Due Process: Constitutional Rights and the Stigma of Sexual Abuse Allegations in Child Custody Proceedings

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DUE PROCESS: CONSTITUTIONAL RIGHTS
AND THE STIGMA OF SEXUAL ABUSE
ALLEGATIONS IN CHILD CUSTODY
PROCEEDINGS

INTRODUCTION

There is growing public awareness of the victimization of children at the hands of their parents. Political pressure, media coverage, and a litigious populace have increased the demand for accountability from those charged with the investigation and prosecution of sex offenses against children. Public outcry over the proliferation of child abuse has sparked a flurry of federal and state legislation. This attention is justified and necessary.

1 See HHS Releases New Data Showing High Level of Child Abuse, Neglect Cases, U.S. NEWSWIRE, Apr. 8, 1997, available in LEXIS, Nexis Library, NEWS/CURNWS File, (quoting Health and Human Services Secretary Donna Shalala: “Child abuse and neglect continue to be a shameful tragedy in our country, and every one of us has a stake in preventing it . . . . and our shock must move us to action.”).

2 See id. at 40.


4 See generally id., (discussing child protection agencies’ dilemma in evaluating cases when intervention is required and yet workers must minimize the potential for litigation charging erroneous intervention); see also Gail Vida Hamburg, When Parents Fail, CHI. TRIB., Nov. 9, 1997, at 1 (discussing climate of hysteria which has had the unfortunate effect of over-intervention); Susan Freinkel, Aggressive Counsel, Unpopular Cause, RECORDER, July 23, 1992, (describing a law practice built on representing accused child abusers in an atmosphere compared to Salem during the witch trials).

5 See COSTIN, supra note 2, at 126-29. Federal initiatives include the Child Abuse and Prevention Act of 1974, the Adoption Assistance and Child Welfare Act of 1980 and the Omnibus Budget Reconciliation Act of 1993. See id. By the time President Clinton took office, federal action was urgently needed. See id. at 127. In spite
for the protection of children's rights.6 The rights of the parents, however, are often trivialized by inadequate procedures that fail to safeguard them from the potentially catastrophic effects of sexual abuse allegations.7

States are facing a frightening surge in reported cases of child abuse.8 Specifically, there has been a dramatic increase in cases involving parents accused of sexually abusing their children.9 In its role as parens patriae,10 the state is empowered to

of projections that federal spending for foster care would climb 61%, from $2,423,000 in 1993 to $3,913,000 in 1998, there was no evidence that child welfare conditions were improving. See id. The Children's Defense Fund estimated that the number of children reported to be abused or neglected in 1992 had tripled since 1980. See id. State budgets were similarly burdened. See id. Child welfare researchers Edith Fein and Anthony Maluccio observed that "the astronomical rise in reports of child abuse and neglect is stretching the state systems to the breaking point." Id. at 127. The federal government's policy in directing states to implement policy initiatives "permitted 50 different state 'systems' to operate." Id. at 128. The result has been an "overwhelming crisis" of ever-increasing caseloads, inadequately trained social workers, and insufficient funding. Id. at 128.

6 See COSTIN, supra note 2, at 138. Due to a lack of conformity or consistency in research methods, researchers believe that child abuse is vastly underreported. See id. at 135. The child abuse and neglect problem has been likened to an iceberg; the small portion of actual cases recorded by authorities is but the tip of the iceberg. See id. at 137-38. Time wasted investigating false or unsubstantiated reports further strains human and economic resources. See id. at 135.


8 See supra note 5 and accompanying text. Although approximately 1 million incidents of child abuse and neglect are substantiated each year, a national study estimated that, due to underreporting, 2.8 million children were actually abused and neglected in 1993. See id. It is estimated that 80% of child abuse and neglect cases may be attributed to parents and other relatives. See id.

9 See THEODORE J. STEIN, CHILD WELFARE AND THE LAW 54 (1991) (discussing characteristics of families reported for child abuse and neglect). According to a study conducted by the American Humane Association, approximately 14% of child abuse is attributed to sexual abuse. See id.; see also Lisa Carpenter, Changing the Balance: Rhode Island's Amended Termination Of Parental Rights Statute, 60 WASH. U.
immediately take custody of the child involved and to conduct an investigation to protect the “best interests” of that child. In protecting the child’s best interests, however, the accused parent’s due process rights are severely jeopardized. Accusations of sexual abuse, frequently arising in the context of bitter matrimonial actions, require an accused parent to defend potentially unfounded allegations in family court with the likely loss of custodial rights. While due process rights to notice and a hearing are guaranteed in these civil proceedings, in most states a judge makes a preliminary determination of the parent’s culpability by utilizing the lowest standard of proof—a preponderance of the

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1. See Stein, supra note 9, at 31 (discussing standards employed by the various states to determine whether state intervention into family matters is warranted). “The best interest standard has typically been interpreted as requiring the decision maker to make long-range predictions about the effects of parental behaviors on children.” Id. at 31. The author argues that, given the difficulty in making long-range predictions regarding the needs of children, decisions that result in the separation of parent and child should be predicated on proof that the child cannot be protected from specific harm, rather than “hypotheses” about long-range harm. See id. at 31–32; see also Meredith Felise Sopher, “The Best of All Possible Worlds”: Balancing Victims’ and Defendants’ Rights in the Child Sexual Abuse Case, 63 FORDHAM L. REV. 633, 639–40 (1994) (discussing states which provide for the appointment of a guardian ad litem to represent a child’s best interests in a child protective proceeding).

2. The function of a standard of proof should “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.” In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The Court stated that “[i]n cases involving individual rights, whether criminal or civil, ‘[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.’ ” Addington v. Texas, 441 U.S. 418, 425 (1979) (quoting Tippett v. Maryland, 436 F. 2d 1153, 1166 (4th Cir. 1971)). [In the typical civil case, society has a minimal concern with the outcome [and, therefore,] plaintiff’s burden of proof is a mere preponderance of the evidence . . . In a criminal case . . . the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof
If the state meets this low threshold, the parent may face deprivation of custodial rights for up to a year or more.14 Furthermore, the stigma of “child molester” immediately attaches a devastating effect on a parent’s reputation.15 This loss designed to exclude as nearly as possible the likelihood of an erroneous judgment . . . . The intermediate standard, which usually employs some combination of the words “clear,” cogent,” “unequivocal” and “convincing,” is less commonly used . . . . One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof.

Id. at 423–424.

See generally PRINCE, RICHARDSON ON EVIDENCE § 3-203 (Richard T. Farrell, ed. 1995). Used primarily in the civil context, litigants, usually suing for monetary damages meet in court to prove their respective cases, each shouldering an equal burden of proof. See id. In order to establish proof by a preponderance of the evidence, the fact finder need only believe that a “fact is more probable than its non-existence.” Id. § 3-206 (citing In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). “A fair preponderance of evidence does not necessarily mean a greater number of witnesses; rather, the quality of the evidence is determinative.” Id. § 3-206. In contrast, criminal defendants must be found guilty beyond a reasonable doubt. See id. § 3-204. In this instance, any doubt in the factfinder’s mind must be based upon a reason. See id.

See 42 U.S.C. § 625(a)(5)(A)-(F) (1994 & Supp. III 1997). In the event a state removes a child from a parent’s custody, federal law mandates that a dispositional hearing to determine if out of home placement is to be continued be held within twelve months.

See infra Part III for discussion of the stigma associated with child abuse registries; see also Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5101–5119 (1994 & Supp. II 1996). The Child Abuse Prevention and Treatment Act requires states to maintain systems to report, monitor, and respond to child abuse. Additionally, see COSTIN, supra note 2, at 34. The Act established the National Center on Child Abuse and Neglect charged with duties to research and disseminate information pertaining to child abuse. See 42 U.S.C. § 5105 (1994 & Supp. II 1996). Under its research and reporting function, the National Center on Child Abuse and Neglect must include information on “substantiated reported child abuse cases that result in civil child protection proceedings or criminal proceedings . . . . with respect to which the court makes a finding that abuse or neglect exists and the disposition of such cases.” Id. § 5105(a)(1)(C)(iii). The Supreme Court held that “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” a liberty interest may be implicated. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). See Bohn v. County of Dakota, 772 F.2d 1433, 1436 n.4 (8th Cir. 1985) (finding that a couple accused of child abuse were “exposed . . . . to public opprobrium and may have damaged their standing in the community”). The mere accusation of sexual abuse of one’s child may have disastrous consequences. See Harry Stein, Explosive Charge, MEN'S HEALTH, July 1993, at 84 (discussing false allegations made in divorce disputes that leave the accused confronting the public perception that “such horrific charges can’t be entirely groundless”). In the midst of divorce, a New Jersey woman accused her psychologist-
implicates a personal liberty interest that demands due process protection as well.\(^8\)

The difference between the temporary loss of custodial rights and permanent termination of parental rights is constitutionally significant. "The United States Supreme Court has maintained that both parents have a constitutional right to custody of their children."\(^7\) Custody of a child is "[the] care, control and maintenance of a child which may be awarded by a court to one of the parents as in a divorce or separation proceeding."\(^8\) When a parent is not granted custody, there is a temporary relinquishment of that care, control, and maintenance by the non-custodial parent. Conversely, the termination of one's parental rights results in the "sever[ing] completely and irrevocably [of] the rights of parents in their natural child."\(^9\) Unlike a child custody decision that is temporary, a parental rights termination proceeding permanently interferes with the parent's fundamental constitutional right to raise his or her child.\(^10\)

This Note examines the due process concerns of a parent accused of sexual abuse in a family court's custodial fact-finding hearing. In these "temporary" dispositions, the majority of states require that proof of child abuse or neglect be proven by a

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See Elizabeth Trainor, Annotation, Sufficiency of Evidence to Establish Parent's Knowledge or Allowance of Child's Sexual Abuse By Another Under Statute Permitting Termination of Parental Rights for "Allowing" or "Knowingly Allowing" Such Abuse to Occur, 53 A.L.R. 5TH 499 (1997).
preponderance of the evidence.\textsuperscript{21} Relying on dicta from \textit{Santosky v. Kramer},\textsuperscript{22} courts repeatedly find that this same evidentiary standard is adequate if parents face only a temporary loss of custody.\textsuperscript{23} Continued reliance on the distinction between permanent and temporary loss of custody as a means of justifying the lowest of evidentiary standards, however, is wrong.

This Note asserts that while children must be protected from the dangers of child abusers, due process requires a closer look at the risks to parents answering sexual abuse allegations in family court. Due to the nature of the accusations, parents and families may be permanently scarred—by loss of employment, social status, and potential loss of physical liberty for the accused as well as by irreparable damage to the family unit—all interests which are substantially different than those of parents charged with non-sexual abuse or neglect.\textsuperscript{24} Accordingly, these parents should be afforded greater due process protection.

It is well established that even carefully drafted procedures cannot substitute for a deficient standard of proof.\textsuperscript{25} Courts,
however, are reluctant to afford greater rights to parents accused of sexual abuse. In a criminal prosecution, erroneous outcomes are limited because the state must prove each element beyond a reasonable doubt, the highest evidentiary standard. As a procedural safeguard, therefore, the standard of proof reduces the likelihood of finding an innocent person guilty. Conversely, civil fact-finding hearings use a far lower standard to expose essentially the same "behavior" and determine parental culpability, while severely jeopardizing parents' due process rights.

This Note examines the preponderance standard as it is applied in child custody and protection proceedings that originate with charges of sexual abuse. It considers the conflict inherent in policies that purport to maintain family integrity while balancing the competing interests of parent and child. Part One discusses the historical development of child welfare policy and the resulting impact on family integrity. This part focuses on the courts' harmful application of a balancing test in a manner that trivializes the fate of the accused parent. Part Two dis-

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27 See ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 300.4e (1996); see also Santosky, 455 U.S. at 764 ("The Court has long considered the heightened standard of proof used in criminal prosecutions to be 'a prime instrument for reducing the risk of convictions resting on factual error.'") (quoting In re Winship, 397 U.S. 358, 363 (1970)).

28 See Santosky, 455 U.S. at 755. The Court noted:

When the State brings a criminal action to deny a defendant liberty or life . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."

Id. (quoting Addington v. Texas, 441 U.S. 418, 423 (1979)).

29 See 43 C.J.S. Infants § 62 (1976). The fact-finding hearing is the adjudicatory stage of the proceeding wherein the allegations are evaluated on the merits; the dispositional phase determines the temporary resolution. See id.

30 Use of the preponderance standard does not comport with Supreme Court jurisprudence regarding matters where substantial personal rights have been determined to be at stake. See PRINCE, supra note 13, at § 3-205. The intermediate standard of clear and convincing evidence has been used when "policy imperatives dictate adoption of the higher standard of probability reflected by the term 'clear and convincing' evidence." Id. See, e.g., Cruzan v. Missouri Dep't of Health, 497 U.S. 261 (1990) (terminating life support systems); Santosky, 455 U.S. 745 (terminating parental rights); Addington, 441 U.S. 418 (confining individual to a mental institution).
cusses how judicial challenges to the standard of proof in two other types of civil actions, civil commitment and juvenile delinquency proceedings, resulted in use of an intermediate level of proof, clear and convincing evidence. It is asserted that parents facing loss of custody based on sexual abuse accusations face similar risks, particularly with respect to the stigma which immediately attaches. Part Three examines the fundamental fairness of equal risk-sharing in child protective proceedings of this type. This part focuses on issues influencing judicial decisions, recent legislation pertaining to child abuse registries, media access to family court proceedings, and the emotionally-charged social and political climate which further prejudice the rights of those who may well stand wrongfully accused. This Note concludes that although custody proceedings are civil rather than criminal, the risks inherent in such proceedings, including the potential for eventual termination of parental rights, loss of reputation, and risk of criminal prosecution warrant that the state prove its allegations by clear and convincing evidence.

I. THE EVOLUTION OF THE POLICY AND POLITICS OF CHILD WELFARE LEGISLATION

A. The Federal View

Matters of family integrity, while not specifically within the scope of congressional power, are subject to the protection of the Fourteenth Amendment because they have been recognized as fundamental to individual liberty. Parents have a fundamental

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32 See U.S. CONST. amend. XIV, § 1; see also Santosky, 455 U.S. at 753 (stating
right to raise their children free from government interference.\textsuperscript{33} This right, however, must be balanced with the government's compelling interest in insuring that its minor citizens are free from abuse and neglect.\textsuperscript{34}

In response to escalating incidences of child abuse and neglect,\textsuperscript{35} Congress enacted the Child Abuse Prevention and Treat-

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\textsuperscript{33} See Prince, 321 U.S. at 165–66. The Supreme Court stated that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Id. at 166. This right is of such magnitude that it is not necessarily preempted by a parent's failings or even a temporary loss of custody. See Santosky, 455 U.S. at 753.

\textsuperscript{34} See STEIN, supra note 9, at 26–27 (discussing the evolution of American family law from the 1800s, when parental rights were seemingly infinite, to the contemporary approach, which seeks to serve the best interests of the child in a balancing of parents’ and children's rights); see also Reno v. ACLU, 117 S. Ct. 2329, 2343 (1997) (recognizing the federal government's compelling interest in protecting children's psychological and physical well-being); Santosky, 455 U.S. at 766 (asserting that the government's "parens patriae interest in preserving and promoting the welfare of the child" is implicated in parental rights termination proceedings); J.B. v. Washington County, 127 F.3d 919, 925 (10th Cir. 1997) (observing that the interests of the parent and child implicated by a forced separation must be weighed against the government's compelling interest as parens patriae in protecting minors from abuse); Whisman v. Rinehart, 119 F.3d 1303, 1309 (8th Cir. 1997) (stating that the liberty interest shared by parent and child in each other's care and companionship is limited by government's interest in ensuring that children are protected from abuse); Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994) (recognizing that the State has a compelling interest in the welfare and safety of children due to its status as parens patriae); In re Department of Public Welfare, 421 N.E.2d 28, 36 (Mass. 1981) (observing that "[t]he State as parens patriae may act to protect minor children from serious physical or emotional harm"); see also CLIVE GRACE, SOCIAL WORKERS, CHILDREN, AND THE LAW 1 (1994) (stating that "social and political concern oscillates between anxiety that children are failing to get adequate protection from abuse, and worry that family and parental feelings are too readily overridden by the child-protection system"); STEIN, supra note 9, at 26–28 (discussing the evolution of American family law from the 1800s when parental rights were seemingly infinite, to the contemporary approach, which seeks to serve the best interests of the child in a balancing of parents’ and children's rights).

ment Act, which mandated that each state report and respond to evidence of child abuse in order to receive certain grants. The Adoption Assistance and Child Welfare Act ("The Child Welfare Act") was enacted to address concern regarding long-term foster placements and the need for permanency planning. The

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39 See STEIN, supra note 9, at 36-43. The goals of the Act were to prevent removal of the child from the home of his or her natural family whenever possible and to avoid placing children in long-term foster placement by reunifying families or facilitating adoptions. See id. at 37. Studies had shown that permanency planning was less expensive than foster care, and that by providing extensive social services, families could remain together. See id. Budget cuts, however, have severely limited the success of permanency planning. See COSTIN, supra note 2, at 123.

In the absence of intensive support services, permanency planning for many children became a revolving door-placement in foster care, reunification with the biological parent(s), then a return to foster care...[O]ne four-year old New York boy...was placed in thirty-seven different homes over two months and...another [child] had been placed in seventeen homes in twenty-five days.

Id. (internal citations omitted); see also Carpenter, supra note 9, at 159 (1996) (discussing provisions of the Adoption Assistance and Child Welfare Act of 1980). Per-
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Child Welfare Act states that, absent serious harm, children should remain with their parents. The states, however, were directed to provide “child welfare services” for the purpose of “preventing, or remediying, or assisting in the solution of problems, which may result in the neglect, abuse, exploitation, or delinquency of children.” The Child Welfare Act allows for emergency removal of a child from his or her home, but mandates that a dispositional hearing be held within twelve months of the removal. States, however, must employ all “reasonable efforts” to prevent such removal, and facilitate the child’s return home when removal is unnecessary.

manency planning is “the systematic process of carrying out, within a brief, time-limited period, a set of goal-directed activities designed to help children live in families that offer continuity of relationships with nurturing parents or caretakers and the opportunity to establish lifetime relationships.” See 42 U.S.C. § 625(a)(1)(C) (1994 & Supp. II 1996) (establishing that social services should be directed toward “preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible”).


See 42 U.S.C. § 675(5)(C) (1994 & Supp. 1998) (recently changing, in November 1997, the time period within which a dispositional hearing must be held from 18 months to 12 months); see also STEIN, supra note 9, at 40–41 (discussing federal requirements that cases be reviewed to insure that children are returned to their families whenever possible). In order to ensure that a child’s development is not unduly interrupted, separation from his or her parents must be for as short a time as possible. See Lori Klein, Doing What’s Right: Providing Culturally Competent Reunification Services, 12 BERKELEY WOMEN’S L.J. 20, 38 (1997) (claiming that a parent’s interest in the companionship, care, and custody of a child and the child’s right to a safe and stable home justify allowing the parent to retain custody, unless the parent has been shown to be unfit) (internal citations omitted); Carpenter, supra note 9, at 159–60, 163–65 (arguing that long term separation from a child’s parent can impede the development of the child) (internal citations omitted); Jennifer Ayres Hand, Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights, 71 N.Y.U. L. REV. 1251, 1257 (1996) (recognizing that even a relatively brief separation from the parent can have grave effects on a child, as “psychological development depends on a secure, uninterrupted relationship with one caregiver”) (internal citations omitted); Jill Sheldon, 50,000 Children Are Waiting: Permanency, Planning and Termination of Parental Rights Under the Adoption Assistance and Child Welfare Act of 1980, 17 B.C. THIRD WORLD L.J. 73, 78–79 (1997) (analyzing the governmental efforts to prevent foster care drift).

42 U.S.C. § 671(a)(15) (1994 & Supp. II 1996). See STEIN, supra note 9, at 38 (discussing the requirement that, before a child is placed outside the family home, the state must demonstrate its efforts to avoid that course of action by first using less intrusive means); see also Jessica A. Graf, Note, Can Courts and Welfare Agen-
B. The Common Law View

Temporary loss of custody is primarily determined by proof by a preponderance of the evidence, regardless of whether the parent is accused of neglect, physical abuse, or sexual abuse.44 This standard, which reflects minimal societal interest in the outcome and carries a substantial risk of error,45 does not protect the due process rights of parents in temporary custody proceedings,46 nor does it support federal policy goals of protecting families from unwarranted governmental intervention.47 Consequently, while preservation of family integrity continues to be a societal goal, courts continue to hold that the temporary and reversible nature of custodial dispositions justifies the preponderance standard.48

44 See Mallory v. Mallory, 539 A.2d 995, 997 (Conn. 1988) (recognizing that, in child custody hearings, “a preponderance of the evidence standard adequately protects a parent from false accusations of sexual abuse, and that the ordinary civil standard of proof better serves the strong societal interest in protecting children from abusive parents”); In re Juvenile Appeal (83-CD), 455 A.2d 1313, 1323 (Conn. 1983) (holding that “the proper standard of proof in temporary custody hearings is the normal civil standard of a fair preponderance of the evidence”); New Jersey Div. of Youth and Family Servs. v. V.K., 565 A.2d 706, 714 (N.J. Super. Ct. App. Div. 1989) (observing that in temporary custody proceedings, as opposed to hearings for the termination of parental rights, the State must prove its case by a preponderance of the evidence); In re N.Y.C. Dep’t of Social Servs. v. Oscar C., 600 N.Y.S.2d 957, 959 (2d Dep’t. 1993) (ruling that the preponderance of the evidence standard is appropriate when the parent faces a temporary loss of custody); Wright v. Arlington County Dep’t of Soc. Servs., 388 S.E.2d 477, 479 (Va. Ct. App. 1990) (concluding that “the preponderance of the evidence standard is an appropriate standard for an abuse and neglect proceeding which may lead to temporary placement of the child”); see also 43 C.J.S. Infants § 61 (1978 & Supp. 1997).

45 See supra note 12 and accompanying text; see also Santosky v. Kramer, 455 U.S. 745, 768 (1982). The Court held that the clear and convincing standard of proof “adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process.” Id. at 769.

46 See id. at 768.

47 See id. at 762 (delineating the risks of erroneous fact-finding attributable to the use of the preponderance of the evidence standard in the context of cases regarding the termination of parental rights); see also supra note 41 and accompanying text (discussing the federal preference for maintaining the integrity of the home).

48 See, e.g., In re Robert, 556 N.E.2d 993, 997 (Mass. 1990) (recognizing that “a significant consideration [in a due process analysis] is ‘the permanency of the threatened loss’ ”) (quoting Santosky, 455 U.S. at 758); In re Tammie Z., 484 N.E.2d
In *Stanley v. Illinois*, decided in 1972, the Supreme Court

determined that the right to raise a family is “essential” and
worthy of constitutional protection. The Court reviewed the
due process rights of an unwed father and held that the state
must provide unwed fathers with procedural protections afford-
ing them the opportunity to prove their parental fitness. In
doing so, the Court demonstrated its willingness to delve into
matters concerning family integrity in order to protect parents’
due process rights.

The *Stanley* court protected unwed fathers’ due process
rights by overturning a statute that presumed them to be unfit
parents. Like the father in *Stanley*, family litigants in a child

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50 U.S. 645 (1972).

51 See id. at 651. The court noted, “It is cardinal with us that the custody, care and
nurture of the child reside first in the parents, whose primary function and freedom
include preparation for obligations the state can neither supply nor hinder.” Id.
(quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

52 See id. at 658. The father challenged a statute that denied him a hearing re-
garding his fitness as a parent following the death of his children’s mother. See id.
at 646. Under this statute, upon their mother’s death, children of unwed fathers be-
come wards of the state. See id. The father claimed that this statute discriminated
against unmarried fathers, thus violating his rights under the Equal Protection
Clause of the Fourteenth Amendment. See id. The Court agreed, and established
that the constitutionally protected right to family integrity entitled the father to a
fair hearing, wherein Stanley could assert his fitness. See id. at 657–58. The Court
stated, “[t]he private interest here, that of a man in the children he has sired and
raised, undeniably warrants deference and, absent a powerful countervailing inter-
est, protection.” Id. at 651. If through this process, Stanley showed himself to be a
fit parent, the statutory policy would be served by leaving custody with the parent,
rather than the state. See id. at 655. Although a due process claim had not been
raised, the Court next evaluated the Constitutionality of procedures utilized by the
state to advance its interest in protecting children. See id. at 652.

53 See id. at 651. The Court also affirmed the states’ power to protect children,
even if it necessitated removing children from their parents’ custody. See id. at
655–56.

54 See id. at 650. Under the Illinois statute, unwed fathers lacking parental
status were excluded from the proceedings because their unfitness was “presumed
at law.” Id. The father’s claim to his children was deemed to be “irrelevant” under
the statute. Id. The statute based its presumption of unfitness on the generalization
that “most” unwed fathers were unfit. Id. at 654.
custody proceeding must be protected from due process violations which “needlessly risk running roughshod over the important interests of both parent and child.”

Nine years later, the Court again had cause to consider parental due process rights. In *Santosky v. Kramer*, the Supreme Court reviewed a New York statute providing for the termination of parental rights due to the parent’s neglect or abuse. The Court examined what process was due to assure that the parents’ rights were constitutionally protected. In a 5-4 decision, the Court held that, given the grievous nature of the loss—permanent dissolution of the family—due process required no less than clear and convincing evidence to support the allegations brought against the parents by the State. The Court applied the three-part test that was first fashioned in *Mathews v. Eldridge*, which weighed the rights of the parent and child, the risk of erroneous determinations on the parties, and the government’s interest in retaining the existing procedures.

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54 Id. at 657.
56 *See id.* at 747 (stating that New York law allowed the state to terminate the natural parent’s rights in their child upon a showing that the child had been “permanently neglected”) (citing N.Y. SOC. SERV. LAW §§ 384-b.4.(d), 384-b.7.(a) (McKinney 1981–82)).
57 *See id.* at 753.
58 Chief Justice Burger and Justices White and O’Connor joined in Justice Rehnquist’s dissent. *See id.* at 770–91. The dissent warned that the decision invited the federal courts to “intrude[d] into every facet of state family law.” *Id.* at 770.
59 *See id.* at 747–48 (holding that New York law, which allowed termination of parental rights upon the same level of proof necessary for an award of monetary damages in a civil trial, provided insufficient protection to the parents’ due process rights).
60 424 U.S. 319 (1976). In this case, Eldridge, a disabled veteran, brought suit when the government stopped payment of his disability benefits, as they had determined he was no longer disabled. *See id.* at 324–25. Eldridge challenged the procedures utilized and asserted that a hearing was required before benefits were discontinued. *See id.* at 325.
61 The *Mathews* Court fashioned a three-part test to determine what process was due:

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

*Id.* at 335.

Additionally, *see Santosky*, 455 U.S. at 755 (assessing the three distinct factors in *Eldridge*). “[T]he minimum standard of proof tolerated by the due process re-
The first of the test's three factors is the private interest affected by the challenged proceeding. The Court recognized the "grievous loss" facing the parent and the permanency of the outcome in a termination proceeding. Noting the permanent, irreversible nature of the parents' loss, the interests of the parents were found to be so substantial that heightened procedural protections were favored.

The second factor under the test considers the risks to the parties created by the procedure. The Court found that the preponderance standard's pitting of the individual against the state, the disparity of resources, and the roughly equal sharing of risks carried the risk of quantitative judgments to the parent's detriment. The Court reasoned that should the state requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." Id. (citing Addington v. Texas, 441 U.S. 418 (1979)).

See Santosky, 455 U.S. at 754.

Id. at 758 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

See id. at 759. The state seeks "not merely to infringe that fundamental liberty interest, but to end it." Id.

See id.

See id. at 761. The Court noted that termination proceedings at the fact-finding stage "bear[] many of the indicia of a criminal trial." Id. at 762. The Court considered the state's ability to marshal its assets to build a case against the parent, the potential for cultural or class bias, and the subjective nature of the decision-making. See id. at 762–63.

See id. at 759.

See id. at 764.

See id. at 768. The Court stated that the sharing of risks was "constitutionally intolerable." Id.; see also Note, Balancing Children's Rights into the Divorce Decision, 13 VT. L. REV. 531, 559 (1989) (noting that a higher standard of proof is necessary for balancing risks, when dealing with forced termination of parental rights); H. Joseph Gitlin, A Legislative Remedy to the Baby Richard Problem, CHI. DAILY L. BULL., Mar. 17, 1997, at 5 (stating that "[a] standard of proof that allocates the risk of error nearly equally between an erroneous failure to terminate, which leaves the child in an uneasy status quo, and an erroneous termination, which unnecessarily destroys the natural family, does not reflect properly the relative severity of these two outcomes").

70 See Santosky, 455 U.S. at 762–64. "A standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case." Id. at 764. The decision suggests that erroneous determinations are exacerbated by the vulnerability of the parents. See id. at 762–63. "Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, [ ] such proceedings are often vulnerable to judgments based on cultural or class bias." Id. at 763 (citing Smith v. Organization of Foster Families, 431 U.S. 816, 833–35 (1977) (citation omitted)). When Smith was decided, 52.23% of children in foster care were black and 25.5% were
erroneously terminate parental rights, the child, who is already in the custody of the state, would remain in foster care or would be deemed available for adoption. It recognized that, from the parent’s perspective, the risk of error would result in the permanent destruction of the family. Thus, the Court determined that a preponderance standard did not properly allocate the risks to parent and child.

The third factor evaluated by the Santosky court was the government interest supporting the use of the state’s procedure. The Court stated that the preponderance standard was consistent with the state’s two interests: providing for the welfare of the child and reducing the fiscal burdens of protective proceedings. The Court then considered, however, that New York already applied a clear and convincing standard in termination proceedings based on a parent’s diminished mental capacity and in cases of severe and repeated child abuse. Thus, the Court concluded that the state would not be unduly burdened by applying the elevated standard in parental termination proceedings based on neglect.

The Santosky dissent shared the majority’s desire to reduce the risk of error in termination proceedings, but asserted that procedural protections adequately served this purpose. How-

Puerto Rican. See Smith, 431 U.S. at 833–34. The Smith Court noted that social workers tend to resist returning children placed in affluent foster homes to their poorer parents. See id. at 834.

See Santosky, 455 U.S. at 765–66. The risk to the child, in the words of the Court, is “preservation of an uneasy status quo.” Id.

See id. at 766 (discussing how erroneous termination for the natural parent “is the unnecessary destruction of their natural family”).

See id. at 765 (stating that this allocation of risk of error between parent and child is “fundamentally mistaken”); see also Addington v. Texas, 441 U.S. 418, 423 (1979) (holding the State to a higher burden of persuasion to “share the risk of error in roughly equal fashion”).

See Santosky, 455 U.S. at 766.

See id.

See id. at 767.

See id. at 768. The Court noted that New York also required proof by clear and convincing evidence for matters involving contract reformation and for proof of traffic infractions. See id. at 767–68. The Court found that there would be no undue burden on the state “to require that its factfinders have the same factual certainty when terminating the parent-child relationship as they must have to suspend a driver’s license.” Id. at 768.

See id. at 768 n.12 (Rehnquist, J., dissenting). In addition to its multi-phased fact-finding and disposition procedures for both custody and termination proceedings, the dissent noted that New York’s family court further reduced the risk by having one judge supervise a case from initial removal through final termination.
ever, the "minimum requirements [of procedural due process] being a matter of federal law... are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." Procedures such as separate fact-finding and dispositional hearings that afford the parent notice and a hearing cannot substitute for a constitutionally deficient standard of proof. A preponderance standard, found to be constitutionally deficient in Santosky, is even more egregious when applied in custody matters that concern sexual abuse. These proceedings, like the parental termination proceedings reviewed in Santosky, require greater scrutiny given the individual interests at stake.

In dicta, the Court distinguished the permanent, irreversible nature of a termination proceeding from a custody proceeding. Thereafter, courts have relied on Santosky and have applied its analysis to justify the use of a preponderance of the evidence standard for fact-finding hearings involving temporary neglect and abuse dispositions.

Reliance on Santosky's dicta as support for the use of the preponderance standard of proof is unfair. Specifically, in determining that parental termination proceedings required a higher standard of proof than a preponderance of the evidence, the Santosky court observed that "the factual certainty required to extinguish the parent-child relationship [utilizing a preponderance standard] is no greater than that necessary to award money damages in an ordinary civil action." Similarly, a parent faced with the prospect of losing custody of a child should be afforded more certainty and less error than he or she would expect...
in an action for money damages. When the loss of custody is compounded by the stigma that accompanies allegations of sexual abuse, the nature of the parent's loss becomes far more grievous.

Furthermore, reliance on Santosky and the Mathews three-part test has produced considerable controversy. Even within a single jurisdiction, there has been strong disagreement as to the proper standard of proof. The explanation is simple. Courts have failed to distinguish the Santosky court's careful analysis of risk factors peculiar to a parental termination proceeding based on permanent neglect, and those risk factors peculiar to temporary custody proceedings which may involve allegations of neglect, physical abuse, sexual abuse, or any combination of the three.
1. The Parent’s Private Interests

In *In re Christine H.*, a New York trial court noted that the distinct parental interests affected in custody proceedings involving allegations of sexual abuse are “the stigma of child abuse, possible criminal prosecutions, and possible termination of parental rights.” The court reviewed evidence supporting the mother’s allegations that the father had touched and rubbed their three-year old daughter’s genitals, grabbed her, and punched her. In consideration of the substantial interests of the parent facing sexual abuse allegations, the grave risk of error, and the slight countervailing government interest in utilizing the preponderance standard, the court applied the clear and convincing standard and dismissed the abuse petition.

Three years later, in *In re Tammie Z.*, the New York Court of Appeals considered the appropriate standard of proof regarding a petition alleging neglect. Three children who had been in the care of their father had been removed from his custody for eighteen months. The Court, in a *per curiam* decision, held...

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81 451 N.Y.S.2d 983 (Fam. Ct. Queens County 1982).
82 Id. at 986 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
83 See id. at 983–84. The father denied all of the allegations and suggested that the timing of the petition was related to marital discord. See id. at 984.
84 See id. at 985–86. The court reconsidered traditional adherence to the preponderance rule in civil family court matters in view of the then-recent decision in *Santosky v. Kramer* and an amendment to New York law that added child abuse as a predicate act on which parental termination could be sought. See id. at 985. The court noted the potential for criminal prosecution, and the Family Court Act’s definitions of “severe” and “repeated” abuse which “established a rigorous standard for the proof of both intent and injury, which parallels similar language in the Penal Law.” Id. at 986 n.1. Felony sex offenses actionable under the Family Court Act were also identified. See id.
85 See id. at 984. The father’s attorney compared the applicable statute to a criminal statute, thus warranting proof by clear and convincing evidence. See id. at 984. The court noted the great risk of error given the “subjective predictions” and “calculated gambles” involved, as well as the preponderance standard’s susceptibility to misinterpretation. Id. at 987 (citation omitted).
86 See id. at 986–87. The court reasoned that the preponderance standard could satisfy governmental interest regarding findings of neglect, but more serious abuse findings warranted the clear and convincing standard of proof. See id. at 987.
87 See id. at 987.
88 484 N.E.2d 1038 (N.Y. 1985) (per curiam).
89 See id. at 1038. “In a fact-finding hearing to determine whether a child is [or has been] abused or neglected, the provision of Family Court Act § 1046(b) that a finding of neglect ‘must be based on a preponderance of the evidence’ affords due process under the Federal Constitution.” Id.
90 See id. at 1038. The petition had claimed that the children were neglected.
that the preponderance standard utilized at the fact-finding hearing was sufficient as a matter of law. It rejected the father's argument that the clear and convincing standard should apply to fact-finding hearings; the court relied on the three-part test utilized in Santosky. The court concluded that "[t]he balance of interests ... differs materially from [parental termination proceedings]." The court distinguished custody and termination proceedings and determined that the preponderance standard was sufficient given the temporary nature of a custody disposition.

In In re Katrina W., a parent challenged the burden of proof to be used in a sexual abuse case. Based on testimony and medical evidence offered at a fact-finding hearing, the court determined that Katrina had been sexually abused by her fifteen year old brother, thus subjecting her to removal from her mother's custody. The mother appealed, challenging the suffi-

within the meaning of section 1012(f) of the Family Court Act. See N.Y. FAM. CT. ACT § 1012(f) (McKinney 1983).

101 See Tammie Z., 484 N.E. 2d at 1038–39.

102 See id. at 1039. This test involves the balancing of private interests, the chance of mistake with a state's procedure, and the governmental interest supporting the procedure. See id.

103 Id.

104 See id. at 1038–39. But cf. In re Pablo C., 439 N.Y.S.2d 229, 234 (Fam. Ct. Bronx County 1980) (determining that clear and convincing evidence is the proper standard of proof for proceedings to suspend visitation for parents whose children were removed from home by the state). The court recognized the risk of error in utilizing the lower preponderance standard and articulated the need to preserve family integrity:

Use of the higher standard would reflect the premise of state policy and the Constitution that maintenance of the family unit is the preferred solution, and would serve to further those particularly important interests of the child and parent by reducing the likelihood of erroneous decisions to suspend visitation. Given the interests of the child in being returned home if possible, and the interest of the state in effectuating that outcome, and given the fact that supervised visitation provides protection for the child, it is not apparent that there is any countervailing interest on the part of the child or state which would be furthered by use of the "preponderance" standard or justify the increased likelihood of erroneous decisions concomitant with its use.

Id. at 233.

105 575 N.Y.S.2d 705 (2d Dep't 1991) (per curiam) (affirming a decision to remove a child from her mother's custody due to sexual abuse by a sibling).

106 See id. at 709. The court concluded that removal was necessary because Katrina's brother, who was discharged to a relative's home, had returned to the family home. See id.
ciency of the evidence and the court's application of the preponderance standard in the context of a proceeding involving sexual abuse. Distinguishing In re Tammie Z., the court noted that the Court of Appeals decision "did not explicitly refer to findings of abuse." The court then considered the issue of what standard should apply in sexual abuse cases. Applying the Mathews three-part due process test, the court found that the governmental interest in protecting children from sexual abuse was "even more compelling" than in neglect matters. Yet, the court still rejected the contention that more weight be accorded parents' interests in sexual abuse proceedings than in matters concerning neglect.

2. The Risk of Erroneous Custodial Deprivation

The second Mathews factor is the risk of error and its impact on the parties. In In re Christine H., the court emphasized the accused parent's substantial private interests in a matter alleging sexual abuse. The court noted that there was no physical evidence of abuse, that the child's testimony contradicted her

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107 See id. at 708. Medical evidence presented by Social Services included a pediatrician who testified to Katrina's enlarged hymeneal opening and vaginal scarring as being consistent with intercourse. See id. A guidance counselor also testified that Katrina discussed her brother's "raping" of her. See id. On appeal, the court found that the evidence supported a finding of abuse. See id.

108 See id. at 706. Katrina's mother claimed the evidentiary standard did not afford procedural due process. See id.

109 Id. at 706.

110 See id.

111 Id. at 708. The court stated, "the [s]tate's parens patriae interest in promoting the welfare of the child is even more compelling where the petition alleges abuse." Id.

112 See id. at 707. A parent is not subject to criminal sanctions simply because there is a finding of sexual abuse. Furthermore, the court found that the stigma attached to an abuse finding, as opposed to a finding of neglect, does not "require a higher burden of proof." Id. at 707–08.


115 See id. at 984. The mother testified that her husband began sexually abusing their younger child the previous summer. See id. The child, aged 4, had stated that her father "put his bone in my mouth and ma[d]e pee pee all over my mouth." Id. The child had repeated this and similar accounts in the presence of a third person. See id. Neither the younger child nor the third party testified. See id. The mother also alleged that the respondent father rubbed the younger daughter's genitals. The father had allegedly beaten, pushed, and punched an older daughter. See id. The mother further alleged that her husband drank excessively and took valium. See id.
mother's, and that there was reason to question the timing and motivation behind the claims of abuse. The court dismissed the petition, stating that the risks associated with the "more serious finding of child abuse" and the preponderance standard's "susceptibility to misinterpretation" justified the use of clear and convincing evidence.

The Court of Appeals, however, in In re Tammie Z., noted that the "risk of error" associated with the court's protection of the child was only temporary—it "remain[ed] in effect only pending a final order of disposition." Thus, if the clear and convincing evidence standard could not be met, the petition for protection would be dismissed, subjecting the child to undesirable risk—the child would be returned to the potentially abusive parents if the abuse or neglect was not proved. The court, cognizant of the "disastrous consequences" of an erroneous dismissal at 983. The mother testified that she had consulted with an attorney in mid-August but that the attorney "advised her to do nothing until an understanding could be reached." Id. at 984.

See id. at 984. The court found that the older child's testimony lacked credibility, due to her "anger and resolve to have no dealings with her father." Id. The court determined that the child was "strongly influenced" by her mother and although her testimony supported some of her mother's testimony, it contradicted her mother's version in material respects. Id.

See id. The father claimed that the timing of his wife's allegations was not coincidental: the police complaint containing the allegations occurred after he ordered his wife's parents out of the marital home, one week after his wife had passed her medical exams, and during a time when he was traveling abroad for several weeks. See id. at 987.

Id. at 987.

Id. "As in so many of these child abuse proceedings, the events have occurred away from the view of outside disinterested parties and therefore credibility becomes a major factor in seeking to determine the truth." Id. at 984. The court noted the risks associated with subjective decisions in child custody matters. See id. at 987. The opinion suggested that the accused parent's liberty interests and the stigma associated with a finding of child abuse required greater certainty despite the proceeding's civil nature. See id. at 986-87 (citing Addington v. Texas, 441 U.S. 418, 425 (1979) (ruling on civil commitment proceedings), and In re Winship, 397 U.S. 358, 368 (1970) (involving a civil juvenile delinquency proceeding)). The decision noted that the Supreme Court had applied the clear and convincing evidence standard in both types of proceedings, due to the particular importance of the individual's interests and the need for greater certainty. See id. at 986.

484 N.E.2d 1038 (N.Y. 1985) (holding that the preponderance standard in a neglect matter affords due process under federal law).

See id. at 1039. The court found risk of mistake to be a "fundamental difference" between an abuse and neglect proceeding. Id.
might have on a victimized child, affirmed the lower court's findings. In *In re Katrina W.*[, the court rejected the mother's argument that threats of criminal prosecution, parental termination and the stigma associated with sexual abuse allegations warranted application of the clear and convincing evidence standard. The court asserted that parental concern with termination of parental rights was misplaced because clear and convincing evidence would be applied in termination proceedings. Ultimately, the court rejected the contention that the stigma resulting from a finding of abuse was "sufficiently greater" than that for neglect. Relying on *In re Tammie Z.*, the holding in *In re Katrina W.* was consistent with other New York decisions which have held that a preponderance of the evidence standard in sexual abuse cases does not offend due process.

Other jurisdictions have reached the same conclusion. The Massachusetts statutory scheme does not specify the standard of proof to be utilized in a hearing that temporarily transfers custody from the parent to the state pending further investigation into whether the child is suffering or is in danger of serious abuse or neglect. Utilizing the *Mathew* three-part test and in
consideration of the temporary nature of the loss, a Massachusetts court, in In re Robert, rejected the clear and convincing standard in favor of the preponderance standard. The higher standard, the court determined, would put children at too much risk of being "erroneously returned to abusive or neglectful parents."

Similar reasoning, on the state level, has resulted in the predominant use of the preponderance standard in abuse and neglect proceedings in Maine, Colorado, and Virginia. California, however, applies the preponderance standard in dependency hearings in matters concerning abuse, but only in those that do not result in removal of the child from parental custody. The more stringent clear and convincing standard has been confined to matters that "sever the parent-child relationship, either temporarily or permanently." Finally, in contrast,
under a federal law addressing custody proceedings involving Native American children, proof by clear and convincing evidence is required in order to remove children from the care and custody of a parent or custodian for any reason.\footnote{See 25 U.S.C. § 1912(e) (1994). Child custody proceedings for Native American Indian children require that "no foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." \textit{Id. See generally Judge Edward L. Thompson, Protecting Abused Children} (1994) (discussing the impact of child protective proceedings on Native American Indians). "The interests of children in a wholesome environment has a constitutional dimension no less compelling than that the parents have in the preservation of family integrity. In the hierarchy of constitutionally protected values both interests rank as fundamental, and must be shielded with equal vigor and solicitude." \textit{Id. at 27} (citing \textit{In re Jerry L.}, 662 P.2d 1372, 1374 (Okla. 1983)).}

3. The Countervailing Government Interest

The important governmental interest in protecting children can still be realized by utilizing the clear and convincing evidence standard in abuse proceedings. Some courts, however, have reasoned that raising the burden of proof might jeopardize the child's safety and result in increased fiscal and administrative burdens.\footnote{See, e.g., \textit{Wright}, 388 S.E.2d at 478-79; \textit{In re Robert}, 556 N.E.2d 993, 1000 (Mass. 1990).} Use of the higher standard would not necessarily cost more, however, and it would more accurately reflect stated policy goals.\footnote{See \textit{Costin}, supra note 2, at 119-122 (discussing family preservation models to assert that the government should target and treat at-risk families, rather than resort to foster care placement).} Pursuant to family preservation ideology,\footnote{See 42 U.S.C. § 629(a) (1994 & Supp. II 1996). The Act provides funding "for the purpose of encouraging and enabling each State to develop and establish, or expand, and to operate a program of family preservation services and community-based family support services." \textit{Id.}} states should resist wresting custody from a parent unless the child's safety or welfare is clearly endangered.\footnote{See \textit{Costin}, supra note 2, at 119. By 1993, 30 states had adopted a family preservation program, Homebuilders, as a model program. \textit{See id. Troubled families are identified and assigned a caseworker. \textit{See id. at 120. Although a pilot program involved a caseworker assigned to "no more than two families" in order to provide round-the-clock access and intensive family services, avoidance of more expensive foster or institutional care resulted in "astonishing" cost savings. \textit{Id.; see also Peter A. Lauricella, Chi Lascia La Via Vecchia Per La Nuova Sa Quel Che Perde E Non Sa Quel Che Trova: The Italian-American Experience and Its Influence on the Judicial Philosophies of Justice Antonin Scalia, Judge Joseph Bellacosa, and Judge Vito Titone, 60 ALB. L. REV. 1701, 1711 (1997) (asserting that Justice Scalia views the}}
nia utilizes bifurcated proceedings but courts impose the higher standard of clear and convincing evidence before removing a child from a parent’s custody. The state is not compelled to dismiss petitions that do not meet the higher standard; rather, it may intervene in productive, less intrusive ways by authorizing family counseling and monitoring services.

New York courts have used similar reasoning to justify applying the clear and convincing standard in proceedings to suspend parental visitation to children placed in foster care: “maintenance of the family unit is the preferred solution. . . . [I]t is not apparent that there is any countervailing interest on the part of the . . . state which would be furthered by use of the ‘preponderance’ standard . . . .” In In re Pablo, a court considered the issue and determined that proof by clear and convincing evidence was required. Like a custody determination, the deci-

preservation of the family unit as paramount”); Carole A. Smith, Family; Family Preservation Services, 25 PAC. L. J. 701, 704–05 (1994) (examining state law which encourages family preservation).

But see Melanie Togman Sloan, No More Baby Jessicas: Proposed Revisions to the Parental Kidnapping Prevention Act, 12 YALE L. & POL’Y REV. 355, 381 (1994) (criticizing the policy of family preservation and claiming that it “is not based on the best interest of the child and more specifically on the child’s social relationships”).

See CAL. WELF. & INST. CODE § 361(b) (Deering 1988 & Supp. 1997); In re Joshua S., 205 Cal. App.3d 119, 125 (Ct. App. 1988) (“Questions concerning a more stringent standard [than preponderance of the evidence] do not arise until a finding of dependency results in a disposition which severs the parent-child relationship either temporarily or permanently.”); In re Christopher B., 82 Cal. App. 3d 608, 617 (Ct. App. 1978) (stating that “clear and convincing proof is required only when the final result is to sever the parent-child relationship and award custody to a nonparent”).

See CAL. WELF. & INST. CODE § 300 (Deering 1994) (defining minors subject to the court’s jurisdiction including those determined to be sexually abused or at risk of sexual abuse). The statute expressly provides that services to families in need of assistance may be offered regardless of whether there is an adjudication of abuse or neglect. See id. Additionally, see CAL. WELF. & INST. CODE § 16500.5 (Deering 1994) (containing a variety of legislative initiatives aimed at supporting and preserving family unity).

In re Pablo C., 439 N.Y.S.2d 229, 233 (Fam. Ct. Bronx County 1980). See also Resignato v. Resignato, 624 N.Y.S.2d 440, 441 (2d Dep’t 1995) (“Denial of visitation rights is a drastic remedy, and should only be done where there are compelling reasons and substantial evidence that such visitation is detrimental to the child’s welfare.”); Vasile v. Vasile, 498 N.Y.S.2d 635, 636 (4th Dep’t 1986) (asserting the importance of visitation to the noncustodial parent).

49 See id. at 233. The court stated:

[An] assessment of the interests of the child, parent and State in a determination of the question of suspension of visitation and the use of a particular standard of proof leads to the conclusion that the appropriate stan-
sion to suspend visitation is temporary and reversible;\textsuperscript{151} however, the court made a distinction, stating that suspension was more serious, as it was "a step beyond removal."\textsuperscript{152} The court reasoned that a higher standard was warranted to serve "the state's policy of returning children to their families whenever possible \["] based on the legislative determination that a normal family life offers a child the best opportunity for development and that his need for a normal family life will usually best be met in the natural home."\textsuperscript{153} The court noted that the higher "'evidentiary requirement operate[s] as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory.'"\textsuperscript{154}

Both suspension of custody and suspension of visitation "set the stage" for a permanent termination of parental rights.\textsuperscript{155} The same degree of caution should be exercised in custodial determinations involving sexual abuse allegations where proof is often entirely circumstantial and contradictory.\textsuperscript{156} In order to ef-

\begin{itemize}
\item \textit{Id.} The natural mother of two children placed in foster care objected to the foster parents' petition to suspend her visitation privileges. \textit{See id.} at 230. Although the Supreme Court had not yet considered the due process issues later decided in Santosky v. Kramer, the New York trial court used a similar analysis in weighing the interests of parent, child and the state in reaching its decision. \textit{See id.} at 231–32.
\item \textsuperscript{151} See W.M.E. v. E.J.E., 619 So.2d 707, 709 (La. Ct. App. 1993) (applying preponderance of evidence standard of proof in a proceeding to suspend visitation because such suspension is not permanent); \textit{In re Marriage of Kingsbury}, 917 P.2d 1055, 1059–60 (Or. Ct. App. 1996) (asserting that the suspension of the father's visitation rights could be reexamined when it would be in the daughter's best interest to do so).
\item \textsuperscript{152} \textit{Pablo C.}, 439 N.Y.S.2d at 234 (claiming that the degree of intrusion caused by the suspension of visitation must be considered in determining the applicable standard of proof); \textit{see also} Acker v. Acker, 623 N.Y.S.2d 34, 34 (4th Dep't 1995) (observing that the denial of visitation is such a drastic remedy that substantial evidence and compelling reasons must be presented as to why it would be in the child's best interests to discontinue visitation).
\item \textsuperscript{153} \textit{Pablo C.}, 439 N.Y.S.2d at 233 (stating that a permanent alternative to reuniting the family can be sought only when it is impossible for a normal family home to be provided for the child by the parent).
\item \textsuperscript{154} \textit{Id.} at 234 (quoting Backer Management Corp. v. Acme Quilting Co., 385 N.E.2d 1062, 1066 (N.Y. 1978)).
\item \textsuperscript{155} \textit{Id.} at 233 (stating that breaking the custodial link by denying parents visitation "sets the stage" for eventual termination of parental rights); \textit{see also} Acker, 623 N.Y.S.2d at 34 (describing the denial of visitation as a drastic remedy).
\item \textsuperscript{156} \textit{See Pennsylvania v. Ritchie}, 480 U.S. 39, 60 (1987) (observing that "child abuse is one of the most difficult crimes to detect and prosecute . . . because there often are no witnesses except the victim"); \textit{see also} Sopher, \textit{supra} note 11, at 636.
fectuate stated policy goals, greater certainty is required before family relationships are irreparably destroyed.

The type of evidence in sexual abuse cases varies and is often contradictory. The state may present evidence of physical abuse which includes, for example, evidence indicating that a young girl's hymen has been broken or that there is vaginal scarring.\textsuperscript{157} Fact-finding determinations may also be based, however, on circumstantial evidence such as a psychologist's interpretation of a child's behavior. In the former case, there is likely enough evidence of sexual abuse that the clear and convincing standard would be met anyway.

Moreover, due process must be flexible. Dissenting in 

\textit{San-}

\textit{tosky}, Justice Rehnquist wrote that the adequacy of statutory schemes "cannot be . . . determined merely by the application of general principles unrelated to the peculiarities of the case at hand."\textsuperscript{158} Custody proceedings that involve sexual abuse allegations are peculiar because they subject accused parents to incomparable risks. Raising the standard would not necessarily preclude less intrusive alternatives and would more effectively serve public policy.

\section*{II. ANALOGIES TO OTHER CIVIL PROCEEDINGS}

The preponderance standard requires that the risk of an erroneous determination be borne in roughly equal fashion by the parties. Equitable risk sharing, however, is not always appropriate despite the civil nature of a proceeding. In \textit{Santosky}, the Court compared parental termination proceedings to civil commitment,\textsuperscript{159} deportation,\textsuperscript{160} and denaturalization,\textsuperscript{161} which are all

\textsuperscript{157} See, e.g., supra notes 104–06 and accompanying text.
\textsuperscript{159} See Addington v. Texas, 441 U.S. 418, 427 (1979) (asserting that "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state").
\textsuperscript{160} See Woodby v. INS, 385 U.S. 276, 285 (1966) (recognizing the serious consequences of deportation).
\textsuperscript{161} See Chaunt v. United States, 364 U.S. 350, 353 (1960) (asserting that "in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside"); Schneiderman v. United States, 320 U.S. 118, 122 (1943) (recognizing the importance of the right of citizenship, and that "such a right once conferred should not be taken away without the clearest sort of justification and
civil proceedings that require a higher standard of proof than preponderance of the evidence.\textsuperscript{162}

A. Civil Commitment

Determining what process is due under the Constitution involves balancing the private interests of the parties and the permanence of the threatened loss.\textsuperscript{163} Like the due process challenge to the civil commitment proceedings in \textit{Addington v. Texas},\textsuperscript{164} child custody hearings are civil proceedings in which the government is a party.\textsuperscript{165} These proceedings involve fundamental liberty interests, and “are all \textit{reversible} official actions.”\textsuperscript{166} The similarity of these issues warrants comparison.

The \textit{Addington} Court recognized the important function of the standard of proof in civil commitment proceedings.\textsuperscript{167} The Court rejected the standard of beyond a reasonable doubt, determining that “the state [should not] be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments.”\textsuperscript{168} The Court, however, found that the preponderance of the evidence standard, even though typically used in civil cases, would be inappropriate in civil commitment proceedings.\textsuperscript{169} The Court noted that the lower standard is appropriate in most civil cases because they involve monetary disputes with which “society has a minimal concern with the outcome.”\textsuperscript{170} In contrast, the Court found that “the indi-
individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."

Whereas in Addington, the state sought to exercise "authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill," in a child custody hearing, the state, as parens patriae, has a legitimate interest in providing temporary removal of a child from a parent's dangerous tendencies. However, reliance on the civil nature of a custody proceeding to justify the preponderance standard belies the gravity of its outcome. In contrast to civil disputes concerning monetary compensation, society has a substantial interest in protecting parents from false allegations that threaten family integrity. Use of a higher evidentiary standard in sexual abuse custody proceedings would comport with Addington's logic that the state must use particular caution when exercising power that serves one of society's interests but infringes upon another.

The state must give greater deference to the rights of parents who may be falsely accused before taking custody of their children. An individual in a civil commitment proceeding faces a significant loss of liberty by involuntary commitment to a men-

171 Id. at 427 (expressing that equal risk sharing in this situation is inappropriate because erroneous decisions pose a substantially greater threat to an individual's interest).

172 Id. at 426 (analyzing the detrimental effect of employing the preponderance standard given the state's interest in the matter).

173 See supra note 10 and accompanying text.

174 See In re Winship, 397 U.S. 358, 365–66 (1970) (rejecting the preponderance standard in civil juvenile delinquency proceedings). The Court noted that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts." Id.; see also In re Dianne P., 494 N.Y.S.2d 881, 884 (2d Dep't 1985) (acknowledging that the "potential impact" child custody proceedings have on "family relationships evokes the need for limited constitutional protections").

175 See Addington, 441 U.S. at 426–27 (noting the impact that burdens of proof have on the factfinder).

176 See Santosky v. Kramer, 455 U.S. 745, 764–65 (1981) (quoting Addington, 441 U.S. at 427) (noting the importance of using a clear and convincing standard "in a parental rights termination proceedings [because it] would alleviate 'the possible risk that a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior'").
Although a parent deprived of custody does not face physical confinement, if the parent is identified as a child molester, severe familial, social, and economic constraints will be imposed.

The *Addington* Court noted that involuntary confinement is not punitive. Theoretically, temporary dispositions in child protective proceedings are not punitive either. The loss of custody and the stigma associated with sexual abuse allegations, however, have the effect of punishing parents for their alleged acts. Moreover, civil commitment and custody proceedings may both result in "temporary" liberty deprivations and can "engender adverse social consequences to the individual." The *Addington* Court concluded that the preponderance standard "falls short of meeting the demands of due process" for civil commitments. Applying *Addington*’s rationale to child custody proceedings, the state should be compelled to prove allegations of

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177 See *Addington*, 441 U.S. at 425 (noting the potential loss of liberty in civil commitments “requires due process protection”).

178 See, e.g., N.Y. FAM. CT. ACT § 1052 (McKinney 1999). Dispositional alternatives include: the child’s placement in a foster home or state institution; issuance of an order of protection or restriction; or prohibition of contact between parent and child. See id.

179 See infra Part III (regarding the social stigma of sexual abuse findings); see also *STEIN*, supra note 9, at 31 (discussing ambiguous statutes and the social harms that they may confer on both parent and child).

180 See *Santosky*, 455 U.S. at 745. The Court acknowledged that a natural parent’s interest in “the companionship, care, custody, and management of his or her children’ is an interest far more precious than any property right.” Id. at 758-59 (citation omitted).

181 See *Addington*, 441 U.S. at 428 (distinguishing standards of proof in civil and criminal proceedings and declining to equate civil commitment proceedings with juvenile delinquency proceedings).

182 See *Sopher*, supra note 11, at 638 n.38 (explaining that “[b]ecause the juvenile court’s purpose is to implement nonpunitive, individualized justice for children, the focus is on help and treatment, not punishment.”); *In re Diane P.*, 494 N.Y.S.2d 881, 885 (2d Dep’t 1985) (noting that parents in child custody proceedings do not face criminal penalties); *In re Vance A.*, 432 N.Y.S.2d 137, 146 (Fam. Ct. New York County 1980) (noting that civil child protection proceedings serve a remedial, as opposed to a punitive, purpose). But see *STEIN*, supra note 9, at 31 (discussing the argument that child neglect laws are unconstitutionally vague and attempt “to punish parents for antisocial behavior”).

183 See *Addington*, 441 U.S. at 426 (noting that regardless of the label used, classifications that draw negative social attention “can have a very significant impact on the individual”).

184 Id. at 425-26.

185 Id. at 426 (referring to involuntary mental commitment).

186 Id. at 431.
a parent’s sexual abuse by clear and convincing evidence.

B. Juvenile Delinquency

In *In re Winship*, the Supreme Court determined that a finding of juvenile delinquency required proof by clear and convincing evidence. The Court acknowledged that although criminal sanctions do not apply, the factfinder is nonetheless charged with determining if the accused has committed a criminal act. The Court also addressed the stigma associated with a juvenile delinquency determination. In spite of their civil nature, the Supreme Court recognized the quasi-criminal nature of the proceedings and the social costs inherent in a finding of juvenile delinquency, and noted the following year that “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” a liberty interest might be implicated. Five years later, the Court expressly required that, in order to rise to constitutional magnitude, the stigma must also result in a “tangible” loss. Thereafter, litigants who could meet a two-part “stigma plus” test were allowed to bring claims regarding reputational damage in federal court.

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188 See Addington, 441 U.S. at 427–28 (discussing *In re Winship*, 397 U.S. 358 (1970)).
189 See *Winship*, 397 U.S. at 363. The Court stated that juvenile delinquency proceedings implicated the “possibility that [the respondent] may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction.” *Id.*
191 See *Paul v. Davis*, 424 U.S. 693, 711–12 (1976) (stating that in order for a liberty violation to occur, a state-protected right or status separate from the injury to reputation must be altered or terminated). The plaintiff’s name and photograph were included in a police department flyer which was circulated to local merchants. The flyer was entitled “active shoplifters.” *Id.* at 695. At the time, the matter was pending and the plaintiff’s guilt or innocence had not been established. See *id.* at 696.
192 See *id* at 708–10. The Court explained that the stigma associated with defamatory allegations is “doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone,
Like a minor charged with an act of juvenile delinquency, a parent accused of sexual abuse in a child custody proceeding does not face criminal sanctions; however, the court makes a factual determination as to whether a criminal act has been committed. While presumptions of innocence do not apply in civil sexual abuse fact-finding hearings, the proceedings do take on quasi-criminal characteristics. An examination of the New York statutes regarding child protective proceedings demonstrates the unique risks confronting parents.

Under New York State law, in order to sustain a petition alleging the sexual abuse of a child, the court must identify the specific section of penal law violated. The family and criminal courts have concurrent jurisdiction. There are unique search and seizure laws under the New York’s Family Court Act which, for example, allow forcible entries. The respondent’s initial

deproi[s the victim] of any ‘liberty’ protected by the procedural guarantees of the Fourteenth Amendment." Id. at 709. The court distinguished prior cases in which the “public opprobrium and scorn” resulted from formalized government action and “affirmative determinations.” Id. at 707 n.4 (quoting Hannah v. Larche, 363 U.S. 420, 443 (1960)) (criticizing Justice Brennan’s dissent). Justice Brennan argued that the majority’s foreclosure of constitutional safeguards amounted to a “regrettable abdication” of the court’s role in protecting against “arbitrary and capricious official conduct.” Id. at 734–35 (Brennan, J., dissenting).

Stigma plus involves a two-prong test. See Tarkanian v. National Collegiate Athletic Ass’n, 741 P.2d 1345, 1350 (Nev. 1987), rev’d on other grounds, 488 U.S. 179 (1988). The first prong is satisfied by an injury to reputation. See id. Additionally, the stigma must be so severe that the individual is precluded from pursuing opportunities in his chosen profession. See id.; see also Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 366 n.13 (9th Cir. 1976).

See In re Gina D., 645 A.2d 61, 65 (N.H. 1994) (“[A]n abuse proceeding undertakes a solemn decision-making process as does a criminal trial on allegations of sexual abuse.”).

See Barton L. Ingraham, The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O’Reilly, 86 J. CRIM. L. & CRIMINOLOGY 559, 572 (1996) (discussing the distinctions between civil and criminal actions in terms of procedures, presumptions, and burdens of proof).

See Santosky v. Kramer, 455 U.S. 745, 762 (1982) (stating that “the factfinding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial”). In criminal proceedings the potential for creating factual errors that justified imposing a heightened standard of proof was found to similarly exist in parental termination proceedings; therefore, imposing the clear and convincing standard in termination proceedings had “both practical and symbolic consequences.” Id. at 764; see, e.g., infra notes 210–21 and accompanying text.

See N.Y. FAM. CT. ACT. § 1051(e) (McKinney 1999).

See id. § 1014 (authorizing transfer to and from family court and concurrent proceedings).

See id. § 1034(2) (McKinney 1999). “The standard of proof and procedure for such an authorization shall be the same as for a search warrant under the criminal
appearance is much like an arraignment. Special evidentiary rules afford the accused far less protection than they would receive in criminal trials. Parents who choose to testify on their own behalf in family court do so at their peril—there is no statutory protection against self-incrimination. Furthermore, a hearsay exception permits a child's out-of-court statements to be used at the hearing, provided there is other admissible evidence to corroborate the child's statements. In practice, a single anonymous call to a child abuse hot-line or a paid "expert's" testimony may satisfy the corroboration requirement.

Moreover, regardless of whether a charge is made in a civil or criminal proceeding, an allegation of sexual abuse necessarily places the parent and the state in adversarial positions. The Santosky court recognized the gross disparity of the resources available to each side.

The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has em-

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procedure law." Id. Furthermore, in child protection proceedings, evidence seized illegally is not subject to the exclusionary rule. See In re Dianne P., 494 N.Y.S.2d 881, 882 (2d Dep't 1985). The state's interest in protecting minors was found to far outweigh the exclusionary rule's deterrent value. See id. See N.Y. FAM. CT. ACT § 1033-b (McKinney 1999) (listing the rights of a respondent at the preliminary hearing).

See Lawrence J. Braunstein, Child Sex Abuse Allegations: Recognizing One's Limits as a Practitioner, N.Y. L.J., Feb. 22, 1991, at 1 (discussing the application of the exclusionary rule in child protective proceedings); see also Ingraham, supra note 194, at 572.

See Braunstein, supra note 200 (noting that clients that testify in child protective proceedings risk self-incrimination in criminal proceedings). See generally N.Y. FAM. CT. ACT § 1014(c) (McKinney 1999) ("Nothing in this article shall be interpreted to preclude concurrent proceedings in the family court and a criminal court."). The family court judge has discretion, however, to grant "testimonial immunity in any subsequent criminal court proceeding." Id. § 1014(d).

See N.Y. FAM. CT. ACT § 1046(a)(vi) (McKinney 1999).

See People v. Daniels, 339 N.E.2d 139, 140–41 (N.Y. 1975) (explaining that, due to the overriding public policy considerations inherent in sexual abuse cases, the New York Court of Appeals has relaxed the requirement for corroboration).
SEXUAL ABUSE ALLEGATIONS IN CHILD CUSTODY

powered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for the termination.\(^{204}\)

It is readily apparent that, regardless of whether a proceeding results in a finding of juvenile delinquency, a permanent termination of parental rights, or a temporary loss of custody, the state retains an overwhelming advantage.\(^{205}\) Utilizing a minimal standard in child abuse and neglect proceedings "places a great deal of importance on an adequate, well prepared and vigorously litigated defense."\(^{206}\) In spite of statutory rights to counsel afforded in some states, the parent of limited means is placed at greater risk.\(^{207}\) As a result, the poor and minorities are most vulnerable to erroneous custodial deprivation decisions.\(^{206}\)

The intermediate standard of proof—clear and convincing evidence—is warranted when more certainty is required "to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'"\(^{209}\) Family courts have


\(^{205}\) See id. Greater procedural and evidentiary protections were traditionally given to criminal defendants because they were said to need additional "protection... against the massive forces and resources of the state." Ingraham, supra note 194, at 574. However, this rationalization may be outdated because potential sanctions are less severe today than under 18th century English common law. See id. at 574–75.

\(^{206}\) Braunstein, supra note 200, at 4.

\(^{207}\) See Lassiter v. Department of Soc. Servs., 452 U.S. 18, 31–32 (1981) (holding that indigent parents in termination proceedings are not automatically entitled to court-appointed counsel; rather, the decision should be left to the discretion of the trial court); see also Kevin W. Shaughnessy, Note, Lassiter v. Department of Social Services: A New Interest Balancing Test for Indigent Civil Litigants, 32 CATH. U. L. REV. 261, 285 (1982) (criticizing the Lassiter court's failure to establish an absolute right to counsel).

\(^{209}\) See ALAN SUSSMAN & STEPHAN J. COHEN, REPORTING CHILD ABUSE AND NEGLECT: GUIDELINES FOR LEGISLATION 111 (1975) (offering several explanations for the statistical finding that the number of reported child abuse cases disproportionately represent the poor and minority populations). To a certain degree, overrepresentation of minorities in child custody proceedings may be due to bias in reporting because lower-income families are more visible to police and caseworkers. See id.; see also COSTIN, supra note 2, at 149 (considering the correlation between reports of child abuse and levels of poverty); Peggy Cooper Davis & Gautam Barua, Custodial Choices for Children at Risk: Bias, Sequentiality and the Law, 2 U. CHI. L. SCH. ROUNDTABLE 139, 157 (1995). The authors suggest "less drastic... dispositional alternatives, such as family supervision, home visits, or services for children and families at risk as the result of inadequate resources." Id.

\(^{209}\) Santosky, 455 U.S. at 756 (quoting Addington v. Texas, 441 U.S. 418, 425–26
not fairly considered parents' contentions that the stigma which results from a finding of sexual abuse of a child adversely impacts their rights, particularly considering the prominence of child abuse registries.

In _Lee TT. v. Dowling_, 10 the New York Court of Appeals affirmed a decision that determined that procedures associated with the state's child abuse registry violated the rights of accused individuals.21 Although this case did not involve child protective proceedings, it implicates the stigmatizing effect of sexual abuse allegations.

_Lee TT._ consolidated two cases involving parties who were the subjects of reports which resulted in the listing of their names with the New York State Central Register of Child Abuse and Maltreatment.212 One petitioner, a child psychologist, was reported to have sexually abused his 16-year old stepdaughter.213 The other petitioners were foster parents.214 A school psychologist filed a report suspecting abuse in response to their foster daughter's "acting out" sexually.215 In both cases, the reports were investigated, hearings held, and although the reports were unsubstantiated, the registry refused their requests to expunge the records because there was "some credible evidence" of the allegations.216

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211 See id. at 1246 (holding that a report of sexual abuse must first be substantiated by a fair preponderance of the evidence before any information concerning the incident may be released to employers in child care agencies); see also Larry "R" v. State of New York Dept of Soc. Servs., 1997 WL 778338, *1 (N.Y. App. Div. 3d Dep't Dec. 18, 1997); In re Kenneth "VV" v. Wing, 652 N.Y.S.2d 894, 896 (3d Dep't 1997); In re Walter W. v. State of New York Dep't of Soc. Servs., 651 N.Y.S.2d 726, 727 (3d Dep't 1997) (annulling and remitting for a review consistent with the appropriate standard of proof, an employees request to have his name expunged from the Central Registry).
212 See _Lee TT._, 664 N.E.2d at 1246 (explaining that the petitioners sought to have their names expunged from the Central Registry).
213 See id. at 1248. Petitioner was the subject of a telephone hotline call to the Central Register. See id. The Register sent the report to the local county Department of Social Services, which investigated the allegation. See id.
214 See id. (noting that the petitioners had three foster children).
215 Id. The psychologist filed the report with the Central Register. See id.
216 Id. at 1248-49. The Department of Social Services requires an investigatory finding that "some credible evidence of the alleged abuse or maltreatment" exist in order to maintain a listing in the Central Register. N.Y. SOC. SERV. LAW § 422(5) (McKinney 1992 & Supp. 1999). Further, the acts alleged were said to be "reasonably related" to employment in the child care field. _Lee TT._, 664 N.E.2d at 1249.
On appeal, the *Lee TT.* court considered whether the state, through its registry procedures, had deprived the parties of any constitutionally protected right, and if so, what process was due. The court applied the "stigma-plus" test. The first prong, damage to reputation, must be supplemented by a showing that the reputational injury caused by state action affected some "tangible" interest. Because the listing was found to "severely jeopardize" the psychologist's future employment opportunities, the court found there was a constitutionally protected interest. The foster parents, now precluded from realizing the tangible benefits of foster care contracts, were found to be similarly damaged.

Once the court determined that a liberty interest was implicated, it applied the *Mathews* three-part balancing test, considering the rights and interests of the parties. The court found that the "State and private interests [were both] weighty and compelling." Based on what the court characterized as a "'bare minimum' of evidence," the court concluded that, in order to disseminate records to employers or state licensing agencies, allegations would have to be proved by a preponderance of the evidence at a fact-finding hearing. Significantly, the court

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217 See *Lee TT.*, 664 N.E.2d at 1249.
218 *Id.* The two-prong test determines if the damage to reputation rises to the level of a deprivation of a constitutional right. *See id.* at 1250.
219 *Id.* at 1249 (noting that "[t]he stigma which results from the publication of such defamatory material is not constitutionally protected. A loss of liberty results only if some more ‘tangible’ interest is affected or a legal right is altered").
220 *Id.* at 1250 (explaining that all future employers would have to consult the list before hiring petitioner, and that if an employer decided to hire him, the employer would be required to state, in writing, his reasons for such a hire).
221 See *id.* (stating that the inclusion of the petitioners in the Central Register affected their present employment and foreclosed future employment in the child care area). The listing had resulted in all three of their foster children being removed by the state. *See id.* The foster parents were also forced to abandon their plans to adopt one of the children as a result of their inclusion in the registry. *See id.*
222 *See id.* at 1250. The three-part balancing test was established by the Court as a means of examining the constitutional sufficiency of administrative procedures. *See Mathews v. Eldridge,* 424 U.S. 319, 334–35 (1976).
223 *Lee TT.*, 664 N.E.2d at 1251.
224 *Id.* at 1251 (referring to the statutory requirement that "some credible evidence" exist in order to list reports in the Central Register). Some credible evidence is defined as "evidence worthy of being believed." *Id.* (citing Department of Social Services Child Protective Services Program Manual, app. B, at 7 (Aug. 1989)).
225 See *Lee TT.*, 664 N.E.2d at 1252 (stating that "[t]he most practical method of safeguarding subjects reported to the Central Register is to require a higher stan-
acknowledged that "the stigma of being branded a child abuser may extend well beyond employment in the child care field to prevent employment in any field." II.

III. UNFAIR RISK SHARING IN CHILD CUSTODY PROCEEDINGS

It has been argued that utilizing a higher standard of proof might seriously jeopardize the child's welfare by placing her at risk to remain or return to a home where she has suffered from actual, though unproved abuse. This position properly considers the welfare of the child, but fails to recognize the harm that children suffer from the unsettling effects of custodial intervention. In light of the deviant nature of sex abuse allegations and subjective determinations, well-intentioned judges and social workers may unwittingly inflate the risk of erroneous removals.

A. The Political Correctness of Judicial Intervention

Four factors have been identified as influencing judicial decision-making in child welfare proceedings:

[T]he perceived status quo at the time of custodial choice; a heightened emphasis upon risks associated with... fewer litigation resources; the fact that the litigation is understandably and inevitably focused upon the possibility that the respondent has caused harm to the child; and the judge's special vulnerability to negative feedback in the event of adverse consequences from a failure to intervene.

These factors cumulatively result in a "sequentiality effect"
that is described as the probability that "custodial decisions made at one stage of...[the] proceeding[s]...[will] influence decisions at the next stage." Compounding this effect is a bias which causes increasing resistance to custodial change over time. Thus, once the child is removed from parental custody, there is a strong tendency to maintain the status quo. Risks of non-intervention are exaggerated in cases that involve poorer parents pitted against the vast resources of the state. As public figures, judges must consider their accountability for erroneous determinations. "[D]ecisionmakers have great reason to fear that they will be made to regret a wrongful decision not to intervene and little reason to fear that they will be made to regret a wrongful decision to intervene." Consequently, political and community pressure may inadvertently result in judges skewing decisions in favor of custodial intervention.

By utilizing the preponderance standard, the risk of error is exacerbated, particularly when facts are uniquely difficult to prove—or disprove. Like the civil commitment proceedings at

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192 See id. at 156.
193 See id. at 152.
194 Id.
195 See id. at 158 (noting that the decision-maker who opts against intervention is more vulnerable to public reprisal); see also In re Christine H., 451 N.Y.S.2d 983, 987 (Fam. Ct. Queens County 1982) (stating that "[u]nless the judge takes no chances and removes all children from all offending or possible offending parents, some children will suffer further injury and even death after their cases are brought to court") (citation omitted).
196 See In re Winship, 397 U.S. 358, 367–68 (1970) (explaining that the preponderance test is often misinterpreted by the trier of fact). Proof beyond a reasonable doubt is "a prime instrument for reducing the risk of convictions resting on factual error." Id. at 363.
197 See Scott M. Brennan, Due Process Comes Due: An Argument for the Clear and Convincing Evidentiary Standard in Sentencing Hearings, 77 IOWA L. REV. 1803, 1809–10 (1992) (noting that the risk of error increases when the preponderance of the evidence standard is applied to complex issues); see also U.S. v. Townley, 929 F.2d 365, 369 (8th Cir. 1991) (stating that "[w]e nonetheless observe the unusual nature of the sentencing determination in this case...[u]nder such circumstances, due process conceivably could require more than a mere preponderance").

Conversely, the risk of error diminishes by utilizing the clear and convincing evidence standard which "is no stranger to the civil law." Woodby v. I.N.S., 385 U.S. 276, 285 (1966). This intermediate standard has been utilized in quasi-criminal proceedings where greater certainty is required. See Winship, 397 U.S. at 368 n.6 (Harlan, J., concurring) (discussing the applicability of a clear and convincing stan-
issue in Addington, determinations in custody proceedings involving allegations of sexual abuse are largely dependent on factual interpretation by psychiatrists and psychologists. Having these professionals testify to the child's experience in the absence of physical evidence is potentially dangerous.\(^5\) The Addington Court rejected the standard of proof beyond a reasonable doubt, surmising that the state could not meet its burden of proof given the "lack of certainty and the fallibility of psychiatric diagnosis."\(^9\) Consequently, the Court "turned to a middle level... of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the state... 'clear and convincing' evidence."\(^2\)

The risks of error in child abuse proceedings are magnified by the subjective nature of the determinations.\(^24\) The Court in Santosky acknowledged the danger of such subjectivity in the judges' "unusual discretion to underweigh probative facts that might favor the parent."\(^242\) This is particularly risky to the parent accused of sexual abuse.\(^243\) Symptoms such as a sudden interest in sexual acts, loss of appetite, or reversion to bedwetting may be valid indicators that a child is being sexually abused.\(^244\)

\(^{238}\) See infra notes 252-253 and accompanying text.

\(^{239}\) See Addington v. Texas, 441 U.S. 418, 429 (1979). "Psychiatric diagnosis... is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient." Id. at 430.

\(^{240}\) Id. at 431.

\(^{241}\) See In re Christine H., 451 N.Y.S.2d 983, 987 (Fam. Ct. Queens County 1982). This risk of error is exaggerated by use of the preponderance standard because it calls on the factfinder to "perform an abstract weighing of evidence... without regard to... convincing his mind of the truth of the propositions asserted." Id. (quoting Dorsan & Rezneck, In Re Gault and the Future of Juvenile Law, 1 Fam. L. Quarterly No. 4, at 26-27, cited in Winship, 397 U.S. at 368).

\(^{242}\) 455 U.S. 745, 762 (1982). Subjectivity becomes a particular problem when sexual abuse is alleged, as vague symptoms may be subject to interpretations. See Costin, supra note 2, at 17.

\(^{243}\) See Stein, supra note 9, at 31 (discussing ambiguous child abuse statutes). "[I]t has been argued that the judge, by virtue of parens patriae, has the freedom and perhaps the responsibility to use his own subjective views. It is the judge's notion of 'neglect' or 'depravity' that is most important." Id. (quoting Sanford N. Katz, When Parents Fail: The Law's Response to Family Breakdown 59 (1971)).

\(^{244}\) See Costin, supra note 2, at 17 (citing possible indicators of child abuse ac-
Under different circumstances, however, these same symptoms might be attributed to childhood stress, divorce, or exposure to age-inappropriate television programming.246

Judges face particular difficulty in assessing the validity of evidence presented in child sexual abuse matters.246 In In re Jaclyn P.,247 a family court found that a father had sexually abused his two daughters, who were ages two and three at the time of the alleged incidents.248 At trial, the children's mother testified that her older daughter had described repeated acts of sexual abuse by their father.249 The father denied the allegations and there was no physical evidence to support the claims.250 Witnesses for the father, including several medical doctors and mental health professionals, also testified that there was no evidence substantiating the allegations.251 The child's out of court statements were corroborated by a certified social worker who had interviewed the child and obtained detailed descriptions of abuse using anatomically correct dolls.252 The Family Court dismissed the petition. The appellate court, citing In re Tammie Z., reversed, stating that "the evidence preponderated in favor of the presentation agency."253 The New York Court of Appeals affirmed, stating that there was adequate support for a finding of sexual abuse.254

according to a list prepared by The National Committee for the Prevention of Child Abuse).


246 Expert testimony espousing various syndromes further complicates judicial evaluation. See Rita Smith & Pamela Coukos, Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations, JUDGES' JOURNAL, Fall 1997, at 38, 42. Among the theories believed to influence witness's testimony are "Parental Alienation Syndrome," and "Malicious Mother Syndrome." Id. at 41.

248 See id. at 1044 (Smith, J., dissenting) (providing factual and procedural background).

250 See id. at 1043 (noting that the older daughter described abuse of both daughters to the mother).

251 See id. The child's paternal grandmother testified that her granddaughter never complained during her visits. See id. A psychologist and a family therapist testified that the allegations of abuse were "unfounded." Id.

252 See id.  
253 Id. (citing N.Y. FAM. CT. ACT § 1046 (McKinney 1999)).

254 See id. The court of appeals rejected the father's challenge to the social
The sole dissenting judge strongly objected to the reliability of the evidence. The dissent questioned whether the expertise of the social worker had been properly established. The dissent noted that there had been no evidence introduced to demonstrate that the social worker had prior experience with sexually abused children of similar age or specialized training in dealing with situations where no physical evidence substantiated the alleged sexual abuse. The dissenting judge questioned the social worker’s techniques, noting the absence of testimony regarding whether they were accepted by the professional therapeutic community, particularly the controversial use of “anatomically correct” dolls. The dissent questioned the reliability of using dolls with “pronounced genitalia”—their use might influence a child’s responses.

A higher standard of proof will not jeopardize the welfare of children when allegations of sexual abuse are supported by physical evidence. When physical evidence is lacking, how-
ever, courts are too willing to err on the side of caution. Considering the myriad of factors that perpetuate erroneous custodial deprivations, a preponderance of the evidence—a standard of proof rejected for civil commitment and juvenile delinquency proceedings—in the words of Justice Blackmun, "does not reflect properly" the relative severity of the outcomes.

B. Child Abuse Registries

As Lee TT. demonstrates, child abuse registries serve an important purpose but have detrimental and potentially devastating social and economic consequences for the accused parent. The decision cites Valmonte v. Bane, in which the displayed behavior consistent with sexual abuse coupled with physical evidence satisfied corroboration requirement).

See, e.g., Mary D. v. Watt, 438 S.E.2d 521, 530 (W. Va. 1992) (denying father unsupervised visitation despite acquittal on same sexual abuse offenses tried in a criminal court). A single dissenting judge admonished the majority opinion and remarked on the hysteria surrounding sexual child abuse:

[S]exual abuse these days seems to arouse all the hysteria that was associated with witchcraft in yesteryear. In fact, it has even spawned a witch-huntingesque cottage industry, to-wit badly trained, ideological rape trauma experts, rape counselors, bachelor level pseudo-psychologists, social activists, and other assorted species of jacklegs. I am a firm believer that the best interests of the child are paramount, but that does not mean ... [that a father], like an accused witch ... cannot clear himself beyond any shadow of a doubt. Continuous yelling and screaming of an accusation does not make that accusation any more true.

Id. (Neely, J., dissenting).

But see In re Gina D., 645 A.2d 61, 64 (N.H. 1994) (rejecting sufficiency of evidence based on psychologist's identification of "victimization themes" interpreting two-year old child's nightmares and drawings).


See SUSSMAN & COHEN, supra note 208, at 11 (proposing a model law of reporting child abuse and neglect). The authors argue that "[t]he protection of children is furthered by encouraging the reporting of cases of suspected child abuse and neglect." Id.

See COSTIN, supra note 2, at 35–37 (discussing controversy over false reports made to child abuse registries).

Even when investigations are handled well, accused persons often find themselves unable to shake off the stigma of being suspected of sexual abuse, even when the case proves to be unfounded or is dismissed in court .... The label of "child abuser" can have profound consequences, among them job loss, family breakup, and social isolation.

Id. at 36.

18 F.3d 992 (2d Cir. 1994) (holding that the procedures employed by the Department of Social Services to remove names from the state's central register of suspected child abusers violated due process since they contained an unacceptably high risk of error).
plaintiffs had asserted that seventy-five per cent of the challenged child registry reports were expunged for lack of even this low level of proof. State agencies, however, are subjected to increasing scrutiny regarding their failure to detect patterns of abuse directed at a particular child or in a family. Expungement of unfounded records has compounded the problem because it effectively erases historical accounts that might otherwise reveal abusive patterns. A study by a special New York Commission charged with investigating the effectiveness of child abuse investigations found that traditional social services approaches, particularly regarding allegations of sexual abuse, were failing. As a result, recent changes to New York State law make it more difficult for unsubstantiated reports to be expunged. The provisions provide a powerful incentive for increasing social worker accountability. However, the laws' liberal

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267 See Lee TT., 664 N.E.2d 1243, 1252 (N.Y. 1996) (citing Valmonte v. Bane, 18 P.3d 992, 1003–04 (2d Cir. 1994); Governor's Memoranda, 1996 N.Y. Laws 1846 (statement of George Pataki, Governor) (“[A]pproximately 80% of the reports made to the child abuse hotline are effectively erased from existence.”). 268 See, e.g., SECRETS THAT CAN KILL: CHILD ABUSE INVESTIGATIONS IN NEW YORK STATE, COMMISSION OF INVESTIGATION, Jan. 1996 at 13. When child abuse results in a fatality, caseworkers are criticized for not intervening. See id. at 9. The study showed that confidentiality of records and the expungment of unfounded reports prevent caseworkers from assessing their alleged failings. See id. at 11. 269 See id. at 2. The Commission reported that New York State received 128,111 reports of child abuse by parents or guardians in 1994. Of these, 12,593 included allegations of sexual abuse. See id. at 19. During the course of its investigation, the Commission ascertained that the confidentiality rules which resulted in expungement of unfounded reports prevented case workers from detecting and preventing incidents of repeated abuse and shielded case workers from accountability when serious and sometimes fatal abuse occurred. See id. at 11. 270 In response to the Commission's findings, the state legislature enacted the Elisa's Law Child Protective Services Reform Act of 1996. See 1996 N.Y. Laws ch. 12 (McKinney). The law was named after six-year old Elisa Izquierdo, who died from her parents' repeated beatings. See Governor's Memoranda, supra note 267, at 1845 (statement of George Pataki, Governor). The law includes revisions to social services law, domestic relations law, the Family Court Act and the mental hygiene law, allowing child protective services information to be shared with schools or health care providers so that abusive families may be quickly identified and furnished with abuse-preventive services. See id. at 1846; see, e.g., N.Y. SOC. SERV. LAW § 422(4)(A) (McKinney 1992 & Supp. 1999). Rather than expunge unfounded reports, the records are sealed and not disseminated to the public. However, records may be shared if the suspected abuser has been charged with an abuse-related crime, officially reported by a state investigatory agency or judge, there has been prior disclosure by the individual in a prior child abuse report, or the child named in the report has died. See § 422-a(1)(a)–(d) (McKinney Supp. 1999).
disclosure rules, low evidentiary standard, and an increasing number of false accusations further subject a falsely accused parent to social stigma.

C. Opening Courtrooms to the Public

Compounding the stigma is a movement to open up family court proceedings to the public and press, revising the traditional preference to close all such hearings to outsiders. For example, pursuant to a change in New York judicial law that went into effect on September 2, 1997, Family Court proceedings are now presumptively open to the public and to the press. While opponents claim that the long-term negative effects to the parties should outweigh the public's right to access to the courts, proponents counter that public access plays a vital educational role. Thus far, courts have demonstrated a willingness to protect the privacy of children, but are far less protective of the privacy interests of their parents.

\[272\] See N.Y. Fam. Ct. Act § 1043 (McKinney 1999). Under the statute, hearings have presumptively been closed but public access has been permitted at the judge's discretion. \[277\] See id. The stigma associated with a sexual abuse allegation warrants procedural protections in light of trends towards opening the courtrooms. \[278\] See In re Gault, 387 U.S. 1, 24–25 (1967) ("The more comprehensive and effective the procedures used to prevent public disclosures of the finding, the less the danger of stigma.").

\[273\] See N.Y. Uniform Rules Fam. Ct. § 205.4(a) (McKinney 1997). The rule states that "[t]he Family Court is open to the public. Members of the public, including the news media, shall have access to all courtrooms, lobbies, public waiting areas and other common areas of the Family Court otherwise open to individuals having business before the court." Id.

\[274\] See In re Ruben R., 641 N.Y.S.2d 621, 624 (1st Dep't 1996) ("[T]he underlying tragedy, and the ensuing public debate, provided an appropriate opportunity to educate the public as to the essential . . . role of the Family Court in the child protective process;' which, thereby, overrode any potential, long-term damage that would result to the children."); see also David A. Schulz & Carolyn K. Foley, Child Protective Proceedings: Open to Public? N.Y. L.J., Feb. 13, 1996, at S2.

\[275\] See, e.g., Ruben R., 641 N.Y.S.2d at 621 (reversing trial court decision which permitted press access to trial). This case involved protective proceedings for Elisa Izquierdo's five half siblings. The appellate court reversed and closed the proceedings to the press, noting the privacy interests of the children. See id. at 626–29. The trial court stated that the parents had "little privacy left to protect." Id. at 624. Additionally, see In re Katherine B., 596 N.Y.S.2d 847, 852 (2d Dep't 1993) (reversing trial court decision to open the courtroom based on the privacy interests of the child, and finding that the right of media access under the First Amendment did not apply to child protective proceedings). \[276\] But see Schulz & Foley, supra note 274 (asserting that these holdings conflict with the New York Court of Appeals' view that open courtrooms play a positive role in child protective proceedings and do not comport with Supreme Court jurisprudence regarding the First Amendment).
In the context of a civil proceeding, the preponderance of the evidence standard contemplates that the parties before the court share equal or near equal risks in the outcome. Parents whose custodial rights are challenged because of allegations of sexual abuse, however, face far greater risks than the typical civil litigant. Political pressure on factfinders and the tendency for early judicial determinations to influence later ones belie the temporary nature of the parent's loss. The stigma of child abuse allegations, which may be unsubstantiated, significantly impact the risks, particularly regarding the privacy interests of the accused parent. The increasing influence of child abuse registries and a movement towards opening child protective proceedings to the public further exaggerate the inequality of risk.

CONCLUSION

Motivated by a desire to protect children from severe and repeated abuse, our legal system seeks to serve the interests of parent and child in a manner that is fundamentally fair. In Santosky v. Kramer, the Supreme Court concluded that, in order to protect the due process rights of parents facing termination of parental rights, proof by clear and convincing evidence was required, particularly since this higher standard of proof would reduce the risk of erroneous decisions without unduly burdening the state. Determinations made in custody proceedings that may result in devastating blows to family integrity and to the individual integrity of the accused likewise require greater certainty than a preponderance standard affords. The courts' continued reliance on child custody proceedings' civil nature inequitably allocates the risk of error, to the considerable detriment of both parent and child.

In an effort to protect children's rights, a climate of hysteria threatens the lives and liberty of the falsely accused. In the interest of fundamental fairness, the preponderance of the evidence standard, found to be defective in parental termination proceedings, should likewise be abandoned in fact-finding hearings involving a parent's potential loss of custody based on sexual abuse allegations. Raising the standard of proof to clear and convincing evidence would serve society's interest in preserving family integrity, ensure that proceedings are fair to the accused parent, and allow for resources to be reallocated towards family monitoring and counseling. Thus, this higher standard would
satisfy the state's compelling interest in protecting children and serve public policy by preserving family integrity.

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