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The Evidence Is "Clear and Convincing": Santosky v. Kramer Is Harmful to Children.

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**The Evidence Is “Clear and Convincing”:
Santosky v. Kramer Is Harmful to Children**

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The Evidence Is “Clear and Convincing”: *Santosky v. Kramer* Is Harmful to Children

I. Introduction

In seeking to protect child victims of abuse and neglect at the hands of their parents,¹ the legal system has designed the mechanism of termination parental rights, a formal legal nullification of the parent’s claim and care for his or her natural children that would not only remove the parent’s harmful influence, but free the child up for a better life through adoption. Yet, termination of parental rights has been viewed as an incredibly severe step, so drastic that its occurrence is considered a reflection of “system failures.”² This attitude regarding termination of parental rights stems from a widespread and long-standing emphasis on family preservation and reunification of troubled families.³

The bias against termination of parental rights was formalized by the Supreme Court’s 1982 decision in *Santosky v. Kramer*.⁴ In *Santosky*, the Supreme Court struck down a New York statutory scheme which allowed parents to be adjudicated “unfit” under a preponderance of the evidence standard; the Court instead mandated at least a “clear and convincing” standard for such cases.⁵ The Court based its holding on the constitutional due process rights of the parents and on its analysis of the likelihood of the risk of error in termination proceedings, and the dire consequences to the parents of any such error.⁶ Specifically, the Court emphasized the strength of a parent’s interest in the care and upbringing of his or her child, opined that any standard

¹ Though it is difficult to determine exact numbers of children victimized by abuse and neglect, every year more than two million reports of suspected child maltreatment are made. JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES 204 (2005). In 2003, 900,000 children were substantiated as victims of abuse or neglect and that same year 1,500 children died from maltreatment. *Id.*

² ELIZABETH BARTHOLET, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 42 (1999).

³ *See id.* at 38–43.

⁴ 455 U.S. 745 (1982).

⁵ *Id.*

⁶ *Id.* at 753–64.

lower than clear and convincing would result in more frequent erroneous terminations, and that the costs of such erroneous terminations were so high that they rendered a lower burden of proof unconstitutional. By making termination of parental rights more difficult, the decision effectively institutionalized a presumption *against* termination of parental rights.

This paper will show that the Court's opinion was harmful to children in two crucial respects. First, on an empirical level, the Court's decision to impose the higher burden of clear and convincing evidence was based on flawed reasoning characterized by logical omissions. Specifically, this paper will highlight four weaknesses that underlie the Court's ultimate decision: The Court's mistaken belief that a heightened burden would lead to more factually correct verdicts; the Court's justification of an increased burden on its perception of uneven resources between the State and the parents, without recognizing the Court's own role in creating that imbalance; the omission of any reasoning regarding how problems of proof in child abuse and neglect cases may weigh against increasing the burden; and a general lack of understanding by the Court about the precise effect changing the burden of proof will have. Examining these flaws suggests that the imposition of the increased evidentiary burden was premature, if not careless.

Second, on a philosophical level, the *Santosky* decision is harmful to children because, though it purports to be acting in the best interests of the children, the Court is instead propagating and extending the traditionalist viewpoint of parental rights as trump over any other rights. Though parents certainly have valuable rights that deserve protection when they are threatened with losing their own children, the simple existence of parental rights does not preclude children from having their own rights, which may be at odds with those of their parents. However, throughout its opinion, the Court minimizes the considerations of the child's interest in

the outcome of the termination proceeding. The Court's reasoning reflects two key balancing determinations the Court renders without fully considering the children. First, in setting up the termination proceeding as an adversarial battle between the parents and the State, the Court overlooks the possibility that the children might have interests that do not coincide with either. By removing the child's interest from any of the balancing involved, the Court was freer to impose a higher standard for unfitness determinations. Second, in determining that erroneous terminations are worse than erroneous non-terminations, the Court makes a value judgment that the loss to parents in the former is greater than the harm to children in the latter. In both of these balancing tests, the Court ignores the possibility for articulating potential rights for children that deserve protection along with parental rights.

Though both the empirical flaws and the parent-focused philosophy of the Court's opinion may be harmful on their own accounts, they combine to justify the Court's imposition of the higher burden of proof. This across-the-board change in the burden of proof may prove injurious to children by resulting in many more erroneous non-terminations of parental rights, leaving children with abusive or neglectful parents or prolonging the indeterminacy surrounding their home lives. In an attempt to limit the damage of this outcome, this paper will oppose proposed extensions to the *Santosky* holding and explore auspicious lower court holdings that seek to contain *Santosky's* influence. Ultimately, this paper will call for a reexamination of *Santosky*, not only by academics who could do more groundwork to discover statistics for erroneous terminations and erroneous non-terminations, but by the present Supreme Court, which may be more predisposed to remove or diminish the *Santosky* obstacle to achieving termination of parental rights.

II. The Empirical Flaws: Increased Burden Not Supported by Court's Logic

This section will identify and analyze four significant weaknesses in the Court's opinion and how those errors may impact children: an erroneous understanding of the expected error rates of the different standards, a disingenuous analysis of the respective resources of the parties, a failure to consider how evidentiary concerns may impact problems of proof, and the omission of considered analysis regarding the effect of shifting the burden. While significant in their own respects, these flaws accumulate to such a degree that they seriously undermine the theoretical underpinnings on which *Santosky* was based.

A. Increasing the Burden Does Not Reduce the Amount of Error

Santosky's reasoning is seriously undermined by the Court's own confusion as to the effect of raising the burden of proof on the number of erroneous outcomes. While on its own, this confusion may not have boded potentially dire consequences, it becomes evident that any increased errors caused by the higher burden of proof must now be borne by children. In other words, though the Court acts in the cloak of reducing errors, it does not actually do so, instead acting to shift the risk of those errors away from the parents. This amounts to a normative judgment that faulty termination of parental rights is worse than erroneous non-termination: that the harm to parents in mistakenly losing their children is worse than the harm to children in mistakenly being left with abusive or neglectful parents. That judgment, which is not an empirical error, will be discussed below in the section regarding the Court's philosophy.

The Court's belief that "a stricter standard of proof would reduce factual error"⁷ is inaccurate. Mario Rizzo, an economist at New York University and supporter of the *Santosky* decision, explains unequivocally that "the preponderance standard always minimizes the total

⁷ *Id.* at 767.

number of errors.”⁸ Indeed, “movement in either direction from the preponderance standard increases the total proportion of error.”⁹ This effect can be demonstrated by assigning probability percentages to the different burdens; for the purposes of this paper, the preponderance standard can be set at 50% and the clear and convincing standard can be set at 75%.¹⁰ Where the clear and convincing standard will only find abuse and neglect in cases above a probability of 75%, the preponderance of the evidence standard will achieve the exact same outcome in this range of cases. The difference shows in the range of 50% - 75%, where the clear and convincing standard does not result in a finding of abuse and neglect, even though such abuse and neglect is statistically probable. By allowing for zero determinations of abuse and neglect in this range, the clear and convincing standard has created more errors. An increase in errors would also be visible by a shift to a standard below preponderance of the evidence, for example, a standard set at 25% probability. In that case, the crucial range of difference would be between 25% - 50%, where the preponderance standard would produce more accuracy. Therefore, the Court’s concern that the preponderance standard will “misdirect the factfinder in the marginal case” is itself misdirected.¹¹ Even in marginal cases, the preponderance standard offers the highest likelihood of accuracy.

Having confused the two factors of minimization of the *cost* of errors and minimization of the *number* of errors, the Court was motivated primarily by its desire to minimize the *cost* of error.¹² Explaining that “preponderance of the evidence is an appropriate standard if the cost of each overinclusion [terminating rights inappropriately] equals the cost of each underinclusion

⁸ Mario J. Rizzo, *The Economics of Termination of Parental Rights: Santosky v. Kramer*, 2 SUPREME COURT ECONOMIC REVIEW 277, 286 (1983).

⁹ *Id.*

¹⁰ As will be discussed *infra* at note 64, it is unclear what numerical probability would correlate to the clear and convincing standard.

¹¹ *Santosky*, 455 U.S. at 764.

¹² Rizzo, *supra* note 8, at 290, 296.

[failing to terminate rights where appropriate],”¹³ Rizzo justifies the Court’s decision on the basis that the cost to the parents of an erroneous outcome exceeds the cost to the State. However, the Court overlooks the social costs of its own decision. Though the Court is correct when it argues that “given the weight of the private interests at stake, the social cost of even occasional error is sizable,”¹⁴ even Rizzo recognizes that the potential for social cost “does not compel a higher standard of persuasion”: “Although the benefits of increasing the standard . . . are high, so too are the costs of a higher standard.”¹⁵ For example, while the Court argues that increasing the burden of proof will “impress the factfinder with the importance of the decision . . . perhaps reduc[ing] the chances that inappropriate terminations will be ordered,”¹⁶ the Court overlooks the fact that any reduction in inappropriate terminations must be offset by an increase in inappropriate non-terminations. The “importance of the decision” is not merely affected by one possible erroneous outcome (erroneous termination), but by all possible erroneous outcomes (erroneous termination and erroneous non-termination).

By raising the burden of proof, the Court actually increases the likelihood of underinclusions (under-terminations), but believes that, in doing so, it is only causing costs to accrue to the State.¹⁷ The Court takes issue with the equal distribution of risk of error¹⁸ attributed to the preponderance standard: “Use of that standard reflects the judgment that society is nearly neutral between erroneous termination of parental rights and erroneous failure to

¹³ *Id.* at 286, 296.

¹⁴ *Santosky*, 455 U.S. at 764.

¹⁵ Rizzo, *supra* note 8, at 296.

¹⁶ *Santosky*, 455 U.S. at 764–65.

¹⁷ The Court has convinced a few commentators on this line of argument. Like Rizzo, another commentator has found that, “The Court’s requirement of clear and convincing evidence will not cause fewer errors to be made; it will lead only to the State bearing most of the risk of erroneous decisions.” Barbara S. Shulman, *Fourteenth Amendment: The Supreme Court’s Mandate for Proof Beyond a Preponderance of the Evidence in Terminating Parental Rights*, THE JOURNAL OF CRIM. LAW AND CRIMINOLOGY 1595, 1607 (1982).

¹⁸ Actually, as Rizzo points out, “the preponderance standard neither equalizes the rates of error nor equally allocates the risks of error between the litigants.” Rizzo, *supra* note 8, at 286. An equal result will only occur if the distribution of cases is symmetric on either side of the “preponderance” decision line. *Id.* The Court’s error in risk allocation here is not as important as its relative valuations of the interests of parents and children.

terminate those rights.”¹⁹ These statements reflect that what actually underlies the Court’s decision is that it believes erroneous termination of parental rights to be worse than erroneous non-termination of parental rights. This valuation will be discussed in more detail below; the crucial understanding here is that, though the Court couched its decision in terms of reducing error, a higher burden will not produce less error, it will simply shift the risk to children by resulting in more erroneous non-terminations of parental rights.

B. Mishandling of Perceived Resource Disparity

Further compounding the harm done by the Court’s improper assessment of likelihood of error is its mishandling of the issue of a possible imbalance in the resources between the State and the parents. The Court’s reasoning in *Santosky* points to a perceived disparity in resources between the State and the parents and hypothesizes that, “coupled with a ‘fair preponderance of the evidence’ standard, these factors create a significant prospect of erroneous termination.”²⁰ Yet, instead of directly addressing the problem of unequal resources, the Court took a much more expansive step by increasing the burden of proof. That step will have ripple effects and create more problems than the other alternatives available to the Court in fixing this problem, such as overruling problematic precedent, requiring procedural protections for parents, requiring less vagueness in state statutes regarding the grounds to terminate parental rights, etc. While it is certainly true that addressing this one justification for *Santosky* by fixing the resource problem would not remove all of the other arguments on which the Court relies, it certainly would affect the argument that motivates the whole opinion: the court’s perception that too many erroneous terminations are occurring. In other words, if the lack of resources for parents is leading to terminations in cases where termination is not appropriate, the most direct way to fix that

¹⁹ *Santosky*, 455 U.S. at 765.

²⁰ *Id.* at 764.

problem is to adjust the resource problem, not to raise the standard. Raising the standard creates the problem of over-correction in which terminations are not taking place when they otherwise should be.

Initially, the Court's very evaluation of the perceived disparity in resources is not foolproof. The Court attributes almost unlimited sums to prosecute the case, expert attorneys and witnesses, and professional caseworkers to the State, as well as the ability to prosecute the parents as many times as possible in order to achieve the desired result.²¹ Painting a picture of the parents as "armed with little or no resources to fight,"²² the Court concluded that "the State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense."²³ Not only did the Court overlook some of the obstacles to the State's case, such as the lack of access to the parental home at issue and evidentiary difficulties,²⁴ the Court may have overvalued the State's resources. Depicting the State as having an almost endless supply of money and people to throw at any particular set of suspected parents, the Court minimizes the actual reality of child protection work. Social workers that would commence the investigations have been estimated to carry 50 and 70 cases at any given time, and have reported carrying up to 200 cases at once.²⁵ Though the State may have a monetary advantage, "budget constraints" have caused many positions to be filled by "men and women with little professional experience in child welfare."²⁶ Moreover, the "most common response to reported abuse and neglect is for CPS

²¹ See *id.* at 762–64.

²² Lisa Pennekamp, *Recent Case: Before a State May Sever Permanently the Rights of Parents in Their Natural Child, Due Process Requires That the State Support Its Allegations by at Least Clear and Convincing Evidence – Santosky v. Kramer*, 51 U. CIN. L. REV. 933, 942 (1982).

²³ *Santosky*, 455 U.S. at 763.

²⁴ See discussion *infra* pp. 12–16.

²⁵ Raymond O'Brien, *Solomon's Dilemma: Exploring Parental Rights: An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209, 1237 (1994).

²⁶ *Id.*

either to do nothing, or to engage in an investigation with nothing more.”²⁷ While it may be true that, compared to the often-indigent parents in these proceedings, the State has more resources,²⁸ the Court’s description is a bit disingenuous regarding reality. On the other hand, there is one significant resource disparity between the State and the parents that the Court alludes to, but does not correct: Once the case has progressed to the termination stage, the State automatically has a lawyer, whereas, under the Court’s binding precedent of *Lassiter v. Department of Social Services*,²⁹ the parent is not constitutionally entitled to one.

The Court’s opinion in *Santosky* does not square with its prior opinion in *Lassiter*, in which the Court held that indigent parents in a termination of parental rights proceeding do not have a constitutional due process right to representation.³⁰ The *Lassiter* opinion by the Court has thus *contributed* to one of the greatest factors in a disparity of resources between parents and state, a fact which the *Santosky* Court mentions in a footnote: “Of course, the disparity between the litigants’ resources will be vastly greater in States where there is no statutory right to court-appointed counsel.”³¹ The value of an attorney for the parents should not be underestimated. Indeed, though “the practical function of the standard of proof is to minimize the risk of erroneous decisions,” “the right to counsel affect[s] how a case is assembled and affect[s] the quality and quantity of the evidence that will be presented to the factfinder.”³²

²⁷ BARTHOLET, *supra* note 2, at 102.

²⁸ Indeed, many commentators accept the disparity in resources. *See, e.g.* Douglas E. Cressler, Requiring Proof Beyond a Reasonable Doubt in Parental Rights Termination Cases, 32 U. LOUISVILLE J. OF FAMILY L. 785, 805 (1994) (“The disparity in resources of the involved parties further compounds the risk of error . . .”); Shulman, *supra* note 17, at 1606–07 (“By recognizing the imbalance between the state’s resources and the parents’”, “the Court demonstrated a more thorough and realistic understanding of the inherent risk of error than it had in either *Eldridge* or *Lassiter*”).

²⁹ 452 U.S. 18, 31 (1981).

³⁰ *See id.*

³¹ *Santosky*, 455 U.S. at 763 n.13.

³² Pennekamp, *supra* note 22, at 943.

Instead of directly attempting to sway the balance of power by overturning *Lassiter*, the Court, perhaps feeling incapable of getting enough votes to do so, irresponsibly tinkers with the burden of proof. Of course, the author of *Santosky*, Justice Blackmun, dissented in *Lassiter* and was joined by the other *Lassiter* dissenters, suggesting that there is good reason to suspect that “the decision in *Santosky* may have been due to the Court’s concern over the result in *Lassiter*.”³³ Certainly, the *Santosky* Court makes uncomfortable attempts to distinguish *Lassiter*,³⁴ but ultimately goes no further. Regardless of the individual opinions of the justices, to allow *Lassiter* to remain on the books untarnished, while simultaneously lamenting the lack of resources for parents in termination of parental rights proceedings verges on hypocrisy.³⁵

And relatively untarnished *Lassiter* remains. Not only is *Lassiter* still good law, it is ironically routinely cited to support the strength of parental rights. In *Santosky* itself, the Court relied on the negative precedent to suggest the extent of those rights: “*Lassiter* declared [the natural parent’s right] ‘plain beyond the need for multiple citation.’”³⁶ Since then, *Lassiter* has been spun for the idea that, “When deprivation of parental status is at stake, however, counsel is sometimes part of the process that is due.”³⁷ More ironically, in extending new protections to parents, such as in *MLB*, the Court relies on *Lassiter*: “In accord with the substance and sense of our decisions in *Lassiter* and *Santosky*, we place decrees forever terminating parental rights in

³³ O’Brien, *supra* note 25, at n.88.

³⁴ Consider the attempt of the Court to explain why the Court upheld the fundamental fairness of procedural protections “mandated only on a case-by-case basis” in *Lassiter* whereas the Court “never has approved case-by-case determination of the proper *standard of proof* for a given proceeding.” *Santosky*, 455 U.S. at 757.

³⁵ The two cases when considered together also produce anomalous outcomes: A state can meet due process “by demanding clear and convincing evidence . . . , even if it does not appoint an attorney to represent an indigent parent. But a state will violate due process, despite its appointment of an attorney for the parent, if it requires only a preponderance of the evidence” Robert A. Wainger, *Santosky v. Kramer: Clear and Convincing Evidence in Actions to Terminate Parental Rights*, 36 U. MIAMI L. REV. 369, 377 (1982).

³⁶ *Santosky*, 455 U.S. at 758.

³⁷ *M.L.B. v. S.L.J.*, 519 U.S. 102, 123 (1996) (holding that appeal from termination of parental rights may not be denied to parent who cannot pay the fees of preparing the record). Note how *Lassiter* has become a statement of a potential positive right, instead of the denial of a guarantee of that right.

the category of cases in which the State may not ‘bolt the door to equal justice.’”³⁸ Over time, *Lassiter* has come to be grouped with *Santosky*, despite the dramatically different principles underlying the decisions. This approach of the Court to slowly repackage *Lassiter* is in some ways a “cop-out.” Instead of confronting the problematic precedent head-on, the Court allows it to remain on the books, but tries to minimize its impact.

Of course, one of the ways that *Lassiter*’s impact has been lessened has been through the *Santosky* decision itself. Yet, to use *Santosky* for this purpose was reckless: Instead of making changes on a mass scale to the burden, affecting the very way the rights of the parties are understood, the *Santosky* Court should have explored other options. First and foremost, reversing or criticizing *Lassiter* was a powerful option for the *Santosky* Court even though the decision had been handed down only a year prior. It’s true that in and of itself, reversing *Lassiter* would not necessarily facilitate the removal of children from abusive or neglectful parents. Indeed, the lawyer’s very role on behalf of the parents might lead to non-termination where termination is appropriate; often the lawyer can obfuscate the facts by capitalizing on problems of evidence³⁹ or winning on procedural grounds. On the other hand, providing lawyers could also go a long way to prevent the erroneous terminations the Court is so concerned about by correcting the imbalance of resources and protecting the parents from unwarranted state intrusion.

Whatever the effect of requiring parents to be represented, it would be better to equalize the resources in this way than to use the lack of representation for the parents as a reason for imposing an increased evidentiary burden on the State. Ironically, providing a right to uniform representation by overturning *Lassiter* would further *Lassiter*’s interest in case-by-case

³⁸ *Id.* at 124.

³⁹ Some problems of evidence are discussed *infra* pp. 12–16.

evaluation, only in a different context. It would allow States to take into account their particular schemes for termination of parental rights and determine the most appropriate standard. Instead, the Court departs from the *Lassiter*'s case-by-case process and opts for a uniform evidentiary standard instead.

If it wasn't feasible for the Court to criticize *Lassiter* openly, because there weren't enough votes,⁴⁰ the Court could have exhorted states to provide more resources or procedural protections to parents or could have mandated minimum guidelines to eliminate vagueness in termination statutes. None of these avenues was considered. Citing the resource disparity as one of the major factors in the burden of proof decision, the Court does nothing to correct it, instead imposing an increased burden on all cases, even in the individual cases where the State has sufficient protections in place such that no significant resource disparity exists.

C. Failure to Take Into Account Evidentiary Problems of Proof

Although acutely aware of the disparity in the usual resources of expertise, time, money, etc. between the State and the parents in a termination proceeding, the *Santosky* Court does not ever make mention of the problems of proof faced by the State in seeking a termination of parental rights. As concerned as the Court is with considering all of the factors that might cause an erroneous termination, the Court entirely overlooked the significant evidentiary burdens the State must face. The State's problem of proof may in fact serve to offset the "resource disadvantage" the Court so frequently asserts.

Though the State may have more physical resources and more expertise as a "repeat-player"⁴¹ in the courts, the parents are armed with the most important resource in the proceeding:

⁴⁰ Even if this were the case, a plurality opinion could have been possible in which *Lassiter* could have been criticized in the main opinion.

⁴¹ For the origination of this term, see Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 LAW AND SOCIETY REVIEW 95 (1974).

information. Unlike the State, which can only make guesses and conclusions on the basis of third-party reports, unannounced visits to the home and other circumstantial evidence, the parents actually know what has happened to their child.⁴² Child abuse and neglect truly take place behind closed doors, often in isolated communities.⁴³ As Richard Gelles has put it, parents subject their children to horrendous treatment *because they can*.⁴⁴ Indeed, “[c]hild abuse is often very difficult to prove in court. Abuse occurs in secret, and the child is usually the only eyewitness.”⁴⁵ Even when abuse or neglect does come to light, it may not be provable.

Problems of proof arise in many contexts, but the most frequent concern, as alluded to above, focuses on the role of the child as witness. As a starting point, “Failure of the child to testify may mean that the legal action cannot proceed.”⁴⁶ Yet, child witnesses pose a host of problems for abuse and neglect proceedings. For example, “Although many children are excellent witnesses, some are too young to testify, and others are ineffective on the witness stand.”⁴⁷ Some children may be too shy, embarrassed or frightened to speak, a problem which may sometimes be rectified by the use of a trusted adult interpreter, if the court allows it.⁴⁸ Those children who are willing to testify must meet competency concerns: “Can the witness communicate with the court, and does the witness understand the duty to tell the truth?”⁴⁹ Those

⁴² See Laura Freeman Michaels, *Evidentiary Issues in Cases Involving Children*, in FOUNDATIONS OF CHILD ADVOCACY 103 (Donald C. Bross and Laura Freeman Michaels, eds. 1987) (“In these cases where the truth is known only by the perpetrator. . .”).

⁴³ BARTHOLET, *supra* note 2, at 100.

⁴⁴ *Id.* at 101 (citing RICHARD GELLES & MURRAY A. STRAUSS, INTIMATE VIOLENCE, text at n.12 (1988)).

⁴⁵ JOHN E.B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT CASES 221 (1998).

⁴⁶ INGER SAGATUN & LEONARD EDWARDS, CHILD ABUSE AND THE LEGAL SYSTEM 155 (1995). Of course, whether the State chooses to place the child on the stand will vary with the specifics of each case. The more physical evidence of abuse or neglect the State possesses, the less crucial the child’s testimony becomes. Similarly, only the State’s attorney can judge the worth of the child’s testimony in a particular case, even should the child meet all competency concerns. If any trend is discernible, it would appear that children are most often put on the stand in sexual abuse cases, discussed *infra* pp. 14–15.

⁴⁷ INGER SAGATUN & LEONARD EDWARDS, *supra* note 46, at 155.

⁴⁸ MYERS, MYERS ON EVIDENCE, *supra* note 1, at 83.

⁴⁹ INGER SAGATUN & LEONARD EDWARDS, *supra* note 46, at 158.

children who are deemed competent enough to testify and who tell the truth on the stand may nonetheless testify inconsistently, often due to the stress of the courtroom setting.⁵⁰

The problems of child testimony lead to other evidentiary concerns. For example, if a child is unwilling to testify, may his or her out-of-court statements be entered as evidence against the parents? Some specific hearsay exceptions will allow certain types of statements into evidence, such as a statement identifying the perpetrator, however, many child hearsay exceptions will only allow the child's hearsay if there is corroborative evidence of the abuse.⁵¹ Child credibility issues have prompted litigants to attempt to introduce evidence regarding the child's specific memory capabilities or credibility on the stand, though such efforts are of questionable admissibility.⁵² These problems with a child witness can clearly complicate any state effort to make a showing against a parent suspected of wrongdoing. Yet the *Santosky* Court failed to give these concerns any recognition whatsoever. Even an ardent supporter of the *Santosky* decision is aware of the problem, though he believes it cuts the other way: "The termination decision may turn in part upon the testimony of the affected child, who is hardly in a position to understand the long-term implications of the proceeding."⁵³

In addition to the general concerns regarding child testimony, there are evidentiary obstacles in particular types of proceedings, namely sexual abuse cases and neglect actions. Since sexual abuse has become a hot-button political topic, there has been significant discussion about the amplified problems of proof in this context. Though child testimony is important in many abuse and neglect proceedings, it is crucial in the sexual abuse context where medical

⁵⁰ MYERS, MYERS ON EVIDENCE, *supra* note 1, at 87, 92.

⁵¹ *Id.* at 615–16, 305.

⁵² Margaret Bull Kovera and Eugene Borgida, *Expert Scientific Testimony on Child Witnesses in the Age of Daubert*, in EXPERT WITNESSES IN CHILD ABUSE CASES: WHAT CAN AND SHOULD BE SAID IN COURT 188–91, 200–03 (Stephen Ceci & Helene Hembrooke, eds. 1998).

⁵³ Cressler, *supra* note 28, at 809.

evidence may be lacking.⁵⁴ The sexual abuse proceeding has prompted its own particular concerns, as insiders debate the legitimacy of child interviewing, the use of anatomical dolls, etc.⁵⁵ One supporter of *Santosky* recognizes the particular problems of proof in sexual abuse cases, but advocates for the extension of *Santosky* to counteract what she views as “a climate of hysteria”⁵⁶ regarding allegations of sexual abuse. Her argument stems from an acknowledgement that evidence in these cases is “often entirely circumstantial and contradictory.”⁵⁷ However, this understanding can also reflect the uphill battle of the State in making the requisite showing for a finding of abuse.

The neglect context poses its own problems. A bit more ubiquitous than physical abuse, it is also harder to define, and harder to separate from mere poverty.⁵⁸ Indeed, “one of the most difficult cases for juvenile courts is the child who lives in a chaotic and filthy home, where the child’s physical and psychological needs are not met, but where it is difficult to find a clear jurisdictional ‘handle’ on which to base a finding of neglect.”⁵⁹ Interestingly, neglect may also serve as the catch-all allegation when physical abuse cannot be proved: *Santosky* itself was brought under neglect, even though the dissenting opinion suggests some significant evidence of physical abuse. In this way, *Santosky* may be a template for the problems of proof in abuse and neglect cases.

⁵⁴ MYERS, MYERS ON EVIDENCE *supra* note 1, at 350–51.

⁵⁵ See Mary Ann Mason, *Expert Testimony Regarding the Characteristics of Sexually Abused Children: A Controversy on Both Sides of the Bench*, in EXPERT WITNESSES IN CHILD ABUSE CASES: WHAT CAN AND SHOULD BE SAID IN COURT 217–23 (Stephen Ceci & Helene Hembrooke, eds. 1998).

⁵⁶ Colleen McMahon, Due Process; Constitutional Rights and the Stigma of Sexual Abuse Allegations in Child Custody Proceedings, 39 CATHOLIC LAW 153, 198 (1999).

⁵⁷ *Id.* at 179–80.

⁵⁸ Indeed, some argue that poverty-stricken parents are being penalized only for being poor and not for wrongdoing. See e.g., Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 Am. U. J. Gender Soc. Poly & L. 1023 (2003).

⁵⁹ MYERS, MYERS ON EVIDENCE, *supra* note 1, at 340.

Ultimately, though the evidentiary problems associated with abuse and neglect cases have been well-documented, there has been no direct research on the effect of these problems in termination proceedings particularly or a comparison of their effects pre- and post- *Santosky*. Though there is certainly room for argument on the question of who should be required to bear the risks of these problems of proof – an argument that would likely parallel the very argument of *Santosky* itself – these issues certainly deserved consideration by the *Santosky* court alongside its analysis of any disparity in resources. Indeed, the problems of proof might in some cases be sufficient to offset any perceived differential in resources, effectively equalizing the parties and no longer requiring the clear and convincing standard. The omission of any analysis of problems of proof is yet another indication that the Court’s imposition of an increased burden was hasty and possibly ill-advised.

D. Unclear Effects of Raising the Burden

Further augmenting the above errors and omissions, the Court took the step of raising the burden without thoroughly engaging in the question of what effect manipulating the burden of proof may have. The Court failed to clear up any of the vagueness that might result from the shift in the standard: the Court “overlooks the fact that scholars and courts have had difficulty articulating the meaning of clear and convincing evidence. In fact, there is some speculation that the standard may confuse the factfinder and heighten the risk of erroneous outcome.”⁶⁰ Indeed, scholars recognize that “despite the clearly intended intermediate position” of the clear and convincing standard, “recent discussion of the standard’s application has revealed uncertainty about standards of proof in general.”⁶¹

⁶⁰ Pennekamp, *supra* note 22, at 942 – 43.

⁶¹ Dorothy Kagehiro and W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, LAW AND HUMAN BEHAVIOR 9:2, 159, 161 (1985).

The Supreme Court itself is aware of the problem: In *Addington v. Texas*, one of the cases most heavily relied on by the *Santosky* Court, the Court recognized: “We can probably assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence.”⁶² In *Addington*, the Court dismissed the problem by emphasizing the importance of reflecting society’s valuation of individual rights in the standard.⁶³ Of course, *Santosky* similarly advocates the importance of society’s valuation, and, like *Addington*, justifies its standard of proof decision primarily in the name of reducing erroneous outcomes. But *Santosky* fails to note the original failure of *Addington* to address the tension between changing a standard of proof to decrease error while recognizing that so doing might not in fact reduce error. Instead of taking the opportunity to address the concern, *Santosky* merely propagates the *Addington* Court’s minimization of the problem.

The vagueness of the standard may have different effects depending on the identity of the factfinder; theoretically, judges are better positioned to understand the standard than juries are.⁶⁴ Given that most parental rights terminations take place at the hands of a judge, *Santosky* supporters could reasonably argue that the danger posed by the vagueness of the standard is minimal. However, a survey of several state opinions reveals that there is no consistent understanding of what the standard requires. Some courts have interpreted it quite stringently, such one Tennessee appellate court, whose description of the standard seems to verge on the beyond a reasonable doubt standard: “In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn

⁶² *Addington v. Texas*, 441 U.S. 418, 425 (1979).

⁶³ *Id.*

⁶⁴ Indeed, though judges estimate the “degree of certainty required by the clear and convincing standard” as between 67% and 75%, scholarship suggests that juries are far less clear on the standard’s meaning. Kagehiro and Stanton, *supra* note 61, at 161.

from the evidence.”⁶⁵ That court elaborates that “such evidence should produce in the factfinder’s mind a firm belief or conviction as to the truth of the allegations sought to be established.”⁶⁶ In contrast, the Supreme Court of Iowa understood the standard as established by *Santosky* to mean that “there must be clear and convincing proof that the child will suffer harm” if there is no termination.⁶⁷

In addition to the uncertainty and lack of uniformity even when applied by judges, the *Santosky* Court itself seemed to suggest that judges may not be the “best” factfinder in termination cases. The Court argues that the “subjective values of the judge” could “magnify the risk of erroneous outcomes.”⁶⁸ Specifically, because “parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.”⁶⁹ This criticism of the judge as biased factfinder suggests that juries would be better suited for these proceedings. Certainly, one *Santosky* supporter has taken this tack: “The risk of error is also compounded because, in most states, the decision to terminate parental rights is made by a judge rather than a jury.”⁷⁰

⁶⁵ *In the Matter of J.L.E.*, 2005 Tenn. App. LEXIS 384 at *20 (Tenn. Ct. App. 2005).

⁶⁶ *Id.*

⁶⁷ *In the Interest of Chad*, 318 N.W.2d at 219.

⁶⁸ *Santosky*, 455 U.S. at 762. Interestingly, despite the Court’s efforts to overcome these subjective valuations by the imposition of the increased burden, they may nonetheless come in to play when the judge determines whether the burden has been met. See, e.g., Laura Freeman Michaels, *Evidentiary Issues in Cases Involving Children*, in FOUNDATIONS OF CHILD ADVOCACY 103 (Donald C. Bross & Laura Freeman Michaels, eds. 1987) (“the actual effect of the differing standards of proof may be more academic than practical” because judges affect their evaluation of what constitutes “sufficient evidence” according to the degree of intervention desired by the State); Ann Ward, *Standard of Proof in Parental Rights Termination: Santosky v. Kramer*, 36 S.W. L. J. 1069, 1082–83 (“A family court judge confronted with evidence of abuse or neglect . . . could reasonably be expected to determine that the abuse or neglect has occurred and then couch his final order in the language of the appropriate standard of proof”). On the other hand, there is no direct evidence of this phenomenon and many judges could be expected to diligently apply the increased standard before terminating parental rights.

⁶⁹ *Santosky*, 455 U.S. at 763.

⁷⁰ Cressler, *supra* note 28, at 809. See also Rizzo, *supra* note 8, at 293 (“The ‘emotional involvement’ of the judges makes them prone to overinclusions, to a greater extent here than in the standard case”). But see 2 ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* § 13.07 (1993) (“Courts are generally very conservative about terminating parental rights because of the seriousness of the action”).

Yet, if the opinion should be read to prefer juries, and in those states in which the termination decision is made by a jury, the vagueness of the new standard poses a real concern. A pair of academics who conducted experiments with mock jurors discovered that jurors had difficulty with the clear and convincing standard: “The experiments were unable to determine the precise intermediate position of the clear and convincing standard.”⁷¹ Based on their findings, they protest the lack of legal quantification of the standards to improve juror understanding⁷² and ultimately conclude that “if the redistribution of the risk of erroneous decision making is as essential to our system of justice as . . . the Supreme Court assert[s], then justice demands that a relationship between the standard of proof and that risk be demonstrated.”⁷³ The Court, in both *Addington* and *Santosky*, has failed to make the requisite connection. Instead, its argument suggests a vicious cycle: To minimize risk of error, juries are more appropriate than (biased) judges, though juries have been shown not to understand the clear and convincing standard, thus leading to greater risk of error. This outcome is yet further evidence that raising the standard will likely not achieve the reduction of error the Court so vehemently desires and suggests again that the Court should have pursued alternatives to raising the burden of proof.

In addition to allowing vagueness in the clear and convincing standard generally, the Court did not engage in any analysis of what effect shifting the burden of proof in the abuse and neglect context might have on the number of cases brought. Though presuming to take into account the “administrative cost” to the State, the Court never considered the effect on CPS investigators and the other steps that must take place before the actual termination proceeding. For example, raising the burden of proof not only makes it more likely that the State will fail to achieve termination of parental rights where it otherwise should; it may mean that these cases are

⁷¹ Kagehiro and Stanton, *supra* note 61, at 174.

⁷² *Id.* at 175.

⁷³ *Id.* at 176.

not even brought in the first place. It would certainly seem likely that given the increased burden of proof, CPS authorities may move less often to terminate parental rights.

Though no empirical evidence has been accumulated on this issue, one observer has considered the effects of standards of proof in child protection investigations themselves. Looking not at the *Santosky* burden for termination of parental rights, but instead at some of the various state burdens for making an administrative determination of maltreatment (ranging from “some credible evidence” to “clear and convincing evidence”), he found that slight differences in standards of proof may not affect an individual investigator’s decision to substantiate a case of abuse or neglect.⁷⁴ However, he did note that it is possible that “child protection investigators in making their determinations keep one eye on how the case might be evaluated if it went to court.”⁷⁵ Certainly this effect may be hard to measure – it may not show up easily in statistics, residing solely in the subjective determinations of the CPS authorities about when to go to court. It is a hypothesis that deserves attention by the legal community, and certainly by the Supreme Court. Ultimately, given the flaws described above that undermine the very reasoning on which the Court imposed the increased burden of proof, the Court’s decision to change the standard seems even more precarious given the lack of predictability resulting from such a change.

III. Court’s Exclusion of Children from the Calculus of Interests

In addition to causing harm by relying on flawed logic, the *Santosky* decision is harmful to children on a philosophical level: The Court has virtually removed the consideration of the children’s interests from the parental unfitness determination. Such reasoning is independently

⁷⁴ Murray Levine, *Do Standards of Proof Affect Decision Making in Child Protection Investigations?*, LAW AND HUMAN BEHAVIOR 22:3, 341, 346 (1998) (“Child protection investigators may develop their own adaptation levels for what constitutes evidence of maltreatment and respond on a ‘gut level.’ The verbal formula for the standard of proof may not affect that gut level decision. We have very little knowledge of how child protection workers . . . make decisions”).

⁷⁵ *Id.*

destructive, representing a step backward for the articulation or institutionalization of children's rights. It is also dangerous on a tangible level, to the extent it contributed to the justification for an increased burden of proof.

This section will initially provide an overview of the parental rights philosophy which animated the Court's thinking in *Santosky*. It will next analyze two separate ways in which the *Santosky* Court removed children from the balancing tests it applied in the course of its opinion. First, the Court characterizes the proceeding as a battle between the State and the parents, without acknowledging that children might have an interest independent of either party. Second, the Court implicitly excludes the costs to children when it concludes that erroneous terminations of parental rights are worse than erroneous non-terminations of parental rights. Finally, this section will illustrate how the removal of children from the two balancing tests actually allowed the Court to strengthen the parental rights message.

A. Background Parental Rights Philosophy

Before addressing the particular lines of reasoning in the decision that undermine children's interests, it is helpful to understand the background beliefs that motivated the Court. The *Santosky* decision relied on a series of cases in which the Court emphasized the importance of parental autonomy. These cases do articulate some strong reasons for parental autonomy, such as the sanctity of the nuclear family from intrusion by the government, a belief that the parent's direction of the child's upbringing will be mutually beneficial for parent and child, and a desire to protect the unique bond between parent and child. On their own, these beliefs may not be harmful. It is when they operate to the exclusion of any recognition of any independent children's rights or interests that these arguments become problematic. Different contexts may require different expressions of children's interests – whether it be an advocate in court, a

separate articulation and constitutionlization of specific children’s rights, or an explicit weighing of children’s interests in court-created balancing tests. Though some small steps were taken along these lines in the past, historically children’s rights have taken a backseat to those of their parents.

Prior precedent suggests the exclusion of constitutional rights for children in the family law context. It is true that some constitutional rights have been extended to children, but this expansion has taken place in piecemeal, disjointed efforts that provide no unified concept of children as constitutional beings. Despite the Supreme Court’s landmark declaration in *In Re Gault* that “whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,”⁷⁶ “children have not themselves somehow become constitutional persons, and our understanding of constitutional personhood has not evolved to include them.”⁷⁷ Instead, certain cases have carved out niches of constitutional protections for children, primarily in the area of individual rights.⁷⁸ In such circumstances – in cases dealing with deprivations of liberty or property by the State – the Court has explained that “the child’s right is virtually coextensive with that of an adult.”⁷⁹ In this context, the analogy is easy for the Court: the State may not intrude on children’s rights, just as it may not intrude on adults’ rights. Indeed, the children may be entitled to even greater protections in these circumstances to account

⁷⁶ *In Re Gault*, 387 U.S. 1, 13 (1967) (affording 15-year-old boy constitutional due process rights in juvenile court proceeding).

⁷⁷ Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 23 (1994).

⁷⁸ See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (extending privacy right of abortion to minors without need of parental consent); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (protecting students’ rights to free expression in school); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (striking down segregation laws that deprived children of equal educational opportunities).

⁷⁹ *Bellotti*, 443 U.S. at 634. For a case that on the surface recognized a child’s liberty rights as similar to that of adults, but nonetheless held that the parents rights were controlling, see *Parham v. J.R.*, 442 U.S. 584 (1979) (“It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment,” but “In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision”).

for their vulnerability.⁸⁰ In cases such as *Tinker* and *Belotti*, minors are engaging in adult activities – expression, abortion, etc. – and the Court can simply pretend for a moment that they are adults.⁸¹ Notably, the few rights the *Santosky* court does consider – property rights, like the right to inheritance – are oddly “adult-like” and seem out of place in this potentially charged, emotional context where the children’s very health and home is at stake.

These pockets of children’s rights which are designed to mirror adult rights have of course played some role in acquiring constitutional status for children. However, they are of little use in the family law context, where children are no longer participating in “adult” activities and requiring protection from state interference, but are instead acting as “children” and are the recipients of relevant treatment, not by the state, but by their own parents. Here, children’s rights cannot be analogized to the status of adults’ rights. The Court has established a scheme in which the child’s personal liberty must defer to parental decision-making on the idea that adults will be more able to facilitate the children’s growth into mature adults: “Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.”⁸²

That “tradition of parental authority” is well-entrenched. Beginning with *Meyer v. Nebraska*⁸³ and *Pierce v. Society of Sisters*,⁸⁴ the courts have recognized a fundamental parental right to direct the upbringing of their children. That right has cut a broad swath, affecting not

⁸⁰ See *Bellotti*, 443 U.S. at 635.

⁸¹ One commentator has argued that this pretense can cut the other way for children’s rights. Fitzgerald, *supra* note 77, at 26–27. She points to *DeShaney v. Winnebago County Department of Social Services* as an example of where the Court essentially considered the child as entitled to adult “rights” and no more. *Id.* That right, the right of “individual autonomy,” was to be free of from state interference with individual liberties, but no guarantee of protection by the state of such liberties. *Id.* Fitzgerald found the application of the “model of individual autonomy” “absurd” in this case, where the child was utterly helpless and unable to participate in the democratic process to obtain more rights. *Id.*

⁸² *Bellotti*, 443 U.S. at 638.

⁸³ 262 U.S. 390 (1923) (upholding right of parents to engage a German teacher for their children).

⁸⁴ 268 U.S. 510 (1925) (sustaining parental right to send child to private school).

only discretion over a child's education,⁸⁵ but rights from excluding interactions with third parties⁸⁶ to a right to voluntarily commit a child for mental health treatment.⁸⁷ Crucially, in these cases in which major decisions are made regarding the trajectory of the child's life, the children are not heard. In *Parham*, which involved a challenge to a parent's right to commit a minor child involuntarily to a mental health institution, the Court rejected an argument that the "constitutional rights of the child are of such magnitude and the likelihood of parental abuse is so great that the parents' traditional interests in and responsibility for the upbringing of their child must be subordinated."⁸⁸ In *Yoder*, which involved a parent's right to pull his child from the public school system, only Justice Douglas in dissent argued that the children's own feelings about their education should be consulted.⁸⁹

Not only possibly denied a voice in the hearing themselves, children have been denied the opportunity to even have standing to bring cases regarding their own well-being. In the infamous *Kingsley* case, an 11-year-old child filed for the termination of parental rights of his parents, but was denied standing due to the disability of nonage.⁹⁰ The Florida District Court of Appeal argued that the procedural flaw of his minority "does not unduly burden a child's fundamental liberty interest to be 'free of physical and emotional violence at the hands of his . . .

⁸⁵ *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding Amish parent's right to withdraw child from otherwise compulsory public education).

⁸⁶ *Troxel v. Granville*, 530 U.S. 57 (2000) (striking down grandparent visitation statute as unconstitutional infringement on parental liberty to direct the upbringing of child).

⁸⁷ *Parham*, 442 U.S. 584 (1979).

⁸⁸ *Id.* at 602.

⁸⁹ *Yoder*, 406 U.S. at 244 (Douglas, J., dissenting) ("On this important and vital matter of education, I think the children should be entitled to be heard"). Given this tradition, it is perhaps unsurprising that the *Santosky* children play almost no role in the determination of their own fate. The majority offers very little detail as to the lives of these children, either with their natural parents or in their temporary foster care arrangements: "From the majority's opinion, however, we learn virtually nothing about the children themselves. The Court presumed to characterize and weigh these children's interests . . . without ever looking at their circumstances or hearing from them." Fitzgerald, *supra* note 77, at 66.

⁹⁰ *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

most trusted caretaker.”⁹¹ The case prompted public outcry, at the idea that a child should be able to ‘divorce’ his parents, but has also spurred proposals that children should be allowed to initiate a termination of parental rights petition if the state has failed to take certain actions.⁹²

These cases provide a background understanding regarding the limited protection historically of children’s rights, whether it take the form of providing children standing, allowing them a voice in the outcome or even explicitly providing a separate assessment of their rights in any analysis. Often, the reason for the limited protection of children is due to the profound emphasis on the parent’s right and reflects deference to the parent to make choices in the best interests of the child. It would seem then that in contexts like abuse and neglect, in which accusations against the parent place deference to parents most in doubt, recognition of children’s interests would be most important. Even the Court itself has implied that abuse and neglect cases might warrant a rejection of the traditional parental deference: In justifying the presumption in favor of deference to parents’ judgments regarding their children, the *Parham* Court dismissed the idea that those parents not acting in their child’s best interests should ruin the deferential presumption for all: “That some parents ‘may at times be acting against the interests of their children’ . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child’s best interests.”⁹³ The unspoken inference is that “caution” with regard to parental deference would be appropriate in those cases in which abuse and neglect is alleged. Despite the *Parham* suggestion, the *Santosky* Court declined to take this route.

⁹¹ *Id.* at 785.

⁹² See Tracey B. Harding, Note, *Involuntary Termination of Parental Rights: Reform is Needed*, 39 BRANDEIS L. 895 (2001).

⁹³ *Parham*, 442 U.S. at 602–03.

B. Termination as a Battle Between State and Parents Only

Swept up in the tradition of emphasizing the fundamental nature of parental rights, the *Santosky* Court went further than simply overlooking the opportunity to create distinct constitutional rights for the children. From start to finish, the Court refused to give teeth or even acknowledgment to children's rights, instead opting each time to strengthen parental rights. The initial example of such judicial behavior occurs when the Court makes the incredibly harmful finding that *for the sake of reducing the possibility of error*, children's interests may reasonably be lumped in with their parents' interests, *until there is a finding of parental unfitness*: "Until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."⁹⁴ This assumption is problematic in numerous ways.

First, perhaps the statement would be accurate if termination of parental rights proceedings were randomly brought against families in the population; however, such proceedings are only brought once there is already suspicion of wrongdoing, once the parents have already triggered CPS attention. Indeed, "a preliminary finding of neglect by an administrative agency precedes the factfinding hearing . . . The state is attempting to protect the child from abuse or neglect *that has already been recognized*."⁹⁵ Under such circumstances, to treat the interests of parents and children as coterminous would be like treating the battered wife's interests under the umbrella of her husband's interests, merely because the two are a legal and familial entity. Only once the wife could prove her husband's wrongdoing would she be allowed to sever her interests from his. While "innocent until proven guilty" may be the proper default for criminal proceedings in which only the accused's freedom is at stake, it cannot be the

⁹⁴ *Santosky*, 455 U.S. at 760–61.

⁹⁵ Pennekamp, *supra* note 22, at 942 (emphasis added).

proper assumption in a proceeding designed to determine the appropriate relationship of two parties, when one party has been accused of mistreating the other, less powerful party, who does not even have a voice in the proceedings.

The problem is even further compounded, and the argument made even more circular, when this assumption is combined with the outcome of this case. By raising the standard of proof, the Court has made it harder to show parental unfitness, thus prolonging the amount of time the child's interests are seen to be represented by the parents. The logical flaw in the Court's reasoning occurs when the Court designates an artificial point in time when the children's interests diverge from the parents; this occurs after a finding of parental unfitness. But in order for there to have been a finding of parental unfitness, there must have been abuse and neglect that began far earlier than the finding was made, thus indicating that the children's interests diverged from their parents' long before the Court was willing to recognize it. And if no such finding is ever made – as is certainly more likely with the increased burden of proof – the two interests will be viewed as one for an indefinite amount of time, which may not reflect reality.

Fundamentally, the Court fails to recognize the importance of its own language – the child's interest only coincides with the parent's if termination would in fact be *erroneous*. But given that there is no way to know going into the factfinding hearing whether termination is erroneous, it is premature and dangerous to require an assumption that the child's interests will be protected by the parent's interest. Justice Rehnquist recognizes this problem in his dissent: “The child has an interest in the outcome of the factfinding hearing independent of that of the parent . . . the child's interest in a continuation of the family unit exists only to the extent that

such a continuation would not be harmful to him.”⁹⁶ By disregarding this, the Court essentially establishes a presumption against termination or automatically assumes that termination is a “bad” outcome, to be avoided in most circumstances.

Having established the faulty construct that children’s rights and parents’ rights in the termination context will coincide, the Court then defines that bundle of rights primarily from the parent’s perspective. Aside from a few throwaway comments about the children’s legal rights to “support and maintenance”⁹⁷ and a concern that one child in the case might have been denied the chance to ever get to know his natural parents,⁹⁸ the majority fails to outline any rights or interests for the children, independent of what effect such rights might have on the termination decision. Such rights could include: the right to an abuse-free home life, the right to love and affection from parents, the right to have their physical needs met, the right to a permanent determination as to their home, or as Harvard Law Professor Elizabeth Bartholet aptly sums it up, the right “to be properly parented.”⁹⁹

Having essentially removed the children’s interests from the balancing test and having relied on the parental rights precedent, the Court has freed itself to embark on a typical constitutional rights analysis of State infringement of personal liberty. The Court immediately assumes a defensive posture practically in line with the parents against the State by proclaiming, “When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty but to end it.”¹⁰⁰ While it is certainly accurate that the State seeks to end the parent’s relationship with the children, the use of language here is important. The State is

⁹⁶ *Santosky*, 455 U.S. at 790 (Rehnquist, J. dissenting).

⁹⁷ *Id.* at 761 (“The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . . , but forever”).

⁹⁸ *Id.*

⁹⁹ BARTHOLET, *supra* note 2, at 100.

¹⁰⁰ *Santosky*, 455 U.S. at 760.

seen as an interloper, first “infringing” on a “fundamental liberty” and then seeking to destroy it. Though the context reveals that the State feels that it has a good reason, namely that the parents’ own actions have weakened their claims to parental ties, the Court lends no legitimacy to the reasons, maintaining a cut-and-dried view only of the loss to *parents* should termination be allowed. Most significantly, the Court seems to operate on a presumption that the parental right is so fundamental and so important that even bad behavior by the parents may not be sufficient to undermine it:

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. 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.¹⁰¹

On its face, this statement may not be as provocative as it ultimately appears in the context of the particular facts of this case. Surely, few would advocate complete termination of parental rights for parents who made a few mistakes or who had not been “model parents.” However, the Court establishes this paradigm in a case where there was evidence of repeated injury to the children, including pin pricks to one child’s back,¹⁰² an action more suggestive of torture than parental imperfection. This minimization of parental fault, in combination with the language casting the State in the role of an interloper, suggests the Court’s own bias against termination, which it ultimately formalizes in an increased burden on the State. This thread of parental rights thinking draws on and encourages traditional views about the preservation of the family, at almost any cost.

¹⁰¹ *Id.* at 753.

¹⁰² *Id.* at 781 n.10 (Rehnquist, J., dissenting).

The Court's parental rights analysis does not end here. It then engages in a David versus Goliath analysis, pitting the powerless parents against the intrusive, brutish State. Interestingly, once the termination process is characterized as an epic battle between the parent and the State, the outcome is predetermined; the Court sets the State up to fail. Not only has the Court aligned the children with the parents, the Court limits the state's *parens patriae* interest in protecting the children: "Yet while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds."¹⁰³

Again, the Court's statement should be basically true: the State has no interest in terminating the parental rights of fit parents; it would only cost the State time and money to displace a child that the State is then responsible for looking after. Given that the State has no interest in erroneous terminations, only proper ones, it can be assumed that the State believes that its action as *parens patriae* is necessary; the State has a good faith belief that it must step in to protect these children. As such, the State views itself as representing the child's interests and in this way, the State has at least as good a claim as the parents do in claiming to speak for the child.¹⁰⁴ Yet, the Court seeks to impose a presumption of parental fitness even on the way the State approaches the case: "Any *parens patriae* interest in terminating the natural parents' rights arises only at the dispositional phase, *after* the parents have been found unfit."¹⁰⁵ This argument is almost facetious: the State must initiate adversarial proceedings and put on a case arguing that the parents are unfit, but until that unfitness determination is made, the State's *parens patriae* interest is actually in keeping the children with the parents. Such reasoning suffers from the

¹⁰³ *Id.* at 766–67.

¹⁰⁴ Ultimately of course, both parties – parents and the State – will be unable to entirely represent the children's interests, which is why this article argues that the children's interests and rights must warrant separate consideration.

¹⁰⁵ *Id.* at 767 n.17.

same flaw exposed in the idea of grouping the child's interest with the parents' until a determination of unfitness: the State's interest only arises, and now hinges on, the decision of a factfinder (now subject to an increased burden of proof) regardless of what the State's interest in fact may actually be.

Having concluded that the State's *parens patriae* interest is not sufficient to overcome the parents' weightier interest, the Court engages in an analysis of the administrative cost and burden to the State of raising the standard of proof. The Court quickly concludes that the increased standard will not create any "real administrative burdens" for the State.¹⁰⁶ This conclusion is unsound – "the state must amass much more evidence to satisfy the clear and convincing standard" and during the termination proceedings, "the state must bear the cost of foster care and maintain the services that are designed to reunify the family."¹⁰⁷ But, even were the costs excessive, it seems unlikely that the Court would allow fiscal considerations to offset the perceived necessity of raising the burden of proof to protect the parent's interests, especially given the Court's analysis of the large resource disparity between parents and State.

Ultimately, pitting the parents against only the State allows the Court to make an easy decision in favor of the parents: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."¹⁰⁸ By eliminating children from the fray, the Court essentially sets up the State as a straw man to take the fall in order to salvage the parents' interests. Clearly, the greatest loss here is of any real representation of the children's interests: In treating the conflict in this way, the Court "assured that no court would consider the actual and particular

¹⁰⁶ *Id.* at 767.

¹⁰⁷ O'Brien, *supra* note 25, at 1254.

¹⁰⁸ *Santosky*, 455 U.S. at 768.

interests of these individual children . . . Indeed, our law’s focus on parental and state interests obliterates the child’s and casts the child not only as a nonparty, but also as a nonentity.”¹⁰⁹

To some, the decision not to recognize the interests of children as “legitimate private interests” is “analytically correct.”¹¹⁰ One observer believes that to recognize the rights of children would “involve the assumption of unproven facts,”¹¹¹ namely, that the parents are not representing the children’s interests; significantly, not recognizing the rights of children also entails such an assumption: that the parents are not guilty of abuse and neglect. Regardless, the refusal to recognize children’s rights “demonstrate[s] the Court’s commitment, as a policy matter, to the autonomy of the family unit. This commitment appears strong, since the Court in *Santosky* refused to consider the childrens’ [sic] interest even where the evidence suggested the possibility of child abuse.”¹¹²

C. Erroneous Terminations As Worse Than Erroneous Nonterminations

Not only is the Court’s minimization of children’s interests evident in its explicit omission of children from the balancing test, it is revealed by the Court’s strongly held opinion that the consequences of an erroneous outcome are far worse for the parents than the children. This conclusion is evident in the Court’s emphasis on the severity of the harm to the parents and its relative gloss over the possible effects on the child. For the parents, an erroneous outcome means “the unnecessary destruction of their natural family.”¹¹³ However, all the child would have to tolerate after an erroneous failure to terminate is “preservation of an uneasy status quo.”¹¹⁴ The Court’s language, as seen in the dramatic difference in connotation between

¹⁰⁹ Fitzgerald, *supra* note 77, at 67.

¹¹⁰ Shulman, *supra* note 17, at 1605–06.

¹¹¹ *Id.* at 1606.

¹¹² *Id.*

¹¹³ *Santosky*, 455 U.S. at 766.

¹¹⁴ *Id.* at 765–66.

“destruction” and “uneasy” facilitates polarization of the parents’ interests, while minimizing those of the children.

Initially, the Court’s version may overstate the harshness of termination, for in fact, the parents often have played a very active role in bringing this outcome on themselves. This understanding – that parents have contributed to their plight and that children are the victims – should be a primary motivating force behind termination: “Parents should not be given numerous chances after failing to adequately care for their children. The children are the victims in these situations and are being forced to suffer needlessly. Having children is not just a right, but a right with attendant responsibilities.”¹¹⁵ But even assuming that the Court’s perception of the loss to the parent is accurate, the potential harm to the children deserves at least as much emphasis.

As it is, the views of the Court and the Court’s followers understate the potential harm to children for failure to terminate. Instead of focusing on the problems of failure to terminate, the Court inverts the question and questions the benefit of termination in the first place. For example, the court claims that “even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare.”¹¹⁶ Incidentally, the Court again seems to understate the parent’s contribution to the outcome, using the word “imperfect” to what must have been an abusive or neglectful situation in order to warrant permanent removal. Moreover, the Court recognizes that even permanent termination of parental rights might not lead to good placements for children. The Court notes that “coercive intervention frequently

¹¹⁵ Harding, *supra* note 92, at 900.

¹¹⁶ *Santosky*, 455 U.S. at 766.

results in placing a child in a more detrimental situation than he would be in without intervention”¹¹⁷ and that adoption is not a guaranteed outcome from termination.¹¹⁸

Interestingly, while noting the negative aspects of living in transition, such as moving between state institutions and foster placements, the Court fails to see that such outcomes are even more likely when parental rights are *not* terminated. Indeed, though permanent termination does not *guarantee* a better permanent placement, it definitely does *free* the child up for such a placement. Given that the Court recognizes that judges have discretion not to return a child to a “hostile environment”¹¹⁹ with his natural parents, the Court must recognize that, by default, children will be caught in these undesirable alternatives, often for over a year.¹²⁰ Though there may be evidence that termination of parental rights does not always have a happy ending for children, “it is simply not clear that the uneasy status quo of foster care and the prospect of returning to an abusive home are any less damaging than the loss of parental rights.”¹²¹ In addition to the concerns already cited, analysts report the possibilities for other harms, such as stress which exacerbates a child’s unstable emotional condition, difficulty in adjusting to new homes after multiple moves and lost chances at permanent placements.¹²² Finally, as the dissent

¹¹⁷ *Id.* at 766 n.15.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Passed 15 years after *Santosky*, the Adoption and Safe Families Act of 1997 (ASFA) may limit the harm children experience in foster care. ASFA encourages states to move to terminate when the child has been in foster care for fifteen of the most recent twenty-two months. Adoption and Safe Families Act of 1997, Pub. L. 105-89, November 19, 1997, 115 Stat. 2115 (codified as amended in various sections of 42 U.S.C.A.) (West Supp. 2003). Prior to ASFA, evidence suggested that a child in a foster care environment might remain there for at least five years pending parental response to state reunification efforts. See O’Brien, *supra* note 25, at 1245. Interestingly, the *Santosky* case itself reflected this danger. Removed from his parents when three days old, Jed Santosky had spent at least eight years – his entire life – in foster care by the time the case reached the Supreme Court. Fitzgerald, *supra* note 77, at 66. Despite the promise of ASFA to reduce the length of time children remain in foster care, “these tough-sounding TPR provisions apply only if the state chooses not to preserve the family.” BARTHOLET, *supra* note 2, at 194. ASFA also provides for three exceptions “which threaten to swallow entirely its TPR mandate.” *Id.* Thus, even with ASFA on the books, “while change is in the air, it may not really happen.” *Id.* at 28.

¹²¹ Pennekamp, *supra* note 22, at 942.

¹²² Mark Hardin and Robert Lancour, Introduction, EARLY TERMINATION OF PARENTAL RIGHTS, DEVELOPING APPROPRIATE STATUTORY GROUNDS 7 (1996).

recognizes, the hardships experienced by the child at this stage are likely to affect the adult he becomes: “It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens.”¹²³

At issue here is a basic crisis over the value of termination of parental rights. The Court’s suggestions about the weaknesses of termination are echoed more vehemently in the academic literature. One commentator claims termination does not always result in permanent placement and that “unless adoption is certain, the termination of parental rights serves virtually no purpose”¹²⁴ primarily because by the time termination proceedings are even brought, the child has been removed from physical harm and legal termination of parental rights is unnecessary to maintain the physical separation between the parties.¹²⁵ Others argue that “termination can permanently extinguish the child’s rights in regard to the natural parents, and likely precludes any possibility of an ongoing relationship between the child and natural parent.”¹²⁶ While this argument may be factually sound, it overlooks the idea that the argued “loss” to the child may not be viewed subjectively as a loss by the children. Children may not want a continuing relationship with an abusive or neglectful parent, and indeed, some may be traumatized by repeated visitations from their natural parents.¹²⁷ Other attempts at articulating children’s rights in a context unfavorable to termination focus on legal losses also mentioned by the Court, such

¹²³ *Santosky*, 455 U.S. at 789. Interestingly, this was one of the motivations behind the parental rights line of thinking in the first place – that parents are in the best position to enable their children to turn into productive members of society. Here, by protecting that parental right, the Court may inadvertently be having the opposite effect. Pennekamp claims that the Court’s decision will result in a vicious cycle for the children: “The consequences suffered by the children involved in these proceedings at the hands of two-sided interest-balancing may affect adversely the type of people and parents that they become.” Pennekamp, *supra* note 22, at 944.

¹²⁴ Cressler, *supra* note 28, at 797–99.

¹²⁵ *Id.* at 795 (“[The child’s interest in being free from harm] has been served once the child has been separated from the abusive parent. Termination of parental rights does nothing to further this interest that cannot be accomplished through continued separation of the parent and child”).

¹²⁶ Brian C. Hill, Comment, *The Public and Private Faces of Family Law: The State’s Burden of Proof at the Best Interests Stage of a Termination of Parental Rights*, 2004 U. CHI. LEGAL FORUM 557, 589 (2004).

¹²⁷ Hardin, *supra* note 122, at 7.

as the loss of the right to inherit or the right to parental support.¹²⁸ These losses appear trivial when compared to the right to be free from abuse; moreover, they become less important if and when the child is placed with new parents who can fulfill these functions.

Instead of being seen as purely negative, the benefits of termination must be recognized: the children are removed permanently from a harmful environment; the children are free to be welcomed into more caring foster or adoptive homes. Though it is unfortunately true that “only about 10 percent of the children who are removed from their parents are ever adopted,”¹²⁹ such statistics are reason to improve the adoption system and encourage adoption culturally, not a reason to discredit the very worth of the termination process itself. The evidence suggests that “children placed in foster homes do better than children whose families are kept together, and children placed in adoptive homes do better yet.”¹³⁰ To encourage these better outcomes, children should be able to pursue these options where removal is warranted by the parents’ own abusive or neglectful conduct.

D. The Parental Rights Message

By excluding the child’s interest from the balancing test and by presuming that erroneous termination is worse than erroneous nontermination, the *Santosky* decision intensifies the traditional superiority of parental rights. Drawing on the long line of precedents establishing the weightiness of the parent’s constitutional right,¹³¹ the Court expanded on traditionalist thinking by seeking to protect parents in a context where those rights might otherwise most be in doubt.¹³² The Court applied the traditional parental rights cases, without questioning the appropriateness

¹²⁸ Hill, *supra* note 126, at 569.

¹²⁹ See BARTHOLET, *supra* note 2, at 110 (1999).

¹³⁰ *Id.*

¹³¹ *Santosky*, 455 U.S. at 753 (citing *Meyer*, *Pierce*, *Prince* and other landmark parental rights precedents).

¹³² Only in a criminal prosecution could a parent’s “fundamental” right to his child be more in question – where the parent is accused of mistreating a child and stands to risk losing his own liberty or his control over his children as punishment for those actions.

of their applicability here. Traditional thinking suggests that at the root of the parent's constitutional right over his children is "a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."¹³³ More significantly, the presumption rests on the belief that "natural bonds of affection lead parents to act in the best interests of their children."¹³⁴ While in other contexts, such as the right of a parent to make decisions regarding his child's education, this type of thinking may be persuasive, the *Santosky* Court maintains this presumption, adopting it in its intertwining of the child's interests with the parents', despite the fact that the very allegation to be tested in the termination forum is that the parent has not been acting and will continue to fail to act in the best interests of the child.

In so doing, the Court sees this as a case primarily placing the parents' liberty interests at stake and not those of the child. Asserting that "a natural parent's desire for and right to the companionship, custody and management of his or her children is an interest far more precious than any property right,"¹³⁵ the Court establishes its baseline understanding as the primary importance of parental rights. The Court reiterates this understanding throughout the opinion, so frequently in fact that it prompted one academic to call the Court "obsessed with the fundamental 'property-like' right of the parents in their child."¹³⁶ This emphasis on the parental rights at issue reflects a basic assumption that the case is about the *parents* and not the *children*: "The best interests of the parents, rather than the best interests of the children, was the predominant concern."¹³⁷ The Court hints at this understanding when rebutting the State's proffered argument of the other important interests at stake: "The fact that important liberty interests of the child and

¹³³ *Parham*, 442 U.S. at 602.

¹³⁴ *Id.*

¹³⁵ *Santosky*, 455 U.S. at 759–60 (citing *Lassiter*).

¹³⁶ Pennekamp, *supra* note 22, at 943.

¹³⁷ O'Brien, *supra* note 25, at 1224.

its foster parents may also be affected by a permanent neglect proceeding does not justify denying the *natural parents* constitutionally adequate procedures.”¹³⁸ Though perhaps notable that the Court seems to accept the existence, at least to some extent, of “important liberty interests of the child,” the Court gives no substance to these interests and gives the impression that it is simply making use of a phrase of the respondent in the case to make its point. Either way, whatever liberty interests the children may have, the Court considers them inferior to the procedural rights of the parents.

While injurious in and of itself for its propagation or parental rights thinking, this parent-oriented philosophy was also harmful in *Santosky* to the extent it justified the increase in the evidentiary standard. Ultimately, the *Santosky* Court is correct about one thing: “Raising the standard of proof would have both practical and symbolic consequences.”¹³⁹ Though in its mind, those “practical consequences” are beneficial because they reduce the parents’ likelihood of erroneous loss and the “symbolic consequences” are similarly positive as the increased burden of proof signals support of the nuclear family, the Court fails to see the flip side of both of these consequences. It is only Rehnquist in dissent who, recognizing the potential impact of the decision on children, indicates that the appropriate symbolic message to send is that the rights of parents and children are equally important:

On the other side of the termination proceeding are the often countervailing interests of the child. A stable, loving homelife is essential to a child’s physical, emotional and spiritual wellbeing. When, in the context of a permanent neglect termination proceeding, the interest of the child and the State in a stable, nurturing homelife are balanced against the interests of the parents in the rearing of their child, it cannot be said that either set of interests is so clearly paramount as to require that the risk of error be allocated to one side or the other. Accordingly, a state constitutionally may conclude that the risk of error should be borne in

¹³⁸ *Santosky*, 455 U.S. at 754 n.7.

¹³⁹ *Id.* at 764.

roughly equal fashion by use of the preponderance-of-the evidence standard of proof.¹⁴⁰

Instead, the Court's message, loud and clear, is that symbolically and legally, children's rights do not measure up to their parents.'

IV. The Future of *Santosky*: Will it be Expanded or Limited?

More alarming than the *Santosky* decision itself are the proposals for extending *Santosky* which have been triggered by the Court's emphasis on parental rights and so-called error-reduction reasoning. In the academic community, there have been numerous calls to build on *Santosky*, such as to require a still higher burden of proof or to extend the *Santosky* burden to other stages of child protection proceedings. In 1982, while the *Santosky* opinion was hot off the press, one commentator warned of "the potential danger" of *Santosky*: "The Court's fundamentalist view of parental rights may indicate that the principal due process interest to be protected in any family matter is that of the parents."¹⁴¹ Certainly, the Court's repetitive highlighting of the importance of parental rights, made more stark by its utter lack of examination of the possibility of children's rights, has provided a fertile breeding ground for expansion proposals.

A. Proposals for Expansion Should Be Resisted

Within the academic community, numerous proposals have surfaced to extend *Santosky* in the name of protecting the family. Though their schemes take different shapes, the commentators in this group believe that *Santosky* was a good starting point, but is eventually insufficient to protect the powerful interests of the parents in these cases. In their own ways, each proposal to extend *Santosky*, and thereby limit termination of parental rights, can be dangerous to children.

¹⁴⁰ *Id.* at 790–91 (Rehnquist, J., dissenting).

¹⁴¹ Pennekamp, *supra* note 22, at 944.

One proposal argues that the burden of proof in termination proceedings be raised from clear and convincing, as required by *Santosky*, to beyond a reasonable doubt.¹⁴² Indeed, this approach has already been taken by New Hampshire¹⁴³ and by the federal government in the Indian Child Welfare Act.¹⁴⁴ Of course, this outcome is itself suggested by the Court at the end of its opinion: “We further hold that determination of the precise burden equal to or greater than [clear and convincing] is a matter of state law properly left to state legislatures and state courts.”¹⁴⁵ The Court does not suggest any constitutional infirmity for a beyond the reasonable doubt standard; for example, that the standard could be constitutionally suspect because it would tip the scales too far in favor of the parent and raise the risk of trampling on children’s rights to an intolerable level. Instead, the Court looks to set only a minimum standard and seems content to allow states to push the burden higher.

The argument to increase the burden to beyond a reasonable doubt is justified primarily by traditional parental rights thinking. There appear to be two interrelated arguments that could support the proposition that the burden should be increased; both mirror the reasoning of the *Santosky* Court and both are not compelling. First, it could be argued that raising the burden of proof to beyond a reasonable doubt could further reduce the risk of error in outcomes. Under this argument, the clear and convincing burden of *Santosky* does not go far enough in rectifying the imbalance in resources between parents and the State or counteracting the subjective instinct

¹⁴² See, e.g., Cressler, *supra* note 28, at 786.

¹⁴³ See *State v. Robert H*, 393 A.2d 1387 (N.H. 1978) (establishing beyond a reasonable doubt as the appropriate standard in termination proceedings) (overruled in part on other grounds by *In re Craig T.*, 800 A.2d 819 (N.H. 2002).

¹⁴⁴ Indian Child Welfare Act, 25 U.S.C. § 1912 (1978) (“No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence *beyond a reasonable doubt*, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child”) (emphasis added).

¹⁴⁵ *Santosky*, 455 U.S. at 769–70.

of factfinders to place children in “better homes” than those of their natural parents.¹⁴⁶ However, any argument that a beyond a reasonable doubt standard decreases error falls prey to the same problem encountered by the *Santosky* Court’s use of this reasoning: Raising the burden above preponderance of the evidence creates a greater likelihood for errors; it just places the risk of error on the children, instead of the parents.

This outcome ties in to the second argument that has been offered to justify increasing the standard: that society must send a message about the supraordinate nature of the natural parent-child relationship. One commentator’s commitment to parental rights is at times almost mystical: “All cultures respect the sanctity of the bond that connects children to their natural parents.¹⁴⁷ This bond has its roots in a profound process that is both biological and spiritual.”¹⁴⁸ For these parental rights traditionalists, the very initiation of termination proceedings represents the State’s “occasional failure to keep the correct emphasis on reunification and family preservation.”¹⁴⁹ Though it is certainly appropriate to recognize the importance of the bond between parent and child, this type of thinking is harmful and idealistic in the context of abuse and neglect. As discussed above, the parent’s interest in preserving the relationship cannot be assumed to represent the child’s interest in being free from harm.

Calls to apply the *Santosky* clear and convincing burden to other stages of the termination process should be similarly resisted. One commentator who argues that the clear and convincing

¹⁴⁶ Cressler, *supra* note 28, at 804 (“The state should have no interest in simply providing a ‘better’ environment than that provided by the natural parents”). Though this thinking draws on the *Santosky* Court’s concern that the subjective class evaluations of judges may increase the risk of error, it confuses that possibility with the actual motivating factor of the termination scheme itself.

¹⁴⁷ Despite this emphasis on the biological blood line, the Supreme Court has not uniformly supported the proposition. Indeed, in some cases, it seems that the Court is more concerned with a *nuclear* family, rather than a natural family. Though certainly the Supreme Court has shown a predisposition to elevate natural parents’ rights over those of foster parents, see *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) (denying due process rights to foster parents), the Court has also minimized the importance of blood ties in the paternity context, see *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (holding that the natural father did not have liberty interest in relationship with his daughter where the child was born of adulterous relationship by mother).

¹⁴⁸ Cressler, *supra* note 28, at 812.

¹⁴⁹ *Id.* at 803.

standard should be applied not only at the parental unfitness stage of a termination proceeding, as required by *Santosky*, but at the best interests of the child stage as well, justifies his argument for the extension of *Santosky* as best serving the *child's* fundamental rights (as well as the parents').¹⁵⁰ Though at least this argument brings the child's interests to the table, the conclusion is unintentionally problematic for children. The argument relies on the assumption that since the purpose of the hearing is centered on the child's interests, the existence of that benevolent purpose will guarantee a positive outcome for the child.¹⁵¹ This contention is not sufficient to offset the two weighty reasons why raising the standard to clear and convincing at this stage could be harmful to children.

Once there has been an adjudication of a parent's unfitness, the appropriateness of termination of parental rights should be presumed. Beyond serving as a prerequisite to even considering the question of best interests,¹⁵² the unfitness finding can serve as a pseudo-proxy for the assumption that the best interests of the child, at the very least, are not to be left in the care of an unfit parent. Notably, this presumption is not institutionalized in the form of a burden of proof presumption against the parents; instead of using the best interests stage as a "second-chance" where perhaps the parents might have the burden of proof of showing that their care is still best for the children, the State still possesses the burden.

Whatever possibility there might be that, despite the finding of unfitness, the parent's care is still in the child's best interest is properly accounted for by the preponderance of the evidence standard. Shifting the burden of proof more in the parent's favor undoes much of the work done by the unfitness hearing. After a finding of unfitness, there is a strong moral

¹⁵⁰ Hill, *supra* note 126, at 575.

¹⁵¹ *Id.* at 580.

¹⁵² See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (noting that a court may not terminate parental rights without a finding of parental unfitness).

argument that parents are not entitled to the “benefit of the doubt” that an increased burden would give them. The preponderance of the evidence standard can correct for any gaps left by the unfitness determination, though such gaps seem unlikely given the imposition of the clear and convincing standard on the State from the onset of the unfitness proceedings. Moreover, increasing the burden at the best interests stage could endanger the child or undermine the benefits of termination.

Finally, any proposition of extending *Santosky* beyond the termination context to related proceedings should be resisted, not only for its potential proliferation of harmful parental rights thinking, but for the possibility that it would erect too many barriers to the child protection process too soon. For example, one academic opposes the use of the preponderance of the evidence standard for proceedings such as custodial determinations which also involve allegations of abuse and neglect, but do not result in permanent judgments.¹⁵³ The argument supporting such a proposition, that “[b]oth suspension of custody and suspension of visitation ‘set the stage’ for a permanent termination of parental rights . . . In order to effectuate state policy goals, greater certainty is required before family relationships are irreparably destroyed,”¹⁵⁴ is potentially dangerous as it suggests a “slippery slope” problem. How early are we going to establish barriers to termination of parental rights? The more that pre-termination proceedings are seen as ultimately leading to a total deprivation of parental rights, the earlier the increased burden of proof argument is instituted, causing less state intervention to result, and possibly leaving children languishing in abusive and neglectful homes. At some initial point, the State must be allowed to proceed with little or no evidence (not that the preponderance standard even allows success with little or no evidence) or else abuse and neglect will never to come to

¹⁵³ See McMahon, *supra* note 56.

¹⁵⁴ *Id.* at 179–80.

light. Especially given that the separation of this stage is not even permanent, allowing an increased burden of proof at this stage would be a tremendous disservice to children at risk of abuse.

B. Hope In the Lower Courts

Despite some variation in the state court decisions addressing these concerns, there is at least some judicial resistance to allowing *Santosky* to become pervasive. These courts do what they think is necessary to comply with the constitutional aspects of the *Santosky*, but rein in *Santosky*'s reach. Such decisions may provide indications as to how best to oppose the spread of *Santosky*'s deleterious effects.

Several courts provide evidence of lower levels of resistance. For example, some courts that had to overturn prior holdings or strike down elements of state statutes that conflicted with *Santosky*'s constitutional holding¹⁵⁵ appear almost reluctant, like the Supreme Court of Delaware's account of the *Santosky* holding, in which the court describes that *Santosky* was announced "notwithstanding a strong four-Justice dissent."¹⁵⁶ In addition, there are, of course, individual decisions finding the new burden met,¹⁵⁷ though it is difficult to know whether this represents resistance to allowing the new standard to have an effect on outcome or whether it reflects the actual certainty of the evidence presented.

¹⁵⁵ See, e.g., *In the Matter of Appeal in Maricopa County*, 647 P.2d 184 (Ariz. Ct. App. 1982) (holding unconstitutional Arizona's statute requiring only a preponderance of the evidence standard for termination); *In the Interest of A.M.D. and M.D.*, 648 P.2d 625 (Colo. 1982) (overturning prior construction of statute as requiring only preponderance of the evidence); *Patricia A.F. v. James R.F.*, 451 A.2d 830 (Del. 1982) (overruling prior precedent requiring only a preponderance of the evidence standard).

¹⁵⁶ 451 A.2d at 831.

¹⁵⁷ See, e.g., *In The Interest of J.L.P.*, 416 So.2d 1250 (Fla. Dist. Ct. App. 1982) (finding termination by clear and convincing evidence where mother was mentally retarded and unbalanced emotionally). Of course, on the other hand, many court decisions reflect the possible impact of the increased burden, by finding that the new standard had not been met. See e.g., *In the Interest of Chad*, 318 N.W.2d 213 (Iowa 1982) (reversing trial court's termination of parental rights and reinstating those parental rights on the idea that *Santosky* created a "rebuttable presumption that the best interests of the child are served by custody of the natural parents"); *In the Matter of J.L.E.*, 2005 Tenn. App. LEXIS 384 (Tenn. Ct. App. 2005) (reversing trial court's termination of parental rights where mother, a drug user, had failed to follow up with state services).

Additional hope lies in the courts who have rebuffed attempts to expand *Santosky*'s reach. Some courts have resisted *Santosky*'s invitation to raise the burden of proof to a beyond the reasonable doubt standard.¹⁵⁸ Others have foregone the option to raise the standard to clear and convincing at the best interests stage of the determination.¹⁵⁹ These courts have capitalized upon the opportunity in *Santosky* to separate the nature of the two proceedings.¹⁶⁰ For example, *Santosky* gives the courts permission to assume that after a finding of parental unfitness, the "interests of the child and the natural parents do diverge."¹⁶¹ While the *Santosky* Court merely provided this language as an opening, the Supreme Court of Illinois has removed the tentative language such as "may assume" in its rephrasing of the *Santosky* directive: "once the State proves parental unfitness, the interests of the parent and the child diverge."¹⁶² In other words, where the *Santosky* Court was less certain about the interests diverging, the Supreme Court of Illinois establishes the understanding as a baseline. This understanding allows the Illinois court to embark on an analysis of the children's interests¹⁶³ and to accept the recognition that "the

¹⁵⁸ See, e.g., *In the Interest of A.M.D. and M.D.*, 648 P.2d 625, 635 (Colo. 1982) ("In our view a standard requiring proof beyond a reasonable doubt would not accomplish a significantly greater reduction of the risk of an erroneous deprivation than that to be achieved by the clear and convincing standard").

¹⁵⁹ See, e.g., *Kent K and Sherry K. v. Bobby M. and Leeh M.*, 110 P.3d 1013 (Ariz. 2005) (holding that Arizona's statutes establish and *Santosky* allows preponderance of the evidence at the best interest stage); *In re D.T.*, 818 N.E.2d 1124 (Ill. 2004) (rejecting the idea that *Santosky* mandated increasing the burden of proof at the best interests stage to clear and convincing); *In the Matter of Jolie S.*, 298 A.D.2d 194 (N.Y. App. Div. 2002) (holding that "the necessary preponderance of the evidence supported the finding that freeing the child for adoption was in her best interest"); *In re the Dependency of A.S.*, 6 P.3d 11 (Wash. Ct. App. 2000) (noting statutory requirement at best interests stage to be preponderance of the evidence). Of course, there are also several states that impose the clear and convincing burden either by case law or statute. See, e.g., *In the Matter of Parental Rights as to K.D.L. and S.P.K.*, 58 P.3d 181 (Nev. 2002) (explaining that termination requires clear and convincing evidence at the best interests stage as well as during the unfitness determination, but finding that burden met in this case); *In the Matter of J.L.E.*, 2005 Tenn. App. LEXIS 384 at *13 (Tenn. Ct. App. 2005) (noting statutory requirement that best interests stage also be proved by clear and convincing evidence).

¹⁶⁰ See, e.g., *Kent K*, 110 P.3d at 1019 ("Despite its sometimes sweeping language, throughout the *Santosky* opinion the Court made it abundantly clear that its analysis of constitutional due process requirements addressed only the first stage of the . . . termination proceeding").

¹⁶¹ *Santosky*, 455 U.S. at 760.

¹⁶² *In re D.T.*, 818 N.E.2d at 1226.

¹⁶³ *Id.* at 1227 ("At a best interest hearing, the parent and the child may become adversaries, as the child's interest in a loving, stable and safe home environment become more aligned with the State's interest . . . Following a finding of unfitness . . . the focus shifts to the child").

stricter clear and convincing burden of proof would place a greater share of the risk of an erroneous determination on the State, operating to the benefit of the parent, but to the detriment of the child.”¹⁶⁴ The Supreme Court of Arizona followed a similar analysis to reach its conclusion that a preponderance standard is most appropriate for the best interests stage. Having concluded that *Santosky* “does not define the minimum standard of proof required for determining the best interests of the child,”¹⁶⁵ the Arizona court moves on to balancing “the rights of an unfit parent against those of the child.”¹⁶⁶ Here, the Arizona court reaches the proper conclusion that requiring a higher burden of proof at this stage “actually places the risk of an erroneous conclusion as to the *child’s best interests* squarely upon the child.”¹⁶⁷ They conclude that where “two interests of relatively equal weight clash,” a preponderance standard is most appropriate.¹⁶⁸

These cases admirably resist the reasoning of those commentators who believe that parental rights must continue to carry fundamental weight at the best interests stage. Having significantly shifted the attention to the children’s interest, it could even be argued that even a preponderance standard goes too far in protecting parental rights, given the previous adjudication of unfitness. Since there is no lower burden than preponderance of the evidence, such a belief could only be effectuated by actually shifting the burden to the parents instead of the State or by eliminating the need for a burden altogether.¹⁶⁹ Notwithstanding these extreme measures,

¹⁶⁴ *Id.*

¹⁶⁵ *Kent K.*, 110 P.3d at 1020.

¹⁶⁶ *Id.* at 1021.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Forgoing the burden at this stage was actually advocated by a dissenting justice on the Supreme Court of Illinois, who argued that, “If the best-interests determination is largely a matter of judgment and not merely fact-finding, then it seems a standard of proof, which relates to factual conclusions, may impair the ability to achieve the goal that best serves the child’s interests.” *In re D.T.*, 818 N.E.2d at 1321 (Garman, J., dissenting).

maintenance of the preponderance of the evidence standard seems to minimize the number of roadblocks placed in front of a termination order.

Aside from limiting *Santosky* within the termination context, some courts have restricted its spread to non-termination proceedings. For example, the Maryland Court of Appeals declined to extend the *Santosky* standard to a custody battle between a parent and a non-parent.¹⁷⁰ The father in *Shurupoff* relied on *Santosky* to claim that “a parent has a fundamental liberty interest . . . to raise his or her children and that any justification for depriving a parent of that right must be supported by clear and convincing evidence.”¹⁷¹ Though the parent analogized a custody battle to termination proceedings by insisting that both place “in jeopardy the parent’s right to raise the child,”¹⁷² the Maryland court did not buy the argument, citing a number of “important differences between, on the one hand, the State seeking to terminate permanently a parent’s entire spectrum of rights . . . and on the other, a dispute between two private individuals over who should have custody. . . .”¹⁷³ *Shurupoff* is useful for showing how far *Santosky* can be taken under the guise of parental rights; indeed the case notes that some states have in fact adopted the *Santosky* standard in custody disputes.¹⁷⁴

More striking than these efforts to confine *Santosky* are those by courts who actually work within the termination context to create loopholes out of *Santosky* which will essentially allow them to maintain the preponderance of the evidence for the entire proceeding, while keeping technically in line with the *Santosky* holding. California courts have been particularly active in this type of resistance. In 1992, a California appellate court upheld a system of proceedings that ultimately led to a termination of parental rights, and did not require clear and

¹⁷⁰ *Shurupoff v. Vockroth*, 814 A.2d 543 (Md. Ct. App. 2003).

¹⁷¹ *Id.* at 553.

¹⁷² *Id.* at 549.

¹⁷³ *Id.* at 552.

¹⁷⁴ *Id.* at 553.

convincing evidence at each stage of the process.¹⁷⁵ In that case, after the child had been removed from the mother, at an 18-month review, the lower court had found by a preponderance of the evidence that the child’s return to the mother would be detrimental to the child.¹⁷⁶ This determination would later serve as the basis for the termination of parental rights.¹⁷⁷ The appellate court rejected the mother’s claim that the 18-month review needed to be based on clear and convincing evidence, especially given a subsequent finding by the lower court that there was clear and convincing evidence to suggest that the child would be adopted.¹⁷⁸ The California court held that *Santosky* does not require “proof by clear and convincing evidence of every element necessary to terminate parental rights when there is clear and convincing evidence that if parental rights are terminated, the child will be adopted.”¹⁷⁹ Spinning *Santosky*, the Court determined that “the child’s *real* interest . . . was in avoiding an erroneous termination” because the child could “easily end up *worse off*.”¹⁸⁰ Unlike in the *Santosky* case, here, “the likelihood of adoption . . . changes the relative severity of the consequences of an erroneous decision.”¹⁸¹ Though trying to stay within the *Santosky* framework, it is clear that the California court simply disagrees with the Supreme Court’s evaluation of the relevant interests, ultimately reaching the exact opposite conclusion of the *Santosky* Court: “If anything, the social consequences are far graver if there is an erroneous non-termination than if there is an erroneous termination.”¹⁸²

¹⁷⁵ *In Re Cristella C. v. Jo Ann C.*, 8 Cal. Rptr. 2d 342 (Cal. Ct. App. 1992).

¹⁷⁶ *Id.* at 343.

¹⁷⁷ *Id.* at 344.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 345.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 346.

¹⁸² *Id.* at 347. It’s possible that this case could reflect the very subjective application of middle-class values that the Supreme Court was worried about: “Not to mince words, erroneous *non*termination could have the effect of denying Cristella the opportunity to escape the drug and criminal culture into which Jo Ann has repeatedly mired herself.” *Id.*

This case reflects a bold step in opposition to *Santosky*. Though on its face, the *Santosky* Court required the clear and convincing standard for any unfitness determination, the California court has found a way to minimize the importance of the unfitness determination, to make that determination earlier and to fundamentally lower the burden the State must face. It does so while claiming to function within *Santosky*, while actually evidencing almost radical resistance. For example, the Court appears to limit its holding:

We do not hold, of course, that the requirement of clear and convincing evidence for adoptability is sufficient by itself to render the termination of parental rights constitutional. But when this requirement is added to a statutory scheme which includes the existing panoply of protections of parental rights, we cannot say that termination in such circumstances lacks ‘due process.’¹⁸³

However, the Court’s consideration of the State’s scheme in aggregate is exactly the kind of consideration the *Santosky* court rejected of the New York scheme.¹⁸⁴

One year later, the California Supreme Court affirmed a similar statutory scheme that allows use of the preponderance standard at earlier stages of the termination proceedings, by rejecting a due process challenge founded in *Santosky*.¹⁸⁵ Though the mother claimed that the system allowed her rights to be terminated on the basis of a finding by a preponderance of the

¹⁸³ *Id.*

¹⁸⁴ *Santosky*, 455 U.S. at 757 n.9 (“We reject the suggestions of respondents and the dissent that the constitutionality of New York’s statutory procedures must be evaluated as a ‘package.’ Indeed, we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous assessment of the “cumulative effect” of state procedures”). Indeed, even courts that are otherwise resistant to the *Santosky* holding recognize this aspect of the Court’s decision. See *In the Interest of A.M.D. and M.D.*, 648 P.2d 625, 634 (Colo. 1982) (“Specific statutory criteria and other procedural safeguards simply do not add up to a sufficient equivalent of clear and convincing evidence . . .”).

¹⁸⁵ *Cynthia D. v. The Superior Court of San Diego County*, 851 P.2d 1307 (Cal. 1993). The scheme at issue was an elaborate system in which after a dependency petition is granted based on preponderance of the evidence, the child is removed from the parents. The parents are notified that if they do not reunify within 12 months, they might be subject to termination of parental rights. After the dependency ruling, the court reviews the case at least once every 6 months, under a statutory presumption that the child will be returned to parental custody unless the court finds by a preponderance of the evidence that the return would be a risk to the child. At the 12-month review, if the Court does not return the child, the court must cease reunification efforts. At that point, the court must determine by clear and convincing evidence that reasonable reunification services have been offered to the parents. Finally, for termination of parental rights, the court must make two findings: (i) That there is clear and convincing evidence that the minor will be adopted and (ii) That there has been a previous determination that reunification services shall be terminated. *Id.* at 1307–11. Notably, the scheme does not contain any individual finding of unfitness, as present in *Santosky*.

evidence and convinced the dissent that the critical decision regarding parental rights is made during the earlier findings and not at the termination proceeding itself,¹⁸⁶ the majority felt that due process obligations had been more than met:

In contrast to *Santosky v. Kramer*, our dependence statutes endeavor to preserve the parent-child relationship and to reduce the risk of erroneous fact-finding in so many different ways that it would be fanciful to think that these state interests require what in most cases would be a sixth inquiry into whether the severance of parental ties would be detrimental to the child.¹⁸⁷

Notably, the emphasis in this conclusion is on what would be detrimental to the child, not of the harm to the parent. The California Supreme Court maintains that “by the time termination is possible under our dependency statutes the danger to the child from parental unfitness is so well established . . .”¹⁸⁸ and contrasts its system with the New York system at issue in *Santosky*,¹⁸⁹ but ducks the issue as to whether that unfitness is established in accordance with *Santosky*’s requirements. The California court argues that the focus of the termination proceeding is on “finding the child a permanent alternative family placement” instead of “accumulat[ing] further evidence of parental unfitness.”¹⁹⁰ Notably, the basis for termination centers on likelihood of adoption and the court is concerned about the child’s interest in “a permanent, secure, stable and loving environment.”¹⁹¹ Given these priorities, the California Supreme Court acknowledges the crucial consequence that the *Santosky* Court overlooked: “In this setting, a burden of proof standard that tilted the evidentiary scales in favor of the parent (as a clear and convincing evidence standard would do) would have the inevitable effect of placing a greater risk on the child than on the parents.”¹⁹²

¹⁸⁶ *Id.* at 1317 (Kennard, J., dissenting).

¹⁸⁷ *Id.* at 1315.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1312.

¹⁹⁰ *Id.* at 1313.

¹⁹¹ *Id.*

¹⁹² *Id.* at 1314.

While California has stretched the limits of *Santosky* without striving too carefully to stay within its bounds, the Supreme Court of Colorado has reached a similar result while explicitly claiming to follow *Santosky's* dictates. In *Colorado v. A.M.D. and M.D.*, the Colorado Supreme Court reversed an inappropriate application of the preponderance standard at the termination level, but upheld the use of that standard for a decree of dependency or neglect that served as a prerequisite to the application for termination of parental rights.¹⁹³ In so holding, the Court found the result not only “constitutionally permissible” but “fully consistent with *Santosky*.”¹⁹⁴

Finding no suggestion in *Santosky* of a prohibition of the preponderance standard for the factual foundation of an abuse and neglect adjudication,¹⁹⁵ the Court engages in a *Santosky*-like application of a balancing test before concluding that the clear and convincing standard is “not necessary to protect the private interests affected.”¹⁹⁶ Most significant are the court’s conclusions that instituting the preponderance standard at the adjudicatory hearing would lead to a “minimal” increased risk of erroneous termination¹⁹⁷ and that requiring a clear and convincing standard would tie the State’s hands by motivating the State “to attempt to meet this standard initially in all cases.”¹⁹⁸ Cleverly, the court assumes the traditional theme of reunification and family preservation as a means of supporting its decisions: Calling the effect of a heightened standard “pernicious,” the court argues that “the State’s activities in gathering and presenting evidence to meet the elevated standard would tend to cast the State in the role of an adversary of the parents . . . rather than in its proper and legislatively-contemplated capacity as a helping intervenor.”¹⁹⁹ In contrast to the California opinions, then, the Colorado Court strives to stay

¹⁹³ 648 P.2d 625 (Colo. 1982).

¹⁹⁴ *Id.* at 635.

¹⁹⁵ *Id.* at 636.

¹⁹⁶ *Id.* at 638.

¹⁹⁷ *Id.* at 637.

¹⁹⁸ *Id.* at 640.

¹⁹⁹ *Id.*

more closely in line with precedent, while reaching a similar outcome. These courts clearly see the need for removing some of the obstacles to termination put in place by *Santosky* and have elected to do so by making the prerequisite determinations easier.

Despite the existence of these *Santosky*-limiting cases, there are, of course opinions that come out precisely the other way.²⁰⁰ Given the variety of state termination schemes and the different traditions in those courts, it is unsurprising that no reliable, general pattern exists. Nonetheless, the decisions discussed above offer crucial ways in which to limit the harmfulness of *Santosky*. At a lower level of resistance, state courts may reject attempts to expand *Santosky*'s holding. Even more encouraging are the courts that have shifted the focus away from the idea that harm to the parents should be the sole consideration in termination cases. These courts refocus the proceeding on the child's interests and some of the California courts have even directed their energy toward the likelihood of adoption. These opinions have also rejected the *Santosky* Court's assumption that the degree of procedural protections provided in the state statutory scheme has no impact on the standard to be imposed.

V. Conclusion

The foregoing analysis has demonstrated that the clear and convincing standard is not serving the interests of children, because the logic on which the standard was based has been shown to be flawed and because the very theoretical underpinnings that justify the use of the standard ignore the children's unique interest in termination proceedings. Children may suffer as a result of the imposition of a heightened burden – by being returned to abusive homes, by being caught in indeterminacy and denied a stable home, by being delayed in the system for years.

²⁰⁰ See, e.g., *In Re Sabrina Enis*, 520 N.E.2d 362 (Ill. 1988) (holding unconstitutional the application of the preponderance of the evidence standard to a statutory scheme which allowed for unfitness determination to be made on the basis of two prior findings of physical abuse). Though the State argued that it was the legislature's intent to base the termination "upon a finding of a pattern of conduct," the Illinois Supreme Court concluded that "simply adding a second finding of abuse does not eliminate the risk of error inhering in [the] determination." *Id.* at 366.

More broadly, children will suffer from the strengthening of the parental rights doctrine: By refusing to acknowledge separate rights or interests for children in a context where that acknowledgment would be most appropriate, the *Santosky* Court propagated the belief that parental rights must trump those of their children. This philosophy may continue to limit children, by preventing the articulation of constitutional rights unique to children, by excluding explicit balancing of children's interests in Court-created balancing tests or by suggesting the lack of necessity for individual legal representation for children.

Extensions of *Santosky* to beyond a reasonable doubt, as New Hampshire has done and as the federal government has done in the Indian Child Welfare Act, should be especially concerning to children's rights advocates, as these proposals threaten to subsume children's interests entirely under the umbrella of parental rights. While there is obviously a well-developed understanding of fundamental parents' rights, there is no real corresponding rights doctrine regarding children and no adequate balancing test for the states to use when these rights collide in the termination context. With the imposition of a beyond a reasonable doubt standard, the presumption rests too heavily in favor of parents who have already given some indication that they cannot provide a fit home for their children.

Aside from restraining *Santosky*'s spread, the *Santosky* precedent itself should be reexamined. Numerous flaws plague the Court's opinion in addition to the most glaring absence of any formulation of children's rights. From misunderstanding the degree of expected errors from each standard of proof to superficially addressing a perceived disparity in resources, the Court instituted across-the board changes where a more individualized approach might have been more appropriate. It seems likely that use of preponderance of the evidence standard could be constitutionally permissible so long as other procedural protections were in place for each of the

parties. Certainly, many state courts felt that the standard was in fact ideal in the years prior to *Santosky*; they differ dramatically from the *Santosky* opinion for their emphasis on the children's rights.²⁰¹

Recent trends certainly provide a sound basis for effecting change to *Santosky*. Despite the weaknesses of federal legislation such as the Adoption and Safe Families Act, such legislation at least represents a move away from the family preservation ideology that justifies erecting barriers to termination of parental rights. Moreover, several lower courts seem receptive to different means of reducing *Santosky*'s effect, which may result in an appeal to the Supreme Court that places *Santosky* on the line. The composition of today's Supreme Court is vastly different than that of the *Santosky* years, with only one member of the *Santosky* majority still remaining on the Court (Justice Stevens). Although Justices Roberts and Alito are yet untested in this area, should they follow the lead of Justice Rehnquist, the Court's shift to the right may actually create an opportunity for Justice Rehnquist's *Santosky* dissent to become the law. Yet, until society acknowledges the importance of children's rights and until the Court recognizes that it is not fair to children to "make a *fundamental* value determination that the erroneous severance of parental rights, vis-à-vis the erroneous failure to sever, constitutionally requires a higher burden of proof,"²⁰² children may continue to suffer as they bear the risks of the termination of parental rights proceeding.

²⁰¹ See, e.g., *Hernandez v. Arizona*, 530 P.2d 389, 392 (Ariz. 1975) ("If one were to focus only on the rights of the natural parents it would perhaps be arguable that a burden of proof higher than a preponderance of the evidence is necessary to achieve the sometimes elusive standard of 'fundamental fairness'"); *In the Matter of Five Minor Children*, 407 A.3d 198, 200 (Del. 1979) ("We are concerned not only with the rights of the parents, but also the best interests of the children").

²⁰² *Hernandez*, 530 P.2d at 393.