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J.D. Candidate, 2001, Fordham University School of Law. I would like to thank Professor Ann Moynihan for her valuable insight, guidance, and support in writing this Note. This Note is dedicated to my Mom in gratitude for her constant inspiration, support, and patience.

SHOULD MARRIAGE MATTER?: EVALUATING THE RIGHTS OF LEGAL ABSENTEE FATHERS

Jennifer E. Burns[*]

Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.[1]

INTRODUCTION

Hardaway and Tammy, future father and mother, married in 1981.[2] Over the next three years, they had a daughter and a son, Dawn and Daniel.[3] In 1989, Tammy left with the children and thereafter kept them from Hardaway.[4] Two years later, she left the children alone at home and a fire erupted in the apartment.[5] Although the children survived the fire, the child protection agency immediately removed them from their mother's care, believing them to be in imminent danger.[6] The agency did not notify Hardaway that his children had been taken into protective custody and would be placed in foster care, nor that Tammy had been charged with abuse and neglect.[7] Hardaway was a registered driver in New York State and had a listed telephone number by which the agency could have located him.[8] Dawn and Daniel lived in foster care for the next four years.[9] While in foster care, the children stated that Tammy had previously abused them sexually.[10] The foster father also allegedly physically abused Daniel.[11] Hardaway tried to locate his children numerous times

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1. Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).
2. *See* Complaint at 9, para. 25, Daniel H. v. City of New York (S.D.N.Y. filed Mar. 5, 1996) (No. 96 Civ. 1605).
3. *See id.* at 9-10, paras. 26-27.
4. *See id.* at 10, para. 28.
5. *See id.* para. 32.
6. *See id.*
7. *See id.* at 11, paras. 33-34.
8. *See id.* at 10, para. 30.
9. *See id.* para. 32; *id.* at 14, para. 48.
10. *See id.* at 11, para. 36.
11. *See id.* at 14, para. 49.

during this period, and even hired a private investigator.[12] In July 1994, three years after the removal, the agency first notified him that his children had been placed in foster care.[13] Once he learned of their whereabouts, he began visiting Daniel and Dawn, planning for their return to his custody.[14] In February 1995, Social Services returned Daniel to his father's care.[15]

This story illustrates the problems facing children, parents, and foster care agencies when the custodial parent is charged with abuse or neglect[16] and the other parent is absent. In emergency proceedings to remove children from unsafe homes,[17] there is little time to find and notify other family members before a child is placed in foster care because of the urgent need to remove the child from the dangerous situation. For example, a father who does not live with the child and is not active in his child's life may not be found in time to prevent his child's placement in foster care. Once the child has been removed without notification to the absent parent, the issue then becomes whether, and when, the non-custodial father[18] should receive notification of a hearing on the child's permanent placement, and what effort should be required to ensure that he receives such notification.

Several recent cases filed in the Southern District of New York challenge the procedures for notifying fathers under New York State law in scenarios like that described above.[19] Under the current law, when a child is removed from a parent because of abuse or neglect, his

12. *See id.* at 10, para. 29.
13. *See id.* at 13, para. 42.
14. *See id.* at 14, para. 47.
15. *See id.* para. 48.
16. In 1997, 75% of all child abuse perpetrators were parents. *See* National Center on Child Abuse and Neglect, U.S. Department of Health and Human Services, Child Maltreatment 1997: Reports from the States to the National Center on Child Abuse and Neglect 7-1 (1999) [hereinafter Child Maltreatment 1997].
17. Emergency circumstances have been defined as those in which the child is "immediately threatened with harm, for example, where there exists an 'immediate threat to the safety of the child' ... or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence." Hurlman v. Rice, 927 F.2d 74, 80 (2d Cir. 1991) (citations omitted) (quoting Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1192 (S.D. Tex. 1977)). The child need not be harmed in the presence of officials, *see* Chayo v. Kaladjian, 844 F. Supp. 163, 169 (S.D.N.Y. 1994), nor does the alleged abuser need to be present when the child is taken, *see* Robison v. Via, 821 F.2d 913, 922 (2d Cir. 1987).
18. While there may be situations in which the child is removed from the custodial father and the mother's notice rights are at issue, this Note focuses on fathers both because of the comparative frequency of their claims as opposed to absentee mothers' claims, and the constitutional analysis that is particular to the rights of fathers.
19. *See* Complaint, Jason Rudy C. v. City of New York (S.D.N.Y. filed Jan. 9, 1998) (No. 98 Civ. 0130); Daniel H. v. City of New York (S.D.N.Y. filed Mar. 5, 1996) (No. 96 Civ. 1605). The challenged statutes include sections 1035 and 1036 of the New York Family Court Act, and sections 384-b, 409-e, and 398-b(1)(c) of the New York Social Services Law. *See* N.Y. Fam. Ct. Act §§ 1035, 1036 (McKinney 1999); N.Y. Soc. Serv. Law §§ 384-b, 398-b(1)(c), 409-e (McKinney 1992 & Supp. 1999).

or her relatives must be located and informed of the removal proceedings.[20] The method by which these relatives are to be located, or whether the other parent should be sought as a first priority, is unclear from the statutory language.[21] Essentially, the above father-litigants argue for aggressive, continuous notification throughout the foster care proceedings.[22] At the center of these disputes lies the tension between a father's right and desire to care for his child, and the state's interest in promptly securing the child's safety and stability in a permanent placement.[23]

These claims also raise the broader question of the scope of the constitutionally protected rights of a legal father who has long been absent from his child's life. Although marrying the mother generally confers full parental rights on the natural father, other factors can lead to the establishment of paternal rights,[24] including establishing biological paternity, acting as a father, and adopting the child.[25] The term "legal father" refers to those men married to the mother at the time of the child's birth who are aware of the child's existence. Status as a legal father continues despite any deterioration in the relationship between husband and wife. Legal absentee fathers pose a complicated dilemma in that the fathers, while once married to the mothers and legally established as parents, have not been involved in their children's lives and now seek to influence their future.

Constitutional analysis of paternal rights[26] has focused largely on the rights of unwed fathers.[27] At common law, if the parents were not married, there was no legal relationship between the father and his

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20. *See* N.Y. Fam. Ct. Act § 1017 (McKinney 1999).

21. *See id.* (requiring only that "an immediate investigation" to locate relatives be undertaken).

22. *See Daniel H.*, No. 96 Civ. 1605, at 2, para. 2.

23. The State's authority to intervene in a family comes from two sources. *See Developments in the Law: The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1198 (1980). First, the State's police power allows it to prevent its citizens from harming one another and to promote the public welfare. *See id.* at 1198-99. Second, the State has the paternalistic power to protect those who cannot protect themselves. *See id.* at 1199.

24. *See* Rebeca Aizpuru, Note, *Protecting the Unwed Father's Opportunity to Parent: A Survey of Paternity Registry Statutes*, 18 Rev. Litig. 703, 715 (1999) (including, for example, the appearance of the father's name on the child's birth certificate).

25. *See* Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 Utah L. Rev. 461, 463.

26. Parental rights include the right to custody, the right to raise one's child, and the right to make decisions about children's lives. *See, e.g.*, 4 California Family Law § 60.02(1)(b) (C. Markey ed., 1987) (noting that custody "embrace[s] the sum of parental rights," including the right to direct the child's activities, make decisions regarding her health and education, and tend to her moral and religious education).

27. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 658 (1972) (striking down a state statute that granted hearings on parental fitness only to married parents, divorced parents, and unmarried mothers, but denying a similar hearing to unwed fathers).

child.[28] Due to the stigma attached to illegitimate children, the law failed to protect them.[29] Constitutional analysis of the rights of unwed fathers traditionally focused on the nature of the interpersonal relationship between father and child in determining the father's rights.[30] Thus, biological status[31] alone does not define a paternal relationship, but it can be enough to warrant constitutional protection in the right circumstances.[32] Implicit in this reasoning is the notion that married fathers need not prove themselves as fathers to be accorded full rights.[33] Through marriage to the mother, fathers receive full legal rights regardless of whether they fulfill their paternal duties.

The rights of married fathers in the constitutional spectrum would thus seem stronger than those of unwed fathers based on social presumptions favoring natural legal families.[34] The rights of married, biological fathers have not been addressed by the courts except to the limited extent as superseding those of an unwed father's claim to

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28. *See* Aizpuru, *supra* note 24, at 704; *see also* Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 Colum. L. Rev. 60, 67 (1995) (noting that the common law was "profoundly patriarchal" and absolved an unwed father of all custodial responsibilities).

29. *See* Tracy Cashman, Comment, *When is a Biological Father Really a Dad?*, 24 Pepp. L. Rev. 959, 962 (1997) (citing Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of* Michael H. v. Gerald D., 65 Tul. L. Rev. 585, 588 (1991)).

30. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 262 (1983) (stating that the Constitution does not compel protecting the opportunity for a relationship a biological father possesses if he fails to "grasp[] that opportunity and accept[] some measure of responsibility for the child's future").

31. Status as a parent is:

> grounded in inexorable truths (e.g., the truths of biological process). Within a universe of status, the obligations and rights that define relationships flow automatically and inevitably from the fact of the relationship. Thus, for instance, parents are expected to love and provide for their children, not because they have agreed to do so, but simply because they are parents.

Janet L. Dolgin, *The Family in Transition from:* Griswold *to* Eisenstadt *and Beyond*, 82 Geo. L.J. 1519, 1526 (1994). As such, status may "sanction[] significant inequalities" among the members of a family and between family members and third parties, but it can also "provid[e] for enduring relationships." *Id.* at 1571.

32. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) (referring to *Stanley v. Illinois* as a circumstance in which "the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father.").

33. *See id.* ("The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. By definition, the issue [of the scope of a father's rights] can arise [before the Court] only when no such marriage has taken place.").

34. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 658 (1972) (striking down statute that favored legal parents wholesale over unwed fathers); *see also infra* notes 277-85, 291-94 and accompanying text (discussing the Court's decisions in *Quilloin v. Walcott* and *Michael H. v. Gerald D.*).

parental rights in his child.[35] An independent constitutional analysis of the married father's right is the focus of this Note. While the relationship between the married father and his child is biological and could be viewed in the same manner as the relationship between an unwed biological father and his child, it has the presumed additional significance of legal and social legitimization as a relationship worth protecting. Nonetheless, these factors should not enhance the relationship's constitutional protection if such fathers do not actively fulfill their paternal roles. In addition, demographic and cultural changes have reduced the importance of marriage as the sole criterion for determining paternal rights and duties.[36]

The analysis of a father's rights and responsibilities, and the bias toward legally established relationships, becomes important in foster care placement decisions. For example, when a child has been taken by the state from one parent because of abuse or neglect, and the other parent, though legally entitled to fully share in the child's custody and care, has been absent, the court must decide whether to simply reaffirm the established bias favoring the legal parent and place the child with that parent, or to delay placement to consider what alternative care arrangement might truly be in the child's best interest. The best-interests-of-the-child standard has long dominated childcare and custody analyses, and should be extended to trump an absentee father's parental rights instead of favoring expeditious placement.

Recent federal legislation pertaining to child abuse, placement, and custody,[37] urges prompt placement of children in a safe and loving home without delay, in addition to seeking a solution to the family's troubled situation that comports with the child's best interest. Protecting the rights claimed by absentee fathers who have long let them lie dormant would cause such an undesirable delay.[38] This delay and its concomitant burdens on the system and the child are not justified in light of the slim possibilities for successful care and supervision in placing the child with a father who has long lapsed in fulfilling his parental duties.

Typically, the most intense search for a father and effort to protect his rights occurs when the state seeks to terminate his parental rights

35. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 129 (1989) (finding that where a child born of an extramarital affair is born into an existing marital family, the "natural father's unique opportunity [interest in developing a relationship with the child] conflicts with the similarly unique opportunity [interest] of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter").

36. *See* Harris, *supra* note 25, at 465. The emphasis has shifted toward basing rights and duties on biological relationship. *See infra* Part II.B.1.

37. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

38. *See infra* Part III.

in order to free his child for adoption. At this stage, the child has languished in uncertainty for months, and the additional upheaval of a father being found when the child nears stability through adoption can be quite damaging. However, increasing the notification efforts expended in the early stages, by intensifying efforts to find parents and other family members in the fact-finding and case assessment phases of state placement, may ease the potential delay without adding procedural layers. Discovering the quality and existence of the father-child relationship should be part of that initial effort. The agency and court would thus avoid wasting valuable time that the child may spend in foster care, and provide the absentee father with notice at the earliest opportunity.

This Note provides a framework within which courts can analyze claims by absentee legal fathers that they should have received continuous notice of foster care proceedings. This Note's analysis focuses on the child protection system and laws of New York State, while highlighting similarities with, and differences from, other states. Part I outlines the child protection and custody system in New York, focusing on situations in which a child is taken from his parent based on a suspicion of abuse or neglect.[39] It then places child protection issues within a political and social context. This part also describes the statutory framework, primarily at the federal level, governing child protection and placement services. Part II analyzes the application of the Due Process Clause of the Fourteenth Amendment to family law proceedings. This part details the Supreme Court cases addressing the family interest protected by the Constitution, and discusses the relative rights of the different parties in foster care proceedings.

Part III argues that based on the Supreme Court's interpretation of the protected family interest, there is no constitutional requirement to take extensive steps to facilitate an absentee legal father's opportunity to develop a relationship with his child. This part further argues that both policy and common sense weigh against granting a legal father, who has sacrificed his right to be a parent, continual notice and opportunity to be heard in state matters affecting his child. Finally, it argues that statutory goals and provisions that shorten the period in which a father can assert his right before permanency planning[40] begins indicate a strong preference for prompt resolution over delay. Aggressive case assessment and resource searching at the child's entry into the state system strike the proper balance between the state's and

39. Children can also be placed in the foster system voluntarily by their parent or parents. *See infra* note 63 and accompanying text.

40. Through permanency planning, the child welfare system aims to find safe, stable homes for children in which they can be placed for an extended period of time. *See* Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 Fordham L. Rev. 2285, 2289 n.39 (1998).

the father's interests. If the father proves unavailable or uninterested at that stage, then the court and protection agencies can move forward with case planning. The continued search for absentee legal fathers throughout a child's involvement in the state system would entail unwarranted delay, which recent legislation aims to prevent. This Note concludes that while the right to raise one's child is fundamental, it is not absolute, and cannot be revived by the courts and child protection system when a father has deliberately allowed it to lapse. To do so would be contrary to the best interests of the child. Consequently, legal fathers should be evaluated according to the same standards as unwed fathers. Their actions and commitment should be analyzed when determining their rights, rather than ending the inquiry when a document proves their status. Parental rights should be predicated on the fulfillment of parental duties.[41] In this way, only those fathers who fulfill their parental duties would be awarded the associated rights of parenthood.[42]

I. THE CHILD PROTECTION SYSTEM

This part reviews the procedures typically governing a child's removal from an abusive home and the subsequent steps taken to notify the parties of state action regarding the child. It also highlights criticisms of the foster care system, and looks at how placement decisions affect the developmental needs of children. Finally, it outlines the federal laws enacted to create standards and uniformity among the states in child protection and custody cases.

A. *Child Protection Proceedings*

State intervention in domestic relations has traditionally been an "unhappy but necessary feature of life" in American society.[43] State agencies enforce child protection and placement laws in order to assist abused and neglected children, and to identify ways to assist the entire family in coping with the effects of poor parenting. Child protection agencies struggle to make equitable and safe determinations regarding childcare and custody that fairly affect the rights of all parties involved. The process can be upsetting and challenging for the children and their families, as well as the professionals assigned to their cases.[44]

Child protection falls within the purview of state government, even

41. *See* Harris, *supra* note 25, at 480.

42. *See id.* (discussing the relationship between the duties and rights of both fathers and mothers).

43. *See* Santosky v. Kramer, 455 U.S. 745, 771 (1982) (Rehnquist, J., dissenting).

44. *See* Katharine Cahn & Paul Johnson, *Critical Issues in Permanency Planning: An Overview*, *in* Children Can't Wait: Reducing Delays for Children in Foster Care 9 (Katharine Cahn & Paul Johnson eds., 1993).

though it is an area of the law that receives significant federal funding.[45] In many states, child protection is carried out by local government agencies,[46] frequently known as Child Protection Services ("CPS").[47] A child may be voluntarily placed by a parent into the state system, or he may be taken from a parent's care based on a suspicion of abuse or neglect. Once he enters the system, he is subject to the family court's decisions as to where and with whom he will live.

Child protection agencies work with many parties, including judges, lawyers, and foster parents, to formulate case planning.[48] The overlap among these parties should provide "safeguards for families, a range of expertise, and a sense of urgency to determine the plan."[49] This overlap, however, can also lead to delay, frustration, and mixed messages.[50] All of these professionals work under immense pressure and time constraints. Consequently, cases often do not receive the degree of attention that they merit.[51] Additionally, many child welfare agencies suffer high turnover due to reassignment, burnout, and low wages.[52] As a result, many children have multiple caseworkers with varying levels of experience handling their cases.[53]

These overburdened agencies must balance two essential values of American society: the protection of children and the respect for family privacy.[54] State child protection generates controversy because it pits society's need to protect children from harm against a parent's right to raise them.[55] Consequently, state child protection agencies are often

45. *See* Mary B. Larner et al., *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, The Future of the Children, Spring 1998, at 4, 4. This funding relationship becomes particularly important when federal law makes significant policy shifts with which the states must comply. *See infra* Part I.C.1.

46. *See* Larner, *supra* note 45, at 5.

47. The generic name of Child Protective Services will be used throughout this Note for consistency. Agencies can take various names for providing the same services; for example, the Administration for Children's Services governs state childcare proceedings in New York City.

48. *See* Cahn & Johnson, *supra* note 44, at 1-2.

49. *Id.* at 3.

50. *Id.*

51. *See id.* at 6.

52. *See id.* at 7.

53. *See id.*

54. *See* Larner, *supra* note 45, at 5. When handling child abuse and neglect cases, "the Constitution already requires courts to balance carefully the need to protect children with the strong obligation to protect family autonomy." Carolyn Wilkes Kaas, *Breaking Up a Family or Putting it Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 Wm. & Mary L. Rev. 1045, 1087 (1996). A tension also exists between the fear of "violat[ing] a family's integrity before intervention is justified and the fear of . . . [waiting] until it may be too late to protect the child whose well-being is threatened." Joseph Goldstein et al., Before the Best Interests of the Child 133 (1979).

55. *See* Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, The Future of Children, Spring 1998, at 23, 24; *see also* Smith v. Organization of Foster Families for Equality and Reform ("OFFER"), 431 U.S. 816, 833 (1977) ("Foster care of children is a sensitive and emotion-laden subject, and foster-care

accused of both unnecessary interference with private life and "irresponsible inaction" when children are in real danger.[56]

As to the first criticism, the legal system generally allows parents to raise their children according to their own value system. Consequently, courts require proof of danger or harm to the child before allowing the state to intervene in the family relationship.[57] Regarding the second criticism, the court is responsible for determining "when a family's situation has so deteriorated that the children's welfare and development are at risk to such a degree that state intervention is justifiable."[58] The seriousness of a miscalculation is great: overestimating the degree of danger could needlessly shatter a family and rupture the child's closest relationships; underestimating the danger could mean suffering or death.[59] With these burdens, CPS and the courts try to make proper judgments, but are not infallible. The balance between the courts and CPS aims to foreclose the possibility of damaging, if not fatal, inaction.

A detailed description of foster care proceedings follows. This explanation borrows heavily from the New York system, which has been looked to as a model for other states,[60] and hence has broad applicability in analyzing state childcare across the country.[61]

A child may enter the foster care system in New York in several ways. For example, the state may take the child either through court intervention[62] or voluntary commitment.[63] Once a determination to

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programs consequently stir strong controversy.").

56. *See* Larner, *supra* note 45, at 5; Michael W. Weber, *The Assessment of Child Abuse: A Primary Function of Child Protective Services*, *in* The Battered Child 120, 120-21 (Mary Edna Helfer et al. eds., 5th ed. 1997).

57. *See* Schene, *supra* note 55, at 23; *see also* Paul D. Steinhauer, The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care 202 (1991) (discussing the dilemma of the family court in balancing the intrusion into family life against the potential for future harm).

58. Steinhauer, *supra* note 57, at 202.

59. *See generally id.* (noting the risks to children who are left in deteriorating family situations); Larner, *supra* note 45, at 5 (same).

60. Family Court Judge Susan R. Larabee has stated that "New York state's statute has been a model for other states and other countries." Susan R. Larabee, *Representing the Government in Child Abuse and Neglect Proceeding*, *in* Child Abuse and Neglect: Protecting the Child, Defending the Parent, Representing the State, at 59, 69 (PLI Litig. & Admin. Practice Course Handbook Series No. C4-4183, 1988), *available in* WESTLAW, 148 PLI/Crim. 59.

61. *See* Bailie, *supra* note 40, at 2298.

62. For example, where both natural parents have died and there are no relatives willing to assume custody or guardians appointed custody, an appropriate government agency takes the child into custody. *See* N.Y. Soc. Serv. Law § 384-b(4)(a) (McKinney 1992); *id.* § 384-b (McKinney Supp. 1999) (parents' abandonment).

63. A voluntary commitment occurs when a parent or guardian signs a written instrument entrusting the care of the child to an authorized agency. *See* N.Y. Fam. Ct. Act § 1021 (McKinney 1999). Parents may voluntarily commit custody of their child to the state for a number of reasons. They may be experiencing problems related to drug or alcohol addiction, financial difficulties, psychological problems, or other physical ailments. *See* Joseph R. Carrieri, Child Custody, Foster Care, and Adoptions

intervene is made, the state takes temporary physical custody of the child and places him in a foster family atmosphere with a view toward permanency planning.[64] Permanency planning involves either returning the child to the biological parent or releasing the child for adoption[65] where return to the biological parent is not appropriate.[66]

Court intervention, as opposed to voluntary commitment, begins with a report of abuse or neglect.[67] Reports of abuse can come from several sources. Professionals in all states must report suspected abuse,[68] while laypersons[69] are required to report in some states and may voluntarily report in others.[70] Both groups can make their report anonymously to a CPS hotline.[71] Based on such a report, an agency or law enforcement official can remove a child without prior court approval if that person has reasonable cause to believe the child is in

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16 (1991) [hereinafter Carrieri, Child Custody]. The terms, duration, and conditions of the agreement may be determined and agreed to by the parties. *See id.*

64. *See* Joseph R. Carrieri, *Social Worker's Legal Handbook*, *in* Child Abuse, Neglect and the Foster Care System 1998: Effective Social Work and the Legal System; The Attorney's Role and Responsibilities 7, 78-79 (1998) [hereinafter Carrieri, *Handbook*].

65. Adoption is a legal proceeding in which an adult "acquires the rights and incurs the responsibilities of a parent" toward a minor child. *See* N.Y. Dom. Rel. Law § 110 (McKinney Supp. 1999).

66. *See* Carrieri, *Handbook*, *supra* note 64, at 78.

67. *See* Schene, *supra* note 55, at 31 fig.1. A child is found to be abused when the child's parent "inflicts, or allows to be inflicted, physical injury, or commits, or allows to be committed, a sex offense against the child." Carrieri, Child Custody, *supra* note 63, at 17. A court typically finds a child to be neglected if the child's parent "has failed to exercise a minimum degree of care." *Id.* at 17-18; *see also* N.Y. Soc. Serv. Law §§ 371(4-a)(i)(A)-(B), 412 (McKinney 1992 & Supp. 1999); N.Y. Fam. Ct. Act. § 1012 (McKinney 1999). In 1994, nearly 3 million reports of child maltreatment were made nationwide. *See* National Center on Child Abuse and Neglect, U.S. Department of Health and Human Services, Child Maltreatment 1994: Reports from the States to the National Center on Child Abuse and Neglect 2-1 (1996). That number remained the same in 1995. *See* National Center on Child Abuse and Neglect, U.S. Department of Health and Human Services, Child Maltreatment 1995: Reports from the States to the National Center on Child Abuse and Neglect 2-1 (1997).

68. For example, New York State's affirmative duty applies to, among others, health care workers, social workers, law enforcement officers, judicial officers, dentists, psychologists, day care workers, and education employees. *See* N.Y. Soc. Serv. Law § 413 (McKinney Supp. 1999). These individuals must report whenever they have "reasonable cause to suspect" that a child has been maltreated. *Id.*

69. In New York State, any individual can make a report to the abuse hotline, even if he does not have a statutory affirmative duty to do so. *See* Valmonte v. Bane, 18 F.3d 992, 995 (2d Cir. 1994).

70. *See* Larner, *supra* note 45, at 6.

71. *See id.* For example, in 1995, more than half of the reports in the United States came from professionals, such as teachers (15%), law enforcement personnel (13%), doctors (11%), and others. *See id.* One-fifth (19%) came from family members of the victims, and the remainder were from friends and neighbors (9%), other reporters (7%), and anonymous individuals (12%). *See id.* New York State maintains a telephone hotline with a toll-free number that is staffed full-time to receive complaints about abuse or neglect. *See* N.Y. Soc. Serv. Law § 422(2)(a) (McKinney 1992); *Valmonte*, 18 F.3d at 995.

imminent danger if she remains in the home.[72] If removed, the child is placed in out-of-home care with the family court's approval.[73]

After receiving a report of abuse, CPS conducts a screening to determine the needed follow-up measures.[74] During this screening, a CPS staff member evaluates the strength of the allegations, the potential danger of the alleged perpetrator, and the state of the children living in the home, including any children who were not specifically alleged to be abused.[75] The CPS official makes these initial determinations within twenty-four to seventy-two hours.[76] If the report is unsubstantiated and the alleged mistreatment appears to be unfounded, the case is closed.[77] If the allegations prove credible, a worker investigates to assess whether continued CPS involvement is necessary.[78]

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72. *See* Colo. Rev. Stat. § 19-3-401(1)(a) (1997); D.C. Code Ann. § 16-2309(a)(3) (Michie 1997 & Lexis Supp. 2000); N.Y. Fam. Ct. Act § 1024(a) (McKinney 1999); S.C. Code Ann. § 20-7-610(A)(1) (Lawyers Co-op. 1985). An emergency situation exists when an authorized person:

> (i)... has reasonable cause to believe that the child is in such circumstance or condition that his continuing in said place of residence or in the care and custody of the parent... presents an imminent danger to the child's life or health; and
>
> (ii) there is not enough time to apply for an order under section one thousandtwenty-two [of the Family Court Act].

N.Y. Fam. Ct. Act. § 1024(a)(i)-(ii) (McKinney 1999).

73. *See* Schene, *supra* note 55, at 31 fig.1.

74. *See* N.Y. Soc. Serv. Law § 424 (McKinney 1992); Schene, *supra* note 55, at 30-32.

75. *See* Schene, *supra* note 55, at 30.

76. *See* Larner, *supra* note 45, at 7. New York Social Services Law provides that the child protective service shall:

> commence or cause the appropriate society for the prevention of cruelty to children to commence, within twenty-four hours, an appropriate investigation which shall include an evaluation of the environment of the child named in the report and any other children in the same home and a determination of the... nature, extent and cause of any condition enumerated in such report... and, after seeing to the
>
> safety of the child or children, forthwith notify the subjects of the report... of the existence of the report and their respective rights....

N.Y. Soc. Serv. Law § 424(6) (McKinney 1992); *see also* Cal. Welfare & Inst. Code § 328 (West 1998 & Supp. 2000) (providing that a probation officer shall immediately commence an investigation to determine whether child welfare services should be offered to the family or whether court proceedings should be commenced); Colo. Rev. Stat. § 19-3-312(1) (1999) (providing that the court must immediately investigate reports of abuse to determine whether a child needs further protection and whether to authorize the filing of a petition); Vt. Stat. Ann. tit. 33, § 4903(1) (1991) (providing that the department of child welfare services shall "investigate all complaints of neglect, abuse, or abandonment of children").

77. *See* N.Y. Soc. Serv. Law § 424(7) (McKinney 1992); *cf.* Colo. Rev. Stat. § 19-3-501(1)(a) (1999) (providing the option that no further action be taken).

78. *See* Schene, *supra* note 55, at 31 fig.1. In New York, the local DSS agency must investigate the truth of alleged abuse charges and complete an investigation within 60 days. *See* N.Y. Soc. Serv. Law § 423(1) (McKinney 1992 & Supp. 1999); *id.* § 424(7) (McKinney 1992).

The case can then proceed along three possible routes. First, CPS may determine that the risk to the child has subsided and services are unnecessary.[79] Second, CPS may determine that services are required, and other agencies will then provide such services to the family and review the family's progress.[80] These services may facilitate the protection of the child or the rehabilitation of the family.[81] If the risk subsequently subsides, the case is closed; if it remains, services will continue to be provided.[82] However, if the risk increases, the child is removed from the home and placed in protective custody.[83]

Three hearings take place once a child is deemed in danger and in need of possible placement outside the home: a fact-finding hearing to determine the existence of abuse or neglect,[84] a dispositional hearing,[85] and an extension-of-placement hearing.[86] The fact-finding hearing is held before a family court judge and is similar to a trial.[87] If the court finds that the facts in the petition alleging child abuse do not sustain those allegations, the court must dismiss the petition.[88] If there is a finding of abuse or neglect, the court will hold a dispositional hearing to decide what will happen to the child.[89] Holding the dispositional

79. *See* Schene, *supra* note 55, at 31 fig.1. "Services" provided to a family aim to assist the family in remedying the difficult situation that led them to abuse the child. *See* Bailie, *supra* note 40, at 2299.

80. *See* Schene, *supra* note 55, at 31.

81. *See* N.Y. Fam. Ct. Act § 1015-a (McKinney 1999).

82. *See id.* These services are intended theoretically to be preventive and protective measures aimed at helping to improve the family situation. *See* Bailie, *supra* note 40, at 2299. Under federal law, such services include individual, group, and family counseling; substance abuse treatment services; mental health services; and assistance to address domestic violence. *See* 42 U.S.C. § 629a(a)(7)(B)(i)-(iv) (Supp. 1999).

83. *See* Cal. Welfare & Inst. Code § 361(c) (West 1998); D.C. Code Ann. § 16-2309 (1997); N.Y. Fam. Ct. Act. §§ 1021-29 (McKinney 1999); Utah Code Ann. § 78-3a-301 (Supp. 1996).

84. *See* N.Y. Fam. Ct. Act § 1044 (McKinney 1999) (defining fact-finding as a hearing to determine whether the child has been abused or neglected). In a petition for the commitment of the guardianship and custody of a child, the law requires clear and convincing evidence in support of the allegations. *See* N.Y. Fam. Ct. Act §§ 614(1)(a)-(d), 622 (McKinney 1999).

85. A dispositional hearing is held to determine what action should be taken in accordance with the best interests of the child. *See* N.Y. Fam. Ct. Act § 623 (McKinney 1999).

86. *See* Carrieri, *Handbook*, *supra* note 64, at 85-88.

87. *See* Colo. Rev. Stat. § 19-3-505 (1999); N.Y. Fam. Ct. Act § 1044 (McKinney 1999); Wis. Stat. Ann. § 48.31 (West 1997); Carrieri, Child Custody, *supra* note 63, at 86.

88. *See* Cal. Welfare & Inst. Code § 356 (West 1984); Colo. Rev. Stat. § 19-3-505(6); N.Y. Fam. Ct. Act § 1051(c) (McKinney 1999); Tenn. Code Ann. § 37-1-129(a)(1) (1996).

89. *See* Cal. Welfare & Inst. Code § 361.5(b)-(c) (West 1998); Colo. Rev. Stat. § 19-3-507; N.Y. Fam. Ct. Act. § 1045 (McKinney 1999); Tenn. Code Ann. § 37-1-129(c) (1996); Carrieri, Child Custody, *supra* note 63, at 86-88.

hearing is a prerequisite to continued placement of the child outside the home.[90]

At the dispositional hearing, the court will frequently place the child with a relative[91] or in foster care for an initial period of up to one year.[92] Once the child is in foster care, the child welfare agency must assess the original family's situation and develop a family service plan.[93] At this point, permanency planning begins with four possible options: reunification with the family;[94] long-term foster care; legal guardianship; or termination of parental rights to facilitate adoption.[95] Reunification will be sought when and if it is within the best interests of and safe for the child.[96]

The most drastic of these options is the termination of parental rights ("TPR"). Termination of parental rights is sought where "positive, nurturing parent-child relationships no longer exist," and the best interests of the child will be served by freeing her for adoption.[97] If the mother was married during the time the child was conceived and born, the man to whom she was married must be made a party to any termination proceedings.[98] If an unwed father has registered in the putative father registry, he is also entitled to notice. Before a parent's rights can be terminated, the state must give notice by personal service or by publication.[99] When a child has been removed from a mother's care and an absentee father exists, CPS may file a petition to terminate the father's rights if it finds that, despite its efforts to encourage and strengthen a parent's relationship with his child, the father has nonetheless failed to improve the relationship.[100]

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90. *See* Carrieri, Child Custody, *supra* note 63, at 88.

91. *See* Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, The Future of Children, Spring 1998, at 72, 72-73. Relatives have no legal obligation to become a child's caregiver, but they often provide for their abused or neglected family members. *See id.*

92. *See* Cal. Fam. Code § 7828(a)(1) (West 1994 & Supp. 2000); N.Y. Fam. Ct. Act. § 1055(b)(i) (McKinney 1999); Bailie, *supra* note 40, at 2301 & n.120. Under New York law, foster care is defined as: "care provided a child in a foster family free or boarding home, group home, agency boarding home, child care institution, health care facility or any combination thereof...." N.Y. Soc. Serv. Law § 392(1)(a) (McKinney 1992). The State licenses foster parents. This license indicates that "their homes have been assessed for basic health and safety standards," and that they have received at least minimal training on how "to provide care and supervision for a child." Berrick, *supra* note 91, at 73.

93. *See* N.Y. Soc. Serv. Law § 409-e(1)-(2) (McKinney 1992 & Supp. 1999).

94. Reunification services vary among the states, but may include providing parents with the skills and knowledge necessary for child-raising in contemporary life. *See* Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 Conn. L. Rev. 1209, 1239-40 (1994).

95. *See* Schene, *supra* note 55, at 31 fig.1.

96. *See* N.Y. Soc. Serv. Law § 384-b(1)(a)(ii)-(iii) (McKinney 1992).

97. *See id.* § 384-b(1)(b).

98. *See* Carrieri, *Handbook*, *supra* note 64, at 60-61.

99. *See id.* at 124-25.

100. *See, e.g.*, N.Y. Fam. Ct. Act § 614(1)(d) (McKinney 1999) (stating that a TPR

Once a court terminates parental rights, the child is committed to the child welfare agency[101] and is thereby freed for adoption.

Before terminating parental rights, a diligent search must be made for the absentee parent if personal service cannot be rendered.[102] A diligent search may include: a visit to the last known address, interviewing neighbors and acquaintances; interviewing all known relatives in the area; scanning welfare, hospital, shelter, and drug rehabilitation records; checking the post office for a forwarding address; and searching the Board of Elections, Department of Motor Vehicles, and the Department of Corrections.[103] Under New York's statute, it remains unclear whether any of these methods *must* be performed, or whether failure to pursue any or all of these avenues would be dispositive of a failure to conduct a diligent search.[104]

Abandonment serves as one ground for terminating parental rights.[105] Abandonment may best describe the actions of the fathers focused on in this Note. Abandonment is defined as an "intent to forego [one's] parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency . . . ."[106] Without evidence to the contrary, the ability to visit and communicate is presumed.[107] The intention not to abandon a child is insufficient to defeat a finding of abandonment.[108] The mere statement of an intention to care for a child, without any actions manifesting that intention, is not sufficient to overcome a parent's inaction.[109] The abandonment can be broken simply by a phone call or visit within a stipulated time period.[110] Under New York law, this

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petition may be filed if the parent "has failed . . . substantially and continuously or repeatedly to maintain contact with or plan for the future of the child").

101. *See* N.Y. Fam. Ct. Act § 634.

102. *See* Carrieri, *Handbook*, *supra* note 64, at 391.

103. *See id.* at 391-93.

104. *See, e.g.*, N.Y. Soc. Serv. Law § 1055 (McKinney 1999) (specifying no particular means by which the diligent search should be executed).

105. *See* N.Y. Soc. Serv. Law § 384-b(4)(b) (McKinney 1992). Other grounds for termination include that the child is permanently neglected, that the parents severely or repeatedly abused their child, and the child has been in state care for the year prior to the proceeding. *See id.* §§ 384-b(4)(d)-(e).

106. *Id.* § 384-b(5)(a); *see also* Fla. Stat. Ann. § 63.032(14) (1997) ("'Abandoned' means a situation in which the parent . . . while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations.").

107. *See* N.Y. Soc. Serv. Law § 384-b(5)(a).

108. *See id.* § 384-b(5)(b) ("The subjective intent of the parent, whether expressed or otherwise, unsupported by evidence of the foregoing parental acts manifesting such intent, shall not preclude a determination that such a parent has abandoned his or her child.").

109. *See, e.g.*, *In re* Jennifer S., 333 N.Y.S.2d 79, 83 (Sur. Ct. 1972) (finding a mother's "naked statement" of desire to have her child with her insufficient where no effort to contact the child had been made during the five years of her life); Carrieri, Child Custody, *supra* note 63, at 180-81.

110. *See* Carrieri, *Handbook*, *supra* note 64, at 127.

time period is the "six months immediately prior to the date on which the [TPR] petition is filed."[111] Consequently, some courts have held that diligent efforts[112] by the agency to strengthen the parental relationship are not required where the absentee parent has not made any communication efforts over the previous six months.[113]

Nonetheless, the court must still inquire whether a good reason exists for the absentee parent's failure to visit or communicate.[114] For example, incarceration does not in itself excuse a father's failure to maintain contact.[115] There must be an additional showing that he was prohibited from contacting the child or child welfare agency.[116] Similarly, distance will not serve as an excuse when it is self-imposed.[117] To disprove the abandonment charge, the objecting parent must show that the hardship asserted as an obstacle to visiting or communicating with the child, at a minimum, "permeated" the father's life to such an extent that contact with the child or agency was not feasible.[118] Insubstantial contacts may not be sufficient.[119] One communication with the child welfare agency during the relevant time period,[120] two insubstantial contacts with the child over a two-year period,[121] or sending birthday and holiday cards[122] do not

111. *See* N.Y. Soc. Serv. Law § 384-b(4)(b) (McKinney 1992); *see also* 750 Ill. Comp. Stat. 50/1(D)(n) (West 1999) (failure to communicate for one year); Kan Stat. Ann. § 59-2136(d) (1994) (father's consent to stepparent adoption is unnecessary if he "has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption"); *cf.* Cal. Fam. Code § 7822(a) (West 1994 & Supp. 2000) (presumption of abandonment where parent fails to communicate for six months).

112. Diligent efforts are reasonable attempts by an agency to "assist, develop and encourage a meaningful relationship between the parent and child...." N.Y. Soc. Serv. Law § 384-b(7)(f). Such efforts may include:

> (1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family; (2) making suitable arrangements for the parents to visit the child...; (3) provision of services and other assistance to the parents... so that problems preventing the discharge of the child from care may be resolved or ameliorated; [and] (4) informing the parents at appropriate intervals of the child's progress, development, and health....

Id. § 384-b(7)(f)(1)-(4).

113. *See* Carrieri, *Handbook*, *supra* note 64, at 379-81.

114. *See id.* at 381.

115. *See In re* Gregory B., 542 N.E.2d 1052, 1057 (N.Y. 1989).

116. *See In re* Jasmine T., 557 N.Y.S.2d 669, 670-71 (App. Div. 1990).

117. *See In re* Stephen B., 303 N.Y.S.2d 438, 442 (Fam. Ct. 1969); Carrieri, Child Custody, *supra* note 63, at 182.

118. *See In re* Catholic Child Care Soc'y of the Diocese of Brooklyn, 492 N.Y.S.2d 831, 833 (App. Div. 1985); Carrieri, Child Custody, *supra* note 63, at 181.

119. *See* Carrieri, *Handbook*, *supra* note 64, at 384.

120. *See, e.g., In re* Starr L.B., 497 N.Y.S.2d 597, 600-01 (Fam. Ct. 1985) (finding that a single phone call where the father was able to call daily did not break the abandonment period).

121. *See, e.g., In re* Michael David K., 433 N.Y.S.2d 212, 213 (App. Div. 1980) (finding that such insubstantial contacts did not constitute a "modicum of interest").

122. *See, e.g., In re* Amanda, 602 N.Y.S.2d 461, 462 (App. Div. 1993) (finding that

automatically overcome the presumption of abandonment. Some state statutes expressly provide that mere "token" contact with a child will not prevent termination of parental rights.[123] The father's actions may be scrutinized during the pregnancy[124] or when the child is a newborn[125] to determine whether he has abandoned his child. Abandonment determinations based on the actions taken during pregnancy focus on the father's treatment of the mother, and are then attributed to his potential relationship with the child.[126] Therefore, the father's parental rights can be foreclosed before he has an

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the mere sending of cards, when other communication was possible, was insufficient to defeat a finding of abandonment).

123. *See* Fla. Stat. Ann. § 63.032(14) (West Supp. 1997) ("marginal efforts" at communication insufficient); Kan. Stat. Ann. § 59-2136(d) (1994) ("In determining whether a father's consent [to a stepparent adoption] is required under this subsection, the court may disregard incidental visitations, contacts, communications or contributions."); Nev. Rev. Stat. § 128.105(2)(f) (1998) ("token efforts" insufficient); Utah Code Ann. § 78-3a-407(6) (Supp. 1996) (same); *see also In re* Adoption of B.O., 927 P.2d 202, 209 (Utah Ct. App. 1996) (affirming termination of father's rights based on finding that he made only "token" contacts with daughter).

124. *See, e.g., In re* Adoption of Baby Boy N., 874 P.2d 680, 687-90 (Kan. Ct. App. 1994) (affirming the Kansas statute's provision premising termination of parental rights on failure to support the child's mother during the six months prior to the child's birth (Kan. Stat. Ann. § 59-2136(h)(4) (1993)); *accord In re* Baby Boy G., No. 2970889, 1999 WL 64951, at *4 (Ala. Civ. App. Feb. 12, 1999) (determining provision of pre-birth support to the unborn child upon failure to perform parental duties); *In re* Appeal of H.R., 581 A.2d 1141, 1162 (D.C. 1990) (finding that when a court evaluates a father's claimed assertion of his opportunity interest, the court may focus on the extent of the father's involvement from the time that he learns of the pregnancy); W.T.J. v. E.W.R., 721 So. 2d 723, 725 (Fla. 1998) (same); *In re* Adoption of Baby E.A.W., 658 So. 2d 961, 964 (Fla. 1995) (finding abandonment where father verbally and emotionally abused the pregnant mother, failed to attend doctor's appointment, forced her to move out of their apartment, and failed to provide her with any support during the pregnancy); *In re* Adoption No. A91-71A, 640 A.2d 1085, 1097-98 (Md. 1994) (finding that a man who deserts the expectant mother shows a lack of concern for the future well-being of the child); Whitney v. Pinney, 956 P.2d 785, 788 (Nev. 1998) (concluding that a court can properly look at a father's pre-birth actions as one factor in its abandonment inquiry); Baby Girl K. *ex rel.* L.K. v. B.B., 335 N.W.2d 846, 852 (Wis. 1983) (determining that father's assault of pregnant mother, attempts to convince expectant mother to smuggle marijuana, and failure to provide financial or emotional support to the pregnant mother supported finding of abandonment). In 1994, the drafters of the Uniform Adoption Act proposed to codify this approach to finding "abandonment." *See* Unif. Adoption Act § 3-504(c)(1) (1994). For an analysis of the possible impact of such a change, see generally Gerald W. Huston, Note, *Born to Lose: The Illinois "Baby Richard" Case—How Examining His Father's Pre-Birth Conduct Might Have Led to a Different Ending for Richard*, 16 N. Ill. U.L. Rev. 543 (1996).

125. For example, Illinois provides that a parent may be found "unfit" if he fails "to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new-born child during the first 30 days after its birth." 750 Ill. Comp. Stat. 50/1(D)(l) (West 1996).

126. The Nevada Supreme Court recently affirmed a trial court's order terminating the parental rights of an unwed father based upon the ground of "abandonment," where the father had provided no financial or emotional support to the mother during her pregnancy and informed her that he would support her decision to surrender the child for adoption. *See* Whitney v. Pinney, 956 P.2d 785, 787-89 (Nev. 1998).

opportunity to be a parent by failing to show concern and care before the child is born.

A finding of abandonment can be the first step in terminating a father's rights to his child. By his inaction, the father has demonstrated to the court that he is unwilling to assume the duties of fatherhood. That inaction can be measured even before the child's birth to predict how the father is likely to act in the future. Once his rights are terminated, he has no legal standing to seek visitation or custody rights with his child, who is legally freed for adoption.

B. *Foster Care in Crisis*

Despite its efforts to successfully care for children at risk, foster care is often heavily criticized for its failures. Consequently, policy concerns undeniably affect the decisions made by both legislatures and courts on how best to address childcare and protection issues. Commentators argue that placing children in temporary foster care, no matter how nurturing the environment, is not in their best interests.[127] In addition, the media continually report horror stories of children abused or killed while in foster care.[128] Although foster care aims to protect children from neglect and abuse by parents and other family members, it often becomes an equally cruel form of neglect and abuse at the hands of the state.[129] Child welfare agencies have also been criticized for inadequately providing for children by focusing only on meeting their basic physical needs.[130] Criticisms such as these make expeditious resolution of a child's care and permanent placement of utmost urgency.

Gathering statistics to discover the extent of re-abuse in foster care has proven difficult.[131] Re-abuse refers to the abuse of children in foster care by their caretakers after they have been removed from an

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127. *See* Nancy Garland, *Wanted: Parents, More Maine Children up for Adoption; Media Step up Assistance to Agencies*, Bangor Daily News, Nov. 6, 1999, at B1.

128. *See, e.g.*, Pamela Mercer, *Toddlers Seriously Ill After Swallowing Pills: Two Boys in Foster Care Got Hold of Medication Used for Hypertension and Hyperactivity*, Orlando Sentinel, Nov. 6, 1999, at 1 (reporting on two boys hospitalized after consuming medication while 61-year-old foster mother slept).

129. *See* National Commission on Children, Beyond Rhetoric: A New American Agenda for Children and Families 287-88 (1991) [hereinafter Beyond Rhetoric]; O'Brien, *supra* note 94, at 1242. In 1997, 41 states reported their fatality rates for foster care: 23 states had no fatalities; 4 states suffered 1 fatality; 2 states reported 3 fatalities; and 2 other states had 2 fatalities. *See* Child Maltreatment 1997, *supra* note 16, at 6-1.

130. *See, e.g.*, Roger Miller, *State's Parenting Skills Taken to Task*, Pantagraph, Oct. 28, 1999, at A4 ("The State . . . sometimes [was] a worse parent than the parent we took the children from because in most cases those parents loved their children.").

131. In 1984, the National Center on Child Abuse and Neglect began to require those states participating in its grant program to treat reports of abuse and neglect for children in substitute care similar to all other reports, and not just as violations of licensing standards. *See* James A. Rosenthal et al., *A Descriptive Study of Abuse and Neglect in Out-of-Home-Placement*, 15 Child Abuse & Neglect 249, 250 (1991).

abusive home.[132] A recent study focusing on the Illinois Department of Children and Family Services charted the abuse and neglect of children in substitute care from 1992 through 1997.[133] Substitute care includes care with relatives, family foster care, specialized foster care for children with special physical and emotional problems, and institutional care.[134] The study considered only those children whose cases were open for at least seven days,[135] and found an average 2% re-abuse report rate.[136] The rate varied only 1% during the five-year focus period despite a continual increase in the number of children in the system.[137] While this percentage may seem low, any abuse is troubling because the state is supposedly protecting these children from abuse by removing them from their homes.

When examined by placement type, family foster care in the Illinois study generally had the highest rate of re-abuse.[138] The five-year average rate was 2.5%.[139] By comparison, the average rate for those living in care with relatives was 1.9%, with a high of 2.6% in 1995.[140] Adoptive placements, where the child lives while awaiting completion of the legal adoption process, had an average re-abuse rate of 1.6%.[141] The permanency and familiarity of the placement, therefore, reduced the risk of re-abuse.

The Illinois study also showed that younger children are more at risk than their older counterparts in state-administered childcare systems. In family foster care, for example, children are most vulnerable to re-abuse between the ages of three and nine.[142] This rate is double that of children living with relatives.[143] The type of abuse most common to family foster care and kinship care is substantial risk of physical harm,[144] followed by sexual abuse.[145]

Overcrowding in homes presents problems in providing quality care. The number of children in the system continually increases,[146]

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132. *See* John Poertner et al., *How Safe are Out-of-Home Placements?*, 21 Children & Youth Servs. Rev. 549, 549 (1999).

133. *See id.* at 551.

134. *See id.* at 554-55.

135. *See id.* at 552.

136. *See id.* at 553.

137. *See id.*

138. *See id.* at 555. Kinship care shared an equivalent rate in 1995 of 2.6% re-abuse. *See id.*

139. *See id.* at 554.

140. *See id.*

141. *See id.*

142. *See id.* at 557.

143. *See id.*

144. *See id.* at 558. The risk of physical harm in kinship care was 54.3%, and in foster care 52.1%. *See id.*

145. *See id.* The risk of sexual abuse in kinship care was 20.3%, and in foster care 36.9%. *See id.*

146. As recently reported, there are approximately 3000 children in foster care in the District of Columbia. *See* Michael H. Cottman & Sari Horwitz, *Williams to*

but the corresponding number of placements does not.[147] When systems are overloaded, abuse worsens because agencies are forced to overcrowd homes and lower standards of care.[148] Legislative initiatives such as the Adoption and Safe Families Act ("ASFA"),[149] which grant exceptions to the requirement under the Adoption Assistance and Child Welfare Act of 1980 ("CWA")[150] that reasonable efforts be made to preserve the natural family,[151] virtually guarantee even larger increases in placement outside the home in the future.[152] This move away from parental placement favoritism leads to the conclusion that more children will ultimately enter the state system.[153]

Concerns regarding foster care are not limited to physical environment and well-being. Commentators have advised that when children successfully bond with families, the state should make every effort to protect and support their placements, wherever those placements may be.[154] Despite notions to the contrary, neither placing a child for adoption nor returning her to her biological parents guarantees permanence or stability.[155] To disrupt a favorable placement unnecessarily, with the goal of providing permanence, is "to remove children from families in which they are emotionally bonded and doing well in the hope of finding a not-yet-available-but-still-possibly-better alternative," and "tak[es] unnecessary chances

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Appoint Official to Work Out Agencies' Problems, Wash. Post, Nov. 3, 1999, at B7. Maine has approximately 3000 children in its foster care system, 700 of whom are available for adoption. *See* Garland, *supra* note 127. Since 1985, the foster care population of the United States has nearly doubled. *See* Richard Wexler, *Shattered Families: Rise in Adoptions Comes at a Cost*, Charleston Gazette, Nov. 2, 1999, at 5A. In Lancaster County Pennsylvania, 570 children are in foster care and 2500 suffer from abuse and neglect. *See* Ryan Robinson, *Judge: "Family Issues are Dominating Our Courts,"* Lancaster New Era, Oct. 25, 1999, at B1.

147. *See* Wexler, *supra* note 146 (noting that the anticipated increase in adoptions has not occurred).

148. *See id.*

149. *See* Pub. L. No. 105-89, 111 Stat. 211 (codified as amended in scattered sections of 42 U.S.C.).

150. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 1, 94 Stat. 500 (codified at 42 U.S.C. § 1305 (1994)).

151. *See* Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 Cal. W. L. Rev. 223, 255 (1989-1990).

152. *See* Wexler, *supra* note 146.

153. *See infra* Part III.D.

154. *See, e.g.*, David Herring, *The Michigan Agency Attorney Project, in* Cahn & Johnson, *supra* note 44, at 29 (stating that the risk of substantial developmental harm from an extended unstable placement was the motivation behind the reasonable efforts requirement to prevent or shorten such placements).

155. *See* Steinhauer, *supra* note 57, at 222 (arguing that legal permanence is just terminology and that permanence can only really be determined by the child's own sense of the situation). "[R]emoving a child from a foster home that is experienced as permanent by both the child and the foster parents in order to return her home or place her on adoption elsewhere may do violence to that child's best chance for permanence in a misguided attempt to secure it." *Id.*

with a child's adjustment and subsequent development."[156] Thus, state agencies are sometimes criticized for doing exactly what they are supposed to be doing—placing children in permanent safe homes.

The average child spends three years in out-of-home care before a permanency decision is made.[157] If a child languishes in impermanence and instability too long, her ability to develop lasting bonds with a caregiver is damaged.[158] The harm from extended temporary foster care, without a sense of when and whether it will become permanent, "may actually be worse for the child than the abuse or neglect originally suffered in the parental home."[159] Children perceive time differently, and a period of even two years of instability can be quite harmful.[160] Therefore, the state should aim to make a potentially permanent placement as early as possible in order to ease the child's transition and help to establish a sense of stability.

While states have established intricate systems to address the needs of damaged families, the performance of these systems has not been flawless. In order to combat problems like those mentioned above and establish uniform standards, Congress has enacted two major pieces of family law legislation in recent decades. The next section discusses that legislation and its impact on protection agencies.

C. *Legislative History*[161]

Since 1935, Congress has legislated and provided funding to states in the area of childcare and protection. While both federal and state laws govern child protection procedures, federal laws establish the general guidelines to which the states must adhere if they wish to seek reimbursement for their social services expenses. These expenses include the costs of foster care and other forms of substitute care, and

156. *Id.*

157. *See* Cahn & Johnson, *supra* note 44, at 1.

158. *See id.*

159. Herring, *supra* note 155, at 15.

160. *See id.*; *see also* N.Y. Soc. Serv. Law § 384-b(1)(b) (McKinney 1992) ("[U]nnecessary stays [in foster care] may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens."). An additional problem results from separating a child from his biological father. A large number of children in the United States do not live with their biological fathers. *See* Joseph P. Shapiro, *Honor Thy children*, U.S. News & World Report, Feb. 27, 1995, at 39 (reporting that 38% of all children do not live with their biological fathers, an increase from 17.5% in 1960). Social literature has highlighted the problems associated with the absence of a father figure in a child's life. In fact, the absence of a father can be a better predictor than poverty of a child's turn to crime or teenage pregnancy. *See id.* This problem is particularly acute in the African American community. *See* John M. O'Donnell, *Involvement of African American Fathers in Kinship Foster Care Services*, 44 Soc. Work 428, 429 (1999). These problems of paternal separation may influence placement choices, as the father is viewed as an important influence in the child's life.

161. *See generally* Schene, *supra* note 55 (documenting the legislative, social, and political response to child maltreatment in the United States).

related expenses for children including food and medical care. This section discusses the two most recent and significant pieces of legislation addressing foster care, child protection, and placement, and compares their goals and successes.

1. Federal Child Protection Laws[162]

In the 1970s, the predominant approach to addressing child abuse was to separate the parent and child.[163] As a result, the foster care system expanded to the point where more than 500,000 children were living apart from their families in 1977.[164] These children were often simply shuffled around a system that was unable to properly handle its overwhelming numbers.[165] In response to the growing criticism of state foster care systems,[166] Congress passed the CWA.[167] The goal of the CWA was to provide children with more permanent placements than foster care was then providing,[168] and to address deficiencies such as states resorting too frequently to foster care and viewing the placement of children in foster care as an end in itself.[169] The CWA

162. Federal laws enabling child protection services began in 1935 with the Child Welfare Services Program. *See* Social Security Act, Title IV-B, 42 U.S.C. §§ 620-29 (1994 & Supp. III 1997). The statute provides grants to states to support preventive and protective services to vulnerable children and their families. Beginning in 1961, foster care payments were made under the Aid to Dependent Children program. *See* Social Security Act, Title IV-A, 42 U.S.C. §§ 601-19 (Supp. III 1997). This program provided federal funds to help states make maintenance payments for children who were eligible for cash assistance and who lived in foster care. Initially, most of these funds went to foster care payments. *See id.* In 1980, this program was transferred to a new Title IV-E of the SSA. *See* Social Security Act, Title IV-E, 42 U.S.C. §§ 670-79 (1994 & Supp. III 1997). In 1974, Congress passed the Child Abuse Prevention and Treatment Act ("CAPTA") to provide limited funding to states to prevent, identify, and treat child abuse and neglect. *See* Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. §§ 5101-5106h, 5116, 5118a-e (1994 & Supp. III 1997)). CAPTA created the National Center on Child Abuse and Neglect, developed standards for receiving and responding to reports of child maltreatment, and established a clearinghouse on the prevention and treatment of abuse and neglect. Changes in 1997 reinforced the Act's emphasis on child safety. *See* Schene, *supra* note 55, at 28.

163. *See* Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L.J. 887, 889 (1975).

164. *See* Shotton, *supra* note 151, at 224.

165. *See* Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 Fam. L.Q. 121, 122 (1995) [hereinafter Guggenheim, *Children in Foster Care*].

166. *See id.* at 122-25 (noting the difficulties that children faced in the foster care system in the 1970s and discussing federal legislation passed in response).

167. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 1, 194 Stat. 500, codified in 42 U.S.C. § 1305 (1994).

168. *See* S. Rep. No. 96-336, at 10 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1459.

169. *See* Martin Guggenheim, *The Foster Care Dilemma and What To Do About It: Is the Problem that Too Many Children are Not Being Adopted Out of Foster Care or That Too Many Children are Entering Foster Care?*, 2 U. Pa. J. Const. L. 141, 142 (1999) [hereinafter Guggenheim, *Foster Care Dilemma*].

required states that sought to maximize federal funding to establish programs and make procedural reforms that would serve children in their own homes, prevent out-of-home placement, and facilitate family reunification following placement.[170]

The CWA established the murky "reasonable efforts" standard as the guideline for both placement prevention, the goal of which was to avoid placing the child outside the home at all, and for reunifying the child with his family.[171] To receive funding under the CWA, state child welfare agencies were mandated to "make 'reasonable efforts' to maintain children with their families or, if this is not possible . . . make reasonable efforts to reunify the child with the family."[172] Placements were to be made with the preferred ranking as reunification, adoption, guardianship, and long-term out-of-home care.[173] Thus, through the Act, Congress shifted the focus of child welfare from foster care to permanency, which was preferred through family reunification, and also through permanent adoption.[174] Although the CWA aimed to protect children by reducing reliance on foster care, the number of children in foster care has increased rather than decreased since its enactment.[175]

These disappointing results led Congress to pass the ASFA.[176] This legislation emerged in a policy climate that "stressed individual responsibility and programmatic accountability."[177] ASFA represents a legislative acknowledgement that the foster care system was further harming abused children instead of helping them.[178] ASFA announced a new standard by which placement options would be evaluated: "[T]he child's *health and safety* shall be the paramount concern."[179] This focus reflects a shift from the prior emphasis on reunifying biological parents and their children. ASFA thus seeks to

170. *See* Cristine H. Kim, Note, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. Ill. L. Rev. 287, 288.

171. *See id.*

172. Shotton, *supra* note 151, at 223.

173. *See* Thomas P. McDonald et al., Assessing the Long-Term Effects of Foster Care: A Research Synthesis 13 (1996).

174. *See* Kim, *supra* note 170, at 289.

175. *See* Bailie, *supra* note 40, at 2291 & n.51.

176. *See* Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.). ASFA re-authorizes and increases funding for the Family Preservation and Support program, while changing its name to "Promoting Safe and Stable Families." The support services included under this program are counseling, substance abuse treatment services, mental health services, domestic violence services, temporary child care, and transportation for services. *See* 42 U.S.C. § 629a(a)(7)(B) (Supp. III 1997).

177. Ernestine Steward Gray, *The Adoption and Safe Families Act of 1997: Confronting an American Tragedy*, 46 La. B.J. 477, 478 (1999).

178. *See* Kim, *supra* note 170, at 288.

179. 42 U.S.C. § 671(a)(15)(A) (Supp. III 1997) (emphasis added); Kim, *supra* note 170, at 309.

strike a balance between family preservation and reunification, and the health and safety of children.[180]

Although ASFA represents a shift from the reunification focus, it retains a modified requirement that agencies continue to make reasonable efforts to "preserve and reunify" families.[181] This reunification effort must be done with the child's safety in mind.[182] The reasonable efforts requirement applies unless a court determines aggravating circumstances exist.[183] Aggravating circumstances are defined by state law, but may include abandonment, chronic physical abuse, or sexual abuse.[184] Additionally, the requirement may be dispensed with if the parent has committed particular crimes against the child or against the other parent, such as murder, manslaughter, or participating in the planning of such an act, or committing serious bodily injury.[185] Additionally, reasonable efforts to reunify are not required if the parent's rights to a sibling have been terminated involuntarily.[186]

Congress changed the name of what was formerly a dispositional hearing[187] to a permanency hearing to reflect ASFA's overall stability goal.[188] It also changed the time frame for a permanency hearing, which now must be held no later than twelve months after a child enters foster care.[189] This is shortened from the previous eighteen-month standard. In addition, if the judge determines that reasonable efforts to reunite the child with the biological parents are not required, a permanency hearing must be held within thirty days of that determination.[190] At the permanency hearing, the court considers whether and when a child will be (1) returned to the parent; (2) planned for adoption and referred for termination of parental rights; (3) referred for legal guardianship; or (4) referred for another permanent living arrangement.[191]

ASFA concretely advances its permanency focus in two ways. First, ASFA requires states to move children from foster care into permanent homes more quickly by terminating parental rights earlier. If a child has been in foster care for fifteen of the most recent twenty-

180. *See* Gray, *supra* note 177, at 478.
181. *See* 42 U.S.C. § 671(a)(15)(B) (Supp. III 1997).
182. *See id.* § 671(a)(15)(B)(ii).
183. *See id.* § 671(a)(15)(D)(i).
184. *See id.*
185. *See id.* § 671(a)(15)(D)(ii)(I)-(IV).
186. *See id.* § 671(a)(15)(D)(iii).
187. *See supra* notes 87-94 and accompanying text for a description of the dispositional hearing.
188. *See* 42 U.S.C. § 675(5)(C) (Supp. III 1997).
189. *See id.* Under ASFA, the date that a child "enters foster care" is either when a court finds that the child has been abused or neglected, or 60 days after the child is removed from the home, whichever is earlier. *See id.* § 675(5)(F).
190. *See id.* § 671(a)(15)(E)(i).
191. *See id.* § 675(5)(C).

two months, or a court has determined an infant child abandoned, the state must file a petition to terminate parental rights.[192] The state must also concurrently identify and approve a qualified family for adoption.[193] Second, ASFA promotes permanency by encouraging adoptions[194] through giving a bounty to the state of $4000 to $6000 for each foster child adopted over a baseline number.[195] This base number is calculated according to the average number of adoptions in the state in prior fiscal years.[196]

To continue receiving federal funding, each state was required to enact its own legislation to comply with ASFA.[197] Under Title IV of the Social Security Act, the federal government reimburses the states for eligible foster care and adoption expenditures.[198] Failure to comply could result in a serious loss of funding. In proposing its compliance legislation, the New York State Senate estimated a potential loss of over $600 million in federal funding if the state did not meet ASFA's commands.[199]

2. New York State Child Protection Laws Enacted to Comply with ASFA

In addition to Chapter 7 of the New York laws that aimed generally to comply with ASFA, the New York Senate and Assembly submitted a bill[200] that proposes to amend certain provisions of the Family Court Act ("FCA") to encourage efforts to find a non-custodial parent.[201] The legislation focuses on changing statutory provisions that address the notification procedures to family members, specifically to non-custodial (non-respondent) parents, which recently have been

192. *See id.* § 675(5)(E).

193. *See id.*

194. *See* H.R. Rep. 105-77, at 7 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2739-40; Kim, *supra* note 170, at 309-10; *see also* Garland, *supra* note 127 ("The push is on at the federal and state levels to get adoptable children into permanent homes more quickly.").

195. *See* 42 U.S.C. § 673b(d) (Supp. III 1997). The additional $2000 is based on the number of special needs adoptions. *See id.* § 673b(d)(1)(B).

196. *See id.* § 673b(g)(3)(A)-(B).

197. New York State enacted its legislation in February 1999. *See* 1999 N.Y. Laws 7 (McKinney 1999).

198. *See* 42 U.S.C. § 674(c) (1994 & Supp. III 1997).

199. *See Assembly Passes Federal Adoption and Safe Families Act*, Assembly Action Highlights (Feb. 12, 1999) <http://assembly.state.ny.us/Press/Weekly/199990212.html>.

200. *See* S. 5117-A, A. 962-A, 222d Legis. Reg. Sess. (N.Y. 1999). The Assembly passed its version on June 21, 1999. The Senate did not vote on the bill in the last legislative session. It has been automatically reintroduced in the 2000 session.

201. *See* Bill Memo in Support of S. 5117-A, An Act to Amend the Family Court Act and Social Services Law, In relation to Facilitating Permanency Planning for Children in Foster Care, 222d Legis. Sess. (N.Y. 1999) [hereinafter S. 5117-A Bill Memo].

challenged in federal litigation.[202] The statute currently mandates that "relatives of the child" be notified of a child's removal and consideration for placement.[203] Father-litigants have challenged the vagueness of this language and argue that it does not adequately protect their parental rights. The proposed legislation adds language directing that notice be rendered specifically to the non-respondent parent, as well as to other relatives. Despite its seeming reunification presumption, this legislation falls under the rubric of complying with ASFA because it aims to make more rapid, permanent placements, thereby decreasing a child's stay in temporary foster care.

For those children involuntarily removed from their homes, the bill would amend the FCA to require the child protection agency to conduct an immediate investigation to locate any non-respondent parent and any relatives of the child to inform them of the proceedings.[204] The new language repeatedly adds "non-respondent parent" to the language that currently reads "person related to the child."[205] If that parent is not ultimately a custodial resource, their information, at a minimum, will be available for notification at a later stage, particularly for a termination of parental rights proceeding.[206] The direct reference to "non-respondent" parent is arguably a legislative attempt to place that parent in an elevated position in these proceedings. However, the language remains vague as to the specific measures to be employed and as to what type or level of search will be deemed satisfactory.

The proposed language to the provisions governing the surrender of a child by a parent into child protective services[207] requires that the parent executing the surrender provide information regarding "the other parent, any person to whom the surrendering parent had been married at the time of the conception or birth of the child," and any other person entitled to notice of a termination of parental rights proceeding.[208] Failure to provide the information, however, does not invalidate the surrender.[209] Under the bill, in preparing for foster care review, the CPS official shall have a "continuing duty to obtain

202. *See supra* notes 19-20 and accompanying text.

203. N.Y. Fam. Ct. Act § 1017 (McKinney 1999).

204. *See* S. 5117-A § 1, 222d Legis. Reg. Sess. (N.Y. 1999) (regarding N.Y. Fam. Ct. Act § 1017).

205. *Id.* The non-respondent parent is typically the noncustodial parent, as the respondent is the parent or legal guardian responsible for the child's care who is alleged to have abused or neglected that child. *See* N.Y. Fam. Ct. Act § 1012(a) (McKinney 1999).

206. *See* S. 5117-A Bill Memo, *supra* note 201.

207. *See* S. 5117-A § 3, 222d Legis. Reg. Sess. (N.Y. 1999) (regarding N.Y. Soc. Serv. Law § 383-c); *id.* § 4 (regarding N.Y. Soc. Serv. Law § 384).

208. S. 5117 § 3, 222d Legis. Reg. Sess. (N.Y. 1999).

209. *See id.* This lack of punishment weakens the force of the requirement and its intended effect.

information . . . from the parent or other individual who placed the child *or* through further investigation . . . ."[210]

These changes seemingly aim to protect parents' rights. However, the absence of punitive measures for the surrendering parent's failure to provide information does not enhance the possibilities for finding and notifying the non-custodial parent. Further, by stating the goal of having the information available for later proceedings, specifically TPR proceedings, the bill's language leads to the conclusion that these parents are not truly viewed as placement resources.

The statutory changes of ASFA and its complementary state law provisions, as seen in New York, indicate a shift toward permanent placements without set formulae. The presumption toward placement with a biological parent thereby weakened, courts and agencies can focus on what is truly best for the child and develop plans to meet those interests more quickly. The Supreme Court exhibited a similar focus by emphasizing the quality of the parent-child relationship beyond a mere biological status inquiry. The next part analyzes the Court's holdings in the family law area.

II. THE SUPREME COURT AND THE FAMILY: A FOCUS ON THE QUALITY OF PARENT-CHILD RELATIONSHIPS

This part details the Court's evaluation of the familial privacy interest. It begins with the Court's treatment of the family generally, then proceeds to examine those cases addressing the notice rights granted to unwed fathers and foster parents. The Court's analysis is then used as a basis for interpreting the rights that legal fathers should be afforded. This part also examines the elements of proper procedure, particularly in the context of child protection and custody proceedings.

A. *Due Process and the Family*

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law."[211] The Supreme Court has held that to make out a claim of deprivation of Fourteenth Amendment due process rights, a plaintiff must demonstrate first that he has been deprived of liberty or property in the constitutional sense.[212] Second, he must demonstrate that the procedure used to deprive him of that interest was constitutionally defective.[213]

The Court has long retreated from a formalistic, rigid interpretation

210. *Id.* § 6 (amending N.Y. Soc. Serv. Law § 392) (emphasis added).
211. U.S. Const. amend. XIV, § 1.
212. *See* Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972).
213. *See id.* at 571-72.

of due process procedural protections,[214] repeating that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances."[215] Nonetheless, the requirement of fundamental fairness remains constant. Fundamental fairness, however, has a "meaning . . . as opaque as its importance is lofty."[216] Applying the Due Process Clause is thus "an uncertain enterprise."[217] Determining fundamental fairness involves considering relevant precedents and assessing the interests at stake.[218]

Once the interest is identified, a balancing test must be applied. In *Mathews v. Eldridge*,[219] the Court identified three factors to be applied in any due process analysis.[220] These factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[221]

Thus, analyzing due process claims involves establishing that the right of which the individual claims to have been deprived is protected, and then evaluating the deprivation procedures. In family law, this analysis begins with the Supreme Court's recognition and protection of a privacy interest in the family, and proceeds by analyzing the procedures that allegedly infringe upon that interest.

The Supreme Court has long recognized a privacy interest in the family,[222] holding that choices about family life and the upbringing of children are among the associational rights protected by the Fourteenth Amendment,[223] as well as by the Equal Protection Clause[224] and the Ninth Amendment.[225] Parents thus have a fundamental right to the custody and companionship of their

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214. *See id.* at 572.

215. Lassiter v. Department of Soc. Servs., 452 U.S. 18, 24 (1981) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

216. *Id.*

217. *Id.* at 24-25.

218. *See id.*

219. 424 U.S. 319 (1976).

220. *See id.* at 335.

221. *Id.*

222. *See infra* notes 230-32 and accompanying text.

223. *See* M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

224. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (striking down a sterilization law that disproportionately affected minorities as violative of the equal protection clause, because marriage and procreation are fundamental rights of man).

225. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (acknowledging that the Ninth Amendment recognizes the right of privacy in marriage as fundamental even though it is not specifically mentioned in the Constitution).

children.[226] This right has been deemed "essential,"[227] one of the "basic civil rights of man,"[228] and "far more precious . . . than property rights."[229] In *Prince v. Massachusetts*,[230] the Court stated that "[I]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[231] In 1981, the Court reaffirmed the line of decisions following *Prince* by stating that "a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[232] Thus, parents have a protected interest in their relationship with their child, and this relationship may be intruded upon only through proper procedure.

Procedural due process applies only to interests protected by the Fourteenth Amendment.[233] When such interests are at stake, "the right to some kind of prior hearing is paramount."[234] Due process of law, however, does not require a hearing in every possible case of government impairment of a private interest.[235] The Court has advised that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[236] A person may be deprived of a protected interest without a hearing only in extraordinary circumstances where some valid governmental interest is at stake that justifies delaying the hearing until after the event.[237]

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226. *See In re* C.A.T., Jr., No. 01-A-01-9510-JV-00474, 1996 Tenn. App. LEXIS 291, at *6 (Tenn. Ct. App. May 17, 1996).

227. *Meyer*, 262 U.S. at 399.

228. *Skinner*, 316 U.S. at 541.

229. May v. Anderson, 345 U.S. 528, 533 (1953); *see also* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (acknowledging the Court's consistent recognition that the parent-child relationship is constitutionally protected); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977) (noting that the liberty interest in family privacy has its contours in "intrinsic human rights"); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (acknowledging the Court's many decisions recognizing freedom of personal choice in matters of family life as a liberty protected by the due process clause); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (same); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (same).

230. 321 U.S. 158 (1944).

231. *Id.* at 166.

232. Lassiter v. Department of Soc. Servs., 452 U.S. 18, 27 (1981) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

233. *See* Board of Regents v. Roth, 408 U.S. 564, 569-70 & n.7 (1972) (holding that plaintiff must first demonstrate he has been denied liberty or property in the constitutional sense).

234. *Id.* at 569-70.

235. *See Stanley*, 405 U.S. at 650.

236. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); *accord Roth*, 408 U.S. at 573.

237. *See Roth*, 408 U.S. at 570 n.7. The Court has rarely found such circumstances to be present. *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598 (1950) (stating that no hearing at the preliminary stage is required by due process so

Any claim to a pre-deprivation hearing is premised on the concept that total relief cannot be obtained at a post-deprivation hearing.[238]

When a hearing is required, it must "be 'at a meaningful time and in a meaningful manner.'"[239] Further, the opportunity to be heard must be tailored to the "capacities and circumstances of those who are to be heard."[240] The Court has stated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation," and has established that the procedures due process may require are determined by the circumstances.[241]

The Supreme Court has cautioned that foster care involves "issues of unusual delicacy... where professional judgments regarding desirable procedures are constantly and rapidly changing."[242] Consequently, federal courts should hesitate to "import rigidity of procedure" into this area where the state's interest is great, but where there also exists a need for flexibility to accomplish what is best for the child.[243] Nevertheless, the minimum requirements of procedural due process are a matter of federal law, and procedures that the state deems adequate do not automatically satisfy the constitutionally required protection.[244] There is then a need to reconcile the state's interest with the constitutional mandate.

Many social services and domestic relations statutes incorporate presumptions favoring a party in the proceeding.[245] For example, the

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long as the requisite hearing is held before final administrative order becomes effective); Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) (stating that where only property rights are involved, postponement of judicial inquiry is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate); Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1921) (discussing Congress's right during war to immediately seize property thought to belong to the enemy).

238. *See* Mathews v. Eldridge, 424 U.S. 319, 331 (1976).

239. Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

240. *Id.* at 269.

241. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); *see also Goldberg*, 397 U.S. at 262-63 (addressing the procedural protections required to terminate welfare payments).

242. Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 855 (1977).

243. Gibson v. Merced County Dep't of Human Resources, 799 F.2d 582, 589 (9th Cir. 1986) (holding that the procedures afforded foster parents to contest the removal of an adopted foster child from their home were adequate to protect whatever liberty interests they may have had in their relationship with the child).

244. *See* Santosky v. Kramer, 455 U.S. 745, 755 (1982) (citing Vitek v. Jones, 445 U.S. 480, 491 (1980)).

245. *See* Conn. Gen. Stat. Ann. § 46b-56b (West 1995) (stating that in custody disputes between parents and non-parents, "there shall be a presumption that it is in the best interest of the child to be in the custody of the parent"); *see also* Mich. Comp. Laws Ann. § 722.25 (West 1993) (stating that in a dispute between the parent and an agency or third person, "it is presumed that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence").

parental presumption is the historical view that the child's best interest is usually served by remaining with the natural parent.[246] The parental preference doctrine is a rule of law designed to protect the constitutional due process rights of a natural parent to the custody of his or her children.[247]

Not all presumptions, however, are constitutional. In *Stanley v. Illinois*,[248] for example, the Court struck down a state statute with an automatic presumption against unwed fathers in custody suits.[249] The Court stated that procedure by presumption "is always cheaper and easier than individualized determination. But when . . . the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child."[250] The Court criticized the statute for presuming, rather than proving, a father's unfitness purely out of convenience.[251] Under the Due Process Clause, convenience is "insufficient to justify refusing a father a hearing when the issue at

246. *See* O'Brien, *supra* note 94, at 1215. In recent years, numerous state cases have continued to adhere to this proposition. *See, e.g.*, P.G. v. W.M.T., 590 So. 2d 329, 330 (Ala. Civ. App. 1991) (applying presumption that in a custody determination between a parent and a third party, the natural parent will be presumed to serve the best interests of the child absent a showing of the natural parent's unfitness); Appeal of H.R., 581 A.2d 1141, 1143 (D.C. 1990) (finding the proper standard for evaluating an unwed father's rights to be the best-interests-of-the-child standard that incorporates a preference for a fit unwed father who has grasped his opportunity interest); Rose v. Potts, 577 N.E.2d 811, 813 (Ill. App. Ct. 1991) (upholding a presumption for the natural parent, but qualifying it as not absolute and as only a factor in the best-interests-of-the-child analysis); Westphal v. Westphal, 457 N.W.2d 226, 229 (Minn. Ct. App. 1990) (denying intervention application of grandparents in custody dispute by applying the two doctrines governing custody disputes between parents and nonparents: first, the natural parent must be shown unfit; second, the best-interests-of-the-child standard governs); Lewelling v. Lewelling, 796 S.W.2d 164, 166 (Tex. 1990) (finding the appropriate standard in parent versus nonparent custody battles to be presumption toward the natural parent unless placement with that parent would not be in the child's best interest *and* such placement would significantly impair the child's physical health or emotional development (citing Tex. Fam. Code Ann. § 14.01(b) (West 1990)) (emphasis added); Mason v. Moon, 385 S.E.2d 242, 244 (Va. Ct. App. 1989) (requiring clear and convincing evidence either that the parents are unfit, voluntarily relinquished the child, abandoned the child, or special facts and circumstances "constitute extraordinary reasons to take the child from the parents" before overcoming the presumption favoring a natural parent); Bancroft v. Bancroft, 578 A.2d 114, 117 (Vt. 1990) (reiterating that a parent has a fundamental right to custody and that the presumption that the best interests of the child are served by granting custody to a natural parent may be overcome only in extraordinary circumstances). *But see In re* Guardianship of Williams, 869 P.2d 661, 664-65 (Kan. 1994) (overruling the use of the best-interests-of-the-child standard in a custody dispute between a natural parent and grandparent).

247. *See In re* Adoption of Baby Boy N., 874 P.2d 680, 688 (Kan. Ct. App. 1994).

248. 405 U.S. 645 (1972).

249. *See id.* at 656-58.

250. *Id.* at 656-57.

251. *See id.* at 658.

stake is the dismemberment of his family."[252] Therefore, statutory presumptions must still protect due process rights.

Due process becomes most important and most contested when the state seeks to terminate parental rights. When a father's rights are terminated, he loses all opportunity for contact and a relationship with his child.[253] The Fourteenth Amendment affords parents faced with the possibility of losing their children important due process rights.[254] These parents are entitled to a hearing and adequate notice,[255] and are entitled to legal representation when the circumstances so require.[256] Further, the state must support its petition by clear and convincing evidence.[257] The protection required is commensurate with the irreversible harm at stake.

In the child custody context, state statutes provide procedures to protect the varying rights of the parties to child protection and placement proceedings. These procedures largely focus on notice and opportunity to be heard on a child's placement decisions after removal, or when an adoption is pending, and the efforts required of government agencies to guarantee such notice to the individuals involved. In New York, for example, after an emergency removal, the person authorized to make such a removal must "make every reasonable effort to inform the parent ... of the facility to which he has brought the child," and to "give, coincident with removal, written notice to the parent ... of the right to apply to the family court for the return of the child."[258] This notice shall be personally served on the parent at the residence from which the child was removed, and a copy of the notice shall be mailed within twenty-four hours.[259] For hearings on whether to extend temporary placements, notice of the hearing must be provided to the parent who will be a party entitled to participate in the hearing.[260] Unless the court directs otherwise, this notice will be made by mail to the parent's last known address at least eight days prior to the hearing.[261] The hearing may not begin until

252. *Id.*

253. For a discussion of the procedure for terminating parental rights, see *supra* notes 97-101 and accompanying text.

254. *See In re* C.A.T., Jr., No. 01-A-01-9510-JV-00474, 1996 Tenn. App. LEXIS 291, at *6 (Tenn. Ct. App. May 17, 1996).

255. *See Stanley*, 405 U.S. at 649 (holding that to deny an unwed father a hearing when his children are taken because the mother of the children dies, while extending such a hearing to all other parents whose custody is challenged, denies him equal protection under the Fourteenth Amendment).

256. *See* Lassiter v. Department of Soc. Servs., 452 U.S. 18, 31-32 (1981).

257. *See* Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) (striking down statutes with lower evidentiary standards).

258. N.Y. Fam. Ct. Act. § 1024(b)(ii)-(iii) (McKinney 1999).

259. *See id.* § 1024(b)(iii).

260. *See id.* § 1055(b)(iii).

261. *See id.*

proof that the parent received actual notice is provided to the court.[262] New York's notice provisions demonstrate both compliance with the law and the lack of specificity as to how these provisions are to be implemented.

B. *The Rights of Parties to Foster Care Proceedings*

The physiological differences between men and women have resulted in the grant of differing rights to biological mothers and fathers.[263] The mother's parental relationship stems from giving birth and is more biologically clear than the father's parental relationship, providing her with full legal rights without need for scientific or legal determination.[264] Fathers, on the other hand, have been granted different kinds of rights in the Court's jurisprudence, where lines have been drawn based on biological, legal, and emotional relationships.

1. The Rights of Unwed Fathers: A Relationship-Based Inquiry

The Supreme Court cases addressing the rights of unwed fathers provide insight into how the Court views the father-child relationship and serve as a background for determining the rights of legal fathers. The cases addressing foster parents similarly provide insight into how the court views the family in a contract-based setting.

The Supreme Court has specifically addressed the rights of unwed fathers five times,[265] and its decisions have rested on different constitutional grounds. First, in *Stanley v. Illinois*,[266] the biological father, who lived with the children's mother and helped raise the children, challenged an Illinois law requiring the children of unwed fathers to be taken into state custody upon the mother's death.[267] Under the statute, the unwed father was not entitled to any hearing on the children's placement. The Court struck down the law, stating that a father's interest in the children he has raised warrants protection.[268] The Court held that the automatic destruction of the custodial relationship, without giving the father an opportunity to argue his fitness as a parent, violated the Due Process Clause.[269] What remained unclear from the Court's decision, however, was whether

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262. *See id.*

263. *See* Cashman, *supra* note 29, at 960.

264. *See* Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) ("The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures.").

265. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

266. 405 U.S. 645 (1972).

267. *See id.* at 646, 649.

268. *See id.* at 650-51.

269. *See id.* at 658.

the unwed father's right existed in every case, or whether the right stemmed from "the existence of a traditional family unit, a long-term custodial relationship with the children, or both."[270]

Stanley appears to support a strong father's rights stance. Subsequent cases addressing the rights of biological fathers, however, have narrowed the scope of this constitutional protection.[271] The following three cases involved unwed fathers attempting to block or vacate the adoption of their children by the husbands of the children's mothers. In *Caban v. Mohammed*,[272] the Court held that a New York statute permitting an unwed mother, but not an unwed father, to block adoption proceedings by withholding consent violated equal protection.[273] The biological father in that case, although no longer in a relationship with the child's mother, maintained contact with his son for six years.[274] While the Court did not address the father's due process claim,[275] it did expand the *Stanley* decision to include protecting men who maintain relationships with their children, even if outside the traditional family unit.[276]

In an apparent shift, the Court in *Quilloin v. Walcott*[277] upheld a Georgia statute that authorized an adoption by a stepfather over the objection of the biological father.[278] The biological father had never legitimated the child, had not sought visitation rights until the adoption petition was filed, and had provided support only on an irregular basis.[279] The child, who was fourteen when the case was decided,[280] had lived with his mother and stepfather from the age of three.[281] The adoption by the stepfather would legally recognize an already existing family.[282] Under these circumstances, the Court found that the state was not required to find anything more than that the adoption was in the best interest of the child,[283] because the state has a "strong state policy of rearing children in a family setting."[284] By implication, the Court refined its holding in *Stanley* by denying rights to an inactive father.[285]

Focusing again on the quality of the father-child relationship, the

270. Aizpuru, *supra* note 24, at 709.
271. *See* Kaas, *supra* note 54, at 1074.
272. 441 U.S. 380 (1979).
273. *See id.* at 394.
274. *See id.* at 389.
275. *See id.*
276. *See* Aizpuru, *supra* note 24, at 711.
277. 434 U.S. 246 (1978).
278. *See id.* at 255.
279. *See id.* at 251, 256.
280. *See id.* at 246-47.
281. *See id.* at 247.
282. *See id.* at 255.
283. *See id.*
284. *Id.* at 252.
285. *See* Aizpuru, *supra* note 24, at 709.

Court held in *Lehr v. Robertson*[286] that a biological father who was uninvolved in his child's life did not have a right to contest adoption proceedings.[287] In the Court's view, the biological connection between father and child was significant in the unique *opportunity* it offered the father to develop a relationship.[288] However, if the father failed to grasp that opportunity, the "Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie."[289] Again, the nature of the father-child relationship was examined in determining constitutional protection.

Returning to its theme of support for the marital unit,[290] in *Michael H. v. Gerald D.*[291] the Court denied the attempts of a father of a child born of an adulterous affair to establish visitation and paternity rights.[292] The Court asserted that the Fourteenth Amendment protects those interests that are fundamental to society, such as the institution of the family.[293] Therefore, the status of the legal relationship between the parents is a factor in defining the scope of the constitutional protection.[294] The Court did not find support for protecting this type of relationship anywhere in its jurisprudence.

In sum, the Court has established that unwed fathers have a right to protect their relationship with their children. That right, however, is not absolute.[295] Rather, it is predicated on a court finding that the father has made sufficient contacts and efforts to establish a relationship prior to the threatened legal proceedings.[296] The Court has noted that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[297] Similarly, states have recognized that

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286. 463 U.S. 248 (1983).
287. *See id.* at 267-68.
288. *See id.* at 262.
289. *Id.*
290. This sentiment was expressed in *Quilloin*. *See supra* notes 277-84 and accompanying text.
291. 491 U.S. 110 (1989).
292. *See id.* at 113-17.
293. *See id.* at 122-23.
294. *See id.* at 123-24.
295. *Compare* Lehr v. Robertson, 463 U.S. 248, 265 (1983) (finding that a father's due process rights were not violated by a lack of notice of adoption proceedings because he had not established a substantial relationship with his child), *with* Caban v. Mohammed, 441 U.S. 380, 394 (1979) (allowing a father to attempt to block a third-party adoption because he had an existing relationship with his child that was worthy of constitutional protection).
296. *See Lehr*, 463 U.S. at 262 (noting that father did not "grasp[] that opportunity" to develop a relationship with his child because he waited until after the adoption petition was filed before attempting to assert his parental rights); *Caban*, 441 U.S. at 389, 393 (holding not only that a father had demonstrated a commitment to a relationship with his children, but also that a substantial relationship existed between the father and his children because he lived with the unwed biological mother and the children for several years); Cashman, *supra* note 29, at 967.
297. *Caban*, 441 U.S. at 397 (Stewart, J., dissenting).

"[a] bare assertion of parental natural right cannot prevail against the clear best interests of the children and the overwhelming evidence of disinterest and abandonment."[298] The unwed father's rights can only be evaluated in context, and are weighed against the best interest of the child. These qualifications lend support to similarly restricting the parental rights of legal fathers.[299]

The Court's decisions gave the states little guidance in defining the rights of unwed fathers.[300] Many states have addressed this uncertainty by establishing paternity registries.[301] The registry places the burden for protecting the legal relationship between father and child on the father.[302] Once registered with the appropriate state agency, the father insures that he will be notified of any petition filed to adopt the child.[303] This right to notice is not the equivalent of full parental rights, but merely entitles him to notification of a hearing at which he may argue against the pending adoption as being against the child's best interest.[304]

States have taken three approaches to establishing deadlines beyond which the father cannot register.[305] The most common approach is to specify an amount of time measured from the child's date of birth, with thirty days being the most prevalent.[306] Another approach is to allow registration until the adoption petition is filed.[307] A third approach is more of a hybrid that provides for a registration period, but also provides the father with the ability to file a paternity action after the deadline has passed to protect his right to notice.[308]

Failing to register can have severe consequences. In New York, for example, if the father fails to register, his rights may be automatically terminated and the child adopted without his knowledge.[309] This type of statute assumes that a father who does not file with the registry is not a good father and will never be one.[310] Other states take a less extreme stance and require an attempt to identify and notify the unwed father of the adoption proceedings, even if he failed to register

298. State v. Hernandez, 259 N.W.2d 272, 274 (Neb. 1977) (finding the parents' lack of interest in their children for six years constituted abandonment and was a ground for terminating their parental rights).
299. *See infra* Part III.
300. *See* Aizpuru, *supra* note 24, at 705.
301. *See id.* Twenty-six states thus far have created paternity registries. *See id.* at n.2
302. *See id.*
303. *See id.*
304. *See id.*
305. *See id.* at 716.
306. *See id.*
307. *See id.* at 718.
308. *See id.* at 719.
309. *See* N.Y. Dom. Rel. Law § 111-a(6) (McKinney 1997).
310. *See* Aizpuru, *supra* note 24, at 705.

in a timely fashion.[311] For the unwed father who wants to undertake the responsibility of parenting, paternity registries provide a means of protecting the father's relationship with his child.[312]

The Court has not specifically addressed the rights of legal fathers. Its treatment has been limited to recognizing a legal father's rights as superseding those of an unwed father's claim.[313] No measures similar to the putative father registry have been required. By implication, the act of marriage is sufficient recognition of the paternal role. Nonetheless, this Note argues that marrying the mother should not enhance the paternal relationship's constitutional protection if the father has neither pursued nor seized a parenting role. The relationship with the child must be separately examined.

2. The Rights of Foster Parents: Emphasizing the Form of a Relationship over Its Substance

In addressing the rights of foster parents, the Supreme Court has moved away from a relationship-based analysis and has emphasized instead the contractual nature of the relationship between the child, foster parent, and state. The Court addressed the liberty interest of foster parents in *Smith v. Organization of Foster Families for Equality and Reform ("OFFER")*.[314] In that case, foster parents alleged that the procedures for removal of foster children under the New York Social Service Law[315] violated the due process and equal protection clauses of the Fourteenth Amendment.[316] The Court first analyzed whether the foster parents' asserted liberty interest was an interest protected by the Fourteenth Amendment.[317] In evaluating the family interest, the Court acknowledged that the importance of the familial relationship stems from the emotional attachments that derive from family intimacy as well as from the connection of a blood relationship.[318]

The Court, however, noted important distinctions between a foster

311. *See id.* at 723-24.

312. *See id.* at 726.

313. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 129 (1989) (finding that where a child born of an extramarital affair is born into an existing marital family, the "natural father's unique opportunity [interest in a relationship with the child] conflicts with the similarly unique opportunity [interest] of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter").

314. 431 U.S. 816 (1977).

315. *See* N.Y. Soc. Serv. Law §§ 383(2), 400 (McKinney 1992). Under the statutes, a foster parent who had cared for a child for at least 12 months was permitted to intervene in custody proceedings. *See id.* § 383(3). A foster parent who believes a social services official's removal of a child from the foster home was improper also has the right to appeal. *See id.* § 400(2).

316. *See OFFER*, 431 U.S. at 820.

317. *See id.* at 839.

318. *See id.* at 844.

family and a natural family.[319] First, a foster family relationship is rooted in state law and contract,[320] while the liberty interest in family privacy is ordinarily found in "intrinsic human rights."[321] Second, finding a liberty interest for foster parents not only weighs against the state's interest, but also against the natural parents' constitutionally protected interest.[322] The Court illustrated the difference in this way:

> It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset.[323]

Consequently, "[w]hatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."[324] The Court, however, did not resolve the liberty interest issue, as it rooted its holding in the constitutionally defective nature of the pre-removal procedures.[325]

Expansions on this limited holding have evolved in subsequent cases. A federal district court judge recently found that foster parents who have almost exclusively raised the child are entitled to certain

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319. *See id.* at 845.

320. *See id.* The Fifth, Sixth, and Seventh Circuits utilized this distinction in ruling that foster parents do not have a constitutionally protected liberty interest. *See, e.g.*, Kyees v. County Dep't of Pub. Welfare, 600 F.2d 693, 699 (7th Cir. 1979) (per curiam) (concluding that the liberty interest question left open by the Supreme Court in *OFFER* should be decided against establishing a liberty interest in the foster family relationship); Drummond v. Fulton County Dep't of Family and Children's Servs., 563 F.2d 1200, 1207 (5th Cir. 1977) (en banc) (finding that true liberty rights do not have their origin in state law as does the foster family relationship, but in "notions of intrinsic human rights"); Sherrard v. Owens, 484 F. Supp. 728, 741 (W.D. Mich. 1980) (rejecting the liberty interest of a foster parent because of the contractual nature of the relationship under which a liberty interest could not truly develop), *aff'd*, 644 F.2d 542, 543 (6th Cir.) (per curiam). State courts likewise have agreed that a strong emotional bond may develop in a foster care situation, but have declined to characterize it as a constitutionally protected liberty interest. *See, e.g., In re* Jaivuan Martin, Nos. 17432, 17461, 17464, 1999 Ohio App. LEXIS 3999, at *6-*7 (Ohio Ct. App. Aug. 27, 1999) (holding that a foster care relationship is not constitutionally protected). Similarly, Ohio limits the intervention power of grandparents in adoption proceedings to those cases where they themselves are seeking to adopt. *See id.* at *7-*8.

321. *OFFER*, 431 U.S. at 845.

322. *See id.* at 846.

323. *Id.*

324. *Id.* at 846-47.

325. *See id.* at 847. In his concurring opinion, Justice Stewart asserted that he would have held that these interests are not the type protected by the Due Process Clause. *See id.* at 858 (Stewart, J., concurring).

procedural protections in adoption proceedings.[326] The court engaged in a detailed factual analysis of the relationship between the foster parent and child in determining whether it should be afforded constitutional protection.[327] Again, the nature of the relationship between the parent-figure and child defined the contours of the constitutional protection.[328] The foster child also has been held to have some rights in these proceedings. For example, one federal district court recently held that a foster child had a right to a hearing prior to removal from the home of a foster parent who is a relative.[329] These cases, while not wholly granting foster parents and children a protected liberty interest, do advance the ideas expressed in *OFFER* aimed at protecting the bonds formed in these contractual family situations.

The significance of the foster family relationship is also apparent in certain state statutes. For example, Arizona, Rhode Island, and South Carolina allow foster parents to file petitions to terminate the rights of the birth parents.[330] Other states qualify this right based on the amount of time the child has lived with the foster parents.[331] In jurisdictions such as New York, foster parents can initiate termination proceedings only after the court orders an agency to bring termination proceedings and the agency fails to do so within ninety days.[332] Another option is to provide notice to a foster parent or relative with whom the child has been placed when the agency seeks permanent custody of the child or seeks to place the child for adoption. The burden is then placed on the foster parent seeking to adopt to express her interest to the agency, and the agency then informs her of how to proceed.[333] Under this type of procedure, once informed of this desire to adopt, the agency gives priority to the foster parent or relative when determining placement, unless such placement is not in the child's best interest.[334] Under the most expansive view, some states permit "interested persons" to initiate adoption proceedings.[335] Thus, while the Court in *OFFER* refused to fully recognize a liberty interest in the foster family relationship, subsequent case law and statutes

326. *See* Rodriguez v. McLoughlin, 49 F. Supp. 2d 186, 195 (S.D.N.Y. 1999).

327. *See id.* at 195-96.

328. *See supra* Part II.B.1 (discussing the relationship-based constitutional analysis of the rights of unwed fathers).

329. *See* Harley v. City of New York, 36 F. Supp. 2d 136, 140 (E.D.N.Y. 1999), *aff'd* No. 99-7314, 99-7628, 2000 U.S. App. LEXIS 4482, at *2 (2d Cir. Mar. 21, 2000).

330. *See* Carrieri, *Handbook*, *supra* note 64, at 73-74.

331. For example, in New Hampshire, a foster parent can file a petition to terminate parental rights when they have had custody of the child for 24 months, or if the agency fails to file the petition after the foster parent requests it. *See id.* at 75.

332. *See id.*

333. *See* Ohio Rev. Code Ann. § 5103.16.1 (West 1996).

334. *See id.*

335. These states include Alabama, Arizona, and Idaho. *See* Carrieri, *Handbook*, *supra* note 64, at 74.

manifest recognition of the importance of the relationship and protect it accordingly.

The Court's treatment of the family in its due process decisions emphasizes biological and legal connection and rewards active parenting. But biology alone is insufficient to confer legal rights on a parent as revealed by the Court's holdings in the unwed father cases.[336] Strong relationships, if rooted outside the traditional family, are also not a guarantee of parental rights. The balance struck between biology and active parenting militates in favor of subjecting legal fathers to an active parenting test. Part III argues for the application of such a standard in the foster care context and assesses its benefits and potential drawbacks.

III. PROMOTING ACTIVE PARENTING REDUCES THE HARMS TO CHILDREN FROM ABUSE AND EXTENDED PLACEMENT IN FOSTER CARE

This part argues that courts should grant inactive legal fathers a limited protected liberty interest in their relationships with their children. This interest must be evaluated within the context of the father's efforts to develop his relationship with his child in the same manner in which an unwed father's efforts are evaluated. A legal father's interest is further checked by the state's important interest in protecting children from harm and encouraging rapid permanent placement when children have been removed from their mothers. Consequently, this limited interest deserves minimal procedural protection.

The procedures currently in place in states such as New York mandate that the child welfare agency seek out family members as resources for the child upon removal from the home. This search includes locating the non-custodial father. Those fathers who have maintained contact and a relationship with the child, however, will naturally make such a search easier and faster. A father with a strong presence in a child's life, whether generated through financial, emotional, or social bonds, will more likely be detected by the search than one who has been absent from his child's life. It is reasonable for the child welfare agency to expect to locate active parents at the beginning of their search, and upon finding them, to either approve or eliminate them preliminarily as a viable placement option. The child welfare agency should not be required to take extraordinary measures above and beyond a thorough initial search in locating inactive parents, and therefore, should not be required to conduct time-consuming searches at later stages that delay a child's permanent placement. A diligent search at the outset of the child's removal affords an absentee legal father with sufficient notice and opportunity

336. *See supra* Part II.B.1.

to come before the court and participate in permanency planning. From there, the agency can proceed to petition for the termination of parental rights utilizing additional notice procedures, such as publication, to insure that the father's rights are protected at the termination stage. The measures already taken will ease and quicken this process and benefit both the state and father. The state benefits from speed and efficiency, and the father will have been notified at the earliest possible time so that he can seek custody or prepare to oppose the termination.

As recent federal legislation highlights,[337] state child protection proceedings must focus on the health and safety of the child. Therefore, automatic favoritism of biological reunification cannot automatically meet such a standard. While such a presumption can be rebutted, its existence encourages courts to place the child with the biological parent out of convenience. Therefore, the only proper presumption is one that looks to the health and safety of the child, independent of other factors. The rights of the legal father must be evaluated under this presumption.

A. *Liberty Interest*

Theoretically, at least, the Supreme Court does not make policy decisions, and it must react only to actual "cases and controversies" that parties bring before it.[338] The Court's holdings in the family area may be viewed as quite narrow under this doctrine.[339] Each case is fact specific, with no two situations bearing the exact same set of circumstances. What has then developed is a "patchwork of decisions" that has not comprehensively addressed many issues in the area of family rights.[340] As a result, those holdings mark the "outer limits" of how states can legislate, and serve as guideposts to state legislatures.[341]

The Court's cases addressing the rights of unwed biological fathers[342] lead to the "conclusion that biological parenthood plus an established parental relationship creates a protectable liberty interest in parental rights."[343] The Court has alluded to a distinction between the interests of an unwed father[344] and those of a separated or

337. *See* Adoption and Safe Families Act of 1997, 42 U.S.C. § 1305 (Supp. 1997); *supra* Part I.C.1.

338. *See* Kaas, *supra* note 54, at 1071 n.113.

339. *See* Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 Ga. L. Rev. 975, 985 (1988).

340. *Id.*

341. Kaas, *supra* note 54, at 1071 n.113.

342. *See supra* Part III.A.

343. Hillary R. Stein, Note, *Massachusetts' "Lizzie's Law": Protection for Children or Violation of Parents' Constitutional Rights?*, 78 B.U. L. Rev. 1547, 1558-59 (1998).

344. A putative father is the child's biological father who was not married to the child's natural mother at the time of the child's birth. *See* Black's Law Dictionary 623

divorced father, but has not specified the rights of the latter.[345] In *Quilloin v. Walcott*, the Court stated that the unwed father's rights were "readily distinguishable from those of a separated or divorced father."[346] The legal status of marriage, whether it be current or not, presumably gives the father an elevated status. The state could therefore potentially provide the unwed father with less veto power over a proposed adoption than it would a married, separated, or divorced father.[347] In *Quilloin*, the Court stated its belief that "legal custody of children is . . . a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage."[348] The Court apparently presumed that the marital relationship entails active parenting. The Court, however, left unanswered the question of what protection a father deserves who enjoys legal, marital status as a parent and who has not undertaken an active parenting relationship with his child.

The Court's analysis of the rights of unwed fathers does not explain why marriage to the child's mother makes the father's parental rights stronger.[349] The Court focused on the substance of the relationship between the unwed father and child, operating under an assumption that if the relationship were legally recognized, such an analysis would be unnecessary. It would seem rational to conclude, however, that the state should ignore the legal connection of a married father who leaves a family before an interpersonal relationship with the child develops, or who allows such a relationship to lapse, when considering placement options in order to further the best interest of the child.[350] The legal connection would not outweigh the state's interest in protecting the child and the child's need for permanency and stability. The Court's blanket statement that the rights of legal fathers supersede those of unwed fathers does not provide structure or guidance for an independent analysis of the weight of the legal relationship alone when considered as a placement option. In light of its quality-of-relationship analysis for unwed fathers, subjecting legal fathers to a relationship-based analysis is reasonable. The Court rewards active parenting in the absence of a legal connection. It should similarly reward active parenting for those with a legal connection, and punish those with a legal connection who do not act upon it, as legal fathers have been treated preferentially under the law already. Legal status has granted married or divorced fathers certain

(7th ed. 1999).

345. *See* Quilloin v. Walcott, 434 U.S. 246, 256 (1978).

346. *Id.*

347. *See id.*

348. *Id.*

349. *See* McCarthy, *supra* note 339, at 999.

350. *See id.*

rights, including the right to protest an adoption. This higher standing in comparison to unwed fathers commands subjecting legal fathers to an equal, if not a more critical, analysis.

B. *Adequate Procedure*

Guidance for determining adequate procedure in child protection and placement proceedings can be found throughout the Supreme Court's opinions. The Court has long retreated from a formalistic, rigid interpretation of due process procedural protections,[351] repeating that due process "'is not a technical conception with a fixed content unrelated to time, place and circumstances.'"[352] Analyzing due process in family law proceedings is complicated by combining this need for flexibility with the inherent subjective nature of family law decisions. Custody and placement proceedings utilize imprecise substantive standards that require determinations based on the subjective values of the judge.[353] While seemingly applying "best interests" or "health and safety" standards, there is no guarantee that "a court's final conclusion . . . is anything other than a reflection of the judge's personal values."[354]

Determining fair procedure poses a difficult challenge to the states in drafting child protection legislation and to the courts in interpreting such statutes. Due process requires fundamental fairness in the procedures used, which involves considering relevant precedents and assessing the interests at stake.[355] For married fathers whose children have been removed from their mothers by the state, providing strong search and notice provisions at the outset of the child's removal from an abusive situation is the most satisfactory solution. Once the state has searched for and failed to find the father, or the father has failed to voluntarily come forward, continuous notice or search attempts thereafter are not warranted. Waiting until the situation worsens, the child has settled into an outside placement, or the father's rights are in danger of being terminated, brings the necessary notice too late. When an absentee parent is not likely to be a suitable placement

351. *See* Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

352. Lassiter v. Department of Soc. Servs., 452 U.S. 18, 24 (1981) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

353. *See* Santosky v. Kramer, 455 U.S. 745, 762 (1982) ("In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent."); *see also* Smith v. OFFER, 431 U.S. 816, 835 n.36 (1977) (noting the criticism that many foster care reviews are only perfunctory because of the heavy caseloads judges carry, and that in applying vague standards such as the best-interests-of-the-child standard, many judges find it difficult not to rest decisions on subjective values).

354. Martin Guggenheim, *The Best Interests of the Child: Much Ado About Nothing?*, *in* Child, Parent, and State: Law and Policy Reader 27, 27 (S. Randall Humm et al. eds., 1994).

355. *See Lassiter*, 452 U.S. at 24-25.

option, which is often evident by his failure to maintain a relationship with his child, delaying effective notice until the final stage of the proceedings is simply too late for both father and child. The child will have suffered the effects of delay and neglect, and the father will be prejudiced at a later TPR proceeding for his failure to come forward earlier. Therefore, aggressive searching and efforts to notify the father within the early days of the child's removal are all that should be required.

The need for comprehensive early investigation is apparent. Poor information collection at intake can lead to surprises that slow down the child's case disposition.[356] Consequently, children languish while social workers attempt to find fathers or identify other relatives who could have been identified and notified earlier.[357] A child may have been placed with, and become bonded to, a foster parent when relatives were available as a resource.[358] This proves true in TPR cases when aggressive casework "often uncovers situations in which families can be reunified."[359]

The procedures conducted prior to termination of parental rights, however, rather than at the actual termination of those rights, are "the true death knell for the parents."[360] At the stages prior to the termination proceeding, if the parents do not come forward and take action, that inaction will ultimately be used against them. While termination is the most drastic measure, the steps leading to it have equally dramatic consequences. Therefore, "prior to the final act that will allow the irrevocable severing of a parental relationship, a sign for the judge to slow down and proceed with caution is needed."[361] To provide for easy solutions early on and more expeditious handling later, the level of casework typically done at the TPR stage should instead be performed at the beginning of the child's entry into the system. Allowing the process to proceed without an aggressive search, and conducting such a search only at the end of a child's involvement in the state's custody, hurts the child and does not adequately protect the father's rights.

In Children Can't Wait: Reducing Delays in Out-of-Home Care,[362] Katharine Cahn and Paul Johnson reported the results of four federally funded studies aimed at improving the child protection system by reducing the delays for children ready for adoption.[363] All

356. *See* Cahn & Johnson, *supra* note 44, at 8-9.
357. *See id.* at 9.
358. *See id.*
359. *Id.*
360. Linda Lee Reimer Stevenson, *Fair Play or a Stacked Deck?: In Search of a Proper Standard of Proof in Juvenile Dependency Hearings*, 26 Pepp. L. Rev. 613, 627 (1999).
361. *Id.* at 630.
362. *See* Cahn & Johnson, *supra* note 44.
363. *See id.* at 2.

four of the projects "emphasized better information-gathering by the agency *during the initial investigation*, especially in finding out about fathers, extended families and other natural support systems."[364] These studies concluded that the time to search for the absent father was not at the TPR stage, but during the initial stage between removal and permanency planning. In this way, the child's time in temporary foster care could be reduced as all resources are known early in the process, and the information needed for termination is available and ready to be used. According to the studies' findings, the failure to locate a father at that stage should signal the end of the inquiry and allow placement planning to move forward without unnecessary delay. This approach accords with that proposed in this Note.

While it can be argued that in cities where parental surrender, neglect, and abuse are rampant, it may seem expedient to dismiss entirely the claims of absent parents in their children, this argument brushes too broadly. Such a practice would deny absentee fathers any due process whatsoever.[365] While wholesale dismissal of inactive parents' rights would highlight the pressing nature of the problem by teaching these parents a "lesson," a blanket characterization of all legal fathers as unworthy and uninterested, without providing some notice and inquiry, reaches too far.[366] This Note does not argue for the drastic measure of providing no notice whatsoever, but for a modified requirement that reduces the time spent searching for fathers after the initial search has been conducted where such fathers have had ample opportunity to assert their parental rights.

The Supreme Court has cautioned that while the "establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication," the "Constitution recognizes higher values than speed and efficiency."[367] While "[p]rocedure by presumption is always cheaper and easier," when "the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child."[368] Addressing the rights of unwed fathers to be heard on the state's placement of their children, the Court noted that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal:

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364. *Id.* at 11 (emphasis added).

365. *See* O'Brien, *supra* note 94, at 1251-52.

366. *See* Editorial, *Children First: Bill Would Ease State's Adoption Process*, Worcester Telegram & Gazette, Mar. 1, 1999, at A6 ("For far too long our laws have provided an excessive tilt in favor of biological parents who fail at everything but a blood test.").

367. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

368. *Id.* at 656-57.

> If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings.... Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined.[369]

Under this analysis, the Court reaches out only to those willing to care for the child and take an active parenting role. Thus, the Court is not seeking to protect the absent, inactive father. Indeed, as unwed fathers can protect their notice right by registering with the state, the effect of that registration is the *opportunity to speak* on the child's best interest and nothing further.[370] Similarly, notice and opportunity to the legal father at the earliest opportunity would serve the same purpose and effect the same rights.

In addressing the evaluation of the quality of the parental relationship in determining rights, the Court has stated that:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents... Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.[371]

Under this mandate, a state may not "arbitrarily interfere with the parental [relationship] merely because the parent's child-raising techniques do not fulfill the state's expectations of ideal parenting."[372] Nonetheless, "[w]hile some deference to parental rights is warranted, too much deference translates into suffering on the part of children."[373] This suffering can come in the form of repeated abuse by the custodial parent upon regaining custody of the child, as well as the emotional and physical problems that develop from lingering for an extended period in foster care. Balancing this harm to children with an absentee parent's rights calls for increased investigative work and notice at the early stages of the process aimed at locating and involving a legal father in the child's placement. It does not, however, require detailed searching and consequent delay at each and every stage of the child's case, where the parent has failed to safeguard his privacy interest in determining his child's living arrangement and

369. *Id.* at 657 n.9.
370. *See* Aizpuru, *supra* note 24, at 722.
371. Santosky v. Kramer, 455 U.S. 745, 753-54 (1982).
372. O'Brien, *supra* note 94, at 1220.
373. *Id.* at 126-27.

future. New York already acknowledges that timely procedure for the termination of parental rights in appropriate cases can help reduce unnecessary stays in foster care.[374]

Ultimately, the family court judge will make the final decision on the care, custody, and relationships in an abused or neglected child's life.[375] Most judges, who have little or no training in child development or family pathology,[376] are unaware of the impact that delayed decision-making can have on a child's psychological development.[377] To counter this adjudicatory delay, judges must decrease the number of adjournments, particularly those that are merely delay tactics and do not reflect real concern for the child's welfare.[378] This includes delays caused by attempts at finding and notifying those fathers who have not grasped their opportunity interest. Having been married to the mother at the time of the child's birth, such a father has been on notice of his parental role since that time and has lapsed in that role. Ignorance of the state's subsequent actions in removing and placing his child outside the home is ultimately a result of the father's choices. Waiting until an adverse action is taken to claim that one has always cared for the interests of a child is specious. Delaying the child's stability and development to protect the rights of an inactive father is therefore unwarranted.

C. *Application of the Mathews Factors*

The Supreme Court laid out the following factors in *Mathews v. Eldridge*[379] for courts to balance when determining the procedures required to protect a constitutional interest:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[380]

In state placement proceedings where the father is a possible placement option, the private interest at stake is that of a father in raising his child. The Court has favored such an interest, at the expense of a governmental interest, where the father has participated

374. *See* N.Y. Soc. Serv. Law § 384-b(1)(b) (McKinney 1992).
375. *See* Steinhauer, *supra* note 57, at 206.
376. *See id.*
377. *See id.* at 209.
378. *See id.* The same rationale applies to reliance on the appeal process to correct errors. Speedy decisions improperly made leave the child in limbo as the appeal process drags on. *See id.* at 211.
379. 424 U.S. 319 (1976).
380. *Id.* at 335.

in raising the child.[381] While the *Stanley* Court claimed that it struck down the Illinois statute, which denied unwed fathers any opportunity to be heard on their child's placement after the mother's death, because of its unconstitutional presumption language,[382] it did so facing sympathetic facts.[383] The father in *Stanley* had lived with his children and their mother for eighteen years and helped raise the children. It is likely, based on subsequent cases,[384] that were the challenging father in *Stanley* long absent or irresponsible, the Court would have upheld the statute. Therefore, the legal father's parental interest should be mitigated by his failure to actively participate in his child's life.

The second *Mathews* factor is the risk of error associated with the available procedures.[385] The limited notice argued for here, to search for and to give notice to a father early in the process, would capably avoid error. A truly devoted father rarely will be denied the opportunity to develop a relationship with his child, as he will presumably have already made efforts to be part of his child's life. Such fathers would not be denied an opportunity to be heard. Nonetheless, court proceedings and permanency planning could go forward more promptly and efficiently without the delay inherent in seeking out undedicated potential claimants.

The final *Mathews* factor is the state's interest, including the fiscal and administrative burdens that would be caused by the additional or substitute procedure.[386] The Court has established the standard that "the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."[387] Therefore, "[t]he ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."[388] In cases of absent legal fathers, the costs to the parties of additional notice

381. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 646-47 (1972) (finding that though unmarried, the father had lived with the children and their mother until her death and acted as the children's father for eighteen years, and was therefore entitled to be heard on their placement).

382. *See id.* at 658 (striking down a presumption of unfitness rooted in administrative convenience as violating the Due Process clause); *supra* notes 266-70 and accompanying text.

383. *See* Aizpuru, *supra* note 24, at 709 ("*Stanley* was perhaps easily decided because a traditional family unit had existed for eighteen years and because Stanley had custody of the children and had nurtured them throughout.... [T]he Court did not indicate whether unwed fathers' rights exist in every case, or whether they stem from the existence of a traditional family unit, a long-term custodial relationship with the children, or both.").

384. *See supra* Part II.B.1.

385. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

386. *See id.*

387. *Id.* at 348.

388. *Id.*

beyond the initial search and hearing opportunities to come forward as placement options, including financial, administrative, and emotional burdens on the system and the children involved, do not weigh evenly with the slim possibilities for success in placing the child with the inactive, absent father.

Increasing the investigative work performed in the fact-finding and case assessment stage that aims at finding all resources for the child may ease the problem of delay without necessarily adding layers to the procedure. Initial case assessment should involve making diligent efforts to find all available resources. Discovering the extent of the father-child relationship should be part of that effort. In doing so, the agency and court avoid wasting valuable time that the child may spend in foster care and give the non-custodial father notice at the earlier opportunity, without waiting until the termination of parental rights proceedings.

D. *Impact of the Adoption and Safe Families Act of 1997*

The courts have long recognized a need for strengthening and promoting biological families. The AFSA,[389] however, may weaken, if not eliminate, that presumption with its emphasis on the child's health and safety.[390] As such, the goals of ASFA seemingly decrease the need for providing extensive notice and opportunity to be heard to non-custodial parents in foster care proceedings.

Each state was required to amend its laws to comply with ASFA's funding mandates.[391] In its main compliance legislation, New York included protections to prevent the placement of a child with a foster care or adoptive parent who has been convicted of a crime, to allow states to refuse to unify a child with parents who have criminal records, and advanced the opportunity to terminate parental rights for a child who has been in foster care for fifteen of the twenty-two most recent months.[392] An additional, more recent piece of proposed legislation[393] calls for increased efforts to locate non-custodial parents when a child is removed from his home.

While this new bill seemingly reinforces the rights of non-custodial parents, it does not insure their protection. While non-custodial parents are sought and considered as a resource upon the child's removal, they are not guaranteed to be awarded custody. There is thus no preference under the proposed statute for parental *placement*,

389. *See supra* notes 176-99.

390. ASFA "virtually repeals the requirement that states make 'reasonable efforts' to keep families together before taking away children and putting them in foster care." Wexler, *supra* note 146.

391. *See supra* note 197 and accompanying text.

392. *See* An Act to Amend the Social Services Law, the Family Court Act, and the Domestic Relations Law, ch. 7, 1999 Sess. Laws of N.Y. (Consol. 1999).

393. *See supra* Part I.C.2.

merely a preference that parents are *found*.[394] Therefore, the legislation does not advance the view that non-custodial parents are strong placement options or provide them with any elevated standing. In effect, it seeks to do what this Note proposes—search aggressively for parents at the beginning of the child's entry into the system to determine their viability as a placement source, and if they prove not to be a viable option, enable their information to be available for the parental rights termination if that becomes necessary. If passed, the bill likely will not lead to more placements with non-custodial parents, as the legislation does not adequately clarify the efforts required of child welfare agencies and thus does not enhance the rights of non-respondent parents in these proceedings. The emphasis of the legislation seems more on record-keeping[395] with an eye toward TPR proceedings,[396] without truly increasing the notice and opportunity to be heard at earlier stages of the process. Thus, the bill does not advocate for a continual search for the absentee father that would delay the proceedings. The legislation's objectives seem to advance family reunification and preservation, but its language does not command such an outcome. The addition requiring a specific search for the non-respondent parent semantically gives those parents a new level of protection; nonetheless, their suitability as parents must still be evaluated. Consequently, even in this most recent New York proposal that aims to comply with ASFA, any presumption toward legal fathers is conspicuously absent. This position supports the argument of this Note that legal status is not preferred status.

CONCLUSION

Parenting should be a forward-looking undertaking in which a parent always acts in accordance with the child's best interest, not in reaction to threatened legal action regarding the removal of his child by the state or the termination of his parental rights. Unless extreme preventive circumstances that prohibit a relationship between the father and child can be proven, such as efforts made by the father that were rebuffed by the mother, or the mother moving the children to a location in which the father could not find them, the father should not be given an additional opportunity to assert his parental rights after the initial search by the state has been completed and sufficient notice

394. *See.* S. 5117-A Bill Memo, *supra* note 203 ("Efforts should be made promptly to locate the child's noncustodial parent, if any, not simply as a potential custodial resource, but also to ascertain any addresses that will be necessary for provision of notice of termination of parental rights proceedings in the event that preservation of the family unit proves not to be feasible."); *supra* Part I.C.2.

395. The results of the search are to be maintained in the Uniform Case Record. *See* S. 5117-A, 222d Legis Reg. Sess. (N.Y. 1999), amending N.Y. Soc. Serv. Law § 384-a(1). Such information would be used for notification at the TPR stage.

396. *See* S. 5117-A Bill Memo, *supra* note 203.

has been provided at the earliest opportunity for him to argue his parental fitness. This stance will compel fathers to continually attempt to make contact with their children, or if prohibited by an inability to locate them or other barriers, to document such legitimate difficulties. Simply arguing that he would not have left the child had he known the abuse by the mother would occur is an inadequate post hoc justification.

Defining a family requires making value choices.[397] The values we choose to emphasize in family relationships have an impact on how courts will determine the most suitable custody and care arrangement for a child. No matter how the family is defined, it cannot successfully operate without commitment and dedication from its members.[398] Thus, the legal framework for determining custody and care should reward committed, responsible relationships.[399] By predicating the awarding of rights on the involvement of a parent, the law would encourage and support fathers who act responsibly toward their children.[400] Parental rights would then flow from the fulfillment of parental duties, as opposed to an abstract claim of right based on a mere legal or biological relationship.[401] A law that bases parental rights on status alone does not adequately compel responsible behavior.[402] Consequently, the recommendations for analysis and procedure here could apply to all parents, whether married, divorced, or unwed.

The extreme stance of an automatic condemnation of the absentee legal father without an inquiry into the quality of the relationship is too harsh. At the other extreme, providing notice and opportunity to be heard at every stage of the child placement proceedings without accounting for the father's inaction or the impact on the child reaches too far. Strong early notification procedures performed upon the child's entry into the state system, the response to which can be used to determine the required later notice, if any, strikes a proper balance. Such a position comports with the Court's continued protection of an associational interest, not a status interest. Additional notice procedures for absentee parents will only delay what is essentially a predetermined outcome.

While any rule or procedure is bound to result in occasional error, the procedures put forth here will facilitate fair disposition of cases in which the absentee legal father is searched for and notified. There may always be the worst case scenarios in which a potentially good father will be overlooked by the necessity for speed and efficiency.

397. *See* Harris, *supra* note 25, at 474.
398. *See id.*
399. *See id.*
400. *See id.* at 480.
401. *See id.*
402. *See id.* at 485.

Nonetheless, the terrible scenario of children subjected to abuse and neglect while in the care of their parents and then languishing in state facilities, at risk of re-abuse by their foster parents, is too real to be ignored. To sacrifice the rights and safety of these children in order to protect the exceptional father is not warranted or necessary. This argument is not based solely on convenience,[403] but on the policy justifications of ensuring children's safety and psychological development and rewarding active parenting.

The potential practical problems of implementation of these measures in conducting more exhaustive searches when the child first enters into state protective services do not outweigh the effectuation of the important interests at stake. Putting a father on notice at the first sign of abuse and the child's removal places the burden of response on him. A father who fails to seek custody or to take other measures toward caring for his child once he learns that the child is in a dangerous situation would then have less of a basis at the termination stage on which to argue his fitness. Early notification and the response received to it aid the judiciary in forming a more complete family picture upon which to make a determination. It also protects parents who truly care about the child—not those who claim to care only when their legal rights are jeopardized. Where an absentee father is unable to be located, assuming there are no extenuating circumstances, he can properly be viewed as having forfeited his right to later participation for failure to actively engage in his child's life. While placing a child in the state system is not the most desirable end, delaying that process to give notice and a hearing to a father whose interest is constitutionally limited is not procedurally required. Extraordinary efforts are not necessary to locate these fathers and give them an opportunity to participate in permanency planning.

The permanency command of ASFA and the speed with which permanence is to be accomplished call for moving the level of diligence normally delivered at the termination stage to the forefront. Such efforts at the early stages should prevent later surprises and errors, making the process smoother and quicker for the most important party involved—the child.

403. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 658 (1972) (striking down a presumption of unfitness rooted in administrative convenience as violating the due process clause).