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AN ANALYSIS OF REALISTIC DUE PROCESS RIGHTS OF CHILDREN VERSUS PARENTS

Raymond C. O'Brien

I. INTRODUCTION

More often than not, the question presented presupposes the answer. For instance, in the infamous case of Bowers v. Hardwick, the Supreme Court was asked to decide whether “the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.” Even in the relative sexual freedom of the post-Griswold era, the answer is quite obvious: No, the Federal Constitution does not confer on homosexuals the fundamental right to engage in sodomy, especially since the states have preemptory jurisdiction over domestic relations; since sodomy is

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1. 478 U.S. 186 (1986) (holding that the due process clause of the Constitution does not confer on homosexuals the right to engage in sodomy in violation of a state statute which prohibits any person, homosexual or heterosexual, from engaging in specifically defined conduct).

2. Id. at 190.

3. See Griswold v. Connecticut, 381 U.S. 479 (1965) (initiating protection of sexual conduct, albeit for married couples, by holding that specific guarantees in the Bill of Rights have penumbras which, in turn, create zones of privacy to which people are entitled as of right). Subsequent cases extended this zone of privacy to the sexual conduct of single persons. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that the Equal Protection Clause prohibits the state from discriminating between married and single persons in the distribution of contraceptives). Bowers should have been the next step in this evolutionary process and should have extended privacy rights to homosexuals. See Rev. Raymond C. O'Brien, Discrimination: The Difference With AIDS, 6 J. CONTEMP. HEALTH L. & POL'Y 93, 102-105 (1990). Indeed, the Bowers' dissent took the right of privacy to be the right of "self-definition". Bowers, 478 U.S. at 205 (Blackmun, J., dissenting). That is, certain decisions in life are so central to the personal identities of those singled out, that no state regulation should be allowed to hinder them. See LAURENCE TRINE, AMERICAN CONSTITUTIONAL LAW, 943 (1st ed. 1978).

known to transmit AIDS; since homosexual activity is not a fundamental right;\(^5\) and since the Due Process Clause should not be used to strike down state laws "that may be unwise, improvident, or out of harmony with a particular school of thought."\(^6\) If the question in \textit{Bowers} had inquired as to the right of a person to be accorded equal protection of the law in something so fundamental as consensual, non-injurious sexual conduct in the privacy of his or her home, another answer may have resulted.\(^7\)

So too can the question presuppose the answer in the Solomonic arena of child, parent, and state. For instance, should natural parents have the right to procreate, raise, and enjoy their children? Surely the answer is a resounding yes.\(^8\) And so it was in \textit{Santosky v. Kramer},\(^9\) where the Supreme Court was asked whether "due process requires that the State support its allegations by at least clear and convincing evidence" before it "may sever completely and irrevocably the rights of parents in their natural child."\(^10\) How could any person justify terminating the rights of a parent in his or her natural child based on anything less than clear and convincing evidence? After all, "[f]or the natural parents . . . the consequence of an erroneous termination is the unnecessary destruction of their natural family."\(^11\) And if the state can-


\(^{11}\) Id. at 769.
not initially meet the clear and convincing standard so as to terminate parental rights the first time, "it always can try once again to cut off the parents' rights after gathering more or better evidence."12

The question posed above presents itself in such a way as to evoke a parent versus state confrontation, presupposing an answer that is heavily biased in favor of the parent. The question presumes that the child’s best interest subsists within the best interest of the parent. This presupposition, however, is erroneously over-expansive. It does not consider the best interest of the child. At the present time, nevertheless, it is the controlling principle in cases involving efforts by states to terminate parental rights.

The purpose of this Article is to analyze the Santosky presupposition and demonstrate why it is misdirected. In particular, the Article posits that the clear and convincing standard adopted by the Court deprives the child of his or her due process rights. The minimum standard should be reduced to at least one of preponderance of the evidence. Such a standard would recognize the so-called parental presumption, i.e. the historical preference given to parents,13 but give greater recognition to the rights of the child.

This Article examines the due process concerns of parent and child from both a legal and a factual perspective. The legal analysis focuses on the level of proof necessary to terminate parental rights. The factual study examines the rapidly changing portrait of the American family and the efforts of individual states to address the alarming increases in abuse, neglect, and abandonment of children by parents. A synthesis of these factual and legal perspectives serves to illustrate that the best interest of the child is not served by adherence to a constitutional standard that deprives states of their legislative ability to address the significant domestic relations problems within their borders.

A large part of this Article is devoted to providing a statistical look at the plight of children in the United States, especially in geographic areas containing large numbers of single parents and in areas where poverty and persistent social dysfunction are prevalent.14 The statistics

12. Id. at 764.
13. See infra part II.A.
14. It would be conjecture, a denial of equal protection, and even racist to presume that the family structure is more tenuous in ghettos, cities, and states with higher percentages of minorities, drug use, or poverty. But it would be a denial of due process to ignore the reality that there are differences among the states and that these differences can most often signal vulnerable children. One constantly predictive difference indicating vulnerable children involves single parents: "Nearly 75 percent of all American children growing up in single-parent families expe-
vividly illustrate that it is no longer possible to suggest that the best interest of each and every child subsists within the parent. Government reports such as *Beyond Rhetoric: A New American Agenda for Children and Families* ("Beyond Rhetoric"), which was presented to Congress in 1991 by the National Commission on Children, provide factual evidence that supports a lowering of the standard of proof necessary to remove a child from an injurious home. The following excerpts from *Beyond Rhetoric* are worth noting at the outset:

Today, one in four children in the United States is raised by just one parent, usually a divorced or unmarried mother. Many grow up without the consistent presence of a father in their lives. Each year, half a million babies are born to teenage girls ill prepared to assume the responsibilities of parenthood.\(^\text{16}\)

\[\ldots\]

Today, children are the poorest Americans. One in five lives in a family with an income below the poverty level. One in four infants and toddlers under the age of three is poor. Nearly 13 million children live in poverty, more than 2 million more than a decade ago. Many of these children are desperately poor; nearly 5 million live in families with incomes less than half the

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\(^{15}\) Id. This lengthy report has drawn praise and criticism. In appraising the report, the conservative *National Review* wrote: "In order to achieve a consensus, radically different points of view had to be accommodated, and so the findings are ludicrously inconsistent." Kate Walsh O'Beirne, *Children's Hour; Report by the National Commission on Children and John D. Rockefeller IV's Efforts to Promote Legislation to Protect Children*, NAT'L REV., July 29, 1991, at 34. But the conservative Heritage Foundation found elements to praise in that the report advocates "two-parent families, recognizes the importance of values and morality, endorses school choice, and acknowledges that what families need is not more government programs, but to be allowed to keep more of the money they earn." Wade F. Horn, *Children and Family in America: Challenges for the 1990s*, 345 THE HERITAGE LECTURES 1, 3-4 (1991) (Lecture presented at The Heritage Foundation on July 23, 1991). See also David Whitman, *Why Children's Commissions Fail*, 111 U.S. NEWS & WORLD REP., July 8, 1991, at 20 ("Rockefeller's intentions are admirable, but his gift for prophecy is suspect."); Editorial, *Beyond the Pro-Family Rhetoric*, THE CHRISTIAN SCI. MONITOR, July 1, 1991, at 20 (praising the report's efforts to focus on the current needs of the family).

\(^{16}\) B EYOND R HETORIC, supra note 14, at 4.
federal poverty level. While the majority of poor children are white, minority children are much more likely to live in a poor family. About 44 percent of all black children and more than 36 percent of Hispanic children are poor, compared to fewer than 15 percent of white children. Today, one in four adolescents in the United States engages in high-risk behaviors that endanger his or her own health and well-being and that of others. [Approximately 40 percent of the nation’s children are at risk of school failure.

The plight of children in America is not entirely the result of parental neglect, abuse, or abandonment; nor is it entirely the result of a lack of government funding for programs, racism, drugs, or the media. Rather, a combination of factors has led to the current situation. While no single solution will rectify the problems facing America’s children, we must ask ourselves one critical question: Is the law concerned with the best interest of the child? The Supreme Court’s continued adherence to the parental presumption provides a negative answer.

After giving a brief history of the application of the parental presumption in our legal system, Part II of this Article examines the best interest of the child in the context of two Supreme Court cases: Santosky and DeShaney v. Winnebago County Department of Social Services. Each case involved the Due Process Clause, and each in-

17. Id. at 24 (citations omitted).
18. Id.
19. Id. at xxvii. Disease and unanticipated pregnancy are two consequences of sexual activity that result in high-risk to adolescents. “Early sexual activity, pregnancy, and childbearing are epidemic in this country. Premarital adolescent sexual activity in the United States has been increasing for at least the last two decades. Currently, just over one-half of unmarried women age 15 to 19 have engaged in sexual intercourse at least once. By the time they reach age 19, three-quarters of unmarried women and 86 percent of unmarried men are sexually active.” Id. at 223 (citations omitted).
20. Id. at xxv. Lack of education is high-risk behavior: “In 1988 high school dropouts were nearly twice as likely as high school graduates and five times as likely as college graduates to be unemployed. Students with weak basic academic skills are more than nine times as likely to have a child out of wedlock and more than twice as likely to be arrested as their academically successful peers.” Id. at 185 (citations omitted).
22. The Court in Santosky regarded the Due Process Clause as demanding a clear and convincing level of proof so as to protect the interest of the parents. “[A]t a parental rights termination proceeding, a near-equal allocation of risk [preponderance of evidence standard] between the parents and the State is constitutionally intolerable.” Santosky v. Kramer, 455 U.S. 745, 768
involved a child or children abused by a natural parent over an extended period of time. The difference between the two cases is in the Court's approach to the interests of the child or children involved. *Santosky* was directed toward the best interest of the parent. *DeShaney* concerned the best interest of the child.

Part III of the Article examines the nature of state proceedings involving the termination of parental rights. After providing a detailed account of what occurs in such proceedings, the Article suggests that many state proceedings do not adequately ensure due process protection for the children involved. This part then demonstrates why a preponderance of the evidence standard would provide children with due process protection.

Part IV focuses on the legal status of the child within the changing American family unit. Statistical evidence is offered to show that the child's interest should be considered separately from that of the parents in termination proceedings. Part Four also demonstrates how existing due process analysis supports the best interest of the child. Finally, in Part V, this Article considers the best interest of the child from a federalist perspective and concludes that federalism justifies state autonomy in domestic relations matters.23

II. THE LAW OF SANTOSKY AND THE FACTS OF DESHANEY

*Santosky v. Kramer*24 and *DeShaney v. Winnebago Department of Social Services*25 serve as useful illustrations of the Supreme Court's approach to the best interest of the child. Before examining these cases, however, a brief exposition on the parental presumption is necessary.

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23. This Article supports the proposition that each state be allowed to develop its own standard of proof necessary to terminate parental rights, recognizing that many states will continue to require a higher standard than preponderance of the evidence. Those states legislating a higher standard should then confront the issue of whether that higher standard deprives a child of his or her constitutional guarantees of due process of law, not whether the lower standard deprives a parent of his or her constitutional guarantees of due process.


A. The Parental Presumption

The parental presumption is the historical presumption that the child's best interest is served by his or her remaining in the care and custody of a natural parent. As early as 1824, Circuit Justice Story wrote in a child custody decision:

As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education.26

Numerous cases so hold today.27 The fundamental presumption is that a child and the natural parent should remain together.28 Beyond Rhetoric supports this presumption:

Parents bear the primary responsibility for meeting their children's physical, emotional, and intellectual needs and for providing moral guidance and direction. It is in society's best interest to support parents in their childbearing roles, to enable them to fulfill their obligations, and to hold them responsible for the care and support of their children.29

28. In re D.G., 583 A.2d 160, 164 (D.C. 1990). For an example of a state statute incorporating the parental presumption, see CONN. GEN. STAT. ANN. § 46b-56b (West 1991) (In custody disputes between parents and non-parents, "there shall be a presumption that it is in the best interest of the child to be in the custody of the parent."); see also MICH. COMP. LAWS § 722.25 (In dispute between parent and agency or third person, "it is presumed that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence.") (MICH. STAT. ANN. § 25.312(5) (Callaghan 1992)).
29. BEYOND RHETORIC, supra note 14, at 65.
Children do best when they have the personal involvement and material support of a father and a mother and when both parents fulfill their responsibility to be loving providers.\textsuperscript{30}

Starting in 1923, with its decision in \textit{Meyer v. Nebraska},\textsuperscript{21} the Court began to take the view that the rights of a parent in his or her child are embodied in the Constitution itself. \textit{Meyer} was quickly followed by several other cases, each of which involved the authority of a parent—or a close relative—in a decisional dispute over a child.\textsuperscript{32} All flirted with the notion that such authority could be characterized as “fundamental.”\textsuperscript{33}

The majority opinion in \textit{Santosky v. Kramer} incorporated the fundamental rights notion of these earlier cases. The \textit{Santosky} Court stated that “[t]he 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.”\textsuperscript{34}

There was a time when the parental presumption was considered more as a trust, with the state being the dominant party and the parent entrusted with the child only as long as the parent acted in his or her

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\textsuperscript{30} Id. at 66.
\textsuperscript{31} 262 U.S. 390 (1923). See also Hershkowitz, supra note 27, at 252.
\textsuperscript{32} See Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) (“[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.”); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparations for obligations the state can neither supply nor hinder.”); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (“[T]hose who nurture . . . and direct [the child’s] destiny have the right, coupled with the high duty, to recognize and prepare [the child] for additional obligations.”).
\textsuperscript{33} Whenever a right is fundamental, it may only be superseded by a state or federal statute when the government has a compelling interest in the statutory objective. For examples of when this issue has arisen, Franz v. United States, 707 F.2d 582 (D.C. Cir. 1983); Sheppard v. Sheppard, 630 P.2d 1121 (Kan. 1981), cert. denied, 455 U.S. 919 (1982). But see Doe v. Staples, 717 F.2d 953 (6th Cir. 1983), cert. denied, 465 U.S. 1033 (1984).
\textsuperscript{34} Santosky v. Kramer, 455 U.S. 745, 753 (1982). The nature of this fundamental right, however, is elusive and difficult to predict. See, e.g., Hao Thi Popp v. Lucas, 438 A.2d 755 (Conn. 1980) (parent’s constitutional right must yield when the child’s welfare requires custody to be given to the non-parent); Custody of a Minor, 389 N.E.2d 68 (Mass. 1979) (state may remove child from parental custody only on a showing of unfitness of the parents); Sorentino v. Family & Children’s Soc’y of Elizabeth, 378 A.2d 18 (N.J. 1977), aff’d 391 A.2d 497 (N.J. 1978); Ellerbe v. Hooks, 416 A.2d 512, 514 (Pa. 1980) (parents have a “prima facie right to custody” which may be forfeited if the child’s interests lie in being in the custody of the non-parent) (citation omitted).
DUE PROCESS RIGHTS OF CHILDREN VERSUS PARENTS

proper fiduciary capacity. The state’s intervention was considered a "demonstration of the state’s benevolence." This attitude was directed more toward the best interest of the child than the rights of the parent. Since the early part of the twentieth century when Meyer was decided, however, the parental presumption has become deeply interwoven in American jurisprudence.

Even when the state intervenes on behalf of a child exposed to abuse, neglect, or surrender, for example, the state does so as a substitute parent, i.e. a parens patriae. In exercising the power of parens patriae, courts frequently deny certain rights to children that are otherwise afforded to adults. For example, states do not have to provide

35. In the nineteenth century and early twentieth century, the courts imposed few limitations on the state's ability to intervene in the family relationship. See Douglas R. Rendelmen, Parens Patriae: From Chancery to Juvenile Court, 23 S.C. L. Rev. 205, 213-29 (1971). The early American courts would exercise parens patriae authority in private and public custody disputes. Since the parent's rights derived from the state, which delegated control over children to their parents as a trust, failure to discharge faithfully the trust justified state intervention. The lack of modern constitutional interpretation added to the state's authority, with the state's interest at least equal to that of the parent.

36. Hershkowitz, supra note 27, at 251-52. State efforts today to remove the child from abusive parents and place the child in a protective setting are often far from benevolent. "For many children, foster care, which is intended to protect them from neglect and abuse at the hands of parents and other family members, becomes an equally cruel form of neglect and abuse by the state." BEYOND RHETORIC, supra note 14, at 282; see also infra notes 163-73 and accompanying text. The dissent in Santosky noted the possible harm that can result to children due to extensive residence in foster care. Santosky, 455 U.S. at 789 n.15 (Rehnquist, J., dissenting).

37. See, e.g., Parham v. J.R., 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."). See also Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972) (Illinois statute violated the Due Process Clause when it provided for the termination of the parental rights of a father without a determination of his unfitness); Barstad v. Frazier, 348 N.W.2d 479 (Wis. 1984) (court relies upon the parental preference theory in sustaining right of parent to child).

38. See generally Hershkowitz, supra note 27 (providing historical development of the parens patriae right). Even though minors have been extended greater protection under the Constitution, that protection is often limited by judicial decisions. See Bellotti v. Baird, 443 U.S. 622, 634 (1979) (constitutional rights of children cannot be equated with those of adults); see also Hodgson v. Minnesota, 497 U.S. 417, 435 (1990) ("[T]he constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women."); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) (upholding Ohio's parental notice requirement for minor women seeking an abortion).

39. For a discussion of the parens patriae power, see Michael J. Florio, Note, An Abused Child’s Right to Life Liberty, and Property in the Home: Constitutional Approval of State Inac-
minors with a jury trial in delinquency adjudications; states may prohibit the sale of pornographic material to children; states may deny minors the right to vote; and states may deny minors the right to marry without parental consent. The justification lies in the "peculiar vulnerability of children." Thus, the "State is entitled to adjust its legal system to account for children's vulnerability and their need for concern, . . . sympathy, and . . . paternal attention."

In most cases, the court has the final say, the parent next, and the child last. In Parham v. J.R., for example, the Court invoked the parental presumption to declare that due process does not require a "formal or quasi-formal" preconfinement hearing in cases where children are committed to institutions by their parents. Merely because a child "balks" at hospitalization does not "diminish the parent's authority to decide what is best for the child." Parents are generally seen as acting in the best interest of the child. "Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and [failing that, of the state] as parens patriae."

In Lassiter v. Department of Social Services, the Court acknowl-
edged that the "[s]tate has an urgent interest in the welfare of the child."\textsuperscript{51} According to dicta in a prior case, the state has an interest in ensuring that children are safeguarded from abuse which might prevent their "growth into free and independent well-developed men and citizens."\textsuperscript{52} Accordingly, the state may require school attendance,\textsuperscript{53} compel the vaccination and medical treatment of children,\textsuperscript{54} regulate or prohibit child labor,\textsuperscript{55} and eventually, may even terminate parental rights under the state's \textit{parens patriae} powers.

Parents, on the other hand, have a right to the care, custody, and management of their children.\textsuperscript{56} This encompasses the right to prepare the child for "additional obligations" and to educate the child. The state may not compel a child to attend public school when the parent desires to educate his or her child in a private school;\textsuperscript{57} nor may the state compel a child to attend school when the parent chooses to raise the

\textsuperscript{51} See generally id. But see Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (states' interest in assuring education is subject to accommodation/balancing of parents' religious beliefs); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (same).

\textsuperscript{52} See, e.g., Jacqueline Y. Parker, \textit{Dissolving Family Relations: Termination of Parent-Child Relations—An Overview}, 11 \textit{DAYTON L. REV.} 555, 569 (1986) (Parental misconduct alone is not sufficient to justify state intervention without a showing of resultant harm to the child). See also Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976) (Before a state can terminate family relationship, the state must prove physical or emotional harm to the child.).

\textsuperscript{53} Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (concerning the role that parents play in the education of the child and implying that, while the parental presumption is predominant, the state has an active responsibility to monitor the child's development).

\textsuperscript{54} Pierce v. Society of Sisters, 268 U.S. 510 (1925) (An Oregon statute which required all children to attend public school held unconstitutional because it infringed on the parental right to guide the child's education.).

\textsuperscript{55} See, e.g., Prince, 321 U.S. at 166 (upholding the Massachusetts labor laws as they apply to children.)

\textsuperscript{56} See, e.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982) (holding that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment); Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981) (The Court's decisions have "made it plain . . . that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'") (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)); Stanley, 405 U.S. at 651 ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum of respect . . . .' The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment.") (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).
child in accordance with the parent’s religious precepts. The state is restrained in these types of actions because the legislated activity infringes upon a perceived “fundamental” parental presumption. Thus, a state may not arbitrarily interfere with the parental presumption merely because the parent’s child-raising techniques do not fulfill the state’s expectations of ideal parenting. Only a “powerful countervailing interest” of the state would justify interference.

B. Santosky v. Kramer

The Court had little trouble acquiescing to the parental presumption in Santosky v. Kramer, a case involving termination of parental rights due to abuse and neglect. In November 1973, nine years before the Supreme Court announced its decision in Santosky, the Commissioner of the Ulster County, New York, Department of Social Services initiated a neglect proceeding and removed Tina Apel Santosky from her home. Tina was two-years-old and had suffered numerous injuries while in the care of her parents: a fractured left femur (treated with a homemade splint); bruises on the upper arms, forehead, flank, and spine; and abrasions of the upper leg. The following summer, the Commissioner removed Tina’s brother, John, from the Santosky home. John was less than one-year-old at the time. He was suffering from malnutrition, had bruises on the eye and forehead, had cuts and blisters on his hands and feet, and had multiple pin pricks on his

58. Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (compulsory school attendance law was unconstitutional as applied to Amish children because such law infringed on the parents’ right to raise their children in accordance with their Amish beliefs).

59. The extent of this “fundamental” right of the parents is unclear, especially in times of increasing neglect and abuse cases. Nonetheless, see Stanley, 405 U.S. at 645. In Stanley, the Court held an Illinois dependency statute unconstitutional. Under the statute, children of unwed fathers became wards of the state upon the death of the mother. The statute presumed that unwed fathers were unfit to raise their children. Peter Stanley, the unwed father, had lived with Joan Stanley intermittently for over 18 years. Together they had three children. When Joan Stanley died, however, Stanley’s children were declared wards of the state. Stanley challenged the statute on equal protection grounds, alleging that the statute treated unwed fathers differently from married fathers by presuming unmarried fathers were unfit. Id. at 646-48. In ruling the statute unconstitutional, the Court emphasized the parent’s fundamental right to conceive and raise his or her child and stated that the “private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.” Id. at 651 (emphasis added).

60. 455 U.S. 745 (1982).

61. Id. at 751.

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

63. Id.
back. The Commissioner took the third Santosky child from the hospital three days after he was born and likewise placed him in foster care. Although Jed Santosky had not suffered physical abuse, his removal was predicated upon the past abuse suffered by Tina and John.

For over four and one-half years, the state maintained the children in foster care and, at the same time, diligently engaged in efforts to rehabilitate their parents. Annie Santosky was offered training from a mother's aide, a nutritional aide, and a public health nurse. The state

64. Id.

65. Id. The Commissioner found that "immediate removal [of Jed] was necessary to avoid imminent danger to his life or health," Id. at 751. In a removal of this sort, without actual neglect, abuse or abandonment, the requisite standard for removal is preponderance of the evidence and removal must be based on actual conditions, not conjecture. See Palmore v. Sidoti, 466 U.S. 429 (1984) (mere conjecture that the child will suffer stigma by being raised in an inter racial household is insufficient as a basis of custody); Johnson v. Johnson, 564 P.2d 71 (Alaska 1977), cert. denied, 434 U.S. 1048 (1978) (conjecture based on affects of religious household, without more, is an insufficient basis of custody); Moye v. Moye, 627 P.2d 799 (Idaho 1981) (mere conjecture that an epileptic parent would be unable to care for a child is not a sufficient ground for a denial of custody).

66. Much of the expense of foster care is borne by the federal government in payments to the state. "If present trends in out-of-home placement continue, the Congressional Budget Office projects that the federal government will spend a total of approximately $9.24 billion between FY 1991 and FY 1996 under Title IV-E to maintain children in foster care." BEYOND RHETORIC, supra note 14, at 306. Furthermore, the National Commission on Children currently recommends that, "the federal government . . . require all states to extend foster care to youths up to age 21, conditional on their enrollment in educational or job training programs, and to provide services to prepare them for independent living." Id. at 302.

67. The approach utilized by the state was one of "tough-minded compassion." Id. at 113. This approach attempts to strike a balance between the view that abuse arises from a lack of personal responsibility and moral strength on the part of the parents, and the view that the problem results from the shortcomings of our social and economic systems. Thus, "parents must be responsible for the health and well-being of their children, but society must enable them to do the job well." Id. at 65. Under either a preponderance of the evidence or a clear and convincing standard, the state must provide sufficient support to the family to allow for reunification.

Family support programs are recommended for families under stress but showing no symptoms of disfunction. These programs have common goals:

First, they attempt to give families the skills and knowledge needed to cope more effectively with the stresses of contemporary life and to care for and nurture their children better. In achieving this goal, programs try to build on family strengths and capacities rather than emphasizing deficits. Second, family support programs are prevention-oriented; that is, they attempt to strengthen families before a crisis occurs. Third, they offer multi-disciplinary services that recognize and address the diverse and interrelated needs of families. Finally, family support programs are community-based and easily accessible to parents in order to be as responsive as possible to the families they serve.

Id. at 275.
family planning clinic offered counseling. The father, John Santosky, was offered psychiatric treatment and vocational training. Despite the considerable efforts of the state on their behalf, Annie and John Santosky refused to avail themselves of the services provided. As a result of the Santoskys’ refusal to try to correct the situation that precipitated the abuse of their children, the state initiated termination proceedings in 1978.

By statute, New York permitted the state to terminate parental rights upon a finding of a “fair preponderance of the evidence” that the child had been “permanently neglected.” Termination could occur only upon certain conditions being met: First, the child must have already been temporarily removed from the parent’s custody and have been in the custody of the state for at least one year. Second, the state must have made “diligent efforts to encourage and strengthen the parental relationship” with the ultimate goal of reunifying the family.

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68. Santosky, 455 U.S. at 782.
69. Id.
70. Id. at 783.
71. Id. at 780.
72. Id. at 747. At the time the Court rendered its decision, New York was not the only state using a preponderance of the evidence standard of proof in termination proceedings. Id. at 749. The standards of proof varied from state to state. Id. at 749 n.3. Thirty-five states used a higher standard of proof than a “fair preponderance of the evidence.” Id. at 749. Thirty states used the clear and convincing standard; fifteen states (Alaska, California, Georgia, Iowa, Maine, Michigan, Missouri, New Mexico, North Carolina, Ohio, Rhode Island, Tennessee, Virginia, West Virginia and Wisconsin) required the “clear and convincing” standard by statute. Id. at 749 n.3. Fifteen different states (Alabama, Arkansas, Florida, Kansas, Minnesota, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Pennsylvania, Texas, Utah, Washington and Wyoming) plus the District of Columbia and the Virgin Islands required the clear and convincing standard by judicial decisions. Id. Two other states, Illinois and New York, required clear and convincing evidence in certain types of parental rights termination proceedings (mental illness or severe child abuse were grounds for termination), but generally required only a preponderance of the evidence. Id. Two states, New Hampshire and Louisiana, required the highest standard of proof: beyond a reasonable doubt. Id. And one state, South Dakota, required a “clear preponderance” not just a “fair preponderance.” Id. All other states used the preponderance of evidence standard. Id. at 749.
73. Temporary removal of the child could occur in one of two ways. The parents could surrender the child—as is more often the case—or the Family Court could have ordered removal based upon a finding of child abuse or neglect. Id. at 776 (Rehnquist, J., dissenting). Neglect was the cause of removal in the Santosky case. Id. at 751. In 1973, after several incidents suggesting parental abuse and neglect, the Commissioner initiated a neglect proceeding and removed Tina from the home. Id. Then, ten months later, the Commissioner procured another Court order to remove John III from the Home because of similar neglect and abuse problems. Id. Finally, based on the injuries to the older children, the Commissioner removed Jed from his parents’ custody shortly after his birth. Id.
74. Id. at 779 (Rehnquist, J., dissenting). The greater the efforts of the state to provide reha-
Third, the state had to comply with numerous procedural requirements directed toward the interest of the parents. These included providing notice of the termination hearing and notice of the permissibility of retaining counsel. Finally, the state had the burden of proving that the parents did in fact neglect the child and, because of this neglect, the child's best interest would be served by termination of parental rights.75

During the fact-finding hearing, the judge concluded that the state had proven by a preponderance of the evidence that the Santosky children had been "permanently neglected."76 The judge emphasized that the state had made "diligent efforts" to encourage and strengthen the parental relationship, but that these efforts were to no avail.77 Annie and John Santosky were not capable of providing for the future of their children in an atmosphere where they could thrive.78 Thus, it would be in the best interest of the three children to terminate parental rights.79

While the children remained in foster care, the parents appealed the decision of the court, arguing that the statute's preponderance of the evidence standard violated their due process rights under the federal Constitution.80 The New York Supreme Court, Appellate Division, affirmed the Family Court's ruling, holding that the preponderance of the evidence standard was "proper and constitutional."81 The standard "recognizes and seeks to balance rights possessed by the child . . . with those of the natural parents . . . ."82 The United States Supreme Court granted certiorari to consider the issue of whether use of the preponderance of the evidence standard in termination proceedings violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.83

On March 24, 1982, four years after the initial termination proceeding was initiated, the Court held that the Santosky's had a fundamental liberty interest in the care and custody of their children,84 and that the

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75. Id. at 780.
76. Id. at 747.
77. Id. at 752.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id.
84. "[The] freedom of personal choice in matters of family life is a fundamental liberty
Due Process Clause required the state to demonstrate by clear and convincing evidence the existence of permanent neglect before terminating that fundamental liberty interest.\textsuperscript{85}

The Court ordered a new hearing to determine if sufficient facts warranted termination under the heightened standard of proof.\textsuperscript{86} The New York Supreme Court, Appellate Division, reviewed the evidence presented using a clear and convincing standard and affirmed the termination of the Santosky’s parental rights.\textsuperscript{87}

By framing the issue in terms of the parents’ interest rather than that of the children, the Santosky Court ignored the factual history of New York’s rehabilitative efforts and the length of time the children had spent in foster care. Most importantly, the Court failed to pursue a constitutional analysis that focused on the best interests of the children.\textsuperscript{88} The focus of the majority opinion was on the due process rights afforded to the parents of the children. The best interest of the parents, rather than the best interests of the children, was the predominant concern. The Court simply acquiesced in the parental presumption.

C. DeShaney v. Winnebago County Department of Social Services\textsuperscript{89}

\textit{DeShaney} was decided seven years after \textit{Santosky}. “The facts of this case are undeniably tragic.”\textsuperscript{90} Joshua DeShaney was born in 1979.

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\textsuperscript{85} The Court added, somewhat sardonically, that “[w]e cannot believe that it would burden the State unduly to require that its fact-finders have the same factual certainty when terminating the parent-child relationship as they must have to suspend a driver’s license.” \textit{Id.} at 768. See N.Y. VEH. & TRAF. LAW § 227.1 (McKinney Supp. 1981) (requiring the State to prove traffic infractions by clear and convincing evidence).

\textsuperscript{86} \textit{Id.} at 770.

\textsuperscript{87} See \textit{In re John AA}, 89 N.Y.S.2d 942 (1982).

\textsuperscript{88} The decision in \textit{Santosky} may have been due to the Court’s concern over the result in Lassiter v. Department of Social Servs., 452 U.S. 18, \textit{reh’g denied}, 453 U.S. 927 (1981), which held that due process gives indigent litigants the right to appointed counsel when such litigants are exposed to deprivation of their physical liberty. \textit{Id.} at 26-27. When the facts of the case present a situation where an indigent parent may lose his or her child, the Court held that the Constitution does not require the appointment of counsel in every parental termination proceeding. \textit{Id.} at 31. Appointment of counsel to represent the child lies within the discretion of the trial court, subject to appellate review. \textit{Id.} at 32. Thus, there is the possibility that the State could amass its forces to deprive an indigent of his or her child without the indigent having an attorney. The State would be a formidable “bully.” See discussion of \textit{Lassiter} in \textit{Santosky}, 455 U.S. at 752-70 (indicating a significant reliance upon concern over the loss of appointed counsel as a matter of right).

\textsuperscript{89} 489 U.S. 189 (1989).

\textsuperscript{90} \textit{Id.} at 191.
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In 1980, Joshua's father was awarded custody of his son pursuant to a divorce. The divorce occurred in Wyoming, and Joshua and his father moved to Wisconsin soon thereafter. The father entered into a second marriage, and that, too, ended in divorce. During the divorce proceedings, the second wife complained that the father hit the boy, causing marks. The father denied the accusations. The state Department of Social Services did not investigate.

In 1983, Joshua was admitted to a local hospital. He had multiple bruises and abrasions. The examining physician reported suspected abuse, and Joshua was placed in the temporary custody of the hospital. A child protection team conducted an investigation, but determined that there was insufficient evidence of child abuse to retain Joshua in custody.

Joshua was returned to the custody of his father. One month later, the boy was again treated for suspicious injuries at the hospital emergency room. Again, officials "concluded that there was no basis for action." A social worker began making monthly visits to the DeShaney home. On one such visit, the social worker noticed suspicious injuries on the boy's head. The social worker also learned that the boy was not attending preschool. These circumstances were noted in the file, but the caseworker "did nothing more."

In late 1983, Joshua was again admitted to the emergency room. The hospital notified the Department of Social Services that Joshua had suspicious injuries, but Joshua was sent home. When the social worker visited Joshua's home on two subsequent occasions, "she was told that Joshua was too ill to see her." Finally,

In March, 1984, Randy DeShaney beat 4-year-old Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by trau-

91. Id.
92. Id. at 192.
93. Id.
94. Id.
95. Id. The Team did, however, decide to recommend several measures to protect Joshua, including enrolling him in a preschool program, providing his father with certain counselling services, and encouraging his father's girlfriend to move out of the home. Randy DeShaney entered into a voluntary agreement with DSS in which he promised to cooperate with them in accomplishing these goals. Id.
96. Id.
97. Id. at 193.
98. Id.
matic injuries to the head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded. 99

Joshua and his mother brought suit against the county, its Department of Social Services, and various individuals in the Department. The complaint alleged that Joshua had been deprived of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, because officials failed to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known. 100

After a series of lower court proceedings, the Supreme Court granted certiorari due to the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights . . . and the importance of the issue to the administration of state and local governments. 101

The majority found that the Fourteenth Amendment did not provide a remedy of redress against the state for the harm that resulted to Joshua, because the state did not have an affirmative duty under the Fourteenth Amendment to care for Joshua under the circumstances of the case. The Court suggested state remedies in tort 102 under "a system of liability which would place upon the State and its officials the responsibility for failure to act . . . " 103 The Court concluded that it was up to the

99. Id.
100. Id. The District Court granted summary judgement for the county and its officials, and the Court of Appeals for the Seventh Circuit affirmed. Id.
101. Id. (citation omitted).
102. Id. at 203. "It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger." Id. See, e.g., Turner v. District of Columbia, 532 A.2d 662 (D.C. 1987) (the issue was whether the District of Columbia and its officials and agencies may be held liable for the death by starvation of an abused and neglected child and the malnutrition of another child which resulted, in part, from the alleged negligence of an agency of the District of Columbia government).
103. DeShaney, 489 U.S. at 203. See, e.g., Suter v. Artist M., 112 S. Ct. 1360, (1992) (holding that the federal Adoption Assistance and Child Welfare Act of 1980 does not create an enforceable right on behalf of children in foster care, but nonetheless containing a strong dissent from Justice Blackmun in which he considers the case a departure from established law);
states to initiate such a system. "[T]hey should not have it thrust upon them by this Court’s expansion of the Due Process Clause of the Fourteenth Amendment."\(^{104}\)

Throughout its opinion, the majority drew attention to the fact that "the harm was inflicted not by the State of Wisconsin, but by Joshua’s father."\(^{105}\) The Court implied that had the boy been within the physical custody of the state, redress against the state would have been available. But since Joshua was at all relevant times in the custody and control of his father,\(^ {106}\) there was no remedy against the state or its agents under the Fourteenth Amendment.

Despite the majority’s legal analysis, the Court was moved by the factual dilemma. "Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them."\(^ {107}\) It is significant that the majority included the gruesome facts of what happened to the child in its opinion. In so doing, the Court indicated a willingness to reject the presumption that the child’s best interest subsists within the parent’s best interest.

The facts of DeShaney suggest that the best interest of the child is not always subordinate to the interest of the parent. Joshua’s father, Randy DeShaney, was not dissimilar to many of the single parents with children today. He was divorced, poor,\(^{105}\) involved with more than

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\(^{104}\) Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir. 1988), cert. denied, 493 U.S. 1044 (1990) (A public school student who alleged that one of her teachers sexually abused her throughout high school, may maintain an action against school officials for their indifferent policies in reporting incidents of abuse).

\(^{105}\) DeShaney, 489 U.S. at 203. Such a federalist notion of respect-and-more for state legislative enactments, finds resonance in Santosky’s dissent, also written by Chief Justice Rehnquist:

Such a conclusion [to adopt a preponderance of the evidence test rather than a clear and convincing one] is well within the province of the state legislatures. It cannot be said that the New York procedures are unconstitutional simply because a majority of the Members of the Court disagree with the New York Legislature’s weighing of the interests of the parents and the child in an error-free fact-finding hearing.

\(^{106}\) Santosky v. Kramer, 455 U.S. 745, 788 n.13 (1982) (Rehnquist, J., dissenting). This analysis rests in part on the domestic relations exception to federal jurisdiction. This too is reflected in Justice Rehnquist’s dissent in Santosky: “[The Santosky majority] cavalierly rejects the considered judgment of the New York Legislature in an area traditionally entrusted to state care. The Court thereby begins, I fear, a trend of federal intervention in state family matters which surely will stifle creative responses to vexing problems.” Id. at 791.

\(^{107}\) Id. at 201 n.9.

\(^{108}\) Id. at 202-03.

\(^{109}\) “Poverty rates among young families have almost doubled since the mid-1960s, and middle-income families report greater difficulty in making ends meet. For perhaps the first time
one sexual partner, and prone to violence. While being a single parent is not inherently suspect, this, coupled with other factors such as poverty, often has a problematic effect on parenting. “Research on the effects of single parenthood confirms that children who grow up without the support and personal involvement of both parents are more vulnerable to problems throughout childhood and into their adult lives.” While the research indicates that Joshua DeShaney may have adapted better in his father-headed household, he was six times more likely to be poor as children who live with both parents, and at most ages, problems seem to be more pronounced for boys in his situation than for girls. The number of single parents is growing rapidly in the United States.

The divorce rate in the United States has quadrupled in the past three decades: Approximately half of all marriages now end in divorce. Indeed, the United States has the highest divorce rate in the world. Even more alarming than the destruction of these relationships is the high and growing rate of out-of-wedlock childbearing and its connection with poverty and abuse among children.

“Today, approximately one in four children in this country is born outside of marriage, compared to only 1 in 20 in 1960.” There is evi-

since the Great Depression, American children will no longer routinely surpass their parents’ standard of living.” BEYOND RHETORIC, supra note 14, at 8 (citations omitted).

109. Id. at 251.
110. Id. at 253.
111. Id.
112. Today, one in four children in the United States is raised by just one parent, usually a divorced or unmarried mother. Many grow up without the consistent presence of a father in their lives. One of every five children lives in a family without a minimally decent income. Many of these families are desperately poor, with incomes less than half the federal poverty level. Each year, half a million babies are born to teenage girls ill prepared to assume the responsibilities of parenthood. Most of these mothers are unmarried, many have not completed their education, and few have prospects for an economically secure future.

Id. at 4.

113. Recent studies affirm the growing poverty rate among children. According to the National Center for Children in Poverty, a part of Columbia University’s School of Public Health, between 1990 and 1991, the number of poor American children under age 6 rose from 5.3 million to 5.6 million, the highest recorded, and the poverty rate for children under 6 edged up from 23 percent to 24 percent. That is double the poverty rate for Americans 65 and older and more than double the rate for adults ages 18 to 64.

Don Colburn, Poverty Rate Record Belongs to Children, WASH. POST, Aug. 31, 1993, at Z5.

114. BEYOND RHETORIC, supra note 14, at 252. The statistics suggest that, “more than half of
idence to suggest that laws encourage single parents to remain that way.

At the federal level, for example, there is a ‘marriage penalty’ in the tax law; currently, a married couple pays higher taxes than two single adults with the same income who live together. At the state level, Aid to Families with Dependent Children, a public assistance program targeted primarily at single mothers and their children, is available only on a very restricted basis to families where the father is present and both parents are unemployed.\(^\text{115}\)

Thus, laws and entitlement programs seem to favor avoiding the kinds of social commitments that are proven to engender better child development. If these laws do in fact contribute to the presence and enlargement of single parent families, they can very well contribute to the kinds of families in which Joshua DeShaney lived when he was brutally beaten by his father.

More attentive diagnosis by hospital personnel may have indicated the presence of battered child syndrome,\(^\text{116}\) or perhaps more aggressive custody modification on the part of the mother could have changed the eventual outcome. But the fact remains that Joshua will spend the rest of his life in an institution as a result of parental abuse, abuse that is increasingly common, particularly in geographical areas involved with poverty, drugs or neglect.

Justice Blackmun wrote a separate dissent in *DeShaney*.\(^\text{117}\) His

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\(^{115}\) Id. at 33 (citations omitted).

\(^{116}\) Id.

\(^{117}\) See generally Commonwealth v. Rodgers, 528 A.2d 610 (Pa. Super. Ct. 1987) (syndrome is based upon a finding that a child suffers multiple physical injuries, is undernourished, has poor hygiene, and that the severity and type of injury is inconsistent with the explanation offered by the custodial person); Richard J. Gelles, *Child Abuse as Psychopathology: A Sociological Critique and Reformulation*, 43 Am. J. Orthopsychiatry 611-21 (1973) (recommends earlier intervention before the child is beaten or killed).
opinion is particularly significant because he wrote the majority opinion in \textit{Santosky}, an opinion replete with reference to parental presumptive rights and the intricacies of the Due Process Clause.\textsuperscript{118} This is not true in \textit{DeShaney}. Blackmun "would adopt a 'sympathetic' reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."\textsuperscript{119}

While \textit{Santosky} involved the termination of a parent’s rights, and \textit{DeShaney} involved a civil rights action against the state and agents of the state, the crucial shift in Blackmun's analysis from \textit{Santosky} to \textit{DeShaney} suggests Blackmun’s recognition of the factual reality of the child’s plight: “Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father . . . .”\textsuperscript{120} If there had been a suit by the state to terminate the rights of Randy DeShaney in his son Joshua, would Justice Blackmun still demand clear and convincing proof of the father’s neglect and abuse before termination? What if the law demanded the return of Joshua yet again to his father because the father partially cooperated with the state in its rehabilitative efforts and therefore was able to rebut the clear and convincing standard? Indeed, the evidence of abuse present in \textit{DeShaney} was not sufficient to overcome the clear and convincing standard. In order for the state to have satisfied the clear and convincing standard, Randy DeShaney would have had to refuse to cooperate with state efforts at rehabilitation over a long period of time—six months to a year, or perhaps longer.

During this time, what becomes of the child’s best interest? This is the crucial question. If Justice Blackmun were serious in wanting to avoid the “sterile formalism” of his due process analysis in \textit{Santosky}, he would have examined the brutal climate in which many children

\textsuperscript{118} See \textit{supra} text accompanying notes 18-21, 90.
\textsuperscript{119} \textit{DeShaney}, 489 U.S. at 213.
\textsuperscript{120} \textit{Id}.
exist in America today, and he would recognize that the parent’s presumptive interest and the child’s best interest increasingly do not coincide.\textsuperscript{121}

A preponderance of the evidence standard would still allow consideration of the parent’s interest, but would at the same time provide the child with greater due process recognition. Such an approach finds support in \textit{Beyond Rhetoric}:

Children need strong, stable, one-to-one relationships with their parents. When parents are unable or unwilling to provide consistent care and nurturing, children should have an opportunity to develop stable, trusting relationships with other caring adults. Accordingly, the Commission encourages states to review their judicial policies regarding termination of parental rights and take steps to accelerate the adoption process in cases where babies have been abandoned at birth and where repeated attempts to reunite older children and their parents have been unsuccessful. Some commissioners recommend terminating parental rights for abandoned infants after 90 days, in order to ensure that these very young children are able to be placed in loving homes and to begin the process of bonding with their adoptive parents as early as possible . . . . The Commission further urges the National Conference of Juvenile Court Judges to develop model statutes and administrative procedures to accelerate the termination of parental rights in cases where there is little hope of successfully reuniting children with their biological families and adoption is feasible.\textsuperscript{122}

The \textit{DeShaney} majority’s suggestion that it was up to the state to provide remedies for the abuse suffered by Joshua reflects a shift in attitude on the part of the Court from \textit{Santosky} to \textit{DeShaney}. The Court

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{121} This position would be in direct opposition to the presupposition of the parental presumption. \textit{See supra text accompanying notes 47-49.}
\item \textsuperscript{122} \textit{Beyond Rhetoric}, \textit{supra} note 14, at 304-05. Only one other time does the Report refer specifically to termination of parental rights. Again, this was in the context of infants and other young children and the Report again encourages “states to move faster to terminate parental rights, where appropriate. We recognize, however, that termination of parental rights may not be in the best interests of all children.” \textit{Id.} at 300-01. But children of all ages are incorporated in the comment: “Until the nation pays substantial attention to building the capacity of communities to support all families in their childrearing roles and provides an array of supportive services to those experiencing problems, the existing child welfare system will continue to be little more than ‘an emergency room for troubled families.’” \textit{Id.} at 301.
\end{enumerate}
\end{footnotesize}
recognized that the states are the appropriate arenas for resolving family relations matters. In acknowledging the tragic facts of DeShaney, the Court may also have finally recognized that states may often have legitimate reasons to depart from a clear and convincing standard of proof in proceedings to terminate the rights of parents like Randy DeShaney.\textsuperscript{123}

III. A PORTRAIT OF THE TERMINATION PROCESS

A. The Children

Cases involving the termination of parental rights arise in the context of adoption proceedings or child protection proceedings, the former usually occasioned by voluntary surrender and the latter resulting from abandonment or abuse\textsuperscript{124} and neglect.\textsuperscript{125} Adoption by someone other

\textsuperscript{123} It is unfair to conclude generally that if termination would be granted through preponderance of the evidence, states would seek to "bully" parents into termination. Santosky v. Kramer, 455 U.S. 745, 784 n.11 (1982). To the contrary, states would still be constitutionally mandated to provide the same kinds of services that were offered to Annie and John Santosky—services that provide for reunification as quickly as possible. There would have to be a showing by a preponderance of the evidence that the parents failed to take advantage of these services, and this finding would of course be subject to appellate review. The distinctive difference between the two standards however, is the factual one that the children would suffer less harm and spend less time in foster care with the lesser of the two levels of proof. The parents would still be given the presumption, but the children would have greater recognition as possessing individual rights.

\textsuperscript{124} For the difference between abuse and discipline, see State v. Jones, 95 N.C. 588 (1886) (criminal responsibility for abuse arises only when there is infliction of permanent injury or discipline proceeding from malice).

\textsuperscript{125} Most state statutes clearly define the grounds for involuntary termination resulting from abandonment or abuse and neglect. For example, 23 Pa. Cons. Stat. § 2511 (1993) enumerates grounds for involuntary termination as follows:

(a) General Rule. — The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

1. The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.

2. The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

3. The parent is the presumptive but not the natural father of the child.

4. The child is in the custody of an agency, having been found under such circumstances that the identity or whereabouts of the parent is unknown and cannot be ascertained by diligent search and the parent does not claim the child within three months after the child is found.
than a biological parent is the anticipated result of termination.126
This third party could be a state agency, a foster parent, a distant rela-

(5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child.

(6) In the case of a newborn child, the parent knows or has reason to know of the child's birth, does not reside with the child, has not married the child's other parent, has failed for a period of four months immediately preceding the filing of the petition to make reasonable efforts to maintain substantial and continuing contact with the child and has failed during the same four-month period to provide substantial financial support for the child.

(7) The parent is the father of a child who was conceived as a result of a rape.

(b) Other Considerations. — The court in terminating the rights of a parent shall give primary consideration to the needs and welfare of the child. The rights of a parent shall not be terminated solely on the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent. With respect to any petition filed pursuant to subsection (a) (1) or (6), the court shall not consider any efforts by the parent to remedy the conditions described therein which are first initiated subsequent to the giving of notice of the filing of the petition.

Id. (emphasis omitted).

126. Adoption is purely a product of statute. The natural parent could surrender the child and consent to the adoption in accordance with the state statute. See, e.g., ARK. CODE ANN. § 9-9-220(b) (Michie 1993) (all rights of a parent to a child may be relinquished and the parent-child relationship terminated by a written agreement signed by the adult parent); CONN. GEN. STAT. § 45a-724(a)(1) (1992) (a statutory parent may, by written agreement, give his or her minor child in adoption). Parental rights may be terminated without consent in states if certain conditions are met. See, e.g., ME. REV. STAT. ANN. tit. 19, § 532(2) (West 1993) (setting forth specific instances when consent to adoption is not required, including those cases where a parent willingly abandoned the child); N.Y. DOM. REL. LAW § 111(2) (McKinney 1993) (also setting forth specific instances when consent to adoption is not required, including parental failure to visit the child for a period of six months when able to do so and parental incompetence due to mental retardation).
tive or friend, or, in some cases, a grandparent.\textsuperscript{127} There is an ever-growing number of children entering the system. Each year there are approximately 1,003,600 cases of child neglect and 675,000 cases of child abuse, resulting in the deaths of 1100 children.\textsuperscript{128} Yearly, almost 160,000 children receive serious injuries as a result of maltreatment. These injuries include loss of consciousness, arrested breathing, broken bones, third degree burns, schooling loss, and loss of special education services.\textsuperscript{129} Additionally, 952,600 children sustain moderate injuries or impairments. These include bruises, depression, and emotional distress that lasts at least forty-eight hours.\textsuperscript{130} These numbers are approximate, but it is ascertainable “that in 1989, 2.4 million reports of suspected child maltreatment were filed in the United States, of which more than 900,000 cases were officially substantiated.”\textsuperscript{131} The increase in the number of reports of child abuse in recent years has been astronomical.\textsuperscript{132}

“In more than [ninety] percent of the cases the child is victimized not by a stranger but by a parent, other family member, or friend known to the child.”\textsuperscript{133} These children are often removed from the custody of a parent when the parent or another family member is the cause of the abuse. This separation from siblings, school, community

\begin{footnotes}
\textsuperscript{127} Note that the parental presumption arises only in the context of a parent versus the state or some third party. The presumption does not arise in the context of a dispute between two parents; there, the presumption applied in connection with a minor is “primary caretaker presumption.” Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981) (in a custody dispute between a natural mother and a natural father, primary caretaker status arises when one of the parents prepares meals, bathes, disciplines, educates, teaches and arranges for the social agenda of the child).
\textsuperscript{128} NATIONAL CTR. ON CHILD ABUSE AND NEGLECT, U.S. DEP’T OF HEALTH AND HUMAN SERVS., STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT, 3-5 to 3-11 (1988).
\textsuperscript{129} Id. at 3-10 to 3-11.
\textsuperscript{130} Id.
\textsuperscript{132} CHILDREN’S DEFENSE FUND, supra note 131, at 175.
\textsuperscript{133} Id. at 176. The report identifies three groups of children: those abused or neglected, those in the foster home system already, and those suffering emotional problems. There is overlap among the three. Id.
and traditional support is acutely painful to the child.

B. The Bureaucracy

Once the statutory prerequisites for termination are met, a termination proceeding can be initiated by filing a petition with the court. Upon filing, the clerk of the court sets a time and a place for the hearing and provides notice to the interested parties, including the parents of the child, as well as any legal guardian appointed for the child. The actual termination hearing almost always consists of two

134. See, e.g., ALA. CODE § 26-18-5 (1993) (petition may be filed by public or private licensed child-placing agency, a parent, or with permission of the court, any interested party); ARIZ. REV. STAT. ANN. § 8-533 (1993) (petition may be filed by any person or agency that has a legitimate interest in the welfare of the child, including a relative, foster parent, physician, or child welfare agency); CONN. GEN. STAT. § 17a-112 (1988) (petition may be filed by the Commissioner of Children and Youth Services or, among others, the attorney who represented the child in the prior commitment proceeding); DEL. CODE ANN. tit. 13, §§ 1104(4)-(5) (1993) (petition may be filed by licensed agency or blood relative of the child); FLA. STAT. ch. 39.461 (1993) (petition may be filed by attorney for department or by any person with knowledge of the facts alleged); IDAHO CODE § 16-2004 (1993) (petition may be filed by authorized agency or any other person possessing legitimate interest in the matter); KAN. STAT. ANN. § 38-1581(a) (1992) (petition may be filed by any interested party); MISS. CODE ANN. § 93-15-105(1) (1993) (petition may be filed by any person, agency, or institution); N.H. REV. STAT. ANN. § 170-C:4 (1993) (petition may be filed by an authorized agency or by a guardian or legal custodian of the child); N.C. GEN. STAT. § 7A-289.24 (1993) (petition may be filed by guardian of child, county department of social services, licensed child-placing agency to which the child has been surrendered for adoption, or any person with whom the child has continuously resided for 2 years); 23 PA. CONS. STAT. § 2512(A) (1993) (petition may be filed by "[t]he individual having custody or standing in loco parentis to the child and who has filed a report of intention to adopt"); S.C. CODE ANN. § 20-7-1564 (Law. Co-op. 1991) (petition may be filed by child protective services agency or any interested party).

Some states mandate that intermediary reports be filed in the court in which the petition for adoption is initiated. See, e.g., 23 PA. CONS. STAT. § 2533 (1993), which states:

Within six months after filing the report of intention to adopt, the intermediary who or which arranged the adoption placement of any child under the age of 18 years shall make a written report under oath to the court in which the petition for adoption will be filed and shall thereupon forthwith notify in writing the adopting parent or parents of the fact that the report has been filed and the date thereof.

In some states, such as Pennsylvania, for example, a report of intention to adopt is not required. The Pennsylvania statute states that "[n]o report shall be required when the child is the child, grandchild, stepchild, brother or sister of the whole or half blood, or niece or nephew by blood, marriage or adoption of the person receiving or retaining custody of physical care." Id. at § 2533(c).

135. While some states mandate that a parent is entitled to counsel by statute in the civil termination proceeding, there is no constitutional guarantee to counsel as there is in criminal proceedings under the Sixth Amendment. See Lassiter v. Department of Social Servs., 452 U.S. 18, 31 (1981). Few jurisdictions provide counsel for children. See, e.g., In re Kapesos, 360 A.2d 174 (Pa. 1976); Ramsey, supra note 125.

136. For statutes providing notice to the guardian of a child, see, e.g., ARIZ. REV. STAT. ANN.
phases.\textsuperscript{137} First, the court engages in some type of factfinding process to determine whether the child is in fact abused, dependent, or in some need of aid.\textsuperscript{138} Second, a hearing is held to determine if the child's best interest will be served by terminating parental rights or by providing for some other alternative.\textsuperscript{139}

\textsuperscript{137} At the fact-finding stage the petitioner must prove the existence of one of the statutory grounds for termination; the disposition stage involves the court's decision as to whether termination is in the best interest of the child. \textit{In re Montgomery}, 316 S.E.2d 246, 252 (N.C. 1984). See also \textit{COLO. REV. STAT.} § 19-11-103 (1986); \textit{N.Y. FAM. CT. ACT} §§ 622-23 (Consol. 1993). But other states combine the fact-finding and dispositional stage of the proceeding.

\textsuperscript{138} Even though the statutory grounds for termination vary from state to state, the courts' functions at the fact-finding stage remain similar among the states and the District of Columbia. The essential element is determining if the petitioner has met the statutory grounds for termination: neglect, abuse, surrender or the general sense of dependency. \textit{See Clemens v. Alabama Dep't of Pensions & Sec.}, 474 So. 2d 1143, 1145 (Ala. Civ. App. 1985) (trial court must first find from clear and convincing evidence that the child is dependent; once dependency is found, court must determine whether less drastic measures than termination of the rights of the parent would suffice to serve the best interest of the child); \textit{ALASKA STAT.} § 26-18-7 (1993) (court must determine at the adjudicatory hearing that there is clear and convincing evidence that the child is in need of aid); \textit{COLO. REV. STAT. ANN.} § 19-3-602 (West 1994) (court must hold a separate hearing and determine if sufficient grounds exist for termination); \textit{FLA. STAT. ANN.} § 39.467 (West 1994) (court must hold an evidentiary hearing to determine if clear and convincing evidence of the statutory grounds for termination exist); \textit{GA. CODE ANN.} § 15-11-81 (1993) (court must determine first whether there is clear and convincing evidence of parental misconduct or inability as defined by the statute); \textit{KY. REV. STAT. ANN.} § 625.080 (Michie/Bobbs-Merrill 1993) (circuit court shall conduct hearing to make findings of fact); \textit{MICH. COMP. LAWS ANN.} § 712A.19b, annot. 1 (West 1994) (court must determine that there is clear and convincing evidence of one of the statutory grounds for termination); \textit{NEV. REV. STAT.} § 128.090 (1993) (court shall require the petitioner to establish the facts by clear and convincing evidence); \textit{N.Y. FAM. CT. ACT} § 622 (Consol. 1994) (court will hold a separate factfinding hearing to determine if the allegations are supported by clear and convincing evidence); \textit{N.C. GEN. STAT.} § 7A-289.30 (1993) (during the adjudication stage of a termination proceeding, court must determine whether the statutory grounds for termination have been proven by clear and convincing evidence); \textit{WIS. STAT. ANN.} § 48.42 (West 1994) (purpose of the fact-finding hearing is to determine whether grounds exist for termination of parental rights).

\textsuperscript{139} In Arizona, for instance, the court may either terminate parental rights or dismiss the po-
Throughout it all, the state is dependent upon a bureaucratic system often managed and staffed by poorly-paid, over-worked men and women.\textsuperscript{140} For instance,

A nationwide study of salaries in public and private welfare agencies in 1989 found that social workers with master's degrees earned an average of $24,824; those without master's degrees earned between $18,000 and $19,000. A survey of public child welfare staff in more than 40 states found that the median salary for entry-level direct service workers in 1989 was just above $21,000; for top-level direct service workers, it was just above $27,000.\textsuperscript{141}

It is not surprising therefore, that "[t]urnover in the field is also quite high. Many experienced social workers leave public service for more lucrative and less stressful positions in private practice, industrial social work, and employee assistance programs."\textsuperscript{142}

The social workers currently deployed in the child welfare field "average between 50 and 70 cases at any given time, although some caseworkers report carrying more than 200 cases simultaneously."\textsuperscript{143} In addition, because of present budget constraints, many positions are filled by men and women with little professional education or experience in child welfare. "Today, only 25 percent of caseworkers providing direct services in the child welfare system have any social work training; roughly 50 percent have no previous experience working with children and families or in human service agencies."\textsuperscript{144} Such deficiencies were brought to the attention of the district court in \textit{Lashawn A. v. Dixon.}\textsuperscript{145} The case involved a class action on behalf of children in foster care in the District of Columbia, and children who, although not yet in foster care, were the subject of reports of abuse and neglect. The court found that the foster care system operated by the District of Columbia did not comply with federal law, District law, or the United

\begin{itemize}
\item 140. For an excellent overview of both the historical and current systems of child dependency actions, see Judith Areen, \textit{Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases}, 63 \textit{GEO. L.J.} 887 (1975).
\item 141. \textit{Beyond Rhetoric}, supra note 14, at 334.
\item 142. \textit{Id.} at 335 (citation omitted).
\item 143. \textit{Id.} at 335 (citation omitted).
\item 144. \textit{Id.}
\end{itemize}
States Constitution. The court described how the system can deprive the children:

It is a case about thousands of children who, due to family financial problems, psychological problems, and substance abuse problems, among other things, rely on the District to provide them with food, shelter, and day-to-day care. It is about beleaguered city employees trying their best to provide these necessities while plagued with excessive caseloads, staff shortages, and budgetary constraints. It is about the failure of an ineptly managed child welfare system . . . and the resultant tragedies for District children relegated to entire childhoods spent in foster care drift. Unfortunately, it is about a lost generation of children whose tragic plight is being repeated every day.47

While some systems are better than others, for those states with systems similar to the District of Columbia's, the requirement of a clear and convincing level of proof for termination of parental rights prevents states from making their systems more responsive to the child’s best interest.

C. Rehabilitation and Reunification

Because termination “operates to extinguish all legal rights between parent and child,” termination will occur only as a last resort, after the state has exhausted its statutory prerequisites.49 Termination pro-

146. Id. at 960-61.
147. Id.
149. Only Massachusetts and Vermont have no statutes providing for termination of parental rights.
ceedings arise after the state has taken protective custody over a surrendered, abused or neglected child\textsuperscript{150} pursuant to a dependency adjudication or care and protection proceeding\textsuperscript{151} and then only because state efforts to rehabilitate the parents and provide for reunification of the family have failed.\textsuperscript{152}

State efforts at reunification may employ a myriad of services, but those described in \textit{Beyond Rhetoric} are illustrative:

First, they attempt to give families the skills and knowledge

\textsuperscript{150} Absent visible physical abuse, neglect or dependency is difficult to ascertain. The test centers on what a reasonably intelligent person should, by common understanding and practice, realize to be necessary for that particular child. See People in Interest of D.K., 245 N.W.2d 644, 651 (S.D. 1976) (statute was sustained in its definition of neglect), \textit{But see Davis v. Smith}, 383 S.W.2d 37, 43 (Ark. 1979) (statute defining parents as unfit if they were unable to provide a "proper home" was unconstitutionally vague). For a case dealing with emotional neglect, see Castor v. Brundage, 674 F.2d 531 (6th Cir. 1982). For a case dealing with potential neglect, see \textit{In re East}, 288 N.E.2d 343, 346 (Ohio Misc. 1972) ("The law does not require the court to experiment with the child's welfare to see if he will suffer great detriment or harm.").

\textsuperscript{151} The state's entry into the family unit is predicated on its \textit{parens patriae} authority. Either surrender of the child or a dependency situation will initiate the state action that eventually evolves into the petition of termination. See \textit{Ark. Code Ann.} § 9-27-341 (Michie 1991) (courts may consider a petition to terminate parental rights after finding by clear and convincing evidence that the juvenile has been adjudicated dependent-neglected); \textit{Colo. Rev. Stat.} § 19-3-602 (1993) (termination of a parent-child relationship shall be considered only after an adjudication of a child as dependent or neglected); \textit{Conn. Gen. Stat. Ann.} § 17a-112 (West 1994) (court may grant a petition to terminate after a child has been found to be neglected or uncared for in a prior proceeding and parent has not been rehabilitated); \textit{Haw. Rev. Stat.} § 571-61(b) (1) (E) (1993) (involuntary termination proceeding will occur after the child has been removed from parental custody pursuant to judicial proceeding); \textit{Ind. Code Ann.} § 31-6-5-4 (Burns 1993) (termination involving child in need of services may occur only after the child has been removed from the parent for at least six months under a dispositional decree); \textit{N.H. Rev. Stat. Ann.} § 169-C (1990) (court may terminate when parent fails to correct conditions that led to finding of abuse or neglect); 23 \textit{Pa. Cons. Stat. Ann.} § 2511(a) (1994) (parental rights may be terminated when parent, for period of six months, has demonstrated a settled purpose of relinquishment or failure to perform parental duties). See generally Hershkowitz, \textit{supra} note 27, at 281 ("Proceedings to determine dependency are generally a prerequisite to the termination of parental rights"); Parker, \textit{supra} note 54, at 572 (by the time a termination proceeding occurs, the child has already been removed from his parents' home pursuant to a care and protection proceeding).

needed to cope more effectively with the stresses of contemporary life and to care for and nurture their children better. In achieving this goal, programs try to build on family strengths and capacities rather than emphasizing deficits. Second, family support programs are prevention-oriented; that is, they attempt to strengthen families before a crisis occurs. Third, they offer multidisciplinary services that recognize and address the diverse and interrelated needs of families. Finally, family support programs are community-based and easily accessible to parents in order to be as responsive as possible to the families they serve.153

Such services are an integral part of the termination process. Their existence rebuts any charge that a state, in initiating a termination proceeding, is depriving the parent of the child through "bullying"154 or coercion. Indeed, when any childcare agency has custody of a child and brings a proceeding to terminate parental rights, the agency must affirmatively plead and prove, often by clear and convincing evidence, that it has fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and reunite the family.155

As was noted in Santosky, an integral part of the termination equation is the scope of the services offered by the state. If the services designed to bring about termination are not extensive and forthcoming,

153. BEYOND RHETORIC, supra note 14, at 275. To control obsessive behavior, parents are often required to enroll in programs such as Alcoholics Anonymous, Narcotics Anonymous, or Weight Watchers. Violence clinics or support groups are available to abusive parents and spouses. More traditional programs include the following:
[1] parent education and support groups for parents;
[2] activities that bring parents and children together to teach parents about child development and strengthen the parent-child relationship;
[3] classes and discussion groups on issues of concern to parents, such as family budgeting, coping with stress, health, and nutrition;
[4] drop in centers, offering unstructured time for families to be with other families and with program staff on an informal basis;
[5] child care while parents are engaged in activities offered by the family support program;
[6] information and referral to other services in the community, including child care, health care, nutrition programs, and counseling services;
[7] home visits, often designed to introduce particularly isolated parents to family resource programs; and
[8] development exams or health screening for infants and children.

Id. at 275-276.

the petition for termination cannot succeed. As Justice Rehnquist noted:

A plan for providing petitioners with extensive counseling and training services was submitted to the court and approved . . . . Under the plan, petitioners received training by a mother's aide, a nutritional aide, and a public health nurse, and counseling at a family planning clinic. In addition, the plan provided psychiatric treatment and vocational training for the father, and counseling at a family service center for the mother.\(^{156}\)

When parents refuse to cooperate with such a plan, the state initiates a termination proceeding. Such a proceeding cannot, therefore, succeed under any due process analysis without the state first offering the family services to prevent the break-up of the family or to reunite it if the child has already left home.\(^{157}\)

In Maine, for example, before termination of parental rights can occur, the social service agency must arrange rehabilitative services for the parents; notify the parents in writing of the child’s address when the child is removed from the home; facilitate visitation between the natural parents and the child; and discuss with the parents the reasons for the child’s removal from the home and the improvements which must be made before the child is returned.\(^{158}\)

State requirements on time limits for rehabilitation vary. Some impose a time limit as a prerequisite before parental rights can be terminated. Others require that the child be in the care of an authorized agency for at least one year following the initial adjudication of dependency before termination may be initiated.\(^{159}\) Statutes with mandated time periods that are not associated with the conduct of the state or with the response of the parents may be invalid as unduly adverse to the best interests of the child under any due process analysis, since the child is most often confined to a foster care facility or an abusive home

\(^{156}\) Santosky, 455 U.S. at 781 (Rehnquist, J., dissenting).

\(^{157}\) Id. at 784 n.11.

\(^{158}\) ME. REV. STAT. ANN. tit. 22, § 4041 (West 1993).

during this period. Nonetheless, the time periods are meant to add caution to a procedure that seeks to balance the best interests of the child with the parental presumption.

D. The Problems with Foster Care

Sometimes the victimized child is placed in the custody of a relative while his or her parents undergo rehabilitation. More often than not, however, the child is placed in foster care. During a termination proceeding, foster care can approximate actual abuse in its injurious effect upon a child.\textsuperscript{6}

"Foster care is intended to protect children from neglect and abuse at the hands of parents and other family members, yet all too often it becomes an equally cruel form of neglect and abuse by the state."\textsuperscript{2} The number of children in foster care has increased dramatically since early declines in the late 1970s and early 1980s. "Recent estimates project that more than half a million children will be in foster care by 1995."\textsuperscript{160}

\begin{itemize}
\item[160.] See Sosna v. Iowa, 419 U.S. 393 (1975), which concerned the validity of a state durational residency requirement for divorce. While the Court sustained the one-year requirement because it was a domestic relations issue and it satisfied the state's need to provide substance to its decrees, \textit{id.} at 396, the dissent lamented the deprivation such statutes cause, \textit{id.} at 418-27. Residence within an injurious environment is sufficient deprivation to warrant close scrutiny of these statutes.
\item[161.] Some children linger in foster care or in institutions for extended periods of time; an estimated 14 percent of foster children stay in the system five or more years. Despite widespread knowledge that children do best in settings that provide continuity and stable, caring relationships with adults, they are often moved from one placement to another. Approximately 55 percent of children in foster care experience two or more placements; 8 percent experience six or more placements, in part because there are too few foster parents trained and willing to care for troubled children and children with special needs. In addition, foster children rarely have just one caseworker who tracks their case and monitors their progress. High rates of turnover among caseworkers make it difficult for children to receive continuous personal attention and may amplify their feelings of being lost in an uncaring system.
\end{itemize}

\textit{Beyond Rhetoric}, supra note 14, at 287-88 (citations omitted).

\textit{Id.} at xxx.

\textit{Id.} This high number reflects a reversal of the trend which saw a decline earlier. "In 1977 an estimated 502,000 children were in foster care. By 1980 this number had dropped to 302,000, and it declined further to a low of 275,000 in 1983." \textit{Id.} at 283-84 (citations omitted). In addition to foster care, "an estimated 91,646 children live in public and private juvenile justice facilities, and another 54,472 receive mental health care as inpatients in hospitals and residential treatment centers." \textit{Id.} at 284 (citations omitted). The increase could be the result of the continued break-up of the family structure, single parent births, homelessness, the continuing recession, drugs, increased reporting requirements, or a pattern of government funding programs that actually provide open-ended out-of-home entitlement, while restricting in-home funds. See \textit{id.} at xxx-xxx (citing entitlement under Title IV-E of the Child Welfare and Adoption Assistance
Time in foster care is the crucial issue. In cases involving a petition for temporary removal of custody or a petition for permanent termination of parental rights, the state often imposes a time period during which reunification of the family unit is fostered through supportive programs. Nonetheless, if the process is delayed because of bureaucratic reasons, parental insouciance or judicial backlog, the time in which the child remains within foster care lengthens.

If states are required to provide for termination of parental rights through clear and convincing evidence, greater delay than under a preponderance of the evidence standard is likely. That is, either more time will be needed to demonstrate a parental refusal to rectify the situation which has brought on the petition, or greater harm to the child will have to be demonstrated to establish the basis for the petition. In either instance, the best interest of the child is interpreted as less significant than the parental presumption. Although many states have passed legislation to prevent delay in such proceedings, the judicial system is over-
burdened, especially in certain geographical areas. The statutes, therefore, even though good-intentioned, are rhetoric.\textsuperscript{165}

The fact is that some children linger in foster care or in institutions for extended periods of time. An estimated fourteen percent of foster children stay in the system five years or more.\textsuperscript{166} For many of these children, movement from one home to another is the norm, rather than the exception.

Between 1983 and 1985, the number of children with multiple placements in foster care rose from 16 percent to 30 percent. Recent longitudinal studies of children in foster care found that in New York 27 percent of the children reunited with their families returned to placement some time later; in Illinois, the comparable figure is just under 30 percent.\textsuperscript{167}

Children who continually return to the foster care system often lack advantages that have been proven to be absolutely essential to healthy development—a setting that provides continuity, and stable, caring rela-

\textsuperscript{165} See, e.g., \textit{CAL. FAM. CODE} § 7870 (Deering 1994):
(a) It is the public policy of this state that judicial proceedings to declare a child free from parental custody and control shall be fully determined as expeditiously as possible.
(b) Notwithstanding any other provision of law, a proceeding to declare a child free from parental custody and control . . . shall be set for trial not more than 45 days after filing notification therefor and completion of service thereon in the manner prescribed by law for service of civil process. The matter so set has precedence over all other civil matters on the date set for trial.
(c) The court may continue the proceeding as provided in Section 7864 or Section 7871.

\textit{CAL. FAM. CODE} § 7864 (Deering 1994) provides:
The court may continue the proceeding for not to exceed 30 days as necessary to appoint counsel and to enable counsel to become acquainted with the case.

\textit{CAL. FAM. CODE} § 7871 (Deering 1994) provides:
(a) A continuance may be granted only upon a showing of good cause. Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause.
(b) Unless the court for good cause entertains an oral motion for continuance, written notice of a motion for a continuance of the hearing shall be filed within two court days of the date set for the hearing, together with affidavits or declarations detailing specific facts showing that a continuance is necessary.
(c) A continuance shall be granted only for that period of time shown to be necessary by the evidence considered at the hearing on the motion. Whenever a continuance is granted, the facts proven which require the continuance shall be entered upon the minutes of the court.

\textsuperscript{166} \textit{BEYOND RHETORIC}, supra note 14, at 287. Note that the Santosky children were in foster care for four and one-half years. Santosky v. Kramer, 455 U.S. 745, 773 (1982).

\textsuperscript{167} \textit{BEYOND RHETORIC}, supra note 14, at 288.
DUE PROCESS RIGHTS OF CHILDREN VERSUS PARENTS

Significant numbers of children never reach this goal, and if they do, it is only after prolonged periods of time have elapsed. As Beyond Rhetoric notes:

Approximately 55 percent of children in foster care experience two or more placements; 8 percent of children experience six or more placements, in part because there are too few foster parents trained and willing to care for troubled children and children with special needs. In addition, foster children rarely have just one caseworker who tracks their case and monitors their progress. High rates of turnover among caseworkers make it difficult for children to receive continuous personal attention and may amplify their feelings of being lost in an uncaring system.

In 1986, of all children leaving foster care, less than sixty percent were either reunited with their families or placed with a parent, relative, or other caregiver. Another seven percent were adopted or relinquished for adoption. Approximately twenty percent either ran away, were incarcerated, got married, died, were discharged to another public agency, or acquired by a legal guardian. Another eight percent reached age eighteen and were no longer eligible for care.

168. Id. at 287.
169. Id. at 288.
171. BEYoND RHETORIC, supra note 14, at 288. No information is available for the remaining six percent of children who left the foster care system in 1986. Id. Recommendations have been made to extend foster care beyond age 18 to age 21, so as to redress the negative effects of foster care placement. See Id. at 302. “In 1990, recognizing that many foster youth need additional support to complete their high school educations, to pursue postsecondary education and training, and to acquire the necessary skills and knowledge to live successfully on their own. Congress extended federal support for foster care services to youth up to age 21 at state option.” Id.

Efforts to reduce the number of children who linger in foster care placement are evidenced by some states’ codified objectives. See, e.g., 55 PA. CONS. STAT. ANN. § 3130.13 (1991), which states:

(a) A statewide goal of 1% reduction in the number of children in placement for 2 or more years is established for each of the next 7 years beginning in Fiscal Year 1983-1984 and concluding at the end of Fiscal Year 1989-1990 with a cumulative reduction of 75%. This goal does not apply to individual counties.
(b) The steps taken to achieve this goal will include:
   (1) Semianual judicial or administrative review of the status of children in placement.
   (2) Uniform monitoring and enforcement of the case planning and review
E. Termination: The Final Solution

The constitutional protections afforded parents in termination proceedings outweigh the protections afforded the child. During the termination proceeding, the child is in a foster care environment that all too often causes further harm to the child. The child is likely to remain in this harmful environment for at least five years pending parental response to state initiatives. The likelihood of adoption decreases as the child grows older. The child is not likely to be represented by legal counsel, and if he or she is represented by counsel, the counsel could be representing the parents as well. The fact of the matter is that a clear and convincing standard places the child at a distinctive disadvantage during the termination process.

In a clash of best interests between the parent and the child, it is difficult to argue that the child is provided due process during termination proceedings. Proceedings subject to a clear and convincing standard simply take too long. The child is traumatized and often suffers irremovable harm, the result of which is often tragic. Beyond Rhetoric describes the high rate of suicide among adolescents:

requirements established in this chapter.

(3) Increased emphasis on the development of adoption resources, including the Adoption Cooperative Exchange (PACE) and the Pennsylvania Adoption Assistance Program.

(4) Increased emphasis on services to children in their own homes.

Id.


173. The parent is provided with complete rights of appeal, and “no petition for adoption may be heard until the appellate rights of the natural parents have been exhausted.” CAL. FAM. CODE § 7893(b) (3) (West Spec. Pamphlet 1993).

174. See, e.g., CAL. FAM. CODE § 7861. (West Spec. Pamphlet 1993) “The court shall consider whether the interests of the child require the appointment of counsel. If the court finds that the interests of the child require representation by counsel, the court shall appoint counsel to represent the child, whether or not the child is able to afford counsel.” Id.

During the 1960s and 1970s, the rate at which adolescents took their own lives doubled, from 3.6 to 7.2 deaths per 100,000, while the rate for adults remained steady. By 1986, it had increased another 30 percent, to 10.2 death per 100,000. Suicide is now the second leading cause of death among adolescents, after accidents. Unlike homicide, it is more common among white teens than black teens, and white adolescents are by far the highest-risk group, with a rate of 16 per 100,000.176

Even if the child does not fall victim to suicide,

[i]t requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline.177

Surely these statistics support the proposition that in any termination proceeding, the interest of the child is of sufficient importance to allow termination to occur under a preponderance of the evidence standard.

IV. THE CURRENT STATE OF DUE PROCESS PROTECTION FOR THE CHILD

Although the parental presumption is deeply imbedded in our system of jurisprudence, courts have recognized the rights of children in some instances. Such recognition has become more widespread over the past quarter century and can be attributed mainly to the changing nature of the American family.

A. The Expanding Recognition of Childrens' Constitutional Rights

In 1967, the Court announced for the first time that the Constitution afforded protection to children as well as to adults.178 Decisions by

176. BEYOND RHETORIC, supra note 14, at 35-36.
177. Santosky, 455 U.S. at 789 (Rehnquist, J., dissenting).
178. In re Gault, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). See also Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); Tinker v. Des Moines Indep. Community Sch.
the Court have established that children have equal protection rights,\textsuperscript{179} privacy rights,\textsuperscript{180} procedural due process protection,\textsuperscript{181} and a right to freedom of speech.\textsuperscript{182}

Recent cases have extended guarantees of privacy for individual minors in areas that had been previously considered the inviolate realm of family privacy and the parental presumption. In \textit{Carey v. Population Services International},\textsuperscript{183} for example, the Court found that a statute prohibiting the sale of contraceptives to minors under the age of sixteen was unconstitutional because it intruded into a privacy right that could only be regulated to vindicate a compelling state interest. Abortion is another key area where changing definitions of family and privacy have resulted in the elevated recognition of children's rights. This is particularly true in cases involving parental notification. In all the cases addressing limits on parental notification, the Court has examined three interests: the state's interest in the welfare of the pregnant minor; the interest of the parents; and the interest of the family unit.\textsuperscript{184} The deci-

\begin{itemize}
\item Dist., 393 U.S. 503, 511 (1969) (minor students are "persons" under the Constitution).
\item 180. Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (allowing contraceptives to be distributed to persons under the age of sixteen); see also Planned Parenthood of Utah v. Matheson, 582 F. Supp. 1001, 1009 (D. Utah 1983) (The absence of a procedure in statute whereby mature minors could demonstrate that parental notification was against their best interests unconstitutionally infringed upon their right to decide whether to bear or beget children.).
\item 181. The Warren Court established the child's right to certain procedural protection in the juvenile context. In \textit{In re Gault}, 387 U.S. 1 (1967), the Court set aside a minor's conviction, holding that even though a juvenile hearing need not "conform with all of the requirements of a criminal trial or even of the usual administrative hearing . . . [it] must measure up to the essentials of due process and fair treatment." Id. at 30 (internal quotations and citation omitted).
\item The Burger Court extended a juvenile's right to due process. In \textit{In Re Winship}, 397 U.S. 358, 368 (1970), the Court held that minors may be found guilty only upon proof beyond a reasonable doubt, and that minors may assert the privilege against compulsory self-incrimination. In \textit{Goss v. Lopez}, 419 U.S. 565, 581 (1975), the Court recognized that a public school student is entitled to notice and an informal hearing before being suspended from school. In \textit{Ingraham v. Wright}, 430 U.S. 651, 676 (1977), the Court held that a child has a liberty interest in procedural safeguards that would minimize risk of wrongful punishment. But the Court held further that due process did not require advanced procedural safeguards before a school could administer corporal punishment. \textit{Id.} at 682. \textit{But see Schall v. Martin}, 467 U.S. 253, 273-74, 277, 281 (1984) (Court held that preventive detention of a juvenile pursuant to a state statutory act does not violate the Due Process clause because the detention is limited and serves to keep the juvenile in a more controlled environment than an adult prison).
\item 182. The Court upheld a minor's right to protest the Vietnam war by wearing black arm bands in school, stating that students "may not be confined to the expression of those sentiments that are officially approved," \textit{Tinker}, 393 U.S. at 511.
\item 183. 431 U.S. 678 (1977).
\item 184. Hodgson v. Minnesota, 497 U.S. 417, 444 (1990). In \textit{Hodgson}, the Court held that the state's requirement of notification to both of the pregnant minor's parents was not reasonably
sions are tortuous, but all establish the privacy right of the child vis-a-vis the parent.\textsuperscript{185}

In \textit{Bellotti v. Baird},\textsuperscript{186} the Court held that a state may not require a minor to obtain her parent’s permission to get an abortion in all cases. States are required to provide an alternative procedure by which the minor may obtain an abortion without notifying the parent or receiving consent. The minor must be permitted to convince the court that the abortion is in her best interest, and if successful, must be allowed to obtain the abortion without notifying her parent.

The crux of \textit{Bellotti} is that parental involvement in the decision of whether or not to beget a child interferes with the “unique” nature and “indelible” consequences involved in the fundamental right to choose an abortion.\textsuperscript{187} Thus, the Court allowed the child’s decision to predominate over that of the parent and nullified the state statute.\textsuperscript{188}

\begin{itemize}
\item Related to the state’s interests. \textit{Id}. at 450.
\item \textit{See}, \textit{e.g.}, Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) (upholding a statute requiring notification by the physician to at least one parent, unless the minor could prove her maturity by clear and convincing evidence at a judicial proceeding).
\item 443 U.S. 622 (1979) (Justice Powell wrote for the majority, and was joined by Chief Justice Burger and Justices Stewart and Rehnquist. Justices Stevens, Marshall, Brennan and Blackmun concurred, and Justice White dissented).
\item \textit{Id}. at 642-43; \textit{see also} \textit{H.L. v. Matheson}, 450 U.S. 398 (1981) (Stevens, J., concurring) (the state has a fundamental and substantial “interest in protecting a young pregnant woman from the consequences of an incorrect abortion decision”).
\item \textit{Bellotti}, 443 U.S. at 651 (the Massachusetts statute requiring parental consent was nullified). In \textit{Planned Parenthood v. Danforth}, 428 U.S. 52 (1976), the Missouri statute, which had required a minor to obtain parental consent before obtaining an abortion, was also nullified. In \textit{Akron v. Akron Ctr. for Reprod. Health, Inc.}, 462 U.S. 416, 441-42 (1983), \textit{overruled by} \textit{Planned Parenthood of S.E. Pa. v. Casey}, 112 S. Ct. 2791 (1992), the Court found that the local ordinance at issue did not meet constitutional safeguards in protecting minors. The statute required minors seeking an abortion to secure either parental consent or a court order. \textit{Id}. at 439.
\item Other cases have upheld parental notification statutes. In \textit{H.L. v. Matheson}, 450 U.S. 398 (1981), the Court upheld a Utah statute which required the attending physician to notify parents of a minor, if possible, before performing an abortion. Notification was allowed, in part, because, in the Court’s view, parents are counselors to their children and have a guidance responsibility. \textit{Id}. at 410.
\item Most states that require parental notification for a minor to receive an abortion also have a judicial by-pass, whereby the pregnant minor may petition the court for a hearing in order for the parental consent or notification not to be implemented. California has in place a statutory scheme that requires the minor to receive the consent of one parent in order to get an abortion. However, “[i]f the court finds that the minor is sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, and that the minor has, on that basis, consented thereto, the court shall grant the petition” for an abortion without parental consent. \textit{CAL. HEALTH & SAFETY CODE § 25958 (c) (1) (West 1994)}.
\item Some states, like Wyoming, have spelled out the level of proof necessary in order for the
Attention to the child’s best interest is not limited to the reproductive context. Other cases have also recognized the child’s best interest. These include cases involving the name of the child, interstate travel by the custodial parent, and parental neglect.

The recent change in judicial attitudes concerning the individuality of children results in part from the acknowledgement of changing definitions of family, marriage, privacy, and the nature of “parenthood.” The past image of parents as depicted in *The Brady Bunch*, *Leave It to Beaver*, or *I Love Lucy* is simply no longer a reality within a vast segment of the population. For instance, the definition of family as a union of a man and woman united in a contract sanctioned by the state for the purpose of procreation and the raising of children has been affected by a series of cases that allow many of the benefits of marriage with-

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189. Henne v. Wright, 904 F.2d 1208, 1215 (8th Cir. 1990) (upholding, upon rational basis review, a statute providing that a child’s welfare is served by bearing surname possessing a connection with at least one legally verifiable parent), cert. denied, 498 U.S. 1032 (1991); In re D.K.W. v. J.L.B., 807 P.2d 1222, 1224 (Colo. Ct. App. 1990) (best interest of child born out of wedlock served by denying motion by father to change child’s surname from mother’s to his); Magiera v. Luera, 802 P.2d 6, 7-8 (Nev. 1990) (best interest of child born out of wedlock to keep surname of the parent with whom she lives); Halloran v. Kostka, 778 S.W.2d 454, 456 (Tenn. Ct. App. 1988) (best interest of child of divorced parents to keep father’s surname); Rio v. Rio, 504 N.Y.S.2d 959, 961-62 (Sup. Ct. 1986) (providing that the best interest of the child should be the determining factor in what name the child should have).

190. See, e.g., Holder v. Polanski, 544 A.2d 852, 856 (N.J. 1988) (holding that a custodial parent may move with the children of the marriage to another state as long as the move does not interfere with the best interest of the children or the visitation rights of the non-custodial parent).

191. Newmark v. Williams, 588 A.2d 1108 (Del. 1991). Even though the court wrote that any balancing test between the child’s condition and state interference must begin with the parental interest, *id.* at 1115, the state can clearly intervene in the parent-child relationship where the health and safety of the child is in jeopardy, *id.* at 1116. The child’s interest takes precedence under *parens patriae*. 
out the concomitant legal requirements or responsibilities. Explorations into the new world of biology have also affected the definition of family.

While it is certain that "[c]hildren do best when they have the personal involvement and material support of a father and a mother and when both parents fulfill their responsibilities to be loving providers . . . . [M]any children do not have two loving parents." Courts overwhelmingly recognize this and are willing to intervene. Thus, when families are so damaged that their children's health and safety are in danger, society must intervene. Through both individual and collective efforts, society must ensure that children's basic needs for food, clothing, shelter, and affection are met when parents are unable to do so alone, and society must protect children who are at serious risk of physical or psychological harm from adults within and outside their families.

In geographical areas where parental surrender, neglect and abuse
are rampant, it may seem expedient to dismiss the claims of parents in their children. This would, however, be a denial of due process to parents, just as ignoring the interests of children is a denial of due process. We must, therefore, balance the child's interest with that of the parent. The due process rights of the child, however, always should be the focus of the balance.

B. The Santosky Majority's Flawed Due Process Analysis

A person has an individual claim to due process protection whenever a state seeks to deprive him or her of life, liberty, or property. In conducting any due process analysis, courts address two issues: First, whether or not the individual possesses a liberty or property interest protected by the Fourteenth Amendment. In making this determination, courts will look to see if an adverse outcome in the proceeding would cause the individual to suffer a "grievous loss." Second, if


197. See, e.g., Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (The applicability of due process depends not on the weight of the interest, but "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."). Property interests include, for example, employment contracts if the public employee had a reasonable expectation of continued employment. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (holding that an employment contract for a fixed period of only one year does not constitute a property interest). Liberty interests include not only fundamental constitutional rights such as free speech, but also a person's reputation and future employment opportunities. See Roth, 408 U.S. at 585 (Douglas, J., dissenting). In Meyer v. Nebraska, 262 U.S. 390, 399 (1923), the Court indicated how expansive the definition of liberty interest could be: [Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his [or her] own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men [or women].

Id.

198. See, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). For an example of a due process claim that did not result in protected conduct, see Bowers v. Hardwick, 478 U.S. 186 (1986) (deciding whether or not the Due Process clause guarantees to homosexuals the right to engage in sodomy), and an article analyzing the case, Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737, 747-52 & passim (1989). For an example of a similar case analyzed under an equal protection claim, see Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (holding that a criminal statute proscribing consensual homosexual sodomy violates equal protection rights guaranteed by Kentucky Constitution absent showing of rational basis for punishing deviate sexual intercourse solely on basis of sexual preference).
the person possesses a protected property or liberty interest, the court will determine what procedures are constitutionally mandated before the state can deprive him or her of this fundamental interest.199

In deciding if the existing state procedures are adequate to provide due process, courts apply the balancing test set forth in Mathews v. Eldridge.200 Mathews requires the weighing of three factors: the private interests that will be affected by the state action; the risk of an erroneous deprivation of the private interest caused by the action at issue; and the government's interest as evidenced by the statute.201

In Santosky v. Kramer, the Mathews balancing test was directed toward the rights of the parents, not the child.202 In applying the first part of the test, the Court focused on the liberty interest of the parents.203 In applying the second part of the test, the Court emphasized that the case was, in form, a contest between the state and the natural parent.204 There was no mention of the child. Since the Court had already determined that the child's interest was subordinate to that of the

199. See, e.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982) (delimiting two central questions: whether a natural parent is entitled to constitutional due process at a parental rights termination hearing, and if so, what process is due); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due.")


201. See id. at 335. In Mathews, the Court weighed the three factors and determined that the state was not required to hold an evidentiary hearing before terminating social security benefits. Id. at 349. For an explanation of Mathews, see Brian A. Cufe, Note, Methods of Notice in Termination of Parental Rights Hearings, 5 CONN. PROB. L.J. 317 (1991).

202. In Santosky, the Court wrote that "when the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." 455 U.S. at 753-54.

It can be argued that one reason why the Court's attention was directed towards parents rather than towards the child was due to the Court's five-to-four decision in Lassiter v. Department of Social Servs., 452 U.S. 18 (1981), one year earlier. Lassiter held that the Due Process Clause does not require the appointment of counsel for indigent parents in every parental status termination proceeding. The majority in Santosky mentions that the "disparity between the litigants' resources will be vastly greater in States where there is no statutory right to court-appointed counsel." Santosky, 455 U.S. at 763-64 & n.13. The point is clear: Parental rights are a fundamental interest that demand due process consideration. Id. at 753. It should be noted, however, that the Court was comfortable with a case-by-case analysis towards due process in Lassiter, while Santosky adopted a uniform burden of proof upon all states and in every parent-child situation. If Santosky was a result of the Court's holding in Lassiter, it was a result that imposed a strict and high level of proof that has factually affected the way in which children are provided due process rights.

203. Id. at 759. The Court recognized the unique deprivation facing the parents in a termination proceeding. Id. If the state prevails, drastic consequences follow: Parental rights will be irrevocably terminated, id., and the parents would also suffer a loss of reputation, id. at 759-60.

Throughout the factfinding stage, the focus was on the parents, not the child. The Court emphasized that no separate interest of the child exists at the factfinding stage. Id. 204. Id. at 762.
parent, it viewed the case as a contest solely between the parent and the state.

In applying the third component of the Mathews test, the Court examined the state's interest. The state had two interests in the termination proceeding: its parens patriae interest in promoting the welfare of the child and its administrative and fiscal interests in reducing the cost of such a proceeding. The majority found that the state's interest would be better served by a clear and convincing standard. This is because the state's goal in dealing with the child was to find a permanent home with a positive and nurturing environment. The natural home of the child was deemed to be the presumptive place where this could occur. Following this presumption, moreover, would result in decreased costs and thus advance the state's administrative and fiscal interests.

The Court's analysis with respect to the state's fiscal interest was flawed. Raising the level of proof to clear and convincing actually results in an increased fiscal and administrative burden. This is due to the fact that the state must amass much more evidence to satisfy the clear and convincing standard. During termination proceedings, the state must bear the cost of foster care and maintain the services that are designed to reunify the family. Consider these facts: Total expenditures by the federal government on child welfare services have increased from $536 million in 1981—one year before Santosky—to $2.385 billion in 1991; the estimated costs for state and local services for children was $4.43 billion in 1989; overall, in the 1989 fiscal year, state and local governments spent at least $180.3 billion (approximately thirty-one percent of their budgets) on services and programs for children. Even under a preponderance of the evidence standard, the costs incurred by the state are enormous. The clear and convincing standard increases these costs.

All three components of the Mathews test were utilized by the

205. Id. at 766.
206. Id. at 767.
207. Id. at 766-67.
208. See Hershkowitz, supra note 27, at 293 (discussion of the effects of elevated standards of proof on the state's administrative and fiscal resources). The Santosky case itself also illustrates the administrative costs: seven proceedings were held concerning the disposition of the children. 455 U.S. at 293 n.352.
209. BEYOND RHETORIC, supra note 14, at 308.
210. Id. at 315.
211. Id. at 316.
majority in such a fashion that the due process rights of the child were ignored. It is not that the due process analysis of Mathews itself was applied incorrectly. The problem lies in the fact that the analysis was directed solely toward the parents under the aegis of the parental presumption.

The dissent in Santosky reapplied Mathews to incorporate the interest of the child. Justice Rehnquist properly recognized the fundamental liberty interest of the parent in the custody and care of his or her child. But he also recognized the private interest of the child in the speedy and proper outcome of the proceeding: "A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being." This private interest does not automatically subsist within that of the parent. In fact, an error in the proceeding that results in a failure to terminate parental rights has serious repercussions for the child, as the facts of DeShaney illustrate. Accordingly, any consideration of the private interest of the child must allow for a separate determination without the parental presumption unduly inhibiting the child's interest. This acknowledgement takes into consideration the factual reality of abuse and neglect in America.

Once the dissent recognized that two private interests were involved in the termination proceeding, it found that due process could be afforded to both the parent and the child by allowing the burden of proof to be borne by each almost equally. Allowing for preponderance of

212. Santosky, 455 U.S. at 787 (Rehnquist, J., dissenting).
213. Id. at 788-89. Emphasis for this is found in BEYOND Rhetoric, supra note 14, at 71: To grow and thrive, children need order. They need safe homes and neighborhoods, free of violence and drugs. They need to feel confident that the adults in their families and their communities will protect them, not prey upon them. Physical safety and psychological security are essential to children's health, education, and overall development. When their experience teaches them that they cannot depend on the adults in their lives, children often grow hostile, distrustful, and angry. In failing to insulate them from crime and violence, we are jeopardizing the futures of millions of youngsters. Today's young victims are very likely to become tomorrow's armed robbers, drug pushers, and murderers.

Id. (citation omitted).
214. Santosky, 455 U.S. at 788 n.13. "This reasoning [subsisting the child's interest within that of the parent] misses the mark. The child has an interest in the outcome of the factfinding hearing independent of that of the parent." Id.
215. Id. If termination of parental rights does not occur when it rightfully should, the child would suffer abuse and neglect. See, e.g., id. at 789 n.14. Or the child could languish in foster care for a period of time too long to allow for adoption by a stable home. Id. at 789 n.15.
216. Id. at 791. Preponderance of the evidence allows for the burden of proof to be borne almost equally between the two independent private interests. The parent still retains the presumption and also other due process remedies such as void for vagueness statutes that often
the evidence decreased the risk to the child and still safeguarded the parent’s rights.

V. FEDERALISM

Implicit within the conflict between state procedures that incorporate a standard of proof to terminate the rights of a parent and the Supreme Court’s interpretation of the Constitution rejecting such procedures, is the concept of federalism. It has long been the practice of the federal courts to abstain from interfering with state solutions to domestic relations problems. 217 This is a historical doctrine, more implicit within the constitutional system of government than within any clearly elucidated constitutional provision or federal statute. 218 In his dissent in Santosky, 219 Justice Rehnquist addressed this issue: “Even more worrisome, [the majority] cavalierly rejects the considered judgement of the New York legislature in an area traditionally entrusted to state care. The Court thereby begins, I fear, a trend of federal intervention in state family law matters which surely will stifle creative responses to vexing problems.” 220

In mandating a clear and convincing standard in parental termination proceedings, the Santosky majority intruded upon the historical ability of states to legislate creative and local solutions to problems such as child abuse. Indeed, any change in the “poverty of hope” 221 will be best brought on by local actors crafting solutions to the particular problems endemic to each community. Federal micro-management arise with termination statutes.


Domestic relations is “an area that has long been regarded as a virtually exclusive province of the States.” Sosna v. Iowa, 419 U.S. 393, 404 (1975); see also Thompson v. Thompson, 484 U.S. 174, 184-85 (1988); De LaRama v. De LaRama, 201 U.S. 303, 307 (1906); Simms v. Simms, 175 U.S. 162, 167 (1899); Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858).

218. “Historically, the right to regulate the relationship between parents and children has been one of the most closely-guarded prerogatives of state government; thus, any effort by the Court to restrict local autonomy in this area faces formidable federalism-related obstacles.” Maltz, supra note 217, at 490-91. The true basis for this exception to federal jurisdiction is stated in a recent decision: “Because we are unwilling to cast aside an understood rule that has been recognized for nearly a century and a half . . .” Ankenbrandt, 112 S. Ct. at 2210 (concerning whether a federal court has jurisdiction over alleged torts committed by a former husband of petitioner against petitioner’s children).


220. Id. at 791.

221. BEYOND RHETORIC, supra note 14, at 5.
Two justifications underlie state autonomy in matters of domestic relations. First, the Court has interpreted the federal statute conferring diversity jurisdiction to exclude federal court jurisdiction over divorce and other cases. \(^{222}\) "Absent a contrary command of Congress, the federal courts properly should abstain, at least from diversity actions traditionally excluded from the federal courts, such as those seeking divorce, alimony, and child custody." \(^{223}\) Second, leaving states free from federal control allows them to experiment with different approaches to the same problems. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." \(^{224}\)

Although states have not always risen to the challenge of devising creative solutions to domestic relations problems, "leaving the States free to experiment with various remedies has produced novel approaches and promising progress." \(^{225}\) States have even "developed specialized courts and institutions in family matters, while Congress and the federal courts generally have not done so." \(^{226}\) Accordingly, only when a domestic relations statute contains a clear constitutional violation should the federal courts interfere with a state’s resolution of domestic relations matters. \(^{227}\)

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\(^{222}\) See Hershkowitz, supra note 27, at 248 n.21. The Judiciary Act of 1789 has been judicially interpreted to include only that subject matter over which the English court of chancery had jurisdiction when the United States became a nation. \(Id.\) Since the court of chancery did not have jurisdiction over divorce, neither do the federal courts. \(Id.\) Early cases signaled this approach: "We disclaim altogether any jurisdiction in the courts of the United States upon subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to a divorce a vinculo, or to one from bed and board." Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858). In 1890, however, the Court made it clear that the lack of federal jurisdiction extended to all areas of domestic relations: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." In re Burrus, 136 U.S. 586, 593-94 (1890).

\(^{223}\) Ankenbrandt, 112 S. Ct. at 2221 (Blackmun, J., concurring).

\(^{224}\) New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

\(^{225}\) Santosky, 455 U.S. at 771 (Rehnquist, J., dissenting). Examples of state innovations would be: Uniform Premarital Agreement Act, see, e.g., OR. REV. STAT. § 108.725 (1990); goodwill as a marital asset, see, e.g., Thompson v. Thompson, 576 So. 2d 267 (Fla. 1991); the disposition of a cryogenically-preserved product of in vitro fertilization, see, e.g., Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), cert. denied, Stowe v. Davis, 113 S. Ct. 1259 (1993); finding that the state homosexual sodomy statute was unconstitutional under the state constitution, see, e.g., Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

\(^{226}\) Ankenbrandt, 112 S. Ct. at 2221 (Blackmun, J., concurring).

\(^{227}\) Santosky, 455 U.S. at 771. See also Hershkowitz, supra note 27, at 249; Allan D. Vestal
By imposing a clear and convincing standard, the Santosky Court preempted the procedures utilized by numerous states. Many such procedures were enacted by states in an effort to promote "fundamental fairness" to all parties involved—including the interests of the child—in the context of other statutory procedures. In New York, for example, the legislature believed that a preponderance of the evidence standard provided fairness to all the parties: parents, children and the state. The New York scheme did not contain a clear constitutional violation.

As Justice Rehnquist concluded in his dissent in Santosky:

"New York's adoption of the preponderance-of-the-evidence standard reflects its conclusion that the undesirable consequences of an erroneous finding of parental unfitness—the unwarranted termination of the family relationship—is roughly equal to the undesirable consequence of an erroneous finding of parental fitness—the risk of permanent injury to the child either


The National Commission on Children has recommended three community-level programs which are essential to the domestic relations exception:

1. Promoting child development and healthy family function through locally controlled and coordinated, community-based family support networks that offer access and referrals to a broad range of services, including health and mental health care, education, recreation, housing, parenting education and support, employment and training, and substance abuse prevention and treatment.

2. Assisting families and children in need in order to strengthen and preserve families that voluntarily seek help before their problems become acute. Human service programs, including health and mental health, juvenile services, substance abuse programs, education, and economic and social supports, must collaborate to provide prevention and early intervention services that offer practical solutions to problems faced by families in crisis.

3. Protecting abused and neglected children through more comprehensive child protective services, with a strong emphasis on efforts to keep children with their families or to provide permanent placement for those removed from their homes.

BEYOND RHETORIC, *supra* note 14, at 295-96 (emphasis omitted).

In particular, when babies are abandoned at birth and when repeated attempts to reunify older children and parents have failed, the programs recommend that the adoption process should be streamlined to expedite placement of children in permanent, stable families. Id. at 300-01.

As federalism is designed to foster such programs, especially within the geographically diverse economic and cultural fabric of American states, anything less than a clear constitutional violation impedes the recommendations of the National Commission on Children and the best interest of the child. The Court's intrusion into state domestic relations in Santosky was unwarranted and not in the best interest of children.
by return of the child to an abusive home or by the child’s continued lack of a permanent home. Such a conclusion is well within the province of state legislatures.228

The New York scheme in place at the time of Santosky incorporated the following requirements to safeguard the rights of the parties involved: (1) that an attorney be appointed to represent the parents; (2) that multiple hearings be held; (3) that there be a determination that the parents are present at the hearings and were served with the petition; (4) that only material and relevant evidence be submitted; (5) that temporary removal be reviewed every eighteen months; (6) that the same judge preside throughout; (7) that parents be notified twenty days before the hearing; (8) that the state make diligent efforts to assist the parents to develop a relationship with the child; (9) that the termination proceeding result in an independent evaluation of the material and relevant evidence; and (10) that the parents be given a right to appeal with the assistance of state appointed counsel.229 Surely the imposition of such safeguards prevented the possibility of a clear constitutional violation.

In and of itself, the standard of proof necessary to terminate parental rights can not be the reason for a clear constitutional violation. As the Santosky dissent noted, “[b]y holding that due process requires proof by clear and convincing evidence the majority surely cannot mean that any state scheme passes constitutional muster so long as it applies that standard of proof.”230 Something more, therefore, must be present before the unique necessity for federal jurisdiction over a matter clearly within the realm of domestic relations is warranted. By imposing a clear and convincing standard, the Santosky Court ignored the historical tradition of abstaining from interference in state domestic relations law. In so doing, the Court inflicted a serious blow to our federalist system.

VI. CONCLUSION

The Introduction to this Article suggested that the question presented often presupposes the answer given. If the question presented continues to be whether parents have a clear and convincing due process claim to the custody of their children, the best interest of the child will not merit constitutional, practical, or honest consideration. The present

228. Santosky, 455 U.S. at 788 n.13 (Rehnquist, J., dissenting) (citation omitted).
229. Id. at 776-80.
230. Id. at 772.
status of the American family, however, demands that we ask a new question: In a clash between the private interests of parents and the private interests of children, does the Due Process Clause demand that states use a preponderance of the evidence standard in terminating parental rights? The answer is yes, because such a standard of evidence rejects the notion that the best interest of the child subsists within that of the parent.

Within certain easily defined geographical areas of the country, an alarming number of children are being victimized by parents who abuse or neglect them. A rigid adherence to the parental presumption obliterates the rights of these children. While some deference to parental rights is warranted, too much deference translates into suffering on the part of children.

Children suffer because of the delay existent in termination proceedings. Children suffer when they are returned to parents who fail to provide for the child and continue to persist in the abuse and neglect that brought on the termination proceedings. Children suffer from the inability of states to fashion creative approaches to child care due to unwarranted encroachment by the federal government. In order to reduce the suffering of children at the hands of abusive parents, we must reckon with reality and allow states to address the best interest of the child through the use of a preponderance of the evidence standard in termination proceedings.