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Article

THE PARENT TRAP: THE UNCONSTITUTIONAL PRACTICE OF  
SEVERING PARENTAL RIGHTS WITHOUT DUE PROCESS OF LAW

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**ABSTRACT**

In 1997, Congress passed the Adoption and Safe Families Act (ASFA) to stem what it perceived as an overreliance by states on foster care to provide a safe place for children whose parents had been accused of abuse or neglect. Prior to ASFA, many children were placed in foster care for extended periods of time while their parents were evaluated for fitness and rehabilitative efforts were made to reunify families. Congress considered the time children spent in foster care as damaging to them because it left them uncertain about where they would live in the future. Congress, in an attempt to reduce the amount of time children spend in foster care, included provisions in ASFA that require states to expedite termination of parental rights to such a speed that states have been engaging in, for many years, systematic deprivation of parents' procedural and substantive due process rights.

Child abuse and neglect have always been a problem in every society, but many cultures, including American culture, have a poor track record of successfully addressing the problem. Early American history shows a lack of appreciation or understanding of the problem, and the evolution of policies to combat child abuse and neglect has been slow and somewhat ineffectual. At the same time, courts have not had a spectacular record of effectively addressing the problem of child abuse and neglect. The Supreme Court was slow to consider problems related to families and did not decide a case regarding the rights of parents to the care, control, and custody of their children until the late 1920s. And it was not until the 1980s that the Court finally declared that parents have a substantive due process right to the custody of their \*640 children.

Even though it took many years, the Supreme Court's recent recognition of protections for the procedural and substantive due process rights of parents is clear: states must be extremely cautious when seeking to terminate parental rights. However, after ASFA, the opposite has been happening. States have every incentive to rush to judgment and sever parental rights, even when there is no evidence the parent ever abused the child being removed and even when the parent is someone who could be a wonderful, loving, and caring parent. These due process violations occur in the context of ASFA provisions that make exceptions to the requirement that states make reasonable efforts to reunify families separated after an allegation of abuse or neglect.

In the second most constitutionally problematic provision of ASFA, states may forego reasonable efforts to reunite parents with a removed child (automatically at birth, in many circumstances) when the parents have previously lost custody of a sibling. Then, in the most constitutionally problematic provision, states must rush to terminate the parental rights of those individuals, even with no evidence they would be unfit to parent the newborn child. Unfortunately,

many state courts apply these provisions with heavy hands, resulting in improper terminations or near misses that are overturned upon appeal. Congress must change ASFA to incentivize states to act in accordance with the Constitution when terminating parental rights, and the Supreme Court should issue binding precedent to prohibit permanent severance of parental rights based on evidence of past misconduct alone. Until then, parents are extremely vulnerable to state court judges who are guided by an unconstitutional statute and who may not appreciate the constitutional risks in its application.

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## \*642 INTRODUCTION

A baby is born every eight seconds in the United States.<sup>1</sup> At that moment, several constitutional rights are also born, including the constitutional rights of parents to the care, custody, and control of their child.<sup>2</sup> The constitutional right of parents to direct and control the upbringing of their child was one of the first substantive due process rights the Supreme Court recognized.<sup>3</sup> Parental rights are among the most sacrosanct rights in American jurisprudence, require a high standard of proof before a state can interfere with them, and are carefully guarded by courts.<sup>4</sup> Or are they?

Of course, the constitutional right of parents to direct and control the upbringing of their child, like every constitutional right, is not absolute. It can be severed when a parent poses a substantial risk to the physical or emotional health or safety of the child.<sup>5</sup> Over the last ninety years, since the Supreme Court first recognized the liberty interests of a parent,<sup>6</sup> courts and legislatures have struggled to balance individuals' \*643 rights to parent and children's rights to be free from harm.<sup>7</sup> The definition of harm has grown and evolved, as has the notion of what it means to have a liberty interest to parent.<sup>8</sup> Placing the fulcrum in the precise location to perfectly balance the rights of children and their parents has

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proven nearly impossible, and in the last twenty years or so, states and Congress have made matters worse by striving for efficiency in the process of seeking permanence for children whose parents have been accused of being unfit to parent.<sup>9</sup>

In a well-intentioned effort to protect children from harm, Congress and many states have enacted one-size-fits-all laws that work to sever a parent's constitutional rights in an efficient, if nevertheless unconstitutional, manner. This happens in a couple ways. First, some states have devised plans that require removal of newborns from their parents' custody before they have even left the hospital and without any evidence of abuse or neglect, typically because their parental rights had been previously involuntarily terminated with respect to a sibling of the newborn. In those cases, under the federal statutory scheme, states can and indeed are encouraged to forego efforts to seek reunification. These procedural requirements, in all their efficiency, create a perfect storm for some parents, making it impossible for them to (1) prevent their children from being whisked away at birth and (2) retain their parental rights to those children once they are removed from their custody.<sup>10</sup>

There are serious constitutional concerns with state interference at both stages. First, some states, as a matter of course, remove newborns from the custody of parents whose parental rights to other children have been terminated in the past.<sup>11</sup> Next, the federal Adoption and Safe Families Act (ASFA) gives financial incentives to states enacting its \*644 dictates, which include a provision allowing state child welfare agencies to refuse to make reasonable efforts to reunite parents with children removed from their custody if their parental rights to another child have been involuntarily terminated.<sup>12</sup> Third, some state laws are so onerous that many parents, including those who would be good parents to the removed children, cannot meet the expectations and lose parental rights in a very short period of time.<sup>13</sup> Legislation allowing the removal of newborns without evidence of abuse and requiring the expedited processes toward final termination of parental rights violates fundamental rights guaranteed by the Due Process Clause of the Fourteenth Amendment and must be amended to allow parents to retain their procedural and substantive due process rights to parent.

## I. THE EVOLVING DOCTRINE OF THE FUNDAMENTAL RIGHT TO PARENT

The belief that a state has the right or even the duty to intervene when a child has been abused is a somewhat modern notion. In the early years of America's history, the number of laws aimed at protecting children from their parents' abuse was nearly zero. States simply did not see it as within the power or province of the government to interfere with a parent's methods of discipline.<sup>14</sup>

### A. *Children as the Father's Chattel*

Historically, in many cultures, children were considered the property of their fathers.<sup>15</sup> They could be sold at the will of the father, beaten for any reason at all, or even murdered if the parents or community deemed it necessary to be rid of an extra mouth to feed.<sup>16</sup> The notion that children were the property of their fathers meant they \*645 could be treated in any way the father felt appropriate and no one could intervene on behalf of the child.<sup>17</sup> The Code of Hammurabi, based on Babylonian law instituted as early as 2130 B.C., permitted fathers to sell their children or wives in payment of a debt.<sup>18</sup> Life was hard for everyone in ancient times, and children were perceived as little more than hungry, expensive burdens who were lucky to have been allowed to live after birth.<sup>19</sup>

In early American colonial times, children fared little better than their counterparts in ancient times.<sup>20</sup> They were still considered the father's chattel and were subjected to horrific abuse, which was lawful if intended to correct the misdeeds

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of the child as defined by the father.<sup>21</sup> As long as the parent did not murder the child, the punishment was considered lawful.<sup>22</sup> Children who did not have parents or children whose parents were too poor to protect them were likely to be entered into indentured servitude.<sup>23</sup> The concept that children were property of the father spilled over to the belief that parentless children were either a burden or a commodity to ignore or trade as needed.<sup>24</sup>

Indentured servants were required to work in exchange for the basic necessities in life.<sup>25</sup> The agreements of servitude often carried with them some protections against mistreatment, but in reality, could do little to actually stop an abusive master from brutally disciplining his servant.<sup>26</sup> Although the system was meant to provide children with \*646 some education, food, shelter, and other basic needs in life, it was a poorly monitored system that left children to the whims of their masters.<sup>27</sup> The Kansas territorial legislature, in 1855, made it legal to bind orphaned children to servitude and included a provision stating that killing servants in the process of disciplining them was not considered a crime.<sup>28</sup> During the time these types of laws and agreements reigned, however, attitudes about the role of children in society started to change.<sup>29</sup>

Over time, society began to slowly accept the notion that children were more than their father's possessions, that they deserved at least some basic protection from harm.<sup>30</sup> In an increasingly industrial society, work shifted away from the home.<sup>31</sup> Men began to work in mills and factories, leaving their wives to care for the home and the children.<sup>32</sup> Especially in middle- and upper-class families, the sphere of the home became dominated by the idealized concept of mothers as the noble and moral protectors of their families, and children were perceived as innocent, pure creatures deserving of their mothers' tender loving care.<sup>33</sup> These "cult of motherhood" notions may have contributed, in part, to the beginning of a new and more charitable societal attitude about the role of children within the family.<sup>34</sup>

In the mid- to late-1800s, concerned citizens began to form societies for the purpose of "child-saving," rescuing children from harmful living situations.<sup>35</sup> The shift started at the grassroots level and was disjointed, disorganized, and unfocused.<sup>36</sup> The challenges facing \*647 families in these times were numerous and particularly affected children through child abuse, poverty, child labor, poor access to medical attention, lack of educational opportunities, and more.<sup>37</sup> The theories and philosophies addressing the problems faced by children varied, but a common theme began to develop: to separate children from their parents in the name of saving the children.<sup>38</sup> Of course, this theory was nearly always employed against families struggling with poverty, where it was believed that families with financial strains were ill equipped to raise children who could contribute to society meaningfully.<sup>39</sup>

As society began to awaken to the plight of children in abusive homes and the difficulties poverty presented to some children's lives, states began to look at the needs of children when deciding what should happen to those who had been abused or were the subject of a custody dispute.<sup>40</sup> When evaluating custody disputes, courts began to consider "the best interests of the child," and on occasion, broke with the long-standing legal practice of automatically awarding custody to the father.<sup>41</sup> The "tender years doctrine" allowed mothers to retain custody of their very young children, while fathers were still awarded custody of any older children.<sup>42</sup> This change was obviously rooted in gender-specific notions about the skills it takes to raise children, but it \*648 signaled a change in courts' willingness to consider the needs of children, not just the legal rights of their fathers, when determining custody.<sup>43</sup> This change in approach, to include understanding children's needs, ushered in a new era of court interference with families and initiated the burgeoning concept of "judicial patriarchy."<sup>44</sup>

### *B. Hyper-interference by the State Into Family Life*

From today's perspective, it is almost impossible to imagine how society could have accepted the notion of children as chattel, essentially less than human, and defined by a value that lay wholly with their fathers. But in the mid-1800s, private organizations started to recognize the problem and began to intervene, trying to effect change.<sup>45</sup> Government, both federal and state, followed suit in the late 1800s and took a special interest in protecting children from neglect and abuse by their caregivers.<sup>46</sup> Interestingly, in the 1920s, the issue faded again, until the 1960s, when a resurgence of interest in protecting children from harm began.<sup>47</sup> Despite the fact that society has been only intermittently concerned with child abuse, when it is an issue at the forefront of society's consciousness, the government has responded by erring on the side of a hyper-adversarial interference into family life, \*649 instead of a more collegial, problem-solving approach.<sup>48</sup>

#### *1. The Beginnings of the "Child-Saving" Movement: The Mid- to Late-1800s*

In the mid- to late-1800s, it appeared that society had begun to understand that control of the parent-child relationship was not solely within the province of the father. And although the "cult of motherhood" idea began to emerge, exalting women in their roles as protectors of children and caretakers of the family, the male-dominated legal community was reluctant to recognize mothers as having legal custodial rights to their children in many cases.<sup>49</sup> In a somewhat expected yet still shocking shift, upon complaints of abuse or neglect, courts began to rescind the parental rights and responsibilities of fathers and insert the state, instead of the mother, as the caretaker of the children.<sup>50</sup> The change was dubbed the beginning of judicial patriarchy, where judges trusted themselves and the state to better care for children who had suffered abuse at home rather than mothers who may have had no part in the abuse.<sup>51</sup> This new attitude created an adversarial relationship between courts and parents deemed unfit,<sup>52</sup> and it likely set the stage for the current struggle over the balance of power between states and parents to direct and control the upbringing of children.

As has been evidenced by the foregoing discussion of the rights of parents (fathers, really) to direct and control the upbringing of their children and the state's willingness or reluctance to insert itself into that relationship, harmony between the two parties is elusive. Trying to protect children from harm within the family, while protecting the autonomy of the family unit, are, in many ways, necessarily incongruous efforts. The state is right to concern itself with the welfare of all children, and when a parent is accused of abuse or neglect, the state must take steps to protect the child at risk. The complexity of the \*650 family dynamic and the attachment that children have to their parents make it difficult to strike the perfect balance between appropriate intervention and improper or unlawful interference. But when, more than one hundred years ago, government began to understand its role in protecting children from family abuse as a necessity in some circumstances, the pendulum swung too far in the direction of injecting the state into the family.<sup>53</sup>

Theories abound to explain how child abuse went from a family matter that was little discussed and widely ignored to a major societal issue that garnered significant political attention.<sup>54</sup> Probably the most widely held theory centered on the story of Mary Ellen Connolly, an abused child who, at ten years old, became the center of a national news story.<sup>55</sup> The abuse that Mary Ellen suffered was not unlike that which many children suffered at the time, but because of the efforts of a few people who took a particular interest in Mary Ellen's plight, her story became highly publicized and widely reported.<sup>56</sup> The often "lurid" reporting of the abuse she suffered and the process of attempting to remove Mary Ellen from the custody of her guardians was met with outrage from the public, and many people believe, was a major

contributor to the beginnings of the anti-cruelty to children movement in the late-1800s.<sup>57</sup> However, an entire movement cannot be built or sustained on a single motivator alone, and there were many issues rising in societal consciousness that made child abuse a rallying point for activists seeking change in the American social construct at the time Mary Ellen's abuse became known.<sup>58</sup>

After a few months of trying to intervene on Mary Ellen's behalf without success, Etta Wheeler called upon Henry Bergh, who was, at the time, President of the Society for the Prevention of Cruelty to Animals in New York City.<sup>59</sup> Mr. Bergh turned to the Society's general \*651 counsel, Elbridge Gerry, for help.<sup>60</sup> At the time in New York, there were no laws prohibiting children from being abused by their parents, but there were laws preventing cruelty to animals.<sup>61</sup> With help from Ms. Wheeler, Mr. Bergh, and Mr. Gerry, the argument was made that Mary Ellen was an animal deserving of protection under the statute, and so the legend goes, Mary Ellen's adoptive parent was sentenced to prison within days of their intervention.<sup>62</sup> And, almost as swiftly, the New York Society for the Prevention of Cruelty to Children was born.<sup>63</sup>

Elbridge Gerry was an influential and passionate figure in the anticruelty movement.<sup>64</sup> He began to build the anti-cruelty movement by bringing together wealthy and powerful white men who were interested in combating child abuse, though primarily through the notion of social control of society's "less fortunate" members.<sup>65</sup> Social control is the notion that society's challenges and difficulties can be confronted and improved by forcing people to behave in certain ways.<sup>66</sup> Elbridge Gerry sought to end child abuse by prosecuting abusive parents who were morally low, and as considered by Gerry, to be hardened, drawn to impurity, and part of a "dangerous class" of people.<sup>67</sup> Gerry was not alone in his contempt for the "class" of people who abused children, and this classist and patriarchal attitude set the tone for courts who were beginning to awaken to the child abuse problem in America at the time.<sup>68</sup>

At the same time Mary Ellen's case was making headlines, several \*652 other important issues for women, children, and families were gaining attention in America.<sup>69</sup> Women's suffrage, temperance, the improvement of the place of women within the family, attempts to stop or ameliorate domestic violence, and more were the focus for many activists seeking change in patriarchal America.<sup>70</sup> At the same time, judicial patriarchy, mixed with the rise of Elbridge Gerry and Charles Loring Brace and their patriarchal notions of combating child abuse by targeting and splitting impoverished families, created an adversarial relationship between families and the state.<sup>71</sup> This was the tone heading into the Progressive Era, when the government began to take an active role in the prevention of child abuse.

## ***2. The Progressive Reform Period: 1890-1920***

In the late-1800s, the problem of child abuse started to receive more attention from official governmental entities than it ever had.<sup>72</sup> The White House held the Conference on the Care of Dependent Children, juvenile courts began to emerge around the country, and legislatures began to pass laws to address problems of neglect, abuse, and child delinquency.<sup>73</sup> The attention on the problem was a positive shift from the era when adults could abuse and neglect children, even murder them, with few repercussions. But the change was not necessarily entirely positive. For a multitude of reasons, like the private entities fighting child abuse, the public institutions charged with addressing the problem of child abuse and neglect could be hostile toward, and judgmental of, families touched by abuse.<sup>74</sup>

When a state identified a child as "needy," it commonly responded by separating the child from the family, even if the child's parents were loving and committed to caring for their child.<sup>75</sup> A general disdain for, and apprehension of, people

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who lived in poverty caused society to \*653 view children born into households without substantial means as neglected and delinquent, even if neither was true.<sup>76</sup> Although those who attended the White House Conference on the Care of Dependent Children largely agreed that it was important to maintain and preserve family units as much as possible, in reality, the opposite happened.<sup>77</sup> Dependency, delinquency, abuse, and neglect were viewed as essentially the same problems, and judges were likely to send children to orphanages or foster care in order to “rescue” them, even if they were not abused or neglected.<sup>78</sup> The state's intervention tended to be as heavy handed as possible, without much regard for helping build and preserve family autonomy.

Recognizing as flawed the system of removing children from their parents' custody when poverty was the only transgression, progressives focused on issues of child welfare in the early 1900s began to push for reforms that would allow children to stay with the mothers struggling to care for them.<sup>79</sup> The new system, providing “mothers' pensions” to women unable to make enough money to provide for their children, was intended to keep families together.<sup>80</sup> Progressives sought to depart from the routine practice of removing children who were not abused or neglected from their impoverished homes and instead provide enough financial assistance that their mothers could feed and clothe them.<sup>81</sup> Mothers' pensions were a popular policy shift for a short period of time, but they were ill-conceived and created new challenges for mothers trying to maintain custody of their children.<sup>82</sup> In reality, mothers' pensions did little to stop states from removing children from their mothers' custody and were more effective at reinforcing the notion that the state should step \*654 into the shoes of parents deemed “lesser than” for any number of reasons.<sup>83</sup>

The paradigm shift away from viewing children as property of their fathers toward protecting children from harm appears to have been dramatic and widespread, affecting multiple levels of society.<sup>84</sup> After so many centuries of ignoring issues of child abuse and neglect, courts were suddenly given broad power to save children from harm.<sup>85</sup> Courts took that mandate seriously and began to step into the role of parent through the doctrine of *parens patriae*.<sup>86</sup> The overriding belief at the time was that the environment in which children were raised was the dominating influence on the child's behavior, so if a child was prone to misbehaving, it was necessary for the court to intercede and remove the child from the home.<sup>87</sup> This dramatic swing, from the societal belief that government's role in family decision making should be limited or nonexistent to the widespread acceptance of government action severing families for apparently small transgressions, was powerful and likely the cause of yet another paradigm shift at the end of the Progressive Reform Period.

### ***3. The Fall and Resurrection of Child Abuse Issue Recognition: 1920-1960***

The goal of ending, or at least limiting, child abuse and neglect seems like the kind of issue that is likely to be perceived as important, no matter what political, legal, or policy challenges the country is facing. But between 1920 and 1960, the issue of child abuse and neglect faded into the background, leaving children largely ignored once again.<sup>88</sup> Positive change continued throughout this era, but the \*655 fervor surrounding the issue of ““child saving” essentially died.<sup>89</sup> There are many potential reasons for this, including discord among groups dedicated to eradicating child abuse and neglect, a refocus of the feminist movement away from child saving and toward issues more directly related to women, and, most importantly for the purposes of this article, disillusionment with the juvenile courts.<sup>90</sup> The juvenile courts, once thought of as the answer to the problems of child abuse and neglect, began to receive criticism about decisions they made and how they made them.<sup>91</sup>

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As stated above, juvenile courts often did not know how to make the distinction between child neglect and child delinquency, which resulted in wildly divergent decisions about how to help at-risk children.<sup>92</sup> Children who were neglected or whose parents had died were routinely removed from whatever family they did have and labeled delinquent or dependent at the whim of the judge.<sup>93</sup> Judges did not have much law to guide them, and little or no training in social work, so their decisions about how to assist families in need were often rudderless and inconsistent.<sup>94</sup> Judges took control of every aspect of abuse and neglect cases, including recruiting foster and adoptive homes, placing children in those homes, and supervising the placements.<sup>95</sup> This judicial hyper-intervention marginalized social work and further pushed the issues of child abuse and neglect into public policy dormancy.<sup>96</sup>

Throughout the first 150 years of the nation's existence, there was no real clarity about how to treat the legal rights of parents and children. It was not necessarily even clear that children had legal rights, and if they did, to what extent they would be recognized and \*656 protected. And when states started to pay attention to the problem of child abuse and neglect, courts applied varying community standards to parents who stood accused of abuse or neglect.<sup>97</sup> The extreme dichotomy in how the public viewed the rights of parents to raise their children throughout America's history highlighted how it could take so long for the Supreme Court to weigh in on the issue. Even though it was one of the first fundamental rights recognized by the Supreme Court, the right of parents to direct and control the upbringing of their children was not recognized until 55 years after the Fourteenth Amendment's ratification.<sup>98</sup>

### *C. Supreme Court Decisions About the Rights of Parents to Raise Their Children*

During the years leading to the modern view of how child abuse and neglect should be addressed, courts grappled with determining the appropriate level of governmental involvement in families' lives and which government entities should be responsible for the intervention.<sup>99</sup> Few regulations, statutes, or common law cases defined or limited the proper level of court intervention after an allegation of abuse or neglect.<sup>100</sup> Until the Supreme Court decided *Meyer v. Nebraska* in 1923, there was no jurisprudence regarding the constitutional rights of parents to make decisions about how to raise their children.<sup>101</sup> Not until 1974 did federal legislation exist to address the problem of child abuse.<sup>102</sup> And it was not until 1982 that the fundamental right of parents to retain custody of their children was separately acknowledged from the right to direct and control the upbringing of a \*657 child.<sup>103</sup>

#### *1. The Constitutional Right to Make Parenting Decisions*

As is often true in any constitutional doctrine, the Court has considered many avenues of parenting rights throughout its history. The Court has determined that persons have a constitutional right to choose to avoid parenthood.<sup>104</sup> A parent's constitutional right to keep a family together,<sup>105</sup> to make educational and religious decisions for a child,<sup>106</sup> and to retain the custody of a child<sup>107</sup> have all been decided by the Court. The bases for those rights have been found mostly in the Fourteenth Amendment's Due Process and Equal Protection clauses.<sup>108</sup> The two most important pieces of the rights to parent for the purposes of this article are the right to custody and the right to direct and control the upbringing of a child, both of which have been addressed separately by the Court, and at times, have been conflated into one all-encompassing "right to parent."<sup>109</sup>

The right to parent has been broken into what can be viewed as two lanes of a highway heading in the same direction. In one lane, a parent has the right to the custody of her children, although that right can be limited or terminated when

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there is proof that the parent is neglectful, abusive, or somehow harmful to the child.<sup>110</sup> In the other lane, a parent has a right to say how she would like to raise her children, i.e., how to feed them, teach them, clothe them, expose them to religious education, and so on.<sup>111</sup> Of course, those rights can be curtailed or \*658 terminated in light of abuse or neglect as well.<sup>112</sup> The distinction can be significant if the parents of children are not living in the same household and disagree about when either party should have the children and how the children should be raised. These concepts are broken into two pieces that courts consider when deciding custody disputes--physical and legal custody.<sup>113</sup>

In the context of a parent's right to retain custody of a child when there has been a claim of abuse or neglect or when a parent loses custody of a child based on the prior loss of custody of another child, however, the two rights cannot be disentangled. When the state removes children from their parents' custody, it also removes parents' right to direct and control the upbringing of their child. The separation of the two rights in this context is not possible or relevant; in order to analyze the importance of the fundamental rights of parents, the right to custody and to the ability to control a child's upbringing must be considered together.

Before the Court announced the fundamental right to parent, it developed several lines of case law that delineated particular parental rights. The Court, however, seemed to avoid acknowledging these rights as fundamental liberty interests for many decades after the Court's first foray into the area.<sup>114</sup> The wait for a clear declaration of the constitutional right to parent ended in 1982, when the Supreme Court definitively, affirmatively, and clearly stated that parents have a fundamental constitutional right to direct and control the upbringing of their children.<sup>115</sup> According to the Court in *Santosky v. Kramer*, parents have a fundamental due process liberty interest to the custody, care, and control of their children.<sup>116</sup> Although the fundamental liberty interest was perhaps not plainly articulated until the early 1980s, the Court has since made clear that the right is one of the most \*659 foundational fundamental rights in the Constitution.<sup>117</sup> The importance of the existence of the broad right cannot be underestimated, and the Court's reticence to recognize it through the substantive due process rights lens perhaps led to many decades of thin protection of parents' rights in custody proceedings. Only if there were procedural due process or equal protection problems with the way a state interfered with the right to parent could parents challenge the loss of their parental rights with constitutional backing.

Not long after juvenile courts began to slip out of favor and the issues of child abuse and neglect faded from the priority list of child welfare activists, the Supreme Court took its first steps at recognizing the fundamental right of parents to raise their children.<sup>118</sup> Before *Meyer*, the Supreme Court had never acknowledged that parents had any rights under the Fourteenth Amendment to parent their children.<sup>119</sup> The Court's inclusion of the right in a long list of other fundamental rights, such as the right "to contract, to engage in any of the common occupations of life, to acquire useful knowledge, [and] to marry," seemed to indicate the Court believed it to be an uncontroversial right to enumerate.<sup>120</sup> Of course, the right to marry, also included in the list, was far from settled as a fundamental right until the Court decided, in *Loving v. Virginia*, that state laws barring interracial marriage violated the Fourteenth Amendment.<sup>121</sup> As with the Court's continued analysis of the fundamental right to marry over the many years between *Meyer v. Nebraska* and *Loving v. Virginia*, the jurisprudence about the right to parent continued to evolve as well.

The Supreme Court appeared to identify, for the first time, the \*660 fundamental right of parents to make decisions about how to educate their children with *Meyer v. Nebraska* and continued to shape the right in the following years. Having the power to decide how a child will be educated may have implied a more encompassing constitutional right for parents to raise their children, but *Meyer* did not definitively answer the question of whether parents have a fundamental due process right to raise their children.<sup>122</sup> While *Meyer* is regarded as the first case that spoke to the rights of parents

to raise their children, the issue before the Court was not whether parents had a fundamental right to direct and control the upbringing of their children.<sup>123</sup> In *Meyer*, the issue before the Court was the criminal conviction of a teacher who taught German to a student in violation of Nebraska law.<sup>124</sup> The Court attempted to define, if loosely, the meaning of the Fourteenth Amendment's prohibition on government deprivation of "life, liberty or property without due process of law."<sup>125</sup>

The Court offered a list of liberties that must be guaranteed under the broad dictates of the law.<sup>126</sup> Included on the list were rights to "acquire useful knowledge," the right to marry, the right to "establish a home and bring up children," and more.<sup>127</sup> The Court then focused the reasoning for its decision to overturn Mr. Meyer's conviction on the "supreme importance" of the acquisition of knowledge and education, as well as the right of parents to control and educate their children.<sup>128</sup> The right of a parent to raise a child, while on the list of rights that the Due Process Clause protects from undue government interference, was not specifically part of the Court's reasoning for overturning the conviction of Mr. Meyer.<sup>129</sup> It would appear the notion \*661 that parental rights were protected by the Due Process Clause was, at this point in the Court's jurisprudence, dicta.

The Court's assertion, albeit perhaps legally weak, that the Due Process Clause protected a person's right to "establish a home and bring up children" continued seeping into other areas of the parent-child relationship. Two years after deciding *Meyer v. Nebraska*, in 1925, the Court decided *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, which also addressed parents' rights to make educational decisions for their children.<sup>130</sup> This time the issue was whether an Oregon statute that required parents to send their children to public school complied with the Due Process Clause.<sup>131</sup>

The two appellees, Society of the Sisters of the Holy Names of Jesus and Mary and Hill Military Academy, were not parents seeking rights to direct and control the upbringing and education of their children.<sup>132</sup> Again, the Court was asked to rule on the constitutionality of an issue that only indirectly affected the rights of parents.<sup>133</sup> The Court was faced with deciding whether the appellees, who were corporations whose purpose was to educate children, could assert a due process right to protect their property interests in their schools and businesses.<sup>134</sup> The Court held the Constitution protected their property interests and ruled the lower court decision in favor of the appellees should stand.<sup>135</sup> The lower court held several things, including that appellees had a protected property right in conducting their schools, which could not be invaded without due process of law.<sup>136</sup> Primarily, the lower court reasoned that the liberty interest at stake held by the schools prohibited improper state interference with their right to operate.<sup>137</sup> Though finding that "in the proper sense" corporations cannot claim a liberty interest in the Fourteenth Amendment, the \*662 Supreme Court nevertheless agreed with the lower court's reasoning that the "right to conduct schools was property and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places."<sup>138</sup>

The Court then set the *Pierce* decision squarely atop the decision in *Meyer v. Nebraska*, stating that it would rely upon the "doctrine of *Meyer v. Nebraska*" to reason that the statute in question interfered with the "liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>139</sup> The *Pierce* Court did not mention that *Meyer* was a case between a teacher and the state about his criminal conviction for teaching material he had a constitutional right to teach.<sup>140</sup> The *Pierce* Court's mention of *Meyer* was in the context of what it called a "doctrine" in *Meyer* that protected the liberty of parents to direct and control the upbringing of their children.<sup>141</sup> Even though *Pierce* also did not directly confront the issue of parents' constitutional rights to raise their children, history has focused on the decision as a parents' rights decision, not a schools' rights decision.<sup>142</sup> So, the Supreme Court appeared to have splashed

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loudly into the relatively calm fundamental substantive due process rights water when it recognized the constitutional rights of parents in two cases that involved no parent litigants at all.

The Court recognized a person's constitutional right to be treated equally under the law and not subject to forced sterilization in 1942 with its decision in *Skinner v. Oklahoma*.<sup>143</sup> The Court struck an Oklahoma statute requiring persons who had two or more “moral turpitude” felony convictions to be sterilized because the requirement \*663 violated the Equal Protection Clause.<sup>144</sup> Because the act characterized some felonies, such as robbery, as crimes of “moral turpitude” but not other felonies, such as embezzlement, the Court held that the statute could not survive equal protection scrutiny.<sup>145</sup> Targeting certain types of, but not all, felonious behavior as so morally repugnant that the perpetrator must be barred from procreating was a clear violation of the Equal Protection Clause.<sup>146</sup> But, the Court declined to declare that persons have a fundamental right to procreation.

The Petitioner challenged the Oklahoma statute on several constitutional grounds, including the Due Process Clause of the Fourteenth Amendment.<sup>147</sup> The Court explicitly refused to decide the case on those grounds and instead focused on the inequities on the face of the statute.<sup>148</sup> The Court did acknowledge the depth of importance of “one of the basic civil rights of man[.]” that is, the right to procreate.<sup>149</sup> And, even though the Court went on to say that “[m]arriage and procreation are fundamental to the very existence and survival of the race[.]” it refrained from declaring procreation as a fundamental right that is protected by the Fourteenth Amendment.<sup>150</sup> Although there are obvious distinctions between the right to procreate and the right to raise a child, in the overwhelming majority of instances, one flows naturally and appropriately into the other, and a declaration of procreation as a fundamental constitutional right in *Skinner* may have given lower courts a much earlier clarification on how much deference to parents' rights the Constitution affords.

Marching forward in its flirtation with fundamental parental rights, the Court next considered *Prince v. Massachusetts* in 1944.<sup>151</sup> The Court characterized the case as yet “another episode in the conflict between Jehovah's Witnesses and state authority[.]” which required review of state authority to invade a person's exercise of her religious \*664 convictions.<sup>152</sup> The issue of parental rights was implicated by the facts in the case; namely, that Sarah Prince was distributing religious material in the evening with her nine-year-old charge, Betty Simmons, for whom Ms. Prince served as a guardian, in violation of several Massachusetts child labor laws.<sup>153</sup> The Court considered Ms. Prince's arguments that the statute forbidding child labor was invalid because it violated the child's, Miss Betty Simmons, First Amendment rights to religious freedom and because it violated Ms. Prince's Fourteenth Amendment right to parent Miss Betty Simmons.<sup>154</sup> The Court treaded carefully into the analysis of the overlapping constitutional interests here, those of a citizen's freedom of religion as well as a parent's right to parent.

The Court started with the discussion of whether a constitutional right to parent, particularly in the context of allowing a child to exercise her religious freedoms, can be invaded by the state.<sup>155</sup> And while the Court determined that such an invasion was proper in narrow circumstances to protect children, it discussed the care states should use when considering treading on parental rights in the context of religious practice: “On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children.”<sup>156</sup> The Court did not stray far from the consideration of a parent's right to direct and control the *religious* upbringing of her child and chose to consider the more narrow issue rather than fully commit the Court to the broader proposition that parents have fundamental rights under the Fourteenth Amendment to raise their children.<sup>157</sup> And in this case, the Court ultimately decided that Ms. Prince's right as a guardian to decide how to allow her charge to

practice her religion could be trumped by the child labor laws at issue.<sup>158</sup> And so, the question of whether parents had a fundamental \*665 right to raise their children continued to remain unanswered.

The Court considered many other challenges by parents to the authority of the state to dictate their parental rights after *Prince v. Massachusetts*. In some cases, the Court protected parents from unconstitutional interference by the state, and in others like *Prince*, the Court permitted the state to draw lines with respect to how parents were permitted to raise their children.<sup>159</sup> The line of cases that extended from the Court's first foray into delimiting parents' rights in *Meyer v. Nebraska* focused on the limits of parents' power to make decisions about how to raise their children. The most recent case where the Court was asked to determine the constitutional rights in the context of parents' rights to make parenting decisions came in 2000, when it decided a case about the rights of third parties to seek court ordered visitation with children.

In *Troxel v. Granville*, the paternal grandparents of two children sought to increase the amount of time they spent with their grandchildren after their son, the father of the children, committed suicide.<sup>160</sup> The grandparents relied on a Washington state law that gave third parties the right to seek visitation with any child with whom they wanted to spend time.<sup>161</sup> The Court reviewed the constitutionality of the law in light of its earlier declaration in *Santosky v. Kramer*, in which the Court recognized that parents have a fundamental right to retain the custody of their children unless the state can show clear and convincing evidence that the right should be invaded.<sup>162</sup> The Court in *Troxel* applied the strict fundamental right standard and struck the Washington statute as impermissibly stepping on the parent's constitutional right to the care and control of her children.<sup>163</sup> The Court held that, in giving the right to third parties to seek visitation, Washington had created standing in court for any individual to \*666 interfere with a parent's right to decide with whom her children can spend time.<sup>164</sup>

*Troxel* was the first case to declare that parents' rights to the care and control of their children are fundamental.<sup>165</sup> *Santosky*, which was decided eighteen years earlier, focused on the question of whether a parent's custodial rights could be terminated at a low evidentiary standard and was less about how the parents in the case parented their children.<sup>166</sup> Of course, underneath every decision about whether a parent should retain custody is a question of the parent's ability to care for and control his or her child. The cases about the care and control of children, on the other hand, do not necessarily require an analysis of whether it is appropriate for the parent to retain custody.<sup>167</sup> Perhaps the cases about parents' rights to direct and control the upbringing of their children were not perceived high stakes enough to warrant a discussion by the Court about fundamental rights, but the statute at issue in *Troxel* finally pushed the Court over, in the context of parents' rights to direct and control their children, that fundamental rights edge.

The Court in *Troxel* may not have recognized its predecessor Courts' reticence to call the rights of parents to direct and control their children a fundamental right, or it may not have wanted to acknowledge how long it took to officially name the right, but either way, the Court in *Troxel* stated that parents' rights have been recognized as fundamental for a lot longer than. perhaps was accurate.<sup>168</sup> The *Troxel* majority deftly weaved fundamental liberty language into its discussion of the precedent:

The liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, we held that \*667 the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own."<sup>169</sup>

Regardless of the Court's reasoning for waiting so long to officially recognize the right, and regardless of the Court's reasoning for its retroactive recognition of the right, the Court had finally declared it. When parents' rights are at stake, either custodial or the rights to direct and control their children's upbringing, the states must take great care to avoid unconstitutional interference with them. And even though it was recognized first, parents' fundamental right to retain custody of their children had its own somewhat difficult path to fruition.

## 2. *The Constitutional Right to Retain Custody*

In *Lassiter v. Department of Social Services of Durham County, N.C.*,<sup>170</sup> the Court was asked to determine whether the protections for criminal defendants in the Due Process Clause to have assistance of counsel when their freedom was at stake extended to parents at risk of losing their parental rights.<sup>171</sup> The Court recognized an important interest in the rights of parents to the custody of their children,<sup>172</sup> but stopped short of drawing a direct comparison of those rights to the rights of criminal defendants at risk of losing their personal freedom.<sup>173</sup> And even though the Court acknowledged the importance of the right to parent in that context, the Court stopped short of stating directly that parents have fundamental rights to parent under the Due Process Clause.<sup>174</sup> It was not until a year later, in *Santosky v. Kramer*, that the Court was willing to make that declaration. In *Santosky*, the Court was asked to consider the constitutionality of the evidentiary standards applied when adjudicating parents' right to custody, and in that \*668 context, the Court finally declared the fundamental right to parent.<sup>175</sup>

*Santosky* afforded the Court the opportunity to clarify the evidentiary standard used to determine whether parents should retain custody of their children.<sup>176</sup> Before then, the standard fluctuated from state to state because each allegation of child abuse or neglect presented unique facts that were then applied to different legal standards.<sup>177</sup> It has always been within the states' purview to determine what constitutes proper parenting according to community standards.<sup>178</sup> What the Court eventually ruled constitutionally impermissible, however, was the lack of consistency among the evidentiary standards states applied to each adjudication of allegations of parental misconduct.<sup>179</sup>

In *Santosky*, the Court articulated clearly, for the first time, the evidentiary standard required by the Due Process Clause to terminate parental rights.<sup>180</sup> The parents in *Santosky*, John and Annie Santosky, were accused of parental neglect of one of their children, Tina, who was removed from their home.<sup>181</sup> Ten months later, their son, John was also removed from the home, which also happened to be the same day Annie Santosky gave birth to another son, Jed.<sup>182</sup> When Jed was three days old, he was transferred to a foster home upon allegations that his \*669 life would be in imminent danger if he were permitted to stay with his parents.<sup>183</sup> After an adjudication hearing where the judge applied a "fair preponderance of the evidence" standard to the question of whether the Santoskys were fit parents, the judge terminated their parental rights.<sup>184</sup>

The Supreme Court took the case on appeal to determine whether the "fair preponderance of the evidence" standard satisfied the Due Process Clause and adequately protected parents from state interference with their rights to custody.<sup>185</sup> The Court then clearly stated, for the first time, that the rights of parents to "freedom of personal choice in matters of family life" was a "fundamental liberty interest protected by the Fourteenth Amendment."<sup>186</sup> The Court went on to say that the "fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."<sup>187</sup> Interestingly, the Court in *Santosky*, for the first time, wrapped parents' rights to the care, control, and

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maintenance of their children together with their right to retain custody of their children. It seems that the increased level of severity of the termination of parental rights gave the Court the opportunity to articulate that a fundamental right to parent exists.

The Court reasoned that when parents have lost custody of their children to the state pending termination proceedings, the standards to protect their constitutional rights are even more important than those at stake for parents who are subject to state scrutiny for their parenting but have retained their custody rights.<sup>188</sup> These considerations are crucial to keep in mind when discussing the current regime encouraging rapid termination of parental rights.<sup>189</sup>

Based on the facts of *Santosky*, the Court did not need to include in \*670 its recognition that parents have fundamental rights to direct and control the upbringing of their children.<sup>190</sup> The higher stakes in *Santosky* could have been distinguished from the earlier parents' rights cases because the Santoskys' parental rights had been terminated.<sup>191</sup> In *Meyer*, *Pierce*, *Prince*, and other cases preceding *Santosky*, the Court was asked to determine whether the state could dictate how parents raise their children, not whether they should be allowed to raise them at all.<sup>192</sup> Once a fundamental right to custody was declared, however, it presumably would have been very difficult to disentangle the obviously interwoven considerations of parents' rights to manage the upbringing of their children.

Of particular importance, when analyzing how the fundamental right to parent can be invaded by the state, is the Court's decision to apply the strict "clear and convincing evidence" standard for terminating parental rights.<sup>193</sup> The *Santosky* Court looked closely at the process used by the State of New York to permanently terminate parental rights and determined that evaluating the case on a "preponderance of the evidence" standard provided inadequate due process.<sup>194</sup> The Court, however, declined to require that states prove "beyond a reasonable doubt" that parental rights should be terminated, as is required by the Indian Child Welfare Act of 1978 (ICWA).<sup>195</sup> Congress reasoned that an Indian parent's rights to parent his or her child should not be permanently severed without evidence showing the termination was necessary "beyond a reasonable doubt."<sup>196</sup>

Congress, in passing the ICWA, reasoned that the "beyond a reasonable doubt" evidentiary standard was necessary because terminating parental rights "is a penalty as great [as], if not greater, than a criminal penalty."<sup>197</sup> In the years before Congress passed the \*671 ICWA, an epidemic of hyper-interventionism was gripping child protection authorities on Native American reservations.<sup>198</sup> When the parental rights of Native Americans were terminated (often for flimsy reasons that could not satisfy even a low standard of proof), their Native American children were placed with, and often adopted by, non-Native families living off the reservation.<sup>199</sup> This practice was so common and percentages of children leaving the reservation permanently so high that activists called upon Congress to intervene.<sup>200</sup> In hopes of preserving the culture of Native Americans, Congress changed the standard of proof for terminating parental rights to the highest there is, beyond a reasonable doubt, and made it very difficult to remove children from reservations.<sup>201</sup> The standard of proof for non-Native American parental rights termination, however, remains the less demanding clear and convincing evidence.<sup>202</sup>

The concern for preserving cultural integrity on Indian reservations was real and Congress addressed that concern, in part, by requiring a strict standard of proof to terminate parental rights of Native American parents.<sup>203</sup> Congress justified its actions in passing the stricter standard by stating, in legislative history, that losing parental rights can be as punishing as (or perhaps more than) criminal penalties.<sup>204</sup> The motivation to evaluate the standard of proof applied

to Native American parents at risk of losing their parental rights was rooted in the concern about cultural bias against Native parents, which was \*672 appropriate and necessary.<sup>205</sup> The absence of the motivation to stem cultural family destruction, however, does not change how stiff the penalty of losing parental rights can be. If the loss of parental rights is a heavy burden for Native American parents to bear, it is an equally heavy burden for all parents to bear.

Perhaps the context of the shockingly high rate of parental rights terminations of Native American parents and adoptions of children from Indian reservations provided a unique lens through which Congress could view parental rights. Instead of evaluating the process of parental rights termination from the perspective of children believed to be at risk, Congress was forced to evaluate the process through the eyes of the parents faced with losing their children to the state and then to strangers. That context may have spurred Congress to take decisive action to protect parents' rights, which is not often the path Congress follows when considering legislation that affects parents and children. Despite its rightful concern for procedural safeguards for Native American parental rights, Congress has prioritized procedures that value efficiency and finality over careful consideration and protection of parental rights for all other parents. This congressional drive for efficiency culminated most recently in the Adoption and Safe Families Act, which has, over the sixteen years since its enactment, encouraged states to speed their procedures for parental rights termination to constitutionally impermissible rates.<sup>206</sup>

## II. ATTEMPTS BY CONGRESS AND THE STATES TO SEEK PERMANENCE FOR CHILDREN WHO HAVE BEEN REMOVED FROM THEIR PARENTS' CUSTODY

The evolution of a balance between protecting children from abusive parents and protecting parents from undue state interference with their right to parent, may have reached equilibrium sometime \*673 around the time *Santosky v. Kramer* was decided by the Supreme Court in 1982. At that point, the problems of child abuse and neglect were well known and acknowledged at every level of government and were addressed in legislation in every state, albeit with varying success rates of saving children from horrible home situations.<sup>207</sup> Also, as discussed in Section I.C.2., *supra*, the Supreme Court recognized that the solution to the problem of child abuse could not include unconstitutional intervention.<sup>208</sup> Of course, many may disagree that there ever was, or could ever be, equilibrium when it comes to balancing children's and parents' rights, but if it existed at all in the early 1980s, it was about to come to an end. In 1997, Congress passed the Adoption and Safe Families Act, which not only made it more difficult for parents accused of abuse or neglect to retain or regain custody of their children but also put children at increased risk of psychological harm by removing them from perhaps imperfect, but ultimately better than the alternative (orphan status), homes.<sup>209</sup>

### A. *The Purpose Behind the Adoption and Safe Families Act*

In passing the Adoption and Safe Families Act (ASFA), Congress intended to “promote the adoption of children in foster care.”<sup>210</sup> Congress was concerned with statistics indicating that children who are placed in foster care because their parents were accused of abuse or neglect were spending significant portions of their childhood in the foster care system and sought to expedite the process of terminating parental rights to free those children for adoption.<sup>211</sup> Children in foster care before ASFA could be hanging in the balance between their parents and a permanent placement with an adoptive family for an extended period of time, sometimes for years.<sup>212</sup> A lack of permanence for those children was considered extremely detrimental to them and \*674 studies showed that the uncertainty of their situation could cause great anxiety and frustration among foster children.<sup>213</sup> The negative impacts of being in limbo for a long time were

considered damaging enough to outweigh the potential benefits of eventually reuniting children with their rehabilitated parents.<sup>214</sup>

In passing ASFA, Congress placed a significant emphasis on cutting the amount of time it takes for states to terminate parental rights of biological or legal parents and free children for adoption.<sup>215</sup> A necessary first step to reducing the amount of time children spend in foster care is to sever the rights of their parents, permanently cutting off parents' rights to legal and physical custody of their children. Once parental rights are terminated, courts may freely finalize adoptions of children who are fortunate enough to have prospective adoptive parents.<sup>216</sup> The purpose behind, and the language in, ASFA aims to expedite the process of parental rights termination so as to give those prospective adoptive parents a clear opportunity to move forward with adoption.<sup>217</sup> More importantly, the aim is to give children in the foster care system a sense of stability by securing permanent placements for them as quickly as possible.<sup>218</sup>

### ***B. How ASFA Works***

Congress intended for ASFA to provide a set of statutory principles \*675 that states can implement for the reward of federal grant dollars.<sup>219</sup> It requires that states seek approval of their plan by the Secretary of Health and Human Services.<sup>220</sup> The Secretary will ensure that the state's plan complies with ASFA requirements before the state can receive any funding under the statute, meaning states must devise procedures to ensure that state child welfare agencies move forward with permanency planning within twelve months after children are removed from their homes and placed in foster care.<sup>221</sup> While the scheme provides a possibility for extension of the permanency planning stage, doing so can only be achieved if the state documents a compelling reason for extension of temporary placement.<sup>222</sup> And in some circumstances, states are not required to wait even twelve months to seek permanency planning.<sup>223</sup> States that delay the process of achieving permanency for children in the foster care system are at risk of losing federal grant money in the future.<sup>224</sup>

The provisions of ASFA essentially have encouraged states to truncate the process of evaluating parental fitness. It does so in two ways. First, in the permanency planning provision, it seeks to shorten the amount of time states are required to make reasonable efforts to reunify children in foster care with their parents.<sup>225</sup> Second, in certain circumstances, the reasonable efforts provision exception seeks to eliminate altogether the reasonable efforts requirement and shortens the time the state must wait to seek termination of parental rights to thirty days.<sup>226</sup> The permanency planning provision is not as restrictive as the exception to the reasonable efforts requirement, but it did seek to shorten the amount of time children spent in foster care, thereby limiting the amount of time parents had to show that they could conform to community standards of "good parenting."

#### **\*676 1. Expedited Permanency Planning Under ASFA**

The permanency planning provision of ASFA requires that states make a definitive move toward permanency for a child who has been in foster care for twelve months.<sup>227</sup> At that point, the court must make a determination about whether the child should be placed back with his or her parents or whether the parents' parental rights should be terminated.<sup>228</sup> The provision does permit a court to continue the foster care relationship for some period of time if there are special circumstances that warrant the continuation.<sup>229</sup> It is clear from the language and construction of the provision, though,

that the possibility of extending the time in foster care for a child is not desirable and should be exercised rarely.<sup>230</sup> In the twelve months between the child's placement in foster care and the permanency hearing, the state is required to make reasonable efforts to "preserve and reunify" the family.<sup>231</sup>

The reasonable efforts provision in ASFA is fairly short, but it makes clear that the state cannot ignore reunification as a goal for families who have been separated by abuse or neglect.<sup>232</sup> The provision requires that "reasonable efforts shall be made to preserve and reunify families[,] before or after the child has been removed from the home."<sup>233</sup> But if those reasonable efforts are deemed inconsistent with the permanency plan set by the court for whatever reason, then the state must shift its reasonable efforts to those that would advance the finalization of the permanency plan.<sup>234</sup> Reasonable efforts to preserve and unify families are only required as long as the court deems them consistent with the permanency plan.<sup>235</sup> It is possible, then, that a permanency plan that is established within twelve months of the child's placement into foster care could be deemed inconsistent with \*677 reasonable efforts to reunite the family, and at that point, the state is free to move forward as quickly as it can to sever family ties completely.<sup>236</sup>

In this scenario, it is quite possible for a parent to lose rights to her child in the time span of twelve months. In twelve short months, a parent struggling enough to lose custody of her child must make significant improvements in her quality of life, including possibly ending an addiction, getting job training and employment, learning and implementing parenting skills (in the absence of having a child to parent), and perhaps much more. Not only must she do those things, she must do them to such a degree she can prove to a court that she is a good candidate to retain parental rights to her children and in only a short while after she has lost them. This task may prove insurmountable to someone who has many of the tools it takes to be a good parent but is struggling with only one of the life challenges that can confront parents from time to time. And though this provision may create a process that is so rushed it cannot pass procedural due process muster, the reasonable efforts exceptions are even more problematic.

## *2. Exception to Reasonable Efforts to Reunify a Family*

In drafting ASFA, Congress was not content to only encourage states to significantly speed the process of terminating parental rights in light of accusations of abuse and neglect. Congress went one step further by including exceptions to the reasonable efforts requirements, allowing states to skip altogether the process of assisting at-risk parents and children to stay together.<sup>237</sup> This provision permits states, in certain enumerated circumstances, to forego any reasonable efforts to reunify the family and move to permanency planning within thirty days of determining that the reasonable efforts exception has been triggered.<sup>238</sup> The exception specifically enumerates several circumstances in which reasonable efforts are not required.<sup>239</sup> Several \*678 of the categories may seem logical and necessary to most, but at least one is unconstitutionally efficient.

Under ASFA, the state is not required to make reasonable efforts to reunite a parent with her child in three circumstances.<sup>240</sup> First, reasonable efforts are not required if the parent has subjected the child to aggravated circumstances as defined by state law, though ASFA suggests to include "abandonment, torture, chronic abuse, and sexual abuse."<sup>241</sup> Additionally, a state can forego reasonable efforts if a parent has committed murder, attempted murder, or felony assault of the child or the child's sibling.<sup>242</sup> In the third category, the state may skip reasonable efforts to reunite a parent and child if the "parental rights of the parent to a sibling have been terminated involuntarily."<sup>243</sup> It is this category of exception to the reasonable efforts rule that most clearly flies in the face of the Due Process Clause.

### III. CONSTITUTIONAL FLAWS OF STATE LAWS EXPEDITING TERMINATION OF RIGHTS

In the years since ASFA was passed, states have fallen in line by passing and implementing their own versions of the statute.<sup>244</sup> Incentives in hand, states have been busily relying on statutes to expedite the process of seeking permanence for children in foster care by terminating parental rights at a faster pace than before ASFA.<sup>245</sup> There have been other problems identified with the passage of ASFA \*679 that have arisen since states adopted versions of it, including creating a whole new class of orphans and teenagers who need to be legally emancipated and find a way to live on their own.<sup>246</sup> But the most pressing constitutional problem with the statute has been the interplay between state practices for removing newborns from their parents' custody within days of birth if the parents have previously lost parental rights to a sibling of the newborn.<sup>247</sup> Coupled with the general expedited process to terminate parental rights, ASFA has essentially incentivized states to sever the rights of these parents with far less than the constitutionally required clear and convincing evidence standard.

#### *A. Expedited Process of Parental Rights Termination After a Prior Involuntary Termination*

The exception in ASFA allowing states to forego reasonable reunification efforts for parents who have previously lost rights to another child is the second of three steps that end in an unconstitutional process for persons falling into a somewhat common parental rights termination scenario. The first step starts in the hospital when a mother who has lost parental rights before gives birth. In many states, when a mother already divested of rights to one child gives birth to another, the state is notified of the birth.<sup>248</sup> In these cases, before the mother is permitted to leave the hospital, the state removes the newborn from her custody on the assumption that the earlier adjudication terminating her parental rights requires the newborn be protected from his or her \*680 mother.<sup>249</sup> At that point step two commences, which relieves the state of any responsibility to make reasonable efforts to reunify the mother with her newborn.<sup>250</sup> Step three also comes from ASFA, which requires the state to have a permanency hearing within thirty days of the newborn's removal and to make reasonable efforts for finalization of the permanency plan.<sup>251</sup>

It is a common practice among agencies charged with protecting children from abusive parents to preemptively remove newborns from the custody of parents who have previously lost parental rights to a sibling of the newborn.<sup>252</sup> When a woman whose parental rights have been involuntarily terminated in the past gives birth again in a hospital, the child protection agency in that jurisdiction is notified of the birth.<sup>253</sup> The agency will typically remove the child from the custody of his or her mother before she can leave the hospital with her new baby.<sup>254</sup> If a baby is not born in the hospital, child protection agencies will remove the child as soon as they are notified of the birth. There are obvious safeguards built into this system, all based on the assumption that the mother of the child has a track record that makes her too much of a risk to allow her to care for her newborn.<sup>255</sup>

In this scenario, which is actually not uncommon, the newborn has been removed as a matter of course, without any determination that the newborn's parents have engaged in any abusive or neglectful behavior. In fact, because the newborns are removed within a few hours to a few days of their birth, it would take concerted effort on the parents' part to engage in abusive or neglectful behavior in the heavily supervised and protective environment of a maternity and infant ward. At this point, the reasonable efforts exception takes effect. It is not clear, based on the language of the statute, exactly how states should implement the provision, but the statute does make clear that it is not \*681 necessary

to make reasonable efforts to reunify the parents and their newborn.<sup>256</sup> The reasonable efforts exception can be read two ways, neither of which ends well for parents who hope to regain custody of their newborn child.

The language of the reasonable efforts exception is ambiguous about how it should be implemented. The relevant portion of the provision states: “(D) reasonable efforts ... shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that ... (iii) the parental rights of the parent to a sibling have been terminated involuntarily.”<sup>257</sup> On one hand, the provision could mean that only after a court of competent jurisdiction has determined the parent was subject to involuntary termination of parental rights in the past, regardless of whether a court or other state agency terminated the parental rights, can reasonable efforts to reunify the family be disregarded. On the other, it could mean the reasonable efforts exception is applicable only if a court of competent jurisdiction has terminated the parents' rights to a sibling of the newborn at issue now.<sup>258</sup> In that case, the child protection agency would only need to know of the prior involuntary termination (and of course it would because the knowledge of the prior termination of parental rights is what alerts the agency to remove the newborn in the first place) to determine for itself that it need not make reasonable efforts to reunify the family.

Even if a hearing is required to determine whether reasonable efforts can be skipped by the agency, the court does not appear to have discretion under ASFA to determine that reasonable efforts should be made.<sup>259</sup> The statute states that reasonable efforts to reunify families “shall not be required to be made” when parents have lost their rights \*682 previously.<sup>260</sup> The court hearing, if there is one at all, is cursory, to confirm that a parent's rights have been terminated involuntarily in the past.<sup>261</sup> Either way, the determination that reasonable efforts are not required is not a rigorous evidentiary analysis of parenting ability. After whichever entity makes the determination that reasonable efforts to reunify the family are not required, a court must move the process along quickly to the next step.<sup>262</sup>

As soon as the exception to the reasonable efforts requirement has been triggered, a court must start the permanency planning process.<sup>263</sup> In fact, a court is required to hold a permanency planning hearing within thirty days of the determination that reasonable efforts are not required.<sup>264</sup> As soon as the permanency hearing is held, the state must begin making reasonable efforts to “place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child.”<sup>265</sup> Within thirty days of the determination that reasonable efforts to reunify are not required, a court must set a permanency plan that must be implemented as quickly as possible.<sup>266</sup> This rush to finality gives parents no opportunity to show they are fit parents with respect to their newborn child, and it allows courts to rely on an adjudication of unfitness in the past as evidence of unfitness in the future, which is a violation of the substantive and procedural due process rights of parents.

### ***B. Due Process Flaws With States' Implementation of ASFA***

The effect of this expedited process terminating parental rights is that parents do not have adequate constitutional protection to regain physical or legal custody of their children. It may be argued that the process is not constitutionally flawed because the parents who have \*683 lost custody will have an opportunity to present evidence that they are capable of properly caring for their newborn at the hearing to set a permanency plan. The reasonable efforts exception and the rush to permanency in ASFA, however, are procedurally flawed in two fundamental ways. First, they allow evidence of a past adjudication of fitness to be used against a parent at a later hearing about a different child. Second, they are based on a presumption that once parents are deemed unfit to parent they are forever unfit, thereby requiring parents to prove, in a court of law, fitness to parent a later-born child. Those flaws have been incorporated into how

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states proceed in terminating parental rights and have resulted in unconstitutional practices that violate the substantive and procedural due process rights of parents.

In *Mathews v. Eldridge*, the Court considered the question of how much procedural due process is required before a person's liberty or property interests can be invaded by the state.<sup>267</sup> Recognizing, of course, that not all liberty or property interests are the same, the Court devised a three part balancing test to help courts determine the appropriate level of caution when conducting a proceeding about the invasion of a person's liberty or property interests.<sup>268</sup> The first part of the test requires consideration of the private and government interests at stake in the proceeding.<sup>269</sup> Next, the risk of error in applying the procedures already in place must be evaluated as well as how beneficial additional procedural safeguards would be.<sup>270</sup> Last, courts evaluate the societal interest in avoiding potentially burdensome procedural safeguards.<sup>271</sup> When applied, these factors weigh heavily in favor of more procedural safeguards in termination of parental rights hearings when a parent has involuntarily lost rights in the past. Later, when the Court decided *Santosky v. Kramer*, it relied partly upon *Mathews* to determine that higher procedural protections were constitutionally required in the context of protecting parents' \*684 fundamental liberty interests in retaining custody of their children.<sup>272</sup>

In *Santosky v. Kramer*, the Supreme Court determined that states may not terminate parental rights without clear and convincing evidence the termination was necessary to protect children from their parents.<sup>273</sup> Thus, states seeking to terminate rights are required to include a procedure where proof that satisfies the high (although not the highest) standard of clear and convincing evidence is presented to, and evaluated by, the court.<sup>274</sup> Justice Blackmun, writing for the majority, articulated the stakes for parents at risk of losing their parental rights:

Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.<sup>275</sup>

The Court in *Santosky* carefully evaluated what the standard of proof should be and concluded that a “preponderance of the evidence” standard was too low to protect a parent's constitutional rights.<sup>276</sup>

In *Santosky*, as stated in Part I.C.2., *supra*, the Supreme Court was very concerned with protecting the procedural and substantive due process rights of parents during termination of parental rights proceedings. The Court rejected a “preponderance of the evidence standard” as too low to protect a right that is “far more precious than any property right.”<sup>277</sup> The Court reasoned:

When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, \*685 but to end it. “If the State prevails, it will have worked a unique kind of deprivation .... A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.”<sup>278</sup>

Unfortunately, the requirements of ASFA, and the ways states have implemented them, have conspired to disregard parents' fundamental liberty interest in retaining custody of their children and to reject the constitutional procedural safeguard of a high evidentiary standard for termination of parental rights.

The constitutional problems with the expedited process in ASFA, as applied in the states, can arise most significantly in two ways. First, it allows the state to rely on evidence of abuse or neglect in the past to prove that abuse or neglect will happen in the future. Second, the process effectively shifts the burden of proof that someone is unfit from the state to parents, who must then prove they are fit to parent the child at issue. Both of these procedural requirements are inconsistent with the definition of due process and do not comply with the balancing test set out by the Supreme Court in *Mathews v. Eldridge*, and they both ignore the *Santosky* requirement that a state must prove by clear and convincing evidence that a parent is unfit.<sup>279</sup> The first example of states' unconstitutional application of ASFA-based provisions expediting the termination of parental rights is exhibited when states use evidence of past terminations to prove that termination is again necessary.

### *1. Use of Past Behavior to Prove That Future Bad Behavior Will Occur*

The Supreme Court in *Santosky v. Kramer*, in its determination that the Due Process Clause of the Fourteenth Amendment requires states to prove by a “clear and convincing” evidence standard that termination of parental rights is necessary, relied on the balancing test in *Mathews v. Eldridge* to reason that a stricter standard of proof would \*686 not unconstitutionally burden the government.<sup>280</sup> In *Santosky*, the Court took particular interest in the fact that the proceedings against the parents in question were very similar to criminal proceedings.<sup>281</sup> The state presented evidence against the parents in accordance with formal rules of evidence, each party was represented by counsel, the state established facts about the family's willingness or unwillingness to participate in reunification efforts, the parties called and cross-examined witnesses, and the court made a determination based on the evidence.<sup>282</sup> This similarity to a criminal trial was an important consideration for the Court in determining that a “preponderance of the evidence” standard was not enough to protect the fundamental parental rights at stake.<sup>283</sup> Despite the fact that proceedings to terminate parental rights, unless they are initiated pursuant to ICWA, do not require the state to prove unfitness “beyond a reasonable doubt,” the level of care that must be taken to ensure constitutional fairness when terminating parental rights has been recognized by the Supreme Court to be extremely high.<sup>284</sup> If parents' liberty interest to custody of their children is severed, it is gone forever with respect to those children.<sup>285</sup> To then permit evidence of that prior termination to be used against a parent in future adjudications of their fitness is to perpetuate the ultimate parental penalty forever.

Unfortunately, ASFA has incentivized states to adopt a process that not only ignores this important foundational notion in our jurisprudence, but encourages state courts to flout it.<sup>286</sup> By allowing states to rely on evidence that parents have had their rights involuntarily terminated in the past to forego reasonable efforts to reunite the family and to move forward with permanency planning immediately, Congress has presumed that a past adjudication of unfitness serves to prove unfitness in the future. States have taken \*687 these provisions to heart and have relied on them to show that parental rights should be terminated with respect to children who have not been subjected to abuse or neglect by their parents.<sup>287</sup> First, states allow child protection agencies to remove children without any evidence that they have been abused or neglected, to deny parents any and all assistance that may result in their regaining custody of those children, and to rely on speculative “evidence” that future abuse may occur to terminate parental rights.<sup>288</sup> Even before ASFA made it desirable for all states to do so, some states had determined that a previous adjudication of unfitness could be used to show that a person was unfit to parent later children.<sup>289</sup>

In 1991, the Florida Supreme Court considered *Padgett v. Department of Health and Rehabilitative Services*.<sup>290</sup> In *Padgett*, the court considered the appeal of parents who had lost custody to five other children due to abuse and neglect.<sup>291</sup> The appeal considered the lower court's decision to terminate parental rights to a newborn who was removed

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from the parents' custody two days after she was born, specifically addressing "whether prospective abuse, neglect or abandonment can serve as grounds for terminating parental rights."<sup>292</sup> The court held that, while parental rights are a fundamental liberty interest that are protected by the Due Process Clause, if the state can show by clear and convincing evidence that the child would be at substantial risk of significant harm upon reunification, then speculation that the parent would commit future child abuse based upon a past finding of abuse was constitutionally permissible.<sup>293</sup>

It is clear that the Florida Supreme Court's decision in *Padgett* made the state's job in proving that parental rights should be terminated with respect to a later-born child much easier if those parents had already lost parental rights to siblings of that child. The court did not, however, \*688 rely solely on the fact that the parents had lost parental rights before.<sup>294</sup> The court did emphasize that the lower court had relied upon evidence of abuse and neglect from the previous dependency adjudications to evaluate that the current termination was proper:

The question before us today is whether this abuse, neglect or abandonment must concern the present child, or whether it can concern some other child. Based on our above analysis, we hold that the permanent termination of a parent's rights in one child under circumstances involving abuse or neglect may serve as grounds for permanently severing the parent's rights in a different child.<sup>295</sup>

The Due Process Clause of the Fourteenth Amendment and the Federal Rules of Evidence prohibit the unfair use of evidence against a defendant, particularly when it is not relevant to the accusation at hand or is more prejudicial than probative of guilt;<sup>296</sup> whatever level of protection those due process requirements may have provided to Florida parents was lowered after the passage of ASFA.

In ASFA, there is no requirement that courts evaluate the facts and circumstances proved in a past termination of parental rights to support termination in a present case.<sup>297</sup> ASFA simply states that states are not required to engage in reasonable efforts to reunite children with parents who have lost parental rights in the past.<sup>298</sup> Furthermore, the provisions allow states to move forward with permanency planning and reasonable efforts to effectuate the permanency plan within thirty days of a determination that the parents have previously lost their \*689 parental rights.<sup>299</sup> The fact that the past termination has happened is enough to support a finding that the current termination is proper, without any consideration of whether the parents actually exhibited abusive or neglectful behavior in the past.<sup>300</sup> This allows states to permanently prohibit people from being parents after only one previous involuntary termination, no matter the past or present circumstances. But even if states are not taking the opportunity to simply rely on the fact that a prior involuntary termination happened, they are willing to interpret ASFA to condone Florida's practice of applying evidence of past abuse or neglect to support terminations in the present.<sup>301</sup>

In Ohio, the Court of Appeals considered the case of two parents whose rights to a newborn were terminated based on no evidence that the child had been abused and only speculation that abuse could occur in the future.<sup>302</sup> The newborn was removed from the parents' custody four days after he was born.<sup>303</sup> A trial court determined that reasonable efforts were not required to reunite the family because the parents had lost custody to two siblings of the newborn in the past.<sup>304</sup> The state held a dependency hearing, in which the infant was declared a dependent of the state because his parents were unfit to care for him, and immediately moved to terminate parental rights to the newborn.<sup>305</sup> Both parents appealed the ruling on several grounds, including that the determination the child should be declared dependent was an "anticipatory dependency."<sup>306</sup>

The appellate court disagreed that the dependency determination was anticipatory.<sup>307</sup> First, it said the determination was based on evidence that two older siblings of the newborn were also adjudicated \*690 as dependent, and their parents' rights had been terminated as well.<sup>308</sup> The court stated that ample evidence existed concerning the parents' lack of custodial skills with respect to the older children.<sup>309</sup> Additionally, the appellate court pointed out that several witnesses had testified as to the appellants' ability to parent the newborn.<sup>310</sup> The parents had been urged to take parenting classes while pregnant with the child at issue and had not done so.<sup>311</sup> The witnesses also testified that the parents would need help caring for the newborn but that they had not put in place a plan to provide for that care.<sup>312</sup> The witnesses further testified they were concerned the parents would expose the newborn to high-risk individuals they allowed into their home.<sup>313</sup> Although there may have been legitimate concern for the welfare of the child, the court relied on constitutionally impermissible evidence of past problems to uphold the lower court's termination of parental rights.<sup>314</sup>

In another case where a court upheld the termination of parental rights based on evidence of past abuse, the Supreme Court of Montana considered the constitutionality of the state's version of ASFA.<sup>315</sup> Like in ASFA, Montana's statutory scheme permits the state to forego reasonable efforts to reunify parents with a removed child if the parents have lost parental rights involuntarily in the past.<sup>316</sup> Unlike in ASFA, however, the Montana statute requires the circumstances of the past termination be "relevant to the parents' ability to care for the child currently at issue."<sup>317</sup> The parents in *In re T.S.B.* had lost parental rights to five other children at various times in the past.<sup>318</sup> Within three days of her birth, T.S.B. was removed from her parents' custody by \*691 the Department of Public Health and Human Services (DPHHS).<sup>319</sup> Two days later DPHHS filed for a determination that reasonable efforts to reunite the family were not required, that the parents' rights should be terminated, and for permanent custody of the child.<sup>320</sup> Based on evidence that the parents had been subject to involuntary termination of their parental rights in the past, the district court entered an order stating the state had established probable cause that T.S.B. was a "youth in need of care."<sup>321</sup>

True, Montana requires more than ASFA does to support the termination of parental rights for persons whose rights were previously terminated in that it requires the state to show evidence of past abuse or neglect, not just the fact of a termination.<sup>322</sup> But that is not enough of a safeguard to protect parents from due process violations. The use of past evidence of abuse or neglect is simply not adequate to prove by "clear and convincing evidence" that termination of parental rights to a different child is necessary. Particularly in situations when a newborn is removed from parents' custody before they have ever really been alone with the child, not only is there not enough evidence to support the charge of parental unfitness with respect to this child, there is not *any* evidence to that effect. At least a few states have recognized that people can change, they mature, their circumstances in life improve, and that using evidence of past fitness against them is not lawful to show they will be bad parents in the future.<sup>323</sup>

There have been cases where courts have refused to allow the termination of parental rights based on evidence of past termination. In Kansas, before ASFA was passed, an appellate court applied the *Mathews v. Eldridge* balancing test to determine the constitutionality of a state statute permitting the state to seek termination of parental rights based on evidence of prior loss of parental rights.<sup>324</sup> The lower court had terminated the mother's parental rights without a single piece \*692 of evidence that termination was necessary other than a certified copy of a journal entry from an eight-year-old rights termination involving another child of the mother.<sup>325</sup> The court concluded that the lower court's application of the statute was a clear violation of the mother's due process rights and was wholly out of procedural due process bounds:

In this state, we do not allow a defendant to be convicted of burglary upon proof that he was convicted of that crime eight years ago. We would not permit a finding of negligence to stand if it were based on nothing more than an eight-year-old prior adjudication of negligence. In neither instance would we permit a showing of a prior conviction of a crime or a prior adjudication of negligence to shift or change the burden of proof. Why should the issue of unfitness be treated any differently?<sup>326</sup>

The Kansas appellate court in *J.L.* did not strike the state statute the lower court relied upon as unconstitutional because the statute actually required courts to do more than rely upon evidence of a prior determination of an involuntary termination of parental rights.<sup>327</sup> But the court did make clear that the liberty interests of the mother were weightier than those of the state, that her due process rights had been violated by the lower court, and that other courts should not be in the practice of applying eight-year-old adjudications as evidence in support of present terminations.<sup>328</sup>

In a similar situation, the Supreme Court of Appeals of West Virginia has held that, even though the Department of Health and Human Resources is statutorily required to file for the termination of parental rights of all children born to parents whose past rights have been involuntarily terminated, a court must determine if the child at issue has suffered abuse or neglect before the parents' rights can be \*693 terminated in the present case.<sup>329</sup> Reasoning that many factors can change for the better in a person's life that would significantly improve his or her ability to parent a child, the court held that a lower court cannot terminate parental rights to a child without any evidence that child has suffered abuse or neglect.<sup>330</sup>

In an Arkansas case, an appellate court overturned a lower court's decision to terminate parental rights after one hearing in which the state presented no evidence of unfitness other than the fact that the parent's rights had been involuntarily terminated in the past.<sup>331</sup> The court of appeals held that, while there was clear and convincing evidence the parents had been subject to involuntary termination of parental rights in the past, there was not clear and convincing evidence that termination would be in the best interests of the child presently before the court.<sup>332</sup> The additional provision of the Arkansas code requiring a clear and convincing evidence standard showing the best interests of the child<sup>333</sup> served to protect the parents from what would have been an automatic severance of their parental rights based on their past termination. ASFA does not require states implementing it to have such a procedural safeguard; if Arkansas had decided to incorporate ASFA as is, the parents in this case would have been without remedy.

And in a Florida case, a lower court terminated a mother's parental rights to her twins because of the involuntary termination of another child five years prior to the twins' birth.<sup>334</sup> The appellate court held that the lower court improperly terminated the mother's parental rights to the twins based on evidence that another of her children had suffered injuries while in her custody years earlier.<sup>335</sup> The court stated:

DCF failed to present any evidence that the mother suffers from any mental illness, drug addiction, or other impairments that would cause her to be a danger to her children or render her \*694 incapable of reestablishing a relationship with them. DCF essentially argued that the severity of the injuries to the sibling child ... was sufficient to find that there was a substantial risk of significant harm to the twins. Based on the evidence presented at the hearing, however, DCF did not meet its burden to show that the twins are at a substantial risk of significant harm.<sup>336</sup>

Unfortunately, not every court may be as careful to avoid improperly severing parental rights when the only evidence is from past adjudications, especially considering how ASFA creates a procedural structure that at least implies the safeguards applied in the above cases are not necessary. In addition to the problem with relying on old evidence to prove new allegations, statutes relying on ASFA improperly incentivize courts to improperly shift the burden of proof away from states, who should have to prove that parents are a risk to their children, to parents to demonstrate fitness.

## 2. *Shifting the Burden of Proof to Parents*

The expedited process provisions in ASFA essentially set up a procedural trap that puts parents in the position of proving they can be good parents, instead of requiring states to carry the burden of proof, by clear and convincing evidence, that parents are a risk to their children.<sup>337</sup> By encouraging states to skip making reasonable efforts to reunite families because of a prior termination of parental rights, ASFA built in a presumption that reuniting such families would be futile. Also, because they are required to seek a permanency hearing within thirty days of a determination that reasonable efforts are not required, there is no opportunity for states to gather evidence showing the parent is unfit. That means the only evidence a court could rely upon to terminate parental rights in the case before it is evidence of a prior termination, as discussed in Section III.B.1, *supra*. This puts parents in the position of having to prove their fitness instead of requiring states to prove, by clear and convincing evidence, the \*695 parents' unfitness.

Some states have not been coy about their interpretation of the expedited process provisions of ASFA; that is, once it has been determined that a parent has involuntarily lost parental rights in the past, the state and court's presumptions are then that the person is unfit to parent any future children.<sup>338</sup> Only if the parent is able to prove that she is now fit can she overcome that presumption. And in some states, even though the statute may not have a presumption of unfitness explicitly built in, the application of the expedited termination of parental rights provisions serve to create a presumption of unfitness.

In Ohio, an appellate court reviewed and upheld the termination of parental rights with respect to a statute that included an express presumption of unfitness when a parent had lost rights involuntarily in the past.<sup>339</sup> There, the father of the child was unable to challenge the constitutionality of the presumption against him because he had failed to raise that argument during the hearings below.<sup>340</sup> The court upheld the termination of his parental rights based on the statute and upheld the termination of the mother's parental rights based on evidence used in a prior hearing to show she was an unfit parent to three other children.<sup>341</sup> The state relied upon evidence that she was unfit to raise her newborn as her other three children had been removed two years before because she failed to maintain a clean home.<sup>342</sup> No new evidence was introduced that her home was still dirty at the time the child at issue was born, and the mother did introduce some evidence \*696 that she had improved her ability to keep her home clean.<sup>343</sup> The appellate court did not consider the lower court's reliance on the old evidence and upheld the termination, essentially stating the mother carried the burden of proof to show that she was a fit parent and that she failed to meet it.<sup>344</sup>

In a 2007 Montana case, the appellate court upheld a termination of parental rights after the lower court heard evidence that the mother's rights should be terminated because her parental rights had been previously terminated, leaving her the burden of disproving a presumption of unfitness.<sup>345</sup> The appellate court rejected her contention that the statute created a presumption against her because the state was required to show (1) that her parental rights had been terminated before and (2) that the prior termination was relevant to the current termination.<sup>346</sup> The court also noted earlier in the opinion that the mother had the opportunity to present evidence of her fitness at trial and had chosen not to do

so.<sup>347</sup> The court reasoned that its procedures were constitutionally sound because it could consider evidence of abuse or neglect with respect to the child at issue, like courts in other states with similar provisions.<sup>348</sup> Unfortunately, however, the court did not actually consider any evidence regarding the child at issue and relied instead on evidence from the earlier terminations, thereby requiring the mother to prove the evidence from the earlier terminations was not relevant to the current proceeding.<sup>349</sup>

A year later, the Montana Supreme Court considered an appeal from the termination of a father's parental rights to a newborn who had never been in his physical custody.<sup>350</sup> The father argued the lower court's procedure of relying on evidence of prior terminations unconstitutionally shifted to him the burden to prove he was a fit \*697 parent.<sup>351</sup> Because the father received notice of the hearing to terminate his parental rights, and he had an opportunity to present evidence to "rebut the State's allegations and show changed circumstances," he was not disadvantaged at the hearing.<sup>352</sup> The court noted that the father "chose not to present any witnesses or evidence demonstrating changed circumstances."<sup>353</sup> The court concluded, in the same breath, that "[t]he statutory scheme did not create a presumption against [the father] as the burden remained on the State."<sup>354</sup>

Although it is common practice in some states to allow the burden to shift to parents to prove their fitness following a showing they had lost parental rights involuntarily in the past, some courts have called the practice or policy into question. In a Kansas case decided before ASFA was passed, for example, a court of appeals considered whether a rebuttable presumption of unfitness written into the procedural requirements in termination proceedings complied with the Due Process Clause of the Fourteenth Amendment.<sup>355</sup> The court held that although evidence of a prior adjudication of unfitness could be probative in a future hearing about the parent's fitness, it is unconstitutional to require parents to prove their fitness by clear and convincing evidence.<sup>356</sup> The court lowered the standard applied to parents presenting evidence to rebut the presumption of their unfitness to "a preponderance of the evidence," but the court declined to declare unconstitutional the statute shifting the burden to the parents.<sup>357</sup>

In *L. D. B.*, the Kansas appellate court relied upon Supreme Court precedent to show that it is not always improper for a state to shift the burden of proof onto the non-moving party.<sup>358</sup> In *Turnipseed*, the Supreme Court considered whether a statute using evidence that an individual sustained an injury on a train as prima facie evidence of negligence violated the Due Process Clause by shifting the burden of \*698 proof to a defendant.<sup>359</sup> The Court held that the burden shift did not violate the Due Process Clause if there was a reasonable opportunity for the defendant to submit his own evidence in his defense.<sup>360</sup> The Court based its holding, however, on the premise that the legislative provision prescribing a rule of evidence, either in a civil or criminal matter, not be "unreasonable in itself."<sup>361</sup> In the case of ASFA, provisions permitting states to rely on evidence that a person behaved badly in the past toward a different child to prove the person will behave badly in the future allow the state to invade a fundamental liberty interest. They also shift the burden to disprove that old evidence and are therefore unreasonable and cannot stand.

### ***C. Applying the Mathews Balancing Test and the Santosky Standard to Termination of Parental Rights in the States***

If Congress had heeded, in drafting ASFA, or states adhered to, in implementing ASFA, the Court's balancing test in *Mathews v. Eldridge*, it would be clear that the states' interests in the expedited procedures in ASFA do not outweigh the fundamental liberty interests to parent. Also, if the drafters and implementers of ASFA had kept in mind the constitutional element that parental rights to a child can only be terminated upon a showing of clear and convincing

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evidence that the termination is necessary as required by *Santosky v. Kramer*, the expedited procedures for termination of parental rights would not be in use today. The expedited procedures in ASFA are woefully deficient when it comes to their constitutionality. Unfortunately, these procedures routinely--likely daily--serve as the basis for terminating parental rights in states throughout the country.<sup>362</sup>

When applying the expedited termination provisions in ASFA to the *Mathews* test to determine whether they are constitutionally sound procedures, it is clear they are not. The *Mathews* test is a three-part analysis that requires balancing the interests of parents subject to \*699 involuntary termination of their parental rights against those of the state and public to seek efficient resolutions to problems.<sup>363</sup> The *Mathews* test first requires that courts look at the interests of the private party on the receiving end of the governmental action.<sup>364</sup> The private interest that would be affected by the governmental action in this situation is that which has been deemed one of the most important fundamental liberties protected by the Constitution.<sup>365</sup> When it is severed, the damage is permanent. Unlike persons sentenced to jail for a portion of their lives and who will ultimately regain their freedom, a parent who loses parental rights is forever without them.<sup>366</sup>

The second consideration in the *Mathews* test is the level of risk in erroneous deprivation of rights when applying the procedures and the probable value of any additional procedural safeguards that might be implemented.<sup>367</sup> In the case of termination of parental rights based on a past involuntary termination, the risk of error is extremely high when states are permitted to use evidence that is wholly unrelated to the matter before the court. Evidence of past bad behavior cannot serve to prove that future bad behavior is so likely to occur that a permanent severance of parental rights is justified. One of the most fundamental principles of the American judicial system is the idea that people are “innocent until prove[n] guilty” of the crime for which they have been accused<sup>368</sup> and that later behavior will be judged independently of past behavior.

The third factor in the *Mathews* test requires the court to consider the public interest in preserving the procedural status quo, including the potential costs of additional or different procedural safeguards.<sup>369</sup> One interest of the government in expediting termination of parental rights is to protect children from abusive or neglectful parents.<sup>370</sup> But, rushing that process is not necessarily going to protect children from \*700 parents who might do them harm. Once the children have been removed from their parents' custody, there is little harm in making the same reasonable efforts to reunify the family as are made for other families. Those children have already been placed somewhere they are supposed to be safe, and taking an additional few months to a year to help their parents address their shortcomings is preferable to risk terminating parental rights of those who have the ability to parent. The efficiency of rushing to termination is lost when the termination never should have happened at all.

On the assumption that there will be parents aplenty to adopt them, another reason the government has sought to expedite the procedures for terminating parental rights is based on the theory that doing so will free children for adoption as quickly as possible.<sup>371</sup> This assumption has proven untrue in the years since ASFA was passed. Children are essentially becoming orphaned instead of remaining in foster care until their parents can regain custody, or they age out of the system.<sup>372</sup> This has created a huge administrative burden on states that are responsible for figuring out what to do with all of the state-created orphans who are not supposed to be languishing in foster care.<sup>373</sup> Changing the procedural safeguards to allow parents who have involuntarily lost parental rights in the past more time to show that they can adequately parent their children would likely not create more of an administrative burden than the current system does.

Another way that ASFA and its progeny statutes have impeded the due process rights of parents is through their disregard for applying the “clear and convincing evidence” standard required by *Santosky*. States have implemented provisions requiring clear and convincing evidence of prior termination of parental rights be proved at a hearing to terminate parental rights to subsequent children of those parents, but all that requires is a showing of past bad behavior toward different children.<sup>374</sup> That requirement cannot be considered constitutionally adequate to support the termination of a fundamental constitutional \*701 right to a different child. Clear and convincing evidence that the parent is unfit to parent *this* child is the only standard that can satisfy the high level of protection afforded to substantive and procedural due process rights. Using past evidence of bad behavior to prove future bad conduct is certainly not clear and convincing evidence. In fact, it is no evidence at all.

### CONCLUSION

It took far too long for the public consciousness to accept that child abuse and neglect are a societal problem that can be addressed by the state. It took even longer for the Supreme Court to recognize that courts should evaluate those accusations of neglect and abuse with the highest order of care because the Constitution requires that the rights of parents to raise their children be carefully protected. But when the public, lawmakers, and judges all arrived at the current level of consciousness about child abuse and neglect, they chose solutions to the problem that are not consistent with the constitutional rights of the interested parties. Congress overshot its goal to reduce the number of children in foster care by unconstitutionally severing the fundamental rights of parents.

Congress and the Supreme Court must address this problem and begin the process of allowing families to repair themselves before they are permanently torn apart. Congress can do its part by changing ASFA to ease the lightning-fast provisions of expedited termination of parental rights in cases where parents have involuntarily lost parental rights in the past. If ASFA simply dropped that one provision, states could return to giving parents who have previously lost parental rights a chance to regain custody of the later-born children. While reunification services may be perceived by some to be expensive, especially because they are unlikely to actually help, it is a less expensive solution in the long run to help parents retain their rights rather than leave the state to try and place children into adoptive homes that, by and large, do not exist. One to two years of reunification services for parents, who can then regain custody of their children and \*702 bear all the costs of raising them, is a much smaller price for the state to pay than up to eighteen years of foster care.

Even if Congress were to amend ASFA, thereby requiring states to drop their exemption of reasonable efforts provisions, it may be necessary for the Supreme Court to make clear to states that their procedures for termination of parental rights may be unconstitutional. Prior to ASFA, states engaged in expedited termination processes that ran afoul of the Due Process Clause. If ASFA were to change, some states may try to rely on state court precedent to continue those unconstitutionally expedited termination proceedings. In that case, the Supreme Court should make clear that (1) relying on evidence of past determinations of unfitness cannot serve as proof of unfitness for other children, and (2) that shifting the burden to parents to prove their fitness, rather than the state proving they are unfit, is not constitutionally reasonable and does not comply with *Santosky v. Kramer*. Anything less would allow states to continue hurting parents and their children by using assumptions and conjecture against them to justify permanently depriving them of their parental rights.

The right to parent cannot forever be severed by the state based on a determination that a person was not a good parent to a child in the past. Each time a parent has a child, that parent should receive full constitutional protection during the process to decide whether he or she can parent this child. The societal costs of requiring the state to engage in a careful determination of the person's ability to parent is minimal compared to the societal costs of living in a country that permits the state to permanently judge someone incapable of parenting, no matter the reality. The risk that parents who would be no worse than any other parent lose their parental rights to every child born to them in the future is far

too great to justify the efficiency of trying to free children for adoption, especially when it is clear that most children will not ever be adopted anyway. Lawmakers and judges need to start relying on their own rhetoric about the value of supporting families and apply those ideals to all families, even the imperfect ones.

Footnotes

- a1 Associate Professor of Law, West Virginia University College of Law. J.D., Tulane Law School. I was able to complete this Article with the support of a Bloom Summer Research Grant, for which I am extremely grateful.
- 1 *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (last visited Nov. 4, 2013).
- 2 *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“In light of [the] extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”). For the purposes of this Article, parental rights generally mean the rights of biological mothers and married couples because the parental rights of unmarried biological fathers are less protected by the Due Process Clause. *Michael H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989) (holding that a man who fathered a child with a married woman did not have a due process right to challenge California's recognition of the mother's husband as the legal father of the child, even when the biological father had a well-established relationship with the child); *Lchr v. Robertson*, 463 U.S. 248, 262 (1983) (holding that the due process rights of a putative father who had not “grasp[cd] [the] opportunity” of building a relationship with his child were not violated when he was not notified of an impending adoption proceeding of his daughter); *Quilloin v. Walcott*, 434 U.S. 246, 249, 254-56 (1978) (holding that a biological father who never legitimated his child by filing paperwork to claim the child as his was not deprived of his due process rights when his parental rights were terminated).
- 3 *E.g.*, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400(1923).
- 4 *See Meyer*, 262 U.S. at 399-400 (“The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.”).
- 5 *E.g.*, *In re J.H.*, 523 S.E.2d 374, 379 (Ga. Ct. App. 1999) (affirming the lower court's termination of parental rights when “the mother exposed the child to an abusive, nomadic, and turbulent lifestyle filled with unrehabilitated drug use and violence”).
- 6 *Meyer*, 262 U.S. at 399.
- 7 For a discussion of balancing the state's *parens patriae* interest in protecting the child and the parent's due process rights, see *Santosky v. Kramer*, 455 U.S. 745, 766-68 (1982). The medical community has also discussed this issue for the last four decades. Thco Solomon, *History and Demography of Child Abuse*, 51 PEDIATRICS 773, 774-75 (1973). “In child welfare today, the basic problem still exists: at what point does the harm of leaving a child in an abusive environment override the negative consequences of splintering the family ...?” *Id.* at 774.
- 8 *See* discussion *infra* Part I.
- 9 *See* discussion *infra* Part II.
- 10 *See* discussion *infra* Part 111.A.
- 11 *See infra* notes 252-55 and accompanying text.
- 12 42 U.S.C. § 671(15)(D)(iii) (2006).
- 13 *See infra* Part III.B.2.

- 14 See BRIAN CORBY, CHILD ABUSE: TOWARDS A KNOWLEDGE BASE 17-21(1993).
- 15 MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 235-38 (1985); MARGARET O. HYDE, CRY SOFTLY! THE STORY OF CHILD ABUSE 36 (1980).
- 16 HYDE, *supra* note 15, at 34-41.
- 17 *Id.* at 37; MARIA SCANNAPIECO & KELLI CONNELL-CARRICK, UNDERSTANDING CHILD MALTREATMENT: AN ECOLOGICAL AND DEVELOPMENTAL PERSPECTIVE 6 (2005).
- 18 HYDE, *supra* note 15, at 36.
- 19 *See id.* at 37-39.
- 20 *See* LERUOY ASHBY, ENDANGERED CHILDREN: DEPENDENCY, NEGLECT, AND ABUSE IN AMERICAN HISTORY 6-7 (1997).
- 21 *Id.*; Marvin Ventrell, *From Cause to Profession: The Development of Children's Law and Practice*, COLO. LAW., Jan. 2003, at 66.
- 22 *See* ASHBY, *supra* note 20, at 6-7.
- 23 *Id.* at 7-8; JOHN E. B. MYERS, CHILD PROTECTION IN AMERICA: PAST, PRESENT, AND FUTURE 11-12 (2006) (“Involuntary apprenticeship was used for substantial numbers of poor children and orphans. Local officials had authority to remove dependent children from their parents and place the children with masters.”). Placing impoverished children in indentured servant arrangements originated from the British “poor laws.” Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 NEW. ENG. L. REV. 1113, 1122(1997).
- 24 ASHBY, *supra* note 20, at 10-14.
- 25 *Id.* at 6.
- 26 *Id.* at 6-8; GROSSBERG, *supra* note 15, at 264-66.
- 27 *See* ASHBY, *supra* note 20, at 21; MYERS, *supra* note 23, at 12.
- 28 ASHBY, *supra* note 20, at 21.
- 29 *Id.*
- 30 *Id.* at 19.
- 31 *Id.*
- 32 *See id.*
- 33 *Id.*; LELA B. COSTIN ET AL., THE POLITICS OF CHILD ABUSE IN AMERICA 50-51 (Duncan Lindsay ed., 1996); *see* BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 6 (1984). The modern family stems from the bourgeoisie of the late 1800s. NELSON, *supra*, at 6. Upper-class families tended to recognize that children had natural rights, and in these homes, excessive violence was not tolerated. *See id.*
- 34 *See* ASHBY, *supra* note 20, at 19.
- 35 COSTIN ET AL., *supra* note 33, at 46; MYERS *supra* note 23, at 37 (“By 1880, there were thirtyseven [nongovernmental] child protection societies in the United States.”).

- 36 See COSTIN ET AL., *supra* note 33, at 46-47.
- 37 See *id.* During the mid- to late-1800s, the population of urban industrial areas grew immensely. ASHBY, *supra* note 20, at 41. Many “child savers” condemned the immigrant urban lifestyle and believed that urban ““corruption” bred juvenile delinquents. See ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 40-41 (2d ed. 1977). This belief reinforced the notion that children of poor families were better served by being taken out of their homes in the city and “reformed.” See *id.* at 61-62.
- 38 ASHBY, *supra* note 20, at 23-29. For instance, The New York Society for the Prevention of Cruelty to Children favored “rescuing” children and separating them from their homes rather than rehabilitating families. NELSON, *supra* note 33, at 8.
- 39 See ASHBY, *supra* note 20, at 22-24; see also DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 17 (2d ed. 2004) (“[Many times] children were removed from impoverished lone mothers and placed in ‘good Christian homes’ in the country, which were viewed as providing a clean wholesome environment ....”).
- 40 ASHBY, *supra* note 20, at 19.
- 41 *Id.* Many scholars cite the industrial revolution of the nineteenth century, which forced many men to work away from the home, as the impetus for the cultural shift to presume that children fair better in their mother’s custody. See Cynthia A. McNecly, Comment, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLS. ST. U. L. REV. 891, 898-99 (1998).
- 42 See ASHBY, *supra* note 20, at 19. Most states followed the tender years doctrine until the late 1960s. Julie E. Artis, *Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine*, 38 LAW & SOC’Y REV. 769, 774 (2004).
- 43 See ASHBY, *supra* note 20, at 19; COSTIN ET AL., *supra* note 33, at 62.
- 44 See COSTIN ET AL., *supra* note 33, at 61-62. Michael Grossberg coined the term “judicial patriarchy” in his book *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA*. *Id.* Grossberg discussed the increased willingness of courts and legislators to intervene in familial matters in the nineteenth century: Judges were new kinds of patriarchs, ones invested with a power over some domestic relations that rivaled that of their predecessors. They used the broad discretionary authority conferred on them by equity and common-law procedures, and conceded by legislative inertia, to rewrite the laws governing the allocation of resources, rights, and duties within the home and between family members and the state. GROSSBERG, *supra* note 15, at 290.
- 45 MYERS, *supra* note 23, at 37.
- 46 See *id.* at 58; see also LINDSEY, *supra* note 39, at 24 & Figure 1.2 (charting the growth of child welfare agencies in the mid-twentieth century). The number of employees in the public child welfare system increased during this time. LINDSEY, *supra* note 39, at 24 & Figure 1.2. In 1960, there were roughly 7,500 employees. *Id.* By 1976, this number grew to roughly 30,000 employees. *Id.*
- 47 See MYERS, *supra* note 23, at 72, 76. (“The Great Depression ... hastened the demise of nongovernmental SPCCs. The charitable contributions that were the lifeblood of SPCCs dried up with the economy ....”).
- 48 See COSTIN ET AL., *supra* note 33, at 62.
- 49 ASHBY, *supra* note 20, at 19.
- 50 See COSTIN ET AL., *supra* note 33, at 62.
- 51 See *id.*; see also GROSSBERG, *supranote* 15, at 248-50.

- 52 COSTIN ET AL., *supra* note 33, at 62.
- 53 *See* discussion *supra* Part I.A.
- 54 *See* ASHBY, *supra* note 20, at 57-59; COSTIN ET AL., *supra* note 33, at 74.
- 55 ASHBY, *supra* note 20, at 55-59; COSTIN ET AL., *supra* note 33, at 51-57.
- 56 ASHBY, *supra* note 20, at 55; COSTIN ET AL., *supra* note 33, at 52.
- 57 ASHBY, *supra* note 20, at 57; COSTIN ET AL., *supra* note 33, at 57-61.
- 58 COSTIN ET AL., *supra* note 33, at 74.
- 59 *Id.* at 53.
- 60 *Id.*
- 61 *See id.*
- 62 *Id.* This legend is inaccurate in many ways, including the timeline of bringing Mrs. Connolly to justice for Mary Ellen's abuse, which was actually much slower, as well as the passion with which Mr. Bergh compared Mary Ellen to an animal needing protection. *Id.* at 53-61. The fact that the media account caught the fancy of the public and likely spurred the beginning of the movement to prevent child abuse is the relevant point here. *See id.*
- 63 *Id.* at 53.
- 64 COSTIN ET AL., *supra* note 33, at 61.
- 65 *Id.* at 64-70.
- 66 *Id.* at 67-70.
- 67 *See id.* at 66.
- 68 *Id.* at 74. Charles Loring Brace was also making headlines in the mid- to late-1800s as the head of the New York Children's Aid Society, which made a practice of placing homeless or destitute children into homes of families as a form of indentured servitude. ASHBY, *supra* note 20, at 39-40. Brace thought of the children he “helped” as a ““happy race of little heathens and barbarians.”” *Id.* at 39.
- 69 *See* COSTIN ET AL., *supra* note 33, at 74.
- 70 *Id.*
- 71 *Id.* at 62, 66, 74.
- 72 *See* ASHBY, *supra* note 20, at 79-84.
- 73 *Id.*
- 74 *Id.* at 79-80.
- 75 *See id.* at 82-83.
- 76 *Id.*
- 77 *Id.*

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- 78 See ASHBY, *supra* note 20, at 82.
- 79 *Id.* at 94.
- 80 *Id.* at 94-98; MYES, *supra* note 23, at 60 (“The first statewide laws authorizing mothers' pensions were passed in 1911 .... By 1920, forty states had mothers' pension laws, and by 1935, nearly all states had such laws.”).
- 81 ASHBY, *supra* note 20, at 94-97.
- 82 *Id.* at 96-97. Mothers' pensions were often not large enough to allow a mother to stay at home with her children full time, requiring her to work at least some portion of a week. *Id.* at 97. Doing so risked her ability to keep her children because childcare was extremely difficult to obtain. *Id.*
- 83 See *id.* at 99-100.
- 84 See COSTIN ET AL., *supra* note 33, at 46-48.
- 85 *Id.* at 48. The phrase *parens patriae* means “‘ultimate parent’ or “‘parent of the country.’” D’ Ventrrell, *supra* note 21, at 66. “The courts accepted the logic that society was entitled to take custody of a child without due process of law, regardless of his or her status as victim or offender, because of the state's authority and obligation to save its children from becoming criminal.” *Id.*
- 86 COSTIN ET AL., *supra* note 33, at 48.
- 87 *Id.*
- 88 CORBY, *supra* note 14, at 26; COSTIN ET AL., *supra* note 33, at 82; MYERS, *supra* note 23, at 79; see generally C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 105 (1962). Dr. Henry Kempe, a pediatrician, increased awareness in child abuse and neglect when he published a series of articles that described the numerous incidents of child abuse he witnessed. CORBY, *supra* note 14, at 2627; see generally Henry Kempe et al., *supra*. Dr. Kempe and his associates ultimately coined the term “battered child syndrome.” COBRY, *supra* note 14, at 26-27.
- 89 ASHBY, *supra* note 20, at 101.
- 90 COSTIN ET AL., *supra* note 33, at 82-91.
- 91 *Id.* at 90-92.
- 92 See *id.*; Ventrrell, *supra* note 21, at 67.
- 93 COSTIN ET AL., *supra* note 33, at 91.
- 94 See *id.* at 91-92.
- 95 *Id.* at 91.
- 96 *Id.* at 92.
- 97 See generally MYERS, *supra* note 23.
- 98 *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923).
- 99 See Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 13-20 (2001).
- 100 See COSTIN ET AL., *supra* note 33, at 89-92.

- 101 See *Meyer*, 262 U.S. at 399 (“While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to ... establish a home and bring up children ....”).
- 102 The Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101-5119c (2006)); see Adlcr, *supra* note 99, at 17-18.
- 103 See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
- 104 E.g., *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007); *Planned Parenthood of Sc. Pa. v. Casey*, 505 U.S. 833, 893-95 (1992) (striking a requirement that married women ask permission from their husbands before obtaining an abortion); *Roe v. Wade*, 410 U.S. 113, 164-65 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).
- 105 See *Moore v. City of E. Cleveland*, 431 U.S. 494, 505-06 (1977).
- 106 *Prince v. Massachusetts*, 321 U.S. 158, 166(1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer*, 262 U.S. at 400.
- 107 See *Michael H. v. Gerald D.*, 491 U.S. 110, 126-30 (1989); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).
- 108 See cases cited *supra* notes 104-07.
- 109 See *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
- 110 See, e.g., *In re Emily*, 540 S.E.2d 542, 553 (W. Va. 2000).
- 111 *Stanley*, 405 U.S. at 651.
- 112 *In re J.P.*, 648 P.2d 1364, 1374-75 (Utah 1982) (“[W]e conclude that ... a parent [can]not ... be deprived of parental rights without a showing of unfitness, abandonment, or substantial neglect ....”).
- 113 See DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 743-45 (3d ed. 2012) (discussing the differences between physical custody and legal custody in the context of joint parenting arrangements).
- 114 See *Troxel*, 530 U.S. at 65-66; *Santosky*, 455 U.S. at 753.
- 115 *Santosky*, 455 U.S. at 753.
- 116 *Id.*
- 117 *Troxel*, 530 U.S. at 65. The Court actually stated that the fundamental liberty interest of parents to the care, custody, and control of their children is “perhaps the oldest of the fundamental liberty interests recognized” by the Court and cites to *Meyer v. Nebraska* in support of that proposition. *Id.* As discussed, *infra*, the Court did not, until much later, make as clear as Justice O'Connor suggested in the majority opinion of *Troxel* that the liberty interests of parents are fundamental.
- 118 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
- 119 *Id.*
- 120 *Id.*
- 121 *Loving v. Virginia*, 388 U.S. 1, 12 (1967); see *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (acknowledging the power of the legislature over the institution of marriage and stating that marriage is the “most important relation in life, as having more to do with the morals and civilization of a people than any other institution”). Obviously, the ongoing debate over same-sex marriage keeps questions alive regarding to what extent marriage is truly a fundamental right under the Constitution.

- 122 Romana Kalccm, Comment, *Towards the Recognition of a Parental Right of Companionship in Adult Children Under the Fourteenth Amendment Substantive Due Process Clause*, 35 SETON HALL L. REV. 1121, 1131 (2005) (“One of the first cases that dealt with familial substantive due process rights, *Meyer v. Nebraska*, recognized the right of a parent to control the upbringing of his or her children.” (footnote omitted)).
- 123 *Id.*
- 124 *Meyer*, 262 U.S. at 396-97.
- 125 *Id.* at 399.
- 126 *Id.*
- 127 *Id.*
- 128 *Id.* at 400-01.
- 129 *See generally id.*
- 130 *See generally Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).
- 131 *Id.* at 529-31, 534.
- 132 *Id.* at 531-33; *see generally Soc’y of Sisters v. Pierce*, 296 F. 928 (D. Or. 1924), *aff’d*, 268 U.S. 510(1925).
- 133 *See Pierce*, 268 U.S. at 531-33; *Meyer*, 262 U.S. at 398-99.
- 134 *Pierce*, 268 U.S. at 535-36.
- 135 *Id.*
- 136 *Id.* at 533-34.
- 137 *See Soc’y of Sisters*, 296 F. at 936-38.
- 138 *Pierce*, 268 U.S. at 534-35.
- 139 *Id.*
- 140 *See id.*
- 141 *Id.*
- 142 *See Fields v. Palmdalc Sch. Dist.*, 447 F.3d 1187, 1189-90 (9th Cir. 2006); *see also* Brad J. Davidson, Comment, *Balancing Parental Choice, Slate Interest, and the Establishment Clause: Constitutional Guidelines for States’ School-Choice Legislation*, 33 TEX. TECH L. REV. 435, 445 (2002) (“*Meyer* and *Pierce* are recognized as the seminal cases declaring the constitutional right of parents to direct the education and upbringing of their children.”); Steven J. Macias, *The Huck Finn Syndrome in History and Theory: The Origins of Family Privacy*, 12 J.L. & FAM. STUD. 87, 92 (2010).
- 143 *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).
- 144 *Id.* at 536, 541-43.
- 145 *Id.* at 539, 541.
- 146 *Id.* at 541.

- 147 *Id.* at 537-38.
- 148 *Id.* at 538.
- 149 *See Skinner*, 316 U.S. at 541.
- 150 *See id.*
- 151 *See generally Prince v. Massachusetts*, 321 U.S. 158(1944).
- 152 *Id.* at 159-60.
- 153 *Id.* at 159-60, 162.
- 154 *Id.* at 164.
- 155 *Id.* at 165.
- 156 *Id.*
- 157 *See Prince*, 321 U.S. at 165-67.
- 158 *See id.* at 170-71.
- 159 *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *cf. Meyer v. Nebraska*, 262 U.S. 390 (1923).
- 160 *Troxel*, 530 U.S. at 60.
- 161 *Id.*
- 162 *Id.* at 66. *See infra* Part I.C.2. *Santosky* was the first case in which the Supreme Court recognized a fundamental parental right; in that case it was the right of parents to retain custody of their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
- 163 *Troxel*, 530 U.S. at 72-73.
- 164 *Id.*
- 165 *See id.* at 65.
- 166 *Santosky*, 455 U.S. at 768-70.
- 167 All of the cases in this Section are about parents' rights to make decisions regarding their children's educational opportunities or religious upbringing. Those cases were not analyzed as situations in which abuse or neglect were at issue.
- 168 *Troxel*, 530 U.S. at 65-66.
- 169 *Id.* (citation omitted).
- 170 *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).
- 171 *Id.* at 24.
- 172 *Id.* at 27.
- 173 *See id.* at 31-32.
- 174 *See generally id.*

- 175 [Santosky v. Kramer](#), 455 U.S. 745, 747-48, 753 (1982).
- 176 *Id.*
- 177 Some states adopted the clear and convincing standard. *See, e.g., In re C.G.*, 637 P.2d 66, 70-71 (Okla. 1981) (“The clear-and-convincing standard balances the parents' fundamental freedom from family disruption with the state's duty to protect children within its borders. It places an appropriately heavy burden upon the ... petitioner (termination-seeking party) to overcome the law's policy which identifies the child's best interest with that of its natural parents.”). *But cf. Custody of Minor*, 389 N.E.2d 68, 74-75 (Mass. 1979). The Supreme Judicial Court of Massachusetts expressly rejected the clear and convincing standard. *Id.* Instead, the court followed an approach that provided the judge discretion when weighing the evidence. *Id.* (“We think it undesirable, however, to adopt the mother's suggestion that we require ‘clear and convincing’ proof in cases of the kind presented here ... We prefer to take the position that the personal rights ... require the judge to exercise the utmost care in promulgating custody awards.”).
- 178 *See, e.g., United States v. Yazell*, 382 U.S. 341, 352 (1966) (“Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family ....”); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (“Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.”).
- 179 [Santosky](#), 455 U.S. at 768-70.
- 180 *Id.*
- 181 *Id.* at 751.
- 182 *Id.*
- 183 *Id.*
- 184 *Id.* at 751-52.
- 185 [Santosky](#), 455 U.S. at 749-52.
- 186 *Id.* at 753.
- 187 *Id.*
- 188 *Id.* (“If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.”).
- 189 *See infra* Part III.
- 190 *See generally Santosky*, 455 U.S. 745.
- 191 *Id.* at 751.
- 192 *See supra* notes 118-25, 130-33, 151-58 and accompanying text.
- 193 [Santosky](#), 455 U.S. at 769-70.
- 194 *Id.* at 768.
- 195 *Id.* at 750-51, 768-70.
- 196 *See id.* at 750-51.

- 197 *Id.* at 769 (alteration in original) (quoting H.R. REP. No. 95-1386, at 22 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7545).
- 198 See Chcyanna L. Jaffke, *Judicial Indifference: Why Does the “Existing Indian Family” Exception to the Indian Child Welfare Act Continue to Endure?*, 38 W. ST. U. L. REV. 127, 129-30 (2011); see also H.R. REP. NO. 95-1386, at 9 (“Surveys of states with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions.”).
- 199 Jaffke, *supra* note 198, at 130. ICWA's congressional findings state that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.” 25 U.S.C. § 1901 (4) (2012).
- 200 Sarah Martinez, *Turning Back the Clock: The Loss of Tribal Jurisdiction Over Involuntary Juvenile Dependency Proceedings*, 10 U. C. DAVIS J. JUV. L. & POL'Y 541, 541--42 (2006).
- 201 25 U.S.C. § 1912(f).
- 202 Brian C. Hill, Comment, *The State's Burden of Proof at the Best Interests Stage of a Termination of Parental Rights*, 2004 U. CHI. LEGAL F. 557, 559 (2004).
- 203 See 25 U.S.C. §§ 1901(3), 1912(f); see also H.R. REP. No. 95-1386, at 22.
- 204 H.R. REP. No. 95-1386, at 22.
- 205 Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 661-62 (2002).
- 206 Mary O'Flynn, Comment, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243, 265 (1999).
- 207 Laura Oren, *The State's Failure to Protect Children and Substantive Due Process: Dcshancy in Context*, 68 N.C. L. REV. 659, 666-67 (1990).
- 208 See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
- 209 See O'Flynn, *supra* note 206, at 251, 265.
- 210 Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. (2006)).
- 211 H.R. REP. NO. 105-77, at 8 (1997), reprinted in 1997 U.S.C.C.A.N. 2739,2740, 1997 WL225672.
- 212 *Id.* at 8-9.
- 213 See O'Flynn, *supra* note 206, at 251. In H.R. REP. No. 105-77, the Ways and Means Committee stated that “[t]here seems to be almost universal agreement that adoption is preferable to foster care and that the nation's children would be well served by a policy that increases adoption rates.” H.R. REP. No. 105-77, at 8.
- 214 See generally Lenore M. McWey & Ann K. Mullins, *Improving the Lives of Children in Foster Care: The Impact of Supervised Visitation*, FAM. REL., Apr. 2004, at 293-300. The study examined children ages from birth to eighteen that were placed in a foster care facility. *Id.* at 295. The study concluded that “for families in which reunification is a goal, young children who have more consistent and frequent contact with their biological parents have more secure attachments and are better adjusted than children who have less contact.” *Id.* at 297; accord Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 136-41 (2001) (summarizing studies that indicate family preservation is superior to foster care).

- 215 [H.R. REP. No. 105-77](#), at 13.
- 216 *See id.* at 23.
- 217 *See id.* at 8 (“[W]hat is needed is a measured response to allow States to adjust their statutes and practices so that in some circumstances States will be able to move more efficiently toward terminating parental rights and placing children for adoption.”).
- 218 *See id.*
- 219 *See generally* Adoption and Safe Families Act of 1997, [Pub. L. No. 105-89](#), [111 Stat. 2115](#) (codified as amended in scattered sections of 42 U.S.C. (2006)).
- 220 42 U.S.C. §671 (a).
- 221 *Id.* § 675(5)(C).
- 222 *Id.*
- 223 *Id.* § 671(a)(15)(C).
- 224 *See id.* § 671(a)(1)-(33).
- 225 *Id.* § 671(a)(15)(C).
- 226 42 U.S.C. §671(a)(15)(E).
- 227 *Id.* § 675(5)(C).
- 228 *Id.*
- 229 *Id.*
- 230 *Id.*
- 231 *Id.* §671(15)(B); O’Flynn,,*Supra* note 206, at 247.
- 232 *See* 42 U.S.C. §671(15)(B).
- 233 *Id.* § 671(15)(B)(i)-(ii).
- 234 *Id.* § 671(15)(C).
- 235 *Id.*
- 236 *See id.*
- 237 *Id.* §671 (15)(D).
- 238 42 U.S.C. § 671 (15)(DHE).
- 239 *Id.* §671(15)(D).
- 240 *Id.*
- 241 *Id.* §671(15)(D)(i).
- 242 *Id.* §671(15)(D)(ii).

- 243 *Id.* § 671(15)(D)(iii).
- 244 *E.g.*, [KAN. STAT. ANN. § 38-2271](#) (West, WestlawNext through 2013 Reg. and Sp. Scss.); [W. VA. CODE ANN. § 49-6-5](#) (West, WestlawNext through 2013 First Extraordinary Scss.); [OHIO REV. CODE ANN. § 2151.414](#) (West, WestlawNext through 2013 Files 24 and 26 to 38 of the 130th Gen. Assembly).
- 245 Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 269-75 (2002). Baldwin looked at all parental termination cases in St. Josephs County, Indiana and found that there were more parental terminations after the passage of the Adoption and Safe Families Act. *Id.* at 273-75. A magistrate judge in Michigan wrote a piece that included empirical evidence showing the unintended negative results of ASFA and accompanying state legislation passed to expedite the termination of parental rights: a spike in the number of state-created orphans with few or no adoption prospects. Kenneth L. Tacoma, *Lost and Alone on Some Forgotten Highway: ASFA, Binsfeld, and the Law of Unintended Consequences* 1-2 (Dec. 2005), [http:// courts.mi.gov/Administration/SCAO/OfficcsPrograms/Documents/ferb/Tacoma.pdf](http://courts.mi.gov/Administration/SCAO/OfficcsPrograms/Documents/ferb/Tacoma.pdf).
- 246 Tacoma, *supra* note 245, at 3-4.
- 247 *See infra* note 248.
- 248 *See. e.g.*, [Padgett v. Dep't of Health and Rehabilitative Servs.](#), 577 So. 2d 565, 567 (Fla. 1991) (“[T]wo days after W.L.P. was born, HRS filed a petition for detention of W.L.P. based on the fact that Mary Padgett 1) had recently given birth to a child who was placed in HRS custody ....”); [In re T.T.: S.T. v. Harrison Cnty. Dep't of Human Servs.](#), 90 So. 3d 1283, 1284 (Miss. Ct. App. 2012) (“On August 5, 2010, DHS received an alert of potential abuse from Biloxi Regional Hospital stating S.T. was in the hospital to give birth to a child. The hospital had received an alert from the Mobile, Alabama, Department of Human Resources (DHR) stating S.T. had two other children already in the custody of DHR, and DHR felt it was important for the newborn to be safe and free from abuse. On August 8, 2010, DHS picked up T.T from the hospital and placed him in foster care.”); [In re West, No. 05CA4, 2005 WL 1400029](#), at \*1 (Ohio Ct. App. June 10, 2005) (“On September 27, 2004, appellant gave birth to General H. West, Jr. On September 28, 2004, ACCS filed a complaint that alleged the child to be neglected and dependent and requested permanent custody.”).
- 249 *See supra* note 248.
- 250 42 U.S.C. § 671 (a)(15)(D)(iii) (2006).
- 251 *Id.* §671(a)(15)(E)(i).
- 252 *See, e.g.*, [Padgett](#), 577 So. 2d at 567; [In re T.T.: S.T.](#), 90 So. 3d at 1284; [In re West](#), 2005 WL 1400029, at \*1.
- 253 *See In re T. T.: S. T.*, 90 So. 3d at 1284.
- 254 *See id.*
- 255 *See* 42 U.S.C. § 671(a)(15)(D).
- 256 *Id.* §671(a)(15)(D)(iii).
- 257 *Id.*
- 258 At least one child protection agency determined the provision did not require a court to make the decision that reasonable efforts were not required. [In re Div. of Family Servs. v. James](#), 28 A.3d 480, 480-81 (Del. Fam. Ct. 2009). In that case, the Division of Family Services filed a motion in Family Court averring that the Division, not the court, was the proper entity to determine that, because the mother had involuntarily lost parental rights to a child in the past, ASFA did not require reasonable reunification efforts. *Id.* However, the court disagreed that the Division was the appropriate decision maker. *Id.*
- 259 *See* 42U.S.C. §671(a)(15).

- 260 *Id.* §671(a)(15)(D).
- 261 *See id.* § 671 (a)(15)(E).
- 262 *Id.*
- 263 *Id.*
- 264 *Id.* §671(a)(15)(E)(i).
- 265 42 U.S.C. § 671 (a)(15)(E)(ii).
- 266 *Id.* §671(a)(15)(E).
- 267 *Mathews v. Eldridge*, 424 U.S. 319, 332-34 (1976) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”).
- 268 *Id.* at 339-41, 343, 347.
- 269 *Id.* at 339-41.
- 270 *Id.* at 343.
- 271 *Id.* at 347.
- 272 *Santosky v. Kramer*, 455 U.S. 745, 754-62 (1982).
- 273 *Id.* at 769.
- 274 *Id.* at 769-70.
- 275 *Id.* at 753.
- 276 *Id.* at 768.
- 277 *Id.* at 758-59, 768.
- 278 *Santosky*, 455 U.S. at 759 (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)).
- 279 *Id.* at 769; *Mathews v. Eldridge*, 424 U.S. 319, 339-41, 343, 347 (1976).
- 280 *Santosky*, 455 U.S. at 754-62.
- 281 *Id.* at 762 (“In New York, the factfinding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial.”).
- 282 *Id.*
- 283 *Id.* at 762-64.
- 284 *See supra* notes 185-88 and accompanying text.
- 285 *See Santosky*, 455 U.S. at 748-50.
- 286 *See* 42 U.S.C. § 671 (a)(15)(D)-(E) (2006).

- 287 See, e.g., *In re T.S.B.*, 177 P.3d 429, 435 (Mont. 2008); *In re D.B.*, Nos. 03CA0015-M, 03CA0018-M, 2003 WL 22015445, at \*4-5 (Ohio Ct. App. Aug. 27, 2003).
- 288 See *supra* note 287.
- 289 See *In re J.L. & D.L.*, 891 P.2d 1125, 1131 (Kan. Ct. App. 1995).
- 290 *Padgett v. Dcp't of Health and Rehabilitative Servs.*, 577 So. 2d 565 (Fla. 1991).
- 291 *Id.* at 566.
- 292 *Id.* at 568.
- 293 *Id.* at 570-71.
- 294 *Id.* at 567.
- 295 *Id.* at 571.
- 296 See *Lisenba v. California*, 314 U.S. 219, 236 (1941) (“The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false.”); [FED. R. EVID. 402](#) (excluding irrelevant evidence); [FED. R. EVID. 403](#) (requiring exclusion of evidence that is more prejudicial than probative); [FED. R. EVID. 404\(b\)](#) (prohibiting the use of evidence of past crimes, unless needed to show “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”).
- 297 See 42 U.S.C. § 671 (2006).
- 298 *Id.* §671(a)(15)(D)(iii).
- 299 *Id.* §671(a)(15)(E)(i).
- 300 See *id.* § 671(a)(15)(D)(iii).
- 301 See *Padgett v. Dcp't of Health and Rehabilitative Servs.*, 577 So. 2d 565, 571 (Fla. 1991).
- 302 *In re D.B.*, Nos. 03CA0015-M, 03CA0018-M, 2003 WL 22015445, at \*1 (Ohio Ct. App. Aug. 27, 2003).
- 303 *Id.*
- 304 *Id.* at \*6.
- 305 *Id.* at \*1.
- 306 *Id.* at\*4-5.
- 307 *Id.* at\*6.
- 308 *In re D.B.*, 2003 WL 22015445, at \*5.
- 309 *Id.* at\*5-6.
- 310 *Id.* at \*5.
- 311 *Id.*
- 312 *Id.*

- 313 *Id.* at\*6.
- 314 *See In re D.B.*, 2003 WL 22015445, at \*5-6.
- 315 *In re T.S.B.*, 177 P.3d 429,434-35 (Mont. 2008).
- 316 *Id.*
- 317 *Id.* at 436.
- 318 *Id.* at 431.
- 319 *Id.*
- 320 *Id.*
- 321 *In re T.S.B.*, 177 P.3d at 431.
- 322 *Id.* at 434-36.
- 323 *See, e.g., In re J.L. & D.L.*, 891 P.2d 1125 (Kan. Ct. App. 1995).
- 324 *Id.* at 1130-35.
- 325 *Id.* at 1127.
- 326 *Id.* at 1131.
- 327 *Id.* at 1133.
- 328 *Id.* at 1135-36.
- 329 *In re George Glen B., Jr.*, 532 S.E.2d 64, 68 (W. Va. 2000).
- 330 *Id.* at 72.
- 331 *See Conn v. Ark. Dep't of Human Scrvs.*, 85 S.W.3d 558, 559-60 (Ark. Ct. App. 2002).
- 332 *Id.* at 560.
- 333 ARK. CODE ANN. § 9-27-341(b)(3) (West, WestlawNext through 2013 Reg. and First Ex. Scss.).
- 334 *J.J. v. Dep't of Children & Families*, 994 So. 2d 496, 497 (Fla. Dist. Ct. App. 2008).
- 335 *Id.* at 502-03.
- 336 *Id.*
- 337 *See 42 U.S.C. § 671(a)(15)(D)* (2006); *Santosky v. Kramer*, 455 U.S. 745, 768 (1982).
- 338 *See, e.g., KAN. STAT. ANN. § 38-2271(a)(1)* (West, WestlawNext through 2013 Reg. and Sp. Sess.) (presuming that a parent is unfit if the state can prove by clear and convincing evidence that the parent has been declared unfit in the past); *W. VA. CODE ANN. § 49-6-5(a)(3)* (West, WestlawNext through 2013 First Extraordinary Scss.) (requiring the Department of Health and Human Services to file a motion to terminate parental rights if the parent has lost parental rights involuntarily in the past); *OHIO REV. CODE ANN. § 2151.414(E)(11)* (West, WestlawNext through 2013 Files 24 and 26 to 38 of the 130th Gen. Assembly) (“The parent has had parental rights involuntarily terminated with respect to a sibling of the child ... and the

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parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.”).

339 *In re Cazad*, No. 04CA36, 2005 WL 1228386, at \*9 (Ohio Ct. App. May 9, 2005).

340 *Id.* at\* 10.

341 *Id.* at\*6,10.

342 *Id.* at \*6.

343 *Id.*

344 *Id.*

345 *In re A.P.*, 172 P.3d 105, 110 (Mont. 2007).

346 *Id.* at 109.

347 *Id.*

348 *Id.*

349 *Id.* at 110.

350 *See In re T.S.B.*, 177 P.3d 429, 431 (Mont. 2008).

351 *Id.* at 432.

352 *Id.* at 437.

353 *Id.*

354 *Id.*

355 *In re L.D.B.*, 891 P.2d 468, 471 (Kan. Ct. App. 1995).

356 *Id.*

357 *Id.*

358 *See id.* (citing *Mobile, Jackson, & Kan. City R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910)).

359 *Turnipseed*, 219 U.S. at 39-40.

360 *Id.* at 43.

361 *Id.*

362 *See supra* Part III.B.1.

363 *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

364 *Id.*

365 *See Troxcl v. Granville*, 530 U.S. 57, 65-66(2000).

366 *See Lassiter v. Dep't of Soc. Scrvs.*, 452 U.S. 18, 59 (1981) (Stevens, J., dissenting).

- 367 *Mathews*, 424 U.S. at 335.
- 368 *See Estelle v. Williams*, 425 U.S. 501, 518 (1976).
- 369 *Mathews*, 424 U.S. at 335.
- 370 *See supra* note 211 and accompanying text.
- 371 *See supra* note 213.
- 372 *See supra* note 245 and accompanying text.
- 373 Tacoma, *supra* note 245, at 3-4.
- 374 *See supra* note 338.

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