May 1996

Unseen Victims: Acknowledging the Effects of Domestic Violence on Children through Statutory Termination of Parental Rights

Amy Haddix

Follow this and additional works at: https://scholarship.law.berkeley.edu/californialawreview

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38P13J

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights

Amy Haddix†

TABLE OF CONTENTS

Introduction ........................................................................................................ 759
I. Terminating Parental Rights ................................................................. 764
II. Substantive Due Process Challenges to Termination Statutes .... 770
   A. An Overview of Substantive Due Process and the Constitutional Status of Parental Rights ............ 771
   B. The Constitutional Rights of the "Thwarted" Father ....................... 776
      1. Defining the "Thwarted" Father's Constitutional Status ............. 777
      2. Terminating the "Thwarted" Father’s Parental Rights ............. 780
   C. Intermediate Scrutiny Should Be Applied in Substantive Due Process Challenges to Termination Statutes .................................................. 782
   D. Applying Intermediate Scrutiny to a Statute Authorizing Termination of Parental Rights for Domestic Violence Committed Against a Parent in the Presence of Children .... 785
      1. Preventing Physical and Emotional Harm to Children Is an Important Governmental Interest ......... 785
      2. Domestic Violence Committed by one Parent against the Other Is Substantially Related to Physical and Emotional Harm Suffered by Children .... 787

Copyright © 1996 California Law Review, Inc.
† B.A. 1993, University of California, Berkeley; J.D. 1996, Boalt Hall School of Law, University of California, Berkeley. Special thanks to Professor Nancy Lemon and Visiting Professor Joan Hollinger, both of Boalt Hall, for their insightful suggestions regarding this topic and their unwavering commitment to the interests of women and children everywhere. Thanks also to Pete Goss, Gil Labrucherie, and Ophir Gazit for their diligent editing. This Comment is dedicated to my parents, Richard and Virginia, whose enduring love, patience, and commitment to their nine children serve as an exemplary model to all parents.
3. Crafting a Statute That Is Least Detrimental to Parental Rights .............................................................. 794

III. Procedural Due Process and Burdens of Proof ......................... 800
   A. The Degree of Proof Required to Establish Past Acts of Domestic Violence.................................................... 800
   B. The Weight To Be Given to Domestic Violence Evidence..... 806
      1. Illinois’ “Inclusive Factor” Approach............................. 807
      2. Texas’ “Irrebuttable Presumption” Approach ................. 808
      3. Louisiana’s “Rebuttable Presumption” Approach.......... 808
   C. Overcoming the Presumption of Unfitness ..................... 809

IV. The Model Statute .................................................................... 811
Conclusion ..................................................................................... 814
Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights

Amy Haddix

Domestic violence is a pervasive reality in many American families. When one parent strikes another parent, such violence has a profound impact both on the abused parent and on any children who witness the abuse. This Comment argues that domestic violence committed in the presence of children should be admissible as evidence of the violent parent's unfitness in legal proceedings to terminate parental rights. In the course of advocating statutory changes that incorporate this principle, the author examines possible objections based in both substantive and procedural due process. Regarding a substantive due process challenge, the author argues that a termination statute incorporating domestic violence should be subject to, and could survive, intermediate judicial scrutiny. She supports this argument by referring to recent studies detailing the effects of domestic violence on children who witness it. Procedurally, the author advocates a rebuttable presumption that a parent who has committed domestic violence in the presence of children is unfit to retain parental rights. Finally, in order to encourage statutory reform, the author presents a model termination statute incorporating her conclusions.

INTRODUCTION

Oh yes, they've seen me be hit. He used to delight in lifting them up out of their beds so they could watch. And this was 2 a.m. . . . He lined them right up against the couch and told them all what I was. He says to them, "Now you see her, she's a whore . . . [S]he's a cow." And the baby was only months old, and he'd say to him, "See her, she's no good. She's dirt. That's what women are. They're all dirt. There's your daddy been out working all day and that's [sic] no tea ready for him."
See how rotten she is to your daddy.” And all the children were dragged out of their beds for no reason at all.¹

Domestic violence in American families is a reality that cannot be ignored. Anywhere from two to four million women suffer physical abuse at the hands of their spouses or lovers every year in the United States.² Domestic violence is so extreme that women are more likely to be killed by their partners than by anyone else.³ Women, however, are not the only victims of domestic violence. Minor children who are present during these acts of abuse also suffer extreme emotional, and sometimes physical harm.

Studies estimate that more than 3.3 million children between the ages of three and seventeen are exposed to domestic violence each year.⁴ In New York City, an evaluation of a police crisis intervention program indicated that children were present in forty-one percent of domestic disturbances that warranted police intervention.⁵ Because police become involved in a relatively small percentage of domestic disputes, this statistic likely underrepresents the degree to which children are exposed to domestic violence.⁶ At least seventy percent of all battered women seeking shelter are accompanied by minor children.⁷ Reports from battered women reveal that in eighty-seven percent of cases the children directly witnessed their mothers’ abuse.⁸

While the law has begun to acknowledge the effects of domestic violence on women through increased criminal and civil protection, child witnesses are all too often overlooked unless they themselves are victims of physical abuse. Although forty-four states and the District of

---

¹ PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 18-19 (quoting R. EMERSON DOBASH & RUSSELL P. DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 151 (1979)).
³ JAFFE ET AL., supra note 1, at 19.
⁶ Id.
⁷ Id. at 19.
Columbia currently allow or require evidence of domestic violence by one parent against the other to be considered in custody disputes between the parents, state legislatures and courts have been reluctant to allow such evidence to be introduced in termination proceedings, which are a more severe form of intervention. Unlike custody proceedings, which frequently preserve a parent’s rights to visitation and continued legal control over the child, termination proceedings are geared toward permanently severing the parent/child relationship and placing the child with state agencies or private third parties.

The California case *In re James M.* presents a striking example of the way in which courts ignore crimes of domestic violence against the mother when evaluating a father’s parental fitness. In *James M.*, Sergio and Judith Marks were married and living together with seven children, four of whom were Sergio’s. Judith left Sergio for another man and took the children with her. Sergio attempted to reconcile with Judith. When she refused to return to him, he stabbed her twenty-two times, killing her. Sergio pled guilty to second-degree murder and was sentenced to five years to life in prison.

Following the murder, the department of public welfare filed a petition to terminate Sergio’s parental rights. In denying the petition, the appellate court upheld the trial court’s determination that Sergio’s murder of his wife was a “crime of passion” and that Sergio’s acts were “not the product of a violent and vicious character.” The court further reasoned that depriving the children of their mother was analogous to separation through divorce and did not constitute neglect of the children’s needs. The court finally concluded that, because Sergio’s actions toward Judith did not amount to cruelty toward his children, and because the children did not want to be separated from each other or from their father, Sergio should retain his parental rights.

Similarly, in *Bartasavich v. Mitchell*, the Pennsylvania Superior Court reversed a trial court’s decision to terminate a father’s parental rights where evidence of domestic abuse was presented. In that case, the father stabbed and killed the mother during a domestic dispute, took

---

10. 135 Cal. Rptr. 222 (Ct. App. 1976).
11. Id. at 224.
12. Id.
13. Id. at 225.
14. Id.
15. Id. at 229.
16. Id.
17. Id.
19. Id. at 838.
his two-year-old daughter to a neighbor’s home, and then attempted suicide by stabbing himself with a fork.20 Despite findings that the child feared her father and suffered from anxiety during her visits with him in prison, the court held that the father’s killing of the mother and its attendant consequences for the child were not sufficient, standing alone, to terminate the father’s parental rights as a matter of law.21

Although some state courts have found that, in particular instances, killing a child’s mother justifies termination of a father’s parental rights, they have generally refused to recognize a per se connection between domestic violence and parental unfitness.22 As a recent Florida custody case indicates, courts may even determine that a lesbian mother poses a more dangerous influence on her child than does a homicidal father.23

Terminating the rights of an abusive father becomes even more difficult when the child is a newborn with whom the father has had little or no contact. This is particularly true in cases where the mother attempts to “thwart” the father’s parental involvement, either by failing to inform him of the pregnancy or by hiding the child from him after birth, while she seeks adoptive placement for the child. If the biological father has no true interest in raising his child, judicial intervention may be necessary to provide the child with a stable, permanent adoptive home. In such cases, however, the courts have consistently refused to terminate the father’s parental rights in favor of a third-party adoption.24 For the child, who will likely reach the age of two before the conclusion of any appeals, moving from a stable adoptive home to live with a father she has never known could be both emotionally and physically devastating, particularly if a close relationship with the biological father fails to develop.

This Comment addresses the reluctance of state legislatures to acknowledge the strong link between domestic violence and parental unfitness in termination proceedings. Of especial concern are those situations where the mother is no longer available to care for the child,

20. Id. at 834.
21. Id. at 835-37.
22. See Naomi R. Cahn, Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions, 44 VAND. L. REV. 1041, 1072-73 (1991); Developments, supra note 8, at 1605, 1608 (citing numerous examples of custody cases in which the courts minimized domestic violence evidence or deemed it irrelevant to parental unfitness).
23. See Killer Says He’s Better for Daughter: Judge Removed Her From Lesbian Mom, S.F. CHRON., Feb. 3, 1996, at A3 (summarizing decision by Florida Circuit Court awarding custody of an 11-year-old girl to her father, who was convicted of killing his first wife, over her mother, a lesbian). The judge reasoned that the child should have a chance to live in “a nonlesbian world.” Id.
having voluntarily placed the child for adoption or having been killed by the father. In such cases, the state, as *parens patriae*, or a third party, may initiate termination proceedings against the abusive father to prevent him from retaining control over the child. I argue that courts should admit evidence of past domestic violence to assist their evaluation of the violent father’s fitness to raise his child.

For the purposes of this argument, I define domestic violence as the deliberate use of physical violence by one parent, whether natural or adoptive, against the other parent when children are present. While domestic violence is frequently defined in broader terms to include acts of child abuse, this Comment limits its analysis to those situations where children are witnesses, not direct victims of assault.

My definition of domestic violence further requires that children be “present” during acts of abuse. This condition, however, is not intended to be restrictive. Children living in close proximity to violence suffer severe emotional consequences, even if they do not directly witness the abuse. They are likely to overhear the abuse from another area of the home, and will see the results of abuse as evidenced by their mother’s broken bones, black eyes, bleeding, and bruises. If the mother is the children’s primary caretaker, they may suffer emotional and physical neglect if she is separated from them due to hospitalization.

An unborn fetus is particularly vulnerable to physical attacks upon its mother. Studies indicate that an abuser’s violence escalates with the onset of pregnancy, increasing the risk that the child will suffer birth defects. Thus, according to my definition, a fetus is “present” during acts of physical abuse committed upon its mother during pregnancy.

---

25. This Comment refers to women as the victims of domestic violence and men as the perpetrators. Although in some instances the gender roles are reversed, in the vast majority of cases, the batterers are male and the victims female. See Russell P. Dobash et al., *The Myth of Sexual Symmetry in Marital Violence*, 39 Soc. PROBS. 71, 74-75 (1992) (surveying police reports and court records indicating that 90-95% of victims of assault in the home are women). Thus, this generalization represents a statistical reality and not an unfounded stereotype.

26. I exclude child abuse from the definition of domestic violence because the law currently allows for termination of parental rights where the parent has directly abused the child, while simultaneously excluding from termination statutes those situations where the child has been severely harmed by witnessing abuse in the home.

27. See infra notes 275-79 and accompanying text.

28. JAFFE ET AL., supra note 1, at 17.

29. Id.

30. Id. at 27; Developments, supra note 8, at 1610.


32. The question of whether a fetus is a “person” and therefore capable of being “present” before reaching viability is beyond the scope of this Comment. However, several states have indicated as much by enacting statutes that provide for termination on the grounds of “pre-birth abandonment” of the child. See, e.g., FLA. STAT. ANN. § 63.032(14) (West Supp. 1996) (providing
By way of introduction, Part I of this Comment presents a summary of the current statutory approaches to terminating parental rights. Part II details the potential substantive due process challenges to a statute, such as the model I propose, that incorporates domestic violence evidence into termination proceedings. This Part begins by examining the constitutional status of parental rights and of "thwarted" fathers in particular. The Part then discusses the appropriate level of scrutiny to be applied to termination statutes. I argue that such statutes should be subject to intermediate judicial scrutiny, which requires proof that domestic violence is substantially related to the important state interest of protecting children. To demonstrate that the statute survives intermediate scrutiny, I summarize recent empirical studies detailing the effects of domestic violence on the children who witness it.

Part III examines procedural due process thresholds that a statute should impose upon a party seeking to introduce evidence of domestic violence in termination proceedings. I discuss both the burden of proof to be placed upon the petitioning party seeking to establish unfitness, and the proper use of an unfitness presumption against the violent parent. I assert that, absent a criminal conviction, clear and convincing evidence of domestic violence should be sufficient to raise a presumption of parental unfitness against the batterer, which he must rebut by presenting clear and convincing evidence of his rehabilitation.

Finally, Part IV presents a proposed model termination statute, compiled from various state custody statutes already enacted, which addresses the concerns raised by this Comment.

I

TERMINATING PARENTAL RIGHTS

A court may deprive a parent of custody over his or her child in two ways. In a divorce or dependency proceeding, the court may remove the child from the physical control of one parent and place the child in the home of another parent or a legal guardian. A parent deprived of physical custody of his or her child frequently retains legal custody, which includes the right to visit the child and to make decisions regarding his or her health, education, and welfare.33

for termination if the father knowingly abandons the mother during pregnancy); KAN. STAT. ANN. § 59-2136(h)(5) (1994) (providing for termination if the father knowingly abandons the mother during pregnancy); OHIO REV. CODE ANN. § 3107.07(B) (Baldwin Supp. 1995) (providing that consent to adoption is not required of a putative father who has abandoned the mother during pregnancy); TEX. FAM. CODE ANN. § 161.001(1)(H) (West Supp. 1996) (providing for termination if the father knowingly abandons the mother during pregnancy). For the purposes of my argument, the likelihood that a father who beats a pregnant mother will continue to beat the mother (and quite possibly the child) after the child is born is strong enough to justify intervention immediately after the child's birth.

33. See, e.g., CAL. FAM. CODE §§ 3003-3004, 3006-3007 (West 1994).
By contrast, in a termination proceeding, the court may deny a parent both physical and legal custody of the child. Termination of parental rights is a drastic response to grave concerns about parental fitness. Termination proceedings entail

the unmitigated cessation of all natural and legal rights a parent has with a child, and a permanent parting of all bonds linking parent to child. It terminates the parent-child relationship, including the parents’ rights to the custody of the child[,] the right to visit the child[,] . . . [and] the necessity to consent to the adoption of the child . . . . The purpose of terminating parental rights is to emancipate the child from the offending parents’ legal bond in order to set the child free for future adoption.34

Each state has enacted statutes authorizing the termination of parental rights where the parent-child relationship is determined to be harmful to the child’s welfare.35

Termination proceedings are of two basic kinds: voluntary and involuntary.36 In some states, parents may voluntarily institute proceedings to terminate their parental rights.37 More commonly, however, parents face involuntarily termination proceedings, brought either by the state in a dependency action, or, in some jurisdictions, by a private third party seeking to adopt the child.38

In dependency proceedings, state statutes frequently require that the parents be given a chance to rehabilitate themselves and reunify with their children.39 Termination is ordered only as a last resort—where it appears that there is little hope of reunifying the child with her parents and that continued efforts at reunification likely would result in long-term instability for the child.

Involuntary termination proceedings may also be brought by third parties seeking to adopt the child. Some states allow the private party to seek termination within the context of the adoption proceeding, while others require that the termination action precede the adoption action.40 If the termination is successful, the child is immediately placed with the adoptive parents, without the requirement of reunification services.

36. Id. §§ 4.04[1]-[2].
38. 1 ADOPTION LAW AND PRACTICE, supra note 35, § 4.04[1].
40. See 1 ADOPTION LAW AND PRACTICE, supra note 35, §§ 4.04[3], [5].
Although state termination statutes vary, generally they authorize involuntary termination of parental rights under three broad rationales: abandonment, neglect, and parental unfitness.41

The most frequently recognized ground for involuntary termination of parental rights is abandonment.42 Abandonment is usually found where a parent has failed to exercise any parental rights and has avoided all parental obligations for a period of at least six months.43 Actions evidencing an intent to abandon the child include failure to communicate with her, and failure to support her despite financial ability to do so.44

Child neglect is another ground for termination of parental rights. Child neglect has been defined as the "intentional or unintentional failure to exercise the care of the child that the circumstances demand."45 Usually, proof of neglect hinges on the physical and psychological impact of the parent's actions (or lack thereof) toward the child.46 Before authorizing termination on grounds of neglect, several states require a showing that the neglect be likely to continue into the future.47

Most states also authorize termination under the general ground of "parental unfitness." Unfitness refers to a parent's inability to raise a child, as opposed to abandonment and neglect, which focus on a parent's unwillingness to be a parent.48 Unfitness is a broad category that frequently includes several criteria.49 Factors indicating unfitness include a parent's mental incapacity to raise children due to mental illness or retardation, and a parent's physical incapacity to raise children due to drug or alcohol addiction or long-term incarceration.50

Also included in the general category of unfitness are specific acts by the parent indicating his general ineptitude. Perhaps the most obvious example of such an act is physical or sexual abuse of the child,
which is grounds for termination in all states.\textsuperscript{31} Less prevalent are statutes that provide for termination of parental rights based upon actions not directed against the child, but generally indicative of parental unfitness.

Currently, in at least nineteen states, the petitioning party at a termination proceeding may introduce past felonies committed by the parent against a person other than the child.\textsuperscript{52} All of the states require that there be a nexus between the past felony conviction and future parental unfitness, so as to avoid punishing the parent for past criminal behavior.\textsuperscript{53} To this end, some states statutorily restrict the introduction of past felonies to violent or sexual crimes committed against other children;\textsuperscript{44}
in these states, a past conviction for certain crimes against children constitutes per se unfitness.

Other states do not restrict the felony to crimes committed against children. In these states, the courts must make an ad hoc determination whether the facts underlying the parent’s felony conviction demonstrate unfitness for future custody of the child.

To meet the nexus requirement of the statutes, courts look for aggravating circumstances that indicate parental unfitness. Typical aggravating factors include a showing that the felony committed was particularly violent, was perpetrated in the child’s presence, was committed under the influence of alcohol, or was a felony mandating lengthy incarceration (which would deprive the child of a parent-child relationship for a significant period of time). Any of these factors may indicate parental unfitness within the factual context of the termination proceeding.

At this time, no state termination statute provides that domestic violence against a mother constitutes per se parental unfitness—even where the most atrocious abuse has occurred. Only Illinois, Washington, and Wisconsin provide for termination based upon murder of a parent. All other states require a showing of aggravating circum-
stances before determining that slaying a child’s mother constitutes parental unfitness.

While no state statutorily requires termination of parental rights for acts of domestic violence, in Texas there is common law precedent for termination on this ground. The Texas Family Code provides for involuntary termination of parental rights if the court finds that the parent has “knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child,” or has “engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child.” Under this statute, several Texas trial courts have terminated a father’s parental rights for committing acts of domestic violence against the mother in the child’s presence.

In *Lane v. Jefferson County Child Welfare Unit*, the Texas Court of Appeals affirmed termination of a father’s parental rights based upon evidence of the father’s abuse of the mother in the child’s presence. During the termination hearing, the mother testified that the father had hit her numerous times during her pregnancy and had raped her in her eighth month. The court found that the father continued such behavior after the child’s birth. On one occasion, he beat the mother and threw a fan across the room that almost struck the child. Another time, the father threw a brick through a window, which sent

---

of first- or second-degree homicide and that the person whose parental rights are sought to be terminated has been convicted of that intentional homicide). See also UNIF. ADOPTION ACT § 3-504(c)(3) (1994), reprinted in 1 ADOPTION LAW AND PRACTICE, supra note 35, app. 4-A at 4A-83 (providing for termination if the parent has “been convicted of a crime of violence or of violating a restraining or protective order, and the facts of the crime or violation and the respondent’s behavior indicate that the respondent is unfit to maintain a relationship of parent and child with the minor”). This section of the Uniform Adoption Act was released in 1994 and has not yet been adopted by any state. See infra note 128 for a brief overview of the Uniform Adoption Act.


61. See, e.g., G.W.H. v. D.A.H., 650 S.W.2d 480 (Tex. Civ. App. 1983) (terminating father’s parental rights upon showing that he was imprisoned for strangling murder of young woman, he was generally violent against females, he had been arrested for rape, he had struck his wife and girlfriend on several occasions, and he had once held his child hostage until his wife came to talk to him); Lane v. Jefferson County Child Welfare Unit, 564 S.W.2d 130 (Tex. Civ. App. 1978) (father’s parental rights terminated due to domestic violence against the mother) (see infra text accompanying note 62-67 for full discussion of case); Crawford v. Crawford, 569 S.W.2d 505 (Tex. Civ. App. 1978) (father’s parental rights terminated upon showing that he had beaten the mother, threatened her life on many occasions, and had beaten the child three times, leaving bruises); In re B.J.B., 546 S.W.2d 674 (Tex. Civ. App. 1977) (father’s parental rights terminated upon showing that the father fatally stabbed the mother and that the children subsequently exhibited fear and anxiety towards their father).


63. Id. at 130.

64. Id. at 132.
glass shards flying near the child. The court found that, although the father's acts were not directed at the child and did not cause the child physical injury, the father's behavior toward the mother in the child's presence endangered the physical and emotional well-being of the child. The court held that this endangerment justified termination of the father's parental rights under the Texas statute.

The termination statute that enabled the Lane decision goes some way toward recognizing that a parent's violent actions can affect the physical and emotional well-being of a child, even where the child is not the target of the actions. However, the Texas statute still fails specifically to enumerate domestic violence as an act that has severe emotional consequences for a child's well-being. Rather, the link between domestic violence and parental unfitness in the Texas case depends solely upon a judge's determination. And as cases like In re James M. indicate, we cannot always rely on judges to make such a determination.

II

SUBSTANTIVE DUE PROCESS CHALLENGES TO TERMINATION STATUTES

The reluctance of state legislatures to provide for termination of parental rights based upon past acts of domestic violence may be due in part to two separate concerns regarding the link between domestic violence and parental unfitness. First, some courts and commentators have expressed overt skepticism toward the claim that domestic violence against a parent is harmful to the children. These courts and commentators maintain that a father may abuse his spouse but still function as a caring and effective parent. However, the majority of states have acknowledged the link between domestic violence and unfitness by enacting custody statutes that favor placement of the child with the non-violent parent in divorce custody disputes. The fact that these states

65. Id.
66. Id. at 131-32.
67. Id. at 132-33.
68. 135 Cal. Rptr. 222 (Ct. App. 1976); see supra notes 10-17 and accompanying text.
69. See Sense of Congress—Evidentiary Presumption in Child Custody Cases: Hearing on H. Con. Res. 172 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 26-27 (1990) (statement of an abused wife, Marcia Shields, regarding her custody case, in which the court concluded that a father may be violent towards his spouse while simultaneously functioning as a caring and effective parent). See also supra note 22. This reluctance to acknowledge the effects of domestic violence on children possibly stems from the lack of social research on the topic. Until recently, very few researchers had considered the impact of domestic abuse on the children who witness the violence. JAPPE ET AL., supra note 1, at 15.
70. Hofford et al., supra note 9, at 199.
have not incorporated a similar domestic violence provision into their termination statutes suggests a second concern: that although states recognize the harmful effects of domestic violence on children, they do not believe the link is strong enough to survive a substantive due process challenge to the termination statutes, which involve a much more serious infringement on parental rights. The arguments that follow demonstrate both that domestic violence and parental unfitness are related, and that the relationship is strong enough to survive substantive due process scrutiny.

A. An Overview of Substantive Due Process and the Constitutional Status of Parental Rights

Although the Supreme Court has frequently encountered procedural due process challenges to termination statutes,\(^7\) it has yet to analyze a termination statute on substantive due process grounds.\(^1\) Thus, it is unclear what level of judicial scrutiny would apply to a termination statute challenged as violative of substantive due process.

As early as the 1890s, the Court determined that, pursuant to the Due Process Clauses of the Fifth and Fourteenth Amendments, government statutes affecting the life, liberty, or property of American citizens must be supported by a legitimate justification.\(^7\) The burden of justification placed on the government varies according to the importance of the constitutional right affected, with restrictions on fundamental rights receiving the strictest review and those affecting economic rights receiving more deferential treatment.\(^7\) In either case, a plaintiff must first

---


72. Timothy J. Cassidy, Comment, Termination of Parental Rights: The Substantive Due Process Issue, 26 St. Louis U. L.J. 915, 915 n.4, 924-25 (1982). Substantive due process is distinguished from procedural due process as follows: Procedural due process is a person's right to have adequate legal procedures that provide a forum to assert his claim. See, e.g., Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). Substantive due process encompasses an individual's right to exercise his freedom without government interference unless a compelling state interest intervenes. See generally Griswold v. Connecticut, 381 U.S. 479 (1965).

Id. at 915 n.4.

As Cassidy explains, the Supreme Court faced a substantive due process challenge to a termination statute in Doe v. Delaware, 450 U.S. 382 (1981), but avoided the issue by determining that the petitioners had not properly presented a federal question. Cassidy, supra, at 924. At least one commentator has argued that the Supreme Court refrains from dealing in this area because it considers "marriage, divorce, and child custody" to be areas of lawmaking power "beyond the constitutional competence of the federal government." Anne C. Dalley, Federalism and Families, 143 U. Pa. L. Rev. 1787, 1789 (1995) (citing United States v. Lopez, 115 S. Ct. 1624, 1632, 1661 (1995) (Breyer, J., dissenting)).


74. The commonly known strict scrutiny test applied to fundamental rights requires that the government statute be narrowly tailored to further some compelling state interest, while the
prove that the interest violated was an identified liberty or property interest protected by the Due Process Clauses.°

The list of fundamental rights traditionally was limited to those rights, such as free speech, expressly protected by constitutional provisions. However, the Supreme Court subsequently identified other rights, not explicitly enumerated in the Constitution, as "fundamental." One such right is the right of privacy. The right of privacy has been found to contain many subcategories, including the right to use contraceptives, the right to terminate a pregnancy, the right to procreate, the right to choose a marriage partner, the right to direct the upbringing and education of one's child, and the right freely to pursue intimate associations. Although this list is by no means exhaustive, the Supreme Court has been reluctant to expand the area of unenumerated fundamental rights. Specifically, it has avoided definitively characterizing as fundamental the "right to parent" implicated by termination statutes. Despite the fact that lower federal courts sometimes characterize parenting as a fundamental right, several commentators have observed that the constitutional status of parental rights is far from settled.

Noting this area of uncertainty, some commentators have argued that the Supreme Court should explicitly recognize a fundamental "right to family integrity," that would require the application of strict scrutiny to parental termination statutes. These commentators rely heavily upon the Supreme Court's language in Meyer v. Nebraska, Pierce v. Society of Sisters, and Stanley v. Illinois. They do recog-

deferential rational basis test, applied mostly to proprietary interests, requires merely that the statute be rationally related to some legitimate state interest. Galloway, supra note 73, at 627 n.12, 643.

76. Galloway, supra note 73, at 627 n.15.
83. Cassidy, supra note 72, at 923.
84. Id. at 924-25.
85. See, e.g., Roe v. Conn, 417 F. Supp. 769, 777 (M.D. Ala. 1976) ("[T]he Constitution recognizes as fundamental the right of family integrity."); Alsager v. District Court, 406 F. Supp. 10, 16 (S.D. Iowa 1975) (holding that the plaintiffs "possess a fundamental 'liberty' and 'privacy' interest in maintaining the integrity of their family unit"), aff'd, 545 F.2d 1137 (8th Cir. 1976).
87. See, e.g., Buckholz, supra note 86, at 720, 722-23; Cassidy, supra note 72, at 925.
88. 262 U.S. 390 (1923).
89. 268 U.S. 510 (1925).
nize, however, that the "right to family integrity" is distinct from and not necessarily governed by the broad Supreme Court language contained in those cases.91

In Meyer, the Court struck down a Nebraska statute that prohibited the teaching of foreign languages in elementary schools as violative of parents' liberty interest in educating their children.92 The Court identified the power of parents to control the education of their children as a matter of "supreme importance," implicitly guaranteed by the right "to marry, establish a home and bring up children."93

Two years later, in Pierce, the Court struck down an Oregon law that required all children to attend public elementary schools.94 The Court held that the law interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control."95

Although these cases seem to delineate a broad right of parental authority, they do not clearly address the type of "interest in family integrity" implicated by the termination statute. Even those who would try to read a "right of family integrity" into Meyer and Pierce admit that the holdings in those cases are limited to educational choices a parent makes on behalf of his or her child.96 By contrast, termination statutes deal with behavior of a parent toward a child that is detrimental to the child's physical and/or emotional well being—behavior that falls well outside the scope of educational choice. Justice White has made the same observation:

The Court's decisions in Moore v. East Cleveland, Pierce v. Society of Sisters, and Meyer v. Nebraska can be read for the proposition that parents have a fundamental liberty to make decisions with respect to the upbringing of their children. But no one would suggest that this fundamental liberty extends to assaults committed upon children by their parents. It is not the case that parents have a fundamental liberty to engage in such activities and that the State may intrude to prevent them only because it has a compelling interest in the well-being of children; rather, such activities, by their very nature, should be viewed as outside the scope of the fundamental liberty interest.97

90. 405 U.S. 645 (1972).
91. Buckholz, supra note 86, at 722-24; Cassidy, supra note 72, at 925.
93. Id. at 399-400.
94. Pierce, 268 U.S. at 536.
95. Id. at 534-35.
96. See Buckholz, supra note 86, at 723.
Thus, it seems reasonable to conclude that a father’s “liberty interest” in abusing a mother in the presence of her children is markedly different from his interest in making decisions about the children’s education.

Justice White’s dictum appeared in a dissenting opinion. However, a majority of the Court has indicated that, in the area of family affairs, violence by a father against a mother may in some cases be so abhorrent as to negate altogether the father’s interest in raising his child. In *Michael H. v. Gerald D.*, 98 the Court rejected an unwed father’s due process challenge to a law denying him the opportunity to establish paternity over his child. The majority further implied that a father who had begotten his child through rape should not have any right to be the child’s parent. 99

Courts have expanded upon the Supreme Court’s dicta in *Michael H.*. 100 The California Supreme Court in *Adoption of Kelsey S.* stated:

[O]ur decision affords no protection, constitutional or otherwise, to a male who impregnates a female as a result of nonconsensual sexual intercourse. We find nothing in the relevant high court decisions that provides such a father a right to due process in connection with the custody and adoption of his biological child. 101

---

99. See id. at 124 n.4, criticizing Justice Brennan’s dissenting opinion: “The logic of JUSTICE BRENNAN’S position leads to the conclusion that if [the father] had begotten [the child] by rape, that fact would in no way affect his possession of a liberty interest in his relationship with her.”
101. *Adoption of Kelsey S.*, 823 P.2d at 1237 n.14. As the appellate court stated in *Cote v. Henderson*, 267 Cal. Rptr. 274 (Ct. App. 1990), it would be “terribly inappropriate for a woman to have been molested, abused, raped . . . and then have . . . the courts or society demand[] that she share that child with the person that treated her with total disregard of herself as a person.” Id. at 280 (quoting findings of fact from prior civil action). At least six states have adopted this reasoning by enacting statutory provisions that limit a father’s due process rights to raise a child conceived through rape. See *Alaska STAT.* § 25.23.180(a)(3) (1995) (sexual abuse of a minor leading to conception of a child will justify termination of parental rights over the conceived child if it is in the child’s best interests to terminate); *Cal. FAM. CODE* § 7611.5 (West 1994) (father not given presumed father status/right to withhold consent to adoption if child is conceived through rape); *Ind. Code Ann.* § 31-3-1-6(i)(2)(B)(i) (West Supp. 1995) (father’s consent not required for adoption of a child conceived as a result of rape for which the father was convicted); *23 Pa. Cons. Stat. Ann.* § 2511(a)(7) (Supp. 1996) (court may terminate father’s parental rights if child is conceived through rape); *Wis. Stat. Ann.* § 48.422(m) (West Supp. 1995) (father not entitled to notice of adoption of child conceived as a result of sexual assault if physician attests to belief that sexual assault has occurred); *Wyo. STAT.* § 1-22-110(a)(viii) (Supp. 1995) (no consent required from father of child conceived as a result of a sexual assault for which he has been convicted). The application of the California statute cited above to a child conceived through marital rape is somewhat unclear, as California, among other states, still distinguishes between spousal and stranger rape. See *Cal. Penal Code* § 262 (West Supp. 1996). However, the California appellate court’s analysis in *Cote v. Henderson*, supra, would seem to apply equally to both married and unmarried women who conceive children through sexual assault. For an extensive argument in favor of equating marital rape with rape by a
Admittedly, the holdings in *Michael H.* and *Kelsey S.* are based upon a quasi-equal protection analysis: because the father denied the mother an equal voice in the conception of the child, he may not now demand an equal voice in the child's upbringing. The opinions did not indicate that fathers who conceive a child consensually and later act violently toward the mother also have a lesser parenting interest. However, these cases do demonstrate that a father's "liberty interest" in making discrete decisions about education is far different from his "liberty interest" in abusing a mother in front of her children. Although the Supreme Court has not ruled authoritatively on the issue, the reasoning of *Michael H.* points toward the conclusion that acts of domestic violence committed in the presence of children cannot be considered within the scope of any "fundamental" right.

For the majority of situations where the child was conceived consensually, commentators cite the Court's discourse in *Stanley v. Illinois* as support for a fundamental right to parenting. In *Stanley*, the Court invalidated a dependency statute that denied unwed fathers the right to a hearing on unfitness before removing their children from the home and placing them in state care. The Court reasoned that such an irrebuttable presumption of unfitness violated the unwed father's "essential" right to conceive and to raise his children. However, *Stanley* dealt with procedural rights to notice and a hearing on parental unfitness, rather than substantive rights such as the right to make decisions regarding the education of one's children. Such procedural due process cases "do not address the nature of substantive protections available in the family integrity context." Thus, *Stanley* does not give rise to a substantive right to parent.

Perhaps the strongest support for a recognized liberty interest in "family integrity"—and the "right to parent" that it implies—appears in dicta in *Quilloin v. Walcott*. In *Quilloin*, the Supreme Court rejected an unwed father's substantive due process challenge to a Georgia statute that allowed the state to terminate his parental rights based solely...
upon a showing that termination was in the child’s best interests, rather than the more stringent requirement that the state prove the father’s unfitness.\textsuperscript{108} Although the Court acknowledged that a constitutionally protected relationship exists between parent and child, it refused to extend constitutional protection to the father, who had failed to maintain substantial contact with his child for the first eleven years of the child’s life.\textsuperscript{109} However, the Court indicated:

\begin{quote}
We have little doubt that the Due Process Clause would be offended “if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interests.”\textsuperscript{110}
\end{quote}

Although this dicta implies that a substantive liberty interest in “family integrity” exists, it does not indicate that such a right is “fundamental.” The Court’s use of the phrase “some showing of unfitness” suggests that something less than strict scrutiny should be applied to this interest in “family integrity.”

The above analysis is in no way intended to imply that a parent’s liberty interest in “family integrity” should be treated with the same deferential, rational-basis review that is applied to economic rights. However, \textit{Quilfoil} does demonstrate that, although there is a significant liberty interest in “family integrity,” this interest is distinct from the other substantive “familial interests” thus far defined. While a parent’s interest in making educational choices for his or her children should trigger strict scrutiny, Supreme Court jurisprudence indicates that the “interest in family integrity” implicated by termination statutes should not.

\textbf{B. The Constitutional Rights of the “Thwarted” Father}

The confusion surrounding the constitutional status of parental rights has been further complicated by attempts to distinguish between different “types” of parents and their corresponding substantive due process rights. State law currently distinguishes between married and unwed fathers, denying an unwed father full constitutional protection unless he has demonstrated a “substantial commitment” to his children. However, the father whose substantive due process rights have been “thwarted” by the mother poses a particular constitutional dilemma not yet addressed by the Supreme Court. The resolution of this dilemma bears heavily on this Comment, for it is just as important to terminate

\begin{itemize}
\item \textsuperscript{108} \textit{Id.} at 254.
\item \textsuperscript{109} \textit{Id.} at 254-56.
\item \textsuperscript{110} \textit{Id.} at 255 (emphasis added) (citation omitted).
\end{itemize}
the parental rights of an abusive "thwarted" father as it is to terminate those of an abusive father who has had the opportunity to exercise his rights. By definition, a "thwarted" father is one who has not been able to demonstrate his commitment to a newborn child because the mother has kept the child from him. Thus, some state courts have concluded that a "thwarted" father must be given full due process rights to veto the child's adoption, absent successful termination of his parental rights on grounds of unfitness. It is difficult to terminate a "thwarted" father's parental rights, however, because most termination statutes focus largely on past interactions between the parent and child to determine unfitness. A termination statute that would allow courts to examine a father's behavior toward the mother during pregnancy would provide better protection for newborn children who will later be harmed by domestic violence, either as direct victims or as witnesses.

1. Defining the "Thwarted" Father's Constitutional Status

The mother's role as child bearer gives her a biological connection to her child, and "in this sense her parental relationship is clear." All states require a biological mother's consent to an adoption absent a showing of unfitness or abandonment. By contrast, the father's parental relationship to the child is frequently ambiguous, particularly if the father is not married to the mother when the child is born. Thus, states have long distinguished between married and unwed fathers. Unwed fathers are typically afforded only minimal due process protection in termination proceedings, such as the opportunity to appear and be heard on the issue of the child's best interests.

111. The uncertainty surrounding the constitutional status of unwed fathers is particularly troubling in light of studies conducted by the United States Census Bureau in 1990 indicating that at least one in four children are born out of wedlock each year. See Robert Pear, Larger Number of New Mothers Are Unmarried, N.Y. Times, Dec. 4, 1991, at A20.

112. Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979)). This general proposition, once widely accepted, is now complicated by the recent medical development of surrogate pregnancy, where the biological mother is hired to carry a child for a woman who is physically unable to have children. For a discussion of the possible ramifications of such medical procedures in the area of parental rights, see 1 Adoption Law and Practice, supra note 35, § 2.04.[2][b]. Although statutes vary widely, many states have placed unwed fathers in two basic categories for purposes of defining their right to parent: those fathers who are entitled merely to notice of the adoption and those fathers who are entitled to withhold consent to the adoption. Id. § 2.04[2][c], at 2-31, 2-44. In most states, unwed fathers who perform certain legal requirements, such as signing a putative father registry or filing an intent to claim paternity, are entitled to notice of a pending adoption proceeding involving their child. Id. However, fathers who meet these minimum requirements generally are not afforded a right to veto the adoption by withholding consent; rather they are merely given the opportunity to argue that the adoption would not
The Supreme Court has upheld the distinction between married and unwed fathers with respect to due process and equal protection challenges by declaring that the substantive due process right to parent is founded on more than a mere biological connection between parent and child. As one state court has explained, "the [unmarried father's] protected interest is not established simply by biology." Rather, full due process protection "requires both a biological connection and full parental responsibility; he must both be a father and behave like one."

Before an unmarried father can veto a mother's decision to put his child up for adoption, courts typically require him to have demonstrated a "substantial commitment" to parenting. In California, once an unwed father knows or reasonably should know of his partner's pregnancy, he must be in the child's best interests. Id. § 2.04[2][c], at 2-31; see also Hiskey v. Hamilton, 824 P.2d 1170, 1174 (Or. Ct. App. 1992).

115. Lehr, 463 U.S. at 261-62. In fact, until the 1970s, unwed fathers' custody rights in their illegitimate children were very limited. See 1 ADOPrion LAW AND PRACTICE, supra note 35, § 2.04[2][a]. In the landmark case of Stanley v. Illinois, 405 U.S. 645 (1972), the Supreme Court recognized for the first time an unwed father's constitutionally protected interest in parenting. Stanley was an unmarried father who had lived interminently with his children and their mother for 18 years. Upon the mother's death, the state of Illinois attempted to declare the children wards of the state without affording Stanley a hearing on his parental fitness. The Supreme Court found that the Illinois law violated both procedural due process and equal protection, reasoning that because Stanley had taken an active part in raising his children, he was entitled to the same right as mothers and married fathers to retain his parental status absent a judicial finding of unfitness. Id. at 649, 658.

It was not until seven years later that the Supreme Court extended its holding in Stanley to private actions, affording an unwed father the right to veto an adoption initiated by the child's mother and her new spouse, absent a showing of his unfitness to parent. Caban v. Mohammed, 441 U.S. 380 (1979). Like Stanley, the unwed father in Caban played an active part in his children's development by living with his children and their mother for five years and making consistent efforts to visit the children after separation. Thus, the court held that a statute allowing the mother to veto an adoption absent a showing of unfitness but automatically denying an unwed father the same right violated the equal protection clause. Id. at 394.

Although Stanley and Caban substantially expanded the rights of unwed fathers, these holdings did not wholly invalidate the legal distinction between married and unwed fathers. The Court recognized Stanley and Caban's paternal rights primarily because of the active role they played in the lives of their children, and refused to extend constitutional protections to unwed fathers who had not demonstrated a similar interest in parenting. See Quilloin v. Walcott, 434 U.S. 246 (1978). For a more elaborate discussion of the evolution of Supreme Court doctrine regarding the due process rights of unwed fathers, see Deborah L. Forman, Unwed Fathers and Adoption: A Theoretical Analysis in Context, 72 Tex. L. Rev. 967 (1994).


117. Id. at 424 (citation omitted); see also Lehr, 463 U.S. at 262 ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship... If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.") (footnote omitted).
promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate "a willingness himself to assume full custody of the child—not merely to block adoption by others." A court should also consider the father's public acknowledgment of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child.118

Fathers often defend an allegation that they have failed to assume parental responsibilities by claiming that their efforts to interact with the child were "thwarted" by the child's mother. For example, if the mother and father separated while the mother was pregnant, the father may argue that he had no reason to know of the pregnancy or that he was prevented from participating in the pregnancy because of his hostile relationship with the mother. This is typical in abusive relationships, where the mother has escaped the father's violence and has taken measures to isolate herself and her child from contact with him.

As commentators have noted, the unwed "thwarted" father poses a constitutional dilemma that has yet to be authoritatively settled by the Supreme Court.119 Two state courts, however, have recently granted substantial protection to "thwarted" fathers. In the "Baby Richard" case,120 the father argued that he was prohibited from forming a relation-

---

118. Adoption of Kelsey S., 823 P.2d 1216, 1236-37 (Cal. 1992) (quoting In re Raquel Marie X., 559 N.E.2d 418, 428 (N.Y. 1990)) (citation omitted) (footnote omitted); see also Adoption of Michael H., 898 P.2d 891, 901 (Cal. 1995), in which the California Supreme Court strictly construed its holding in Kelsey S. to require a prompt and unwavering demonstration of parental interest and responsibility on the part of the father.

Many states take a similar approach to that outlined in Kelsey S. by using a pre-birth "abandonment rationale" to deny the father a veto over the adoption of his newborn child. See In re Adoption of Doe, 543 So. 2d 741, 745-46, 749 (Fla. 1989) (finding that an unwed father's failure to support the mother during pregnancy when he knew of pregnancy and had means to provide some support justified termination of parental rights), cert. denied, 493 U.S. 964 (1989); Doe v. Attorney W., 410 So. 2d 1312, 1316-17 (Miss. 1982) (upholding finding that unwed father abandoned child where he suggested abortion or adoption to mother and bore none of the physical, mental, or financial burdens of the pregnancy and childbirth); see also UNIF. ADOPTION ACT § 3-504(c)(1), supra note 59, app. 4-A at 4A-82.

However, courts refuse to find that the father has abandoned the child during pregnancy if the mother withholds news of the pregnancy from him or rebuffs his efforts to maintain contact. See In re B.G.C., 496 N.E.2d 239, 246 (Iowa 1983) (rejecting contention that unwed father abandoned child prior to birth when father had no knowledge that he might be father); In re Adoption of Klonowski, 622 N.E.2d 376, 378 (Ohio Ct. App. 1993) (refusing to find abandonment where mother rejected unwed father's attempts at assistance and support).

Likewise, the court in Kelsey S. specifically noted that a father will not be penalized for failing to support the mother during pregnancy unless he had the financial means to do so. Adoption of Kelsey S., 823 P.2d at 1236-37. Thus, a father can frequently point to his indigency as a successful defense to abandonment so long as he has made some attempt to maintain contact with the child.


ship with his newborn child because the mother told him that the baby had died, and then secretly placed the child for adoption. The father learned that the child was alive fifty-seven days after the child's birth and immediately took steps to contest the adoption. The Illinois Supreme Court held that, due to the mother's deception, the father could not be penalized for failing to show interest in the child during the first thirty days of the child's life, as required under Illinois law. Nearly four years after the adoptive placement, the Illinois Supreme Court ordered that Baby Richard be returned to a father he had never known.

Similarly, in the "Baby Jessica" case, a Michigan court declined to terminate an unmarried father's parental rights where the mother had lied about the father's identity and the father did not receive notice of the adoption until one month after his daughter was born. The court refused to find abandonment on the basis of these facts and denied the adoption petition. After a series of appeals lasting two years, the court ordered the adoptive parents to return Jessica to her natural father.

2. Terminating the "Thwarted" Father's Parental Rights

In both the "Baby Richard" and the "Baby Jessica" cases, the unwed father was able to excuse his pre-birth abandonment of the mother by claiming that he was unaware of the pregnancy or was rebuffed by the mother, and by taking steps to oppose the adoption once he received notice. While in some cases a father may have made genuine, good-faith efforts that were "thwarted," in many instances the unmarried father has no intention of creating a stable relationship with his child. As one court noted:

[T]he pattern that emerges is pretty obvious: that the [father] is unwilling to lift a finger to [establish contact with his child] until [he] is faced with a moment of truth, when, to be sure, [he] will fight legal efforts to deprive [him] of [his] parental rights with tooth and nail, lapsing again into inertia and lethargy once the moment of crisis has passed.

In the meantime, the child may be permanently deprived of the opportunity to be adopted and to form a stable bond with caring parents.
In response to this concern, drafters of the Uniform Adoption Act have proposed a strict, six-month limitation on appeals and other challenges.\textsuperscript{128} Under the Act, a “thwarted” father who did not receive notice of termination proceedings must file an appeal within six months, and must further demonstrate by clear and convincing evidence that the termination is not in the child’s best interests.\textsuperscript{129} This approach codifies the opinion of some state courts that a father should have only a limited opportunity to manifest his desire to raise his child, and that the father’s interests cannot indefinitely trump the state’s interest in a prompt and final adoptive placement.\textsuperscript{130}

It is not yet clear whether the approach taken by the Uniform Adoption Act would survive due process scrutiny. However, if the Supreme Court decides to afford “thwarted” fathers the constitutional right to block an adoption, states will be in an awkward predicament. Current termination statutes provide little guidance for evaluating the fitness of a parent who has had no interaction with his newborn child. This deficiency in termination statutes likely will lead to confusing opinions, making it difficult for adoptive parents to terminate the parental rights of a “thwarted” yet clearly abusive father.\textsuperscript{131} If state ter-

\textsuperscript{128} Uniform Adoption Act § 3-707(d), supra note 59, app. 4-A. The Uniform Adoption Act is a model statute drafted and approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL). \textit{Id.} at 4A-1. “The NCCUSL is a non-profit organization of state legislators, judges, lawyers, and law professors appointed by the governors of every state for the purpose of drafting and proposing uniform state legislation on topics normally subject to state legislative authority.” Id. The Uniform Adoption Act aims to be a comprehensive and uniform state adoption code that, among other things, is responsive to the federal constitution and that delineates the legal requirements and consequences of different kinds of adoption. \textit{Id.} at 4A-6 to 4A-7. The 1969 Revised Act has been adopted by five states. \textit{9 U.L.A. pt. I, at 11} (1988). Although the 1994 version has been distributed nationwide, statistics on how many states have adopted this version, including the section summarized in the text, are not yet available.

\textsuperscript{129} Uniform Adoption Act § 3-707(d), supra note 59, app. 4-A.


\textsuperscript{131} The recent Florida case, \textit{In re Adoption of Baby E.A.W.}, 658 So. 2d 961 (Fla. 1995), \textit{cert. denied,} 116 S. Ct. 719 (1996), supports this contention. In that case, potential adoptive parents sought to terminate the parental rights of an unwed father who wished to retain custody over his newborn child. The trial court found that the father had given little emotional or financial support to the mother during her pregnancy. \textit{Id.} at 964. On one occasion during the pregnancy, the father grabbed the mother, shook her, and spit at her because she had used his razor. \textit{Id.} He frequently called her names and verbally abused her. \textit{Id.} He also resumed a sexual relationship with a former girlfriend while the mother was pregnant. \textit{Id.} at 965. When the mother told the father she was considering adoption, the father told her to “do whatever you have to do.” \textit{Id.} at 964. After the pregnant mother decided to leave the father, he continued to harass her by making early morning telephone calls to her new residence. \textit{Id.} Soon after the child was born, the mother instituted adoption proceedings. \textit{Id.} The father attempted to intercede in the proceedings, but the trial court granted the adoptive parents’ request to terminate the father’s parental rights. \textit{Id.} at 965. In order to affirm the trial court’s ruling, the Florida Supreme Court was forced to construe the father’s abusive acts towards the mother as “abandonment” so as to fall within the Florida termination statute, which did not specifically include domestic violence during pregnancy as a ground for termination. \textit{Id.}
mination statutes contained provisions allowing courts to consider the father's abuse of the mother during pregnancy, courts could more effectively evaluate the father's fitness to raise his newborn child. My proposed model termination statute provides courts with criteria for evaluating the parental fitness of fathers who have had no interaction with their newborn children, but have exhibited violence toward the mother that indicates future parental unfitness.

C. Intermediate Scrutiny Should Be Applied in Substantive Due Process Challenges to Termination Statutes

Although the parental rights of married and unwed fathers have not yet been fully defined, it appears, in any case, that they should not be deemed "fundamental" as that term has been used in traditional constitutional jurisprudence. By this, I do not mean to imply that termination statutes affecting the liberty interest in "family integrity" should receive rational basis scrutiny. Rather, I argue for an intermediate level of scrutiny to be applied to statutes affecting parental rights.

Substantive due process jurisprudence generally provides for only two levels of review: rational basis and strict scrutiny. However, constitutional scholars have identified an "intermediate level" of scrutiny underlying some Supreme Court substantive due process cases. This "intermediate" standard suggests that there is a hierarchy or, at least, a "tiering" of constitutional rights rather than the rigid, black-and-white

This somewhat belabored analysis demonstrates the difficulty courts face in trying to incorporate acts of domestic violence within termination statutes as currently worded. As one of the judges of the Florida Court of Appeals noted, a state termination statute allowing for consideration of the father's past crimes of violence would aid courts in evaluating the father's fitness to raise his newborn. See In re Adoption of Baby E.A.W., 647 So. 2d 918, 932 (Fla. Dist. Ct. App. 1994) (Pariente, J., concurring) (citing text of § 3-504(3) of the 1994 Uniform Adoption Act, which allows the court to terminate parental rights based upon the father's past acts of violence against the mother), maj. op. approved, In re Adoption of Baby E.A.W., 658 So. 2d 961 (Fla. 1995), cert. denied, 116 S. Ct. 719 (1996).

132. Recall that for purposes of my argument a fetus is a "present witness" to acts of abuse committed against the mother during pregnancy. See supra note 32 and accompanying text.

133. See In re Adoption of Baby E.A.W., 647 So. 2d at 932 (Pariente, J., concurring).

134. See infra Part IV.

135. This "intermediate level" of scrutiny has been identified in at least two Supreme Court substantive due process cases. See Galloway, supra note 73, at 642-43 & n.110 (noting that the Court's scrutiny in Carey v. Population Services Int'l, 431 U.S. 678 (1977), and in Moore v. City of East Cleveland, 431 U.S. 494 (1977), appears less exacting than strict scrutiny); see also G. Sidney Buchanan, The Right of Privacy: Past, Present, and Future, 16 Ohio N.U. L. Rev. 403, 458 (1989) (noting that, although the test applied in Moore v. City of East Cleveland is heightened scrutiny, it is not technically strict scrutiny review). Similarly, the California Supreme Court has recently outlined an intermediate "balancing test" for "penumbral" issues of privacy not rising to the level of fundamental rights. See Hill v. National Collegiate Athletic Ass'n, 865 P.2d 633, 654, 660 (Cal. 1994) (holding that not all privacy rights deserve strict scrutiny protection under the California Constitution and specifically that drug testing involving monitoring of urination will be upheld if it serves a legitimate and important competing interest).
categories of fundamental and non-fundamental rights. Borrowing from the Court’s equal protection analysis regarding gender discrimination, this intermediate-level scrutiny requires that the legislation at issue be \textit{substantially related} to an \textit{important} governmental interest.

Notably, the cases supporting the existence of an “intermediate scrutiny test” outside of the equal protection area deal with families and minor children. In \textit{Carey v. Population Services International}, the Supreme Court examined a statute prohibiting distribution of contraceptives to minors under the age of sixteen. The Court invalidated the statute under a quasi-intermediate scrutiny test, finding that the legislation did not serve a “significant state interest.” The Court acknowledged that this test is “less rigorous than the ‘compelling state interest’ test applied to ... the privacy rights of adults.” The Court reasoned, however, that lesser scrutiny was appropriate both because of “the states’ greater latitude to regulate the conduct of children” and because of children’s recognized “lesser capability for making important decisions.”

Similarly, in cases where a child’s health or safety is jeopardized by a parent’s actions, the Court has found that the state’s interest in protecting the child justifies a limitation on the parent’s decision-making autonomy. In \textit{Prince v. Massachusetts}, the Court upheld a child labor law that prohibited the defendant’s nine-year-old daughter from selling magazines on the street, in spite of the mother’s claim that the statute impaired her substantive parental rights.

The Supreme Court has also applied a quasi-intermediate scrutiny test in the area of family living arrangements. In \textit{Moore v. East Cleveland}, the Court examined a city housing ordinance that prohibited extended family members from residing with the nuclear family. The Court invalidated the statute on the ground that the government’s interest in minimizing traffic and parking congestion, while legitimate, was

---


137. \textit{Craig v. Boren}, 429 U.S. 190, 197 (1976); \textit{see also Galloway, supra note 73, at 642.}


140. \textit{Id. at 693 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976)).}

141. \textit{Id. at 693 n.15.}

142. \textit{Id.}


144. \textit{Id. at 164.}

served “marginally, at best” by the statute.\textsuperscript{146} Although the Court failed to establish definitively the test to be applied in the area of family living arrangements, it indicated that lower courts must “examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”\textsuperscript{147} This language suggests that intermediate scrutiny, not strict scrutiny, should govern issues concerning family living arrangements.\textsuperscript{148}

It is not surprising that an intermediate scrutiny test has evolved in the area of “family integrity,” as family-related matters pose a unique balancing of complex, interrelated, and often conflicting rights: the interest of the parent in preserving the “integrity and privacy of the family unit”; the interest of the state, as parens patriae, in protecting children from harm; and the interest of the child in having a “permanent, secure, stable, and loving environment.”\textsuperscript{149}

Thus, termination statutes pose a more complicated substantive due process question than do the contraception, abortion, and marriage cases, where the state’s interest in regulating morality is pitted directly against individual decision-making autonomy. Where, in contrast to the privacy cases, the health or safety of a child is at issue, the state has both the right and the duty to take protective action on the child’s behalf.\textsuperscript{150} Because the health and safety of a child is at issue in termination cases, the right to “family integrity” is necessarily constrained by the interests of the state and of the child. As the California Supreme Court has noted, the Due Process Clause is “neither absolute nor globally vague, but is carefully confined to specific sets of interests that must inevitably be weighed in the balance against competing interests before the right is judicially recognized.”\textsuperscript{151} In the context of terminating parental rights,

\textsuperscript{146} Id. at 499-500.  
\textsuperscript{147} Id. at 499.  
\textsuperscript{148} Buchanan, supra note 135, at 458-59; Galloway, supra note 73, at 643.  
\textsuperscript{149} In re Angelia P., 623 P.2d 198, 204 (Cal. 1981). Although many courts recognize the child’s interest in permanency and stability, see, e.g., In re Jasmon O., 878 P.2d 1297, 1307 (Cal. 1994) (“Children, too, have fundamental rights—including the fundamental right...to have a placement that is stable [and] permanant.”) (citations omitted); In re D.J.R., 454 N.W.2d 838, 845 (Iowa 1990) (“[T]he best interests of a child are often not served by requiring the child to stay in ‘parentless limbo.’”), children are still not afforded standing to institute a termination proceeding on their own behalf. Kingsley v. Kingsley, 623 So. 2d 780, 783 (Fla. Dist. Ct. App. 1993) (“Courts historically have recognized that unemancipated minors do not have the legal capacity to initiate legal proceedings in their own names.”). For a discussion on why minors should be granted legal capacity to initiate termination proceedings, see Christina D. Sommer, Note, Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings, 79 CORNELL L. REV. 1200 (1994).  
\textsuperscript{151} Hill v. National Collegiate Athletic Ass’n, 865 P.2d 633, 648 (Cal. 1994).
the best means to balance competing interests is by applying intermediate scrutiny to termination statutes.\textsuperscript{152}

Although the use of an intermediate scrutiny test would be inappropriate in the area of fundamental parental rights, such as the right to educate one's child, it should be applied to the "right to family integrity" implicated by the model statute proposed in Part IV below. Where a child suffers harm by witnessing domestic abuse, the state's interest in protecting the child is sufficiently strong, and the violent parent's interest in continuing his conduct sufficiently weak, that the application of intermediate scrutiny is warranted.

D. Applying Intermediate Scrutiny to a Statute Authorizing Termination of Parental Rights for Domestic Violence Committed Against a Parent in the Presence of Children

Following the above analysis, in the event of a substantive due process challenge, a statute that allows for termination of the parental rights of a father who physically abuses a mother in the presence of her children should be subject to intermediate scrutiny. In order for the statute to survive intermediate scrutiny, the state must show that it has an important governmental interest in protecting children from harm arising from witnessing domestic violence, and that the statute is substantially related to this interest.

1. Preventing Physical and Emotional Harm to Children Is an Important Governmental Interest

All states currently have statutes providing for immediate intervention in the parent-child relationship if the parent has physically abused or neglected his child.\textsuperscript{153} There is little doubt that such actions by the parent directly harm the child,\textsuperscript{154} and in such cases the state has not only an important but a compelling interest in protecting the child from immediate harm.\textsuperscript{155}

Whether the state has a compelling or important interest in protecting children from future physical harm is a more difficult question.

\textsuperscript{152} See The Supreme Court, 1991 Term—Leading Cases, 106 Harv. L. Rev. 163, 211, 219 (1992) (arguing for official recognition of an intermediate-level scrutiny test for those areas of substantive due process that do not clearly invoke fundamental rights).

\textsuperscript{153} See ELLMAN ET AL., supra note 51, at 1124; Buckholz, supra note 86, at 719. For a summary of state statutes authorizing termination on the grounds of physical or sexual abuse, see supra note 51.

\textsuperscript{154} Cassidy, supra note 72, at 925.

\textsuperscript{155} See In re R.B., 566 A.2d 1310, 1315-16 (Vt. 1989) (finding that the state has a "legitimate and compelling interest in the safety and welfare of the child"), cert. denied, 493 U.S. 1086 (1990); see also Stanley v. Illinois, 405 U.S. 645, 649 (1972) (finding that the state has a "duty" to protect minor children through a judicial determination of their interests in a neglect proceeding).
Arguably, after a state has temporarily removed the child from the physically dangerous environment, its interest in taking future, long-term action, such as termination of parental rights, is diminished. However, this argument largely has been rejected by courts and legislatures. When a parent has subjected his child to physical abuse or neglect, courts have little trouble finding that the state has an important interest in protecting the child from the likelihood of future harm.

Termination statutes, by their very nature, are prospective and predictive in nature. Their purpose is not to punish parents for past behavior, but rather to prevent future harm to children by interpreting past behavior as indicative of future parental unfitness. I argue that the prospective nature of my proposed model termination statute should not lessen its substantial relation to the state's important interest in protecting children from physical harm. The need to prevent harm to children is as important, if not more important, than addressing harm to children that has already occurred.

While the proposed model termination statute is in some respects prospective, it also addresses the present emotional injury suffered by children who witness acts of domestic violence committed against their mothers. Arguably, the state's interest in protecting children from emotional harm is less compelling than the interest in protecting children from physical harm. Although less widely recognized as a ground for termination, the prevention of emotional harm increasingly has been accepted as an important governmental interest.

In the 1960s and 1970s, several states expanded their statutes to include emotional harm to children as grounds for termination of parental rights. For example, the Texas Family Code provides for ter-

---

157. See, e.g., CAL. WELF. & INST. CODE §§ 366.25(a),(d)(1) (West Supp. 1996) (providing for permanent termination of parental rights if a child is removed from the home due to physical abuse or neglect and if reunification services have not proven successful within 18 months of removal); see also In re Adoption of Baby Boy D., 742 P.2d 1059, 1067-68 (Okla. 1985) ("Children are not static objects. They grow and develop, and their growth and development require more than day-to-day satisfaction of their physical needs .... This court recognizes that a child's need for permanence and stability, like his or her other needs, cannot be postponed .... The need for early assurance of permanence and stability is therefore an essential factor in a constitutional determination ... of whether or not to protect [a father's] potential relationship with his child.").
159. 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, 911 (1975); see also GA. CODE ANN. § 15-11-81(b)(4)(A)(iv) (Harrison 1994) (providing for termination if the parent's depraved conduct is likely to cause the child serious physical, mental, emotional, or moral harm)(emphasis added); KY. REV.
mination of parental rights if the parent has "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child" or "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." Texas courts have upheld this statute in the face of substantive due process and vagueness challenges.

Other statutes, such as the Illinois Adoption Act, indirectly protect the emotional welfare of the child by providing for termination of a parent's rights for "depravity," "open and notorious adultery or fornication," and "habitual drunkenness or addiction to drugs." In addition, at least one lower federal court has identified "physical or emotional harm" to children as presenting a compelling interest that would justify state intervention.

In sum, the state has at least an important—if not a compelling—governmental interest in protecting children from immediate and future emotional and physical harm. As such, a statute providing for termination on these grounds would survive the first prong of the intermediate scrutiny test.

2. Domestic Violence Committed by one Parent against the Other Is Substantially Related to Physical and Emotional Harm Suffered by Children

To survive intermediate scrutiny, the state must prove not only that it has an important governmental interest in protecting children from physical and emotional harm, but also that the termination statute at is-

---

161. STAT. ANN. § 625.090(1)(c) (Michie Supp. 1994) (providing for termination if the parent has continuously inflicted or allowed to be inflicted physical or emotional harm on the child) (emphasis added); N.D. CENT. CODE § 14-15-19(3) (1991) (allowing for termination if the parent's neglect causes the child to suffer serious physical, mental, moral, or emotional harm) (emphasis added); TEx. FAM. CODE ANN. § 161.001(1)(D)-(E) (West Supp. 1996) (providing for termination if the parent engages in conduct or knowingly places the child in conditions that endanger the physical or emotional well-being of the child) (emphasis added).
sue is substantially related to that interest. The substantial relationship
test is two-pronged: first, there must be a substantial relationship be-
tween domestic violence against a mother and physical and emotional
harm to the child; second, the statute must protect the child through the
means least detrimental to the rights of the father and the child her-
self.165

Until recently, few researchers considered the impact of domestic
violence on the children who witnessed this behavior.166 Similarly, social
workers frequently felt that, unless the children were physically abused,
they were merely a complicating liability in finding safe placement for
the mother.167

However, recent psychological studies indicate that domestic vio-

lence committed against a mother has a profound effect on the children
who witness it.168 Children who live in an environment of domestic vio-

lence are very likely to suffer emotional and physical abuse. Empirical

studies indicate that children of all ages who witness domestic violence

exhibit aggravated behavioral problems.169 These children are also

likely to suffer from physical injury, either through direct assaults or

by being “caught in the crossfire” of the father’s violence against the

mother.170 Moreover, even if the children are not direct victims or wit-

nesses of the abuse, they suffer harm from the mere presence of a father

who endorses violence as a means of settling family disputes.171

165. Galloway, supra note 73, at 640-42, 648 (explaining that once the government has
demonstrated a compelling state interest, it must further show (1) that the statute is “substantially
effective” or related to that interest and (2) that the statute is “necessary” or presents the least
“onerous alternative” to achieving the interest).
166. See JAFFE ET AL., supra note 1, at 15.
167. Id. at 15-16.
168. The findings summarized below come largely from a group of studies surveyed by Peter
Jaffe. See id. at 15-22, 27-31, 34-54. The studies refer to children of varying ages who have
repeatedly witnessed severe acts of emotional and physical abuse directed at their mother by her
intimate partner. Id. at 17. Again, my definition of “witness” includes children who do not directly
see the domestic violence, but who overhear the violence or witness its aftermath. See supra notes
27-30 and accompanying text.
169. John W. Fantuzzo and Carol U. Lindquist, The Effects of Observing Conjugal Violence on
Children: A Review and Analysis of Research Methodology, 4 J. FAM. VIOLENCE 77, 78, 81-85
(1989).
170. JAFFE ET AL., supra note 1, at 27. In addition, the children may be physically abused by
their mothers, as studies indicate that abused women are twice as likely to abuse their children.
MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 216-17
(1980). For a discussion of the proper application of a termination statute to women in abusive
homes, see infra notes 226-30 and accompanying text.
171. Developments, supra note 8, at 1610. At least one state, Idaho, recognizes the general
destructiveness of a violent environment by including domestic violence as a factor in determining the
parent’s fitness for custody “whether or not in the presence of the child.” IDAHO CODE § 32-
Several studies indicate that children suffer severe mental trauma from witnessing domestic violence in the home. In fact, some social scientists have described domestic violence as a form of child abuse, reasoning that the child who witnesses violence is "for all intents and purposes, exposed to the same emotional milieu as the battered child." As Lenore Walker explained:

[Children who live in a battering relationship experience the most insidious form of child abuse. Whether or not they are physically abused by either parent is less important than the psychological scars they bear from watching their fathers beat their mothers. They learn to become part of a dishonest conspiracy of silence. They learn to lie to prevent inappropriate behavior, and they learn to suspend fulfillment of their needs rather than risk another confrontation.... They do expend a lot of energy avoiding problems. They live in a world of make-believe.]

Walker's observations, made in 1979, have been increasingly supported by empirical studies of child behavior. Although children's responses vary widely depending upon the age of the child and the severity of the abuse, almost all children exposed to domestic violence demonstrate some form of behavioral problems.

Infants exposed to violence tend to exhibit poor health, including weight and eating problems. They are also plagued by sleeplessness, decreased responsiveness, and excessive screaming. Researchers believe that infants experience these symptoms largely because violence significantly disrupts their attachment to the mother. Women who live in fear of physical assault frequently are unable to maintain proper sleeping and feeding schedules for their infants. Because they commonly suffer from depression, low self-esteem, and helplessness, mothers find it difficult to muster the energy necessary to care for and

172. **Jaffe et al., supra** note 1 at 27-31, 34-54 (summarizing results of studies by Davidson, Grusznski, Hart & Brassard, Hughes, Layzer, MacLeod, McKay, Rosenbaum & O'Leary, Sopp-Gilson, and Straus among others).
175. See Jaffe *et al., supra* note 1, at 34-54 (summarizing studies by Davidson, Layzer, McKay, Rosenbaum & O'Leary, Sopp-Gilson, and Straus among others).
176. Id. at 40-41.
177. Id. at 35 (citing studies by J.I. Layzer et al., *Children in Shelters*, 9 Response 2 (1977)).
179. Id. at 27 (citing a study by S.N. Hart & M.R. Brassard, *A Major Threat to Children's Mental Health: Psychological Maltreatment*, 42 Am. Psychologist 160 (1987)).
180. Id.
nurture their children properly. Furthermore, after a severe beating, the mother may be physically separated from her infant for several days due to hospitalization. Such a prolonged separation from the mother can result in physical neglect of the child when the father is not a proper caretaker.

Latency-age children exhibit more extreme responses to domestic violence, perhaps because they are at an age where they can actively detect emotions like fear and anger. Children in this age group frequently exhibit anxiety during normal daily activities, which may be evidenced by hiding from other children, shaking uncontrollably, and stuttering. Older children in this age group also may suffer guilt, because they believe that the father's violence toward the mother is somehow their fault.

Adolescents who have experienced violence in the home for several years tend to minimize or deny it. At the same time, they increasingly resort to acts of aggression in order to resolve conflicts. Adolescent children of battered women are more likely to run away from home, attempt suicide, or engage in criminal activities. Some adolescents even exhibit violence against their mothers, believing that the mothers are responsible for the family violence and do not deserve their respect.

There is also a significant danger that children who grow up in violent households will eventually adopt their parents' behavioral patterns. Young children look primarily to their parents as role models. Consequently, young children—boys in particular—learn from violent fathers that violence is an acceptable way to deal with conflicts. They are frequently aggressive, disobedient, and destructive. Young girls who grow up with violent fathers often become withdrawn and dependent.

These behavioral traits frequently continue into adulthood. The adult sons of batterers demonstrate a dramatically higher incidence of

181. Developments, supra note 8, at 1610.
182. Id.
183. The latency period refers to children from five years of age to puberty. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1275 (1986).
185. Id. at 40-41 (citing DAVIDSON, supra note 178; Alessi & Hearn, supra note 178).
186. Id. at 28.
187. Id. at 40.
188. Id. (citing DAVIDSON, supra note 178; Alessi & Hearn, supra note 178).
189. Id. at 41; Developments, supra note 8, at 1609 n.90 (citing HARVARD LAW SCH. BATTERED WOMEN'S ADVOCACY PROJECT, TRAINING AND RESOURCE MANUAL 64 (8th ed. 1992)).
190. JAFFE ET AL., supra note 1, at 40-41.
191. Id. at 27, 35-36 (quoting S. Sopp-Gilson, Children from Violent Homes, 23 J. ONTARIO ASS'N CHILDREN'S AID SOCIETIES 1 (1980)).
192. Id.
battering than sons of nonviolent fathers. Boys who witness domestic violence are three times more likely as adults to batter their own partners, with sons from the most violent households exhibiting a rate of wife beating 1,000 times greater than sons from nonviolent homes. Likewise, a significant number of women who become victims of domestic violence witnessed domestic abuse as children. Although there is no guarantee that a child who witnesses domestic violence will exhibit these characteristics, the patterns of behavior are pronounced enough to warrant serious attention.

Although many batterers do not intentionally strike their children, they frequently act with reckless disregard for the children’s safety by creating a dangerous environment in the home. Infants and young children are particularly prone to being “caught in the crossfire.” Because they are frequently within the mother’s vicinity, children may be hit, pushed, or dropped during attacks. In addition, nearly half of abusive fathers batter mothers during pregnancy, when they are particularly vulnerable to physical attacks. This abuse makes the mother four times as likely to bear a low birth-weight baby. Once born, the

1996] STATUTORY TERMINATION OF PARENTAL RIGHTS
newborn child may suffer birth defects due to the father’s abuse of the mother. Statistics from the March of Dimes indicate that more babies are born with birth defects due to physical abuse of the mother during pregnancy than from all diseases for which we immunize.\textsuperscript{200}

Removing the mother from the home does not guarantee that the children will be safe from the father’s violence. In fact, a batterer’s aggression against the mother frequently escalates after separation.\textsuperscript{201} Children often become pawns in the father’s battle to retain control over the mother. The father may use visitation as a further opportunity to abuse the mother, in which case the children are often present as witnesses.\textsuperscript{202} In addition, batterers who obtain custody of the children after a separation sometimes abuse them in an attempt to control the mother.\textsuperscript{203}

Even when the father and mother have no post-separation contact, children who remain with their fathers are still at risk of becoming indirect victims of violence. Batterers have a high rate of recidivism, with anywhere from fifty to eighty percent of men repeating the pattern of abuse in new relationships.\textsuperscript{204} Thus, children present in the father’s household are still at risk of witnessing or becoming indirect victims of violence in the new relationship.

More abhorrent is the fact that between fifty and seventy percent of male batterers intentionally beat their children as well as their female partners.\textsuperscript{205} Because the onset of child abuse frequently postdates abuse of the mother, the child may not become a direct victim of abuse until after separation.\textsuperscript{206} Thus, in termination proceedings held shortly after

\footnotesize
\begin{itemize}
\item \textsuperscript{200} Klein & Orloff, supra note 31, at 828 & n.126 (quoting statistics from National Commission to Prevent Infant Mortality, Death Before Life: The Tragedy of Infant Mortality 16 (1988), and March of Dimes, All Pregnant Women Should Be Evaluated for Battery During Routine Prenatal Care 3 (1992)).
\item \textsuperscript{201} Bureau of Justice Statistics, U.S. Dept of Justice, Report to the Nation on Crime and Justice 33 (2d ed. 1988) (indicating that nearly 75\% of domestic violence assaults occur after separation).
\item \textsuperscript{202} Developments, supra note 8, at 1611.
\item \textsuperscript{203} Hart, Gentle Jeopardy, supra note 193, at 322.
\item \textsuperscript{204} See Saunders, supra note 194, at 53 (citing two non-random studies that reported recidivism rates with new partners ranging from 57\% to 86\%). This high rate may be attributable to common personality characteristics shared by batterers, including “dependence, depression, anxiety, low self-esteem, paranoia, dissociation from their own feelings, poor impulse control, antisocial tendencies, and hostility towards women.” Renata Vaselle-Augenstein & Annette Ehrlich, Male Batterers: Evidence for Psychopathology, in Intimate Violence: Interdisciplinary Perspectives 139, 147 (Emilio C. Viano ed., 1992).
\item \textsuperscript{205} Lenore E. Walker et al., Beyond the Juror’s Ken: Battered Women, 7 Vt. L. Rev. 1, 11 (1982) (summarizing reports from two groups of battered women indicating that children were also battered in 50\% to 70\% of the households); Stark & Flitcraft, supra note 193, at 147 (reporting that children whose mothers are battered are more than twice as likely to be physically abused than children whose mothers are not battered). See also Saunders, supra note 194, at 51-52.
\item \textsuperscript{206} Stark & Flitcraft, supra note 193, at 163.
\end{itemize}
the parents’ separation, violence against the mother should serve as a
"beacon to the trier of fact of [the batterer’s] potential for violence and
physical harm,"\(^207\) even absent specific evidence of child abuse.

Some commentators have criticized the legitimacy of the empirical
studies cited above.\(^208\) Dr. Peter Jaffe, a prominent researcher in this
field, concedes that discrepancies and errors are inherent in all social
science data. Nevertheless, he concludes that child development is sig-
nificantly impacted where children witness acts of violence committed
against their mothers.\(^209\)

In addition to the studies summarized above, the United States
Congress and most state legislatures have recognized the relationship
between domestic violence and parental unfitness. In 1990, Congress
passed a concurrent resolution holding that credible evidence of spousal
abuse should create a statutory presumption against granting custody of
the child to the abusive parent.\(^210\) Congress initiated the resolution in
response to numerous state courts’ refusal to recognize the detrimental
effects of domestic violence on children.\(^211\)

Congress found that children witnessing domestic violence suffered
emotional and physical harm, including shock, fear, guilt, low self-
esteeem, and impairment of developmental and socialization skills.\(^212\)
Congress further found that children often become targets of physical
abuse themselves or are injured while intervening on behalf of the
abused parent.\(^213\) Finally, the resolution indicated that violent tendencies
were often passed on from one generation to the next, and that children
who witness an aggressive parent may conclude that violence is an ac-
ceptable tool for resolving conflicts.\(^214\)

Although the concurrent resolution was merely advisory, forty-four
states and the District of Columbia now have legislation allowing or re-
quiring courts to consider evidence of domestic violence in intrafamily

\(^{207}\) In re Custody of Williams, 432 N.E.2d 375, 376 (Ill. App. Ct. 1982).

\(^{208}\) The commentators generally present two points of contention with such studies. First, many
of the studies are based on very small samples, sometimes fewer than 50 children, and their results
are rarely conclusive. See Cahn, supra note 22, at 1055 n.82. Second, according to Fineman, much
social science information is being used in the debate over custody without first subjecting it to critical
examination. See Martha L. Fineman, A Reply to David Chambers, 1987 Wis. L. Rev. 165, 165. But
see David L. Faigman, To Have and Have Not: Assessing the Value of Social Science to the Law as
Science and Policy, 38 Emory L.J. 1005 (1989) (defending the usefulness of social science data).

\(^{209}\) JAFFE ET AL., supra note 1, at 60.

Res. 172 Before the Subcomm. on Administrative Law and Governmental Relations of the House

\(^{211}\) Id. at 4.

\(^{212}\) Id. at 3.

\(^{213}\) Id.

\(^{214}\) Id.
custody cases. However, the legislation varies in the weight given to domestic violence evidence. Some states treat domestic violence as a "factor" to be considered in custody disputes, while others create a rebuttable or irrebuttable presumption against granting child custody to batterers.

The above studies and legislative findings show that there is a direct and substantial relationship between domestic violence against a mother and emotional and physical harm to the children who witness it. Empirical observations demonstrate that children who witness violence against their mothers initially suffer from shock, fear, and guilt, and may eventually emulate their parents’ behavior.

Those batterers who continue to abuse their partners in front of their children demonstrate reckless disregard for the emotional impact that their actions have on the children. This blatant indifference to the children’s welfare is a strong indication of parental unfitness, even if the batterer has not actually assaulted the child. Moreover, it is worth reemphasizing that physical harm to a child often accompanies acts of violence against the mother. Statistical data indicate that children who live with batterers are likely to suffer indirect physical abuse from being "caught in the crossfire," and may even become victims of direct violence in the future. The imminent danger of physical assault, along with the psychological damage engendered by witnessing or overhearing abuse, cements the substantial relationship between domestic violence and parental unfitness.

3. Crafting a Statute That Is Least Detrimental to Parental Rights

The “substantial relationship” prong of intermediate scrutiny analysis requires that the statute be drafted to achieve the important governmental interest in a manner least detrimental to the liberty interests involved. In the context of termination of parental rights, the “least detrimental alternative” standard requires a showing that severance of the parent-child bond is the least detrimental alternative for both the parent and the child.

For a violent father, the least detrimental alternative simply means that he should be given "the opportunity to rehabilitate [himself] and

215. Hofford et al., supra note 9, at 199.
216. See, e.g., 750 ILL. COMP. STAT. ANN. 5/602 (West Supp. 1996) (including domestic violence as one factor to be considered in child custody determinations); LA. REV. STAT. ANN. § 9:364 (West Supp. 1996) (creating a rebuttable presumption against custody to batterers); TEX. FAM. CODE ANN. § 153.004 (West Supp. 1996) (creating an irrebuttable presumption against joint conservatorship (custody) if there is evidence of domestic violence by one parent against the other). See infra notes 280-89 and accompanying text for a detailed description of state custody legislation.
217. For a discussion of this danger, see supra note 197 and accompanying text.
218. Galloway, supra note 73, at 638, 642.
reunite with [his children] . . . before ordering the termination of [his] rights.”219 Many state statutes already require that reunification efforts be made in dependency actions220 instituted by state agencies.221 Similarly, the proposed model termination statute would afford the violent parent a limited time frame for rehabilitation.222 A violent father cannot be allowed, however, to disguise his unfitness by indefinitely seeking counseling services. “The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it.”223 With this concern in mind, some commentators suggest that a child’s interest in stability mandates termination and permanent placement with adoptive parents after six months of separation from the natural parents.224

A violent father should not be allowed to avoid rehabilitation by arguing that his violent activities have ceased because the other parent is no longer in the household (whether due to death or voluntary absence). Incidents of post-separation violence and violence in subsequent relationships are too frequent to allow a batterer’s temporary lull in violent behavior to masquerade as genuine rehabilitation.225 Absent rehabilitation through counseling, there is no alternative short of termination that can prevent future physical and emotional harm to children. Thus, if the abusive father wishes to keep his parental rights, he must seek permanent reform through a batterer’s treatment program. Only upon successful completion of such a program should termination of the batterer’s parental rights be delayed.

By contrast, the least detrimental alternative standard requires that termination statutes not be used against a mother to terminate her pa-

---

220. For a discussion of the difference between dependency and third-party termination actions, see supra notes 38-40 and accompanying text.
222. See infra part III.C.
224. UNIF. ADOPTION ACT § 3-504 cmt., supra note 59, app. 4A at 4A-88 (suggesting a strict six-month limitation on all appeals and other challenges to an adoption placement); see also Herring, supra note 221, at 145 (citing a study indicating that children under the age of three will likely form primary attachments with surrogate parents by the end of a six-month period).
225. See supra notes 201-04 and accompanying text.
rental rights for failing to protect her children from witnessing abuse.\textsuperscript{226} Currently, in many states, a battered woman who has never physically abused her children may nonetheless have her parental rights terminated for failing to intercede in the father’s abuse of the children.\textsuperscript{227} While the general question of whether mothers should be found unfit for failing to protect their children from physical abuse is beyond the scope of this discussion,\textsuperscript{228} I contend that a third party, such as a potential adoptive parent, should not be allowed to apply a termination statute to a woman who fails to remove \textit{herself} from an abusive environment.

Such an application of the statute would likely result in premature termination of the parental rights of otherwise fit and caring mothers. This would violate the “least detrimental alternative” standard required by intermediate scrutiny. Evidence indicates that, once freed from an abusive relationship, battered women frequently regain coping skills and establish normal lives. A 1992 study reports that women who receive counseling have an eighty percent chance of removing themselves and their children from the battering environment to resume a life free from physical violence.\textsuperscript{229} This report suggests that the proper method of

\begin{itemize}
\item \textsuperscript{226} If the battered woman actively abused the children herself, she likely would be found unfit under a general termination provision dealing with physical abuse. At least one study indicates that women victims of abuse are twice as likely as women who are not abused to abuse their children. \textit{Straus et al.}, supra note 170, at 216-17. However, another study indicates that battered women’s abuse of their children generally decreases once the women escape their abusers. \textit{Saunders}, supra note 194, at 52. This report suggests that removing a mother and her children from an abusive environment is a less drastic alternative to terminating the mother’s parental rights.

\item \textsuperscript{227} \textit{See, e.g., In re Angelia P.}, 623 P.2d 198, 207 (Cal. 1981) (“Child abuse includes more than a parent’s physical abuse. . . . [T]he term may involve a failure to protect the child from harm caused by others.”); \textit{State ex rel. Human Servs. Dep’t v. Dennis S.}, 775 P.2d 252, 253 (N.M. Ct. App. 1989) (state terminated mother’s parental rights for neglect and failure to protect children from father’s abuse).

\item In \textit{In re Halamuda}, 192 P.2d 781 (Cal. Dist. Ct. App. 1948), a California appellate court terminated a mother’s parental rights for failure to protect her child from the father’s physical abuse. The court cited a probation report that characterized the mother as weak, “unstable and too ineffectual to create and execute any constructive plan for the successful reestablishment of the family unit.” \textit{Id.} at 784. The court concluded:

[C]ruelty may be inflicted mentally by failure to act as well as by physical abuse. [The mother] could not aid [her son] and did not protect [him] from the cruel and inhuman treatment of her husband. She could not and did not provide a home for him where he could live peacefully and grow into normal youth. While her faults were negative in this respect in failing to act, the results on the child were equally bad. \textit{Id.} at 784-85.

\item \textsuperscript{228} For a full discussion on this topic, see Jill A. Phillips, \textit{Re-Victimized Battered Women: Termination of Parental Rights for Failure to Protect Children from Child Abuse}, 38 \textit{Wayne L. Rev.} 1549 (1992).

\item \textsuperscript{229} \textit{Developments}, supra note 8, at 1617 n.149 (reporting that approximately 80% of 46 women treated had escaped with their children from the battering environment and were no longer abused); \textit{see also} \textit{Saunders}, supra note 194, at 53 (citing report that only 33% of battered women surveyed were involved in more than one violent relationship). Furthermore, women who abuse their children while suffering domestic violence themselves may stop the abuse once they escape their batterers. \textit{Id.} at 52.
protecting children from domestic violence is to remove the batterer—and not the mother or the children—from the home.

Thus, because mothers show such a high likelihood of improving the lives of their children once the batterer has been removed, termination of their parental rights based solely upon the mother’s pre-separation conduct would violate the “least drastic alternative” standard. The abused mother must be given a chance to raise her children in a nonviolent environment before her parenting skills are scrutinized for possible termination of her parental rights.

This reasoning has been adopted by at least one state legislature. A Louisiana custody statute incorporates a “least detrimental alternative” clause for battered women by providing that “[t]he fact that the abused parent suffers from the effects of the abuse shall not be grounds for denying that parent custody.” 230 A similar provision is incorporated into the proposed model termination statute to protect battered women from being punished for their status as victims. Only if the mother physically abuses the child herself following separation from the father should she face termination on the grounds of unfitness.

Even where termination is the means of protecting a child least detrimental to the violent father’s rights, termination must also be shown to be the “least detrimental alternative” from the child’s perspective. Citing appalling examples of abusive foster parents, 231 some commentators argue that termination is the least detrimental alternative for the child only if there is a permanent adoptive placement available. The issue of available placement frequently arises in dependency proceedings, where the state has taken immediate action to remove the child from the home without arranging for a permanent placement in advance. Thus, the children are placed in foster care while they await the determination of reunification and termination proceedings.

Although the foster care system has been highly criticized, more recent studies regarding long-term placement indicate that foster care is frequently better for a child’s development than leaving the child in an abusive home. 232 Children who are removed from abusive homes and placed in a more harmonious family environment seem to improve, while children who remain in a disturbed family environment are at risk of continuing emotional harm. 233 Thus, removal from an abusive home,

---

233. Id. at 1779.
regardless of future placement, is often preferable to leaving a child in a disturbed environment.\footnote{Id. at 1780.}

Moreover, even if children are left in long-term foster placement due to the unavailability of adoptive homes, studies indicate that such long-term placement generally is not detrimental to children. Most children in long-term foster care are not shifted around to various placements and therefore are able to mature and develop stability in their lives.\footnote{Id. at 1781, 1786.} In fact, some studies have reported demonstrable improvements in children’s emotional adjustment and school performance during foster care placement.\footnote{Id. at 1782.}

Studies of adults who were formerly in foster care placement indicate that, with few exceptions, they function at the same level as the general population.\footnote{Id. at 1782-83.} The majority of former foster children are self-supporting, law-abiding citizens with stable marriages and a strong sense of community norms.\footnote{Id. at 1783-84.} Overall, studies of current and former foster children indicate that, for children coming from violent homes, long-term foster care generally provides a better environment in which to grow.\footnote{Id. at 1785.}

Although statistics regarding foster care placement are disputed, a bright-line rule prohibiting termination where adoptive placement is unavailable would almost certainly be detrimental to the child. The California Court of Appeal’s ruling in In re Albert B.\footnote{263 Cal. Rptr. 694 (Ct. App. 1989).} graphically illustrates the danger of such a position. In Albert B., social workers removed two children, ages eighteen months and five months, from their parents’ home after determining that the children had been severely neglected.\footnote{Id. at 695-96.} The five-month-old child was so malnourished that she was in imminent danger of dying. She was also extremely dirty, with a severe case of diaper rash and dermatitis on her scalp.\footnote{Id. at 696.} The eighteen-month-old child, also extremely dirty, displayed several physical deformities, including an unstable gait and a misshapen head.\footnote{Id. at 696-97.} Doctors theorized that the infant’s misshapen head was caused by its lying in one position for extended periods of time.\footnote{Id. at 697.}

The older child would not speak at all during the day but awoke screaming at two-hour intervals during the night.\footnote{Id. at 696.} Although the children improved somewhat in temporary foster placement, they regressed each time they...
visited their biological parents. On several occasions, the children returned from such visits with various physical injuries including black eyes, bruises, scratches, and chipped teeth.

Although the appellate court found more than adequate evidence to sustain termination of the parents' rights on grounds of neglect, the court remanded the case because the trial court had failed to determine that the children were adoptable, as required under California law. Because no immediate adoptive placement was available, these severely neglected children faced further attempts at reunification with their abusive parents.

Although a termination statute must ensure that severance of the parent/child bond is the alternative least detrimental to the child's welfare, an absolute requirement of adoptive placement may, as Albert B. demonstrates, create a more dangerous and unstable environment for the child. Therefore, in an attempt to satisfy the least detrimental alternative standard, the model statute proposed below adopts a general requirement that the termination be in the child's best interests. This standard, already used in several states, would require judges to take into account the availability and desirability of alternative placements on an ad hoc, factual basis. Incorporating the "child's best interests" standard into a termination statute guarantees that all other alternatives will be considered before termination occurs. This fact-based analysis allows courts to comply with the "least detrimental alternative" standard without mandating that they adopt the ludicrous proposition that an unfit parent is always better than no parent at all.

In summary, a statute providing for termination of a father's rights for physically abusing the mother when children are present should survive a substantive due process challenge. Although the right to parent is

245. Id. at 701-02.
246. Id. at 697.
247. Id. at 700.
248. Id.
249. See infra part IV.B.1.
250. See, e.g., CAL. FAM. CODE § 7800 (West 1994); TEX. FAM. CODE ANN. § 161.001(2) (West Supp. 1996); see also Coleman, supra note 41, at 332 (noting that many states have expressly incorporated the best interest of the child requirement into their termination statutes).
252. As the court noted in In re S.O., 483 N.W.2d 602, 604-05 (Iowa 1992), the need to protect children from future physical harm justifies removal absent adoptive placement: "We do not find the difficulty in [locating] an adoptive home for children with serious emotional problems to be a sufficient reason for refusal to terminate the parent-child relationship"; see also Catherine Lombardo, Note, Adoption Need Not Always Be "Waiting in the Wings" Before Parental Rights Can Be Terminated: Considerations and Procedures for Termination, 12 J. Juv. L. 47, 49 (1991).
a recognized liberty interest, it has never been accorded "fundamental" status by the Supreme Court and should therefore be protected by no greater than intermediate scrutiny.

The proposed model termination statute would survive intermediate scrutiny. States have an important governmental interest in protecting children from physical and emotional harm. Further, social scientists have demonstrated the substantial relationship between a child's witnessing domestic violence and her suffering emotional and physical harm. State and federal legislatures have recognized this substantial relationship in specific legislative findings.

Finally, the proposed model statute is the least drastic means of alleviating the harm to children caused by witnessing domestic abuse. It allows an abusive father a limited opportunity to successfully rehabilitate himself so as to be able to retain his parental rights without future harm to the child. It also takes into account, in each case, whether termination is the least drastic alternative for the child by imposing a "best interests" standard in the proceedings. Thus, the proposed model termination statute falls well within the parameters of federal substantive due process requirements.

III
PROCEDURAL DUE PROCESS AND BURDENS OF PROOF

Introducing domestic violence evidence into termination proceedings raises several procedural issues: What degree of proof should be required to establish that domestic violence actually occurred? Once domestic violence has been established, what weight should be given to domestic violence evidence in determining parental unfitness? Once unfitness has been presumptively determined, what avenues, if any, should be available to the unfit parent to rebut such a presumption?

A. The Degree of Proof Required to Establish Past Acts of Domestic Violence

The Supreme Court has clearly defined the procedural due process protection afforded parents in termination proceedings. In *Santosky v. Kramer*, the Court held that for mothers and married fathers, procedural due process requires that the state prove allegations of unfitness, neglect, or abandonment by clear and convincing evidence. The

---

254. For a discussion of the substantive and procedural rights afforded to unwed fathers, see supra part II.B.
255. *Santosky*, 455 U.S. at 769. Clear and convincing evidence requires that "the evidence be so clear as to leave no substantial doubt"; it is a finding of "high probability." *In re Angelia P.*, 623 P.2d 198, 204 (Cal. 1981); see also *BLACK'S LAW DICTIONARY* 251 (6th ed. 1990) (defining clear
Court reasoned that application of the "beyond a reasonable doubt" standard was rarely appropriate in noncriminal proceedings. This is especially true in termination hearings because, according to the Court, they often involve issues like motive, affection, and psychiatric condition that are difficult to prove to this level of certainty.

Therefore, under Santosky, a state legislature could conclude that the "beyond a reasonable doubt" standard would "erect an unreasonable barrier to state efforts to free permanently neglected children for adoption." At the time of the Santosky decision, thirty-one states had already adopted a clear and convincing evidence standard of proof for termination proceedings. However, as explained below, some states have gone beyond the Santosky holding and afforded parents the procedural protection of "proof beyond a reasonable doubt" in limited circumstances.

At least twelve states have enacted termination statutes that allow a court to consider past actions of the parent not directed at the child but indicative of future parental unfitness. In those states, the party petitioning for termination must prove that the parent suffered a felony conviction for his past action, and that the facts of the crime prove the parent's unfitness to have future custody of the child.

This added level of procedural protection is likely due to the inherent risk of error involved in "predicting" future parental fitness based upon past criminal activities. When a child is the direct victim of abuse, state courts do not require a felony conviction to find the parent unfit because the link between child abuse and unfitness is clear. In such instances, the court may terminate parental rights upon a showing and convincing proof as that which "results in reasonable certainty of the truth of the ultimate fact in controversy").

256. Santosky, 455 U.S. at 768-69.
257. Id. at 769.
258. Id. at 749 n.3. The Uniform Adoption Act also endorses a clear and convincing evidence standard for termination proceedings. UNIF. ADOPTION ACT § 3-504, supra note 59, app. 4-A at 4A-82.
259. See supra note 55.
260. Typical factors indicating unfitness include the chronic use of alcohol, the violent nature of the criminal act, and the commission of the act in the child’s presence. Supra note 57 and accompanying text.
261. Using past character evidence to predict future behavior does not offend the Federal Rules of Evidence when character is an element of the statute. In this situation, which is commonly referred to as "character in issue," evidence regarding character is allowed under Federal Rule of Evidence 404(a). See Fed. R. Evid. 404(a), advisory committee’s note. Specifically, in the context of domestic violence, past evidence of abuse is admissible to prove subsequent violence against the same victim. See People v. Zack, 229 Cal. Rptr. 317, 320 (Ct. App. 1986) ("Where a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g., identity, intent, motive, etcetera, are admissible based solely upon the consideration of identical perpetrator and victim without resort to a ‘distinctive modus operandi’ analysis of other factors.").
of child abuse by clear and convincing evidence. By contrast, when the parent has committed a criminal act against a person other than the child, states are understandably more hesitant to rely on this evidence as a predictor of parental unfitness. The showing of a causal connection between the past act and future unfitness required by these twelve states, combined with the added requirement of a felony conviction, sufficiently protects the parent from unfounded findings of unfitness.

Arguably, a father who commits domestic violence against a mother is similarly situated to a father who commits a crime against any third party. This would mean that in order to terminate a violent father’s parental rights because he abused a mother in her children’s presence, the father would have to have suffered a felony conviction for domestic violence, based upon a “beyond a reasonable doubt” standard of proof. However, this should not be so. Rather, domestic violence should be treated like child abuse or neglect, which need only be proven by clear and convincing evidence at the termination proceeding.

A termination statute need not require a felony conviction for domestic violence in order to comply with procedural due process requirements. This is true for two reasons. First, as shown above, there is a substantial relationship between domestic violence and parental unfitness. When a father routinely beats a mother in close proximity to her children, he implicitly demonstrates his disregard for the children’s emotional welfare. Unlike the general category of “past felony convictions,” which includes felonies committed against third parties outside of the child’s presence, the very nature of domestic violence implies unfitness. Thus, a court need not take exhaustive due process precautions as it does when evaluating a parent’s felony conviction for a crime unrelated to domestic violence.

Second, requiring that domestic violence be proven through a past felony conviction would greatly impede the use of this evidence in termination proceedings. Domestic violence is drastically underreported to police. When it is reported, police make few arrests, particularly if the police do not witness the abuse or the batterer has left the scene.

262. Klein & Orloff, supra note 31, at 808 n.4 (estimating that spousal abuse is not reported between 43% and 90% of the time) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE (1980)).

263. See U.S. Comm’n on Civil Rights, Under the Rule of Thumb: Battered Women and the Administration of Justice 21-22 (1982) [hereinafter Administration of Justice] (stating that police frequently fail to respond to domestic disturbance calls, fail to arrest in appropriate cases, and sometimes use reporting practices that mask the nature and frequency of the crime); see also Paul C. Friday et al., Policing Domestic Violence: Perceptions, Experience and Reality, 16 CRIM. JUST. REV. 198, 199-200 (1991) (stating that failure to arrest can be attributed to several factors, including poor officer training, exaggerated perceptions about the danger of domestic violence investigations, cynicism about the woman’s intentions to stay away from the batterer, and sexist attitudes).
If the batterer is arrested and subsequently prosecuted, his crime is frequently charged as a misdemeanor. In addition, because of the preference for counseling, many batterers are able to avoid a criminal conviction by participating in a diversion program. Even when victims are fully cooperative, they have little guarantee that their abusers will actually be prosecuted or convicted. Thus, requiring a felony domestic violence conviction in termination proceedings would place a near-impossible burden on those seeking to demonstrate the father’s abusive nature.

Of course, doing away with the requirement of a felony conviction will increase the risk that a father may have his parental rights terminated based upon false accusations of domestic violence. However, this risk is quite low. As discussed below, a court may require corroborating evidence of past domestic violence before ordering termination. Such corroborating evidence would likely be reliable, since fraudulent claims of domestic violence are rare. Domestic violence is notoriously difficult to prove, especially when a judge requires independent corroboration through police reports and medical records. This fact alone deters many women from pursuing legitimate claims, let alone making false ones.

Furthermore, in the case of a woman seeking to give her baby up for adoption, the risk of fabrication would be further reduced because the woman would have little motive to lie. The potential for false claims is much higher in custody disputes, where the mother seeks to retain control over her child at the expense of the father’s custody. Where fabrication is a concern, however, states may reduce the incidence of false allegations of domestic violence by allowing conditional adoptions. These adoptions enable the mother to give consent conditioned upon termination of the father’s parental rights, and afford her the op-

264. Administration of Justice, supra note 263, at 33-34 (finding that prosecutors often give low priority to domestic violence cases; hesitate to file charges or, if filed, charge defendants with a lesser crime; fail to prosecute or obtain convictions but then attribute low prosecution rates to uncooperative victims; and discourage use of subpoenas to ensure victim cooperation).


266. In fact, courts have refused to impose a duty upon prosecutors to pursue legitimate domestic violence charges, and have held prosecutors immune from suit by the relatives of women killed by their abuser following their unsuccessful attempts to seek prosecutorial assistance. See Miller v. Curry, 625 S.W.2d 84, 87 (Tex. Ct. App. 1981); Collins v. King County, 742 P.2d 185, 187-88 (Wash. Ct. App. 1987).

267. See infra note 273 and accompanying text.

268. See, e.g., Peter Finn, Civil Protection Orders: A Flawed Opportunity for Intervention, in Woman Battering: Policy Responses 155, 171 (Michael Steinman ed., 1991) (commenting that “while many courts and law enforcement agencies have their ‘horror story’ about a woman who made life difficult for her husband or boyfriend through fraudulent claims of abuse, documented instances of women abusing the process are rare”).
tion of revoking consent and taking the child back if the father succeeds in frustrating the adoption. Thus, she has less reason to lie during the proceedings because she retains ultimate control over the custody of her child.

In light of the evidentiary concerns enumerated above, proof of domestic violence by clear and convincing evidence in a termination proceeding would achieve a balance between the abusive father's parental rights and the state's interest as parens patriae in preserving and promoting the child's welfare. Requiring a felony conviction would place an unreasonable burden on the state or private party seeking to introduce domestic violence evidence. In addition, a "beyond a reasonable doubt" showing is unnecessary to protect the abusive parent, who will not suffer a criminal conviction based solely upon the civil court's unfitness determination.269

Having determined that acts of domestic violence must be shown by clear and convincing evidence, the question arises as to what types of evidence should be admissible to prove these acts. The strongest form of evidence admissible to prove domestic violence is, of course, a past felony or misdemeanor conviction.270 In cases where the abusive parent has been convicted of domestic violence, a court could review the facts of the criminal proceeding, thus avoiding the necessity of eliciting further testimony from the victim. However, in all other instances, direct testimony by the victim should be required to establish the nature and extent of the violence. The only exception should be when the victim is no longer available for testimony, due to death or disappearance. In these instances, courts traditionally have allowed admission of any of the victim's past statements taken under oath and subject to cross examination by the defendant.271

The existence of a civil domestic violence restraining order should serve as corroborative but not conclusive proof of the father's acts of violence. Because civil restraining order proceedings are frequently conducted in an informal setting, with the respondent appearing in pro

269. Although the civil finding of domestic violence within the context of a termination proceeding could be used as evidence of guilt in a subsequent criminal prosecution, the prosecutor would, by necessity, be required to present additional evidence, as the termination proceeding is adjudicated on a "clear and convincing" evidence standard, not a "beyond a reasonable doubt" standard.

270. States that currently limit their termination statutes to considering only felony convictions should broaden the statutes to admit misdemeanor convictions for domestic violence crimes. Frequently, the defendant's act of violence rises to the level of a felony but is only charged as a misdemeanor due to administrative concerns. See supra note 264. Thus, misdemeanor domestic violence convictions potentially carry as much probative value as felonies and should be equally admissible in termination proceedings.

per (if at all), issuance of a restraining order cannot have the same persuasive force as a criminal conviction. Furthermore, respondents frequently stipulate to the entry of the order, not realizing the potential consequences for future custody or termination proceedings. Thus, the violent father should have the opportunity to reexamine the victim under oath during the termination proceeding, when the consequences of her accusation are fully apparent.

A criminal stay away order, issued in conjunction with a pending criminal case, also could serve as persuasive evidence of domestic violence. A criminal stay away order raises a stronger presumption that domestic violence occurred than does a civil order, because criminal orders are issued in the context of a criminal proceeding where the batterer is usually represented by counsel. Ultimately, the strength of the presumption raised by a civil or criminal restraining order should depend upon the quantity and quality of the evidence presented at the hearing.

Criminal prosecution for violation of a restraining order should also serve as corroborative evidence of the parent’s propensity to commit domestic violence. However, because minimal telephone or mail contact could constitute a violation, the facts surrounding the conviction must be scrutinized carefully to determine whether they indicate parental unfitness. This caveat also applies to a civil contempt finding based upon violation of a civil restraining order.

Absent a prior criminal or civil finding, the victim may be required to produce, in addition to her testimony, some other form of corroborative evidence indicating the extent of the domestic violence. For example, the California custody statute suggests that

As a prerequisite to [considering domestic violence], the court may require substantial independent corroboration, including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities or other... organizations providing services to victims of sexual assault or domestic violence.

Of course, the level of corroboration required to establish the existence of domestic violence lies within the discretion of the trial court. The testimony of a credible victim may be sufficient to compensate for a lack of other corroborative evidence. However, considering the magnitude of the parental interest and the danger of false accusations, trial

272. See, e.g., CAL. PENAL CODE § 136.2 (West Supp. 1996) (allowing the judge to issue a stay away order in any pending domestic violence case where it appears that the defendant is attempting to intimidate the victim).

273. CAL. FAM. CODE § 3011(b) (West 1994) (emphasis added).
courts may require some form of independent corroborative evidence in many cases.274

Finally, to prove that domestic violence is truly relevant in a termination proceeding, there must be some showing that the violence occurred in the presence of the child.275 This, however, should not be difficult to prove in most cases. Reports by battered women indicate that eighty-seven percent of their children witness their abuse.276 In fact, children are frequently the only witnesses to the abuse and may be responsible for calling the police or alerting a neighbor. As Dr. Jaffe points out, children can witness domestic violence in several ways.277 They may directly observe the father striking or threatening the mother, they may overhear the abuse from another area of the home, or they may view the results of the abuse in the form of broken bones, black eyes, bleeding, and facial swelling. Almost all children interviewed by Dr. Jaffe's research team could describe detailed accounts of violent behavior that their parents never realized they had witnessed.278 This, of course, indicates that the exposure estimates cited above may be underrepresentative.

State courts in Texas have accepted the statistical reality that the close proximity of family members dictates that all children in the household will be aware of domestic violence. Thus, the courts have concluded that when a child lives in close association with his or her parents, "it is obvious that the abuse of [a family member] occurred in [the child's] presence."279 Following this reasoning, a child should not be required to testify in detail about domestic violence incidents to prove his or her exposure. Rather, evidence that the child was living in the household where domestic violence took place should be sufficient.

B. The Weight To Be Given to Domestic Violence Evidence

Once domestic violence has been established by clear and convincing evidence in the termination proceeding, a court must receive

274. Unfortunately, allowing the trial judge to determine the required level of corroborating evidence may result in abuses of the statute. See, e.g., Simmons v. Simmons, 649 So. 2d 799 (La. Ct. App. 1995) (finding no error in custody proceeding by judge who refused to find history of domestic violence despite abuser's admissions, because victim was only able to document one hospital visit). Despite this disturbing example, the procedural due process concerns enumerated above would seem to mandate that judges be able to require some form of corroborating evidence if deemed necessary in the individual proceeding.

275. As defined, violence in the child's "presence" would include evidence that the child witnessed the abuse or the effects of the abuse, overheard the abuse, or was present in the home during a demonstrated period of abuse. See supra notes 27-30 and accompanying text.

276. Developments, supra note 8, at 1609.

277. JAFFE ET AL., supra note 1, at 17.

278. Id. at 21.

guidance as to the significance of such evidence in establishing unfitness. The custody statutes of various states provide three possible approaches for weighing domestic violence evidence: (1) domestic violence must be considered as a factor in determining unfitness, (2) domestic violence creates a rebuttable presumption that the parent is unfit to retain control of the child, or (3) domestic violence creates an irrebuttable presumption that the parent is unfit to retain control of the child.

I. Illinois’ “Inclusive Factor” Approach

Illinois employs an “inclusive factor” approach to domestic violence in its custody statute. The Illinois Marriage and Dissolution Act lists eight factors that the court must consider in determining whether a custody award is in the best interests of the child, including the occurrence of ongoing domestic violence directed against the child or another person.

The Illinois approach ostensibly assists battered women in custody disputes by lending statutory validity to the link between parental fitness and domestic violence. However, this “inclusive factor” approach provides no guidance as to how much weight domestic violence evidence should carry in determining a parent’s fitness to retain custody. Rather, it only mandates the admission of such evidence. After listening to domestic violence evidence, a judge is free to disregard it as trivial or irrelevant to the custody decision at hand. In fact, in at least one case, the Illinois Court of Appeals affirmed a trial court’s award of custody to a father who had been convicted of voluntary manslaughter for strangling the mother.

The court explained that the trial judge had broad discretion to determine fitness and that violence against the other parent was only one of the factors to be considered in determining the child’s

---

281. Other factors to be considered are the wishes of the child and his parents, the child’s interaction with his parents, the child’s adjustment to his surroundings, the mental and physical health of all parties, and the willingness of each parent to encourage a continuing relationship between the child and the other parent. Id. Thirty-five states mandate that the court consider domestic violence when determining the best interests of the child. Hofford et al., supra note 9, at 199. Other states incorporate evidence of domestic violence in statutory provisions other than the “best interests of the child” provision. For example, 11 states statutorily mandate consideration of domestic violence in their joint custody statutes, creating a presumption that joint custody is not in the best interests of the child if there has been a showing of domestic violence. Id. at 200-01. By contrast, many states still utilize a “friendly parent” provision, providing that custody will be awarded to the parent who is most likely to facilitate contact between the child and the other parent. This provision constitutes a strong prejudice against domestic violence victims, who frequently attempt to shield themselves and their children from contact with the batterer. Recognizing this dilemma, a few states have now enacted an exception to the provision if domestic violence is shown. Id. at 202.
best interests. Thus, the Illinois statute does little to neutralize the bias that judges frequently exhibit against battered women.

2. Texas' "Irrebuttable Presumption" Approach

On the opposite end of the spectrum, Texas prohibits an award of joint parental conservatorship (custody) upon a finding that one parent has physically abused the other parent. The statute reads: "The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present . . . physical or sexual abuse by one parent directed against the other parent, a spouse, or a child." This statutory approach creates an irrebuttable presumption that the abusive parent is unfit to share control over his child with the other parent. This approach seems to be as problematic as the Illinois statute, because it carries the presumption of unfitness too far. Rather than acknowledge the batterer’s ability to reform, it permanently severs his contact with the child in favor of custody to the other parent. Although there is strong statistical evidence that a batterer will continue to jeopardize his children’s welfare in the future, the ultimate determination of unfitness in each case should be made by the trial court, not by legislative mandate. This argument is even stronger in the termination context, where the parent’s rights can be permanently severed.

3. Louisiana’s "Rebuttable Presumption" Approach

The Louisiana custody statute presents an appropriate compromise between the "inclusive factor" and "irrebuttable presumption" approaches described above. The statute goes one step beyond Illinois law by creating a "presumption that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children." However, it stops short of the Texas approach and allows the presumption to be overcome by a showing that the parent has successfully completed a treatment program and is not abusing alcohol or drugs, and that it is in the best interest of the child to have contact with him.

283. Id. at 986-87.
285. Id.
286. However, it is questionable whether the Texas statute employs an irrebuttable presumption of unfitness in all contexts, because it does not explicitly exclude an award of sole custody to the batterer. Thus, this statute may be aimed at preventing harms to the child that result from continuing contact between the parents, not from contact between battering parent and child. See Cahn, supra note 22, at 1067.
288. Id.
This approach is preferable to the other two statutes because it recognizes the substantial statistical link between domestic violence and unfitness without denying the offending parent an opportunity to rehabilitate. In fact, in the context of termination proceedings, procedural due process may require that a parent be given the opportunity to rebut a legislatively mandated presumption of unfitness for the statute to survive constitutional scrutiny.\textsuperscript{289}

C. Overcoming the Presumption of Unfitness

Allowing a batterer to prove his rehabilitation presents several procedural concerns. Initially, what burden of proof should be required for a father to demonstrate his rehabilitation? The Louisiana statute requires a parent to prove his reform by a preponderance of the evidence.\textsuperscript{290} By contrast, the Illinois termination statute provides that murder of a parent creates a presumption of unfitness that may only be overcome by clear and convincing evidence of fitness to parent.\textsuperscript{291}

When debating which level of proof to impose upon an abusive parent seeking to establish his reform, a legislature must weigh three factors: "the private interests [of the parent and child] affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure."\textsuperscript{292} As one court has noted, requiring proof of rehabilitation by clear and convincing evidence rather than a preponderance of the evidence "would result in a greater risk that parental rights would be erroneously severed, but a smaller risk that a child, as a result of a factual error, would be forced to return to a hostile, if not dangerous, family situation or spend his childhood in a series of temporary foster homes."\textsuperscript{293} In light of batterers' high recidivism rates, the risk of error should be balanced in favor of the child's interests by requiring that the batterer prove his rehabilitation by clear and convincing evidence.

\textsuperscript{289} Wanda E. Wakefield, Annotation, \textit{Validity of State Statute Providing for Termination of Parental Rights}, 22 A.L.R.4th 774, 779 (1983). Unfortunately, even the specific legislative mandate that evidence of a history of domestic violence give rise to a presumption of unfitness may be circumvented by a strict interpretation of the facts. \textit{See} Simmons v. Simmons, 649 So. 2d 799, 801 (La. Ct. App. 1995) (finding that occasional incidents of violence by husband against wife did not rise to the level of "history of perpetrating family violence" where wife could only present medical records relating to one assault and where husband claimed that violence was provoked by wife's adultery).


When the child is an infant, additional timing issues arise regarding rehabilitation. First, if the father completed a batterers' counseling program sometime prior to the infant's birth, and has not had any subsequent contact with the mother or the infant, he may not yet have had an opportunity to "test" his newly developed coping skills. In such a case, the court should consider how recently the father underwent the treatment program, as well as any available testimony regarding the father's success in subsequent intimate relationships, in determining whether the father has proven his rehabilitation.

A second concern arises where the child is an infant and the parents have recently separated. Under these circumstances, the father may not have had an opportunity to participate in a treatment program. Here, the termination proceeding should be continued for a three-month period, which gives the father a chance to enroll and begin satisfactory progress in a program. If he fails to take preliminary steps during this period, the termination proceeding would resume and evidence would be presented regarding his unfitness. However, if the father demonstrates a commitment to the program after three months, the child should be placed with the mother or other relative, if available, or in state protective custody pending the father's completion of the program. At the end of the program, the petitioning parties may choose to reinstate the termination proceeding and introduce evidence of the father's domestic abuse, which would require the father to prove successful completion of the program and cessation of all abusive behavior by clear and convincing evidence.

294. A three-month continuance is not unreasonably short in light of the child's pressing interest in immediate placement and the expanding availability of batterer's treatment programs. A parent's right to reunification services is not unlimited, and after extended periods of time, the child's interest in stability outweighs the parent's interest in regaining custody of the child. See In re Jasmon O., 878 P.2d 1297, 1311 (Cal. 1994). However, a father may be deterred from enrolling in a batterer's counseling program within three months due to indigency. Many states provide reunification and counseling services free of charge to indigent parents facing state-initiated termination proceedings. See e.g., id.; In re Parental Rights of P.A.M., 505 N.W.2d 395, 398 (S.D. 1993). In addition, many states provide indigent parents with counsel in termination proceedings, even when the proceeding was filed by a private party. See Joel E. Smith, Annotation, Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights, 80 A.L.R.3d 1141, §5 (1977 & Supp. 1995); see also Odoms v. Batts, 791 S.W.2d 677 (Tx. Ct. App. 1990) (requiring trial court to appoint attorney to indigent father in termination proceeding filed by private parties). The Supreme Court, however, has not recognized a constitutional right to counsel in every case. See Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) (holding that right to counsel in termination proceedings is to be determined by the trial judge on an ad hoc basis). In light of the important liberty interest in parenting and the essential role treatment programs will play under a termination statute incorporating domestic violence, states should provide indigent parents with free rehabilitation programs upon request. This requirement should not place a heavy burden on states, as many batterer's programs already employ sliding scale fees for individuals ordered to counseling in conjunction with domestic violence convictions.
If the father successfully proves his rehabilitation, he should not immediately receive full custody of his child. Rather, the court should deny the petition to terminate and allow the child to remain in a temporary placement with a relative or foster parent. The child would then be integrated into her father’s custody with careful supervision over a period of six months to one year. During this time, the father would receive frequent visitation with the child as well as valuable advice about child rearing from qualified foster parents. This transition could drastically enhance the father's understanding of, and relationship with, his child. The alternative approach of placing a child exclusively with a father who has little or no experience in child rearing would be frustrating and detrimental to both the father and the child.

IV
THE MODEL STATUTE

Because current termination statutes fail to make the connection between domestic violence and harm to child “witnesses”—at great cost to many children—I propose the following statute, which incorporates domestic violence into termination proceedings.

Much of the language in the model statute is borrowed from current state custody statutes. Although termination is a more severe procedure, I argue that the evidence presented above is strong enough to support the extension of this language from the custody context to the termination context.

ADOPTION AND INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

A. CONSENT NOT REQUIRED

Consent to adoption of a child is not required from the biological father if the child was conceived through marital or nonmarital rape, child molestation, or incest for which the father was convicted.

B. TERMINATION BASED UPON UNFITNESS

1. The court shall terminate any relationship between the respondent parent and the child if the court finds upon clear and convincing

---

295. The model code is divided into “consent” and “termination” sections in order to address two scenarios. Section (A) would dispense with a father’s consent to an adoption completely if the child was conceived through rape, while sections (B)(1) and (2) would raise a presumption in favor of terminating a father’s parental rights for raping the mother prior or subsequent to conception of the child. This framework follows several state statutes already in effect. See supra notes 99-102 and accompanying text.

evidence that the parent is unfit to raise the child and that termination is
in the best interests of the child.

2. Grounds for unfitness include but are not limited to evidence of any of the following conditions:

(a) The parent has been convicted of a crime of violence against the other parent or of violating a restraining or protective order, including a finding of contempt of court; the acts of violence were committed in a home environment where the child was present; and the facts of the crime or violation and the respondent's behavior indicate that the respondent is unfit to maintain a relationship of parent and child with the minor.297

(b) There exists a history of physical abuse by one parent against the other parent in a home environment where the child was present. As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration, including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence.298

(c) For the purposes of this statute, the requirement that the child be present during the acts of physical abuse does not require a showing that the child directly witnessed the abuse. Evidence that the child was in the home environment during the period of abuse, that the child overheard the abuse, or that the child witnessed the physical effects of the abuse are all sufficient. Evidence that the mother was pregnant with the child during periods of physical abuse is also sufficient to prove the child's presence.

3. The above showings shall create a presumption of unfitness that may be overcome only by clear and convincing evidence.299

(a) That the violent parent has successfully completed a batterers' treatment program, is not currently engaging in violent behavior, and is not abusing alcohol or engaging in the use of illegal drugs,300 and

297. See UNIF. ADOPTION ACT § 3-504, supra note 59, app. 4A at 4A-82.
298. See CAL. FAM. CODE § 3011 (West 1994).
(b) That it is in the best interests of the child to have a continuing legal and physical relationship with the parent.301

4. Time limitation for rehabilitation: within three months from the institution of the adoption proceeding, the parent wishing to block the adoption must begin treatment in a batterers’ treatment program. If, at the end of the three-month period, the parent is making successful progress in the program, the termination proceeding shall be postponed pending successful completion of the program. If the parent fails to complete the program, the petitioning party shall have the option of reinstituting the termination proceeding against the parent.

5. Upon successful proof of rehabilitation, the termination proceeding shall be dismissed and the child shall be placed with an appropriate relative or taken into state protective custody. The child shall then be reintegrated into the rehabilitated parent’s household with counseling and supervision over a period of six months to one year. However, if the non-violent parent has placed the child for adoption conditioned upon successful termination of the violent parent’s rights, the non-violent parent shall have the option of reasserting parental rights and instituting custody proceedings to determine the parents’ respective rights to custody of the child.

6. The fact that the abused parent suffers from the effects of the abuse, including any failure to decrease her children’s exposure to violence by removing herself and the children from the abusive environment, shall not be grounds for terminating that person’s parental rights.302

This model statute is designed to supplement the other grounds for unfitness already provided for by state statutes. The statute is also de-

301. Id. Once the petitioner has proven that domestic violence exists by clear and convincing evidence and that the best interests of the child warrant termination, it is permissible to shift the burden of proof to the parent to show not only that he has reformed and is no longer unfit, but also that the child’s best interests are truly served by a continuing relationship with the reformed parent. The best interests evaluation will be especially pertinent when the parent has not yet begun a treatment program and is arguing for further delay in the proceedings (beyond the three-month period) in order to reform himself. In this case, the burden will be on the father to show that the best interests of the child favor continued attempts at reunification, rather than a stable placement with adoptive parents. If the parent has begun a treatment program but has not successfully completed that program, he will have the burden of showing that the best interests of the child mandate dismissal of the proceedings.

signed to operate in conjunction with existing state statutes that limit the unmarried father's due process rights as a result of his abandonment or failure to demonstrate a substantial commitment to his children. The model statute merely fills a gap in the existing state statutes by providing an additional ground for termination.

This statute protects children from physical and emotional harm resulting from witnessing domestic violence without infringing on the substantive and procedural due process rights of abusive fathers. It sets a clear threshold for the introduction of evidence of domestic violence in termination proceedings, and provides a rehabilitation period for fathers who intend to correct their behavior. It is an effective solution to a problem that has been neglected for too long.

**CONCLUSION**

Domestic violence is an epidemic that infiltrates the homes of many American families. Too often children in the household become a captive audience for, or direct victims of, their father's physical abuse. Both psychological studies and legislative findings confirm that children suffer extreme emotional harm as a result of being raised in violent homes. They become despondent, frightened, and antisocial. They are also at risk of suffering indirect or direct physical abuse from the batterer. Because batterers have high rates of recidivism, even newborn children face the risk of physical and emotional harm by remaining with violent fathers. Furthermore, maturity into adulthood will not guarantee these children a safe haven from violence. To the contrary, studies indicate that many children grow up to emulate their parents' behavior and become either batterers or victims of batterers as adults.

Courts have mistakenly resisted acknowledging the connection between domestic violence and parental unfitness. Any concern they may have over the strength of that connection dissipates in the face of the sociological evidence. Based upon this evidence, and the legislative findings by Congress and the majority of state legislatures, a statute including domestic violence by one parent against the other as a ground for termination likely would survive a due process challenge under intermediate scrutiny.

During a termination proceeding, the petitioning party would be required to establish the abusive parent's acts of domestic violence by clear and convincing evidence. Although this is a lesser standard of proof than previously has been required by states that allow use of past felony convictions to indicate unfitness, the lesser showing does not raise constitutional concerns. Because the connection between domestic violence and parental unfitness has been determined to exist as a matter
of law and is statutorily codified, the legislature need not require a higher level of proof.

Evidence of domestic violence would create a presumption of unfitness, which the father could then rebut by showing his rehabilitation by clear and convincing evidence. Thus, admission of domestic violence evidence in and of itself would not automatically terminate a father’s rights. Rather, the judge would retain ultimate discretion to determine unfitness, according to legislative guidelines for finding rehabilitation. In those cases where rehabilitation is not feasible, the proposed model termination statute would help to place children in supportive environments before their lives are irreparably damaged by domestic violence. The statute, however, would not serve as a sword against the victimized woman by terminating her parental rights for not removing herself and her children from the abusive environment.

The model statute I have proposed is designed to alleviate the social epidemic facing our children. Children are entitled to live in a loving and supportive environment where they may experiment and grow free from the stress inherent in a violent household. The state, as parens patriae, has not only the right but the obligation to protect children from abusive parents. If the state fails to intercede, children likely will mature into mirror images of their parents, perpetuating the cycle of domestic violence into future generations. Admittedly, termination is a drastic means by which to achieve the goal of child protection. However, in light of batterers’ high rates of recidivism and post-separation violence, termination is the only sure way to protect children from chronically abusive parents.