

## VERMONT'S CHILDREN IN NEED OF CARE OR SUPERVISION: JUDICIAL DISCRETION OR DEFINITION?

*In the absence of scientific certainty it must be borne in mind that the farther back from the point of imminent danger the law draws the safety line of police regulation, so much the greater is the possibility that legislative interference is unwarranted.<sup>1</sup>*

*Juvenile Court history has . . . demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure . . . . The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures.<sup>2</sup>*

### INTRODUCTION

In child neglect cases governed by Vermont's Juvenile Procedure Act,<sup>3</sup> the needs of the child, the power of the state, and the rights of the parent must find their uncertain balance in the arena of the juvenile court. To provide for the well-being of the child is of first importance, and it is for this purpose that the forum is convened. The proceedings are both protective and informal. The court's requisite standard of care is largely undefined; yet the court has vast power to protect or to intrude.

When the state intervenes into the affairs of a family to determine whether a child is the victim of neglect, it can only do so by questioning the activities of an enclave which constitutes a core of individual privacy.<sup>4</sup> This intrusion is a singularly forceful exercise of state power, and the interests involved are complex. An equitable process for resolving questions of child neglect and custody is difficult to achieve because the interests involved are seldom neatly divisible into discrete categories. Rather, the issues in this area of law are compound. The question is not solely the right of parent and child to continue as a family; the question is also what result will genuinely, though perhaps not immediately, provide for the

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1. E. FREUND, STANDARDS OF AMERICAN LEGISLATION 83 (2d ed. 1965).

2. *In re Gault*, 387 U.S. 1, 18 (1967).

3. VT. STAT. ANN. tit. 33, §§ 631-67 (1981 & Supp. 1982).

4. The family is recognized as a center of privacy both intuitively and judicially. See *infra* note 22.

child's best interests. It is a question which requires the decision-maker to look carefully into and then beyond the present circumstances.

This note will examine the substantive due process<sup>6</sup> considerations which are present in Vermont's system for resolving questions of child neglect and custody. It will define and compare the competing interests which must be balanced. The principal focus, however, will be the role of judicial discretion in child neglect hearings and the impact which such discretion has on the substantive interests involved. The ultimate question which this note seeks to address is whether the broad discretionary powers presently granted to the juvenile court are consistent with both the actual "best interest of the child"<sup>8</sup> and the constitutional rights of the parties who become subject to its jurisdiction.<sup>7</sup>

Juvenile courts following the statutory scheme face three major discretionary stages in the decision-making process. First, the court must determine whether it has jurisdiction over a particular child. At this threshold, the judge must determine as a matter of fact whether a child is, by statutory definition, "a child in need of care or supervision."<sup>8</sup> Thus, the court must combine its own fact-finding with a broad statutory label. The second major discretionary function of the juvenile court is to determine what course of action is consistent with the "best interests of the child."<sup>9</sup> This stage contains two major considerations. The court must decide whether the family situation can be improved sufficiently by ordering counselling, rehabilitation or supplementary care to allow the child to remain with its parent.<sup>10</sup> Alternatively, the court must estimate what risks are posed for the child by a change of custody and whether those risks outweigh the possibility that the present circumstances, no matter how bleak, can be improved.<sup>11</sup> A final discretionary element is the judge's role as author of procedure.<sup>12</sup> To the extent that this element is present throughout the entire neglect-custody process, it determines whether the rights of parties are treated consistently from hearing to hearing.

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5. See generally *infra* notes 46-47.

6. VT. STAT. ANN. tit. 33, § 667 (1981 & Supp. 1982).

7. See *infra* notes 46-47 and accompanying text.

8. VT. STAT. ANN. tit. 33, § 632(12)(1981).

9. See *id.* § 667.

10. See *id.* § 655.

11. See *id.* § 656.

12. See *infra* note 68.

## I. A CONSTITUTIONAL OVERVIEW

### A. *The Division of Authority*

The ability of state government to regulate in the area of domestic affairs is implicit in the language of the tenth amendment.<sup>13</sup> This power is neither reserved to the United States nor specifically apportioned by the Bill of Rights. The individual privacy and liberty interests of each family member, however, are specifically protected by both the Constitution and the Bill of Rights. Thus, while the state may regulate in the area of family affairs, it must do so in a manner which recognizes and affords due deference to the individual rights affected.

The open-ended provisions of the Constitution instruct the judiciary to protect individual rights, not state prerogatives . . . [T]hat those powers reserved to the states by the tenth amendment are subject to the entire Bill of Rights, including the unenumerated rights of the ninth amendment, and the fourteenth amendment is an explicit restraint on state power.<sup>14</sup>

That the state has the power to act is clear; the manner in which it may act, however, will be determined by the strength of and basis for the particular liberties it seeks to limit.

### B. *The Parens Patriae Power*

When the state intervenes into the family relationship to inquire whether a child is neglected, it does so under the equitable doctrine of *parens patriae*—as parent surrogate to the child. The power of *parens patriae* is more limited than the police power to the extent that its focus is on individual rather than general welfare.<sup>15</sup> The principal distinguishing element of the *parens patriae* doctrine is that the state acts in a benevolent fashion to protect those who lack the capacity to defend their own best interest.<sup>16</sup> The doctrine comprises three essential elements which provide

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13. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *U.S. Const.* amend. X.

14. *Developments in the Law—The Constitution and the Family*, 93 *HARV. L. REV.* 1156, 1182 (1980) [hereinafter cited as *Developments*].

15. See, e.g., *Addington v. Texas*, 441 U.S. 418, 426 (1979).

16. "The state has a legitimate interest under its *parens patriae* powers in providing care to [sic] its citizens who are unable because of emotional disorders to care for themselves . . . ." *Id.* at 426.

both its purpose and its limitations. The first element is a presumption that children lack the mental competence and maturity of adults.<sup>17</sup> The second element is the consideration that "the child is not the mere creature of the State."<sup>18</sup> Thus, before the state may act on behalf of a child it must demonstrate that there is a substantial flaw in the parental relationship in terms of unfitness, unwillingness, or disability.<sup>19</sup> Third, once the state has satisfied the first two elements, it must exercise its powers of *parens patriae* "solely to further the best interest of the child."<sup>20</sup>

### C. A Constitutional Basis for Family Integrity and Privacy

The Supreme Court has been slow to find that a specific right of family integrity exists.<sup>21</sup> It has, however, ruled with respect to many individual liberties which are attendant upon the marriage relationship and procreation.<sup>22</sup> In so doing, the Court has for more than fifty years constructed the basis for a significant constitutionally protectible interest—a "private realm of family life which the state cannot enter."<sup>23</sup> This body of case law is significant not only because it has served to define specific rights, but also because these rights have been found to fall within the ambit of the due process clause. "[T]he Court has come to recognize that in many of [these cases] the ultimate basis of protection is the doctrine of substantive due process. This in itself is a constitutional development of major importance."<sup>24</sup> In the context of child neglect determinations this constitutional development derives its importance from the weight which the doctrine of substantive due process commands when balanced against the powers of the state.

The seeds of a constitutional right to family privacy and integ-

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17. See *id.*; but cf. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (children who are mature and competent do possess fundamental decisional rights).

18. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

19. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

20. *Developments, supra* note 14, at 1202; see also VT. STAT. ANN. tit. 33, § 667 (1981 & Supp. 1982).

21. See *Santosky v. Kramer*, 455 U.S. 745, 759-60 (1982).

22. See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 55 (1976); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

23. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

24. *Developments, supra* note 14, at 1161-62.

erty were first planted in an era when the doctrine of substantive due process—the notion that “governmental deprivations of life, liberty, or property are subject to limitations regardless of the adequacy of the procedures employed”<sup>25</sup>—was most often evoked in the field of economic regulation.<sup>26</sup> During this period the Court decided *Meyer v. Nebraska*<sup>27</sup> and *Pierce v. Society of Sisters*.<sup>28</sup> In *Meyer* the Court stated that the liberty guarantee of the fourteenth amendment “[w]ithout doubt . . . denoted . . . the right of the individual . . . to marry, establish a home and bring up children.”<sup>29</sup> In *Pierce*, this right was further expanded to include the liberty of parents to direct the rearing and education of their children.<sup>30</sup>

The next significant development was the Supreme Court’s holding in *Skinner v. Oklahoma*,<sup>31</sup> which dealt with a state statute requiring sterilization of criminals. *Skinner* assumed major importance for two reasons: first, Justice Douglas stated that the regulation under review “involve[d] one of the most basic civil rights of man”<sup>32</sup> and that such regulation, therefore, must be observed with “strict scrutiny”;<sup>33</sup> second, *Skinner* marked the continued validity of substantive due process for analysis of individual liberties despite the fact that the doctrine had long been discarded in cases of economic regulation.<sup>34</sup>

After *Skinner*, the Court continued to use the due process analysis for individual liberties in *Prince v. Massachusetts*,<sup>35</sup> decided in 1944. In *Prince*, the Court upheld a Massachusetts statute which forbade child labor, but in so doing it laid the cornerstone for future decisions by stating:

It 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

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25. *Id.* at 1166; see also L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 7-3 (1978).

26. The era of substantive due process began with *Lochner v. New York*, 198 U.S. 45 (1905), and ended with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

27. 262 U.S. 390 (1923).

28. 268 U.S. 510 (1925).

29. 262 U.S. at 399.

30. 268 U.S. at 535.

31. 316 U.S. 535 (1942).

32. *Id.* at 541.

33. *Id.*

34. See *supra* note 26.

35. 321 U.S. 158 (1944).

neither supply nor hinder . . . And it is in recognition of this that these decisions [*Meyer* and *Pierce*] have respected the private realm of family life which the state cannot enter.<sup>36</sup>

Important to the continuing evolution of due process analysis is the recent line of Supreme Court decisions which establishes the doctrine of privacy within the ambit of the due process clause.<sup>37</sup> The Court in *Roe v. Wade*<sup>38</sup> stated that when state regulation infringes upon a "fundamental right" such regulation "may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake."<sup>39</sup> In the 1978 case of *Zablocki v. Redhail*,<sup>40</sup> the Court found the right to marry to be a protected "fundamental interest."<sup>41</sup> Although the majority of the Court chose to base its analysis upon the equal protection theory, Justice Stewart found the right to marry, as a "new" right, to be properly protected by the doctrine of substantive due process.<sup>42</sup> A recent commentator has stated:

Precedent suggests that the compelling interest test accurately reflects the level of justification which the state must supply when its infringement of the right is at its apex. That family rights, when their infringement is at its apex, be outweighed only by compelling state interests is consistent with the level of protection afforded other substantive constitutional values protected under the due process clause of the fourteenth amendment, such as freedom of speech or religion.<sup>43</sup>

Regardless of how the decisional basis of *Redhail* is labelled, the case recognizes a perspective which is relevant in the area of child neglect and custody. The Court stated: "[W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital rela-

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36. *Id.* at 166.

37. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

38. 410 U.S. 113 (1973).

39. *Id.* at 155 (citations omitted).

40. 434 U.S. 374 (1978).

41. *Id.* at 382.

42. *Id.* at 395-96 (Stewart, J., concurring).

43. *Developments, supra* note 14, at 1196.

tionship may legitimately be imposed."<sup>44</sup> The word "significant" remains an undefined term.<sup>45</sup>

In state-initiated child custody litigation, two privacy rights come into play: First, each individual, including the child, has a privacy interest in maintaining his or her relations within the family without the intrusion of the state;<sup>46</sup> second, the parent has a somewhat less developed right to continued authority over and companionship with the child.<sup>47</sup> Although there is a recognized "private realm of family life which the state cannot enter,"<sup>48</sup> the state also "is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."<sup>49</sup> These two statements by the United States Supreme Court illustrate the inner tension of the child neglect-custody process. The privacy rights of each family member are significant; they are not, however, immune from limitation when the state has a compelling interest to act on behalf of a child. The obligation of the state is to preserve and uphold these two conflicting interests in as vigorous yet consistent a manner as possible.

The substantive difficulty of striking a balance between family and state entails a task which surely even Solomon would not have envied. The neglect determination process comprises a spectrum of

44. 434 U.S. at 386.

45. *Id.* at 387 n.12 (The court looked to the "directness and substantiality of the interference with the freedom to marry.")

In his concurring opinion, Justice Stewart stated:

The problem in this case is not one of discriminatory classification, but of unwarranted encroachment upon a constitutionally protected Freedom. I think that the Wisconsin statute is unconstitutional because it exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment.

*Id.* at 391-92.

46. See, e.g., *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842 (1977); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499, 503-04 (1977) (plurality opinion); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("integrity of the family unit" protected by fourteenth and ninth amendments); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (there exists a "private realm of family life which the state cannot enter").

47. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("fundamental interest of parents . . . to guide the religious future and education of their children"); *Ginsburg v. New York*, 390 U.S. 629, 639 (1968) ("the parent's claim to authority . . . to direct the rearing of their children is basic in the structure of our society"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It 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.")

48. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

49. *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

events, beginning with an initial contact between state and family and potentially ending with the complete termination of all parental rights. An ardent libertarian might argue that the mere presence of a social worker in one's home constitutes a major intrusion into family privacy and integrity. On the other hand, few would deny that the utter termination of all parental rights and the placement of a child for adoption constitutes a singularly forceful and devastating exercise of state power. The state's task is to balance the sometimes opposing interest of parent and child by a process which sweeps no more broadly than is required by its compelling interest.

## II. VERMONT'S STATUTORY SCHEME

In Vermont, care and supervision cases are begun by Social and Rehabilitation Services (SRS).<sup>50</sup> SRS, through the State's Attorney's office, files a petition with the juvenile court alleging a child to be in need of care and supervision.<sup>51</sup> A hearing is then held by the juvenile court to determine whether the child is, in fact, in need of care and supervision by virtue of abuse, abandonment, neglect, or unmanageability.<sup>52</sup> This hearing is to determine whether, factually, the court has jurisdiction over a particular child according to the relevant statutory definition.<sup>53</sup> If the court finds that the child falls within one of the statutory definitions of a "child in need of care or supervision,"<sup>54</sup> it then proceeds to determine what course of action needs to be taken.<sup>55</sup> If there is to be a change of legal custody subsequent hearings are held.<sup>56</sup>

The point at which the state holds the greatest power to abolish or permanently alter the family unit is the point at which this judicial process begins. Although absolute termination of parental rights<sup>57</sup> does not occur at the first hearing, it can be the eventual consequence of such a hearing. If the state is granted temporary

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50. VT. STAT. ANN. tit. 33, § 645 (1981).

51. *Id.* Frequently, SRS has had some previous contact with the family. See e.g., Record Accompanying Brief for Appellant, *In re Rathburn*, 128 Vt. 429, 266 A.2d 423 (1970) (available in Montpelier Law Library).

52. VT. STAT. ANN. tit. 33, § 652(c)(12)(A)-(C) and § 654 (1981 & Supp. 1982).

53. *Id.*

54. *Id.* § 632(a)(12)(A)-(C).

55. *Id.* § 654(b).

56. *Id.*

57. Residual rights, those which are not affected by change of custody as opposed to termination, constitute the parents' continuing legal interest in the child, such as decisions concerning major medical questions and consent to marriage, and to military service.

custody of the child at this initial hearing, a parent may regain custody after an opportunity for judicial review or upon a showing of "changed circumstances"<sup>58</sup> in the home environment. In every instance, however, the power of the state is brought to bear upon the family relationship. If a finding of neglect is reached, the parent is placed in the position of having to overcome the threshold prejudice of such a finding to regain custody of the child.<sup>59</sup> A second consideration is that even when there is only a "temporary" change of legal custody, this change can constitute a de facto dissolution of the family unit if the child remains in foster care until he reaches majority. Thus the point of "significant interference," and the point from which state action ought to be reviewed under a standard of strict scrutiny, is the moment of the first hearing.

#### A. *Parens Patriae Revisited*

Two constitutional trends affect the balance of individual rights and state action in the context of child neglect determinations. The first is the increased constitutional attack on the *parens patriae* doctrine. Vermont's Juvenile Procedure Act covers both delinquency and neglect; when the state acts in these areas it does so under the doctrine of *parens patriae*. Vermont's Supreme Court uses the language of the Act both to articulate and to limit the powers vested in the juvenile court under the doctrine.<sup>60</sup> As discussed earlier,<sup>61</sup> the third element of the doctrine is that the state acts solely to further the "best interests of the child"—that is, without regard to punishment of an adult parent. This benevolent purpose, once thought to shield the doctrine from constitutional attack, was seriously questioned in the line of cases consisting of *Gault*,<sup>62</sup> *McKeiver*,<sup>63</sup> and *Winship*.<sup>64</sup> These cases articulated which rights of juvenile delinquents must be preserved in the juvenile court setting, the benevolence of the *parens patriae* doctrine notwithstanding:

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58. *In re J. and J.W.*, 134 Vt. 480, 483-84, 365 A.2d 521, 524 (1976).

59. See, e.g., Note, *The Custody Question and Child Neglect Re-Hearings*, 35 U. CHI. L. REV., 478, 482 (1968) (discusses the concept of "threshold prejudice").

60. See *In re J.M.*, 131 Vt. 604, 607, 313 A.2d 30, 31-32 (1973). "In the face of such awesome power vested in the juvenile court empowering it under . . . the doctrine of *parens patriae* to encroach upon . . . private family life . . ." *Id.*

61. See *supra* text accompanying note 20.

62. *In re Gault*, 387 U.S. 1 (1967).

63. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

64. *In re Winship*, 397 U.S. 358 (1970).

While the narrow holding of *Gault* merely delineated specific procedures constitutionally mandated in juvenile delinquency hearings, the Court's recognition that children possess constitutional rights undermined the state's traditional argument that its benevolent motivation shielded *parens patriae* laws from constitutional attack. *Gault* triggered a widespread judicial reexamination [sic] of the validity not only of informal juvenile court procedures, but more significantly of the broad jurisdictional and dispositional standards used by the juvenile courts in neglect and delinquency cases.<sup>65</sup>

In sum, the underpinnings of the *parens patriae* doctrine—incapacity of minors and the best interest of the child—seem today an inadequate reason to bar a challenge to the constitutional legitimacy of child neglect proceedings based upon their effect on the rights of both children and adults.

The second trend consists of a growing body of case law from the federal courts which has applied the findings of the Supreme Court in the area of individual liberties to define a fundamental right to family integrity.<sup>66</sup> This body of law, which began with *Alsager v. District Court*,<sup>67</sup> has been used increasingly to strike down vague child neglect statutes.<sup>68</sup> To date, the Supreme Court has declined to hear several cases which might have struck down state *parens patriae* laws using the *Alsager* family integrity/vagueness analysis.<sup>69</sup> Justice Blackmun, however, has noted the *Alsager* opinion with approval, stating, "[t]his Court more than once has adverted to the fact that the 'best interests of the child' standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values."<sup>70</sup> Hence, at the same time that the doctrine of *parens patriae* has become less stable, the

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65. *Developments, supra* note 14, at 1221.

66. *See, e.g., Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd per curiam*, 545 F.2d 1137 (8th Cir. 1976); *Roe v. Connecticut*, 417 F. Supp. 769 (M.D. Ala. 1976).

67. 406 F. Supp. 10 (S.D. Iowa 1975).

68. *See, e.g., Duchesne v. Sugarman*, 566 F.2d 817, 824-28 (2d Cir. 1977); *Davis v. Page*, 442 F. Supp. 258, 261-62 (S.D. Fla. 1977); *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1190-91 (S.D. Tex. 1977), *rev'd on other grounds sub nom. Moore v. Sims*, 422 U.S. 415 (1979); *Roe v. Connecticut*, 417 F. Supp. 769, 777 (M.D. Ala. 1976).

69. *See, e.g., Gonzales v. Texas Dep't of Human Resources*, 581 S.W.2d 522 (Tex. Civ. App. 1979), *cert. denied*, 445 U.S. 904 (1980); *Mercado v. Rockefeller*, 502 F.2d 666 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *In re Tomasita N.*, 30 N.Y.2d 927, 287 N.E.2d 377, 335 N.Y.S.2d 683 (1972) *appeal dismissed sub nom. In re Negron*, 409 U.S. 1052 (1972).

70. *Lassiter v. Dep't of Social Serv.*, 452 U.S. 18, 45 n.13 (1981) (Blackmun, J., dissenting).

strength of individual liberties within the family has received growing support.<sup>71</sup>

In view of the increased instability of the *parens patriae* doctrine, it is important to consider the relevant language of Vermont's Juvenile Procedure Act together with the procedure by which it is made effective. The act provides:

(a) The purposes of this chapter are: (1) to provide for the care, protection, and wholesome moral, mental and physical development of children coming within the provisions of this chapter;

...  
(3) to achieve the foregoing purposes, whenever possible, in a family environment, separating the child from his parents only when necessary for his welfare or in the interests of public safety; and

(4) to provide judicial procedure through which the provisions of this chapter are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced.<sup>72</sup>

The principle statutory definition relevant to a discussion of vagueness and judicial discretion is as follows:

(a) As used in this chapter, unless the context otherwise requires:

(1) "Child" means an individual under the age of eighteen years for purposes of subdivision (12) of this subsection

...  
...

(12) "Child in need of care or supervision" means a child who:

(A) Has been abandoned or abused by his parents, guardian or other custodian; or

(B) Is without proper parental care or subsistence, education, medical, or other care necessary for his well being; or

(C) Is without or beyond the control of his parents, guardian or other custodian. . . .<sup>73</sup>

The phrase "child in need of care or supervision"—the jurisdictional "label" of the juvenile court—describes a broad spectrum

71. *Id.*, compare *Santosky v. Kramer*, 455 U.S. 745 (1982).

72. VT. STAT. ANN. tit. 33, § 631(a)(1), (3), (4) (1981).

73. *Id.* § 632(a)(1), (12).

of situations. Subsection (A), abandonment or abuse, is perhaps most clear and calls to mind concepts which, although subject to variation, are generally understood. Subsection (C), unmanageability, is also subject to some degree of common understanding. Subsection (B), a neglected child,<sup>74</sup> however, is literally circular (by definition, a "child in need of care or supervision" is one "without proper parental care and subsistence. . . or other care necessary for his well being"<sup>75</sup>).

In practice it is not uncommon for subsection (A) and (B) to be used interchangeably.<sup>76</sup> A parent may appear in court to oppose a petition which alleges her child to be in need of care of supervision when, in fact, the social worker believes the child is being abused. Although it would be impractical to try to categorize every possible set of family difficulties the present statutory language of subsections (A) and (B), when used interchangeably, allows the words "in need of care or supervision" to be applied to every conceivable situation from the "dirty-home" variety of neglected child,<sup>77</sup> to one with absent parents,<sup>78</sup> to one who is the victim of violence or incest.<sup>79</sup>

To characterize an "abuse" case as one involving "lack of proper care or supervision" may sometimes ease the implementation of counselling or other rehabilitative remedies by removing the stigma associated with abuse from the parent. The benefit of allowing flexibility in marginal instances is apparent: when the forum's purpose is to seek the best interests of the child, improvement in the home situation is to be preferred to confrontation and the lack of cooperation from the parent. On the other hand, the virtually meaningless statutory definitions allow the juvenile court judge an extraordinary amount of discretion when determining

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74. *Id.* § 632(a)(12)(B). "Provision [632 of this title defining] 'neglected child' does not require, in cases where the child is sought to be taken from the custody of a parent, that there be a willful act or willful conduct by the parent." *Id.* annot. (1981).

75. *Id.* § 632(a)(12)(B).

76. *See, e.g., In re S.A.M.*, 140 Vt. 194, 436 A.2d 736 (1981); *see also, In re T.L.S. and M.J.C.*, 139 Vt. 197, 425 A.2d 96 (1980). While sufficient facts do not appear in the supreme court opinion, brief for the state alleges incest and physical abuse in addition to mental instability of the parent. This case could have fallen within subsection (A) or (B). Brief for Appellee, *In re T.L.S. and M.J.C.*, 139 Vt. 197, 425 A.2d 96 (1980).

77. For a good example of the "dirty-home" variety of neglected child, see *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975).

78. *E.g., In re R.H., Jr.*, 138 Vt. 425, 415 A.2d 1318 (1980) (mother deceased, father imprisoned).

79. *E.g., In re T.L.S. and M.J.C.*, 139 Vt. 197, 425 A.2d 96 (1980).

whether the court has jurisdiction over a child. Such language could easily allow tacit consideration of factors which should not have a bearing on the court's decision-making process, such as race, religion, or local moral standards.<sup>80</sup> The juvenile court is required to make a written finding of facts upon which to base its decision.<sup>81</sup> The statutory language, however, provides no threshold criterion of need against which to compare a particular child's situation. Precisely what constitutes a child in need of care or supervision is left to the juvenile court. This initial discretionary zone in the neglect determination process is subsequently compounded at the dispositional stage by the use of the "best interests of the child" standard.<sup>82</sup>

### III. *The Alsager Challenge*

The legal effect of the discretionary breadth which has been built into Vermont's Juvenile Procedure Act is best understood by examining closely the analysis of a similar statute employed by the United States District Court for the District of Iowa in *Alsager v. District Court*.<sup>83</sup> Although there are more recent decisions from the federal courts,<sup>84</sup> *Alsager* retains a special position among its progeny for two reasons. First, it announces quite clearly that there is a fundamental right to family integrity protected by the due process clause.<sup>85</sup> Second, it explicitly develops the issue of vagueness and takes into account what judicial constructions might have been used to remedy the Iowa statute.<sup>86</sup>

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80. See, e.g., *Blackburn v. Blackburn*, 249 Ga. 689, 292 S.E.2d 821 (1982).

81. *In re Lee*, 126 Vt. 156, 224 A.2d 917 (1966).

82. When the district court sits as a juvenile court it is not required by statute to use the Vermont Rules of Civil Procedure. This absence of procedural certainty creates yet another area of judicial discretion which directly affects the rights of the parties involved. See, e.g., Brief for Appellant at 1-2, *In re T.L.S. and M.J.C.*, 139 Vt. 197, 425 A.2d 96 (1980). (The court summarily ordered the psychiatric examination of a parent without the conventional safeguards of notice, good cause shown or opportunity to contest. The court stated it had the inherent authority to order such an examination, the absence of statutory authority notwithstanding.)

There is presently a proposed bill before the Vermont Senate Judiciary Committee that would amend the Juvenile Procedure Act to require that the Civil Rules be used in child neglect/custody litigation. An Act to Amend 33 V.S.A. §§ 633 and 650 Relating to Children in Need of Care and Supervision: *Hearings on H. 406 Before the House Judiciary Committee*, Bien. Sess., (Feb. 24, 1981) [hereinafter cited as *Hearings*].

83. 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd per curiam*, 545 F.2d 1137 (8th Cir. 1976).

84. See cases cited *supra* note 68.

85. *Alsager*, 406 F. Supp. at 16.

86. *Id.*

In *Alsager*, defendant parents had their rights in five of their six children terminated. They sought a declaratory judgment that the Iowa termination statutes were unconstitutionally vague, both on their faces and as applied.<sup>87</sup> The Alsagers challenged the standards embodied in the statutory phrases "refused to give the child necessary parental care and protection . . . and unfit parents by reason of . . . conduct detrimental to the physical or mental health or morals of the child."<sup>88</sup> Mr. and Mrs. Alsager, at the time of the action, had been married for eleven years and had six children ranging from age ten to less than one year.<sup>89</sup> At the time of the termination proceeding Mr. Alsager was employed and had never been on welfare. The couple lived together and desired to maintain their family intact.<sup>90</sup>

The evidence reveals that the Alsagers sometimes permitted their children to leave the house in cold weather without winter clothing on, "allowed them" to play in traffic, to annoy neighbors, to eat mush for supper, to live in a house containing dirty dishes and laundry, and to sometimes arrive late at school.<sup>91</sup>

In June of 1969, the Polk County District Court received complaints from the Alsagers' neighbors about the Alsager children. A probation officer visited the Alsager home, at which time only Mrs. Alsager and the youngest child were present. The officer spent twenty minutes in the house and, on the basis of her observations without having even seen the other children, determined that all six children should immediately be removed.<sup>92</sup> This removal was to be temporary, pending a determination of neglect by the juvenile court.<sup>93</sup> At the hearing, the children were found to be neglected and were ordered to remain in the custody of the county until placed in an institution or foster home.<sup>94</sup>

One month after the neglect determination, proceedings were instituted to terminate the parent-child relationships. The termination petitions alleged that:

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87. *Id.* at 10.

88. IOWA CODE ANN. § 232.41 (West 1965) *repealed by Acts of 1979* (68 G.A.) ch. 32, § 2 (effective July 1, 1979); *compare* VT. STAT. ANN. tit. 33, § 632 (1981).

89. *Alsager*, 406 F. Supp. at 13.

90. *Id.* at 22.

91. *Id.*

92. *Id.* at 13.

93. *Id.*

94. *Id.*

the best interest of the children . . . requires [sic] that the parent-child relationships . . . be terminated by the Court because said parents have substantially and continuously and repeatedly refused to give their children necessary parental care and protection and because said parents are unfit parents by reason of conduct detrimental to the physical or mental health or morals of their children.<sup>95</sup>

On the basis of this petition, the juvenile court judge found "adequate and sufficient cause" existed for termination, but declined to terminate the parents' rights until they had been given an opportunity to remedy their situation.<sup>96</sup> In May of 1970, the juvenile court judge ordered that the Alsagers' rights in all but the second oldest of their six children be terminated.<sup>97</sup>

The *Alsager* holding was expressly limited to proceedings which completely terminate parental rights, and did not include so-called temporary neglect-custody questions. Despite this limitation, the point of significant impact upon the family in Vermont's care or supervision cases makes the *Alsager* rationale applicable.<sup>98</sup>

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95. *Id.* at 13-14.

96. *Id.* at 14.

97. *Id.* (The second oldest child was found to be mature enough to remain at home.)

98. In Vermont's custody proceedings, although there are additional safeguards such as judicial review and "changed circumstances," the court must apply the standard of a "child without proper parental care or supervision" at both the jurisdictional and termination stages. At neither stage is the standard clearly defined by statute. Arguably, the notion of "changed circumstances" serves as a substitute for a statutorily prescribed standard—a sort of probation period for the family.

One of the principal decisions dealing with this relatively recent element of Vermont's law, *In re J. and J.W.*, 134 Vt. 480, 365 A.2d 521 (1976), demonstrates graphically that there is an extraordinary amount of discretion given to the juvenile court even during this final stage. In *In re J. and J.W.*, a woman had two children by her second husband. The husband was sentenced for assaulting her. She voluntarily committed herself for mental treatment, and a first neglect petition was brought at that time (1971). After the first child-neglect petition, and after a period of out-patient treatment, the mother divorced her second husband, remarried, and established a stable life. She had, in the interim, visited the children as frequently as she was allowed, and she and her new husband lived in an apartment with sufficient room for the children.

Three years after the first neglect petition, the Department of Social Welfare (now SRS) petitioned the district court to modify its original order and to sever all parental rights in the children in order to free them for adoption. Relying heavily on a child psychology treatise which was never introduced into evidence, the court found that after the three year separation the mother was no longer the psychological parent to the children and that her parental rights should be terminated. *Id.* at 481, 365 A.2d at 522.

On appeal, the Vermont Supreme Court reversed. *Id.* at 484, 365 A.2d at 524. The court found that the facts of the case did not describe what could adequately be called "stagnation" and that the question of psychological parentage was improperly decided. In his concurring opinion, Justice Larrow stated: "Such specious logic would even serve to destroy the

The Alsagers challenged the Iowa termination statutes under theories of substantive due process and procedural due process. For the purposes of this note, the substantive due process arguments are most relevant. The Alsagers' substantive due process attack contained two prongs: first, a "void for vagueness" theory;<sup>99</sup> and second, a theory which alleged the Iowa statutes did not require a sufficient showing of "high and substantial degree of harm to the children" to create a narrowly stated compelling interest.<sup>100</sup>

Before considering the particular constitutional theories to be applied, the *Alsager* court reviewed past decisions of the United States Supreme Court which shaped theories of individual liberties to protect rights of procreation and family life.<sup>101</sup> It then stated categorically that "the inescapable conclusion . . . is that the Alsagers possess a fundamental 'liberty' and 'privacy' interest in maintaining the integrity of their family unit . . . . It is this fundamental right to family integrity, protected by the due process clause of the fourteenth amendment, which is menaced by Iowa's parental termination statute."<sup>102</sup>

The first issue which the *Alsager* court addressed under its vagueness analysis was whether the doctrine could be applied to a statute which was civil rather than criminal. The court held that "the State of Iowa cannot avoid a vagueness challenge . . . by claiming the 'civil character' of its parental termination statute."<sup>103</sup> The court then approached the issue of vagueness by employing the three-part test announced by the Supreme Court in *Grayned v. City of Rockford*:<sup>104</sup> (1) absence of fair warning, (2) impermissible delegation of discretion, and (3) undue inhibition of the legitimate exercise of a constitutional right. With respect to fair warning, the *Alsager* court found the statutory language, "refused to give their children necessary parental care," to be susceptible to such varying interpretation that an ordinary person could not know what con-

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parental rights of a father in overseas military service. The 'best interest of the child' is a useful maxim, but it comes into play only when there is legal justification for the permanent severing of parental rights." *Id.* at 486, 365 A.2d at 525. For a discussion of the "changed circumstances" doctrine, see Note, *Juvenile Proceedings: Changed Circumstances—The Procedural Obstacle to Termination of Parental Rights*, 2 Vt. L. Rev. 191 (1977).

99. *Alsager*, 406 F. Supp. at 17-21.

100. *Id.* at 21.

101. See generally cases cited *supra* notes 46 and 47.

102. *Alsager*, 406 F. Supp. at 18.

103. *Id.* at 17.

104. 408 U.S. 104, 108-09 (1972).

duct was prohibited.<sup>105</sup>

The real issue with respect to vague child neglect statutes is not their lack of notice but the breadth of judicial discretion which they confer. This concept has been expressed by Professor Laurence Tribe as "structural due process."<sup>106</sup> "Structural due process, as conceived by Professor Tribe . . . specifies the constitutional limits on the *form* of government action by defining which decision-making bodies may formulate government regulation and how those regulations may be applied to particular individuals."<sup>107</sup> It is, therefore the second element of the *Grayned* test which is directly on point: impermissible delegation of discretion. The court's statement on this issue in *Alsager* applies equally to Vermont's standard. It stated:

Under Iowa's current scheme, state officials may subjectively determine on an *ad hoc* basis, what parental conduct is 'necessary' and what parental conduct is 'detrimental.' The termination of the parent-child relationship in any given case may thus turn upon which state officials are involved in the case, rather than upon explicit standards reflecting legislative intent. This danger is especially grave in the highly subjective context of determining an approved mode of child rearing. The Court finds these standards unconstitutionally vague in that they are permeated with the 'dangers of arbitrary and discriminatory application.'<sup>108</sup>

On the third issue of the vagueness analysis, the extent to which the statutory language inhibits the exercise of a constitutionally protected right, the court found the standards "unconstitutionally vague in that they deter parents from conduct which is constitutionally protected."<sup>109</sup> The court explained:

Wary of what conduct is required and what conduct must be avoided to prevent termination, parents might fail to exercise their rights freely and fully. The risk that parents will be forced to 'steer far wider of the unlawful zone' than is constitutionally necessary is not justified when the state is capable of enacting less ambiguous termination standards.<sup>110</sup>

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105. *Alsager*, 406 F. Supp. at 18.

106. See generally Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L.L. REV. 269 (1975).

107. *Developments*, *supra* note 14, at 1234 n.217.

108. *Alsager*, 406 F. Supp. at 18-19.

109. *Alsager*, 406 F. Supp. at 19.

110. *Id.*

In sum, the court found that as to each element of the *Grayned* test the Iowa termination statutes were impermissibly vague and that their manner of implementation violated the due process rights of the parents.

Following its "void for vagueness" analysis, the court considered whether the open language of the termination statute had been remedied by judicial limitation and definition. The court found that:

[i]n the great majority of decisions involving an application of the standards of 'necessary parental care and protection,' and of '[parental] conduct . . . detrimental to the physical or mental health or morals of the child,' the Iowa court has simply made a determination as to the 'substantiality of the evidence' to support a finding based on those standards.<sup>111</sup>

Thus, although Iowa's procedure allowed for judicial review of factual determinations, the termination standards themselves, as "defined" by statute, were never given concrete meaning by judicial construction. The *Alsager* court found this to be an unacceptable degree of judicial construction to remedy the vagueness of the statute.

The *Alsagers'* alternative challenge, which claimed a lack of compelling interest, is inextricably tied to the vagueness of the termination standards embodied in the statutes. The *Alsagers* argued that the statutes failed to require a showing of "a 'high and substantial degree of harm to the children' as a prerequisite to termination, nor [did] they require the state to pursue 'less drastic' alternatives prior to resorting to termination."<sup>112</sup> The court considered whether the Iowa statutes, by their terms, furthered a "compelling interest" and whether the statutes were so "narrowly drawn as to express only that interest"<sup>113</sup> and found them inadequate. The court stated "that the evidence . . . in this case was wholly insufficient to constitute a 'compelling state interest' in terminating the protected parent-child relationship of this . . . family."<sup>114</sup> Thus, although the state does have an interest in acting on behalf of a child, if it does so without an articulable standard of care, it has not stated its interest narrowly enough to overcome the

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111. *Id.*

112. *Id.* at 21.

113. *Id.* at 22.

114. *Id.*

right to family integrity.

#### IV. *The Vermont Standard*

Vermont's section 632, like the condemned Iowa termination statutes, suffers from its inability to communicate to the ordinary person what sort of conduct is prohibited. The logical flaw with the *Alsager* court's use of the fair warning argument, which applies equally to Vermont's statutory scheme, is that such thinking assumes that families can and do govern their affairs with an eye on the statute books. The legal flaw in the Vermont statute's lack of warning, however, is that there is no defense to the standards embodied in its language. Since the language communicates no standard of care, the only real argument to be made, once a child is found to be in need of care or supervision, is that the juvenile court has not stated facts sufficient to support its findings.

Vermont's care and supervision cases do not require an unworkably specific definition of what constitutes neglect. Neglect, of necessity, raises factual questions.<sup>115</sup> Rather, what is required is a reasoned, specific criterion of need for determining when a child should be removed from the home. There is a difference. Vermont presently uses what Professor Robert Mnookin has called an "indeterminate standard."<sup>116</sup> Its major characteristic is that it allows the judge's role as fact-finder to become fused with an individual, subjective sense of what constitutes the best interests of a child. The result is subjective justice. Although evidence suggests the judiciary is compassionate and deeply concerned with the many aspects of child neglect and custody,<sup>117</sup> the use of the indeterminate standard allows the judicial process to tread more heavily on the integrity of the family than the state's compelling interest requires.

The constitutionality of Vermont's care and supervision statute has been challenged several times since 1966.<sup>118</sup> The Vermont Supreme Court has consistently maintained that the language of the care and supervision statute sweeps no more broadly than the

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115. See, e.g., *In re R.H., Jr.*, 138 Vt. 425, 427, 415 A.2d 1318, 1320 (1980).

116. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975).

117. See *Hearings*, *supra* note 82.

118. *In re Neglected Child*, 130 Vt. 525, 296 A.2d 250 (1977); *In re J.M.*, 131 Vt. 604, 313 A.2d 30 (1973); *In re Lee*, 126 Vt. 156, 224 A.2d 917 (1966). This is not surprising. In view of the statutory language, a constitutional attack is one of the few defenses available to the parent apart from challenging the factual findings.

state's compelling interest requires.<sup>119</sup> To date, the court has vigorously defended the indeterminate standard but has also required written findings of fact. In *In re J.M.*,<sup>120</sup> the court stated:

The ultimate finding of neglect, the prerequisite for any deprivation or severance of parental rights, can stand only if the evidence adduced by the State in support of the petition is sufficient to establish in the mind of the juvenile court that factually the child comes within the statutory definition of a neglected child.<sup>121</sup>

The written statement of facts which support a finding of neglect must be detailed enough to allow the supreme court, on appeal, to review the juvenile court's finding.<sup>122</sup> However, although the facts are reviewable, the standard itself remains indeterminate. This form of judicial review is virtually the same method which the *Alsager* court found inadequate to remedy the vagueness of the Iowa termination statute.<sup>123</sup>

The care and supervision statute was again challenged in 1977 in *In re Neglected Child*.<sup>124</sup> The appellants challenged the Act as unconstitutional on its face.<sup>125</sup> Their theory, like the *Alsagers'* alternative challenge,<sup>126</sup> was that the statute allowed the state to take their child without a showing of compelling interest.<sup>127</sup> The Vermont Supreme Court "found" a compelling interest by looking to the purpose of the Juvenile Procedure Act, but did not analyze the weight and substance of the competing interests. The court found an interest to be present, but did not define the meaning of section 632(a)(12). The court effectively closed the door on appellants' substantive due process challenge by stating:

[The Due Process Clause] compels the state to draw its statutes narrowly enough to not sweep [sic] beyond that area which the state seeks to regulate. To withstand the charge of being an unconstitutional delegation of legislative power, the statute . . . must establish reasonable standards to govern the

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119. See, e.g., *In re R.H., Jr.*, 138 Vt. 425, 415 A.2d 1318 (1980); *In re J.M.*, 131 Vt. 604, 313 A.2d 30 (1973).

120. 131 Vt. 604, 313 A.2d 30 (1973).

121. *Id.* at 607, 313 A.2d at 32.

122. *Id.* at 608, 313 A.2d at 32.

123. See *supra* text accompanying note 111.

124. 130 Vt. 525, 296 A.2d 250 (1977).

125. *Id.*

126. See *supra* text accompanying note 112.

127. *In re Neglected Child*, 130 Vt. at 530, 296 A.2d at 253.

achievement of its purposes and the execution of the powers which it confers . . . . [T]he standards embodied within 33 V.S.A. § 632(a)(12), are detailed enough to govern the achievement of the purposes the act seeks to fulfill . . . .<sup>128</sup>

This statement by the court does not clarify the basis for the state's compelling interest. The standards embodied in section 632 remain general. The question, as it was treated by the *Alsager* court, is not whether the standards embodied in Section 632 are detailed enough to achieve their purpose. It is, rather, whether the standards—and the manner in which they are made effective—violate unnecessarily upon the family's fundamental right to integrity because the standards are not adequately detailed to exclude situations which do not warrant state intervention. Moreover, the Vermont Supreme Court has previously held that the language of section 632 is to be "liberally construed" to further the protection of children.<sup>129</sup> Thus, if anything, the meaning of the statutory definition has been expanded.

The history of section 632 makes clear that, decisions of the supreme court notwithstanding, the statutory definition of a "child in need of care or supervision" continues to be used as a rubber stamp without a meaningful finding of facts.<sup>130</sup> In sum, the supreme court's mandate in *In re Lee*,<sup>131</sup> that findings of neglect be based upon a written statement of facts based upon competent evidence in order for the supreme court to be able to review the determination of the juvenile court,<sup>132</sup> has not effectively limited the juvenile court's ability to make neglect determinations in a totally discretionary fashion. In *In re R.H., Jr.*,<sup>133</sup> Justice Larrow stated:

At the adjudication hearing, the district court's sole finding was that R.H., Jr. was a 'child in need of care or supervision, and is without proper parental care, subsistence, education, medical or other care necessary for his well-being.' This is simply a recital of 33 V.S.A. § 632 (a)(12)(b), one of the three statutory definitions of 'a child in need of care or

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128. *Id.*

129. See *In re Rathburn*, 128 Vt. 429, 434, 266 A.2d 423, 426 (1970).

130. See, e.g., *In re R.H., Jr.*, 138 Vt. 425, 415 A.2d 1318 (1980); *In re R.B.*, 134 Vt. 368, 360 A.2d 77 (1976); *In re F.E.B.*, 133 Vt. 463, 346 A.2d 191 (1975); *In re P.F.*, 133 Vt. 64, 329 A.2d 632 (1974); *In re J.M.* 131 Vt. 604, 313 A.2d 30 (1973); *In re Lee*, 126 Vt. 156, 224 A.2d 917 (1966).

131. 126 Vt. 156, 224 A.2d 917 (1966).

132. *Id.* at 159, 224 A.2d at 919.

133. 138 Vt. at 425, 415 A.2d at 1318.

supervision.'

As we have repeatedly held, this Court will not accept findings couched in conclusions which merely repeat the statutory definition of a neglected child . . . Without adequate findings this Court cannot determine if the facts support the judgment in the particulars alleged in the petition.<sup>134</sup>

As *In Re R.H., Jr.* indicates, although the supreme court has attempted to remedy the vagueness of the statute by requiring detailed findings of fact in support of neglect determinations, some district court judges continue to render decisions without the benefit of either a "determinate" standard or without producing a viable "finding of facts." It is therefore difficult to say that the statutory language effectively states a narrow interest. That cases are reheard for failure to state a finding of facts demonstrates that the statutory directives cause the judicial process itself to sweep too broadly. The flaw is in the lack of a reasonable criterion of need stated succinctly enough to give the juvenile court judge some benchmark against which to make determinations.

*Alsager* was expressly limited to termination proceedings: the point at which, without doubt, the state's power is greatest and the right to family integrity is most fragile. There is evidence, however, which suggests that—at least when there is some indication that a family's problems are more chronic than acute—the first change of legal custody can have nearly as severe an impact upon the family and the ultimate best interest of the child as termination has. On a national basis, fewer than half of all children separated from their parents ever return home.<sup>135</sup>

[E]vidence suggests that children removed by the state from the home of their parents are often destined to remain in limbo until adulthood, wards of a largely indifferent state. On the one hand, they frequently are unable to return to their natural parents . . . On the other hand, they are sometimes placed in a series of foster homes, with each family cautioned not to become too attached. Few foster children are ever adopted.<sup>136</sup>

In Vermont, SRS presently has responsibility for over 900 children.<sup>137</sup> "According to an SRS count, 315 of the 921 children

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134. *Id.* at 426-27, 415 A.2d at 1319-20 (emphasis added).

135. See Mnookin, *supra* note 116, at 273 n.209.

136. *Id.*

137. Rutland Herald, Dec. 14, 1981, at 1, col. 1.

have been in custody less than a year and 170 for more than five—possibly as many as 14 years. The rest fall in between.”<sup>138</sup> One reason why so many children remain in limbo is that SRS has only recently begun a policy of “permanency planning”—a program which will seek a permanent solution to a child’s specific needs within one year.<sup>139</sup> At present it can take up to four years to terminate parental rights.<sup>140</sup>

A more definitive standard for removing a child from his parents—coupled with an appropriate form of aid—may well be a better solution for the child. The rationale for this approach is that predictions as to future emotional or psychological harm to the child caused by remaining in his home environment are, in many instances, far more speculative than the known psychological problems attendant upon separation and adapting to one, or several, foster home environments.<sup>141</sup> It would be extremely simplistic to assume, however, that a child’s physical health is the sole indicator of his well being. The concept of a psychologically abused child is not an illusory one. It would be impossible to prescribe standards for removal which are not in some way discretionary. The goal which should be achieved, however, is to mold the decision-making process to a pattern which recognizes significant indicia.

Professor Mnookin suggests a separation standard to replace the “best interests of the child” which is based more upon the child’s actual physical health than upon speculation as to perceived psychological harm:

A state may remove a child from parental custody without parental consent only if the state first proves: (a) there is an immediate and substantial danger to the child’s health; and (b) there are no reasonable means acceptable to the parents by which the state can protect the child’s health without removing the child from parental custody.<sup>142</sup>

Professor Mnookin has provided a standard of care against which to weigh factual findings of neglect. The corollary aspect of this more definitive standard for removal is that it would place a

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138. *Id.* at 6, col. 2.

139. *Id.* at 6, col. 3.

140. *Id.*

141. Mnookin, *supra* note 116, at 273.

142. *Id.* at 278.

significant obligation on the state to improve and maintain the family unit. In *Roe v. Connecticut*,<sup>143</sup> decided a year after *Alsager*, two leading child psychologists testified with respect to a separation standard which would most benefit the needs of the child. They gave the following opinion:

1. Summary removal of a young child from a parent who has been his major caregiver is a severe threat to his development. It disrupts and grossly endangers what he most needs, that is, the continuity of affectionate care from those to whom he is attached through bonds of love.

2. Summary removal should be allowed only under conditions in which physical survival is at stake.

3. In situations in which some interference is indicated because parents are unable to take good care of their child, there are alternatives to summary removal which should be used either singly or in combination. Among these are the following: (a) the provision in the child's home of assistance to parents with child care and with managing a household; (b) the provision of counselling to parents about how to care for a child in ways that enhance his development and well-being; (c) the provision of a day care center or day care family in which assistance to child and parent can be provided which is addressed to their specific needs; (d) the provision of a residential facility or foster family in which both parent and child can receive the nurture and guidance they may need (in extended families, relatives often supply such benevolent help, and when they are unavailable, it is one of society's responsibilities to organize and make available such assistance); and (e) the provision of 24-hour substitute care for a child, which does not cut him off from contact with his parents.<sup>144</sup>

The fundamental premise behind the removal standards suggested in *Roe* is that a love bond exists between parent and child which should be preserved. Once this bond is established, and absent mitigating circumstances such as physical abuse or incest, the *Roe* opinion makes clear that the state has many options which are more desirable than summary removal. More importantly, *Roe* makes clear that even where actual removal is temporarily necessary the state has an obligation to foster the continuum of the par-

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143. 417 F. Supp. 769 (M.D. Ala. 1976).

144. *Id.* at 776. The two experts were Dr. Sally A. Provence, Professor of Pediatrics at Yale University Child Study Center and Director of the Child Development Unit, and Dr. Albert J. Solnit, Sterling Professor of Pediatrics and Director of the Child Study Center at Yale University.

ent-child relationship.

#### CONCLUSION

It appears to be time for a rethinking of Vermont's definition of a "child in need of care and supervision." A study of Vermont law reveals that the inherent vagueness of the statutory language, when taken in concert with the best interests of the child concept, no longer provides a remedy which is either legally equitable to all concerned or in the best interests of the child. Moreover, the current degree of discretion afforded the juvenile courts to define both neglect and the child's best interest—though benevolent in purpose—is not an appropriate delegation of power in the face of the very fundamental interests involved.

*J. David Shaw*

