Volume 14
Number 1 *Fall 1979*

*pp.*69-121

Fall 1979

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INDIANA'S APPROACH TO CHILD ABUSE AND NEGLECT: A FRUSTRATION OF FAMILY INTEGRITY

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And a woman who held a babe against her bosom said, Speak to us of Children.
And he said:
Your children are not your children.
They are the sons and daughters of Life's longing for itself.
They come through you but not from you,
Any though they are with you yet they belong not to you.

You may give them your love but not your thoughts,
For they have their own thoughts.
You may house their bodies but not their souls, . . .

You are the bows from which your children as living arrows are sent forth.
The archer sees the mark upon the path of the infinite, and He bends you with His might that His arrows may go swift and far.
Let your bending in the archer's hand be for gladness;
For even as He loves the arrow that flies, so He loves also the bow that is stable.

Kahlil Gibran**

INTRODUCTION

Traditionally the family provided the primary source of education, health services, employment and recreation. The family was

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** THE PROPHET (1923). Gibran's words are especially appropriate in the year 1979—designated as the International Year of the Child.

the focal point of the child's life.[1] Legally parents were thought to have a natural or inalienable right to raise their children as they saw fit.[2] In this century the family shares to a greater extent than ever before the responsibility for teaching, caring, and disciplining children with other institutions such as schools, welfare agencies, child care centers, and hospitals. Compulsory education, child labor, and abuse and neglect laws have been enacted in order to protect children and assure their normal development. Nevertheless the primary responsibility for child-rearing remains with the family.[3]

Associated with this parental sharing of child-rearing responsibility with the state, has been the state's legislative assumption of the specific power to intervene. The state has only that authority to intervene which the citizens grant it. There is no express authorization by the people in the United States Constitution granting the government the power to regulate family life. Under the Ninth Amendment of the United States Constitution, the people retain all of those rights, including broad child-rearing authority, which are not expressly limited in the Constitution.[4]

That authority granted the government is limited to legislatively created means to protect the health, safety and

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1. K. KENISTON, ALL OUR CHILDREN: THE AMERICAN FAMILY UNDER PRESSURE 14 (1977) [hereinafter cited as KENISTON].

2. *See* Hafen, *Does the Movement Towards Children's "Rights" Contain the Seeds of Destruction for the Family?*, 63 A.B.A.J. 1383, 1388 (1977). In Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U.L. Rev. 604, the author states: "[T]he family unit does not simply co-exist with our constitutional system; it is an integral part of it. . . . The immensely important power of deciding about matters of early socialization has been allocated to the family, not the government." *Id.* at 615-617. *See also* Doe v. Irwin, 441 F. Supp. 1247 (W.D. Mich. 1977) *citing* the concurring opinion of Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

3. Hafen, 1976 B.Y.U.L. REV., *supra* note 2, at 613.

4. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. Justice Goldberg in his concurring opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), stated:

> [It is] clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people. . . . The home derives it preeminence as the seat of family life. And the integrity of that life is something so fundamental that is has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . .

Id. at 488-90.

minimum education of children.[5] The primary role of instilling values is reserved for parents. Parents retain the rights and duties to raise and educate their children according to their own personal philosophies and preferences. The sole limitation on the exercise of this discretionary control is that it does not result in physical or emotional harm to the child. Therefore the socialization of the young rests with the parents who have chosen to delegate some of this authority to schools and other state agencies while retaining wide discretion and freedom of choice.[6]

Abuse and neglect laws should be geared to keeping the family together with minimum outside influences until the child is able to function independently.[7] Except in clear cases of serious harm to the child under clearly defined standards and procedure,[8] constitutional and case law authorities reflect the values placed on protecting the family from state intervention. In order to preserve the family, there is a need to build upon these authorities and to more carefully tailor abuse and neglect laws. Current abuse and neglect laws facilitate the destruction of families rather than promote family integrity.

There are a number of basic principles which should be followed to achieve the necessary protection of the family. First, the least intrusive means should be employed. No child should be removed from his or her home unless there is a clear showing that the child is experiencing or is in imminent danger of serious physical, psychological, or emotional harm. Unless the delay caused by the imposition of due process requirement will result in irreparable harm, the child should not be removed without a prior evidentiary hearing. Secondly, there must be a strong presumption in favor of the nuclear family first and secondly in favor of the extended family. Before the child is removed, the court must find that the replacement home or institution will be less damaging to the child's physical and emotional welfare than the conditions existing in the nuclear or extended family. Finally, substantial efforts should be made to rehabilitate the family. Courts must be committed to ordering intervening state agencies to provide services to keep the family

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5. Hafen, 1976 B.Y.U.L. REV., *supra* note 2, at 658.

6. *Id.*

7. *See generally* FAMILY POLICY (A. Kahn & S. Kamerman eds. 1978) [hereinafter cited as KAHN & KAMERMAN]; KENISTON, *supra* note 1; C. LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESEIGED (1977) [hereinafter cited as LASCH].

8. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

intact. In short, rehabilitation should be the guiding principle at every successive step of intrusion, until all reasonable efforts have been expended.

There are a number of critical phases in the intervention process which have substantial impact on the family. These include investigation, removal and placement, voluntary removal and other consented intervention, maintenance of family contact and visitation, family rehabilitative services, and termination procedures and standards. There is need to make further study and inquiry into these steps to determine their significance and to then develop the necessary legal framework to facilitate the achievement of the recommended objectives.

Physically and emotionally healthy families are vital to stable, caring, happy human relationships, and to our society's overall strength and well-being. This proposition, well articulated and well supported elsewhere,[9] will be only briefly supported in this article. This article is designed primarily to examine the interplay between the family and child abuse and neglect laws. One goal of this article is to assist in redirecting the thrust of our efforts to more fully achieve the preservation and strengthening of the family.[10] A strong

9. *See, e.g.*, KAHN & KAMERMAN, *supra* note 7, at 14; J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 13 (1973) [hereinafter referred to as GOLDSTEIN]; KENISTON, *supra* note 1, at xiv; LASCH, *supra* note 7, at 4.

10. The development of improved legal responses to a given social problem, already treated by statute and case law, entails two processes. First, the purposes of the existing law, stated as well as implicit, must be ascertained. Second, statutory and judicial standards and procedures must be initiated to more nearly fulfil desired basic purposes and ultimate goals. In this fashion, more appropriate legal responses are developed to solve the problem.

A beginning point of this article is the recognition that abuse and neglect laws are an integral part of the entire body of law referred to as family law. One underlying purpose of all law relating to families is to provide the legal means to met their needs and to legalize their desires in such matters as marriage, dissolution of marriage, custody and support. In these instances, the state, through its administrative and judicial systems, is called upon to legally sanction or arbitrate matters submitted to it by the family and its members. On the other hand, in the abuse and neglect area the state is both one initiator of action to protect children and the decisionmaker. The state, as initiator, urges the state, as decisionmaker, to do what it believes best for the children. Thus, when the state intervenes, it suggests that the fundamental purpose of abuse and neglect legislation is to protect children and outweighs any purpose to preserve family autonomy. Implicit in the state's pursuit of this purpose is the notion that the state decides what is best for the family and removes from it the discretion to seek its own levels and meaning of family relationships. However, in pursuing its goal to protect children from abuse and neglect, the state may be unnecessarily foregoing the value and strength of family autonomy.

argument will be made for a legal framework which views abuse and neglect in the broader sense of a family problem requiring family solutions. A further contention is that the sole or primary focus of abuse and neglect laws in protecting children is currently being accomplished at the cost of fragmenting, impairing and possibly destroying the family whose intimacy and integrity is so highly valued and needed.

In urging the importance of the family it is readily acknowledged at the outset that while most families aspire to provide a caring, loving and nurturing environment for their members, all families experience occasional episodes of conflict, crisis, pain and demoralization. Family life experts view most of these episodic experiences not as bad or abnormal, but as a common, natural and necessary part of the family living process.[11] One of the unique qualities of family life

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A major contention of this article is that the family unit is so important that people living together as a family should be allowed to freely solve their problems in their existing environment, if that is their desire. This suggests that child abuse or neglect must be treated as a family problem, requiring family solutions, rather than as a narrower problem involving only the protection of children. It must be recognized, that the most basic underlying purpose of all abuse and neglect legislation should be the protection of children *through* preservation of the family. Unnecessary removal of a child from the home may substantially increase ultimate termination of the parent-child relationship. This result may ultimately be more harmful to all the members of the family, including the child, than the abuse or neglect which prompted the removal. *See* Comment, *The State vs. The Family: Does Intervention Really Spare the Child?*, 28 MERCER L. REV. 547 (1977).

This argument supporting preservation of the family unit is guided by three interrelated principles. First, intervention into the family should be limited only to those situations when it becomes necessary to protect the child from serious harm. When there is doubt as to the harm, or when the suspected harm results from that which is in the broad range of acceptable child-rearing practices, intervention should not take place. Secondly, when intervention become necessary, interference should take place in the least intrusive fashion, only to the extent necessary to protect the child. Finally, the state's right to intervene implicitly carries with it the dury to permit the family to remain together subject only to the restriction that the serious harm which the child was experiencing ceases.

This goal of family preservation is entirely consistent with the avowed purpose of most abuse and neglect legislation. For example, Section 31-5-7-1 of the old Indiana Juvenile Code stated: "the purpose of this act is to secure for each child within its provisions such care, guidance and control, *preferably in his own home*, as will serve the *child's welfare* and the *best interest of the state*; . . ." (emphasis supplied.) Similarly, the new Indiana Juvenile Code, IND. CODE § 31-6-1-1 (Supp. 1979), states one of its purposes is "to strengthen family life by assisting parents to fulfill their parental obigations;. . . ."

11. In the book, MARITAL LOVE AND HATE, the author stated:

> It should be a goal . . . of one's personal and family emotional life, to expect and accept . . . pain and conflict and injustice and betrayal as the

is an open environment where family members can resolve personal and interpersonal conflicts. If this environment is important to us as a society, we ought to prevent unnecessary government intervention.

Unfortunately some parents actively or neglectfully hurt their children. In order to protect their lives, sometimes society must coercively intervene. The primary issue then becomes at what point and to what degree should intervention take place.[12] If family integrity is to be maintained the standards and procedures for intervention must be clearly defined. Intervention should be permitted only in those cases involving actual or potential serious harm to the child. As a result intervention will alleviate rather than exacerbate the harm.

Beginning with an exploration of the importance of the family, this article argues for the further development and expansion of the fundamental constitutional right to family integrity. The nature and extent of the problem of child abuse and neglect is indicated and the public and private efforts being made to deal with the problem will be reviewed. Next, an attempt will be made to define the interests and rights of the family, the parents, the children and the state. The crucial aspects of coercive state intervention, such as investigation into the family and removal of children, will be discussed in light of the recent cases. Finally, through an analysis of the abuse and

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> stuff of life from which grow joy and becoming and love and family wholesomeness, though always in cyclical, complexly interweaving processes of growth and decay, life and death.

I. CHARNY, MARITAL LOVE AND HATE 305 (1972). In the Mid-Town Metropolis study reported by Charny, and conducted in Manhattan, it was found that eighty to ninety percent or more of the population was suffering from symptoms indicative of emotional disturbance. Charny concluded:

> [It is] a compelling truth, but one that the mental-health field has been hard-pressed to deal with as long as the sick-healthy distinction remains the key working concept of diagnosis rather than concepts of personal and collective evolution. When we ask how far man has come along in his potential for mental health and family fun, we are much freer to be honest about the terrible agonies of most families than if we have to end up saying everyone is sick, sick.

Id.

12. In deciding when and how much to intervene, it is extremely important to recognize that all normal families at times experience episodes of crisis. KENISTON, *supra* note 1, at 186. Intervention at all moments of crisis would possibly be to their permanent detriment. Intervention at the point of each crisis would deprive every family the satisfying and strengthening experience of autonomously solving family problems. Furthermore, not enough is known about healthy or unhealthy family conflict to permit the state to impose its value judgments on a family except in extreme cases.

neglect provisions of the new Indiana Juvenile Code, effective October 1, 1979, a statutory framework will be suggested which will protect the child and the family from unnecessary coercive intervention while adequately protecting children. The only justification for intervention arises from a finding of serious harm that violates clearly defined standards. This article argues specifically that any framework must be built around the concept that coercive intervention should be limited to protecting children from clearly defined serious harms, actual or imminent, under precise and fair procedures.

FAMILY INTEGRITY

The family is the most important and fundamental social institution.[13] It not only provides a nurturing and protective environment during a child's emotional and physical development,[14] it also furnishes the primary source for moral socialization.[15] The family of-

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13. KAHN & KAMERMAN, *supra* note 7, at 429-503; KENISTON, *supra* note 1, at 8-9.

14. Wald, *Making Sense Out of the Rights of Youth*, 4 HUMAN RIGHTS 13 (1974).

15. LASCH, *supra* note 7, at iv.

In this respect, the importance religious authorities give to families should not be ignored. Both the Old and New Testament scriptures place a high value on the family. The Psalmist says in Psalm 68: 6 that "God sets the solitary in families." In Ephesians, St. Paul depicts the family from the noble perspective that the family is a gift from God, deserving of our loving care and deepest possible committment: "For this reason I bow my knees before the Father, from whom every family in heaven and on earth is named, . . ." *Ephesians* 3: 14-15. In the *Social Principles of the United Methodist Church*, one denomination's position on the family is made clear:

> "II. The Nurturing Community
> The communiy provides the potential for nurturing human beings into the fullness of their humanity. . .
> A. *The family.* We believe the family to be the basic human community through which persons are nurtured and sustained in mutual love, responsibility, respect, and fidelity. We understand the family as encompassing a wider range of options than that of the two-generational unit of parents and children (the nuclear family), including the extended family, families with adopted children, . . . we urge social, economic, and religious efforts to maintain and strengthen families in order that every member may be assisted toward complete personhood."

A statement in the *Christian Family Standard*, in use since 1951, indicates the position of the Luthern Church, Missouri Synod:

> We also acknowledge children as precious gifts of God and regard them as a sacred trust. We pledge ourselves to live together as a family in a manner pleasing to our heavenly Father. We acknowledge the God-established family as providing the ideal environment in which man and woman and their children can best supply one another's needs and find their fullest development and their highest happiness.

fers an open and intimate environment for working out conflicts between love and duty, and reason and passion,[16] thereby serving as a microcosm for the development of socially satisfying and productive human relationships.[17] Due to its fundamentality as a social unit, the family must be protected from governmental intervention in all but the most compelling of circumstances. Often the best interests of the child seem to dictate governmental intrusion[18] since a child is ill-equipped to protect itself from abuse and neglect. On the other hand, every family has a basic right to an opportunity to provide adequate care for its children without governmental intervention.[19] However, the best interests of an abused and neglected child and the right to family privacy are not necessarily inconsistent values. The child's interest should be the paramount consideration only after a fair determination of justification for intrusion into the family relationship. Even then the best interests of the child often mandate strong efforts to fulfill the needs of the child within the family unit. After balancing the best interests of the child against the right to family integrity, only clear cases of delinquency, abuse, or neglect will warrant governmental intrusion.[20]

The Constitutional Right to Family Integrity

Family integrity means simply a wholeness or completeness of the family in an unbroken condition; living together as a family.[21] Although no court has defined the term, courts have begun to use it in cases involving the protection of families and individuals from arbitrary coercive state intervention.[22] Courts now appear to be at the threshold of a fully developed constitutional right to family integrity. Recognition of this right would guarantee free exercise of family living with all its benefits while still allowing for the protection of children.[23] It is impossible to express all of the nuances of this right.

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16. LASCH, *supra* note 7, at iv.

17. *Id.*

18. GOLDSTEIN, *supra* note 9, at 7.

19. *Id.* at 8.

20. *Id.* at 105-06.

21. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961), defines integrity as "an unimpaired or unmarred condition . . . the quality of state of being complete or undivided: material, spiritual, or aesthetic wholeness: organic unity." *Id.* at 1174.

22. *See, e.g.*, White v. Rochford, 592 F.2d 381 (7th Cir. 1979); Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976).

23. David L. Slader, Chief Attorney of the Child Advocacy Project of the Metropolitan Public Offender, Portland, Oregon, has perceptively and succinctly articulated the constitutional issue involved in protecting the family. In his address to the Second National Conference on Child Abuse and Neglect in 1977, he stated:

Perhaps its constitutional breadth can best be expressed in terms of a prohibition against the government rather than in the form of a

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> Apart from encompassing the family within the concepts of "liberty" and "privacy"—a process which is more one of definition than analysis—the Supreme Court has, curiously, never explored the fundamental constitutional rationale for the family's protected status. They have treated it, indeed, as if the constitutional foundation for the right was too self-evident to be discussed.
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> The principles may be elusive precisely because they are so basic. More fundamental even than the liberties of the Bill of Rights is the concept pervading the Constitution that the government it creates—and, indeed, any government consistent with its principles—be one of limited powers. The family, as an institution, is essential in maintaining that system.
>
> The two most important institutions which affect our behavior and influence our lives are the family and the state. If you weaken one, you strengthen the other. Any system of laws which has as its touchstone a curb on the powers of the state must rely for its survival upon the strength of some countervailing force. The family, if only for the reason that it fills what would otherwise be an enormous power vacuum, is that force.
>
> Where the family dissolves or functions below a socially acceptable level, the state inevitably intervenes. The state will, thus, take in the abandoned child, rescue the neglected and abused one, coerce compliance with the duty of parents and to cooperate with each other, and direct in the most minute detail parental behavior of divorced spouses. If the family were to dissipate as an institution or its vitality sapped, the state would inevitably sense the vacuum and inexorably fill the void. It would by that one stroke, cease to be a government of limited powers.
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> The unspecified rights reserved to the people by the Ninth Amendment and those guaranteed by the concept "liberty" include the family because constitutional government cannot function without it. That principle is a silent premise in any child protection proceeding and serves as an inflexible limitation on any postulated "rights of children" which rely for their efficacy upon sovereign intervention. The question is, thus, not just, "Is this in the child's best interest?" but also "Do we want the state to have this power?"

CHILD ABUSE AND NEGLECT: ISSUES ON INNOVATION AND IMPLEMENTATION, PROCEEDINGS OF THE SECOND NATIONAL CONFERENCE ON CHILD ABUSE AND NEGLECT, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE 374-75 (1977).

In light of this statement, there should be concern about the growing exercise of power by various levels of government over the family. For example, both the Aid to Families with Dependent Children (AFDC) program and the Child Welfare Services program are subject to regulations which contain mechanisms for substantial instrusions into the home. Families are required to submit to regular recertification of eligibility based upon observations and reports submitted by caseworkers. These observations may be used against the family in abuse and neglect proceedings in which either supervision or removal of the children are sought. *See* 42 U.S.C. § 601 (1976), and the regulations promulgated thereunder, 45 C.F.R. § 2201 (1978). *See also* 42 U.S.C. § 5101 (1976), and 45 C.F.R. § 231 (1978), for the Child Abuse Prevention and Treatment Act and its governing regulations.

complete enumeration of rights. Thus, in the context of abuse and neglect, the government should not intervene in the family except in cases involving serious harm to a child; and then only in the manner least intrusive to family integrity.

Contemporary society recognizes the important benefits of family living which may be sacrificed only in cases of serious proven harm to the child.[24] The reasons for honoring family integrity include an appreciation of personal autonomy and family autonomy. A corollary to the value of family autonomy is the appreciation of cultural diversity and recognition that, despite varying social, economic or ethnic backgrounds, all families have equal rights to the enjoyment of their heritage. Moreover a child's home environment is not predictive of the child's later achievements. Children remain psychologically attached to their parents and need to retain family ties long after separation and removal. From a pragmatic standpoint, government intervention tends to create dependence on government for assistance while lessening intervention facilitates strengthening of family self reliance. Finally, when interference is not governed by clear standards, the free exercise of family rights is threatened and everyone is the worse for it.

Abuse and Neglect: Background

Although intervention on behalf of children in abuse and neglect cases is less than 100 years old, all states currently have statutory intervention procedures.[25] The degree of intervention

24. NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION TASK FORCE REPORT 337-42 (1976) [hereinafter referred to as JUVENILE JUSTICE AND DELINQUENCY PREVENTION REPORT].

25. All states have enacted juvenile statutes whereby the state may intervene into the family relationship, usually on a county level, in matters concerning dependency and child abuse and neglect. *See* Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1 (1975). A close examination of these statutes indicates a consistent use of broad and vague terminology. In many states a finding of "inadequate" or "unfit" parents is sufficient to confer jurisdiction on the court to order intervention. KENISTON, *supra* note 1, at 187.

Similarly, since 1967 all states have enacted some form of legislation requiring the report of any child abuse. *See* V. DEFRANCIS, CHILD ABUSE LEGISLATION IN THE 1970'S (1970). Under the typical reporting act, physicians, teachers, and other persons are required to report suspected child abuse to the county welfare department or other designated agency. *See, e.g.*, IND. CODE § 31-6-11-3 (Supp. 1979).

Finally, every state now has some statutory provision permitting voluntary termination of parental rights, either under its adoption statute of juvenile statute. *See* Note, *Legislative and Judicial Recognition of the Distinction Between Custody and*

varies from unobtrusive informal inquiries or investigations to measures as drastic as involuntary termination of the parent-child relationship.

Typically, a local welfare department petitions the court on behalf of the state seeking legal custody of the child. This custody, known as wardship, permits the agency to remove the child from the home and to place the child in institutional or foster care. In almost every instance, the purpose of removal is avowedly to provide adequate temporary care for the child until the parents can reassume their duties. Although the agency has legal custody during this period, the parents retain guardianship rights.[26] They, and not the state, retain the authority to control the child's life in crucial respects such as consent for surgery, marriage or enlistment in the military.

Three competing interests have been identified and weighed in abuse and neglect cases: the liberty and privacy interests of the parents,[27] the interest of the state in protecting children from harm as *parens patriae*,[28] and the interests of the child.[29] Under the early abuse and neglect statutes, the best interests of the child were paramount. This approach failed to protect adequately parents' rights by neglecting to account for them. Recently courts have recognized that parental rights are fundamental, thus offering more protection from state intervention.

The interest of the child, on the other hand, has been nearly unrecognized. In fact, until 1967, courts assumed children had no legal rights.[30] Even today, children are not legally entitled to

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Termination Orders for Child Neglect Cases, 7 J. FAM. L. 66 (1967). Under these statutes parental rights are completely severed and the right to regain custody permanently relinquished.

26. Smith v. Organization of Foster Families, 431 U.S. 816, 828 n.20 (1977).

27. Loosely described, parental rights include the right to care, custody, and control of the child. GOLDSTEIN, *supra* note 9, at 4.

28. The state's interests are delicately balanced between protecting the child and preserving the family. The state, through its police powers and role as *parens patriae*, recognizes the necessity of protecting children due to their inability to protect themselves from abuse and neglect. Areen, *Intervention Between Parents and Child: A Reappraisal of the State's Role in the Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 893 (1975). On the other hand, premature or unwarranted state intervention on behalf of children destroys family strength. This not only weakens the social fabric, it also creates an economic burden. *Id.* at 892.

29. *See* J. RADBILL, A HISTORY OF CHILD ABUSE AND INFANTICIDE 3-21 (1974).

30. In the landmark decision, In Re Gault, 387 U.S. 1 (1967), the Supreme Court summarized the prevailing assumption when it stated:

medical care or a nutritionally adequate diet,[31] although recently the Supreme Court has begun to recognize the interests of the child as separately important.[32] In addition a few state statutes now require court appointed guardians ad litem in abuse and neglect proceedings,[33] while some states also permit partial or complete emancipation of some children found abused or neglected.[34] Thus the rights of children have only begun to be accorded a new significance in our legal systems. As the law begins to recognize and develop the right to family integrity, these separate interests compete less to the detriment or exclusion of each other; rather the law emphasizes honoring and preserving the family as its primary goal while the separate interests are subordinated.

American child abuse and neglect laws are, however, in tension with the parents' rights to raise their children according to personal dictates.[35] The law sanctifies this right by granting parents legal

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> A child, unlike an adult, has a right "not to liberty, but to custody." If his parents default in effectively performing their custodial functions—that is, if the child is delinquent—the state may intervene. In doing so, it does not deprive the child of any rights because he has none. It merely provides the "custody" to which the child is entitled.

Id. at 17.

31. Areen, *supra* note 28, at 895.

32. In In Re Gault, 387 U.S. 1 (1967), the Court held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 13. In Wisconsin v. Yoder, 406 U.S. 205 (1972), Justice Douglas recognized that: "While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views." *Id.* at 243-44 (cites omitted) (Douglas, J., concurring in part and dissenting in part).

More recently the Court, in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), again recognized that minors, as well as adults, are protected by the Constitution and possess rights under it. *Id.* at 74. *See also* Cary v. Population Services International, 431 U.S. 678 (1977). Finally, in Parham v. J.R., 99 S. Ct. 2493 (1979), the Court upheld the constitutionality of a Georgia statute permitting parents to commit their children to the state mental hospital without first a hearing before an impartial tribunal. The Court concluded that parents have a substantial, if not the dominant interest in the decision absent abuse or neglect. *Id.* at 2505. Without specifically defining the balance of interests between parents and children in abuse and neglect cases, the Court indicated that the interest of the parent would be less than that of the child. This case is perhaps more significant for the reason that the Court again cautioned the state to abstain from interference into matters involving family choices.

These cases indicate a distinct, though unclearly defined, recognition children's rights separate from parents and from the state. There is indeed a need for more carefully defined standards in the area of children's rights in order to preserve family integrity and the free exercise of family living. *See* N. WEINSTEIN, LEGAL RIGHTS OF CHILDREN (1973).

33. *See, e.g.*, IND. CODE § 31-6-3-4 (Supp. 1979).

34. *See, e.g.*, IND. CODE § 31-6-4-16(e)(5) (Supp. 1979).

35. *See* Katz, Ambrosino, McGrath & Sawirtsky, *Legal Research on Child Abuse and Neglect: Past and Future*, 11 FAM. L.J. 151 (1977).

custody of their children and by supporting them with the legal presumption that parental love and concern provides adequate care and protection for the child.[36] Despite the lack of specific constitutional authority, the United States Supreme Court recognized and upheld the parents' right to determine their children's upbringing on various constitutional grounds.[37] Constitutional bases also justified state court decisions upholding parental control of their children.[38] Thus the underlying principle of abuse and neglect laws is that the state should not disturb parental choices so long as parents provide an adequate home, medical care and education.[39]

Legal Recognition of the Value of Family Integrity

Only recently the Supreme Court has begun to recognize what sociologists and psychologists have accepted for decades. In *Moore v. East Cleveland*[40] the court first noted the roots of the family in this country's history and tradition. It added that "[i]t is through the family that we inculcate and pass down many of our most cherished values, ..."[41] The same year, in *Smith v. Organization of Foster Families*,[42] the Court observed that the importance of families "stems from the emotional attachment that derives from the intimacy of daily associations, and from the role [they play] in promot[ing] a way of life through the instruction of children."[43] Recent court decisions, then, establish constitutional protection for the sanctity of the family.[44]

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36. The state should not disturb the parents' personal choices in raising their children so long as the parent provides an adequate home, maintains the children's health, and provides eduction. Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 396 (1970).

37. Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Ginsberg v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); Armstrong v. Manzo, 380 U.S. 545, 550 (1965); May v. Anderson, 345 U.S. 528, 533 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 518 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see* sources cited in note 9 *supra*.

38. *See, e.g.*, Pima County v. Howard, 112 Ariz. 170, 540 P.2d 642 (1975); Reist v. Bay County Circuit Judge, 396 Mich. 326, 241 N.W.2d 55 (1976). *See also* J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW 399-408 (1965).

39. W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 159 (6th ed. 1976).

40. 431 U.S. 494 (1976).

41. *Id.* at 503-04.

42. 431 U.S. 816 (1976).

43. *Id.* at 845-46. *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972), in which the Court discusses the strong position of the family in Western civilization.

44. *See, e.g.*, Moore v. East Cleveland, 431 U.S. at 503. For a discussion of the

A corrollary to the sanctity of the family recognized by the Supreme Court is the right to family integrity, also described as "the right to live together as a family."[45] The concept of family integrity was first articulated in Justice Harlan's dissenting opinion in *Poe v. Ullman*.[46] Harlan noted that the home derives its preeminence as the seat of family life. He then added: "The integrity of that life is something so fundamental that it has been found to draw to its protection from the principles of more than one explicitly granted constitutional right."[47] Eventually the majority of the Court adopted Harlan's concept of family integrity.[48]

Other federal and state tribunals echo the language of the Supreme Court in specifying the rights of the family. For example, in *Alsager v. District Court*,[49] the court concluded there is a fundamental right to family integrity protected by the Fourteenth Amendment of the United States Constitution.[50] The Oklahoma Supreme Court recently recognized the fundamentality of family integrity which it found emanated from both the Fourteenth and the Ninth Amendments.[51] At the core of the right to family integrity, then, are the Fourteenth Amendment liberty and privacy interests articulated in *Griswold v. Connecticut*.[52]

The Supreme Court's recent recognition of the protection of certain relationships is crucial to a fuller development of the fundamental right to family integrity. In *Paris Adult Theatre I v. Slaton*,[53] for example, the Court, in dicta, concluded that constitu-

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evolution of the sanctity of the family, *see* Boykin, *Origins of the Substantive Right of Family Autonomy*, 30 MERCER L. REV. 719 (1979).

45. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

46. 467 U.S. 497 (1961).

47. *Id.* at 551-52.

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

49. 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976).

50. *Id.* at 16. *See also* Roe v. Conn, 417 F. Supp. 769, 777 (M.D. Ala. 1976). In Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1191 (S.D. Tex. 1977), *rev'd on other grounds*, 99 S. Ct. 2371 (1979), the court stated: "It is now clear that there is a fundamental right emanating from the Constitution, which protects the family unit. . . ."

51. Matter of Sherol A.S., 581 P.2d 884, 888 (Okla. 1978). In Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716 (7th Cir.), *cert. denied*, 425 U.S. 916 (1976), the court ruled against the plaintiffs who had sought to be in the delivery room during the birth of their children. Despite this adverse ruling, the court nevertheless recognized the protected interest in family integrity.

52. 381 U.S. 479, (1965) (Harlan, J., concurring).

53. 413 U.S. 49 (1973).

tionally protected privacy of family, marriage, motherhood, procreation and child-rearing involves protected intimate relationships.[54]

Perhaps the most basic of all relationships, that of parent and child, has recently been subjected to close judicial scrutiny.[55] In *Duschesne v. Sugarman*,[56] the Second Circuit held that the preservation of family integrity encompasses the reciprocal rights of both parent and child in relationship to each other.[57] The court defined the interest of the parent as the right to the companionship, care, custody and management of his or her children. The interest of children was defined as the right to maintain the emotional attachments deriving from the intimacy of daily association with the parent.[58] Thus the court attempted to deal with the complexity of the parent-child relationship.

Three important considerations form the basis for recognizing and protecting family relationships when dealing with abuse and neglect. First and foremost, abuse and neglect practices, the most common occurence of state intervention, must be undertaken with the goal of preserving family bonds steadfastly in mind. From the premise that parent-child relationships are delicate, intimate and highly valued, flows the conclusion that intervention should occur only when absolutely necessary. This conclusion is reinforced by the fact that determining what constitutes real harm to the child and predicting what impact it will have on the child's adult life is difficult, if not impossible. This knowledge should serve to curb intervention except in cases of serious harm. Even when the threat to the child justifies intervention, the state must honor the relationships as fully as possible in order to preserve and restore them. In practice this requires the state to use the least intrusive means and to place primary emphasis on rehabilitative services. Intervention must not occur at the expense of family relationships, and thereby perhaps also at the expense of the children, but as a means of preserving the family whenever possible. Secondly, because the family is composed of a number of protected relationships, each of those relationships deserves the same protections as are afforded the family as a unit. Finally, it must not be forgotten that children,

54. *Id.* at 66 n.13. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court spoke of "a *relationship* lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485 (emphasis supplied).

55. *See, e.g.*, Roe v. Conn, 417 F. Supp. 769, 777 (M.D. Ala. 1976).

56. 566 F.2d 817 (2d Cir. 1977).

57. *Id.* at 825.

58. *Id.*

as integral parts of family relationships, are entitled to the same rights and protections derivatively gained from the family and family associations.

CURRENT ABUSE AND NEGLECT PRACTICES: AN EROSION OF FAMILY INTEGRITY

In recent years the actual and estimated incidence of abuse and neglect has greatly increased. This rise is due in large part to heightened public awareness of the problem brought about through mass media coverage. As a result, child care and public assistance personnel have focused their attention on the detection and prevention of child abuse and neglect.[59]

Approximately 150,000 child abuse and neglect proceedings are heard each year by the various juvenile courts throughout the United States.[60] Estimates vary widely as to the actual incidence of child abuse and neglect. Some authorities indicate that 665,000 to 1,675,000 children are physically abused, sexually molested, or seriously neglected by their parents each year.[61] Each year more than 10,000 children are severely battered; at least 50,000 to 75,000 are sexually abused; 100,000 suffer physical, moral or educational neglect; and another 100,000 are emotionally neglected.[62] Neglect is

59. For example, caseworkers are required by law to make periodic home visits to families on public assistance. 42 U.S.C. § 601 (1976); 45 C.F.R. § 2201 (1978). These visitations place the caseworkers in a practical position to observe cases of abuse and neglect.

60. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, JUVENILE COURT STATISTICS 1973 12-13 (1975). Poor people are subjected to abuse and neglect proceedings at a higher rate than their percentage of the general population. Estimates indicate that probably seventy-five percent of neglected families seen by agencies have income below the poverty level and half may be on welfare. *See* Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1021 n.186 (1975). *See also* Handler & Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice*, 31 L. & CONTEMP. PROB. 377 (1966); Paulsen, *Juvenile Courts, Family Courts and the Poor Man*, 54 CAL. L. REV. 694 (1966).

A 1964 study conducted in Minnesota indicates that even though only three percent of the families in the general population were receiving public assistance, forty-two percent of the families reported to be neglecting their children were receiving public aid. Boehm, *The Community and the Society Agency Define Neglect*, 1964 CHILD WELFARE 453, 459. Some authorities have concluded that our child welfare laws even foster discrimination against the poor. *See, e.g.*, tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, (pts. 1-3), 16 STAN. L. REV. 257, 900 (1964), 17 STAN. L. REV. 614 (1965).

61. Light, *Abused and Neglected Children in America: A Study of Alternative Policies*, 43 HARV. EDUC. REV. 556, 567 (1975).

62. V. FONTANNA, SOMEWHERE A CHILD IS CRYING: MALTREATMENT—CAUSES AND PREVENTION 38 (1976).

estimated to be 2½ to 20 times higher than abuse, with estimates ranging between 500,000 and 2,000,000 incidents a year.[63] Still another source estimates that from 2,000 to 5,000 children die each year as a result of child abuse.[64] This disparity in estimates of abuse and neglect incidence stems in part from disagreement as to what constitutes abuse and neglect;[65] a disagreement that is reflected in the variety of statutory standards among the states.[66]

Although statutory standards vary, the laws consistently rely on two tests: the "inadequate parent" standard and the "best interests of the child" standard. Both tests fail to adequately account for the right to family integrity. Reliance on these tests results in

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63. LEVIN, CHILD NEGLECT: REACHING THE PARENT 26 (1973).

64. Kempe, *Approaches to Preventing Child Abuse*, 130 AM. J. DIS. CHIL. 941, 945 (1976).

65. Areen, *supra* note 28, at 887 nn.5 & 6.

66. Various state juvenile codes make reference to delinquency, dependency, neglect and abuse. For example, under IND. CODE § 31-5-7-5 (repealed 1979), the old code provision, a dependent child was defined as: "any boy under the age of eighteen [18] years or any girl under the age of eighteen [18] years, who is dependent upon the public for support, or who is destitute, homeless, or abandoned."

The old code also defined a neglected child as:

> Any boy under the age of eighteen [18] years or any girl under the age of eighteen [18] years who:
> (1) Has not proper parental care of guardianship;
> (2) Is destitute, homeless or or abandoned;
> (3) Habitually begs or receives alms;
> (4) By reason of neglect, cruelty or disrepute on the part of parents, guardians or other persons in whose care the child may be living in an improper place;
> (5) Is in an environment dangerous to life, limb or injurious to the health or morals of himself or others.

IND. CODE § 31-5-7-6 (repealed 1979). The new code, IND. CODE § 31-6-4-3 (Supp. 1979), contains a typical definition of an abused child as one whose "physical or mental health is seriously endangered due to injury by the act or omission of his parent, guardian, or custodian;. . . ." Generally, dependency means that the parents, through no fault of their own, become unable to care for their child. Neglect and abuse, on the other hand, do involve parental fault. Abuse is generally confined to willful injuries to the child while neglect is the result of unintentional inadequate parental care. CHILD ABUSE AND NEGLECT: THE PROBLEMS AND ITS MANAGEMENT, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE 2-3 (1977). This definitional distinction between abuse and neglect is often based on who reports the case rather than what happens to the child. *Id.* This traditional terminology, however, is being abandoned in favor of such terms as "endangered child," and "Child in Need of Services" (CHINS). *See* INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO ABUSE AND NEGLECT 3 (1978); JUVENILE JUSTICE AND DELINQUENCY PREVENTION REPORT, *supra* note 30, at 334. *Compare* IND. CODE § 31-5-7-4, -5, -6 (repealed 1979) *with* IND. CODE § 31-6-4-3 (Supp. 1979).

state intervention in the family without an adequate state interest, thereby destroying family integrity.

Most statutes permit courts to act in the "best interests of the child."[67] However, none of the statutes specify at what point courts must apply this test. Consequently the test has become a general standard for determining whether a child is abused or neglected rather than a dispositional standard to be applied once abuse or neglect is found. The improper application of this test results in a serious erosion of family integrity.

The standard is also impossible to apply because of its inherent vagueness. This vagueness permits judges to import into their decisions personal and typically middle-class biases. Judges, motivated by the worthy goal of giving children the best chances of success in life, often leap to conclude that children would be better off in another placement before any determination is made that the child is truly abused or neglected. These highly subjective judgments of what constitutes bad parenting allow children to be separated from their families or allow the family to be otherwise monitored by the state regardless of actual objective harm. Justice Stewart, concurring in *Smith v. Organization of Foster Families*,[68] condemned the "best interests" test by explaining:

> If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the State cannot enter."[69]

Similarly, the Indiana Court of Appeals has also expressed dissatisfaction with the "best interests" test:

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67. *See* Katz, Howe and McGrath, *supra* note 25. *See also* Areen, *supra* note 28, at 888 n.5. The new Indiana Code provision, IND. CODE § 31-6-4-16 (Supp. 1979), requires the court to enter a decree consistent with the welfare of the child and placement "in the best interests of the child." This test was borrowed from divorce law. Clearly the circumstances involved in a divorce differ from those in an abuse and neglect proceeding. In a divorce, the state acts as an arbiter between parents with equal rights to a child and in roughly equal bargaining positions. On the other hand, in abuse and neglect proceedings, the parents have not voluntarily submitted themselves to the court's jurisdiction for a custody determination and the state participates both as an arbiter and a party.

68. 431 U.S. 816 (1976).

69. *Id.* at 862, *cited with approval* in Quilloin v. Walcot, 434 U.S. 246, 255 (1978), and in Duchesne v. Sugarman, 566 F.2d 817, 827 (2d Cir. 1977).

> If the best interest [of the child] rule was the only standard needed without anything else, to deprive the natural parent of custody of his own child, then what is to keep the government or third parties from passing judgment with little, if any, care for the rights of natural parents. In other words, a child might be taken away from the natural parent and given to a third party simply by showing that a third party could provide the better things in life for the child and therefore the 'best interest' of the child would be satisfied by being placed with a third party.[70]

Subjective judgments on the best interest of the child thus fail because not enough is known about the relative impact of a deficient home and also because such judgments intrude on the private realm of family life.

In order to remedy the abuses of the "best interests" test, the Juvenile Justice Standards Project proposed a two step process. The court should first ascertain whether the child is in fact being abused or neglected.[71] Secondly, the court must apply the best interests of the child test to determine whether intervention and removal is required or if the child can be protected by some other means from the harm used to justify intervention.[72] Thus, the court would be forced to consider if home-based services or alternatives would reasonably ensure the protection of the child. This two step approach more adequately accounts for the family's right to live together.

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70. Hendrickson v. Bailey, 161 Ind. App. 217, 224, 316 N.E.2d 376, 381, *cert. denied*, 423 U.S. 868 (1974). *See also* Caban v. Mohammed, 99 S. Ct. 1760 (1979). In *Caban*, the Court rejected a New York statute which on the theory of the best interests of the child allowed the adoption of a child against its unwed father's wishes. The Court held that there must be a finding of abandonment or other legal basis for permitting adoption. *See also* Hyatt v. Lopez, ____ Ind. App. ____ , 366 N.E.2d 676 (1977); Stevenson v. Stevenson, ____ Ind. App. ____ , 364 N.E.2d 161 (1976). *See generally* Wald, *supra* note 60.

71. *See* Wald, *State Intervention on Behalf of "Neglected" Children: Standards of Removal of Children From Their Homes, Monitoring the Status of Children in Foster Homes, and Termination of Parental Rights*, 28 STAN. L. REV. 625, 627, 662 (1976).

72. In State v. McMaster, 259 Ore. 291, 486 P.2d 567 (1971), the Oregon Supreme Court refused to terminate the parent-child relationship on the basis of the family's poverty, housekeeping, or instability. The court used an equal protection analysis and noted that perhaps the children would have a greater opportunity for achievement in another environment but, in the absence of a substantial departure from the norm, the state could take no action. *See also* In Re Rinker, 180 Pa. Super. 143, 117 A.2d 780 (1955).

Closely related to the "best interests" test is the "inadequate parent" standard, a term which also frequently occurs in abuse and neglect statutes. Like "best interests," the term defies precise definition, thereby allowing the judges and caseworkers the freedom to inject personal, middle-class values into situations involving the lower socio-economic stratum.[73] While discretionary freedom is essential, the vagueness of the "inadequate parent" standard invites abuse.

At the root of the problem with this standard is the difficulty of predicting adult achievement from observation of child-rearing practices. A study recently summarized by Arlene Skolnick demonstrated this fact.[74] Psychologists followed 166 infants born in the year 1929 for a thirty year period. The most startling finding was the difficulty of predicting what thirty-year-old adults would be like even after the most sophisticated data had been gathered on them as children. Ms. Skolnick stated:

> [T]he researchers experienced shock after shock as they saw the people they had last seen at age 18. It turned out that the predictions they had made about the subjects were wrong in about 2/3s of the cases! How could a group of competent psychologists have been so mistaken?
>
> Foremost, the researchers tended to over-estimate the damaging effects of early troubles of various kinds. Indeed, many instances of what looked like severe pathology to the researchers were put into constructive use by the subjects.
>
> The theoretical predictions of the researchers were also jarred from the other direction by the adult status of children who had seemed especially blessed by ability, talent or personality, or ease and confidence . . . .[75]

Courts, rather than heeding such studies, unfortunately often rely on their own judgments in abuse and neglect cases.

In practice abuse of the standard is demonstrated by the creation of presumptions of inadequate parenting. Courts assume, without specifically finding, that mental illness or alcoholism, for example, prevent a parent from adequately caring for the child.[76] In

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73. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROB. 226, 242, 248 (1975).

74. A. SKOLNICK, THE INTIMATE ENVIRONMENT: EXPLORING MARRIAGE IN THE FAMILY (1973).

75. *Id.* at 372.

76. Wald, *supra* note 60, at 1021.

other cases courts have terminated parental rights where the child was present in the home with other illegitimate children or where parents were guilty of writing bad checks.[77] Although parental conduct may harm a child, creation of an irrebuttable presumption or even implicit assumptions of serious harm, absent actual proof, deprives the family of the fundamental right to family integrity and offends basic due process. In fact that which is apparently harmful to the child may actually instill such positive values as responsibility, self-reliance, industry, independence, and innovativeness.

Removal

Unless there is a clear emergency, removal of a child from the home should occur only after abuse or neglect has been determined at a proper adjudicatory hearing and less drastic alternatives have been carefully considered and rejected. Physically splitting up the family constitutes the most serious of all intervening actions. In practice, however, removal tends to be one of the first protective measures used by the state. Frequently, prior to any hearing, a caseworker removes and places a child under foster care. This may be accomplished either with a court order, issued on the word of the caseworker that an emergency exists, or without such an order. Thus the caseworker determines the primary issue of abuse and neglect as well as the dispositional alternative. This, in turn, paves the way for a court to ratify the removal and then to follow the additional recommendations of the welfare department. Given the fact that removal is so drastic and can be accomplished *ex parte* at the early stages of a case, it should be carefully controlled to avoid abuse and overuse.[78]

Statistics indicate the severity of the removal problem. Children are removed from their natural or adoptive homes at an annual rate in excess of 100,000.[79] Approximately 754,000 children

77. *See, e.g.*, In Re Cager, 251 Md. 473, 248 A.2d 384 (1968); In Re Welfare of Karren, 280 Minn. 377, 159 N.W.2d 402 (1968).

78. Despite its impact on the subject family, removal has many attractive features. Removal is relatively easy to effect because the child can be quickly and simply taken from the home by a coordinated effort of the court, the police, and the welfare department. Removal is a potent, effective tool with a great deal of appeal to a sensitive public because the affected child, secreted in foster care, is placed beyond the control and influence of the abusive or neglectful parents. Removal is particularly appealing to the state and its understaffed agencies because it is much less time consuming than other alternatives such a supervision in the natural home.

79. A study conducted in Los Angeles and San Francisco indicates that the courts remove children in sixty to sixty-five percent of all cases in which they assume jurisdiction. In San Francisco the average time spent in foster care is nearly five

live under some form of foster care.[80] The best available data indicate that up to half of abuse and neglect proceedings result in removal of the child from the natural parents' home.[81] Once removed, there is a fifty percent likelihood that a removed child will remain in foster care for three or more years.[82] Estimates vary but between forty and eighty percent of all children presently removed from their homes by court order will never be returned to their parents.[83]

Proper removal takes place in four ways: it may occur without court order under true emergency circumstances; or upon an emergency court order may be obtained prior to a hearing; or after a full adjudicatory hearing for the purpose of establishing temporary wardship; or finally, removal may come after an adjudicatory hearing held to terminate parental rights.

While little is known about what factors most influence child development, one facet seems to rise above all others in importance: the stability of relationships with parents and parent figures.[84] Experts point out that children frequently experience pressure to assimilate new and frightening demands and realities. Since children lack internal controls and objectivity, internal assimilation is best accomplished when a child has a relationship continuity with parent figures.[85]

Child development authorities suggest that any disruption of this relationship severely harms the child. This is true partially because the child conceives of time differently than adults who have

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years. Sixty-two percent of the children placed in foster care remain there for their entire childhood. Fifteen to twenty-five percent return home and less than fifteen percent are ever adopted. *See* Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 559 (1973). *See also* KENISTON, *supra* note 1, at 188.

80. 44 Fed. Reg. 13,255 (1979).

81. Mnookin, *supra* note 79, at 606. *See also* INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO ABUSE AND NEGLECT 1 (1978).

82. Wald, *supra* note 71, at 627.

83. *Id.* at 662.

84. GOLDSTEIN, *supra* note 9, at 9-28.

85. Physical emotional, intellectual, social and moral growth does not happen without causing one child inevitable internal difficulties. The instability of all mental process during the period of development needs to be offset by stability and uninterrupted support from external sources. Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal one. . . . Continuity of relationships, surroundings and environmental influences are essentials for a child's normal development.

Id. at 31-32.

learned to anticipate the future and thus manage delay. Removal becomes an anxiety-ridden experience because children have an innate sense of urgency for emotional ties and support. The child cannot take care of himself physically and his emotional and intellectual memory is too immature to enable effective use of his cognitive powers to hold onto his parents after separation from them. Emotionally and intellectually the infant cannot stretch his waiting more than a few days without feeling overwhelmed by the absence of the parent.[86]

Removal has been described as the coarsest implement used by the state on the family. Involuntary separation of the family is probably the most drastic disruption to family stability.[87] It has been portrayed as a terrifying and painful experience which damages the child's personality and normal growth.[88] The impact of removal is particularly traumatic for the child when it occurs precipitously and without preparation, which is often the case. In fact caseworkers and police officers often prefer surprise removal because the task is much easier.[89]

Parental trauma resulting from removal probably equals that of the child. While many studies have examined the pathology of abusive and neglectful parents,[90] there is very little empirical data regarding specific psychological effects of removal on parents.[91] The parent may experience intense sorrow, pain, shame, fear and a general sense of hopelessness.[92] In addition labels of "child abuser"

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86. *Id.* at 40-41.

87. KENISTON, *supra* note 1, at 185-92.

88. It is abnormal in our society for a child to be separated for any continuing length of time from his own parents and no one knows this so well as the child himself. For him, placement is a shocking and bewildering calamity, the reasons for which he usually does not understand.

Young, *Placement from the Child's View*, 31 SOCIAL CASE WORK 250 (1950). *See also* Maluccio, *Foster Family Care Revisited: Problems and Prospects*, 31 PUB. WELFARE 58 (1973); Wiltse & Gambrill, *Foster Care, 1973, A Reappraisal*, 32 PUB. WELFARE 94 (1974). "[S]o far as the child's emotions are concerned, interference with the tie, whether to a 'fit' or 'unfit' psychological parent, is extremely painful." GOLDSTEIN, *supra* note 9, at 20.

89. In the author's experience, almost every summary removal occurs without any warning to the parent or child, affording no kind of meaningful preparation. In many cases the child of cognitive age is not informed adequately even after removal.

90. *See, e.g.*, CHILD NEGLECT: AN ANNOTATED BIBLIOGRAPHY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (1975).

91. Bricker, *Summary Removal of Children in Abuse and Neglect Cases: The Need for Due Process Protections*, 2 FAM. L. REP. 4037, 4039 (1976).

92. S. JENKINS & F. NORMAN, FILIAL DEPRIVATION AND FOSTER CARE (1972).

or "neglectful parent" stigmatize parents in our society.[93] So long as the welfare caseworker is working with the family in the privacy of the home or the welfare office, the family problem is not open to public review. Removal, however, raises suspicion, gossip and questions among friends, relatives and neighbors. The damage to parents incurred as the result of the labelling experience is not easily overcome.[94] Although the parent may be better equipped emotionally, the pain and the trauma to the parent must be akin to that suffered by the child.[95] Unexpected removal certainly deepens the trauma. Such removal may cause some parents, particularly those without many material goods, to feel as if they have been stripped of the last thing of value in their lives.

Family development experts note a number of other harms associated with removal and placement in foster care. The overall harm to the child and family may exceed the damage the intervention sought to avoid. Often there is little or no contact between the parent and child following removal. The child feels cut off from the parent upon whom he depends for physical and psychological needs. The child may be shifted from placement to placement. The result of all of this is that the child may feel responsible, punished, and bewildered, particularly if the reasons for intervention are not made clear.[96]

Based upon these observations, clearly a child should not be removed except as a last alternative in extreme cases.[97] Unfortunately there are cases of abuse and cases of crisis situations of neglect when a child must be removed from the home immediately. Even in those instances, if the child can be adequately protected or the crisis abated with the child remaining in the home, removal

93. Bricker, *supra* note 91, at 1039, *citing* E. GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963) [hereinafter referred to as GOFFMAN], and R. SCHWARTZ & J. SKOLNICK, TWO STUDIES OF LEGAL STIGMA FOUND IN PERSPECTIVES ON DEVIANCE—THE OTHER SIDE (1964) [hereinafter referred to as SCHWARTZ & SKOLNICK].

94. Bricker, *supra* note 91, at 1039; GOFFMAN, *supra* note 93; SCHWARTZ & SKOLNICK, *supra* note 93.

95. The effect on both parent and child of sudden and unplanned removal is perhaps not unlike the nighttime arrests vividly described in A. SOLZHENITSIN, THE GULAG ARCHIPELAGO (1974), where the author relates the experience as "a breaking point in your life, a bolt of lightning which has scored a direct hit on you. . . . It is an unassimiliable spiritual earthquake not every person can cope with, as a result of which people often slip into insanity. . . ." *Id.* at 3.

96. *See* J. BOWLBY, CHILD CARE AND THE GROWTH OF LOVE 13-20 (1965); GOLDSTEIN, *supra* note 9, at 19-20.

97. Wald, *supra* note 60, at 991-1000; Wald, *supra* note 71, at 638.

would not be warranted. Even when the child cannot be fully protected in the home, the question must become whether the child will be harmed more by the removal than by staying in the home. In answering this question, it must be recognized that, once separated, the family is in danger of complete disintegration. This is due to the lack of social services for rehabilitation and the overuse of foster care.[98] The system's failings can be traced in substantial part to the unbridled discretion of the state and social agencies in dealing with families that come to their attention. The agencies' exercise of this discretion logically overlooks the importance of honoring family integrity.[99]

The consequences of removal reach far beyond the emotions of the parent and child. The frequency and manner in which removal takes place is one barometer of society's commitment to honor family integrity.[100] The ease with which the courts permit removal is an indication of how much they rely on the word of welfare caseworkers.

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98. GOLDSTEIN, *supra* note 9, at 19-20.

A recent 18 month study of foster care revealed that while we spend in excess of two billion dollars annually on foster care, there is little effort to reunite the family. The study found that children are bounced from placement to placement with little apparent justification other than expedience. The report concluded that money could better be spent for rehabilitative services such as counseling, emergency caretakers and crisis intervention services in order to keep families together. NATIONAL COMM'N ON CHILDREN IN NEED OF PARENTS, WHO KNOWS, WHO CARES? FORGOTTEN CHILDREN IN FOSTER HOMES (1979).

99. Lowry, *The Judge v. the Social Worker: Can Arbitrary Decision Making be Tempered by the Courts?*, 52 N.Y.U.L. REV. 1033, 1034 (1977).

A typical consent to temporary wardship reads as follows:

CONSENT TO TEMPORARY WARDSHIP AND
WAIVER OF NOTICE OF HEARING

_____, the natural mother/father of _____ a minor child under the age of eighteen (18) years hereby consents to said minor child being made a temporary ward of the _____ County Department of Public Welfare and waives notice upon any hearing the purpose of which is to create a temporary wardship.

100. Wald, *supra* note 60, at 991-1000; Wald, *supra* note 71, at 638. Wald argues forcefully against removal and in favor of family autonomy. He also criticizes removal because little is known about child-rearing practices and adult predictability and intervention itself may prove more harmful than not removing the child at all. Finally, Wald does not draw the distinction between parental rights and children's rights that some commentators urge. *See, e.g.* S. FIRESTONE, THE DIALECTIC OF SEX 99-118 (1971); Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972). Wald's position is that by promoting autonomous families, both the interests of the child and the parent are promoted. This is a recognition of the right to family integrity and the family's right to be free from state intrusion except in those instances where serious harm is done to the child.

It is also a guage of how far the courts allow the welfare departments to proceed applying their own standards. Removal of the child from the parent who has been the major provider of care has so many disadvantages that some authorities contend summary removal should be exercised only in those instances in which the child's very survival is at stake.[101]

Removal, particularly on a summary and *ex parte* basis, places the state in a powerful position to dictate to the parents the terms and conditions surrounding the return of the child including such things as seeking of counseling, gaining employment, obtaining different housing, and other terms.[102] The state could impose none of

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101. *See* expert testimony of Drs. Albert J. Solnit and Sally A. Provence in Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976), where these eminent child development experts concluded:

> 1. Summary removal of a young child from a parent who has been his major caregiver is a severe threat to his development. It disrupts and grossly endangers what he most needs, that is, the continuity of affectionate care from those to whom he is attached through bonds of love.
> 2. Summary removal should be allowed only under conditions in which physical survival is at stake.

102. Two recent cases, one involving alleged abuse and the other neglect, in which the Valparaiso University Law School clinical program interns represented the natural mothers, illustrate the power the state can wield in the removal process. Moreover, these cases point the need for clearly defined and observed standards.

In the first case an eighteen-year-old natural mother of a two-month-old child was in the process of moving from her parents' home to her maternal grandmother's home. A dispute arose between the woman and her father and the police was called to assist her in vacating her parents' premises. Upon arrival, the police resolved the conflict by advising her to entrust the child to her mother and to leave the premises. Thereafter the police notified the welfare department and, armed with an *ex parte* emergency order from the juvenile court, the department placed the child in a foster home. At the hearing to dissolve the emergency order, the court held as a matter of law that the type of emergency comtemplated by the dependent and neglected child statute existed and that a later evidentiary hearing to determine the existence of a true emergency in this case should be held. Ultimately, through negotiation and a home study to determine fitness of the grandmother's home, the child was returned to the natural mother within two weeks of the removal.

Two points are noteworthy about this case. First, even though both the police and the welfare department admitted that the only reasons for removal of the child were the threats made by the grandfather against the mother, neither saw fit to simply escort the mother and her child out of the house. Secondly, the court found as a matter of law that the child was dependent or neglected thereby creating an emergency juvenile matter. Given this interpretation of the juvenile statute, a parent's argument with a neighbor could conceivably result in an emergency justifying instant removal of the child from the home without further inquiry. Surely child abuse and neglect statutes and the removal power of the state were not intended to be applied in such a loose manner.

these conditions on a family in the absence of abuse or neglect and it seems anomolous that they are permitted to do so when such conditions are not necessarily related to the abuse conduct which gave rise to intervention. This permits caseworkers to impose their personal values on families, thus infringing on family integrity. The potential for such caseworker abuse increases when the statutory standards are couched in vague terms and where any adversarial judicial hearing may not be held for weeks or even months following removal of the child.

It is imperative that the state assume responsibility for compliance with constitutional prerequisites. Presently the state acts with broad discretion and assumes that a parent or family aggrieved by such practices will seek its remedy in a lawsuit. The entire process, however, usually occurs in an uneven situation in which the government has far greater resources and familiarity with legal pro-

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In the second case, a twenty-two-year-old mother had custody of her four-year-old child under a dissolution of marriage decree. During a weekend visitation the natural father took the child to the hospital emergency room for treatment of a skin condition which the mother had been treating as a rash. The child allegedly told the attending physician that her mother had burned her. The welfare department was notified and immediately assumed wardship under an emergency oral order of the court. The natural father was given custody of the child. Upon further investigation by the welfare department, it was determined that the child had made conflicting statements about the origin of her skin condition. The child's pediatrician, after an examination, diagnosed the condition as insect bites or impetigo. After an informal meeting of the judge and the welfare department it was suggested that the matter be heard as a petition for modification of custody in the dissolution court. Nevertheless, the welfare department refused to return the child to the mother pending the outcome of the modification hearing. The refusal was based upon the fact that the child had been taken pursuant to court order (albeit *ex parte* and oral) and that return of the child could not be made absent another court order. Although, as customary, a hearing was set by the court for two months hence, an earlier hearing date was obtained and a special judge ordered return of the child due to inconclusive evidence of abuse. All of this occurred within three weeks of the removal.

In this case the welfare department determined abuse and received official oral sanction of its decision to remove the child. The department then assumed the role of a dissolution court by effecting temporary custody with the father and placing him in a strong position to seek and obtain modification of the original custody order. At no time prior to removal was the mother afforded an opportunity to be heard.

Taken together, these two cases point out the need for clearly defined and applied standards of neglect and abuse. In neither case was there sufficient evidence to warrant immediate removal without a hearing. In neither even was there an effort to hold a hearing within a reasonable time after removal had taken place. These traumatic experiences can have a profound and lasting effect on parent-child relationships and greater care must be taken in the initiation and determination of removal proceedings.

cedures than the typical family which is uninformed in legal intricacies.[103]

Removal can set into motion a boot-strapping process whereby the welfare department places itself in a strong position to justify its actions. It may effectively prepare an argument that in removal the child's best interests have been met and served simply by taking numerous steps prior to the adversarial hearing in order to gain approval of its proposed disposition of the case. For example, the child may be examined by a physician and provided with full medical treatment which the parents could not provide. Parents who fail to provide complete routine immunization and dental care, deficiencies not normally considered neglect in and of themselves, are disfavored under the best interests test. The state is in a position to argue that providing such care serves the child's best interests, while ignoring the fact that the jurisdictional prerequisite of abuse or neglect may be totally lacking at the outset of the case. As a result, the state often places the child in a home which can provide great affluence and cultural exposure to the child. In short the state has the knowledge and resources to provide middle-class improvements in a child's status and further arm itself with arguments disfavoring return of the child to the home and family. Moreover, the child of cognitive age may be extremely reluctant to surrender his newly acquired foster care benefits and return home. In some cases the courts consider the wishes of the child in determining what is in the child's best interest. As this pattern develops, it becomes much easier for the court at the time of the adversarial hearing to conclude that there was indeed neglect and abuse taking place at the time of removal. The court may then impose rigorous middle-class standards upon the parents as a precondition to the return of their child.[104]

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103. *See, e.g.*, Duchesne v. Sugarman, 566 F.2d 817, 828 (2d Cir. 1977); Sims v. State Department of Public Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds*, 99 S. Ct. 2371 (1979).

104. Mr. Donald R. Lundberg, an Indianapolis, Indiana, attorney who has represented a number of families in abuse and neglect proceedings, had this to state regarding strategy in removal proceedings:

> From the strategic standpoint of the parents, there is nothing more important than having a child still in the home at the time of the hearing. First, the parents are able to demonstrate that they can adequately care for the child. Secondly, it is far more difficult for the judge to look at the parent whose child is yet in the home directly in the eye and say, "I am removing your child today," than it is for the judge to simply order the continuation of the status quo for a child already removed.

Interview with Donald R. Lundberg, Attorney at Law, in Indianapolis, Indiana (April 3, 1979).

As a result of the removal parents are often in so poor an emotional state as to render them incapable of assisting counsel to prepare for any court hearings.[105] Parents may become so traumatized that they are unable to face their child in regular visits and this too may be held against them at a later date. Finally, removal is precisely the opposite of what is needed for a family experiencing disintegration. It may well be the death knell to the family in trouble. What is really needed is the opportunity for the family to remain together to salvage and build upon those positive aspects of the family.

The legalities of removal proceedings must be scrutinized under two broad considerations; substantive and procedural due process. First, it must determined whether the standards for removal correctly balance the interests of the family, parents, the state, and children, and secondly, whether, when removal becomes absolutely necessary, adequate notice and opportunity to be heard are provided. The establishment of adequate standards for removal is fraught with many difficulties. First, even experts are unable to agree when removal should take place.[106] Secondly, judges are often less knowledgeable in child development and psychology. Finally, caseworkers and others involved in the process are similarly unprepared to deal properly with the complex psychological problems

105. Neglect and abuse proceedings can be a highly emotional experience for the family, but the unannounced removal of a child is perhaps the most traumatic aspect of all. The lawyer who has counselled parents immediately thereafter may find them still in shock and often receives firsthand exposure to their raw emotional responses, including anger, hostility, resentment, sadness, shame, self-pity, frustration, and blame. Many first interviews with parents are indelibly imprinted in the author's memory. Caseworkers, attorneys, and judges who are exposed to these emotional expressions may become hardened and removed to a safe distance by professionalism. However, for the family members experiencing coercive separation for the first time, the loss can be devasting.

Aside from being left emotioinally poor, the parents of a removed child or children may also be financially poorer, thereby compounding the problems of reuniting the family. In particular, removal results in the termination of AFDC payments to the family. A parent who is unemployable for one or another reason may thus have difficulty surviving, let alone getting his family back together. Further complicating matters is the fact that the state may attempt to terminate parental rights if the parents fail to make sufficient progress toward reuniting the family. These facts are particullarly ironic when considered in light of the disparity between AFDC benefits which a family is entitled to while living together and the amount of money allotted for foster care. For example, Indiana pays $325 per month to a family with four children under the AFDC program. But the state pays $720 per month in foster care when the same children are removed from the home. Such disparity clearly dishonors family integrity.

106. *See, e.g.*, Paulsen, *Legal Protection Against Child Abuse*, 13 CHILDREN 42 (1966).

that arise. A number of commentators have noted that removal and placement decisions often are the result of middle-class misunderstandings of the poor and the eccentric rather than from any proven harm to the child.[107] In addition racial and class biases have been found to play a substantial role in many removal and placement decisions.[108]

Removal is most often effected under vague standards of "neglect." In thirty states a finding of neglect can be based on the parents' inability to provide the child with necessities due to poverty.[109] This results in a classic case of blaming the victim. At a minimum, removal should not be permitted except for those harms which are jurisdictional; that is, those instances which clearly permit the court to legally order intervention based upon abuse and neglect.

With respect to procedural due process and the timing of adversarial hearing, a number of jurisdictions have condemned removals absent a prompt hearing.[110] In recognizing the fundamental nature of the parent-child relationship, these courts have held that a crowded court docket does not justify dispensing with a prompt hearing.[111]

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107. *See, e.g.*, Campbell *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause*, 4 SUFFOLK L. REV. 631 (1970); Levine, *Caveat Parens: A Demystification of the Child Protections Process*, 35 PITT. L. REV. 1 (1973).

108. *See* Painter v. Bannister, 248 Iowa 1390, 140 N.W.2d 152 (1966); In Re Booth, 253 Minn. 395, 91 N.W.2d 921 (1958). Although race cannot be a motivating factor in infringing on parents' fundamental right to the care and custody of a child, race may be considered in the adoption of a foster child. Drummond v. Fulton County Department of Family and Children's Serv., 408 F. Supp. 382 (1976), *aff'd*, 563 F.2d 1200 (1977), *cert. denied*, 437 U.S. 910 (1978).

109. KENISTON, *supra* note 1, at 187.

110. *See, e.g.*, Sims v. Department of Public Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds*, 99 S. Ct. 2371 (1979) (Ten Days); Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976); Newton v. Burgin, 363 F. Supp. 782 (W.D.N.C. 1973) (Five Days); White v. Minter, 330 F. Supp. 1194 (D. Mass. 1972) (Six Months); In Re C____ , F____ , and B____ , 497 S.W.2d 831 (Mo. App. 1972); York v. Halley, 534 P.2d 363 (Okla. 1975); LeMaster v. Oakley, 203 S.E.2d 140 (W. Va. 1974).

111. In Ives v. Jones, No. 75-0071-R (E.D. Va., decided August 8, 1975), the court entered a consent order which prohibited summary removal except in emergencies where the child's life or health was in "imminent danger" to the extent that delay for the provision of the hearing would likely result in irremediable injury. The United States Supreme Court has set forth constitutional support for this position. In Stanley v. Illinois, 405 U.S. 645, 659 (1972), the Court noted that family integrity requires that parents be given a hearing prior to the forced removal of their child by the state.

In the nonfamily context, the Court has permitted summary intervention into protected interests in emergency situations. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67

Because removal is such a drastic course of action, it is incumbent that it be resorted to in a limited number cases. Four important principles for its application emerge. First, the interests of the parent and the family require that the child be removed only in those instances where the state clearly demonstrates the child is facing imminent and serious harm. Secondly, removal without first holding an adversarial hearing should be limited to those cases where the serious harm will become irreparable as a result of the delay necessitated by holding such a hearing. Thirdly, if summary removal becomes necessary, a full judicial hearing should be held no later than five to ten days after removal is effected. Finally, the state must be able to demonstrate that the harm occasioned by the removal is less damaging than the harm that would result from the child's continued presence in the home.

The Need for Continued Parent-Child Contact

Once removal becomes necessary and is effected, continued parent-child contact is vital to the family rehabilitative process. Unfortunately studies indicate that continued contact between the removed child and parent does not often take place. Once a child is placed in foster care there is a fifty percent chance that the child will remain there three years or more.[112] Statistics also reveal that little or no visitation occurs once the child is placed in foster care.[113]

There is evidence that the child is benefitted by contact with the parent even though it may be infrequent. Even relatively few visits help to prevent the feeling of abandonment and tend to promote feelings of security. In one study of sixty-one children who had been in foster care in excess of one year, thirty-three identified with both the foster and natural parent while seventeen identified primarily with the natural parent. In the latter case, this was true even though many were visited infrequently.[114] Those children who identified with their natural parents were determined as having the

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(1972). *See also* North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601 (1975), where the Court limited such actions to emergency situations which are carefully circumscribed. Thus a prior hearing must be held unless it would irreparably frustrate a substantial state interest.

112. *See* note 82 *supra*, and accompanying text.

113. *See* E. SHERMAN, R. NEUMAN & A. SHINE, CHILDREN ADRIFT IN FOSTER CARE: A STUDY OF ALTERNATIVE APPROACHES (1974). Their study indicated that only sixteen per cent of the children were visited bi-weekly or more and twenty-seven per cent of the children had no cantact at all with their parents.

114. E. WEINSTEIN, THE SELF-IMAGE OF THE FOSTER CHILD 65 (1960).

highest sense of well-being of all the children.[115] One expert suggests that a child benefits from two sets of parents. This appears to be especially true in those cases where the natural parents visit their children often.[116]

Every state has some form of statutory provision which permits terminations of parental rights. Although certainly there are cases that justify total and permanent separation of the parent and child, it is suggested that such is not always the case. Rather, there are countless cases where continued parent-child contact would lead to more stable personal and family relationships. Every opportunity should be afforded parents and children to visit each other. Indeed frequent visitation and contact should be encouraged as opposed to being completely and irrevocably terminated.

INDIANA'S ABUSE AND NEGLECT PRACTICES[117]

Indiana's abuse and neglect practices developed under the old juvenile code,[118] and were superseded by the new code.[119] The federal[120] and state[121] welfare statutes and regulations also shaped these practices. These practices were implemented through the machinery of the county probation and welfare departments and the various juvenile courts.[122]

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115. *Id.*

116. Wald, *supra* note 71, at 672.

117. The author's conclusions in this segment of the article are drawn from personal interviews of six juvenile court judges from six counties in northwestern Indiana. The interviews were conducted in late 1978 and early 1979 using the same 67-item questionnaire for each judge concerning their practices under the old code and their analysis of the new code. Counties selected for the survey are demographically representative of Indiana counties; their populations accordings to the 1975 census were 12,780, 20,667, 22,919, 105,857, and 546,757. Thus three of the counties were primarily rural, two are moderately urban and one county is substantially urban. County size is directly proportionate to the amount of time each judge spends on abuse and neglect cases. In smaller counties, abuse and neglect cases are infrequent; in medium-size counties, judges spend about one-half day per week on such cases; in the largest county, three juvenile court referees devote a substantial amount of their time to abuse and neglect with approximately 200 petitions per year. The judges surveyed in age from 32 to 60 years and in experience in juvenile matters from 2 to 16 years.

Supplementing the survey of judges, the author submitted a 33-item questionaire to each of the six county's welfare departments in 1979. Five of the six departments responded to the questionaire which was designed to gather specific statistical data on complaints, placement, return of children, and consented intervention.

118. IND. CODE §§ 31-5-7-1 through 31-5-7-25 (repealed 1979).

119. IND. CODE §§ 31-6-11-21 (Supp. 1979).

120. The Social Security Act of 1935, 42 U.S.C. § 601 *et seq.* (1976).

121. The Indiana Public Welfare Act, IND. CODE §§ 12-1-1-1 *et seq.* (1976).

122. In every state welfare program for families are administered on the local

Each abuse and neglect practice must be examined in light of its impact on family integrity. Indiana does not treat abuse and neglect as a family problem requiring family solutions. Instead the welfare department and the courts focus primarily on the best interests of the child, a focus which often results in removal of the child from his home. This may protect the child, but only at a substantial risk to the family. Parents and children are separated in a high number of cases with few assurances of adequate continued family association during this period of removal. Moreover, the more often separation occurs, the greater the likelihood that reuniting will not take place.

Indiana's practices may be modified under the new code, but probably not to the extent necessary to assure family integrity consistent with the best interests of the child. By allowing the welfare department and the courts broad discretion, the new code follows the style of the old. Additionally the court's traditional reliance on the welfare department's judgments grants the departments enormous powers. The evil of this arises from the welfare departments' delegation of discretionary authority to individual case workers. This delegation of authority to the caseworker permits the interjection of personal biases in any given case at the initial point of state contact with the family.[123]

Abuse and neglect proceedings begin with a complaint.[124] After welfare department investigation and a report to the court, the

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level by county departments of public welfare under the direction and supervision of state welfare departments. In Indiana each county department has two divisions: eligibility caseworkers who work with families receiving Aid to Families with Dependent Child (AFDC) benefits and caseworkers who work with both AFDC families and nonwelfare recipient families deemed to be in need of child welfare services. The federal government pays a substantial portion of the costs to operate these welfare programs.

123. The "child welfare services" provisions of the Indiana Public Welfare Act confer responsibility on the state department of public welfare and the various county departments to protect and care for the homeless, dependent, and neglected children and children in danger of becoming delinquent. IND. CODE § 12-1-8-1 through -3 (1976). All of the well-populated counties in Indiana have divisions within their departments which specialize in working with families and children deemed to be in need of protected services. These divisions also secure and supervise foster homes and make placements for those children who are removed from their natural or adoptive homes.

124. According to the survey the most populous county in the survey receives 1,036 complaints per year while the least populous county receives 18 per year. Forty percent of the complaints are filed by neighbors, twenty percent by teachers, fifteen percent by AFDC caseworkers, and fifteen percent by other persons. On the average, sixty-nine percent of all complaints received are determined by the welfare departments to involve abuse and neglect.

judge makes a prelimilnary determination of whether it should exercise formal jurisdiction.[125] The court may then permit the county probation or welfare department to file a petition alleging dependency or neglect or that the child is in need of services.[126] With the filing of a petition, the court acquires formal jurisdiction and may order a disposition of the case after a hearing. The child, however, may be removed prior to a hearing and without court order by welfare department action.[127]

Statistics reflect that the courts rely heavily on the actions and recommendations of the welfare department. A welfare department survey disclosed that courts find abuse or neglect in ninety percent of all such cases filed. Three-fifths of the counties surveyed indicated that the courts found abuse or neglect in *all* of the cases filed. Welfare department recomendations were followed in ninety-five percent of the cases. Finally, courts make the children wards of the welfare department, vesting the department with nearly full discretion as to placement, visitation and conditions for return of the children to their natural homes in all but a few instances.[128]

What these statistics mean is that the welfare departments most often request wardship which is customarily granted, even though the old code provided eight other specific dispositions.[129] The new code, likewise, provides eight alternatives to wardship.[130] Although wardship in the welfare department is not specifically provided for in the new code, only experience may disclose a change in the courts' dispositional practices.

Some indication of the direction the courts will take in interpreting the new code may be found in the courts' and welfare departments' definitional approaches under the old code. Most of the

125. *Compare* IND. CODE § 31-5-7-8 (repealed 1979), *with* IND. CODE § 31-6-4-10 (Supp. 1979). Under the new code, the petition is to be filed by the county prosecutor or attorney for the county welfare department.

126. IND. CODE § 31-6-4-10 (Supp. 1979).

127. Under the old code, removal could occur with a court order, IND. CODE § 31-5-7-9 (repealed 1979), or without an order of the court, IND. CODE § 31-5-7-12 (repealed 1979). The new code permits summary removal to occur either with or without order of the court or as a dispositional alternative. *See* IND. CODE §§ 31-6-4-4, -10(e), and -16 (Supp. 1979).

128. Parents aggreived by actions of the welfare department acting under such broad authority are always entitled to contest the actions in court. The new code, however, does not require the appointment of counsel until after the parent-child relationship is terminated. This means that poor families may effectively be barred from attaching abuses of discretion of the welfare departments.

129. IND. CODE §§ 31-5-7-15 (repealed 1979).

130. IND. CODE §§ 31-6-4-16 (Supp. 1979).

judges surveyed expressed difficulty in defining the terms dependent or neglected.[131] Apparently the welfare departments have as much difficulty defining these terms as the courts. The surveyed departments responded that they relied solely on the statutory definitions.[132]

Both judges and case workers consider the best interest of the child as paramount. All of the judges replied that the best interest of the child is an inseparable element in the determination of neglect. The judges' statements of the purpose of wardship varied widely, but generally centered on protection of the child.[133] Welfare departments responded similarly.[134] On balance however, four of the six judges gave a high priority to the rights of the parents. They indicated that in their view, so long as they comply with the law, parents have the right to control their child until the home becomes clearly inadequate. They also indicated that parental rights are equal to or more important than the rights of the criminal defendant.[135]

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131. "Abuse" was defined by all of the judges to mean "intentional injury." On the other hand, there was no consensus as to the meaning of "neglect." It was defined as a lack of love or basic necessities; failure to provide for basic needs of the child; ability to care for the child but failure for one reason or another to do so; a clear deprivation of necessities; and a failure to give adequate care to the child. While it is unclear from these various definitions whether judicial focus is on parental conduct or the harm done to the child, it is significant that none of the judges specifically mentioned that they require a showing of harm to the child as part of the proof. Implicit, however, is the assumption that a showing of substandard care indicates harm to the child.

132. In identifying neglect, caseworkers look for exploitation of the child; emotional disturbance due to constant friction in the home, marital discord, or mentally-ill parents, and emotional neglect resulting in insecurity of the child. *See* INDIANA DEPARTMENT OF PUBLIC WELFARE SOCIAL SERVICES MANUAL, III-4-14, (1976).

133. Two judges indicated that the purpose of wardship is to protect the child and that the protection interest is paramount. Two other judges indicated that wardship is a step that permits the court to provide an institutional substitute when parents are not properly caring for the child. Finally, the last two judges indicated that wardship is designed to provide a period for abatement of the problem until such a time as the parental deficiencies are corrected.

134. Three county welfare departments view wardship solely as a means of protecting the child. Two other departments indicated that wardship is designed to not only protect the child but to provide a time for rehabilitation of the home.

135. Although these judges indicated that parental rights are important, this is inconsistent with their treatment of welfare department investigations which involve entry into the home. None of the judges, for example, indicated that they ever excluded evidence because it was the fruit of an illegal search or seizure. All five of the reporting welfare departments said that they inspect homes which are the subject of a complaint, and in most instances without a court order to inspect.

The United States Supreme Court addressed the Fourth Amendment issues in-

According to the welfare survey, children are removed from their parents in sixty-five percent of the cases in which the welfare

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volved in inspections in Wylman v. James, 400 U.S. 309 (1971). As noted, many complaints registered with the welfare department come through the AFDC caseworker after the regular recertification of eligibility home visit. In *Wylman*, the Court held that these visits without a warrant did not violate the Fourth Amendment, since the visits are not searches. The Court concluded that they were not searches because there is notice, the purpose is limited to gathering information for continued eligibility and the visits are not "forced or compelled." They are not forced or compelled since visits can be refused without criminal sanction, although AFDC benefits are forfeited. Moreover, the Court stressed that the visits were at reasonable hours and the caseworker conducted the interview only in the living room and not throughout the house.

Ironically, the AFDC caseworker relates to the parent as a friend and helper. In many instances, this caseworker represents the family when problems, such as landlord/tenant conflicts, arise. A much different role is assumed by the same caseworker when he or she reports possible abuse or neglect to the child welfare division. This is especially true when the caseworker later testifies against his client in an abuse or neglect proceeding. It is incongruous to assume that an AFDC recipient's consent to the recertification interview is also a consent to adversarial use of home observations in an intervention proceeding.

Besides AFDC caseworker reports, observations of the home may be gathered in the course of investigation upon complaint of a neighbor, teacher or other person. Most, if not all, of these observations are made prior to any instruction from the court to make an investigation.

In these instances, a warrantless search is equally offensive and more legally suspect. In Re The Wardship of Bender, ___ Ind. App. ___ , 352 N.E.2d 797 (1976). The Indiana Court of Appeals addressed the Fourth Amendment issues raised by these investigations. In this case, the welfare department investigator came into the home on three separate occasions without a warrant and with only questionable consent. On the last occasion, health officials accompanied the department representative. The purpose of the visit was to summarily take the child and document the home conditions. They looked into the refrigerator, garbage bags, bedrooms, closets, and drawers. Their observations, supplemented by photographs and memoranda, were extensively reported in court. Although the Court of Appeals admitted that such unconsented observations may constitute an unreasonable search and seizure in violation of the Fourth Amendment, it held that the error was harmless. The court found that in this case there was sufficient untainted evidence on which the lower court could base a finding of neglect. Thus the welfare department may bootstrap its contentions after gathering illegal evidence by admissions of parents or "consented" removal and placement.

Warrantless administrative searches in the context of OSHA regulations were recently held violative of the Fourth Amendment. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). Obviously, warrantless administrative searches by the welfare department present a substantially different situation than searches by industrial safety inspectors. If industrial workers are considered unable to protect themselves, how much more so are children. Nevertheless, the home is a carefully protected place in our society where the most stringent showings of probable cause are required before searches are permitted. The greatest dangers of intrusion occur when children are summarily removed in the course of unannounced investigatory inspections.

Moreover, the other basic protections of trial procedure are also frequently not

department makes a determination of abuse or neglect. All but ten percent of these children are summarily removed prior to any adversarial hearing. Moreover, the courts deny welfare department requests for removal in only about five percent of the cases. But these figures do not tell the entire story.

The most disturbing element which underlies these figures is the vast discrepency in standards of the official mechanisms involved and the inexcusable delays which result. Judges' standards for granting emergency removal vary, as do those of the welfare departments.[136] Only one judge reported that an adversary hearing was held within ten days after removal of filing of the case. Three judges indicated that hearings typically occur thirty days after removal or filing, and one judge said the hearing was held between thirty and sixty days later. This is substantially longer than constitutionally permissible. Moreover, most welfare departments admitted that alternatives which keep the family together are either not available or cannot be considered under the circumstances.[137] Child placement thus becomes all the more crucial to preserving family integrity.

Given the fact that ninety percent of the cases result in welfare department wardship, serious issues arise concerning the discretion vested in the departments. Once wardship is granted, the

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followed. For example, five of the six judges reported that they do not adhere to the rules of evidence in abuse and neglect hearings. Also, the judges shift the burden of proof to the parents to prove fitness, once the petitioning welfare department makes a prima facie case of abuse or neglect. The judges disagreed about the burden of proof required.

136. One judge indicated that there has to be substantial neglect. Another said the child has to be in danger. A third judge requires that the children be unattended or in a filthy home. The fourth judge states the situation must be imminent in an abuse neglect and absolutely no responsible person to care for the child in a neglect case. A fifth judge requires that the situation be desperate, and the sixth judge gave no response. Three of the judges make no finding of abuse or neglect for issuance of the emergency order. One of the judges simply puts his reasons on the record. Two of the judges make findings of fact regarding abuse or neglect.

Only one department reported that the child's life must be in danger to justify emergency removal. The other departments said that they summarily remove the child when the child is in immediate danger, or seriously abused or neglected or the health, welfare and safety of the child require removal.

137. Most departments report they consider counseling and homemaker services prior to removal but they are often unworkable solutions. Three of five counties report the unavailability of homemaker services, day care, or supervised family facilities in their counties. Use of foster family care is by far the most often used alternative when a child is removed. The departments express regret that high caseworker caseloads prevent any meaningful direct supervision in the home.

court no longer exercises control over child placement.[138] Most often the welfare departments place the child in foster care.[139] Frequently, two or more children from the same family are split between homes. In one reporting department, separation occurs in eighty-five percent of the removals.[140]

The effects of separation on family unity are devasting. These consequences are compounded by the fact that only about fifty-five percent of the removed children are eventually returned to their homes.[141] Additionally children under the age of five are kept out of the home for periods ranging from two to five years. Finally, visitation rights are severely limited by welfare department discretion. Typically visitation occurs once per month for one hour at the welfare department office.[142]

Unfortunately, unless there are drastic increases in welfare department resources, meaningful reform in abuse and neglect practices is unlikely. Rehabilitation of the family is all but a dream so long as each case worker must handle an average of seventy-five open abuse or neglect cases. While other community agencies may help, the most effective rehabilitative agent, the case worker, is precluded from engaging in direct, comprehensive family treatment. To some extent the caseload problems of the departments are self inflicted. Funds which might otherwise be spent hiring additional

138. All judges indicate that placement in foster family care is left entirely up to the welfare department. None of the judges look into the adequacy of the foster home for the reason that foster homes must meet state welfare department licensing requirements. One judge lamented that the court never has any idea in which foster home the child or children are placed and that the welfare department shifts children from one foster home placement to another without court approval.

139. The survey indicates that welfare departments place sixty percent of the children in foster homes, fifteen percent in institutions, ten percent with relatives, and fifteen percent of the children remain with a parent. All of the judges report foster family care is the first alternative sought in placing children. Both the welfare departments and the judges agree that institutions are one of the least desirable alternatives and that children should be placed in group homes when individual foster families are not available.

140. For a moving description of the trauma experienced by children separated in different foster home, *see* K. HAYES & A. LASSARINO, BROKEN PROMISE (1978).

141. In those counties surveyed, the highest rate of return is eighty-five percent and the lowest rate is fifteen percent.

142. Only one department permits weekly visitation by the parents. Two departments permit foster home visitation and, depending on the circumstances, overnight visits in the parents' home. Among those reasons most often cited for such limitations are parental disinterest, a hesitancy to disrupt the child's adjustment in the foster home, foster parent bias against visitation, and the lack of sufficient staff to supervise visitation.

caseworkers and other rehabilitation personel are channeled into providing foster care for children which might have remained in the home. Judges, however, fail to perceive that insufficient efforts are directed into rehabilitation. Four of the six responding judges stated that the departments in their jurisdictions made reasonable efforts to return children to their homes. None of the judges reported ordering the welfare department to provide rehabilitative services.[143]

The problems with judges' perceptions of abuse and neglect proceedings do not end here however. The powers of the court are consistently misconstrued by the judges. For instance, all reporting judges believed that they may terminate parental rights in juvenile court, even though the old code did not provide for such termination.[144] Moreover, both courts and welfare departments construe "wardship" under the old code to mean either temporary or permanent wardship. Permanent wardship is thus tantamount to termination.[145] Although the new code fails to provide clearly defined involuntary standards and procedures, judges can be expected to terminate parental rights when they deem it justified, as they have in the past.[146]

THE NEW INDIANA JUVENILE CODE

In response to growing dissatisfaction with the 1907 Indiana Juvenile Code,[147] the Indiana Legislature enacted a new version effective October 1, 1979.[148] The old code primarily focused on parental conduct rather than family integrity. In permitting the overuse of removal as a dispositional alternative, the old act did not adequately assure the maintenance of the parent-child relationship.[149] In seeking

143. One judge commented that most cases of physical neglect could be remedied best while the child is in the home. Unfortunately, there are insufficient funds for the necessary supervision and services that such an alternative would require. This judge concluded that the current emphasis on removal and foster care is misplaced. Rather, the thrust of the effort should be on services in the home.

144. Two judges state they terminate the parent-child relationship only when there is no hope of rehabilitation or of ever returning the child to the natural home.

145. *See* in the Matter of Perkins, ____ Ind. App. ____ , 352 N.E.2d 502 (1976); In Re Bender, ____ Ind. App. ____ , 352 N.E.2d 797 (1976).

146. *See* IND. CODE § 31-6-5-4 (Supp. 1979). The termination test as enunciated in In The Matter of Perkins, ____ Ind. App. ____ , 352 N.E.2d 502 (1976), should remain relevant. Three inquiries are pertinent: the length of the history of abuse or neglect; the probability of continued abuse or neglect; and the best interest of the child's future welfare in terminating the parent-child relationship.

147. IND. CODE §§ 31-5-4-3 through 31-5-5-4 (repealed 1979).

148. IND. CODE §§ 31-6-1-2 through 31-6-4-19 (Supp. 1979).

149. *See generally* IND. CODE §§ 31-5-7-5 through 31-5-7-6 (repealed 1979).

to remedy these shortcomings, the general assembly made significatnt modifications in the procedures and standards for state intervention.

The new code has been incorporated into Indiana's family law statutory scheme. Ostensibly the new code emphasizes family autonomy and integrity. Indeed the law as enacted includes the purpose "to strengthen family life by assisting parents to fulfill their parental obligations . . . ."[150] However a closer examination of the new code reveals a continued pronounced emphasis on the child rather than the family. For example the designation of "dependent or neglected" has merely been replaced by the term "Child in Need of Services."[151] Likewise, the standards for intervention have been revised to focus on harm to the child rather than parental conduct.[152] Under the dispositional alternatives section, emphasis is placed on the safety of the community and the child.[153] Finally, the new code provides for progress hearings every nine months to determine the appropriateness of the child's present placement.[154]

These isolated statutory provisions, however, do not adequately or fairly depict the precise nature of the act. In order to undertake a proper analysis of the degree to which the state intends to honor family integrity, the new code must be examined with respect to seven critical stages: investigation, placement, visitation, voluntary

150. *See* IND. CODE §§ 31-6-1-1 (Supp. 1979).

151. *See* IND. CODE § 31-6-4-3 (Supp. 1979). A major critism of the new act is that the delinquency and CHINS provisions are in the same chapters and sections with same or similar language used to deal with both concepts. In some instances, deliquency terms are used to set CHINS standards. The purposes, considerations, and interests at stake of state, parents, children and families, are distinctly different for delinquency as compared to abuse or neglect. The act, therefore, more properly should have been divided into two separate, distinct parts; one dealing with delinquency only and the other with CHINS.

152. IND. CODE § 31-6-4-11 (Supp. 1979).

153. IND. CODE § 31-6-4-16, -19 (Supp. 1979). Under these sections of the code, the court is to provide in the dispositional decree "a reasonable opportunity for the participation by the child's parent," and is to consider in the progress reviews "the extent to which the parent has visited the child, including the reasons for infrequent visitation." There are, however, no specific provisions ensuring the right to continued meaningful family association during the period of time that the court has jurisdiction. Thus, family integrity is not taken into account and is not afforded necessary protection by the State.

154. IND. CODE § 31-6-4-19 (Supp. 1979). This progress report section appears to indicate a legislative opposition to family integrity. In order to prevail at such a hearing, "the state must show that the child should not be returned to the parent, guardian, or custodian." It would seem from this language, however, that the legislature does not deem that the state gains when the family is reunited.

removal, rehabilitative services, termination standards, and the right to counsel.[155]

Investigation

The new code permits any person to give the juvenile court intake officer written information indicating that a child is in need of services.[156] The officer then makes a preliminary inquiry or informal investigation into the child's background, current status and school performance.[157] The act gives broad discretion to the court officer without placing limitations on the manner and extent of fact gathering.

In *Sims v. State Department of Public Welfare*,[158] the court made it clear that the mandate of due process extends to the investigative stage of state action into the privacy of the family. Under this rule the family must have access to the fruits of the investigation, including reports and records, so that it can be fully apprised of the nature of the accusations made by the state. Severe legislative restriction on the nature of the investigation, the use of psychological or psychiatric examinations, and the dissemination of information prior to an adversarial proceeding and subsequent judicial determination would also seem to be required. Permitting an investigation without these safeguards is a violation of due process and the right of privacy. By failing to impose restrictions on the investigative process, the act has increased the chance for violation of these rights.

Similarly, the new code does not impose any limitations on observation and fact gathering in the home. The United States Supreme Court has condemned warrantless administrative searches for purposes of housing inspections,[159] and warrantless administrative searches for purposes of fire inspections.[160] It would

155. The Indiana Child Welfare Act of 1978 reflects some of the best current thought in the neglect area and takes account of each of these considerations. One section which was proposed, but was omitted from the final version of the act, would have clarified the distinction between parental conduct and actual harm to the child. Poverty, inadequate housing, alcohol abuse or other non-conforming social behaviors on the part of the parent or the extended family were not to be deemed prima facie evidence that serious physical or emotional damage to the child had or would occur.

156. IND. CODE § 31-6-4-8 (Supp. 1979).

157. *Id.*

158. 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds*, 99 S. Ct. 2371 (1979).

159. Camara v. Municipal Court, 387 U.S. 523 (1967).

160. See v. City of Seattle, 387 U.S. 541 (1967).

seem that the fundamental right to family integrity which directly involves family relationships requires an even higher level of protection. Here, not only are the physical conditions of the family abode being invaded, but in addition these observations intrude into very personal, intimate family relationships. In *Wyman v. James*,[161] the United States Supreme Court permitted observations in the home for purposes of the recertification of welfare benefits. However, clearly such observations are distinguishable from those which are performed for the purpose of possible coercive intervention. In *In Re the Wardship of Bender*,[162] the Indiana Court of Appeals held that the Fourth Amendment protects the family in abuse and neglect proceedings. However, it also held that use of illegally obtained evidence in that case was harmless error after reviewing the entire record. There must be an initial determination as to the legality of the methods utilized to obtain evidence, without consideration of its substance. To consider the evidence in light of the entire record is to fail to recognize the unavoidable prejudicial effect on the judge at the time of introduction. The new code must exlicitly guarantee this Fourth Amendment protection.

Removal

Removal is by far the most critical and drastic stage of abuse and neglect proceedings. This is particularly true of summary removal where there is no opportunity for an adversarial hearing. Under the new code a child alleged to be in need of services can be removed from the home by use of one of three procedures. Removal can be accomplished with[163] or without[164] a court order. In either instance the removal is summary and therefore without an adversarial hearing, although a detention hearing is required within seventy-two hours after removal.[165] The child may also be removed after a full adversarial hearing on the issue.[166]

The code properly acknowledges that a child should not be removed absent a showing of clear harm and that an adversarial hearing must be held quickly. However there are no provisions restricting summary removal to cases where irreparable harm would be caused by the delay to hold a hearing nor does the code re-

161. 400 U.S. 309 (1971).
162. ___ Ind. App. ___ , 352 N.E.2d 797 (1976).
163. IND. CODE § 31-6-4-4(c) (Supp. 1979).
164. IND. CODE § 31-6-4-10 (Supp. 1979).
165. IND. CODE § 31-6-4-6 (Supp. 1979).
166. IND. CODE § 31-6-4-16 (Supp. 1979).

quire the state to show that the removal is less harmful than the harm occurring in the home. As a result of these deficiencies, officials responsible for summarily removing a child are permitted to apply subjective standards for removal. Moreover once the child is summarily removed, even after an adversarial hearing, the court is free to ratify the removal and to impose substantial conditions upon the family for return of the child.

The new code provides that a child may be taken into custody by any law enforcement officer under an order of the court.[167] It further permits removal without a court order by any law enforcement officer, probation officer, or case worker acting with probable cause to believe that the child is in need of services.[168] As originally enacted the code permitted removal if it appeared that the child might be injured. This vagueness permitted too much discretion because any injury, regardless of its severity, could justify removal. The standard clearly has been tightened so as to require serious harm to the child as a prerequisite to removal.[169]

The code enumerates four separate grounds for detention: upon a reasonable belief to protect the child; the child is unlikely to appear for subsequent proceedings; there exists a reasonable basis for the child's request not to be released; or the parent is unwilling or unable to take custody of the child.[170] Therefore, under the new code a child may also be removed from the home pursuant to a court order but without any adversarial hearing. This type of removal occurs after a petition which alleged that the child is in need of services has been authorized for filing. With the support of sworn testimony or an affidavit, the petitioner may request that the child be removed. The court may grant the request by making written findings of fact that at least one of the foregoing grounds for detention

167. IND. CODE § 31-6-4-4 (Supp. 1979).

168. IND. CODE § 31-6-4-4(c) (Supp. 1979).

169. *See, e.g.*, Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976).

170. IND. CODE § 31-6-4-6(d) (Supp. 1979). Several concerns are raised by these standards. First, while Section 31-6-4-6 was amended by the legislature in 1979 to clearly apply to a child in need of services, these detention standards are almost identical to those applied to a delinquent child under Section 31-6-4-5. The term "detention" is a delinquency concept similar to the adult criminal term "incarceration" and focuses on the restraint of the child's liberty. These standards do not, however, lend themselves to addressing the liberty and privacy interests of the family. Second, the statute is totally unclear as to what the child is to be protected from or the degree of harm that must be present. The result is to permit broad discretion in the summary removal process because the actions of the removing party are not first subject to adversarial scrutiny.

exists.[171] Similarly when the child is removed without a court order, the intake officer is required to investigate the reasons for detention and may remove the child if one of the enumerated standards is met.[172] Thus the person removing the child initially without a court order is required to believe only that the child is seriously impaired or seriously endangered while the intake officer must reasonably believe that the child is in need of protective services.

Once the child is removed, with[173] or without[174] court order, a detention hearing must be held within seventy-two hours after custody, excluding Saturdays, Sundays, and legal holidays. This is a substantial improvement over the act as originally passed. Under the original act, if the child was removed without a court order, the court was apparently obligated to hold a detention hearing within forty-eight hours.[175] However, if removal occurred by court order pursuant to a request supported by sworn testimony and affidavit, there was apparently no detention hearing requirement.[176] The child in effect could be removed and kept out of the home for an indefinite period without any adversarial determination. The amended language requiring a hearing within seventy-two hours for all cases of summary removal clearly meets the *Roe v. Conn*[177] and *Ives v. Jones*[178] requirement for an adversarial hearing within ten days after removal.

When removal is supported by a full fact-finding hearing, the court may place the child in another home or foster care facility.[179] This method of removal best honors family integrity because it is effected only after a full adversarial hearing on the issue of abuse or neglect. Further, however, the court should be obligated, when consistent with the safety of the community and the welfare of the child, to enter a dispositional decree that least interferes with family autonomy and privides a reasonable opportunity for participation by the child's parents. Other alternatives which afford parental participation are home supervision, voluntary rehabilitative treatment, and placement with the extended family. If the court fully

171. IND. CODE § 31-6-4-10(e) (Supp. 1979).
172. IND. CODE § 31-6-4-6 (Supp. 1979).
173. IND. CODE §§ 31-6-4-6 and 31-6-4-10(e) (Supp. 1979).
174. IND. CODE § 31-6-4-4 (Supp. 1979).
175. IND. CODE §§ 31-6-4-4 and 31-6-4-5 (Supp. 1979), as originally enacted.
176. IND. CODE § 31-6-4-10(e) (Supp. 1979).
177. 417 F. Supp. 769 (M.D. Ala. 1976).
178. No. 75-0071-R (E.D. Va., decided August 8, 1975).
179. IND. CODE § 31-6-4-16 (Supp. 1979).

recognizes family integrity, removal as an alternative will take place only after all these other less intrusive measures have been exhausted.

Placement

Placement of the child is the second most crucial aspect of the child in need of services proceeding. Placement away from the family must be pursued only in those cases where supervision and counseling cannot adequately protect the child while remaining in the family. Placement alternatives, however, should be considered in order commencing with that which is least traumatic and disruptive to the family.[180] Placement should maximize the chances of reuniting the family. It should provide adequate physical and emotional care of the child and at the same time offer the best chances for continued family association.[181] The code is conspicuously silent on guidelines for temporary placement prior to an adversarial or dispositional hearing. The child removed without court order may be released to parents or placed as designated by the juvenile authorities.[182]

Current placement practices indicate that the Department of Public Welfare has wide discretion as to placement after either summary proceedings or a judicial determination. The welfare department chooses the type of placement and moves the child without court approval or an adversarial hearing. In most cases once neglect of abuse is determined the court simply ratifies the summary removal and placement. The child then becomes a ward of the welfare department which has full discretion for placement thereafter. These placement practices do not provide adequate checks on the exercise of judicial or departmental discretion.

Under the new code, it appears that upon summary removal the court can simply ratify the emergency placement or recommen-

180. *See, e.g.*, Roe v. Conn, 417 F. Supp. 769, 777 (M.D. Ala. 1976).

181. It is for these reasons that a preferred order of placement should be adopted and used in determining the proper placement of a child. For example, the preferred placement might be the extended family (aunts, uncles, grandparents), followed by a foster family (a family takes the child into its home), a licensed group home (a married couple acts as parents to a number of removed children in a simulated family home), and finally a licensed institution (care is provided by an administrative staff and employees).

As originally enacted, the new code provided a similar preferred order of placement for children removed without a court order. IND. CODE § 31-6-4-6(a) (Supp. 1979). No preferred order was set out for children removed through a court order. IND. CODE § 31-6-4-10 (Supp. 1979).

182. IND. CODE § 31-6-4-6(c) (Supp. 1979).

dation of the department, or it can simply delegate the authority for placement to the welfare department. Thus the new code contains no provisions for reformation of Indiana's current placement practices. No specific placement alternatives are set forth nor are there clear guidelines to assist the court or the department in placement.

Visitation and Contact

Removal and placement call into question the important issue of continued family visitation and contact. It would seem that the fundamental right to family integrity requires the court to permit and even facilitate the exercise of substantial visitation and contact.[183] In practice, however, visitation is left entirely up to the welfare department. It is usually set no more often than once per month, frequently in the welfare office for approximately one hour under the supervision of a caseworker. The usual reason given for such limited visitation is lack of sufficient welfare personnel. Another factor sometimes preventing meaningful visitation is that the child may be located at such a distance that frequent visitation is made impossible.

The code, which is silent on visitation and contact, ought to outline specific guidelines requiring the state to permit frequent and meaningful private visitation and contact among the family consistent with the protection of the child. This arguably is not only required by the constitutional right to family integrity but it is also a rational approach to the ultimate goal of reuniting the family.

Voluntary Removal and Other Forms of Voluntary Intervention

The problems connected with removal, placement and limitations placed on continued family association are not always created by coercive intervention. The state's use of parental consent for removal or other forms of voluntary intervention presents a key issue. The code expressly protects the child from waiver of constitutional rights except under carefully defined conditions. There is no such provision for the protection of parents in the waiver of their constitutional rights except at the termination stage.[184] The written

183. The only mention of visitation in the new code is contained in Section 31-6-4-19(b)(3). Under this section the court may consider the extent of visitation in reviewing a request for modification of the original decree. The code, however, contains no mandatory provisions regarding visitation.

184. IND. CODE § 31-6-5-3 (Supp. 1979), provides that upon voluntary termination of the parent-child relationship, the parents must be advised as to their rights and to the nature of the consequences of termination.

consent to temporary wardship is a typical kind of waiver used in Indiana. This initial step may lead to removal, placement and ultimate termination of the parent-child relationship. It is vital that parents understand what they are surrendering by consent and that the court determine that the consent is voluntarily, knowingly and intelligently given. Sometimes the welfare department seeks welfare assistance.[185] As detected by the Supreme Court in *Smith v. Organization of Foster Families*:[186]

> The extent to which supposedly "voluntary placements" are in fact voluntary has been questioned on other grounds as well. For example, it has been said that many "voluntary" placements are in fact coerced by threat of neglect proceedings and are not in fact voluntary in the sense of an informed consent.[187]

Such a use of voluntary consent forms by the welfare department should be expressly limited or carefully regulated by the new code to protect the family from unwarranted state intervention.

Family Rehabilitative Services

The new code permits the state to petition for parental participation in a program of care and rehabilitative treatment for the child.[188] Presumably this is intended to be family rehabilitation. Yet

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185. *See, e.g.*, Duchesne v. Sugarman, 566 F.2d 817, 822 (2d Cir. 1977).

186. 431 U.S. 816 (1977).

187. *Id.* at 834.

188. IND. CODE § 31-6-4-17 (Supp. 1979). Under this provision, the parents' failure to participate in care or rehabilitation of their child can lead to the termination of their relationship. Under the threat of this powerful sanction, the state can dictate with whom and in what manner treatment and rehabilitation takes place. The efficacy of a system that forces an individual to choose between the privacy of the parent-child relationship and the right to personal autonomy must seriously be questioned. As one expert has noted:

> Though obvious once said, when left unsaid, the limitations of law often go unacknowledged in discussion about child placement. Too infrequently there is attributed to law and its agents a magical power—a power to do what is far beyond its means. While the law may claim to establish relationships, it can in fact do little more than give them recognition and provide an opportunity for them to develop. The law, so far as specific individual relationships are concerned, is a relatively crude instrument. It may be able to destroy human relationships; but it does not have the power to compel them to develop.

GOLDSTEIN, *supra* note 9, at 49-50.

One major concern with required parental counseling as a condition for the return of the child is the additional requirement that the complete results of the

there is no provision for the parent to initiate rehabilitation or for the funding of such treatment. Neither is there any provision recognizing parental discretion as to treatment though rehabilitation should be available as a matter of choice before other forms of state intervention.

Although the new code does not confer the right to family rehabilitative services, a strong case for such treatment can be made by analogizing to mental commitments and juvenile delinquency proceedings. In a case of mental commitment, the state has a compelling interest for restraining the patient's liberty to protect the patient or society. The courts have held, however, that deprivation of liberty without provision for adequate treatment violates due process.[189] Similarly, in delinquency proceedings, the juvenile is entitled to rehabilitative treatment under the Fourteenth Amendment. In *Nelson v. Heyne*,[190] the court noted:

> A new concept of substantive due process is evolving in the therapeutic realm. This concept is founded upon a recognition of the concurrency between the state's exercise of sanctioning powers and its assumption of the duties of social responsibility. Its implication is that effective treatment must be *quid pro quo* for society's right to exercise its *parens patriae* controls.[191]

Thus it can be argued that once the state, acting as *parens patriae*, intervenes into protected family interests effective treatment is constitutionally required. Even though a family may be experiencing disintegration, the right to family rehabilitative services in an effort to preserve family integrity keeps the family free from state interference until the state demonstrates serious harm to the child. This right to family integrity, both before and after intervention,

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counseling be disclosed to the welfare department and courts. This would appear to seriously threaten meaningful counseling.

189. Donaldson v. O'Connor, 422 U.S. 563 (1975); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

190. 491 F.2d 352 (7th Cir. 1974).

191. *Id.* at 359.

In Callis v. Railey, NA 79-132-C (S.D. Ind. Filed Sept. 21, 1979), plaintiffs are alleging that the Clark County, Indiana Welfare Department failed to develop a plan to return children to their homes after removal. The cause of action is based on 42 U.S.C. § 608 (1976), and regulations found at 45 C.F.R. 233.110 (1978), as well as equal protection and due process grounds. See also Hancock v. Clark County Department of Public Welfare, 79A16 (Clark County Circuit Court, filed March 29, 1979). The Eastern District of Louisiana recently analyzed the constitutional issues in such cases in Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1976).

continues with the same force and intensity. The state is therefore should be required to take those rehabilitative measures calculated to restore the family and provide a safe environment for the child.

Termination

Ultimately the severest state action against the family is the termination of the parent-child relationship. There is a serious question as to whether the parent-child relationship should ever be involuntarily and totally terminated so long as there exists any function which the parent can adequately exercise and fulfill.[192] In the absence of a showing that continued exercise of the relationship will result in serious harm to the child there is no valid reason to terminate it. It may be possible for the natural parents to share their responsibility with surrogate parents without seriously harming the child. There is a tendency to completely terminate the relationship because of the adult perception that the parenting obligation should not be shared. This perception may be a reflection of the last remaining vestiges of the concept that children are properly subject to exclusive parental control. In terms of the human dimensions and the purpose of family life, it makes more sense to preserve at least a limited parent-child relationship rather than to terminate it completely and permanently.

At a minimum the state should be required to show that more harm is likely to befall the child by staying with or maintaining contact with the parents than by permanently separating the parent and child.[193] No such requirement is set forth in the new code. The new code does suggest, however, that prior to involuntary termination of the parent-child relationship the state must show that reasonable services have been offered to the parent to assist in fulfilling parental obligations.[194] This provides an important protection for the family relationship.

Right to Counsel

The new code is clearly lacking in its provisions for aid of counsel.[195] The court is obligated to appoint counsel for the parents

192. Wald, *supra* note 71, at 672-73.

193. *See* Alsager v. District Court, 406 F. Supp. 10, 24 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976).

194. IND. CODE § 31-6-5-3(6)(C) (Supp. 1979).

195. A number of states have recognized the consitutional right to counsel in abuse and neglect cases. *See, e.g.*, In Re B, 30 N.Y.2d 352, 2815 N.E.2d 288 (1972); State v. Jamison, 251 Ore. 114, 444 P.2d 15 (1968); In the Matter of Luscier, 84 Wash. 2d 135,

only in termination proceedings and may appoint counsel to represent parental interests in any other proceedings.[196] The problem with mandating counsel for parents only at the termination proceedings is that it is often too late for counsel to do much more than to assure that procedural due process is afforded. The parent may have been deprived of counsel at the equally important stages of removal, placement, and prescription of rehabilitative services. While the availability of counsel to the parents is certainly limited, the access to counsel for children is severely limited. Under the Act the court is not obligated to appoint counsel for the child except in delinquency proceedings.[197] When the child is not represented the state jeopardizes family integrity in its zeal to protect the child.

The constitutional right to counsel at early states of abuse and neglect proceedings has been recognized[198] by at least one court which reasoned that since counsel must be made available at every critical stage in a criminal proceeding, counsel must also be made available immediately following removal of the child. Since the new code fails to mandate that counsel be made available at every critical stage of the proceeding, it is conceivable the code could not withstand constitutional challenge.

RECOMMENDATIONS

There is no doubt that the new code is the result of a significant attempt of the part of the Indiana Legislature to modernize child and neglect practices and procedures. This is primarily evidenced by substantial revision in the jurisdictional standards which focus on the seriousness of the harm done to the child rather than on parental conduct.[199] In addition to this noteworthy change, there are other significant improvements in the new code. For example, the new code requires the petition to contain a considerably more specific delineation of the basis for jurisdiction, a concise statement of of the facts upon which the allegation is based, and a reference to the section of the code supporting the petition. These provisions comport with the constitutional requirement of adequate

524 P.2d 906 (1974). Most recently the Alaska Supreme Court extended the right to counsel an indigent child custody litigants in a private custody dispute between parents. *See* Flores v. Flores, 48 U.S.L.W. 1027 (1979).

196. IND. CODE § 31-6-7-2(b) (Supp. 1979).

197. IND. CODE § 31-6-7-2(a) (Supp. 1979).

198. Davis v. Page, 442 F. Supp. 258 (S.D. Fla. 1978). *See also* authority cited in note 195 *supra*.

199. IND. CODE § 31-6-4-3 (Supp. 1979).

notice.[200] In an effort to provide further flexibilities the code also permits an informal adjustment period.[201] Under this program an abuse and neglect case can be handled informally for a six month period which may be renewed for an additional six months. This can be an effective tool for keeping children in the home rather than summarily or dispositionally removing them. The pending petition can be a motivating force for prompting recalcitrant parents to undertake their parental responsibilities. The new Indiana Code therefore provides significant substantive changes in the handling of abuse and neglect cases.

In addition to the substantive changes, the new code adopts numerous procedural adjustments designed to more adequately protect the rights of the parties. For example, the judicial proceedings are divided into four distinct phases: the initial or preliminary hearing,[202] the fact finding hearing,[203] the predispositional stage,[204] and the dispositional hearing.[205] The initial hearing is designed to determine representation for the child and to simply inform the family of the nature of the proceedings and to provide them with the opportunity to obtain their own counsel. The fact-finding hearing assures that all parties to the proceeding are made aware of the basis for the actions taken by the petitioner. The predispositional stage affords parents and others the opportunity to submit alternative recommendations for disposition of the case. All of these steps are designed to ultimately provide the family with information sufficient for them to have meaningful input into the disposition of the child.

The new code similarly takes steps to assure that once a dispositional decree has been rendered, ample opportunity is given for a periodic review of the placement. The periodic review provision[206] requires a review by the court every nine months after the decree removing the child from the home thus assuring that neither the child nor the family are left in an unsettled state for an indefinite period of time. The court has a duty to determine the propriety of any modification in the original dispositional decree. Every eighteen months the statute mandates the court to hold a formal hearing on the question of its continued jurisdiction. These periodic

200. IND. CODE § 31-6-4-10 (Supp. 1979).
201. IND. CODE § 31-6-4-12 (Supp. 1979).
202. IND. CODE § 31-6-4-13.5 (Supp. 1979).
203. IND. CODE § 31-6-4-14 (Supp. 1979).
204. IND. CODE § 31-6-4-15 (Supp. 1979).
205. IND. CODE § 31-6-4-16 (Supp. 1979).
206. IND. CODE § 31-6-4-19 (Supp. 1979).

reviews are of significant assistance in determining the effectiveness of any rehabilitative treatment presents one of the more positive means for restoring family integrity.

Just as the new code has made significant strides in abuse and neglect proceedings it is also apparent that it is riddled with significant shortcomings. There is a particular need for clearer and more definitive statements of policy and procedure. The purposes of the code should be recited and expressly include the facilitation of family autonomy and integrity consistent with the protection of the child. There should be express Fourth Amendment guarantees applicable to all investigations of abuse and neglect. Summary removal provisions should be amended to allow dispensation of the adversarial hearing only when delay caused by that hearing would result in serious irreparable harm to the child. Moreover the statute should require the state to clearly demonstrate that removal of the child would be less harmful than the harm experienced in the home. Special attention should be drawn to assuring that the least intrusive dispositional alternative is implemented consistent with the protection of the child. Currently the court has no specific guidelines for making a determination. The code should also explicitly require review and approval of all child placements. Regular, frequent, and substantial private visitation and association should be expressly guaranteed consistent with the protection of the child. Consented intervention should be prescribed except when the court adequately determines that consent and any waiver of rights are knowingly, intelligently, and voluntarily given. The right to rehabilitative services should be guaranteed regardless of economic or social position of the family and should include the right to seek voluntary treatment from qualified sources; treatment in which the confidential nature of the treating relationship is privileged and respected. The coercive termination standards should be more clearly enunciated. Termination should not be permitted in a relatively short period of time after removal unless the state can show that the parent is financially able to establish a proper home but refuses or fails to do so. The parents' right to counsel should be guaranteed at every critical stage of the proceedings. Finally the standard of proof should be beyond a reasonable doubt due to the liberty and privacy interests at stake.[207]

207. Under IND. CODE § 31-6-7-13 (Supp. 1979), the standard of proof at any stage of CHINS proceeding is a mere preponderance of the evidence. The courts have made it clear that the fundamental right to family integrity requires that at the very least the allegations be proven by clear and convincing evidence. They also strongly

CONCLUSION

There are many important reasons for protecting the family from state intervention. There is substantial evidence that abuse and neglect intervention is too broadly exercised resulting in increased encroachment on family autonomy. Clearly current removal and placement practices fail to either adequately shield children from unnecessary trauma or to protect the sanctity of the family.

There are numerous steps which can be taken to remedy these deficiencies. First there must be a concerted legislative effort to promote the preservation of the family consistent with the goal of protecting the child. Secondly coercive removal should be prohibited except when there is actual or imminent serious harm to the child and then only if the removal will be less harmful than non-removal. Summary removal should be limited to cases where a delay caused by a proper hearing would result in irreparable harm to the child. In all cases the means of protecting the child should be those which least intrude into the family unit. In short, the emerging constitutional right to family integrity must be employed to not only protect the family but to develop specific statutory standards and procedures.

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imply that since termination of the parent-child relationship is akin to a delinquency proceeding which requires proof beyond a reasonable doubt, termination also should require proof beyond a reasonable doubt. *See* Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976). *See also* Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds*, 99 S. Ct. 2371 (1979). The CHINS provision of the new code should therefore properly reflect these holdings and require the higher standards of proof.