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Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children

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I. INTRODUCTION

In late 1988 as part of a comprehensive effort to combat violent street gang activity,[1] the California legislature passed an amendment to section 272 of California's Penal Code,[2] commonly known as the Paren-

1. Abramovsky, *Parent's Liability for Child's Crime*, 202 N.Y.L.J. 3 (1989). The California legislature found that violent street gangs, whose activities presented a "clear and present danger to public order," had created a state of crisis. CAL. PENAL CODE § 186.21 (West Supp. 1990).

2. CAL. PENAL CODE § 272 (West Supp. 1990). In addition, the legislature passed the Califor-

tal Responsibility Law.[3] Section 272 originally stated only that every person who commits any act or fails to perform any duty that causes or tends to cause a minor to do a prohibited act is guilty of contributing to the delinquency of a minor, a misdemeanor under the California Penal Code, and subject to a maximum fine of twenty-five hundred dollars, one year in jail, or both.[4] When the California legislature amended section 272, it imposed an additional affirmative duty on parents and legal guardians "to exercise reasonable care, supervision, protection, and control over their minor child[ren]."[5] In essence, California's legislative package makes parents liable for failing to prevent their minor children from engaging in criminal activity.[6]

Although the State has not prosecuted anyone under the new laws,[7] the American Civil Liberties Union of Southern California (ACLU) has filed a taxpayers' lawsuit challenging the constitutionality of the Parental Responsibility Law.[8] The complaint alleges that the amendment is vague, overbroad, and an infringement on family privacy. The ACLU has requested that the court enjoin enforcement of the Parental Responsibility Law and declare it unconstitutional.[9]

California's Parental Responsibility Law reflects a recent trend among the states to make parents more responsible for the activities of

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nia Street Terrorism Enforcement and Prevention Act (Street Terrorism Act). *Id.* §§ 186.20-186.27. The Street Terrorism Act criminalizes participation in a street gang with knowledge of the gang's patterns of criminal activity. *Id.* § 186.22.

3. *Law Challenged Holding Parents Criminally Liable*, L.A. Daily J., July 21, 1989, at 1, col. 4 [hereinafter *Law Challenged*].

4. CAL. PENAL CODE § 272 (West 1988), prior to the 1988 amendment, read: "Every person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any [minor] . . . to come within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code" is guilty of a misdemeanor. Sections 300, 601, and 602 define the types of minors who are subject to the juvenile court's jurisdiction. Section 300 governs minors who have been or are in danger of being physically, emotionally, or sexually abused or neglected or exploited by someone in the minor's home. CAL. WELF. & INST. CODE § 300 (West Supp. 1990). Section 601 covers habitually disobedient or truant minors, *id.* § 601, and § 602 concerns minors who have violated any state or federal law or any city or county ordinance other than curfew ordinances. *Id.* § 602.

5. CAL. PENAL CODE § 272 (West Supp. 1990). A person is considered a minor in California until the age of 18. *Id.*

6. *See* Kantrowitz, Springen, Annin & Gordon, *Now, Parents on Trial*, NEWSWEEK, Oct. 2, 1989, at 54 [hereinafter *Parents on Trial*]; Abramovsky, *supra* note 1, at 3; *Law Challenged*, *supra* noto 3, at 1, col. 4.

7. In April 1989 the Los Angeles city attorney filed charges under the Parental Responsibility Law against Gloria Williams after her son, a gang member, was arrested for rape. *Parents on Trial*, *supra* note 6, at 55. Williams was charged with failing to provide reasonable care for her son. *Law Challenged*, *supra* note 3, at 1, col. 4. Prosecutors dismissed the charges when they learned that Williams had taken a parenting class. *Id.*

8. *Law Challenged*, *supra* note 3, at 1, col. 4.

9. *Id.*

their minor children.[10] Some states have imposed certain duties on parents with the ultimate goal of discouraging various forms of undesirable behavior by their children.[11] Moreover, Kentucky[12] and New York[13] have legislation that greatly resembles California's Parental Responsibility Law. This trend has enormous potential for growth because many states could use existing criminal statutes to regulate parental conduct in the same manner as California's new legislation.[14]

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10. Abramovsky, *supra* note 1, at 3; *see also* Shapiro, *When Parents Pay for Their Kids' Sins*, U.S. NEWS & WORLD REPORT, July 24, 1989, at 26.

City councils also have countered increases in juvenile crimes with ordinances to punish parents who do not keep their children out of trouble. *See* Gibson, *Make Parents Pay for Actions of Kids*, USA Today, Dec. 19, 1989, at 10A (final ed.) (discussing the success of a new city ordinance in Dermott, Arkansas that seeks to curb juvenile delinquency by prosecuting parents of delinquent children). For example, the Norwalk, California City Council voted to impose $2500 fines on parents of delinquent children. Harris, *Norwalk Votes to Fine Parents of Lawbreakers*, L.A. Times, Feh. 11, 1990, at 1, col. 2 (home ed.). The Norwalk ordinance also enables the city to file civil suits against parents whose children are gang members. *Id.*

California State Senator Ed Davis has advocated federal and state tax subsidies to encourage mothers to stay home and raise children. Davis, *A Parental Presence Prevents Delinquency*, L.A. Tunes, Feb. 25, 1990, at 4, col. 1 (home ed.). According to Senator Davis, mothers should remain at home to teach children cultural values during the children's formative years. *Id.*

11. A Florida law requires parents to store securely any loaded guns or face a $500 fine and 60 days in prison. FLA. STAT. ANN. §§ 790.173-790.174 (West 1976 & Supp. 1990). In Wisconsin parents who fail to support the offspring of their unmarried minor children may face a $10,000 fine or a maximum jail term of two years. WIS. STAT. ANN. § 49.90 (West 1987 & Supp. 1990). Wisconsin legislators enacted the law to combat teenage pregnancy and abortion by making parents feel more responsible for the sexual behavior of tbeir minor children. *See Parents on Trial*, *supra* note 6, at 54. Hawaii has a similar law. *See* Shapiro, *supra* note 10, at 26. The Arkansas legislature has passed a law that fines parents if their children miss school. *Id.*

12. "A parent, . . . is guilty of endangering the welfare of a minor when he fails or refuses to exercise reasonable diligence in the control of such child to prevent hun from becoming a neglected, dependent or delinquent child." KY. REV. STAT. ANN. § 530.060(1) (Michie/Bobbs-Merrill 1985). A neglected child is one whose parents have harmed or threatened to barm the child's physical or emotional welfare. *Id.* § 600.020(1) (Michie/Bobbs-Merrill 1990). A child is dependent if the child's parents unintentionally cared for the child improperly. *Id.* § 600.020(15). "Delinquency" is not defined in the Kentucky Code.

13. "A person is guilty of endangering the welfare of a child when: . . . [b]eing a parent, . . . he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an 'abused child,' a 'neglected child,' a 'juvenile delinquent' or a 'person in need of supervision,' . . ." N.Y. PENAL LAW § 260.10(2) (McKinney 1989). An abused child is one whose parent physically or sexually abused the child or allowed another to abuse the child. A neglected child is one whose physical, emotional, or mental condition has been impaired or is in danger of being impaired because the parent has not provided a minimum degree of care. N.Y. JUD. LAW § 1012(e), (f) (McKinney 1983 & Supp. 1990). A juvenile delinquent is a child who has committed a crime. *Id.* § 301.2(1) (McKinney 1983). A child is in need of supervision if the child is babitually truant, incorrigible, ungovernable, habitually disobedient, or has a conviction for the unlawful and knowing possession of marijuana. *Id.* § 712.

14. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-3612, 13-3613 (1989); GA. CODE ANN. § 15-11-2 (1990); *id.* § 16-12-1 (1988); NEV. REV. STAT. ANN. §§ 201.090, 201.110 (Michie 1986); R.I. GEN. LAWS § 11-9-4 (1981); S.D. CODIFIED LAWS ANN. §§ 26-8-6, 26-9-1 (1984 & Supp. 1990).

In addition, the police in Grand Rapids, Michigan have reactivated a 20-year-old city ordinance that holds parents criminally liable for their children's misbehavior. *See Parents Are*

This Note addresses the legal problems presented when states attempt to regulate parental conduct through statutes that penalize contributing to the delinquency of minors.[15] Part II of this Note discusses the current popularity of enforcing contributing statutes to deter juvenile crime indirectly. Part III reviews the void for vagueness doctrine and analyzes the nearly unanimous view of the state courts that contributing statutes are not void for vagueness. Part IV examines the argument that these statutes violate parents' constitutional right to privacy in child rearing decisions. Part V concludes that some contributing statutes are void for vagueness and most contributing statutes impermissibly interfere with the fundamental right of parents to make child rearing decisions.

II. BACKGROUND FOR STATUTORY TREND

A. *Prevailing Views on the Solution to Juvenile Crime*

Between 1978 and 1987 overall arrests of juveniles for violent crime decreased.[16] In the same period, however, juvenile arrests increased 20 percent for forcible rape and 8.3 percent for aggravated assault.[17] Other assault arrests also rose,[18] and the number of juveniles arrested for weapons possession increased 16.9 percent.[19]

From 1987 to 1988 arrests of juveniles for violent crimes increased 7.7 percent.[20] Arrests for murder and nonnegligent manslaughter, which had decreased from 1978 to 1987,[21] grew 17.8 percent between 1987 and 1988.[22] The previous decline in arrests for drug abuse violations[23] reversed sharply from 1987 to 1988.[24] Moreover, arrests for aggravated and other assaults and for weapons possession continued to increase.[25]

Charged After Crime by Kids, Chicago Tribune, Feb. 6, 1990, at 3 [hereinafter *Parents Charged*]. Although the city had not prosecuted anyone under the ordinance for fifteen years, seven people have been charged in the last four months. *Id.* Under the ordinance, parents who fail to exercise "reasonable control" over their children may face 90 days in jail and a $500 fine. *Id.* The Assistant City Attorney has stated that parents will be charged only if their children have committed three or more serious offenses. *Id.*

15. This Note does not address the application of contributing statutes to defendants who are not parents of the minor.

16. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 489 (1989) [hereinafter SOURCEBOOK].

17. *Id.*

18. *Id.*

19. *Id.*

20. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE U.S. 176 (1989) [hereinafter UNIFORM CRIME REPORTS].

21. SOURCEBOOK, *supra* note 16, at 489.

22. UNIFORM CRIME REPORTS, *supra* note 20, at 176.

23. SOURCEBOOK, *supra* note 16, at 489.

24. UNIFORM CRIME REPORTS, *supra* note 20, at 176.

25. *Id.*

These unsettling patterns of juvenile violence prompted the Select Committee on Children, Youth, and Families of the House of Representatives to hold a hearing in May 1989 to consider causes of the violence and possible solutions to the problem.[26] Experts on juvenile delinquency testified that while the proportion of juveniles committing violent crimes is not increasing,[27] those juveniles currently involved are much more violent than deliquents were a few years ago.[28] The easy availability of drugs and weapons has aggravated the situation.[29] In addition, a new phenomenon has surfaced in that inner city men in their twenties are not growing out of adolescent violence, but instead are continuing to commit more violent crimes.[30] Many of the Committee's witnesses pointed to family breakdown as a major contributor to juvenile delinquency.[31] Other witnesses focused on factors such as the influence of peer groups on juvenile offenders[32] and poverty.[33] The most common

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26. *Down These Mean Streets: Violence by and Against America's Children: Hearing Before the House Select Comm. on Children, Youth, and Families*, 101st Cong., 1st Sess. 4 (1989) [hereinafter *Down These Mean Streets*].

27. *See* UNIFORM CRIME REPORTS, *supra* note 20, at 172.

28. *Down These Mean Streets, supra* note 26, at 107 (statement of Dr. Delbert S. Elliott, Professor of Sociology, University of Colorado at Boulder); *see also supra* notes 16-25 and accompanying text.

29. *Down These Mean Streets, supra* note 26, at 107.

30. Dr. Elliott explained that violence in young people usually peaks around the age of 15 or 16 and ends by the age of 19. Today, almost 20% of delinquent teenagers are continuing their violent behavior into adulthood. In addition, these delinquent adults are committing violent acts more frequently. Dr. Elliott suggested that this phenomenon is caused in part by increased poverty and unemployment in urban areas. *Id.* at 107-08.

31. Representative Thomas J. Billey, Jr. stated that "[v]iolence on the streets cannot be separated from what is happening in the home." *Id.* at 11. Another witness worried about the "deterioration of the family structure." *Id.* at 44 (statement of J. Reggie B. Walton, Associate Judge, Superior Court of the District of Columbia); *see also id.* at 115-16 (statement of Karl Zinsmeister, Adjunct Research Associate, American Enterprise Institute for Public Policy Research).

The Department of Justice statistics confirm that family breakdown is a factor in juvenile delinquency. Almost one-half of the juveniles in long-term institutious were raised by single mothers. Family breakdown cannot be the entire explanation, however, because almost 30% of incarcerated juveniles grew up with both parents at home. SOURCEBOOK, *supra* note 16, at 601.

32. Dr. Elliott testified that while inadequate parenting does make juveniles more likely to be violent, the more immediate cause of juvenile violence is association with violent peer groups. During adolescence the influence of peer groups far outweighs the influence of parents. *Down These Mean Streets, supra* note 26, at 109. Peer groups become the dominant factor perpetuating violent behavior because these groups teach members "techniques of moral disengagement which provides justification and rationalizations for engaging in crime." *Id.* Because violence is an "expression of group hostility," Dr. Elliott believes that any attempt to solve the juvenile delinquency problem that ignores peer groups is destined to fail. *Id.*

33. Parents need more social services before they can reclaim parental authority. "Parents . . . can exert power when they are seen as effective protectors; but when their resources . . . prohibit them from providing more than [the barest necessities], then they are seen as weak adult authority figures. They dare not say no because they fear their children will . . ." leave them. *Id.* at 53 (statement of Deborah Meier, Principal of Central Park East Secondary School in East Harlem, New York, New York). *See generally* STAFF OF HOUSE SELECT COMM. ON CHILDREN, YOUTH,

recommendation made to the Committee was that parents should be held accountable for the violent activities of their children.[34]

Holding parents responsible for juvenile delinquency is not a new concept. Colorado enacted the first law holding parents criminally liable for their children's delinquent acts in 1903.[35] The reasoning behind the concept is fairly simple. The family is the primary influence in the lives of children and, therefore, is the institution best situated to prepare children to become productive members of society.[36] Consequently, the state should require parents not only to provide for the basic needs of children, but also to teach them fundamental societal values, including respect for authority.[37] Advocates of this solution suggest that lack of adequate parental control and guidance causes juvenile delinquency. Advocates also believe that through the imposition of fines or prison terms for delinquent parenting the state can force parents to control their children and, therefore, decrease the incidence of juvenile delinquency.[38]

B. *The Hidden Potential in Present Criminal Laws for Expansion of the Trend*

Many states are embracing this proposed solution to the growing problem of juvenile crime.[39] For example, California prosecutors lob-

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AND FAMILIES, 100TH CONG., 2D SESS., REPORT ON CHILDREN AND FAMILIES: KEY TRENDS IN THE 1980S 3 (Comm. Print 1989) [hereinafter REPORT ON CHILDREN AND FAMILIES] (outlining the economic prohlems facing the modern family).

34. *See, e.g., Down These Mean Streets, supra* note 26, at 165 (response by Judge Walton to subsequent questions posed by Congressman Lamar Smith); *id.* at 119 (statement of Karl Zinsmeister, Adjunct Research Associate, American Enterprise Institute for Public Policy Research). Zinsmeister recommended positive family building laws, new penalties for persons who harm children, and new laws holding parents accountahle for the actions of their children. "[T]he first step in reducing juvenile delinquency has to be to make negligent parents, who are just kind of not exerting themselves in a proper way, exert some control over their charges." *Id.*

35. For a discussion of the Colorado law, see Gladstone, *The Legal Responsibility of Parents for Juvenile Delinquency in New York State: A Developmental History*, 21 BROOKLYN L. REV. 172, 173-74 (1955). "This theory of [parental] criminal responsibility and causation [of juvenile crime] climbs upwards in popularity every now and then. When it has its effect we have increased punishment . . . of parents of delinquent children." S. RUBIN, CRIME AND JUVENILE DELINQUENCY 21 (3d rev. ed. 1970).

36. *See Children and Families in Poverty: Beyond the Statistics: Hearing Before the House Select Comm. on Children, Youth, and Families*, 99th Cong., 1st Sess. 64 (1985) [hereinafter *Children and Families*] (additional submitted material hy Glenn C. Loury); S. KATZ, WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN 1, 2 (1971).

37. S. KATZ, *supra* note 36, at 9-13.

38. *See generally Children and Families, supra* note 36, at 64 (discussing the role of the family in juvenile delinquency). *But see* S. RUBIN, *supra* note 35, at 21-31 (calling for the repeal of contributing statutes); Alexander, *What's This About Punishing Parents?*, 12 FED. PROBATION 23 (1948) (acknowledging the failure of Ohio's contributing statute).

39. *See Parents on Trial, supra* note 6, at 54; Shapiro, *supra* note 10, at 26.

bied for the adoption of the Parental Responsibility Law because they believed that it would divide children and gangs.[40] Most states already can force parents to take greater responsibility for their children through enforcement of statutes that prohibit contributing to the delinquency of minors.[41] Many contributing statutes contain general terms that could be used to punish parents for either acts or omissions later found to have promoted the delinquency of their children. A typical statute reads: "Contributing to [the] delinquency of [a] minor consists of any person committing any act, or omitting the performance of any duty, which act or omission causes, or tends to cause or encourage the delinquency . . ." of a minor.[42] This language is broad enough to include any activity of a parent, intentional or not, that an outside observer subsequently determines is detrimental to the child.

Other state contributing statutes contain language specifically applicable to parental behavior. Contributing statutes in California, New York, and Kentucky explicitly require parents to exercise reasonable control over their children.[43] Other states either bury the control provisions in the statutory definitions of delinquent or dependent children[44] or require parents to prevent their children from engaging in certain

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40. Prosecutors stated that the new law would "drive a wedge between children and gangs." *Law Challenged, supra* note 3, at 22, col. 2.

41. *See* ALA. CODE § 12-15-13 (1986); ALASKA STAT. § 11.51.130 (1989); ARIZ. REV. STAT. ANN. § 13-3613 (1989); ARK. STAT. ANN. §§ 5-27-205, 5-27-220 (1987); CAL. PENAL CODE § 272 (West Supp. 1990); COLO. REV. STAT. § 18-6-701 (1988 & Supp. 1990); CONN. GEN. STAT. ANN. § 53-21 (West 1985); DEL. CODE ANN. tit. 11, § 1102 (1987); GA. CODE ANN. § 16-12-1 (1988); HAW. REV. STAT. §§ 709-904 (1989); ILL. REV. STAT. ch. 23, para. 2361a (1987); IND. CODE ANN. § 35-46-1-8 (Burns 1985); IOWA CODE ANN. § 233.1 (West 1985 & Supp. 1990); KAN. STAT. ANN. § 21-3608 (1989); KY. REV. STAT. ANN. § 530.060 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 92 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 554 (1983 & Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. § 3-831 (1989); MASS. GEN. LAWS ANN. ch. 119, § 63 (West Supp. 1990); MICH. COMP. LAWS ANN. § 750.145 (West 1975); MINN. STAT. ANN. § 260.315 (West Supp. 1991); MISS. CODE ANN. § 97-5-39 (Supp. 1990); NEB. REV. STAT. § 28-709 (1989); NEV. REV. STAT. ANN. § 201.110 (Michie 1986); N.H. REV. STAT. ANN. § 169-B:41 (1990); N.J. STAT. ANN. § 2C:24-4 (West Supp. 1990); N.M. STAT. ANN. § 30-6-3 (1984); N.Y. PENAL LAW § 260.10 (McKinney 1989); N.C. GEN. STAT. § 14-316.1 (1986); N.D. CENT. CODE § 14-10-06 (Supp. 1989); OHIO REV. CODE ANN. § 2919.24 (Anderson 1987); OKLA. STAT. ANN. tit. 21, § 858.1 (West Supp. 1991); OR. REV. STAT. § 163.575 (1990); PA. STAT. ANN. tit. 18, § 4304 (Purdon Supp. 1990); R.I. GEN. LAWS § 11-9-4 (1981); S.C. CODE ANN. § 16-17-490 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 26-9-1 (Supp. 1990); TENN. CODE ANN. § 37-1-156 (1984); TEX. FAM. CODE ANN. § 72.002 (Vernon 1986); VT. STAT. ANN. tit. 13, § 1301 (1974); VA. CODE ANN. § 18.2-371 (Supp. 1990); WASH. REV. CODE ANN. § 9A.42.030 (1988); W. VA. CODE § 49-7-7 (Supp. 1990); WIS. STAT. ANN. § 948.40 (West Supp. 1990).

42. N.M. STAT. ANN. § 30-6-3 (1984).

43. *See* CAL. PENAL CODE § 272 (West Supp. 1990); KY. REV. STAT. ANN. § 530.060(1) (Michie/Bobbs-Merrill 1985); N.Y. PENAL LAW § 260.10(2) (McKinney 1989).

44. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-3613, 13-3612 (1989); GA. CODE ANN. §§ 16-12-1, 15-11-2 (1988, 1990); NEV. REV. STAT. ANN. § 201.110 (Michie 1986); S.D. CODIFIED LAWS ANN. §§ 26-9-1, 26-8-6 (Supp. 1990).

behavior.[45]

Although in the past states generally have used contributing statutes to punish strangers for sexual or physical assaults on minors,[46] the statutory language permits a broader application. New York, for example, which previously has applied its contributing statute narrowly, soon may use its statute to police parental behavior.[47] Because New York and California are influential states, other states are likely to follow their lead. The majority of states would not require legislative action to punish parents; instead, state prosecutors simply could begin to enforce existing criminal statutes more strictly.[48]

III. THE VOID FOR VAGUENESS DOCTRINE

A. Supreme Court Decisions

Defendants have challenged contributing statutes most frequently under the void for vagueness doctrine.[49] The United States Supreme Court developed the doctrine in a series of cases in which the Court held that a penal statute violates due process[50] if its terms are too vague and indefinite.[51] The purpose of the void for vagueness doctrine is to ensure fair warning of the effect of a penal statute and to prevent standardless law enforcement.[52]

If a statute's terms are too vague, ordinary citizens, forced to guess at the statute's meaning, inevitably will disagree about what conduct comes within the purview of the statute.[53] More importantly, a vague law allows policemen, judges, and juries to make subjective, and possi-

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45. *See, e.g.*, OHIO REV. CODE ANN. § 2919.24 (Anderson 1987); R.I. GEN. LAWS § 11-9-4 (1981); VT. STAT. ANN. tit. 13, § 1301 (1974).

46. *See* MODEL PENAL CODE § 230.4 comment, at 445-47 (1980).

47. Abramovsky, *supra* note 1, at 3.

48. *See generally* MODEL PENAL CODE § 230.4 comment (discussing broad reach of current contributing statutes); S. RUBIN, *supra* note 35, at 28 (stating that "[a]s long as 'contributing' statutes are on the books, the danger exists that they will be used, and when they are used, the danger exists . . . that they will be abused"); *see also Parents Charged supra* note 14, at 3 (discussing the current enforcement of a little-used city ordinance holding parents criminally liable for their children's misbehavior).

49. *See, e.g.*, Brockmueller v. State, 86 Ariz. 82, 340 P.2d 992, *cert. denied*, 361 U.S. 913 (1959); State v. Schriver, 207 Conn. 456, 542 A.2d 686 (1988); State v. Bachelder, 565 A.2d 96 (Me. 1989); State v. Simants, 182 Neb. 491, 155 N.W.2d 788 (1968); State v. Flinn, 158 W. Va. 111, 208 S.E.2d 538 (1974).

50. *See* U.S. CONST. amends. V, XIV, § 1.

51. *See* Kolender v. Lawson, 461 U.S. 352 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963); United States v. Petrillo, 332 U.S. 1 (1947); Thornhill v. Alabama, 310 U.S. 88 (1940); Connally v. General Constr. Co., 269 U.S. 385 (1926). For a good discussion of Supreme Court decisions in this area, see *Flinn*, 158 W. Va. at 111, 208 S.E.2d at 538.

52. *Kolender*, 461 U.S. at 357.

53. *Connally*, 269 U.S. at 391.

bly arbitrary, decisions.[54] Thus, the principal requirement of the vagueness doctrine is that criminal statutes establish at least minimal guidelines to limit discretionary law enforcement.[55]

The Constitution, however, does not require complete specificity.[56] At times the legislature must use general terms in a statute because the various behaviors required or prohibited cannot be described or listed adequately.[57] An ambiguous statute is not unconstitutional merely because of the possibility that in some marginal cases the exact application of the statute will be difficult to determine.[58] Moreover, courts may cure the constitutional shortcomings of potentially vague statutes by finding a specific intent element in the offense[59] or by determining that prior judicial decisions have eliminated the vagueness.[60]

In accordance with concerns for both discriminatory enforcement and due process, the Supreme Court has adopted two approaches to the vagueness problem, depending on whether the Constitution protects the activity governed by the statute. In *Thornhill v. Alabama*[61] the Court held that the Constitution requires a strict vagueness test when reviewing statutes that regulate first amendment rights.[62] The strict test requires a facial examination of an allegedly vague statute notwithstanding the particular conduct concerned in the case.[63] The *Thornhill* Court believed that the freedoms of speech and of the press deserved enhanced protection because of the importance of these rights in a democracy.[64] The Court was concerned that vagueness in statutes

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54. *Thornhill*, 310 U.S. at 97-98. The subjective nature of vague statutes encourages harsh and discriminatory law enforcement. *Id.*

55. *Kolender*, 461 U.S. at 358.

56. *Petrillo*, 332 U.S. at 7-8.

57. One court has upheld a contributing statute on this basis, stating that the ways in which an adult may corrupt a minor are so numerous that "to compel a complete enumeration in any statute designed for protection of the young before giving it validity would be to confess the inability of modern society to cope with the problem of juvenile delinquency." State v. McKinley, 53 N.M. 106, 111, 202 P.2d 964, 967 (1949).

58. *Petrillo*, 332 U.S. at 7.

59. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952).

60. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

61. 310 U.S. at 88.

62. *See id.* at 96-98. In *Thornhill* the defendant was charged with violating an Alabama statute that prohibited persons from loitering or picketing, without just cause, on the property of a lawful business, with the intention of convincing customers not to trade with that business. *Id.* at 91. The defendant had been picketing the Brown Wood Preserving Company under a strike order issued by the American Federation of Labor. *Id.* at 94. According to the Court, the Alabama statute embraced almost every available means of informing the public about the causes of a labor dispute. *Id.* at 104. The Court stated that "freedom of speech and of the press . . . embraces at the least the liberty to discuss publicly . . . all matters of public concern without previous restraint or fear of subsequent punishment." *Id.* at 101-02 (footnote omitted).

63. *Id.* at 96-97; *see* State v. Hodges, 254 Or. 21, 26, 457 P.2d 491, 493 (1969).

64. *Thornhill*, 310 U.S. at 95.

regulating first amendment rights would deter constitutionally protected and socially desirable conduct.[65] Additionally, the Court feared that a vague statute would prove to be a convenient tool for harsh and discriminatory enforcement against disfavored groups.[66]

In *Papachristou v. City of Jacksonville*[67] the Supreme Court extended the strict test of *Thornhill* beyond first amendment rights to other constitutionally protected activities. *Papachristou* concerned a challenge to a Florida vagrancy ordinance that criminalized normally innocent activities, such as wandering without lawful purpose or objective and becoming economically dependent on a wife or minor child even though able to work.[68] The Court stated that although the Constitution and Bill of Rights do not list these particular activities specifically, these activities historically have been features of life in the United States.[69] Tolerance for this conduct has fostered American independence and creativity by inviting spirited dissent and nonconformity rather than submissiveness.[70] The Court consequently held that the ordinance was unconstitutional under *Thornhill* because the broad language of the ordinance allowed the police and the courts to violate the constitutionally protected right of citizens to determine their personal lifestyles.[71]

The *Papachristou* decision was not based on the first amendment or on any specifically enumerated constitutional right. The Court was concerned more about arbitrary enforcement of the vagrancy statute based on subjective statutory criteria and the potential that law enforcement officials could apply the statute inappropriately to deter socially desirable, historically protected conduct. This extension of *Thornhill* is not limited to vagrancy statutes, even though the *Papachristou* Court did mention the distinctive and familiar abuses of

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65. United States v. National Dairy Prods. Corp., 372 U.S. 29, 36 (1963).

66. *Thornhill*, 310 U.S. at 97-98.

67. 405 U.S. 156 (1972).

68. *Id.* at 156 n.1.

69. *Id.* at 164.

70. *Id.* The Court stated:

> The difficulty [with the ordinance] is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

Id.

71. *Id.* at 170. The Court stated that persons covered by the statutory language could be "required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts." *Id.*

vagrancy statutes by law enforcement officials.[72] In later cases the Supreme Court has stated explicitly that the *Thornhill* test applies to constitutionally protected activities other than first amendment liberties.[73]

In *United States v. National Dairy Products Corp.*[74] the Court developed a second, less exacting approach to the vagueness problem. The Court held that it would examine general penal statutes that do not implicate constitutionally protected activities both facially and in light of the particular conduct concerned in the case.[75] Thus, if the statute as applied would not violate the due process rights of the defendant, the Court will allow it to stand even if it might be unconstitutionally vague in another situation.[76] The Court usually tests economic regulatory statutes under this looser standard because of the narrower subject matter and because businesses are expected to plan their activities more carefully than individuals.[77] In these cases the Court has found the terms of statutes to be sufficiently certain by interpreting the statutes in light of the common understanding and general usage of the words.[78]

B. Analysis of State Court Decisions on the Vagueness of Contributing Statutes

State courts almost unanimously have rejected challenges to contributing statutes based on vagueness;[79] however, the rationale of the various courts has differed.[80] Some courts have looked to the legislative

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72. The Court was worried that "a vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest." *Id.* at 169. The Court quoted with approval Justice Felix Frankfurter's statement that "[t]hese [vagrancy] statutes are in a class by themselves, in view of the familiar abuses to which they are put . . . . Definiteness is designedly avoided . . . to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense." *Id.* (quoting Winters v. New York, 333 U.S. 507 (1948) (Frankfurter, J., dissenting)).

73. *See* Kolender v. Lawson, 461 U.S. 352, 358 (1983).

74. 372 U.S. 29 (1963).

75. *Id.* at 36. *National Dairy* concerned violations of the Robinson-Patman Act, 15 U.S.C. § 13a (1988), which prohibits selling goods at "unreasonably low prices for the purpose of destroying competition." 372 U.S. at 29. The Court distinguished *Thornhill* on the ground that *Thornhill* concerned first amendment activities, which are constitutionally protected and socially desirable. *Id.* at 36. The Robinson-Patman Act, on the other hand, is "directed only at conduct designed to destroy competition," activity that is neither constitutionally protected nor socially desirable. *Id.*

76. *National Dairy*, 372 U.S. at 33.

77. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982); *see* United States v. Petrillo, 332 U.S. 1 (1947).

78. *See* United States v. Vuitch, 402 U.S. 62, 72-73 (1971); *Petrillo*, 332 U.S. at 5-8.

79. *See, e.g.*, Brockmueller v. State, 86 Ariz. 82, 340 P.2d 992 (1959); State v. Bachelder, 565 A.2d 96 (Me. 1989); State v. McKinley, 53 N.M. 106, 202 P.2d 964 (1949); State v. Crary, 10 Ohio Op. 2d 36 (Common Pleas Ct. 1959); Commonwealth v. Randall, 183 Pa. Super. 603, 133 A.2d 276 (Super. Ct. 1957); State v. Flinn, 158 W. Va. 111, 208 S.E.2d 538 (1974). None of these cases concerns the type of parental conduct at issue in this Note.

80. *See generally Flinn*, 158 W. Va. at 116, 208 S.E.2d at 547-48 (discussing various state

intent behind the statute and narrowed the scope of the statute to demand only the conduct that would best achieve the legislative purpose.[81] Other courts have rejected vagueness objections because the statute so obviously prohibited the particular conduct concerned.[82] Many courts have upheld contributing statutes on the broad policy ground that the welfare of youth is such a vital state interest that the legislature must write statutes in general terms that preserve the flexibility necessary to handle the problem of juvenile delinquency effectively.[83] Other courts have found contributing statutes constitutional because these statutes have a long history at common law[84] or because a lack of prior challenges to the law indicates that no genuine vagueness problem exists.[85] One group of state courts upheld the statutes on the grounds that the terms were not indefinite.[86]

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court decisions).

81. *See, e.g.*, State v. Simants, 182 Neb. 491, 493, 155 N.W.2d 788, 790 (1968); *Crary*, 10 Ohio Op. 2d at 39; *Flinn*, 158 W. Va. at 137, 208 S.E.2d at 552-53.

82. *See, e.g.*, *Bachelder*, 565 A.2d at 97 (stating that "it cannot be doubted in this instance that the children's natural mother, with whom they live, has . . . a duty . . . [that] extends to caring for their health, safety and mental welfare"); People v. Owens, 13 Mich. App. 469, 477, 164 N.W.2d 712, 714-15 (1968) (finding that encouraging a 16-year-old girl to leave home was exactly the type of conduct that the statute intended to prohibit); Matthews v. State, 240 Miss. 189, 193, 126 So. 2d 245, 246 (1961) (holding that defendant's failure to provide proper medical treatment for her child "indicated at least a negligent and careless attitude toward the care and well-being of her child"); James v. State, 635 S.W.2d 653, 655 (Tex. Ct. App. 1982) (holding that the language of the statute was sufficiently clear to inform a reasonable person that encouraging and aiding a 14-year-old to dance nude in a public bar contributed to her delinquency).

83. *See, e.g.*, People v. Deibert, 117 Cal. App. 2d 410, 256 P.2d 355 (1953); McDonald v. Commonwealth, 331 S.W.2d 716 (Ky. Ct. App. 1960); State v. Cialkowski, 193 Neb. 372, 227 N.W.2d 406 (1975); *McKinley*, 53 N.M. at 106, 202 P.2d at 964; State v. Coterel, 97 Ohio App. 48, 123 N.E.2d 438 (1953), *appeal dismissed*, 162 Ohio St. 112, 120 N.E.2d 590 (1954); Birdsell v. State, 205 Tenn. 631, 330 S.W.2d 1 (1959); State v. Harris, 105 W. Va. 165, 141 S.E. 637 (1928).

84. *See, e.g.*, *Brockmueller*, 86 Ariz. at 84, 340 P.2d at 994 (stating that a long history of common-law interpretation renders the language of these statutes sufficiently clear and meaningful).

85. *See, e.g.*, State v. Friedlander, 250 P. 453, 455 (Wash. 1926) (noting that no one previously had challenged the 1907 statute as unconstitutionally vague and that the objection had no merit).

86. *See Randall*, 183 Pa. Super. at 611, 133 A.2d at 279-81. In State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), the court held that because the words used in the statute were ordinary words of common usage, the statute gave adequate warning that "any person who knowingly does any act to produce, promote or contribute to any condition of delinquency of a child is in violation of the statute." *Id.* at 509, 173 S.E.2d at 903.

After rejecting the defendant's void for vagueness challenge to Utah's contributing statute on grounds of waiver, the Utah Supreme Court stated in dicta in State v. Tritt, 23 Utah 2d 365, 463 P.2d 806 (1970), that the terms "delinquency" and "contributing to delinquency" in the statute have such widespread usage that the statute had a clear and understandable meaning. *Id.* at 369, 463 P.2d at 808-09. The court found that these terms denoted any actions that caused a child to engage in conduct which "is contrary to law or which is so contrary to the generally accepted standards of decency and morality" that the result of this conduct would harm substantially the child's "mental, moral, or physical well-being." *Id.* at 369, 463 P.2d at 809. *But see* State v. Val-

A few courts, however, have found contributing statutes void for vagueness.[87] Most recently, the Connecticut Supreme Court held that a statute prohibiting any "act likely to impair the health or morals" of a child[88] was unconstitutionally vague as applied to a particular set of facts.[89] The Louisiana Supreme Court similarly struck down a statute penalizing an adult for enticing, aiding, or permitting a minor to perform an "immoral act."[90] In Oregon, the state supreme court found that the statutory language, "any person who does any act which manifestly tends to cause any child to become [a delinquent]," was void because it contained no standards by which a jury could determine guilt.[91] Moreover, the Wyoming Supreme Court struck down a statute prohibiting an adult from causing, encouraging, aiding, or contributing to the endangerment of a minor's health, welfare, or morals.[92] The court stated that determining what conduct was being prohibited based on the terms of the statute would be an utter impossibility.[93]

Very few of the state courts that have upheld contributing statutes

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lery, 212 La. 1095, 1098-99, 34 So. 2d 329, 331 (1948) (rejecting a similar definition of "immoral").

87. *See, e.g.*, State v. Schriver, 207 Conn. 456, 561-62, 542 A.2d 686, 689 (1988); *Vallery*, 212 La. at 1099, 34 So. 2d at 331; State v. Hodges, 254 Or. 21, 27-28, 457 P.2d 491, 494 (1969); State v. Gallegos, 384 P.2d 967, 968-69 (Wyo. 1963).

88. CONN. GEN. STAT. ANN. § 53-21 (West 1985).

89. *Schriver*, 207 Conn. at 456, 542 A.2d at 686. In *Schriver* the State of Connecticut charged the defendant with engaging in activity that was "likely to impair the health or morals" of a child. The court found that the statute, on its face, failed "to articulate a definite standard for determining whether the conduct [of this defendant was] permitted or prohibited." *Id.* at 461, 542 A.2d at 689. The court then discussed whether prior judicial decisions had added a gloss that could save the statute. The court concluded, based on prior decisions, that "grahbing the waist of a fully clothed minor while uttering a sexually suggestive remark is not the type of lewd conduct that § 53-21 proscribes." *Id.* at 466, 542 A.2d at 691.

90. *Vallery*, 212 La. at 1095, 34 So. 2d at 329. The Louisiana court determined that the term "immoral" was too vague to establish any standards for enforcement. The court rejected a statutory construction that defined "immoral" as conduct that violated "well established and well accepted standards of the community" because that definition was equally uncertain. *Id.* at 1098-99, 34 So. 2d at 331.

After *Vallery* the Louisiana legislature amended the statute to read "sexually immoral act." State v. Fulmer, 250 La. 29, 31, 193 So. 2d 774, 774 (1967). The Louisiana Supreme Court upheld the new statute on the grounds that "sexually immoral" had an "accepted meaning not susceptible to misunderstanding." *Id.* at 33, 193 So. 2d at 775.

91. *Hodges*, 254 Or. at 21, 457 P.2d at 491. The *Hodges* court held that the statute was void for vagueness because it was an "instrument of potential abuse" contrary to due process and because it violated the Oregon Constitution's prohibition on the delegation of legislative power. *Id.* at 28, 457 P.2d at 494. While some courts have interpreted *Hodges* as based solely on the state constitution, the decision also is based on the due process clause of the federal constitution. *See Flinn*, 158 W. Va. at 128-29, 208 S.E.2d at 548. *But see* Comment, *Contributing Survives Constitutional Attack: Confusion or Certainty*, 78 W. VA. L. REV. 145, 149-50 (1975).

92. *Gallegos*, 384 P.2d at 967. Although the *Gallegos* court cited Supreme Court cases to support its discussion, the court ultimately based its holding on the Wyoming Constitution. *Id.* at 969.

93. *Id.* at 968.

have provided defensible reasoning for their decisions. The judicial decisions that avoided the constitutional question through statutory construction[94] effectively eliminated vagueness concerns. Courts frequently can construe statutes to avoid constitutional challenges.[95] On the other hand, state courts that have declared a potentially vague statute constitutional on grounds that no one had challenged it before[96] cannot defend this reasoning. In addition, a blanket assertion that protecting children is a vital state interest[97] circumvents the question of whether the statute is unconstitutionally vague.

Other state courts have yet to analyze their contributing statutes in light of the Supreme Court decisions on vagueness. While the egregiousness of a defendant's conduct[98] may be relevant to the court's determination, the court first must decide which constitutional test applies before evaluating the weight of the facts. The facts of a case are irrelevant under the *Thornhill* test because the court must judge the potential for vagueness problems on the face of the statute, while under the *National Dairy* approach, the court also must consider the statute in light of the facts.

The state court decisions holding that the language of the contributing statutes was not indefinite[99] require closer examination. In *Musser v. Utah*[100] the United States Supreme Court stated that a statute prohibiting a person from committing any act "injurious to public morals" was vulnerable to multiple subjective interpretations by judges and jurors depending on the fact finder's view of morality.[101] The Court did not strike down the statute, but hinted that unless the Utah Supreme Court construed the statute to supply more definite standards, the statute would be void for vagueness.[102] The *Musser* decision suggests that the contributing statutes phrased in terms of morality are facially vague.

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94. *See Brockmueller*, 86 Ariz. at 84, 340 P.2d at 994 (interpreting statute in light of a long history of common law); State v. Crary, 10 Ohio Op. 2d 36, 39 (Common Pleas Ct. 1959) (limiting statute's application to certain specified types of conduct).

95. *See* Fox v. Washington, 236 U.S. 273, 277 (1915); State v. McKinley, 53 N.M. 106, 111, 202 P.2d 964, 967 (1949); James v. State, 635 S.W.2d 653, 655 (Tex. Ct. App. 1982); State v. Flinn, 158 W. Va. 111, 130, 208 S.E.2d 538, 547 (1974).

96. *See supra* note 85 and accompanying text.

97. *See supra* noto 83 and accompanying text.

98. *See supra* note 82 and accompanying text.

99. *See supra* note 86 and accompanying text.

100. 333 U.S. 95 (1948).

101. *Id.* at 96-97; *see also Flinn*, 158 W. Va. at 130, 208 S.E.2d at 549 (stating that the phrases "immoral or vicious persons" and "injure or endanger the morals" are unconstitutionally vague).

102. *See Musser*, 333 U.S. at 96-98.

In *Commonwealth v. Randall*,[103] however, the Pennsylvania Superior Court upheld a statute that penalized adults whose actions corrupted or tended to corrupt the morals of a child. According to the court, the statute was not vague because the community easily could decide what particular conduct was forbidden based on commonly accepted notions of decency, morality, and common sense.[104] Although both *Randall* and *Musser* concerned interpretation of the term "morals," the Pennsylvania court apparently found the clear and obvious meaning that had eluded the Supreme Court. The Pennsylvania court distinguished *Musser* on the grounds that public morals was a much broader category than the morals of children.[105] Yet the court failed to explain how the term "morals" as applied to children could have an obvious, universal meaning when other courts have declared the term unconstitutionally vague.[106]

Other state courts have upheld contributing statutes because the terms "delinquency" and "contributing to delinquency" have clear meanings.[107] Because "delinquency" was not known at common law, however, all definitions of the terms are statutory.[108] Since nearly every state defines "delinquency" differently,[109] the term must lack a clear and obvious meaning. Moreover, when the courts considering these statutes attempted to define "delinquency," they based their definitions in terms of "morality."[110] As illustrated by the admonition of the Supreme Court in *Musser*, the term "morality" is unconstitutionally vague.[111]

C. *Application of the Void for Vagueness Doctrine to Contributing Statutes*

Under modern void for vagueness doctrine, a court first must decide whether to apply the strict *Thornhill* test or the less exacting *National Dairy* standard. If the contributing statute infringes on constitutionally protected conduct, the court should apply the stricter *Thornhill* test. Under either test, however, contributing statutes that

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103. 183 Pa. Super. 603, 133 A.2d 276 (Super. Ct. 1957), *cert. denied*, 355 U.S. 954 (1958).

104. *Randall*, 193 Pa. Super. at 611, 133 A.2d at 280.

105. *Id.* at 610, 133 A.2d at 278.

106. *See* State v. Vallery, 34 So. 2d 329 (La. 1948); *Flinn*, 158 W. Va. at 111, 208 S.E.2d at 538.

107. *See supra* note 86 and accompanying text.

108. *See* MODEL PENAL CODE § 230.4 comment, at 444-45 (1980).

109. For a sampling of the various definitions, see OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, A COMPARATIVE ANALYSIS OF JUVENILE CODES 23-24 (1980).

110. *See* cases cited *supra* note 86.

111. *See supra* notes 100-02 and accompanying text.

contain a specific intent element[112] pass constitutional muster. The contributing statutes pertinent to this Note[113] fall roughly into one or both of two categories, neither of which specify a requisite intent. These categories include: (1) statutes, like California's Parental Responsibility Law, that require parents to exercise reasonable or proper control over their children[114] and (2) statutes that require persons to prevent minors from engaging in certain conduct.[115]

The concerns that the Supreme Court articulated in *Papachristou*[116] are present in the context of contributing statutes that expressly require parents to exercise reasonable or proper control. Although parents have a limited duty in civil law to control the conduct of their children,[117] contributing statutes broaden parental liability because the statutes, unlike the civil law, may be used to impose criminal penalties on parents who neither know nor have reason to know the consequences of their conduct in relation to their children. Yet courts long have recognized parental discretion in child rearing as a fundamental precept in

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112. *See* ALA. CODE § 12-15-13 (1988) ("willfully"); ARK. STAT. ANN. § 5-27-205, 5-27-220 (1987) ("knowingly"); DEL. CODE ANN. tit. 11, § 1102 (1987) ("knowingly" or "intentionally"); GA. CODE ANN. § 16-12-1 (1988) ("knowingly and willfully"); HAW. REV. STAT. § 709-904 (1988) ("knowingly"); ILL. REV. STAT. ch. 23, para. 2361a (1987) ("knowingly or willfully"); IND. CODE ANN. § 35-46-1-8 (Burns 1985) ("knowingly or intentionally"); IOWA CODE ANN. § 233.1 (West 1985 & Supp. 1989) ("knowingly"); LA. REV. STAT. ANN. § 92 (West 1986) ("intentional"); ME. REV. STAT. ANN. tit. 17-A, § 554 (1983 & Supp. 1989) ("knowingly"); MD. CTS. & JUD. PROC. CODE ANN. § 3-831 (1989) ("willfully"); MISS. CODE ANN. § 97-5-39 (Supp. 1989) ("willfully"); N.H. REV. STAT. ANN. § 169-B:41 (Supp. 1988) ("knowingly"); N.C. GEN. STAT. § 14-316.1 (1986) ("knowingly or willfully"); N.D. CENT. CODE § 14-10-06 (Supp. 1989) ("willfully"); OR. REV. STAT. § 163.575 (1985) ("knowingly"); PA. CONS. STAT. ANN. § 4304 (Purdon 1989) ("knowingly"); S.C. CODE ANN. § 16-17-490 (Law. Co-op. 1985) ("knowingly and willfully"); VA. CODE ANN. § 18.2-371 (1989) ("willfully"); WASH. REV. CODE ANN. § 9A.42.030 (1988) ("recklessly").

113. This Note focuses solely on the statutory language. If the state judiciary has provided a limiting interpretation of these statutes, the statutes might not be void for vagueness. *See* Musser v. Utah, 333 U.S. 95 (1948) (remanding case to state supreme court for authoritative interpretation of statute in vagueness case).

114. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3612 (1989); CAL. PENAL CODE § 272 (West Supp. 1990); KY. REV. STAT. ANN. § 530.060 (Baldwin 1985); NEV. REV. STAT. ANN. § 201.090 (Michie 1986); N.Y. PENAL LAW § 260.10 (McKinney 1989); S.D. CODIFIED LAWS ANN. § 26-9-1 (1989).

115. The statutes in this category hold parents liable for behavior that tends to cause their children to engage in certain conduct such as growing up to lead an "idle, dissolute or immoral life," ARIZ. REV. STAT. ANN. § 13-3612 (1989), habitually associating with "vicious, immoral, or criminal persons," R.I. GEN. LAWS § 11-9-4 (1981), or acting in a way likely to "injure or endanger the health or morals of himself or others," OHIO REV. CODE ANN. § 2151.022 (Anderson 1987). *See also* NEV. REV. STAT. ANN. § 201.090 (Michie 1986); VT. STAT. ANN. tit. 13, § 1301 (1974).

116. *See supra* notes 67-71 and accompanying text.

117. Under civil law a parent has a "duty to exercise reasonable care so to control his minor child" to prevent the child from intentionally or recklessly harming others if the parent "knows or has reason to know that he has the ability to control his child, and . . . knows or should know of the necessity and opportunity for exercising such control." RESTATEMENT (SECOND) OF TORTS § 316 (1977).

our society,[118] premising the fundamental character of parental rights on the idea that the democratic system mandates individualized and independent parental decisions free of official interference.[119] The freedom of parents to choose how to raise their children is even more basic to our society than the freedom to wander and to enjoy a variety of lifestyles that was protected in *Papachristou.* By requiring parents to exercise reasonable or proper control over their children, contributing statutes in the first category attempt to regulate sensitive constitutional rights without any concrete guidelines to limit the subjective discretion of prosecutors, policemen, judges, and jurors. Thus, based on the reasoning in *Papachristou,* a court should apply the stricter *Thornhill* test to this category and judge the statutes facially.[120]

A statute requiring parents to exercise reasonable or proper control over their children may not appear unconstitutionally vague because the Constitution does not require complete specificity.[121] The Court, however, usually allows general language in a statute only if greater specificity is either impossible or impractical.[122] In the parental control context, the legislature could identify what type of parental behavior would be penalized.[123] In addition, even though courts and legislatures typically define legal standards in terms of reasonableness,[124] the risk of arbitrary law enforcement in the application of this standard is substantial when regulating parental control.[125] Without a concrete definition of what constitutes "reasonable" or "proper" parental control, prosecutors, judges, and jurors are free to make hindsight judgments about parental conduct based on their personal views of "reasonable" or "proper" behavior. No consensus exists concerning the proper or reasonable way to raise children, and the judiciary has no special competence in this area.[126] Unless prior judicial decisions have provided a

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118. *See infra* subpart IV(B)(1).

119. *See infra* subpart IV(B)(2).

120. *See* State v. Hodges, 254 Or. 21, 26, 457 P.2d 491, 493 (1969) (stating that the "*Thornhill* rule is not invoked . . . unless the terms of the questioned statute are so broad that their application in a normal, nondiscriminatory way would violate the individual's constitutional rights").

121. United States v. Petrillo, 332 U.S. 1, 7-8 (1947).

122. Kolender v. Lawson, 461 U.S. 352, 361 (1983); *see Petrillo,* 332 U.S. at 7-8.

123. For example, the legislature could add a specific intent requirement and specify what type of behavior parents should discourage. While states regularly set minimum standards for the care, supervision, and protection of children, these statutes are much more specific than the contributing statutes. *See* S. KATZ, *supra* note 36, at 10-12.

124. *See* Nash v. United States, 229 U.S. 373, 377 (1913) (stating that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree").

125. *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67, 93 (1960).

126. Bellotti v. Baird, 443 U.S. 622, 638 (1979) (plurality opinion). Moreover, the Court

concrete definition of proper or reasonable conduct, these statutes are unconstitutionally vague.

One commentator has found that the Supreme Court has used the vagueness doctrine to create an insulating zone of protection around certain freedoms in the Bill of Rights.[127] Once a legislature attempts to regulate a constitutionally protected area, the Supreme Court's response will depend on a variety of factors including the nature of the threatened individual freedom and the potential deterrent effect of the risks of arbitrary enforcement.[128] Parental discretion in child rearing is an important right in our society, and this intrusion into family life could be extremely detrimental to the family unit.[129] These factors further suggest that contributing statutes requiring parents to exercise reasonable or proper control over their children are unconstitutionally vague.

The second category of contributing statutes requires persons to prevent minors from engaging in certain conduct. Although the statutes in this category may contain vague terms, they do not implicate parental discretion in child rearing expressly. These statutes should be judged under the *National Dairy* test because they contain only the potential for use against parents. If used against parents, these statutes would fail even the looser test of *National Dairy* because they contain morality language that is unconstitutionally vague.

In Rhode Island, for example, a parent could be held criminally liable for "permit[ting] or suffer[ing]" a child to "habitually associate with vicious, immoral, or criminal persons, or to grow up in ignorance, idleness or crime."[130] On its face, the Rhode Island statute contains inherently subjective criteria for punishment. While the term "permit" does have some element of specific intent, parents may disagree over whether particular persons are immoral. Other statutes in this category contain similar questionable language.[131] As illustrated by the Supreme Court in *Musser v. Utah*,[132] the term "morality" is unconstitutionally vague.

Even though the provisions concerning morality may be vague facially, these statutes also must be judged in light of the particular

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stated that one central premise has emerged in this area: parents must have a substantial measure of authority over their children. *Id.*; *see also* L.A. Times, June 21, 1989, at 7, col. 5 (home ed.) (emphasizing the lack of definition in California's Parental Respousibility Law).

127. *See* Note, *supra* note 125, at 75.

128. *Id.* at 94.

129. *See infra* notes 228-36 and accompanying text.

130. R.I. GEN. LAWS § 11-9-4 (1981).

131. Most of the statutes in this second category prohibit some form of "immoral" conduct. *See supra* note 115.

132. 333 U.S. 95 (1948); *see also supra* notes 100-02 and accompanying text.

conduct at issue. Under the *National Dairy* test, if the behavior at issue in a particular case is so extreme that everyone generally could agree that it is immoral, a court probably would uphold the statute despite its facial vagueness. In addition, a court always could turn to prior judicial decisions to see if precedent had added a judicial gloss that would limit the application of the statute. A court also might declare statutes in this second category unconstitutionally vague if prosecutors, judges, or jurors used their own subjective views of correct parental behavior to penalize nonconforming parents.

IV. Violation of Right to Privacy in Family Matters

A. *Substantive Due Process Methodology*

While defendants have challenged contributing statutes as unconstitutionally vague rather than as violations of a constitutional right to privacy in family matters,[133] this latter constitutional objection may have a greater chance of success. The Supreme Court repeatedly has held that the state and federal governments cannot deprive citizens of life, liberty, or property without due process of law.[134] The due process clause provides both procedural[135] and substantive[136] protections. While in most cases a court will uphold a statute unless it lacks any rational basis,[137] if the statute infringes on a fundamental right, the governmental interest behind the statute must be compelling and the means must be closely related to the end.[138] If parental rights are not fundamental, a court will uphold the constitutionality of contributing statutes because under the rational basis test, a court will approve almost any reason for the statute.[139] If parents have a fundamental right to privacy in child rearing, however, a court will subject the contributing statutes to strict scrutiny.

Much of the litigation related to substantive due process has con-

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133. Defendants probably have not raised the family privacy defense because most of the defendants convicted for violating contributing statutes were either strangers to the minor or relatives accused of sexually molesting the minor. *See* Model Penal Code § 230.4 comment 1, at 447 (1980).

134. U.S. Const. amends. V, XIV, § 1; *see, e.g.*, Quilloin v. Walcott, 434 U.S. 246 (1978); Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923).

135. *See* Stanley v. Illinois, 405 U.S. 645 (1972). This Note does not examine procedural due process protections.

136. *See* Roe v. Wade, 410 U.S. 113 (1973); Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

137. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

138. Once a court finds a fundamental right the statute must pass strict scrutiny. *See Roe*, 410 U.S. at 113.

139. *See Williamson*, 348 U.S. at 483, 488.

cerned the definition of "fundamental right."[140] For a forty year period, beginning with *Lochner v. New York*,[141] the Supreme Court substituted its views of social and economic values for those of the state and federal legislatures under the guise of substantive due process.[142] Since the end of the *Lochner* era the Court has been wary of imposing its own value judgments in place of the legislative will;[143] however, the Court consistently has continued to look beyond the text of the Constitution to determine which substantive rights the due process clause protects.[144] According to the Court, fundamental rights are those rights that are "implicit in the concept of ordered liberty,"[145] or "deeply rooted in this Nation's history and tradition."[146] Recently, the Court has stated that the due process clause only protects those interests that society traditionally has protected.[147]

B. Parental Rights As Fundamental Rights

1. Supreme Court Cases

The Supreme Court first addressed family rights in *Meyer v. Nebraska*[148] and *Pierce v. Society of Sisters*.[149] Both *Meyer* and *Pierce* concerned state statutes that interfered with parents' ability to choose how to educate their children.[150] In *Meyer* the Court stated that al-

140. *See, e.g.*, Michael H. v. Gerald D., 109 S. Ct. 2333 (1989); *Roe*, 410 U.S. at 113; *Griswold*, 381 U.S. at 479. *See generally Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1168-77 (1980) [hereinafter *Developments*] (discussing other aspects of substantive due process); McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 980-84 (1988) (briefly outlining the controversies surrounding the Supreme Court's use of substantive due process).

141. 198 U.S. 45 (1905).

142. *Developments*, *supra* note 140, at 1166-67.

143. "The Judiciary . . . is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or . . . the design of the Constitution." Moore v. City of E. Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting).

144. *See, e.g., Roe*, 410 U.S. at 113 (concerning childbearing); Loving v. Virginia, 388 U.S. 1 (1967) (concerning marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (concerning sterilization).

145. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

146. *Moore*, 431 U.S. at 503 (plurality opinion); *see also Griswold*, 381 U.S. at 479 (various Justices attempted to define fundamental rights).

147. *Michael H.*, 109 S. Ct. at 2333. While the traditional rationale was not followed in older cases such as *Roe*, 410 U.S. at 113, tradition does seem to be an important consideration to the current Supreme Court. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that the right to engage in homosexual sodomy traditionally has not been protected in our society).

148. 262 U.S. 390 (1923).

149. 268 U.S. 510 (1925).

150. In *Meyer* a Nebraska statute prohibited any person from teaching another language or a subject in any language other than English to a child who had not passed the eighth grade. 262 U.S. at 397. In *Pierce* an Oregon statute required parents to send their children between the ages of eight and sixteen to public schools. 268 U.S. at 530-31.

though it could not define the liberty protected by the due process clause exactly, that liberty undoubtedly included the right to marry and raise children.[151] Likewise the Court held in *Pierce* that the due process clause prevented the state from requiring all children to attend public schools because parents have the right and the duty to raise their children individually.[152]

While the Court purportedly applied strict scrutiny in these cases, the statutes ultimately failed because the legislation did not have a reasonable relationship to a permissible purpose.[153] Thus, these statutes arguably would have failed the looser rational basis test as well as the strict scrutiny test. *Meyer* and *Pierce* may not stand directly for the proposition that parental rights are fundamental[154] because of the narrowness of the holdings and the timing of the decisions.[155]

The Court reaffirmed these early family rights cases in *Wisconsin v. Yoder*.[156] The *Yoder* Court applied strict scrutiny to a state statute requiring children to attend school until the age of sixteen because the statute impermissibly infringed on the fundamental right of parents to raise their children.[157] In that case Amish parents had refused to send their children to school after the eighth grade because of the parents' religious beliefs.[158] Although the Court found no flaw in the statutory purpose, the Court decided that application of the statute in this case would not further the statutory purpose.[159] The Court clearly emphasized the importance of the parental right to raise children free from state interference,[160] yet the Court also focused on the freedom of religion claim.[161] Therefore, some commentators believe that *Yoder* may

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151. *Meyer*, 262 U.S. at 399.

152. *Pierce*, 268 U.S. at 534-35.

153. *Id.* at 534-35 (stating that "the Act . . . unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children under their control"); *Meyer*, 262 U.S. at 403 (holding that "the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State").

154. *See* McCarthy, *supra* note 140, at 986-89 (suggesting that *Meyer* and *Pierce* are of limited significance in the family rights area).

155. Because the Court decided both *Meyer* and *Pierce* during the *Lochner* era, the Court's expansive view of substantive due process during that time could have tainted the Court's reasoning. *See id.* at 993; Rose, *Compulsory Education and Parent Rights: A Judicial Framework of Analysis*, 30 B.C.L. REV. 861, 876-79 (1989).

156. 406 U.S. 205 (1972).

157. *Id.* at 214.

158. *Id.* at 208-09.

159. *Id.* at 234-36.

160. *Id.* at 213-14, 232-34.

161. The *Yoder* Court stated that "when the interests of parenthood are combined with a free exercise claim . . . more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity" of the statute. *Id.* at 233.

have limited significance as a family rights case.[162]

The Court extended the reasoning of *Meyer*, *Pierce*, and *Yoder* in *Moore v. City of East Cleveland*.[163] In *Moore* a plurality of the Court applied strict scrutiny to a housing ordinance that limited the occupancy of a home to certain defined members of a family.[164] Although the ordinance had legitimate goals, the means used did not achieve those goals adequately.[165] Justice Lewis Powell, writing for the plurality, acknowledged that *Meyer*, *Pierce*, and *Yoder* had not dealt expressly with the problem raised in *Moore*,[166] but he explained that the due process clause protects the family rights implicated in those three cases because the rights are rooted in the Nation's traditions and history.[167] Justice Powell believed that tradition and history also compelled the Court to strike down the housing ordinance.[168] A plurality of the Court held that the due process clause prevented the state from forcing its citizens to live in particular family patterns.[169]

Although the Court has considered directly the parental right to raise children only in rare cases, it has continued to recognize the fundamental nature of parental rights in a variety of other situations. In these cases the Court has asserted broadly that precedent plainly establishes that parents' interest in raising their children deserves deference unless the state can show a powerful countervailing interest.[170] The Court has discussed the fundamental nature of parental rights in the context of state proceedings to terminate parental rights,[171] in cases concerning the rights of unwed fathers[172] and foster families,[173] and in

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162. *See* McCarthy, *supra* note 140, at 990-91; Rose, *supra* note 155, at 880.

163. 431 U.S. 494 (1977) (plurality decision).

164. *Id.* at 496 & nn.1-2 (plurality opinion).

165. *Id.* at 499-500 (plurality opinion).

166. *Id.* at 500-01 (plurality opinion).

167. *Id.* at 503-04 (plurality opinion).

168. *Id.* at 500-01, 506 (plurality opinion). Justice Powell stated that "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the . . . Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." *Id.* at 501 (plurality opinion).

169. *Id.* at 506 (plurality opinion). Justice Powell, analogizing the Cleveland ordinance to the statute in *Pierce*, which sought to "standardize" children hy requiring them to attend public schools, stated that "[b]y the same token the Constitution prevents East Cleveland from standardizing its children . . . by forcing all to live in certain narrowly defined family patterns." *Id.*

170. *See, e.g.*, Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981) (stating that previous cases have "made plain beyond the need for multiple citation" that the parental right deserves deference "absent a powerful countervailing interest").

171. *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982) (acknowledging "this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest"); *Lassiter*, 452 U.S. at 27.

172. *See, e.g.*, Michael H. v. Gerald D., 109 S. Ct. 2333, 2342 (1989) (noting the "historic respect" for family relationships); Lehr v. Robertson, 463 U.S. 248, 258 (1983) (stating that "the relationship of love and duty in a recognized family unit is an interest in liberty entitled to consti-

privacy cases concerning other family matters.[174] The Court also has upheld parents' authority over their children in light of challenges to that authority by the child.[175] Several lower federal courts explicitly have recognized a fundamental right to family integrity based on these Supreme Court cases.[176]

2. Justification for Protecting Parental Decisions

Even though the Court often speaks of the fundamental nature of parental rights, its opinions rarely offer a justification for this protection. An understanding of why the family has been protected historically may bolster the argument that the family rights at issue in the contributing statutes deserve constitutional protection. In a recent case, the Court explained that the fundamental character of family rights stems from the historic respect for the sanctity of familial relationships.[177]

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tutional protection"); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (stating that the Court has "recognized on numerous occasions that the relationship hetween parent and child is constitutionally protected"); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

173. *See, e.g.*, Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 842-47 (1977).

174. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973); Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

175. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 626 (1979) (plurality opinion); Parham v. J.R., 442 U.S. 584, 602-04 (1979).

176. *See, e.g.*, Doe v. Staples, 706 F.2d 985 (6th Cir.) (challenging the summary removal policies and practices of the state welfare department), *cert. denied*, 465 U.S. 1033 (1983); Lehman v. Lycoming County Children's Servs. Agency, 648 F.2d 135 (3d Cir. 1981), *aff'd*, 458 U.S. 502 (1982) (challenging a state adoption act); Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977) (concerning an action for damages stemming from the conduct of the city child welfare bureau); Doe v. Connecticut Dep't of Children & Youth Servs., 712 F. Supp. 277 (D. Conn. 1989) (discussing an action for damages caused by state child welfare officials); McCollester v. City of Keene, 586 F. Supp. 1381 (D.N.H. 1984) (attacking the "facial validity of juvenile curfew ordinance"); Sylvander v. New England Home for Little Wanderers, 444 F. Supp. 393 (D. Mass.), *aff'd*, 584 F.2d 1103 (1st Cir. 1978) (challenging the constitutionality of a parental rights termination statute); Roe v. Connecticut, 417 F. Supp. 769 (M.D. Ala. 1976) (attacking a state child neglect law); Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd in part*, 545 F.2d 1137 (8th Cir. 1976) (challenging a state parental rights termination statute); *see also Developments*, *supra* note 140, at 1237-38 (discussing the effect of more widespread judicial recognition of the fundamental rights of parents).

177. *See Michael H.*, 109 S. Ct. at 2341-46. Although only two members of the Court fully endorsed the plurality opinion's view of the proper way to weigh tradition in the substantive due process analysis, the Court unanimously agreed that family rights traditionally have warranted protection. *Id.*; *see* Bowers v. Hardwick, 478 U.S. 186 (1986); *Moore*, 431 U.S. at 494 (plurality opinion).

One commentator has suggested that the Supreme Court always uses tradition as a basis for recognizing fundamental rights for families. *See Developments*, *supra* note 140, at 1177. The Court first attempts to determine whether the interest at issue has been regarded historically as within a sphere in which the state's interference is disfavored. *Id.* at 1178. Even if the interest has been protected historically, the interest also must have contemporary validity. *Id.* at 1179. After the Court decides which characteristics of the interest are of constitutional importance, it must define

A plurality of the Court discussed its deference to parental rights more comprehensively in *Bellotti v. Baird*,[178] a case challenging the constitutionality of a statute requiring parental consent before a minor could obtain an abortion.[179] The *Bellotti* Court explained that the state should defer to parents in child raising matters because of the important role parents play in the child's development.[180] This role is essential to the creation of socially responsible citizens and largely beyond the competence of a large impersonal institution.[181] By entrusting child care to parents, the state fosters social pluralism and diversity, important ideals in a society that is committed to individual liberties.[182] Therefore, according to the *Bellotti* Court, parental authority is a basic presupposition of a free society.[183]

Commentators have agreed with the *Bellotti* Court's reasons for protecting parental judgments and have advanced additional justifications. One commentator has argued that by insulating the rights of parents to control the upbringing of their children, the state serves the interests of the parents, the child, and society.[184] Parents obviously have an interest in raising their children free from interference.[185] This parental control usually serves the interest of the child as well because parents can fulfill a child's needs in ways that an institution cannot.[186] Finally, parental control may help to preserve an individualistic society by precluding state attempts at standardization.[187] Parental rights may deserve different degrees of protection depending on which of the identified interests are present.[188]

Other commentators rationalize the protection given parental decisions through generalized analogies to the Bill of Rights.[189] Through these rights, the Constitution makes a statement about the form of government and society in the United States. The Constitution protects certain individual rights in part to guarantee the freedom of citizens to make certain personal decisions unfettered by conventional norms.[190] Under this theory, parental autonomy in child rearing decisions flows

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the scope of that interest based on those characteristics. *Id.* at 1180.

178. 443 U.S. at 622.
179. *Id.* at 624.
180. *Id.* at 637-38.
181. *Id.* at 638.
182. *Id.*
183. *Id.*
184. *See Developments, supra* note 140, at 1353.
185. *Id.*
186. *Id.* at 1214, 1353-54.
187. *Id.* at 1215-16, 1354.
188. *Id.* at 1354.
189. McCarthy, *supra* note 140, at 1026-28.
190. *Id.* at 1026.

directly from the individual right to decide to have children.[191]

C. *The State's Compelling Interest*

Even assuming that the parental right to raise children is fundamental,[192] the Constitution does not preclude the state from limiting that right. The state can interfere with a fundamental right only if the state has a compelling interest and the means chosen are closely related to that interest.[193] The state's compelling interest for contributing statutes is the protection of society from the wrongful acts of children, not the protection of children from the wrongful acts of parents.

The state's power to intervene in the family setting stems from two sources: the police power and the *parens patriae* power.[194] Under either of these powers, the state has a limited right to intervene in family affairs if the family situation evidences a threat to either the community or the welfare of the child. The state uses its police power to protect and promote all aspects of public welfare. Clearly, the state has the power to prevent and punish acts that directly threaten the existence or stability of the state or the personal safety or security of its citizens. Thus, California can defend its Parental Responsibility Law, and other states their contributing statutes, based on the state's need to protect society from the wrongful acts of children.[195] Under its *parens patriae* power, the state can protect and promote the welfare of only those individuals, such as minors, who lack the capacity to act in their own best interests.[196]

The Supreme Court has ruled that the states may circumscribe parental discretion.[197] In *Prince v. Massachusetts*,[198] for example, the Court upheld the conviction of a guardian for allowing her wards to sell

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191. *Id.* at 1027. A joint commission of the Institute of Judicial Administration (IJA) and the American Bar Association (ABA) also has argued that state intervention in family decisions should be limited because of our society's commitment to individual freedom and diversity. STANDARDS RELATING TO ABUSE AND NEGLECT Standard 1.1, commentary at 49-50 (IJA-ABA Joint Comm'n on Juvenile Justice Standards 1981) [hereinafter IJA-ABA STANDARDS]. Extensive intervention carries the risk of intervening to "save" the children of poor or minority parents. *Id.* at 49.

192. *See* Rose, *supra* note 155, at 874-83 (discussing the fundamental nature of parents' rights to educate their children).

193. *See supra* notes 134-38 and accompanying text.

194. *Developments, supra* note 140, at 1198-1202.

195. For a discussion of the Parental Responsibility Law, see *supra* notes 1-7 and accompanying text.

196. *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

197. *See* Parham v. J.R., 442 U.S. 584 (1979). The *Parham* Court noted that a state constitutionally can control parental discretion in situations in which the physical or mental health of a child is jeopardized. *Id.* at 603.

198. 321 U.S. 158 (1944).

religious leaflets in violation of child labor laws.[199] The defendant claimed that the conviction violated both her freedom of religion[200] and her parental rights.[201] The Court balanced the substantial private interests of parents against the societal interest in protecting the welfare of children.[202] The Court recognized that under both *Meyer* and *Pierce* a private sphere of family life exists in which the state cannot interfere.[203] Nevertheless, the Court upheld the power of the state to limit the rights and duties of parents under its *parens patriae* power when the child's welfare was at stake[204] because of the state's independent interest in the welfare of children within its borders.[205] Although the Court upheld the statute, it cautioned that the holding was limited to the facts of the case.[206]

In later cases the Court has explained that parental rights are accompanied by duties.[207] The right of parents to educate their children that was recognized in *Meyer* and *Pierce* is coupled with the duty to prepare the child for a responsible place in society.[208] Indeed, the constitutional protection afforded family decisions is based on the presumption that parents will act in the best interests of their children.[209] When parents act contrary to that presumption, the state may intervene to protect the child.[210] In addition, Justice Byron White has argued that although parents have a fundamental right to make decisions about child rearing, some activities by parents, such as assaults on their children, are intrinsically outside the scope of the parents' fundamental rights.[211]

While the Court has recognized the power of the state to interfere with parental discretion, usually the state's compelling interest in the welfare of the child justifies the interference.[212] The purpose of California's Parental Responsibility Law and similar statutes, however, is to

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199. *Id.*
200. *Id.* at 164 (citing U.S. CONST. amend. I).
201. *Id.* (citing U.S. CONST. amend XIV).
202. *Id.* at 165.
203. *Id.* at 166.
204. *Id.* at 166-67.
205. *Id.* at 168-69; *see also* Ginsberg v. New York, 390 U.S. 629, 640 (1968).
206. *Prince*, 321 U.S. at 171.
207. Lehr v. Robertson, 463 U.S. 248 (1983).
208. *Id.* at 257-58.
209. Parham v. J.R., 442 U.S. 584, 602-03 (1979).
210. *Id.*
211. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 792 n.2 (1986) (White, J., dissenting); *see also* McCarthy, *supra* note 140, at 1027-28 (discussing Justice White's view).
212. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982); Lassiter v. Department of Social Servs., 452 U.S. 18 (1981); *Parham*, 442 U.S. at 584.

protect society from the wrongful acts of the child, not to protect the child.[213] Thus, these statutes are not justified based on the child's welfare. Protecting society from the wrongful acts of children is the only legitimate purpose for these statutes.

D. The Statutory Method Does Not Closely Fit the Goal

The Supreme Court has allowed the state to restrict parental discretion when necessary to protect the child's welfare only because the means closely fit that end.[214] Yet the state's only compelling interest in contributing statutes that regulate parental conduct is protecting society from juvenile crime. Thus, the question for a court is whether policing parental behavior is closely related to that goal.

Commentators long have argued that criminalizing parental behavior does not reduce juvenile crime.[215] While state officials readily have assumed that these statutes actually reduce delinquency rates, the only empirical study in this area revealed that these sanctions simply do not achieve the desired results.[216] In 1948 Judge Paul Alexander analyzed the effects of punishing parents under Toledo, Ohio's contributing statute over a period from 1937 to 1946.[217] When parents prosecuted under the statute received a suspended sentence, the conduct of those particular parents improved.[218] Despite massive publicity of ninety-one cases that resulted in actual punishment of the parents, however, the number of parents arrested increased steadily over the ten-year period.[219] Judge Alexander found no evidence that punishing parents had any effect on curbing juvenile delinquency.[220] Although delinquency rates remained

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213. See *supra* notes 1-7 and accompanying text for a discussion of the purposes behind the California statute.

214. Even in this area, the state cannot interfere freely in family life. The Constitution does not permit the state to disrupt families in general simply because some parents abuse or neglect their children. *Parham*, 442 U.S. at 603. The *Parham* Court stated that the "notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Id.* The state must show that intervention in a particular case will further its goal of protecting children. *See Santosky*, 455 U.S. at 745. Parents do not lose their fundamental rights because they have not been model parents. *Id.* at 753. The Court has recognized that parents who are threatened with state intervention need even more constitutional protection than model parents do. *Id.*

215. *See, e.g.*, S. RUBIN, *supra* note 35, at 21-31; Ludwig, *Delinquent Parents and the Criminal Law*, 5 VAND. L. REV. 719 (1952); Note, *Criminal Liability of Parents for Failure to Control Their Children*, 6 VAL. U.L. REV. 332 (1972).

216. Alexander, *supra* note 38, at 23.

217. *Id.* Judge Alexander reviewed 1027 contributing cases, 500 of which involved parents as defendants.

218. *Id.* at 29.

219. *Id.* at 28-29.

220. *Id.*; *see also* Gladstone, *supra* note 35, at 174-88 (analyzing the failure of New York's adult delinquency statute).

steady during the first three years of the study, the rates increased sharply in 1943 and subsequently declined.[221] Regardless of this empirical evidence, state officials continue to believe that these statutes can reduce delinquency. This belief, however, faces broad opposition.

Contributing statutes do not reduce juvenile crime effectively because the statutes address only one aspect of the problem of juvenile delinquency, lack of parental control.[222] Although inadequate and irresponsible parenting is a factor behind delinquent behavior, other factors, such as social class, educational level, urbanization, living conditions, and social instability, are equally important.[223] Dr. James Austin, director of research at the National Council on Crime and Delinquency, testified before a congressional subcommittee that experts have linked juvenile delinquency to combinations of factors such as drug abuse, school failure, inadequate family relationships, antisocial values, child abuse, and association with delinquent peers.[224] The most important predictive factor of delinquent behavior is association with a delinquent peer group.[225] Because parental behavior may be one of many influences in the life of a delinquent child, determining whether the parental behavior at issue in a particular case actually caused the delinquency would be almost impossible.[226] Some states have avoided this causation problem by also criminalizing parental behavior that

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221. Alexander, *supra* note 38, at 23.

222. *See supra* notes 32-34 and accompanying text; *see also* Nazario, *What Do We Know About Delinquency?*, 12 UPDATE ON LAW-RELATED EDUC. 8, 8 (1988) (stating that experts cannot agree on a single cause of delinquency).

223. *See* Note, *supra* note 215, at 334; *see also* Nazario, *supra* note 222, at 8.

224. *Youth and the Justice System: Can We Intervene Earlier? Hearing Before the House Select Comm. on Children, Youth, and Families*, 98th Cong., 2d Sess. 89 (1984) (statement of James Austin, Director of Research, National Council on Crime and Delinquency). Mr. Austin reported several trends among juveniles: (1) rates of delinquency for serious juvenile offenders generally decrease over time; (2) rates of emotional problems for youth generally decrease over time; (3) rates of drug abuse generally increase over time; (4) serious delinquents have high rates of multiple drug use, emotional problems, school problems, and family problems; (5) serious delinquents are principally male and are associated strongly with delinquent peer groups; (6) association with delinquent peer groups is the most important predictor of serious delinquent behavior. *Id.* at 92-93.

225. *Id.*

226. *See* Stouthamer-Loeber & Loeber, *The Use of Prediction Data in Understanding Delinquency*, 6 BEHAVIORAL SCI. & L. 333 (1988). The authors surveyed the research done in the area of prediction of juvenile delinquency. They concluded that many factors, including early childhood behavior, family situation, socioeconomic status, and peer groups, may predict later delinquent behavior, but cautioned against excessive reliance on any particular factor. *Id.* at 345. The authors believe that the "processes that lead to delinquency are still poorly understood." *Id.* The authors stated that "the fact that a particular factor predicts delinquency does not mean necessarily that such a factor is causal to delinquency." *Id.* Because many predictive factors are interrelated, a particular factor may predict delinquency "solely by virtue of its association with another, more causally related factor." *Id.*; *see also* Note, *supra* note 215, at 339-44 (discussing the legal requirements for criminal omissions and the causation problems associated with contributing statutes).

tends to cause delinquency regardless of whether the child actually becomes delinquent.[227]

Not only does punishing parents not reduce delinquency, but application of contributing statutes adversely affects the family unit.[228] In general, the fines under these statutes are too small to effect a change in the behavior of the parents,[229] but often reduce the already minimal resources available for parents to provide for the family.[230] Prison sentences can be even more detrimental for the entire family.[231] Removing the parent from the home may eliminate the one stable factor in the delinquent child's life and also may leave other children without any parental care.[232] Many commentators believe that these parents need society's help, not its punishment.[233] Delinquent children are frequently from lower economic levels.[234] Parents of these children often are unable to meet the mental, emotional, and social needs of their children because of a lack of resources, not a lack of will.[235] Punishing parents only exacerbates the problems that cause delinquency. Criminal sanc-

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227. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3614 (1989); GA. CODE ANN. § 16-12-1 (1988).

228. *See* Hafen, *The Family As an Entity*, 22 U.C. DAVIS L. REV. 865, 909-15 (1989).

229. Most fines for violating contributing statutes are approximately $1000. *See, e.g.*, N.Y. PENAL LAW § 80.05 (McKinney 1987); S.D. CODIFIED LAWS ANN. § 22-6-2 (Supp. 1990). The maximum statutory fines, however, vary from $100 to $10,000. *See, e.g.*, CAL. PENAL CODE § 272 (West Supp. 1990) (imposing maximum $2500 fine); N.M. STAT. ANN. § 31-18-15 (Supp. 1990) (imposing maximum $5000 fine); VT. STAT. ANN. tit. 13, § 1301 (1974) (imposing maximum $100 fine); WIS. STAT. ANN. § 939.50 (West 1982) (imposing maximum $10,000 fine).

230. *See* Ludwig, *supra* noto 215, at 733. *See generally* REPORT ON CHILDREN AND FAMILIES, *supra* note 33, at 1-14 (outlining the economic problems in today's families).

231. In the majority of states, violation of the contributing statute could result in one year in jail. *See, e.g.*, ARK. STAT. ANN. §§ 5-4-401(b)(1), 5-27-205 (1987); HAW. REV. STAT. § 706-663 (1988). In the other states, prison terms could range from 30 days to 18 months to 10 years. *See, e.g.*, CONN. GEN. STAT. ANN. § 53-21 (West 1985) (imposing 10 year term); IOWA CODE ANN. § 903.1 (West Supp. 1990) (imposing 30 day term); N.M. STAT. ANN. § 31-18-15 (Supp. 1990) (imposing 18 month term).

232. *See* IJA-ABA STANDARDS, *supra* note 191, Standard 9.1 commentary (arguing that imprisonment of a parent is against the child's psychological interest).

233. *See* S. RUBIN, *supra* note 35, at 24-25; Ludwig, *supra* note 215, at 731-36; *see also* Ripston, *No Parent Is Safe from Headline Justice*, L.A. Times, June 21, 1989, at 7, col. 5.

234. *See Children and Families*, *supra* note 36, at 64.

235. *See supra* note 33 and accompanying text; *see also* Ripston, *supra* noto 233, at 7. A famous New York case illustrates this proposition. *See* Humann v. Rivera, 272 A.D. 352, 71 N.Y.S.2d 321 (1947). A mother was arrested for being "indifferent and irresponsible" and for "failing in her responsibility" as a parent after her 14-year-old son shot three strangers with a stolen gun. The trial judge sentenced the mother to one year in jail under New York's contributing statute. Public interest groups became involved in the case on appeal and discovered that the mother had been mistreated by her own parents, abandoned by her husband and forced to raise two children alone, and was afflicted by mental and emotional problems. The appellate court reversed the conviction because of the admission of hearsay evidence and ordered a new trial if the authorities deemed necessary. For a discussion of this New York case, see S. RUBIN, *supra* note 35, at 24, and Ludwig, *supra* note 215, at 719-20. Because this mother did not encourage the delinquency of her son intentionally, criminal sanctions would have had no effect in this case.

tions simply may be ineffective in this setting.[236]

In addition, contributing statutes may be both overinclusive and underinclusive. By punishing parents for failing to exercise reasonable care for or control over their children, the state will punish some parents merely because their child is delinquent, even though the parents tried, but were unable, to control their children's behavior. Alternatively, some parents who do fail to control their children will escape punishment simply because their children did not become delinquent. Because these statutes do not contain a specific intent element, the only difference between these two sets of parents is that one set has a delinquent child. Even though some states do not require an adjudication of the child's delinquency before application of the contributing statute,[237] in practical terms the authorities rarely will discover inadequate parental control without some delinquent act by the child. Because of this detection problem, application of contributing statutes actually occurs too late to prevent delinquency.[238]

Finally, the use of contributing statutes against parents is an extremely intrusive method of achieving the state's goal. Contributing statutes are inherently ambiguous and difficult to apply because of their broad language. Judges and jurors must determine whether a parent used reasonable control over a child. Even though reasonableness is a common standard in criminal statutes, it is an inherently subjective inquiry.[239] Parents constantly will have to decide how a disinterested observer would judge a particular behavior. This area is too sensitive and subjective to allow outsiders to make these determinations. The Supreme Court has stated that no societal consensus on the correct way to raise children exists and that the judiciary has no special expertise in the matter.[240] In addition, the American Bar Association has recommended that because no best way to raise a child exists, states should limit themselves to protecting children from specific harms.[241]

Contributing statutes may have served a purpose when they were

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236. *See* Ludwig, *supra* note 215, at 732-34 (arguing that criminal sanctions cannot deter unintentional parental misbehavior effectively and could have adverse consequences even if parental behavior is intentional); *see also* Comment, BRI v. Leonard: *The Role of the Courts in Preserving Family Integrity*, 23 NEW ENG. L. REV. 185 (1988) (arguing that the state should protect the family and encourage independent family decisions through the courts).

237. *See supra* note 227 and accompanying text.

238. Ludwig, *supra* note 215, at 732.

239. *See* IJA-ABA STANDARDS, *supra* note 191, at 49; S. KATZ, *supra* note 36, at 5 (stating that state laws describing the legal responsibilities of parents for their children are "expressions of community expectations about parenthood" and their interpretations "reflect prevailing middle-class mores").

240. Bellotti v. Baird, 443 U.S. 622, 638 (1979) (plurality opinion).

241. IJA-ABA STANDARDS, *supra* note 191, at 50.

first enacted,[242] but they are an anachronism in criminal law today. The Model Penal Code has substituted a more limited endangerment provision for its contributing statute largely because of the criticisms leveled against contributing statutes.[243] States have other more narrowly tailored statutes to penalize parents who intentionally harm their children or truly neglect them.[244] By relying on application of contributing statutes to reduce juvenile crime, state legislatures are avoiding the tough issues surrounding the failure of the juvenile justice system.[245]

While the state may have a compelling interest in preventing juvenile delinquency, no evidence suggests that policing parental behavior achieves that end. Contributing statutes unnecessarily infringe on parents' fundamental right to raise their children free from undue state interference. These statutes are difficult to apply and have detrimental effects on families. The statutes as applied to parents should fail the strict scrutiny test because the means do not closely fit the end.

V. CONCLUSION

When states use contributing statutes to force parents to control their children, these statutes are vague and an impermissible infringement on the fundamental rights of parents. The statutes that require parents to exercise reasonable or proper control over their children are unconstitutionally vague because they lack even minimal guidelines to limit the discretion of law enforcement officials.[246] Although some parents will fail to fulfill the responsibilities that accompany the right to raise their children, the state can reach those parents through properly limited statutes that contain specific intent elements and concrete definitions of delinquency. A parent who knowingly, willfully, or intention-

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242. Contributing statutes may have functioned at one time in the same manner as modern child abuse and neglect statutes.

243. MODEL PENAL CODE § 230.4 comment, at 444-52 (1980). The drafters of the Model Penal Code were concerned that the "range of behavior punishable as contributing to delinquency was as broad as the whole penal code and more." *Id.* at 446. The drafters advocated precise purposes for criminal laws. *Id.* at 449. According to the drafters, these broad contributing statutes are "meaningless criminological concept[s]" and are simply a way for legislatures to avoid hard decisions in this area. *Id.* at 450. Model Penal Code § 230.4 "is designed to state the appropriate limits of the function that the criminal law should perform." *Id.* That section requires knowing action by the parent and actual endangerment of the child before liability may attach. *Id.* at 450-52.

244. *Id.* at 450.

245. *See* Ripston, *supra* note 233, at 7. For a discussion of some of the problems of the juvenile justice system, see Kaufman, *The Child in Trouble: The Long and Difficult Road to Reforming the Crazy-Quilt Juvenile Justice System,* 60 WASH. U.L.Q. 743 (1982); Note, *Ungovernability: The Unjustifiable Jurisdiction,* 83 YALE L.J. 1383 (1974); Middleton, *Punishment or Parenting for Child Criminals?*, Nat'l L.J., Apr. 18, 1988, at 1, col. 1.

246. *See supra* notes 117-29 and accompanying text; *see also* Ripston, *supra* note 233, at 7 (discussing the arbitrariness of California's Parental Responsibility Law).

ally encourages a child to commit a violent criminal act should be punished. The generalized contributing statutes, which are not addressed specifically to parents, may be constitutional in some situations depending on the facts of the case, but these statutes also contain inherently subjective moral standards.[247] In addition, while inadequate parental control has been linked to juvenile delinquency, this linkage is too speculative to justify the extensive infringement on the fundamental rights of parents.[248] The state cannot interfere in the family setting because of the mere possibility that interference will solve the juvenile crime problem.

Violent juvenile crime is a problem in modern society.[249] Although state governments have the right to remedy the problem, the state cannot achieve that goal at the expense of the constitutional rights of parents. State governments should avoid the lure of this easy response to juvenile crime. The causes of juvenile delinquency remain unclear.[250] Even if inadequate parenting is a factor, the strong arm of the criminal law is not appropriate in the family context. The same reasons that justify deferring to parental decisions in the typical family situation apply with equal strength when the American family is breaking down.[251] Instead of penalizing parents for their failures, state officials should focus on solving the multitude of problems that face parents in the 1990s such as the lack of affordable housing, education, and health and child care.[252] Maybe if parents could provide better opportunities for their children, the children would be less inclined to commit violent acts.[253]

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247. *See supra* notes 130-32 and accompanying text.

248. *See supra* subpart IV(D).

249. *See supra* notes 16-25 and accompanying text.

250. *See supra* notes 31-33 and 222-27 and accompanying text.

251. *See supra* notes 177-91 and accompanying text.

252. *See* REPORT ON CHILDREN AND FAMILIES, *supra* note 33, at 1-50.

253. *See supra* note 33. Many states have implemented programs designed to help potential juvenile delinquents. *See* Natali, *Orange County Focus: Buena Park*, L.A. Times, June 19, 1990, at 3, col. 2 (Orange County ed.) (discussing program in which police attempt to reach potential gang members and offer family counseling); Rich, *Preschool Care Linked to Drop in Delinquency*, Wash. Post, at A11 (final ed.) (discussing experimental program in Syracuse, New York); Sipchen, *Kids Out of Control*, L.A. Times, May 18, 1989, at 1, col. 4 (home ed.) (advocating "family preservation" projects); Thomas, *Pulling Teens Back from the Edge*, Wash. Post, Sept. 8, 1988, at J1 (final ed.) (describing Washington, D.C. Youth at Risk Program).