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Erwin Chemerinsky
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DEFINING THE "BEST INTERESTS":
CONSTITUTIONAL PROTECTIONS IN
IN VOLUNTARY ADOPTIONS

by Erwin Chemerinsky*

Usually, a child's adoption occurs only after his natural parents consent.1 The right to withhold consent, however, is not absolute.2 Every state has enacted a statute providing for involuntary termination of parental rights.3 Traditionally, these laws provide that natural parents have a right to the custody of their children until and unless they are shown to be unfit.4 In most states the pertinent statute sets out specific circumstances which are sufficient to justify an involuntary adoption, such as mental disability,5 failure to provide support,6 habitual drunkenness,7 child neglect or abuse,8 abandonment,9 or extended imprisonment.10

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6 See, e.g., IND. CODE ANN. § 31-3-1-6(g)(1) (Burns Supp. 1975); MINN. STAT. ANN. § 260.221(b)(2) (West Supp. 1975).


9 See, e.g., VT. STAT. ANN. tit. 15, § 435 (Supp. 1974).

Many states, however, have concluded that statutes which enumerate grounds for termination are too restrictive, preventing adoptions in situations where such a course is essential. Traditional statutes do not allow for adoptions to maintain a stable, existing relationship between the child and the prospective adoptive parents. Often, children who are apart from their natural parents for a long period of time develop strong ties with another adult. Separation from this “psychological parent” could do great emotional harm to the child. Thus, a number of jurisdictions have enacted laws which provide for adoptions without the parents’ approval upon a finding that the consent is “withheld contrary to the best interests of the child.”

Until recently, the expansive phrase “best interests of the child” has been given a narrow construction. Courts in states with statutes using the term have held that “best interests” requires proof of unfitness before permanent separation of parent and child can occur. In the past few years, though, a number of state supreme courts have affirmed involuntary adoptions, despite the absence of a finding of unfitness or the need to maintain strong ties between the

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11 With reference to traditional statutes it has been said that the “only instance in which a state will allow a child to be taken from his or her natural parents without their consent and adopted by new parents is when the natural parents are found unfit.” Note, “The Best Interests of the Child”: The Illinois Adoption Act in Perspective, 24 DePaul L. Rev. 100, 114 (1974) [hereinafter cited as Illinois Adoption Act].

12 The concept of a “psychological parent,” and the possible traumatic consequences for a child in being separated from such an adult, is discussed in J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child, 114-25 (1973). See text accompanying notes 65-70 infra.


child and the prospective adoptive parents. In these instances adoption was ordered solely upon a trial judge's general conclusion that adoption would be in the child's "best interests."

There are serious constitutional problems in allowing adoptions based on such vague standards and findings. The United States Supreme Court, in dicta, has recently spoken against terminations based entirely on considerations of the child's best interests. Such adoptions do not accord sufficient protection to the parents' right to raise their children.

This article is an attempt to define "best interests" so as to provide full protection of the parents' constitutional rights, while still permitting adoptions for the purpose of allowing a child to remain with "psychological parents." The first section traces the history and development of the law of involuntary adoptions. The decisions which have permitted adoptions without consent of the parents, based entirely on a trial court's general findings about the child's best interests, are discussed in the second section. The third section considers the parents' constitutional rights to custody of their children and the constitutional objections to terminations based entirely on the "best interests" criteria. The final section details a way in which "best interests" statutes can be reconciled with the Constitution.

I. HISTORY AND DEVELOPMENT OF INVOLUNTARY ADOPTIONS

Adoptions are an ancient practice; as early as 228 B.C., the Code of Hammurabi spoke of adoption as it existed among the Babylonians. Initially, adoption was designed to insure the continuity of the family. For example, under

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19 See text accompanying notes 114-90 infra.
16 See, e.g., Illinois Adoption Act, supra note 11, at 101.
Roman law adoption was a means "whereby the great families provided themselves with heirs to their property and worship, successors to office or a political following." In ancient Greece, men without sons adopted male children as their heirs. The sole purpose of adoption in these cultures was to benefit the adoptor by perpetuating the family's existence. The welfare or interests of the child were irrelevant. Once adopted, a child severed all relationships with his or her natural family. The adoption ceremony was a religious one, with the child being inducted into the faith of his or her adoptive parents.

England had no formal law of adoption. The English viewed heirs solely as legitimate children with a blood relation to their parents. Adoption could never create such a relationship, and was therefore not part of English law until the Adoption of Children Act of 1926.

Though England did not provide for adoptions, it did provide alternate mechanisms to care for children without parents or children whose parents were not caring for them. For example, as early as 1535 Parliament passed a statute stating that "children under fourteen years of age, and above five, that live in idleness, and be taken begging, may be put to serve by the governors or cities, towns, etc. to husbandry, or other crafts or labors." Additionally, during the fifteenth and sixteenth centuries there developed a widespread practice of "putting out" children, similar in many respects to foster care. When a child was "put out" he or she was placed into another family's home. There the child was fed

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20 Id. at 61.
22 Id. at 745.
23 Id. at 743.
24 Id. at 745-46.
25 The English law was passed primarily to provide secure homes for children displaced by World War I. Simpson, supra note 3, at 349-50.
26 Areen, supra note 2, at 895.
27 Illinois Adoption Act, supra note 11, at 104-05.
and clothed and trained in the trade of the family but the child was not formally adopted so that rights of succession existed. Colonial America continued the English practice of “putting out” children. The practice was extended, however, into the first statutes providing for involuntary adoption. In 1648, the Massachusetts Colony passed a law allowing the state to remove children from their parents and place them with another family if the children were “rude, stubborn, and unruly.”

In the eighteenth century, some colonies began to pass laws allowing for separation of children from their parents when the parents were destitute and lacked income to care for them. Poor children who were neglected were “put out” as in England. This system allowed children in need of care to be removed from their parents without being a costly burden on their new family since they were forced to work.

In the mid-nineteenth century adoption law in America changed drastically, with most states passing statutes to govern adoptions. In part, these laws reflected the fact that industrialism and mass immigration made “putting out” economically impractical since children were no longer especially valuable as workers. In part, too, these statutes reflected a growing concern for the welfare of the child. As Professor Huard explains:

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29 Id. at 104-05.
30 Id. at 103-04.
32 Virginia, for example, passed a statute providing “where any person or persons shall be, by their county court, judged incapable of supporting and bringing up their child or children in honest courses . . . it shall be lawful for the church wardens of the parish . . . by order of the county court, to bind every child or children apprentices, in the same manner, and under such covenants and conditions as the law directs for poor orphan children.” Reprinted in Children and Youth in America 68 (R. Bremner ed. 1970).
33 Areen, supra note 2, at 901.
34 Id.
35 Illinois Adoption Act, supra note 11, at 107-08.
36 Id. at 106.
The true genesis of our adoption laws ... seems to lie in the increasing concern for the welfare of neglected and dependent children which became apparent at many points in this country beginning about 1849. Our statutes, therefore, took an immediate and radical departure from a basic concept of the Roman law in that the primary concern of our laws was the welfare of the child rather than concern for the continuity of the adoptor's family.\(^7\)

The movement to codify adoption procedures in statutes began with the Mississippi Act in 1846.\(^8\) This law allowed an adopted child to become heir to the adopting parents.\(^9\) Texas and Vermont passed statutes in 1850, and Massachusetts in 1851.\(^10\) Virtually every state passed a similar law over the next quarter of a century.\(^11\) These early adoption statutes varied in that some provided for judicial supervision over adoption,\(^12\) while others provided only for authentications and public records of private adoptions.\(^13\)

In those states which provided for judicial supervision of adoption, statutes usually included provisions allowing the state to have the child put up for adoption without the parents' consent. For example, the Massachusetts law allowed for adoptions without consent where the parents were judged "insane" or where the parents had "willfully deserted and neglected to provide for the proper care and maintenance of the child for one year."\(^14\) The first state intervention to protect a child from parental abuse occurred in 1874.\(^15\) Such

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\(^7\) Huard, supra note 22, at 748-49.

\(^8\) McFarlane, The Mississippi Law on Adoptions, 10 Miss. L. J. 239, 240 (1938).

\(^9\) Id. at 240.

\(^10\) Illinois Adoption Act, supra note 11, at 108. See M. Korntzer, Child Adoption in the Modern World (1952), for a detailed history of adoption during this period.

\(^11\) Id. at 106-07.


\(^13\) Id. at 106-07. Texas and Tennessee were among the states with statutes that did not require judicial supervision of adoptions.


\(^15\) Professor Areen describes the efforts of the New York Society for the Prevention of Cruelty to Animals to rescue eight-year-old Mary Ellen Wilson from her foster parents. Areen, supra note 2, at 903.
interventions were rare, however, in that parents were said to have "natural rights" to custody of their children. One court, early in the twentieth century, summarized the attitude of the times:

As the act of adoption is to sever absolutely the legal relation between the parents and child, to destroy their reciprocal relations and create entirely new ones between the adopting parent and the child, the law, recognizing the natural and sacred rights of natural parents to their children, will permit this to be done only with the consent of the parents, unless under exceptional conditions, which it itself prescribes, such consent is declared unnecessary.

The initial decades of the twentieth century witnessed a number of changes in adoption laws. First, virtually all states enacted laws which required judicial supervision over the adoption process, with an increasing number of jurisdictions requiring a thorough investigation before a child was placed for adoption. Second, the development of social welfare programs in the 1930's, such as aid to dependent children (often called "mother's aid"), "made it possible for states to stop removing children from parents because of family poverty."

Third, and most important in terms of involuntary adoptions, there was the development of the parens patriae concept. Under this doctrine, the state was allowed to intrude into private family life when it was thought necessary to assure the welfare of the child. The notion of the state as parens patriae led to the development of juvenile courts, neglect hearings, and detailed state statutes defining situations when the state could separate parent and child without the parents' consent.

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44 See, e.g., Nugent v. Powell, 4 Wyo. 173, 33 P. 23, 28 (1893).
46 Huard, supra note 22, at 749.
48 Areen, supra note 2, at 910.
50 Id. at 534-35; Areen, supra note 2, at 911-12.
Though in the past two decades the concept of parens patriae has "been challenged and found wanting," the detailed statutes regulating involuntary adoptions have remained. The laws provide that the parent's rights to his children may be terminated if he is demonstrated to be unfit. In order to prove a parent unfit it must be shown that the parent's conduct is named in the statute as grounds for adoption without consent. Most statutes set out behavior such as parental abandonment, neglect or abuse, habitual drunkenness, or mental disability as bases for placing the child for adoption over the parent's objections. New York's statute is illustrative:

The consent shall not be required of a parent or of any other person having custody of the child . . . who evinces an intent to forego his or her custodial rights and obligations . . . who has surrendered the child to an authorized agency . . . or who . . . is presently and for the foreseeable future unable to provide proper care for the child.

Though other states' statutes may set out additional grounds or may vary the descriptions, almost all statutes provide specific definitions of unfitness. Under these laws, "[g]eneral unfitness is not enough. No matter what the parent may have done, if this is not named in the statute as grounds for dispensing with consent, then the child simply cannot be adopted without the parent's consent."

The form of adoption statute which sets out specific grounds for an involuntary adoption has been subject to significant criticism. Requiring proof of unfitness often means

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83 Ketchum & Babcock, supra note 51, at 534-35.
84 Simpson, supra note 3, at 347, 360-63.
85 Illinois Adoption Act, supra note 11, at 114.
88 See, e.g., IOWA CODE ANN. § 232.41(d) (West 1969); MO. ANN. STAT. § 211.441(1)(2)(d) (Vernon 1962).
89 See, e.g., ILL. ANN. STAT. ch. 4, §§ 9.1-10(h), 9.1-8 (Smith-Hurd 1975).
90 N.Y. DOM. REL. LAW § 111(2) (McKinney 1977).
91 Simpson, supra note 3, at 353-56.
92 Id. at 355.
that "children in the custody of an agency or foster home . . . [can] not be freed for adoption." In some instances it would be in the child's best interest to remain with adults who have given him or her love and affection, rather than have the child returned to the natural parents. In their seminal book, Beyond the Best Interests of the Child, Joseph Goldstein, Anna Freud, and Albert Solnit speak of the child's need to maintain a relationship with a caring adult. This relationship must be based upon "day-to-day interaction, companionship and shared experiences." It is a role which can be performed by a biological parent or by "any other caring adult." Critics argue that since separation of the child from this "psychological parent" can cause "intense trauma and possibly permanent emotional damage," statutes should allow for adoptions without the parents' consent to maintain such a relationship. In instances where the natural parent failed to establish a loving and caring relationship and another adult has developed strong ties with the child, the child's best interests are served by adoption. Statutes which provide for involuntary adoption only upon proof of parental unfitness do not allow for adoption to maintain such ties.

In response to these criticisms, a number of states have passed laws providing for adoption without the parents' consent when such an action would be in the child's "best interests." For example, Massachusetts law provides that the

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64 Simpson states: "The fact that the child has become attached to others over a period of time is not considered relevant." Simpson, supra note 3, at 356.
65 Ketchum & Babcock, supra note 51, at 536-38.
66 J. GOLDSTEIN et al., supra note 12, at 114-25.
67 Id. at 19.
68 Id.
70 J. GOLDSTEIN et al., supra note 12, at 53.
consent of the parents to adoption of their child is not necessary if "the court hearing the petition finds that the allowance of the petition is in the best interests of the child . . . ." The Virginia adoption statute allows for an adoption, notwithstanding objections of the parents, when "the best interests of the child will be served." Likewise, Arizona law sanctions adoptions whenever "the interests of the child will be promoted thereby." Other states have enacted similar statutory provisions, and a number of jurisdictions with traditional statutes have modified them to include the statement that "[t]he best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act."

These statutes eliminate the requirement that unfitness be proved and thereby allow for adoption without consent when it would be in the child's best interests to maintain a relationship between the child and a "psychological parent." Read literally, however, these statutes accomplish much more. The statutes would "preclude objection by a parent to the removal of his child even from his regular and permanent home so long as the move to the new home was deemed in the best interests of the child." Indeed, an "extreme interpretation of the best interests rule could lead to a redistribution of the entire minor population among the worthier members of the community."

Traditionally, state courts interpreting these laws have rejected such sweeping definitions of "best interests," and

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75 See, e.g., D.C. Code § 16-304 (1967), providing for adoption "when the court finds . . . that the consent or consents are withheld contrary to the best interests of the child."
78 Gordon, supra note 77, at 221.
79 Simpson, supra note 3, at 355.
have read into the statutes a requirement for proof of neglect or abandonment. Courts, usually, have been unwilling to see the "best interests of the child" rule as authorizing removal of "children from their homes because . . . they would be better off with someone else." Recently, however, courts in a few states have held that adoptions may occur without proof of unfitness solely to foster the child's best interests.

II. INVOLUNTARY ADOPTIONS TO PROMOTE THE "BEST INTERESTS" OF THE CHILD

Though the "best interests" test was designed to allow courts to order adoptions to preserve a stable relationship between the child and prospective adoptive parents, courts in a number of states have recently given it a substantially broader interpretation. These courts have approved petitions for involuntary adoptions in situations where there was neither a finding of parental unfitness nor foster parents willing to adopt the children. These adoptions have been ordered solely upon a trial judge's generalized conclusion that such a course would be in the children's "best interests."

In In re New England Home for Little Wanderers the Supreme Judicial Court of Massachusetts rejected the contention that there must be proof of parental unfitness before an involuntary adoption can be ordered. The trial judge in that case approved a petition for adoption without the mother's consent on the grounds that the mother "took an unrealistic approach to her problems and never worked out a practical way to implement her plans for herself or the child." The trial court did not conclude that the mother was unfit, nor did the judge specify any basis for believing that the mother would neglect or abuse her child, nor could

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8 See, e.g., Westerlund v. Croaff, 68 Ariz. 36, 198 P.2d 842 (1948).
82 Simpson, supra note 3, at 355.
84 Id. at ___, 328 N.E.2d at 857.
any of the evidence in the record or discussed by the court lead to the inference that the mother was unfit.

Only three dispositive factors are discussed in the court opinion: the mother's lack of a job, her missing appointments, and her placing the child in foster care. The mother's lack of income cannot be a basis for finding her unfit. Such a view would justify denying all poor people custody of their children. It is especially impermissible when her lack of income resulted from the state's actions. If she had her child she could, for instance, receive welfare payments in the form of Aid to Families with Dependent Children, and thereby support the child. In fact, Congress in enacting the AFDC program explicitly designed it "to help maintain and strengthen family life." Its primary goal is "to keep . . . young children with their mother in their own home." Nor is there any basis for equating unkept appointments to see a social worker with inability to be a competent parent. Missed appointments can mean many things: hostility to the case worker, feelings of futility, difficulty in transportation, etc. Interpreting them as unfitness has no rational basis. Accepting such an inference, as opposed to all the alternative explanations for missed appointments, creates a presumption in favor of finding unfitness. Such a presumption is clearly impermissible under Massachusetts law and the United States Constitution.

Finally, the fact that the mother placed her child in foster care does not prove her unfit, especially since she wanted her child back. Foster placements are by definition intended to be temporary with the natural parents retaining "an absolute right to the return of their child." Nothing in Massachusetts law, nor the law of any other state, justifies

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85 Id. at ___, 328 N.E.2d at 856-57.
87 S. REP. No. 628, 74th Cong., 1st Sess. 17 (1935).
83 See text accompanying notes 111-53 infra.
an inference that the parent is unfit because he or she temporarily relinquished the child to a foster home.

Therefore, it is clear that the trial court in *Little Wanderers* not only failed to identify unfitness, but that the evidence in the case could not possibly support such a finding.\(^1\) Nor did that case involve a situation where an adoption was ordered to maintain strong ties between the child and the prospective adopting parents. The foster parents were not going to adopt the child. A family that had no contact with the child was chosen to adopt.\(^2\) The court thus premised its approval of the petition for an involuntary adoption not on a finding of unfitness or the desire to allow the child to remain with his foster parents, but rather solely on the conclusion that such an adoption was "in the best interests of the child."\(^3\)

The mother appealed the trial judge's decision to the Massachusetts Supreme Judicial Court. There she contended that since the purpose of the adoption was not to preserve a stable relationship for the child, the state was under the obligation to prove unfitness before an involuntary adoption could be ordered.\(^4\) The court rejected this argument and held that the notions of the "best interests" and "parental unfitness" are not separate and distinct. The court found that "elements of parental 'unfitness' figure strongly in the 'best interests' test, while elements of 'best interests of the child' weigh in any consideration of whether a parent is fit to have custody of his child."\(^5\) This language is confusing because the court made no attempt to define what factors, other than unfitness, are sufficient to support a conclusion that adoption would be in the child's best interests. In fact, the court explicitly stated that such an enumeration

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\(^1\) This analysis does not imply there were factors which the trial judge could have pointed to as a basis for finding the mother unfit. Rather, the point is that the evidence the court did cite could not support such a conclusion.

\(^2\) *In re New England Home for Little Wanderers, ___ Mass. ___, ___, 328 N.E.2d 854, 857 (1975).*

\(^3\) *Id. at ___, 328 N.E.2d at 857.*

\(^4\) *Id. at ___, 328 N.E.2d at 857-58.*

\(^5\) *Id. at ___, 328 N.E.2d at 858.*
would be “neither possible nor desirable . . . ; much must be left to the trial judge’s experience and judgment.” Thus, the court’s decision grants a trial judge power to separate children from their parents, without a finding of unfitness or the existence of strong ties between the child and the prospective adoptive parents, based entirely upon the judge’s belief that adoption would be in the child’s best interests.

Subsequent decisions in Massachusetts have affirmed the trial court’s authority to order an involuntary adoption without finding the parents unfit. For example, in In re Department of Public Welfare to Dispense with Consent to Adoption the Massachusetts Appeals Court sustained an involuntary adoption based on the judge’s conclusion that “it would be unthinkable to entrust to . . . [the mother] the care and custody of a two-year-old child for the foreseeable future.” No basis for this conclusion was given. No evidence was cited that the mother was likely to abuse or neglect her child, nor was there any finding that she was unable or unwilling to care for her daughter. The court offered no delineation as to why it would be “unthinkable” for the mother to have custody of her child. The only evidence contained in the judge’s findings was that she missed appointments with the social worker, that she lacked income, and that she had no set plans for her future. None

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96 Id. at ___, 328 N.E.2d at 863.
98 See Judge’s Findings, Dep’t of Public Welfare v. Mary Connolly, part of record in In re Dep’t of Public Welfare to Dispense with Consent to Adoption. Id.
99 Id., at nos. 7, 9, 13.
100 Id. at no. 16.
101 The judge also mentions the fact that the mother had been convicted of prostitution before the child was born. Id. at nos. 2, 17, 18. Under Massachusetts law it is clear that criminal convictions do not justify a finding of unfitness. Until 1972, state law had a provision which stated that there was no need for parental consent to adoption if the parent was serving a sentence in a correctional institution that still had three years to run. MASS. GEN. LAWS ANN. ch. 210, § 39. At most, the mother’s sentence in this case was for ten months. Trial transcript, Dep’t of Public Welfare v. Mary Connolly, part of the record in In re Dep’t of Public Welfare to Dispense with Consent to Adoption, at 25. Similarly, under the old statute, a conviction for prostitution was grounds for adoption without parental consent only if the parent was otherwise proven unfit. MASS. GEN. LAWS ANN. ch. 210, § 3a.
of this evidence proves a parent unfit. Since the foster parents were elderly and did not wish to adopt, it is clear that the adoption was ordered only because the judge felt adoption was in the child’s “best interests.” The Massachusetts Court of Appeals affirmed.\textsuperscript{102}

Massachusetts is not alone in allowing adoptions based solely on a judge’s belief that the best interests of the child are served by such an action. In Dyer v. Howell,\textsuperscript{103} the Virginia Supreme Court affirmed an adoption over the natural parent’s objection without any finding that the parent was unfit and despite the fact that the foster parents were not going to adopt the child. The father in that case had been arrested for the murder of his wife and was found not guilty by reason of insanity. He was confined to a mental institution, during which time he maintained contact with his son. Upon his release he sought custody.\textsuperscript{104} The Virginia Supreme Court upheld an adoption over the father’s objection, while making clear that it “would give little weight to any inherent parental interest in the child and would require only a showing that adoption was in the child’s best interests.”\textsuperscript{105} While a parent found not guilty of murder by reason of insanity may very likely be unfit as a parent, the trial court should have pointed to some evidence, as of the time adoption was ordered, that the father was likely to abuse or neglect the child. Even if the adoption was based solely on the fact that the father had been tried for murder and placed in a mental


\textsuperscript{103} 212 Va. 453, 184 S.E.2d 789 (1971). But see Malpass v. Morgan, 213 Va. 393, 192 S.E.2d 794 (1972), where the Virginia Supreme Court distinguished the Dyer case and denied an adoption petition. The court in Malpass rejected the contention that a mere showing that adoption would advance the interests of the child would suffice to dispense with parental consent. The court thus implied that parental rights will not be terminated unless it is shown that continuance of the relationship would be detrimental to the child’s welfare. However, four years later in Szembi v. Clements, 214 Va. 639, 202 S.E.2d 880 (1974), the Virginia Supreme Court ordered an adoption without finding the mother unfit on the ground that such an adoption could serve the best interests of the child.

\textsuperscript{104} 212 Va. at ___, 184 S.E.2d at 791.

\textsuperscript{105} Note, Malpass v. Morgan: Determining when a Parent’s Consent to Adoption is Withheld Contrary to the Best Interests of the Child, 60 Va. L.R. 718 (1974).
institution, the court should have said this. Instead, there was only the general conclusion that adoption was in the child's best interests.\footnote{106}

Likewise the supreme courts of Wisconsin,\footnote{107} Iowa,\footnote{108} and Maryland\footnote{109} have affirmed adoptions despite the absence of a trial court's finding that the parents were unfit. Only in Arizona is it clearly established that parents who have never consented to the adoption of their children may not, over their objection, be deprived of the children without a showing of neglect, unfitness, or dependency.\footnote{110}

III. CONSTITUTIONAL OBJECTIONS TO INVOLUNTARY ADOPTIONS UNDERTAKEN TO PROMOTE THE "BEST INTERESTS" OF THE CHILD

In *Smith v. Organization of Foster Families for Equality and Reform*,\footnote{111} Justice Stewart, in a concurring opinion, wrote:

> If a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the state would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'\footnote{112}

A year later, in *Quilloin v. Walcott*,\footnote{113} a unanimous court

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\footnote{106}{212 Va. at __, 184 S.E.2d at 791.}
\footnote{107}{See *In re* Tachick, 60 Wis. 2d 540, 210 N.W.2d 865 (1975).}
\footnote{108}{See *In re* Zimmerman, 229 N.W.2d 245 (Iowa 1975).}
\footnote{109}{Lloyd v. Schutes, 24 Md. App. 515, 332 A.2d 338 (1975).}
\footnote{110}{In re Hyatt, 24 Ariz. App. 170, 536 P.2d 1062 (1975).}
\footnote{111}{431 U.S. 816 (1977). *Smith* focused on whether a foster family may claim protected liberty status for purposes of procedural protections before a foster child may be removed from the foster home. Justice Brennan's majority opinion held that informal procedures were adequate given the minimal liberty interests of a foster family.}
\footnote{112}{Id. at 862-63.}
\footnote{113}{434 U.S. 246 (1978). *Quilloin* involved a due process and equal protection attack on Georgia's adoption laws denying an unwed father authority to veto adoption of his illegitimate child. The state court had authorized adoption after finding that it would serve the "best interests of the child." The natural father contended that he was entitled as a matter of due process and equal protection to an absolute veto over adoption, absent a finding of his unfitness as a parent. Though the Court
adopted Justice Stewart's language. Though neither *Smith* nor *Quilloin* specifically involved involuntary adoptions, the dicta in both cases clearly indicate that the Supreme Court would be most reluctant to approve adoptions based solely on a judge's belief that granting the petition for adoption would serve the best interests of the child.

This section analyzes the constitutional objections to adoptions based on the best interests criteria. Initially, the constitutional protection of family integrity and the right of parents to raise their children is discussed. The remainder of the section considers the ways in which adoptions based on the "best interests" criterion abridge these constitutional rights because of vagueness and a failure to rely on the "least drastic alternative."

**A. Constitutional Protection of Family Integrity and the Right of Parents to Raise Their Children**

The Supreme Court has consistently recognized that parents have fundamental liberty and privacy interests in maintaining the integrity of the family unit.  

"[I]n the nineteenth century children were thought to be chattels of their parents, with parents having the same unimpeded authority over them as over any other property."  

"[T]wentieth century analysis accords parents the right to control the upbringing of their children, not because of any property right, but rather out of a belief that such authority will best ensure the child's welfare."  

The Supreme Court has observed that it "is through the family that we inculcate and pass down..."
many of our most cherished values, moral and cultural."[117] The family is viewed as an institution "deeply rooted in this Nation's history and tradition."[118] Individuals and society depend on the family to provide the "emotional attachments that derive from the intimacy of daily association."[119] Thus, "the family unit does not simply co-exist with our constitutional system" but "is an integral part of it" for our "political system is super-imposed on and presupposes a social system of family units, not just isolated individuals."[120]

The constitutional liberty interest guaranteed to the family was first formally recognized by the Supreme Court in *Meyer v. Nebraska.*[121] In that case the Court upheld the right of parents to raise their children as they saw fit, specifically the right to have their children learn the German language. The Court concluded that the "liberty" guaranteed by the fourteenth amendment "without doubt . . . denotes . . . the right of the individual to marry, establish a home, and bring up children."[122] In emphasizing the importance of parental control over the family unit, the *Meyer* Court contrasted American society with that described in Plato's *Republic:*

> For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent.' . . . In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation of the individual and the state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State

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[118] *Id.* at 503.
[121] 262 U.S. 390 (1923).
[122] *Id.* at 399.
without doing violence to both letter and spirit of the Constitution.\textsuperscript{123}

The Court further rejected any such attempt to "standardize" American children in\textit{ Pierce v. Society of Sisters}.\textsuperscript{124} An Oregon statute prohibiting private school education was declared unconstitutional because it interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control."\textsuperscript{125}

The importance of these two decisions in establishing a fundamental constitutional protection for family relationships was explained in\textit{ Prince v. Massachusetts}.\textsuperscript{126} It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . . It is the recognition of this that these decisions [\textit{Meyer} and \textit{Pierce}] have respected the private realm of family life which the state cannot enter.\textsuperscript{127}

This line of reasoning was applied and extended in\textit{ Wisconsin v. Yoder},\textsuperscript{128} where the Supreme Court addressed the fundamental right of parents to direct the religious upbringing of their children vis-a-vis the state's interest in requiring compulsory education in state-approved public or private schools. Amish parents sought to have their children excused from school attendance, contending that compulsory education interfered with their religious freedom. The Court ruled in favor of the parents and held that the state did not provide a compelling state interest to justify interference with the Amish families' decisions.

Though \textit{Meyer}, \textit{Pierce}, and \textit{Yoder} arose in the context of the free exercise clause of the first amendment, their holdings extend far past that and clearly establish that the fourteenth amendment's "liberty" includes a parent's

\textsuperscript{123} Id. at 401-02.
\textsuperscript{124} 268 U.S. 510, 535 (1925).
\textsuperscript{125} Id. at 573.
\textsuperscript{126} 321 U.S. 158 (1943). \textit{Prince} upheld the right of the state to prevent adults from enlisting children to proselytize religion on street corners.
\textsuperscript{127} Id. at 165.
\textsuperscript{128} 406 U.S. 205 (1972).
“immediate right to the care, custody, management, and companionship of minor children.” Thus, in *Skinner v. Oklahoma*, the Supreme Court invalidated a state law providing for the sterilization of persons convicted two or more times of “felonies involving moral turpitude.” The right to reproduce and raise one’s children was held to be “one of the basic civil rights of man.”

The parents’ liberty interest in the care and custody of their children was most explicitly affirmed in *Stanley v. Illinois*. There the Supreme Court declared unconstitutional an Illinois statute which denied unmarried fathers the custody of their children in the event the mother was no longer present or able to care for the children. The fundamental protection of the family was emphasized:

The rights to conceive and raise one’s children have been deemed ‘essential’, ‘basic civil rights of man’, and ‘rights far more precious than property rights’. . . . [T]he custody, care and nurture of the child reside first in the parents . . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause . . . and the Ninth Amendment.

Other decisions, establishing similar protections for family integrity, have been premised on the right of privacy. The Supreme Court first formally recognized the existence of a right to privacy in *Griswold v. Connecticut*. In *Griswold* the Court declared unconstitutional a Connecticut statute which prohibited the use of “any drug, medicinal arti-

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130 316 U.S. 535 (1942).
131 *Id.* at 541. *See* Downs v. Sawtelle, 574 F.2d 1, 11 (1st Cir. 1978).
133 *Id.* at 651.
134 381 U.S. 479 (1965). Though *Griswold* was the first formal Supreme Court recognition of a constitutionally protected right of privacy, the common law had long accorded such a right. *See* W. Prosser, *Handbook of the Law of Torts* 802-14 (4th ed. 1971). Additionally, a number of earlier Supreme Court decisions had been premised on an implicit right of privacy. *See*, e.g., Martin v. City of Struthers, 319 U.S. 141 (1943); Breard v. City of Alexandria, 341 U.S. 622 (1951). The phrase “right to privacy” appears to originate from the seminal article by Warren and Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890).
The concept of privacy set out in *Griswold* was dramatically expanded in *Roe v. Wade*. In striking down laws outlawing abortions, the Court in *Roe v. Wade* held that the guarantee of personal privacy includes those rights that are "implicit in the concept of ordered liberty [such as] activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education." The zone of privacy "encompasses a woman's decision whether or not to terminate her pregnancy." The controversial decision extended privacy beyond its previous limits "by failing clearly to base the woman's interest in the abortion decision on specific Bill of Rights guarantees and by expanding pre-existing conceptions of the fundamental right." Numerous subsequent Supreme Court decisions have spoken of the "constitutionally protected privacy of family, marriage, motherhood, procreation and child rearing."

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135 381 U.S. at 484.
136 Id. at 485.
137 410 U.S. 113 (1973).
138 Id. at 152 (citations omitted).
The importance of privacy as protection for family integrity was most clearly illustrated in *Moore v. City of East Cleveland.* In *Moore,* the Supreme Court invalidated East Cleveland’s single family zoning ordinance that defined “family” so narrowly as to prevent a grandmother from living in the same residence with her son and two grandsons who were first cousins rather than brothers. The Court emphasized the importance of the family both for the individual and society, and accorded the constitutional privacy protection to extended families.

These decisions clearly establish that family integrity and the right of parents to raise their children are protected by the United States Constitution. This protection was specifically applied to involuntary adoptions in *Alsager v. District Court of Polk County, Iowa.* In 1970, Charles and Darlene Alsager were adjudged unfit by an Iowa juvenile court which ordered the removal of five of the Alsagers’ children from their parents’ care. This action was taken pursuant to an Iowa statute allowing removal when the parents “refuse to give the child necessary parental care and protection,” or when the parents are deemed “unfit . . . by reason of . . . conduct detrimental to the physical or mental health or morals of the child.” The Alsagers challenged this statute, contending that it was unconstitutionally vague under the due process clause of the fourteenth amendment.

The District Court for the Southern District of Iowa noted at the outset that “[t]he Alsagers possess a fundamental ‘liberty’ or ‘privacy interest in maintaining the integrity of the family unit.’” As such, the state’s interest in protecting the children “must be balanced against the parents’ countervailing interest in being able to raise their children in an environment free from government interfer-

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143 Id. at 513 (Stevens, J., concurring).
144 406 F. Supp. 10 (S.D. Iowa 1975), aff’d, 545 F.2d 1137 (3d Cir. 1976).
145 Id. at 15; the statute relied upon was IOWA CODE ANN. § 232.41(2) (West 1969).
146 406 F. Supp. at 16.
The Court declared the Iowa statute unconstitutional because it did not insure that terminations would "only occur where more harm is likely to befall the child by staying with his parents than by being permanently separated from them."\textsuperscript{148}

These authorities forcefully establish a right of parents to raise their children. Like all constitutional protections, this right is not absolute. The state has a legitimate interest in securing and safeguarding the welfare of minors.\textsuperscript{149} State laws requiring children to be immunized\textsuperscript{150} and preventing child labor,\textsuperscript{151} among others, have been sustained, though they interfere with parents' control over their children. The state's authority to replace the parents' judgment only exists, however, when a compelling state interest is shown.\textsuperscript{152} Accordingly, the drastic step of separating children from their parents may occur only if a clear need is proven, and the parent must be "provided with the full panoply of legal rights before termination is ordered."\textsuperscript{153}

\section*{B. The Unconstitutionality of Involuntary Adoptions Based on the Best Interests Criteria: The Problem of Vagueness.}

The Supreme Court consistently has held that constitutional rights may not be abridged by a statute whose terms are "so vague, indefinite and uncertain" that one cannot determine their meaning.\textsuperscript{154} Though vagueness attacks are usually lodged against criminal statutes, it is clear that civil laws and regulations also must be clear and specific.\textsuperscript{155} Fam-

\textsuperscript{147} Id.
\textsuperscript{148} Id. at 24.
\textsuperscript{149} See Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158, 166 (1943).
\textsuperscript{150} Jacobson v. Massachusetts, 197 U.S. 11 (1905).
\textsuperscript{151} Prince v. Massachusetts, 321 U.S. 158 (1943).
\textsuperscript{152} See generally, L. Tribe, American Constitutional Law 892-93 (1978).
\textsuperscript{153} Ketchum & Babcock, supra note 51, at 534.
\textsuperscript{154} Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939). This case reversed a conviction under a statute making it a crime to be a "gangster."
ily integrity and the rights of parents to raise their children are so fundamental that the possible grounds for termination must be clearly spelled out.

In *Grayned v. City of Rockford*\(^{156}\) the Supreme Court identified several reasons why vague standards are constitutionally impermissible.

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'\(^{157}\) (citations omitted).

Exactly the problems discussed in *Grayned* are incurred when a judge is allowed to order an adoption solely upon the conclusion that such an action would be in the child's best interests.\(^{158}\) There is both an absence of fair warning and an impermissibly broad delegation of discretion. If adoption statutes are to avoid vagueness, they must clearly delineate possible grounds for involuntary termination and they must require judges to specify the precise reasons why adoption is ordered.

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156 408 U.S. 104 (1972). *Grayned* focused on the constitutionality of an ordinance regulating protests in a high school. Though *Grayned* arose in the context of the first amendment, its holding also applies in the constitutionally protected area of family rights. Whenever liberty or property rights are infringed, there must be a clear delineation of the reasons and basis. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

157 408 U.S. at 108-09.

158 The Massachusetts courts have explicitly rejected the argument that "best interests" is too vague, concluding that "standards of mathematical precision are neither possible nor desirable." *In re New England Home for Little Wanderers, ___ Mass. ___,* 328 N.E.2d 854, 863; *In re Dep't of Public Welfare to Dispense with Consent to Adoption, ___ Mass. ___,* 358 N.E.2d 794 (1976).
The failure of statutes to define "best interests" means that parents are given no warning as to what behavior may cost them their children. Citizens should be able to know what conduct is and is not permissible. When the standard embodied in a statute is never spelled out or delineated "a person may believe that his actions comply with the law, only to have the law used against him." If the statute and decisions never define "best interests," a parent cannot know what behavior is required or must be avoided to prevent parental termination. For example, "a parent might follow a rigid scheme of 'discipline-instilling' corporal punishment believing himself in full compliance with the law, only to learn of his folly at a termination proceeding."

Moreover, when state statutes permit courts to approve adoptions without finding either unfitness or psychological ties between the child and the adopting parents, arbitrary and discriminatory terminations are inevitable. Judges are allowed to "subjectively determine on an ad hoc basis, what parental conduct is 'necessary' and what parental conduct is 'detrimental.'" Terminating a parent's responsibilities is so major a decision, infringing on fundamental constitutional rights, that statutes must clearly limit the exercise of judicial discretion by defining situations when separation can occur. As described above, existing "best interest" statutes have been held to allow adoptions premised on findings that it would be "unthinkable" for the mother to maintain custody and that the parent was "unrealistic." Laws which permit adoptions based on such generalized findings

139 Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (3d. Cir. 1976).
141 406 F. Supp. at 18.
142 Id.
provide judges with unlimited discretion to decide the preferable way to raise a child.

In addition to defining best interests in terms of the situations which justify involuntary adoptions, statutes must require that judges detail the precise reasons for ordering termination. Unless the content, nature, and existence of the parents' present and future unfitness are carefully delineated, courts are allowed to make subjective, intuitive judgments about parents without having to justify them. Such ambiguity can hide adoptions ordered solely because another set of parents was found better qualified. There is no way to insure that there are compelling justifications for termination, as there must be given the constitutional protection of family integrity, unless judges are forced to articulate their reasons for finding the parent unfit or allowing the child to remain with psychological parents.

The choice as to whether to permanently separate a parent and child is always a difficult and complex one. There will never be absolute tests for fitness or clear indications of the true best interests. It is precisely for this reason, to insure that courts consider only relevant factors and that all evidence is properly weighed, that state statutes must specify what "best interests" means and judges must be compelled to articulate their reasons for ordering involuntary adoptions.

Furthermore, do not parents have a right to know exactly why they are being denied the custody of their children? This seems to be exactly what Justice Stewart condemned in his concurring opinion in Smith v. Organization of Foster Families, 431 U.S. 816 (1977). See text accompanying note 17 supra.

Such “an extreme interpretation of the best interests rule could lead to a redistribution of the entire minor population among the worthier members of the community.” Simpson, supra note 3, at 355.

Ketchum & Babcock, supra note 51, at 556.

As the Maryland Supreme Court expressed in Logan v. Coup, 208 A.2d 694, 699 (1965): “In order to justify the drastic action of permanently severing the legal relationship of a fit and proper parent and his child, clear and sufficient legal reasons must be shown as to why such action is needed for the interests and welfare of the child.” (emphasis added).
children? It can hardly be enough for parents to be told they are losing their children because a judge thinks it would be in the children’s best interests to be elsewhere. In a world in which most judges are white and middle-class, while many parents in involuntary adoption proceedings are black and poor, courts should be forced to state exactly why an adoption is appropriate. Without such a specification as to what “best interests” means, the standard is clearly void for vagueness.

C. The Unconstitutionality of Involuntary Adoptions Based on the Best Interest Criteria: The Failure to Insure Reliance on the Least Drastic Alternative

Statutes sanctioning adoptions to promote the “best interests” of the child fail to insure that all less drastic alternatives, short of adoption, are relied on first. It is clearly established that whenever a state’s actions infringe upon constitutionally protected rights, the government must demonstrate that no less intrusive alternative will adequately serve the purpose. If another means to fulfill the state’s interest exists which has fewer adverse effects on fundamental rights, the government is required to use the less restrictive alternative. The Supreme Court repeatedly has held that “statutes affecting constitutional rights must be drawn with ‘precision,’ and must be ‘tailored’ to serve their legitimate objectives.”

This doctrine has been applied and articulated in many cases. In Shelton v. Tucker the Supreme Court declared unconstitutional an Arkansas statute which required teachers in state schools to file annual affidavits listing all organizations to which they belonged. The Court held that though the state has a legitimate interest in providing competent

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122 364 U.S. 479 (1960).
teachers, this purpose must be accomplished in the way which has the fewest adverse effects on the constitutionally protected right of association. In explaining the importance of relying on the least restrictive alternative, the Court declared:

In a series of decisions this Court has held that, even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in light of less drastic means for achieving the same basic purpose.174

In addition to association, the Supreme Court has held that interference with fundamental rights such as speech,175 religion,176 privacy,177 procreation,178 interstate travel,179 and voting180 requires reliance on the least restrictive alternative.

In a number of cases this requirement has been specifically applied to cases involving interference with the family. In Griswold v. Connecticut, the privacy of married couples was found to include the right to choose whether or not to have children.181 The Supreme Court recognized that bans on the sale of contraceptives could serve the purpose of enhancing marital fidelity by discouraging extra-marital relations. The Court held, however, that this objective could be accomplished by a more precisely tailored statute which did not intrude on the constitutionally protected privacy of the family. The existing law was held invalid because it "achieved its goals by means having a maximum destructive impact upon" protected rights.182

174 Id. at 488.
181 381 U.S. 479 (1965).
182 Id. at 485.
In *Roe v. Wade*, the Supreme Court held that the right of privacy in family relationships protects a pregnant woman's decision whether or not to have an abortion. Any legislative interference with this choice "must be narrowly drawn to express only the legitimate state interests at stake."

Similarly, in *Cleveland Board of Education v. LaFleur*, the Supreme Court invalidated mandatory leave provisions for pregnant school teachers because they unnecessarily interfered with "freedom of personal choice in matters of marriage and family." The Court held that the "Fourteenth Amendment requires the school board to employ alternative administrative means, which do not so broadly infringe upon basic civil liberties, in support of their legitimate goals."

Reliance on the least restrictive alternative is essential in cases involving adoption without consent of the parents. The least restrictive means is essential in situations where there are "absolute and irreversible deprivations." An adoption is such a deprivation because parents are permanently denied their children. It is because of the importance of family integrity under the Constitution, and the irreversible nature of an adoption, that courts must insure that there is no alternative means less restrictive of these fundamental rights.

There are many possible alternatives less drastic than adoption which can be relied upon. In some instances foster care or a short-term separation may be all that is required to protect the child. After some time apart from the child, the parent will be able to resume custody and properly care for the child. In other situations, social services can be

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184 Id. at 155.
186 Id. at 647.
offered to the parent before involuntary termination. Perhaps with the assistance of a caseworker, and services such as day care, addiction control, and education, a parent can be helped to learn how to properly cope with and care for a child. In some situations, intensive psychological counseling coupled with homemaking services can allow a parent to keep custody.

None of this is to imply that in every case there is an alternative short of adoption with potential for success. To the contrary, the viability of alternatives must be decided on a case-by-case basis. There must, however, be such an inquiry in every case. An adoption should be ordered only after all other avenues are investigated and found wanting.

When judges have ordered adoptions based solely on a conclusion about the child's best interests, there has been no inquiry into possible alternatives to adoption. The court has simply decided the child would be better off somewhere else, without considering what might be done to avoid permanent separation. In these cases there have been no findings that other less drastic options had been examined. To the extent that adoptions based on the "best interests of the child" occur before less restrictive alternatives are considered and tried, there is an impermissible interference with constitutionally protected rights to family integrity.

IV. INSURING CONSTITUTIONAL PROTECTIONS IN INVOLUNTARY ADOPTIONS

None of the above analysis is meant to suggest that statutes providing for involuntary adoptions to insure the best interests of the child serve no useful purpose or are per se unconstitutional. To the contrary, these laws are advanta-

189 For example, the Massachusetts Social Services Policy Manual, § 258.43, provides that the removal of a child from his or her home is an "extraordinary measure that should only be considered as a last resort," to be undertaken only after services such as psychological testing, medical, family planning, homemakers, day care, educational psychiatric, case work, and addiction control services are tried. Id. at § 258.45.

gious in that they focus primary attention on the child's welfare\textsuperscript{191} and allow adoptions to maintain a child's ties with "psychological parents."\textsuperscript{192} The constitutional problem arises because statutes using the phrase "best interests" do not define the situations when involuntary termination is permissible. Judges in these jurisdictions are allowed to order adoption solely by invoking "best interests" without elaborating on the basis for the conclusion or examining alternatives.

To overcome these constitutional objections, "best interest" statutes should incorporate, or be held to require, that adoptions without consent may only be ordered if:

1. There is either a finding (a) that the parents are unfit, that is a finding that there is such a significant likelihood that the parents will abuse or neglect the child in the future that the child's best interests would be served by adoption; or (b) that the child has been separated from his or her natural parents for a lengthy period of time and has in the meantime entered into a stable, "psychological parent-child relationship" with an adult who is willing to adopt, such that the child's best interests would be served by adoption; and
2. The judge has specified the reasons and evidence supporting the belief that the parents are unfit or that the child would be better off with the psychological parents; and
3. The judge has specified the reasons why alternatives less drastic than adoption would not be likely to be successful; and
4. There has been a full hearing at which the parents have been accorded the full rights of procedural due process.\textsuperscript{193}

The first requirement is that an involuntary adoption under a "best interest" statute only be allowed if it is to remove a child from the custody of an unfit parent or allow a child to remain with a psychological parent. No other situation offers the compelling justification necessary to inter-


\textsuperscript{192} See text accompanying notes 65-70 supra.

\textsuperscript{193} See generally Ketchum & Babcock, supra note 51, at 544-56. Babcock's and Ketchum's proposal is similar in many respects, though it is not specifically designed to modify "best interests" statutes, nor does it define unfitness as requiring proof of neglect or abuse.
fere with a parent's constitutional right to raise his or her child. Unfitness is an obviously ambiguous term, and should be seen as requiring proof that there is a significant likelihood that the parent will neglect or abuse the child. The factors enumerated in traditional unfitness statutes, such as abandonment, alcoholism, mental disability and the like are relevant to the extent they reflect on the probability of future neglect or abuse. Conduct such as promiscuity, which is sometimes cited as demonstrating a parent "unfit," is likely to become irrelevant since it has little or no bearing on whether the parent will abuse or neglect the child. The inquiry must be a prospective one, focusing on the future likelihood of conduct detrimental to the child.

Involuntary adoptions also may be ordered if the child has been separated from his natural parents for a lengthy period of time and in the meantime has "entered into a psychological parent-child relationship with the prospective adoptive adult." It should be noted that "lengthy period of time" is a relative term depending on the age of the child. The younger the child, the shorter the periods of time need to be in order to be significant. Involuntary adoption on this basis requires proof that strong emotional bonds have developed between the child and the prospective adoptive parent, and that breaking of these ties to return the child to his or her natural parents would risk significant emotional harm to the child.

Thus, under this proposal the complete separation of a child from his or her parents is recognized to be a drastic action which cannot be permitted "for other than substantial reasons." Judges do not have unlimited discretion to

184 See Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10 (S.D. Ia. 1975), where an Iowa adoption statute using the term "unfitness" was declared void for vagueness.
186 Ketchum & Babcock, supra note 51, at 550.
187 Id. at 555.
188 J. Goldstein et al., supra note 12, at 40-45.
189 See generally Bodenheimer, supra note 69, at 29-33.
decide the most preferable way to raise a child. Instead, a judge may find involuntary adoption to be in the child's best interests only if there is a likelihood of neglect or abuse, or a need to maintain an existing relationship.

The decision as to whether a parent is unfit or a child better off with "psychological parents" is inevitably subjective. It is for this reason that judges must be required to state their reasons for believing that the parents will neglect or abuse the child, or that there are strong ties with the adoptive parents which should be preserved. Forcing judges to state their reasons means that courts must justify their decisions and consider all relevant facts; intuitive judgment about the child's best interests is not sufficient. A clear statement of the evidence and reasons for ordering adoption allows the appellate court to review the trial court's decision and insure that compelling reasons for termination do exist. Additionally, such enumeration tells parents exactly why they are being denied the right to raise their children.

Similarly, requiring judges to state why alternatives less drastic than adoption cannot work insures that such options are not overlooked. States "should be required to provide . . . social service assistance"201 to "afford the troubled but concerned parent an opportunity to re-establish a viable household and preserve the relationship with the child."202 Adoption should be ordered only when it is the option least restrictive of family rights capable of protecting the child's welfare.

Finally, since parents have a constitutional right to raise their children, the full protections of procedural due process must exist.203 Procedural due process rights include a termination proceeding conducted in court,204 with all parties ac-

201 Ketchum & Babcock, supra note 51, at 548 n.1.
202 Id. at 548.
203 For a discussion of the justifications, requirements, and nature of procedural due process see L. Tribe, supra note 152, at 501-63; See also, Note, Child Neglect: Due Process for the Parent, 70 COLUM. L. REV. 465, 475-85 (1970) [hereinafter cited as Child Neglect].
204 Child Neglect, supra note 160, at 475-85.
corded timely notice, representation by counsel, and an opportunity to present evidence and cross-examine witnesses.

The four-part proposal outlined above can become law either by interpreting it to be part of existing “best interest” statutes or by requiring legislatures to amend those laws to incorporate it. As the analysis in section three of this article indicates, if “best interest” statutes do not include these requirements they are unconstitutional. In interpreting a statute, courts are required to assume that it contains all elements necessary to comply with the Constitution, absent a clear statement to the contrary from the legislature. Thus, courts may read these four requirements into the law since they are necessary to insure constitutionality. In fact, dicta in state court decisions support such an interpretation. The Massachusetts Supreme Judicial Court wrote in In re New England Home for Little Wanderers:

In writing this statute the department and the legislature were primarily concerned with cases where unfit parents were blocking the adoption of their children; we do not think that they meant to allow fit parents to be deprived of their children, even if they had temporarily given up custody, unless some factor such as lengthy separation and a corresponding growth in ties between the child and the prospective adoptive parents indicated that the child would be hurt by being returned to the natural parents.

If such constitutional construction is not possible, state legislatures should be required to incorporate these requirements into “best interest” adoption statutes.

V. CONCLUSION

Choosing the course of action which would best enhance the child’s welfare is inherently difficult and uncertain.

265 Id. at 475-85.
267 See In re Gault, 387 U.S. 1, 14-18 (1967).
Child rearing is far from a science, and no one, except a fortune teller, can predict for the long term what would be in a child’s best interests. Nonetheless, courts are regularly called upon to decide whether to leave children with their natural parents or separate parent and child, often permanently. The decision cannot be delegated to a judge with absolute discretion to choose the best way to raise a child. The Constitution, and its protection of family integrity and the right of parents to raise their children, does not allow such absolute power. Instead, there must be clear standards for when involuntary terminations can occur.

Statutes which allow for adoptions to promote the “best interests” of the child are laudable in focusing attention on the child’s welfare. If, however, “best interests” is not defined, as thus far it has not been, these laws give judges unlimited authority to interfere with the family. This article has attempted to outline the constitutional problems with current interpretations of “best interest” statutes, and provide a way to define “best interests” to protect the rights of parents and children.