Journal of Criminal Law and Criminology

Volume 73
Issue 4 *Winter*

Article 13

Winter 1982

Fourteenth Amendment--The Supreme Court's Mandate for Proof beyond a Preponderance of the Evidence in Terminating Parental Rights

Barbara S. Shulman

0091-4169/82/7304-1595
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 73, No. 4

Printed in U.S.A.

FOURTEENTH AMENDMENT—THE SUPREME COURT'S MANDATE FOR PROOF BEYOND A PREPONDERANCE OF THE EVIDENCE IN TERMINATING PARENTAL RIGHTS

Santosky v. Kramer, 102 S. Ct. 1388 (1982).

I. INTRODUCTION

Child abuse and neglect are growing problems in America. Though it is not clear whether the rise in reported cases is due to greater awareness of the issue or to an actual increase in the incidence of child abuse and neglect,[1] states have resorted to greater intervention into family autonomy to combat the rising tide of child abuse.

In *Santosky v. Kramer*,[2] the Supreme Court reviewed one state's attempt to deal with child abuse. The Court considered the constitutionality of the New York Family Court Act,[3] which allowed the State to separate parents from their children upon proof, by a preponderance of the evidence, that the parents had permanently neglected their children.[4] In concluding that the due process clause of the United States Constitution mandated proof by at least clear and convincing evidence in such proceedings, the Court employed a test which balanced the private interests involved, the risk of error inherent in the challenged proceedings and the State's interest in retaining the challenged procedure. This Note will explore the Court's treatment of these factors.

The Court's decision also relied on due process decisions which involved a determination of the proper standard of proof. In these cases, a higher standard of proof was found to be constitutionally mandated by the due process clause of the Constitution. This Note will examine the Court's reliance on these due process cases.

---

[1] *See* V.J. FONTANA & D.J. BESHAROV, THE MALTREATED CHILD ix, xi, 4 (4th ed. 1979); S.Z. NAGI, CHILD MALTREATMENT IN THE UNITED STATES 2 (1977); D.G. GIL, VIOLENCE AGAINST CHILDREN 3 (1970).

[2] 102 S. Ct. 1388 (1982).

[3] N.Y. FAM. CT. ACT § 111 (McKinney 1976).

[4] *Id.* § 622.

II. THE FACTS OF *SANTOSKY V. KRAMER*

In 1973, the Ulster County Department of Social Services received reports from neighbors and physicians regarding Tina Santosky's injuries.[5] Tina's injuries included a fractured femur, bodily bruises and abrasions.[6] Fearing that Tina was the victim of child abuse, the County instituted a temporary neglect proceeding[7] against the Santosky parents to remove Tina temporarily from the Santosky home.[8] The County succeeded in placing Tina in State custody in November, 1972.[9] Ten months later, the County removed John Santosky III from the home after hospital personnel had determined that John suffered from malnutrition.[10] Three days after that, the County placed Jed Santosky, only three days old, in a foster home.[11]

Once a New York county has temporarily removed a child from his or her home and placed the child in foster care,[12] the State of New York may institute permanent neglect proceedings which, if successful, terminate all parent-child relations and allow others to adopt the child.[13] The New York Family Court Act provides that the State may permanently terminate parental rights by proving (1) that for more than one year after the child was removed by the County, the foster care agency "made diligent efforts to encourage and strengthen the parental relationship,"[14] and (2) that during that period, the natural parents failed "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so."[15] Both these elements must be proven by a "fair preponderance of the evidence."[16]

The County began permanent neglect proceedings against the Santoskys in 1978. The Ulster County Family Court held that the

---

5 *Santosky*, 102 S. Ct. at 1393.

6 *Id.* at 1409, n.10 (Rehnquist, J., dissenting).

7 *Santosky*, 102 S. Ct. at 1393.

8 A neglected child is one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter or education. . . ." N.Y. FAM. CT. ACT § 1012(f) (McKinney 1976).

9 The order for temporary removal was issued under *Id.* § 1022.

10 *Santosky*, 102 S Ct. at 1393.

11 Although there was no allegation of neglect with respect to Jed, he was removed based on the alleged neglect of the two older children. *Id.*

12 "Foster care" refers to a temporary relationship in which an adult "receives a child for 'board and care' either from a state welfare commission or from a recognized social agency." J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 23 (1973).

13 N.Y. SOC. SERV. LAW § 384 (McKinney 1976).

14 *Id.* §§ 611, 614.1(c).

15 *Id.* § 614.1(d).

16 *Id.* § 622.

Santoskys' failure to plan and care for their children was excused because of their indigence.[17] Thus, the State could not prove the second element of its case and the proceedings were dismissed.[18]

In 1979, the County initiated a second permanent neglect proceeding against the Santoskys.[19] The three Santosky children, Tina, John III and Jed, were adjudged to be permanently neglected. On April 5, 1979, the Ulster County Family Court entered an order permanently terminating the Santoskys' parental rights.[20] The Santoskys appealed, contending that the New York Family Court Act violated the due process clause of the fourteenth amendment.[21]

The appellate division upheld the lower court's termination, noting that the "permanent neglect statute recognizes and seeks to balance rights possessed by the child with those of the natural parents."[22] The Santoskys then petitioned the United States Supreme Court to consider whether the State must prove permanent neglect by more than a preponderance of the evidence when seeking to permanently separate parents from their children.[23]

III. THE DECISION OF THE SUPREME COURT IN *SANTOSKY V. KRAMER*

The Supreme Court, in a five to four decision, held that the due process clause of the fourteenth amendment mandates a higher standard than proof by a preponderance of the evidence before the State may permanently terminate parental rights.[24] Justice Blackmun delivered the opinion of the Court, in which Justices Brennan, Marshall, Powell and Stevens joined.

The Court first found that natural parents have a fundamental liberty interest under the fourteenth amendment in the "care, custody and management of their children."[25] The Court stated that such interest was not extinguished by the fact that the family had already been sepa-

---

17 *See* Matter of Santosky, 89 Misc. 2d 730, 393 N.Y.S.2d 486 (1977). For dismissal of the appeal, *see In re* John W., 63 App. Div. 2d 750, 404 N.Y.S.2d 717 (1978).

18 *See* N.Y. FAM. CT. ACT § 614.1(d) (McKinney 1976).

19 *See* Brief for Petitioners, at 2, 12, *Santosky*, 102 S. Ct. 1388 (1982).

20 Orders permanently terminating parental rights were entered on April 5, 1979. *In re* John "AA", 75 A.D.2d 910, 427 N.Y.S.2d 319, 320 (N.Y. App. Div. 1980). *See* Brief for Petitioners, at 2, 12, *Santosky*, 102 S. Ct. 1388 (1982).

21 *Id.*

22 *Id.* 427 N.Y.S.2d at 320. In *In re* John "AA," the court followed its decision of *In re* Anthony L. "CC", 48 A.D.2d 415, 370 N.Y.S.2d 219 (N.Y. App. Div. 1975), which upheld the constitutionality of § 622 of the Family Court Act.

23 Santosky v. Kramer, 450 U.S. 993 (1981).

24 *Santosky*, 102 S. Ct. at 1402.

25 *Id.* at 1394.

rated as a result of a temporary neglect proceeding.[26] The Court said, when the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures[27] which comport with the due process clause of the Constitution.

To determine what process is due to parents seeking to prevent the State from permanently terminating parental rights, the Court applied the balancing test enunciated in *Mathews v. Eldridge*.[28] The *Eldridge* test calculates and balances the relative weights of three factors: (1) "the private interests affected by the proceeding;" (2) "the risk of error created by the State's chosen procedure;" and (3) "the countervailing governmental interest supporting use of the challenged procedure."[29]

Although the Court in *Lassiter v. Department of Social Services* had applied the *Eldridge* factors in conjunction with a presumption favoring the constitutionality of the challenged procedure,[30] the Court found such use of a presumption inappropriate in *Santosky*.[31] The Court noted, "decisions concerning constitutional burdens of proof have not turned on any presumption favoring any particular standard."[32]

In examining the private interests affected by the challenged procedure, the Court considered "both the nature of the private interest threatened and the permanency of the threatened loss."[33] The Court said that the private interests included the parents' interest in maintaining familial bonds, an interest far exceeding mere property rights.[34] This interest was enhanced by the fact that the family court's decision terminating parental rights, once affirmed on appeal, is final and irrevocable.[35] The interests of the children were not considered as a component of the private interests. The Court said that, in such proceedings, the "State cannot presume that a child and his parents are adversaries."[36] Therefore, the interests of the children cannot be determined until parental unfitness has been proven.

---

26 *Id.*

27 *Id.*

28 424 U.S. 319 (1976).

29 *Santosky*, 102 S. Ct. at 1394.

30 *See* Lassiter v. Department of Social Services, 452 U.S. 18, 31 (1981).

31 *Santosky*, 102 S. Ct. at 1394.

32 *Id.*

33 *Id.* at 1397.

34 *Id.*; *see also Lassiter*, 452 U.S. at 27; Stanley v. Illinois, 405 U.S. 645, 651 (1972).

35 The Court noted that parents may petition the family court to set aside an order. However, the order, once affirmed on appeal, is reviewable only on narrow grounds, such as newly discovered evidence or fraud. *Santosky*, 102 S. Ct. at 1392 n.1.

Further, in Lehman v. Lycoming County Children's Services, 102 S. Ct. 3231 (1982), the Court determined that an aggrieved parent could not use a writ of habeas corpus as a basis for review of a family court order permanently terminating parental rights.

36 *Santosky*, 102 S. Ct. at 1398. Similarly, the interests of the foster parents were disregarded as "not implicated directly in the factfinding stage of a State-initiated permanent

The Court next considered the risk of error inherent in the use of the proof by a preponderance of the evidence standard in parental rights termination hearings. The Court noted that the factfinder has a great deal of discretion in deciding whether the State has proven its case.[37] The Family Court Act requires the factfinder to make highly subjective decisions in appraising the diligence of the agency's efforts to reunite the family[38] and the substantiality of the parents' contact with the children.[39] The Court implied that with highly subjective determinations, the potential for erroneous termination is great.[40] The Court then noted that since the typical parent involved in such proceedings was poor and uneducated, the decisions might reflect class and cultural biases of the factfinder.[41] The risk of erroneous termination was also enhanced by the fact that the State, as an adversary, could use its greater expertise and financial resources to overwhelm the parents.[42] Further, since the State employs the agency's caseworkers, the primary witnesses in the action, the likelihood of erroneous terminations was increased by the potential partiality of the key witnesses.[43] Finally, the Court noted that the State, as custodian of removed children, could control parent-child contact prior to the proceeding to prevent parents from maintaining the requisite contact with their children.[44]

The Court next considered whether a higher standard of proof would reduce the risk of erroneous terminations.[45] Since raising the standard of proof by which the State must prove its case would "reduc[e] the risk of convictions resting on factual error,"[46] the Court determined that

---

neglect proceeding" against the natural parents. *Id. See* N.Y. FAM. CT. ACT § 615, 1055(d) (McKinney 1976); N.Y. SOC. SERV. LAW § 392.7(c) (McKinney 1976).

37 102 S. Ct. at 1399.

38 The Family Court Act, though requiring the foster care agency to make diligent efforts to reunite the family, allows the factfinder to disregard less than diligent efforts if such efforts would have been "detrimental to the moral and temporal welfare of the child." N.Y. FAM. CT. ACT § 614.1(c) (McKinney 1976).

39 The factfinder may "discount actual visits or communications on the grounds that they were insubstantial or 'overtly demonstrat[ed] a lack of affectionate and concerned parenthood.'" (citation omitted) *Santosky*, 102 S. Ct. at 1399 n.12.

40 *Id.* at 1399.

41 *Id.* The Court did not articulate its reasons for finding that such proceedings could be vulnerable to class and cultural biases.

42 *Id.*

43 *Id.*

44 *Id. See* note 15 and accompanying text. The Santoskys alleged that the State had sought court orders denying them the right to visit their children. Brief for Appellant at 9, Santosky v. Kramer, 102 S. Ct. 1388 (1982). The Brief for Appellant also points out that the State may introduce as evidence the parents' refusal to accept proferred social services to demonstrate the State's diligent efforts to reunite the family and the parents' failure to plan for the future of their child. Brief for Appellant at 10-11.

45 *Santosky*, 102 S. Ct. at 1400.

46 *Id.* (quoting *In re* Winship, 397 U.S. 358, 363 (1970)).

requiring proof beyond a preponderance of the evidence would reduce the risk of erroneous terminations.[47]

Finally, the Court examined the interests of the State in retaining the challenged procedure. The Court found two legitimate State interests in parental termination proceedings: (1) a *parens patriae* interest in preserving and promoting the welfare of the child and (2) a fiscal and administrative interest in reducing the cost and burden of such proceedings.[48] The Court found that both State interests would be served by a heightened standard of proof since the welfare of the child requires the assurance of an accurate and just decision, and the fiscal burdens imposed by a heightened standard of proof would be insubstantial.[49]

After weighing the fundamental interests of the parents in maintaining familial bonds, the high risk of erroneous terminations inherent in the proceedings and the State interests involved, the Court held that proof greater than a preponderance of the evidence was constitutionally mandated before the State could permanently deprive parents of their children.[50] Noting that a standard of proof beyond a reasonable doubt, while constitutionally permissible, might unduly burden the State, the Court held only that proof by clear and convincing[51] evidence was constitutionally mandated.[52]

As a second basis for its decision, the Court relied on its due process cases in which a higher standard of proof was required to ensure fairness.[53] The Court first noted that a standard of proof serves to allocate the risk of error inherent in the proceedings[54] and to instruct the factfinder on "the degree of confidence which our society thinks he should have in the correctness of factual conclusions."[55] The Court said

---

47 *Id.*

48 *Id.* at 1401.

49 *Id.*

50 *Id.* at 1402-03.

51 *Id.* Clear and convincing proof has been termed an "intermediate standard" of proof, requiring more than a preponderance of the evidence, yet less than proof beyond a reasonable doubt. It is often used in civil cases in which moral turpitude is alleged and in which the interests at stake are "more substantial than mere loss of money." Addington v. Texas, 441 U.S. 418, 424 (1979). *See also* Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 285 (1966); Chaunt v. United States, 364 U.S. 350, 354 (1960); Schneiderman v. United States, 320 U.S. 118, 125 (1943).

52 102 S. Ct. at 1402-03. The Court noted that a decision to permanently terminate parental rights often involved "issues difficult to prove to a level of absolute certainty," but left to the state legislatures the determination of a specific standard of proof equal to or greater than proof by clear and convincing evidence. *Id.*

53 Addington v. Texas, 441 U.S. 418 (1979) (civil commitment); *In re* Winship, 397 U.S. 358 (1970) (juvenile delinquency); Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966) (deportation); Chaunt v. United States, 364 U.S. 350 (1960) (denaturalization); Schneiderman v. United States, 320 U.S. 118 (1943) (denaturalization).

54 *Santosky*, 102 S. Ct. at 1395.

55 *Id.* (quoting *In re* Winship, 397 U.S. at 370).

that determination of the correct standard of proof "is the kind of question which has traditionally been left to the judiciary."[56] When the challenged standard of proof does not comport with the minimum requirements of due process courts may decree a higher standard of proof than that required by the legislature.[57]

The Court found that proof by a preponderance of the evidence did not fairly and adequately allocate the risk between the two adversaries in the proceedings—the State and the parents—since the parents would suffer a greater loss from an adverse decision.[58] The Court rejected the contention that the risk should be distributed equally between the children and the parents,[59] but added that even if such were the case, the harm to the children of erroneous non-termination was far less severe than the harm to the parents of erroneous termination.[60] The Court noted that since the children had been placed in foster homes as a result of temporary removal proceedings, erroneous non-termination would only force the child to remain under foster care, unable to seek permanent adoption.[61] The Court characterized this "uneasy status quo"[62] as having less negative social impact than an erroneous termination which would destroy a viable family unit.[63]

IV. DISSENT

Justice Rehnquist wrote the dissenting opinion, in which the Chief Justice and Justices White and O'Connor joined.[64] He criticized the majority's "myopic scrutiny of the standard of proof"[65] and the majority's refusal to examine the Family Court Act as a whole. The Court, Justice Rehnquist said, should have examined other elements of the Act which

---

56 *Santosky*, 102 S. Ct. at 1395 (quoting *Woodby*, 385 U.S. at 284).

57 *Id.* It is difficult to reconcile the Court's position here with its decision in Vance v. Terrazas, 444 U.S. 252 (1980), in which the Court held that the judicial preference for clear and convincing evidence in expatriation hearings was not constitutionally mandated, and could be overridden by a legislative act.

58 The Court noted that previous cases in which clear and convincing evidence had been mandated were based on a finding that an adverse decision would result in "a significant deprivation of liberty," or "stigma." *Santosky*, 102 S. Ct. at 1396. *See also supra* note 53 and accompanying text.

59 *Id.* at 1400-01.

60 *Id.*

61 *Id.* at 1401. The Court noted that under the New York statutory scheme, a judge had discretion to extend the original order of temporary removal so that children would not automatically be returned to potentially threatening environments. *Id.* at 1401 n.16. *See supra* note 12 and accompanying text.

62 *Id.*

63 *Id.*

64 *Id.* at 1403 (Rehnquist, J., dissenting).

65 *Id.*

made the Family Court Act "fundamentally fair"[66] and therefore consistent with due process. Justice Rehnquist also criticized the Court for further intruding upon a state's sovereign right to handle domestic relations.[67] In addition, Justice Rehnquist stated that a presumption favoring the constitutionality of legislative acts should have been utilized.[68]

The dissent also said that a preponderance of the evidence standard adequately allocated the risk of error between the litigants.[69] Unlike the majority opinion's analysis, Justice Rehnquist considered not only the parents' and the State's interests, but also the interests of the children.[70] The dissent weighed the parents' interest in the "continuation of the family unit and the raising of their own children,"[71] the State's interest in the welfare of the child,[72] and the children's interest in a "stable, loving homelife."[73] Since the interests of the parents did not clearly outweigh the interests of the State and the children, "a State may constitutionally conclude that the risk of error should be borne in roughly equal fashion."[74]

V. ANALYSIS

As discussed above, the Court based its decision—that proof by clear and convincing evidence was required by the Constitution in parental rights termination proceedings—on two separate lines of cases. First, the Court balanced the three *Eldridge* factors and found that, in parental rights termination hearings, proof by a preponderance of the evidence violated the due process clause.[75] Second, the Court examined

---

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.* at 1403-04.

70 The dissent noted that the parents and the child share an interest in avoiding erroneous terminations but that a "child's interest in a continuation of the family unit exists only to the extent that such a continuation would not be harmful to him." *Id.* at 1412 n.13. The majority criticized the dissent for accepting as factual data "findings that are not part of the record and that have only been found to be more likely true than not." *Santosky*, 102 S. Ct. at 1403 n.19.

71 *Id.* at 1412.

72 *Id.* at 1413.

73 *Id.* at 1412.

74 *Id.* at 1413. The New York State Legislature had sought, in enacting the Family Court Act, to balance the various interests involved. The legislative purpose of the Act was stated in the New York Social Services Law:

> It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs and rights of the child by terminating the parental rights and freeing the child for adoption.

N.Y. SOC. SERV. LAW § 384b-1(b) (McKinney 1976).

75 *See infra* notes 81-119 and accompanying text.

civil cases in which a specific standard of proof was found to be constitutionally required.[76] (This Note will refer to these cases as "standard of proof" cases.) Although both lines of cases have previously been applied to determine whether an individual has been deprived of due process, the two lines of cases treat the issue of risk of error inherent in various proceedings differently. The cases utilizing the *Eldridge* test balance private and state interests along with an estimation of the *amount* of error inherent in the proceedings. The standard of proof cases determine the *allocation* of error inherent in the proceedings, as a matter of policy.

A. APPLICATION OF THE *MATHEWS V. ELDRIDGE* FACTORS

1. Background

The fourteenth amendment of the United States Constitution guarantees "that no person shall be deprived of life, liberty or property without due process of law."[77] Having determined that the right to retain parental ties with one's children is a liberty interest protected by the fourteenth amendment,[78] the Court in *Santosky* examined the requirements of due process in parental rights termination proceedings. As one commentator has stated, due process represents "the minimum level of protection by which the exercise of state power against the individual is to be controlled."[79] Due process requires that essential procedural protections "assure fairness to the individual so that his notice and opportunity to be heard are meaningful."[80]

The Court's battle to come to terms with the precise meaning of due process has resulted in the emergence of a test set forth in *Mathews v. Eldridge*.[81] The test balances (1) the individual or private interests; (2) the risk of error created by the challenged procedure and the likelihood that further safeguards may reduce the likelihood of error; and (3) the interests of the State in retaining the challenged procedure.[82]

In *Eldridge*, the Court considered whether the absence of a hearing prior to termination of social security disability benefits violated the due

---

[76] *See infra* notes 126-40 and accompanying text.

[77] U.S. CONST. amend. XIV.

[78] *Santosky*, 102 S. Ct. at 1394. The Court cited: Quilloin v. Walcott, 434 U.S. 246 (1978); Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Moore v. East Cleveland, 431 U.S. 494 (1977) (plurality opinion); Cleveland Bd. of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[79] Lawrence, *Fairly Due Process: Minimum Protection Recognized But Not Applied in Mathews v. Eldridge*, 1977 UTAH L. REV. 627, 633.

[80] *Id.*; *see also* Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

[81] 424 U.S. at 335.

[82] *Id.*

process clause of the Constitution.[83] The Court first determined that the claimant's only legitimate interest was in the receipt of uninterrupted disability benefits.[84] Second, the Court found that the risk of error was not high, stating that termination decisions were based on objective criteria.[85] As a result, the Court did not consider whether such error might be reduced by further safeguards. Third, the Court examined the economic and administrative interests of the State in not providing pre-termination hearings, finding them to be substantial.[86] After balancing these factors, the Court noted that "substantial weight must be given to the good faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals."[87] The *Eldridge* Court then held that a pre-termination hearing was not required by the due process clause of the fourteenth amendment.[88]

The Court recently applied the *Eldridge* test in *Lassiter v. Department of Social Services*,[89] in which the State had terminated the parental rights of an indigent mother for whom the lower court had not appointed counsel. Ms. Lassiter's child had been adjudged neglected and had been temporarily removed to the custody of county authorities.[90] Ms. Lassiter was imprisoned as a result of a murder conviction[91] and the department petitioned the district court to permanently terminate Ms. Lassiter's parental rights.[92] Ms. Lassiter represented herself at the termination hearing. The court held that her parental rights should be terminated.[93]

To determine whether Ms. Lassiter had a constitutional right to

---

83 *Id.* at 323.

84 Since decisions of the social security administration were appealable and benefits would be paid retroactively if the claimant prevailed on appeal, the Court did not recognize any private economic interest other than an interest in uninterrupted benefits. *Id.* at 340.

85 Id. at 343. The assumption of objectivity in social security disability determinations is questionable. Although the definition of disability can be medically determined, the factfinder must also decide whether, as a result of such disability, the claimant can engage in "substantially gainful activity." 42 U.S.C. § 423(d)(1)(A)(1976). In making this determination, the factfinder must consider such factors as the age, past work experience and education of the claimant. For further criticism of the assumption of objectivity, see Marshaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Lawrence, *supra* note 79.

86 *Id.* at 347.

87 *Id.* at 349.

88 *Id.*

89 452 U.S. 18, 31 (1981).

90 *Id.* at 20.

91 *Id.*

92 *Id.* at 20-21.

93 *Id.* at 24.

court-appointed counsel, the Court applied the *Eldridge* test. The Court said that the individual interest involved in parental termination proceedings was strong.[94] However, the Court found that the gravity of individual interests at stake may differ from case to case and therefore must be determined on an *ad hoc* basis.[95]

Similarly, in considering the risk of error inherent in the proceedings, the Court found that "the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of erroneous deprivation of the parent's rights insupportably high."[96] Thus, the risk of error would also have to be determined on an *ad hoc* basis.

Finally, the Court considered the State's interests in saving costs of appointing counsel,[97] preserving the informality of permanent parental rights termination hearings[98] and obtaining a just decision.[99] The State's economic interest was found to be insubstantial[100] and its interest in preserving informality was found to differ from case to case.[101] After weighing the three factors and invoking a presumption that counsel need not be appointed in civil cases,[102] the Court concluded that Ms. Lassiter did not have a constitutional right to court-appointed counsel.[103]

B. *SANTOSKY V. KRAMER*

1. Private Interests

In *Santosky*, the Court recognized the parents' strong interest in preventing the State from permanently severing their familial bonds.[104] The Court did not, however, recognize the interests of the children as legitimate private interests. The Court noted that, "until the State proves parental unfitness, the child and his parents share a vital interest

---

94 The Court noted that Ms. Lassiter's interest might have been viewed as more compelling had any of the allegations carried the potential for criminal liability. *Id.* at 31.

95 *Id.*

96 *Id.*

97 *Id.* at 27-29.

98 *Id.*

99 *Id.*

100 Although the costs of appointing counsel might be high, the Court found that those costs were de mimimis compared to the total costs of providing counsel in criminal cases. *Id.* at 28.

101 *Id.* at 31.

102 The Court's use of a presumption in *Lassiter* has been criticized as "rest[ing] on a dubious reading of precedent." *The Supreme Court, 1980 Term, Lassiter v. Department of Social Services*, 95 HARV. L. REV. 93, 138 (1981).

103 *Lassiter*, 452 U.S. at 33.

104 *Santosky*, 102 S. Ct. at 1397.

in preventing erroneous termination of their natural relationship."[105] Thus, until the parents are adjudged unfit, a court cannot assume that the child's best interests lie in terminating parental rights.[106]

This refusal to consider the rights of the children is analytically correct, since such consideration would involve the assumption of unproven facts. Significantly, the refusal may demonstrate the Court's commitment, as a policy matter, to the autonomy of the family unit.[107] This commitment appears strong, since the Court in *Santosky* refused to consider the childrens' interest even where the evidence suggested the possibility of child abuse.

2. *Risk of Error*

The Court, in *Santosky*, discussed several factors that contributed to the risk of error, but which had not been considered in either *Eldridge* or *Lassiter*.[108] The Court recognized that the State could control the amount of contact the parent had with the child prior to the hearing. Since failure to maintain contact is one element of the State's case, the Court concluded that the State's control of pre-hearing events increased the potential for an erroneous termination.[109] In addition, the Court considered that the State's advantage over the individual in litigation, e.g., the State's greater expertise and financial resources, and the possibility of cultural and class biases affecting a decision, all increased the risk of an erroneous termination.[110]

By recognizing these factors, the Court demonstrated a more thorough and realistic understanding of the inherent risk of error than it had

---

[105] *Id.* at 1398. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 12, at 22, in which the authors state that during the adjudicatory stages of the proceeding, "the parents remain qualified to represent the interests of the entire family."

[106] *Id.*

[107] Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977); Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion); Cleveland Bd. of Education v. LaFleur, 414 U.S. 632, 639-40 (1974); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[108] In ascertaining the risk of error, the Court in *Eldridge* considered only the reliability of the established procedures. The Court found them to be reliable based on the lack of subjectivity involved in the decision. Since the decision would be based on objective criteria, the procedure of providing only for written review was found to be permissible. *Eldridge*, 424 U.S. at 343-47.

In *Lassiter*, the Court found the statutory requirement of proof by clear and convincing evidence to be an adequate assurance of accurate decisions. The Court considered the parent's lack of education and sophistication as factors contributing to the risk of error. The Court did not discuss any other factors. *Lassiter*, 452 U.S. at 30.

[109] *See supra* note 41.

[110] *Santosky*, 102 S. Ct. at 1399.

in either *Eldridge* or *Lassiter*.[111] This thorough understanding is essential to accurately assess the risk of error in a challenged procedure. If the Court continues to utilize this realistic approach, the *Eldridge* test can be a valuable method for determining whether due process has been satisfied.

3. State Interests

The Court found that the *parens patriae* interest of the State in the welfare of the child would be served by a higher standard of proof. In doing so, the Court assumed that the risk of error contemplated by the *Eldridge* test measures both erroneous terminations and erroneous non-terminations, since both would be damaging to the welfare of the child. However, prior Supreme Court analyses of risk of error have considered only the error which may result from decisions adverse to the *individual*.[112] Both *Eldridge* and *Lassiter* considered only those errors which could unduly benefit the State, but did not consider errors which might unduly benefit the individual.[113] Similarly, in *Santosky*, the Court said that the risk of error was the error inherent in requiring proof by a preponderance of the evidence which might adversely affect the parents.[114] The Court's requirement of clear and convincing evidence will not cause fewer errors to be made; it will lead only to the State bearing most of the risk of erroneous decisions.[115] When the State must prove its case by a preponderance of the evidence, the individual and the State share equally in the risk of error.[116] As the standard of proof is raised, society imposes more of the risk upon itself,[117] though the amount of error remains the same. Thus, the Court failed to consider that the State's *parens*

---

111 The *Eldridge* decision was criticized for its limited view of the risk of error inherent in social security disability determinations. See Marshaw, *supra* note 85, at 41, which criticizes the Court's analysis of the risk of error as "incomplete" and Lawrence, *supra* note 79, which criticizes the Court for disregarding certain facts in its determination of inherent risk of error.

The Court in *Eldridge* concluded that termination decisions carried a low risk of error by assuming that the decisions were based on purely objective criteria. *See supra* notes 85-108.

In *Lassiter*, the Court was willing to look at factors such as the lack of education of the parent, but declined to find that these factors indicated an inherent risk of error. *Lassiter*, 452 U.S. at 30-31. *See supra* note 108. Instead, the Court found that such factors *may* operate to create a high risk of error and should be examined on a case-by-case basis. *Lassiter*, 452 U.S. at 31.

112 *See generally Santosky*, 102 S. Ct. 1388; *Lassiter*, 452 U.S. 27; *Eldridge*, 424 U.S. 319.

113 *See supra* notes 108, 111 and accompanying text.

114 *Santosky*, 102 S. Ct. at 1398-1400.

115 *Addington*, 441 U.S. at 423. *See also* Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1306 (1977), which notes that one use of a higher standard of proof is to compensate for the possibility that the factfinder may subjectively favor the State.

116 *Id.*

117 *Id.* at 424.

patriae interest includes the prevention of both erroneous terminations and erroneous non-terminations,[118] and would therefore not necessarily be served by a higher standard of proof.

Furthermore, by finding that a higher standard of proof would serve the State's interest, the Court only considered the State's interest in the *proposed* procedure, rather than its interest in retaining the *existing* procedure. In *Eldridge*, the Court contemplated the State's interest in retaining the existing procedure[119] since it was the constitutionality of that procedure that was at issue. The Court in *Santosky*, therefore, should have ascertained only the State interests which would have supported the retention of the standard of proof by a preponderance of the evidence.

4. Use of Presumptions

The Court, in dicta, approved of the use of a presumption of constitutionality in conjunction with the *Eldridge* factors, but declined to apply such a presumption.[120] The *Eldridge* test, as enunciated in *Mathews v. Eldridge*, did not include a presumption favoring the constitutionality of the challenged procedure.[121] In *Lassiter*, the Court employed the presumption that counsel need not be appointed in parental rights termination proceedings.[122] In *Santosky*, however, the Court distinguished the use of a presumption by noting that "[u]nlike the Court's right to counsel rulings, [the Court's] decisions concerning constitutional burdens of proof have not turned on any presumption favoring any particular standard."[123]

The Court's distinction in *Santosky* is conceptually valid. One would have hoped, however, that the Court would have gone further and held that the use of such presumptions in conjunction with the *Eldridge* factors is never appropriate. The use of a presumption has been criticized as an unnecessary and harmful addition to the *Eldridge* test.[124] By adding this presumption to the three factor test, the Court increased the quantum of evidence that an individual is required to produce to establish the unconstitutionality of a given procedure. An individual must not only prove that a consideration of the *Eldridge* factors will lead to the conclusion that he or she was deprived of due process, but must

---

118 *See supra* note 105 and accompanying text.

119 *Eldridge*, 424 U.S. at 335.

120 *Santosky*, 102 S. Ct. at 1394-95.

121 *Eldridge*, 424 U.S. at 335.

122 *Lassiter*, 452 U.S. at 31.

123 *Santosky*, 102 S. Ct. at 1394-95.

124 *See The Supreme Court, 1980 Term*, *supra* note 102; Note, *The Termination of Parental Rights: Lassiter and the New Illinois Termination Law*, 13 LOY. U. CHI. L.J. 135, 154 (1981).

prove this by enough additional evidence to rebut the presumption that the procedure was constitutional. The *Eldridge* factors were developed to determine whether an individual had been deprived of due process under the law. The individual carries a sufficient burden in proving deprivation of due process through a balancing of the *Eldridge* factors alone. To increase this burden by introducing a presumption of constitutionality unduly burdens the individual in the attempt to protect constitutional rights.[125]

VI. THE COURT'S ANALYSIS OF THE STANDARD OF PROOF CASES

The second basis for the *Santosky* Court's decision is its determination that the minimum standard of proof tolerated by the due process clause should reflect 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."[126] This approach differs from the *Eldridge* approach in that it contemplates a judicial policy decision regarding the *allocation* of the amount of error in a given proceeding.[127] Since the allocation of error will affect the relative frequency of erroneous terminations and erroneous non-terminations,[128] the determination of a standard of proof should "reflect an assessment of the comparative social disutility of each."[129] Thus, to determine the proper allocation of error in a parental rights termination hearing, the Court considered whether, as a matter of social policy, it is worse to erroneously separate a viable family or to erroneously keep an abused or neglected child in foster care, ineligible for adoption.[130]

In criminal cases, due process requires proof beyond a reasonable doubt of the defendant's guilt.[131] *In re Winship*,[132] the Court confronted the standard of proof question as it applies to civil cases in which the individual is threatened with a significant deprivation of physical liberty. The Court there found that in juvenile delinquency proceedings, which are civil in nature, due process required proof beyond a reasonable doubt that the juveniles committed the illegal acts with which they

---

125 *See The Supreme Court, 1980 Term*, *supra* note 102, at 138.

126 *Santosky*, 102 S. Ct. at 1395.

127 *Eldridge*, 424 U.S. at 343-47, contemplated only the *amount* of error.

128 *See In re* Winship, 397 U.S. at 370-71 (Harlan, J., concurring).

129 *Id.* at 371.

130 *Santosky*, 102 S. Ct. at 1400-01.

131 *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Holland v. United States, 348 U.S. 121, 138 (1954); Leland v. Oregon, 343 U.S. 790, 795 (1952); Brinegar v. United States, 338 U.S. 160, 174 (1949); Wilson v. United States, 232 U.S. 563, 569-70 (1914); Holt v. United States, 218 U.S. 245, 253 (1910); Davis v. United States, 160 U.S. 469, 488 (1895); Miles v. United States, 103 U.S. 304, 312 (1881).

132 397 U.S. 358.

were charged.[133] The Court based its decision on the social stigma attached to juvenile deliquents and on the significant deprivation of physical liberty that could result from a decision against the individual.[134]

Later, in the landmark case of *Addington v. Texas*,[135] the Court held that, in a civil proceeding to commit an individual to a mental institution, a higher standard of proof than a preponderance of the evidence was constitutionally mandated.[136] The Court again based its holding on the stigma attached to commitment to a mental institution and on the significant deprivation of physical liberty that would result from a decision against the individual.[137] The Court declined to hold that the State must prove its case beyond a reasonable doubt due to the Court's desire to retain this standard of proof for cases involving moral turpitude.[138] Additionally, the Court said that because of the inherent uncertainties associated with psychiatric diagnoses, requiring the State to prove its case beyond a reasonable doubt was unduly burdensome.[139] Instead, the Court held that the necessity for commitment must be proven by clear and convincing evidence.[140]

Since both *Winship* and *Addington* involve significant deprivations of *physical* liberty, the *Santosky* Court appears to have added termination of parental rights—a non-physical fundamental liberty—to the types of civil proceedings in which proof by a mere preponderance of the evidence is constitutionally insufficient. Although it is difficult to ascertain how securely the Court rests its holding on the standard of proof cases, as opposed to the *Eldridge* test, *Santosky* seems to signal the Court's willingness to extend constitutionally based standard of proof protection to cases in which deprivation of physical liberty is not at issue.

VII. CONCLUSION

Under the *Eldridge* analysis, the Court in *Santosky* concluded that (1) parents' interest in maintaining the family was fundamental; (2) the risk of erroneously terminating parental rights was inherently high; and (3) the State's interests in retaining its preponderance of the evidence standard of proof in these proceedings were insubstantial. In its treatment of private interests, the Court demonstrated a high regard for familial rights. The Court's willingness to consider a myriad of factors in

133 *Id.* at 368; *see also* Vitek v. Jones, 445 U.S. 480 (1980) (guaranteeing due process safeguards to inmates in mental institutions).

134 397 U.S. at 368.

135 441 U.S. 418.

136 *Id.* at 427.

137 *Id.* at 425-27.

138 *Id.* at 428.

139 *Id.* at 430.

140 *Id.* at 431-33.

determining the risk of error could result in a more viable due process balancing test. The Court's consideration of the State's interests, however, did not adequately focus on whether sufficient State interests supported retaining the challenged procedure. Finally, although declining to apply a presumption in *Santosky*, the Court did not expressly reject the use of a presumption in conjunction with the *Eldridge* test.

In examining standard of proof cases, the Court said that the termination of parental rights required a standard of proof greater than proof by a preponderance of the evidence. This determination represents a departure from past standard of proof cases in which only deprivation of physical liberty was held to mandate a higher standard of proof. The invalidation of the New York Family Court Act then, represents a significant policy decision favoring the retention of the viable or potentially viable family unit in cases in which neglect can be proven by only a preponderance of the evidence.

BARBARA S. SHULMAN