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I. INTRODUCTION

In the past two decades, the area of family law has become increasingly infused with federal constitutional principles. Prior to that time, two factors—the fact that “family rights” are not explicitly mentioned in the Constitution and the tenth amendment’s residuary power clause—combined to leave the area of family law under the exclusive jurisdiction of the states with constitutional
protections thought to be inappropriate, if not inapplicable. Today, the clear trend has been in the direction of an increasing recognition and protection of family rights under the Constitution.

This protection has taken two distinct, but at times related, forms: equal protection and due process. The present analysis will focus solely on the second branch of these constitutional protections. Following the landmark case of *Griswold v. Connecticut,* in which the Court held that the fourteenth amendment's...

9. For an example of a case involving both an equal protection and due process analysis, see Zablocki v. Redhail, 434 U.S. 374 (1978). This case involved a state statute requiring an applicant for marriage to submit a statement that his or her children were being adequately supported. See also Stanley v. Illinois, 405 U.S. 645 (1972).
10. No state shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV, § 1. Briefly, the Supreme Court has developed a three-tier analysis under this amendment. The highest level of scrutiny, strict scrutiny, is applied to suspect classifications and fundamental rights. A middle level of scrutiny is applied to semi-suspect classifications such as sex. The lowest level of scrutiny, rational basis, is used in the remainder of cases.

11. The fourteenth amendment provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.
12. 381 U.S. 479 (1965). *Griswold* may be seen as the crystallization or culmination of the Supreme Court's earlier attempts to articulate a fundamental interest in family relationships. See supra note 1. The trend which resulted in *Griswold* is often traced back to *Meyer v. Nebraska,* 262 U.S. 390 (1923) and *Pierce v. Society of the Sisters,* 268 U.S. 510 (1925). *Meyer* involved a school teacher who had been convicted under a state statute prohibiting the teaching of any foreign language to children younger than the eighth grade. In dicta, the Court recognized the right of an individual "to marry, establish a home and bring up children . . .," *Meyer,* 262 U.S. at 399, among other rights. *Pierce* involved an Oregon statute making attendance at public schools mandatory. The *Pierce* Court held that the statute was unconstitutional because it intruded on the liberty of parents to make decisions regarding the raising and educating of their children. Commentators have also pointed to *Roe v. Wade,* 410 U.S. 113 (1973), a case involving a woman’s decision whether or not to have an abortion, as a continuation of the Court's recognition of the fundamental nature of family life.
due process clause was applicable to the fundamental interest of marital privacy,\textsuperscript{13} the due process doctrine has been extended to a number of important, related rights,\textsuperscript{14} including the right of parents to rear their children.\textsuperscript{15} The fundamental nature of parental rights was recently reaffirmed in \textit{Lassiter v. Department of Social Services}\textsuperscript{16} when the Court wrote:

This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the companionship, care, custody and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection."\textsuperscript{17}

After having thrown the cloak of due process around this sphere of family rights, the Supreme Court has been confronted with a host of decisions\textsuperscript{18} asking it to define the parameters of what process is constitutionally due.\textsuperscript{19} In \textit{Lassiter},\textsuperscript{20} the Court applied the three factor balancing test\textsuperscript{21} laid out in \textit{Mathews v. Eldridge}\textsuperscript{22}

\begin{itemize}
  \item \textsuperscript{13} Griswold v. Connecticut, 381 U.S. 479 (1965).
  \item \textsuperscript{14} Among the rights recognized as fundamental are: (1) the right of individual autonomy in activities relating to marriage, Zablocki v. Redhail, 434 U.S. 374 (1978); (2) procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942); (3) contraception, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965); (4) abortion, Roe v. Wade, 410 U.S. 113 (1973); (5) family relationships, Moore v. City of E. Cleveland, 431 U.S. 494 (1977); and (6) the rearing and education of children, Pierce v. Society of the Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). \textit{See also Developments, supra} note 2, at 1161.
  \item \textsuperscript{15} For example, in Stanley v. Illinois, 405 U.S. 645 (1972), the Court struck down a state statute mandating that upon the death of their mother, children of unwed fathers become wards of the state. The Court said: "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." \textit{Id.} at 651.
  \item \textsuperscript{16} 452 U.S. 18 (1981). This case presented the question of whether the due process clause of the fourteenth amendment required that indigent parents be afforded counsel.
  \item \textsuperscript{17} \textit{Lassiter}, 452 U.S. at 27 (citation omitted).
  \item \textsuperscript{18} \textit{See supra} note 14.
  \item \textsuperscript{19} \textit{See, e.g.}, Morrissey v. Brewer, 408 U.S. 471 (1972). In \textit{Morrissey}, the Court held that under the due process clause a parolee at parole revocation hearings is entitled to a hearing, written notice, and an opportunity to present evidence and cross-examine witnesses. This case is usually cited for the proposition that "[o]nce it is determined that due process applies, the question remains what process is due." \textit{Id.} at 481.
  \item \textsuperscript{21} These three factors include: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation and the probable value of additional or substitute procedural safeguards; and (3) the government's inter-
to define what process is constitutionally due in the area of family rights. *Santosky v. Kramer,* a case in which the Court was asked to determine what standard of proof is constitutionally mandated in a termination of parental rights proceeding, presented the Court with another opportunity to apply the *Mathews* analysis in a matter of family law.

This Note will analyze the *Santosky* decision, giving particular emphasis to its reconcilability with *Lassiter.* Additionally, an analysis of whether the Supreme Court went far enough in establishing the standard of proof will be undertaken.

II. THE SANTOSKY DECISION

A. The Facts

The *Santosky* decision marked the culmination of nearly a decade of litigation between John and Annie Santosky and the State of New York. The first contact between the Santoskys and the New York Family Court came in November 1973. After some evidence of parental neglect and abuse, Kramer, Commissioner of the Ulster County Department of Social Services, initiated temporary removal proceedings in the New York Family Court and succeeded in having Tina, the Santoskys' eldest daughter, removed. Ten months later, on the basis of similar evidence, John III was also temporarily removed. Three days later, when the Santoskys' third child, Jed, was only three days old, he was also re-

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23. *Mathews* held that due process did not require that prior to termination of Social Security disability benefit payments, a recipient be afforded an opportunity for an evidentiary hearing.
24. The Santoskys have five children: Tina, John III, Jed, James, and Jeremy. Only three of these children are involved in the present litigation. The State of New York has not initiated temporary removal or permanent neglect proceedings for the other two children.
25. The department specifically sued was the Ulster County Department of Social Services. *Santosky,* 102 S. Ct. at 1393. See also id. at 13391-92 for a summary of relevant New York statutory law.
26. *Santosky,* 102 S. Ct. at 1408 n.10 (Rehnquist, J., dissenting). The Court noted, that the temporary removal proceedings for Tina were initiated on the basis of complaints by neighbors and hospital reports of injuries to the child.
28. *Santosky,* 102 S. Ct. at 1408 n.10 (Rehnquist, J., dissenting). John III was
moved. Temporary removal of these children was continued pursuant to an evidentiary hearing in December 1975.

Nearly one year later, in September 1976, Kramer initiated permanent neglect proceedings for the three children but was unsuccessful. In October 1978, Kramer again petitioned the Family Court for permanent termination of the Santosky's parental rights and was successful. At the factfinding stage in this latter proceeding, the court applied the statutory standards and found that the Santoskys had failed to plan for the future of their children, that this failure had risen to the level of permanent neglect, and that the state had made diligent but unsuccessful efforts to reunite the family. The presiding Family Court judge rejected the Santoskys' constitutional challenge to the "fair preponderance" standard of proof and proceeded to decide the case upon that standard. At the dispositional hearing in April 1979, the same judge determined that the best interests of the three Santosky children would be served by the permanent termination of their natural parents' rights.

In 1980, the Santoskys sought review of the Family Court decision in the New York Court of Appeals again challenging the constitutionality of the "fair preponderance" standard. That court sua sponte transferred the case to the New York Supreme Court, Appellate Division, which affirmed the Family Court, holding that temporarily removed when he was admitted to the hospital for malnutrition and injuries.

29. See id. In the case of Jed, Kramer apparently used the exigent circumstances exception to the temporary removal statute. Thus, based on the abusive treatment of the other two children, Jed was removed.

30. After this evidentiary proceeding, the Family Court issued a written opinion indicating the reason for its decision, namely that the Santoskys could not resume their parental duties because of personality defects. The court directed Kramer and his Department to provide a written plan for the Santoskys in their attempts to reunite the family.

31. In re Santosky, 89 Misc. 2d 730, 393 N.Y.S.2d 486 (1977). The court dismissed Kramer's petition for failure to prove an essential statutory element. The case was affirmed on appeal in In re John W., 63 A.D.2d 750, 404 N.Y.S.2d 717 (1978), where the Appellate Division of the New York Supreme Court found that the Santoskys had planned for the future of their children.

32. The plan proposed by Kramer included both intensive counseling and training services for the Santoskys. The 1976 petition was the result of the Santoskys' failure to avail themselves fully of these services and of a growing concern over the children's lengthy stay in foster homes.

33. As the majority noted, parents are not afforded double jeopardy protection. Thus, the state may continue to initiate permanent neglect proceedings until successful.

34. The Court had transferred the case because it felt that a direct appeal was not available since questions other than the constitutional validity of a statute were involved.

New York's standard was proper and constitutional. The New York Court of Appeals then dismissed the case for lack of a substantial constitutional question. In 1981, the United States Supreme Court granted certiorari.

B. The Supreme Court Decision

In *Santosky v. Kramer*, the United States Supreme Court held in a 5-to-4 decision that the due process clause of the fourteenth amendment required that a state use a clear and convincing standard of proof in a termination of parental rights proceeding.

The Court quickly disposed of the threshold question of whether due process applied to cases involving the termination of parental rights, stating: "[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Thus, procedures to terminate parental rights must meet the standards of the due process clause. The Court was then confronted with the corollary question of what process was due and employed the *Mathews* factors to make this determination. The *Santosky* majority and dissent did not differ on the threshold question, that is, whether due process applied, but only on the results of an application of *Mathews* to determine what process was in fact due.

Relying on *Addington v. Texas*, the Court reaffirmed its views on the function of a standard of proof, namely that the standard is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclu-

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36. *Id.* The Court reasoned that the “fair preponderance” standard balances the child’s rights with those of the parents.
38. *Id.* at 1402.
39. *Id.* at 1394.
40. The Supreme Court had been confronted with that exact question most recently in *Lassiter* and there held that it is “not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause.” *Santosky*, 102 S. Ct. at 1394 (citation omitted). Also, the Court pointed out that the fundamental liberty interest of natural parents in their children “does not evaporate simply because they have not been model parents or have lost temporary custody of their children. . . . When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.” *Id.* at 1394.
41. See *supra* note 19.
42. See *supra* note 21.
43. “It is the majority’s answer to this question [what process is due] with which I disagree.” *Santosky*, 102 S. Ct. at 1405 (Rehnquist, J., dissenting).
44. 441 U.S. 418 (1979). *Addington* involved the standard of proof in civil commitment cases. Using a due process analysis, the Court held that a clear and convincing standard of proof was constitutionally necessary.
sions for a particular type of adjudication," and it also represents a societal judgment about how the risk of error should be distributed among the parties. Additionally, the Court emphasized that this was a question of federal law, and the type of question traditionally decided by the judiciary.

The *Santosky* Court began examining the first Mathews factor, namely the private interest affected, by making two key points. First, the Court quoted from *Goldberg v. Kelly*, stressing that the extent of due process protection is governed by the extent of an individual's potential grievous loss. The question of whether a loss is sufficiently grievous to require more than average certainty by the factfinder turns on both the nature of the private interest affected and the permanency of the loss. In the present case, the Court reaffirmed its position that parents have a substantial interest in their children. Additionally, the Court emphasized the permanency of this loss in two ways: "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." The Court also stated that unlike juvenile delinquency, civil commitment, deportation, and denaturalization cases, the termination of parental rights is irreversible.

Second, the Court distinguished between the factfinding and dispositional phases of New York's procedure. It emphasized that at the former, the interests of parent and child are identical; in particular, they share a "vital interest in preventing the erroneous

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45. *Id.* at 423 (quoting *In re Winship*, 397 U.S. 358 (1970) (Harlan, J., concurring)). *Winship* held that a beyond a reasonable doubt standard was constitutionally necessary in both adult criminal cases and juvenile delinquency proceedings.

46. *Santosky*, 102 S. Ct. at 1395. Perhaps in an attempt to rebut the dissent's argument of state supremacy in this area, the *Santosky* Court quoted from *Vitek v. Jones*, 445 U.S. 480, 491 (1980) by stating: "The 'minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the state may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.'" *Santosky*, 102 S. Ct. at 1395.

47. *Id.* But see *Id.* at 1404 n.2 (Rehnquist, J., dissenting).

48. 397 U.S. 254 (1970). *Goldberg* involved a plaintiff whose welfare benefits were terminated without a prior evidentiary hearing. The Court held that the plaintiff had a due process right to such a hearing.


50. *Id.*

51. See *supra* note 15.

52. *Santosky*, 102 S. Ct. at 1397.

53. *Id.* The Court went on to state: "Few forms of state action are both so severe and so irreversible." *Id.*

54. See *supra* note 25.
termination of their natural relationship." Thus, interests of the parent and child are not to be balanced against each other. Rather, this factfinding proceeding pits the State against the parent. It is at this point that the dissent diverged from the majority opinion. The dissent viewed the interests of the parent and child as distinct. Thus, the dissent believed it necessary to balance the interests of parent and child, and then balance the parent's interest against the interests of the child and the state.

The Court considered two questions in its analysis of the second Mathews factor: the risk of erroneous deprivation of private interests resulting from the "fair preponderance" standard and the likelihood that a higher standard would reduce that risk.

The Court noted that the "fair preponderance" standard did not fairly allocate the risk of an erroneous factfinding between the state and the parents. The Court stressed that the factfinding stage of termination proceedings bears many of the indicia of a criminal trial. Additionally, a variety of policy considerations...
combined with this standard to create a substantial risk of erroneous termination.\textsuperscript{63}

In regard to the second aspect of this \textit{Mathews} factor, the Court noted that raising the standard of proof would have both practical and symbolic consequences.\textsuperscript{64} The practical consequence would be to inform the factfinder of the importance of the decision and thus reduce the likelihood of an inappropriate termination.\textsuperscript{65} On a symbolic level, a preponderance standard falsely reflects a societal determination that an erroneous termination and an erroneous failure to terminate are equal societal values,\textsuperscript{66} when in fact there is greater harm when an erroneous termination ensues.\textsuperscript{67} Thus, a preponderance standard does not accurately reflect the relative severity of these outcomes.\textsuperscript{68} Again, the dissent would agree with New York's conceptualization that these outcomes are essentially equal.\textsuperscript{69}

In its analysis of the third \textit{Mathews} factor, governmental interests, the Court focused on two interests. First, it noted that the

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  \item The fact that permanent neglect proceedings use rather imprecise substantive standards. These standards leave decisions open to the subjective values of judges, give judges unusual discretion in underweighing facts favorable to the parents, and leave proceedings vulnerable to cultural or class bias. The second set of factors concerns the state's superior ability to assemble a case. In particular, the state's attorney is usually an expert in this type of litigation and has access to public records and psychological experts. Also, since the child is usually in the state's custody, the state can, more easily than the parents, shape the events leading to a termination proceeding. The Court noted that this disparity will be even greater in states not providing counsel for indigent parents. The final set of factors concerns the asymmetry in the litigation options of the two parties. In particular, parents have no double jeopardy protection. \textit{Id.} at 1399-1400.
  \item The Court borrowed language from \textit{Addington} to make its point. "An elevated standard of proof in a parental rights termination proceeding would alleviate 'the possible risk that a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] ... idiosyncratic behavior.'" \textit{Id.} at 1400.
  \item "For the child, the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo. For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family." \textit{Id.} at 1400-01.
  \item In balancing the interests of the child and state against those of the parents, Justice Rehnquist wrote: "[I]t cannot be said that either set of interests is so clearly paramount as to require that the risk of error be allocated to one side or another." \textit{Id.} at 1413 (Rehnquist, J., dissenting). Therefore, the dissent concluded that a fair preponderance standard is constitutional.
\end{itemize}
state had a strong *parens patriae* interest in "preserving and promoting the welfare of the child . . . ." In this way, the State shares the parents' interest in an accurate determination at the factfinding stage since it would be a betrayal of this power to sever the legal relationship between fit parents and their children. Like the interests of the child, the state's interests only diverge from those of the parents' interests at the dispositional stage.

The second government interest noted by the Court was "a fiscal and administrative interest in reducing the cost and burden of such proceedings." From a fiscal standpoint, the Court distinguished *Santosky* from the *Mathews* and *Lassiter* decisions by emphasizing the relatively minimal impact that a stricter standard of proof would have upon the proceedings. Also, the *Santosky* Court noted that thirty-three states employ a higher standard without adverse consequences. Similarly, on the question of administrative burden, the Court stressed that Family Court judges

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70. "In the United States, the state, as a sovereign—referring to the sovereign power of guardianship over persons under disability; . . . such as minors, and insane and incompetent persons." BLACK'S LAW DICTIONARY 1269 (rev. 4th ed. 1968) (citations omitted).


72. Id. This language affirms that the state's goal under this power is to provide for a permanent home for the child. The *parens patriae* power of the state favors preservation of the natural family unit when the parents are fit. *Id.*

73. Id. Stanley v. Illinois, 405 U.S. 645 (1972) is cited for this proposition.

74. *Santosky*, 102 S. Ct. at 1401 n.17. If the Court's analysis is to be taken at face value, this statement is difficult to reconcile with the Court's earlier statement that the factfinding stage pits the parent against the state. Perhaps the Court is merely implying that all parties—parent, child, and state—share a vital interest in an accurate and just determination, even in the adversary roles occupied by the state and the parents.

75. Id. at 1401.

76. Id. "Unlike a constitutional requirement of hearings, see, e.g., Mathews v. Eldridge, 424 U.S. at 347, 96 S. Ct., at 908, or court appointed counsel, [see, e.g., Lassister v. Dep't of Social Services, 452 U.S. 18 (1981),] a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." *Id.*

77. The states requiring a clear and convincing standard by statute are: Alaska, California, Georgia, Iowa, Maine, Michigan, Missouri, New Mexico, North Carolina, Rhode Island, Tennessee, Virginia, West Virginia and Wisconsin. The states requiring a clear and convincing standard by court decision are: Alabama, Arkansas, Florida, Illinois, Kansas, Minnesota, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Pennsylvania, Texas, Utah, Washington, Wyoming, the District of Columbia and the Virgin Islands. South Dakota has required a "clear preponderance" standard. New Hampshire and Louisiana has required a "beyond a reasonable doubt" standard by case and statute respectively. The citations are collected in *Santosky*, 102 S. Ct. at 1392 n.3.

As previously noted, Nebraska requires a clear and convincing standard. See In re Souza, 204 Neb. 503, 283 N.W.2d 48 (1979).
were already familiar with a higher standard of proof; and therefore, its application in this setting would not create greater administrative burdens.

Thus, the Court stated: “The logical conclusion of this balancing process is that the ‘fair preponderance of the evidence’ standard . . . violates the Due Process Clause of the Fourteenth Amendment.” The only question left for the Court to consider was whether to apply a clear and convincing standard or a beyond a reasonable doubt standard. The Court decided upon the former standard for two basic reasons. First, it was hesitant to apply the reasonable doubt standard too broadly in noncriminal cases. Second, the Court stressed that psychiatric evidence which would be employed in termination proceedings would not be susceptible to proof at the higher standard. The Court distinguished the Indian Child Welfare Act’s use of a clear and convincing standard. Thus, the Court held “that such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process.” Of course, the Court noted, the exact level of proof equal to or greater than this standard is left to the states to decide.

Apart from its differing analysis of the Mathews factor, the dissent offered two arguments. First, the dissent emphasized the hegemony of the states in the area of family law. The dissent pointed out that the decision would have undesirable consequences in two ways. First, it would lead to the federalization of

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78. Specifically, New York mandates a clear and convincing standard of proof in termination of parental rights cases due to mental illness, retardation, or severe abuse. Also, New York uses this higher standard in cases of traffic infractions and contract reformations. 102 S. Ct. at 1402.

79. Id.

80. Id.

81. Id. (relying on language from Addington).

82. Id. “Congress did not consider, however, the evidentiary problems that would arise if proof beyond a reasonable doubt were required in all State-initiated parental rights termination proceedings.” Id.

83. 102 S. Ct. at 1402-03.

84. 102 S. Ct. at 1403. States have always been free to provide greater but not lesser protections than are constitutionally mandated.

85. Id. (Rehnquist, J., dissenting). The dissent seemed to be attempting to revive the notion that matters of family law should be left to the states. See supra notes 4-5 and accompanying text. But the dissent qualified its position: This is not to say that the Court should blink at clear constitutional violations in state statutes, but rather that in this area, of all areas, “substantial weight must be given to the good faith judgments of the individuals [administering a program] . . . that the procedures they have adopted assure fair consideration of the . . . claims of individuals.”

Id. (citation omitted).
family law, that is, greater federal intervention in state court matters, and second, it would stifle the generation of creative solutions to family law problems in state courts.

The dissent's second major argument was that the majority took a myopic view of New York's statutory procedure by merely focusing on the standard of proof and not the statute in its entirety. Taken as a whole, the dissent concluded that New York's scheme is fundamentally fair. Additionally, the dissent pointed to the factual setting of *Santosky* as an illustration of the exhaustive character of New York's statutory scheme.

### III. ANALYSIS OF THE SANTOSKY DECISION

A discussion of the *Santosky* decision begins by asking why the Supreme Court did not mandate the reasonable doubt standard as the constitutionally necessary burden of proof in termination of parental rights proceedings.

Since the Court in deciding *Santosky* spent the greater part of its opinion rejecting New York's "fair preponderance" standard and only three paragraphs deciding between a clear and convincing and a reasonable doubt standard, the Court does not make its reasoning on this question abundantly clear. When the Court did arrive at the final question of which standard should be required, it relied almost exclusively on language from *Addington* to the effect that first, it was hesitant about extending the reasonable doubt standard to noncriminal contexts, and second, it was concerned with the unreliability of evidence used in termination proceedings. Finally, as additional support for its decision, the Court noted that a majority of states use a clear and convincing standard. A number of possible explanations for the Court's decision

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86. 102 S. Ct. at 1404 (Rehnquist, J., dissenting). The dissent argued that by analyzing the question of an appropriate standard of proof, the Court would have to evaluate other aspects of the states' statutory schemes; and thus, family law would be federalized.

87. 102 S. Ct. at 1403-04 (Rehnquist, J., dissenting). The dissent emphasized that federal intrusion will stifle states' attempts to come up with "novel approaches and promising progress" to the problems of family law. *Id.*

88. *Id.* at 1405. (Rehnquist, J., dissenting).

89. *Id.* at 1403. (Rehnquist, J., dissenting).

90. *Id.*

91. *Id.* at 1402-03.

92. *Id.* at 1402.

93. *See supra* note 77. This argument appears rather vacuous on its face, since the Court has never felt compelled to make a decision by merely tallying the stands of the various states. In fact, if this were the case, the decision in *Lassiter* would have been different since 33 states provided that indigent parents are entitled to counsel. Perhaps the Court's argument is really an indication of some deference being paid to states in the area of family law. The
will be examined below. It should be noted that these rationales are not necessarily mutually exclusive.

First, the *Santosky* Court’s heavy reliance on language from *Addington* carries the implicit assumption that termination of parental rights proceedings more closely resemble cases of civil commitment than criminal trials; and therefore, a clear and convincing standard is more appropriate. The cogency of this assumption will be explored.

In deciding *Addington*, the Court began by referring to the two-pronged test announced in *In re Winship*.94 In that case, the Court held that a reasonable doubt standard was not only constitutionally necessary in adult criminal trials, but also in juvenile delinquency proceedings because both types of cases involved: (1) the potential for the complete loss of physical liberty, and (2) stigma.95 Interestingly, the Court in *Addington* concedes that both of these elements are present in cases of civil commitment96 but proposes that there still exist differences between civil commitment and juvenile delinquency cases which justify different standards.97 Specifically, the Court noted that in civil commitment, the state’s power is not punitive, that there are opportunities for changing erroneous commitments, and that the two proceedings involve very different types of inquiry.98 Therefore, it is necessary to further examine the Court’s reasoning in *Addington* to determine the applicability of these factors to *Santosky* and to decide whether *Santosky* more closely resembles criminal cases than *Addington*.

In regard to the first *Winship* factor, it may be argued that *Addington* comes closer to criminal cases because of the potential loss of physical liberty inherent in commitment. In contrast, *Santosky* involves the loss of a different type of fundamental liberty interest, namely the loss of one’s children. The Court’s distinction between

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94. See supra note 45.
97. *Id*.
98. *Id*.
these two types of interests was made clear in *Lassiter* where the Court noted that an indigent's right to appointed counsel exists only where the litigant may lose physical liberty if he or she is found guilty.\(^9\)

Thus, as a litigant's interest in personal liberty diminishes so does his or her right to appointed counsel.\(^{100}\) Therefore, the Court balanced its analysis of the *Mathews* factors on the question of appointed counsel against a presumption disfavoring appointed counsel in noncriminal cases.\(^{101}\) The dissenters in *Lassiter* questioned the soundness of this distinction.\(^{102}\) In fact, Justice Stevens suggested that the loss of one's children may in fact be more grievous than the loss of physical liberty.\(^{103}\) Even the dissent in *Santosky* noted: "Few consequences of judicial action are so grave as the severance of family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members."\(^{104}\) Thus, a major stumbling block to the use of a reasonable doubt standard in termination proceedings is the fact that no loss of physical liberty is involved. It is understandable why the Court, having rejected the attempt in *Addington* to import the reasonable doubt standard,

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100. Id.
101. The *Santosky* Court distinguished *Lassiter* on this point, noting that there is no presumption as to the correct standard of proof against which the *Mathews* factors would be balanced.
102. "By emphasizing the value of physical liberty to the exclusion of all other fundamental interests, the Court today grants an unnecessary and burdensome new layer of analysis on its traditional three-factor balancing test." *Lassiter*, 425 U.S. at 659 n.8 (Blackmun, J., dissenting).
103. Id. at 659-60 (Stevens, J., dissenting).

Theoretically, it is difficult to attempt to balance the loss of physical liberty and the loss of one's children. Empirically, it may be possible to measure the impact of both types of losses in order to attain a better understanding of the gravity of each. Another way of comparing these two types of deprivation might be in terms of permanency. As the Court in *Santosky* pointed out, the extent of due process protection must be evaluated according to the nature of the interest affected and the permanency of the loss. Except in extreme cases, a criminal conviction does not result in the permanent deprivation of physical freedom. However, a parental termination decision does result in an *irreversible* deprivation of parents' liberty interest in their children. *See infra* note 113.

Finally, the values of these two interests might be compared on an "exhaustiveness" dimension. Thus, imprisonment is usually totally encompassing for the specified period, while termination of parental rights does not preclude parents from having other children—as the facts in *Santosky* attest. But, one might question whether termination would have a chilling effect on a parent's desire for additional children or when a parent is unable to have other children.
would be even more hesitant to do so in *Santosky* which did not involve a loss of physical liberty.

Regarding the second *Winship* factor, stigma, it appears that both *Addington* and *Santosky* resemble criminal cases. The *Addington* court noted that stigma often accompanies commitment. In the same way, stigma would clearly result from a determination by a court that parents were unfit to care for their children. The literature on perceptions of child abusers might be supportive of this assertion. Arguably, then, *Santosky* meets both prongs of the *Winship* test. However, *Addington* instructs that the two prongs of *Winship* are necessary, but not sufficient conditions.

Perhaps, then, the *Winship* decision rested not only on these two points of similarity between criminal cases and juvenile delinquency proceedings but on other similarities. The Court in *Addington* stressed the importance of other factors. First, it noted that the State's power in cases of civil commitment was not punitive as in criminal cases and presumably juvenile delinquency proceedings. Assuming arguendo that the Court was correct in *Addington*, it is possible to argue that the termination of parental rights is indeed punitive. For instance, the dissent in *Lassiter* states: "It is hardly surprising that this forced dissolution of the parent-child relationship has been recognized as a punitive sanction by courts, Congress, and commentators." Similarly, the New Hampshire Supreme Court stated: "The loss of one's children can be viewed as a sanction more severe than imprisonment." In this sense, *Santosky* may be closer to criminal cases than *Addington*.

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105. However, while the Court did not equate juvenile delinquency proceedings with criminal trials per se, it should be remembered that in *In re Gault*, 387 U.S. 1 (1967), decided three years before *Winship*, the Court similarly held that a juvenile is entitled to many of the same protections accorded an adult criminal defendant. Specifically, these protections included notice of charges, right to counsel, right to confrontation and cross-examination of witnesses, and the right against self-incrimination. Thus, the Court had already gone a long way toward equating these proceedings. Although later, in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court seemed to back down by not mandating trial by jury in juvenile cases, the incredible similarity between criminal cases and juvenile proceedings cannot be escaped.

106. In stressing these other considerations, the *Addington* Court sought in particular to distinguish *Winship*. See *Addington*, 441 U.S. at 423.


108. *State v. Robert H.*, 118 N.H. 713, 716, 393 A.2d 1387, 1389 (1978). In this case, the New Hampshire Supreme Court required that a reasonable doubt standard be used in parental termination cases. New Hampshire and Louisiana are the only two states requiring this higher standard. See supra note 77.

109. One caveat to this argument must be noted. In criminal cases, the state exer-
Another factor stressed in *Addington* was that there are opportunities to change erroneous commitments. In contrast, the majority in *Santosky* stressed the permanence and irreversibility of a termination decision once it has become final. Specifically, the Court mentioned both juvenile delinquency and civil commitment cases as examples of “reversible official actions” at least to a degree. Conversely, the Court wrote of terminations: “Few forms of state action are both so severe and so irreversible.”

Finally, the *Addington* Court stressed that criminal and civil commitment cases involved two very different types of inquiry. Criminal adjudications as well as juvenile cases usually require relatively straightforward factual determinations while civil commitment decisions rest on interpretations of the meaning of facts. More specifically, the *Addington* Court pointed to the general unreliability of psychiatric evidence used in civil commitment determinations and that this evidence is usually not susceptible to proof beyond a reasonable doubt. It is interesting to note that the *Santosky* majority adopted this argument: “Like civil commitment hearings, termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress.”

Two objections could be raised to this assertion. First, in civil commitment the standard is whether an individual is mentally ill and dangerous to self or others. The question of mental illness is a notoriously difficult one to answer. Also, the dangerousness question requires a mental health expert to make a prediction of future conduct, which as demonstrated by the relevant literature, is very uncertain. In civil commitment the state is exercising both a *parens patriae* power, in taking care of individuals who cannot care for themselves, and a police power in protecting society. In termination cases, the state is acting merely under a *parens patriae* power, although a parent may later be subject to criminal liability. In this sense, then, *Addington*, is closer to the criminal context.

110. *Santosky* 102 S. Ct. at 1397 (emphasis original).
111. *Id.*
112. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous . . . . The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations.


113. *Santosky*, 102 S. Ct. at 1402. Also, the Court noted, the Indian Child Welfare Act used a higher standard of proof, but dismissed this precedent on the ground that Congress had not considered the attendant evidentiary problems raised by a higher standard of proof.
hard. \footnote{114} In contrast, termination of parental rights proceedings might be more akin to criminal proceedings in which the factfinder is instructed by statutory standards as to what elements must be present before a conviction takes place. For example, in New York, the factfinder must decide whether a parent has substantially failed to plan for the future of his or her child and whether the state has made diligent efforts to reunite the family. These are factual issues relating to past events which are susceptible to demonstration through the use of ordinary evidence. It is true that other issues, including parental neglect and absence of affection between parent and child, might require expert testimony, but these issues may not be so unlike the issue of insanity in criminal cases as to justify a distinction.

Second, if parental termination standards really are so ambiguous, then this may be a two-edged sword. That is, a higher standard of proof may be necessary to combat the potential abuses of this standard. This is precisely the argument that the majority in \textit{Santosky} advanced for not using a preponderance standard\footnote{115} and the dissent in \textit{Lassiter}\footnote{116} used to support an indigent parent's right to counsel.

Another argument which was not raised in \textit{Addington}, but played an important part in \textit{Winship} and \textit{Gault}, concerned the effect of the additional protections on the nature of the proceeding. Thus, it was argued in both \textit{Winship} and \textit{Gault} that incorporating various procedural protections into the juvenile system would destroy the ameliorative and beneficial nature of the proceedings. The \textit{Winship} Court rejected these arguments by saying that a civil label and good intentions cannot justify the lack of due process.\footnote{117} This argument also appeared in \textit{Lassiter} where the Court wrote that the state sometimes has an interest in informal proceedings. The dissent, on the other hand, likened parental termination to criminal trials.\footnote{118} The Court in \textit{Santosky} adopted this latter position when it wrote that termination proceedings "bear many of the indicia of a criminal trial."\footnote{119} Since the proceedings are already formal and adversarial, the use of a higher standard of proof would not make the proceedings less beneficial. In the same vein, it should be noted, as the Court in \textit{Santosky} did, that in both types of

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115. \textit{Santosky}, 102 S. Ct. at 1399. \textit{See also supra} note 62.


\end{footnotes}
cases, the state is pitted directly against the individual.120

In addition to the preceding examination of the Court's rationale in rejecting the reasonable doubt standard in *Santosky*, there are at least three other possible explanations the Court's decision. First, the Court might simply be concerned that requiring a reasonable doubt standard in the context of parental termination proceedings would not only require the Court to decide (or redecide as in *Lassiter*)121 whether other "criminal" protections are necessary in that context,122 but would also open the floodgates to the use of the reasonable doubt standard in other contexts such as civil commitment.123 Thus, perhaps the Court is simply exercising a type of self-restraint.

A second explanation of *Santosky* might be the Court's quiet solicitude for the interests of the child. Perhaps the Court is balancing not only the interests of the parents and the state, but also the child's interest in a "stable, loving homelife."124 While the majority eschewed this position125 and the dissent advocated it, this silent interest of the child may in fact present a very real hurdle to equating termination of parental rights with criminal trials where there are only two interested parties, the state and the defendant.

Finally, on a jurisprudential level, *Santosky* might simply have been a compromise, middle-of-the-road decision like *Lassiter*. In *Lassiter*, the court had a choice between not requiring and requiring counsel for indigent parents. The Court avoided either extreme and chose a moderate case-by-case approach. *Santosky* follows this trend nicely.126 Given the choice of three standards, the Court chose the middle ground.127 In both cases, the Court scrupulously avoided equating termination proceedings with either "extreme" criminal trial or civil case. In adopting this mod-

120. *See supra* note 57 and accompanying text.
121. It is likely, then, that because of the similarities between the cases, *Lassiter* would have to be redecided had there been a different decision in *Santosky*.
122. This has been the case in juvenile law since *Gault*.
123. It is still arguable, that *Addington* can be successfully distinguished from *Santosky* and that a reasonable doubt standard could be used in the latter without being used in the former. *See text accompanying notes 92-122.*
125. *Id.* at 1398.
126. The major problem, in reconciling *Santosky* and *Lassiter*, concerns the possible tension between the rights guaranteed in the respective decisions. It is questionable whether elevating the standard of proof from a fair preponderance to clear and convincing will be of much help to uncounseled indigent parents. The function of counsel is to get evidence before the Court, while the function of a standard of proof is to instruct the factfinder how to weigh that evidence. Thus, indigent parents may be simply unable to amass the relevant evidence without the assistance of counsel and the effect of a higher standard will be impaired.
erate position, the Court might be saying that the liberty interest of a parent in his or her offspring is one of substantial importance and worthy of protection, but not as substantial as the loss of physical liberty. The analogies between *Lassiter* and *Gagnon v. Scarpelli* and between *Santosky* and *Addington* are not accidental. In each case, the individual is given some but not all the rights of a criminal defendant.

Perhaps one final speculation is permissible. Given the relative recency of the status of family rights as fundamental, the Court might actually be heading in the direction of elevating these rights to the status accorded physical liberty, but is presently in a state of transition.\(^{129}\)

**IV. CONCLUSION**

With the increasing recognition of the fundamental nature of "family rights," the Supreme Court has been confronted with a variety of cases, asking it to delineate the scope of due process protections necessitated by the fundamental nature of the right. *Santosky*, and for that matter, *Lassiter*, are unremarkable in this regard. However, they may be instructive as to the type of middle-of-the-road stance the Court is presently taking in matters concerning the family.

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\(^{128}\) 411 U.S. 778 (1973). *Gagnon* held that a probationer did not have a right to counsel per se in probation revocation proceedings but that it would be decided on a case-by-case basis. The rationale for the decision was that probationers do not enjoy the same rights as criminal defendants before conviction. For a fuller analysis of this point, see *Lassiter*, 452 U.S. at 31-32.

\(^{129}\) The *Lassiter* dissent's analysis of the progression from Betts v. Brady, 316 U.S. 455 (1942), which held that a criminal defendant's right to counsel was not a fundamental right, to Gideon v. Wainright, 372 U.S. 335 (1963), which reversed *Betts*, is instructive. Also, it should be remembered that *Winship*, which mandated a reasonable doubt standard, was not decided until 1970.