears to have emerged during the latter part of the 1700's. Originally, its definition resembled that used for clear and convincing evidence, but later descriptions such as "moral certainty" gave the standard a separate identity. Unlike the clear-and-convincing and preponderance-of-the-evidence standards, which focus on the quality of the evidence itself, the reasonable-doubt standard is characterized by the state of mind. There is no reason to believe that a clear description of this standard can be formulated since it has evaded clarification from the time of its inception.

In In re Welfare of Rosenbloom, the court specifically rejected the argument for the use of the reasonable-doubt standard in termination proceedings and held that clear and convincing evidence was appropriate. In its discussion of the reasonable-doubt standard, the court indicated that this standard is appropriate primarily for criminal actions because the potential loss of liberty and the stigma of conviction are such grave consequences. The Rosenbloom court did state, however, that the reasonable-doubt standard is desirable for certain civil actions which could result in a loss of liberty. In reaching its holding, the court did not address the fundamental right of family integrity nor did it speak to the

Matthews criteria: a broad base which encompasses the constitutionally protected interests of the parties as well as the practical problems in administering any set of procedures.

120 For a discussion of the need to focus on the specific harms a child may suffer if termination is not granted, see Realistic Standards, supra note 3.

121 J. Wigmore, supra note 95, at § 2497.

122 Id.

123 Id.

124 Id.

125 Id.

126 266 N.W.2d 888 (Minn. 1978). In Rosenbloom the court rejected the use of the reasonable doubt standard in permanent termination proceedings. The mother who appealed the termination order had argued that due process required the use of the highest standard. The court held that clear and convincing evidence was appropriate. Id. at 889-90.

127 Id. at 889.

128 Id.
fact that the termination of parental rights may be more offensive to
parents than a criminal sanction. 129 These factors should play a part in
the balancing of the interests when determining the appropriate stan-
dard of proof in a termination proceeding.

It has been stated that the reasonable-doubt standard should not be
used in termination proceedings because: (1) the evidence is, by nature,
subject to wide interpretation; (2) it would not protect the child's
interests; 131 and (3) it would place too heavy a burden on the state. 132 While
these reasons appear valid, they alone do not substantiate the failure of
the courts to accept this standard. 133 A compelling case can be made for
the use of the beyond-a-reasonable-doubt standard.

B. An Argument for the Use of the
Beyond-A-Reasonable-Doubt Standard of Proof

In In re Robert H., 134 the Supreme Court of New Hampshire adopted

129 See, e.g., In re Robert H., 118 N.H. 713, 393 A.2d 1387 (1978). In addition
to the impact on the parents, a permanent termination may be injurious to
the child even if the parents could be labelled as “bad.” State Intervention, supra
note 8, at 639-40.

130 See Clear and Convincing, supra note 3, at 787-88. Most courts and
legislatures have chosen not to use the reasonable doubt standard. Id.

131 Id. at 789.

132 Id. at 801.

133 The Santosky Court briefly discussed the beyond a reasonable doubt standard
and concluded that it placed too heavy a burden on the state to require the use
of this standard. 455 U.S. at 768-69. The Court's determination was based on con-
sideration of the types of evidence used in termination proceedings. Evidence
such as medical and psychiatric reports, and issues such as parental unfitness
come together in a termination proceeding. The Santosky Court determined that
the beyond a reasonable doubt standard was not appropriate for these issues.
Id. at 769. However, the court also stated cogently that the state has the power
to shape the “historical events that form the basis for termination.” Id. at 763.
“Furthermore, the primary witnesses at the hearing will be the agency's own
professional caseworkers whom the state has empowered both to investigate the
family situation and to testify against the parents.” Id. The impact of this testimony
cannot be underestimated. Despite the concededly difficult-to-prove issues in a
termination proceeding, courts have been able to find beyond a reasonable doubt
that a termination order should be granted.

The courts of several jurisdictions have found beyond a reasonable doubt that
a termination order should be granted despite the fact that this standard was
not statutorily required. See, e.g., Robinson v. People ex rel. Zollinger, 173 Colo.
113, 476 P.2d (1970) (trial court found evidence in favor of termination supported
beyond a reasonable doubt); Coffey v. Department of Social Servs., 41 Md. App.
340, 397 A.2d 239 (1979) (chancellor found beyond a reasonable doubt that ter-
mination was in child's best interest and that parental visitation should be discon-
tinued); In re D.L.H., 198 Neb. 444, 253 N.W.2d 283 (1977) (beyond a reasonable
doubt that child's best interest was protected by termination); In re J.Z., 190
N.W.2d 27 (N.D. 1971) (trial court found beyond reasonable doubt that J.Z. had
suffered serious physical injury due to maltreatment by father).

the use of the beyond-a-reasonable-doubt standard of proof in proceedings to terminate parental rights. The state had petitioned for custody of Robert H.'s three children after he had failed to correct the situations which were causing problems in the family environment and which had led to the initial state action for temporary custody due to neglect. The court refused to allow the termination to stand. Robert H. apparently had spoken on only one occasion with his welfare caseworker since the Division of Welfare had designed a plan to help the family and prevent the termination. This caseworker had not contacted the family's prior caseworker. When the termination petition was filed, the caseworker was unaware of the health problems of Robert H. which contributed to his inability to maintain employment and to his family's problems. These flaws in the services provided to the parents contributed to the court's concern for protecting Robert H.'s family.

Focusing on the right of the parents to custody and care of their children, the court cited the New Hampshire Constitution as authority for the existence of these natural family rights. In addition, the court cited United States Supreme Court decisions establishing the fundamental right of family integrity and the protection afforded the family under the due process clause. The court's concern for the manner in which services were provided to the family, coupled with the fundamental rights involved, prompted the court to hold that the beyond-a-reasonable-doubt standard was the appropriate standard of proof for these proceedings. The Division of Welfare was instructed by the court to continue working with the family and that any further action to terminate would have to conform to this highest standard.

The Robert H. court was especially concerned about the drastic effect of the termination decision. It compared the gravity of the termination of parental rights with proceedings for involuntary commitment to a psychiatric facility and stated that the permanent termination "can be viewed as a sanction more severe than imprisonment." Termination was also described as a disposition more final "than voluntary commitment or delinquency proceedings." Another concern voiced by the court in-

135 Id. at 714, 393 A.2d at 1388.
136 Id. at 720, 393 A.2d at 1391.
137 Id. at 718, 393 A.2d at 1390.
138 Id. at 718, 393 A.2d at 1390.
139 "The New Hampshire Constitution, part I, article 2 states that 'all men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty . . . and . . . seeking and obtaining happiness.'" Id. at 715, 393 A.2d at 1388.
140 Id. at 715-16, 393 A.2d at 1388-89.
141 Id. at 720, 393 A.2d at 1391.
142 Id. at 720, 393 A.2d at 1391.
143 Id. at 716, 393 A.2d at 1389.
144 Id. at 716, 393 A.2d at 1389.
volved the class differential between caseworkers and their clients and the effect that this social inequality could have on decisions to terminate.\(^\text{145}\)

This same issue played a role in the passage of the Indian Child Welfare Act.\(^\text{146}\)

Other concerns that prompted Congress to pass the Act included: the break-up of Indian tribes and families by welfare agencies;\(^\text{147}\) the lack of understanding of Indian child-rearing patterns on the part of officials responsible for assisting Indian families;\(^\text{148}\) the frequency of permanent termination proceedings involving Indian parents;\(^\text{149}\) and the need to empower tribal communities with jurisdiction to resolve custody controversies within their community.\(^\text{150}\)

Indian parents suffered an inordinately large number of unnecessary terminations because courts believed that the children's best interests would be served by such action. However, many of the children taken from their Indian parents were raised in non-Indian families\(^\text{151}\) and suffered psychological trauma later in life\(^\text{152}\) as a result of being reared in a culturally foreign environment.

Certainly the same issues that Congress hoped to address by this Act can be found in society at large. Since the United States is comprised of various ethnic groups and economic levels, a variety of child-rearing patterns and lifestyles is present, some of which are destined to be viewed as too different to be acceptable. When an individual with authority to recommend termination confronts a pattern of child-rearing drastically different from his own background, he will be more likely to classify it as unacceptable. Some parents may lose the rights to custody and control of their children merely because they approach child-rearing differently. A lack of acceptance or understanding of a variety of child-rearing techniques on the part of welfare department employees can have disastrous results for the family.\(^\text{153}\)

Furthermore, this lack of understand-

\(^{145}\) *Id.* at 713, 393 A.2d at 1390.


\(^{147}\) Barsh, *supra* note 146, at 1287-92.

\(^{148}\) *Id.* at 1294-96.

\(^{149}\) See *id.* at 1289 (for a chart contrasting Indian foster care, placements and adoptions with those for non-Indian children).

\(^{150}\) Under the Act, tribes retain exclusive jurisdiction for children on the reservation. In situations where this jurisdiction is lost, the tribe may petition the government for return of jurisdiction. If the parents or tribe requests, a child custody proceeding may be transferred to a tribal court from a state court. See 25 U.S.C. § 1918 (Supp. III 1979).

\(^{151}\) Barsh, *supra* note 146, at 1290.

\(^{152}\) *Id.* at 1290-92.

ing creates bias which, when combined with the wide discretion of the courts in termination proceedings, can result in too many terminations under the guise of standards such as the "best interests of the child." Indeed, Congress discovered that the procedures and federal programs created to assist Indian families had caused the real problem.

Although the Act has been criticized for being vague and easy to circumvent, its purpose is clearly defensible. The problems facing the American Indian family could only be exacerbated by frequent terminations of parental rights. Courts interpreting the Act have focused on its purpose and procedural safeguards. In two cases recently decided by state courts, the court majority found the Act to be determinative, and in a third case a dissenting Chief Justice voiced strong disapproval of his colleagues' failure to apply the Act's standard.

The first of these cases, In re Welfare of Chosa, was heard by the Supreme Court of Minnesota in 1980. The court vacated a termination order and remanded the case for further proceedings subject to the Act. It ruled that parental rights could not be terminated without a showing that serious physical or emotional injury to the child would occur if he remained in the home. In this case, the child's mother refused to cooperate with the welfare agency and she was chemically dependent. The court stated that any further proceedings would "require that termination of parental rights of Indian children . . . be supported by evidence beyond a reasonable doubt." 

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155 Barsh, supra note 146, at 1294-96. Those working in these programs often lacked the training necessary to appreciate the differences in the child-rearing practices of Indian culture. For example, the Indian methods of disciplining children never rely on physical punishment. Also, the Indian parent does not supervise his children closely. These practices have been used as evidence against Indian parents in child neglect proceedings. Id. at 1295.

156 Id. at 1334-36.

157 290 N.W.2d 766 (Minn. 1980). The mother in Chosa was 15 years old at the time of the birth of her son. After a period of time living with her sister she began to show symptoms of chemical dependency. Her attempts to rehabilitate herself were unsuccessful. Her son, Anthony, was taken from her on an order for temporary custody. Eventually, an order for permanent termination was granted. The Supreme Court of Minnesota vacated the order because of the Act. Noting that Anthony's life had been fairly unstable since he was initially taken from his mother, the court stated that:

This resolution of the case will not adversely affect Anthony's welfare because further court proceedings could add little more to the disruption of Anthony's life than is presently occurring. However, we do express our desire that the proper authorities carefully monitor the situation and promptly seek termination of [the mother's] parental rights again if she is unable to meet the challenge of parenthood.

Id. at 769.

158 Id. at 767-79.

159 Id. at 769.
In the second case, E.A. v. State, the Supreme Court of Alaska decided in 1981 not to apply the Act retroactively. Chief Justice Rabinowitz, however, strongly dissented, advocating that the beyond-a-reasonable-doubt standard should apply regardless of the commencement date of the original action. He opined that the purpose of the Act should not be disregarded merely because of a procedural question and that the beyond-a-reasonable-doubt standard should be used.

Last, in In re Appeal in Pima County Juvenile Action, a case of first impression for the Arizona Court of Appeals, the termination order was reversed. The court noted that "[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." Custody in this case was returned to the mother because the state had failed to prove its case beyond a reasonable doubt.

The court in Robert H. and the courts interpreting the Indian Child Welfare Act were all addressing the child's needs and were all exceptionally hesitant to judicially alter the family structure. In Robert H. this hesitancy was due to the New Hampshire Constitution. Courts interpreting the Act were obliged, by a statutory mandate, to assume that the child's best interests would be served by his remaining at home. The ultimate protection afforded these families is found in the standard of proof required: beyond a reasonable doubt.

C. Vague Termination Statutes and Their Effect on Fundamental Rights

Apart from the statutory mandate of the Act and the constitutional considerations relied upon in Robert H., there are other reasons for using the highest standard of proof in proceedings to permanently terminate parental rights. One compelling reason is the broad scope of termination statutes.

The family is the foundation of society and as such deserves special protection from the intervention of the state. To this end, the right to family integrity, a fundamental right, has been developed through a series of Supreme Court decisions focusing on a wide range of issues relating

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160 623 P.2d 1210 (Alaska 1981). In E.A., the court upheld an order granting permanent termination. The mother and grandparents had appealed the order granted by the lower court. The order had been based on clear and convincing evidence, the appropriate standard at the time of the order. Id. at 1212.

161 Id. at 1216.


163 "The Act defines certain procedures to be followed in state court proceedings involving Indian children. These procedures protect the Indian parent or custodian from a moving party's abuse of either voluntary or involuntary placement procedures." Id. at 204, 635 P.2d at 189.

164 See Clear and Convincing, supra note 3, at 771.
to family law.165 Where a fundamental right exists, the Supreme Court will use the strict-scrutiny test to determine whether a state statute improperly infringes the exercise of the right.166 This test requires the state to have a compelling reason for interfering with the right and there must be no less drastic alternatives available.167

Wide discretionary state powers to terminate parental rights have come under increasing attack.168 While the state's interest in assisting families and children in need is laudable and would certainly be viewed by most as a necessary and proper exercise of state authority and power, the expression of this interest in termination statutes has been criticized for lack of specificity.169 Legal authorities critical of these statutes generally find fault with the broad discretion which prevades the entire termination system due to a lack of procedural protections and a lack of statutory focus on parental behavior rather than on the actual injury a child may suffer if he remains at home.170

The protections afforded the family become even more significant in an era when the right to family integrity is deemed "fundamental."

One approach to protecting this right would be the enactment of statutes which are neither vague nor seriously lacking in due process considerations. When determining whether a termination statute is vague, a court should look at whether the statute gives the parents adequate notice of the standards they must meet to retain custody of their children. The child's best interests are not at issue in a vagueness challenge.172 Even if the child's interests were at issue, they would be better served by a more specific and clearly written statute.173

165 See supra note 1 and accompanying text.
167 Id.
168 See, e.g., Realistic Standards, supra note 3; State Intervention, supra note 8; Barsh, supra note 146.
169 See Day, supra note 30.
170 Realistic Standards, supra note 3, at 1001.

The problems caused by statutory vagueness are intensified because the statutes permit intervention solely on the basis of parental conduct without requiring evidence of specific harms to children. Yet, all available evidence indicates that it is extremely difficult to correlate parental behavior or home conditions with specific harms to the child. In light of the significant harm that can result from intervention, it is essential that laws be drafted in a manner that assures that these factors be taken into consideration. . . .

Id. at 1002-03.
171 See generally Family Integrity, supra note 3. See also supra note 1 and accompanying text.
172 Vagueness Doctrine, supra note 166, at 359.
173 Id. The state may be unable to prove its case the first time it attempts
Alsager v. District Court of Polk County, Iowa\textsuperscript{174} provides an example of a court holding that a termination statute was vague. The federal district court agreed with the family that the state must prove harm to the children in excess of the harm to follow from termination in order to establish its “compelling interest.”\textsuperscript{175} In Alsager, the initial decision to remove all six children was made after a twenty minute visit to the home by a county probation officer.\textsuperscript{176} At the time of the visit only Mrs. Alsager and the youngest child were present.\textsuperscript{177} The county petitioned for, and was granted, an order for temporary custody based on a finding of neglect.\textsuperscript{178} Subsequent to the neglect hearing, and less than one month later, the petition was filed for permanent termination of parental rights.\textsuperscript{179} The

to have parental rights terminated. It may be unable to prove that the parents are "unfit" according to the terms of a statute, even a broadly written statute. But this is of little comfort to a family about to argue successfully against the order for permanent termination.

Unlike criminal defendants, natural parents have no “double jeopardy” defense against repeated state termination efforts. If the State initially fails to win termination, . . . it always can try once again to cut off the parents' rights after gathering 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.

\textit{Santosky}, 455 U.S. at 764. This problem is compounded by the fact that the state, because of its resources, has the opportunity to “shape the historical events that form the basis for termination.” \textit{Id}. at 763. Thus, a major problem with the termination system is the fact that the state, working within broadly worded statutes, is afforded a continuing opportunity to reinterpret data and shape family history in such a way that parents, possessing incomparable resources when contrasted with those of the state, may be repeatedly subject to custody challenges.

\textsuperscript{174} 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976).
\textsuperscript{175} \textit{Id}. at 22-24.
\textsuperscript{176} "Based on her observations inside the house, and without seeing the other five children, [the probation officer] determined that all six children should immediately be removed to the Polk County Juvenile home. This removal was to be temporary. . . ." \textit{Id}. at 13.
\textsuperscript{177} \textit{Id}.
\textsuperscript{178} \textit{Id}. The hearing for temporary custody was held within one week of the removal of the children. At the hearing the judge determined that the children were, in fact, neglected and that they should remain in the custody of the court. This is common procedure prior to the placement of children in an institution or a foster care environment.
\textsuperscript{179} \textit{Id}.

This petition alleged that the \textit{best interests} of the children . . . require that the parent-child relationship . . . be terminated by the Court because said parents have substantially and continuously and repeatedly refused to give their children necessary parental care and protection and because said parents are unfit parents by reason of conduct detrimental to the physical or mental health or morals of their children.

\textit{Id}. at 13-14. The petition speaks in terms of parental conduct, not the specific
statute allowing the termination was held to be vague both on its face and as applied to the Alsager family. The court found that the Alsagers’ right to family integrity was “menaced by Iowa’s parental termination statute.”\(^{180}\) While the vagueness of termination statutes raises important considerations when determining what protections should be afforded the family faced with a termination action, it is not the only factor.

D. Other Considerations Affecting the Fundamental Right of Family Integrity

1. The Problems with Temporary Custody

Before parental rights are terminated permanently, the state often seeks to obtain temporary custody of the child. This allows the state to place the child in an institution or with foster parents. In the latter case a situation may develop which creates an obstacle for parents attempting to have their children returned. Foster parents have been accorded some due process rights\(^{181}\) with respect to children in their care. In addition, in In re Diana P.,\(^{182}\) the Supreme Court of New Hampshire held that foster parents have standing to bring an action for permanent termination of parental rights because they act in loco parentis for the child.\(^{183}\) In Diana P. the child had been removed from the home after a neglect hearing in 1974.\(^{184}\) Three years later the foster parents with whom she had been placed learned that Diana was to be returned.\(^{185}\) They attempted to have parental rights terminated in order to prevent Diana’s removal. The court held that they had a right to do so if “psychological family” ties had developed between themselves and the child.\(^{186}\) The standard of proof that the foster parents had to meet was the same as if the state were peti-

harm that the child may suffer from remaining in this particular home environment. For a discussion of the need to focus termination statutes on the specific harms a child will suffer if he remains at home, see Realistic Standards, supra note 3.

\(^{180}\) 406 F. Supp. at 16. The conclusion was stated to be “inescapable” that the Alsagers had both a liberty and privacy interest in the integrity of their family unit. Id.


\(^{183}\) 424 A.2d at 180.

\(^{184}\) Id. at 179.

\(^{185}\) Id. at 180.

\(^{186}\) To conclude that foster parents can never stand in loco parentis to a child in their care would be unrealistic. The foster parents, however, should have had the foster child or children in their home long enough to have formed a “psychological family.” While a few weeks would not be long enough, at least two or three years would seem sufficient.

Id. at 181.
tioning to have parental rights terminated.\(^{187}\) In such circumstances, the need for the highest standard becomes even more apparent.

As foster parents are accorded standing to petition for permanent custody, the court must weigh the interests of the foster parents against the rights of the natural parents. In this balancing, the court must accord more protection to the natural parents since their rights are inherently fundamental. An appropriate safeguard would be the use of the highest standard of proof. The decision in Diana P. may create a situation in which parents will refuse to cooperate with the state in placing their children in foster care because of the potential for the foster parents to gain permanent custody of their foster children.

In addition to the rights of foster parents, natural parents may face other problems after temporary custody is granted. At least one state\(^ {188}\) presumes that it is best for the child to permanently terminate parental rights when custody is not returned to the natural parents within two years after it is granted to the state. Additionally, even if the natural parent has taken affirmative action to correct any defect in parenting, the court may refuse to vacate an order for permanent termination.\(^ {189}\)

In Carter v. Kaufman,\(^ {190}\) the California Court of Appeals held that the

\(^{187}\) "If there is to be a lesser standard in privately brought termination petitions, which does not require the exhaustion of the [welfare] divisions resources to assist the natural parents, then the constitutional safeguards announced in Robert H. have become meaningless." Id. at 185. The Diana P. court was concerned by the fact that the welfare division was contesting the termination action brought by the foster parents of Diana. This could have been interpreted to mean that the division did not feel it had served Diana's natural family to the fullest extent possible; a guideline required by the court in Robert H. The court, however, also stated that it had not intended to impose an impossible burden on the division. As a result, the court did not allow the division's contest of the termination action to prevent the foster parents from bringing the action. Id. at 182-83. Although the Diana P. court determined that the foster parents would be required to meet the beyond a reasonable doubt standard to terminate the rights of her natural parents, the extent to which this standard varies from the clear and convincing standard is uncertain. See In re Dixon, 81 Ill. App. 3d 493, 502, 401 N.E.2d 591, 598 (1980) (appellate court referred to trial court which indicated that the two standards are "substantially" similar).

\(^{188}\) See Coffey v. Department of Social Servs., 41 Md. App. 340, 397 A.2d 233 (1979) which states:

Article 16 section 75 [Md. Code Ann.] . . . provides: (a) After a child has been under continuous foster care for a period of two consecutive years under the custody of an agency authorized by law to make placements, it shall be presumed by the court that it is in the best interest of the child to award to that agency a decree granting guardianship with the right to consent to adoption or long term care short of adoption, without the consent of the natural parent or parents.

Id. at 350, 397 A.2d at 239-40.


burden to prove that a child's dependency adjudication should be reversed falls "clearly on the parent." Thus the initial action of the state for temporary custody may create a number of difficulties for the natural parent who attempts to have the children returned. These difficulties are compounded by the fact that parents are not accorded the right to counsel during these proceedings. In addition, if the notice to appear in juvenile court, which is sent to parents prior to a hearing, omits any reference to the possible termination of parental rights, this lack of notice may not be considered prejudicial to the rights of parents. Thus, a state that takes temporary custody may cause many problems for parents who are concerned that permanent custody might eventually be granted. Other problems, such as the judicial and procedural hurdles for the parents created by the juvenile court system itself, must be considered when determining what standard of proof is necessary for the protection of family integrity.

2. Juvenile Court and Evidentiary Concerns

The juvenile court judges hearing petitions for temporary and permanent custody may lack understanding of sociological and psychological data which would be of critical importance to a termination decision. The skills they apply in making these decisions are acquired in the courtroom and usually are not the result of any special prior training in the analysis of such data. If a juvenile court judge performs his duties well during his tenue in juvenile court, he will likely be appointed to a higher court. As a result of this process, a less-experienced judge will probably take

191 Id. at 785, 87 Cal. Rptr. 680.
192 Id. at 786, 87 Cal. Rptr. 679. See Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) (5-4 decision) (fourteenth amendment due process does not require appointment of counsel for indigents in all termination proceedings).
193 Robinson v. People ex rel. Zollinger, 173 Colo. 113, 476 P.2d 262 (1970) (no denial of due process if notice fails to indicate that termination is a possibility).
194 State Intervention, supra note 8. "Few juvenile court judges are trained in psychology or other behavioral sciences. Many are not even lawyers. Thirty percent have not graduated from college. Only twenty percent spend full time on juvenile matters; the rest rotate in and out of juvenile court." Id. at 640 (footnotes omitted). Thus, the juvenile courts may not have the resources to deal appropriately with these problems.
195 Because they receive no training in this area, juvenile judges learn from the actual performance of their jobs. To assist judges and lawyers in interpreting some of the complex information before them, articles have been written explaining this kind of interpretation. See, e.g., Groves, Lawyers Psychologists and Psychological Evidence in Child Protection Hearings, 5 QUEENS L.J. 241 (1980). The demands of the job may be such that a judge will inevitably rely heavily on the agency report. See, e.g., Note, Corey L. v. Martin L.: Involuntary Termination of Parental Rights Under New York's "Abandonment" Concept, 43 ALB. L. REV. 189 (1978) [hereinafter cited as Involuntary Termination].
his place\textsuperscript{196} and will need to develop the same competencies anew. Thus, the expertise of the judge making these decisions varies greatly. Because of "the permanent and irreversible nature of the order,"\textsuperscript{197} a termination decision must be made with great caution. However, given the problems with judicial expertise, a situation exists which may cause too great a potential for arbitrary termination of parental rights. The best-interests-of-the-child standard simply does not provide enough guidance to a judge making these decisions.\textsuperscript{198} This standard, however, is so strongly engrafted to termination proceedings that a court's finding that continued custody of a child by a welfare department is in the child's best interest can actually be upheld on appeal regardless of the custody statute's requirement that another standard be used.\textsuperscript{199} The best-interests standard does not provide sufficient guidelines for the judges making termination decisions.

In contrast, the beyond-a-reasonable-doubt standard would require a stricter scrutiny of the evidence by judges. They would be forced to evaluate the situation more comprehensively than they would by merely focusing on the best interests of the child; the rights of the natural parents would weigh more heavily in their considerations, and the result would be a fairer adjudication for all the parties—the child, the parents and the state.

In addition to the problems created by the application of a lower standard by an inexperienced judge, the evidence presented at termination hearings can be equally problematic. Since the action is usually instituted by a state agency, the reports submitted to the judge will be compiled by social workers and probation officers. Judges rely heavily on these reports. Even vague statements by the agency representatives, such as termination being in the child's best interests, may be relied upon by the court.\textsuperscript{200} Certainly the judge needs a wide variety of information to make a proper decision, but to allow courts to consider as authoritative such broad language by caseworkers gives the "social report" inappropriate importance in the termination decision. For example, in \textit{Robert H.}\textsuperscript{201} the caseworker recommending termination had not even spoken with the family's prior caseworker. His testimony was merely hearsay.

These evidentiary problems are compounded because evidence of a family's prior contact with the welfare agency or the court years earlier

\textsuperscript{196} For information regarding juvenile court judges, see Smith, \textit{A Profile of Juvenile Court Judges in the United States}, 25 JUVENILE JUSTICE 27 (Aug. 1974).

\textsuperscript{197} \textit{In re La Rue}, 244 Pa. Super. 218, 366 A.2d 1271 (1976).


\textsuperscript{200} \textit{See Involuntary Termination}, supra note 195.

\textsuperscript{201} 118 N.H. 713, 393 A.2d 1387 (1978).
may be used by the court to determine parental "design and general intentions."\textsuperscript{202} While this evidence should be admissible as proof of a history of parental inability to provide a safe environment for their children, it creates a difficult situation for parents. Once aware that this prior history may be admissible in a termination hearing, parents may be unwilling to seek help during the early stages of family problems.

Even a showing of parental fitness is insufficient to ensure that custody rights will remain intact. In \textit{In re Cunningham},\textsuperscript{203} the Ohio Supreme Court held that "[t]he mere fact that a natural parent is fit, though it is certainly one factor that may enter into juvenile consideration, does not automatically entitle the natural parent to custody . . . ."\textsuperscript{204} Thus, even a fit parent may be unwilling to chance receiving assistance for any family problems from the state because of the possibility that this may do nothing more than help build a case against him at a later date.

The use of the highest standard of proof would attenuate the evidentiary impact of prior contact with a welfare agency. Knowing that the state had a higher evidentiary burden, parents would feel safer seeking assistance from a welfare agency.

E. The State's Duty to Provide Services to Families

The extent to which the state must assist families prior to petitioning for custody is another uncertain feature of the termination system. Some courts have held that the state must diligently strive to provide services to the family before attempting to intervene by terminating parental rights.\textsuperscript{205} Other courts have been unwilling to place such a burden on the state before it can petition for permanent termination.\textsuperscript{206}

The Robert H. court held that the state must provide intensive services to the family prior to attempting termination.\textsuperscript{207} This holding was based upon two considerations: the importance of the family unit and the obligation of the state to document strongly the need for termination. If strong documentation of a dysfunctional family environment was a prerequisite to an action for termination, the state could only provide their documentation through intensive work with the family.\textsuperscript{208}

Certainly the state has an obligation to care for its dependent and neglected children, but its obligation to provide services to families is less clear. Although all states provide protective services to children and


\textsuperscript{203} 59 Ohio St. 2d 100, 391 N.E.2d 1034 (1979).

\textsuperscript{204} \textit{Id.} at 106, 391 N.E.2d at 1038.

\textsuperscript{205} See, \textit{e.g.}, \textit{In re} Robert H., 118 N.H. 713, 393 A.2d 1387 (1978).

\textsuperscript{206} See, \textit{e.g.}, \textit{Note, Duty of the State to Provide Supportive Services to a Parent Before Terminating the Parent's Rights}, 14 J. FAM. L. 341 (1975).

\textsuperscript{207} 118 N.H. at 719, 393 A.2d at 1390-91.

\textsuperscript{208} \textit{Id.} at 720, 393 A.2d at 1391.
families, there is no universal standard for determining how intensely the family must be served before a child can be taken from the home. This lack of clear obligation to provide intensive services to families is a distressing flaw in the termination system. The focus of state services in the termination area should be the family, the site of the fundamental right of family integrity. The welfare agency should have to document both intensive work with the family and the failure of that work to change the family environment before the state could move to take permanent custody.

This recommendation is made with the caveat, however, that state agencies understand and respect different child-rearing patterns. During the hearings held prior to passage of the Indian Child Welfare Act, Congress learned that the agencies assisting Indian families were partly responsible for unnecessary terminations of parental rights. This was due to their lack of understanding of the differences in child-rearing patterns. Such a lack of understanding would be decreased by more intensive involvement with families.

The varied state policies regarding the extent to which a state agency must provide services to the family unit prior to taking permanent custody should be reexamined in light of the recognition of the fundamental right of family integrity. A permanent termination should only be allowed after the state has worked diligently to ensure that the family unit has a chance to remain whole. If the standard of proof necessary for permanent termination was evidence convincing beyond a reasonable doubt, it would help assure that the state would provide more services to families. Because the state record would have to document the evidence necessary to meet this standard, it would have to prove a genuine and prolonged effort to assist the family.

F. Symbolic Value

One of the necessary considerations for determining the appropriate standard of proof is its symbolic value. In part, the reasonable-doubt

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210 See Family Integrity, supra note 3.
211 See Barsh, supra note 146, at 1292-94.
212 Id. at 1294-96.
213 The court in Robert H. was concerned that the division of welfare had not worked thoroughly enough with the family. They encouraged the division to provide intensive staff time to families in need. 118 N.H. at 719, 393 A.2d at 1390-91.
214 Even more significant is the symbolic importance of the particular standard of proof chosen. The function of the standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusion for a particular type of adjudication." The standard of proof serves to allocate
standard is used for criminal proceedings because it conveys the importance of the interests at stake. For purposes of termination of parental rights, the clear-and-convincing-evidence standard and the reasonable-doubt standard are viewed by some courts as being "substantially equivalent." Given the call for placing restrictions on the courts' discretion when deciding termination actions, one of the ways of doing so would be the use of the reasonable-doubt standard. Even if some courts view the standards as close, a legislative determination that the beyond-a-reasonable-doubt standard is to be used in termination proceedings would resolve any uncertainty as to whether the appropriate standard was the highest standard of proof. The use of this standard would symbolically depict the strength of America's conviction that the family is the "cornerstone of our democracy." This would also ensure that the agencies responsible for providing services to families render them more diligently and ensure that the focus of state activity is on the family unit: the site of the fundamental right. The experience of New Hampshire would suggest that the use of this standard would not frustrate the state's duty to care for its children. In other states, where the reasonable-doubt standard is not required, courts have been able to make findings using this standard in termination cases.

VI. RECOMMENDATIONS

The balancing of parents', child's and state's interests is critical when determining to terminate parental rights. Due to the fact that children are so strongly tied to their parents, "even 'bad' parents, intervention that disrupts the parent-child relationship can be extremely damaging

the risk of erroneous decision-making and to underscore the significance of the ultimate determination to the factfinder.

Clear and Convincing, supra note 3, at 802 (footnotes omitted).

215 See In re Dixon, 81 Ill. App. 3d 493, 401 N.E.2d 591 (1980), where the court stated:

The standard has been expressed that it should be by clear and convincing evidence. I think probably this is the court standard. One court has apparently interpreted that to mean beyond a reasonable doubt. . . . I am not sure it is correct to say beyond a reasonable doubt. But clear and convincing evidence would mean something substantially equivalent to that.

Id. at 502, 401 N.E.2d at 598 (emphasis added).

216 Clear and Convincing, supra note 3, at 771.

217 See supra note 213 and accompanying text.

218 Family Integrity, supra note 3.


to the child." 221 Merely stating that termination is in the child's best interests does not provide a workable formula for balancing the rights and interests of the parties involved in termination actions. As a result, there is a need to greatly restrict the discretion which exists throughout the termination system. Some have argued for termination statutes designed to focus on specific harms that the child will suffer if he remains at home rather than on the conduct of parents. 222 Others have recommended that the termination order be rescinded in the event that a suitable adoptive setting cannot be found for the child within a certain period of time after a permanent custody order is granted. 223 The debate continues on how to decrease the potential for arbitrariness in the termination process and still ensure that the child has a continuous loving relationship. 224

One expedient solution to the problem would be to statutorily increase the standard of proof required to permanently terminate parental rights. The use of the beyond-a-reasonable-doubt standard would symbolize the importance of the family's integrity and serve to limit the potential for arbitrary decision-making in termination hearings. It would also function as a strong statement that the child's best interests are linked to the natural family. 225 As the reasonable-doubt standard is viewed as similar to, yet higher than, the standard of clear and convincing evidence, it would not represent such a drastic change in the termination procedure as to appear that the child's interests were no longer being focused upon. There is reason to believe that the child's interests may often be jeopardized by ill-advised termination decisions. 226

Upgrading the standard of proof to the reasonable-doubt standard would help attenuate the features of the termination process which have received the greatest criticism: lack of procedural protections and court discretion; 227 broadly worded termination statutes; 228 evidentiary problems; 229 biases held by those involved in making termination decisions; 230 and an unclear best-interests standard. 231 Certainly upgrading the standard of proof alone would not correct all of the defects in the existing termination system, but it would be a significant step in the direction of limiting the potential for abuses.

221 State Intervention, supra note 8, at 639-40.
222 Realistic Standards, supra note 3, at 993.
223 Ketcham & Babcock, supra note 2, at 554.
224 This is the fundamental purpose behind the termination of parental rights. For a discussion of this purpose see id. at 536-37.
225 Barsh, supra note 146, at 1305-06.
226 Realistic Standards, supra note 3, at 994.
227 See supra notes 14-41 and accompanying text.
228 See supra notes 164-80 and accompanying text.
229 See supra notes 194-204 and accompanying text.
230 Barsh, supra note 146, at 1294-96.
231 Id. at 1297-98.
In addition to the use of the highest standard of proof in permanent termination proceedings, legislators should alter termination statutes to center on the specific harms a child will suffer if he remains at home rather than on parental conduct.\textsuperscript{232} The current emphasis on parental conduct may not serve the interests of the child, who is the most affected party in a termination action.\textsuperscript{233} The use of the highest standard of proof coupled with a statutory focus on the potential for serious injury to the child would provide the proper balance between the fundamental right of family integrity and the child's safety and care.

Termination statutes subject to these guidelines would need to address the following issues: (1) a description of the injuries to the child which would occur if he remained at home, including both serious psychological injury and serious physical deprivation; and (2) the beyond-a-reasonable-doubt standard of proof in proceedings to terminate parental rights. Incorporating these recommendations into termination statutes would assist the state in its obligation to care for its children\textsuperscript{234} and assure the child's right to a secure environment,\textsuperscript{235} which is to say they would uphold the best interests of the child.

\section*{VII. Conclusion}

The Supreme Court decided, in \textit{Santosky v. Kramer},\textsuperscript{236} that the standard of proof for proceedings to terminate parental rights must \textit{at least} be clear and convincing evidence.\textsuperscript{237} Prior to \textit{Santosky}, three standards were used in these proceedings: preponderance of the evidence,\textsuperscript{238} clear and convincing evidence\textsuperscript{239} and evidence beyond a reasonable doubt. The balancing tests used to arrive at the appropriate standards of proof generally weigh factors affecting the interests of the parents, the child and the state.\textsuperscript{240} A focus on the parties' interests alone ignores other realities of the termination system\textsuperscript{241} that affect the fundamental right

\begin{itemize}
\item \textsuperscript{232} \textit{Realistic Standards}, supra note 3, at 993.
\item \textsuperscript{233} \textit{Clear and Convincing}, supra note 3, at 797-99.
\item \textsuperscript{234} See \textit{supra} notes 14-27 and accompanying text.
\item \textsuperscript{235} \textit{Ketcham & Babcock}, \textit{supra} note 2, at 536.
\item \textsuperscript{236} \textit{445 U.S. 745 (1982)}.
\item \textsuperscript{237} Id. at 748.
\item \textsuperscript{238} The arguments for the use of the preponderance standard focused on the need for broad discretionary powers whenever termination is an issue. Those favoring this standard believe it is desirable to allow a strong measure of subjectivity in interpreting the facts of each case. For an example of this argument see \textit{Note, Dependency and Termination Proceedings in California—Standards of Proof}, 30 \textit{Hastings L.J.} 1815 (1979).
\item \textsuperscript{239} This has been described as the "intermediate" standard. The argument for the use of clear and convincing evidence, in termination proceedings, centers on the need to reconcile the child's interests with the fundamental right of family integrity. For an example of this argument, see \textit{Clear and Convincing}, \textit{supra} note 3.
\item \textsuperscript{240} Id. at 797.
\item \textsuperscript{241} Balancing the interests would be appropriate for arriving at a conclusion
\end{itemize}
of family integrity and can create problems for the child when taken from his family.\textsuperscript{242} When these factors are examined in terms of their impact on termination proceedings, the usual balancing of interests becomes inadequate.

There exists a compelling need to restrict the judicial discretion built into the termination system and still ensure that childrens' needs are at its heart. This objective can best be accomplished by enacting termination statutes that address the harms a child will suffer if termination is not granted and by requiring the beyond-a-reasonable-doubt standard of proof in permanent termination proceedings.

\textbf{DEAN MICHAEL ROONEY}

\footnotesize{\textsuperscript{242} During hearings prior to the passage of the Indian Child Welfare Act of 1978, Congress learned that the placement of Indian children in non-Indian homes caused many problems for these children later in life. These problems included alcoholism and suicide. Barsh, \textit{supra} note 146, at 1290-91. These problems are not exclusive to Indians. There is no available evidence to prove that state intervention in the child's life causes successful change. \textit{Realistic Standards}, \textit{supra} note 3, at 998-1020.

If a legislature were willing to fund "hard" services at an adequate level, and if child-care workers received adequate training and utilized the best available knowledge about child development, it might be reasonable to pay less deference to parental autonomy and allow coercive intervention. . . . However, under current circumstances, the costs of coercive intervention and the lack of evidence of its effectiveness require adopting the preference for parental autonomy.

\textit{Id.} at 999.