BUILDING BROKEN CHILDREN IN THE NAME OF PROTECTING THEM: EXAMINING THE EFFECTS OF A LOWER EVIDENTIARY STANDARD IN TEMPORARY CHILD REMOVAL CASES

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In 1982, the Supreme Court in Santosky v. Kramer *held that the "clear and convincing" standard was the minimum evidentiary burden that the state must meet in order to permanently separate and remove a child from his home. A majority of states since then have interpreted* Santosky *to find that the evidentiary standard for temporary child removal cases is lower. Although the custody interest at stake in a temporary removal proceeding is different from that of* Santosky*, the harmful psychological effects that stay with children that have been separated from their home, even temporarily, are irreversible and are often omitted from the court's analysis in adjudicating those children. This Note examines two different evidentiary standards required by states and their effects on state child welfare systems and the families that become involved in such proceedings. While many states maintain a "preponderance of the evidence" standard for temporary child removals, this lower evidentiary bar inevitably allows for more child removals at an earlier stage with a significant number of cases that end up being unsubstantiated. This Note argues that states should move away from adjudication and provide alternative resources for families involved in low-risk cases in order to avoid unnecessary separation while protecting the children that these systems were meant to protect. While ensuring a safe environment for a child should be a priority, taking a child away from his or her home and family should not be taken lightly.*

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* J.D. Candidate 2019, University of Illinois College of Law; B.S. 2016, Auburn University. First, I would like to thank the editors, members, and staff of the *University of Illinois Law Review* for their under-appreciated hard work and dedication to this journal. I would also like to thank my parents for their encouragement and support for every ambition that I pursue. I have learned from them strength and unconditional love for family, both of which formed my passion for child welfare issues like the ones discussed in this Note.

I. INTRODUCTION

Maisha Joefield, a hardworking single parent, went through the horrifying experience of having her seven-year-old daughter, Deja, taken away from her by the authorities when Deja walked across the street to her grandmother's house while Ms. Joefield was taking a bath.[1] Although the doctors concluded that Deja was healthy and happy, Ms. Joefield was charged with endangering the welfare of her child, and Deja was removed from her home and placed in foster care by the Administration for Children's Services,[2] a governmental welfare service agency in New York City.[3] Ms. Joefield was eventually released from jail, and after a court hearing, Deja was returned to her mother, but not without the long-lasting psychological effects from the separation.[4]

Ms. Joefield and Deja's story is an example of two things: the power of governmental family and child welfare services to remove a child from his or her home with limited information, and the long-lasting mental and emotional consequences that stay with the child even after reunification with his or her family. In 2017, the number of child removal petitions rose 40% in large cities such as New York,[5] and stories like Deja's show us that some of those claims of abuse or neglect will end up being unsubstantiated, turning out to be a complete mistake. We want a child welfare system that will protect all children from neglect and abuse. But we also want to protect families from becoming victims of a

1. Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html.

2. *Id.*

3. *About ACS*, ADMIN. CHILD. SERV., http://www1.nyc.gov/site/acs/about/about.page (last visited Jan. 14, 2019).

4. Clifford & Silver-Greenberg, *supra* note 1.

5. *Id.*

harsh, over-zealous system that separates families first without using other means to ensure the children's safety, and only after says "sorry, our mistake," leaving the families to deal with the consequences of an emotionally broken child and home.[6]

Under the Fourteenth Amendment's Due Process Clause, the Supreme Court has recognized the parental right to have and raise one's own children.[7] The Supreme Court has also used the Due Process Clause to ensure procedural due process in government decisions, such as a child removal order, by balancing the private and public interests affected by such a ruling.[8] Once an allegation of child abuse or neglect has been made, the state child welfare agency will investigate and initiate a child removal petition to remove the child from the potentially harmful environment depending on the level of risk to the child.[9] In low-risk cases, where violence is not suspected to be an immediate risk, the court will judge in an initial adjudication hearing whether separation of the child from his or her family is warranted and subsequently decide the best temporary placement for the child.[10]

At the initial adjudication hearing, the court will assess the facts and determine whether a child is "dependent."[11] Although each state has its own statutory definition, generally, a court will deem a child to be "dependent" after the state meets the burden of presenting evidence showing that the child is a minor without proper care from his or her parent or guardian.[12] After the court finds that a child is "dependent," the court then has jurisdiction of the child and can order a temporary removal of the child for placement in foster care or a group home until the parents can remedy the situation.[13]

The minimum evidentiary standard that the state must meet to prove that a child is "dependent" also depends on each individual state.[14] After the Supreme Court case *Santosky v. Kramer*,[15] most states require the child welfare agency that initiated a petition to remove a child to meet a lower "preponderance of the

6. *Id.*

7. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (recognizing the parental right to engage in their children's education); Pierce v. Soc'y of the Sister of the Holy Names of Jesus and Mary, 268 U.S. 510, 534 (1925) ("[The court] declared the right to conduct schools was property and that parents and guardians, as a part of their liberty, might direct the education of children . . . .").

8. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 761 (1982) ("Given this disparity of consequence, we have no difficulty finding that the balance of private interests strongly favors heightened procedural protections.").

9. *Court Processes*, OFF. CHILD. AND FAM. CTS., http://www.ocfcpacourts.us/system-professionals/child-dependency-system/court-processes (last visited Jan. 14, 2019); *see, e.g.*, Children's Administration, *What Happens Once Abuse & Neglect is Reported?*, WASH. ST. DEP'T SOC. HEALTH SERV., https://www.dcyf.wa.gov/safety/what-happens-abuse-reported (last visited Jan. 14, 2019).

10. *How the Child Welfare System Works*, CHILD WELFARE INFO. GATEWAY, http://www.childwelfare.gov/pubs/factsheets/cpswork.cfm (last visited Jan. 14, 2019);

11. *Id.*; *Court Petition*, CHILD AND FAMILY SERV. REV., https://training.cfsrportal.acf.hhs.gov/book/export/html/3019 (last visited Jan. 14, 2019).

12. *How the Child Welfare System Works*, *supra* note 10.

13. *Id.*

14. *See infra* section III.C.

15. 455 U.S. 745 (1982).

evidence" standard,[16] while a minority of states require the government to show with "clear and convincing" evidence that the court should rule a child as dependent.[17] This Note examines the effects of the two different standards of proof required by states at the initial adjudication stage and their effects on the states' child welfare system. Part II of this Note reviews Supreme Court cases that establish the fundamental right to parent and the right to procedural due process under the Fourteenth Amendment. Part II then explores subsequent cases that applied those constitutional rights to child welfare issues. Part III compares state applications of different evidentiary standards at the initial adjudication stage, examine the outcomes the different standards have on the child welfare system, and examine the potential effects of removal on an adjudicated child. Part IV recommends alternative services and resources to aid and educate families while continuing to maintain a high level of protection and safety for children at risk.

For younger children, dramatic changes, such as being moved to an unfamiliar living environment with unfamiliar faces, can traumatize them and leave long-lasting mental and emotional scars that negatively impact their cognitive development as they grow into adults. While ensuring a safe environment for a child should be a priority, taking a child away from his or her home and family should not be taken lightly.

II. BACKGROUND

Before analyzing modern state interpretations and applications of evidentiary standards and the impact of these applications on child removal proceedings, this Part will first discuss the evolution of the fundamental right to parent under the Fourteenth Amendment. This Part will then examine Supreme Court cases that establish and apply the balancing test from *Mathews v. Eldridge*[18] to ensure procedural due process in government decisions. Finally, this Part will discuss the Supreme Court's decision in *Santosky v. Kramer*,[19] where the Court grappled with the fundamental parental right and procedural due process right in a *permanent* child removal case, setting the standard for *temporary* child removal cases to be discussed later in this Note.[20]

16. Candra Bullock, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U.J. GENDER SOC. POL'Y & L. 1023, 1031 (2003).

17. Ashley J. Provencher, Josh Gupta-Kagan & Mary E. Hansen, *The Standard of Proof at Adjudication of Abuse or Neglect: Its Influence on Case Outcomes at Key Junctures*, 17 SOC. WORK & SOC. SCI. REV. 22, 27 (2014); WILLIAM G. JONES, WORKING WITH THE COURTS IN CHILD PROTECTION 30, U.S. DEP'T HEALTH HUM. SERV. (2006), https://www.childwelfare.gov/pubPDFs/courts.pdf.

18. 424 U.S. 319, 336 (1976).

19. 455 U.S. 745.

20. *See infra* section III.C.

A. The Fundamental Parental Right

The right to parent one's biological children is a highly regarded fundamental right under the Fourteenth Amendment.[21] Although the Constitution does not explicitly state this fundamental right in its text, in the following cases, the Supreme Court has read the Fourteenth Amendment to contain the implied, or unenumerated, right to parent one's children.[22]

In 1923, the Supreme Court first established the parental right to raise one's own children without interference of the government in *Meyer v. Nebraska*.[23] The Court in *Meyer* reviewed a Nebraska statute after a teacher was tried and convicted for teaching a foreign language to young students.[24] The state's prohibition of teaching a foreign language at school "infringe[d] the liberty guaranteed . . . by the Fourteenth Amendment" by interfering "with the power of parents to control the education" of their own children.[25] The Court failed to find the teaching of a foreign language "injurious to the health, morals, or understanding of the ordinary child," and struck down the Nebraska statute.[26]

Two years later, in *Pierce v. Society of Sisters*, the Supreme Court reinforced this parental right by striking down an Oregon statute that required students to attend public school.[27] In keeping with *Meyer v. Nebraska,* the Court found that Oregon's Compulsory Education Act "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing . . . of [their] children" by forcing parents to access only public school teachers.[28] The Court emphasized that children are not "mere creature[s] of the state; those who nurture [them] and direct [their] destiny have the right, coupled with the high duty, to recognize and prepare [them]" without government interference.[29]

In the context of custody rights, the Supreme Court in *Stanley v. Illinois* recognized a father's fundamental right to parent his biological children by striking down a statutory scheme that declared the unmarried father's children as "state wards" following the death of their mother.[30] The Court again found that the father's parental interest in caring and managing his own children "warrants deference . . . absent a powerful countervailing interest,"[31] with the countervailing interest being the government's interest in protecting children.[32] Revisiting

21. *See, e.g.,* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981).

22. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992) ("It is tempting . . . to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. . . . But of course this Court has never accepted that view.").

23. 262 U.S. 390, 402 (1923) (holding that the state laws "exceed[ed] the limitations upon the power of the state and conflict with rights assured to [the parent]").

24. *Id.* at 396–97.

25. *Id.* at 399, 401.

26. *Id.* at 402.

27. Pierce v. Soc'y of the Sister of the Holy Names of Jesus and Mary, 268 U.S. 510, 531 (1925).

28. *Id.* at 534–35.

29. *Id.* at 535.

30. Stanley v. Illinois, 405 U.S. 645, 649–651 (1972).

31. *Id.*

32. *Id.* at 652.

previous Supreme Court cases that established the fundamental parental right "ma[de] it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial."[33]

The family unit and the bond between parents and their children had found protection in the Due Process Clause of the Fourteenth Amendment.

B. Procedural Due Process and the "Three 'Eldridge*' Factors"*

While the cases above examined the substantive parental right within the Fourteenth Amendment, the Amendment also ensures the individual right to procedural due process by "impos[ing] constraints on governmental decisions"[34] such as child adjudication hearings. While the Fourteenth Amendment protects individuals from state deprivation of individual rights,[35] the Supreme Court has interpreted procedural due process to be "flexible," affording "procedural protections *as the particular situation demands*."[36] Due process is "not a technical conception with a fixed content," and courts should consider the "time, place and circumstance"[37] of each due process challenge. In the cases below, the Supreme Court analyzed the "governmental and private interests" at stake when determining whether the government's rulemaking comported with the individual's right to procedural due process.[38]

In *Mathews v. Eldridge*, after receiving a letter from the Social Security Administration which notified him that his disability benefits would end, Eldridge challenged the "constitutional validity of the administrative procedures" for assessing the allocation of disability benefits.[39] *Eldridge* discusses due process under the Fifth Amendment, rather than the Fourteenth, because the Social Security Act is federal law.[40] The Supreme Court analyzed the private and public interests at stake and found that due process generally requires the consideration and balancing of three key factors: (1) the private interests affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and, if any, additional or substitute procedural safeguards; and (3) the countervailing governmental interest supporting use of the challenged procedure.[41]

Eldridge's private interest in his case was receiving disability benefits because he claimed that he was "unable to do his previous work [and could not], considering his age, education, and work experience engage in any other kind of substantial gainful work which exists in the national economy."[42] Next, the risk

33. *Id.*
34. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).
35. *Id.*
36. *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)) (emphasis added).
37. *Id.* (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).
38. *Id.*
39. *Id.* at 324–25.
40. *Id.* at 323.
41. *Id.* at 334–35.
42. *Id.* at 336 (citing 42 U.S.C. § 423(d)(2)(A) (2018)).

of potentially depriving benefits to a family unit of a physically disabled worker was high, especially when the government conceded that the delay between a request to review the decision and the actual review would exceed a year.[43] Finally, the Court considered the public's interest by weighing "the administrative burden and other societal costs that would be associated with requiring . . . an evidentiary hearing upon demand in all cases prior to the termination of disability benefits."[44] The Court, however, found that since Eldridge could "assert[] his claim" and receive subsequent judicial review before the claim became final, the government's decision fully comported with the protections of due process under the Constitution.[45]

Five years later, the Supreme Court applied the three *Eldridge* factors to *Lassiter v. Department of Social Services*, a procedural due process challenge in a parental rights termination case.[46] Lassiter, the mother, was accused of neglecting to provide her infant son with proper medical care.[47] A North Carolina trial court adjudicated Lassiter's son as a neglected child and placed him in the custody of the Durham County Department of Social Services.[48] After she was convicted of second degree murder in an unrelated case and faced up to forty years in prison, the Department of Social Services moved to terminate her parental rights to her son.[49] Lassiter argued that "because she was indigent, the Due Process Clause of the Fourteenth Amendment entitled her to the assistance of counsel, and that the trial court had . . . erred in not requiring the State to provide counsel for her."[50] Acknowledging that "[s]tate intervention to terminate the relationship between [the parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause,"[51] the Court used the *Eldridge* factors to balance the State's and parent's interests.[52]

The first *Eldridge* factor was Lassiter's private interests in maintaining her custody rights to her son.[53] As previously stated in *Stanley v. Illinois*, "the interest of a parent in the companionship, care, custody, and management of his or her children"[54] is a "precious" one,[55] and has a unique place in our legal culture. Here, the Department of Social Services sought not only to infringe upon that interest, but to end it.[56]

43. *Id.* at 341–42.
44. *Id.* at 347.
45. *Id.* at 349.
46. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981).
47. *Id.* at 20–21.
48. *Id.*
49. *Id.*
50. *Id.* at 24.
51. *Id.* at 37 (Blackmun, J., dissenting) (evaluating, as did the majority, the "'three distinct factors' specified in *Mathews v. Eldridge*").
52. *Id.* at 27.
53. *Id.*
54. *Id.* at 38 (Blackmun, J., dissenting) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).
55. *Id.* (Blackmun, J., dissenting) (quoting May v. Anderson, 345 U.S. 528, 533 (1953)).
56. *Id.* at 27.

The Court next considered the second *Eldridge* factor, the risk of an erroneous deprivation of interests with the procedure used.[57] Lassiter argued that a termination hearing, "is one as to which the parent must be uniquely well informed and to which the parent must have given prolonged thought."[58] The Supreme Court also acknowledged that "the parents [in a custody termination proceeding] are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation."[59] Given the magnitude of the decision and Lassiter's lack of resources and education, the risk of erroneously and permanently depriving a person of her fundamental right to parent weighed in favor of Lassiter's challenge.[60]

Finally, the Court acknowledged the countervailing governmental interest in protecting children and families that are in need of government intervention in an economically efficient manner.[61] While the "State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel,"[62] the State's interest clearly diverges from the parent's when the State prefers to avoid the expense of appointed counsel and the cost of lengthened proceedings.[63]

In the end, the Court found that even where the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, "due process did not . . . require[] the appointment of counsel."[64] The termination proceeding contained no allegations based on criminal charges, expert witnesses, or "troublesome points of law."[65] The presence of counsel would not have made a determinative difference for Lassiter.[66] Although thirty-three states and the District of Columbia, at the time, statutorily provided for the appointment of counsel in termination cases, the Supreme Court found that this did not imply that the Constitution requires it.[67] The Court did find, however, that while the "Constitution imposes . . . the standards necessary to ensure that judicial proceedings are fundamentally fair," a state "may require that higher standards be adopted than those minimally tolerable under the Constitution."[68] The Supreme Court's ruling only set the constitutional minimum and left states with the freedom to impose a higher standard for the government.

57. *Id.* at 28–29.
58. *Id.* at 29.
59. *Id.* at 30.
60. *Id.* at 29–30.
61. *Id.* at 27–28.
62. *Id.* at 28.
63. *Id.*
64. *Id.* at 31.
65. *Id.* at 32.
66. *Id.* at 32–33.
67. *Id.* at 34.
68. *Id.* at 33.

C. Standard of Proof in Permanent Child Removals

For the first time, in *Santosky v. Kramer*, the Supreme Court considered the minimum evidentiary standard for a permanent child removal proceeding.[69] After the State of New York filed to permanently remove a child from his biological parents, the parents challenged the constitutionality of the proceeding's "preponderance of the evidence" standard, alleging that the government's burden was too low and that it violated the parents' due process rights.[70] The Court considered the fundamental parental right and the right to procedural due process by using the three *Eldridge* factors.[71]

As previously stated in *Lassiter*,[72] the Court found the "natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right."[73] This private interest at stake weighed "heavily against use of the preponderance standard at a state-initiated permanent neglect proceeding."[74]

Next, the Court emphasized the magnified risk of erroneous fact-finding when parents "subject to termination proceedings are often poor, uneducated, or members of minority groups."[75] Permanent neglect proceedings leave determinations "unusually open to the subjective values of the judge,"[76] potentially exposing uneducated parents to judgments based on cultural or class bias.[77] The disparity between the parties' resources aligned with their litigation options.[78] For the parents, the "consequence of an erroneous termination is the unnecessary destruction of their natural family."[79]

Lastly, the Court recognized New York's "urgent interest in the welfare of the child."[80] Finding the child an alternative permanent home, however, should only arise "when it is *clear* that the natural parent cannot or will not provide a normal family home for the child."[81] At the fact-finding stage, the State's interests are best served by "procedures that promote an accurate determination of whether the natural parents can and will provide a normal home."[82]

Ultimately, the Supreme Court held that the "clear and convincing evidence" standard was the minimum burden that the government should bear in a permanent neglect proceeding to "strike[] a fair balance between the rights of the

69. Santosky v. Kramer, 455 U.S. 745, 757 (1982).
70. *Id.* at 751.
71. *Id.* at 758.
72. *Lassiter*, 452 U.S. at 38 (Blackmun, J., dissenting).
73. *Santosky*, 455 U.S. at 758 (quoting *Lassiter*, 452 U.S. at 35).
74. *Id.* at 759.
75. *Id.* at 762–63.
76. *Id.* at 762.
77. *Id.* at 763.
78. *Id.* at 764 (comparing child termination proceedings to criminal trials where natural parents have no "double jeopardy" defense against repeated state termination efforts).
79. *Id.* at 766.
80. *Id.* (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)).
81. *Id.* at 767.
82. *Id.*

natural parents and the State's legitimate concerns."[83] New York, at the time, demanded "at least clear and convincing evidence in proceedings of far less moment" such as traffic court proceedings and contract reformation.[84] "Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances" that inappropriate terminations will be ordered.[85] The "preponderance of the evidence" standard of proof would yield a substantial risk of error, impeding on the private interests of families.[86]

As seen in both *Lassiter* and *Santosky*, the Supreme Court only determined the minimum burden that states are constitutionally required to bear, leaving the determination of a proper evidentiary standard a "matter of state law."[87]

III. ANALYSIS

Part III, in contrast to *Santosky's* permanent custody termination proceeding, will focus on the process of temporary child removals. Child adjudication procedures differ from state to state, and thus, Section III.A will first provide a general overview of the temporary removal process. Section III.B will then examine different state interpretations and applications of *Santosky's* holding in temporary child removal decisions in contrast to the permanent termination at issue in that case. Section III.C will analyze the data from both "preponderance of the evidence" states and "clear and convincing" states and compare the effects that the two evidentiary standards have on the states' child welfare systems. Finally, Part III will conclude by discussing the potential harm of temporary child removal proceedings in the context of the child's mental and psychological health and the parents' legal restrictions.

A. The Initial Child Removal Process

The proceedings following a report of child neglect are difficult ones, both emotionally and procedurally. Although each state has different procedures and statutes, generally, there are three ways that a child can enter the child welfare system: (1) a police protective custody order, (2) an emergency shelter care petition, and (3) a standard dependency petition.[88] A police protective custody order is filed by a law enforcement officer and verbally requests a judge to order the immediate removal of a child from his home.[89] Similarly, the state agency

83. *Id.* at 769.

84. *Id.* at 767–68 ("We cannot believe that it would burden the State unduly 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.").

85. *Id.* at 764–65.

86. *Id.* at 758.

87. *Santosky*, 455 U.S. at 769–70; Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 34 (1981).

88. *See, e.g.*, *Court Processes*, *supra* note 9.

89. *See id.*

can file an emergency shelter care petition to take protective custody of a child.[90] Cases that involve the need of police protective custody or emergency shelter are high-risk cases that involve obvious and immediate risk of violence or abuse in the home.[91]

In contrast, in nonemergency, low-risk cases, the state's child welfare agency will file a standard dependency petition, and the court will adjudicate the case based on the facts contained within the petition.[92] This process begins with an initial adjudication hearing where a judge will decide whether a child is "dependent."[93] Following a finding that a child is dependent, a separate disposition hearing will take place to decide where to temporarily place a child while his or her case makes its way through the court system.[94] While the two hearings do not need to be on separate days or times, there must be a "definitive bifurcation of the proceedings so that the parties are afforded an opportunity to present evidence at both the adjudicatory and dispositional hearings."[95]

After the state's child welfare agency initiates a dependency petition, at the initial adjudication stage, the state bears the burden to show that the child should be temporarily removed from his or her current living situation.[96] A judge will then determine whether the state has met the burden of proof by presenting enough evidence to show that the alleged abuse or neglect actually occurred and that the child should be removed from his or her home or separated from his or her family while the state continues with the case.[97] If the state meets its burden, the court will deem the child to be "dependent."[98] The state is then permitted to intervene in the parent-child relationship with further investigation, separation, and continued court involvement.[99] A ruling that a child is not fit to remain in his or her home is a prerequisite for the court to not only remove the child, but also for the court to have the authority to order the parents to take specific actions to address and remedy the causes of the adjudication.[100] Once a child is in the court's jurisdiction as a dependent child, a disposition hearing will take place to decide the child's temporary placement.[101] If the judge believes that a child re-

90. JANE NUSBAUM FELLER ET AL., WORKING WITH THE COURTS IN CHILD PROTECTION, U.S. DEP'T HEALTH AND HUMAN SERVS. 11–13 (1992), https://www.childwelfare.gov/pubPDFs/courts_1992.pdf (last visited Jan. 14, 2019).

91. *See id.*

92. *Court Processes*, *supra* note 9.

93. *Id.*

94. 43 C.J.S. *Infants* § 119 (2018).

95. *Id.*; *Court Petition*, *supra* note 11.

96. Provencher, Gupta-Kagan, & Hansen, *supra* note 17, at 27; *Court Petition*, *supra* note 11; *Court Processes*, *supra* note 9.

97. *Court Petition*, *supra* note 11; *Court Processes*, *supra* note 9.

98. *Court Processes, supra* note 9.

99. FELLER ET AL., *supra* note 90, at 15; *Court Petition*, *supra* note 11.

100. *Court Petition*, *supra* note 11; *see, e.g.*, Kella W. Hatcher & John Rubin, *Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina,* UNIV. N.C. SCH. GOV'T, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/book_chapter/Chapter%206%20Adjudication%20of%20Abuse%2C%20Neglect%2C%20or%20Dependency.pdf (last visited Jan. 14, 2019).

101. *Court Processes, supra* note 9.

maining in his or her home could be dangerous, then the judge will issue a disposition order to remove the child and place him or her in foster care, a group home, or with a relative, if available.[102]

Conversely, if the judge finds at the adjudicatory hearing that the state failed to meet its burden of proving that either the alleged abuse or neglect occurred or that the child is unfit to remain in his or her home, then the case is dismissed and the child can be legally returned to his or her parents.[103] The state loses its authority to continue removal proceedings or to investigate without the parents' consent.[104]

B. Evidentiary Standards for Temporary Removals

The standard of proof is the minimum burden that a party must meet in order for the factfinder to reach a particular determination.[105] Following *Santosky*, for child custody hearings, the evidentiary standard is either a "preponderance of the evidence" or a "clear and convincing" standard, depending on the state.[106]

A "preponderance of the evidence" standard requires the factfinder to return a judgement in favor of the petitioner if the petitioner is able to show that a particular fact or event was more likely than not to have occurred.[107] If two or more possibilities can be inferred from the evidence presented, then neither of them can be said to have been proven—the party on which the burden of proof falls will have failed to meet that burden.[108] The petitioner, or in most cases, the state, need only present evidence that is more credible than the defendant, or the parents.[109]

In contrast, the more rigorous "clear and convincing" standard requires the petitioner to prove that a particular fact is *substantially* more likely than not to be true.[110] While less than the "beyond a reasonable doubt" standard, the petitioner must produce in the mind of the factfinder a firm belief that there is a high probability that the particular allegations in question are true.[111] This higher standard is generally used in civil proceedings where "moral turpitude is implied," or when public and social concerns are at stake.[112]

While *Santosky* addressed the proper evidentiary standard for a *permanent* child removal case, courts have interpreted *Santosky's* holding to apply the lower

102. FELLER ET AL., *supra* note 90, at 15.
103. *Id.*; *see, e.g.*, 14 PA. CODE § 1409 (2016).
104. JONES, *supra* note 17, at 30.
105. 32A C.J.S. *Evidence* § 1615 (2018); Ann E. Ward, *Standard of Proof in Parental Rights Termination:* Santosky v. Kramer, 36 SW. L.J. 1069, 1074 (1982).
106. ANN M. HARALAMBIE, *Standard of Proof*, 2 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 13:3 (2017); JONES, *supra* note 17, at 35.
107. 32A C.J.S. *Evidence* § 1627 (2018).
108. *Id.*
109. *Id.*
110. 32A C.J.S. *Evidence* § 1624 (2018).
111. 29 AM. JUR. 2D *Evidence* § 173 (2018).
112. 32A C.J.S. *Evidence* § 1624 (2018).

"preponderance of the evidence" standard to an initial adjudication hearing because of the proceeding's *temporary* consequences.[113] For example, in *Matter of N.H.*, a mother brought an appeal against a state statute, claiming that it violated her "constitutional right to due process" by "fail[ing] to require proof of neglect by clear and convincing evidence . . . ."[114] The D.C. Code only requires that a finding of child neglect be proven beyond a "preponderance of the evidence."[115] The mother argued that this lower standard failed to balance her parental interest in regaining custody of her child, the child's interest in an accurate judgment at trial, and the government's administrative interest in reuniting the mother and child, if possible.[116]

Although the court acknowledged the fundamental parental right discussed earlier in this Note,[117] the court in N.H.'s case held that this right is not absolute when the duty to protect minor children is involved.[118] The court disagreed with the mother's argument that *Santosky* controlled this case on the grounds that the nature of the hearing was entirely different.[119] After a finding of neglect, the trial court ruled between a "temporary third party placement of the child or supervised placement of a child with the parents for a two-year period,"[120] both consequences involving only temporary or limited separation. Because N.H.'s case did not involve the possibility of permanent removal of the child, the court found that the "fair preponderance" standard was in accord with "due process to the parent and the child."[121] When considering the risk of erroneous fact-finding under *Eldridge*, courts have found that the weight of an incorrect removal is far less in a temporary child removal case because not only are the consequences reversible but the parents are also given an opportunity to remedy their situation and comply with the court's instructions to be reunited with their child.[122]

C. State Interpretations in the Aftermath of Santosky

Similar to *Matter of N.H.*, in the aftermath of *Santosky*, thirty-two states, including California, New York, and Illinois, maintain a "preponderance of the evidence" standard for initial adjudication hearings.[123] Meanwhile, eighteen states, including Pennsylvania and Ohio, maintain a "clear and convincing"

113. HARALAMBIE, *supra* note 106 ("The Court left it open for states to require a higher burden, but states generally have rejected the higher standard.").

114. 569 A.2d 1179, 1180 (D.C. 1990).

115. D.C. CODE § 16-2317(c)(2) (1990); *Matter of N.H.*, 569 A.2d at 1181.

116. *Matter of N.H.*, 569 A.2d at 1181.

117. *See* discussion *supra* Section II.A.

118. *Matter of N.H.*, 569 A.2d at 1181–82.

119. *Id.* at 1182 (stating that the correct standard of proof "depends on the magnitude of the interest in the right which is being infringed.").

120. *Id.* at 1182–83.

121. *Id.*

122. *See* Provencher, Gupta-Kagan & Hansen, *supra* note 17, at 28.

123. *See id.* at 27.

standard.[124] Examined below are the applications of different evidentiary standards in temporary child removal cases from four states—California, Illinois, Pennsylvania, and Ohio. California and Illinois require a "preponderance of the evidence" standard to find abuse or neglect and are in the top five states in the country to have the highest number of child removal cases each year.[125] Pennsylvania and Ohio require a "clear and convincing" standard and have the highest number of child removal cases among states that maintain the same higher standard of proof.[126]

1. California

Under California law, a child is deemed as "dependent" if the state can prove that a child: suffered, or is at substantial risk to suffer, serious physical harm not accidentally inflicted; suffered, or is at substantial risk to suffer, physical harm or illness as a result of the failure or inability of his or her parent to adequately supervise or protect the child; suffered, or is at substantial risk to suffer, serious emotional damages as a result of a guardian's failure to provide adequate care, or if the child is left without any provision for support.[127] Furthermore, as a matter of due process, California law requires that a parent unable to attend the initial adjudication hearing in person must be given some means of participation in the hearing, such as through counsel, telephone, or video conference.[128]

While the court can hold multiple hearings, if the court finds that a child is not dependent under California law, the court then has no authority to order services or obligations upon the parent because the child is ineligible for those services.[129] If a child has been temporarily removed from the home, "the child shall be returned to the physical custody of that parent or guardian immediately after a finding"[130] that the child is no longer eligible under the statute unless the social worker or an opposing party establishes by a preponderance of evidence that the conditions still exist."[131]

Similar to *Matter of N.H.*, in *Cynthia D. v. Superior Court*, the mother challenged a California statute that allows the termination of her parental rights "based on a finding by a *preponderance of the evidence*,"[132] and claimed that it violated her right to procedural due process.[133] The mother relied on *Santosky* and argued that a finding in favor of termination of parental rights must be made by "clear and convincing evidence."[134]

124. *Id.*
125. *Id.* at 30–31.
126. *Id.*
127. CAL. WELF. & INST. CODE § 366.26 (2018).
128. *Id.* § 13:29.
129. *Id.* § 362.
130. *Id.* § 361.1.
131. *In re* Aurora P., 194 Cal. Rptr. 3d 383, 386–87 (Ct. App. 2015).
132. CAL. WELF. & INST. CODE § 366.26 (emphasis added).
133. Cynthia D. v. Superior Court, 851 P.2d 1307, 1311 (Cal. 1993).
134. *Id.*

The mother in *Cynthia D.*, however, challenged the statutory review process of a parent's fitness that takes place after the fact-finding stages of the initial adjudication hearing and the subsequent disposition hearing.[135] The court disagreed with the mother's argument, holding that the "context of the *entire* dependency process" must be considered when deciding on the constitutionality of the statutory scheme.[136] Unlike the termination hearings in *Santosky*, a review under the challenged statute does not "accumulate further evidence of parental unfitness and danger to the child," but rather, "begin[s] the task of finding the child a permanent alternative family placement" six months after a disposition hearing.[137] Unlike an initial adjudication hearing, by the time the case reaches the review stage under the challenged statute, the child has already been temporarily removed and "there have been multiple specific findings of parental unfitness."[138] The court found that, in the context of California's adjudication procedures, the termination of parental rights by a showing of a "preponderance of the evidence" complied with the mother's right to procedural due process.[139]

Applying the preponderance of the evidence standard as set forth by California law, in *In re Aurora P.*, the counsel for the "dependent" children opposed the agency's recommendation that the juvenile court should terminate its dependency jurisdiction over the children, arguing for continued state intervention.[140] The children's counsel alleged that the mother had fractured her son's wrist and that her partner physically disciplined the children in the home.[141] After the state agency filed a petition, the juvenile court found that removal was necessary and temporarily placed the children in the agency's care pending further court proceedings.[142] After a series of unhopeful "Family Maintenance Review Hearings," the agency filed a final report stating that the mother had started complying with her case plan set forth by the agency, and the sexual abuse claims and other safety concerns were found to be inconclusive.[143]

Here, the juvenile court ruled that, considering the social workers' testimony and the reports submitted by the agency, the children's counsel had not established by a preponderance of the evidence that the harmful conditions still exist or were likely to exist.[144] The court dismissed the dependency hearing and ended its dependency jurisdiction of the children.[145] The court concluded by agreeing with the agency that "the family's situation may not be optimal or perfect and that [the] Mother may be overwhelmed at times"—these circumstances,

135. CAL. WELF. & INST. CODE § 300(a)–(j) (2018).
136. *Id.* at 1313 (emphasis added).
137. *Id.*
138. *Id.*
139. *Id.* at 1315.
140. *In re* Aurora P., 194 Cal. Rptr. 3d 383, 387 (Ct. App. 2015).
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 392.
145. *Id.*

however, "[do] not compel the continued exercise of dependency jurisdiction" and "[are] not the same as abuse or neglect."[146]

2. *Illinois*

Similar to California, Illinois' Juvenile Court Act defines an adjudicatory hearing as "a hearing to determine whether the allegations of a petition . . . that a minor under 18 years of age is abused, neglected or dependent, or requires authoritative intervention . . . are supported by a preponderance of the evidence."[147] After hearing the evidence, if the court finds that the minor is not dependent, the court will dismiss the petition to remove the child and order the minor to be discharged to his or her parents.[148]

If the court finds, however, by a preponderance of the evidence that the child has been abused or neglected and should not remain in his or her home, the court then orders the parents to "cooperate with the Department of Children and Family Services, comply with the terms of the service plan, and correct the conditions that require the child to be in care, or risk termination of parental rights."[149] If the court deems a child a "dependent" child of the court, the judge "shall then set a time not later than 30 days after the entry of the finding for a dispositional hearing" to determine whether it is "consistent with the health, safety and best interests of the minor and the public that he be made a ward of the court."[150]

In *In re N.B.*, the mother filed an appeal in the Supreme Court of Illinois after the appellate court affirmed the circuit court's decision to adjudicate her minor children, N.B. and C.R., as "dependents" of the state.[151] After multiple witnesses testified about the mother's emotional instability, the circuit court found that, while there was no evidence of physical violence, "it is an . . . injurious aspect of a child's environment if the child is subject to anger, and to excessive emotion which renders adult supervisors in the child's life out of control."[152] The circuit court found that the State had proved by a preponderance of the evidence a finding of neglect under the Juvenile Court Act,[153] "a necessary predicate to an adjudication of wardship of a child."[154] The court, in turn, found that the two instances of "temper not directed to the children," failed to show "frequency, duration or quality that would indicate that the children lived in an environment that exposed them or, threatened them with, emotional or physical injury."[155] While the State argued that the court should not wait until the children "suffered

146. *Id.* at 403.
147. 705 ILL. COMP. STAT 405/1–3(1) (2018).
148. *Id.* 405/2–21(1).
149. *Id.*
150. *Id.* 405/2–21(2).
151. 730 N.E.2d 1086, 1087 (Ill. 2000).
152. *Id.* at 1092.
153. *Id.* at 1087; *see* 706 ILL. COMP. STAT 405/1–1 (2018).
154. *In re N.B.*, 730 N.E.2d at 1088.
155. *Id.* at 1094.

actual abuse before the court could find an injurious environment,"[156] the court found that the State had failed to meet the lower "preponderance" burden and reversed the circuit court's order adjudicating the children as dependents.[157]

Although the standard of proof was not contested by the parent in *In re N.B.*, in *In re D.T.*, the mother of the adjudicated children argued that the state's burden of proof to prove abuse or neglect should be a "clear and convincing" standard because of her fundamental parent-child relationship.[158] The Supreme Court of Illinois revisited *Santosky* and acknowledged that after the Supreme Court's "balancing of the three public and private interest factors identified in *Mathews v. Eldridge*," due process "required proof of *permanent* neglect by clear and convincing evidence."[159] The court found, however, that when comparing the proceedings in *Santosky* and the present case, the "clear and convincing evidentiary standard adopted in *Santosky* for New York's fact-finding hearing is applicable only to Illinois' unfitness hearing."[160] The court noted that the Illinois legislature did, in fact, amend the Juvenile Court Act to raise Illinois' evidentiary burden necessary to support a finding of parental unfitness from a "preponderance of the evidence" to a "clear and convincing" standard.[161] Using the *Eldridge* factors, the court found that requiring a clear and convincing standard would "frustrate the state's . . . interest in protecting the welfare of its children . . . [as well as] an interest in severing family ties" when necessary.[162]

Justice Rita Garman dissented in *In re D.T.* by questioning if a standard of proof should even be applied in the context of parental rights.[163] Justice Garman compared judicial discretion in criminal sentencing to the decision to sever the parent-child relationship, both grave and serious decisions.[164] Sentencing courts have "traditionally heard evidence and found facts without any prescribed burden of proof at all."[165] Justice Garman prescribed the idea that parental rights should be decided by considering the child's and public's best interests, not by using a rigid standard of proof.[166] A strict standard of proof in an adversarial system may actually "hamper our trial courts in the exercise of their duty to protect children like D.T."[167]

156. *Id.* at 1093; *see also In re* S.D., 581 N.E.2d 158, 162 (Ill. App. Ct. 1991) ("In an adjudicatory hearing to determine neglect, a court does not have to wait until a sibling becomes the victim of sexual or physical abuse before the court can find that the sibling is in an environment injurious to his welfare.").

157. *In re* N.B., 730 N.E.2d at 1094 ("[W]e may not approve of the [mother's] behavior before her children, [but] we must conclude . . . that the finding of neglect was against the manifest weight of the evidence.").

158. *In re* D.T., 818 N.E.2d 1214, 1224–25 (Ill. 2004).

159. *Id.* at 1224 (emphasis added); *see* Santosky v. Kramer, 455 U.S. 745, 769 (1982).

160. *In re* D.T., 818 N.E.2d at 1225.

161. *Id.*

162. *Id.* at 1227–28.

163. *Id.* at 1229 (Garmin, J., dissenting).

164. *Id.* at 1230 (Garmin, J., dissenting).

165. *Id.* (Garmin, J., dissenting) (citing McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986)).

166. *Id.* at 1230–31 (Garmin, J., dissenting).

167. *Id.* at 1231 (Garmin, J., dissenting).

3. *Pennsylvania*

In contrast to California and Illinois, to adjudicate a child as a dependent of the State in Pennsylvania, the court must determine by clear and convincing evidence that the child "is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals."[168] Pennsylvania courts have interpreted the "clear and convincing" standard to describe evidence that is so "clear, direct, weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitance, of the truth of the precise facts in issue."[169] At the initial adjudication stage, the court should "receive evidence from all interested parties" and also "disinterested witnesses, e.g., neighbors, teachers, social workers, and psychological experts."[170] Only after this burden is met, the court can order "what is necessary under the circumstances, including the removal of the dependent child from parental custody."[171]

In *In re B.L.F.*, the state agency presented evidence at the adjudication hearing that the mother of B.L.F had "a history of substance abuse, domestic violence, untreated mental health issues, and unstable housing."[172] Additionally, all four of B.L.F's older siblings had already been placed in foster care.[173] The Supreme Court of Pennsylvania maintained the higher "clear and convincing" standard of proof, and confirmed the purpose of Pennsylvania's Juvenile Act, to "preserve the unity of the family whenever possible."[174] The court insisted that the State should not separate a child from his or her parents unless it finds that the separation is "clearly necessary" under Pennsylvania law.[175] In this case, however, the court found that the State had met its burden of presenting "clear and convincing" proof that B.L.F. was at risk of harm and was therefore "dependent."[176] Although the father was "ready and willing to care for the child," the court separated the child from his biological father because "his relationship with [the] mother indicate[d] that he is not presently able to ensure [the] child's safety."[177]

In *In re Haynes*, after the mother obtained employment, successfully abstained from her alcohol abuse, and remarried, the Supreme Court of Pennsylvania found that "the agency ha[d] not met its burden and ha[d] not proved by clear

168. *In re* A.B., 63 A.3d 345, 349 (Pa. Super. Ct. 2013) (citing 42 PA. CONS. STAT. § 6302 (2012)).

169. *In re* J.C., 5 A.3d 284, 288 (Pa. Super. Ct. 2010) (quoting *In re* J.L.C., 837 A.2d 1247, 1251 (Pa. Super. Ct. 2003)).

170. *In re* C.M.T., 861 A.2d 348, 356 (Pa. Super. Ct. 2004) (quoting In the Interest of Michael Y., 530 A.2d 115, 118 (Pa. Super. Ct. 1987)).

171. *In re* A.N., 39 A.3d 326, 332 (Pa. Super. Ct. 2012) (quoting 42 PA. CONS. STAT. §§ 6341, 6351 (2012)).

172. No. CP–7–DP–00022–2017, 2017 WL 4712478, at *1 (Pa. Super. Ct. Oct. 20, 2017).

173. *Id.*

174. *Id.* at *3–4.

175. *Id.* at *4 (citing *In re* G.T., 845 A.2d 870, 873 (Pa. Super. Ct. 2004)).

176. *Id.* at *5.

177. *Id.*

and convincing evidence that the natural mother could not care for [her] children."[178] Although the State argued for a "best interest of the child" standard of fact-finding, the court maintained that "under the Juvenile Act the court is not free to apply a general standard . . . but is confined by the restrictive definitions" under the Pennsylvania statute.[179] "A finding of dependency is not the same thing as a determination of the best interests of the child; the question is whether the child is presently without proper parental care and, if so, whether that care is immediately available."[180]

4. Ohio

In Ohio, a "dependent child" is defined as any child that is homeless or without adequate parental care; whose condition or environment is such as to warrant the state in assuming the child's guardianship; or that is residing in a household in which a parent committed an act that was the basis for adjudicating another child in the household as "an abused, neglected, or dependent child."[181] Similar to Pennsylvania, a court will order a dispositional hearing to hear evidence as to the proper disposition of the child only after it finds by clear and convincing evidence that the child is abused, neglected, or dependent.[182] After the disposition hearing, the court may issue a dispositional order to temporarily place a child out of the home.[183]

In *In re E.M.*, a mother appealed the trial court's decision that determined her child, E.M., was an abused child under Ohio law.[184] The mother admitted to using heroin while pregnant with E.M., and was prescribed the drug, Subutex, to treat her opioid addiction.[185] Although neither the mother nor E.M. was found to have heroin in their system, E.M. was born with the prescription medicine in her system.[186] Under Ohio law, an abused child is defined as a child who, "[b]ecause of the acts of his parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child's health or welfare."[187] The trial court found that the State's evidence of prescription medicine in E.M.'s system proved beyond the "clear and convincing evidence" standard that the mother was unfit to retain custody of E.M.[188]

On appeal, however, the court distinguished E.M. from the newborns in other Ohio cases who had "tested positive at birth for the illegal drugs to which they were exposed in utero due to their mothers' ongoing drug use."[189] E.M. did

178. 473 A.2d 1365, 1368 (Pa. Super. Ct. 1983).
179. *Id.*; *see also* Stapleton v. Dauphin County Child Care Services, 324 A.2d 562, 567 (Pa. Super Ct. 1974).
180. *In re* Haynes, 473 A.2d at 1368 (citing *In re* Jackson, 302 A.2d 369, 376 (Pa. Super. Ct. 1982)).
181. OHIO REV. CODE ANN. § 2151.04(A)–(D) (2018).
182. *Id.* § 2151.35.
183. *See* In re Baby Girl Baxter, 479 N.E.2d 257, 258 (Ohio 1985).
184. *In re* E.M., 31 N.E.3d 204, 205 (Ohio Ct. App. 2015) (interpreting OHIO REV. CODE § 2151.031(D)).
185. *In re* E.M., 31 N.E.3d at 205.
186. *Id.*
187. *Id.* (citing OHIO REV. CODE. § 2151.031(D)).
188. *Id.*; *see also In re* L.S., 60 N.E.3d 9, 18 (Ohio Ct. App. 2016).
189. *In re E.M.*, 31 N.E.3d at 207.

not experience "symptoms of withdrawal from the drugs, [and] there [wa]s no evidence in the record that E.M.'s health or welfare was harmed or threatened with harm as a result of [her mother's] illegal drug use."[190] Moreover, the State did not present any evidence that "the effects of Subutex . . . harmed or threatened to harm E.M.'s health or welfare."[191] The appellate court reversed the trial court's finding that E.M. was abused on the basis that the State failed to prove with "clear and convincing" evidence that E.M. was harmed, or threatened with harm, under Ohio law.[192]

D. Different Standards, Different Results

As the various state court decisions above have found, sometimes the difference between a "preponderance of the evidence" standard and a "clear and convincing standard" could change the outcome of a child dependency decision at the initial adjudication stage.[193] Although it could be difficult to imagine the tangible outcomes of an adjudication hearing, according to an empirical study by the National Survey of Child and Adolescent Well-being ("NSCAW") analyzing the results of different evidentiary standards at the initial child adjudication stage, there are clear differences between the states' child welfare systems.[194]

The NSCAW compiled data from child neglect and abuse cases from eight states, two of which that have a "clear and convincing" standard of proof (Pennsylvania and Ohio) and six that have a "preponderance of the evidence" standard (California, Illinois, Florida, Michigan, New York, and Texas) for initial adjudication hearings as the minimum burden of proof for the state agency.[195] The study used data from California, Illinois, Pennsylvania, Florida, Michigan, and Ohio because these states have some of the highest number of child welfare cases every year.[196] The study looked at a total of 3,121 cases from a sample time frame, all of which involved children included under the age of 15[197] and varied types of reported abuse, such as sexual abuse, physical violence, and neglect.[198]

The first key difference from the data showed that there were more home visits by the investigating state agency for states that maintained a higher "clear and convincing" standard of proof compared to "preponderance of the evidence" states.[199] With a higher standard of proof, the state's social workers and attorneys had a greater incentive to gather more evidence before bringing a petition before a judge.[200] More physical visits to the home could lead to more thorough inves-

190. *Id.*
191. *Id.*
192. *Id.*
193. *See supra* Section III.C.
194. Provencher, Gupta-Kagan & Hansen, *supra* note 17, at 30–31.
195. *Id.* at 31.
196. *Id.* at 30–31.
197. *Id.* at 30.
198. *Id.* at 33.
199. *Id.* at 40, 48.
200. *Id.* at 29.

tigations, allowing the state to have a better basis for reporting cases and adjudicating petitions. If the standard is too high, however, then the case workers are discouraged from trying difficult cases because of administrative costs and time.[201] This caveat is significant in long-term sexual abuse cases that could have limited physical evidence.[202] In this scenario, a higher standard of evidence could hamper the effectiveness of a state's efforts to protect the child.

Next, the data also showed that a higher standard of proof resulted in a lower chance that the judge would rule in favor of the state agency.[203] For all age groups, the probability of a judge ruling an adjudication hearing in favor of the state was 90% higher in states with a "preponderance" standard compared to a "clear and convincing" standard.[204] This result could lead to two opposite conclusions. First, fewer rulings in favor of the state could mean that cases that will ultimately be unsubstantiated later are being weeded out at an earlier stage with the higher standard of proof. This could be, in part, because the results above showed that more investigation also takes place in states with a higher standard of proof. In turn, this data could also mean that the standard of proof is too high for the state agency to meet, returning children to potentially dangerous home situations.

Finally, in cases where a child was adjudicated as abused or neglected, states with a "clear and convincing" standard had higher percentages of children placed in nonrelative out-of-home placements, such as foster care or group homes, while awaiting subsequent court proceedings.[205] Again, this result could be, in part, due to the higher quality and quantity of evidence that was presented by the state to meet the higher burden of proof. While the state agency met the burden to adjudicate the child, it could have also presented evidence to show that staying close to the family, or with relatives, was also potentially harmful.

Although the magnitude of each result varied slightly depending on the type of abuse or age group, the NSCAW study shows that the higher standard of proof affected the outcome of child removal cases by increasing the number of visits to the home during an investigation, lowering the odds of substantiating an investigation, lowering the odds that the case reaches the initial adjudication stage, lowering the odds of adjudication in favor of the state, and increasing the odds of an out-of-home placement while awaiting further government intervention.[206]

Furthermore, the National Child Abuse and Neglect Data System ("NCANDS") reported that there were 2,044,924 reports of alleged abuse or neglect in states with a "preponderance of the evidence" standard in 2012.[207] Of those reports, 470,562 cases (23%), were substantiated, meaning that there was enough evidence to determine that child abuse or neglect existed in those

201. *Id.*
202. *Id.* at 38.
203. *Id.* at 43.
204. *Id.* at 45.
205. *Id.* at 44, 46.
206. *Id.* at 37–38.
207. *Id.* at 46.

cases.[208] Combining the NCANDS statistics with the NSCAW data from above that concluded that fewer cases are substantiated with a "clear and convincing" standard, in 2012, only 368,315 cases (18%) would have been substantiated using a higher evidentiary standard.[209] Over 100,000 more child abuse or neglect petitions would have reached the adjudication process under the preponderance of the evidence standard, even if they would have been unsubstantiated using the clear and convincing standard.[210] These numbers present two unsettling outcomes: first, a lower evidentiary standard and burden placed on the government agency results in children that are temporarily and unnecessarily separated from their parents when there is actually no abuse or neglect in the home; and second, a higher threshold or burden would prevent the government from being able to adjudicate cases and help children that actually do need the government to intervene.

E. The Long-Lasting Effects of Short-Term Separation

Returning to Deja and Ms. Joefield's story, despite the agency's suggestion, the judge overseeing Deja's removal proceeding acknowledged that "the risk of emotional harm in removal outweighed the risk of neglect."[211] The judged ultimately ordered Deja to be returned home to her mother.[212] Although Deja was removed from her home for only four days, Ms. Joefield and her family were left with long-lasting effects after her return.[213] In addition to Ms. Joefield's name remaining on the state registry of child abusers for years, Ms. Joefield also saw a change in Deja's personality and a decline in her performance in school.[214]

In 2014, 178,336 children were in foster care for less than a year.[215] During this time, children are placed in unfamiliar settings with unfamiliar adults.[216] Even temporary removals, what adults may consider as a short amount of time, can be a long and traumatic experience for young children. As suggested in the case of Deja, even when a child is temporarily removed from her home and eventually returned to her family, research shows that many children that have been through the child removal process display "disproportionately high rates of physical, developmental, and mental health problems" as they mature.[217] In 2014, 80% of youth that had been touched by the child welfare system required mental

208. *Id.*
209. *Id.* at 47.
210. *Id.*
211. Clifford & Silver-Greenberg, *supra* note 1.
212. *Id.*
213. *Id.*
214. *Id.*
215. *See* Nina Williams-Mbengue, *The Social and Emotional Well-Being of Children in Foster Care*, NAT'L CONF. ST. LEGIS. (May 9, 2016), http://www.ncsl.org/Portals/1/Documents/cyf/Social_Emotional_WellBeing_Newsletter.pdf.
216. Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L & SOC. CHANGE 207, 209 (2016).
217. Comm. on Early Childhood, Adoption and Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1145 (2000), http://pediatrics.aappublications.org/content/106/5/1145 [hereinafter *Developmental Issues*].

health intervention and services due to "developmental, behavioral, or emotional issues" that affected their ability to participate in society.[218]

Children are most vulnerable at young ages when their individual experiences have a greater influence on their developing brains.[219] As an adolescent, the brain structures that govern personality traits, learning processes, and stress coping mechanisms are developed and strengthened.[220] However, if these structures are unused or disrupted by prolonged stress, the development of the brain and its functions can result in cognitive impairment that stay with the child even into his or her adult years.[221] Children also have a different sense of time than adults do. "For young children, periods of weeks or months" does not mean the same temporary span of time as it does to older humans with more life experiences.[222]

For younger children, the traumatic experience of removal or foster care can have serious consequences on their futures.[223] During the most critical period of brain development, children need a sense of permanence and continuity, whether that comes from a primary adult figure or a stable home.[224] To develop a psychologically and mentally healthy human being, children must have stable relationships in their lives. This is essential in developing a sense of emotional security, moral balance, and social conscience.[225] Frequent changes in a child's environment results in the disruption of relationships with his or her family, teachers, friends, and other people that the child is used to having in his or her life.[226]

Prolonged psychological stress can also manifest in physical ways. Mental stress can lead to the child becoming "psychologically disengaged, leading to detachment, apathy, and excessive daydreaming."[227] Repeated or continuous experiences of traumatic events can also affect the brain's ability to regulate the body and control anxiety and result in hyperactivity, anxiety, mood swings, impulsiveness, and sleep problems.[228] Even when the circumstances stemming from socioeconomic disadvantages were taken into account, children that had encountered the foster care system displayed poorer mental and physical health compared to those from every other type of family situation.[229]

Children who spend time in foster care, even for a short amount of time, have also been shown to experience poorer outcomes later in life, such as "sub-

218. Williams-Mbengue, *supra* note 215.
219. *Developmental Issues*, *supra* note 217, at 1145; Williams-Mbengue, *supra* note 215.
220. *Developmental Issues*, *supra* note 217, at 1145.
221. *Id.*; Williams-Mbengue, *supra* note 215.
222. *Developmental Issues*, *supra* note 217, at 1146.
223. *Id.* at 1145–47.
224. *Id.* at 1145–46.
225. *Id.*
226. Williams-Mbengue, *supra* note 215.
227. *Developmental Issues*, *supra* note 217, at 1147; *see* Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, 138 PEDIATRICS 1, 1 (2016).
228. *Developmental Issues*, *supra* note 217, at 1147.
229. Turney & Wildeman, *supra* note 227, at 5, 10.

stance abuse, unemployment, homelessness, teen pregnancy, lower education attainment, and mental health issues."[230] "[C]hildren on the margin of placement—cases where investigators disagree on whether a child should be removed from his/her home—experience better outcomes when they remain at home."[231] Meanwhile, children on the margin of placement who were "placed out of home were found to be two to three times more likely to enter the criminal justice system as adults, enter the juvenile delinquency system, and experience more emergency health care episodes."[232] These results are troubling when 47% of the nearly 500,000 children in foster care were temporarily placed in a nonrelative home or in foster care.[233]

Although most cases, including those discussed above, consider temporary child removal cases in the context of parental rights and the physical well-being of the child, the psychological and mental effects on the child should play a bigger part in the consideration to temporarily remove the child from his or her home and family. "Any time spent by a child in temporary care should be therapeutic, but may be harmful to the child's growth, development, and well-being."[234]

F. The Ticking Federal Legislation Clock

In addition to the negative psychological effects that a child might experience from being separated from the home, temporary child removals can play a large role in the legal timeline. Every day that a child is ordered as removed from home and in the state's care counts towards a permanent removal under the Adoption and Safe Families Act ("ASFA").[235]

Before the ASFA, and in response to the increasing number of children in foster care and the psychological studies about children in foster care, Congress reformed child welfare laws with the Adoption Assistance and Child Welfare Act ("AACWA").[236] The AACWA's focus was to "make it possible for a child to safely return to the child's home,"[237] instead of disruptive "out-of-home placements."[238] This Act gave more deference to parental rights and keeping the natural family intact. The main part of the AACWA was the "reasonable efforts" standard that "suggest[ed] a policy preference against removal from the home

230. Stephanie Macgill & Alicia Summers, *Assessing the Relationship Between the Quality of Juvenile Dependency Hearings and Foster Care Placements*, 52 FAM. CT. REV. 678, 678 (2014) (citations omitted); *see* Erin Kim Hazen, *Youth in Foster Care: An Examination of Social, Mental, and Physical Risks*, NYU STEINHARDT: DEP'T OF APPLIED PSYCHOL., https://steinhardt.nyu.edu/appsych/opus/issues/2014/fall/hazen (last visited Jan. 14, 2019).

231. Macgill & Summers, *supra* note 230, at 679.

232. *Id.*

233. *Id.*

234. *Developmental Issues*, *supra* note 217, at 1146.

235. *See* Adoption and Safe Families Act of 1997, 42 U.S.C. § 675 (2018).

236. Amy Wilkinson-Hagen, *The Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Constitutional Rights*, 11 GEO. J. POVERTY L. & POL'Y 137, 142 (2004).

237. 42 U.S.C. § 671(a)(15)(B)(ii) (1980).

238. Dorothy Roberts, *ASFA: An Assault on Family Preservation*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/roberts.html (last visited Jan. 14, 2019).

where possible and for reunification where removal was deemed necessary."[239] The AACWA required agencies to show that it made "reasonable efforts" to safely return children in foster care to their parents, eliminating the need to separate families.[240] However, a few years after the passing of the AACWA, the number of children in foster care began to rise again.[241]

In 1997, Congress enacted the Adoption and Safe Families Act ("ASFA") to move towards the idea of permanency, rather than reunification.[242] The ASFA's focus was on the child's health and safety in a permanent home, even if that meant that the home wasn't with their biological parents.[243] Although the goal was to promote quick placement of children in safe, permanent families, the ASFA was also quick to terminate parental rights of the biological parents,[244] and the number of children in foster care who were reunited with their biological families declined under the ASFA.[245]

To expedite the permanency process, the ASFA imposes strict timelines for reunification.[246] Under the ASFA, states are required to initiate parental custody termination proceedings if a child has been in foster care "for 15 of the most recent 22 months," the marker for when a child becomes "an abandoned infant (as defined under State law)."[247] The "hearing shall determine the permanency plan for the child that includes whether . . . the child will be returned to the parents, placed for adoption [where] the State will file a petition for termination of parental rights, or referred for legal guardianship."[248] The amount of time that a child spends being adjudicated as a "dependent" child now affects his or her permanency plan.[249] Once a child is declared "dependent" and placed in an out of home placement, the clock starts ticking for the parents to remedy the situation that made the child "dependent" in the first place; otherwise, the state will be forced to file, under federal legislation, for permanent termination of parental rights.[250]

In cases where a child was removed because of a situation in the home resulting from poverty, and not parental neglect, the ASFA's strict time requirements make it harder for parents to reunite with their children. For parents living under the poverty level, fifteen months could not be enough time to alleviate the situation that resulted in the removal of their children in the first place. Part IV

239. Wilkinson-Hagen, *supra* note 236, at 143.

240. *Id.*; Roberts, *supra* note 238; *see also* 42 U.S.C. § 675(5)(C) (2018).

241. Wilkinson-Hagen, *supra* note 236, at 144.

242. JONES, *supra* note 17, at 20; *see also* Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 424 (1983).

243. JONES, *supra* note 17, at 20.

244. Kimberly Carpenter Emery, *Family Ties Dismissed: The Unintended Consequences of ASFA*, 12 VA. J. SOC. POL'Y & L. 400, 401–02 (2005).

245. *Id.* at 405.

246. Sean D. Ronan, *No Discretion, Heightened Tension: The Tale of the Adoption and Safe Families Act in New York State*, 48 BUFF. L. REV. 949, 968 (2000).

247. 42 U.S.C. § 675(5)(E) (2018).

248. *Id.*

249. *Court Processes*, *supra* note 9.

250. *See* Wilkinson-Hagen, *supra* note 236, at 150.

recommends alternative services and resources in place of removals to help families that might need government intervention and resources but have nothing to gain from child removals.

IV. RECOMMENDATION

Taking into account the lasting effects that stay with a removed child and his or her family, a higher standard of proof could increase the quality and quantity of investigations and lower the number of substantiated abuse and neglect cases.[251] In 2000, nearly twice as many child abuse or neglect petitions were unsubstantiated as substantiated.[252] For every one case that was substantiated and adjudicated, two were deemed to have insufficient evidence. The American University study discussed above showed that states with a higher standard of proof experienced more thorough investigations, because the state agency was required to have a stronger factual basis for bringing a claim of child abuse or neglect before the court.[253]

However, a lower number of substantiated cases might not always be the best indicator for a better child welfare system. The ideal child welfare system will catch and adjudicate all cases of abuse and neglect, while abandoning cases based on misunderstandings or mistakes, like Ms. Joefield's case.[254] Unfortunately, having a lower number of substantiated cases does not indicate that there is less child abuse and neglect. While having a higher standard of proof could decrease the number of erroneous claims that are filed, it could also increase challenges for investigators and state agencies for solving real claims of child abuse. Courts that use the preponderance of the evidence standard have noted that "wrongfully ruling that abuse or neglect did not occur would leave children living with unfit parents at risk of future neglect."[255] If implementing a higher standard of proof to adjudicate whether child abuse or neglect occurred will result in risking real cases slipping through the cracks, then it could be argued that the risk of erroneous temporary separation might not be the worst outcome for a child. Neither scenario seems like a successful child welfare system. Instead, referring back to Justice Garman's dissent in *In re D.T.*, perhaps a better solution to process child removal petitions in the best interest of the family is to eliminate litigious standards of proof altogether.[256]

251. Provencher, Gupta-Kagan & Hansen, *supra* note 17, at 28.
252. *See id.* at 31.
253. *See id.* at 37–38.
254. *See* Clifford & Silver-Greenberg, *supra* note 1.
255. Provencher, Gupta-Kagan & Hansen, *supra* note 17, at 28.
256. *In re* D.T., 818 N.E.2d 1214, 1231 (2004).

A. Alternative Family Resources

One option is to avoid removing a child from his or her home in the first place.[257] Effective risk assessment and alternative services could help decrease unnecessary removal and separation from the family while ensuring a safe environment for the child.[258]

NCANDS reported data from six states that offered formal alternative responses to traditional child abuse and neglect investigation.[259] Kentucky, Minnesota, Missouri, New Jersey, Oklahoma, and Wyoming have implemented alternative responses and family resources into their state-run child welfare system.[260] In 2002, of the 313,838 children that had pending abuse or neglect petitions, 140,072 (almost half) received an alternative response.[261] The data shows that the six states above used more nonagency resources to evaluate risk and file reports after the implementation of such alternative resources compared to the traditional investigative process.[262] School sources and social workers helped families with their unique circumstances, rather than legal or criminal justice sources.[263]

In Kentucky, for example, while high-risk cases that meet the state criteria for the traditional investigative track do involve social case workers and law enforcement,[264] low-risk cases are put on the "Family in Need of Services Assessment" ("FINSA") track.[265] This route emphasizes the government's role in "partnering with the family and community in order to establish a family support system to meet the needs of the family in a comprehensive manner and prevent future abuse or neglect incidents."[266] This alternative resource allows families to assess their needs with a social worker and educate themselves on how to remedy situations without the involvement of law enforcement, attorneys, or judges. Kentucky also places families in need on the "Resource Linkage" track, another alternative resource used for cases that do not meet high-risk criteria.[267] The family is linked to appropriate community resources to meet the needs of the child.[268]

257. Emery, *supra* note 244, at 406.

258. *Id.*; *see also* CASEY FAM. PROGRAMS, THE DIFFERENTIAL RESPONSE (DR) IMPLEMENTATION RESOURCE KIT: A RESOURCE FOR JURISDICTIONS CONSIDERING OR PLANNING FOR DR 1 (2014), http://www.ucdenver.edu/academics/colleges/medicalschool/departments/pediatrics/subs/can/DR/Documents/Differential%20Response%20%28DR%29%20Implementation%20Resource%20Kit--May%202014%5B1%5D.pdf (last visited Jan. 14, 2019).

259. *See generally* U.S. DEP'T HEALTH & HUM. SERV., ALTERNATIVE REPONSES TO CHILD MALTREATMENT: FINDINGS FROM NCANDS 1 (2005), https://aspe.hhs.gov/system/files/pdf/74256/report.pdf [hereinafter *Alternative Responses*].

260. *Id.* at vii.

261. *Id.*

262. *Id.* at 1.

263. *Id.* at 16.

264. *Id.* at 24.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

If the case proceeds to the initial adjudication stage, the parents can provide evidence of their efforts to remedy their child's needs and avoid further litigation.[269]

In Kentucky, 51% of children that were reported to have emotional maltreatment, 31% of children reported to be neglected, and 21% of children reported to be victims of physical abuse were referred to alternative resources.[270] Rather than adjudicating the children and separating them from their families, while their parents try to alleviate the situation, alternative resources can help families heal and improve together.

B. Court Mediation

In addition to state resources, the judiciary can also provide alternative services through court mediation. Mediation in a child welfare case facilitates discussion, collective problem solving, development of bi-party alliance, and fair neutrality.[271] Most importantly, mediation provides a forum that allows parties to communicate in a nonconfrontational or nonadversarial atmosphere.[272] Parents can present relevant facts, such as economic difficulties at home, that are not a showing of abuse or neglect and could mean the difference in keeping their children.[273] At court mediation, parties can work through issues in the presence of a judge, a caseworker, and sometimes, after careful consideration, even the child.[274] Discussion allows judges and parents to fully explore and try to resolve the most pressing issues of the case without disrupting a family unit.[275]

Parents that are given an opportunity to speak in court and participate in the discussion have been linked to positive outcomes for families and reunification.[276] A parent who has actively participated in services pending court decisions may be viewed more favorably by the judge, improving chances of having the dependency dismissed.[277]

V. CONCLUSION

Child removal cases are extremely sensitive, fact-based, and most of all, heartbreaking. The fact that a state agency petitioned to remove a child from his or her home in the first place shows that there were circumstances that led inves-

269. ASSOC. FAM. CONCILIATION CT., GUIDELINES FOR CHILD PROTECTION MEDIATION 1 (2012) https://www.afccnet.org/Portals/0/Guidelines%20for%20Child%20Protection%20Mediation.pdf [hereinafter GUIDELINES FOR CHILD PROTECTIVE MEDIATION].

270. *Alternative Responses*, *supra* note 259, at 25.

271. Allan Barsky & Nico Trocme, *The Essential Aspects of Mediation in Child Protection Cases*, 20 CHILDREN AND YOUTH SERV. REV. 629, 649 (1998).

272. *Id.* at 637.

273. Macgill & Summers, *supra* note 230, at 679.

274. *Id.*; GUIDELINES FOR CHILD PROTECTIVE MEDIATION, *supra* note 269, at 6.

275. *Id.*; Barsky & Trocme, *supra* note 271, at 637–38.

276. Macgill & Summers, *supra* note 230, at 680; Hon. Leonard P. Edwards, *Mediation in Child Protection Cases*, 5 J. CTR. FAM. CHILDREN & COURTS 57, 65 (2004).

277. *See, e.g.*, Edwards, *supra* note 276, at 64–65.

tigators to believe that the child's environment might not be the ideal environment for a young child to develop in a healthy manner. But while child removal cases rightly focus on the prevention of immediate risk of physical harm to the child, there are also serious and negative psychological, mental, and emotional consequences of removal that should be taken into consideration when determining a child's out-of-home placement.

This Note first discussed a number of Supreme Court cases that acknowledged the precious value of family. Not only is this an idea that has been cited in precedent, but this idea is also deeply embedded in our society. While the Supreme Court has recognized family as a fundamental value, each state has interpreted *Santosky* and its ruling differently, resulting in different standards for handling one of the first proceedings in a child removal case. A majority of states, like California and Illinois, have a lower preponderance of the evidence standard, while a minority of states, such as Pennsylvania and Ohio, have a clear and convincing evidence standard. Results are different depending on the standard implemented. This Note argues that these negative effects can be enough to change the balance of the *Eldridge* factors. Because there would be problems with having a higher standard as well, this Note recommends, instead of deciding on a proper evidentiary standard, the implementation of alternatives to removal, such as alternative government services and court mediation.

"It is easier to build strong children than to repair broken men."[278] A system that is quick to separate children from their homes and families, however, even in the name of protecting them, is building broken children. We want children to develop healthy and conscientious minds and thoughts. Although the system is doing its job of physically protecting children from harmful situations, we do not want the system and its procedures to move children from one place to another.

278. Charles M. Blow, *Fathers' Sons and Brothers' Keepers*, N.Y. TIMES (Feb. 28, 2014), https://www.nytimes.com/2014/03/01/opinion/blow-fathers-sons-and-brothers-keepers.html.