

# THE CRAB FISHERMAN AND HIS CHILDREN: A CONSTITUTIONAL COMPASS FOR THE NON-OFFENDING PARENT IN CHILD PROTECTION CASES

ANGELA GREENE\*

*Parents have a constitutional right to raise their children without interference from the state. It is also well settled that the state may step into a family and take custody of a child if it finds that a child's welfare is in danger. Although an offending parent found to be unfit by a court ruling could have his or her child taken away, states differ as to what safeguards should be afforded to non-offending parents in child custody cases. This Article argues that Alaska, which has unsettled law in this area, should adopt rules that protect the rights of non-offending parents with minimal interference from the state. In order to help determine what rules are appropriate, this Article describes different approaches states have taken with regard to custody and non-offending parents and it advocates for laws that protect the interests of non-offending parents.*

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\* J.D., Cleveland-Marshall College of Law (1997), Cleveland, Ohio; B.A., Florida International University (1991), Miami, Florida. The author is currently the Supervising Attorney of the Barrow office of the Alaska Public Defender Agency. Prior to moving to Barrow, she spent almost three years handling child-in-need-of-aid cases in the Bethel office of the Public Defender Agency, where she represented the father in *Peter A. v. Dep't of Health and Social Services*, 146 P.3d 991 (Alaska 2006), in both the trial court and the Alaska Supreme Court. The author is admitted to the following jurisdictions: United States Supreme Court, the State of Alaska, the State of Ohio, the United States Court of Appeals for the Sixth Circuit, and the Federal District Courts of the Northern and Southern Districts of Ohio.

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#### I. INTRODUCTION: THE CRAB FISHERMAN AT SEA

There is no issue more important to the courts than the mandate to protect children from abusive or neglectful parents. Yet, the need to balance that compelling interest against the fundamental rights of parents is a constitutionally confused area of the law. It gets even more complicated when a fit, non-offending parent presents himself to authorities and claims he is ready to care for the child, even though the other parent may have neglected or abused the child. At this point, the judge, lawyers, and children's services workers are left in a constitutional quandary: does the court have any authority to intervene when a fit parent is present? If so, when does that authority begin and end?

For example,<sup>1</sup> suppose you spend much of the winter working on the crew of a crab-fishing boat. You sail on the Bering Sea out of Dutch Harbor, Alaska as part of the reality show *The Deadliest*

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1. The following facts are a composite of actual cases and issues arising in daily practice regarding child protection law in Western Alaska.

*Catch*.<sup>2</sup> Although you are gone for months at a time, your wages from this work support your family living in Anchorage for the whole year. Before you left your home in Anchorage, your wife and two children were fine, although your marriage was a bit rocky due to your extended absences. However, to your knowledge, your wife is a good mother to your children while you are gone.

Three months into your work on the Bering Sea, you receive word from a social worker via satellite phone that your wife has been arrested for driving while intoxicated with the children in the car, and she was coming from her abusive boyfriend's house. She had a black eye and was too intoxicated to give the names of relatives or friends who were able to take the children, so the social worker placed the children in an emergency shelter in Anchorage.

The social worker also notifies you that your children are now in state custody, because the Office of Children's Services (OCS) filed a petition in state court to have them declared in need of aid.<sup>3</sup> The temporary custody hearing authorizing the placement occurred without your participation, because weather and communication problems inherent in the region made it impossible to contact you in time for the hearing.<sup>4</sup>

You protest, claiming that you are perfectly capable of caring for the children because your mother can take them until you get off the boat. The social worker does move the children to their grandmother's house after this conversation, but OCS retains state custody<sup>5</sup> and continues to pursue a formal adjudication against you and your family, in part because you cannot physically care for the children yourself as you are still on the crab-fishing boat.

Incensed, you interrupt your season and pay your way from the Bering Sea to Anchorage to retrieve your children from the state, assuming that once you explain the situation to the social worker yourself, this will be over and the state will leave your family alone. You soon discover it is not that simple.

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2. *The Deadliest Catch* is broadcast on the Discovery Channel and documents the daily lives of crab fishermen on the Bering Sea.

3. See ALASKA CT. R., CHILD IN NEED OF AID RULES, R. 6-7; see also ALASKA STAT. §§ 47.10.011(8)-(10) (2006).

4. See ALASKA CT. R., CHILD IN NEED OF AID RULES, R. 10.

5. Custody in Alaska means:

[T]he responsibility of physical care and control of the child, the determination of where and with whom the child shall live, the right and duty to protect, nurture, train, and discipline the child, the duty of providing the child with food, shelter, education, and medical care, and the right and responsibility to make decisions of financial significance concerning the child.

ALASKA STAT. § 47.10.084(a) (2006).

After a week of travel, you arrive at the Anchorage OCS, identification in hand, and request your children back. The social workers refuse to give them to you, citing the temporary custody order issued by the court, and instead allow you only supervised visits at the OCS office. The social worker says she first has to do a background check before she can let you see your kids without supervision, although she cannot tell you how long that will take.

Two days later you have a court date, where you are formally advised of the petition and appointed a lawyer.<sup>6</sup> You explain to the judge that you can care for your children and want them back home with you, naively assuming that he will understand your position, release the children to you, and allow you to get on with your life. Instead, the court continues custody, leaving visitation at the discretion of OCS, and sets the adjudication date for four months in the future.<sup>7</sup> Meanwhile, during those four months, you will be expected to participate in a case plan with OCS designed to reunite your family.<sup>8</sup> You are stunned and begin to wonder how the court can do this since you are the father, can care for the children, and did not do anything to neglect or otherwise endanger them.

In the language of child protection, the issues in this scenario revolve around the constitutional rights of the non-offending parent. The legal question is whether a court can adjudicate these children as in need of aid when a fit, non-offending parent is willing and able to care for them, notwithstanding the acts of the offending parent.<sup>9</sup> If adjudication is not permissible, then what steps can the state take to administer its compelling interest in the safety of the children put at risk by one parent, while still balancing the other parent's constitutional rights?

To make sense of this scenario and to answer these questions, this Article will first give an overview of the relevant United States Supreme Court case law governing the right to parent in order to argue the unconstitutionality of adjudicating a child as in need of aid when a fit and willing parent is present. The Article will then

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6. See ALASKA CT. R., CHILD IN NEED OF AID RULES, R. 10.

7. See ALASKA STAT. § 47.10.080 (2006) (requiring that an adjudication hearing be completed within 120 days).

8. See ALASKA CT. R., CHILD IN NEED OF AID RULES, R. 13.

9. Alaska uses the term "child in need of aid" to describe a child brought under the court's supervision due to neglect or abuse. Other states use variations on this terminology to describe neglected or abused children coming before the court. In this Article, "child-in-need-of-aid," "dependent," and "neglected" are terms used interchangeably to mean children who find themselves before the court through their parents' actions.

survey the different state approaches to this problem, with special comparison to Alaska law. Finally, it will present a model solution for our crab fisherman that protects the child and the constitutional rights of the fit parent. This Article seeks to provide a logical conceptual framework for practitioners, judges, and state legislators when addressing the issue of non-offending parents in child protection proceedings.

## II. A REVIEW OF UNITED STATES SUPREME COURT CASE LAW: RIGHTS OF PARENTS IN CHILD PROTECTION CASES

It is settled law that parents have a fundamental right to parent their children without interference by the state. This fundamental right is protected by the liberty interest inherent in the Due Process and Equal Protection clauses of the Fourteenth Amendment and by the Ninth Amendment's grant of residual liberties to the people.<sup>10</sup> As a matter of constitutional law, the government may not restrict fundamental rights unless it demonstrates a compelling interest.<sup>11</sup> In the relationship between parent and child, the state's compelling interest exists if the parent is unfit to make decisions regarding his or her own children.<sup>12</sup> Without a showing that a parent is unfit, the state normally has no justification to interfere with the family unit.<sup>13</sup>

Unfitness cannot be presumed by the parent's circumstances; the state must make an individualized assessment of the parent's ability to care for his children.<sup>14</sup> Thus, the fact that one parent is unfit does not alter the state's burden to prove the other parent is also unable to care for the child before it may interfere in the

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10. See *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (holding that parents have a fundamental right to make decisions concerning the rearing of their children and that courts should give deference to parents' decisions); *id.* at 91–92 (Scalia, J., dissenting) (arguing that the right of parents to direct the upbringing of their children is a fundamental right protected by the Ninth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (noting that the traditional relation of the family is a fundamental right protected by the Ninth Amendment); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that marriage and procreation are fundamental rights guaranteed by the Equal Protection Clause).

11. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

12. *Troxel*, 530 U.S. at 68–69.

13. *Id.*

14. See *Stanley v. Illinois*, 405 U.S. 645, 656–58 (1972).

family.<sup>15</sup> The United States Supreme Court has made clear that when both parents are available for their children, the state must prove that each parent is unfit before it may take custody of the children or otherwise interfere with the family.<sup>16</sup> According to the *Stanley* Court, the individualized assessment of each parent is necessary to prevent the arbitrary and unjustified interference with a parent's important fundamental right.<sup>17</sup> To rule otherwise would lead to a situation where one parent's actions negate the constitutional rights of the other.

States protect this fundamental right by specifically defining parental unfitness in state child neglect and dependency laws. These unfitness definitions are not standardized. However, each has in common the goal of using the state's *parens patriae*<sup>18</sup> power to protect the child while maintaining, when possible, the family unit.<sup>19</sup> No matter the particulars of the various state laws, once the parents have been found to have committed an act or failed to take an action, as defined under state law, that risks or leads to harm to their children, the parents are also found constitutionally unfit to exercise the fundamental right to care for and have custody of their children.<sup>20</sup> At this point, the state's compelling interest in the welfare of children overrides the parents' rights, and the state is authorized to exercise its *parens patriae* power by taking action to protect the child.<sup>21</sup>

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15. *See id.* at 652 (“What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular case?”).

16. Recognizing that each parent has this fundamental right does not impede the state's ability to act when one parent is unknown and the known parent's actions put the child at risk. “[D]ue process is *flexible* and calls for such procedural protections as the particular situation demands.” *Parham v. J.R.*, 442 U.S. 584, 608 n.16 (1979) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (emphasis added)). In the case of a missing or unknown parent, due process would require a state to make every reasonable effort to contact that parent. Diligent efforts to contact or identify the missing parent would be sufficient to meet the demands of due process. *See Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976).

17. *Stanley*, 405 U.S. at 656–57.

18. “‘*Parens patriae*,’ literally ‘parent of the country,’ refers traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability.” *BLACK’S LAW DICTIONARY* 1003 (5th ed. 1979).

19. *See infra* Part III.

20. *See Stanley*, 405 U.S. at 652.

21. *See id.*

Without a finding of unfitness, the state has no constitutional authority to exercise that power.<sup>22</sup> Furthermore, each parent is entitled to the same rights.<sup>23</sup> In other words, under current Supreme Court authority, the existence of a single fit parent, regardless of the acts of the other parent, negates the state's ability to interfere in the family unit.<sup>24</sup>

Adjudication of a child as dependent or neglected, even when a fit parent is present and able to care for the child, unconstitutionally trumps the fit parent's fundamental right to parent his or her child without state interference. With a fit parent present, the state lacks any compelling interest sufficient to justify state involvement in the family. Thus, adjudication of a child as dependent or neglected, without a finding of unfitness on the part of both parents, is unconstitutional because it permits the court to interfere with the family unit without the requisite compelling interest.

### III. DEFINING THE NON-OFFENDING PARENT: OVERVIEW OF ALASKA LAW AS COMPARED TO OTHER STATES

Alaska has not directly addressed the question of the effect of the availability of a non-offending parent on adjudication, although it has acknowledged the lack of clarity of the law in this area.<sup>25</sup> The use of misguided dicta in a previous Alaska case, *Jeff A.C. v. State*,<sup>26</sup> has muddied the waters in this area because the *Jeff A.C.* court stated that adjudication can be had "based on the acts of just one parent."<sup>27</sup> This statement created unnecessary confusion regarding the substantive due process rights of non-offending parents, because the father in *Jeff A.C.* raised a procedural, as opposed to substantive, due process claim.<sup>28</sup> The father argued only that he had a procedural due process right to an adjudication hearing prior to termination of parental rights, not that he was a fit parent to his child.<sup>29</sup> The *Jeff A.C.* case did not involve a fit parent who was willing and able to care for his child and who had timely asserted his fundamental right to parent without interference by the state. In other words, he was not a true non-offending parent. One

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22. Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

23. Stanley, 405 U.S. at 651–52.

24. *Id.* at 652.

25. See Peter A. v. Dep't of Health & Soc. Servs., Office of Children's Servs., 146 P.3d 991, 996–97 n.30 (Alaska 2006).

26. 117 P.3d 697 (Alaska 2005).

27. *Id.* at 703.

28. *Id.* at 702.

29. *Id.* at 702–03.

reason the father in *Jeff A.C.* was not a non-offending parent was because he had unsuccessfully participated in a case plan with the OCS and faced termination of his parental rights due to his failure to assume responsibility for his child.<sup>30</sup>

In contrast to the procedural claim in the *Jeff A.C.* case, the Alaska Supreme Court's treatment of the substantive issue in *Peter A.* illustrates the difference in judicial consideration of the two types of due process claims. The *Peter A.* case presented the court with a fit, non-offending parent pressing a timely, substantive constitutional claim.<sup>31</sup> Instead of relying on the *Jeff A.C.* case, the Alaska Supreme Court avoided the substantive constitutional question altogether by finding the matter moot after the child was released to the father at disposition.<sup>32</sup> Nonetheless, the Alaska Supreme Court did vacate the adjudication on equitable grounds.<sup>33</sup> The Court also acknowledged the gap in Alaska law regarding the constitutional necessity of an adjudication hearing for both parents if both of the parents are known.<sup>34</sup>

Alaska's avoidance of the question of substantive constitutional rights contrasts with decisions from other states directly addressing such rights of the fit, non-offending parent. Nationwide, in deciding cases where there was a true non-offending parent, four states have found that the presence of a fit parent negates the state's ability to interfere with the family.<sup>35</sup> Other states limit the court's ability to interfere at the adjudication stage with legislation designed to set boundaries on state power, thereby avoiding the need to address the rights of non-offending parents solely through case law.<sup>36</sup>

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30. *Id.* at 704–05.

31. *Peter A. v. Dep't of Health & Social Servs., Office of Children's Servs.*, 146 P.3d 991, 993 (Alaska 2006).

32. *Id.* at 994.

33. *Id.* at 997.

34. *Id.* at 996–97 n.30.

35. See *In re Sophie S.*, 891 A.2d 1125, 1131 (Md. Ct. Spec. App. 2006); *In re Cheryl K.*, 484 N.Y.S.2d 476, 477 (N.Y. Fam. Ct. 1985); *In re M.L.*, 757 A.2d 849, 850 (Pa. 2000); *Hammack v. Wise*, 211 S.E.2d 118, 121 (W. Va. 1975).

36. *Peter A.*, 146 P.3d at n.30; see ME. REV. STAT. ANN. tit. 22, § 4035(2)(C) (2005) (requiring court to make “a jeopardy determination with regard to each parent who has been properly served”); MD. CODE ANN., CTS. & JUD. PROC. § 3-819(e) (2006) (“If the allegations in the petition are sustained against only one parent of the child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is in need of assistance, but, before dismissing the case, the court may award custody to the other parent.”); *In re Okla. Unif. Jury Instructions for Juvenile Cases*, 116 P.3d 119, 131 (Okla. 2005) (discussing necessary evidence for adjudication of deprivation of a child and

A few states take a different approach, drawing the constitutional line at custody. These states permit an adjudication of the child as in need of assistance even when a presumptively fit parent is present. However, a fit parent is entitled to physical and legal custody of his or her child absent a showing of unfitness, the acts of the other parent notwithstanding.<sup>37</sup>

Finally, Ohio stands alone among the states in drawing no constitutional line at all. Ohio permits the adjudication and disposition of a child into state custody even when a fit, non-offending parent is present.<sup>38</sup>

Each of these approaches will be addressed in detail in Part IV and Part V of this Article, with Part V offering a model solution for Alaska based on a constitutional analysis of these approaches to a non-offending parent's rights.

#### IV. ANALYSIS OF VARIOUS STATE APPROACHES TO THE NON-OFFENDING PARENT AND A COMPARISON TO ALASKA LAW

As stated above, the lack of clarity in Alaska law on the issue of the non-offending parent is the result of dicta in a procedural due process case that did not involve a true non-offending parent. A non-offending parent, like our crab fisherman, would press both a substantive and a procedural due process claim at the trial court level in order to try to get his children released to him immediately.<sup>39</sup> As a fit parent, he would not wait around for a termination proceeding, like the father in *Jeff A.C. v. State*<sup>40</sup> did, before asserting only a procedural due process right to a hearing he

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stating that a child is not deprived “if the other parent was providing satisfactory care for the child”).

37. See CAL. WELF. & INST. CODE § 361.2 (West 2006); *In re Austin P.*, 13 Cal. Rptr. 3d 616, 623 (Cal. Ct. App. 2004); *B.C. v. Dept. of Children and Families*, 864 So.2d 486, 490–91 (Fla. Dist. Ct. App. 2004) (holding that the Florida statute allows adjudication based on acts of one parent, but remanding to allow father to make a record on an as-applied constitutional challenge to the statute); *In re Stephanie H.*, 639 N.W.2d 668, 680–81 (Neb. Ct. App. 2002).

38. *In re C.R.*, 843 N.E.2d 1188, 1190 (Ohio 2006).

39. See generally *Michael H. v. Gerald D.*, 491 U.S. 110, 120–22 (1989). The *Michael H.* court rejected a father's separate procedural and substantive due process claims to his biological child born during the marriage of the mother to another man. The father's procedural claim rested on California's failure to provide him a forum to assert his substantive claim. The substantive claim asserted that the mother's marriage was an insufficiently compelling interest to interfere with his constitutionally protected rights as a father—a separate claim from the lack of a procedural mechanism to enforce the asserted substantive right.

40. 117 P.3d 697, 699 (Alaska 2005).

should have asked for upon first contact with the state. However, Alaska is not alone in contributing to the confusion about the substantive fundamental rights of parents—Michigan made the same error in another procedural due process case.

To illustrate the distinction between the procedural and substantive claims and to point out the deficiency in Alaska law, this Part will begin with an analysis of analytically parallel Alaska and Michigan decisions that used regrettably broad language to address procedural claims raised by parents who were clearly not fit. Then, the discussion will focus on Alaska's reaction to an appeal raised by a true non-offending parent who was fit, yet saw his children adjudicated as in need of aid. In this comparison, the contrast between the procedural and substantive claims becomes clear, and the gap between Alaska law and other states' more comprehensive laws stands in stark relief.

Next, this Part of the Article will concentrate on the approaches taken by those other states in confronting substantive constitutional claims raised in non-offending parent cases. While the details of the laws vary greatly across the states, and the case law interpreting these provisions is often driven by unpleasant facts, there are two dominant approaches explicitly addressing the substantive rights of non-offending parents in child protection cases. For non-offending parents, states either do not permit adjudication if a fit parent is present and able to care for the child or do permit adjudication but draw the constitutional line at the custody determination.

A. The Theory that Trial Court Jurisdiction Attaches to the Child: Misguided Dicta from Alaska and Michigan that Does Not Apply to True Non-Offending Parent Cases.

Alaska and Michigan courts have both decided strikingly similar cases that are seen as permitting adjudication based on the actions of only one parent. However, given the facts and procedural posture of those cases, it is overreaching to conclude that they stand for the proposition that an adjudication of a child as dependant or neglected can constitutionally occur when a fit parent is available. These cases did not involve a non-offending parent asserting fundamental rights; instead, they were procedural cases with parents unable to remedy the conditions that led to the children being placed in state custody. Thus, the parents faced termination of their parental rights.

The Alaska Supreme Court considered a procedural due process argument that a father's rights to his children could not be

terminated without a prior adjudication specifically as to him.<sup>41</sup> In *Jeff A.C.*, the state placed the children in state custody due to the mother's substance abuse.<sup>42</sup> The mother then incorrectly identified the father to the social worker.<sup>43</sup> Thus, the state initially pursued reunification efforts with the wrong person.<sup>44</sup> After approximately one year, the OCS identified Jeff as the father and located him in Pittsburgh, Pennsylvania.<sup>45</sup> Following an initial period of resistance, Jeff participated in a case plan for a year and during that time never asserted his right to force the state to prove him unfit in an adjudication hearing.<sup>46</sup> Jeff's efforts ultimately proved unsuccessful, and the state filed a petition to terminate his parental rights.<sup>47</sup> After the state filed the termination petition, and just prior to trial, the father moved to bifurcate the proceedings and asserted his right to a separate adjudication hearing before termination.<sup>48</sup> The trial court denied that motion, and, after a contested proceeding, terminated the father's parental rights.<sup>49</sup>

On appeal, the father claimed the lack of a prior adjudication was error and asserted that procedural due process entitled him to an adjudication before his parental rights could be terminated.<sup>50</sup> The Alaska Supreme Court held that a prior adjudication was not required, particularly when the father's conduct was sufficient to justify termination of his parental rights.<sup>51</sup> However, rather than focusing solely on the procedural aspects of the case in rejecting the claim, in dicta the court mistakenly linked the jurisdiction of the trial court to that of the child's status. The court stated that the "ultimate focus of a [child-in-need-of-aid] adjudication is on the child, not the parents."<sup>52</sup> The court then stated that a child can be adjudicated based on the acts of one parent and that the "other parent's acquiescence or fault in allowing the abuse to occur is not required in order to find the child to be in need of aid."<sup>53</sup> With this broad language, the Alaska court incorrectly conflated the

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41. *Id.* at 700–04.

42. *Id.* at 700.

43. *Id.*

44. *Id.*

45. *Id.* at 700–02.

46. *Id.* at 701.

47. *Id.* at 702.

48. *Id.* at 702–03.

49. *Id.* at 703.

50. *Id.* at 702.

51. *Id.*

52. *Id.*

53. *Id.* (citing *A.H. v. State*, 779 P.2d 1229, 1232 (Alaska 1989)).

substantive and procedural due process aspects of child protection cases. As demonstrated in Part II of this Article, the matter of the constitutional necessity of a hearing and adjudication on both parents, if known, was settled by the United States Supreme Court in *Stanley v. Illinois*.<sup>54</sup>

Aside from the constitutional concerns in the wording of the Alaska Supreme Court's decision in *Jeff A.C.*, the "child-centered" language is an inaccurate summary of the purpose and scope of the Alaska statutes.<sup>55</sup> Alaska specifically defines the acts or omissions by the *parents* upon the child which render the parent legally unfit to raise the child.<sup>56</sup> Indeed, any other interpretation of Alaska statute section 47.10.011 would render the statute unconstitutional.<sup>57</sup>

In a similar case where a parent asserted a procedural due process claim, the Michigan Court of Appeals made the same error as the Alaska Supreme Court. In Michigan, the court of appeals held that a termination order could be entered against both parents, even when the trial court had not held a prior adjudication as to the father.<sup>58</sup> While procedurally this may be correct for a number of reasons, the Michigan court also included unfortunate dicta that based the jurisdiction of the court over a family solely on the child's condition, not the acts of the parents.

In *In re C.R.*, the state child protective agency filed a petition alleging that the substance abuse and extensive criminal histories of both parents caused the children to come within the jurisdiction of the Michigan courts.<sup>59</sup> Subsequently, the parties reached an agreement whereby the mother would plead no contest to the allegations in the petition, the petition against the father would be

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54. 405 U.S. 645, 657–58 (1972).

55. See ALASKA STAT. § 47.10.011 (2006).

56. See ALASKA STAT. § 47.10.011(1) (parent abandons child); § 47.10.011(2) (parent incarcerated and other parent absent); § 47.10.011(3) (parent's whereabouts unknown and custodian unable to provide care); § 47.10.011(4) (parent knowingly fails to provide medical treatment); § 47.10.011(6) (parent fails to adequately supervise child); § 47.10.011(7) (sexual abuse from parent or by failure of parent to adequately supervise child); § 47.10.011(8) (parent creates conditions terrifying child or exposes child to violence); § 47.10.011(9) (parent neglects child); § 47.10.011(10) (parent's ability to parent impaired by alcohol); § 47.10.011(11) (parent mentally ill); § 47.10.011(12) (parent approves of or encourages illegal behavior by child). An exception is Alaska Statute section 47.10.011(5), which allows a runaway child to be deemed a CINA.

57. See *supra* Part II.

58. *In re C.R.*, 646 N.W.2d 506, 515–16 (Mich. Ct. App. 2002).

59. *Id.* at 508.

dismissed, and both parties would participate in family support services recommended by the state.<sup>60</sup>

Despite agreeing to participate in the services offered, the parents continued to drink, neglected their children, and the father went as far as to shave all the hair off his body to avoid complying with the court's order for drug testing.<sup>61</sup> After approximately eighteen months of unsuccessful reunification efforts, the state filed a termination petition against both parents.<sup>62</sup> The trial court found that both parents suffered from alcohol and drug addictions that impaired their ability to parent their children and that termination was in the children's best interests.<sup>63</sup> The father and mother both appealed the order.<sup>64</sup>

On appeal, the father argued that because the original petition against him had been dismissed, and no subsequent adjudication entered, the appellate court must reverse the trial court's termination order because his right to procedural due process of law was violated.<sup>65</sup> The Michigan court disagreed, finding that, under Michigan law, once the trial court found jurisdiction over the children due to the mother's no-contest agreement, the court had the right to compel the other parent to adhere to a case plan or take other steps necessary to reunify with their children.<sup>66</sup> In deciding this issue, the Michigan court held that the state rules did not require the child protection agency to allege and prove child dependency against every parent involved.<sup>67</sup> Instead, the Michigan court found jurisdiction tied to the status of the children, thus permitting the court to terminate parental rights of a parent who has not been an official party to the prior proceedings.<sup>68</sup>

This decision has been cited for the proposition that a court can interfere with the family unit even when a fit parent is available to care for the child.<sup>69</sup> This case stands for nothing of the sort.

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60. *Id.* at 508–09.

61. *Id.* at 509–10.

62. *Id.* at 510.

63. *Id.* at 511.

64. *Id.* The mother's appellate arguments involved the sufficiency of the evidence against her and are not relevant to the issues addressed in this Article.

65. *Id.* at 511.

66. *Id.* at 514–16.

67. *Id.* at 515.

68. *Id.*

69. See Vivek Sankaran, *But I Didn't Do Anything Wrong: Revisiting the Rights of Non-Offending Parents in Child Protection Proceedings*, 82 MICH. BAR. J. 22 (2006) (criticizing as unconstitutional Michigan's statutory scheme that he interprets as allowing adjudication based on acts of one parent).

Because this father was not a non-offending parent, the decision does not stand for the proposition that single parent adjudication is constitutionally permissible if one parent is fit.<sup>70</sup>

The father in *C.R.* was clearly not fit and had submitted to the court's jurisdiction for at least a year prior to the termination trial.<sup>71</sup> During the entirety of the proceedings involving his family, he did not claim a right to adjudication or the right to make the state prove him unfit before it interfered with his family.<sup>72</sup> Further, the appellate court's holding was grounded in procedural, not substantive, due process.<sup>73</sup> Nowhere in the *C.R.* decision does the court decide whether a fit parent may be deprived of the right to the unfettered care and custody of his children without a finding of unfitness, nor did it have reason to do so, as the father was obviously unfit.

In addition, the Michigan court's statement that jurisdiction of the court is dependent on the status of the child is, like Alaska's, incorrect as a matter of state law. Michigan Statute section 712A.2(b) defines what it means to be an unfit parent in Michigan. This law speaks only to acts or omissions of the parents or guardian that leave a child a ward of the court.<sup>74</sup> Like its Alaska counterpart,

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70. *Contra id.* In his article, Professor Sankaren reads *C.R.* too broadly and applies it to a non-offending parent situation but does not argue that the decision is easily distinguishable on the grounds that *C.R.* was a procedural due process case, not one involving a true non-offending parent asserting his or her substantive, fundamental rights before the court. *See id.*

71. *See In re C.R.*, 646 N.W.2d at 508–11.

72. *See id.*

73. *See id.* at 518–19.

74. Michigan Statute section 712A.2(b) states in large part:  
Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

(3) Whose parent has substantially failed, without good cause, to comply with a limited guardianship placement plan described in section 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5205, regarding the juvenile.

it is *parental* conduct that determines whether a Michigan child is dependent or neglected, not merely the condition of the child. Thus, the Michigan appellate court's conclusion that jurisdiction in child protection cases is based on the children is incorrect; it is the parents' acts that determine whether they are unfit caretakers for their children. These distinctions render the Michigan court's language regarding jurisdiction being vested in the children nothing more than misguided dicta.

Both Alaska and Michigan use their child protection statutes to provide the individualized assessment of parental unfitness necessary before the state may interfere with the parent's fundamental right to raise their children.<sup>75</sup> The parents' actions must be found lacking to instigate state *parens patriae* jurisdiction over the child.<sup>76</sup> Thus, neither the Alaska nor the Michigan decision can be used to justify a conclusion that a court could constitutionally adjudicate a child as in need of aid when a non-offending, fit parent is available to care for the child, even if the other parent was found unfit.

Indeed, when presented with just that issue, the Alaska Supreme Court did not apply its child-centered language from *Jeff A.C.*, but instead punted. In *Peter A. v. Department of Health & Social Services*,<sup>77</sup> the father appealed an adjudication order entered solely on the basis of his wife's substance abuse problems and the

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(4) Whose parent has substantially failed, without good cause, to comply with a court-structured plan described in section 5207 or 5209 of the estates and protected individuals code, 1998 PA 386, MCL 700.5207 and 700.5209, regarding the juvenile. (5) If the juvenile has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and the juvenile's parent meets both of the following criteria:

(A) The parent, having the ability to support or assist in supporting the juvenile, has failed or neglected, without good cause, to provide regular and substantial support for the juvenile for 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for 2 years or more before the filing of the petition.

(B) The parent, having the ability to visit, contact, or communicate with the juvenile, has regularly and substantially failed or neglected, without good cause, to do so for 2 years or more before the filing of the petition.

MICH. COMP. LAWS § 712A.2(b) (2007) (finding jurisdiction where, for example, parents fail to provide necessary medical and educational care, create an unfit environment, or violate other relevant statutes).

75. See *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972).

76. *Id.* at 658.

77. 146 P.3d 991 (Alaska 2006).

risk it posed to their children.<sup>78</sup> He had been hospitalized for more than a year for serious and permanent injuries sustained in a snowmachine accident when the OCS placed his children in state custody.<sup>79</sup> OCS did so because the mother arrived intoxicated at the hospital facility to visit with the father late one night, bringing two of her children with her.<sup>80</sup>

The state filed an emergency petition based solely on the mother's conduct.<sup>81</sup> The father appealed the adjudication, claiming he was a fit parent and thus entitled to raise his children without further state interference.<sup>82</sup> However, the trial court found the children in need of aid under Alaska law.<sup>83</sup> The trial court did not make a finding against the father; instead, the adjudication of child-in-need-of-aid status was based entirely on the actions of the mother.<sup>84</sup>

At the disposition hearing, one month after adjudication, the state moved to dismiss the case and release the children from supervision because they had been safe at home with the father for four months.<sup>85</sup> The father agreed to the dismissal, but appealed the adjudication which found that his children were in need of aid on the grounds that the state did not find him unfit to care for them.<sup>86</sup> Because the children had a fit parent with full custodial rights, ready, willing and able to care for them, the father argued that the state lacked any compelling interest sufficient to justify the court's jurisdiction over his children prior to the dismissal of the case.<sup>87</sup>

Peter A. was a true non-offending parent who timely asserted his right to parent his children. Faced with this situation, the Alaska Supreme Court did not apply the *Jeff A.C.* case to its analysis, or its child-centered language. Instead, the court acknowledged the lack of precision in Alaska law and noted that Alaska's statute did not specifically address the rights of both parents.<sup>88</sup> As to the father's constitutional arguments, the court

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78. *Id.* at 992.

79. *Id.* at 992–93.

80. *Id.* at 993.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 996, n.30.

found the matter moot as the children had been returned to him, but, as a matter of equity, vacated the adjudication order.<sup>89</sup>

As the *Peter A.* case demonstrates, the unfortunate dicta in the prior Alaska and Michigan opinions, implying that it is solely the condition of the child that confers jurisdiction on courts in child protective proceedings, only confuses what should be a rather straightforward issue. Can the state prove the child has no fit parent available to care for him or her? If no fit parent exists, then the state has the compelling interest to act as *parens patriae*. If a fit parent is available to care for the child, then the state lacks the compelling interest to interfere and must return the child to that parent. Putting the emphasis on the child's status permits the state to skip the constitutionally required unfitness finding for each parent and unnecessarily complicates what should be a relatively simple matter.

#### B. The Simple and Constitutional System: A State Does Not Have the Power to Interfere with the Family When a Fit Parent is Available to Care for the Child

Unlike Alaska and Michigan, three other states—New York, Maryland and Pennsylvania—have each directly addressed the issue of the fit, non-offending parent through case law and found that a child cannot be deemed dependent or neglected if a fit parent is available to care for that child.<sup>90</sup> Alaska should adopt the reasoning of these states, either through legislation or case law, because requiring proof of unfitness against both parents at adjudication has the virtue of being both simple and constitutional, and it can be done in a manner that protects children.

New York has consistently held that a child cannot be adjudged dependent if a fit parent is available to care for her.<sup>91</sup> In

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89. *Id.* at 994–96.

90. See *In re Sophie S.*, 891 A.2d 1125 (Md. Ct. Spec. App. 2006); *In re M.L.*, 757 A.2d 849 (Pa. 2000); see also *In re Cheryl K.*, 484 N.Y.S.2d 476 (N.Y. Fam. Ct. 1985); *In re Okla. Unif. Jury Instructions for Juvenile Cases*, 116 P.3d 119, 131 (Okla. 2005) (discussing necessary evidence for adjudication of deprivation of a child and stating that a child is not deprived “if the other parent was providing satisfactory care for the child.”); *Hammack v. Wise*, 211 S.E.2d 118, 122 (W. Va. 1975) (finding that non-offending parent may not be deprived of custody of his children).

91. See *Cheryl K.*, 484 N.Y.S.2d at 477; see also *Alfredo S. v. Nassau County Dep’t of Soc. Servs.*, 568 N.Y.S.2d 123, 127 (N.Y. App. Div. 1991) (“If the department believed the petitioner to be an unfit father, it was obligated to make a sufficient showing in this proceeding of extraordinary circumstances, or to commence a neglect proceeding against him.”).

*In re Cheryl K.*, the mother was not a party to the original child abuse hearing that found that the minor's father had sexually abused her.<sup>92</sup> The trial judge placed the child in state custody. A year later the mother moved to vacate the placement of the child in foster care.<sup>93</sup> The New York court framed the substantive issue as follows: "Where the court has adjudicated only one parent of abuse or neglect, does the non-offending parent, not a party to the proceedings, have, absent a finding of neglect or unfitness, a right to custody of her children superior to that of third parties, including the Commissioner of Social Services?"<sup>94</sup>

The New York court determined that the mother did have that superior right against all third parties and that the right was based on her fundamental right to the care and custody of her child.<sup>95</sup> Without a finding of unfitness against the parent, the court has no authority to intervene in family affairs. The court also noted that the Commissioner had a remedy if he were concerned about the welfare of the child in the mother's custody, since he was free to file a petition alleging that the mother was unfit to care for her child.<sup>96</sup> The court stayed its own order for seventy-two hours to allow the social welfare department time to decide whether to file a petition. If the state did not file, then the child would be returned to her mother.<sup>97</sup>

Maryland addressed the issue of the non-offending parent through statute rather than constitutional interpretation. In *In re Russell G.*, the Maryland Court of Special Appeals held that the Maryland Child-In-Need-of-Assistance statute required adjudication against both parents before a child could be deemed neglected.<sup>98</sup> The court stated that this decision was consistent with the purposes of the child-in-need-of-assistance statute in that: "A child who has at least one parent willing and able to provide the child with proper care and attention should not be taken from both parents and be made a ward of the court."<sup>99</sup>

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92. *Cheryl K.*, 484 N.Y.S.2d at 477.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 477-78; see also *In re Alfredo S.*, 568 N.Y.S.2d at 127 ("If the Department believed the petitioner to be an unfit father, it was obligated to make a sufficient showing in this proceeding of extraordinary circumstances, or to commence a neglect proceeding against him.").

97. *In re Cheryl K.*, 484 N.Y.S.2d at 478.

98. 672 A.2d 109, 114 (Md. Ct. Spec. App. 1996).

99. *Id.*

Although the court did not render its holding as a matter of constitutional law, it reached the constitutionally correct result. While this was the right result as a matter of law, the holding nonetheless presented practical problems for family court judges. In some cases, the non-offending parent did not have legal custody of the child because the offending parent received custody in a prior divorce proceeding. Literal application of the law would leave family court judges compelled to return a child to an abusive parent because the non-offending parent, while fit, would not have legal custody.<sup>100</sup>

In response to this problem, the Maryland legislature devised a unique solution. It revised its child-in-need-of-assistance statute to allow a modification of custody upon a finding that the allegations in the petition are true. Specifically, Maryland Code section 3-819(e) states:

If the allegations in the petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before dismissing the case, the court may award custody to the other parent.<sup>101</sup>

The finding that the allegations are sustained against one parent is a jurisdictional precondition to the modification of custody.<sup>102</sup> The Maryland approach has the advantage of simultaneously protecting the child from the offending parent, protecting the rights of the fit parent, and preserving the family, all of which are consistent with the goals of family laws throughout the country. While Maryland approached this as a statutory issue in *Sophie S.*, the unfitness finding is constitutionally required before a court has jurisdiction to deprive a parent of custody.<sup>103</sup>

Pennsylvania addressed the practical need to transfer custody from the abusive, unfit, parent to the fit parent through case law rather than legislative action. In *In re Jeffrey S.*,<sup>104</sup> the father faced an accusation of sexual abuse.<sup>105</sup> The mother and father of the children were married at the time of the abuse.<sup>106</sup> The mother

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100. See *In re Sophie S.*, 891 A.2d 1125, 1130 (Md. Ct. Spec. App. 2006) (paraphrasing counsel for Department of Social Services recitation of history of Maryland Code section 3-819(e)).

101. MD. CODE ANN., CTS. & JUD. PROC. § 3-819(e) (2007).

102. See *In re Sophie S.*, 891 A.2d at 1133.

103. See *Stanley v. Illinois*, 405 U.S. 645, 657–58 (1972).

104. 628 A.2d 439 (Pa. Super. Ct. 1993).

105. *Id.* at 440.

106. *Id.*

found out about the abuse, informed the authorities, and petitioned under state law to have the father removed from the home.<sup>107</sup>

Subsequently, the mother requested that the father be permitted to return to the home, and made arrangements for her children to stay with the grandmother.<sup>108</sup> The state filed a dependency petition, heard in court on the same day the father entered a guilty plea to some of the criminal allegations.<sup>109</sup> The trial court sustained a finding of dependency based on the theory that the mother had minimized the abuse and wavered in her support of her husband.<sup>110</sup> The court of appeals reversed.<sup>111</sup> Noting that the purpose of child dependency proceedings is to preserve families, the court stated that a child cannot be adjudged dependent “where an innocent, caring, and loving parent is ready, willing, and able to provide the child with proper parental care and control.”<sup>112</sup>

The *Jeffrey S.* court rightly concluded that the existence of a fit parent negated the right of the state to insert itself into the family. Because the parents were married, however, the opinion did not address the impact of a prior custody order on the court’s ability to protect the child from an offending parent. Following this ruling, Pennsylvania family courts thus faced the same problem Maryland courts had; when a prior custody order granted custody to the offending parent, judges were put in the position of returning a child to an abusive parent, even where the non-custodial parent was fit.

The Pennsylvania Supreme Court solved this problem with its holding in *In re M.L.*,<sup>113</sup> a case involving unfounded allegations of sexual abuse of a child made by the child’s mother against the father.<sup>114</sup> The trial court adjudicated the child dependent even though the father was available to care for the child.<sup>115</sup> In reversing, the Pennsylvania Supreme Court held:

When a court adjudges a child dependent, that court then possesses the authority to place the child in the custody of a relative or a public or private agency. Where a non-custodial

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 441.

111. *Id.*

112. *Id.*

113. 757 A.2d 849 (Pa. 2000).

114. *Id.* at 850.

115. *Id.* Although the trial court adjudicated the child as dependent, it did award custody to the father. *Id.*

parent is available and willing to provide care to the child, such power in the hands of the court is an unwarranted intrusion into the family. Only where a child is truly lacking a parent, guardian or legal custodian who can provide adequate care should we allow our courts to exercise such authority.<sup>116</sup>

To solve the problem of prior civil custody orders, the court stated that trial courts in dependency cases have the inherent authority to modify child custody orders, based on the statutory mandate to act in the best interests of the children.<sup>117</sup> This authority exists with or without a dependency finding.<sup>118</sup>

While this approach seems to offer greater flexibility to judges in changing custody orders in the best interests of the children, it is constitutionally questionable. Unlike in Maryland, no official finding of unfitness on the part of either parent is explicitly required before a Pennsylvania court can change custody.<sup>119</sup> Unfitness is the indispensable constitutional trigger to judicial intrusion in the family unit.<sup>120</sup> Despite this constitutional flaw, Pennsylvania's solution does give it the power needed to protect both the child and the non-offending parent. The constitutional concern is easily addressed by requiring a trial court judge to make a finding that the offending parent is unfit before custody is modified.

These states provide valuable guidance to Alaska in tackling the gap in Alaska law regarding the non-offending parent. To fix this problem, Alaska should adopt the first principle of parental rights enunciated by the United States Supreme Court in *Stanley v. Illinois*,<sup>121</sup> and duly followed by New York, Maryland and Pennsylvania through their case law and legislation—a child is not in need of aid if he has a fit parent available and willing to care for him. As seen by the examples of these three states, recognition of this first principle would not put an onerous burden on the state, nor would it endanger the children in the state's care.<sup>122</sup> It would

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116. *Id.* at 851.

117. *Id.* at 851 n.3.

118. *Id.*

119. *Id.* at 851.

120. *See Troxel v. Granville*, 530 U.S. 56, 68–69 (2000).

121. 405 U.S. 645, 656–57 (1972).

122. *See also In re Okla.* Uniform Jury Instructions for Juvenile Cases, 116 P.3d 119, 131 (Okla. 2005) (discussing necessary evidence for adjudication of deprivation of a child and stating that a child is not deprived “if the other parent was providing satisfactory care for the child”); ME. REV. STAT. ANN. tit. 22, § 4035(2)(C) (2006) (requiring court to make “a jeopardy determination with regard to each parent who has been properly served”). Oklahoma and Maine

mean only that children would return more quickly to their families and the state would save resources for truly needy children.

C. The Constitutionally Dubious Compromise: States Allowing Adjudication Based on the Acts of One Parent, but Drawing the Constitutional Line at Custody

The second general approach among states to non-offending parents is that adjudication can be based on the acts of one parent, but states temper that constitutional imposition with a presumptive right of custody for the non-offending parent with the burden on the state to show unfitness prior to denying custody.<sup>123</sup> However, even that compromise position is increasingly being challenged as unconstitutional.<sup>124</sup> In those states allowing adjudication based on the acts of one parent, no cases have directly challenged the constitutionality of the statutes when one fit parent is present and able to arrange satisfactory care for his children. On these facts, those statutes would be ripe for a constitutional challenge.<sup>125</sup> Alaska should not embrace this approach as it is constitutionally dubious, intellectually incoherent, and does nothing more to protect children than adhering to the first principles of parental rights.

California's scheme is an example of this intellectual incoherence. California deals with the question of non-offending parents by permitting the adjudication of a child as dependent based on the actions of one parent and then presumptively entitling the non-offending parent to custody at disposition. However, while the California appellate courts have stated that adjudication can occur in the absence of a finding of unfitness of both parents, the question of whether "the non-offending parent can protect the child from the offending one is relevant to a determination of

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save state resources and protect families from unwarranted intrusion through these legal mechanisms.

123. See FLA. STAT. ANN. § 39.521 (2007); CAL. WELF. & INST. CODE § 361.2 (2007); *In re Austin P.*, 13 Cal. Rptr. 3d 616, 623 (Cal. Ct. App. 2004); *B.C. v. Dep't of Children and Families*, 864 So. 2d 486, 490–91 (Fla. Dist. Ct. App. 2004); *In re Stephanie H.*, 639 N.W.2d 668, 679 (Neb. Ct. App. 2002).

124. See *B.C.*, 864 So. 2d at 491 (holding that Florida statutory law allows adjudication based on acts of one parent, but remanding to allow father to make a record on an as-applied constitutional challenge); see also Sankaran, *supra* note 69, at 22 (criticizing as unconstitutional Michigan's holding in *In re C.R.*, 646 N.W.2d 506 (Mich. Ct. App. 2002), which he interprets as allowing adjudication based on the acts of one parent).

125. See Sankaran, *supra* note 69, at 24; see also discussion *supra* Part II.

whether the petition should be dismissed altogether.”<sup>126</sup> In *Aaron S.*, the California Appellate Court went on to say that it is “appropriate to sustain a petition on the basis of one parent’s conduct if the other parent will not be able to protect the child.”<sup>127</sup>

This approach to adjudication needlessly muddies the distinctions between fit and unfit parents. A parent who is unwilling to protect his child from serious harm is—or should be deemed—unfit; therefore, the state could file a petition alleging unfitness and have adjudication against both parents. As it is, the constitutionally required finding of unfitness is relegated to an evidentiary matter under California law. The simple act of filing a petition naming both parents (if known) would avert the constitutional problems inherent in California’s adjudication system.

While California’s method of adjudication is constitutionally suspect, California does protect the rights of a fit parent to the custody of his or her children at disposition. Once a child is deemed dependent, a non-offending parent is entitled to file a petition requesting custody of the child.<sup>128</sup> The parent is presumptively entitled to custody absent a showing of detriment to the child.<sup>129</sup> In other words, before the court may interfere in the familial relationship by seeking custody and/or removal of the child from the home, California requires a showing that the presumptively non-offending parent is unfit.

The presumptive right of custody for the non-offending parent is consistent with those states allowing adjudication based on the acts of one parent.<sup>130</sup> While the non-offending parent retains custody of the child, adjudication can still take place. In Florida, for example, a child can be deemed dependent even when a fit

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126. *In re Aaron S.*, 228 Cal. App. 3d 202, 211 (Cal. Ct. App. 1991).

127. *Id.*

128. CAL. WELF. AND INST. CODE § 361.2.

129. *In re Austin P.*, 13 Cal. Rptr. 3d 616, 623 (Cal. Ct. App. 2004).

130. CAL. WELF. AND INST. CODE § 361.2 (applies to a previously non-custodial parent); UTAH CODE ANN. § 78-3a-307 (2007) (applies to a previously non-custodial parent). A California court has held that the constitutional rights of an incarcerated father who could delegate care of his children while incarcerated prevented the state from usurping custody absent a showing of physical harm to the child from the father’s planned arrangement. *See In re Isayah C.*, 13 Cal. Rptr. 3d 198, 209–11 (Cal. Ct. App. 2004). Likewise, in Nebraska, the courts permit the adjudication of a child in need of assistance with a non-offending parent present, but require proof of unfitness before the non-offending parent can be denied custody. *In re Stephanie H.*, 639 N.W.2d 668, 679–82 (Neb. Ct. App. 2002).

parent is available to care for him.<sup>131</sup> This constitutional imposition on the fit parent is mitigated by Florida's mandate requiring "the court to place a child with a nonoffending parent who desires to assume custody unless there is a showing that the child would be endangered by such placement. Further, the best interest standard does not apply."<sup>132</sup> As in California, the Florida courts require a showing that the non-offending parent is unfit before denying custody.

This right to custody in Florida applies even when the non-offending parent has not had any prior contact with his child. In *In re K.M.*,<sup>133</sup> the state filed a dependency petition against the mother, claiming that she could not parent her children due to her substance abuse and mental illness.<sup>134</sup> The state placed the child with maternal relatives.<sup>135</sup> At the time, the father's whereabouts were unknown and the trial court specifically withheld adjudication as to him.<sup>136</sup> One month later, the father was identified and found to be living in New York.<sup>137</sup> He wrote a letter to the court asserting his right to raise his child and inquiring as to the steps he needed to take to achieve that goal.<sup>138</sup> The trial court subsequently found him to be a non-offending parent under Florida law and ordered a home study to be done in New York pending placement of the child with him.<sup>139</sup> Meanwhile, the court ordered telephonic visitation for the father.<sup>140</sup>

After numerous delays in the home study process because of concern over living arrangements of the father's girlfriend, the trial court denied the father's motion for custody of his child and granted permanent custody to the maternal grandmother.<sup>141</sup> The trial court also ordered the grandmother to encourage telephonic visits between the father and child, but did not grant him any

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131. *B.C. v. Dep't of Children & Families*, 864 So. 2d 486, 491 (Fla. Dist. Ct. App. 2004) (holding that a single parent adjudication is permitted under the statute, but remanding to permit an as-applied challenge to the constitutionality of the statute).

132. *In re K.M.*, 946 So. 2d 1214, 1219 (Fla. Dist. Ct. App. 2006); *see also* FLA. STAT. ANN. § 39.521(3)(b) (2007).

133. 946 So. 2d at 1214.

134. *Id.* at 1216.

135. *Id.* at 1217.

136. *Id.* at 1216–17.

137. *Id.*

138. *Id.* at 1217.

139. *Id.*

140. *Id.*

141. *Id.* at 1217–18.

visitation rights.<sup>142</sup> The father appealed, arguing that Florida law required custody with the non-offending parent unless “such placement would endanger the safety, well-being, or physical, mental, or emotional health” of his child.<sup>143</sup>

The court of appeals agreed, noting that the father has a fundamental liberty interest in the care of his children and that the trial court should have considered only whether placement with the non-offending parent would endanger the child.<sup>144</sup> Since the trial court had not made that finding, and the New York home study came back without significant concerns, the Florida appellate court remanded the case to the trial court for proper review under the statute.<sup>145</sup> The fact that, according to the opinion, the father had not seen his child prior to state involvement, and may have seen his child only once in the year of litigation, was not considered by the court.<sup>146</sup> Because the father was fit, he had the paramount right to raise his child, notwithstanding his lack of contact with the child prior to state interference.<sup>147</sup>

Though the Florida court opinion did not explain why the best interest standard did not apply when considering custody for a non-offending parent, the reason is constitutionally obvious. As stated in *Troxel v. Granville*, “there is a presumption that fit parents act in the best interests of their children.”<sup>148</sup> Consequently, so long as a parent is fit under Florida law “there will normally be no reason for the State to inject itself further into the private realm of the family . . . .”<sup>149</sup> Thus, even though the father of K.M. had not seen his child, he was considered fit; the court therefore had no reason to keep custody from him.

Although these states offer some protection to the non-offending parent by drawing the constitutional line at the custody determination, the practice is still unconstitutional. Without the

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142. *Id.* at 1218.

143. *Id.* at 1219 (citing FLA. STAT. ANN. § 39.521(3)(b) (2007) (“If there is a parent with whom the child was not residing at the time the events or conditions arose that brought the child within the jurisdiction of the court who desires to assume custody of the child, the court shall place the child with that parent upon completion of a home study, unless the court finds that such placement would endanger the safety, well-being, or physical, mental or emotional health of the child.”)).

144. *Id.*

145. *Id.* at 1219–20.

146. *See id.* at 1216–17 n.3.

147. The court’s opinion does not disclose the child’s age.

148. 530 U.S. 57, 68 (2000).

149. *Id.* (internal quotation marks omitted).

initial unfitness pronouncement at adjudication, these states lack the constitutionally required compelling interest to make a custody determination in the first instance.<sup>150</sup> In this situation, the non-offending parent's fundamental right to non-interference in the parent-child relationship was unjustifiably impaired. Alaska should not adopt this standard when addressing the rights of non-offending parents.

#### D. The Unconstitutional Solution: No Protection at all for the Fit Parent

Among states that have addressed the issue, Ohio stands alone in granting no protection to the fit parent. In a decision that can only be described as a national anomaly, the Ohio Supreme Court held, in a 4-3 decision, that a fit parent has no superior right to the care and custody of his child as against the state. In *In re C.R.*,<sup>151</sup> the Ohio Supreme Court held: “[W]hen a juvenile court adjudicates a child to be abused, neglected, or dependent, it has no duty to make a separate finding at the dispositional hearing that a noncustodial parent is unsuitable before awarding legal custody to a nonparent.”<sup>152</sup>

In this case, the legal issue raised on appeal was the trial court's grant of custody to a non-parent at disposition, even though a fit parent was present and wanted to care for his child.<sup>153</sup> In states like Florida, California and Nebraska, where the state claims the power to adjudicate even when a fit parent is present, the father would have the presumptive right of custody at the disposition hearing absent proof he was unfit.<sup>154</sup> However, with this decision Ohio has gone further than any other state as the result of the court's failure to draw a constitutional line for state intrusion on the parents' rights.

As pointed out in the dissent, the majority opinion in *C.R.* does not address the father's fundamental rights; the entire majority opinion is in fact devoid of any mention of his constitutional right to the care and custody of his child.<sup>155</sup> Given the weight of this fundamental right, the majority's opinion that an unfitness finding is not required before an award of custody to a non-parent is startling because it ignores direct United States

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150. *See Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

151. 843 N.E.2d 1188 (Ohio 2006).

152. *Id.* at 1192.

153. *Id.* at 1190.

154. *See supra* Part IV.C.

155. *In re C.R.*, 843 N.E.2d at 1193 (Pfeifer, J., dissenting).

Supreme Court authority to the contrary.<sup>156</sup> No other state has gone as far as Ohio in explicitly denying fit parents custody of their children. When clarifying its law on non-offending parents, Alaska should not join Ohio in abrogating the constitutional rights of the parents.

V. SO WHAT ABOUT OUR ALASKA  
CRAB FISHERMAN: HOW TO PROTECT THE CHILD AND THE  
CONSTITUTIONAL RIGHTS OF THE PARENTS

So what would our crab fisherman do with all of this information? As noted in Part II, our crab fisherman has a number of rights that can be enforced by the court while simultaneously protecting his children from the negligent mother. As a first principle, he has the constitutional right to the care and custody of his children, unless Alaska shows that he is unfit.<sup>157</sup> However, even with this fundamental right, under current Alaska law he is caught in the legal equivalent of a tangled fishing net.

No Alaska law specifically addresses the rights of fit parents in these circumstances, and this father's fundamental right to parent collides with the state's interest in ensuring the safety of his children after they were taken from the custody of an alcoholic, neglectful mother. Under the current state of legal affairs, he is at the mercy of the court and OCS; no Alaska rules or statutes guide either the courts' or OCS's consideration of his conduct and rights, as distinct from his wife's rights. Nor does any rule spell out the balance between his rights and the state's obligations to children.

When our crab fisherman finally arrives at OCS in Anchorage and demands his children, do his constitutional rights mean OCS must give him the children upon nothing more than presentment of identification? No; of course not. The state should have an opportunity to check to make sure the putative father is who he says he is, that he is not a registered sex offender, someone with a history of violence against the children, or otherwise unfit to parent. This minimal intrusion on his liberty would certainly be permissible under the balancing test set forth in *Mathews v. Eldridge*.<sup>158</sup>

The *Eldridge* test requires a weighing of three factors to determine the process due to a litigant before the government: (1) the private interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used; and (3) the

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156. See *supra* Part II.

157. See *supra* Part II; see also *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972).

158. See 424 U.S. 319, 334–35 (1976).

significance of the government's interest.<sup>159</sup> Here, the father's private interest in the care and custody of his children is certainly of the highest order. Yet, balanced against the risks to the children of an erroneous decision should the father be abusive or a sex offender, a background check and few days of visitation hardly seems an intrusion sufficient to trump the state's compelling interest in the welfare of children.

This investigation could be, and should be, done relatively quickly. A model solution would be a court rule in Alaska following the guidance by the New York Family Court in *In re Cheryl K.*<sup>160</sup> In that case, the New York Family Court held that the state had seventy-two hours to file a petition alleging the mother unfit if it did not want to turn the child over to the parent.<sup>161</sup> Alaska could fashion a rule allowing OCS seventy-two hours to do a background check on the non-offending parent to see if there are child protection concerns. While waiting for the background check, a non-offending parent would have liberal visitation. If no protection concerns arise during the visitation and background check, the child would be released into the custody of the parent and the petition dismissed.

One of the factors to be considered in this investigation is whether the crab fisherman can make arrangements to protect the children from the actions of the mother, who had become an alcoholic while the father was fishing. If he could do so, perhaps by having extended family assist in the children's care while he goes back to crab fishing, there would be no risk to the children. If the father's plan consisted of offering the mother a stern scolding but continuing to leave the children in her care, the state would be free to amend its petition; it could allege that the father is exposing his children to a substantial risk of harm by not protecting them from his wife.<sup>162</sup> The state would then be within its constitutional authority to pursue adjudication against both parents.

Suppose our crab fisherman is committed to protecting his children, and asserts that he will leave them in the care of their grandmother while he is fishing, thus not putting the children at risk. The state still faces the question of how to assist this father in protecting the children from the mother, especially if the father were to institute separation proceedings based on her conduct. Maryland's statute provides valuable guidance in this regard.

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159. *Id.*

160. 484 N.Y.S.2d at 476.

161. *Id.* at 477-78.

162. See ALASKA STAT. § 47.10.011(6) (2006).

Alaska could adopt a similar statute permitting an award of custody upon a finding that the allegations in the petition are true.<sup>163</sup>

Under the Maryland scheme, the trial court could not find that the crab fisherman's children were in need of aid because they had a fit parent, the father, to care for them, and it could award sole custody to him.<sup>164</sup> Proceeding in this way minimally infringes upon the constitutional rights of the father while protecting the state's compelling interest in the welfare of the children. Once the court issues the custody order, the children would be protected from unauthorized contact with the mother. By dismissing the case, the court is not burdened with a continuing and unnecessary child protection proceeding that takes resources from addressing the concerns of truly needy children.

Our crab fisherman has some decisions to make regarding his family. With some changes and clarity to Alaska law and minimal involvement by social workers, our crab fisherman could make those decisions and be back at sea earning a wage to support his family within days of taking his children into his custody.<sup>165</sup> His children could be safe with their grandmother, the father's mother, while he worked. Hopefully, his wife would find her way to a treatment program, but, since the children are safe, the state would no longer need to be involved in his family, thereby saving resources for more difficult cases.

## VI. CONCLUSION

Most child protection cases are more difficult than that of the crab fisherman, but the same constitutional principles always apply. For example, one can imagine a soldier being stationed away from his child and while he is out of the state and unaware the mother of his child gives the child to OCS with the understanding that he or she will be adopted. The father has no notice of the plan as the mother has informed OCS that the father is unknown. The child is well cared for in the pre-adoptive placement, and the proposed parents love him. Due to circumstances beyond his control, the

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163. Alaska could also adopt Pennsylvania's approach, holding that judges in children's matters have the inherent authority to modify custody orders using the court's power to act in the best interests of the children. See *In re M.L.*, 757 A.2d 849, 851 n.3 (Pa. 2000). However, to be constitutional, this would require a finding that one parent was unfit.

164. See MD. CODE ANN., CTS. & JUD. PROC. § 3-819(e) (2006).

165. See ALASKA STAT. § 47.05.065(2) ("It is the policy of the state to strengthen families and to protect children from child abuse and neglect . . .").

soldier might be gone a year or more before he can get emergency leave and come home to get his child, place him or her with family, and rejoin his unit. There are also cases in which the correct father is not identified for some period of time, and it is only long into the child protection process that the father comes forward claiming fitness and a desire to raise his child. In either of these circumstances, the child would be a virtual stranger to the father and have already bonded with the foster parents.

Upon these facts, it would be difficult for a judge to award custody against the state and to the father, but the court must unless the father is found unfit. The court must return the child, because it is not the business of the courts to decide that “some other person might possibly furnish the child a better home or better care.”<sup>166</sup> The law presumes the child’s best interests are served in the care and custody of a fit parent.<sup>167</sup> Therefore, if an investigation into the father yields no child protection concerns, and the parent is fit, the child belongs with the parent even when, as in the case of the father in *In re K.M.*,<sup>168</sup> the parent is a virtual stranger to the child.

In these difficult situations, parents, children, social workers, lawyers, and judges would be well-served by guidance in the form of rules and statutes designed to protect the rights of fit parents, while keeping in mind the welfare of the children. Alaska, and other states that have not already done so, should adopt the minimally intrusive rules advocated in this Article to provide clarity and protection to the non-offending parent. By following this model, families can be reunited sooner and state resources reserved for those families needing stronger intervention.

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166. *Hammack v. Wise*, 211 S.E.2d 118, 121 (W.Va. 1975) (quoting *State Dep’t of Pub. Assistance v. Pettrey*, 92 S.E.2d 917, 921 (W.Va. 1956)).

167. *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

168. *See* 946 So. 2d 1214, 1216 n.3, 1219 (Fla. Dist. Ct. App. 2006).