NOTES

THE MASSACHUSETTS CARE AND PROTECTION SYSTEM: IS A LOW TOLERANCE FOR RISK REALLY IN THE BEST INTEREST OF CHILDREN?

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I. INTRODUCTION

Although the Massachusetts care and protection system purports to act in the best interest of children, its serious shortcomings often cause the system to inflict more harm than help. In the worst cases, this harm goes so far as to trample upon the constitutional or statutory rights of a child and his or her parents. These grave violations of family rights, especially the children's rights that the system was created to protect, call for the reformation of the Massachusetts system. Absent meaningful change, the care and protection system will likely continue to intrude unacceptably into the sacred family realm, interfering with society's most basic support structure without justification.

As a result of its faulty care and protection system, Massachusetts has infringed upon family rights on many occasions. In one notable case, the State removed two-year-old Mikaela from her mother's custody and placed her in foster care.[1] In compliance with Massachusetts state law, the court appointed a lawyer to represent the child. [2] Mikaela's lawyer had a duty to advocate zealously for her client.[3] Due to an overwhelming caseload, however, Mikaela's lawyer withdrew from her case. [4] As a result of the withdrawal, the statutorily required 72-hour hearing never happened.[5] Abandoned by the state to the foster care system, Mikaela spent a full year separated from her mother without any showing that such separation was in her best interest.[6]

In another example, the state temporarily removed one-year-old Zoltan from his mother's care and placed him in a foster home after the 72-hour hearing found allegations of neglect to be credible.[7] At trial a year later, the court found Zoltan's mother unfit.[8] When she petitioned for a review and redetermination hearing, the court again found that she was unfit and terminated her parental rights. [9] By this time, Zoltan was three years old. [10] His mother ap-

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[1] Josh Krumholz & Warren Tolman, *No Justice for Mikaela*, BOS. GLOBE, Feb. 26, 2005, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/02/26/no_justice_for_mikaela/.

[2] *Id.*

[3] McCoy v. Court of Appeals of Wis., Dist. 1, 486 U.S. 429, 435 (1988) (holding that court-appointed counsel must act as an "active advocate" for his client).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *In re* Adoption of Zoltan, 881 N.E.2d 155, 158 (Mass. App. Ct. 2008).

[8] *Id.*

[9] *Id.*

pealed the court's ruling, and the appellate court found that the trial court had erred in its judgment; the facts were insufficient to justify termination of the mother's custody.[11] Zoltan's case was remanded to the lower court to determine whether sufficient evidence of unfitness existed to warrant a new trial.[12] At the time of remand, Zoltan was four years old, and although he got along well with his mother during visits, he had a strong bond with his foster parents—the only family he had ever really known. [13] Having spent three of his four years caught up in the system, Zoltan's future was still uncertain at the time of his latest trial.[14]

Stories like these are all too common. Massachusetts law promises to act in the best interest of children, but the state's overuse of the foster care system coupled with its lack of oversight has resulted in the systematic violation of children's constitutional rights to safety and family integrity.[15] In addition, Massachusetts law prescribes a shockingly low standard to bring families before the juvenile court, which sweeps large numbers of people into the system who do not belong there.[16] The State defends its low standard by arguing that it has a "low tolerance for risk."[17] Despite the good intentions of such risk-averse measures, however, the extraordinary number of cases overburdens the court and court-appointed lawyers, which gives rise to rampant due process violations and unwarranted parental deprivations.[18]

Part II of this note will explore: (1) the rights of children, parents, and the State; (2) the workings of the Massachusetts care and protection system; and

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[10] *Id.*

[11] *Id.* at 162.

[12] *Id.* at 164.

[13] *Id.*

[14] *Id.* (case was remanded to determine whether mother was unfit to parent or a candidate for reunification; no outcome has been reported).

[15] *See, e.g.*, Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142, 163 (D. Mass. 2011) (establishing that, if plaintiffs successfully prove the elements of their case on remand, the State's transgressions would amount to a systemic violation of constitutional family rights).

[16] *See, e.g.*, *In re* Zita, 915 N.E.2d 1067, 1072 n.14 (Mass. 2009) ("At a hearing pursuant to G.L. c. 119, § 24, a judge must find by a 'fair preponderance of the evidence' that there is 'reasonable cause to believe' that the child is in 'immediate danger of *serious* neglect' and that 'immediate removal' is necessary to protect the child from such harm.") (emphasis added).

[17] David Abel, *Massachusetts Foster Care Endangers Children, Lawsuit Alleges: State Cites Gains, Disputes Data*, BOS. GLOBE, April 16, 2010, http://www.boston.com/news/local/massachusetts/articles/2010/04/16/mass_foster_care_endangers_children_lawsuit_alleges/.

[18] Trisha M. Anklam, *The Price of Justice: In Light of* Lavalee, *What Should Massachusetts Courts Do When Attorneys Are Not Available to Represent Indigent Parents Involved in Care and Protection Matters?*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 111, 125 (2006).

(3) other state approaches to the care and protection of minors that better protect and enforce the rights and responsibilities of all involved. Part III will consider the failings of the Massachusetts system and will assert that violations of the constitutional and statutory rights of children and parents would be diminished by: (1) requiring full licensure and special training for Department of Children and Families ("DCF") social workers; (2) referring alleged victims and perpetrators to appropriate professionals to secure expert opinions regarding the allegations; (3) applying stricter evidentiary requirements in care and protection hearings; (4) increasing the standard of proof required at every stage of the proceedings; and (5) providing a jury trial upon the request of any party involved in a termination hearing.

II. LEGAL BACKGROUND

A. *The Rights of Children, Parents, and the State*

The United States Constitution creates a complex relationship among children, parents, and the State with respect to child protection.[19] Children have two fundamentally important constitutional rights. The first of these is the right to family integrity.[20] The right to family integrity guarantees freedom from State interference in private decisions affecting the establishment and raising of a family.[21] The second is the right to safety.[22] The right to safety opens the family's door to the State, which may step in to protect this right if necessary.[23] Given the presumption that a fit parent will act in the best interest of his or her child, the primary protectors of these rights are the child's parents, not the State.[24] This presumption is rebuttable, however, because the State has the authority to intervene when a parent does not act in the best interest of his or her child. [25]

Like their children, parents have a right to family integrity.[26] They also have a fundamental liberty right, which is embodied in the right to "establish a home and bring up children."[27] This right precludes the "unreasonable . . . interfer-

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[19] *See* Prince v. Massachusetts, 321 U.S. 158, 165-66 (1944).

[20] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (confirming the right to "establish a home and bring up children").

[21] *See Meyer*, 262 U.S. at 399.

[22] *Prince*, 321 U.S. at 165; Ex Parte Crouse, 4 Whart. 9, 11 (Pa. 1839).

[23] *See Crouse*, 4 Whart. at 11.

[24] Troxel v. Granville, 530 U.S. 57, 58 (2000).

[25] *See id.* at 68 ("[*S*]*o long as* a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family . . . .") (emphasis added).

[26] *Meyer*, 262 U.S. at 399.

[27] *Id.*

ence" of the State within the private family sphere.[28] Freedom from unreasonable interference does not, however, prohibit State involvement in appropriate cases.[29] For example, the United States Supreme Court has observed that although "[p]arents may be free to become martyrs themselves," they are not "free . . . to make martyrs of their children."[30] In other words, the right to family integrity (both of parents and of children) is not absolute.[31] When a parent's actions endanger the safety of his or her child, the State may enter the family sphere by invoking its *parens patriae* power. [32] As *parens patriae*, or "common guardian of the community," the State may supersede the role of the natural parent who is "unequal to the task" of caring for his or her child. [33] Pursuant to this power, the State may remove a child from an unsafe home if necessary to protect the child's well-being.[34] In extreme cases, the State may even go so far as to sever permanently the bond between parent and child.[35]

The power to destroy so permanently "one of the [most] basic civil rights of man"[36] is indeed grave. In fact, the termination of parental rights is so serious that in a series of cases the Supreme Court has held that termination proceedings are "quasi-criminal" in nature.[37]s In characterizing such proceedings as quasi-criminal, the Court noted that parental termination "work[s] a unique kind of deprivation"[38] and that "[f]ew consequences of judicial action are so grave as the severance of natural family ties."[39] The quasi-criminal nature of such proceedings has been held to trigger certain due process protections for parents.[40] One such protection is the right of an indigent parent to gain access to an appeal when he or she cannot afford to pay record preparation fees.[41] Another is the requirement that parental unfitness be proven by clear and con-

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[28] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 536 (1925).

[29] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[30] *Id.* at 170 (explaining that there are certain decisions a parent cannot make for her child; she must wait for the child to mature and make the decision for herself).

[31] *See* Troxel v. Granville, 530 U.S. 57, 93 (2000).

[32] *Id.*; Ex Parte Crouse, 4 Whart. 9, 11 (Pa. 1839).

[33] *Crouse*, 4 Whart. at 11.

[34] *Id.* at 11-12.

[35] *See* Santosky v. Kramer, 455 U.S. 745, 767 (1982); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[36] Skinner v. State of Okl., *ex. rel.* Williamson, 316 U.S. 535, 541 (1942).

[37] *See* M.L.B. v. S.L.J., 519 U.S. 102, 105-06 (1996) (distinguishing "parental status termination decrees from mine run civil actions on the basis of the unique deprivation termination decrees work: permanent destruction of all legal recognition of the parental relationship").

[38] Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18, 27 (1981).

[39] *Santosky*, 455 U.S. at 787.

[40] *M.L.B.*, 519 U.S. at 118-19.

[41] *Id.* at 128.

vincing evidence.[42] The Supreme Court has *not* ruled that parents facing termination proceedings are guaranteed a jury trial.[43] Furthermore, according to the Supreme Court, the quasi-criminal characterization of termination proceedings does *not* guarantee a right to counsel in all cases.[44] Massachusetts has, however, created a statutory right to counsel for both parents and children involved in a termination proceeding, which is triggered at the preliminary hearing stage.[45] Recognizing that "[an] indigent parent facing the possible loss of a child cannot be said to have a meaningful right to be heard in a contested proceeding without the assistance of counsel," the Supreme Judicial Court found that parents have a constitutional right to counsel in the care and protection context.[46]

In order to address the great number of indigent parents facing allegations of abuse or neglect, Massachusetts has instituted a panel of court-appointed lawyers to serve this demographic. [47] Massachusetts then established a set of rules regulating the conduct of lawyers on the panel.[48] For example, court-appointed lawyers are required to decline representation when they are "unable to afford the client prompt, diligent representation."[49] Counsel is *de facto* "unable to afford . . . prompt, diligent representation" if "counsel is unable to begin working on the case promptly" or "is unable to appear in court on an assigned date and cannot arrange a continuance that is consistent with the client's interests."[50] Court-appointed counsel must also be aware of caseload limits.[51]

Beyond merely possessing the *authority* to remove a child from the custody of unfit parents, the State might also acquire an *obligation* to care for that child once removed. [52] While the United States Supreme Court has held that no special duty arises when the State begins an investigation into family life, it has not addressed whether such a duty arises when the State actually takes custody of the child.[53] Once the State has legal and physical custody of the child, the child is in much the same position as an involuntarily committed mental pa-

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[42] *Santosky*, 455 U.S. at 748.

[43] *See, e.g.*, *M.L.B.*, 519 U.S. at 104; *see also* U.S. CONST. amend. VI (guaranteeing a jury trial in *criminal* prosecutions).

[44] Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18, 31-32 (1981).

[45] Dep't of Pub. Welfare v. J.K.B., 393 N.E.2d 406, 408 (Mass. 1979); MASS. GEN. LAWS ch. 119 § 29 (2010); Standing Order of the Juvenile Court 1-93.

[46] *J.K.B.*, 379 Mass. at 4.

[47] *See* COMMITTEE FOR PUBLIC COUNSEL SERVICES, http://www.publiccounsel.net/.

[48] *See generally* PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES §§ 1-8 (2003), *available at* http://www.publiccounsel.net/Practice_Areas/cafl_pages/performance_standards_for_cafl_attorney.html.

[49] *Id.* § 1.2(b)(i).

[50] *Id.* § 1.2 cmt.

[51] *Id.*

[52] *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 198 (1989).

[53] *Id.*; *see also* Parham v. J.R., 442 U.S. 584, 619 (1979) (commenting that on remand,

tient. [54] Although neither can take care of himself when at liberty, the State removes each from the support of his family and thereby assumes the caretaking responsibility.[55] Regarding the commitment situation, the Court stated that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[56] When the State "renders [a person] unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause."[57] Although the Court does not explicitly create a duty in *DeShaney v. Winnebago County Department of Social Services*, it leaves open the possibility of the existence of a duty, saying that when the State removes a child from his home and places him in foster care, it "might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."[58]s

While the Supreme Court and the First Circuit have yet to rule definitively on the existence of a constitutional duty to protect,[59] the United States District Court of Massachusetts has construed *DeShaney* to affirm such a duty.[60] Finding the analogy to involuntarily committed mental patients apt,[61] the court held that the duty to protect applied with even more force to abused and neglected children taken into State custody.[62] It reasoned that "it *must* be unconstitutional for the state to take custody of abused and neglected children, arguably more vulnerable than [prisoners and involuntarily committed patients], and fail to make adequate efforts to ensure their safety."[63]s In other words, foster children have a substantive due process right to State provision of their "basic human needs . . . and reasonable safety."[64] This right encompasses the rights to "pro-

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"the District Court might well consider whether wards of the State should be treated . . . differently from children with natural parents").

[54] *See Deshaney*, 489 U.S. at 199 (discussing the rationale for imposing a duty when the State involuntarily commits mental patients).

[55] *See id.*

[56] *Id.* at 199-200.

[57] *Id.* at 200.

[58] *Id.* at 201 n.9.

[59] *See* J.R. v. Gloria, 593 F.3d 73, 80 (1st Cir. 2010) (assuming *arguendo* the existence of a special relationship triggering a duty to protect).

[60] Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142, 160 (D. Mass. 2011).

[61] *See id.* (applying the following language from *Youngberg v. Romero* to foster children: "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." 457 U.S. 307, 315-16 (1982)).

[62] *Id.*

[63] *Id.* (emphasis added).

[64] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

tection from unnecessary harm," "a living environment that protects foster children's physical, mental and emotional safety and well being," "safe and secure foster care placements," "appropriate monitoring and supervision," "placement in a permanent family," and "treatment and care 'consistent with the purpose of the assumption of custody by [the Department of Children and Families].'" [65] Furthermore, the district court kept open the possibility that the right includes the right "not to be maintained in custody 'longer than is necessary to accomplish the purposes to be served by taking the child into custody.'"[66]s Thus, the United States District Court of Massachusetts has found that the State possesses not only the authority to intervene in family life, but also the obligation to provide adequate care for children in State custody.[67]

B. *The Massachusetts Care and Protection System*

In an effort to balance a child's right to family integrity with his right to safety, Massachusetts has established an elaborate system for the care and protection of children.[68]s In its declaration of purpose, Massachusetts asserts that "[t]he health and safety of the child shall be of paramount concern."[69] In prioritizing the welfare of the child, Massachusetts sets relatively low standards for bringing the child before the court.[70] Massachusetts officials justify the State's low standards by pointing to a "low tolerance for risk."[71] The idea behind the low threshold is that the State can better assess the best interest of children and more effectively prevent harm when a child is in State custody (or at least appears before the court periodically).[72]

The care and protection system handles everything from the initial report of abuse or neglect to the conclusion of the termination hearing.[73] All referrals go through the Department of Children and Families ("DCF"), which purportedly

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[65] *Connor B.*, 771 F. Supp. 2d at 161.

[66] *Id.* ("At this stage in the litigation, the court cannot say categorically that Plaintiffs have no . . . right to remain in state custody no longer than necessary under the circumstances. . . . [But] this court finds it easily conceivable that Defendants' failure to provide the above services deprived Plaintiffs of 'conditions of reasonable care and safety' and 'reasonably nonrestrictive confinement conditions' to which they are entitled." *Id.*

[67] *See id.*

[68] *See* 110 C.M.R. 1.01 ("These dual obligations—to protect children and yet simultaneously to respect the right of families to be free from unwarranted state intervention—present an inherently difficult balance to strike. Yet, this is precisely the Department's mandate. The effort to balance these two basic obligations, above all others, shall govern the Department's activities.").

[69] MASS. GEN. LAWS ch. 119 § 1.

[70] *See* MASS. GEN. LAWS ch. 119 § 24 (requiring only "reasonable cause to believe" the child is in need of services to merit a 72-hour hearing).

[71] *See* Abel, *supra* note 17.

[72] *See id.*

[73] *See* 110 C.M.R. 4.20–9.05 (reaching even beyond termination to adoption procedures).

works to balance a child's safety with respect for the integrity of the family.[74] A social worker is assigned to each case referred to DCF and is responsible for seeing the case through from the initial investigation to the ultimate disposition.[75]s

1. The Role of Social Workers

The care and protection process begins with a social worker.[76] To become a DCF social worker in Massachusetts, a person must: (1) have a Bachelor's degree in any subject and (2) obtain a minimum of a valid licensure as a Licensed Social Work Associate ("LSWA").[77]s To obtain licensure as an LSWA, one must: (1) (a) have an associate's degree or 60 hours of college credit in social work or a related area; (b) have a baccalaureate degree in any subject; or (c) have at least 1,000 hours of instruction in social work theory; (2) pass the basic licensure examination; (3) submit three professional references.[78]

The care and protection process begins when a DCF social worker receives a report of neglect or abuse.[79]s Once the social worker receives a report, he screens it to determine whether an investigation is necessary.[80] If the report is outdated, unreliable, or beyond DCF's jurisdiction, the social worker screens it out.[81] For example, the social worker will screen out reports "where the alleged perpetrator is not a caretaker" or where multiple reports are "demonstrably unreliable or counterproductive."[82] The social worker then examines surviving reports for identification of potential child victims and for characterization as emergency or non-emergency.[83] The social worker will designate the report an "emergency report" when he determines that "the reported condition poses a threat of immediate danger to the life, health, or physical safety of the child."[84]s He will label all other reports "non-emergency reports."[85] In investigations of both emergency and non-emergency reports, the social worker will visit the child's home to assess the family's living situation and to interview the child and his parents.[86] There are no clear rules guiding

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74 110 C.M.R. 1.01.

75 110 C.M.R. 4.20–9.05.

76 110 C.M.R. 4.20–4.21.

77 *See* Social Worker A/B, HUMAN RES. DIV., https://jobs.hrd.state.ma.us/recruit/public/31100001/job/job_view.do?postingId=J31596 (listing the qualifications for licensure and indicating that no prior experience is necessary to obtain a job as a DCF social worker).

78 258 C.M.R. 9.06.

79 110 C.M.R. 4.20–4.21.

80 110 C.M.R. 4.21.

81 *Id.*

82 *Id.*

83 *Id.*

84 110 C.M.R. 4.25.

85 *Id.*

86 110 C.M.R. 4.25–4.27.

the structure of these interviews; the manner in which the interview is conducted is left to the discretion of the worker.[87] While the social worker may investigate emergency reports in the same manner as non-emergency reports, he must begin his investigation of the former more immediately; emergency reports must be investigated within 24 hours of the initial report. [88] If the social worker believes that the child is at immediate risk of serious harm, he can remove the child at the time of the investigation and submit a written report explaining his decision to the court the next working day.[89]

Non-emergency reports must be investigated within three working days of the screening decision.[90] If, after conducting the investigation, the social worker satisfies the judge that he has "reasonable cause to believe" that "(i) the child is suffering from serious abuse or neglect or is in immediate danger of serious abuse or neglect; and (ii) that immediate removal of the child is necessary to protect the child from serious abuse or neglect," the judge may order that the child be placed in temporary DCF custody for up to 72 hours. [91] The statute offers no guidelines to either the judge or the social worker for determining whether a threat to the child is sufficiently "serious" to warrant removal.[92]s If the social worker does not find that the child is in imminent serious danger, he may still petition the court to find that the child is in need of care and protection if one of the following conditions exists:

> [T]he child (a) is without necessary and proper physical or educational care and discipline; (b) is growing up under conditions or circumstances damaging to the child's sound character development; (c) lacks proper attention of the parent, guardian with care and custody or custodian; or (d) has a parent, guardian or custodian who is unwilling, incompetent or unavailable to provide any such care, discipline or attention.[93]

Following such petition, the court may order a precept to have the child brought before the court.[94] The court will "issue a notice to the department" and shall issue "summonses to both parents of the child to show cause why the child should not be committed to the custody of the department." [95]

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[87] *See* 110 C.M.R. 4.27 (providing that "the nature of the [interview] is determined by the investigator").

[88] 110 C.M.R. 4.26.

[89] 110 C.M.R. 4.29.

[90] 110 C.M.R. 4.27.

[91] MASS. GEN. LAWS ch. 119 § 24.

[92] *See id.* (allowing for immediate removal when a child is in "serious" danger without defining the conditions indicating seriousness of the threat).

[93] *Id.*

[94] *Id.*

[95] *Id.*

2. 72-Hour Hearing/Preliminary Hearing

If the court determines that there is reason to believe the child is in need of care and protection, it must hold a hearing within 72 hours to decide who will take custody of the child.[96]s At this hearing, the child's parents may argue that they should retain custody of the child, but the burden rests with DCF to show that the child should be committed to DCF custody.[97] DCF must convince the court by a fair preponderance of the evidence that the child needs DCF's care and protection and should be temporarily or permanently committed to DCF custody.[98] If the court is so convinced, it may grant DCF custody of the child "until he becomes an adult or until, in the opinion of the department, the object of his commitment has been accomplished, whichever occurs first." [99] Should the court decide to grant custody to DCF, it must then set a date for pretrial conference to take place within 120 days of the 72-hour hearing.[100] Once DCF obtains custody of the child, it must place him or her in out-of-home care. [101] DCF may place the child with kin, but often chooses to place him or her in foster care.[102] The date for trial is then set at the pretrial conference.[103]s

3. Trial

The trial must occur between twelve and fifteen months after the social worker files the petition for care and protection.[104] If DCF wishes to pursue termination of parental rights, it must convince the court by clear and convincing evidence that the parent is unfit.[105]s In making its case, DCF need not comply with all the traditional rules of evidence.[106] It may, for instance, offer evidence of hearsay of a child under ten if it relates to sexual abuse and "the person to whom the statement was made, or who heard the child make the statement testifies."[107] Although the burden is on DCF, the parents may have a hard time defending their case because there is no right to confront adverse witnesses, [108] and a single judge decides the outcome of their case rather than a

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[96] MASS. GEN. LAWS ch. 119 § 24.

[97] *In re* Care and Protection of Summons, 770 N.E.2d 456, 465 (Mass. 2002).

[98] *Id.*

[99] MASS. GEN. LAWS ch. 119 § 26.

[100] MASS. JUV. CT. STANDING ORDER 1-04(III)(A)(6) (2004) (superseded 2006).

[101] *See* 110 C.M.R. 7.101.

[102] Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142, 163 (D. Mass. 2011) (alleging that "DCF failed to make appropriate use of kinship placements").

[103] MASS. JUV. CT. STANDING ORDER 1-04(III)(B) (2004) (superseded 2006).

[104] *Id.*

[105] Santosky v. Kramer, 455 U.S. 745, 769 (1982); *In re* Erin, 823 N.E.2d 356, 359 (Mass. 2005).

[106] *E.g.*, MASS. GEN. LAWS ch. 233, § 83.

[107] MASS. GEN. LAWS ch. 233, § 83(a); Adoption of Arnold, 741 N.E.2d 456, 463 (Mass. App. Ct. 2001).

[108] *In re* Adoption of Don, 755 N.E.2d 721, 729 (Mass. 2001).

jury of their peers.[109] The court may find that the parents are unfit but still find that terminating parental rights would not be in the best interest of the child. [110] When that happens, the parents and DCF have a right "to petition every six months 'for [a] review and redetermination'" hearing to assess the current needs of the child.[111] If instead the court finds the parents unfit and determines that termination would be in the best interest of the child, the parents lose all custodial and parental rights to their child and their child becomes a legal stranger to them.[112]s Termination works as a permanent legal severance between parent and child, modifiable only by appeal.[113]

4. Permanency Hearing

Unlike the trial, which must balance the rights of the child with those of the parents, permanency hearings focus primarily on the interest of the child.[114] As long as a child remains in DCF custody, the court must hold a permanency hearing for the child every twelve months.[115] Thus, if the court finds the parent unfit at trial, the child is entitled to an annual permanency hearing until the child has achieved a permanent placement. [116] At these hearings, the court will review the permanency plan for the child, which shall address

> whether and, if applicable, when: (i) the child will be returned to the parent; (ii) the child will be placed for adoption and the steps the department will take to free the child for adoption; (iii) the child will be referred for legal guardianship; (iv) the child will be placed in permanent care with relatives; or (v) the child will be placed in another permanent planned living arrangement.[117]

Pursuant to this rule, the court may reconsider parental fitness at the permanency hearing by evaluating the current status of the parent's fitness along with the current best interest of the child.[118] Alternatively, if the court has terminated parental rights and the child continues to reside in a temporary placement, the permanency hearing will consider whether the temporary placement might become permanent or whether DCF needs to seek a new placement for the child.[119] Until DCF achieves permanency for the child, the child is entitled to

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[109] MASS. GEN. LAWS ch. 119 § 26.

[110] *Id.*

[111] *In re* Thomasina, 915 N.E.2d 569, 574-75 (Mass. App. Ct. 2009).

[112] *In re* Adoption of Gillian, 826 N.E.2d 742, 748 (Mass. App. Ct. 2005).

[113] M.L.B. v. S.L.J., 519 U.S. 102, 106 (1996).

[114] *See* MASS. GEN. LAWS ch. 119 § 29B (Supp. 2012) ("The health and safety of the child or young adult shall be of paramount, but not exclusive, concern.").

[115] *Id.*

[116] *See id.*

[117] *Id.*

[118] *See id.*

[119] *Id.*

an annual permanency hearing (unless he ages out of the system without achieving permanency).[120]

C. *Other State Approaches*

The difficulty of balancing a child's competing interests in family integrity and safety will inevitably lead to problems. All state care and protection systems are flawed. Massachusetts has some significant issues, as Section III will discuss. In suggesting reform for Massachusetts, it may be helpful to examine how other states approach child protection.

1. The Role of Social Workers

While Massachusetts has fairly minimal requirements for licensure as a social worker, this is not the case in every state. In Connecticut, for example, one must have a Master's degree "in social work or a closely related field" or a baccalaureate in "social work or a closely related field and two (2) years of experience" or a baccalaureate "and three years of experience." [121] While some states require higher education and experience, others call for special training of social workers who interact with children and families.[122] In Alaska, once a social worker is hired, he or she must undergo training in the constitutional and statutory rights of children and their parents.[123]

A 2010 study suggests that requiring social workers to achieve greater expertise may improve child outcomes in at least two important ways.[124] First, it may yield social workers who can more effectively screen out unsubstantiated cases.[125] Social workers in Connecticut and Alaska find almost twice as many cases unsubstantiated as substantiated at the initial investigation stage.[126] Massachusetts social workers, on the other hand, find *more* cases substantiated than not.[127] Second, social workers in Connecticut and Alaska manage to provide services to a much higher percentage of children in foster care than do social workers in Massachusetts.[128] The comparative success of these states indicates

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[120] *Id.*

[121] CONN. DEP'T OF ADMIN. SERVS., http://www.das.state.ct.us/HR/Jobspec/JobDetail.asp?FCC=3008 (last visited Sept. 15, 2012).

[122] *See, e.g.*, ALASKA STAT. § 47.17.033 (2010).

[123] *Id.*

[124] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT: 2010 REPORT 5-12 (2011), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf.

[125] *Id.* at 12.

[126] *See id.* (showing Connecticut finding 18,702 reports unsubstantiated compared to 7,075 substantiated and Alaska finding 2,927 unsubstantiated compared to 1,845 substantiated).

[127] *See id.* (showing Massachusetts finding 12,279 reports unsubstantiated compared to 16,621 substantiated).

[128] *See id.* at 98 (showing 38.2% of foster children in Connecticut and 53.0% of foster

that hiring more highly qualified social workers would lead to better child outcomes.

Some states also impose special rules governing the interactions between social workers and children.[129]s For example, in Kansas, all child interviews must be visually and aurally recorded for their content to be admissible in court hearings.[130] In Colorado, the state goes even further; when the truth of certain allegations may be particularly difficult to assess, Colorado requires social workers to refer children to professionals with the relevant expertise.[131] In cases of alleged emotional abuse, for instance, Colorado law requires that both the alleged child victim and the alleged perpetrator be referred to a mental health care professional.[132] Because social workers play such a major role in child protection, requiring greater expertise and collaboration with child health care professionals helps social workers to make better informed decisions. Better informed decisions, in turn, guarantee more effective services for the children.

2. Differences at the Trial Level

At the trial stage of the proceedings, some states go further than Massachusetts in recognizing that the quasi-criminal nature of termination hearings requires heightened procedural safeguards. [133] The Supreme Court of Oklahoma has held that "parental rights are too precious to be terminated without the full panoply of protections afforded by the Oklahoma Constitution." [134] The constitutional provision to which the court referred provides for "[j]uries for . . . juvenile proceedings."[135] According to the Oklahoma Supreme Court, the severance of the parental bond is sufficiently grave to trigger the right to a jury trial at the termination stage. [136]

In New Hampshire, the law protects the family relationship through other means: use of the "beyond a reasonable doubt" standard.[137] Controlling New Hampshire law states that "because parental rights are fundamental under the New Hampshire Constitution,"[138] the party seeking to terminate "must prove

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children in Alaska receiving services, compared to only 18.8% of foster children in Massachusetts).

[129] *E.g.*, KAN. STAT. ANN. § 38-2249 (Supp. 2011).

[130] *Id.*

[131] COLO. REV. STAT. § 19-3-312 (2011).

[132] *Id.*

[133] *See, e.g.*, OKLA. CONST. art. II, § 19; Stanley D. v. Deborah D., 467 A.2d 249, 251 (N.H. 1983); KAN. STAT. ANN § 38-2249 (Supp. 2011); and W. VA. CODE § 49-6-2 (Supp. 2012).

[134] A.E. v. State, 743 P.2d 1041, 1048 (Okla. 1987).

[135] OKLA. CONST. art. II § 19.

[136] *Id.*

[137] *Stanley D.*, 467 A.2d at 251.

[138] *In re* Shannon M., 766 A.2d 729, 733 (N.H. 2001).

the statutory ground for termination beyond a reasonable doubt."[139] Furthermore, in New Hampshire,

> "the rights of parents over the family are natural, essential and inherent rights within the meaning of New Hampshire Constitution, part I, article 2 . . . . [T]he government must prove its case . . . beyond a reasonable doubt before the permanent termination of liberty and natural rights of parents guaranteed under the New Hampshire Constitution . . . can occur."[140]

The "beyond a reasonable doubt" standard is substantially more protective of parental rights than the "clear and convincing evidence" standard. Under the "clear and convincing evidence" standard, the fact finder need only be convinced that it is "highly probable" that the allegations are true. [141] The "beyond a reasonable doubt" evidentiary standard requires more: "[A reasonable doubt] is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."[142] Thus, applying the "beyond a reasonable doubt" standard requires that the fact finders are virtually *positive* that the defendant is guilty of abuse or neglect.[143]

Another useful tool for protecting against wrongful deprivation is reliance on certain evidentiary and procedural rules.[144] Under Kansas law, statements of children less than thirteen years of age may be admitted into evidence *provided that* the statements were visually and aurally recorded, that the statements did not result from leading questions, that "every voice on the recording is identified," and that "no attorney for any party or interested party [was] present." [145] Rather than provide special evidentiary rules such as this Kansas law, West Virginia employs its standard rules of evidence, including the rules against hearsay.[146] It also provides for the right of parents to "present and cross-examine witnesses,"[147] a right denied to parents in Massachusetts.[148]

In establishing various procedural safeguards at the trial stage, other states are more protective of parental rights than is Massachusetts. The use of crimi-

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[139] *Stanley D.*, 467 A.2d at 251.

[140] *In re* Diana P., 424 A.2d 178, 182 (N.H. 1980) (quoting State v. Robert H., 393 A.2d 1387, 1389 (1978)).

[141] BLACK'S LAW DICTIONARY 636 (9th ed. 2009) (quoting Commonwealth v. Webster, 59 Mass. 295, 320 (1850)).

[142] *Id* at 1380.

[143] *Id.*

[144] *See, e.g.*, KAN. STAT. ANN. § 38-2249 (Supp. 2011).

[145] *Id.*

[146] W. VA. CODE § 49-6-2 (Supp. 2012).

[147] *Id.*

[148] *In re* Adoption of Don, 755 N.E.2d 721, 729 (Mass. 2001).

nal-like procedures recognizes the gravity of the right at stake and works to prevent wrongful termination. Furthermore, evidence suggests that states that provide greater procedural safeguards have a lower rate of maltreatment recurrence than Massachusetts. [149] While the rate of recurrence in Oklahoma, New Hampshire, Kansas, and West Virginia ranges from 2.7% to 5.9%, Massachusetts' maltreatment recurrence rate is 8.5%.[150] The higher rate of maltreatment recurrence in Massachusetts is particularly upsetting in light of the fact that Massachusetts surpasses most states in terms of the number of children brought into the system. [151] A higher percentage of recurrence as applied to a greater number of children means many more children overall suffering abuse or neglect *after* the intervention of State protective services. Therefore, Massachusetts fails in both directions; it undervalues family integrity and misidentifies the children who are truly at risk of harm.

III. ARGUMENT

A number of flaws plague the Massachusetts care and protection system.[152] Both individually and collectively, these flaws demonstrate disrespect for the integrity of the family and give rise to potentially significant due process violations.[153] Worse still, the system's failings channel many children into foster care where they face a heightened risk of abuse, stunted emotional and educational growth, and a lack of the services required to enable them to thrive as adults. [154] It is therefore apparent that the current system fails to strike the proper balance between respect for family integrity and protection of child safety; in erring too far on the side of safety, the system actually *creates* a new set of hazards for children in State custody. By drawing on mechanisms employed by other states, Massachusetts may improve its system of child welfare.

A. *Reduce Reliance on the Foster Care System*

Because the failings at each stage of the care and protection process add to

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[149] *See* CHILDREN'S BUREAU, *supra* note 124, at 56.

[150] *See id.*

[151] *See id.* (Massachusetts is among the top six states in the number of reports it finds substantiated, becoming involved with almost twice the average number of families (16,621 substantiated cases compared to an average of 8,391)).

[152] *In re* Adoption of Zoltan, 881 N.E.2d 155, 158 (Mass. App. Ct. 2008); Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. APP. PRAC. & PROCESS 179, 180 (2004); *see, e.g.*, Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142 (D. Mass. 2011).

[153] *See* Krumholz and Tolman, *supra* note 1.

[154] Bella English, *Aging Out: The State Is Not Required to Care for Foster Children Beyond Their 18th Birthday. But That's Precisely When Many Young People Need a Helping Hand into Adulthood*, BOS. GLOBE, Oct. 16, 1994, *available at* 1994 WLNR 2039397; *see Connor B.*, 771 F. Supp. 2d at 142.

the State's overreliance on the foster care system, it is important to examine just how seriously this overreliance harms children. The proposed reforms following this section all aim to reduce the incidence of the problems that necessitate such frequent use of foster care placements. By easing the burden on the foster care system, hopefully these reforms will eliminate many of the harms discussed herein.

The Massachusetts system's failings often put children in foster homes where they may suffer violations of their constitutional right to special State protection from harm. [155] If removed from their homes, these children may spend years in the foster care system where they are bounced from one home to another.[156] In fact, "[a]lthough the foster care system is intended to provide temporary care, one in ten children [in Massachusetts] spend[s] more than seven years in the system."[157] In Massachusetts, almost half of children awaiting adoption (43.2%) have "spent more than forty-eight months in foster care." [158] While in the system, children are routinely denied access to beneficial services DCF is designed to provide, and they are often placed in the care of foster parents who lack access to services themselves.[159] Departmental services include access to counseling for foster children and foster parents, [160] provision of child care services, [161] and monetary stipends and reimbursement. [162] When foster parents are unable to access the services they need to care for their foster children effectively, they may either fail to provide a nurturing environment or withdraw from the foster system completely, bumping the child into yet another unfamiliar home. [163] Frequent relocation is incredibly detrimental to children as they have a particular need for stability.[164]s

Furthermore, research suggests that children in Massachusetts foster homes suffer abuse at four times the national standard for state-supervised foster homes.[165] This means that the State is removing children from potentially dan-

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[155] *Connor B.*, 771 F. Supp. 2d at 160.

[156] Ariana L. Johnson, *Meeting the Best Interest of the Child: Reconsidering Massachusetts' Foster Care System*, 14 B.U. PUB. INT. L.J. 277, 277 n.2 (2005).

[157] *Id.* at 286.

[158] *Id.*

[159] *Id.*

[160] 110 C.M.R. 7.081.

[161] 110 C.M.R. 7.070.

[162] *See* 110 C.M.R. 7.130 (providing reimbursement for child care costs, including medical, psychological, and/or social needs, a quarterly clothing allowance, extraordinary out-of-pocket expenses, and supplements for birthdays and holidays).

[163] Johnson, *supra* note 156, at 288.

[164] *Id.*

[165] *Citing Widespread Abuse of Kids in Foster Care and Seeking Sweeping Reforms, Advocates Sue Massachusetts Governor*, CHILDREN'S RIGHTS (Apr. 15, 2010), http://www.childrensrights.org/news-events/press/citing-widespread-abuse-of-kids-in-foster-care-and-seeking-sweeping-reforms-advocates-sue-massachusetts-governor/.

gerous homes and placing them in foster homes where they may be even *more* likely to suffer abuse.[166] The allegations made in *Connor B.* may help to explain this phenomenon. [167] The plaintiffs in that case alleged that insufficiently trained social workers with unmanageable caseloads were unable to monitor and review foster care placements effectively.[168]s In one real life example, six-year-old Connor (plaintiff of *Connor B.*) was sexually abused in his first foster care placement.[169] Following this abuse, Connor spent four months in a psychiatric unit.[170] After his release, he bounced from foster home to foster home. [171] He had been moved seven times by the time he was nine.[172] As a result, Connor developed serious mental health issues, and his prospects of achieving permanency were no better than they had been three years earlier.[173] The increased threat of danger to children like Connor violates the State's duty to keep children within its custody safe.[174]s When the State fails to provide special protection, destroys family integrity, and fails to keep children safe, the State violates the rights of the children in its care.[175]

In addition to the immediate detrimental effects the State's actions (and inaction) have on children, foster children often suffer tangible long-term consequences as well.[176]s The act of removing a child from his biological parents and presenting him with new parents can be psychologically overwhelming.[177] Already faced with the normal "challenges . . . of psychological development," children in foster care "must master and deal with feelings provoked by separation . . . and also overcome the fear of developing closeness with the new parents."[178] The fear of bonding with new parents grows with each additional foster care placement.[179] Mastering these feelings is particularly difficult for children who have in fact been the victims of abuse or neglect.[180] For these children, it is a challenge "to develop a sense of basic trust . . . leaving the child

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166 *See id.*

167 Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142, 150 (Mass. Dist. Ct. 2011).

168 *Id.*

169 Dan McCue, *Horrific Abuse Alleged in Mass. Foster Care*, COURTHOUSE NEWS SERVICE (Apr. 19, 2010), http://www.courthousenews.com/2010/04/19/26516.htm.

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142, 163 (Mass. Dist. Ct. 2011).

175 *See id.* at 167 ("Plaintiffs' asserted interests . . . are more than abstract needs or desires; they are legitimate claims of entitlement.").

176 English, *supra* note 154; Charlotte Weldon, *Foster Care: A Psychological War*, SAMFORD UNIVERSITY (2001), http://www4.samford.edu/schools/artsci/scs/weldon.html.

177 Weldon, *supra* note 176.

178 *Id.*

179 *Id.*

180 *Id.*

with little to no hope of healing."[181]s The younger a child is at the time of victimization and/or removal, the more damaging the psychological strain.[182]

Aside from the profound psychological and emotional needs of children facing the described conditions of the foster care system (and, possibly, residual effects of actual abuse or neglect preceding placement), the State often fails to provide children with the resources they need to cope financially in the adult world.[183] One example of this failure is the story of a foster child named James. James was five when the state first became involved in his life.[184]s Thirteen years later, he aged out of the system without ever achieving a permanent placement.[185] Because the state stops foster care payments once a child ages out of the system, James' foster mother could no longer afford to take care of him once he turned eighteen.[186] With no foster family and nowhere else to turn, James was homeless.[187] He had no high school diploma, having dropped out of high school, so employment was hard to find.[188] James managed to get a minimum-wage job, but he was fired after a dispute regarding stolen money.[189] He then procured a second minimum-wage job but was forced to quit when he was unable to make the long commute.[190] He had no job, no home, no medical insurance, and lived day to day by "sleeping wherever [he found] a spare couch."[191] Given thirteen years to find James a safe home and a promising future, the State instead abandoned him to life on the streets.[192]

When a child in the care and protection system reaches his eighteenth birthday, he is usually removed from the system. [193] If, as is so often the case, his foster parents are unable to provide for him without support from DCF, he may be kicked out of his foster home and left to fend for himself.[194]s Many foster children who, like James, have spent significant portions of their lives in foster care or have moved between multiple homes drop out of school before receiving a diploma.[195] Thus, the cessation of State protection, however minimal it may have been, often means sudden homelessness and unemployment with no

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[181] *Id.* (citing Linda L. Katz, *An Overview of Current Clinical Issues in Separation and Placement*, CHILD & ADOLESCENT SOC. WORK J. 209, 211 (1987)).

[182] *Id.*

[183] English, *supra* note 154.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *See id.*

[194] *See id.*

[195] *Id.*

clear prospects of improvement.[196] Furthermore, foster children are at a heightened risk of engaging in crime, experiencing teenage pregnancies, and ultimately becoming involved in the system as parents.[197]

In sum, the harms inflicted upon foster children are of the utmost concern. By implementing the following reforms, it may be hoped that Massachusetts will not only see a reduction of due process violations and a greater respect for family integrity, but will also see significant improvements for children in foster care.

B. *Better Equipped Social Workers*

Social workers are the gatekeepers of the care and protection system; when reporters file claims of abuse or neglect, social workers filter out the unsubstantiated cases from those requiring additional investigation.[198] In order to filter cases, a social worker determines whether the risk of harm to a particular child outweighs his (and his parents') right to family integrity. [199] In making this weighty determination, the social worker performs three different roles.[200] At the first stage of the process, she performs the duties of a police officer.[201] In this role, she visits the child's house, makes an investigation of the premises, and conducts interviews with the parents and child.[202] She then acts as a lawyer in assessing her findings to determine whether she has sufficient evidence to seek removal of the child and proceed to trial.[203] If she concludes that the evidence supports removal, she petitions the court for DCF custody. [204] If the court awards DCF temporary custody, the social worker then proceeds like a judge and decides the temporary disposition of the child's case.[205] In this role, she may exercise broad discretion in determining the placement of the child, the visitation schedule for the family, and the goals the parents are required to achieve prior to reunification with the child.[206]s If the parents are found to be unfit at trial, the social worker has the power to continue to make decisions regarding the child's placement.[207]

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196 *Id.*

197 *Id.*

198 110 C.M.R. 4.21.

199 110 C.M.R. 1.01.

200 *See* 110 C.M.R. 4.27.

201 *Id.*

202 *Id.*

203 MASS. GEN. LAWS ch. 119 § 24.

204 *Id.*

205 MASS. GEN. LAWS ch. 119 § 26.

206 *Id.*

207 MASS. GEN. LAWS ch. 119 § 29B.

1. Failings of the Massachusetts System

In *Connor B. ex rel. Vigurs v. Patrick,* six children filed a class action alleging that "children in DCF custody are exposed to severe potential harm" resulting from "systemic deficiencies within DCF."[208] As the federal district court recognized in that case, "DCF controls the fate of these children."[209] Elaborating on the breadth of DCF's discretion, the court noted:

> When [DCF] is granted permanent custody of a child, it has virtually free rein to place that child in a foster home of its choosing, to decree whether, how much, and what sort of family visitation there should be, and to decide whether to have the child adopted. This discretion is subject only to a petition for review which cannot be filed more than once every six months.[210]

In other areas of juvenile law, such broad discretion is usually reserved for people like judges who have professional training and years of experience in their field.[211] Nevertheless, in the care and protection setting, Massachusetts instead awards expansive decision-making power to social workers whose qualifications may include nothing more than a baccalaureate degree in *any* subject.[212] The right to family integrity is fundamental and deserves special protection from governmental interference.[213] Massachusetts' low standards for qualification as a DCF social worker coupled with broad grants of discretion minimize the importance of that right and deny even moderate protection from unwarranted interference.[214]s In addition, Massachusetts social workers are more likely than other states' social workers to find a report of abuse or neglect substantiated.[215] The State's minimal requirements for a position as a DCF social worker may explain social workers' apparent inability to screen out unsubstantiated cases. The failure to filter out such cases at the outset adds to the overburdening of court-appointed lawyers and the foster care system.

2. Rationale Behind the Massachusetts System

In light of its low threshold for bringing children into the system, Massachu-

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208 Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142, 150 (Mass. Dist. Ct. 2011).

209 *Id* at 155.

210 *See id.* (citing Care & Protection of Three Minors, 467 N.E.2d 851, 861 (Mass. 1984)).

211 *See id.* ("In stark contrast to the discretion afforded juvenile courts in TPR and CHINS proceedings, Massachusetts law greatly restricts the juvenile courts' discretion once a child is placed in DCF's permanent custody.").

212 Social Worker A/B, *supra* note 77.

213 *See* Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (holding that the fundamental right "to establish a home and bring up children . . . may not be interfered with . . . by legislative action" absent a legitimate governmental interest).

214 *See Meyer*, 262 U.S. at 399-400; *see also* Social Worker A/B, *supra* note 77.

215 CHILDREN'S BUREAU, *supra* note 124.

setts has a high volume of care and protection cases. In fact, Massachusetts is one of only four states that find more reports of abuse or neglect substantiated than unsubstantiated.[216]s Of those four states, Massachusetts has by far the greatest disparity between reports found substantiated and those found unsubstantiated.[217] With so many cases to pursue, the State needs a generous supply of social workers. [218] The high demand for social workers explains the minimal qualifications required of potential hires.[219] If social worker applicants were required to obtain a Master's degree or extensive experience, the State would not have enough workers to handle the caseload.[220] As it is, the average Massachusetts social worker oversees twenty-eight families at a time.[221] In contrast, "the national standard is 13 to 18 children per caseworker."[222]s Therefore, if Massachusetts wishes to retain its "low tolerance for risk," it cannot feasibly heighten the hiring requirements for social workers.[223]

3. Suggested Reform

Because social workers may exercise such far-reaching authority, they should be well-educated in the field of social work or a related area. Massachusetts should therefore adopt stricter social worker qualifications, such as those required by Connecticut. [224] By requiring Massachusetts social workers to obtain a Master's degree in social work or a Bachelor's degree in social work coupled with two to three years of experience in the field, the State may better equip social workers to perform their many roles. [225] Although increasing the educational requirements of social workers may potentially reduce the number of qualified workers, this is not problematic. Adoption of heightened educational requirements would yield social workers who are experts in their field and are better equipped to distinguish substantiated from unsubstantiated claims. Thus, raising hiring standards will work to *reduce* the number of cases DCF pursues. By improving each worker's ability to identify unsubstantiated cases, the educational requirement would also promote family integrity. Families who do not belong in the care and protection system would be screened out earlier in the process, preventing unwarranted State intrusion into family life.

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216 *Id.*

217 *Id.*

218 *See* 110 C.M.R. 4.20–9.05 (detailing many tasks performed by social workers).

219 *See* Social Worker A/B, *supra* note 77.

220 *See* Abel, *supra* note 17 (Massachusetts employs "2,400 caseworkers for about 8,000 children in foster care.").

221 *See id.*

222 *See id.*

223 *See id.*; *see also* Social Worker A/B, *supra* note 77.

224 Social Worker Job Listing, CONN. DEP'T OF ADMIN. SERVS., http://www.das.state.ct.us/HR/Jobspec/JobDetail.asp?FCC=3008.

225 *Id.*

This would in turn promote the goal of child safety by freeing up services for the children who truly need State intervention on their behalf.

Furthermore, imposing more stringent hiring qualifications will provide the added benefit of reducing State costs. While each social worker would earn a higher salary (in light of her educational achievements), the State would have fewer social workers on its payroll. In addition, the workers' increased ability to screen out cases would result in overall savings for the entire care and protection system. Reducing the caseload eases the State's financial burden in paying court fees (from the preliminary hearing to permanency hearings), court-appointed lawyer fees, and foster care stipends.

In addition to imposing higher educational requirements on potential social workers, Massachusetts should follow Alaska in mandating training in the constitutional and statutory rights of children and their parents.[226] Social workers are State actors, and familiarity with the respective rights of children and their parents will help to ensure that the State upholds rather than infringes upon these rights. While knowledge of those rights will not eliminate the difficulty of balancing family integrity with child safety, it will at least reduce the incidence of preferring child safety to family integrity where evidence of harm is lacking.

Furthermore, Massachusetts should provide greater oversight as a check on the social worker's sweeping authority. Because the social worker performs several roles, it is important to reduce the risk of abuses of power. One way to increase oversight would be to enact a law like Kansas has, requiring the video and audio recording of interviews with children.[227] Aside from their evidentiary value, these recordings would allow the social worker's supervisor to review the worker's interaction with the child. The supervisor could then determine whether the social worker accurately interpreted the child's statements. This oversight procedure would also ensure that the child was not pressured to make certain statements or asked leading questions.[228] Protecting against abuses of power will promote the legitimacy and reliability of the system, and will be helpful in bringing children in need of protection into the system while simultaneously screening out unsubstantiated cases.

Mandating constitutional and statutory training and instituting oversight procedures will impose additional costs on the State. However, the increased expertise of the social workers will, as mentioned above, save the State money. Therefore, the money saved by raising social worker qualifications can be redirected to fund additional training and oversight procedures. Additionally, a

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[226] ALASKA STAT. § 47.17.033.

[227] KAN. STAT. ANN. § 38–2249.

[228] *See, e.g.*, Robert G. Marks, *Should We Believe the People Who Believe the Children?: The Need for New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207, 221 (1995) (noting children's particular susceptibility to suggestion and eagerness to satisfy authority figures).

greater familiarity with parents' and children's rights may actually save the State money by reducing the incidence of suits alleging DCF infractions of those rights.

The above-proposed changes further an additional goal. Inasmuch as each reform helps social workers to screen out unsubstantiated cases in the first step of the process, these reforms would reduce the burden on court-appointed lawyers.[229] If a social worker dismisses a case before it reaches the 72-hour hearing, there is no need to assign a lawyer to the case. Relieving a part of the lawyer's burden frees up his time and resources to represent children and parents effectively in more difficult cases.[230] This would reduce the incidence of parents having to choose either to forgo their statutorily required 72-hour hearing or to forgo their constitutional right to counsel and proceed without representation, discussed in Section III.E.[231] In other words, giving social workers the tools they need to distinguish between substantiated and unsubstantiated cases would not only promote family integrity and child safety, it would also reduce the incidence of due process violations.

C. *Referral to Mental Health Care Professionals*

Some allegations are so sensitive or difficult to prove by physical evidence (e.g., claims of sexual abuse or emotional abuse/neglect) that even a highly-trained social worker would be at a disadvantage when trying to elicit the facts. In such cases, an independent, licensed psychiatrist would be best suited to work with the child or parent.

1. Failings of the Massachusetts System

As discussed above, the State's overreliance on social workers gives rise to a number of difficulties. In addition to those already mentioned, social workers are ill-equipped, no matter how well-trained, to identify and address certain kinds of abuse. When the signs of the alleged abuse are psychological rather than physical in nature, the social worker faces special challenges. First, she must reconcile the child's words with both his tone and his nonverbal cues. [232] Second, she must know how to monitor her own words and tone so as not to manipulate the child's testimony unintentionally.[233] Third, she must be able to identify psychological issues.[234] She must then be able to determine whether the issues identified were caused by or related to some kind of parental

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[229] *See* Johnson, *supra* note 156.

[230] *See id.*; *see also* Krumholz and Tolman, *supra* note 1.

[231] *See* Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18, 46 (1981).

[232] *See, e.g.*, Marks, *supra* note 228.

[233] *See, e.g., id.*

[234] *See* Anthony Spirito, PhD, et al., *Society of Pediatric Psychology Task Force Report: Recommendations for the Training of Pediatric Psychologists*, 28 J. PEDIATRIC PSYCHOL. 85, 89-90 (2003), *available at* http://jpepsy.oxfordjournals.org/content/28/2/85.full.pdf+html.

abuse.[235] Without these skills, the social worker would be hard-pressed to differentiate between those children who are truly at risk and those who are not. Requiring all social workers to acquire such specialized skill would be costly, time-consuming, and unreasonable. The social worker's necessary range of interaction is too broad to require the development of this complex skill set.[236] Therefore, alleged victims of sexual or emotional abuse should be assessed by someone other than a social worker, and Massachusetts does not provide for that.

Another problem is that Massachusetts fails to fulfill its promise to "make every reasonable effort to encourage and assist families to use all available resources to maintain the family unit intact."[237] Rather than attempt to rehabilitate a parent who has been found deficient, DCF typically removes the child from that parent.[238] This may be explained by the fact that a social worker is unable to assess the parent's psychological state and identify underlying issues.[239] Without the ability to identify the issues, the social worker has little hope of showing the parent how to overcome those issues and adopt a healthier parenting style. [240] Nevertheless, preferring separation over rehabilitation is insufficiently respectful of family integrity.[241]s

2. Rationale Behind the Massachusetts System

The most plausible explanation of Massachusetts' failure to refer difficult cases to licensed professionals is the attendant cost. With the whole system as overburdened as it is, the funding for this kind of improvement may be difficult to obtain. Without the necessary means to pay for referral to professionals, the State must choose between relying on social workers to rehabilitate parents and removing the children from possible harm while the parent seeks rehabilitation on his own terms. Given DCF's stated preference for avoiding risk, it is reasonable to choose foster care placement over placement with a parent DCF hopes to rehabilitate.[242]

3. Suggested Reform

Rather than relying exclusively on social workers to perform every role in

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[235] *Id.*

[236] *See* 110 C.M.R. 4.27.

[237] 110 C.M.R. 1.01.

[238] *See, e.g.*, CHILDREN'S BUREAU, *supra* note 124, at 12 (finding that Massachusetts social workers are more likely than social workers in most other states to find cases substantiated and to place children in the foster care system).

[239] *See* Social Worker A/B, *supra* note 77.

[240] *See id.* (requiring only a baccalaureate degree in any field, minimizing the likelihood that the worker will be equipped to rehabilitate deficient parents).

[241] *See* Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

[242] Abel, *supra* note 17.

the process, Massachusetts should employ licensed psychiatrists. A psychiatrist, particularly a pediatric psychiatrist, may recognize a child's nonverbal as well as verbal cues. [243] He may also be aware that "children are more vulnerable to suggestion and more easily influenced by various authority figures than are adults" and would know how to communicate with a child so as to reduce these reliability risks.[244] Thus, Massachusetts should adopt the Colorado practice of referring children to mental health care professionals.[245] After conferring with alleged victims, these professionals could be called as expert witnesses at the trial stage.

Referring children to mental health care professionals would serve the same goals as requiring social workers to be more qualified. First, having an expert speak with the child would ensure that the interview is conducted appropriately, with attention to nonverbal cues, and avoiding suggestive or leading questions.[246] This would promote family integrity by reducing the risk that the child's testimony will be misunderstood or manipulated to find harm where none exists. Second, the expert's familiarity with manifestations of underlying problems will help him to identify children in danger. Proper identification of at-risk children will allow the State to remove them from their homes and determine the most appropriate means of protecting them. Third, the expert's ability to distinguish between at-risk children and healthy children will allow the care and protection system to focus its efforts on the children who are truly in need of protection. Finally, the expert can offer his opinion at trial, which can then be weighed against the other evidence. This would allow for a more fully informed—and, hence, more reliable—decision regarding parental fitness.

Where the court has found a parent guilty of abuse or neglect but has not yet ruled on his parental fitness, Massachusetts should refer the parent to a mental health care professional. [247] A psychiatrist would be best able to discover the root cause of the parent's maltreatment of her child. Knowing the cause of the problem, the psychiatrist could then help the parent to work through the problem and learn to interact with her child in a safe and appropriate manner. Because DCF's goal is to reunite children and their parents whenever possible, it would be beneficial to see if the parent could be rehabilitated and to provide psychiatric services before seeking termination.[248] This would promote family integrity by preferring reunification to termination. It would also promote child safety in two ways: (1) identifying parents who can be rehabilitated and helping

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[243] *See Facts for Families*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, http://www.aacap.org.

[244] Marks, *supra* note 228.

[245] COLO. REV. STAT. § 19-3-312.

[246] *See* Marks, *supra* note 228; COLO. REV. STAT. § 19-3-312.

[247] COLO. REV. STAT. § 19-3-312.

[248] 110 C.M.R. 1.01.

them reform their behavior; and (2) determining which parents cannot be rehabilitated and seeking termination in appropriate cases.

Referral to mental health care professionals is admittedly costly. Because most clients are indigent, the State would have to bear these costs. It is possible that these costs could be paid using the money saved by the significant reduction in the State's caseload resulting from: (1) better educated social workers; (2) stricter evidentiary requirements; and (3) heightened standards of proof. If these measures fail to free up enough of the State's resources, referral to a professional may have to be reserved for particularly difficult cases.

D. *Stricter Evidentiary Requirements*

Parental termination hearings do not require DCF to comply with all of the traditional rules of evidence.[249]s In particular, DCF may introduce the hearsay of a child less than ten years of age if it regards allegations of sexual abuse. [250]

1. Failings of the Massachusetts System

This relaxation of the rules of evidence is especially troubling because the permitted hearsay poses special problems of reliability.[251] Indeed, "[e]ven if children perceive incidents correctly, their memories of incidents may be subject to distortions or fantasies [and] [m]any scholars believe that children are more vulnerable to suggestion and more easily influenced by various authority figures than are adults."[252] In addition to making DCF's job easier by relaxing the rules of evidence, Massachusetts makes the parent's job more difficult by denying him the right to confront adverse witnesses[253] or to be tried by a jury of his peers.[254] Thus, even though the parental right is fundamental and deserving of special protection, Massachusetts law makes DCF's job easier while making the parent's ability to negate the claims more difficult.

2. Rationale Behind the Massachusetts System

Massachusetts' relaxation of the rules of evidence is consistent with its prioritization of children's well-being.[255] In an effort to protect children from the trauma of testifying at trial, the State permits the admission of certain types of hearsay.[256] This approach allows the child's lawyer to introduce relevant infor-

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[249] *See, e.g.*, MASS. GEN. LAWS ch. 233, § 83.

[250] *Id.*

[251] *See* Marks, *supra* note 228 ("Children's out-of-court statements, admitted as hearsay, are particularly susceptible to problems of untrustworthiness."); *see also* MASS. GEN. LAWS ch. 233, § 83; Adoption of Arnold, 741 N.E.2d 456 (Mass. App. Ct. 2001).

[252] Marks, *supra* note 228, at 222.

[253] *In re* Adoption of Don, 755 N.E.2d 721, 729 (Mass. 2001).

[254] MASS. GEN. LAWS ch. 119 § 26.

[255] *See, e.g.*, MASS. GEN. LAWS ch. 233, § 83.

[256] *Id.*

mation into evidence without subjecting the child to cross-examination. [257] Being called upon to testify against his parents is often quite damaging to a child.[258] Massachusetts' recognition of this fact is embodied in the adjustment of the rules of evidence in care and protection cases. [259]

3. Suggested Reform

While Massachusetts' special hearsay exception serves the important purpose of preventing trauma to the child (caused by forcing him to bear witness against his parents at trial), it poses a significant reliability risk.[260] This provides yet another reason to adopt Kansas' requirement that interviews with children be visually and aurally recorded.[261] If all interviews are recorded, Massachusetts could join West Virginia in following the traditional rules of evidence (including rules against hearsay) without losing valuable testimony of the alleged victims.[262]s The recordings could be entered into evidence at trial, preventing the need for the child to offer live testimony, while allowing the fact finder to determine the reliability of the child witness and his testimony. Entry of the interview into evidence would also give the parents an opportunity to dispute the claims brought against them without subjecting the child to cross-examination. The use of recordings would serve the dual purpose of protecting the child from the mental anguish inherent in participating in a trial against his own parents, while maximizing the fact finder's access to information relevant to the disposition of the case. The more information the fact finder has, the more likely it is that he will reach the correct conclusion and strike the appropriate balance between family integrity and child safety.

E. *Better Protections at the 72-Hour Hearing*

The standard of proof at the 72-hour hearing is proof by a preponderance of the evidence.[263] This is a fairly low standard, and it becomes difficult for parents to prevent DCF from satisfying the standard when they lack access to counsel. Even though Massachusetts guarantees a right to counsel at this stage, rules limiting a court-appointed lawyer's caseload often create practical difficulties.[264] While the proposed reform of better equipped social workers would

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[257] Adoption of Arnold, 741 N.E.2d 456, 463 (Mass. App. Ct. 2001).

[258] *See id.*

[259] *See, e.g.*, MASS. GEN. LAWS ch. 233, § 83.

[260] Marks, *supra* note 228.

[261] KAN. STAT. ANN. § 38-2249.

[262] W. VA. CODE, § 49-6-2.

[263] MASS. GEN. LAWS ch. 119 § 24.

[264] PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES § 1.2(b)(i) (2003), *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/chapter_4_sections/civil/trial_panel_standards.pdf.

reduce the problem of overburdened lawyers (see Section B), increasing the standard of proof would help to protect against wrongful deprivation.

1. Failings of the Massachusetts System

a. *Overburdening of Court-Appointed Lawyers*

The problem of the overburdening of court-appointed lawyers is significant.[265]s A large number of care and protection defendants are indigent and rely on court-appointed lawyers. [266] In any given case, there may be a lawyer for the mother, a lawyer for the father, and a lawyer for each child (if each child's interests are potentially at odds), which clearly calls for a high number of available attorneys.[267] These lawyers are paid less for representing indigent clients than they are for representing private clients, so many either allocate the majority of their time and resources to private clients or remove their names from the panel of court-appointed attorneys altogether.[268]s

Given Massachusetts' "low tolerance for risk," which results in a high volume of abuse and neglect cases, compliance with caseload limits leaves many clients without representation.[269] Thus, even when attorneys do not remove their names from the panel, they may often be unavailable to represent new clients.[270] As a result of this problem, indigent parents must often choose among three unattractive alternatives: (1) forgoing representation at the 72-hour hearing; (2) relying on an unprepared lawyer for representation at the hearing; or (3) being denied a hearing altogether.[271]

In at least two of these situations, indigent parents suffer a direct violation of their due process rights. Once Massachusetts held that there is a constitutional right to counsel [272] and established a statutory right to a 72-hour pre-deprivation

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265 Anklam, *supra* note 18, at 111.

266 Johnson, *supra* note 156 ("There is a particularly strong connection between poverty and the need for child welfare services. Families that earn less than $15,000 per year are twenty-two times more likely to be involved in the child welfare system than families with yearly incomes greater than $30,000.").

267 Anklam, *supra* note 18, at 116.

268 *See id.* ([M]ore than 200 private attorneys have removed their name from the panel of court-appointed attorneys."); *see also* COMMITTEE FOR PUBLIC COUNSEL SERVICES, www.publiccounsel.net (last visited Mar. 14, 2012) ("Most representation [of indigent clients] is provided by approximately 3,000 private attorneys trained and certified to accept appointments.")

269 Abel, *supra* note 17.

270 PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES § 1.2(b)(i) (2003), *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/chapter_4_sections/civil/trial_panel_standards.pdf.

271 Anklam, *supra* note 18, at 116.

272 Dep't of Pub. Welfare v. J.K.B., 393 N.E.2d 406, 408 (Mass. 1979).

hearing,[273] the denial of either of these rights constitutes a violation of due process. Parents who proceed without representation are denied the right to counsel guaranteed by *Department of Public Welfare v. J.K.B.* and face a serious disadvantage.[274] As the court noted in *J.K.B.*, "[a]n indigent parent facing the possible loss of a child cannot be said to have a meaningful right to be heard in a contested proceeding without the assistance of counsel." [275] Parents who have court-appointed representation at the hearing are somewhat better situated, but the overburdening of these lawyers often leaves them insufficient time to prepare fully for the hearing.[276] Even with caseload limitations, the court-appointed lawyer often takes on more work than he can comfortably manage.[277] In these cases, the parent is denied *meaningful* access to counsel; without the time to prepare adequately, the attorney is likely unable to meet his obligations to work through "complex questions of fact and law" and to "[safeguard] the rights of the parents." [278] Parents forced to forgo the statutorily guaranteed 72-hour hearing face the worst consequences. They are denied both their right to counsel and their right to a hearing, and without counsel to advocate for them, they may be denied access to a hearing indefinitely (as in the case of Mikaela, a two-year old removed from her mother's care without the benefit of a hearing, who was discussed in Section I). [279] In such extreme cases, the parent's fundamental parental rights are indeterminately severed in the complete absence of any form of process.[280]

b. *Preponderance of the Evidence Standard*

Another problem with the Massachusetts system is the interaction between the low standard of proof required at the 72-hour hearing and the aforemen-

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[273] MASS. GEN. LAWS ch. 119 § 24.

[274] *J.K.B.*, 393 N.E.2d at 408.

[275] *Id.* (also noting the comparative superiority of the State as an adversary).

[276] *See* Calkins, *supra* note 152, at 185-86 (examining the effect of federal child protection law on states finding a constitutional right to counsel in care and protection cases); Krumholz and Tolman, *supra* note 1.

[277] PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES § 1.2(b)(i) (2003), *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/chapter_4_sections/civil/trial_panel_standards.pdf.

[278] *J.K.B.*, 393 N.E.2d at 408.

[279] Krumholz and Tolman, *supra* note 1.

[280] PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES § 2.1 (2003), *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/chapter_4_sections/civil/trial_panel_standards.pdf (acknowledging that counsel is necessary to protect the right to a hearing and explaining that "[b]ecause of the potential for serious ramifications to the parent-child relationships and the safety of the child, due process demands that clients receive diligent, zealous representation of counsel at such hearings.").

tioned overburdening of court-appointed lawyers. [281] At the 72-hour hearing, DCF must satisfy the judge by a fair preponderance of the evidence that the child is in need of care and protection.[282] To meet the preponderance of the evidence standard, DCF need only convince the judge that it is more likely than not that the child is in need of care and protection; the judge must "find for the party that, on the whole, has the stronger evidence, however slight the edge may be."[283]s With such a low evidentiary burden, DCF may not have much difficulty making its case, especially if the parent lacks the meaningful assistance of an attorney.[284]

2. Rationale Behind the Massachusetts System

Once again, the State's justification of its low burden of proof at the 72-hour hearing is its "low tolerance for risk."[285] Because the social worker has so little time to prepare for the 72-hour hearing, it is unreasonable to expect him or her to gather sufficient evidence to meet a higher burden of proof. If the State nevertheless imposes the heightened burden, many at-risk children will be returned to homes where they may be in danger. In balancing the child's right to family integrity with his right to safety, Massachusetts tips the scale on the side of safety. Therefore, requiring DCF to meet a heightened standard of proof with only 72 hours to prepare is a risk the State is not willing to take.

3. Suggested Reform

Setting the standard intentionally low to avert risk is insufficiently respectful of family integrity and diminishes the resources that should be reserved for children who are *more likely* to be at risk of harm. Those children whose cases would satisfy a higher standard of proof are, by definition, more likely in need of DCF protection. Therefore, even though the lower standard of proof is meant to reflect a "low tolerance for risk,"[286] it actually increases the likelihood that children at greater risk will receive less help than they need as resources are consumed to "help" children who may not need it. To ensure that the State's resources will be reserved for the children who actually need them, Massachusetts should require DCF to prove its case by clear and convincing evidence at the 72-hour hearing.

Nevertheless, strong countervailing interests counsel against setting the stan-

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[281] Calkins, *supra* note 152.

[282] MASS. GEN. LAWS ch. 119 § 24.

[283] BLACK'S LAW DICTIONARY 1301 (9th ed. 2009).

[284] *See* Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18, 46 n.14 (1981) (citing Davis v. Page, 442 F. Supp. 258, 260 (S.D. Fla. 1977)) (noting that the "uncounseled parent, ignorant of governing substantive law, '[is] little more than a spectator in the adjudicatory [dependency] proceeding'").

[285] Abel, *supra* note 17.

[286] *Id.*

dard so high this early in the process. With only 72 hours to investigate and gather evidence, it may be quite difficult to separate children who are at risk of harm from those who are not. To serve the State's paramount interest in ensuring the safety of the child, DCF could continue to monitor families who are screened out of the court system under this heightened evidentiary standard. Allowing for monitoring would conserve the court's resources for cases satisfying a higher evidentiary standard while retaining protective oversight of potentially at-risk children. DCF could then screen out monitored families once it ascertains that their cases have been appropriately dismissed from court. Families that remain of concern could continue to be monitored as DCF collects the evidence necessary to return to court if it determines that such action is proper.

Increasing the standard of proof would also give greater recognition to the constitutional presumption of parental fitness.[287] If the State need only prove that it is slightly more likely than not that abuse or neglect has occurred, the presumption seems to lack any bite or constitutional value. If the parent has not yet been proven unfit, the court presumes that the parent acts in the best interest of her child.[288] Making removal of a child easier without overcoming the presumption ignores the importance of the presumption. The clear and convincing standard better balances the interests of the parent and the constitutional presumption with the child's potentially conflicting interests in integrity and safety. On the other hand, because the presumption is rebuttable, DCF must be allowed to gather evidence refuting it. Monitoring would be of use in this respect as well.

Raising the standard of proof would also prevent the overburdening of the foster care system. With a higher standard of proof, fewer children would be found in need of care and protection at the 72-hour hearing, and hence fewer children would be removed from their homes and placed in foster care. Reducing the burden on the foster care system will keep safe, appropriate placements available for those who truly need them. Raising the standard also prevents the overburdening of social workers, which affords them more time to investigate potential foster homes thoroughly, to monitor potentially at-risk children, and to perform frequent follow-up investigations of foster children to avoid the types of harms alleged in *Connor B.* Fuller investigations and more regular follow-up care would help the State to fulfill the duty of care owed to children in its custody.

F. *Heightened Standard of Proof at Trial*

1. Failings of the Massachusetts System

Any shortcomings that affect a termination trial are especially troublesome due to the permanent and devastating nature of a ruling terminating parental

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[287] *See* Troxel v. Granville, 530 U.S. 57 (2000).

[288] *Id.*

rights.[289] At trial, DCF must prove its case by clear and convincing evidence. [290] While this is a more stringent standard than that required at the 72-hour hearing, it is easier to meet than the criminal trial requirement of proof beyond a reasonable doubt.[291]s In *Lassiter v. Department of Social Services of Durham County, N.C.*, the Court noted that "removal of a child from the parents is a penalty *as great, if not greater*, than a criminal penalty."[292] Therefore, although the trial itself has only been characterized as quasi-criminal in nature, the potential for such a severe deprivation calls for a higher level of certainty that the deprivation is justified. [293]

2. Rationale Behind the Massachusetts System

While the United States Supreme Court has determined that parental termination proceedings are quasi-criminal in nature, they are only that: *quasi*-criminal. As such, Massachusetts must grant parents who are party to such proceedings greater protection than parties to "the mine run of [civil] cases," but it need not provide the same level of protection afforded criminal defendants.[294] The Supreme Court has required only that states impose a clear and convincing evidence standard, and Massachusetts has done that. [295] Having satisfied the mandate of the Supreme Court, Massachusetts may justifiably prefer to err on the side of caution and protect the child from possible harm.[296]

3. Suggested Reform

The clear and convincing evidence standard fails to recognize the seriousness of the deprivation in question. Massachusetts should therefore adopt the New Hampshire "beyond a reasonable doubt" standard. As New Hampshire recognizes, "the rights of parents over the family are natural, essential and inherent rights"; therefore, "the government must prove its case beyond a reasonable doubt before the permanent termination of liberty and natural rights of parents . . . can occur."[297] This standard is more aligned with the Supreme Court's acknowledgment that parental termination cases are quasi-criminal and merit special consideration. The State's standard of proof should reflect the gravity of the cost at stake. Because the parent-child relationship is a "natural, essen-

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[289] *See* M.L.B. v. S.L.J., 519 U.S. 102, 121 (1996) (acknowledging that "parental status termination is 'irretrievabl[y] destructi[ve]' of the most fundamental family relationship") (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

[290] *In re* Adoption of Zoltan, 881 N.E.2d 155, 158 (Mass. App. Ct. 2008).

[291] *Id.* at 159.

[292] Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18, 39 n.5 (1981) (emphasis added).

[293] *M.L.B.*, 519 U.S. at 128.

[294] *Id.* at 116.

[295] Santosky v. Kramer, 455 U.S. 745, 748 (1982).

[296] Abel, *supra* note 17, at 2.

[297] *In re* Diana P., 120 N.H. 791, 798 (1980) (internal citations and punctuation omitted).

tial and inherent right" and termination works such a severe and permanent deprivation, Massachusetts should require the highest standard of proof.[298]s Anything lower increases the risk of wrongful deprivation, which is a violation of due process and the rights of the parent and child to family integrity.[299]

Heightened standards of proof at all stages of the process would also save the State money by reducing its caseload. If the State must satisfy a higher burden to prove its case, more families will be screened out of the system at each stage. The money the State saves could then finance professional consultants, as suggested in Section III.C.

G. *Provision of a Jury Trial*

Although parental termination proceedings are quasi-criminal, Massachusetts' termination trials lack most of the safeguards of a criminal trial.[300] Not only are evidentiary rules relaxed and the standard of proof lessened, but there is also no guarantee of a trial by jury.[301] Oklahoma, on the other hand, has recognized that "parental rights are too precious to be terminated without the full panoply of protections."[302] Among these protections is the right to a jury trial, which Oklahoma guarantees in parental termination cases.[303] Massachusetts should follow Oklahoma's lead and provide jury trials for all parents facing termination. Provision of a jury would be consistent with the Sixth Amendment guarantee of a jury trial in all criminal prosecutions. [304] While parental termination proceedings are technically civil, the Supreme Court's recognition that they are quasi-criminal in nature speaks in favor of heightened protection. Massachusetts should find parental termination proceedings sufficiently grave to trigger the Sixth Amendment guarantee of a trial by jury. The risks of wrongful deprivation are decreased at a jury trial, allowing for greater protection of the family's due process rights.

IV. CONCLUSION

The current Massachusetts care and protection system, with its low tolerance for risk, is skewed heavily in favor of removing children from their homes and placing them in foster care. In addition to demonstrating a disregard for the right to family integrity, frequent resort to the foster care system has led to an overburdening of the foster care system itself, as well as of the social workers

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298 *Id.*

299 *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (establishing the rights of parents and children to family integrity).

300 *See In re* Adoption of Zoltan, 881 N.E.2d 155, 158 (Mass. App. Ct. 2008) (failing to provide a trial by jury for a termination proceeding).

301 *Id.*

302 A.E. v. State, 743 P.2d 1041, 1048 (Okla. 1987).

303 *Id.*

304 U.S. CONST. amend. VI.

who must oversee it and the court-appointed lawyers who must represent the families brought into it. While overburdening of the system is a policy problem, the system's shortcomings propagate human rights violations: children in State custody are often denied their right to safety (guaranteed by *Connor B.*), and parents and children alike suffer due process violations (particularly at the 72-hour hearing). In order to reduce the incidence of these kinds of rights violations, Massachusetts should follow the lead of states whose laws demonstrate respect for family integrity and provide procedural safeguards throughout the process to protect against wrongful deprivations, either temporary or permanent.

First, Massachusetts should implement more stringent educational and training requirements for social workers. This would create a better filtering system at the outset of the care and protection process. The State should also establish oversight procedures to protect against abuses of authority. Second, the State should refer alleged child victims to mental health care professionals to ensure that statements made by the child are interpreted accurately and that communications with the child occur in a manner that minimizes reliability risks. It should also refer alleged perpetrators to mental health care professionals to determine whether the parent can be rehabilitated and safely reunited with her child. Third, Massachusetts should follow the traditional rules of evidence in termination trials. To protect children from the trauma of testifying before a court, social workers should record interviews with children and submit the recordings into evidence. This allows parents to respond to their children's statements without cross-examining them. Fourth, the standards of proof at all stages of the process should be heightened to ensure that the children found in need of care and protection are actually at risk and that the State's resources are conserved for those who truly need them. Finally, Massachusetts should provide parents facing termination proceedings with a jury trial to guarantee them due process and to prevent the wrongful termination of their parental rights.

Implementing these reforms would go far to reduce the overburdening of the entire care and protection system. If the problem of overburdening is eased, the system will be able to function more efficiently to provide care and protection to children who are truly at risk. At the same time, these reforms will keep children who are not at risk out of the system, preserving their right to family integrity. The additional procedural safeguards will protect the due process rights of all involved and will promote the legitimacy of the care and protection system. It is therefore critical that Massachusetts adopt the suggested reforms in order to achieve its goal of balancing a child's right to safety with the family's right to integrity.[305]

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[305] 110 C.M.R. 1.01.