The Termination of Parental Rights: *Lassiter* and the New Illinois Termination Law

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**INTRODUCTION**

The parental right to conceive and raise children is undeniably one of our most fundamental liberties and is recognized by the Supreme Court as predating the existence of the state. Accordingly, the Constitution of the United States has frequently been interpreted to protect the exercise of parental rights against unreasonable state interference. Where parents fail to act in their children’s best interest, however, the state has empowered itself, as *parens patriae*, to protect the welfare of these children. Public awareness of the problem of child neglect and abuse is increasing. Each state has passed laws permitting intervention where a threat

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3. See notes 51-58 infra and accompanying text.
4. English common law protected the property interests of children as early as 1600, and later developed the concept of *parens patriae* in order to protect children from the immoral and harmful conduct of their parents. F. McCarthy & J. Carr, *Juvenile Law and Its Processes* 12 (1980) [hereinafter cited as *McCARTHY & CARR*]; see Levine, *Caveat Parens: A Demystification Of The Child Protection System*, 35 U. PITT. L. REV. 1 (1973) [hereinafter cited as Levine]. In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court upheld the state’s power to regulate child labor despite parental wishes. *Prince* has since been used by the Court as the primary basis for the proposition that parental rights are not immune from state intervention. see Parham v. J.R., 442 U.S. 584 (1979); Wisconsin v. Yoder, 406 U.S. 205, 229,30 (1972).


The Juvenile Court Act of Illinois is a manifestation of this governmental commitment to protect the welfare of children. Ill. Rev. Stat. ch. 37, ¶ 701 et seq. (1979). Illinois was the first state in the nation to provide a separate body of law to protect juveniles, and it did so in 1899. See, McCarthy & Carr, supra this note, at 47.

to a child's well being is indicated.\(^6\) Necessarily, these laws entail significant intrusions upon the constitutionally protected rights of parents to raise their children in privacy.\(^7\) The intrusion is greatest where intervention results in children being actually removed from their parents' homes. Moreover, child development experts and juvenile law commentators maintain that state intervention has often failed to improve a child's long term situation and has many times had a negative effect on children and their parents. Consequently, these authorities insist upon a policy of minimum state intervention in family matters.\(^8\) The most controversial and drastic form of state intervention is encountered in the judicial procedure in which the parent-child relationship is permanently cut off, a ter-

6. Note, Towards an Upstream Model of Child Abuse Legislation in Illinois, 11 LOY. CHI. L.J. 251 (1980) [hereinafter cited as Note, Abuse Legislation]. for example, Illinois has enacted the Abused and Neglected Child Reporting Act, ILL. REV. STAT. ch. 23, ¶ 2052-2061.7 (1979), which has the threefold purpose of: 1) protecting the best interest of children; 2) preventing further harm to children; and 3) stabilizing the home environment and preserving family life whenever possible. ILL. REV. STAT. ch. 23, ¶ 2052 (1979).

7. Legal confrontations between parents and the state occur frequently as a result of state intervention into family affairs. See Lassiter v. Department of Social Servs. 101 S. Ct. 2153, 2160 (1981) and Regenold v. Baby Fold, Inc., 68 Ill. 2d 419, 429, 369 N.E.2d 858, 862 (1977), for examples of the ways federal and Illinois courts deal with this confrontation.

8. J. GOLDSTEIN, A. FREUD, A SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD, 31-34 (1973) [hereinafter cited as GOLDSTEIN, et al, BEYOND BEST INTEREST]. The authors state that their combined clinical experience indicates that state intervention often results in a child being removed from his parents and that the resulting break in the parent-child relationship has severely negative affects on the child's development. In their second book, J. GOLDSTEIN, A FREUD, A SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979) [hereinafter cited as GOLDSTEIN, et al, BEFORE BEST INTERESTS], the authors state that a child's paramount interest lies in the preservation of his family and that, therefore, a policy of "minimum state interference" is in the child's best interest. Id., at 4-5.


Commentators are especially critical of the practice of placing children in foster care. One Commentator states "that [it] is now the prevailing ethic among child care experts that foster care has been overused as a means of protecting children. Although still widely used, foster care is considered generally to be a worse alternative than leaving a child in his home." 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, 644 (1976) [hereinafter cited as WALD].
mination of parental rights. This procedure not only severs the parents' legal rights but prevents any form of relationship between parents and their children from developing in the future. The only remaining vestiges of the bond are the natural parents' purely residual legal obligation to support their children and their children's right of inheritance from their natural parents.

Illinois law has reflected the seriousness of this degree of state intervention. Since parental rights are fundamental, the state must protect these rights with sufficient due process of law. Recently, however, Illinois passed a law which changes the standard of proof in termination proceedings from one of clear and convincing evidence to a preponderance of the evidence. This article will examine the new law to determine whether a preponderance standard is constitutionally adequate to protect the fundamental rights of parents. One month before passage of the Illinois law, in Lassiter v. Department of Social Services, the United States Supreme Court wrote its first opinion on the question of the degree of due process protection required when a state seeks termination of parental rights to their children. The Lassiter decision, which upheld a North Carolina termination law, will be analyzed to gain a perspective on the outcome of a due process challenge to New York's termination law which is pending before the court. The New York law, like the new Illinois law, allows termination on a preponderance of the evidence. Finally, the new termination law will be analyzed on a policy level to determine whether it is an appropriate response to current problems relevant to child neglect and the termination of parental rights.

12. See notes 27-37 infra and accompanying text.
13. See notes 49-56 infra and accompanying text.
THE ILLINOIS TERMINATION LAW

The recently enacted Illinois termination law amends selected provisions of the Juvenile Court Act and the Adoption Act. These two acts combine to regulate the termination procedure. In order to terminate parental rights, the acts require that the state have the parents' consent or prove the parents "unfit" through a formal proceeding. The new termination law has two significant

19. A termination proceeding may occur subsequent to a finding that a child is neglected or dependent. A neglected minor is a child under 18 years of age:
   (a) who is neglected as to proper or necessary support, education as required by law, or as to medical or other remedial care recognized under State law or other care necessary for his well-being, or who is abandoned by his parents, guardian or custodian; or
   (b) whose environment is injurious to his welfare or whose behavior is injurious to his own welfare or that of others.
Although the statute does not specifically define an abused child, the "environment injurious" language in the definition of neglect includes abuse. An abused child is generally regarded as one who has suffered serious and intentional physical harm. See Note, Abuse Legislation, supra note 6, at 258.

The Juvenile Court Act defines a dependent minor as one under 18 years of age:
   (a) who is without a parent, guardian, or legal custodian;
   (b) who is without proper care because of the physical or mental disability of his parent, guardian or custodian;
   (d) who has a parent, guardian, or legal custodian who with good cause, wishes to be relieved of all residual parental rights and responsibilities, guardianship or custody.

If the court finds that a child is neglected or dependent, and that it is in the child's best interest, the court may adjudge him a ward of the court. Id. at 704-8. The Illinois Department of Children and Family Services (DCFS) is made guardian of the vast majority of children made wards of the court. A child made a ward of the court may be the subject of an adoption petition brought by DCFS. Id. at 705-9(1). If the child's parents consent, or if the court finds that the parents are unfit, based on the grounds listed in note 20 infra, the court may appoint DCFS as guardian with the right to consent to adoption. Id. at 705-9(2). "An order so empowering the guardian to consent to adoption terminates parental rights."

20. Juvenile Court Act as amendment by P.A. 82-437, provides that:
   (2) If the petition prays and the court finds that it is in the best interests of the minor that a guardian . . . be appointed and authorized to consent to the adoption of the minor, the court with the consent of the parents, if living, or after finding, based on a preponderance of the evidence, that a non-consenting parent is an unfit person . . . may empower the guardian . . . of the minor . . . to appear in court . . . and to consent to the adoption. Such consent is sufficient to authorize the court in the adoption proceedings to enter a proper order or decree of adop-
components, both of which make the proof of parental unfitness a much easier process. The first component changes the standard of proof used in a termination proceeding from one of clear and convincing evidence to that of a preponderance of the evidence. The second eliminates the requirement that an agency show diligence in encouraging a parent to regain the custody of her child.

The termination law is intended to alleviate a major problem in Illinois child welfare policy, the creation of permanent homes for children under State guardianship. Practitioners in juvenile law and the related social sciences are equally concerned about this problem. The negative effects upon children of growing up in a varying number of foster placements has been well documented. By
making it easier to prove "unfitness," and to thereby terminate parental rights, the law enables the state to begin the difficult task of finding adoptive homes for children under its care. In addition, the law will decrease the substantial administrative and financial burdens of maintaining children in foster placements. There are currently 13,000 children under state guardianship in Cook County, Illinois, alone. Not only are these children suffering from impermanent home settings, but the state is hard pressed to deal with the problem of placing so many children in foster care. The new law is an attempt to relieve this suffering, and at the same time to decrease the state's burden.

Judicial Scrutiny of Termination Proceedings

State policymakers have sponsored the termination law partially in response to the Illinois judiciary's firm commitment to protecting parental rights. An appellate court has described the termination of parental rights as being "as drastic and permanent an action as can be taken." Consequently, the courts have strictly interpreted the current evidentiary standard used in termination proceedings, that of clear and convincing evidence. Appellate courts have also held that this standard creates a heavy burden of

25. See notes 180-81 infra and accompanying text.
26. Interview with Mr. Douglas Anderson, Research Director, Cook County Probation Department, (July 14, 1981); BETTER GOVERNMENT ASSOCIATION, THE STATE AND CHILDREN IN NEED 32 (1979) [hereinafter cited as BGA].
27. See Cowgill, supra note 11, at 641. The Illinois Supreme Court was that first court in the nation to declare a child neglect statute unconstitutional, and it did so on the grounds that the law infringed upon a parent's liberty in raising his child. In O'Connell v. Turner, 55 Ill. 280 (1870), the court invalidated a statute providing commitment to reform schools any child between the age of six and sixteen who is "destitute of proper parental care, or is growing up in mendicancy, ignorance, idleness, or vice." Id. at 282. The court announced its holding in language which is still applicable today:

What is proper parental care? The best and kindest parents would differ, in the attempt to solve this question. No two scarcely agree; and when we consider the watchful supervision, which is so unremitting over the domestic affairs of others, the conclusion is forced upon us, that there is not a child in the land who could not be proved, by two or more witnesses, to be in this sad condition . . . Before any abridgement of the right [to custody], gross misconduct or almost total unfitness on the part of the parent, should be clearly proved.

Id. at 283-85. See Note, Child Neglect: Due Process For the Parent, 70 COLUM. L. REV. 465-68 (1970) [hereinafter cited as Note, Child Neglect].
29. Id. The court in In re Gibson, 24 Ill. App. 3d 981, 322 N.E.2d 223 (1975), stated that the review of relevant Illinois cases indicated that the clear and convincing standard was "a standard of proof not to be taken lightly." Id. at 985, 322 N.E.2d at 226.
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proof, and have reversed trial court decisions where this standard was judged to be unmet. In addition, Illinois courts have required state agencies to provide a minimum of assistance to parents in attempting to regain custody of their children, even where the specific allegation of unfitness was not based on grounds which required a showing of agency diligence. Similarly, a termination has been vacated where an agency frustrated a parent's attempt to regain custody. Courts have likewise shown consideration for a parent's own particular limitations. In summary, Illinois courts have paid great respect to the parents' "inherent right" to the care and custody of their children, recognizing this right as encompassed within the protection of the fourteenth amendment.

Due Process Challenge

In the past decade, the Adoption Act has been amended to make the termination of parental rights less difficult in particular instances. In reducing the standard of proof to a mere preponder-
ance of the evidence, however, the new law makes terminating parental rights substantially less difficult in every case. The Illinois Supreme Court has held that the State may not intrude upon family autonomy “under the guise of protecting the public interest” by laws which are arbitrary or unreasonable. The current standard of proof in termination proceedings is one of clear and convincing evidence. This standard has been most often defined as “the quantum of proof which leaves no reasonable doubt” in the mind of the court as to the truth of the proposition in question. In contrast, the new law will allow termination on a mere preponderance of the evidence, a standard defined as “more probably true than not.” Abolishing a parent-child relationship is an extraordinary and severe legal procedure. Arguably, it is unreasonable that such a drastic legal action should be based on a slight preponderance of the evidence. The need to protect the integrity of the family, as essential to our concept of ordered liberty, is reflected not only in the decisions of federal and state courts, but also in state law and

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However, Illinois courts have been reluctant to apply these laws. Although the “reasonable efforts/reasonable progress” grounds were enacted in 1973, it wasn’t until 1978 that an Illinois court interpreted the “reasonable effort” grounds as requiring more than simply subjective effort by parents. In In re Massey, 35 Ill. App. 3d 518, 341 N.E.2d 405 (1978), the court held that there must be actual evidence of this effort which would indicate that the parent will be better able to provide for the child’s needs. Id. at 523-24, 341 N.E.2d at 409. Similarly, the “reasonable progress” ground was effective in 1973, but was not held to effect the legislative intent of making termination less difficult until 1978 in In re Austin, 61 Ill. App. 3d 344, 378 N.E.2d 538 (1978). In Austin, the court held that “reasonable progress” requires more than the subjective efforts of the parents to make progress but that there must be “at a minimum measurable or demonstrable movement toward the goal of return of the child.” Id. at 350, 378 N.E.2d at 542. See, Note, Delineating Grounds, supra this note, at 831-33.


40. See, e.g., Galapeaux v. Orviller, 41 Ill. 2d 442, 446, 123 N.E.2d 321, 324 (1954).


42. See notes 51-58, infra and accompanying text.

43. See notes 27-37, supra and accompanying text.

by organizations within the legal community.\textsuperscript{45} In addition, the leading authorities in the field of child development stress the crucial role that parental autonomy plays in child rearing.\textsuperscript{46} These authorities advocate a general policy of minimum state intervention\textsuperscript{47} in the context of child neglect cases and recommend that the law place a "heavy burden of proof upon those who are empowered to intrude" upon family privacy.\textsuperscript{48} Therefore, it is quite likely that the Illinois law will be challenged.

The constitutionality of the new Illinois termination law will be determined by the outcome of the Supreme Court's decision in \textit{Santosky v. Kramer},\textsuperscript{49} where the Court will decide the constitutionality of a similar New York law that also provides a preponderance standard. The basis of the \textit{Santosky} challenge is that the use

\textsuperscript{45} The Standards Relating to Abuse and Neglect, promulgated by the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association, reflects this reverence for parental rights by stating as its first principle "a strong presumption for parental autonomy in child rearing." R. Bourne & E. Newberger, "Family Autonomy" or "Coercive Intervention?": Ambiguity And Conflict In The Proposed Standards For Child Abuse and Neglect, 57 B.U.L. Rev. 670, 671 (1977) [hereinafter cited as Bourne & Newberger]. The author of the Juvenile Justice Standards has stated that this presumption in favor of parental autonomy is not based on a property concept, i.e., that parents have a property right to their children, but upon the fact that parents, in almost all situations, have been found to be most able to provide for a child's physical and psychological needs. Wald, supra note 8, at 691-93. The ABA standards, recommended for national use, also provide that the termination of a parent’s rights can only occur upon a finding of clear and convincing evidence. Bourne & Newberger, supra this note, at 690. The mere preponderance standard is especially unreasonable in light of Illinois' requirement that any common municipal ordinance violation, including traffic offenses, be proven by a "clear preponderance" of the evidence. City of Highland Park v. Curtis, 83 Ill. App. 2d 218, 228, 226 N.E.2d 870, 876 (1967). As applied, this standard is more difficult than a simple preponderance burden. Interview with the Honorable Peter Costa, Judge, Juvenile Division, Circuit Court of Cook County, Illinois (July 21, 1981).

\textsuperscript{46} GOLDSIEN, \textit{et al.}, \textit{BEFORE BEST INTERESTS}, supra note 8, state that the intricate developmental processes of childhood require the privacy of family life under the guardianship of autonomous parents. The authors also recommend that the law recognize family autonomy as a barrier to state intrusion. Id. at 9-12. These authors support their contentions with the findings of numerous other authorities in the field of child development. Id. at 199-206.

\textsuperscript{47} Id. at 4. These authors find that the state as \textit{parens patriae} is "too crude an instrument to become an adequate substitute" for parents and has neither the resources nor the sensitivity to respond to a child's ever-changing needs and demands. Id. at 12. Similarly, the state is unable to deal on an individual basis with the consequences of its decisions and, where it intervenes in situations of child neglect, "it may turn a tolerable or even a good situation into a bad one." Id. at 12-13. See notes 160-88, \textit{infra} and accompanying text for a further discussion of the consequences of state intervention.

\textsuperscript{48} Id. at 18.

of a preponderance standard creates too high of a risk that parents' fundamental rights to their children will be erroneously cut off. In discussing the possible outcome of this challenge, this article will examine the United States Supreme Court's recent decision in *Lassiter v. Department of Social Services*,\(^5\) which upheld North Carolina's termination statute against a due process challenge.

**SUPREME COURT PROTECTION OF PARENTAL RIGHTS**

The Supreme Court has long acknowledged parental authority as essential to the "private realm of family life which the state cannot enter."\(^51\) The right of parents to control the upbringing of their children has been acknowledged by the common law\(^52\) and established as a liberty interest protected by the due process\(^53\) and equal protection clauses\(^54\) of the fourteenth amendment. In the last decade, the Court has also stated that the family's right to be free of unnecessary state intrusion is an intrinsic human right founded in our nation's history and traditions.\(^55\) Although acknowledging the state's interest in the welfare of children,\(^56\) the Court has repeatedly held that parents' interest in the care and custody of their

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51. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). In *Prince*, the Court upheld the conviction of a mother on the charge of violating a child labor law. The mother allowed her daughter to assist her in selling copies of the "Watchtower," a Jehovah's Witnesses publication. Mrs. Prince's absolute right to care for her child, combined with her right to freedom of religious expression was subordinated to the state's interest in regulating child labor.

*Prince* is cited, however, for the Court's eloquent statement that the parent-child relationship is constitutionally protected: "It is cardinal with us that the custody, care, and nurture of the child reside in the parents, whose primary function and freedom include preparation of obligations the state can neither supply nor hinder." *Id.* at 166; accord, H.L. v. Matheson, 101 S. Ct. 1164, 1171, 72 (1981).

55. In *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977), the Court stated that "unlike the property interests that are also protected by the Fourteenth Amendment, (citations omitted), the liberty interest in family privacy has its source, and its contours are ordinarily sought, not in state law, but in intrinsic human rights, as they have been understood in this Nation's history and tradition," citing *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). The right to privacy was not explicitly granted in the Bill of Rights, but has been held to be contained within it. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

56. See note 4 *supra* regarding the concept of *parens patriae*. The state's interest as *parens patriae* is recognized in *Wisconsin v. Yoder*, 406 U.S. 205, 229 (1972) and *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).
The earliest cases dealing with this parent-state conflict involved compulsory education laws. In *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court invalidated laws prohibiting instruction of foreign languages and requiring attendance at exclusively state-run schools. The Court held that the fundamental theory of liberty upon which our government is based excludes any general power of the state over children. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) Parents, whose natural duty required them to provide for their children, were held to possess the corresponding right of control over their children's destiny. *Meyer v. Nebraska*; 262 U.S. 390 (1923).

This precedent of Constitutional protection for parental authority was given renewed vigor in the more recent case of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where the Court held that the right of Amish parents to provide a private education, oriented to their religious community, was superior to a Wisconsin law requiring minors to attend high school. *Id.* at 227-28. The Court recognized the state's interest in the education and welfare of children as a high-ranking one. *Id.* at 214. Nonetheless, the Court ruled that the combination of the rights of the Amish parents to the free exercise of religion protected by the first amendment, and their liberty interests in raising their children, outweighed the state's interest in educating minors. *Id.* at 232-34. The Supreme Court has since relied upon *Yoder* to uphold the precedent of "broad parental authority over minor children." *See Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Moore v. East Cleveland*, 431 U.S. 494, 503 n.12 (1976); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 73 (1976).

One commentator suggests that the Court has recognized two corollaries to the basic parental interest in custody and control; first, is the right to exercise one's religious and cultural preferences through one's children; and second, the right to pass on to children the ideas and beliefs that parents have found rewarding and which they believe will contribute to the child's future well being. Garvey, *Child, Parent, State, And The Due Process Clause: An Essay On The Supreme Court's Recent Work*, 51 S. Cal. L. Rev. 769, 772, 73 (1978) [hereinafter cited as Garvey, *Child, Parent*].

Justice Douglas, dissenting in *Yoder*, thought that the Amish children should have been heard, since it was their future that was possibly being imperiled by an inadequate education. But the majority opinion did not view the children as having an independent interest in this case and stated simply that, "[T]he children are not parties to this litigation." *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972).

This approach to protecting family autonomy was evident in *Parham v. J.R.*, 442 U.S. 584 (1979). In *Parham*, minors joined in a class action alleging deprivation of their liberty in violation of due process. Pursuant to a Georgia mental health law, the minors had been hospitalized for psychiatric treatment by their parents without a formal preadmission hearing, and against their own wishes. The Court found that the children did have substantial liberty interests at stake. *Id.* at 600-01. In focusing on the nature of those interests, however, the Court emphasized the dependence of children on their parents, interpreting the children's interest as "inextricably linked" with those of their parents. *Id.* The fact that the minors' desires not to be hospitalized were opposed to their parents wishes was not signifi-
asserted their own interests in opposition to parental authority, the Court has perceived those interests within the parent-child relationship, and attempted to minimize the extent to which a minor's state created rights can be used to undermine parental authority. Consistently, Supreme Court opinions have protected the parent-child relationship by deferring to the parents' primary role in the upbringing of their children. Given this strong precedent, the Lassiter decision is surprising. In Lassiter, a parent's rights were terminated pursuant to a hearing in which Ms. Lassiter was denied basic procedural safeguards. Although the Court referred to cases establishing parental rights, it seemed to ignore their significance in its decision.

The dissent in Parham considered the statute constitutionally infirm and favored the independent liberty interests of the minors. The dissent reasoning was consistent with the Court's opinion in Planned Parenthood v. Danforth, 428 U.S. 52 (1976). In Danforth, the Court struck down a law making parental consent a prerequisite to a minor obtaining an abortion. The holding added the right of privacy to a number of Constitutional protections which the Court has provided for minors. Parental authority and concern for the integrity of the family were clearly acknowledged. However, these interests were not sufficient to justify . . . "providing a parent with absolute power to overrule a determination made by the physician and his minor patient," Parham v. J.R., 442 U.S. 584 (1979).

The Supreme Court again dealt with a conflict in parent-child interests, this time in the context of a child's privacy rights in H.L. Matheson, 101 S. Ct. 1164 (1981). Matheson involved a Utah statute that required a physician to give notice to parents prior to performing an abortion on minor children. Although acknowledging the minor's right to privacy, the Court again viewed the child's interests in relation to a parent's right to direct her upbringing. Id. at 1171. That the notice requirement would inhibit the child in exercising her privacy right did not control. Instead, the Court found that it was more important to protect the relationships within the family. Parents were seen as possessing a right to participate in the events which shape their children's development, and their children had a corresponding right to their parents' guidance and emotional support.

60. An example of this deference is found in Yoder v. Wisconsin, 406 U.S. 205 (1972), where the Court stated: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Id. at 232.
62. See notes 105-11 infra and accompanying text.
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THE DECISION: Lassiter v. Department of Social Services

The issue in Lassiter was whether there was a right to counsel for an indigent parent in a judicial proceeding to terminate her parental rights. Although the Court had not previously ruled with regard to the termination of parental rights, it had established that a parent's right to the care and custody of her child "undeniably warrants deference and, absent a powerful countervailing interest, protection." In a five to four decision, the Court ruled that the Constitution does not require the appointment of counsel for indigent parents in all termination proceedings. Specifically, the Court affirmed the decision of the trial court which had refused to appoint counsel for Ms. Lassiter in the hearing in which her rights were terminated.

Factual Background

In 1975, a North Carolina state trial court had adjudged Ms. Lassiter's infant son, William, to be neglected, based on evidence that she had not provided him with proper medical care. William was removed from her home and placed in the custody of the Durham County Department of Social Services. A year later, Ms. Lassiter was convicted of second-degree murder and began serving a sentence of 25 to 40 years imprisonment. The Department petitioned the court to terminate Ms. Lassiter's parental rights in 1978, based on reasons stemming from her lack of contact with her son since 1975. Ms. Lassiter was notified of the proceeding, but was not informed of her right to be represented in a termination hearing.

During the hearing, a social worker gave testimony concerning the original medical neglect finding and Ms. Lassiter's subsequent lack of contact with the Department after it had removed her child. Ms. Lassiter was permitted to cross-examine the witness, but she did so ineffectively. Ms. Lassiter testified that she had seen

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64. Id. at 2161-62.
66. 101 S. Ct. at 2163.
67. Id. at 2156.
68. Id. at 2156-57.
69. Id. at 2173.
70. Id. at 2157. In addition, Ms. Lassiter did not object to the worker's use of the hearsay testimony of people in her mother's community. The Department attorney also made no effort to justify this use of hearsay even though the formal rules of evidence and procedure
William numerous times since he was removed from her custody, and that she wanted him to be transferred to her mother's care. The Department then called Ms. Lassiter's mother, who gave testimony conflicting with that of the social worker. Ms. Lassiter was not told she had the right to cross-examine her mother. The trial court then entered findings and terminated Ms. Lassiter's parental rights to her child. The North Carolina Court of Appeals rejected Ms. Lassiter's contention that because she was indigent the due process clause of the fourteenth amendment required the state to appoint counsel for her. The North Carolina Supreme Court denied review, and the United States Supreme Court granted certiorari.

The Majority Opinion

To determine whether the due process clause required the assistance of counsel in proceedings to terminate parental rights, Justice Stewart first examined the nature of the due process inquiry. Having concluded that “due process” has never been precisely defined, he stated that the due process inquiry must discover what “fundamental fairness” consists of in a particular situation by weighing two factors, i.e., the relevant case precedents and the interests of the parties involved. Justice Stewart considered most relevant criminal law cases dealing with the issue of the right to counsel. Reviewing these precedents, he established the presumption that an indigent litigant has a right to appointed counsel only when he faces deprivation of his own physical liberty. This presumption must then be weighed against all other factors in the due process inquiry to determine whether to appoint counsel in a particular termination proceeding. By creating this presumption

were in effect at the hearing, Id. at 2168.
71. Id. at 2157-58.
72. Id. at 2158.
73. Id. at 2174.
74. Specifically, the trial court found that Ms. Lassiter had not contacted the Department about her child since late 1975, had not expressed concern for his care, made no effort to plan for his future, and that it was in the minor's best interest that his mother's parental rights be terminated. Id. at 2158.
77. 101 S. Ct. at 2158.
78. Id.
79. Id. at 2159.
80. Id.
against the appointment of counsel, the Court added a preliminary factor to its normal due process analysis.

In weighing the other due process factors, the Court chose the prevailing three-tier due process analysis articulated in Mathews v. Eldridge. The first factor considered is the private interest that will be affected by the official action. The second is 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. The third, is the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedure would entail.

In considering the first factor, the private interests at stake, Justice Stewart referred to a parent's interest in her child as one which undeniably warrants deference. Accordingly, the Court described a parent's interest in the fairness of a decision to terminate her relationship with her child as a "commanding" one.

Second, the Court dealt with the governmental interest, and reasoned that because the state's interest in the welfare of children is "urgent," the state "shares" the parent's interest in a just decision. Because of this mutual interest, the state also "shares" the indigent parent's interest in the availability of appointed counsel. In addition, the government has an interest in making termination proceedings as informal and inexpensive as possible. Given the admittedly de minimis cost involved, this interest was viewed as an insignificant factor in comparison to the fundamental interests of a parent in the custody of her child.

Third, the court considered the risk that a parent would be erroneously deprived of her child because the parent is not represented by counsel. The Court reviewed both North Carolina's statutory guarantees of procedural fairness in termination proceedings, and the State's arguments that the assistance of counsel was unnecessary. Justice Stewart observed that the ultimate issues involved

82. 101 S. Ct. at 2160.
83. Id.
84. Id.
85. Id. at 2160-61. Among the procedures required in petitioning to terminate parental rights were: first, the allegation of facts sufficient to support a finding of one of the grounds for termination; and second, 30 days notice to the parent. If a parent did not file a written answer within 30 days, or was not present at the hearing, his or her rights were terminated. Id. at 2160.
in a termination hearing are not always simple, and that expert medical and psychiatric testimony could "overwhelm an uncoun-
selled parent." 86

Summarizing the interests at stake, the Court maintained that: the parent's interest is extremely important; the state shares the parent's interest in a correct decision, but has a weak financial inter-

est; and the risk of an uncounseled parent's rights being errone-
ously terminated, "could be, but would not always be" insupporta-

bly high. 87 A weighing of the interests of parents and the state could overcome the presumption against the appointment of coun-

sel in a given case. Because the interests would not always weigh in the parent's favor, however, the decision to appoint counsel for a parent should be made by the trial judge in each case. 88 Having enunciated this general rule, the Court proceeded to the merits and found sufficient evidence to support the trial judge's decision denying Ms. Lassiter legal representation. 89

Justice Stewart concluded with an apologia, commenting that the fourteenth amendment imposes standards on the states which are "minimally tolerable" under the Constitution. 90 Referring to the many organizations in the juvenile justice field advocating the appointment of counsel in termination proceedings, the Court stated that its decision did not imply that this informed public opinion was "other than enlightened and wise." 91

86. Id. at 2161. The Court noted that courts in other states have unanimously upheld an indigent parent's right to appointed counsel in proceedings to terminate their parental rights.

87. Id. at 2162.

88. Id. The Court based its case by case approach on Gagnon v. Scarpelli, 411 U.S. 778 (1973), in which the Court held that the decision of whether to appoint counsel in a probation or parol revocation hearing should be made by the body conducting the hearing in each case. Id. at 790.

89. 101 S. Ct. at 2163. Specifically, the Court found that: there were no allegations upon which criminal charges could be based; no experts testified at the termination hearing; Ms. Lassiter's mother failed to show sufficient interest in her grandson; and Ms. Lassiter had expressly declined to appear at the 1975 child custody hearing. Id. at 2162-63.

90. Id. at 2163.

91. Id. The Court regarded as most significant the fact that 33 states and the District of Columbia provide statutorily for the appointment of counsel in termination cases. Illinois is not among those States, since termination hearings are governed by the Adoption Act, Ill. Rev. Stat. ch. 40, ¶¶ 1501 et seq. (1979), which does not require the appointment of counsel. Parents are invariably represented by counsel, in all such proceedings, however, unless they expressly refuse it, since the Juvenile Court Act, Ill. Rev. Stat. ch. 37, ¶ 701-20 (1979), provides that the court can appoint counsel for indigent parties.
The Dissenting Opinions

Justice Blackmun, joined by Justices Brennan and Marshall, dissented vigorously.\(^9\) He rejected the majority's presumption against the appointment of counsel in termination cases.\(^8\) He maintained that the majority had unwisely broken with the Court's traditional due process analysis by drawing a presumption from criminal law cases and using it in the substantially different area of a termination proceeding.\(^4\) Justice Blackmun interpreted the Court's due process analyses as having been consistently limited to a "particular context."\(^5\) He further maintained that the majority's use of the case by case approach in deciding when a procedural safeguard should be granted, an approach developed in the context of parole revocation hearings, is completely inappropriate in the context of termination hearings.\(^6\) Accordingly, he saw the main issue in \textit{Lassiter} as one which is not dependent on right-to-counsel precedents, but which requires an independent analysis of the interests in this particular type of proceeding.\(^7\) He reasoned, therefore, that the three part test must be applied specifically to the interests at stake in the unique situation of a termination proceeding.\(^8\)

\(^9\) 101 S. Ct. 2166 (Blackmun, J., dissenting). Justice Stevens, dissenting separately, viewed the majority opinion as dealing with the case in terms of a deprivation of property rights alone. For Justice Stevens, the threat of destruction of the "natural relationship" between parent and child was a threat to a fundamental liberty which "commands" the protection of the fourteenth amendment. He considered the issues one of fundamental fairness and would require the full range of protections available in criminal cases, regardless of the state's interests. \textit{Id.} at 2176. (Stevens, J., dissenting).

\(^8\) \textit{Id.} at 2166. \textit{Id.} at 2166-67. (Blackmun, J., dissenting). Justice Blackmun viewed this presumption as "improperly conflating two distinct lines of prior cases" and warned that this precedent could endanger other procedural protections as well. \textit{Id.} at 2167 n.8 (Blackmun, J., dissenting).

\(^6\) \textit{Id.} at 2167 (Blackmun, J., dissenting).

\(^5\) \textit{Id.} at 2167 (Blackmun, J., dissenting). Parole revocation hearings are conducted by a correctional administrator without an attorney, are informal, and are directed at rehabilitation, whereas termination hearings are conducted by a judge and the state's attorney according to the formal rules of evidence, are distinctly adversarial, and are directed at the absolute termination of parental rights. \textit{Id.} at 2167-68 (Blackmun, J., dissenting).

The dissent also considered the majority's case by case solution as a "sharp departure" from the Court's previous due process decisions which had not been limited to the immediate case but had general application to similarly situated cases \textit{Id.} at 2171 (Blackmun, J., dissenting) \textit{Mathews v. Eldridge}, 424 U.S. 319 (1976); \textit{Goldberg v. Kelley}, 397 U.S. 254 (1970). Justice Blackmun predicted that this ad hoc solution would be a stimulant for numerous post-verdict challenges and, since constitutional rights were implicated, increased federal interference in state proceedings. \textit{Id.} at 2172 (Blackmun, J., dissenting).

\(^7\) \textit{Id.} at 2167 (Blackmun, J., dissenting).

\(^6\) \textit{Id.} (Blackmun, J., dissenting).
ing the test, Justice Blackmun found: first, that a parent’s liberty interest is undeniably fundamental; second, that the risk that an uncounselled parent’s interest would be erroneously deprived is of “extraordinary proportion”; and, third, that the fiscal interests of the State are “hardly significant enough” to overcome private interests as important as those of a parent facing termination. Consequently, in Justice Blackmun’s view, minimal due process protection requires the appointment of counsel for every indigent parent facing termination of his or her parental rights.

Turning to Ms. Lassiter’s individual case, Justice Blackmun stated that her lack of representation denied her a fair opportunity to be heard. He considered “virtually incredible” the majority’s conclusion that Ms. Lassiter’s hearing was compatible with the fourteenth amendment guarantee of fundamental fairness, and viewed her case as an illustration of the injustice which the majority’s decision would promote.

ANALYSIS

The Lassiter decision represents a significant departure from the Supreme Court’s long-standing respect and protective concern for the parent-child relationship. Without explanation, the Court virtually ignored its numerous precedents establishing that those who conceive and raise children have an interest in them superior to that of the state, and one which merits deference and protection from state intrusion. For the first time, the Supreme Court placed the state on an equal basis with a parent, her interest being described as merely “shared” with the state’s interest in her child. The unstated factor in the Court’s rationale for equating the interests of parents and the state seems to have been the previous finding of neglect in Ms. Lassiter’s case. In Parham v. J.R.,

99. Id. at 2165 (Blackmun, J., dissenting).
100. Id. at 2170 (Blackmun, J., dissenting).
101. Id. (Blackmun J., dissenting).
102. Id. at 2175-76 (Blackmun, J., dissenting).
103. Id. at 2175 (Blackmun, J., dissenting).
104. Id. (Blackmun, J., dissenting).
105. See notes 50-57 supra and accompanying text.
106. See notes 51-58 supra and accompanying text. In H.L. v. Matheson, 101 S. Ct. 1164, (1981), Justice Marshall in his dissenting opinion discussed these cases and stated that, “[T]he critical thrust of these decisions has been to protect the privacy of individual families from unwarranted state intrusion.” Id. at 1191 (Marshall, J., dissenting).
the Court stated that a neglect finding would remove the presumption that a parent acts in her child's best interests. In Lassiter, it appears that this finding includes a diminution in the parent's constitutionally protected right to family privacy.\(^{109}\)

The Court has stated that the extent to which procedural due process must be afforded is influenced by the extent to which a person may be "condemned to suffer grievous loss."\(^{110}\) Since the Court has recognized that a parent's loss of the custody of her child is a "unique kind of deprivation,"\(^{111}\) providing adequate safeguards against an unnecessary deprivation of this magnitude would have been in keeping with the Court's consistently high regard for parental rights.\(^{112}\)

The Lassiter decision is not only inconsistent with the Court's prior holdings, its own reasoning seems to contradict its conclusion. In assessing the interests at stake, the Court found that a parent's interest in her child was "a commanding one," which undeniably warranted protection.\(^{113}\) The State's interests would be best served by an "equal contest . . . in which both the parent and the State . . . are represented by counsel."\(^{114}\) Finally, in considering the risk that a parent will be erroneously deprived of her child, the Court stated that the technical factors involved in a termination hearing may combine to "overwhelm an uncounseled parent."\(^{115}\)

In summary, the Court's assessment of the interests at stake in Lassiter indicated a decision in favor of the parent's right to counsel. Despite its assessment, however, the Court reached the contrary conclusion, holding that assistance of counsel was not required to insure the "fundamental fairness" mandated by the due

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111. Lassiter v. Department of Social Servs., 101 S. Ct. at 2160 (1981), citing May v. Anderson, 345 U.S. 528, 533 (1953). In May, the Court went on to refer to a parent's right to the custody of her child as "far more precious . . . than property rights." 345 U.S. 528, 533 (1953).
112. See notes 51-58 supra.
113. 101 S. Ct. at 2160.
114. Id.
115. Id. at 2161. The Court also observed that the Department of Social Services could point to not a single authoritative case holding that an indigent parent has no due process right to appointed counsel in termination proceedings, and cited many cases holding that parents do have this right. Additionally, the Court noted that a survey of New York family court judges found that 72% of them agreed that when a parent is unrepresented it becomes more difficult to conduct a fair hearing. Id. at n.5.
A possible cause of this inconsistency may be the addition by the Court of an unprecedented presumption against a procedural safeguard to its three part due process analysis. The Court developed a two-stage test. First, it created a presumption against the right to counsel in termination proceedings. Second, the Court weighed that presumption against the result of the three part due process test. The Court's opinion, therefore, not only appears internally inconsistent, but has taken the extraordinary step of adding another stage to its due process analysis.

These factors suggest that the majority may have become distracted by the facts in the Lassiter case. A person serving a twenty-five year prison sentence is obviously incapable of parenting her child. The issue, however, was not whether Ms. Lassiter should have had her parental rights terminated, but rather whether the proceeding which terminated her rights was in conformity with the constitutional requirements of due process. The majority's reasoning seems inverted. Having concluded that the result of the hearing was fair, the Court supported its decision with a rationale borrowed from the significantly different context of the criminal law. Further, with regard to the fairness of the hearing itself, it seems clearly unfair to allow an uncounselled indigent parent to defend her natural right to her child against the investigative and prosecutorial resources of the state. Indeed, a judicial proceeding upheld under these conditions appears to violate the due process requirement of "fundamental fairness."

116. Id. at 2167 n.8 (Blackmun, J., dissenting).
117. Id. at 2158.
118. Id. at 2159.
119. Manifestations of this unfairness were apparent in Ms. Lassiter's hearing. Since she was not informed of her right to cross-examine her mother, she did not do so. Ms. Lassiter was unable therefore, to bring to the trial court's attention information which her mother possessed relating to her habits in caring for her son. Id. at 2174 (Blackmun, J., dissenting). Hearsay evidence was admitted through the social worker's testimony, and Ms. Lassiter was understandably not aware that she could have objected to its use. Id. at 2173 (Blackmun, J., dissenting). Ms. Lassiter was also unable to develop defenses to the allegations that she had not arranged constructive plans for her child, defenses which would have been obvious to an experienced attorney since Ms. Lassiter had in fact arranged for her son to stay with her mother. Id. at 2174 (Blackmun, J., dissenting). Lastly, had Ms. Lassiter been represented by counsel, she almost certainly would not have been subjected to the sarcasm and ridicule which both she and her mother suffered at the termination hearing. Id. at 2173-74 (Blackmun, J., dissenting).
IMPACT OF LASSITER ON THE PREPONDERANCE STANDARD

The effect the Lassiter decision will have on a challenge of the constitutionality of the Illinois termination law will become apparent with the Supreme Court’s decision in Santosky v. Kramer. Santosky will decide the issue of whether a New York statute which provides for termination on a preponderance of the evidence constitutes a denial of due process. The enactment of the preponderance standard is the key aspect of the Illinois termination law, and the one most likely to be challenged. The Santosky decision will, therefore, determine the constitutionality of the new Illinois statute, as well as the current New York law. In forming its opinion in Santosky, the Court is certain to rely on Lassiter, its first pronouncement regarding a termination statute. The Lassiter decision indicates that in considering a due process challenge of a termination statute, a court should first be guided by the relevant case precedents. Secondly, the private and state interests involved should be assessed and balanced against each other. Because Santosky also involves a due process challenge of a termination statute, it seems likely that the Santosky Court will utilize this same two-step process.

Relevant Precedents

The only Supreme Court precedent pertaining to the constitutionality of a termination statute is the Lassiter decision itself. The Lassiter Court did not set minimum procedural guidelines for state proceedings terminating parental rights. Instead, the Court upheld a North Carolina law allowing the trial court to determine, on a case by case basis, whether the right to counsel would be required. By affirming a decision denying a parent the basic protection of the right to counsel, the Court indicated that parents in termination proceedings are entitled to only diminished constitutional protection. Nevertheless, the Court did not set out what the minimum procedural safeguards must be. The majority was con-
tent to rely on the discretion of the trial court judge and was satisfied that discretionary appointment of counsel would adequately protect a parent's rights. This case by case alternative is not available, however, where the issue is the appropriate standard of proof. The preponderance standard is either adequate or it is not, and the answer to this question must be applied in every termination case. It cannot be assumed, therefore, that the Lassiter opinion will be determinative of the Court's decision in Santosky. Precedents relevant to the specific issue of the standard of proof must also be examined.

The threshold question of whether an adjudicatory hearing must even be provided for parents facing termination was resolved in Stanley v. Illinois. In Stanley, the Court specifically held that the fundamental right of family integrity requires that Illinois parents be entitled to a hearing on their fitness before their children could be removed from their custody. To resolve the question of what standard of proof is required, the Court should review its most recent precedent on that issue, In Re Winship.

In Winship, the Court struck down a New York statute which provided a mere preponderance standard in the context of juvenile delinquency adjudications. Dismissing the importance of the fact that the statute had a "civil label," the Court focused on the minor's interests in his physical liberty and in avoiding the stigma of an adjudication of delinquency. Justice Brennan described

cedural safeguards provided by North Carolina law. Id. at 2160. This may indicate that the Court considered this an appropriate standard. Ironically, however, North Carolina changed its standard from one of a preponderance to "clear, cogent, and convincing" after Ms. Lassiter's case had been decided. The Court noted that a lessor standard had been applied in her case, but did not consider this fact determinative. Id. at 2160, n.4. Therefore, the question of what standard the Court does consider necessary was indirectly posed by the Lassiter decision, but left unresolved.

126. 101 S. Ct. at 2162.

127. Santosky v. Kramer, 427 N.Y.S.2d 319, cert granted, 101 S. Ct. 1694 (1981). The outcome in Santosky is especially unclear since Justice Stewart, who authored the Court's 5 to 4 decision in Lassiter, has retired. Justice O'Connor, as a lower court judge, has not written an opinion regarding parental rights in termination proceedings. However, it is quite possible that she could provide the pivotal vote in a decision intended to insure that the fundamental rights of parents are fully protected.


129. Id. at 658.


131. Id. at 368.

132. Id. at 365-66.

133. Id. at 363.
these interests as possessing a “transcendent value.” Accordingly he held that a preponderance of the evidence was inadequate and that a standard of beyond a reasonable doubt must be applied. Similarly, in Woodby v. Immigration & Naturalization Service, the Court ruled that the interests at stake in deportation proceedings required the protection of a clear and convincing standard of proof rather than a preponderance, regardless of the fact that these proceedings were civil in nature. The Court reasoned that since it was a “drastic deprivation” to compel a person “to forsake all the bonds formed here,” the stricter standard should apply.

After reviewing the precedents relevant to the appointment of counsel, the Lassiter Court stated that a presumption exists against the right to counsel in termination proceedings. The precedents relevant to the standard of proof, however, indicate that where “transcendent interests” are involved, courts should apply a higher standard than that used in cases involving mere pecuniary interests. Therefore, the Court might declare the preponderance standard inadequate in a context involving an “essential” civil right which is “far more precious . . . than property rights.” Moreover, a federal court precedent does exist for such a holding. In Alsager v. District Court the district court invalidated on due process grounds an Iowa statute which permitted termination on a mere preponderance of the evidence.

134. Id. at 364.
136. Id. at 285.
139. Id. at 371 (Harlan, J., concurring).
142. 406 F. Supp. 10 (S.D. Iowa, 1975), aff’d per curiam, 545 F.2d 1137 (8th Cir. 1976). In Alsager, the court invalidated an Iowa termination statute holding that “the fundamental right to family integrity deserves” a standard of clear and convincing evidence. 406 F. Supp. at 25. A basis for the holding was the U.S. Supreme Court decision of In re Winship, 397 U.S. 358. See text accompanying notes 130-34 supra. In addition, the court reasoned that since a clear and convincing standard had been required in an involuntary civil commitment, Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974), the rights of parents in their children warranted an equal standard. 406 F. Supp. at 25. The Lynch court rejected the assertion that since a commitment proceeding was civil in nature a preponderance standard must be used. Focusing on the subjective issues involved in assessing the person’s mental condition, the court held that, because such subjective determinations could not be made with the same degree of certainty possible where more objective facts were involved, a higher standard of proof was needed. 386 F. Supp. at 393. The Alsager’s court’s use of the Lynch decision is sensible in view of the similarly subjective issues involved in both termi-
Weighing The Interests At Stake

The second step in the process used by the Lassiter Court required a weighing of the interests involved by means of the three-part Eldridge test. Because the standard of proof, like the appointment of counsel, is a procedural due process issue, the Santosky Court will also probably use the Eldridge test. In considering the first element of the test, the private interest at stake, the Santosky Court is likely to rely, as the Lassiter Court did, on the precedents discussed earlier which establish that parental rights are of a fundamental and "commanding" nature.

The second element of the test requires an assessment of the risk that the procedure in question will lead to an erroneous deprivation of the private interests involved. The Lassiter Court reasoned that the trial court could minimize this risk by appointing counsel when it felt it necessary. The risk presented by an inappropriate standard of proof, however, is not amenable to this type of ad hoc solution. A preponderance standard, applied in every case, would have a critical impact in fact situations where the decision is a difficult one. This minimal standard, therefore, could be

nation and commitment proceedings. The Lynch court also relied upon In re Winship. 386 F. Supp. at 393, n.12.


144. In In re Winship, the Court recognized the standard of proof as a procedural due process issue. 397 U.S. 358, 359 (1970).

In Lassiter, the Court did not apply a substantive due process analysis. It is unlikely, therefore, that the Court will do so in Santosky. Lower courts which have considered termination laws, however, have utilized both substantive and procedural due process analyses, yet there is disagreement as to the level of scrutiny which should be applied. An Illinois Appellate Court has recently held that a rational relationship between the termination statute and the State's interest is sufficient. People v. Ray, 88 Ill. App. 3d 1010, 411 N.E.2d 88 (1980). However, two federal courts have invalidated termination statutes, holding that the fundamental rights of parents require that termination statutes be narrowly drawn to meet a "compelling" state interest test. Alsager v. District Court 406 F. Supp. 10, 23 (S.D. Iowa, 1975), aff'd per curiam, 545 F.2d 1137 (8th Cir. 1976); Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976).

145. See notes 51-58 supra and accompanying text.


147. Id. at 2162.

148. The decisive impact which the lesser preponderance standard of proof could have is evident in many Illinois cases where appellate courts refused to terminate parental rights because the "clear and convincing" standard of proof had not been met. See, e.g., Lenza v. Lenza, 90 Ill. App. 3d 275, 280, 412 N.E.2d 1154, 1158 (1980); In re Barber, 55 Ill. App. 3d 587, 590, 371 N.E.2d 299, 301 (1977); Ybarra v. Illinois, 29 Ill. App. 3d 725, 729, 331 N.E.2d 224, 226 (1975); In re Gibson, 24 Ill. App. 3d 981, 322 N.E.2d 223, 225 (1975); In re Overton, 21 Ill. App. 3d 1014, 1019, 316 N.E.2d 201, 204 (1974) See Note, Family Integrity, supra
clearly seen as an insufficient safeguard where the risks are so unequal and the consequence of error so grave. The Supreme Court has rejected the preponderance standard where a party is threatened with a "drastic deprivation" or has an interest at stake of "transcending value." It is possible, therefore, that the Court would view this standard as presenting an unacceptably high risk that the "precious" rights of parents would be erroneously terminated. This is especially true since the Court has stated that the choice of a standard reflects an assessment of the "comparative social costs of erroneous factual determinations." Since the Court has assessed the value of parental rights as "unique," it would seem that a higher standard should be required.

In addition, the Court has been critical of the preponderance standard since it calls on the trier of fact to merely weigh the evidence presented "without regard to its effect in convincing him of the truth of the proposition asserted." Accordingly, the Court has regarded the preponderance standard as appropriate for cases involving economic interests, where it viewed the risk of an erroneous verdict for the plaintiff as equal to the risk of an erroneous verdict for the defendant. The risks in a termination proceeding, however, are conspicuously unequal. Parents face complete and permanent severance of their relationship with their children.

Lastly, the interests of the State should be assessed. In Lassiter, the Court described the State's economic interest as minimal, but stated that it "shares" the parent's interest in a just decision. Nevertheless, the Court seemed to favor the State's position by allowing it to proceed against an uncounseled defendant. Therefore, a preponderance standard might also be held as adequate to insure a just verdict. Although this would be inconsistent with the Court's decisions holding that the standard of evidence must reflect the interests involved, it would be compatible with the Lassiter
Court's apparent view that termination proceedings do not warrant careful due process scrutiny.

The Lassiter decision can be seen as indicating one of two things. Either parents in termination proceedings have diminished constitutional rights, or, more narrowly, the Supreme Court believes that the discretion of the trial court in appointing counsel, combined with the opportunity for appeal, is adequate to provide due process of law in termination hearings. The Court's decision in Santosky will shed light on this question. A decision upholding termination on a preponderance of the evidence may signify a shift in the balance away from the liberty and privacy interest of parents in their children and toward the interest of the state as parens patriae.® Clearly, however, such a holding would mean that the new Illinois termination law's standard of evidence will withstand a due process challenge.

POLICY CONSIDERATIONS: WILL THE TERMINATION LAW HELP?

Background

The problem which Illinois' termination law is intended to solve has, in large part, been created by the state's own policies. In response to public outrage over the deaths and abuse of children, the state has sought to prevent child abuse and neglect. Unfortunately, "preventing child abuse" has been generally interpreted by state policy makers and social workers to require removing children from their parents' homes. Clearly, however, such a holding would mean that the new Illinois termination law's standard of evidence will withstand a due process challenge.

159. See text accompanying note 123 supra.
160. See, e.g., Chi. Tribune, Feb. 8, 1981, § 2 at 4, col. 1, where an editorial, entitled Parents Rights vs. Child Abuse, condemned the act of a Knox County, Illinois judge who, citing Illinois law requiring agencies to show diligent efforts to keep natural families together, sent Alan Madden, a 5-year old, back home to his mother. Alan was later beaten to death by his mother's boyfriend. The editorial concludes that Alan should have been freed for adoption through termination of his mother's rights and that termination in Illinois should be made easier.
161. A major reason for the frequency with which children are removed is that the first priority of the Illinois Department of Children and Family Service (DCFS) workers is the immediate safety of the child. DCFS investigates reports of child neglect and abuse and makes the initial decision whether to remove a child or recommend that the judge return a child home. In several rare cases, a child who has not been removed, or who has been returned home, has died as a result of abusive treatment. See note 160, supra. Criticism of DCFS for these tragedies has caused it to adopt a very cautious removal policy. Child Protective Service workers would often rather remove a child than accept even a slight risk that a child on their caseload might be abused or killed. Interview with Carol Amadio and Marilyn Bernstein, legal counsel for DCFS, in Chicago (July 21, 1981) [hereinafter cited as DCFS Interview]. The unfortunate result of this policy has been the needless separation of
some situations, authoritative study favors parental autonomy in raising children and clearly indicates that a general policy of removal is injurious to children. In addition, commentators point out that removal frequently leads to an unnecessary termination of the parent-child relationship.

It is a severely traumatic experience for a child to be taken from thousands of families. See notes 166-67, 180-81 infra and accompanying text. Removal to foster care is also a simpler and less time consuming alternative than is arranging for treatment of the family. These are important considerations for caseworkers, who are responsible for a large number of cases. Bourne & Newberger, supra note 45, at 677-78. Although there are no statistics available showing the percentage of children removed as a result of DCFS investigations, the general consensus among lawyers (DCFS Interview, supra this note) and judges (Interview with the Honorable James M. Walton and the Honorable Peter Costa, Judges of Cook County, Illinois, Circuit Court Juvenile Division (July 23, 25, 1981) is that too many children are being removed from their parents' custody.

Illinois law provides that when a child is removed from the parents' custody, a judicial hearing must be held within 48 hours to determine whether there is probable cause to believe that the child is dependent or neglected. ILL. REV. STAT. ch. 37, ¶ 703-5(2) (1979). See note 19 supra for definitions of dependent and neglected. Hearsay evidence is admissible at probable cause hearings. See note 169 infra. If the court finds that it is a "matter of immediate and urgent necessity" that the child be removed, DCFS is appointed guardian. Id. ¶ 703-6(2). The child is then placed in a foster home, or possibly the home of a relative, and the matter is set for a formal adjudicatory hearing on the issue of whether the child is dependent or neglected. Id. ¶ 704-2. The rules of evidence are in effect at the adjudicatory hearing. Id. ¶ 704-6. The statute requires that the adjudicatory hearing be set within 30 days of the probable cause hearing and be acted upon within 90 days. Id. ¶ 704-2. Nevertheless, the average wait between these hearings is six months. Interview with the Honorable Peter Costa, Judge, Circuit Court of Cook County, Illinois, Juvenile Division (July 23, 1981). The significance of such a lengthy removal before a parent has been given a due process hearing, and the detrimental effect that this prolonged waiting period has on the parent-child relationship, is discussed at notes 169-70 infra.

162. Goldstein, et al. Beyond Best Interests, supra note 8, at 51-52. M. Wald, author of ABA Juvenile Justice Standards, maintains that even where parents have been found neglectful, as opposed to physically abusive, social work intervention often has a negative effect on family functioning. Caseworkers may pressure the parents into substituting the caseworker's views on childbearing for their own, or not allow for cultural differences between the caseworker's values and preferences and those of the parents. As a result, parents become uncertain and ambivalent in dealing with their children and may begin to "scapegoat" them for being the source of this humiliating invasion of their family's privacy. Wald believes that absent adequate funding of services such as homemaking instructors, financial aid, and medical care, and absent caseworkers who have received adequate training in dealing with families, a presumption in favor of parental autonomy is required. Wald, supra note 8, at 996-1000.

163. Bowlby, Maternal Care and Mental Health (1952); A. Freud, Infants Without Families (1944); Yarrow, Conceptual Perspectives on the Early Environment, 4 J. AM. ACAD. CHILD PSYCH. 168, 176-77 (1965); See note 170 infra and accompanying text. But see Alpert, Reversibility of Pathological Fixation Associated With Maternal Deprivation in Infancy, 14 PSYCH. STUDY CHILD, 169-85 (1982), for a study indicating that some of these negative effects may be reversible through therapy.

164. See notes 180-81 infra and accompanying text.
his home and parents, regardless of whether the parents are neglectful.\textsuperscript{165} This drastic step should be reserved, therefore, for situations where a child faces irremediable harm,\textsuperscript{166} rather than a vaguely defined\textsuperscript{167} danger that is often more a manifestation of the

\textsuperscript{165} There are no statistics available concerning the mental health of parents involved in neglect proceedings. Even parents with impoverished backgrounds or unstable personalities can provide their children with the emotional support necessary for normal emotional development. Interference with a parent-child relationship, whether the parent is "fit" or "unfit," is "extremely painful" for the child. \textit{Goldstein, et al. Beyond Best Interests, supra} note 8, at 19-20.

\textsuperscript{166} Irremediable harm includes situations where a child has suffered or is likely to suffer from serious physical injury, is suffering from severe emotional damage and his parents are unwilling to work toward resolution of their problems, has been sexually abused, or is suffering from a serious medical problem and his parents are unwilling to provide him with suitable treatment. Wald, \textit{supra} note 8, at 1008.

In situations which involve some type of neglect, the family should be treated with the child in the home. It is probable that removal will traumatize the child and the parents. Oftentimes removing the child will not have an ultimately beneficial effect. Caseworkers frequently recommend removal, and judges order it, based on the desire to make the "safest" choice in a decision which they are ill-equipped to make. Most caseworkers do not have the training to make accurate assessments of parents' psychological health. \textit{A. Kadushin, Child Welfare Services}, 585 (1969), \textit{cited in Levine, supra} note 4, at 14. Moreover, Child Protective Service (CPS) workers are primarily investigators and DCFS employment training emphasizes this role. CPS workers are oriented toward the short range mandate of preventing child abuse and neglect, rather than the child's developmental need for a permanent family home. \textit{See BGA, supra} note 26, at 17.

In addition, the decision to remove a child is actually made by the CPS investigator. In other states, a multi-disciplinary team composed of agency and non-agency experts decides when a child should be removed. The Illinois approach provides no objective check on the decision to remove, a decision which not only has a profound effect on the parent-child relationship, but also involves parents in a judicial proceeding aimed at placing their child under the control of the Juvenile Court. \textit{Note, Abuse Legislation, supra} note 6, at 262.

Judges are equally unprepared to make assessments of a family's health and predictions about its future interactions. Bricker, \textit{supra} note 8, at 4038; \textit{cf. Kay, A Family Court: The California Proposal}, 56 \textit{CALIF. L. REV.} 1205, 1208 (1968), who argues that these decisions should be made by judges who have the required expertise. \textit{Goldstein et al, Beyond Best Interests, supra} note 8, at 49-52, dispels the myth that judges have "magical powers" to make predictions which are far beyond their means. Goldstein maintains that all decisions to remove or place a child must take into account the law's incapacity to supervise or make predictions regarding interpersonal relationships. He also admits that even child care experts are quite limited in the ability to make the predictions inherent to removal decisions. \textit{Id.} at 51. An often cited illustration of the near impossibility of making generally accurate removal decisions involved a comparison of three highly trained child welfare specialists evaluating 50 families thought to be in need of services. In determining which children should be removed and which families should be given supportive services in their home, the three experts could agree in less than half the cases. \textit{Factors Associated with Placement Decisions in Child Welfare} (Child Welfare League of America ed. 1971) \textit{cited in Bricker, supra} note 8, at 4038.

\textsuperscript{167} Wald maintains that current standards such as "imminent harm" or "best interests" may promote excessive and often discriminatory removal. The absence of specifically defined grounds invites judges to apply their own "folk psychology" in removal decisions.
family's poverty than of neglect.\textsuperscript{168}

Aside from imposing a serious violation of a parent's liberty and privacy interests,\textsuperscript{169} the current practice of removing children is also inadvisable in light of state policies actually discouraging the reuniting of families.\textsuperscript{170} For example, the normal amount of time a

Wald, supra note 8, at 649-53; see Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976), where a statute authorizing removal of a child was invalidated as unconstitutionally vague and as promoting unnecessary "interference into the sanctity of the family unit." The Illinois statute is similarly vague, permitting a caseworker to remove a child if she determines that the child is in "imminent danger." ILL. REV. STAT. ch. 23, ¶ 2055 (1979); see Bricker, supra note 8, at 4037, for an argument that prehearing removals constitute a violation of the parents' substantive and procedural due process rights. The author maintains that full due process hearings should be required within the shortest possible time after such a removal. \textit{Id. See also Note, Family Integrity, supra, note 8, at 236-37.}

168. Caseworkers are often not only culturally biased but class biased as well. Consequently, they project their own response to the poverty in which many families live onto the child and conclude that the child should be removed. \textit{See Polier, The Invisible Legi Rights of the Poor, 12 CHILDREN 215, 219 (1965); Chilman, Child Rearing and Family Relationship Patterns of the Very Poor, WELFARE REV. 9 (Jan. 1965) One author and practitioner in the juvenile justice system in Cook County, Illinois, has argued that 90% of the cases heard in juvenile court were there for reasons almost solely related to poverty. He considers most neglect problems to be the result of over-crowded and inferior housing, the worst available schools, and the effects of social discrimination. P. Murphy, OUR KINDLY PARENT THE STATE 153-54 (1974) [hereinafter cited as Murphy].}

169. Parents in Illinois are also denied fundamental procedural safeguards after their children are removed, specifically the right to confront the witnesses against them. This right is part of the sixth amendment and is applicable to the states through the fourteenth amendment. Pointer v. Texas, 380 U.S. 400 (1965). The denial of this right occurs during temporary custody hearings, where hearsay is admissible and may be used against a parent. Rules of evidence only apply at the adjudicatory hearing, which focuses on the allegation of neglect. ILL. REV. STAT. ch. 37, ¶ 704-6 (1979). By this time, however, a child who has been removed has been separated from his parents for at least six months. This is the average time between a temporary custody hearing and the adjudicatory hearing. Interview with the Honorable Peter Costa, Judge of Cook County Illinois, Circuit Court Juvenile Division (July 23, 1981). Parents and children, therefore, suffer a traumatic loss before having the benefit of fundamental safeguards. \textit{See Note, Child Neglect: Due Process For The Parent, 70 COLUM. L. REV. 465 (1970).}

170. The six month separation until a formal hearing may severely damage a relationship which was actually healthy. Ironically, the first six months of separation is also viewed by child welfare experts as the crucial period in facilitating a return of the child. Interview with Judith Miles, Assistant Guardian Ad Litem, Cook County, Illinois (July, 1981) Illinois policy, therefore, prevents the possibility of return during the time it is most likely to occur. One study found that half of the children who were removed from their home for three months remained in placement for two years or more. Rein, Nutt & Weiss, Foster Family Care: Myth and Reality, 37 CHILDREN AND DECENT PEOPLE 37, (A. Schort, ed., 1974). A second study found that the longer a child remained in foster care the less likely his chances were of ever returning home. E. Sherman, R. Newman, & A. Shyne, CHILDREN ADrift IN Foster Care 99 (1973). The State's policy of removing children from their homes is also contrary to the purpose of the Juvenile Court Act of Illinois. This Act provides in its statement of Purpose and Policy that it is intended "to preserve and strengthen the minor's family ties whenever possible." ILL. REV. STAT. ch. 37, ¶ 701-2(1) (1979).
child is allowed to visit his parents after being removed is one hour per month.  

Children who are removed, and are later made "wards" of the court, are usually placed under the guardianship of the State through its agency, the Department of Children and Family Services (DCFS). Once a child is made a ward of the court, he is often placed in a foster home. The foster parents understand that the child can be removed at any time and that, likewise, they themselves can initiate the child's transfer. The number of transfers a particular child will be subjected to varies with the child's age, behavior and ability to adjust. Each transfer, however, can have a negative effect on the child's development, or can be a severely detrimental psychological experience. These negative effects are possible even though the temporary nature of the foster relationship discourages the development of the strong bond and commitment which is essential to a developing child.

The problem which has resulted from the State's preference for removal is evidenced by the great number of children who have been set adrift in impermanent foster care placements. There are currently 16,000 children who are wards of the court in Cook County alone, and of these, 13,000 are under the guardianship of the State and DCFS. Commentators argue that the State is

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171. This policy was discussed during a hearing of the case of Flora, No. 81 (19-J 1435, Circuit Court of Cook County, Illinois, Juvenile Division (July 22, 1981). The only justification given for the policy was that the number of cases DCFS handles precludes them from arranging more frequent visitation.

172. Although an effort is made to keep children together, brothers and sisters are often separated from each other, many times permanently. DCFS also follows a policy of placing children with relatives of the family whenever possible. Frequently, however, such alternatives are not available and foster placements are used. Interview with Carol Amadio, legal counsel for DCFS (July 21, 1981).


174. A newly placed child often sees himself as "bad." He cannot accept the fact that he has no control over the move and, rather than settle for his lack of control, he seeks some semblance of autonomy by fantasizing himself as "bad." This self-blame gives him a role which enables him to cope with his new situation and also helps him deny his frightening anger towards his parents. Children know they should love and honor their parents, yet their true feelings create an intense inner conflict. This internal struggle is often so overwhelming that children frequently withdraw emotionally after having been taken from a home. They anesthetize themselves against all feelings and become remote or withdrawn, inaccessible to foster parents and foster siblings. In the all or nothing world of a child, the risk of loving again is the intolerable risk of another loss. Didier, *supra* note 173, at 25.


176. Interview with Mr. Doug Anderson, Research Coordinator, Cook County, Illinois, Probation Department (July 17, 1981). Mr. Anderson also stated that until a recent study was completed, the County had no accurate figures on how many children were wards of the
clearly unable to deal with this many children, much less provide them with relationships superior to those which children had with their own parents. Indeed, the State has never been able to comply with even the minimal statutory requirement that it submit a report to the Juvenile Court, once every two years on each child under its care, stating "facts relative to the child's present condition of physical, mental and emotional health . . ."176

Although DCFS policy is generally aimed at returning children to their parents, its budgetary priorities frustrate the realization of this goal.180 Rather than expending its resources on rehabilitating parents who may have been neglectful, or were found to be so in a neglect hearing, the State has chosen to create an enormous foster care system and allow children to grow up in a varying number of foster placements. The result has been the unnecessary disintegration of thousands of parent-child relationships.181

court. See BGA, supra note 25, at 32.
177. The 1979 BGA study found that DCFS did not know where many of the children under its care were placed. In fact, DCFS could only estimate the number of children to be between 8,000 and 17,000. BGA, supra note 25, at 32.
178. Id. Recent figures indicate that the Juvenile Court continues to receive reports on only a small portion of the children under DCFS care. Statistics Department, Circuit Court of Cook County, Illinois, Juvenile Division (September, 1981).
180. In addition to its policy of allowing only a one hour visit per month, the state spent six times as much on foster care and institutional placements as it did on in-home services designed to keep families together. Services such as homemaking instruction, day care service, and counselling, for example, received only 2% of the DCFS budget for the Chicago area in 1979. BGA, supra note 25, at 11. The state also de-emphasizes the rehabilitation of families in its employee training practices. When 400 New caseworkers were hired in 1979 and 1980, they were taught how to receive and investigate reports of child abuse, yet learned very little about providing appropriate services to troubled families. Chi. Tribune, Feb. 8, 1981, § 2 at 4, col. 1; BGA, supra note 25, at 17. Allocation of caseworker time also reflects this emphasis on investigation. From fiscal year 1978 to fiscal year 1980, the amount spent for staff working on family maintenance only increased from 4 million to 4.4 million dollars, whereas, expenditures for investigation have jumped from 8.7 million to 17.2 million dollars. These budgetary priorities have resulted in bringing an increasingly large number of children into the foster care system, while opportunities to keep families together are often ignored. BGA, supra note 25, at 18.

Since this BGA study was released, the state, through DCFS, has adjusted its priorities somewhat, and has listed the following facts in a recent report:

The number of children in institutional care has decreased by 11.5 percent over the past year, from 2,330 on March 31, 1980 to 2,063 on March 31, 1981.

On March 31, 1981, there were 6,025 children who had been in substitute care over two years compared to 6,179 on March 31, 1980, a 2.5 percent decrease.

181. A 1978 DCFS study of the cases of 1500 children under its guardianship in foster care concluded that large numbers of these children had been removed from their homes
Response

The termination law is designed to facilitate the adoption of children placed in foster care. The law reduces the standard of evidence in termination hearings to a mere preponderance of the evidence and eliminates the state's responsibility of showing diligence in reuniting separated families. In so doing, it provides an easier means of terminating the rights of parents whose children are in foster care, thereby making the children eligible for adoption.

For those children whose relationships with their parents have disintegrated with the passage of time away from home, or who have adjusted to foster placements, the termination law may bring the permanence of an adoptive home. Yet the possibility of adoption for many children is doubtful, since it is difficult to find adoptive homes, especially for children who are older or have some type of handicap or behavior problem. For those few children fortunate enough to have already found permanence with foster parents and left to drift in foster care without the benefit of permanent plans that would unite them with their families. In studying these cases, the author also noted an absence of evidence that remedial efforts were made by DCFS to assist families in resolving crises prior to removing their children. The study concluded that homemakers had occasionally been used to strengthen a family, but that "in the vast majority of situations, however, it appeared that no action had been taken to help a family resolve problems which might have enabled the child to remain at home." C. Alexander, An Analysis of Cook County, Children in Foster Care for Two Years or More, Under the Age of Thirteen (Oct. 1978), cited in BGA, supra note 25, at 10.

182. Terminating parental rights is by no means a guarantee that a child will be adopted. The negative effects of prolonged placement in foster care make adoption for many children quite difficult. See Eisenberg, Deprivation and Foster Care, 4 J. AM. ACAD. CHILD PSYCH. 243, 246 (1965). But see BGA, supra note 25, at 9, for a discussion of an intensive pilot project conducted by the United States Children's Bureau in Illinois and concluded in 1975. The project was successful in finding homes for 70% of the research group, even though many had characteristics which make adoption difficult. Despite this demonstration of what conscious planning for children could produce, DCFS adoptions declined for the next three years, 1976-79. Because DCFS spent only 2% of its budget on adoption services, however, this failure of the State to find permanent permanent homes for children was not surprising. BGA, supra note 25, at 9.

Since 1979, there have been slight improvements in the number of adoptions DCFS has obtained. Three hundred sixty (369) adoptions were consummated through March of fiscal year 1981, compared to 352 through March of fiscal year 1980, an increase of 2.3%. There were also 407 children freed for adoption through termination in fiscal year 1981, a 22% increase over the previous year. DCFS Report, supra note 180, at 2.

In view of the 16,437 children who are presently wards of the court in Cook County, and the 1,904 children who are the subject of currently pending petitions by the State to be made wards of the court, it is clear that the state's limited success in finding permanent homes for children will be dwarfed by the hundreds of children which it continues to draw into the stream of impermanent foster care. [Statistics Department, Circuit Court of Cook County, Illinois, Juvenile Division (September, 1981)].
who want to adopt them,\textsuperscript{183} the law will provide an easier means to give legal recognition to the reality of a new family.\textsuperscript{184} In contrast with these limited and short term benefits, however, the law promises to accelerate a process by which thousands of children have been and are being deprived of their only innately permanent relationships, those with their own parents. With an easier termination process and less responsibility toward parents, the State will probably be even more inclined to remove children, rather than to help parents improve their situation or parenting skills.\textsuperscript{185} In addition, once children are removed, the availability of

\textsuperscript{183} Three hundred ninety (390) children entered pre-adoptive placements through March 31 of fiscal year 1981, compared to 382 during that period in 1980, an increase of only 2.1%. \textit{DCFS Report, supra} note 180, at 2.

\textsuperscript{184} The majority of children in foster care, however, are not so fortunate. One of the problems encountered in the foster care maze is termed, "conflicting parental bonding." This occurs when a foster parent and child develop a strong relationship, and the child is subsequently transferred or returned home. The child must then cope with conflicting loyalties towards his natural and foster parents. \textit{See} Didier, \textit{supra} note 173 and accompanying text. \textit{See also Goldstein, et al, Beyond Best Interests, supra} note 8, at 23-27. Foster parents also suffer grievous losses when a child is removed, as evidenced by their legal actions brought to retain custody of foster children. In Smith v. Organization of Foster Families, 431 U.S. 816 (1977), the Supreme Court recognized the liberty interest of foster parents as worthy of constitutional protection, \textit{Id.} at 855, but distinguished rights created by state law from the rights of natural parents, which the Court saw as embodied in "intrinsic human rights, as they have been understood in this Nation's history and tradition (citation omitted)" \textit{Id.} at 845.

Child development experts point out that foster placements usually do not supply children with the stability they need. \textit{Goldstein, et al, Beyond Best Interests, supra} note 8, at 23-27. When a child remains in a foster home for a year or more, however, and a deep relationship has developed, they advocate the termination of parental rights and adoption by the foster parent. \textit{Id.} at 80.

\textsuperscript{185} Although assisting parents requires creative effort, it is far less expensive than foster care, in addition to its chief advantage of preserving the integrity of families. A family oriented "Homebuilders" program in Tacoma, Washington, intervened in cases where it had been determined that removing children would be necessary, but before they had actually been removed. Therapists, using in-home techniques, prevented removal in 90% of the families served and expended only 25% of projected placement costs. Children Without Homes, \textit{An Examination of Public Responsibility to Children in Out-of Home Care, Children's Defense Fund, Washington D.C. 156 (1978) cited in BGA, supra} note 25, at 23-24. Murphy supports his recommendation of providing services to troubled families, rather than separating them, by contrasting the amount the state is willing to spend on assisting a family before removal with the huge expense involved in placement. Moreover, children with behavior problems that make them impossible to place in foster homes require institutional placement which can cost upwards of $25,000 yearly. \textit{Murphy, supra} note 168, at 158-59. Currently, a mother receiving welfare receives a monthly allowance of $76.00 per child, whereas a foster parent receives $175.000 per child. \textit{DCFS Data Control Form PR-615 (10-1-79). It is reasonable to conclude that, as the above Tacoma project demonstrated, a policy of spending more of these resources on keeping families together would result in saving not only the families, but a substantial amount of money as well.}
an easy termination minimizes incentives for the State to work towards reuniting the family. So, although the law may help some children, it will draw far more into a system which often works against their best interests and those of their parents. The banner of “permanence for children,” under which both houses of the legislature righteously and unanimously passed the termination law, must be raised while children are still with their needy parents, not after their relationships have deteriorated or been broken.

CONCLUSION

The right of parents to raise their children free from state intrusion has been recognized as a fundamental liberty interest “which occupies a unique place in our legal culture.” By allowing those rights to be severed on a mere preponderance of the evidence, the Illinois termination law seems to violate that liberty interest by failing to require a sufficient justification for such an absolute act of state intrusion. Unfortunately, the Supreme Court’s decision in Lassiter condones the radical diminution of a parent’s constitutionally protected rights in termination proceedings. The Court’s decision in Santosky v. Kramer will determine whether parental rights may be terminated on a preponderance of the evidence, thereby determining the constitutionality of the Illinois termination law. Although the Lassiter decision indicates that a mere preponderance standard may be upheld, the Court’s evidentiary precedents require a higher standard where fundamental rights are at stake. It is difficult, therefore, to predict the outcome of the Santosky case.

The new termination law is an attempt to solve a problem created by the placement of thousands of children in foster care. In responding to the dilemma presented by families in which children are neglected, State policy has clearly favored removing children and has not been committed to helping troubled families before removal. Placing children in foster homes is not an adequate substitute for the family and often has betrayed children by depriving them of the stability they need for normal development. By eliminating the requirement that DCFS show diligence in helping families, the termination law furthers this policy of removal and may

cause many more children to be placed in foster care. Hopefully, DCFS priorities will be amended to comply with the purpose of the Juvenile Court Act, "to preserve and strengthen the minor's family ties whenever possible." With a primary emphasis on helping families and a policy of removing children only after remedial efforts have failed, the number of children in foster care would decrease. This would be a far better method of insuring that children develop in permanent home settings, than is removing children and terminating their natural parents' rights in the hope that they will be adopted. With due regard for the fundamental rights of parents, termination would remain an option of last resort. Unfortunately, the new Illinois law diminishes these fundamental rights and uses termination as merely a means to an end.

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190. The statistics and literature relating to child neglect and abuse make it evident that these problems are very real. Nationwide there are between 100,000 and 200,000 cases yearly in which children are physically abused, and 700,000 to 800,000 cases in which children suffer some type of neglect. See note 19, supra, for definitions of abuse and neglect. Most tragically, an estimated 2,000 children die of some form of child abuse each year. Note, Abuse Legislation, supra note 6, at 251 n.2.

In Illinois, between July 1, 1980 and March 31, 1981, there were 9,984 DCFS investigations of alleged child neglect. The results of these investigations revealed that in 4,341, or 43.5 percent of the cases, there was sufficient evidence to file a petition alleging that a child was dependent or neglected. DCFS Report, supra note 180, at 1. In cases where it was later found that children actually were dependent or neglected, this finding was made pursuant to a formal adjudicatory hearing and according to the due process of law. Obviously, the facts in some of these cases indicated that foster care was the necessary choice. Many parents are simply incapable of raising children. However, until the State becomes seriously committed to keeping families intact and expending a greater portion of its resources actualizing this commitment, the number of neglecting parents that could correct their behavior will remain unknown.

The State has developed an impressively sophisticated system to accomplish the crucial task of detecting incidents of child neglect and abuse. See, Note Abuse Legislation, supra note 6. Equally important is the problem of providing neglected children with safe and stable homes in the future. Since foster care has often failed in this regard, see notes 8, 173-181 supra and accompanying text, a renewed effort should be made to assist parents in caring for their children. This effort should include a policy against removing children until remedial efforts have failed. In addition, programs which have succeeded in preventing neglect in other jurisdictions should be instituted in Illinois. See note 185 supra. Further examples of such programs are crisis nurseries where parents may voluntarily leave their children during a period of great stress, and home health visitors who assist potentially or formerly abusing parents. For an informative discussion of these alternatives, see, Note, Abuse Legislation, supra note 6 at 270-75.