Due Process Methodology in Parental Termination Proceedings - Santosky v. Kramer

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Traditionally, parents have been accorded the right to control the upbringing of their children. Although this right is not explicitly granted in the United States Constitution, the Supreme Court has established that parents have a constitutionally protected interest in the establishment of the family. The origin of parental rights remains uncertain despite considerable comment. One theory holds that parental rights gained recognition as a property right, with the child analogized to a chattel. For a discussion of this theory, see Schoulec, A Treatise on the Law of Domestic Relations §§ 243-49 (5th ed. 1895); Sayre, Awarding Custody of Children, 9 U. Chi. L. Rev. 672 (1942). Another theory suggests that parental rights derived from the trust reposed in parents by the state pursuant to its authority as parens patriae. This trust theory serves to justify the state's power to intervene in the parent-child relationship when the child is in need of care. See Comment, The Rights of Children: A Trust Model, 46 Fordham L. Rev. 669 (1976) (likening the parent-child relationship to a trust). For a discussion of the early development of the parental rights concept, see generally Tamiia, Neglect Proceedings and the Conflict Between Law and Social Work, 9 Duq. L. Rev. 579-81 (1971) (pre-20th century courts reluctant to interfere with the sanctity of the family).

The current rights of parents include the right to establish a home and rear a child, to maintain the care, custody, society, and association of the child, to control the child's education, to choose the child's religion, to veto the issuance of a passport to the child, to administer the child's property, to discipline the child, to choose medical care for the child, to give the child a name, to consent to the child's marriage, to determine the child's nationality and domicile and to consent to the child's adoption. Dobson, The Juvenile Court and Parental Rights, 4 Fam. L.Q. 410, 413 (1970) [hereinafter cited as Dobson]; Levy, The Rights of Parents, 1976 B.Y.U. L. Rev. 693, 698. Parental rights are not, however, unlimited. See also Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish parents exempt from compulsory school attendance law requiring them to send their children to public or private school until age 16); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state prohibited from requiring children to accept instruction only from public school teachers).


The Supreme Court has given constitutional protection to the establishment of the family. The Court has declared that the right to marry is fundamental. See, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978) (invalidating statute which prohibited residents from marrying if delinquent in child support payments); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (fourteenth amendment liberty right encompasses decisions relating to marriage, thus, mandatory maternity leave requirement unconstitutional); Loving v. Virginia, 388 U.S. 1 (1967) (Court held right to marry is fundamental in our society and overturned a statute that prohibited interracial marriages).

The Court also has established the right to procreate as one of the "basic civil rights of man." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (overturning Oklahoma's criminal steriliza-
maintenance of their family life. This parental freedom of choice in family matters is protected under two basic analyses: the zone of privacy created by the first, fourth, fifth, and ninth amendments;6 and the fourteenth amendment statute which forced sterilization of habitual criminals). In Griswold v. Connecticut, 381 U.S. 479, 485 (1965), the Court struck down a statute which prohibited the use of contraceptives by married couples. The majority viewed this right as legitimate and protected by a zone of privacy found in the first, third, fourth, fifth, and ninth amendments. Id. at 484-85. Justice Goldberg, in his concurrence, found recognition for this protected right under a different analysis. Justice Goldberg stated that the due process clause protects liberties that are "so rooted in the traditions and consciences of our people as to be ranked as fundamental." Id. at 497 (Goldberg, J., concurring) (quoting Aynder v. Massachusetts, 291 U.S. 97, 105 (1934)). He concluded that the right to marital privacy is a "fundamental and basic" right retained by the people within the meaning of the ninth amendment. 381 U.S. at 499. Also included within the majority's zone of privacy is the decision whether to bear a child or terminate a pregnancy. Roe v. Wade, 410 U.S. 113, 153 (1973). The Roe Court held, however, that after the first trimester, the state's interest in protecting both the mother from the significant health risks created by the abortion and the fetal life becomes compelling. Consequently, absent a health risk in the mother carrying the child to term, these concerns outweigh the mother's privacy right. Id. at 163.

Some areas of family life have not been protected. One area involves the rights of foster parents. In Smith v. Organization of Foster Families, 431 U.S. 816, 847 (1977), the Court refused to hold that foster parents have a protected liberty interest in their foster children. The Smith Court found that the procedures provided by the state were adequate to protect the limited liberty interests of the foster parents. Another area which remains unsettled is the parental rights of unwed fathers. Compare Quillian v. Walcott, 434 U.S. 246, 255 (1978) (natural father who never had legal or actual custody of his eleven year old child denied authority to veto adoption of the child) with Stanley v. Illinois, 405 U.S. 645, 649, 657-58 (1972) (state prohibited from taking custody of unwed father's children without a hearing and a finding that the father was an unfit parent).

5. The Court has protected rights incident to the establishment of family life. In the seminal case of Meyer v. Nebraska, 262 U.S. 390 (1923), the Supreme Court established that a state may not interfere with the fundamental right of parents to control the education of their children and, thus, struck down a statute banning the teaching of foreign languages in school. Id. at 403. The Meyer doctrine was reaffirmed in Pierce v. Society of Sisters, 268 U.S. 510 (1925). The Court in Pierce struck down a statute imposing compulsory public school attendance. The Court held that it "unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control." Id. at 534-35. More recently, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court held that the Amish parents' claims of first amendment religious freedom and fourteenth amendment due process freedom were sufficient to overturn a criminal statute mandating school attendance. The Yoder Court recognized that parents possess the primary role in raising their children. See id. at 232. The Court also has upheld the family's choice of living arrangements. In Moore v. City of East Cleveland, 431 U.S. 494 (1977), a woman was arrested and convicted for living with her son and two grandsons in violation of a city ordinance which banned statutorily defined "non-families" from living together. The Moore Court struck down the statute holding that it infringed upon the parents' right of personal choice on matters of marriage and family life. Id. at 499.

Although protected, parental rights have been subordinated to both the child's rights and the state's interest in protecting minors. See, e.g., Bellotti v. Baird, 443 U.S. 622, 643 (1979) (despite recognition of parental rights against undue, adverse interference by state, minor not required to obtain parent's consent for abortion because of unique nature of decision); Prince v. Massachusetts, 321 U.S. 158, 166, 170 (1941) (although guardian's right to care and nurture child is cardinal, state has a compelling interest in prohibiting minors from preaching religious interests in public streets even if accompanied by parent or guardian).

6. In Paris Adult Theater I v. Slaton, 413 U.S. 49, 65 (1973), the Supreme Court stated
Employing these analyses, the Court has declared that freedom of choice in family matters is an essential right, even more precious than property rights. Consequently, the Court has repeatedly struck down statutes which arbitrarily infringe upon a parent’s protected interest.

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that the right to privacy “encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.” Other Supreme Court decisions have recognized a zone of privacy in domestic matters. See, e.g., Roe v. Wade, 410 U.S. 113, 154, 163 (1973) (decision on whether to terminate pregnancy during first trimester included within constitutionally protected zone of privacy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (zone of privacy extends to unmarried individual’s choice of contraceptives); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (use of contraceptives by married couples falls within a zone of privacy created by Bill of Rights). Commentators have criticized the Court’s zone of privacy theory. See, e.g., Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 932 (1973) (attacking Roe Court for manufacturing constitutional rights and usurping legislative functions); Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 SUP. CT. REV. 159, 170 (criticizing Roe Court for usurping legislative functions).


The state has a broad interest in preserving itself as a collective entity. The state will intervene in the family structure when the parent’s behavior threatens the state’s interest in maintaining the security of its social, political, or economic institutions. Note, State Intrusion into Family Affairs: Justifications and Limitations, 26 STAN. L. REV. 1383, 1387 (1974) [hereinafter cited as State Intrusion]. For an explanation of these state interests, see Pound, A Survey of Social Interests, 57 HARV. L. REV. 1 (1943). Depending on the circumstances, these interests may or may not be compelling when viewed by courts. Child abuse and neglect however, are always considered compelling and warrant state intervention. See infra note 11. For an overview of state neglect laws, see generally Katz, Howe & McGrath, Child Neglect Laws in America, 9 FAM. L.Q. 1 (1975) [hereinafter cited as Katz].
upon the family structure: 11 police power and parens patriae. Pursuant to its police power interest, a state has broad authority to act as the guardian of its citizens. 12 Closely linked with this police power interest is the state's parens patriae interest in safeguarding the education, development, and emotional well-being of its citizens. 13 Pursuant to these powers, the state may

11. When parents either abuse or neglect a child, or make potentially life threatening decisions which may seriously jeopardize a child's well-being, the state's interest is compelling and justifies intervention into privacy of the family. The state's rationale is that children are particularly vulnerable and lack the ability to protect themselves. See Note, Developments in the Law—The Constitution and the Family, 93 Harv. L. Rev. 1156, 1198-1248 (1980). For a general discussion of the state's interests, see Areen, Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases, 63 Geo. L.J. 887 (1975) [hereinafter cited as Areen]; Note, The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers, 27 U. Pitt. L. Rev. 894 (1966) [hereinafter cited as Parens Patriae].


The Supreme Court in In re Gault, 387 U.S. 1 (1967) discredited many accepted notions regarding the state's parens patriae interest in the juvenile system. Gault involved a fifteen year old boy who had been placed in a detention home without written notice of the charges against him or his right to counsel. The Court held that due process required procedural regularity in state delinquency proceedings, notwithstanding the state's altruistic purposes of assisting and redirecting the child. Id. at 17-18.

temporarily remove an abused or neglected child from the parental home and impose criminal sanctions on the parents responsible for such maltreatment. If subsequent to the temporary removal of a child from its home the parents evidence little improvement and reconciliation is deemed improbable, the state may attempt to secure a permanent removal of the child from the parental home. Specifically, alleging that the parents are unfit, constitutional underpinnings of the parental responsibility doctrine and basis for state legislative authority over family matters.

In recent decisions, however, the Supreme Court has reaffirmed the state's parens patriae interest. See, e.g., Parham v. J.R., 422 U.S. 584, 605 (1979) (parens patriae interest in helping parents care for the mental health of children); Addington v. Texas, 441 U.S. 418, 426 (1979) (state has parens patriae interest in caring for mentally disabled and protecting the community from their dangerous tendencies). The Gault decision serves as a continuous reminder to the states that although they have a legitimate parens patriae interest, constitutional limitations define its scope.


15. States vary in their efforts to unite the family before initiating a termination proceeding. See, e.g., In re Rosenbloom, 266 N.W.2d 888, (Minn. 1978) (per curiam) (failure of welfare agency to make reasonable efforts to reunite family resulted in dismissal of initial termination determination); In re Barron, 268 Minn. 48, 127 N.W.2d 702 (1964) (policy of statute requires and welfare of child demands reasonable effort by social agencies to aid parent before termination); In re Leon R., 43 N.Y.2d 117, 397 N.E.2d 374, 421 N.Y.S.2d 863 (1979) (by discouraging parents from visiting child, Department of Social Services did not meet its statutory burden of demonstrating efforts to reunite the family). But see, e.g., In re Rose G., 57 Cal. App. 3d 406, 129 Cal. Rptr. 338 (1976) (social services not mandated in every case and absence of social services alone is not a denial of due process); In re Susan M., 53 Cal. App. 3d 300, 125 Cal. Rptr. 707 (1956) (providing services is matter of judicial discretion, remanded for consideration of whether services should have been offered).

16. To remove the child permanently from the home, the state must first terminate the parental rights. Termination of the parental rights follows from several factual situations. A termination occurs without the parent's consent at an adoption proceeding or a special hearing prior to an adoption proceeding. A court also may order a termination at the dispositional phase of a neglect proceeding held to determine the fitness of the parent or the best interest of the child. Finally, termination may occur at a special fact-finding termination hearing. These hearings are commonly held when the child has been in a foster home for a period of time and the parent has failed to maintain contact with the child or plan for the child's future. See Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 STAN. L. REV. 623, 633-36 (1976).

17. New Hampshire, for example, has established four categories of parental unfitness which justify the termination of parental rights. A termination petition will be granted by the probate court if: a) the parents have abandoned the child; b) the parents have neglected to provide the necessary care to the child; c) the parents have failed to correct conditions leading up to a finding of neglect and the parents are and will continue to be incapable of giving the appropriate care to the child. N.H. REV. STAT. ANN. § 170-c:5 (1977 & Supp. 1981). See also N.Y. SOC. SERV. LAW §§ 384-b, 4(a)-(e) (McKinney Supp. 1981-1982) (guardianship will be awarded if: a) both parents are dead; b) parents abandoned child prior to petition for adop-
the state can petition the family court to terminate permanently the parental rights and place the child in an alternate home.18

In Santosky v. Kramer,20 the Supreme Court addressed the issue of whether the fair preponderance of the evidence standard of proof was a sufficient standard upon which a state could completely and irrevocably sever the natural parents' rights to their children. The Santosky Court held that natural parents have a constitutionally protected liberty interest in the care, custody, and management of their children, and that this interest must be accorded fundamentally fair procedures.21 Upon examination of a typical termination proceeding, the Court determined that numerous factors exist which create a significant probability of an erroneous termination of parental rights.22 Consequently, the Santosky Court rejected the fair preponderance of the evidence standard of proof and held that due process requires the state to support its allegations of parental unfitness by clear and convincing evidence.23

After a brief review of procedural due process, the Court's due process analysis in parental termination proceedings will be discussed. An examination of the constitutional underpinnings of procedural due process will reveal the deficiencies inherent in the due process test applied by the Santosky Court.

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18. As one court succinctly stated:
Termination of parental rights, so called, severs permanently, not only the rights and obligations of the parent relative to the child, but those of the child as well. The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit and all other rights inherent in the legal parent-child relationship, not just for the period during which he is subject to the code, but forever. In re K.S., 33 Colo. App. 72, 76, 515 P.2d 130, 132-33 (1973). Accord In re William L., 477 Pa. 322, 370, 383 A.2d 1228, 1252 (Manderino, J., dissenting) (when parental rights are terminated, the child is "dead" as far as the parents are concerned), cert. denied sub nom. Beatty v. Lycoming County Children's Servs., 439 U.S. 880 (1978).

19. Although the state's goal is to make adoption possible, adoption is neither a legally necessary predicate nor a realistic expectation of many children who become wards of the state. See N.Y. Soc. Serv. Law § 384-b, 3(i) (McKinney Supp. 1981-1982) (proof of likelihood that child will be placed for adoption not required in determining whether best interests of child are promoted by committing guardianship and custody of child to authorized agency). Cf. Smith v. Organization of Foster Families, 431 U.S. 816, 837 (1977) (few foster children achieve a stable home life through final termination of parental ties and adoption into a new permanent family). See generally J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 49-52 (1979) (authors conclude that the law is a crude instrument and cannot be utilized to create parental relationships) [hereinafter cited as Goldstein]; Mnookin, Foster Care—In Whose Best Interest?, 43 Harv. Educ. Rev. 599, 605-06 (1973) (long term foster care can never replace nurturing advantage lost to the child from the break up of natural family and may be harmful to needs of the child) [hereinafter cited as Mnookin].

21. Id. at 1394.
22. Id. at 1398-1401. See infra text accompanying notes 101-02.
23. 102 S. Ct. at 1402-03.
Additionally, the practical effects of imposing a higher degree of proof on termination statutes, termination procedures, and child protection agencies will be explored.

**Procedural Due Process**

An analysis of procedural due process must begin with the fourteenth amendment which commands that no state shall "deprive any person of life, liberty, or property without due process of law."24 The fundamental requirements of procedural due process mandate that an individual be given an opportunity to be heard25 at a meaningful time and in a meaningful manner prior to the deprivation of life, liberty, or property.26 These procedural safeguards, which have evolved to include notice,27 the right to a hearing,28 and the right to present evidence,29 are derived from the theory that personal freedom can be preserved only when there is a check on arbitrary governmental action.29

Evaluating whether an individual is entitled to procedural due process protection involves an inquiry into whether a due process right is involved, and if so, exactly what procedural safeguards are required.30 The threshold inquiry begins with a determination of whether the personal interest asserted

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25. Grannis v. Ordean, 234 U.S. 384, 394 (1918) ("the fundamental requisite of due process of law is the opportunity to be heard").
30. See generally Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 Yale L.J. 319, 340 (1975) (limitations on governmental power are necessary even when legitimate governmental concerns exist).
31. See Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (Court first considered whether due process requirement applied to parole revocation and then determined what procedural safeguards should apply). See, e.g., Addington v. Texas, 441 U.S. 418, 433 (1979) (individual's due process interest in not being unnecessarily confined in mental institution warranted a clear and convincing standard of proof); Bell v. Burson, 402 U.S. 535, 539 (1971) (clergyman's entitlement interest in driver's license requires that he receive a hearing before revocation); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (welfare benefits are constitutionally protected statutory
falls within the protective ambit of the due process clause. The two major judicial approaches utilized to examine whether due process protection is warranted are the entitlement analysis and the core liberty analysis.\textsuperscript{32}

The entitlement analysis conditions due process protection upon the existence of an independently grounded legal right.\textsuperscript{33} Without this right, an individual is not entitled to invoke the protection of the fourteenth amendment.\textsuperscript{34} An entitlement inquiry concentrates on the process that must be followed to minimize unfair or mistaken deprivations of rights conferred upon private individuals or groups by the government.\textsuperscript{35} As such, the analysis focuses on the specific provisions of statutes, administrative rules, regula-

\textsuperscript{32} L. Tribe, American Constitutional Law §§ 10-8 to 10-11, at 506-532 (1978) [hereinafter cited as Tribe].

\textsuperscript{33} Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Statutory entitlement interests are interests that arise from positive law or mutually explicit understandings. Entitlement interests include employment contracts with the government, welfare benefits, and parole benefits. This concept originated in the 1970's, when the rapid expansion of the public sector, along with the government's assumption of responsibility for the poor, increased dependence upon the government. \textit{See generally} Reich, The New Property, 73 Yale L.J. 733 (1964) (extensive discussion of the birth of statutory entitlement interests). The Court originally distinguished between individual rights, stemming from constitutional or common law sources, and "privileges" bestowed by the government. The privilege concept was limited somewhat by the doctrine of "unconstitutional conditions." This doctrine held that the government may not condition the receipt of a benefit upon the non-assertion of constitutional rights. See Sherbert v. Verner, 374 U.S. 398 (1963) (state cannot condition unemployment compensation benefits on the acceptance of Saturday work when it infringes on an individual's religious practices). The Court has rejected this doctrine and now holds that entitlements are protected liberty and property interests. See, e.g., Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (parole revocation must be preceded by orderly process); Bell v. Burson, 402 U.S. 535, 539 (1971) (since clergyman was entitled to drivers license, he was entitled to a hearing concerning suspension of the license); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (welfare benefits are a matter of statutory entitlement and those who receive them are entitled to a hearing before they are terminated). For a discussion of the Court's rejection of the "unconstitutional conditions" doctrine, see Van Alstyne, \textit{The Demise of the Right-Privilege Distinction in Constitutional Law}, 81 Harv. L. Rev. 1439, 1448 (1968).

\textsuperscript{34} There have been several cases in which the absence of a legally grounded right has precluded application of the entitlement analysis. See, e.g., Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972). \textit{See generally} Comment, Entitlement, Enjoyment, and Due Process of Law, 1974 Duke L.J. 89 (extensive discussion of the inconsistencies and illogical fallacies inherent in the present entitlement doctrine) [hereinafter cited as Entitlement].

\textsuperscript{35} Tribe, supra note 32, § 10-7, at 503. This instrumental approach views the purpose of due process as an enforcement device. Instead of emphasizing the individual's rights, it stresses procedural regularity. Its purpose is to assure accuracy by distributing various benefits in an orderly manner. Mathews v. Eldridge, 425 U.S. 319, 332-35 (1976). The resolution of issues involving the constitutional sufficiency of administrative procedures requires consideration of three factors: (1) the private risk that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable values, if any, of additional safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. \textit{See infra} notes 45-48 and accompanying text.
tions, and mutual understandings between the government and the individual. 36

In contrast, a core liberty analysis 37 focuses on the importance of an individual's right and the adverse impact that will result from infringement of that right in a particular decisional context. This analysis is based on the theory that substantive or core values exist which are so fundamental that government infringement must be narrowly circumscribed and must only occur to fulfill a compelling purpose. 38 Instead of focusing on the existence of a legal entitlement, a court will scrutinize the effect of state action on an individual's interest and determine whether due process procedural safeguards are necessary to protect that interest. 39 This approach embodies

36. See generally Tribe, supra note 32, § 10-9, at 515. Individuals do not have a constitutional right to receive statutory entitlements. See Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (once government offers right, it cannot withdraw that right without meeting the requirements of due process).

37. The Court has defined core liberty interests as encompassing both procedural and substantive protection. Core liberty interests include "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children [and to] worship God according to the dictates of . . . conscience." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The Court has subsequently extended the definition of core liberty interests to include government actions which are devoid of fundamental fairness. See Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (despite lack of biological relationship and despite state's role in creating foster parent relationship, foster families might have a fundamental liberty interest sufficient to trigger procedural due process); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (procedures devoid of fundamental fairness offend due process, thus, Attorney General's action of providing list of designated communist groups to Loyalty Review Board for Board's use in determining employees' loyalty invalid).


The Court traditionally applies a strict scrutiny analysis when addressing core liberties. The theoretical underpinnings of strict scrutiny rest on the recognition that state actions which burden fundamental rights or connote prejudice against racial or other minorities should be subjected to a heightened scrutiny to preserve the substantive values of equality and liberty. Tribe, supra note 32, § 16-6, at 1000. Strict scrutiny has been called "strict in theory and usually fatal in fact." Gunther, The Supreme Court, 1977 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 18 (1972).

39. See, e.g., Cary v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) (regulations on the right to make fundamental decisions regarding procreation may be justified by a compelling state interest and must be narrowly drawn to effectuate that interest); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (state regulation of family living arrangements must be carefully examined by the court to determine legitimacy of the interest and extent that interest is served by the regulation); Roe v. Wade, 410 U.S. 113, 155 (1973) (state statutes limiting fundamental rights must be justified by a compelling state interest and narrowly drawn to minimize infringement of legitimate rights at stake); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (regulation of contraceptives struck down because it unnecessarily abridged protected freedoms).
an intrinsic view of due process, stressing the individual’s right to participate in a judicial process in which the government seeks to abridge a protected liberty interest.\footnote{40}

Upon finding a constitutionally protected interest under either an entitlement or core liberty analysis, the inquiry turns to a determination of the appropriate level of procedural protection. The Supreme Court has stated that due process is flexible and prescribes distinct procedures for each set of circumstances.\footnote{41} Additionally, the Court has held that the objectives of due process, minimizing error and reducing the possibility of arbitrary governmental actions, can be achieved through varying procedures tailored to fit the specific factual context.\footnote{42}

The Court typically has applied a balancing approach when determining the appropriate level of process due. Prior to 1970, the Court employed an intrinsic inquiry which focused primarily on the nature of the governmental function and the private interest affected by the governmental action.\footnote{43} During the 1970’s, however, the Court embarked on an intensive review of administrative hearing procedures for constitutional violations.\footnote{44} Dissatisfied

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\item\textsuperscript{40} The intrinsic approach to due process emphasizes the individual’s right to maintain his dignity as a person. For a discussion of this approach, see generally Michelman, \textit{The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights—Part I}, 1973 \textit{Duke L.J.} 1153, 1172-75. Granting individuals a hearing so that they may participate in governmental decisions that affect them embodies the principle that the primary purpose of the due process clause is the interchange between citizens and government. In essence, it is the right to be consulted about what action is taken against an individual. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (right of welfare recipient to participate in process by which government attempts to withdraw benefit). See also \textit{Joint Anti-Fascist Refugee Comm. v. McGrath}, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (confrontation aspects of adversarial system serve as most effective means of protecting personal liberty).
\item\textsuperscript{42} See Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).
\item\textsuperscript{44} For a discussion of this shift in the Court’s focus, see Mashaw, \textit{The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value}, 44 \textit{U. Chi. L. Rev.} 28 n.1 (1967) [hereinafter cited as \textit{Mathews}].
\end{itemize}
with the informal balancing test, the Court in Mathews v. Eldridge\(^4\) created an instrumental three-tiered due process formula. The Court stated:

[The] identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\(^6\)

Although the costs of procedural protections are not controlling, they are given substantial weight in this formula.\(^7\) This emphasis results from the public’s competing interest in conserving scarce fiscal and administrative resources.\(^8\) Notwithstanding the Supreme Court’s acknowledgment that procedural due process is not designed to promote governmental efficiency,\(^9\) the Court noted that “at some point the benefit of an additional safeguard

\(^{45}\) 424 U.S. 319 (1976). In Eldridge, the Court upheld the Social Security Administration’s procedures for terminating social security benefits without an evidentiary hearing. The Eldridge Court concluded that holding evidentiary hearings would entail fiscal and administrative burdens vastly out of proportion to any countervailing benefits. Id. at 345. See Mashaw, supra note 44, at 44. Mashaw writes that Eldridge represents a turning point in the Court’s resolution of procedural due process issues. He points out that after Eldridge, plaintiffs have been uniformly unsuccessful. Id. at 28 n.1. Interestingly, the Court has avoided a balancing analysis in recent cases by finding due process inapplicable. Id.

\(^{46}\) 424 U.S. at 335.

\(^{47}\) Id. at 348. The Eldridge test has been attacked by several commentators. One scholar criticizes the Eldridge test as conflicting with the primary purpose of the due process clause; protecting individual interests from arbitrary governmental infringement. Tribe, supra note 32, § 10-13, at 543. Tribe believes that the Eldridge test’s focus on monetary factors renders it incapable of measuring the values of dignity and self-respect. Id. Additionally, the test establishes a presumption of constitutionality for procedural safeguards instituted by the government. Id. See Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (substantial weight must be given to good-faith judgment of the administrators of the social welfare system that procedures provided assure fair consideration of individuals’ entitlement claims). The Court’s unwillingness to consider values other than obtaining accurate results coupled with the Court’s strong presumption of constitutionality to statutory procedural protections, has been described as “a serious abdication . . . of judicial responsibility under the due process clause.” Tribe, supra note 32, § 10-13, at 542-43. See also Mashaw, supra note 44, at 30 (the failure of the Eldridge test lies in its emphasis on questions of technique rather than value).

\(^{48}\) 424 U.S. at 343. The Court noted that “experience with the constitutionalizing of government procedures suggests that the ultimate additional costs in terms of money and administrative burdens would not be insubstantial.” Id. The Eldridge Court found it particularly important that the increased costs of new administrative procedures would be paid by deserving recipients of the social welfare program. Id. In short, the Court’s rationale for concentrating on expense purports to be a concern for the individual rights of others and not the costs of an additional procedural safeguard in general.

to the individual affected by the administrative action and to society in terms of increased assurance is outweighed by the cost.150

PROCEDURAL DUE PROCESS CHALLENGES IN TERMINATION PROCEEDINGS

The Court has addressed procedural due process challenges involving state termination of parental rights under both an intrinsic and an instrumental procedural due process methodology. In Stanley v. Illinois,11 the Court decided the threshold question of whether a hearing should be required to determine a parent's fitness before the state terminates the parent's right to his child. The Stanley Court held that an unwed father could not be presumed unfit without particularized proof.52 Applying a two-pronged intrinsic test, the Stanley Court balanced the nature of the governmental function involved and the private interest at stake.53 The Court concluded that the parent's substantial interest in raising his child outweighed the state's legitimate interest in protecting the welfare of its minor children and, thus, a hearing was constitutionally required.14 The Stanley Court emphasized that parental interests "warrant deference and absent a countervailing interest, protection."55

Nine years later in Lassiter v. Department of Social Services,56 the Court

50. 424 U.S. at 348.
51. 405 U.S. 645 (1972).
52. Id. at 648. Under the Illinois statutory scheme examined in Stanley, a hearing and proof of parental unfitness was required before the state could assume custody of the children of married or divorced parents and unmarried mothers. Children of unmarried fathers, however, were declared dependents of the state when their mothers died and were taken from their unwed fathers without a hearing on parental fitness and without proof of neglect. In Stanley, an unwed father attacked this statutory scheme as violative of equal protection. The Court, constrained by the pleadings, implied that the application of an irrebuttable presumption to one classification and not to another violated equal protection. The Stanley Court reasoned that because Illinois recognizes that married fathers have a right to a hearing the equal protection clause also requires that such protection be extended to unmarried fathers. Id. (Burger, C.J., dissenting). For a general discussion of irrebuttable presumptions, see Comment, The Irrebutable Presumptions Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974).
53. See 405 U.S. at 658. The Court applied the test followed in Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1971)). Although noting that the state's interest in prompt efficacious procedures is worthy of cognizance in constitutional adjudication, the Stanley Court held that the Constitution recognizes higher values than speed and efficiency. The Court emphasized that the due process clause is designed to protect the fragile values of a vulnerable citizenry from the states' overbearing concern for efficiency and efficacy. 405 U.S. at 656.
54. Id. at 658. The Court further noted that the state's interest in administrative efficiency was insufficient to justify refusing an unwed father a hearing when the dismemberment of his family was at issue. Id. at 658.
55. Id. at 651. Although the Court did not label the parental right fundamental, it did recognize that it is an important right deserving constitutional protection. As a result, the Stanley decision stands for the proposition that the due process clause requires states to protect the interests of both parents and children by limiting its intrusion upon the family structure. See Note, Termination of Parental Rights and the Lesser Restrictive Alternative Doctrine, 12 Tulsa L.J. 528 (1977) [hereinafter cited as Lesser Restrictive Alternative].
addressed whether an indigent parent should be provided counsel in a parental termination proceeding. The Lassiter Court abandoned the Stanley two-pronged intrinsic test and adopted a structured instrumental test which changed the thrust of its due process analysis in parental proceedings. In determining whether due process required assistance of counsel, the Court established the presumption that an indigent parent does not have the right to appointed counsel unless faced with a deprivation of physical liberty.

The Lassiter Court balanced this presumption against the three factors enunciated in Mathews v. Eldridge: the interests of the parent; the interests of the state; and the risk of an erroneous deprivation of the parents' interest through the procedures used. Although the Court found that the parents' interest was significant in Lassiter, this interest was outweighed by the presumption against appointed counsel. Thus, the Lassiter Court concluded that the decision to appoint counsel for indigent parents should be made by the trial judge on an individualized basis. By adopting the Eldridge test, the Lassiter Court shifted due process concerns from the intrinsic analysis, which focused on how parental rights can be best protected, toward an instrumental evaluation of the competing economic and fundamental interests involved.

**Standard of Proof**

For a thorough understanding of the Santosky decision, the function of the standard of proof sufficient to satisfy the due process clause must be discussed. In every lawsuit, the factfinder must weigh the evidence presented against a specific standard of proof. The standard of proof instructs the factfinder on the gravity of the right involved and the degree of confidence he must have in the correctness of his decision. Traditionally, the issues

57. Id. at 24-32.
58. Id. at 25-26. The Court stated that the defendant's interest in personal freedom triggered the right to appointed counsel. The Court seemed unpersuaded by the fact that physical liberty is at stake in termination proceedings. Id. That is, many termination proceedings have quasi-criminal overtones and, in fact, are often predicated upon criminal activity such as child neglect. See S. Katz, When Parents Fail 56-67 (1971) (in-depth discussion of child neglect statutes).
59. See supra note 46 and accompanying text.
60. Lassiter, 452 U.S. at 31.
61. Id. at 31-33. The Court, using a case-by-case analysis, found that the Eldridge factors would not always be distributed in a manner to overcome the presumption against the right to appointed counsel. Thus, the standard established by Eldridge, enabling a court to balance the costs and benefits of a procedural safeguard, increases the possibility that the Court would deny indigents the right to appointed counsel. Id. at 59 (Stevens, J., dissenting). Justice Stevens argued that the Eldridge test is totally inappropriate for cases involving physical liberty. Id. Justice Stevens stated that such cases should be addressed in terms of fairness rather than weighing the pecuniary costs to the state against the benefits to society. Id. at 60.
62. Id. at 32.
to be resolved, the potential consequences to the parties involved, and the practical difficulties of proof determine the appropriate burden of proof.64 Three standards of proof have emerged: preponderance of the evidence,65 clear and convincing evidence,66 and proof beyond a reasonable doubt.67

In a civil suit, where the risk involved is commonly money damages, courts apply the lower standard, preponderance of the evidence.68 Under this standard, the risk of an erroneous determination is allocated equally between the parties to the suit. This allocation is appropriate because the consequences of an erroneous determination are not serious enough, inasmuch as they do not involve the loss of liberty or life, to necessitate a higher standard of proof.69

In contrast to the civil standard of proof is the stringent standard imposed in a criminal proceeding. In criminal proceedings, the state attempts to deprive an individual of liberty and/or life. Consequently, courts apply the highest standard, proof beyond a reasonable doubt.70 The application

have about the alleged facts in order to return a verdict. In contrast, the burden of proof refers to the duty a party has to persuade the trier of fact that the allegations are true. 9 J. Wigmore, Evidence §§ 2485, 2493, 2497 (3d ed. 1940) [hereinafter cited as Wigmore]. See also Dworkin, Easy Cases, Bad Law, and Burdens of Proof, 25 Vand. L. Rev. 1151, 1153, 1164 (1972) (explaining differences between burden of proof and burden of persuasion); McBaine, Burden of Proof: Degrees of Belief, 32 Calif. L. Rev. 242, 246-47 (1944) (because of human malice, the factfinder can never be sure a fact is true; he can find only "what (a) probably happened, or (b) what highly probably happened, or (c) what almost certainly has happened") (emphasis in original).


65. The preponderance of the evidence standard has been defined as proof that an alleged fact's "existence is more probable than its non-existence." Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 66 (1933). For further discussion of this standard, see Wigmore, supra note 63, § 2498.


70. The Court traditionally has limited the beyond a reasonable doubt standard of proof to criminal cases in which the liberty and reputation of the accused is threatened. See Addington v. Texas, 441 U.S. 418, 423 (1979). See also In re Winship, 397 U.S. 358, 362 (1970) ("'reasonable doubt' rule in criminal actions evolved from common law traditions of safeguarding against unjust conviction). In Winship, the Court announced, for the first time, that the beyond a reasonable doubt standard of proof was constitutionally mandated. Recently, however, courts have expanded the scope of this standard to cases involving involuntary commitment to mental institutions and involuntary terminations of parental rights. See, e.g., In re Sonsteng, 175 Mont. 307, 314, 573 P.2d 1149, 1152 (1977) ("'reasonable doubt' standard applies in commitment proceedings); State v. Robert H., 118 N.H. 713, 716, 393 A.2d 1387, 1389 (1978) (parents must be proved unfit beyond a reasonable doubt before parental rights can be terminated).
of this standard reflects the belief that the entire risk of error should be placed on government. This standard provides society with a reasonable assurance that guilty persons are convicted and innocent persons remain free.  

The third standard of proof, clear and convincing evidence, is applied when the interest at stake is more important than money, but not as severe as a total deprivation of liberty. Courts apply this standard where strong policy considerations are involved and where the possibility of deceit is greater than in ordinary circumstances. For example, when the state attempts to civilly commit a person to a mental institution, due process requires proof by clear and convincing evidence that the individual is mentally ill. This standard strikes a fair balance between the interests of the individual and those of the state.

THE SANTOSKY DECISION

John and Annie Santosky's three oldest children were temporarily removed from their care in 1973 and 1974 because of incidents indicating parental neglect. Each child was adjudicated as neglected, and placed with the Ulster County Department of Social Services for a period of eighteen months.

71. For a discussion of the historical development of the beyond a reasonable doubt standard, see May, Some Rules of Evidence, Reasonable Doubt in Civil and Criminal Cases, 10 Am. L. Rev. 642 (1876).


75. Id. at 430-431. The standard imposes a burden of proof on the state that is possible to meet given the subtleties and nuances of psychiatric diagnosis, yet guards against the possibility that the individual would be unnecessarily confined under a lower standard of proof. Id.

76. Santosky v. Kramer, ___ U.S. ___, 102 S. Ct. 1388, 1393 (1982). Tina, the oldest child, was removed from the parents' custody by court order in November, 1973 when she was two years old. The Santoskys' second child, John, was removed from the home a year later because he was suffering from malnutrition and had extensive bruises on his body. The third child, Jed, was removed from the parents' custody when he was three days old as a result of the abusive treatment suffered by the two older children. Id. at 1409-10 n.10 (Rehnquist, J., dissenting). Subsequent to the removal of the three older children, the Santoskys had two other children. No action was taken to remove them from their parents' care. Id. at 1393 n.5. Under a New York statute, temporary removal of a child may occur in two ways. The parents may consent to the removal, or, as in the Santosky case, the family court can order the removal pursuant to a finding that the child has been abused or neglected. N.Y. Fam. Ct. Act §§ 1021, 1022 (McKinney 1975 & Supp. 1976-1981).

77. 102 S. Ct. at 1393. A neglected child is one "whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care." N.Y. Fam. Ct. Act. § 1012 (f)(i) (McKinney Supp. 1976-1981). After temporary removal, the children were placed
Pursuant to New York law, a review was held at the end of this eighteen month period, and the New York Family Court ordered the agency to retain custody of the children. Additionally, the court directed the agency to formulate a specific plan to reunite the family.

In September of 1975, the Ulster County Department of Social Services initiated proceedings to permanently terminate the Santoskys' parental rights. Under New York's statute, the family court must make a finding of permanent neglect at a fact-finding hearing before termination at a subsequent dispositional hearing is possible. Accordingly, the Department filed peti-
tions alleging permanent neglect,\textsuperscript{82} claiming that the parents had failed to plan for the future of their children. The family court conducted a fact-finding hearing on the matter and dismissed the petition. Applying the preponderance of the evidence standard of proof, the court held that there were insufficient grounds to terminate the Santoskys' parental rights.\textsuperscript{83}

In October of 1978, the Department of Social Services filed a second set of petitions to terminate the Santoskys' parental rights.\textsuperscript{84} When the fact-finding hearing commenced, the Santoskys challenged the constitutionality of section 622 of the Family Court Act which permitted a finding of permanent neglect upon proof supported by a fair preponderance of the evidence.\textsuperscript{85} The family court rejected this constitutional challenge and found that the Santoskys had neglected to plan for the future of their children,\textsuperscript{86} and that the care they had provided for their children was, at best, "superficial and devoid of any emotional contact." In accordance with the New York statute, the court held that the parents' actions constituted permanent neglect.\textsuperscript{87} At a subsequent dispositional hearing, the family court terminated the Santoskys' parental rights to their three children.\textsuperscript{88}

\textit{Holding}

To determine whether due process requires a standard of proof greater than a preponderance of the evidence in parental termination proceedings, the majority pursued the traditional two-tiered due process inquiry: whether the interest involved was deserving of due process protection, and if so, what safeguards the level of process due required.\textsuperscript{89} First, the Court held that the fourteenth amendment protects the parents' fundamental liberty interest

\textsuperscript{82} 102 S. Ct. at 1393. Pursuant to statute, the termination petition must allege that despite the state agency's diligent efforts, the parents failed to maintain contact with their children or failed to plan for the future of their children. N.Y. SOC. SERV. LAW § 384-b, 7(a) (McKinney Supp. 1981-1982).

\textsuperscript{83} In re Santosky, 89 Misc. 2d 730, 393 N.Y.S.2d 486 (1977). The family court held that, although the Santoskys' reactions to the state's efforts were generally "non-responsive and even resentful, the fact that their response was at least superficially cooperative showed that there was hope of future improvement and an eventual reuniting of the family." Id. at 738, 393 N.Y.S.2d at 492.

\textsuperscript{84} 102 S. Ct. at 1393.

\textsuperscript{85} Id.

\textsuperscript{86} Planning is defined as taking "such steps as may be necessary to provide an adequate stable home . . . within a period . . . which is reasonable under the financial circumstances available to the parent." N.Y. Soc. Serv. Law § 384-b, 7(c) (McKinney Supp. 1981-1982). "The plan must be realistic and feasible, and a good faith effort shall not, of itself, be determinative." Id. Maintaining contact will not preclude a court from terminating parental rights. Id. § 384-b, 7(b). Thus, if a visit or communication by a parent with the child demonstrates a lack of affection and concerned parenthood, the action may be disregarded as insubstantial. Id.

\textsuperscript{87} 102 S. Ct. at 1393.

\textsuperscript{88} Id.

\textsuperscript{89} Id. Once the parental rights were terminated, the children faced the possibility of adoption.

\textsuperscript{90} Id. at 1388, 1394. See supra note 31 and accompanying text.
in matters of family life. Indeed, persons confronted with forced dissolution of parental rights have a critical need for fundamentally fair procedures to prevent the irretrievable destruction of family life. As a result, the Court concluded due process protection must be accorded.

The Court then turned to the second inquiry, the nature of due process protection required in a termination proceeding. The Court recognized that the standard of proof adopted reflects the weight of the private and public interest affected, as well as a societal judgment on the proper distribution of risk between litigants. Rejecting the state's contention that individual states should determine the standard of proof to be applied under a state termination statute, the Court held that the minimum requirements of due process are a matter of federal law and should be left to the federal judiciary to resolve. The Court renounced the case-by-case procedural due process analysis previously applied in termination proceedings and stated that the appropriate level of due process would be determined by reference to the typical parental termination proceeding, not the specific circumstances of a particular case.

Thus, the Santosky Court adopted the three-tiered due process test of Mathews v. Eldridge. The first tier of the Eldridge test, the private interest affected, balanced in favor of the parents. The parents' fundamental interest in retaining custody of their children was not only infringed upon by the state, but was completely severed. The Court also stressed the fact that termination is final and irreversible. Rejecting the possibility that a child may have an interest adverse to the parents, the Court maintained that, until a finding of permanent neglect is made, the child possesses the same vital interests as the parent in maintaining the family relationship. Accordingly,

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91. Id. at 1394.
92. Id. See infra note 140.
93. Id.
94. Id. at 1396 (citing Addington v. Texas, 441 U.S. 418, 424 (1979) (commitment proceeding)).
95. 102 S. Ct. at 1395.
96. Id. at 1396. In Lassiter v. Department of Social Serv., 452 U.S. 18, 31-32 (1981), the Court applied a case-by-case analysis to determine whether the indigent parents had the right to court-appointed counsel in termination proceedings. The Santosky Court rejected this approach and stated that the standard of proof must be known in advance and not determined by the trial court subject to appellate review. 102 S. Ct. at 1396. See supra notes 45-48 and accompanying text.
98. Id. at 1396.
99. Id. at 1397-98. The Court stated that a finding of parental unfitness should not be determined by balancing the child's interest in a normal family home against the parent's interest in raising the child. Id. Pursuant to the New York termination statute, the fact-finder only should be concerned with whether the state made diligent efforts to reunite the family and whether the parents maintained contact with or planned for the future of their children. N.Y. FAM. CT. ACT § 614 1(c), (d) (McKinney 1975). Consequently, a court may only consider the parent-child relationship to be adversarial after the state has established parental unfitness. 102 S. Ct. at 1398.
the Court concluded that the risk to the parents—a finding of permanent neglect which would authorize subsequent termination of the parental rights—requires heightened procedural protections.100

The Court then addressed the second tier of the Eldridge test: whether the risk of an erroneous deprivation of the private interest affected would be increased by applying the fair preponderance of the evidence standard. The Court noted that a fact-finding hearing bears many of the indicia of a criminal trial.101 The Court cited numerous factors which magnify the risk of an erroneous determination. For example, the termination proceedings employ imprecise substantive standards that leave determination open to the subjective values of the judge. Additionally, the parents involved are often poor, uneducated, and classified as a minority. The state, on the other hand, has more expertise and financial resources to prepare its case and the power to shape the historical events that form the basis of the termination.102 Finally, the Court pointed out that parents have no double jeopardy defense against continued state efforts to terminate parental rights of their children.103 Consequently, the preponderance of the evidence standard, the Court concluded, is deficient because it distributes the risk of error equally between the parent and the state in a proceeding that potentially may deny a fundamental liberty interest to the parents.104

Evaluating the last concern in the Eldridge analysis, the Court declared that the state’s interest in reducing the cost and burden of termination proceedings, and its parens patriae interest in preserving and promoting the welfare of its minor citizens, could adequately be served by applying a higher degree of proof.105 The Court stressed that the state’s primary interest is the continuation of the family relationship.106 Its secondary goal of providing

100. 102 S. Ct. at 1398.
101. Id. A termination proceeding has an accusatory and punitive focus. Alleging that the parents are unfit, the state petitions the court to permanently sever the parental rights. For an extensive discussion of termination procedures, see Lassiter v. Department of Social Serv., 452 U.S. 18, 42-43 (1981) (Blackmun, J., dissenting).
102. 102 S. Ct. at 1399. See supra notes 81-87 and accompanying text.
103. 102 S. Ct. at 1400. In the Santosky case, the state’s first attempt to terminate the parental rights was unsuccessful. See supra notes 80-83 and accompanying text.
104. 102 S. Ct. at 1400-01. The Court stated that using a fair preponderance of the evidence standard reflects an incorrect judgment that society is essentially neutral toward the erroneous termination of parental rights and the erroneous failure to terminate those rights. Id.
105. Id. at 1401. Unlike a constitutional mandate requiring a hearing or court-appointed counsel, a stricter burden of proof does not impose substantial burdens on the state. Id. See Lassiter v. Department of Social Serv., 452 U.S. 18, 31-32 (1981) (balancing presumption against counsel with the three Eldridge factors results in a finding that parents do not have right to counsel in every termination proceeding). The Court also noted that a higher degree of proof would not create any new administrative burdens since New York already required the clear and convincing standard of proof in matters of less importance, such as revocation of a drivers license. 102 S. Ct. at 1401-02.
a child with a permanent alternate home arises only when the natural parent cannot or will not provide an adequate family home.

Accordingly, the Court found that the near equal allocation of risk inherent in the fair preponderance of the evidence standard violated the fourteenth amendment in parental termination proceedings.107 The Court declined, however, to require proof beyond a reasonable doubt because the evidence relied on at termination procedures is difficult to prove to a level of absolute certainty and because state statutes prescribe different substantive standards for evaluating parental unfitness.108 The Court thus concluded that, at a minimum, a clear and convincing standard of proof is required in a parental termination proceeding.109 The decision of whether a higher standard of proof should be required is left to the discretion of the states.

**Analysis**

The Supreme Court has consistently held that parents have a fundamental right or liberty interest in freedom of choice concerning family life110 and has narrowly limited the extent to which the state may intrude upon that protected interest.111 Nevertheless, the Santosky Court applied the Eldridge due process formula and greatly infringed upon this protected interest of

107. 102 S. Ct. at 1402.

108. Id. See infra note 134 and accompanying text. For an extensive discussion of those state standards, see generally Katz, supra note 10; Ketcham & Babcock, Statutory Standards for the Involuntary Termination of Parental Rights, 29 Rutgers L. Rev. 530 (1976) [hereinafter cited as Ketcham]. These standards require the fact finder to evaluate to an absolute certainty such factors as lack of parental motive, absence of affection, and failure of parental foresight and progress. 102 S. Ct. at 1402.

109. 102 S. Ct. at 1402-03. Justice Rehnquist, Chief Justice Burger, Justice White, and Justice O'Connor dissented. The dissent criticized the majority for establishing the standard of proof as a matter of federal constitutional law. Id. at 1404 (Rehnquist, J., dissenting). The dissenting Justices predicted that the Court would inevitably be forced to address other aspects of termination proceedings, thereby inviting further federal court intervention into family law questions and, ultimately, the federalization of family law. Id. at 1404. The dissenters also disagreed with the majority's conclusion regarding the nature of process due to a parent in a termination proceeding. They maintained that the majority should have assessed the cumulative effect of the procedural protections offered by the New York Family Court Statute. Id. at 1405. Accordingly, after a thorough examination of the statute, the dissenters found it to be a praiseworthy attempt to "aid" parents in regaining the custody of their children. Id. at 1414. Finally, the dissent argued that the statute struck the proper balance between the interests of the parents in maintaining custody of their children and the interest of the state in providing a stable, nurturing homelife for its children. Id. at 1412-13. Consequently, the dissenters concluded that a fair preponderance of the evidence was the appropriate standard of proof in a parental termination proceeding. Id. at 1414.

110. See supra notes 1-9 and accompanying text.

111. See, e.g., Roe v. Wade, 410 U.S. 113, 155 (1973) (right of privacy is not absolute and is subject to some limitations because at some point state's interest in protection of health, medical standards, and prenatal life outweigh interest of individual); Wisconsin v. Yoder, 406 U.S. 205, 213 (1973) (state's interest in universal education, however highly ranked, is not totally free from a balancing process when it infringes on other fundamental rights and interests). See also supra notes 3-8 and accompanying text.
parents. By utilizing the Eldridge analysis, the Santosky decision may result in a serious impairment of parents' fundamental interest in bringing up their children.112

In essence, the Santosky Court employed a social calculus analysis, balancing the parents' liberty interest, the probability that a higher standard of proof would better protect that interest, and the state's additional administrative expense in granting alternate procedures.113 The Santosky Court, admittedly, gave only a cursory analysis to the state's administrative and fiscal interest.114 The mere consideration of this interest, however, increases the possibility that the parents' protected interest may be subjugated to a state's concern in avoiding increased administrative and fiscal costs. More importantly, the Court's concern with fiscal resource allocation has minimized the constitutional importance of the parents' fundamental liberty interest.

A comparison of the Eldridge and Santosky decisions demonstrates that the Eldridge due process formula is inappropriate in an inquiry concerning parents' fundamental interests. In Eldridge, the Court created the three-tiered balancing test to determine the threshold question of whether a hearing should be granted before termination of disability benefits.115 The Court focused on an entitlement interest, an independently grounded legal right found in the Social Security Act.116

In contrast to Eldridge, the Santosky Court considered whether the parents received the necessary procedural safeguards to ensure a fair hearing. The Santosky Court analyzed a core liberty interest and looked to the explicit and implicit guarantees of the United States Constitution.117 Specifically, the issue was whether the fair preponderance of the evidence standard of proof adequately protects parental rights when the state initiates an action to com-

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112. The Court, in effect, applied a test that limited the parent's constitutional due process right in order to economize and streamline administration of parental termination proceedings. Ultimately, the degree of protection that will be given to a parental right will vary in direct proportion to the fiscal and administrative costs involved. Thus, the parent's right to constitutional protection is sacrificed in favor of administrative efficiency. See generally Saphire, Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protections, 127 U. Pa. L. Rev. 111 (1978) (Court has failed to specify due process values and, essentially, has drained due process of its basic function as a limitation on the exercise of governmental power).

113. See generally Mashaw, supra note 44, at 48-49. Mashaw criticizes this social calculus analysis because it "dwarfs soft variables" and "ignores complexities and ambiguities." Id. at 48. The author asserts that the Court is incapable of finding an optimum social utility equation and that the decision should be left to the superior competence of the legislature. Id. Other commentators have demanded that the Court apply a test that is more responsive to procedural protections. See generally Interest Balancing, supra note 43, at 1538 (suggesting an alternative to Court's interest-balancing approach which would focus inquiry on whether procedures state accords an individual adequately achieve the basic purpose of due process).

114. See supra note 105 and accompanying text.


116. Id.

117. 102 S. Ct. at 1402.
pletely and irrevocably terminate those rights.\textsuperscript{118} The \textit{Santosky} Court found that under the fourteenth amendment’s due process clause, parents possess a protected liberty interest deserving strict procedural safeguards in termination procedures.\textsuperscript{119} Instead of directing its inquiry to how the parents’ constitutionally assured liberty interest could best be protected, however, the \textit{Santosky} Court directed its inquiry to how both the state’s and the parents’ interests could best be satisfied. Under this analysis, state fiscal and administrative concerns may be viewed as outweighing the parents’ protected interest in the upbringing of children.

In short, the \textit{Eldridge} test insufficiently protects the parents’ fundamental liberty interest because it embodies the view that the purpose of procedural protections is to enhance efficiency and minimize cost.\textsuperscript{120} The Supreme Court should de-emphasize the routine utilitarian consideration of the \textit{Eldridge} test and direct its analysis toward the parents’ intrinsic need for procedural protections.\textsuperscript{121} By applying an analysis which moves closer to an intrinsic conception of due process, the Court will reaffirm its historical recognition that parents have a constitutionally assured liberty interest in matters of family life.

**IMPACT OF THE \textit{SANTOSKY} DECISION**

Although the \textit{Santosky} Court improperly adopted the \textit{Eldridge} test, the outcome of the decision is commendable. The decision will have a significant impact on termination statutes,\textsuperscript{122} termination proceedings, and child protective agencies.

\textsuperscript{118} The purpose of the \textit{Eldridge} due process test is to ensure an equal distribution of limited statutory entitlement interests. This test is inappropriate in the context of \textit{Santosky} where the state is initiating a procedure to sever a biological relationship, recognized by the Constitution, in a manner that is punitive and adversarial. \textit{See supra} notes 58 & 101.

\textsuperscript{119} 102 S. Ct. at 1402.

\textsuperscript{120} \textit{See Tribe, supra} note 32, § 10-13 at 543. It is essentially a utilitarian analysis that balances the individual’s right to procedural protection against a majoritarian benefit analysis. \textit{See Interest Balancing, supra} note 43, at 1533.

\textsuperscript{121} When the Court addresses a fundamental right it applies a rigorous strict scrutiny analysis. Under a strict scrutiny approach, state laws imposing on fundamental rights must be justified by a compelling state interest and narrowly drawn to effectuate that legitimate compelling interest. For cases applying a strict scrutiny analysis, \textit{see supra} note 38. If the Court were to adopt the intrinsic, strict scrutiny approach, the possibility that the parent’s interest in preservation of their family unit being outweighed by the state’s interest in avoiding fiscal and administrative burdens would be eliminated. Furthermore, application of this test would be consistent with the Court’s prior decisions which have invalidated statutes infringing on fundamental interests.

\textsuperscript{122} Fourteen states have already adopted the “clear and convincing evidence” standard or its equivalent by statute. Sixteen states, the District of Columbia, and the Virgin Islands require the “clear and convincing evidence” or its equivalent in case law. \textit{Santosky v. Kramer}, 102 S. Ct. 1388, 1392 n.3 (1982). Three states have barred parental rights termination unless the key allegations have been proved beyond a reasonable doubt. \textit{In re Angela M.P.}, 106 Cal. App. 3d 42, 56-67, 164 Cal. Rptr. 849, 857 (1980), \textit{aff’d}, 28 Cal. 3d 908, 171 Cal. Rptr.
After *Santosky*, legislators and courts will be forced to scrutinize closely termination statutes to ascertain whether preservation of the parent-child relationship\(^{23}\) is sufficiently recognized. The protection of the child’s welfare is the primary purpose of most termination statutes.\(^{124}\) In attempting to protect the child’s interest, some courts in termination proceedings do not focus on parental unfitness, but rather, focus on whether the foster parents are fulfilling the needs of the child.\(^{125}\) Other courts strike a balance between the child’s interests and the parents’ interest in avoiding termination.\(^{126}\) The *Santosky* Court, however, established that the parents’ and child’s interests diverge only after the parents are declared unfit.\(^{127}\) Thus, the decision will

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123. See supra note 15.

124. See, e.g., CAL. CIV. CODE § 232.5 (West 1982) (“this chapter shall be liberally construed to serve and protect the interests and welfare of the right”); DEL. CODE ANN. tit. 13, § 1113 (Supp. 1980) (“[t]his Chapter is designated to achieve without undue delay the paramount objective of the best interest of the child, and all questions of interpretation shall be resolved with that objective in mind”); FLA. STAT. § 39.9(2) (1978) (court may order termination if best interests and welfare of child require this result). It is submitted that addressing the child’s best interests is an essential inquiry. The courts fail in this inquiry, however, when they treat the rights as adversarial and do not consider the possibility that the best interests of the child might be with the parents. See, e.g., *In re N.J.W.*, 273 N.W.2d 134, 139-40 (S.D. 1978) (conflict is inherent between the rights of the parents and those of the children). Consequently, under the “best interest” test the dispute is confined to “a simple factual issue as to which [party affords the better surroundings or as to which party is better equipped to raise the child.” *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 469, 113 N.E.2d 801, 804 (1953) (quoting *People ex rel. Portnoy v. Strasser*, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952)).

125. Many courts rely on the psychological attachment theory discussed in Goldstein, supra note 19. The authors believe that a child’s understanding of time is unnatural and long term separation from parents produces detrimental psychological effects. *Id.* at 11-12. They maintain that if a child develops a psychological parent-wanted relationship with a foster family, the child should stay with the foster parent. *Id.* at 13-14, 19. The authors state that a child needs continuity in relations and when this does not occur serious psychological harm results. Thus, the authors conclude that placement decisions should be based on the least detrimental alternative available. *Id.* at 53-56. The primary goal is to place children with parents who will become the child’s psychological parents. Therefore, termination proceedings would concentrate on whether the child’s needs are being met by a new psychological parent. *Id.* at 106. See, e.g., *In re Raymond*, 81 Misc. 2d 70, 77, 364 N.Y.S.2d 321, 328 (Fam. Ct. 1975) (court will consider psychological attachment theory when determining permanent neglect); *In re Kegal* 85 Wis. 2d 574, 584, 587-88, 271 N.W.2d 114, 119 (1978) (termination affirmed on continuity of relationship theory). Commentators have criticized this theory because existing psychiatric and psychological knowledge is generally insufficient to make a custody determination between two individuals having the same attachment to the child. See, e.g., Mnookin, supra note 19, at 605.

126. See, e.g., *State v. McMaster*, 259 Or. 291, 486 P.2d 567 (1971) (upholding statutory provisions against vagueness attack because they properly balance the child’s and the parent’s interests). *See also* N.Y. SOC. SERV. LAW § 384-b (McKinney Supp. 1981-1982) (intent of legislature to balance both the natural parents’ right and the child’s right to a nurturing parent-child relationship). *See generally* Gordon, supra note 81, at 263 (advocating that the natural rights of the parents be weighed with the childrens’ right to a warm supportive permanent home).

127. 102 S. Ct. 1388, 1398 (1982).
serve as precedent to invalidate statutes that construe the parent-child relationship as an adversarial one. Moreover, after *Santosky*, courts will no longer consider the child's best interests separately in a termination proceeding. Rather, they will focus solely on whether the state adequately has proved parental unfitness, and in doing so, should decrease the number of unnecessary terminations.

By imposing the clear and convincing standard of proof, *Santosky* will provide an impetus for the judicial system to uphold the goal of maintaining the family unit. Each state has various grounds for terminating parental rights. The majority of these statutes are vague and provide little meaningful guidance to judges. Consequently, the possibility of an erroneous termination is high, because judges often are forced to rely on their subjective beliefs and experiences to ascertain if termination is necessary. The *Santosky* decision will correct the inadequacies of these statutes by requiring judges to possess a higher degree of confidence in the accuracy of their decisions before terminating parental rights.

128. *See infra* note 130.

129. *See, e.g.*, WASH. REV. CODE ANN. § 13.34.020 (West Supp. 1982) ("[t]he legislature declares that the family unit is a fundamental resource of American life which should be nurtured").

130. Although some statutes properly consider parental culpability, intent, and refusal to perform duties following an adjudication of dependency as grounds for termination, the statutes generally give little concrete guidance. *See, e.g.*, S.C. CODE ANN. § 20-7-1570(1)(a) (Law. Co-op. 1981) (grounds for termination include failure to make effort to provide stable home, to show concern for the child’s welfare, or to achieve personal rehabilitation); Wis. STAT. ANN. § 4840(2)(b) (West 1979) (repeated refusal to give child necessary parental care for prolonged periods of time is grounds for termination). For a discussion of various child protective statutes, see generally Katz, *supra* note 10, at 48-49, 66-68; *Involuntary, supra* note 73, at 779-82 (1980); Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEo. L.J. 213, 231-32, nn.146-50 (1979).

There is a general feeling that more definite or specific statutes would not protect the welfare of the child. *See In re Adoption of J.S.R.*, 374 A.2d 860 (D.C. 1977); *In re Ladewig*, 34 Ill. App. 3d 393, 340 N.E.2d 150 (1st Dist. 1975). In fact, some courts maintain that the general standards used in the statutes are essential for protecting the child’s interest. *See, e.g.*, State v. McMaster, 259 Or. 291, 297-99, 486 P.2d 567, 570 (1971) (statute permitting termination of parental rights if parent is “unfit by reason of conduct or condition seriously detrimental” is not unconstitutionally vague because broad language is needed to protect the child). This approach has been criticized, however, and many proposals have been offered which contain specific standards for termination of parental rights. *See Institute of Judicial Administration, American Bar Association Standards Relating to Abuse and Neglect* (1981); Katz, *Freeing Children for Permanent Placement Through a Model Act*, 12 FAM. L.Q. 203 (1978).

131. Statutory standards which are not specific invite judges to apply their own folk psychology in state intervention decisions. Wald, *supra* note 13, at 1001-03. This permits judges to impose their own ideas of adult behavior, social depravity, and morality. S. Katz, *When Parents Fail*, 59 (1971).

132. In one study, three experienced juvenile court judges were given files concerning 50 actual families and asked if the parental rights should be terminated. The judges agreed in less than half of the cases. In those decisions they did agree on, the judges did not identify the same factors as determinants. *See Mnookin, supra* note 19, at 619.
Finally, the imposition of a higher degree of proof will yield a positive effect throughout a state's intervention system. Many states do not require child protection agencies to make firm efforts to preserve the family unit by providing rehabilitative and home-care services. Other states allow child protection agencies to make only half-hearted attempts to rehabilitate the family. Consequently, children often are subjected to an endless parade of foster homes, or worse, an ill-advised termination of parental rights. When a state relinquishes its goal of preserving the family relationship, the unwarranted disintegration of families results. The termination of parental rights causes the child to be put up for adoption. This, in turn, provides an alternative home for the parentless child and, thereby, relieves the state of its obligation to provide foster care and bear the resultant administrative costs. A higher standard of proof will remedy this result by compelling state agencies to provide increased rehabilitative services. The Santosky decision, by mandating that clear and convincing evidence exist to terminate parental rights, has rendered it significantly more difficult for the state to permanently remove a child from his natural home. Because the termination of parental rights is now less feasible, and returning a child to

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133. See supra note 15.
135. The longer a child remains in foster care, the less likely are his chances of returning home or being adopted. See A. GRUBEL, FOSTER HOME CARE IN MASSACHUSETTS, 72 (1973) (60% of children in foster care had been in such care between four to eight years with average stay over five years). This problem occurs because courts frequently consider the length of time that the parent and child have been separated as grounds for leaving the child in the custody of a state agency. Alsager v. District Ct., 406 F. Supp. 10 (S.D. Iowa 1975), aff'd per curiam, 545 F.2d 1137 (8th Cir. 1976). Other reasons have been cited for the child's extended stay in foster homes. For example, agencies fail to offer rehabilitative services to the parents, to prepare them for the return of their children. Additionally, states employ a limited number of social service workers who are poorly paid, inadequately trained, and possess inherent cultural biases toward minorities and the poor. For a more detailed discussion of the inadequacies of the foster care system see Ketcham, supra note 108, at 540-43; State Intrusion, supra note 10, at 1386.
137. 102 S. Ct. at 1402.
138. Statutes require courts to make an adjudication of dependency before removing the child from the home. Dependency encompasses a finding of neglect, abuse, or abandonment. Most state statutes require proof by a preponderance of evidence to justify a finding of dependency. See, e.g., COLO. REV. STAT. § 19-3-106(6)(a) (1973) (dependency adjudication based on preponderance of evidence); DEL. CODE ANN. tit. 108, § 937(a) (preponderance of evidence required); IDAHO CODE § 16-1610(a) (Supp. 1982) (preponderance of evidence).
a harmful parental home is inadvisable, a state's alternative will be to either
direct its efforts toward rehabilitating the family or bear the high ad-
ministrative costs of providing foster care. Considering the economic hard-
ship that states are experiencing, it is likely that most states will choose to
work toward preserving the family unit. If indeed this is the case, future
termination of parental rights will occur only after the state has made diligent,
yet unsuccessful efforts to remedy the deficient home environment, and the
state has clearly proved statutory allegations of parental unfitness.

CONCLUSION

The adoption of a higher standard of proof in parental termination pro-
ceedings prevents the unnecessary destruction of parent-child relationships. The
state, constrained by a higher standard of proof, will have to work first toward
rehabilitating the family and may only initiate actions to terminate parental rights
after the parents clearly prove irredeemable. The Santosky decision impresses
upon the state intervention system that the primary goal of society is to preserve
parent-child relationships, not to terminate them.

Although the Santosky conclusion is commendable, the Court's due process
methodology may prove problematic. The Eldridge utilitarian due process for-
ma formula poses a serious threat to the parents' constitutionally assured liberty in-
terest. By balancing the parents' protected interest against the state's ad-
ministrative and fiscal interests, the Court minimizes the value of parental rights.
Indeed, it is difficult to accept the Eldridge proposition that the concepts of
individual rights and public costs are susceptible to principled comparisons.139
Furthermore, the Court has noted that the interest of a parent in the care,
custody, and management of his child "comes to the Court with a momentum
of respect lacking when appeal is made to liberties which derive merely from
shifting economic arrangements."140 Parental rights should be infringed upon
only when there is a substantial threat to the child's well-being, not because
a consensual view of convenience and cost exists.141 A less positivistic
methodology of procedural due process is needed in parental termination pro-
ceedings. Accordingly, the Court should renounce the Eldridge three-tier
balancing test and adopt a test which focuses on protecting the parents' funda-
mental liberty interest in bringing up their children.

Ruth Slayco Witt

95 (1949) (Frankfurter, J., concurring)).