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Standard of Proof in Parental Rights Termiantion: Santosky v. Kramer

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STANDARD OF PROOF IN PARENTAL RIGHTS TERMINATION: *SANTOSKY V. KRAMER*

WHEN a child has been neglected by his parents, the state may normally step in to protect him. New York law permits involuntary termination of parental rights when a child is shown to be neglected.[1] The termination proceeding consists of a fact-finding hearing, in which the state must prove by a preponderance of the evidence that the child has been permanently neglected,[2] and a dispositional hearing to ascertain which placement would serve the child's best interests.[3] Bernhardt S. Kramer, the Commissioner of the Ulster County, New York, Department of Social Services, initiated such proceedings in October 1978 to terminate the parental rights of John Santosky II and Annie Santosky in their three children. Although the Santoskys immediately challenged the constitutionality of the New York Family Court Act's preponderance of the evidence standard for proving neglect, the family court applied this statutory standard and ruled that the Santoskys' parental rights should be terminated. The New York Supreme Court, Appellate Division, affirmed the decision,[4] and the New York Court of Appeals dismissed the Santoskys' appeal for lack of a substantial constitutional question.[5] The United States Supreme Court granted certiorari. *Held, vacated and remanded*: In a proceeding for involuntary termination of parents' rights in their natural child, the due process clause of the fourteenth amendment demands that the state support its allegations by at least clear and convincing evidence. *Santosky v. Kramer*, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

I. DUE PROCESS, THE FAMILY, AND STANDARDS OF PROOF

The due process clause of the fourteenth amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law."[6] Due process thus restricts the ways in which state legisla-

1. N.Y. SOC. SERV. LAW §§ 384-b(4)(d), (7)(a) (McKinney Supp. 1981-1982); *see also infra* note 136.

2. N.Y. FAM. CT. ACT § 622 (McKinney 1975 & Supp. 1981-1982).

3. *Id.* §§ 623, 631. The dispositional hearing was not at issue in *Santosky v. Kramer* because the challenged standard of proof applies only to the fact-finding hearing.

4. *In re* John AA, 75 A.D.2d 910, 427 N.Y.S.2d 319, 320 (1980).

5. The dismissal is noted *sub nom. In re* Apel, 432 N.Y.S.2d 1031 (1980), but the opinion is not published.

6. U.S. CONST. amend. XIV, § 1.

tures may limit individual freedoms.[7] When life, liberty, or property is at stake, the state must provide certain procedural protections to ensure that its action complies with the due process clause.[8] The basic requirement of due process is fairness to the individual.[9] The procedural protections essential to achieving fundamental fairness include adequate notice of the basis for the action, a neutral decisionmaker, an opportunity to present evidence and witnesses, the right to confront and cross-examine witnesses, the right to representation by counsel, and a final decision based on a record that includes a statement of the reasons for the decision.[10] In determining the adequacy of procedural safeguards, the Supreme Court has traditionally balanced the rights of the individual against the government's interest in limiting those rights.[11] A parental rights termination case involves a balancing of competing interests,[12] including the parents' interest in maintaining the care and custody of their child,[13] the state's interest in the welfare of the child,[14] and the child's interest in being free from abuse and neglect.[15] The United States Supreme Court has recognized that applying the due process clause to a proceeding to decide whether a parent's relationship with his natural child should be severed is "an uncertain enterprise" in which the court must consider the various interests at stake in order to determine what procedure meets the requisites of due process and constitutes fundamental fairness to the parties involved.[16] One means of ensuring a fair balance between the rights of individuals and the legitimate concerns of the state is to have an appropriate standard of proof.[17] The various jurisdictions have disagreed as to what standard should be used.[18]

The parent's interest in preventing the dissolution of his parental rights warrants deference in the balancing process of a custody proceeding because the parent stands to suffer a substantial loss if his parental rights are

7. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 476 (1978).

8. *Id.* at 477. The range of interests protected by the due process clause is not infinite, however, and if the interest in question does not fall within one of the areas encompassed by the fourteenth amendment, due process requirements do not apply. Board of Regents v. Roth, 408 U.S. 564, 569-71 (1972).

9. *In re* Murchison, 349 U.S. 133, 136 (1965); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 7, at 483, 501.

10. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 7, at 499; *see also* Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

11. *See, e.g.*, Matthews v. Eldridge, 424 U.S. 319, 335 (1976) (individual's right to Social Security benefits versus government's interest in terminating benefits to recipients no longer eligible); Morrissey v. Brewer, 408 U.S. 471, 481-83 (1972) (comparing parolee's interest in continued liberty with governmental interest in restricting that liberty); Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 894-96 (1961) (balancing employment interests of naval gun factory employee with government's security interests).

12. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981); *see also infra* notes 102-03.

13. Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981); *infra* notes 19-30 and accompanying text.

14. Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981).

15. *See infra* notes 59, 151-52 and accompanying text.

16. Lassiter v. Department of Social Servs., 452 U.S. 18, 24-25 (1981).

17. *See* Addington v. Texas, 441 U.S. 418, 431 (1979).

18. *See infra* notes 90-99 and accompanying text.

terminated.[19] The Supreme Court at an early date recognized an individual's right to establish a home and bring up children as one of the freedoms protected by the fourteenth amendment.[20] The Court's inherent respect for the sanctity of the family[21] has created a strong presumption that natural bonds of affection lead parents to act in their child's best interests,[22] and that, therefore, the duty to care for and nurture the child should normally reside with the parents.[23] Early Supreme Court decisions concerned the parents' right to dictate specific aspects of their child's upbringing[24] rather than the right to custody; the Court finally addressed the child custody issue in *Stanley v. Illinois*.[25] In that case the Court characterized the rights to conceive and raise one's children as "essential," as "basic civil rights of man," and as "rights far more precious . . . than property rights."[26] In recent years the Court has indicated even greater confidence in the parent's competence to make important decisions regarding the upbringing of children.[27] Thus, in seeking the involuntary termination of parental rights, a state confronts not only the ordinary procedural requirement of proving its allegation of parental unfitness, but also the deep-seated notion that, in most cases, parents "generally do act in the child's best interests."[28] This assumption was apparent in *Lassiter v. Department of Social Services*,[29] a parental rights termination case in which the Court stated: "If the State prevails, it will have worked a unique kind of deprivation . . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one."[30]

Nevertheless, the state is not without support for its intervention into the parent-child relationship. As the Court noted in *Lassiter*, the state has an urgent interest in the child's welfare.[31] The state's right and obligation to guard the child's well-being arise from its function as parens patriae.[32] In

19. Stanley v. Illinois, 405 U.S. 645, 651-52 (1972).

20. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

21. In Moore v. City of Cleveland, 431 U.S. 494, 503 (1977), in which the Court held unconstitutional a zoning ordinance prohibiting an extended family from residing together in a single household, the Court noted that the family is an institution "deeply rooted in this Nation's history and tradition."

22. Parham v. J.R., 442 U.S. 584, 602 (1979).

23. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

24. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (upheld parents' right to send their child to private school); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (struck down statute forbidding teaching of foreign languages to school children and held that parent, not state, must be one to supervise child's education).

25. 405 U.S. 645 (1972).

26. *Id.* at 651.

27. *See, e.g.*, Parham v. J.R., 442 U.S. 584 (1979) (upholding state statute permitting parents to have their minor children committed for mental health treatment); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish parents may substitute private instruction of their high-school-aged children for public education).

28. Parham v. J.R., 442 U.S. 584, 602-03 (1979).

29. 452 U.S. 18 (1981).

30. *Id.* at 27.

31. *Id.*

32. "*Parens patriae*, literally 'parent of the country,' refers traditionally to the role of the state as sovereign and guardian of persons under a legal disability to act for themselves such

Prince v. Massachusetts the Court stated that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare.[33] The opinion defined the parens patriae doctrine as a governmental duty to assure proper development of the child: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection."[34]

Outside the realm of parental rights termination, the state's interest has often been indistinguishable from that of the parents. For example, in *Ginsberg v. New York*[35] the Court upheld a city ordinance prohibiting the sale of obscene materials to minors and found that regulation for the welfare of children is within state constitutional power.[36] The Court noted that because parents are charged with the responsibility for rearing their children, they are entitled to the support of laws designed to aid discharge of that responsibility.[37] Ideally, the interest of the state as parens patriae should be identical to that of the parents.[38] A parental rights termination proceeding is, however, a unique situation, because the state's interest does not coincide with the parents'; in such a case, the state seeks not simply to infringe upon the parents' interest but to end it.[39]

The third interest at stake in a parental rights termination case is that of the child. Statutes authorizing termination typically focus upon serving the child's best interests.[40] Although the Supreme Court has emphasized the importance of the child's interests in a custody case,[41] it has been reluctant to accord the child's interests the same status as the parents'.[42] Even when the interests of parent and child do not conflict, the Court has ele-

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as juveniles, the insane, or the unknown." West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

33. 321 U.S. 158, 167 (1944). The state may restrict the parents' control, for example, by requiring school attendance and, as it did in this case, regulating child labor. *Id.* at 166.

34. *Id.* at 168. For additional discussion of the doctrine of parens patriae, see Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae"*, 22 S.C.L. REV. 147 (1970); Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DE PAUL L. REV. 895 (1976).

35. 390 U.S. 629 (1968).

36. *Id.* at 639.

37. *Id.*

38. Thus, in Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), the statutes that the Court held unconstitutional disserved the interests of both the state and the parent.

39. *Lassiter*, 452 U.S. at 27.

40. *See, e.g.*, MICH. COMP. LAWS § 722.25 (1970 & Supp. 1981-1982); N.Y. FAM. CT. ACT § 631 (McKinney 1975 & Supp. 1981-1982); N.C. GEN. STAT. § 7A-289.30(c) (1981); TEX. FAM. CODE ANN. § 15.02 (Vernon 1975 & Supp. 1982).

41. *See* May v. Anderson, 345 U.S. 528, 536 (1953).

42. *See* Parham v. J.R., 442 U.S. 584, 603-04 (1979). In *Parham* the Court implied that the due process rights of parents and children are not identical in custody cases. The specific holding was that no constitutional mandate exists to provide a formal hearing before a minor is committed to a mental health treatment facility on his parents' application. *Id.* Conversely, the Court in the same year championed the due process rights of adults in involuntary commitment proceedings. Addington v. Texas, 441 U.S. 418 (1979); *see infra* notes 83-88 and accompanying text.

vated the adult's interests above those of the child.[43] This attitude is evident in the Court's treatment of juvenile delinquents. Although a juvenile is entitled to due process in proceedings to determine his delinquency,[44] due process does not include a right to jury trial in juvenile court proceedings.[45] Similarly, due process does not require that corporal punishment of minors in public schools be preceded by notice and hearing.[46] These decisions indicate that a child's interest may be entitled to very limited due process protection when it competes with the interest of an adult. The Court addressed this apparent inconsistency between the rights of adults and children in *Bellotti v. Baird*,[47] in which it enumerated three factors to support its conclusion that a child's constitutional rights cannot be equated with those of an adult:[48] a child's vulnerability,[49] his inability to make critical decisions for himself,[50] and the importance of the parental role in child-rearing.[51]

The child, however, is not without constitutional rights, and recent Supreme Court decisions have established a minor's rights to be similar to,[52] if not indistinguishable from,[53] an adult's. On occasion the Court has subordinated the parent's rights to the child's.[54] In *Planned Parenthood v. Danforth*[55] the Court stated: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of

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43. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 230-31 (1972). The Court in *Yoder* stated: "It is the parents who are subject to prosecution here . . . and it is their right of free exercise, not that of their children, that must determine [the state's] power to impose criminal penalties on the parents." While *Yoder* was a case in which the rights of parent and child did not conflict, the fact that the decision was based solely on the parents' rights of free exercise and not the children's rights reveals the Court's opinion that adults' interests are superior to children's interests. *See also* Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1778-79 (1981):

> It is odd . . . that when parents and the state are fighting about how the child will be educated, the decision so often turns simply on a consideration of the *parents'* due process and free exercise rights. One reason for this peculiarity is that laws saying when and where children have to go to school and what they have to do there are enforced against the parents. . . . A second and more persuasive reason is the reluctance of the courts to recognize constitutionally protected freedoms for children in matters that their parents usually decide for them.

44. *In re* Gault, 387 U.S. 1 (1966). *Gault*, however, also recognized the parents' rights to certain procedural protections. *Id.* at 34.

45. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

46. Ingraham v. Wright, 430 U.S. 651 (1977).

47. 443 U.S. 622 (1979).

48. *Id.* at 634.

49. *Id.* The child's vulnerability was also the apparent basis for the state's power to prohibit the sale of obscene material to a minor in Ginsberg v. New York, 390 U.S. 629, 639 (1968).

50. 443 U.S. at 634. In Parham v. J.R., 442 U.S. 584, 603 (1979), the Court noted that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . . . Parents can and must make those judgments."

51. 443 U.S. at 634.

52. *See In re* Winship, 397 U.S. 358, 361 (1970).

53. *See Bellotti*, 443 U.S. at 635.

54. *See id.* at 642-43 (Court held unconstitutional state law requiring parental consultation before minor may seek court-ordered abortion).

55. 428 U.S. 52 (1976).

majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[56] While recognizing a minor's right to make her own decision regarding abortion,[57] the Court nevertheless concluded that the state can regulate minors to some extent when the regulation serves some significant state interest that is not present in the case of an adult.[58] Thus, although children have rights, a child's constitutional status is still precarious; only a narrow base of constitutional decisions supports the interest of the abused or neglected child.[59] Moreover, a child has no constitutional rights against his parents.[60] If a child is abused or neglected, however, he clearly has an interest in avoiding a family court decision that leaves him in an abusive home environment. This interest is the interest that is weighed against the parents' right to retain custody.

The procedural protections prescribed by the state in a termination case affect the risk of erroneous determination of each interest at stake. These protections include the standard of proof that the state must meet in showing that a child is abused or neglected.[61] A high standard of proof increases the likelihood that a child will be forced to remain with parents who are unfit to raise him, while a low standard creates a risk that parental rights will be erroneously severed.[62] Settling on the proper standard of proof for a termination proceeding therefore involves a careful weighing of the interests of every party.[63]

A standard of proof serves to communicate to the factfinder the degree of confidence he should have that his conclusions are correct.[64] Consequently, a higher standard of proof is ordinarily required in criminal cases, because the defendant's freedom from actual confinement is threatened,[65] while a lesser standard applies in most civil actions, because the endangered interest is typically monetary.[66] The standard of proof thus reflects

56. *Id.* at 74; *see also* Breed v. Jones, 421 U.S. 519 (1975) (juvenile delinquent is entitled to protection of fifth amendment double jeopardy clause); Goss v. Lopez, 419 U.S. 565 (1975) (high school student facing temporary suspension has property and liberty interests that qualify for due process protection, including notice and hearing); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (suspension of public school students for wearing black armbands in protest of Vietnam War violated students' first amendment right to freedom of speech or expression).

57. 428 U.S. at 74.

58. *Id.* at 75.

59. Note, *Family Law—Standard of Proof—"Clear and Convincing Evidence" Standard of Proof Will Be Required in All Proceedings for Involuntary Termination of the Parent-Child Relationship*, In re G.M., 12 ST. MARY'S L.J. 559, 567 (1980); *see also* Herrera v. Herrera, 409 S.W.2d 395, 396 (Tex. 1966); Legate v. Legate, 87 Tex. 248, 252, 28 S.W. 281, 282 (1894).

60. Wingo & Freytag, *Decisions Within the Family: A Clash of Constitutional Rights*, 67 IOWA L. REV. 401, 401 n.1 (1982).

61. Hernandez v. State *ex rel.* Arizona Dep't of Economic Sec., 23 Ariz. 32, 530 P.2d 389, 393 (1975).

62. *Id.*

63. *In re* N.J.W., 273 N.W.2d 134, 139-40 (S.D. 1978).

64. *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

65. 9 J. WIGMORE, EVIDENCE § 2497 (3d ed. 1940).

66. *See, e.g.*, Carson Inv. Co. v. Anaconda Copper Mining Co., 26 F.2d 651 (9th Cir. 1928); Jones v. United States, 239 F. Supp. 474 (E.D. La. 1965); Moore v. Stone, 36 S.W. 909 (Tex. Civ. App. 1896); *see also* 9 J. WIGMORE, *supra* note 65, § 2498.

the value that society, through its courts, places on a particular right or activity. Conversely, because the risk of erroneous outcome is charged to one or the other of the litigating parties, the prescribed measure of proof also indicates society's assessment of the comparative disutility of each type of possible erroneous decision.[67]

Generally, the standard of proof falls within one of three basic categories or levels of proof.[68] The highest level, normally characterized as "proof beyond a reasonable doubt," is virtually mandatory in criminal cases[69] and juvenile delinquency adjudications.[70] This standard is designed to eliminate the chance of an erroneous conviction, with the result that society imposes the risk of error in criminal cases almost entirely upon itself.[71] In contrast, the least stringent measure of proof, and one that is applicable to most civil cases, is the "preponderance of the evidence" standard. Literally, this standard requires only a quantitative comparison of the evidence, so that the risk of error is shared equally by all parties to the action.[72] When the threatened interest is not a person's freedom from confinement but nevertheless is one of greater import than a monetary concern, a third, intermediate standard is often employed that requires proof by "clear and convincing" evidence.[73] For example, the Supreme Court has demanded proof by "clear, unequivocal, and convincing evidence" in deportation[74] and denaturalization[75] proceedings because of the potentially drastic consequences of such proceedings.[76] Clear and convincing evidence has also been required in civil cases involving allegations of fraud or undue influence.[77]

While the suggestion has been made that no meaningful distinctions among varying standards of proof exist because measuring the "intensity of human belief"[78] is impossible, the Supreme Court has disavowed any such skepticism.[79] Although the labels used for alternative standards of proof are vague and do not provide a very clear guide to decisionmaking, the choice of a particular standard reflects a fundamental assessment of the comparative social costs of erroneous factual determinations.[80]

Standard of proof was not an issue of federal constitutional concern

67. *See In re* Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).
68. *See* Addington v. Texas, 441 U.S. 418, 423 (1979).
69. *See id.*
70. *See In re* Winship, 397 U.S. 358, 368 (1970).
71. Addington v. Texas, 441 U.S. 418, 423-24 (1979).
72. *Id.* at 423.
73. *Id.* at 424. The Court noted that this standard of proof has been variously defined to require "clear," "cogent," "unequivocal," or "convincing" evidence. *Id.*
74. Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 286 (1966).
75. Chaunt v. United States, 364 U.S. 350, 353 (1960); Nowak v. United States, 356 U.S. 660, 663 (1958); Baumgartner v. United States, 322 U.S. 665, 670 (1944); Schneiderman v. United States, 320 U.S. 118, 142 (1943).
76. *See* Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 285 (1966); *see also* Rowoldt v. Perfetto, 355 U.S. 115, 120 (1957).
77. 9 J. WIGMORE, *supra* note 65, at 329.
78. *Id.* at 325.
79. *See In re* Winship, 397 U.S. 358, 369 (1970) (Harlan, J., concurring).
80. *Id.* at 369-70.

prior to the holding in *In re Winship* that proof beyond a reasonable doubt is necessary in juvenile delinquency adjudications.[81] In civil cases it remains a topic that is ordinarily not of constitutional significance.[82] The exception to this rule is *Addington v. Texas*,[83] in which the Court ruled that an individual's liberty interest in the outcome of a civil commitment proceeding is of such importance that due process requires a showing of clear and convincing evidence to justify confining an individual to a mental institution.[84] Rejecting the holding of the Supreme Court of Texas that a mere preponderance of the evidence was sufficient,[85] the Court stated that requiring a higher standard was one way of impressing the factfinder with the importance of his decision and thereby reducing the chances of erroneous commitment.[86] The Court, refusing to invoke the beyond a reasonable doubt standard,[87] selected the intermediate clear and convincing evidence standard, or some equivalent measure of proof, which "strikes a fair balance between the rights of the individual and the legitimate concerns of the state."[88] Use of this standard indicates the existence of a right so significant that it would not be adequately protected by a preponderance of the evidence standard.[89]

The standard of proof in parental rights termination proceedings varies among the states that provide for termination.[90] The general belief that children's interests are ordinarily best served by allowing their parents to retain custody[91] is evidenced by the fact that some states do not possess a mechanism for involuntary termination.[92] Of the states that permit involuntary termination, the majority require, either by statute or by judicial decision, that the state prove its case by clear and convincing evidence or its equivalent.[93] Two states require the stricter standard of proof beyond a

81. *Id.* at 368; *see* Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1328 (1979).

82. *See* Lavine v. Milne, 424 U.S. 577, 585 (1976).

83. 441 U.S. 418 (1979).

84. *Id.* at 433.

85. State v. Addington, 557 S.W.2d 511, 511 (Tex. 1977), *vacated*, 441 U.S. 418 (1978).

86. 441 U.S. at 427.

87. *Id.* at 428-29. The Court stated four reasons that the highest standard of proof was inappropriate: the nonpunitive nature of a commitment proceeding compared with a criminal case; the historic reservation of this standard for criminal matters; the undesirability of imposing the entire risk of error upon society; and the difficulty of proving mental illness beyond a reasonable doubt. *Id.*

88. *Id.* at 431.

89. *Id.* at 427.

90. *See generally* Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1 (1975).

91. *See supra* notes 20-23 and accompanying text.

92. *E.g.*, Vermont, Massachusetts, Maryland, and Kentucky.

93. The following state statutes require clear and convincing evidence or its equivalent: ALASKA STAT. § 47.10.080(c)(3) (1979); CAL. CIV. CODE § 232(a)(7) (West 1982); GA. CODE §§ 24A-2201(c), 24A-3201 (1981); IOWA CODE ANN. § 600A.8 (1981); ME. REV. STAT. ANN., tit. 22, § 4055.1(B)(2) (Supp. 1982-1983); MICH. COMP. LAWS ANN. § 722.25 (Supp. 1982-1983); MO. REV. STAT. § 211.447.2(2) (Vernon Supp. 1982); N.M. STAT. ANN. § 40-7-4(J) (Supp. 1982); N.C. GEN. STAT. § 7A-289.30(e) (1981); OHIO REV. CODE ANN. § 2151.35 (Page 1976 and Supp. 1982); R.I. GEN. LAWS § 15-7-7(d) (1981); TENN. CODE ANN. § 37-

reasonable doubt.[94] Only a handful of state statutes specify a preponderance standard,[95] and in at least one of those states that standard has been held to violate a parent's due process rights.[96] Two state supreme courts that upheld statutory preponderance standards in termination proceedings did so with an express goal of balancing the interests of parent and child, rather than concentrating solely on the parents' interests.[97] Finally, some state termination statutes do not prescribe a standard of proof.[98]

Lower federal courts have rarely been called upon to comment on due process in parental rights termination cases, because the family is a traditional area of state concern. The two federal courts that have addressed the topic of standard of proof for involuntary termination have both held that the state must prove its case by clear and convincing evidence.[99] Thus, despite inconsistency among individual state statutes and holdings, the general tenor of parental rights termination law has been one of solicitude for the parents' custody rights, characterized by a higher standard-of-

246(d) (Supp. 1981); VA. CODE § 16.1-283(B) (1982); W. VA. CODE § 49-6-2(c) (1980); WIS. STAT. ANN. § 48.31(1) (Supp. 1981-1982).

The following judicial decisions mandated clear and convincing evidence or its equivalent: Dale County Dep't of Pensions & Security v. Robles, 368 So. 2d 39, 42 (Ala. Ct. App. 1979); Harper v. Caskin, 265 Ark. 558, 560-61, 580 S.W.2d 176, 178 (1979); *In re* J.S.R., 374 A.2d 860, 864 (D.C. 1977); Torres v. Van Eepoel, 98 So. 2d 735, 737 (Fla. 1957); Blakey v. Blakey, 72 Ill. App. 3d 946, 947, 391 N.E.2d 222, 223 (1979); *In re* Kerns, 225 Kan. 746, 753, 594 P.2d 187, 193 (1979); *In re* Rosenbloom, 266 N.W.2d 888, 889 (Minn. 1978); *In re* J.L.B., 594 P.2d 1127, 1136 (Mont. 1979); *In re* Souza, 204 Neb. 503, 510, 283 N.W.2d 48, 52 (1979); J. & E. v. M. & F., 157 N.J. Super. 478, 489, 385 A.2d 240, 246 (Super. Ct. App. Div. 1978); *In re* J.A., 283 N.W.2d 83, 92 (N.D. 1979); *In re* Darren Todd H., 615 P.2d 287, 289 (Okla. 1980); *In re* William L., 477 Pa. 322, 332, 383 A.2d 1228, 1233, *cert. denied*, 439 U.S. 880 (1978); *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980); *In re* Pitts, 535 P.2d 1244, 1248 (Utah 1975); *In re* Sego, 82 Wash. 2d 736, 739, 513 P.2d 831, 833 (1973); *In re* X, Y, Z, 607 P.2d 911, 919 (Wyo. 1980).

94. *See* State v. Robert H., 118 N.H. 713, 716, 393 A.2d 1387, 1389 (1978); LA. REV. STAT. ANN. § 13:1603.A (West Supp. 1982).

95. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-537(B) (1974); COLO. REV. STAT. § 19-3-106 (1973 & Supp. 1981); IDAHO CODE § 16-2009 (1979); NEV. REV. STAT. § 128.090 (1979); TEX. FAM. CODE ANN. § 11.15 (Vernon 1975).

96. *See In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980). The Supreme Court of Texas, citing Stanley v. Illinois, 405 U.S. 645 (1972), noted that the "involuntary termination of parental rights involves fundamental constitutional rights." 596 S.W.2d at 846. Referring to *Addington*, the court stated:

> The right to enjoy a natural family unit is no less important than the right to liberty which requires at least a clear and convincing standard of proof to inhibit such liberty through involuntary and indefinite confinement in a mental institution. Termination is a drastic remedy and is of such weight and gravity that due process requires the state to justify termination of the parent-child relationship by proof more substantial than a preponderance of the evidence.

Id. at 847.

97. *See* Hernandez v. State *ex rel.* Arizona Dep't of Economic Sec., 23 Ariz. App. 32, 530 P.2d 389, 393 (1975); *In re* N.J.W., 273 N.W.2d 134, 139-40 (S.D. 1978). In *In re* G.M., 596 S.W.2d 846 (Tex. 1980), the Supreme Court of Texas did not discuss the child's rights.

98. *See, e.g.*, CONN. GEN. STAT. § 17-43a (1981); HAWAII REV. STAT. §§ 571-61 to -63 (1976 & Supp. 1981); IND. CODE ANN. § 31-6-5-4 (Burns Supp. 1982); MISS. CODE ANN. § 93-15-109 (Supp. 1981); S.C. CODE ANN. § 20-7-1560 to -1610 (Law. Co-op. Supp. 1981).

99. Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1194 (S.D. Tex. 1977), *rev'd on other grounds sub nom.* Moore v. Sims, 442 U.S. 415 (1979); Alsager v. District Ct., 406 F. Supp. 10, 25 (S.D. Iowa 1975), *aff'd on other grounds*, 545 F.2d 1137 (8th Cir. 1976).

proof requirement and a tendency to dismiss the child's interest on the ground that it is identical with either the state's or the parents' interest.

II. *SANTOSKY V. KRAMER*

In *Santosky v. Kramer* the Supreme Court determined that parents deserve the protection of a higher standard of proof in a proceeding to terminate their parental rights than the preponderance of the evidence standard used in most civil actions.[100] The Court's holding that due process requires the state to support its allegations by at least clear and convincing evidence[101] emerged from its analysis of the termination proceeding in light of the *Mathews v. Eldridge*[102] balancing test. Under *Mathews* a court must consider the following factors in order to ascertain the requirements of due process in a particular type of case:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[103]

The *Santosky* opinion, written by Justice Blackmun,[104] commences with a discussion of the first element of the *Mathews* test, the private interest at stake, which is that of the parents.[105] The extent to which the parents must be afforded due process, the Court stated, depends upon the extent to which they may be "condemned to suffer grievous loss."[106] Emphasizing the finality and irreversibility of a termination decision and the array of public resources at the state's disposal,[107] the Court concluded that the parents were indeed threatened with grievous loss and, therefore, deserved

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100. 102 S. Ct. at 1402, 71 L. Ed. 2d at 617.

101. *Id.* at 1391, 71 L. Ed. 2d at 603.

102. 424 U.S. 319 (1976).

103. *Id.* at 335; *see also* Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (regarding flexibility of due process to meet specific situations).

104. Justices Brennan, Marshall, Powell, and Stevens joined Justice Blackmun in the majority opinion. Justice Blackmun wrote a forceful dissent in *Lassiter*, in which the Court ruled against a parent in a termination proceeding. Lassiter v. Department of Social Servs., 452 U.S. 18, 33 (1981); *see supra* note 12. In *Lassiter* Justice Blackmun expressed in his dissent the same themes that he later incorporated into the majority opinion in *Santosky*:

> A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development. . . . Surely there can be few losses more grievous than the abrogation of parental rights.

452 U.S. at 39-40 (Blackmun, J., dissenting).

105. 102 S. Ct. at 1397-98, 71 L. Ed. 2d at 610-11.

106. *Id.* at 1397, 71 L. Ed. 2d at 610 (quoting Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970), which quoted Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951)).

107. 102 S. Ct. at 1397, 71 L. Ed. 2d at 610.

heightened procedural protection.[108]

The Court refused, however, to consider the second private interest, the child's interest in being free from abuse or neglect, as a factor distinct from the parents' interest.[109] Noting the bifurcated nature of New York's statutory termination process,[110] the Court stated that the fact-finding stage, in which the state must prove neglect,[111] pits the state directly against the parents such that the focus is emphatically not on the child.[112] At that point, the Court noted, the child shares with his parents a vital interest in preventing an erroneous termination of their natural relationship.[113] Only after the state establishes parental unfitness may the family court assume that the interests of parent and child diverge.[114] Consequently, whatever procedural protection is appropriate for the parents will also adequately serve the child's interest during the fact-finding process. As a result, the Court did not weigh the child's interest separately.[115]

The second element of the *Mathews* test is the risk of erroneous deprivation resulting from the use of a preponderance of the evidence standard in the termination proceeding.[116] The Court found that New York's statutory process increases this risk of error in a number of ways, including the family court's unusual discretion to weigh facts according to imprecise substantive standards,[117] the likelihood that cultural or class bias will influence the fact-finder,[118] and the disparity between the resources available to the state for prosecuting its case and those available to the parents for mounting a defense.[119] This imbalance of substantive factors in favor of

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108. *Id.* at 1398, 71 L. Ed. 2d at 611.

109. Justice Rehnquist noted this omission in his dissent: "On the other side of the termination proceeding are the often countervailing interests of the child." *Id.* at 1412, 71 L. Ed. 2d at 628 (Rehnquist, J., dissenting).

110. *Id.* at 1397-98, 71 L. Ed. 2d at 610-11.

111. *See* N.Y. FAM. CT. ACT § 622 (McKinney 1975 & Supp. 1981-1982).

112. 102 S. Ct. at 1397, 71 L. Ed. 2d at 610.

113. *Id.* at 1398, 71 L. Ed. 2d at 611. The Court noted that in some instances when parental rights are terminated, the child may lose not only the right to maintenance and support, for which he may thereafter be dependent upon society, but also the right of inheritance and all other rights inherent in the legal parent-child relationship. *Id.* n.11.

114. *Id.* at 1398, 71 L. Ed. 2d at 611.

115. *Id.*

116. *See supra* note 103 and accompanying text.

117. 102 S. Ct. at 1399, 71 L. Ed. 2d at 612. The conduct and conditions that amount to neglect defy precise definition. The New York Family Court Act defines a neglected child as one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter or education." N.Y. FAM. CT. ACT § 1012(f) (McKinney 1975). Child neglect statutes typically define neglect in terms of parental characteristics, parental failure to provide for the child, or the child's actual condition. *See* Note, *Constitutional Limitations on the Scope of State Child Neglect Statutes*, 79 COLUM. L. REV. 719, 720 (1979); *see also* Katz, Howe & McGrath, *supra* note 90, at 4-5 (neglect defined in both physical and psychological terms).

118. 102 S. Ct. at 1399, 71 L. Ed. 2d at 612-13. The Court noted that parents subject to termination proceedings are often poor or uneducated. *Id.*

119. *Id.* As the dissent noted, there was no evidence that any of these factors influenced the outcome of the *Santosky* termination hearing. *Id.* at 1410 n.11, 71 L. Ed. 2d at 626 n.11 (Rehnquist, J., dissenting). No actual financial limitations, however, restrict the state in prosecuting a termination. *Id.* at 1399, 71 L. Ed. 2d at 612-13.

termination necessitates the use of countervailing procedural safeguards for the parents' interest in retaining custody; a preponderance standard of proof falls short of the minimum procedural requirements of due process because it allocates the risk of error equally between the parents and the state.[120] The Court determined that implicit in the selection of a preponderance standard is the mistaken assumption that termination of parental rights always benefits the child.[121] Because an erroneous termination may be just as undesirable as an erroneous failure to terminate, the Court held that the family court must employ a higher standard of proof to reduce the prejudice in favor of termination.[122] In addition, the Court stated that an increased burden of proof would impress the fact-finder with the importance of his decision, thereby decreasing the chances of erroneous outcomes.[123]

The final component of the Court's analysis was the state's interest in the parental rights termination process. The state is concerned with two factors: first, as parens patriae the state seeks to promote the child's welfare; secondly, the state has a fiscal and administrative interest in reducing the cost and burden of permanent neglect proceedings. In its role as parens patriae the state shares the parents' interest in providing the child with a permanent home and in maintaining the natural familial bonds whenever possible. Thus, the state's interest, like that of the parents, is better served by a higher standard of proof, which reduces the likelihood that the parent-child relationship will be erroneously severed. The Court also found that requiring the state to meet a greater standard of proof would have no effect on the speed, form, or cost of the termination proceeding.[124] Finally, the Court stated that a stricter standard of proof would not increase the administrative burden on the state, particularly in view of the fact that New York law already required proof by at least clear and convincing evidence in matters involving much less significant interests, such as the prosecution of traffic violations, without imposing undue

120. *Id.* at 1400, 71 L. Ed. 2d at 614.

121. *Id.*, 71 L. Ed. 2d at 614-15; *see* Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 993 (1975) (coercive intervention by state may result in greater detriment to the child than if he were allowed to remain with his parents).

122. 102 S. Ct. at 1402-03, 71 L. Ed. 2d at 617.

123. *Id.* at 1400, 71 L. Ed. 2d at 614 (citing Addington v. Texas, 441 U.S. 418, 427 (1979)); *see supra* note 64 and accompanying text.

124. 102 S. Ct. at 1401, 71 L. Ed. 2d at 615. The Court did not explain this finding but presumably the state would not put on more or different evidence under a clear and convincing standard than it would under a preponderance standard; the evidence that it produced would simply be examined differently, for qualitative rather than quantitative sufficiency. *Id.* at 1400, 71 L. Ed. 2d at 613. *Santosky*, viewed in conjunction with *Lassiter*, may represent an attempt by Justice Blackmun to compensate the parents for the Court's refusal in *Lassiter* to assure them of appointed counsel in termination cases. *See supra* note 104. Another approach to reconciling these cases is the possibility that the *Santosky* Court considered increased procedural protection for parents to be an adequate and much less expensive substitute for representation by appointed counsel. *See* Lassiter v. Department of Social Servs., 442 U.S. 18, 28 (1981); *see also* Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973) (significant state interests in informality, flexibility, and economy need not always be sacrificed to the requirements of due process).

administrative burden.[125]

Holding that New York's preponderance of the evidence standard of proof in parental rights termination cases was constitutionally intolerable, the Court concluded that the due process clause mandates clear and convincing evidence, but not proof beyond a reasonable doubt.[126] The Court explained that some state legislatures might find the difficulty in many cases of proving neglect beyond a reasonable doubt to be an unreasonable barrier to legitimate state efforts to protect permanently neglected children.[127] Individual states are nevertheless free to impose the highest standard if they so choose.[128]

Justice Rehnquist dissented on two grounds.[129] First, he argued that the majority opinion invited future federal court intrusion into every facet of state family law.[130] Noting the Court's historic solicitude toward state legislatures in family matters,[131] Justice Rehnquist stated that the Court, having fixed the standard of proof in parental rights termination proceedings, would now be called upon to evaluate other aspects of such proceedings.[132] The result, he suggested, would be to discourage the social and economic experimentation of the various states, which in the past have served as laboratories for trying novel solutions in the family law area without risk to the rest of the country.[133] Secondly, Justice Rehnquist took issue with the majority's conclusion that the New York statutory scheme violated the Santoskys' due process rights.[134] Although he agreed with the majority that the fourteenth amendment protects the parents' interest in their relationship with their children, Justice Rehnquist stated that the requirements of due process must be ascertained by examining all state procedural protections and not by focusing on a single provision of the state statute.[135] He noted that a lengthy and complicated process precedes any order terminating parental rights under the New York statutes,[136] and that all state efforts

125. 102 S. Ct. at 1401-02, 71 L. Ed. 2d at 615-16 (citing N.Y. VEH. & TRAF. LAW § 227.1 (McKinney Supp. 1981)).

126. 102 S. Ct. at 1402, 71 L. Ed. 2d at 616-17.

127. *Id.*, 71 L. Ed. 2d at 617.

128. *Id.* at 1403, 71 L. Ed. 2d at 617.

129. *Id.* Chief Justice Burger and Justices White and O'Connor joined Justice Rehnquist in the dissent.

130. *Id.*

131. *Id.* at 1403, 71 L. Ed. 2d at 618 (citing United States v. Yazell, 382 U.S. 341, 352 (1966)).

132. 102 S. Ct. at 1404, 71 L. Ed. 2d at 619.

133. *Id.*

134. *Id.* at 1403-14, 71 L. Ed. 2d at 617-30.

135. *Id.* at 1405, 71 L. Ed. 2d at 620.

136. *Id.* at 1406-08, 71 L. Ed. 2d at 621-24. The family court has no jurisdiction over a child unless action has been taken to remove him temporarily from his parents' custody and place him in the care of a state agency. N.Y. FAM. CT. ACT § 614(1)(b) (McKinney 1975 & Supp. 1981-1982). Temporary removal, when it occurs without the parents' consent, entails a notice and hearing procedure, which the statute carefully delineates and which provides the parents with many procedural protections as well as court-appointed counsel, if necessary. *See id.* §§ 262(a)(i), 1012-1048; N.Y. SOC. SERV. LAW § 384-b (McKinney Supp. 1981-1982). The statute requires regular review of a temporary removal order. *Id.* § 392(2). Only after the child has been in the state's custody for a year or more may the state seek termina-

prior to the termination proceeding are carried out in pursuit of the stated goal of ultimately reuniting the child with his parents by encouraging the parents to resume a role of responsibility.[137] Justice Rehnquist observed that in the Santoskys' case the state adhered to all of the statutory procedures and, in addition, made available to the Santoskys numerous opportunities for training and counseling designed to enhance their ability to care for their children; the Santoskys responded only sporadically to some of these offerings and not at all to the others.[138] Justice Rehnquist concluded that the New York parental rights termination procedure, taken as a whole, afforded the Santoskys the fundamental fairness that constitutes due process.[139] Furthermore, he argued, the statutory preponderance of the evidence standard reflects a constitutionally permissible attempt to balance the legitimate interests of both parent and child, neither of which is so clearly paramount as to require the allocation of a greater risk of error to one or the other.[140]

While parents are clearly entitled to due process in proceedings to terminate their rights in their children, the *Santosky* decision upheld the parents' rights at the possible expense of the legitimate interests of both the child and the state. *Santosky* is thus clear evidence of what the Court has previously asserted: child welfare litigation is an area in which the individual states, rather than federal courts, are best able to accommodate competing interests and decide any constitutional questions that may arise.[141] The Court acknowledged this fact in *Santosky* when it stated that each state should determine for itself what standard of proof, if any, it would demand above and beyond clear and convincing evidence.[142]

The *Santosky* decision is likely to have limited practical effect. A family court judge confronted with evidence of abuse or neglect of the sort that the state presented in *Santosky*[143] 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 such that the standard of proof specified by statute has no effect on the outcome of the termina-

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tion of parental rights. *Id.* § 384-b(4)(c). The state must notify the parents of its action, the potential outcome of the termination proceeding, and the parents' right to appointed counsel. *Id.* § 384-b(3)(e). The proceeding consists of an initial fact-finding hearing to determine whether the child is neglected and, if neglect is established, a dispositional hearing to determine the best placement for the child. *See* N.Y. FAM. CT. ACT §§ 622, 623 (McKinney 1975 & Supp. 1981-1982). Any termination order may, of course, be appealed to higher courts.

137. 102 S. Ct. at 1407-08, 71 L. Ed. 2d at 623 (citing N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney Supp. 1981-1982)).

138. 102 S. Ct. at 1408-10, 71 L. Ed. 2d at 624-25.

139. *Id.* at 1410, 71 L. Ed. 2d at 625-26.

140. *Id.* at 1410-13, 71 L. Ed. 2d at 626-30.

141. *See* Moore v. Sims, 442 U.S. 415, 435 (1979).

142. 102 S. Ct. at 1403, 71 L. Ed. 2d at 617.

143. Two of the three Santosky children taken into the state's temporary custody exhibited conditions ranging from broken bones, bruises, cuts, and abrasions to malnutrition and multiple pinpricks. As a result of the older children's condition, the state removed the third child from his parents' custody when he was only three days old. *Id.* at 1408-09 n.10, 71 L. Ed. 2d at 624 n.10 (Rehnquist, J., dissenting).

tion proceeding.[144] The Court's express refusal to state an opinion on the merits of the Santoskys' case[145] indicates its uncertainty as to whether, on remand, the new standard of proof would result in any change in the lower court's decision. If, however, the increased standard of proof creates a notable difference in the outcome of termination proceedings, it will be because the risk of an erroneous decision not to terminate has shifted such that the risk weighs heavily against the child.[146] The clear and convincing evidence standard, the historic presumption in favor of allowing parents to retain custody of their children,[147] and the frequent difficulty of obtaining proof of neglect when its existence is not in doubt[148] combine to limit the neglected child's rights in a termination hearing.[149]

Santosky's greater significance lies in the precedent it sets for treatment of future parental rights termination cases and family law matters in general. Its potential effect is twofold. First, the Court, perceiving the state as hostile to the interests of parent and child in keeping the family together, clearly indicated that a child has no interest distinct from his parents' interest that is worthy of due process protection during the fact-finding stage of a termination case.[150] In so holding, the Court seemed to disregard the very purpose of such a proceeding, which is to protect the child from abuse, neglect, or similar threats to his well-being.[151] If the Court is willing to abandon a child's interests in matters in which the child is one of the most interested parties, this attitude is likely to pervade other decisions when children's interests are in jeopardy. *Santosky* may thus represent a reversal of the recent tendency of the Court to acknowledge, albeit guardedly on some occasions, that children have constitutional rights.[152]

Secondly, in setting the standard of proof in a child custody proceeding, the Court in *Santosky* broke with its tradition of nonintervention with re-

144. In his dissent, Justice Rehnquist observed that the standard of proof in a parental rights termination proceeding under the New York statute is relatively insignificant in comparison to standards of proof in other areas of litigation. This is so because the same judge normally presides over a child custody case from the time of the state's initial petition for temporary removal until the final order terminating parental rights; he is therefore "intimately familiar" with the facts of the case and better able to make an accurate judgment without relying on a standard of proof to guide his decision. *Id.* at 1411 n.12, 71 L. Ed. 2d at 627 n.12.

145. *Id.* at 1403, 71 L. Ed. 2d at 617.

146. *Cf.* Speiser v. Randall, 357 U.S. 513 (1958), in which the Court noted that it has at times struck down statutes that unfairly shifted the burden of proof.

147. *See* Parham v. J.R., 442 U.S. 584, 602 (1979); *see also supra* text accompanying note 22.

148. *See* Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 697-701 (1966).

149. *See* Note, *supra* note 59, at 569; *see also supra* note 60 and accompanying text.

150. 102 S. Ct. at 1397-98, 1400, 71 L. Ed. 2d at 610-11, 613-14.

151. *See id.* at 1412-14, 71 L. Ed. 2d at 628-30 (Rehnquist, J., dissenting).

152. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979) (minor seeking abortion may attempt to show court that she is mature and informed enough to make abortion decision without parental consent); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (no state interest justified statutory imposition of blanket parental consent requirement regarding abortions for unmarried minors); *In re* Gault, 387 U.S. 1 (1966) (juvenile delinquency adjudication must measure up to the essentials of due process and fair treatment).

gard to family matters.[153] As Justice Rehnquist observed in his dissent, federal courts historically intervene only in cases in which a clear constitutional violation has occurred.[154] Creating a constitutional issue out of the standard of proof in a civil proceeding when the interest in question already commands the support of precedent, presumption, and statutory procedural protection broadens the Court's authority for interfering in areas historically reserved to the states.[155] While the majority denied this charge,[156] the *Santosky* decision established a precedent for future federal intervention into family court matters.[157]

III. CONCLUSION

In *Santosky v. Kramer* the Supreme Court held that in a proceeding for the involuntary termination of parental rights, a preponderance of the evidence standard of proof is constitutionally inadequate. Instead, the Court held that the state in prosecuting a termination case must prove its allegations by at least clear and convincing evidence. In so holding, the Court reaffirmed the deep-seated notion that parents have a fundamental right to the care and custody of their children, and that this right is of constitutional dimension. Implicit in the opinion was the view that children have very few due process rights. Moreover, the decision represents an unprecedented invasion of family court procedure, which may signify the onset of increased federal involvement in areas of law traditionally left to state control.

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153. *See* United States v. Yazell, 382 U.S. 341, 352 (1966). Only a year earlier the Court refused to consider the question presented by *Santosky*. *See* Doe v. Delaware, 450 U.S. 382 (1981). The Court, after granting certiorari in *Doe*, dismissed the matter for want of a properly presented federal question. *Id.* Justices Brennan and Stevens, who joined Justice Blackmun in the *Santosky* majority, filed dissents to the dismissal of *Doe*.

154. 102 S. Ct. at 1404, 71 L. Ed. 2d at 619.

155. *Id.*

156. *Id.* at 1402 n.18, 71 L. Ed. 2d at 616 n.18.

157. *Id.* at 1404, 71 L. Ed. 2d at 619 (Rehnquist, J., dissenting).