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Nothing represents a more dramatic clash among the competing interests of parents, children and the state than a conflict resulting in the permanent and irrevocable termination of parental rights. In *Santosky v. Kramer*¹ the United States Supreme Court invalidated a New York statute allowing parents' rights to be terminated after a finding of permanent neglect by a fair preponderance of the evidence.² The *Santosky* Court held that the New York law violated the due process clause of the fourteenth amendment,³ which requires clear and convincing proof to properly balance the interests of the parents and the state.⁴ Such a standard “adequately conveys to the factfinder the level of subjective certainty about his conclusions necessary to satisfy due process.”⁵

The primary influence of *Santosky* will not be in its holding on the standard of proof. The majority of jurisdictions already require clear and convincing proof of parental unfitness.⁶ More important than the burden of proof holding are

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2. *Id.* at 768.
5. *Id.* at 769.

the *Santosky* Court's statements on the interests of children. Noteworthy in this context is the fact that the majority in *Santosky* did not regard the interests of children as separate from the interests of their parents until after the parents are found unfit.\(^7\)

This note will review the decision and place it in the context of other recent Supreme Court decisions balancing the interests of the family and of the state. It will also examine the impact of *Santosky* on the rights of children.

I. THE FACTUAL SETTING

In October 1978 the Ulster County (New York) Department of Social Services petitioned to terminate the rights of John Santosky II and Annie Santosky to three of their minor children who had been in foster care for several years.\(^8\) The Department had removed the oldest child to a foster home in 1973. Ten months later the second child was taken to a foster home, and on the same day Mrs. Santosky gave birth to a third child who was transferred to state custody after only three days "to avoid imminent danger to his life or health."\(^9\) During the next four years Mrs. Santosky bore two other children. Although these two children remained in the Santoskys' custody, the Department came to the conclusion that the family could not be rehabilitated despite economic, medical and counseling assistance. It decided that the three

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1. *Santosky*, 455 U.S. at 760.
3. *Id.* at 751.
children in placement could not be returned to the home.\textsuperscript{10}

After a bifurcated permanent neglect hearing,\textsuperscript{11} the trial judge determined that the best interests of the children required the permanent termination of the Santoskys' parental rights.\textsuperscript{12} The parents appealed this ruling on the ground that the fair preponderance of the evidence standard specified in the New York law\textsuperscript{13} was unconstitutional.

The New York Supreme Court, Appellate Division, affirmed the trial court,\textsuperscript{14} and the New York Court of Appeals dismissed the parents' petition on the ground that "no substantial constitutional question is directly involved."\textsuperscript{15} The United States Supreme Court granted certiorari to consider the petitioners' challenge.\textsuperscript{16} In a five-to-four decision, the Court reversed, holding that New York's fair preponderance standard did not satisfy due process requirements.\textsuperscript{17} To terminate parental rights, the level of proof must be clear and convincing.\textsuperscript{18}

II. \textbf{Before Santosky: Supreme Court Decisions Affecting Family Rights}

\textbf{A. Family Rights in General}

Traditionally, the realm of family law has been left to the

\begin{footnotesize}
\begin{enumerate}
\item Id. See also \textit{In re} John W., 63 A.D.2d 750, 751, 404 N.Y.S.2d 717, 719 (1978); \textit{In re} Santosky, 89 Misc. 2d 730, 393 N.Y.S.2d 486 (1977).
\item Wisconsin provides a bifurcated procedure for the termination of parental rights. Wis. STAT. §§ 48.424, .427 (1981-1982). At the factfinding hearing the trier of fact must determine whether the grounds exist for termination under either § 48.41 or § 48.415. If the grounds for termination are found, the court proceeds to hear evidence and motions related to dispositions. Id. § 48.424(4). The dispositional alternatives are enumerated in § 48.427.
\item Santosky, 455 U.S. at 752.
\item N.Y. FAM. CT. ACT § 622 (McKinney 1975).
\item The dismissal is noted sub nom. in \textit{In re} Apel, 432 N.Y.S.2d 1031 (1980) (unpublished).
\item 450 U.S. 993 (1981).
\item Santosky, 455 U.S. at 765.
\item Id. at 769.
\end{enumerate}
\end{footnotesize}
prerogative of state and local governments. However, the states' power to administer family law is not entirely free from constitutional limitations, and some commentators predict a gradual constitutionalization of family law. The Supreme Court's decisions in the field of domestic relations have recognized as "fundamental" the right of individual autonomy in activities relating to marriage, procreation, contraception, abortion, family relationships and the rearing and education of children.

The origin of constitutional protection of family rights has been traced to Meyer v. Nebraska and Pierce v. Society of Sisters. In Meyer the Court held that a state statute which forbade the teaching of foreign languages to grade school children violated a liberty interest accorded parents under the fourteenth amendment. A similar interest was protected by the holding in Pierce which struck down a state

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19. See, e.g., De Sylva v. Ballentine, 351 U.S. 570 (1956) (dictum) ("There is no federal law of domestic relations, which is primarily a matter of state concern.").


22. See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942) (Court invalidated state statute providing for sterilization of persons convicted of two or more felonies involving moral turpitude).


26. See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923) (parents can select language their children will be taught at private school).

27. Id.


29. U.S. Const. amend. XIV, § 1 (the due process clause, which states: "nor shall any State deprive any person of life, liberty, or property, without due process of law").
law requiring all children to attend public schools.\textsuperscript{30} The liberty interest protected in these cases is "not merely freedom from bodily restraint but also the right of the individual to marry, establish a home, and bring up children."\textsuperscript{31} The focus of this interest is the right of the parents to the "custody, care and nurture of the child."\textsuperscript{32} This principle continues to have constitutional validity.\textsuperscript{33}

In addition to acknowledging the parents' right to privacy in childrearing, recent Supreme Court cases have recognized a right to family privacy.\textsuperscript{34} Family privacy protects the interest of family members in avoiding unjustified state interference which undermines the integrity and stability of the family as an institution.\textsuperscript{35} It upholds the right to participate with others in an intimate, familial relationship.\textsuperscript{36} As such, family privacy is a relational rather than an individual interest.

The state, however, has traditionally had the authority to intervene in family matters under its police power\textsuperscript{37} or parens patriae power.\textsuperscript{38} The police power allows state intervention to protect the health, education and welfare of individuals to enable them to become informed and competent citizens.\textsuperscript{39} Parens patriae, on the other hand, permits state action to promote the best interests of certain individuals.

\begin{itemize}
\item \textsuperscript{30} Pierce, 268 U.S. at 530-32.
\item \textsuperscript{31} Meyer, 262 U.S. at 399.
\item \textsuperscript{32} Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
\item \textsuperscript{33} See, e.g., Parham v. J.R., 442 U.S. 584 (1979) (child not entitled to hearing before being committed to state mental hospital by parents); Stanley v. Illinois, 405 U.S. 654 (1972) (unwed father entitled to hearing before child may be removed from his custody); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish parents not required to send children to school beyond eighth grade).
\item \textsuperscript{34} See, e.g., Smith v. Organization of Foster Families, 431 U.S. 816 (1977) ("[T]he importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association."); Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").
\item \textsuperscript{36} See Developments in the Law, supra note 20, at 1198-1248.
\item \textsuperscript{37} Id. at 1214-16.
\item \textsuperscript{38} Id. at 1221-42.
\item \textsuperscript{39} See, e.g., id. at 1198-99.
\end{itemize}
who lack the capacity to act on their own behalf.\textsuperscript{40}

Three generally accepted beliefs influence the exercise of parens patriae powers on behalf of children. The first is that children lack the capacity and maturity to make certain decisions for themselves, so the state must protect their well-being.\textsuperscript{41} Second, parents are presumptively best able to make important decisions concerning the welfare of their children.\textsuperscript{42} Thus, before the state may intervene, it must show that the parents are unfit or unwilling to exercise their right to care and control.\textsuperscript{43} Finally, the state should exercise its parens patriae power only to further the best interest of the child.\textsuperscript{44} The doctrine of "best interest" is generally a focal point for decisionmaking in child custody disputes pursuant to a divorce.\textsuperscript{45} This doctrine implicitly recognizes that each child is unique and that, ideally, the court should give primary regard to the child's individual needs.\textsuperscript{46}

The United States Supreme Court has recognized the child as an individual who has constitutionally protected rights by extending the safeguards of due process to minors in both criminal\textsuperscript{47} and civil\textsuperscript{48} cases. The child has a right to


\textsuperscript{43} Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (dictum) ("We have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness . . . ." (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862-63 (1977))).

\textsuperscript{44} See Developments in the Law, supra note 20, at 1199-1202.


\textsuperscript{46} See generally J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1979).

\textsuperscript{47} See, e.g., In re Winship, 397 U.S. 358 (1970) (minors entitled to standard of proof of beyond a reasonable doubt in delinquency proceedings); In re Gault, 387
privacy in making decisions regarding abortion\textsuperscript{49} and the use of contraceptives.\textsuperscript{50} There is also support in case law and the literature for the proposition that children have a privacy interest in the family relationship because of their interest in receiving parental guidance and support.\textsuperscript{51} The rights of children are discussed below in Part V.

B. Supreme Court Decisions Affecting Termination of Parental Rights

It was not until 1981 that the Supreme Court considered a termination of parental rights case specifically.\textsuperscript{52} The issue of standard of proof in termination proceedings came before the Court in 1980 in \textit{Doe v. Delaware},\textsuperscript{53} but the \textit{Doe} Court dismissed that case "for want of a properly presented federal question."\textsuperscript{54} In the next Term the Court again faced the termination issue in \textit{Lassiter v. Department of Social Services}.\textsuperscript{55} In a five-to-four decision the Court held that due process does not require the appointment of counsel for indigent parents in every termination of parental rights proceeding.\textsuperscript{56}

\begin{itemize}
  \item U.S. 1 (1967) (children have right to notice, right to counsel, right to remain silent and right to confront and cross-examine witnesses in delinquency hearings). \textit{But see} McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (children do not have right to jury trial).
  \item \textit{See}, e.g., Bellotti v. Baird, 443 U.S. 622 (1979) (Court held unconstitutional state law requiring parental consultation before minor may seek court order allowing abortion).
  \item \textit{See}, e.g., Planned Parenthood v. Danforth, 428 U.S. 52 (1976).
  \item 450 U.S. 382 (1981).
  \item \textit{Id.} at 382.
  \item 452 U.S. 18 (1981).
\end{itemize}
This decision set forth the general principle that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty. The Court then weighed the three factors used in Matthews v. Eldridge to determine what procedural due process requires: the private interests at stake, the government interest and the risk that the procedures used will lead to erroneous factfinding. The Lassiter majority concluded that the presumption against a right to counsel was not outweighed by the requirements of a termination hearing, although special circumstances may require that parents be represented by an attorney. The Lassiter decision, by applying the Eldridge factors to termination proceedings, set the stage for the due process analysis in Santosky which decided the question of the standard of proof required for terminations.

III. The Santosky Opinion

Santosky v. Kramer became the second termination of parental rights case to be decided by the United States Supreme Court. Writing for the majority, Justice Blackmun first addressed the question of whether process is due parents in proceedings to terminate their parental rights. His opinion relied on Lassiter for the answer. There the Court had acknowledged "that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause."

The Court then determined the level of process necessary to satisfy the constitutional requirement. The majority again relied on Lassiter in deciding that the requisite due process in terminations is to be determined by balancing the three

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57. Lassiter, 452 U.S. at 25.
58. 424 U.S. 319, 335 (1976) (termination of social security benefits without a prior evidentiary hearing does not violate due process).
59. Lassiter, 452 U.S. at 27 (citing Eldridge, 424 U.S. at 335).
60. Lassiter, 425 U.S. at 31.
62. Id. at 752-53.
63. Id. at 753 (quoting Lassiter v. Department of Social Servs., 452 U.S. 18, 37 (1981) (Blackmun, J., dissenting)).
Accordingly, the Court in *Santosky* weighed the private interest of the parents, the interest of the government and the risk of error.

The majority prefaced their application of this balancing test by considering the function of a burden of proof. Citing *Addington v. Texas*, in which the Court established clear and convincing as the standard of proof in state involuntary commitment proceedings, the Court stated that the function of the burden of proof is "to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" When the preponderance of the evidence standard is used, money damages are usually in issue. In *Addington*, where the middle burden was required, a stigma to the person was at stake. When life or liberty is in jeopardy the beyond a reasonable doubt standard is usually required. The ultimate determination of the standard which will satisfy procedural due process is a matter of federal law, even though a state might specify its own procedures. Moreover, this determination is traditionally within the province of the judiciary.

### A. The Private Interest

To initiate the balancing process, the *Santosky* Court stated that the parents' interest in the care and custody of their children is the most important private interest to be considered. The criterion for assessing the importance of the private interest is the "extent to which . . . [the individual] may be 'condemned to suffer grievous loss.'" The Court concluded that the private interest affected by termi-

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64. *Santosky*, 455 U.S. at 754.
68. *Addington*, 441 U.S. at 426. The "clear and convincing" standard has also been adopted by the Court for application in cases involving gender bias. *See* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982).
70. *Id.*
71. *Id.* at 755-56.
73. *Id.* at 758 (quoting Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970)).
nations weighs heavily against a preponderance of the evidence standard because the parent's right to custody of his or her children is more precious than a mere property right, and because terminations not only infringe upon the parent's liberty interest, but seek to end it finally and irrevocably.

Significantly, in assessing the *Eldridge* private interest factor, the majority did not consider the interest of the child in having a safe and permanent home. Instead, the majority decided that the child shares the parents' interest at the factfinding stage. Justice Blackmun stated: "After the state has established parental unfitness at the initial proceeding, the Court may assume at the dispositional stage that the interests of the child and the natural parent do diverge." This conclusion that the child shares the parents' interest at the factfinding stage was criticized by the dissent and has serious consequences for the rights of children which will be discussed below in Part V.

### B. The Government Interest

The Court found two relevant government interests in terminations. One is the state's parens patriae interest in promoting the health and well-being of children. The second is a fiscal and administrative interest in reducing the cost and burdens of the termination process. Reasoning that the parens patriae interest can only coincide with the parents' interest in preservation of the family unit at the factfinding hearing, the Court excluded this factor from the balance of interests required by *Eldridge*. The Court deter-

74. *Santosky*, 455 U.S. at 759.
75. *Id.* at 758-59.
76. *Id.* at 759.
77. *Id.* at 760-61.
78. *Id.* at 760 (emphasis in original).
79. *Id.* at 787-91 & n.13 (Rehnquist, J., dissenting).
82. *Id.*
mined that the second government interest, administrative and fiscal efficiency, does not present an obstacle to a higher standard of proof.

C. The Fair Allocation of Risk

The third Eldridge factor to be considered when selecting a minimum standard of proof is the fair allocation of risk. Because the majority determined that the factfinding phase of the termination proceeding is "an adversary contest between the State and the natural parents," it weighed only the risk of erroneous factfinding as it related to those two parties. The Court identified several factors which, in its view, magnify the risk of erroneous factfinding against the parents, including the subjective values of the judge, the greater resources of the state and the limited litigation options of the parents. Coupling these factors with a preponderance of the evidence standard creates a significant prospect of erroneous termination, according to the majority. It is noteworthy that the Court stressed, in its assessment of risks, that the standard of proof should not be construed as allocating the risk of error between the parents and the child.

D. The Standard of Proof

Balancing the interests of the parents and of the state against the risk of erroneous factfinding, the Santosky Court held that the fair preponderance of the evidence standard of proof violates the due process clause of the fourteenth amendment. The question of what standard of proof is constitutionally mandated is resolved first of all by the majority's evaluation of the reasonable doubt standard. Looking again to Addington, the Court decided that the highest

84. Id. at 762-64.
85. Id. at 764.
86. Id. at 765. The Supreme Court characterized as "fundamentally mistaken" the suggestion of the New York court that "a preponderance standard properly allocates the risk of error between the parents and the child." Id. (footnote omitted) (emphasis in original).
standard of proof is inappropriate for terminations because that standard should not be applied "too broadly or casually in noncriminal cases" and because the type of evidence involved is rarely susceptible to proof beyond a reasonable doubt.

Second, noting that a majority of states have established clear and convincing as the standard of proof in terminations, the Court held that "such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process." The *Santosky* decision leaves to the states the option of whether to require an even stricter standard.

IV. THE DISSERT

Although Justice Rehnquist, in the dissenting opinion, expressed concern that the majority "invites further intrusion into every facet of family life," his support of the fair preponderance standard of proof contradicts that concern. His analysis is more clearly understood in the context of his view that states should have considerable freedom in developing legislation and programs to meet the needs of their


91. *Santosky*, 455 U.S. at 768-69 (quoting *Addington*, 441 U.S. at 429-30 (1979)). It is interesting to note that the Court does not clarify in *Addington* to what extent, if any, its holding modifies *Winship*. In *In re Winship* the Court reasoned that a higher standard of proof was required in juvenile delinquency adjudications because, as in adult criminal prosecutions, the consequences of the proceedings are a loss of liberty and a stigmatization by the community. *In re Winship*, 397 U.S. 358, 365-66 (1970). *Addington*, on the other hand, held that, although the individual would suffer a loss of liberty and stigmatization from involuntary commitment to a mental health facility, the Constitution does not mandate the highest standard of proof. In civil commitments the Court concluded that beyond a reasonable doubt was inappropriate because that standard should not be applied too broadly in noncriminal cases and psychiatric evidence is not susceptible to proof beyond a reasonable doubt. *Addington*, 441 U.S. at 428-30.


93. *Id.*

94. *Id.* at 769-70.


96. *Id.*
citizens, particularly in the area of domestic relations.\textsuperscript{97} Thus, the dissent found that New York provides comprehensive services for families in need of them and that its policies and procedures represent a "good faith effort" to balance the interests of the parent, the child and the state.\textsuperscript{98}

The dissent also argued that the fair preponderance standard of proof selected by the New York Legislature represented a constitutionally permissible balance of the interests involved in termination proceedings.\textsuperscript{99} Justice Rehnquist defined these interests as the parents' interest in family integrity, the child's interest in a stable and loving home and the state's interest in the welfare of children.\textsuperscript{100} The dissent claimed that none of these interests is "so clearly paramount as to require the risk of error to be allocated to one side or the other."\textsuperscript{101} Thus, fair preponderance provides "fundamental fairness" to parents in termination proceedings.\textsuperscript{102} In support of this conclusion, the dissent stressed the importance of considering the child's interest at the initial stage of the proceedings.\textsuperscript{103} Justice Rehnquist warned of the severe consequences which may befall a child who is a victim of erroneous factfinding and is forced into unduly long stays in the foster care system.\textsuperscript{104}

V. The Impact of Santosky on Children's Rights

It is likely that Santosky will be noted less for setting a standard of proof in termination of parental rights hearings and more for the Court's enunciation of general considerations and beliefs concerning the rights of children in relation to those of their parents.\textsuperscript{105} The Court in Santosky determined that at the factfinding stage of the proceedings the interests of the parent and of the child coincide, asserting

\textsuperscript{97} Id. at 771. The dissent stated, "We have found . . . that leaving the State free to experiment with various remedies has produced novel approaches and promising progress." Id.
\textsuperscript{98} Id. at 771-72.
\textsuperscript{99} Id. at 785.
\textsuperscript{100} Id. at 787-90.
\textsuperscript{101} Id. at 790-91.
\textsuperscript{102} Id. at 770-71.
\textsuperscript{103} Id. at 788 n.13.
\textsuperscript{104} Id. at 789-90 n.15.
that both parties have a vital interest in preventing an erroneous termination of the parent-child relationship.\textsuperscript{106} Furthermore, the Court stated that any parens patriae interest of the state "arises only at the dispositional phase, after the parents have been found unfit."\textsuperscript{107} This analysis has legal and symbolic implications for children. First, although the child shares the parents' interest in preventing erroneous terminations, he or she may also have an interest in the termination of a nonviable parental bond.\textsuperscript{108} This interest should also have been weighed by the Court in the Eldridge balancing process either in connection with the parens patriae role of the state or as part of a broader consideration of the private interests of the child.\textsuperscript{109} Second, the Court's characterization of the parens patriae role in terminations is inconsistent with the tradition of that doctrine through which the state asserts the interests of individuals unable to act on their own behalf.\textsuperscript{110}

\textbf{A. The Child's Interest}

The Court's failure to fully explore the interests of the child and recognize them at the adjudicatory phase is not surprising in view of the protection it traditionally affords parental rights.\textsuperscript{111} The rights of natural mothers and fathers to the care, control and companionship of their children have been regarded as sacred by courts.\textsuperscript{112} Courts have rec-

\begin{footnotesize}
\begin{enumerate}
\item[106.] Id. at 760.
\item[107.] Id. at 767 n.17 (emphasis in original).\textsuperscript{108}
\item[108.] Id. at 788 n.13 (Rehnquist, J., dissenting). The dissent noted: The child has an interest in the outcome of the factfinding hearing independent of that of the parent. . . . [T]he child's interest in continuation of the family unit exists only to the extent that such a continuation would not be harmful to him. An error in the factfinding hearing that results in a failure to terminate a parent-child relationship which rightfully should be terminated may well detrimentally affect the child.
\item[109.] Id. at 790 (Rehnquist, J., dissenting). ("Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance.")
\item[110.] See supra note 80 and accompanying text.
\item[111.] See supra text accompanying notes 27-36.
\end{enumerate}
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ognized, however, that these rights carry responsibilities which entail a duty to provide proper care and protection for the child. Although the duty of parents to provide a minimally adequate environment is important, the corresponding rights of children have generally yielded to parents' rights.

By presuming that the interests of parents and children coincide at the adjudicatory phase, it is arguable that the Court undervalued the basic interest of the child in growing up in a stable and secure environment. It has been stated that:

"Children have a strong interest in having a secure and stable home. Such a home must not only be secure and stable in the sense that it provides a physically secure and emotionally stable environment, but it must also be secure and stable in the sense that it will be relatively permanent. Permanence is important in order for the child to develop a normal family relationship and to avoid the anxiety and developmental problems that can be caused by uncertainty in care and custodial arrangements."

In actions to terminate parental rights, then, the point may be reached where the child's interest and the parent's interest diverge. If the family is functional or is likely to become functional with rehabilitative services, the child's interest in preserving the familial bond coincides with the parent's interest in custody and control. But if the family is nonfunctional or nonexistent, the child's interest in a safe and secure environment may conflict with the parent's interest in preserving the parental bond. In that case the interests of the child should be recognized at the factfinding stage because of the consequences for the child at this point.

The Santosky majority, however, did not analyze the

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117. Id. See also Alsager v. District Ct., 406 F. Supp. 10, 23-24 (S.D. Iowa 1975) (termination recommended if consequences of allowing parent-child relationship to continue are more severe than severing that bond), aff'd per curiam, 545 F.2d 1137...
separate interests of the child. The Court instead focused on the common interest of parent and child "in preventing erroneous termination of their natural relationship." In this context, the Court noted the serious consequences of termination, including permanent loss of support and maintenance, loss of the right to inherit and all other rights inherent in the legal parent-child relationship. The Court's emphasis on the common interest of parent and child in preventing termination is also supported on the ground that state interference with parental ties may cause the child to experience serious emotional pains whether the parent is "fit" or "unfit." Furthermore, this focus on the common interest and the reluctance to assess the child's independent interest may be rooted in the difficulty courts have in determining "unfitness." Even experts cannot agree on what parental behavior harms the child: "[N]o generally accepted standards exist detailing conduct that will or will not cause emotional harm. In fact, little evidence indicates that a parent's values or immoral conduct will harm the child at all. No consensus exists on the best way to raise children." In light of the serious consequences of termination and the difficulty in determining whether parental bonds should be permanently severed, it is not surprising that the Court failed to recognize the independent interests of the child at the factfinding stage but focused instead on the common interest of parent and child "in preventing erroneous termination."

B. Parens Patriae Role of the State

The Court has also stated that: "Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision at the factfind-
The Court recognized that, under the doctrine of parens patriae, the state's goal in enacting child welfare legislation is to provide the child with a permanent home. Yet, because the state's interest favors preservation of positive family relationships, the Court concluded that its role in termination proceedings arises only after the adjudicatory phase. Although this analysis is consistent with the Court's characterization of the factfinding hearing as an adversary contest between the state and the parents, it fails to recognize that the state's primary function in terminations is to promote the welfare of the child at all phases of the proceedings. Because the child's interest in preserving the family unit exists only to the extent that its preservation would not be harmful to him or her, the state's interest has a broader focus than preventing erroneous terminations. The state's role is "to provide procedures not only assuring that the rights of the natural parents are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child..."

Nevertheless, Santosky's conclusion that the state's parens patriae interest coincides with the parents' interest is in accord with a trend in Supreme Court decisions dating from the early 1960's minimizing the importance of the state's parens patriae role. These decisions, however, have not distinguished that role in juvenile delinquency cases from that in child protective cases.

Until the Court's decision in In re Gault in 1967, state laws dealing with neglect, abuse, termination and delinquency were subject to minimal judicial scrutiny. Gault changed that situation by specifying what procedural protec-

125. Id. at 766 (quoting Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981)) (emphasis in original).
127. Id. at 767.
128. Id. at 761.
129. Id. at 790 n.16 (Rehnquist, J., dissenting).
130. Id. at 788 n.13 (Rehnquist, J., dissenting).
131. Id. at 791 (Rehnquist, J., dissenting) (quoting N.Y. Soc. Serv. Law § 384-b(1)(b) (McKinney 1976 & Supp. 1982)).
tions were mandated in delinquency hearings in order to protect children's rights which had not been sufficiently guarded by the parens patriae rationale allowing benevolent state intrusion into the lives of children and their families.\footnote{Gault, 387 U.S. at 16-31.} The Court subsequently held in \textit{In re Winship}\footnote{397 U.S. 358 (1970).} that delinquency adjudicatory proceedings must use a beyond a reasonable doubt standard of proof.\footnote{Id at 365-68.} \textit{Breeds v. Jones}\footnote{421 U.S. 519 (1975).} used the \textit{Gault} rationale to hold that double jeopardy protection must be accorded a minor accused of a crime.\footnote{Id at 529.}

A moderate resurgence of the parens patriae doctrine can be seen in Supreme Court decisions in the 1970's. For example, \textit{McKeiver v. Pennsylvania}\footnote{403 U.S. 528 (1971).} held that a jury trial is not constitutionally mandated in juvenile delinquency proceedings. The Court stated that "[t]here is a possibility, at least, that the jury trial, if required . . . will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."\footnote{Id at 545.} Subsequently, in \textit{Parham v. J.R.}\footnote{442 U.S. 584 (1979).} the Court concluded that the child's due process rights were not violated by a state statute which permitted the commitment of a minor to a mental health facility at the parents' request without a formal hearing.\footnote{Id at 604.} The Court reasoned that the state's parens patriae interest in assisting parents to obtain treatment for their children was consistent with informal admissions procedures.\footnote{Id at 605.}

The impetus for these decisions may be the Court's increasing distrust of the broad assumptions which underlie the application of the parens patriae power of the state to direct the lives of children and their parents.\footnote{See Developments in the Law, supra note 20, at 1221-27.} In the name of rehabilitation and state "caring," the parens patriae power was being invoked by the state to protect neither the rights of the parent nor the welfare of the children. Instead it was
used to separate children from their parents informally and with wide discretion or to commit children involuntarily to institutions, schools, hospitals and group homes.\textsuperscript{145}

Further confusion concerning the application of parens patriae exists because of the courts' failure to distinguish the state's role in child protective cases from the state's role in delinquency matters.\textsuperscript{146} Such a distinction is necessary to adequately assess the government's interest.\textsuperscript{147} In delinquency proceedings the child has a liberty interest at stake which has been accorded due process protection.\textsuperscript{148} The state's role is to proceed in a prosecutorial manner which does not infringe upon this liberty interest. In neglect, dependency or termination hearings the child has potentially conflicting interests in being free from physical or emotional harm and in receiving parental care and guidance.\textsuperscript{149} Thus, in these cases the state's role should be to balance these interests from the child's perspective to determine which dispositional alternative will be in his or her best interest or which will be least detrimental to his or her well-being.\textsuperscript{150}

VI. CONCLUSION

In \textit{Santosky v. Kramer}\textsuperscript{151} the United States Supreme Court held that before a state may terminate the rights of parents in their child, due process requires the state to support its allegations by at least clear and convincing evidence.\textsuperscript{152} In reaching its decision, the Court ignored any independent interest the child might have at the factfinding stage of the proceedings. The Court instead focused on the common interest of the parent, the child and the state "in preventing erroneous terminations."\textsuperscript{153} This point of view has at least two noteworthy consequences. First, \textit{Santosky} reinforces the longstanding presumption favoring parents'

\textsuperscript{145} \textit{Id.} at 1226-27 (and cases cited therein).
\textsuperscript{146} \textit{Id.} at 1225.
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{See supra} notes 124-31 and accompanying text.
\textsuperscript{149} \textit{Santosky}, 455 U.S. at 787-90 (Rehnquist, J., dissenting).
\textsuperscript{150} \textit{See J. Goldstein, A. Freud & A. Solnit, supra} note 46.
\textsuperscript{151} 455 U.S. 745 (1982).
\textsuperscript{152} \textit{Id.} at 769.
\textsuperscript{153} \textit{Id.} at 760.
right to the custody, control and companionship of their children. Second, the decision signals continued moderation in the Court's view of the state's parens patriae role, particularly in actions which involve the conflicting interests of children and their parents.

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154. See generally McGough & Shindell, Coming of Age: The Best Interest of the Child Standard in Parent-Third Party Custody Disputes, 27 Emory L.J. 209, 212-13 & n.21 (1978) (and cases cited therein) (parental rights doctrine based on assumption that unless parent is disqualified by proof of unfitness, the interests of the child are best served by awarding child to parent).

155. See supra notes 123-42 and accompanying text.