ACHIEVING DUE PROCESS THROUGH COMPREHENSIVE CARE FOR MENTALLY DISABLED PARENTS: A LESS RESTRICTIVE ALTERNATIVE TO FAMILY SEPARATION

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Tammy Lynn Cook, a mentally ill mother, lost her parental rights and custody of her son and daughter whom she had abused and neglected.[1] Rejecting her appeal, the court discussed at length Cook's failure to cooperate with social services and the treatment offered to her, as well as the lack of improvement in her parenting since the initial removal of her children. Because of her "reckless actions"[2] in regards to her own mental health, the court held it was "clearly not in the children's best interests for mother to maintain her . . . parental rights . . . with no evidence that mother will ever rectify the conditions that posed harm to them."[3] On its face, this ruling seems reasonable as it privileges children's safety and well-being over the parental rights of a mother who harms them and is continuously unable to recover from her mental illness. But digging deeper into the issue of parental mental health and the consequential neglect or abuse of children could teach otherwise. Separating parents and children need not always be the only way to protect children.

1 *See* Cook v. Roanoke Dep't of Soc. Servs., No. 2930-00-3, 2001 WL 7467686 (Va. Ct. App. July 3, 2001).

2 *Id.* at *4.

3 *Id.*

With the decrease of treatment in hospital commitment settings and an increase of community-based services, the number of parents with schizophrenia—in particular, women—has grown.[4] Additionally, women with severe mental illness are just as likely as mentally healthy women to marry and have children, but are at a higher risk of losing custody of their children.[5] Studies suggest that as much as 70–80% of parents that have a mental illness lose custody of their children.[6] Ironically, it is the fear of losing their children that deters parents from seeking much needed treatment that could help prevent neglect or abuse of children.[7] If parents do turn to services, these often are inadequate in addressing their special needs both as people with a severe mental illness and as parents.[8] However, not all services are futile. Since the 1970s, social sciences have developed treatment plans—Programs of Assertive Community Treatment (PACTs)—that have been proven effective in achieving recovery for people with severe mental illness, particularly schizophrenia. Moreover, PACTs are also highly successful in improving performance in different areas of life, including parenting and family functioning. Over ten states have PACTs as part of state-sponsored social services,[9] and others have even incorporated PACTs into their legal system as an alternative to criminal proceedings.[10]

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4 *See* Barry J. Ackerson, *Parents with Serious and Persistent Mental Illness: Issues in Assessment and Services*, SOC. WORK, Spring 2003, at 187, 188 (discussing an unexpected "increase in women with a severe mental illness bearing and raising children"). To clarify, this is not to say that there are more people, or women, suffering from schizophrenia because of the decrease in hospitalization—only that there are more people with schizophrenia who become parents, and that these people tend to be women.

5 *Id.*

6 Carolyn Mason et al., *Clients with Mental Illness and Their Children: Implications for Clinical Practice*, 28 ISSUES MENTAL HEALTH NURSING 1105, 1106 (2007) (noting that rates of custody loss by parents with mental illness have been reported as high as 80%).

7 *See* Ackerson, *supra* note 4, at 191 (stating that social services that are designed to improve parenting skills are not fitted for parents with mental illnesses. Parents with mental illness, then, often drop out of such programs or—if they do participate—are unable to benefit from them. "[T]he didactic method of instruction combined with the severity of [these parents'] illness may impede their ability to apply the lessons to their own situations").

8 *See id.* at 193 (considering the unique role social work can have in addressing the needs of people with mental illness and parents in general).

9 *See* Paul B. Gold et al., *The Program of Assertive Community Treatment: Implementation and Dissemination of an Evidence-Based Model of Community-Based Care for Persons with Severe and Persistent Mental Illness*, 10 COGNITIVE & BEHAV. PRAC. 290, 295–96 (2003) (discussing the states with PACTs as a part of state sponsored social services, including Delaware, Florida, Georgia, Idaho, Illinois, Indiana, North Carolina, New Jersey, New Mexico, South Dakota, Texas, Virginia, and Rhode Island).

10 Such states include Florida and Texas. *See* discussion *infra* Part III.B.

In light of PACTs and their advantages, this Article argues that the solution the law provides to families struggling with parental mental illness—that is, family separation in the form of children's removal or termination of parental rights—is highly troubling. Using a fundamental right concept to family integrity as a starting point,[11] I argue that separating children from parents without exploring an alternative that has a higher potential for success overly burdens family integrity.[12] Moreover, child protection is a suspect justification for such a severe infringement, because it does not consider the need to protect children from the harms of removal, such as abuse and neglect in foster care, or psychological wounds caused by separation from attachment figures in the child's family of origin. As such, family separation jeopardizes substantive due process rights of families both as individuals and as a collective.[13] My argument, however, should not be taken to be overly sweeping. I do not mean to state that in all cases family separation violates substantive due process rights. I merely maintain that lawmakers should be aware of the heightened risk of unnecessary separations. Substantive due process, therefore, requires—at the very least—exploring PACTs as a less restrictive alternative.

I build my argument in three steps. In Part I, I discuss schizophrenia and its impact on parenting and on children of parents with schizophrenia. I choose to focus on schizophrenia because of its extreme severity and its debilitating effects on almost all levels of functioning. Such all-encompassing impairments create substantial challenges to parenting, but do not necessarily negate parenting abilities altogether in all cases. Therefore a choice between family preservation and family separation is all the more complex. Part I goes on to present the current models of legal interventions on the federal and

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11 Though not explicitly terming this as a right to "family integrity," the Supreme Court has long recognized a parent's fundamental right to the childrearing, custody and companionship of her child. As this Article progresses, I present the argument that both children and parents should enjoy this fundamental right, and that they should be able to hold this right as a family unit, that is, that family integrity is an aggregated right of the family as a collective. *See infra* Part II.A.

12 Throughout this Article I use the terms "family integrity," "family unity" and "family preservation" interchangeably. All refer to keeping the family as a cohesive unit, where parental rights remain intact and parents are the custodians and caregivers of their children. I use these terms in opposition to removal of children from the home or termination of parental rights, which I refer to as "family separation."

13 *See infra* Part II.A.2, where I argue that fundamental rights, both of parents and of children, should not be considered as conflicting positions or interests. Rather, where family preservation is concerned, these rights can, and should, be viewed as complementing each other, and therefore as aggregated.

state levels. Most state laws are designed to protect children from harm at the hands of parents with schizophrenia, primarily through family separation. In doing so, these states comply with the overarching framework of privileging family separation that federal law dictates. I later focus on Virginia law as representative of most other states, and as a good example of how state laws burden parents with mental illness. Virginia law adds additional burdens, however, because it articulates a presumption that, as a rule, mental illness causes unfit parenting. Because of the harshness of Virginia law, this state is in much need of change to better serve families and uphold substantive due process rights. Yet Virginia also has immense potential to lead toward positive growth, because it already has operating state-sponsored PACTs.

Part II concentrates on my argument that family separation is inconsistent with substantive due process. I apply the test the Supreme Court utilized in *Washington v. Glucksberg*,[14] which first requires the existence of a fundamental right. Here, I argue that aggregating already recognized fundamental rights of parents and children would elevate family preservation to the level of a fundamental right, as well. Next, the *Glucksberg* test applies strict scrutiny to the state's infringement on that fundamental right. Put differently, removal or termination of parental rights must be narrowly tailored to serve the state's compelling interest, i.e., child protection. Following this substantive due process test, my analysis leads me to conclude that family separation fails to protect children from harm and therefore does not serve the state's purported compelling interest.

Part III expands on the "narrowly tailored" prong of the strict scrutiny test. Here, I argue that the availability of PACTs as effective treatment for people with schizophrenia renders them a less restrictive means to family separation. I go on to demonstrate how PACTs have been utilized as a less restrictive alternative to criminal proceedings in Florida. The operation of PACTs in Florida demonstrates how PACTs are a beneficial, interdisciplinary solution to the multitude of issues that families struggle with when a parent suffers from schizophrenia. Part III also argues that in order to ensure their efficacy as a less restrictive alternative for families, PACTs should be designed to provide families with comprehensive services that will promote parents' recovery as well as children's well-being. However, even in their family-oriented form, PACTs still may raise concerns. For this reason, I end Part III grappling with some of the potential

14 521 U.S. 702 (1997).

oppositions to the PACTs solution I advocate. Particularly, I address the doubt that PACTs do in fact protect children, and the concern that PACTs establish positive rights that overly burden the state by requiring provision of services. I conclude by highlighting Virginia's leading role in changing current interventions and by introducing other fields of family law and parental unfitness in which substantive due process should be re-examined.

I. MENTAL DISABILITIES AND PARENTING

A. Schizophrenia—A Typology

At the outset, a discussion of schizophrenia and its symptoms, diagnostic process and prognosis is imperative in order to understand the parenting issues surrounding it. Misconceptions around schizophrenia among social service providers and legal professionals lead to more separations of children from parents than necessary. A better understanding of parenting with schizophrenia facilitates a more nuanced view of who can be a capable parent despite the illness and which the law, in turn, ought to reflect. Schizophrenia is a severe mental illness,[15] characterized by a breakdown of personality functions, withdrawal from reality and disturbed emotional and cognitive processes.[16] The impaired sense of reality is mainly manifested through delusions, illusions and hallucinations.[17] While this wide variety of disturbances to thought, perception, emotion, motivation and motor activities typical of schizophrenia could result in an inability to function or care for one's self, other persons may only experience a minor decrease in coping abilities.[18]

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15 *See* Laurie T. Izutsu, *Applying* Atkins v. Virginia *to Capital Defendants with Severe Mental Illness*, 70 BROOK. L. REV. 995, 1012 (2005) (discussing that the term "severe mental illness" is usually restricted to schizophrenia, schizoaffective disorder and bipolar disorder).

16 *Schizophrenic disorder*, *in* AM. PSYCHOLOGICAL ASS'N, GLOSSARY OF PSYCHOLOGICAL TERMS, *available at* http://www.apa.org/research/action/glossary.aspx#s (last visited Feb. 16, 2010).

17 *See* Krista A. Gallager, Note, *Parents in Distress: A State's Duty to Provide Reunification Services to Mentally Ill Parents*, 38 FAM. & CONCILIATION CTS. REV. 234, 236 (2000) (discussing the disorted perceptions of reality experienced by people with schizophrenia). Delusions are false beliefs founded on mistaken interpretations of reality, which are inconsistent with one's intelligence or culture and persist despite reason or evidence of their incorrectness. Hallucinations are false sensory perceptions that do not derive from actual, real stimuli. In schizophrenia, hallucinations tend to be auditory, though visual hallucinations are common as well. *See* Éva Szeli, *Ex Parte Civil Commitment, Family Care-Givers, and Schizophrenia: A Therapeutic Jurisprudence Analysis*, 24 SEATTLE U. L. REV. 529, 530–31 (2000) (considering hallucinations and delusions of people with schizophrenia).

18 Peter F. Liddle, *Descriptive Clinical Features of Schizophrenia*, *in* 1 NEW OXFORD TEXTBOOK OF PSYCHIATRY 571 (Michael G. Gelder et al. eds., 2000).

A set of phenomena indicative of schizophrenia demonstrates how the disorder causes some to lose their sense of ownership of their own mental or physical activity. At different cycles of the progression or severity of schizophrenia, one could experience a lack of agency and autonomy, attributing thoughts and behaviors to an outside source.[19] These symptoms include sensory hallucinations, primarily auditory; delusions influencing the interpretation of events or others' behavior; and an experience of losing control over one's own emotions and thoughts.[20]

As a psychosis involving the breakdown of a sense of reality, schizophrenia is characterized by a lack of insight regarding the illness. Lacking insight means that a person with schizophrenia may fail to accept her illness or to understand that all or some of her symptoms are a consequence of the illness.[21] Thus the lack of insight is not a denial of illness but a lack of awareness coupled with persistent disbelief that the illness distorts reality.[22] As a result of the lack of insight, a person may avoid, refuse or discontinue treatment.[23]

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19 *See id.* at 572–73 (discussing the clinical symptoms of schizophrenia).

20 *See id.* at 573, 580 (listing the Schneiderian first-rank symptoms). First-rank symptoms are: (a) voices commenting: auditory hallucinations of a voice commenting, usually in a negative and judgmental manner, on one's actions; (b) voices discussing or arguing: auditory hallucinations of multiple voices discussing or arguing about oneself; (c) audible thought: hearing one's own thoughts as if spoken; (d) thought insertion: experiencing thoughts as not of one's own but rather inserted by an alien source; (e) thought withdrawal: the belief that an alien agency is removing thoughts from one's mind; (f) thought broadcast: experiencing thoughts as being broadcast to become available to others; (g) made will: experiencing a loss of control over will, which becomes subject to alien influence; (h) made acts: the belief that behavior are actions of an alien agency, rather than one's own actions; (i) made affect: emotion that is not one's own but influence by outside source; (j) somatic passivity: bodily functions controlled by alien forces; (k) delusional perception: attributing unwarranted and unreasonable meanings to normal perception. These phenomena, however, are not used as diagnostic tools. Instead, a diagnosis of schizophrenia requires the existence of bizarre delusions and/or commenting voices or voices conversing over an extended period of time; or the existence of at least two of the following symptoms: delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, or negative symptoms. To conclude the diagnosis, other possible conditions such as brief mood disturbances or substance abuse must be excluded. Symptoms must be present for at least a month. Additionally, symptoms must exist for a significant portion of a month prior to the diagnosis along with six months of disturbance in social or occupational functions. *Id.*

21 *See id.* at 574 (emphasizing that lack of insight is a defining characteristic of psychotic illness).

22 *See* Izutsu, *supra* note 15, at 1014 ("The inability or refusal to comply with treatment tends to lead to exacerbation of symptoms and coinciding disturbances in behavior.").

23 *See* Liddle, *supra* note 18, at 574 (considering the role lack of insight has in refusing to accept treatment).

The expectancy rate for developing schizophrenia in the general population is around, or slightly lower than, 1%.[24] Rates of schizophrenia among men and women are practically the same.[25] Additionally, there is no clear and conclusive evidence that symptoms are qualitatively different between sexes. Whatever differences do exist, they are generally attributed to other male or female dissimilarities, such as brain development or social gender roles, rather than schizophrenia itself.[26]

Findings regarding the high rates of schizophrenia among family members suggest that genetics are a necessary, though insufficient, risk-factor for schizophrenia. Additionally, the closer the family connection—that is, the more common genes—the higher the risk of schizophrenia development.[27] Other biological risk factors are factors that influence brain development such as pre- and perinatal damage.[28]

Besides biological factors, social or familial environments also may contribute to the development of schizophrenia. Research suggests that underprivileged socio-economic status or ethnic minority status can be risk factors, as well as having been born and raised in an urban environment.[29] Marital status, however, has a mitigating effect on schizophrenia. Marriage can delay the onset of schizophrenia or cushion its impact and severity of symptoms.[30] These findings about the causes of schizophrenia are notable for two reasons. First, the strong genetic connection between parents and children suggests that, to the extent removal of children is meant to prevent development of the child's schizophrenia, it is unjustifiable. Removing a child from her parent's care does not control for the biological factors that contribute to the development of schizophrenia. Second, these findings about causation of schizophrenia reinforce the importance of family

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24 *See id.* at 590 ("The frequently cited 'rule of thumb' estimate of disease expectancy for schizophrenia [is] at around 1 per cent . . . ."); Gallager, *supra* note 17, at 236 ("Approximately 1% to 2% of the U.S. population is schizophrenic.").

25 *See* Liddle, *supra* note 18, at 590 (discussing the onset rates of men and women at different ages). *But see* Gallager, *supra* note 17, at 236 (citing evidence that perhaps men are 1.5 times more likely to develop schizophrenia than women due to differences in diagnostic tools).

26 *See* Liddle, *supra* note 18, at 591 (considering the symptomatic differences between males and females diagnosed with schizophrenia).

27 *See id.* at 593 (discussing the role genetic risk can play in schizophrenia).

28 *See id.* at 593–94.

29 *See id.* at 595 (exploring the environmental factors relevant to the onset of schizophrenia).

30 *See id.*

preservation to persons with schizophrenia, because maintaining the family unit can help postpone or ease their suffering.

The course of schizophrenia moves in cycles of psychotic episodes and partial or complete remissions.[31] Although during the first ten years following initial onset one's condition usually deteriorates, most will later experience stabilization and gradual improvement.[32] But outcomes vary significantly and range from complete recovery to unremitting illness and deterioration of cognitive and mental functions.[33] According to long-term studies, as many as 50% of people with schizophrenia recover and lead productive and satisfying lives.[34] In other words, at different stages of schizophrenia some may very well be able to function and may be contributing members to society, including being valuable resources for their children.

Different methods of treatment are effective. For example, drug treatment, specifically anti-psychotics, mitigate symptoms, increase cognitive function, assist with modifying behavior and decrease resistance to treatment.[35] These medications help with the chemical imbalance in the brain that seems to cause symptoms such as delusions and hallucinations.[36] Effective psychosocial interventions are also available. These interventions include psychodynamic therapy (though usually combined with anti-psychotic medications) or programs training self-management and social skills development focusing on the individual's own environment and needs.[37] Family interventions, by contrast, focus on the family dynamics' impact on the person suffering from schizophrenia. They address the possible hostility within the family and attempt to resolve negative or harmful dy-

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31 Specifically, five primary patterns for the course of schizophrenia have been identified: single psychotic episode followed by complete remission; single psychotic episode followed by incomplete remission; at least two psychotic episodes with complete remission between episodes; at least two episodes with incomplete remission between them; and continuous psychotic illness. *See id.* at 615.

32 *See id.* (explaining a three-stage classification of post-onset course for schizophrenia).

33 *See id.* at 619 (considering the extreme variances of relapses and partial remissions of persons diagnosed with schizophrenia).

34 *See* Leighton Y. Huey et al., *Families and Schizophrenia: The View from Advocacy*, 30 PSYCHIATRIC CLINICS N. AM. 549, 559 (2007) (considering the ability of patients to recover from schizophrenia and lead productive lives).

35 *See* D.G. Cunningham & E.C. Johnstone, *Treatment and Management of Schizophrenia*, *in* 1 NEW OXFORD TEXTBOOK OF PSYCHIATRY, *supra* note 18, at 621.

36 *See* Shari Lynne Kahn, Comment, *The Right to Adequate Treatment Versus the Right to Refuse Antipsychotic Drug Treatment: A Solution to the Dilemma of the Involuntarily Committed Psychiatric Patient*, 33 EMORY L. J. 441, 446 (1984) (explaining the role of antipsychotic drugs in the alleviation of symptoms).

37 *See* Cunningham & Johnstone, *supra* note 35, at 625–26 (considering various types of psychotherapy available for schizophrenia).

namics by educating family members about schizophrenia and offering advice regarding coping with the illness.[38]

Because of the wide variation in experiences of schizophrenia between different people, as well as the diversity in the types and intensity of symptoms, considering all persons with schizophrenia as incapable of a well-functioning life oversimplifies their condition. Further, it ignores the array of efficient interventions toward recovery. The result of essentializing the impact of schizophrenia on a person's life is the risk of inadequate legal actions that are not sufficiently nuanced to account for differences between people with schizophrenia. As an example of such shortcomings in the law, the remainder of this Article focuses on the limited ability of current legal frameworks to reflect distinctions between parents who have lost their ability to parent their children because of schizophrenia, and other parents who remain fit parents despite the illness.

B. The Impact of Schizophrenia on Parenting

Parents with severe mental illness, such as schizophrenia, are often considered by social science, the law and society at large to be inadequate parents who may cause grave harm to their children.[39] This, however, may not always be the case for all parents with schizophrenia, although schizophrenia could impair parenting abilities in various ways. Symptoms may directly diminish parenting skills by limiting ability to read non-verbal cues or to navigate social interactions successfully.[40] Also, an altered sense of reality caused by symptoms such as delusions or hallucinations may result in neglect or abuse of a child;[41] a parent distracted or preoccupied with a delusion or obsession could withdraw from the child or become unavailable.[42] Symptoms such as social withdrawal or irritability also hinder a parent's responsiveness to her child, or her ability to express warmth or to be a nurturing parent.[43] A parent's capability to discipline a child ade-

38 *See id.* at 625.

39 *See* Ackerson, *supra* note 4, at 187–88 (considering the role mental health literature has played in focusing on the negative aspects of parenting by people with serious mental illness).

40 *See id.* at 190.

41 *See id.* ("Parents with schizophrenia may have an impaired ability to read nonverbal cues or to engage in mutual social interchange and may present a greater risk of physical abuse as a result of hallucinations or delusions.").

42 *See* Jacqueline Barnes & Alan Stein, *Effects of Parental Psychiatric and Physical Illness on Child Development*, *in* 2 NEW OXFORD TEXTBOOK OF PSYCHIATRY, *supra* note 18, at 1848, 1849.

43 *See* Corina Benjet et al., *Evaluating the Parental Fitness of Psychiatrically Diagnosed Individuals: Advocating a Functional-Contextual Analysis of Parenting*, 17 J. FAM. PSYCHOL. 238, 242 (2003)

quately is compromised as well.[44] Alternatively, the parent could incorporate the child in the delusion or obsession.[45] However, these phenomena do not necessarily put a child in direct physical danger. It is important to note that overall, persons with schizophrenia are no more violent or dangerous than the rest of the population, unless the illness is coupled with other conditions or disorders, such as substance abuse.[46]

Other challenges parents with schizophrenia may face are the social issues incidental to schizophrenia.[47] Stigmatization leads to decreased educational or vocational opportunities, instability of relationships and unavailability of health care insurance.[48] Impoverishment and homelessness are also related to mental illness and are detrimental to family dynamics.[49] Yet these are not factors that render a parent unfit, though they play a determinative role in the perception of a mentally ill parent's fitness. Misunderstanding the complexity of schizophrenia and its impact on parenting could lead to assumptions about parents with schizophrenia as unfit, incapable or dangerous parents. Perhaps because of these social challenges, many parents are reluctant to seek professional assistance in coping with parenting difficulties or with the impact of their illness on their children.[50] Though one possible explanation could be the lack of insight about the illness itself and its detriment to parenting, the fact that parents may be fearful of turning to social services for support because that could trigger custody proceedings resulting in

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(discussing whether symptoms of parents with schizophrenia render them unfit parents below community standards).

44 *See* Joanne Nicholson et al., *Focus on Women: Mothers with Mental Illness: I. The Competing Demands of Parenting and Living With Mental Illness*, 49 PSYCHIATRIC SERVICES 635, 636 (1998), *available at* http://psychservices.psychiatryonline.org/cgi/content/full/49/5/635 (last visited Feb. 16, 2010) (considering that mothers with mental illness have greater difficulty disciplining their children).

45 *See* Heather Dipple et al., *The Experience of Motherhood in Women with Severe and Enduring Mental Illness*, 37 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY, 336, 337 (2002) (giving an example of two women who believed they should kill their children).

46 *See* Izutsu, *supra* note 15, at 1018–19; *see also* Benjet et al., *supra* note 43, at 240 (finding that substance abuse was associated with a greater risk for violence than mental illness).

47 These social effects are not exclusive to schizophrenia. Rather, they could be attached to mental illness more generally. However, given the severity of the mental illness, people with schizophrenia are more likely to be affected by these social effects.

48 *See* Huey et al., *supra* note 34, at 554.

49 *See* Gallager, *supra* note 17, at 239 (finding that poverty has been shown to increase the risk of abuse for children by parents with mental disorders).

50 *See* Alisa Busch & Allison D. Redlich, *Patients' Perception of Possible Child Custody or Visitation Loss for Nonadherence to Psychiatric Treatment*, 58 PSYCHIATRIC SERVICES 999, 999 (2007) (finding that for at least some parents, "stigma and fear of losing child custody resulted in delaying needed treatment").

removal of children[51] is also highly troubling. The hardships of parenting are exacerbated by lack of assistance, and yet parents would rather struggle than get much needed help for fear of losing their children.[52]

Despite the effects of schizophrenia on parenting abilities, many parents still manage to raise their children well.[53] In fact, women with schizophrenia who maintain custody of their children function better than other women with severe mental illness, despite using the same mental health services.[54] This finding is consistent with a different study that found that hospitalizations of women with schizophrenia were prolonged when these women had previously been separated from their children. The study's authors hypothesized that perhaps the separation had exacerbated schizophrenic symptoms.[55] Because mothers tend to fare better when they have custody of their children, and because children may not actually be at risk, it should be in the interest of the state to prioritize family preservation.

Another level of analyzing the effects of schizophrenia is examining the direct impact it has on the child herself and her own mental health. A parent's severe mental illness has the potential of compromising the stability of children's lives. The cyclicality of schizophrenia could leave a child confused by behavior that swings from loving and nurturing to frightening and unstable.[56] If a child becomes somewhat of a caregiver to the parent in a reversal of normative dependency roles, the child's physical health could be at risk as well.[57] Another concern is that children of parents with mental illness are prone to poor development, be it cognitive, emotional or social.[58] These children may exhibit social withdrawal, as well as academic and behavioral difficulties at school, irritability, stress, along with sleeping

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51 *Id.*

52 As my argument progresses in Part I.C. *infra*, these concerns of parents seem justified. With statutes disadvantaging them as parents, it is very likely that once the state intervenes, whether through social services or the legal system, some form of family separation will occur.

53 *See* Barnes & Stein, *supra* note 42, at 1848.

54 *See* Ackerson, *supra* note 4, at 189 (citing a study of case management clients in Massachusetts). Regardless of whether these women maintain custody of their children because they function better or the other way around, this finding challenges the correlation between severe mental illness and parental unfitness.

55 *See* Dipple et al., *supra* note 45, at 340.

56 *See* Huey et al., *supra* note 34, at 554.

57 *See* Benita Walton-Moss et al., *Effects of Mental Illness on Family Quality of Life*, 26 ISSUES MENTAL HEALTH NURSING 627, 629 (2005) (explaining that role reversals of dependency and care in families contributed to negative effects on the caregiver's health).

58 *See* Barnes & Stein, *supra* note 42, at 1848.

and eating disorders.[59] Because of social stigmatization of mental illnesses, they are highly vulnerable to isolation, discrimination and harassment.[60]

Children of parents with schizophrenia are also at a heightened risk of developing schizophrenia themselves, or other poor mental health conditions.[61] For instance, children of parents with schizophrenia demonstrate early attentional difficulties common to schizophrenia that continue in adulthood and may later develop into schizophrenia.[62] A child of a parent with schizophrenia has a 10% risk of developing schizophrenia.[63] Even without becoming full-blown schizophrenia, attentional deficits may be predictive of associative thought disorders or future relationship problems.[64]

That said, such concerns regarding the well-being of children of parents with schizophrenia do not materialize in all cases. In fact, research suggests that harms are exacerbated by separation from the parent. Thus, the rates of mental illness among children not raised by their parents were somewhat higher than those among children who remained in their mothers' custody.[65] Being raised by a parent with schizophrenia, therefore, is not sufficient for the development of schizophrenia in the child. Children can be resilient despite a parent's mental illness; a resilience attributed to different coping styles, intellectual abilities or social skills.[66]

These positive findings regarding the effect of parents' schizophrenia on children, as well as findings about the health benefits of maintaining children's custody and care to parents, lead to the conclusion that schizophrenia does not necessarily hinder parenting. Despite suffering from schizophrenia, parents are a valuable resource for their children. In the next Part I examine whether the law reflects this conclusion or whether it views schizophrenia as incompatible with parenting, suggesting therefore, that people suffering from

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59 *See generally id.* at 1848–49.

60 *See* Amy Weir, *An Introduction to the Issues: A New Holistic Approach Outlined*, *in* CHILD PROTECTION AND ADULT MENTAL HEALTH: CONFLICT OF INTEREST? 1, 2 (Amy Weir & Anthony Douglas eds., 1999) (maintaining that children of parents with mental illness can be vulnerable to bullying and social isolation as a result of negative remarks made about their parent's behavior or characteristics).

61 *See* Barnes & Stein, *supra* note 42, at 1850.

62 *See id.*

63 *See* Gallager, *supra* note 17, at 236. Though the precise level of contribution is not clear, both genetics and environmental factors make for this risk. *See also supra* notes 27–30 and accompanying text about risk factors for the development of schizophrenia.

64 *See* Barnes & Stein, *supra* note 42, at 1850.

65 *See id.*

66 *See id.* at 1849.

schizophrenia should not be raising children. My critiques of the law, primarily federal and Virginia law, center around their heightened burdens on parents with schizophrenia, the unavailability and inadequacy of services to these parents, the shortcomings of assessment of mental illness in legal contexts, the law's assumption that mental illness is permanent and the overly narrow view of the child's best interest, all of which perpetuate family separation as the only legal remedy for children neglected or abused by parents with schizophrenia.

C. The Law of Mental Disability and Parenting: Current Models of Intervention

The law addresses parents with mental illness primarily in the context of custody and termination of parental rights. A mental illness alone is not ordinarily sufficient for removal of children from a parent's custody or termination of parental rights. Rather, many jurisdictions require a showing that the parent is unable to care for the child because of her mental illness.[67] However, the law is constructed to burden parents with mental illness in maintaining or regaining custody and other parental rights over their children. Presumptions of unfitness, the denial of social services, or the assumption that unfitness due to schizophrenia persists over time mean that both statutes and courts stand in the way of family preservation. I discuss below the Adoption and Safe Families Act (ASFA), the federal statute most relevant to parents with mental illness. After a general overview of state law, I move to focus on Virginia law as a more specific example of how states create statutory frameworks that overly burden parents with mental illness.

1. Federal Law—Adoption and Safe Families Act

As termination of parental rights is a common prerequisite for adoption,[68] the relevant federal statute is the Adoption and Safe Families Act of 1997 (ASFA),[69] despite not directly targeting parents with mental illness. In an attempt to move children out of the foster care system, the Act guides states' regulation of foster care, family reunifications, termination of parental rights and adoptions. As such, its di-

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67 For a general discussion of removal and termination in state law, see *infra* Part I.C.2.

68 Not every case of adoption requires termination of parental rights. Examples include step-parent adoptions or second-parent adoptions for same-sex couples.

69 Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (promoting and imposing safety requirements for the adoption of children in foster care).

rectives are the overarching principles to which state laws conform. ASFA's financial incentives further ensure states' compliance and prioritization of children's release for adoption by severing ties with birth families.

ASFA's main guiding principle for states is guaranteeing the child's health and safety.[70] However, ASFA embodies a belief that this principle is best realized through adoption, rather than family preservation.[71] According to ASFA, states should make reasonable efforts to maintain family integrity, but only as long as the child's health or safety are not compromised.[72] These efforts at family preservation occur at two points in time: first, before foster placement, in order to prevent the child's removal from home;[73] second, after foster placement to facilitate a child's safe return to her parents.[74] However, states are not obligated to make such reasonable efforts if a parent has subjected the child to aggravated circumstances,[75] or if the parent's parental rights to a sibling were previously terminated.[76]

It would seem, then, that the federal government prioritizes family preservation, as long as the child's safety can be guaranteed. However, the fact that states are not required in all instances to provide families with social services[77] facilitates adoption of children because

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70 42 U.S.C. § 671(a)(15)(A) (2006).

71 *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 105 (2002).

72 42 U.S.C. § 671(a)(15)(B).

73 *Id.* § 671(a)(15)(B)(i).

74 *Id.* § 671(a)(15)(B)(ii).

75 *Id.* § 671(a)(15)(D)(i). "Aggravated circumstances" are to be defined by state law and, according to ASFA, include but are not limited to abandonment, torture, chronic abuse and sexual abuse.

76 *Id.* § 671(a)(15)(D)(iii).

77 *See infra* Part I.C.3–4. In some circumstances—previous termination of parental rights, for instance—states are not required to provide services. It is unclear whether states can provide no services whatsoever; state courts generally agree that states are only required to provide reasonable services, rather than futile ones, which leaves services providers with much latitude when deciding whether and which services to provide. Examples of court decisions to this effect include *Mary Ellen C. v. Arizona Department of Economic Security*, 971 P.2d 1046, 1053 (Ariz. Ct. App. 1999) (reversing the juvenile court's severance order because the State failed to establish by clear and convincing evidence that it made a reasonable effort to preserve the family); *In re Sydney J.*, 2005 Conn. Super. LEXIS 2176, at *27 (June 13, 2005) (finding that the department met its burden by making reasonable efforts to reunify the mother with the children, even though the mother was unable or unwilling to benefit from the reunification efforts); *In re Children of Vasquez*, 658 N.W.2d 249, 254–55 (Minn. Ct. App. 2003) (finding that "reasonable efforts would be futile and unreasonable" where "appellant failed to comply with his parental duties when he murdered his wife (the children's mother) and then did not allow the children to attend their mother's funeral"); *In re Conley/Wilt Children*, 1998 Ohio App. LEXIS 679, at *19–20 (Feb. 6, 1998) (reversing the award of permanent custody to the department and remanding for further proceedings because the lower court had not determined "whether

parents are denied the assistance they need in order to do better. It is puzzling why families are left unserved precisely when they face such "aggravated circumstances."[78] These families are in most need of services, but are denied the right to them.

When services are to be provided to families, the standard of services provision—i.e., "reasonable"—is unclear. The standard's vagueness enables far too easy termination of parental rights, as judges can avoid in depth review of the services.[79] Judges may also exercise broad discretion over the type and scope of services that satisfy the standard. As a result, courts find agencies that have provided very little, or no, services as compliant, often because of a lack of funding or the unavailability of services.[80] By not specifying mandatory services or providing guidelines as to which services are "reasonable," ASFA effectively excuses agencies from providing any family preservation services at all.[81] This, in turn, perpetuates the parent's impaired care for her children and facilitates the termination of her parental rights and pursuant adoption of her children.

Another reason to question the federal law's efficacy in fostering family preservation is that the incentives ASFA puts in place for moving children out of foster care and releasing them for adoption create obstacles for family preservation.[82] For each child adopted out of foster care (beyond a base number of children) a state is eligible for an additional $4,000 from the federal government.[83] An eligible state is that which exceeds in a fiscal year its base number of adoptions.[84]

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the agency had made reasonable efforts through its case plans to reunite [the mother] with her children, nor did the court determine that efforts at reunification would have been futile").

78 *See* ROBERTS, *supra* note 71, at 109 ("Most people would agree that children have an interest in, if not a right to, government protection from this sort of violence.").

79 *See id.* at 131 (discussing *Suter v. Artist M*, 503 U.S. 347 (1992), in which the U.S. Supreme Court rejected the right of foster children to bring a federal suit to enforce the reasonable efforts provision against the Illinois Department of Children and Family Services because the provision was too ambiguous to enforce).

80 *See id.* at 132 (citing one guardian's testimony before Congress).

81 *See id.* at 132–33 (discussing an investigation by the U.S. General Accounting Office into how a Florida county implemented the AFSA).

82 *See* 42 U.S.C. § 673b(a) (2006) ("[T]he Secretary shall make a grant to each State that is an incentive-eligible State for a fiscal year in an amount equal to the adoption incentive payment payable to the State under this section for the fiscal year, which shall be payable in the immediately succeeding fiscal year.").

83 *Id.* § 673b(d)(1)(A). Incentives for other adoptions, such as older child adoptions, may be of a different amount.

84 *Id.* §§ 673b(b)(2), (g)(3). Two base numbers are in place. The first concerns the number of foster children adoptions. Here, the base number is the number of such adoptions in the state for the year 2007. As for the base number of older children adoptions, that too is the number of such adoptions in the state during 2007. However, the state is eligi-

This system encourages states to continuously exceed the number of adoptions from one year to the next,[85] but does not at all incentivize states to preserve families. Consequently, states would understandably privilege adoptions over family preservation.[86]

The Louisiana Supreme Court well articulated the relationship between ASFA and state law, stating: "The ASFA tilts th[e] delicate balance [between the natural parent's fundamental right and the child's right to a permanent home] in the child's favor and requires states, as a condition to continued receipt of certain federal funding, to enact parallel legislation."[87] As a result, states are often exempt from working with the family toward reunification, and the burden to prove parental fitness shifts to the parent who wishes to maintain her parental rights.[88]

2. State Law and Parents with Mental Disorders: An Overview

As a general matter, though specifics vary across jurisdictions, most states consider a parent's mental disorder grounds for removal or termination of parental rights when that mental disorder results in the parent's inability to care for her child. Some states express this view in their statutory schemes. These statutes explicitly state that a mental illness ought to be considered by courts in removal proceedings if the mental illness renders a parent unable to care for the child. Among these states are Arizona and Kansas. Other states, however, do not have such statutes and regard a parent's mental illness as reason for removal or termination as fitting the child's best interest, as does the District of Columbia.

One state where a parent's mental illness is grounds for termination is Arizona. This state's statute instructs courts to terminate pa-

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ble for additional funding if it exceeds its highest number of adoptions in the state in a single year since 2002. To be clear, let us assume that State X has released 1000 children for adoption in 2007. Let us assume further that since 2002 the most adoptions in that state in a single year have been 1500. To qualify for a federal grant in 2009, State X would have to release more than 1000 children for adoption. However, for a higher grant, State X would have to release more than 1500 children for adoption in 2009.

85 Continuing the illustrative calculations above: assuming State X has indeed exceeded its base number in 2009 by releasing more than 1500 children for adoption (let us say the number of children adopted in State X in 2009 is 2000), the highest number of adoptions ever that qualifies State X for the increased grant in pursuant years will become 2000. Thus, in order to maximize funding, states are incentivized to continually increase the number of adoptions. ROBERTS, *supra* note 71, at 111.

86 *See id.*

87 State *ex rel. SNW* v. Mitchell, No. 01-2128, 2001 La. LEXIS 3105, at *14 (Nov. 28, 2001).

88 *Id.* at *14–22.

rental rights of a mentally ill or deficient parent, if the parent is unable to perform parental responsibilities and if that inability is likely to persist over an indeterminate period of time.[89] An Arizona court has interpreted this statute as mandatory; when clear and convincing evidence exists that a parent does in fact have a mental illness, that the parent cannot care for the child because of the mental illness and that this inability to care is persistent over time, the court has no discretion and must terminate the child-parent relationship.[90]

Similarly to the Arizona statute, Kansas too has instructed courts through its law to consider a parent's mental illness as a factor in terminations of parental rights.[91] Here, the mental illness must be of such nature or duration that it would eliminate the parent's ability to care for the child's physical, mental and emotional needs,[92] and the situation must be one that is unlikely to change in the foreseeable future.[93] Indeed, mental illness alone cannot satisfy the conditions for terminations. In *In re J.Y.*,[94] the Kansas Court of Appeals reaffirmed the lower court's termination of the father's rights. Rather than the father's mental illness, the court of appeals based its decision on the father's criminal record, his failure to comply with rehabilitation efforts and his failure to care for the child. The court reasoned that the state provided no evidence to support a claim that the father's bipolar disorder had any effect on his parenting ability.[95]

The District of Columbia's statutory scheme provides that termination decisions are made on the basis of the child's best interests,[96]

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89 ARIZ. REV. STAT. ANN. § 8-533(B)(3) (2009).

90 *In re* Appeal in Pinal County, 729 P.2d 918, 920 (Ariz. Ct. App. 1986).

91 KAN. STAT. ANN. § 38-2269(b)(1) (2008).

92 *Id.*

93 *Id.* § 38-2269(a).

94 191 P.3d 1137, No. 100,214, 2008 WL 4239122 (Kan. Ct. App. 2008).

95 *Id.* at *2 ("The court provided no reasoning for choosing this factor, merely stating the natural father had been incapable of caring for J.Y. While the record contained evidence the natural father had been diagnosed with bipolar disorder as a juvenile, no evidence provided by the State demonstrated the effect this disorder might have on the natural father's ability to parent or the persistence of the natural father's disability. Consequently, the evidence does not support a finding the natural father currently possesses an emotional or mental illness or disability that renders him incapable of parenting J.Y.").

96 D.C. CODE ANN. § 16-2353 (2001). The District of Columbia statute's language reads:

> (b) In determining whether it is in the child's best interests that the parent and child relationship be terminated, a judge shall consider each of the following factors: (1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages; (2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child; (3) the quality of the interaction and interrelationship of the child with his or her parent, siblings, relative,

without specifically regarding parental mental illness as a factor. While courts agree that mental illness in itself is not grounds for termination of parental rights, it is a consideration when the illness impacts the child's well-being. In *E.C. v. District of Columbia*,[97] the D.C. Court of Appeals affirmed a termination of the parents' rights using the best interest framework. In this case, based on testimonies from psychiatrists, social workers and family members, the court found that the parents', particularly the father's,[98] mental condition had a potential adverse effect on the three young children.[99] The court concluded that the father was both emotionally and physically dangerous to his children for two reasons. First, his disorder could cause irreversible emotional damage to the children who already suffered developmental impairments. Second, the court was concerned with the lack of attachments between the parents and the children, which was so severe that the children exhibited distress and behavioral problems after visits with the parents, including self-injurious behavior.[100]

Another state that adopts a framework similar to the best interest model is Louisiana.[101] Although the Louisiana statute does not explicitly use the term "child's best interest," its language effectively creates such a standard by prescribing that courts consider in their termination decisions the child's age and "need for a safe, stable, and permanent home."[102]

To summarize, states generally require termination of parental rights on three basic necessary conditions: (a) a parent's mental illness; (b) a parent's inability to care for her child; (c) causality be-

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> and/or caretakers, including the foster parent; (3A) the child was left by his or her parent, guardian, or custodian in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child was ready for discharge from the hospital, and the parent, guardian, or custodian of the child has not taken any action or made any effort to maintain a parental, guardianship, or custodial relationship or contact with the child; (4) to the extent feasible, the child's opinion of his or her own best interests in the matter; and (5) evidence that drug-related activity continues to exist in a child's home environment after intervention and services have been provided . . . . Evidence of continued drug-activity shall be given great weight.

97 589 A.2d 1245, 1249 (D.C. 1991).

98 *Id.* at 1247 (discussing the father's mental state, the court cited a psychiatrist who found the father suffered from a "character disorder which caused him to view everyone around him with deep suspicion and to deny any personal responsibility for events in his life, and hindered his ability to have any insight into his problems"). The court also referred to a counseling psychologist who testified that the father's disorder manifested in his inability to organize his life and to meet his responsibilities. *Id.* at n.5.

99 *Id.* at 1250.

100 *Id.* at 1247–49.

101 *See* LA. CHILD. CODE ANN. art. 1015 (2008).

102 *Id.* at art. 1015(5).

tween the illness and the inability to care. However, other common considerations for termination are the parent's prospects at improvement and recovery and the child best interest model. In Subparts C.iii and C.iv.1–3 below, I discuss in greater detail how these conditions work to disadvantage parents with mental disorders. In Virginia, the jurisdiction on which I focus hereafter, once condition (a) applies, there is a presumption that conditions (b) and (c) exist as well. This presumption increases the risk that parents will lose custody of their children, which is an infringement on their fundamental rights. Virginia, therefore, is both representative of most states' treatment of parents with mental disorders and an example that highlights how state law overly burdens such parents.

3. Virginia Law—Obstacles to Family Preservation

The State of Virginia intervenes in families when a child is abused or neglected.[103] Defining abuse or neglect, Virginia law stipulates that a child left without parental care because of a parent's mental incapacity is a neglected child.[104] When there is concern that a child has been neglected or abused, a social services agency may remove the child immediately from her home and petition, within four hours, for a court issued emergency removal order.[105] For a court to grant an order, the petition must establish that returning the child home would likely place the child in imminent danger of life or of severe or irreversible injury.[106] Additionally, the petition must show that reasonable efforts to prevent removal have been made, and that there was no less drastic alternative to removal that would ensure the reasonable protection of the child.[107] When there is no reasonable opportunity to provide these or other services, it is assumed that reasonable efforts to prevent removal have been made.[108]

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103 Virginia law defines an abused or neglected child as a child whose parent or caretaker inflicts, threatens to inflict or facilitates non-accidental mental or physical harm, substantial risk of death, disfigurement or impairment of bodily or mental functions; neglects or refuses to provide care necessary for the child's health; abandons the child; commits or allows unlawful sexual acts upon the child; leaves the child with a registered violent sex offender; or a child left without parental care. *See* VA. CODE ANN. § 16.1-228(1)–(6) (2009).

104 *See id.* § 16.1-228(5).

105 *See id.* § 16.1-251(A).

106 *See id.* § 16.1-251(A)(1).

107 *See id.* § 16.1-251(A)(2). The statute suggests less drastic alternatives such as "medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family."

108 *See id.* § 16.1-251(A)(2).

Once a child is placed in the custody of social services or a child welfare agency, and unless the child has been returned to the custody of her parents, the department of social services must design a foster care plan.[109] After approving a foster care plan, courts must review the plan at least twice.[110]

Just as ASFA directs, Virginia too requires the child's health and safety to be the highest priority for the agency devising a foster care plan and for the court reviewing and approving it.[111] Also, like ASFA, Virginia requires that the plan support reasonable efforts to return the child to her parents within the shortest feasible amount of time, providing that reunification is consistent with the child's health and safety.[112] However, the agency is not required to make reasonable efforts to reunite the child with her parent if the parent has previously lost parental rights over a sibling or if the parent has been convicted of other crimes—generally different types of homicide or violent crimes against children.[113]

The court may terminate parental rights when a child has been abused or neglected and has been placed in foster care if termination is in the best interest of the child.[114] Before looking into the child's best interest, however, threshold conditions must be met: that the abuse or neglect must have seriously and substantially threatened the child's life, health or development;[115] and that it is not reasonably likely that the abuse or neglect would have ended, therefore ensuring the child's safe return home in reasonable time.[116]

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109 *See id.* § 16.1-281(A). The agency should involve the parent and child—provided that the child's involvement is in her best interest—and has sixty days (and in some circumstances an additional sixty days) for designing the plan. The plan should specify: (a) the programs, care, services and other support to the child and parents; (b) the participation and conduct required from the parents; (c) the permitted visitations or other contacts between the child and parents; (d) the nature of the child's placement; and (e) if the child is 16 or over, programs and services to help the child prepare for independent living. *Id.* § 16.1-281(B).

110 A court is to hold a hearing in order to review and approve a plan within seventy-five days. At this hearing, a judge has the authority to revise a foster care plan. *See id.* § 16.1-281(C). Following approval of a plan, the court is to schedule another review hearing in six months, unless the effects and results of the plan are equivalent to those of termination of parental rights, in which case the court is to schedule a review hearing in twelve months. *See id.* § 16.1-281(E).

111 *See id.* § 16.1-281(B).

112 *See id.*

113 *See id.*

114 *See id.* § 16.1-283(B).

115 *See id.* § 16.1-283(B)(1).

116 *See id.* § 16.1-283(B)(2).

Most important for our purposes, the law creates a presumption that a parent's mental illness excludes the likelihood of a child's safe return home into the custody of her parents. The presumption exists when a parent has a mental illness that is severe enough to eliminate a reasonable expectation for a parent's ability to care for the child in a manner appropriate with the child's age and developmental stage.[117]

This statutory framework disadvantages parents with mental illness in several ways. First, by making an explicit connection between a parent's mental incapacity and neglect, the statute lowers the general standard of neglect. When a parent has no mental illness, an agency must show that the child has been, or is currently, at risk of harm or death, or that the child is without care that is necessary for her health.[118] Yet, when the parent has a mental illness no such showing is required; instead it is sufficient that a child is without parental care[119] regardless of whether the lack of care places the child in risk or if the absent care is necessary for her health. Thus, when a child has a parent with a mental illness, the threshold for a court finding that the child has been neglected is lower. Rather than turning on the harm to the child, the standard—which is no longer neutral—now turns on the parent's mental capacity.

While the statute itself creates a disparate standard, courts have further exacerbated this disparity. In *Jenkins v. Winchester Department of Social Services*,[120] a mother with paranoid-schizophrenia, who had her parental rights over three older children terminated, appealed the termination of parental rights to a younger boy and girl. Contesting the termination of her rights regarding her daughter, who was removed immediately after birth,[121] Jenkins argued that as the child was removed so early, there was no actual finding of abuse or neglect. Therefore, Jenkins argued, her rights should not have been terminated. The court found Jenkins's illness rendered her incapable of being an independent parent[122] and therefore posed a substantial risk to her children. The court interpreted "substantial risk" as relating to a future possibility that indeed may not materialize.[123] Thus, based on

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117 *See id.* § 16.1-283(B)(2)(a).

118 *See id.* § 16.1-228(1)–(6).

119 *See id.* § 16.1-228(5).

120 409 S.E.2d 16 (Va. Ct. App. 1991).

121 *Id.* at 17.

122 *Id.* at 18–19. The court did not specify what it meant by "independent parent," but seems to imply that an independent parent is one who does not require constant and frequent supervision or assistance from others, particularly from the Department of Social Services.

123 *Id.*

her mental illness, the court presumed that Jenkins could not care for her daughter.[124] Furthermore, the court presumed that she eventually would present a risk because the court did not believe there was a reasonable possibility that Jenkins' parenting would improve.

Thus, not only does the court assume that a parent is unfit because of a mental illness, but it also subjects a parent who suffers from a mental illness to a higher standard of parenting than it does mentally healthy parents.[125] In regards to her son, Jenkins argued that, pursuant to her participation in social services, her parenting abilities had improved enough that she no longer presented a substantial risk to him.[126] However, the court ruled this was insufficient, and despite the progress she had made,[127] Jenkins would have to show that she could function as an independent parent if she were to reverse a termination decision and regain custody.[128] Notably, this "independent parent" standard is a standard that has no root in the language of the statute. Moreover, being an "independent parent" is not expected of mentally healthy parents. Arguably, other parents are encouraged to share parental responsibilities with their extended families and communities rather than shoulder the burdens of parenting on their own. The result is that the standard for the state to remove a child is lower, yet the standard for a parent to regain rights is elevated. A child of a parent with a mental illness, then, is more likely to be removed from her home and a parent's custody, and less likely to be reunited with that parent.

A second way in which Virginia law hinders mentally ill parents is by limiting reunification services. As a way to comply with ASFA,[129] Virginia law excuses a social services agency from making reasonable efforts at reunification when a parent's parental rights to a sibling

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124 *Id.* at 19 ("Ms. Jenkins' mental incapacity prevented her from rendering appropriate parental care."). For another example of a case where the court concludes that a mental illness means a parent is unfit, see *Marston v. Fairfax County Department of Family Services*, No. 1336-01-4, 2002 Va. App. LEXIS 26 (Jan. 22, 2002).

125 *See* Ackerson, *supra* note 4, at 190 ("[M]any judges apply a higher standard of parental competence that is more appropriate for divorce custody cases than for termination of parental rights.").

126 *Jenkins*, 409 S.E.2d at 20.

127 Note that when discussing her daughter, the court maintained that there was no evidence of improvement in Jenkins's parenting skills.

128 *Id.*

129 *See* Toms v. Hanover Dep't of Soc. Servs., 616 S.E.2d 765, 772 (Va. Ct. App. 2005) (pointing out the provision regarding reasonable services has been amended to conform to the federal statute).

have been previously terminated.[130] Given the high rate of termination of rights of parents with mental illness, this allows agencies not to provide services to parents with mental illness. A case in point is *Toms v. Hanover Department of Social Services*,[131] where the court reviewed a lower court's decision to terminate a father's parental rights over his severely neglected and underdeveloped children. The father, diagnosed with multiple severe mental health problems,[132] argued that the state could not terminate his parental rights because he was not provided with reasonable services.[133] The court analyzed the language regarding reasonable services and concluded that the state had discretion—not an obligation—to provide services even when the law does not explicitly release the state from its responsibility to provide services.[134] Addressing the issue of parental mental health, the court found that "another example of *prima facie* evidence (severe 'mental or emotional illness') . . . includes no mention of rehabilitative services, [therefore] it cannot be reasonably asserted that the subsection necessarily requires them in all cases."[135]

This ruling by the court is troubling for two reasons. First, by releasing agencies from the obligation to provide services to those parents who are presumably most in need of such services, the law once more increases the risk that children will remain separated from their parents and that these parents' rights will eventually be terminated. This raises concerns that the denial of services to parents who are mentally ill could ultimately reproduce their unfitness and failure as parents. Second, courts that are required to evaluate a parent's ability to remedy the abuse, neglect or unfitness are without means to make such judgments. Absent these services and the opportunity to demonstrate to the court that services are both beneficial to parents and protective to the child, or that the abuse or neglect has ended in a way that will facilitate the child's safe return home in reasonable time (as the termination provision suggests),[136] parents are denied the

130 VA. CODE ANN. § 16.1-281(B) (2008). This was also one of the court's findings in *Jenkins*, that because she had lost custody over her older children, she presented a risk to her younger children. *Jenkins*, 409 S.E.2d at 21.

131 616 S.E.2d 765 (2005).

132 *Id.* at 768. Psychological testing revealed that Toms suffered from episodes of delusional thinking, social phobias, paranoia, severe anxiety, obsessive-compulsive disorder, depression and avoidant personality features. He also acknowledged that he suffered from alcohol abuse. Some of these have symptoms common to schizophrenia, such as the delusions and paranoia.

133 *Id.* at 767.

134 *Id.* at 770–71.

135 *Id.* at 771 n.4.

136 VA. CODE ANN. § 16.1-283(B)(2) (2008).

opportunity for a less drastic alternative to removal and termination. Nor do parents have the chance to avoid separation from their children altogether. Moreover, services enable both caseworkers and courts to evaluate different factors that could implicate the child's best interest, her ability to cope with the separation, to address any special needs the child may have and to estimate whether in fact the child is likely to be adopted if parental rights are terminated.[137] As I will argue in the following Parts, this is inconsistent with parents' and children's substantive due process rights, as it creates a heightened risk that a child removed from her parent's custody will remain separated from the home when removal progresses to termination of parental rights.

The third and most detrimental way the law compromises the parental rights of parents with mental illness is the presumption that a parent's mental illness diminishes the likelihood of a child's safe return home.[138] The presumption becomes almost unrebuttable when courts find that a diagnosis alone is sufficient to deem a parent unfit.[139] As demonstrated in *Jenkins*, this presumption creates a default that a parent with mental illness should not retain her parental rights since because of her illness—and her illness alone—she cannot, and will not in the future be able to care for her child. In another case, *Helen W. v. Fairfax County Department of Human Development*,[140] the court ruled that the parents' mental illness (both parents shared a common system of paranoid delusions) and their poor prognosis were sufficient for a finding of unfitness.[141] In ruling so, the court held that a finding regarding a mental illness and a poor prognosis was "tantamount to a finding of parental unfitness and [that] no separate finding of unfitness was necessary."[142] Thus, not only is the state agency exempt from showing that the rights of a parent with mental illness should be terminated, but this presumption places the burden on the parent to show that those rights should not be terminated. What's more, the state leaves the parent without resources to demonstrate that her rights should not be terminated because she had been

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137 *See* Nina Wasow, *Planned Failure: California's Denial of Reunification Services to Parents with Mental Disabilities*, 31 N.Y.U. REV. L. & SOC. CHANGE 183, 218–19 (2006) (discussing the "reasonable efforts" phase of dependency proceedings).

138 VA. CODE ANN. § 16.1-283(B)(2)(a).

139 *See* Wasow, *supra* note 137, at 221 ("Many judges, in denying services or terminating rights, simply point to the diagnosis as if it were evidence enough of inability to parent . . . .").

140 407 S.E.2d 25 (Va. Ct. App. 1991).

141 *Id.* at 29–30.

142 *Id.* at 30.

previously denied access to services which could have served as a less restrictive alternative to removal, or could have enabled her to become a fit parent.

4. The Inadequacy of Current Interventions

Beyond the previously discussed shortcomings of the federal and Virginia frameworks, these interventions also are inadequate because they fail to properly address the particular circumstances of parents with mental illness. First, while removal, reunification and termination revolve around mental illness and its impact on the parent's fitness, the law does not address how mental illness is to be assessed. Presumably, assessment is the role of social science professionals in their service to the courts, yet social science too struggles with the problem of assessment in legal contexts.[143]

Second, as much as the law attaches parental mental illness to parental unfitness, it also conflates severity of mental illness with permanency. Once a court finds a parent unfit merely because of that parent's mental illness, the court is also more likely to conclude (sometimes with no in-depth scrutiny) that the illness is chronic,[144] and the parent, therefore, permanently unfit. A poor prognosis of the parent's improvement justifies, in the eyes of the court, the termination of parental rights.

Lastly, both in statute and in court implementation, there seems to be an assumption that a child's best interest is to be separated from a mentally ill parent that is abusive or neglectful. Here, too, social science research, as well as the conditions of child welfare, raise hard questions as to whether a child's best interest points to family separation and out of home care.

a. Assessing Parental Fitness

Parenting skills, or parental fitness, are subject to the law's scrutiny primarily when disputes between parents or disputes between parents and the state arise. Relevant here are challenges brought by the state—upon moving for removal or termination of parental rights—to the parental fitness of a parent with schizophrenia. Yet social scientists have challenged the adequacy of evaluations of parental fitness upon which courts rely, arguing that parents with mental ill-

143 *See infra* Part C.4.a.

144 *See infra* note 166 and accompanying text.

ness lose their children due to inadequate and inappropriate assessments.[145]

The problems with assessment stem from the tools social services use to identify mental illness and parental fitness. Because there are no formal guidelines or standards for assessment of parental mental illness,[146] some of these tools, specifically personality tests, are inappropriate for assessing fitness,[147] while others do not test parenting skills at all.[148] The efficacy of these tools in determining fitness remains insufficiently tested.[149]

Assessments of parental fitness may also reflect assessors' bias toward individual parents, for which the inadequate tools are unable to control. While mental health professionals conducting assessments tend to predict poor prognoses, the actual outcomes of treatment are more positive, thus inconsistent with the prognosis.[150] Also, it seems that low socio-economic status is predictive of severe diagnoses and poor prognoses.[151] This is a bias that reproduces the disadvantages to parents with mental health problems as well as parents from low socio-economic backgrounds and particularly those at the intersection. Finally, out of concern to children's safety and well-being, assessors tend to over-estimate the risk a parent may present in a preference to err on the safe side.[152]

Still, however deficient assessment tools may be, they are preferable to a complete lack of assessment, as was the case in *Datta v. Fairfax Department of Family Services*.[153] There, Datta appealed the Virginia

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145 *See* Ackerson, *supra* note 4, at 190 ("[M]any mentally ill parents risk loss of their parental rights on the basis of inadequate or inappropriate assessment methods and professional bias.").

146 *See* Busch & Redlich, *supra* note 50, at 999 ("There are no formal practice standards to assess parental mental health or parental fitness . . . .").

147 *See* Ackerson, *supra* note 4, at 190 ("[P]rofessionals and judges continue to rely on personality tests and other assessment tools that may be inappropriate for this population in determining parenting competence.").

148 *See* Wasow, *supra* note 137, at 211 (discussing the flaws in psychological assessment of parental adequacy and child mistreatment risk).

149 *See* Ackerson, *supra* note 4, at 190 ("Psychological instruments that are typically used for child welfare assessments have received little empirical testing regarding their efficacy for measuring parenting competence.").

150 *See* Wasow, *supra* note 137, at 212 (discussing a study conducted by attorney Bruce Ennis and psychologist Thomas Litwack which found a poor correlation between prognosis and actual outcome of treatment).

151 *See id.* ("[P]erceived lower socio-economic status correlates directly with more severe diagnosis and poorer prognosis . . . .").

152 *See id.* ("[P]sychologists have a significant tendency towards over-prediction of violent behavior in civil commitments, which is a problem in child welfare cases." (citation omitted)).

153 No. 0293-06-4, 2006 Va. App. LEXIS 394 (Aug. 22, 2006).

circuit court's decision to remove her son, arguing the court erred in finding she had a "mental incapacity."[154] Neither the circuit court nor the court of appeals based their rulings on a mental health assessment conducted by a mental health professional. Rather, both courts based their findings on witnesses' descriptions of the mother's behavior, as well as her medical history.[155] Therefore, the court of appeals ruled that the circuit court did not err in concluding Datta had a mental incapacity.[156]

This finding of Datta's mental incapacity rests on shaky ground for two reasons. For one, according to social science research, because of the inadequacy of assessment tools, caseworkers find it difficult to identify who is mentally ill or an unfit parent due to mental health problems.[157] Second, even a history of psychiatric treatment can be misleading. Keeping in mind that the course of mental illness varies significantly among patients, includes periods of remission and can, in some cases, lead to complete recovery,[158] relying only on medical history with no inquiry into the individual's *current* mental health is insufficient. In the context of removal of children from their parents' custody—a burden on a fundamental right[159]—a finding of mental illness without proper assessment is highly troubling.

Even when a mental illness has been correctly identified, it is a poor proxy for unfitness. A series of studies suggest that parental fitness hinges on many factors, less than on the diagnosis itself.[160] These factors range from a parent's intellectual and social competence, parenting practices and the severity of symptoms.[161] Courts should therefore examine the actual parenting style, the particular symptoms a parent experiences, and their impact on the child and on parenting

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154 *Id.* at *2.

155 *Id.* at *10 ("No witness opined that Datta was suffering from a particular mental disease. Rather, the witnesses described her attitude toward others and her uncommon behavior. . . . Datta believed she was being followed or she spoke to persons who were not present. She exhibited aggressive behavior, which included threatening [the child's] family and social workers. . . . [She] had a history of mental hospitalization and she took psychiatric medications . . . .").

156 *Id.*

157 *See* Ackerson, *supra* note 4, at 189 (citing a study that found that "child welfare workers perceived themselves ill equipped to deal with assessment and treatment of the mentally ill parents they serve").

158 *See* Assen Jablensky, *Course and Outcome of Schizophrenia*, *in* 1 NEW OXFORD TEXTBOOK OF PSYCHIATRY, *supra* note 18, at 612, 619 ("[S]chizophrenia presents a broad spectrum of possible outcomes and course patterns . . . .").

159 For a discussion of parents' custody rights, as well as family integrity, as fundamental rights, see Part II.

160 *See* Ackerson, *supra* note 4, at 190 (listing such studies).

161 *See id.*

skills, rather than rely only on the diagnosis itself. In light of these studies, it seems that the ruling in *Datta* was not in fact incorrect, because a particular diagnosis seems immaterial. Had the court analyzed the impact of Datta's mental incapacity or her actual parental fitness, perhaps this argument would have merit. The court, however, merely presented facts it saw as demonstrative of Datta's unfitness—it did not address whether there existed a causal connection between Datta's mental incapacity and her supposed inability to provide appropriate mental care for her son.[162]

b. Assuming Permanency: Requiring a 'Poor Prognosis'

As part of a termination of parental rights proceeding, Virginia courts examine the parent's prognosis for recovery. A decision to terminate must be based on the court's finding that prospects for improvement are poor, and that as a result, the abuse or neglect are unlikely to be remedied in a reasonable time.[163] This "poor prognosis" requirement is rooted in a view that severe mental illness is chronic and immutable and that, as such, mental illness permanently precludes one from being a competent parent.[164] The "poor prognosis" requirement highlights the lack of understanding among lawmakers and courts about the nature of mental illness, specifically recovery or remission prospects. Although individuals may recover even from severe mental illnesses, such as schizophrenia, or at least experience periods of remission,[165] the existence of a mental illness in itself serves, again, as a proxy—this time for little chances of future mental health.

For example, in *Hayes v. Petersburg Department of Social Services*,[166] parental rights were terminated despite the fact that the father, suffering from schizophrenia, had been receiving rehabilitative services and therapy, though the father had sought out services later than proscribed in the foster care plan.[167] The court held that despite the father receiving services, it was not in the child's best interest to have to wait a long period of time to "find out when, or even if, a parent

162 Datta v. Fairfax Dep't of Family Servs., No. 0293-06-4, 2006 Va. App. LEXIS 394, at *10 (Aug. 22, 2006).

163 *See* VA. CODE ANN. § 16.1-283 (B)(2)(a) (2008).

164 *See* Ackerson, *supra* note 4, at 188 (describing how researchers view a parent's mental disorder as "an immutable problem that inevitably undermines the ability to be an effective parent").

165 *See* Jablensky, *supra* note 158, at 619.

166 No. 1166-05-2, 2005 Va. App. LEXIS 431 (Nov. 1, 2005).

167 *Id.* at *8.

will be capable of resuming his [] responsibilities."[168] In light of the purpose of the foster care system as a temporary, yet oftentimes prolonged, solution for children whose parents are unable to care for them,[169] the logic flowing from this ruling is puzzling. If it is not in the best interest of children to wait for their parents to be able to parent them again, why the need for foster care as an intermediate period of time until adoption? What's more, a parent's capability to parent is contingent upon the services she receives while her child is in foster care, yet these services take time to be effective in achieving remission or recovery. Why, then, provide these services, which arguably are a strain on public resources? If, according to the court, children should not have to wait for their parents to become fit parents, it would follow that every child removed from her unfit parents should be released for adoption immediately. This ruling is highly under-protective of both parents' rights to the custody of their children and their interest in receiving mental health services, as well as children's right to family integrity.

c. Determining the Child's Best Interest

In most matters of family law concerning children, the law instructs courts to consider the best interest of the child. This is true also regarding removal of children or termination of parental rights. Indeed, both ASFA and Virginia law emphasize the child's best interest as a guiding principle.[170] However, the "best interest of the child" is an individualized, context-based standard that scholars have criticized for being too vague.[171] Perhaps, then, a different concept is in order. While one would be hard pressed to contest that protection from abuse or neglect is inconsistent with the child's best interest, this should not be the only set of circumstances taken into account.

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168 *Id.* at *9 (quoting Kaywood v. Halifax County Dep't of Soc. Servs., 394 S.E.2d 492, 495 (Va. Ct. App. 1990)).

169 *See* Cristina Chi-Young Chou, *Renewing the Good Intentions of Foster Care: Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and the Substantive Due Process Right to Safety*, 46 VAND. L. REV. 683, 683 (1993) ("The purpose of foster care is to provide a temporary safe haven for children whose parents are unable to care for them.").

170 ASFA prioritizes the child's "health and safety." 42 U.S.C. § 671(a)(15) (2006). Virginia law considers the child's best interest both in designing a foster plan, *see* VA. CODE ANN. § 16.1-281(B) (2009), and in termination of parental rights, *see id.* § 16.1-283 (B).

171 *See* Virginia Sawyer Radding, *Intention v. Implementation: Are Many Children, Removed from Their Biological Families, Being Protected or Deprived?*, 6 U.C. DAVIS J. JUV. L. & POL'Y 29, 35–36 (2001) (discussing how some scholars believe the "best interests of the child" standard is vague due to nonexistent guiding criterion and because its application is "vulnerable to biases").

Rather, I propose a wider view of the standard that examines not only the child's home life, but the impact of removal or termination and the legal proceedings which they involve, as well as the conditions and effects of foster care.

When parents with mental illness are concerned, an inquiry into the child's best interest often involves a discussion of the parent's condition,[172] and how that condition relates to the child. But a finding of a parent's mental illness does not necessarily compromise the child's best interest. In fact, research regarding the harms of parental schizophrenia on children reveals that the likelihood and severity of attention deficits or thought disorders, common in children of parents with schizophrenia, worsen with separation from the parent. Similarly, mental illness rates among children not raised by their parents are higher than those among children who remained in their mothers' custody.[173]

Separation from parents further implicates the child's best interest because it loosens—even breaks—the ties of attachment. According to attachment theory, children's bonds with a primary care-giver are necessary for healthy psychological development.[174] Through an ongoing, long-term relationship with parents, children learn how to face the world and forge their own identity by either imitating or rejecting their parents as role models.[175] Breaking the child-parent relationship causes severe trauma to children and can hinder their development.[176] And though children can form these attachments with more than one caretaker, when forced to separate from their attachment figures, they still suffer emotional harm,[177] including lessened emotional security, lower self-esteem and a decreased ability to form

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172 *See e.g.*, *Hayes*, 2005 Va. App. LEXIS 431; Martin v. Pittsylvania County Dep't of Soc. Servs., 348 S.E.2d 13 (Va. Ct. App. 1986).

173 *See* Jacqueline Barnes & Alan Stein, *Child and Adolescent Psychiatry*, *in* 2 NEW OXFORD TEXTBOOK OF PSYCHIATRY, *supra* note 18, at 1848, 1850 ("A longitudinal comparison of children reared with or apart from their schizophrenic mother found that the rate of psychopathology was in fact marginally higher in the group reared apart than those who had stayed with their mothers.").

174 *See* ROBERTS, *supra* note 71, at 106 ("[C]hildren's relationships with a caregiver is essential to normal psychological development.").

175 *See* ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 5 (2004) ("Parents also provide lasting role models which older children can begin to identify with—and which teenagers can reject, safe in the knowledge that the parent will not leave.").

176 *See id.* ("[H]ealthy emotional development requires a close and enduring relationship with one or more parental figures.").

177 *See* ROBERTS, *supra* note 71, at 106 ("[M]oving children after [bonds of attachment] have formed causes serious emotional damage.").

relationships.[178] Additional psychological wounds can occur as a result of separation from siblings and extended family.[179] Separation from family, particularly due to termination of parental rights, carries legal ramifications, such as the loss of a claim to support or inheritance,[180] or the loss of the child's right to voice her position regarding parents' medical treatment. Participating in medical decisions is a highly significant right in the context of parents who are mentally ill because, on occasion, the parent may not be competent or capable of informed consent regarding her own medical treatment.

Despite adoption being the ultimate goal of termination and foster care, a significant number of children are not adopted, are moved between multiple placements ("foster care drift"),[181] and may reach the age of majority while still in foster care, thereby "aging out" of the foster system.[182] For children of parents with mental illness, never being adopted is highly likely because of the special needs of most of these children.[183] It should also be noted that when a child is removed from her home, and certainly when she is subjected to foster care drift, her education is affected as well. For example, changes in foster placement may result in changes in schools, compromises in educational placements or disturbances to school attendance. Adjustment to new educational settings may hamper academic achievement and break important social ties. Finally, children may be placed in unsuitable special education settings or not receive special education services at all.[184]

The most important cause yet for misgivings about foster care's consistency with a child's best interest is the staggering number of

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178 *See* Wasow, *supra* note 137, at 219 (maintaining that continual contact with biological parents, even while in foster care, benefits children's emotional security, self-esteem and relationship skills).

179 *See* Radding, *supra* note 171, at 31 (explaining how "years of bouncing among temporary living situations" may destroy emotional bonds with "parents, siblings, grandparents and extended family").

180 *See id.* at 31–32 ("[S]evering a child's ties to his natural parents result in the child's loss of his rights to be supported by them and to inherit from them.").

181 *See* Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate*, 66 MONT. L. REV. 21, 24–25 (2005) ("[M]any children suffer[] multiple placements over a lengthy period, with some being lost in the foster care system. They [are] caught in . . . foster care 'drift' or 'limbo.'").

182 *See* Wasow, *supra* note 137, at 219 (stating that many children become legal orphans for a significant period of time, many until they reach majority).

183 *See id.* (discussing "aging out" in the context of children with special needs).

184 For the harmful impact of foster care on education, see generally Sarah Hudson-Plush, Note, *Improving Educational Outcomes for Children in Foster Care: Reading the McKinney-Vento Act's "Awaiting Foster Care Placement" Provision to Include Children in Interim Foster Care Placements*, 13 CARDOZO J. L. & GENDER 83 (2006).

children abused in foster care. As many as thousands of children are subject to abuse or neglect by their foster families. Others receive inadequate medical and psychological treatment while in foster care.[185] Children in foster care are ten times more likely to be abused than children not in foster care, and that abuse tends to be more severe.[186] Agencies often fail in their screening, training and supervising of foster families, who in turn fail to address the likely special developmental, psychological and medical needs of the children in their care.[187] Perhaps this can explain why removal into foster care in itself is a risk factor for a variety of mental health and behavioral problems.[188] Coupled with these children's vulnerability to such problems because of their parent's mental state, foster care could increase mental health harms to children. A broader take on the child's best interest would lead to a conclusion that a child's mental health might benefit from remaining in her parent's care.[189]

Finally, prolonged proceedings and extended periods of time in foster placement may affect the outcome of the termination proceeding.[190] Because of changes in children's attachment,[191] needs, and developmental stages, their "best interests" shift with time, disadvantaging parents from whom they have been separated.[192] A presumably

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185 *See* Laura A. Harper, Note, *The State's Duty to Children in Foster Care—Bearing the Burden of Protecting Children*, 51 DRAKE L. REV. 793, 793 (2003) ("[T]housands [of children in the foster care system] suffer abuse or neglect in foster homes and receive inadequate medical or psychological treatment or other services while in the system.").

186 *See id.* at 796–97 (describing studies conducted by the National Foster Care Education Project that found "rates of abuse and neglect of children in foster family care . . . to be ten times higher than the rates for children in the general population." The study also found that foster children are more vulnerable to sexual abuse).

187 *See id.* at 797 ("Foster parents often receive inadequate training and lack the support system necessary to properly care for foster children, who are likely to experience unique developmental, behavioral, and psychological problems due to previous abuse.").

188 *See* Mason et al., *supra* note 6, at 1106 ("Removal of a child from the home and placement in a foster home, in an institution, or with others is in itself an additional risk factor that predisposes these children to a multitude of mental and behavioral problems.").

189 *See* Barnes & Stein, *supra* note 173, at 1850 ("A longitudinal comparison of children reared with or apart from their schizophrenic mother found that the rate of psychopathology was in fact marginally higher in the group reared apart than those who had stayed with their mothers.").

190 *See* Martin Guggenheim & Christine Gottlieb, *Justice Denied: Delays in Resolving Child Protection Cases in New York*, 12 VA. J. SOC. POL'Y & L. 546, 570 (2005) (discussing the effect of delays in child welfare cases on the child's best interest).

191 *See* ROBERTS, *supra* note 71, at 106 (citing arguments that children bond with their "new 'psychological parents'" as they are separated from their biological parents for longer periods).

192 *See* Guggenheim & Gottleib, *supra* note 190, at 570 (arguing that delays result in a choice between the child residing with a biological parent or with the primary attachment figure).

preferable outcome in which the best interest of the child would converge with her parents' rights to raise her can be adversely altered by the separation,[193] perpetuating and reproducing the perceived harms that brought on her removal to begin with.

Determining the child's best interest is no easy task, and a broad perspective, considering different factors such as the detriment caused by separation from family and the ills of foster care, should color the outcome of a best interest analysis. It should also be considered, as I discuss in Part II, that, despite suffering abuse or neglect from a parent with a mental illness, the child's best interest does not necessarily diverge from her parent's fundamental rights to custody. Her best interest may in fact be served by conceptualizing family preservation as an aggregated right of both parent and child.

To sum up this Part, schizophrenia is a severe mental illness that can, but does not necessarily at all times, adversely affect parents and children. Under federal and Virginia law, state intervention tends to prioritize separation of children from parents in the form of foster care or adoption placements. These laws assume that schizophrenia equals parental unfitness and, as such, overly burden parents with schizophrenia. The regulations are further inadequate because of problems in assessing mental illness, the assumption that mental illness is permanent, and a narrow view of the child's best interest. Still, a framework privileging removal of children from the home is troubling not only because of the shortcomings described in this Part, but also because it infringes on the fundamental right to family integrity and therefore implicates the federal constitutional right to substantive due process. I present the argument regarding the unconstitutionality of the family-separation framework in Part II.

II. CURRENT INTERVENTIONS—UPHOLDING SUBSTANTIVE DUE PROCESS?

Now that I have discussed and explored the weaknesses of the current interventions of federal and Virginia law regarding parents with mental illness, it is time to test their constitutionality through the lens of substantive due process rights.[194] Removal, and subsequent termination of parental rights, are inconsistent with substantive due process rights of both parents and children. My inquiry progresses in three steps, according to the strict scrutiny analysis of substantive due

193 *See id.* ("The system itself is creating a harm by unnecessarily severing the child's interest in her parental relationship from her interest in her primary attachment.").

194 *See* U.S. CONST. amend. XIV, § 1.

process rights articulated in *Washington v. Glucksberg*.[195] As a foundation, I show that family preservation—that is, parents' rights to custody of their children, and children's right to their families' integrity—is a fundamental right. Under a concept of aggregated rights, parents' rights do not conflict with children's rights. Rather, parents' and children's positions share a common interest and thereby complement one another.

Next, I apply strict scrutiny to family separation. Ordinarily, strict scrutiny is framed as the examination of the fitness between the state's compelling interest and its action. Put differently, courts examine whether family separation is narrowly tailored to serve the state's compelling interest: protection of children. However, the remainder of this Article does not treat the strict scrutiny analysis as one question. Rather, I separate its different elements. Because I maintain that, similar to the child's best interest principle, children's protection requires a broader view, I pay extra attention to the government's compelling interest in protecting children from abuse and neglect.[196] The government's interest must be to protect children from harm more generally. Though the importance of children's protection merits state intervention, this intervention must be narrowly tailored to achieve the state's interest in order to comply with substantive due process. I therefore proceed to focus my challenge of current interventions on two levels: (a) the interventions are not narrowly tailored, or least restrictive; and (b) they fail to achieve the state's compelling interest in protecting children.

A. Family Preservation as an Aggregated Fundamental Right

The Due Process Clause of the Fourteenth Amendment provides heightened protection from government intrusion into certain liberty interests or fundamental rights.[197] Heightened protection requires the state to satisfy a higher standard of interest—a compelling state interest—in order to justify intervention. The state must also refrain from overstepping its bounds when intervening. To warrant such

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195 521 U.S. 702, 720–21 (1997) (upholding assisted-suicide ban under strict scrutiny analysis).

196 Courts tend to skip a rigorous analysis of child protection as a compelling interest. I do not maintain this approach is wrong in that child protection is not a compelling interest. My approach differs from that prevalent in the case law in that I perceive a broader view of child protection that expands beyond merely preventing their abuse or neglect by parents. *See infra* Part II.B.

197 *See Glucksberg*, 521 U.S. at 719–20 (listing protected rights beyond those specified in the Bill of Rights).

heightened protection, though, the relevant right subject to state intervention must be a fundamental right. A fundamental right is one that is "'deeply rooted in this Nation's history and tradition' . . . such that 'neither liberty nor justice would exist if [it] were sacrificed.'"[198] But are the rights we are concerned with here—parents' rights and children's rights, both together and severally—fundamental rights?

1. Parents' Fundamental Rights

Parents have been entrusted by society with the care and responsibility for the well-being of their children under the assumption that parents—because of biological ties, societal norms and affection—are best equipped, best situated and most driven to act in their child's best interest.[199] As a result, the child-parent relationship and the process of childrearing have been privileged by the law. The law allows parents expansive liberties to raise their children as they see fit in order to guarantee future citizenship.[200] These liberties are so deeply rooted in American legal tradition[201] that the Supreme Court has long recognized the vast freedom parents hold in the childrearing process, framing this freedom as the parents' right "to direct the upbringing and education of children under their control," free of state intervention.[202]

A necessary and vital aspect of parents' liberty in childrearing is a parent's fundamental right to custody of her child.[203] As long as parents' childrearing decisions are reasonable, the state does not intervene in parents' actions, reflecting a view that procreation, custody, and childrearing rights are central to personal autonomy and self-determination. Children are perceived to be an extension of one's self, as parenting provides an individual with the opportunity to

198 *See id.* at 720–21 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977); Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

199 *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 35 (2005).

200 *See id.* at 23–24 (arguing that because state value inculcation is incompatible with limits on government intrusion on freedoms of speech and religion, broad parental latitude in childrearing decisions is rooted in fundamental tenets of American law).

201 *See* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 643 (2006) ("[R]ight to the care and custody of [one's] child . . . . has deep historical roots and significant contemporary adherents in the legal academy; it has driven federal and state legislation and shaped legal doctrine.").

202 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding Oregon Compulsory Education Act, requiring enrollment in public school in the district in which a child resided, unconstitutional).

203 Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

choose the way of life she prefers and raise her children accordingly.[204] Also at the core of parents' rights to the custody and inculcation of their children is the belief that liberty mandates that children be able to become individuals rather than be "standardize[d]" through the exclusive instruction of the state and its public educators.[205] It can thus be inferred that, as a matter of democracy and pluralism, parents are to be the primary care-takers of their children, and this fundamental right is protected from state intervention, or can be only subjected to highly justified and minimal interference.[206] Put differently, the state is severely limited in its ability to separate families absent sound reason, such as parental unfitness,[207] the inability to care for the child,[208] or the infliction of harm through abuse or neglect.[209]

In the context of parents with mental illness, one could argue that such parents are (or are at least presumed by Virginia's prima facie rule to be)[210] inherently unfit, and therefore parents' fundamental rights do not apply to them. However, in *Santosky v. Kramer*,[211] the Supreme Court ruled that mentally ill parents, like all other parents, also have these fundamental rights to custody and childrearing.

In *Santosky*, the mentally ill parents challenged the termination of their parental rights on procedural due process grounds, claiming

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204 *See* GUGGENHEIM, *supra* note 199, at 32 (arguing that at the basis of conceptions of self in relationships with others is parenting as an expression of "'self-definition and moral choice'" (citing PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 168 (1997)).

205 *Pierce*, 268 U.S. at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.").

206 *See* Troxel v. Granville, 530 U.S. 57, 66–67 (2000) (overturning statute that allowed "'[*a*]*ny person* [to] petition the court for visitation rights *at any time*'" without consideration of parental opinion of the child's best interest (citing WASH REV. CODE § 26.10.160(3)). Though this case examines parents' procedural due process protections, its analysis of parents' fundamental rights applies to the discussion of such rights here as well.

207 *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("[I]t is now firmly established that 'freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974))).

208 *See* GUGGENHEIM, *supra* note 199, at 36 (pointing out that government may only interfere when parents fail "to exercise a 'minimum degree of care,'" which is "low").

209 *See* MARTIN GUGGENHEIM ET AL., THE RIGHTS OF FAMILIES 94 (1996) (stating that the purpose of child protection laws it to prevent future harm from abuse or neglect).

210 VA. CODE ANN. § 16.1-283(B)(2)(a) (2008) (providing that proof of severe mental illness is prima facie evidence that conditions of neglect or abuse are not reasonably likely to be corrected).

211 455 U.S. 745, 747–48 (1982) (requiring "clear and convincing evidence" before termination of parental rights for permanent neglect).

that the standard the State of New York used—a "preponderance of the evidence"—was unconstitutional.[212] Holding that a higher standard of "clear and convincing evidence" was more appropriate, the court addressed parental rights to show that because such rights are fundamental, the burden on the state to justify termination of parental rights should be heavier, even in cases of abuse and neglect. Delivering the opinion of the court, Justice Blackmun stated:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . . Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for . . . protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.[213]

This finding that parental rights, particularly when the state wishes to end the relationship completely, merit heightened protection, led to the Court's decision that the risk of error from a lower standard of proof was too great in the context of parental rights and should thus be elevated.[214] The Court reasoned that the risk of error is greater for parents, which merits heightened protection of their rights. The risk for parents is greater than that of the state because once parental rights have been terminated in a final decision, the termination is irreversible. The state, on the other hand, may continuously move for termination upon collecting more or better evidence.[215] The Court also stressed that for certain disadvantaged groups of parents (poor, undereducated or minorities), termination proceedings carry heightened risks because of cultural or class bias, which a court must help counter.[216] This is also true for parents with mental illness who face stigmatization that may adversely influence proceedings concerning parental rights.[217] Therefore, parents with

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212 *Id.* at 747.

213 *Id.* at 753–54.

214 *See id.* at 758 ("In parental rights termination proceedings, the private interest affected is commanding . . . .").

215 *Id.* at 764 ("If the State initially fails to win termination . . . it always can try once again to cut off the parents' rights after gathering more or better evidence.").

216 *Id.* at 762–63 ("Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias." (internal citations omitted)).

217 *See* Wasow, *supra* note 137, at 221 ("A central and enduring aspect of stigmatization of people with mental disabilities is the belief that they are violent. This belief prompts a particularly negative response to parents with mental illnesses . . . . Such biases even affect

mental illness are in great need of more balanced and protective adjudication that will enable the preservation of their families and relationships with their children.

2. Children's Interest in Family Preservation

Undoubtedly, children have a right to be protected and free from neglect or abuse at the hand of their parents,[218] and are guaranteed a minimal degree of care.[219] It is reasonable, then, to view abusive or neglectful homes as violative of children's rights, and family preservation as conflicting with such rights.[220] Yet, the protection of a child from abuse and neglect by removal from her home may ultimately come at a very high price to her—so much, in fact, that removal is as much a violation of her rights as it is of her parents'.[221] As I have suggested previously in this Article,[222] perhaps here, too, a broad concept of children's rights that goes beyond abuse and neglect by their parents is appropriate. Other considerations, such as the bond between parent and child or the potential conditions and possible harms of foster care, should also inform decisions about the child's best interest.

Law and sociology professor Dorothy Roberts has maintained that the highly intrusive aspects of ASFA that enable more removals of children and terminations of parental rights might actually be inconsistent with children's rights on a macro-level because children are now more vulnerable to the ills of foster care: abuse, neglect, foster drift and others.[223] Because such problems in the foster care system are inconsistent with children's rights, family preservation may not

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mental health professionals, and may influence their judgments about parental fitness . . . .").

218 *See* GUGGENHEIM ET AL., *supra* note 209, at 94 (declaring that child protection laws aim to protect against abuse and neglect).

219 *See* Joel Fienberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 125 (William Aiken & Hugh LaFollette eds., 1980) (describing rights common to all children that derive from their dependence on others for basic care).

220 For more on the debate concerning the possible divergence of children's rights and family preservation, see generally Dorothy E. Roberts, *Is There Justice in Children's Rights? The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 115–17 (1999).

221 *See* Huntington, *supra* note 201, at 639 (citing scholars' and advocates' arguments that removal from biological parents violates children's rights).

222 See *supra* Part I.C.4.c, where I argue for a broad concept of the child's best interest.

223 *See* Roberts, *supra* note 220, at 125–28 (advocating that focus should be put on lessening the need for removal of children from biological parents because emphasis on permanent adoption does not reduce foster care populations).

only be in the child's best interest but it may be an aspect of her own fundamental right to remain with her parents.[224]

Federal courts have also recognized family preservation as a child's right. In the due process and equal protection claims of *Jordan v. Jackson*,[225] the parents challenged Virginia's removal of their son when he was not in imminent harm of irreversible danger. In addition to reiterating that family preservation was a fundamental right of the parents, the court found that the child, too, had a constitutional right to the integrity of his family, infringed upon by the extended separation from his parents due to removal into foster care.[226]

Those most concerned with protection of children may continue to maintain that the child's right to family preservation still is not tantamount to her fundamental right to be safe and free from abuse. Yet, aggregating parents' rights and children's rights (conceiving of both as different aspects of the same right—that of family preservation) elevates children's rights to the level of a fundamental right that merits strict scrutiny of any state action attempting to intervene in it. In other words, I do not argue that child protection is insignificant, but that a balance that privileges child protection over family preservation should be shifted to afford family protection more weight and greater consideration to a nuanced perspective about both rights of the child in particular cases.

3. Aggregating Rights to Family Preservation

Traditionally, in the context of abuse and neglect, parents' rights and children's rights were considered in opposition to each other.[227] This need not be the case when both rights are framed in terms of family preservation, which, as I have demonstrated in my discussion of children's rights and the child's best interest, do not always conflict with children's protection.

Proposing a framework of couples' aggregated rights, law professor Holning Lau explains that aggregated rights acknowledge both the individual's right to belong to certain social groups in which

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224 *See* Huntington, *supra* note 201, at 651 ("[F]amily preservation reflects both parents' rights (not to have a child removed unnecessarily) and children's rights (not to be removed unnecessarily).").

225 15 F.3d 333, 336–37 (4th Cir. 1994) (holding that emergency child removal statute delaying judicial review for up to sixty-five hours did not violate parents' due process or child's equal protection rights).

226 *Id.* at 351.

227 *See* Huntington, *supra* note 201, at 639–40 (arguing that a rights-based model perpetuates adversarial decision-making in the child welfare system).

membership is inherent to her identity, and the group's own right to thrive.[228] If one's identity, self-determination and autonomy are relational to the social groups with which she associates and that are fundamental to her self-development, then those social groups must exist and continue to develop in order to protect the rights of the individuals in the group.[229] Lau maintains, therefore, that the group—or couple—itself holds rights that are worthy of protection.[230]

Drawing on Lau's aggregated rights framework, it follows that if cultural, racial or sexual groups merit protection as rights-holding collectives because of their contribution to identity and sense of self, this is certainly true of families as the most immediate and significant social network, and therefore most influential on one's sense of self. Family preservation, then, is the right of the family as a whole, not just the parents' right to the custody and rearing of their children or the children's right not to be separated from their parents.

A theory of family rights as a joint right of family members has also been proposed by Jane Rutherford.[231] Rutherford argues that in order to bridge family unity with protection of individual family members, the law must adopt a framework that privileges family rights as fundamental rights that belong to the family as a group.[232] She reasons that focusing on individuals' rights within families obscures the need to protect the family as a unit from state intervention.[233] The only exception Rutherford supports is the protection of a weaker party when competing rights exist.[234] Since, in the case of parents with schizophrenia, though, it is not always clear who the weaker party is—parent or child—this exception may not apply here.[235]

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228 *See* Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1273 (2006) ("The basic premise of group rights—and of the couples' rights I propose—is that an individual's identity is inextricably linked to her memberships in certain social collectives. Accordingly, protecting that individual requires not only protecting her individual right to associate with those collective entities, but also protecting those entities' aggregate rights to develop.")

229 *See id.* at 1281–82 (discussing transcending individualism and the individual's right to self-development).

230 *See id.* at 1282 ("[T]o protect the individual's right to self-development, it is imperative to protect the . . . group on which the individual relies to develop her sense of self." (citation omitted)).

231 *See* Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 U. FLA. L. REV. 627, 643 (1987).

232 *Id.*

233 *Id.* at 644.

234 *Id.* at 643.

235 Consider, in addition to the imparities caused to parents by mental illness and children's general position as less powerful, the possibility presented above of role reversals between

Aggregated rights theory already informs the custody placements of minority children. For example, Native American children are to be placed with extended family, within their tribe or within the Native American community as much as possible.[236] This placement preference demonstrates a recognition that protection of children can and should be achieved while preserving Native American families or tribes as a right-holding group.[237] Put differently, the group rights of the tribe to protect its existence and continuity are not at opposition to the child's right to safety and are seen as a joint interest in preserving the tribe.

In *Santosky v. Kramer*, Justice Blackmun seems to support aggregated rights to family preservation over adversarial views of parents' rights versus children's rights.[238] Justice Blackmun notes that the assumption that termination inherently benefits the child is perhaps incorrect and that parents and children have common interests.[239]

Conceptualizing family preservation as an aggregated right of both parents and children is a wider view that manifests the convergence of parents' rights and the child's rights and best interest. Moving away from a framework of adversarial rights, toward that of aggregated rights, allows for an examination of children's rights and best interest informed by the parent-child relationship and the family's dynamic as a cohesive group.[240] As an aggregated right, family preservation is bolstered as fundamental, not just for parents, but for children as well.[241] The argument in favor of family preservation that is beneficial to all parties involved grows stronger, and state intervention need be more subtle. Expanding our perception of the costs and benefits to the family as a whole can facilitate a more refined standard of state intervention and a more nuanced solution that en-

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parents and children as caregivers to each other. *See* Walton-Moss et al., *supra* note 57, at 629.

236 *See* James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 899–900 (2003) (explaining the rights granted by the Indian Child Welfare Act).

237 *Id.*

238 455 U.S. 745, 766–67 (1982).

239 *Id.* at 765.

240 *See* Radding, *supra* note 171, at 36 ("Still others argue that the child's best interest cannot be evaluated independently from consideration of the primary adults.").

241 Though I believe a framework of aggregated rights is most appropriate, since parents and children have an individually recognized fundamental right to family integrity, the substantive due process argument I make in this Article does not rise or fall by accepting that parents and children hold aggregated rights. The aggregated rights framework makes the case for family integrity stronger, but is not the only framework upon which family integrity is based.

sures child protection but does not impose too grave a harm to family unity.

B. Child Protection as a Compelling State Interest

After establishing that family preservation is a fundamental right, courts apply strict scrutiny to determine whether the state action violates the right holder's substantive due process right. To withstand such scrutiny, the state must show a compelling interest that is served by the state action in question. Here, the state interest is the protection of children from abuse or neglect.

Despite the status of parental rights and family preservation as fundamental rights, they are not absolute, and the family unit is not beyond the intervention of the state.[242] The family and thus the child are subject to the state's interest in the child's life, safety and well-being. As *parens patriae*, the state bears the responsibility of being the ultimate protector of abused or neglected children.[243] Underlying the state's interest is that the child "be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[244] Put differently, because of children's status as potential citizens who should contribute to society, the state is entitled to protect children from harm to their physical or mental health and development.[245]

State intervention, however, should not be impetuous. In a case discussing parental authority to deny a child medical treatment, a California appellate court articulated the standards and considerations required for the state to limit parents' rights.[246] To justify intervention, the court held, the state needed to meet a "serious burden" of serving the child's best interest. The state can satisfy this heightened burden by demonstrating the gravity of harm to the child or the substantial likelihood of serious harm, the evaluation and risks from

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242 *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty.").

243 *See* Radding, *supra* note 171, at 33–34 (discussing the *parens patria* doctrine, "in which the State as ultimate protector may safeguard children by invading the familial sanctum to separate abusive and neglectful parents from their children").

244 *Prince*, 321 U.S. at 165.

245 *See In re* Phillip B., 156 Cal. Rptr. 48, 51 (Ct. App. 1979) ("Parental autonomy, however, is not absolute. The state is the guardian of society's basic values. Under the doctrine of *parens patriae*, the state has a right, indeed, a duty, to protect children.").

246 *Id.* The California Court of Appeals considered a case of parents refusing heart treatment to their son as a neglect case. The state argued the parents did not provide their son with the "necessities of life."

treatment, and the child's own preference.[247] Applying these factors to the context of removal or termination of parental rights, the state's compelling interest in protecting children from abuse or neglect would require the state to weigh more than just the potential harm to the child if she was left with her parents. Additional considerations, as an analogy to medical treatment, must be the conditions of foster care, the feasibility of reunification and the possibility and likelihood of adoption. The state might consider the conditions of the child's potential placement (for instance, with a family versus in a group home), the ramifications to the child's education (i.e., the interruption to the child's school attendance or educational placement), or the child's age, emotional and cognitive skills (as indicative of her ability to adjust to foster care or her chances of adoption).

It should be noted, though, that the state's interest is not limited to the protection of children from abuse. Rather, the state has other compelling interests in strengthening families through family preservation[248] and in distributing resources efficiently and conservatively so that only useful interventions are funded.[249] Since the state must balance both its internally conflicting interests as well as the conflict between its interest and the rights of the family, it is not only limited in its opportunities for intervention, but also in the form and scope of intervention. Once the state has presented its compelling interest in protecting a child, it establishes its authority to intervene in the family. Yet, the state would still need to address the means it utilizes for such intervention, namely separation of the family through removal or termination, and demonstrate that such means of intervention are consistent with substantive due process rights by being narrowly tailored to serve the state's interest. The remainder of this Article questions whether state interventions that implicate family integrity are in fact consistent with substantive due process for two reasons. First, these interventions do not serve the state interest; they fail to protect the child's best interest. Second, family separation is not the least restrictive means to ensure child protection.

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247 *Id.*

248 *See* Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994) ("[T]he state also shares the interest of the parent and child in their family's integrity because the welfare of the state depends in large part upon the strength of the family." (citation omitted)).

249 *See generally* ROBERTS, *supra* note 71, at 134–35 ("The availability of federal matching funds for foster care may provide a financial incentive to remove these children from their homes.").

C. *Removal and Substantive Due Process—Serving the Compelling State Interest?*

When the state infringes on the fundamental right of family integrity, in addition to showing a compelling interest, the state must demonstrate that that interest is advanced by the means the state utilizes and that these means are the least restrictive ones to serve that interest.[250] Put differently, to survive the strict scrutiny test of substantive due process and pass constitutional muster, removal of children or termination of parental rights must achieve protection of children from neglect or abuse.[251] However, removal or termination do not necessarily protect children, and may perhaps even harm them. Removal or termination therefore excessively limit the right to family integrity and could violate substantive due process. My argument, though, should not be taken to be overly sweeping. I do not mean to state that in all cases termination or removal are inconsistent with substantive due process rights. I merely maintain that, under current law,[252] which already over-burdens parents with schizophrenia, courts should be aware of the heightened risk of wrongful separations, should exercise greater caution and should apply more in-depth scrutiny to such cases.

It is imperative that courts deeply analyze cases, because without such examination it is questionable whether separation in fact achieves child protection in a particular case. First, as discussed above,[253] the presumption that the existence of mental incapacity in a

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250 *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) ("[T]he Fourteenth Amendment 'forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" (quoting Reno v. Flores, 507 U.S. 292, 302 (1993))); Moore v. East Cleveland, 431 U.S. 494, 499 (1977). In *Moore*, Justice Powell explained the appropriateness of strict scrutiny in cases concerning family preservation. "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.*

251 The other prong to strict scrutiny analysis for substantive due process—that the means utilized by the state are narrowly tailored, or the least restrictive alternative—will be discussed extensively in Part III, in which I propose PACTs as a possible, less restrictive alternative to removal or termination of parental rights.

252 As I discussed above in Part I.C.1, although ASFA does not explicitly address parents with schizophrenia, its directives—particularly the financial incentives it prescribes—are the overarching framework that creates and further reproduces states' prioritization of removal or termination. Though this Part primarily analyzes the Virginia statutory framework, the arguments raised here regarding removal's or termination's failure to achieve the state's interest in protecting children similarly apply to removal or termination as proscribed by ASFA.

253 *See supra* Parts I.C.4.a–b.

parent leads to unfit parenting is misguided. Keeping in mind the concerns surrounding assessment,[254] it may be the case that a parent's mental problems do not rise to the level of incapacity.[255] Further, if there is a mental incapacity, without proper assessment, it is uncertain whether such incapacity does actually lead to unfitness. Recall that persons with schizophrenia have not been found to be more violent than people not suffering from schizophrenia,[256] thus assumptions as to inevitability of ties between schizophrenia and abuse cannot stand. Also, recovery rates seem higher than an individual prognosis may predict.[257] Therefore, permanency of unfitness is very uncertain, which is further reason to doubt the link between schizophrenia and unfitness and the adequacy of termination, particularly. A court that does not look into or question the parent's assessment is unable to adequately conclude that a parent is unfit or abusive.

Second, separation of children from their parents may not achieve child protection, because when courts assume that a finding (even a wrongful one) of unfitness is sufficient for removal or termination, these courts do not look into whether or not a child is actually harmed.[258] This assumption alone, without a showing of harm to the child, disconnects the state's action (i.e., removal or termination) from the state's interest. The *Jenkins* case is a good example of this.[259] Recall that in that case, the court stated that there is no need for a showing of actual harm, just of a "substantial risk" of harm.[260] This may seem like an adequate ruling that is consistent with the state's compelling interest to ensure protecting children. After all, erring on the safe side by removing a child facing that risk could seem reasonable. However, we must remember that family integrity is a fundamental right warranting strict scrutiny. Therefore, a "risk of harm" should not be sufficient. If a child is not harmed, there is no real need for protecting that child (especially when parenting skills improve, as was the case in *Jenkins*).[261] Separation achieves no state in-

254 *See supra* Part I.C.3.a.

255 *See* Ackerson, *supra* note 4, at 190 ("Because mental illness can include a broad array of conditions, it is erroneous to assume that all mothers or fathers who have a diagnosed mental disorder are alike.").

256 *See supra* note 46 and accompanying text.

257 *See* Wasow, *supra* note 137, at 212–13 ("[A] poor correlation exists between prognosis and actual outcome of treatment.").

258 *See supra* notes 118–19 and accompanying text.

259 Jenkins v. Winchester Dep't of Soc. Servs., 409 S.E.2d 16 (Va. Ct. App. 1991) (holding that the statutory definition of an abused or neglected child does not require proof of actual harm or impairment having been experienced by the child).

260 *Id.* at 1183.

261 *Id.* at 1184.

terest, as that interest is irrelevant when a child is not subject to neglect or abuse. When a fundamental right is at issue there cannot be a considerable disconnect between the means and the state interest.

Another reason why courts should be more critical as to whether removal or termination do in fact achieve the state's interest in protecting children is the broader perspective of the child's best interest.[262] According to this broader view, courts should examine whether removal or termination could actually harm the child in question. The harms that courts should take into account are the child's own mental health, which could deteriorate upon separation from a parent,[263] the legal ramifications such as loss of property or other rights,[264] and, of course, the harms of foster care: foster care drift,[265] aging out,[266] abuse and neglect,[267] and disturbances to education.[268] Perhaps courts would do better, then, to balance the harms posed to children who remain in the home against the harms that may occur upon removal or termination. Courts are unable to take on this balancing task, though, if they do not engage in rigorous analysis into these risks of harm. Courts that do not examine the child's vulnerability to harm both at home and as a result of separation, and that do not make conclusive findings that harms to children who are not removed from the home are greater, should not assume that removal of a child ensures her protection.

Finally, because family separation is the primary measure the state utilizes to protect children from harm by parents with schizophrenia, the risk to children is exacerbated. Parents are deterred from accessing services that can help them recover because of their fear that the

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262 *See* Part I.C.3.c.

263 *See* Barnes & Stein, *supra* note 173, at 1850 ("A longitudinal comparison of children reared with or apart from their schizophrenic mother found that the rate of psychopathology was in fact marginally higher in the group reared apart than those who had stayed with their mothers."); *see also* ALSTOTT, *supra* note 175, at 5 ("[P]sychologists emphasize the importance of recreating continuity for . . . children . . . .").

264 *See* Radding, *supra* note 171, at 31–32 ("[S]evering a child's ties to his natural parents result in the child's loss of his rights to be supported by them and to inherit from them.").

265 *See* Ramsey, *supra* note 181, at 24–25 ("[M]any children suffer[] multiple placements over a lengthy period, with some being lost in the foster care system. They [are] caught in . . . foster care 'drift' or 'limbo.'").

266 *See* Wasow, *supra* note 137, at 219 (stating that many children become legal orphans for a significant period of time, many until they reach majority).

267 *See* Harper, *supra* note 185, at 793 ("[T]housands [of children in the foster care system] suffer abuse or neglect in foster homes and receive inadequate medical or psychological treatment or other services while in the system.").

268 *See* Hudson-Plush, *supra* note 184, at 84 ("[T]he foster care system is replete with examples of foster children suffering poor educational outcomes.").

state will initiate removal of children.[269] Therefore, the parent's strong interest in receiving treatment and achieving recovery is undermined, resulting in a probable deterioration in their mental condition. Consequently, the child's safety, too, is compromised because of the parent's deteriorating condition. By the time the state intervenes, if at all, the parent may be suffering terribly, the child could have been severely harmed or the situation could be otherwise too dire to avoid extreme measures such as hospitalization and family separation.

Removal or termination of parental rights must ensure child protection if they are to satisfy the substantive due process test by surviving strict scrutiny (provided they are the least restrictive means available, which the next Part discusses). However, family separation does not necessarily achieve child protection, and might actually harm a child. I suggest, therefore, that in order for removal or termination to be consistent with substantive due process, to not violate the fundamental right to family integrity, and to still protect children, they must be exercised by the state upon both a showing that a child is harmed at home and that such harm is greater than the harm caused by removal or termination and foster care placement. Otherwise, the risk of wrongful removal and infringement of a fundamental right is far too great.[270]

III. A NEW CONCEPT OF SUBSTANTIVE DUE PROCESS: ACHIEVING FAMILY PRESERVATION

Satisfying the last prong of the substantive due process test is highly contingent on the availability of less restrictive means that are an alternative to more severe state intervention. Moreover, the alternative, less restrictive means must also be related to the state's compelling interest; that is, the means must achieve child protection. Similar to education law, where removal of children from home and into residential education settings in order to provide special education services is considered overly restrictive if special education can be provided at school or at home through individual education pro-

269 *See* Benjet et al., *supra* note 43, at 238 (arguing that diagnosis of a major mental illness alone often suffices for termination of parental rights, without consideration of actual parenting ability).

270 *See* Santosky v. Kramer, 455 U.S. 745, 764 (1982) (finding that the risk of error is greater for parents than the state: once separation has occurred and termination may follow, there is a great risk that separation will become irreversible for the parents, while the state could continuously move for removal or termination).

grams,[271] it so follows that removal or termination is overly restrictive when children can be protected from neglect or abuse while remaining in their parents' custody. As the alternative to removal of children, I propose here the use of Programs for Assertive Community Treatments (PACT or PACTs), which social scientists have long recognized as efficient and effective in treating schizophrenia. Notably, PACTs are not completely foreign to the law. Indeed, at least one jurisdiction uses PACTs as an alternative to criminal proceedings, and others have considered their use. Reshaped to accommodate families, PACTs present multiple advantages for families dealing with a parent's mental illness and the abuse or neglect of children. Family-oriented PACTs both treat parents and strengthen their parental skills while children remain in their custody. PACTs can also satisfy the state's obligation to provide services to struggling families and can help lower costs, financial or otherwise, of social and welfare services.[272] More importantly still, PACTs have the ability to prevent removal of children from the home by directly addressing the problems families face and empowering these families to overcome such problems. I end this Part addressing some of the reservations that may arise in incorporating PACTs as an alternative to removal of children or termination of parental rights.

A. Programs of Assertive Community Treatment (PACTs) for Schizophrenia

Before evaluating PACTs as preventative alternatives for removal or termination, it is essential to understand what these programs are, how they are structured and operate, and their efficacy.

PACTs originated in the 1970s as an integrated clinical treatment[273] that would substitute hospitalization of persons with schizophrenia,[274] and have since been continuously empirically validated.[275]

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271 *See* 20 U.S.C. § 1412(a)(5) (2006) (stating that children with disabilities are not to be removed from regular classroom instruction unless their disabilities are so severe that education may not otherwise be achieved).

272 *See* Gold et al., *supra* note 9, at 295 (addressing concerns that PACTs financially drain states: "The research evidence [shows] . . . the provision of PACT . . . reduces the burden placed on health and human service systems"); Mason et al., *supra* note 6, at 1118 ("In the long run [PACTs are] . . . more cost effective by reducing the negative effect on parents, their children and other family members, as well as on the overall community and society . . . .").

273 *See* Gold et al., *supra* note 9, at 290 (describing a PACT as a "multidisciplinary team approach, [that] delivers integrated community-based treatment, rehabilitation, and support services").

274 *See* Anthony F. Lehman et al., *Evidence-Based Treatment for Schizophrenia*, 26 PSYCHIATRIC CLINICS N. AM. 939, 943 (2003) (describing PACTs' purpose of treating "high risk" individuals who need more than typical community-based treatment).

PACTs are built as teams of professionals from multiple disciplines who provide constant, comprehensive interdisciplinary services and support,[276] including at times of emergency.[277] The goal is recovery;[278] to achieve and sustain clients' participation and functioning in the community.[279] Usually, PACT teams are comprised of at least a coordinator, social worker, nurse, psychologist, employment specialist, substance abuse specialist and a psychiatrist.[280] PACTs that are geared toward a specific skill set or area of life function typically include an appropriate professional. For example, a team working on a person's family issues may include a couples' therapist or parenting specialist. An empathetic, cooperative and continuous relationship between the team and the client is crucial for the program's success in achieving recovery.[281] Paul B. Gold et al. describe the relationship between client and PACT team as follows:

> Both clients and PACT teams, in their joint efforts, are the primary change agents. . . . [A] PACT team[] . . . engage[s] clients into working alliances, making it clear that the team recognizes suffering and wishes to alleviate it. The . . . working alliance depends on the team's gentle efforts . . . to instill hope for relief, foster a sense of safety and personal control, motivate taking on the tasks of healing, respecting and ensuring self-determination on the pathway to healing, and restoration of self-identity as a "whole" person.[282]

As the relationship progresses, and as a way to empower clients and develop problem-solving skills, the team includes the patient in designing her own recovery plan and determining the goals of treatment and appropriate interventions, given the patient's symptoms

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275 *See* Gold et al., *supra* note 9, at 291 (reporting that the Schizophrenia Patient Outcomes Research Team lists PACT as a "recommended . . . first-line service").

276 *See* Lehman et al., *supra* note 274, at 943 (describing "coverage 24 hours a day, 7 days a week").

277 *See* Gold et al., *supra* note 9, at 293 (discussing availability of on-call staff and psychiatrists during nonbusiness hours).

278 *See id.* at 294 (defining recovery as "full community participation . . . [which] include[s] (a) symptom stability, (b) health maintenance and care of medical conditions, (c) low to no use of emergency and inpatient psychiatric facilities, public safety resources, or *the judicial system*, (d) stability in independent living arrangements, and (e) normalization of activities of daily living" (emphasis added)).

279 *See* Catherine F. Kane & Michael B. Blank, *NPACT: Enhancing Programs of Assertive Community Treatment for the Seriously Mentally Ill*, 40 COMMUNITY MENTAL HEALTH J. 549, 550 (2004) (detailing recovery aimed at reduction of symptoms and substance abuse; stable housing; employment; and better maintenance of physical health and criminal justice system interactions).

280 *See id.*

281 *See* Gold et al., *supra* note 9, at 291 ("PACT minimizes fragmentation of services and promotes continuity of provider-client relationships . . . .").

282 *See id.*

and environmental circumstances.[283] The plan is modified to accommodate the client's changing needs and preferences to maintain improvement.[284]

Because of their ability to mitigate the severity and shorten the period of symptoms,[285] PACTs have been shown to significantly decrease the need for hospitalization, both during initial acute phases of schizophrenia and during relapse.[286] Research on PACTs has also produced evidence of patient satisfaction, which is particularly important as people with schizophrenia struggle with commencing and continuing treatment.[287] Other evidence shows that PACTs improve the clinical condition of schizophrenia, advance functioning (particularly when they are designed to address a particular area of life or skill set, such as vocational training) and heighten quality of life.[288] Programs that have the best results are those most loyal to the original key elements of the programs,[289] though programs that are designed to improve specific domains facilitate marked improvement in those areas.[290]

For families struggling with a parent's schizophrenia, PACTs are vitally important and immensely beneficial for several reasons. First, as PACTs are comprehensive services led by a multi-disciplinary team, PACTs can successfully address the multitude of issues with which families (both as individuals and as a whole) may be dealing. Also, when one team works with the family, that entire team coordinates its efforts to advance every member of the family. This is more beneficial than several teams providing services that may overlap or be inconsistent with one another. An additional concern is that services by different teams lead to incompatibility of services for one family member with the needs of another's.

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283 *See id.* at 292 (describing treatment plans as "highly detailed and individualized").

284 *See id.* (explaining that depending on degree and duration of disability, services may continue for many years).

285 *See* Kane & Blank, *supra* note 279, at 550 (documenting fewer hospital and emergency room visits, and of shorter duration).

286 *See* Lehman et al., *supra* note 274, at 943 (discussing randomized trials showing reduction of inpatient and more continuous outpatient treatment).

287 *See* Michael G. Gelder et al., *Clinical Syndromes of Adult Psychiatry*, *in* 2 NEW OXFORD TEXTBOOK OF PSYCHIATRY, *supra* note 18, at 574 (listing lack of insight, which occurs in 90% of people with schizophrenia, as a factor in refusal of treatment).

288 *See* Lehman et al., *supra* note 274, at 943 (pointing out that research on other outcomes has been less conistent).

289 *See* Gold et al., *supra* note 9, at 294 (describing study showing that programs highly consistent with PACT standards had the biggest reductions in hospital days).

290 *See id.* at 294–95. Examples include employment, substance abuse and family functioning.

Second, by fostering a working alliance and encouraging the service recipient to take an active role in designing the treatment plan, PACTs are able to empower everyone in the family and rectify power imbalances. This is particularly important for children, as proactive participation in the family treatment might mitigate emotional harms inflicted by the parent's illness or abuse and restore the child's sense of agency.[291] By mitigating emotional harms PACTs can also lower the risk that the child herself develops a severe mental health problem later in life.

Third, PACTs' proven ability to alleviate symptoms of schizophrenia, and to do so in a short period of time,[292] means that these services can help shorten the length of time a child may be in danger of neglect or abuse, if not eliminate that danger altogether. PACTs' strength in preventing hospitalization[293] also reduces the need to find alternative care for children while a parent is absent due to hospitalization.

Lastly, providing services in the form of PACTs, where recipients' satisfaction is high,[294] incentivizes parents to turn to treatment and commit to it. Because parents are reluctant to seek treatment for fear of losing their children,[295] an effective family treatment alternative that can help ensure family preservation and prevent removal is vital. Without it, a parent's condition might deteriorate, resulting in a heightened risk of neglect or abuse and subsequent removal or termination.

B. PACTs in the Law: Alternative to Criminal Proceedings

Noting the recognition PACTs have achieved in the social sciences, lawmakers have begun to incorporate PACTs into the legal sys-

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291 For the psychological harm caused by imbalanced relationships, as well as the need for reshifting that imbalance and empowering the weaker party, see generally Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance over Form in Personalized Abuse*, 14 WM & MARY J. WOMEN & L. 495 (2008).

292 *See* Kane & Blank, *supra* note 279, at 550 (stating that services are aimed at reducing "duration [and] intensity" of symptoms).

293 *See* Lehman et al., *supra* note 274, at 943 (citing a study showing substantial reduction in inpatient care).

294 *See* Gelder et al., *supra* note 287, at 574 (explaining that patients' lack of insight to their psychosis, as well as inadequate education and fear of side effects, impede the formation of therapeutic relationships, contributing to refusal of treatment).

295 *See* Busch & Redlich, *supra* note 50, at 1000–02, and accompanying text, discussing the finding that for at least some parents, the fear of losing child custody results in the delay of necessary treatment.

tem.[296] Orange and Osceola Counties in Florida have gone so far as to establish PACTs as an alternative to criminal proceedings under the special needs diversion program.[297] The Texas legislature has also recommended incorporating PACTs to serve criminal courts in an attempt to prevent incarceration of persons with severe mental illness.[298] As the Florida program is already in place, it is the focus of this Part.

The Florida special needs diversion program aims to redirect people with mental health or other special needs out of the criminal justice system, and instead provide them with the most appropriate treatment to their needs while still ensuring community protection.[299] Identification of those in need of services, as part of the diversion program, is made by corrections health services staff upon arrest, or by referrals from justice officials, family members or others in the community who believe a mental disorder is at the root of one's involvement in the criminal system.[300] Individuals excluded from the program are those currently charged or formerly convicted of generally violent crimes or sex crimes, including crimes against children.[301]

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296 Examples include: Oklahoma's statutory definition of PACT (among other state recognized mental health services), OKLA. STAT. tit. 43A, § 3-302(8) (2008); Massachusetts' bill to allocate state funds to PACTs, H.B. 5300, 182d Gen. Ct., 2002 Mass. Acts 412; and New Jersey's proclaimed encouragement of state established PACTs, N.J. STAT. ANN. § 30:9A-1 (West 2009).

297 Amended Order Governing Pretrial Release, Pretrial Detention, and First Appearance Proceedings in Orange County at 69, Admin. Order No. 2003-39-12 (Fla. Cir. Ct. Oct. 7, 2003), *available at* http://www.ninthcircuit.org/research/legal_research.shtml (listing Florida Assertive Community Treatment as part of the treatment component of a voluntary Mental Health Court program). Florida also has specialized Mental Health Courts that deal with mentally disabled offenders in an attempt to direct them into treatment rather than incarceration. *See generally* LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 29 AM. J. CRIM. L. 255 (2001) (arguing that mental health courts provide a partial solution to legal and social problems created by criminal cases involving defendants with mental disorders); Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 507 (2005) (debating the efficacy of the mental health court model from the perspectives of an academic specializing in therapeutic jurisprudence and an advocate for the rights of the mentally disabled).

298 *See* AUSTIN TRAVIS COUNTY MENTAL HEALTH AND MENTAL RETARDATION CENTER, JAIL DIVERSION INITIATIVE (2005). This report recommends that PACTs that are already in use in Texas be expanded, and that special teams be dedicated to servicing courts. However, for this to be effective, the state should allocate additional funding, and courts must be aware of the high success rates of PACTs both in providing treatment and in decreasing recidivism.

299 *See* Amended Order Governing Pretrial Release, Pretrial Detention, and First Appearance Proceedings in Orange County, *supra* note 297.

300 *See id.* at 67.

301 *See id.* at 66–67. An exception is made for domestic violence crimes—and an individual can be included in the program upon the victim's approval.

Once a mental health professional finds the defendant capable of participation in services, and recommends that the court divert the defendant into services, the court will refer the defendant to the appropriate services. Such services may be PACTs, as well as alternative or additional services as needed.[302] The court will also appoint a corrections officer or social worker to design a specialized treatment plan and supervise the progress of such treatment.[303]

Though the Florida program seems to be on the right track generally,[304] it is problematic in several respects. Primarily, the program's exclusion of violent offenders is troubling, because it leaves those who presumably would require the most help out of the program and without treatment.[305] Arguably, the state would have a greater interest in protecting potential victims from violent offenders, and is thus less motivated to divert these offenders into treatment rather than incarceration. However, this very reasoning delegitimizes the program. If the program is in fact based on the premise that those suffering from mental illness who commit a crime *because of that illness* should not be penalized under the criminal system and should instead receive treatment and other social services, why should the nature of the offense matter? Does a violent offense cancel out the fact that the offense is a result of a mental illness, while other, less severe crimes do not?

The exclusion of violent offenders who are mentally disordered also conflicts with the program's proclaimed mission to provide mentally disordered offenders with the most appropriate treatment to their needs, while still ensuring community protection.[306] This is a balancing task between the offender's need for treatment and the public's safety. It is not clear why this balance is achievable only when the offense is not a violent one. After all, if the offender's mental disorder is at the root of the offense, and if that mental disorder is

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302 *See id.* at 68–69. This takes place as early in the judicial process as possible, preferably as early as the first hearing.

303 *See id.* at 69.

304 Searches of legal databases have not resulted in material discussing the program, or its efficacy. I therefore base my analysis on the regulations alone.

305 As discussed in Part I, people with mental health problems are usually violent when illness is co-occurring, that is when they suffer from more than one mental health problem in conjunction. These tend to be the more complex cases. *See* Benjet et al., *supra* note 43, at 240 (reviewing research correlating violence, mental illness, and substance abuse); Izutsu, *supra* note 15, at 1018–19 (referring to study showing that risk of violence among people with schizophrenia is only heightened where there is co-occurring substance abuse).

306 *See* Amended Order Governing Pretrial Release, Pretrial Detention, and First Appearance Proceedings in Orange County, *supra* note 297.

treated, then it would follow that the now mentally healthy offender will not pose a threat to public safety. Again, the distinction between "regular" and "violent" crimes is puzzling. Why have faith in treatments' ability to prevent future crimes but not their ability to prevent *violent* crimes? Further, if we do think that treatment can prevent violent crimes, but the risk for community safety is too great, why the blanket exclusion? If the Florida program is serious about balancing treatment with community protection, it should be able to strike the balance on a case-by-case basis, rather than have an all-encompassing exclusion of violent offenders from the possibility of receiving treatment.

Lastly, in the context of families, there is also room for improvement. While the program excludes those who have committed crimes against children, it does allow domestic violence offenders to participate in the program and receive treatment, upon the victim's consent.[307] This deference to victims influences decisions regarding their mentally disordered aggressor, respects the victim's agency and demonstrates an awareness of the complexity of crimes committed within the family, as well as an understanding that a victim may be interested more in the offender's recovery than criminalization.[308] And though we should not always expect child-victims to be able to make this decision (particularly at a young age), it may be worthwhile to explore the possibility of treatment in some cases of crimes against children rather than, again, summarily dismissing treatment and excluding all cases of crimes against children from the diversion program.

Despite these flaws to the program, its recognition of the importance of social services and treatment is very encouraging. Just as these legal frameworks utilize evidence-based programs, such as PACTs, as less restrictive alternatives to criminal proceedings, it can be advantageous to employ successful treatment services in other areas of law as well. The next Part will present the benefits of PACTs to parents with schizophrenia and their neglected or abused children.

C. Reforming PACTs as Family-Oriented: The Least Restrictive Mean

PACTs' status as an evidence-based, highly successful treatment for schizophrenia, as well as its incorporation into the criminal legal

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307 *See id.*

308 *See* Rachmilovitz, *supra* note 291, at 505–07 (discussing the complexities of withdrawal from abusive relationships because of the dependence of the abused party on the abuser).

system, is reason to hope that PACTs can benefit families affected by parents' mental illness and the consequent neglect or abuse of children. However, for PACTs to be successful in treating families as well as individuals, they should be redesigned to address the special needs of these families.

Though PACTs that stray far from their original design are less successful in ensuring recovery, not all PACTs need be uniform to provide effective treatment. As discussed above, PACT services are often reshaped to address a person's specific needs. It would follow, then, that for persons with schizophrenia who are struggling with raising their children, it would be most beneficial to create a family-oriented PACT plan. This Part discusses how, along with working toward recovery, this type of treatment plan could potentially teach parenting skills, provide mental health assistance to both parent and child (together or severally) and rebuild or strengthen a child-parent bond. A successful plan can restore the child's well-being in the home and alleviate concerns for her safety, thus eliminating the need to remove the child. A family-oriented PACT also helps the parent recover and achieves both child protection and family preservation. Therefore it is narrowly tailored to serve the state's compelling interest, thus surviving constitutional scrutiny.

1. Family-Oriented PACTs—Why and How

PACTs' success lies in individual treatment plans that address the multiple and complex issues with which a person with schizophrenia is coping. For those with children, participating in comprehensive family-oriented PACTs can be a path to recovery and a way to maintain family well-being.[309] The holistic approach of family-focused treatment is particularly important to families of parents with schizophrenia, because the child's well-being is highly contingent on that of the parents.[310] A great advantage to PACTs over other forms of treatment is that PACTs accomplish indirect recovery goals such as improved family dynamics, because PACTs provide comprehensive services and also offer competent specialized intervention, enabling

309 *See* Walton-Moss et al., *supra* note 57, at 638–39 (identifying three types of management styles of families coping with mental illness: "Hanging On" families, "Being Stable" families and "Doing Well" families. Families may remain in earlier, more difficult stages of coping, and never progress toward "Doing Well" but for support and intervention).

310 *See* Ackerson, *supra* note 4, at 191 (discussing the benefits of assessments "that include multiple, interdisciplinary sources of information in multiple contexts").

parents to achieve more than basic recovery.[311] Another benefit of family-oriented treatment is that by involving family members in treatment, as well as treating family members themselves, the collaborative relationship between the family and the PACT team can encourage treatment adherence[312] and ensure support toward recovery of the family as a whole.

In addition to the basic standard PACT plan services, family-oriented PACTs should be designed to include services such as assessment of parenting skills, monitoring of child well-being, child development and parenting training, family planning support, trauma and abuse counseling, marital and family counseling, and assistance with children's education needs.[313]

A potential concern about family-oriented PACTs is that by straying from the original model and its basic elements, the program risks its efficacy and compromises success.[314] Yet this concern is relevant primarily to programs that detract from the basic standards or minimum elements required to produce positive change.[315] Unlike such programs, family-oriented PACTs do not eliminate elements from the basic program, but rather add to the model and complement other areas of treatment with family services.[316] The success of family-oriented PACTs already in place is evidence that these types of services do not derail treatment, but instead reduce family conflict and strengthen the family as a positive support system.[317]

An additional challenge that family-oriented PACTs may present is the ethical obligation of PACT team members. Service providers treating families as a whole, or as individuals, now may face added conflicts of interests between their clients, as they would become obligated to uphold confidentiality and other professional duties to several clients whose treatment is interrelated but whose interests, as embodied in the treatment plan, may conflict. Such challenges to

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311 *See* Gold et al., *supra* note 9, at 297 (examining the training, supervision and consultation by PACT experts).

312 *See* Busch & Redlich, *supra* note 50, at 1001 (finding that for at least some parents, stigma and fear of losing child custody resulted in delaying needed treatment).

313 *See* Ackerson, *supra* note 4, at 192 (examining programs designed to teach parenting skills to mothers with schizophrenia); Mason et al., *supra* note 6, at 1118 (discussing multidisciplinary service needs identified in a study by Cook and Steigman (2000)).

314 *See* Gold et al., *supra* note 9, at 294 ("Programs with highest relative fidelity to key elements of the PACT model seem to produce the strongest outcomes.").

315 *See id.* at 297. These basic elements for PACTs can be team size and configuration, staff/client ratios, admission criteria, treatment planning, frequency of contact, etc.

316 *See id.* (discussing the PACT alliance with other community resources and the involvement of family, social and community networks).

317 *Id.* at 294–95.

ethical duties and professional responsibilities have inspired broad discussions in different professions from social services to medicine and law. It could be helpful to adopt some of the solutions utilized by those professions. One common method is the use of informed consent[318]: the service provider discusses the conflict with all parties involved, presents available actions that could resolve the conflict and their consequences in an attempt to secure their awareness and consent to the conflict or to its proposed resolution.

Family-oriented PACTs would require specialized training of staff and allocation of resources to manage the multiple and complex issues of family treatment.[319] Yet shifting the PACT team's focus from treating one individual to supporting her whole family in the context of her unique circumstances is instrumental to family preservation. These comprehensive PACTs take on broader, more encompassing treatment goals that are family-oriented. They therefore increase family functioning and lead to positive outcomes regarding parenting skills, family relationships and children's well-being.[320] As such, PACTs are a strong and useful tool for preventing child removal or termination of parental rights, and thus preserving a family in which a parent is on her way to recovery and the child is out of harm's way.

2. Family-Oriented PACTs—Narrowly Tailored and Preserving Families

To ensure the substantive due process rights of parents and children, their fundamental right to family preservation can only be infringed upon by the state if the state's action is narrowly tailored to serve the compelling state interest in protecting children. Compared to removal or termination, which infringe on family integrity, services provided through family-oriented PACTs are a much less extreme measure to ensure children's safety. This narrowly tailored, less restrictive mean should replace removal or termination whenever possible. Similar to the use of PACTs as an alternative to criminal proceedings, families would be better served if legislatures and courts would establish PACTs as the default measure in cases of abuse or neglect of children to parents with schizophrenia. Only upon a

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318 *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2002).

319 *See* Mason et al., *supra* note 6, at 1117 ("There is a need to provide continuing education for clinicians to move from treating only the client with the mental illness and to begin viewing the family as a unit and the focus of care.").

320 *See id.* at 1106–07 ("Mental health advocates stress that with the right services and supports, many parents with mental illness and their families can remain together and function adequately.").

PACT's failure to facilitate the parent's recovery, or to guarantee the child's protection, should removal or termination be considered.

Recall ASFA and the critique regarding the statute's mandate to provide "reasonable" services to parents, which in effect results in very limited or no services.[321] Incorporating PACTs as an alternative clarifies the adequate standard for services the state is to provide. Indeed, such detailed guidelines limit judicial discretion because the court is no longer free to decide which services are reasonable. Of course, judicial discretion is not eliminated. Rather, discretion shifts from a formal test to a substantive one.[322] Courts would now look at the adequacy of service when clear, pre-determined standards for treatment are available. The courts would now exercise discretion in deciding whether these services were provided in a manner that satisfies the "reasonable" requirement in ASFA. This would ensure that families do in fact receive a minimal standard of services from the state.

Additionally, utilizing PACTs as an alternative to removal or termination challenges the presumption established in the Virginia statute; that a parent with schizophrenia is an unfit parent and should therefore be separated from her child. Instead, PACTs are an opportunity for parents to improve their parenting skills and to take an active role in creating a healthier environment for themselves and their children. By affording parents this vital opportunity, lawmakers shift the default paradigm; a parent is no longer unfit due to a mental disorder alone. Such a finding regarding the parent's fitness would in effect now require a finding based on in-depth scrutiny, that a parent is unable to recover and regain parental skills despite the availability of a PACT program.

As a preventative measure that lessens the need for removal or termination as a way to protect children and still maintain family integrity, PACTs comport more with substantive due process than current interventions which do not prioritize family preservation. Such interventions only attempt family preservation after a child has already been removed, usually in cases of emergency. This may be too little, too late. While separating the child from her parent protects her from neglect or abuse by her parents, it exposes her to other

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321 *See supra* Part I.C.1.

322 A ruling whether certain *types of services* are reasonable would be a formal test, while inquiring into whether the services themselves, the way they were provided and their efficacy for a particular family, were adequate would be a substantive test. Further discussion of such a substantive test is out of the scope of this paper, and I therefore leave it to future work.

harms. By maintaining family preservation and preventing removal, PACTs help safeguard the parent-child attachment, which in turn minimizes risks for later termination of parental rights.[323] Provision of services can prevent unnecessary removal and pursuant termination, and allow children to remain in their parents' care.[324]

Additionally, by centralizing all services provided to the family under one roof, rather than delegating them to different authorities (such as mental health systems *and* child welfare), PACTs' coordinated services facilitate their efficiency.[325] The concern for conflicting treatments or gaps in treatment is mitigated, as well as the need for time-consuming, costly communications between different service providers, assuming these communications do occur. Because of PACTs' efficiency and success, they are less intrusive than other interventions. PACTs are able to be effective in a short period of time, and therefore they are less obstructive to family life than removal or termination, which are more prolonged processes.

Not only are PACTs less restrictive than removal or termination, but they serve the state's interest on a broad scale. In addition to allowing a child to remain in her parent's care, PACTs address the parent's and the child's need for treatment or support, strengthen parental skills and restore attachments and healthy family dynamics. In doing so, PACTs achieve recovery for parents and protection for children—both of which can be viewed as state interests on a macro level, all without removing children into foster care which infringes on parents' and children's rights to family preservation and substantive due process.

D. Potential Challenges to Utilizing PACTs

Despite the advantages to family preservation, incorporating family-oriented PACTs as a less restrictive alternative to child removal or termination of parental rights has its shortcomings. In this Subpart I present two possible counterarguments to PACTs and explain how they can be rebutted.

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323 *See* Huntington, *supra* note 201, at 690 ("In the ideal model of family group conferencing the conference occurs before removal, thus the risk of damaging the bond between parent and child by preemptive removal is minimized.").

324 *See* Ramsey, *supra* note 181, at 24 ("A major concern was that children were being removed from their homes unnecessarily when the provision of services could have allowed them to stay home.").

325 *See* Ackerson, *supra* note 4, at 189 (citing a study of case management clients in Massachusetts).

1. Do PACTs Achieve Child Protection?

To pass muster under the substantive due process test, in addition to being least restrictive, PACTs must also serve the state's compelling interest: child protection. A significant concern is that allowing children to remain in their parents' care while the family participates in a PACT program leaves children vulnerable to neglect or abuse, and that PACTs can only ensure child protection at the end of a process, but not in cases of imminent danger. For this reason, I would advise cautious optimism and close supervision.

PACTs might not be appropriate in each and every case. My proposal here is not to mandate PACTs whenever a child is at risk as a result of a parent's struggle with schizophrenia. I merely argue that substantive due process requires that courts *consider* PACTs as a first line of defense, rather than resorting to removal or termination. As long as courts are mindful of the possibility for treatment through PACTs as a preventative alternative to removal, they are able to explore the adequacy and potential for success of this opportunity on a case-by-case basis.[326]

It may be useful for courts to think of parents with schizophrenia as falling into one of three groups.[327] The first group would include parents who are capable of safely raising their children and therefore should not be separated from their children at all. In the second group are parents who will likely benefit from PACTs over a longer period of time. Here, if courts find it necessary to remove children because of an emergency, the length of separation should be strictly limited with the goal of reuniting families as soon as the PACT program starts producing positive results. The last group would comprise of parents who are incapable of raising their children, and where prospects of a PACT being successful are too dim. Courts would decide which parents belong in which group, keeping in mind that the third group should be strictly limited to only the most severe and hopeless cases. Only if the court has taken a PACT into account but found it highly likely to fail in that particular case (if a parent is unable or unwilling to consent or participate, or if a child is in severe

326 This Article proposes PACTs as a generally available less restrictive alternative, but it is out of its scope to address or propose tests to distinguish cases where PACTs would be appropriate and those where removal is still a better suited option for child protection.

327 I leave the matter of which guidelines or tests are appropriate for courts to distinguish between parents in each group to future scholarship. Such attempt is out of the scope of this Article because it detracts from my main argument that PACTs should, at the very least, be considered as an alternative before removal of children or termination of parental rights.

imminent danger which a PACT could not relieve, for example), and a PACT becomes a futile attempt at a less restrictive alternative, then removal or termination would become a preferable measure that satisfies substantive due process.

In cases of emergency, for instance, Virginia law allows social services agencies to remove the child from her home for up to four hours. Within this short period of time, social services are to petition for a court issued emergency removal order.[328] In the petition, the agency must show that reasonable efforts to prevent removal have been made, and that there are no less restrictive alternatives to removal that would ensure the reasonable protection of the child.[329] This proceeding seems like a good opportunity to incorporate a PACT into the process. First, the initial removal is for a very limited period of time, which can help eliminate concerns regarding harm to a child that is separated for longer and placed in foster care. Second, as this statute requires the court to consider less restrictive means, evaluating the efficacy of a PACT in such cases of emergency is not a far cry from what courts are currently directed by law to do. If the court still is not persuaded that a PACT will ensure a child's safety, then there may be no other way but to remove the child beyond the initial four hours.

Lastly, because of the nature of PACTs as hands-on comprehensive services, the PACT team can closely supervise the progress of parents and children and report back to the court if need be. By constantly monitoring families, the team would be able to notice whether neglect or abuse are ongoing. Their awareness and familiarity with the family should allow PACT teams to intervene quickly by changing or intensifying services to ensure the child's safety. Again, in extreme cases, PACTs might be unable to help families recover and prevent harm to children, and therefore there would not be an alternative that would protect children as well as maintain family integrity.

Because PACTs may not be able to ensure a child is always safe from harm or neglect or abuse, they should be evaluated in the context of a particular case. Children's safety should not be compro-

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328 VA. CODE ANN. § 16.1-251(A) (2008).

329 *Id.* § 16.1-251(A)(2). The statute suggests alternatives such as "medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family" as less drastic. To bolster courts' awareness about PACTs as possible interventions that are less drastic, the Virginia legislature would do well to specify them in this section of the statute. Perhaps more preferably, lawmakers could make PACTs the default, less drastic alternative for courts and social services to explore.

mised, and occasionally there is no alternative to family separation. To comply with substantive due process rights it is not necessary for courts to always utilize PACTs as a less restrictive means; it is, however, crucial that courts are aware of PACTs' benefits and strengths and, at the very least, take them into account as a possible alternative to removal where appropriate.

2. Are PACTs Positive Rights?

Another possible opposition to utilizing PACTs as an alternative to removal or termination is the objection to creating an expansive welfare system that overly burdens the state.[330] Provision of services requires states to actively step into the private sphere of families, and, as such, can be viewed by some as a positive right that is inconsistent with ideas of personal liberty and principles of non-interventionist government. I offer two main responses to this argument: one, that state intervention in the form of PACTs in effect protects liberty interests; and, two, that because the state cannot avoid interfering in cases of families so severely affected by a parent's schizophrenia, it must take measures that are effective and in accordance with due process rights.

As discussed above, family preservation is a fundamental right that stems from coupling the expansive freedom parents hold in the childrearing process[331] and the child's interest in remaining in her parents' care. These aggregated rights are a liberty independent of the state, so long as parents' childrearing decisions are reasonable and the child is not harmed.[332] Thus, a state that allows families to participate in PACTs in an attempt to achieve family preservation protects their liberties and enables them to exercise that liberty in the only way that can preserve it continuously. Put differently, without

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330 As to the possible financial burden on states utilizing PACTs, because of the high costs of foster care, prolonged removal or termination proceedings and hospitalization, it is possible that establishing PACTs will be more cost-effective. Also, since a number of states, including Virginia, already have PACTs in place providing services to people with schizophrenia, utilizing them would not require the allocation of as many funds as would be required when creating PACT teams. Regarding the cost efficiency of family preservation services compared to foster care, see generally ROBERTS, *supra* note 71, at 134–35.

331 *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (finding it "entirely plain that [a particular Act of Congress] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

332 *See* GUGGENHEIM, *supra* note 199, at 36 (discussing the "minimum degree of care" parents need to exercise in order to prevent state intervention); GUGGENHEIM ET AL., *supra* note 209, at 94 ("A parent's past behavior is relevant in child protection only to the extent that it reflects on a parent's capacity to raise children adequately in the future.").

PACTs, parents suffering from schizophrenia are on a "fast track"[333] to lose their children. Therefore, PACTs are vital to preserving their liberty interests. State intervention through PACT services, effectively, does not infringe on family preservation, but rather is needed to facilitate it.[334] Instead of framing PACTs as positive rights (that is, that one has a right to services through PACTs), a more accurate framing of the issue would be a framework which recognizes a broader right to family preservation and PACTs as the means to accomplish that broader liberty.

Another justification for the use of PACTs, even as a positive right, is the state's compelling interest in child protection. Due to this compelling interest one would be hard pressed to argue against state intervention altogether. However, once the state intervenes, it must provide effective interventions, rather than interventions that could prove futile.[335] Currently, the standard the law employs is that services are "reasonable." This is considered the appropriate standard, because it balances the need for intervention with the potential burden to the state. However, "reasonable" is in effect an inadequate standard for services provided by the state. As seen in the case of *Toms v. Hanover Department of Social Services*,[336] "reasonable" services can turn into no services at all because courts may find that in the case of mentally disordered parents where a prima facie case of unfitness exists, the state is not obligated to provide services. Therefore, to ensure services that—again—protect multiple rights and interests,[337] perhaps the standard should be elevated to adequately reflect the gravity of such rights and interests.

A standard of "effective" services guarantees that services are not futile and that public resources invested in providing services do not

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333 *See* Ackerson, *supra* note 4, at 188 ("Policies intended to promote a speedier resolution for children in out-of-home care may have an unintended discriminatory effect by singling out parents who have a diagnosed mental illness for 'fast track' termination of their parental rights.").

334 *See* Wasow, *supra* note 137, at 220 ("[D]enial of services clearly implicates liberty interests of enormous magnitude. The strong, constitutionally protected interest at stake for the parent should militate in favor of giving her an opportunity to try to address the circumstances that led to the child being taken into foster care.").

335 *See* Mary Ellen C. v. Arizona Dep't of Econ. Sec., 971 P.2d 1046, 1048 (Ariz. 1999). In this case, the mother who suffered from several co-existing mental disorders challenged a decision to terminate her parental rights. The court found that "although the State is not obliged to undertake futile rehabilitative measures, it is obliged to undertake those which offer a reasonable possibility of success." *Id.*

336 616 S.E.2d 765, 771 (Va. Ct. App. 2005).

337 Among such rights and interests are the right to family preservation, substantive due process rights, the state's interest in protecting children and even its interest in parents' and children's mental health.

go to waste. Services that are merely reasonable may not be suitable for parents with schizophrenia and their children, and thus may be doomed to fail. Services that are not designed to address the unique needs of parents with schizophrenia are unsuccessful; parents do not adhere to treatment, and they are often unable to learn and implement them in their lives.[338] PACTs, contrastingly, do increase treatment adherence and produce positive results for participants. Therefore, because states have chosen to intervene and to offer services that can be seen as positive rights, they should do so in a manner that is fruitful and beneficial to participants. PACTs have proven to be just that.

CONCLUSION

The impact of schizophrenia on families is disheartening, and while children are vulnerable to harm if left at home, their well-being is not ensured by separating them from their parents. As a comprehensive treatment plan, PACTs hold great potential for positive growth. Because it already has operating state-sponsored PACTs, Virginia can become a true trailblazer for many other jurisdictions if it changes current law governing parents with mental illness to incorporate PACTs as a preventative alternative for family separation. The result would be improving the mental health of parents and children, better protecting children, and preserving families according to substantive due process rights.

Such a change in the law dealing with struggling families can be expanded beyond the context of mental illness to other instances where parental unfitness is questioned. Perhaps better protections of substantive due process rights and family preservation are available for parents with substance abuse problems, parents involved in criminal proceedings, or divorcing parents challenging each others' fitness. I leave these matters, though, for future endeavors.

In this Article, I attempted to challenge family separation and lay a foundation for better serving the needs of families that struggle with schizophrenia, not as parties with opposing interests, but as one collective in need of support. PACTs' comprehensive care brings on

338 *See* Ackerson, *supra* note 4, at 191. Ackerson states that social services that are designed to improve parenting skills are not fitted for parents with mental illnesses. Parents with mental illness, then, often drop out of such programs or—if they do participate—are unable to benefit from them. "[T]he didactic method of instruction combined with the severity of [these parents'] illness may impede their ability to apply the lessons to their own situations." *Id.*

recovery and well-being to all family members, as well as produces healthier family dynamics. Already endorsed by certain legal systems, PACTs, I believe, are the superior, less restrictive alternative that serves parents. Only when lawmakers and social services providers join together to optimally advance families are parents and children ensured their due process rights.