

AGGRAVATING CIRCUMSTANCES: SKIPPING REUNIFICATION SERVICES IN CHILD NEGLECT CASES VIOLATES PARENTS' DUE PROCESS RIGHTS¹

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ABSTRACT

The family regulation system violates the due process rights of parents by routinely skipping reunification services without providing alternative procedural protections. This drastically increases the risk of erroneously terminating parents' fundamental rights. Further, states' criteria for skipping reunification services are

1. The terminology surrounding family regulation courts is quite complex and unclear. Some states refer to these courts as “dependency courts.” This term has been criticized as outdated, and it carries a negative stigma as it comes from the historical separation of families due to poverty. The term for many still implies parents and families in these courts are dependent on the state and incapable of caring for their families. Other states simply refer to “child welfare” or “child safety” courts. This is often argued to not be reflective of the impacts of the system. Throughout this piece, I use the phrase “child neglect courts” as the phrase is clear. A vast majority of cases in these courts are neglect cases, and it is understood and accepted across states. Further, I use the phrase “family regulation system.” This phrase more clearly states the impact and realities of the system as it has a historical legacy of controlling, regulating, and surveilling families and communities of color. *See, e.g., Racism at Every Stage: Data Shows How NYC’s Administration for Children’s Services Discriminates Against Black and Brown Families*, NYCLU (June 20, 2023), <https://www.nyclu.org/en/campaigns/racism-every-stage-data-shows-how-nycs-administration-childrens-services-discriminates> [<https://perma.cc/JMH4-ZWBG>] (“Currently in New York, Black families are seven times as likely as white families to be reported to the family regulation system and 13 times more likely to have their children removed. Roughly ninety percent of the families ACS investigates are Black or Brown.”).

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overbroad, illogical, and rooted in stigma, all of which present additional due process violations.

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INTRODUCTION

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. Further, persons faced with the forced final dissolution of their parental rights arguably have a more critical need for procedural protections than those resisting the initial state intervention into ongoing family affairs. As courts have recognized: “When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”²

Few parents can imagine a more horrible situation than a court ordering them not to see their children. The family regulation system often forces court separation of children and parents, causing extreme trauma, suffering, and grief.³ From the 1980s into the 2000s, Congress and state legislatures substantially weakened protections for parents by implementing policies to permanently separate families much more quickly, most significantly through the Adoption and Safe Families Act (ASFA) passed in 1997.

When the state accuses a parent of neglect in family regulation courts, the state agency is typically required to provide reasonable efforts to connect parents with resources such as parenting courses, counseling, and substance use treatment programs for the parents to complete over a set period of time to reunify the family. However, Congress and states have enacted provisions allowing an agency to skip providing these services under certain circumstances. Initially created by the ASFA, these provisions alleviate the state from their obligation to provide services when either (1) the court enters a finding under extreme circumstances defined as the actual or aiding and abetting the murder, manslaughter, or felony assault of a child’s sibling, or (2) a parent’s parental rights to a sibling have been involuntarily terminated.⁴

2. Santosky v. Kramer, 455 U.S. 745, 753–54 (1982).

3. Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527–28 (2019).

4. 42 U.S.C. § 671 (a)(15)(D)(i). These provisions include circumstances such as the following: the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse); (ii) the

States have expanded the ASFA's bypass provisions, drastically broadening the circumstances that allow procedural processes for the parents to be skipped.⁵ These policies move the family straight to adoption or legal guardianship other than reunification, with adoption and the Termination of Parental Rights (TPR) being the favored approach. Taking away reunification services eliminates an important safeguard for parents and increases the chance that their parental rights will be erroneously terminated as parents are not given other procedural protections.

Given the fundamental nature of parental rights, the extreme racial and class disparities in the family regulation system, and the vast harm caused to both the parent and child in severing family ties, courts should not be entrusted to always make the correct decision—thus necessitating procedural safeguards. The family regulation system already requires an alarming amount of subjective judicial decisions. Limiting the protections for families only worsens the system and, more importantly, harms families who are wrongfully torn apart.

Part I of this Note provides an overview of the importance of parental rights and how federal legislation, particularly the ASFA, has changed family regulation courts. This Part will explain the nature of reasonable efforts, which offer procedural protections and resources, as well as the exceptions to that requirement created under the ASFA. It will also describe how many states have broadened these exceptions, creating various avenues to skip providing efforts to keep families together.

Part II of this Note explains how allowing courts to bypass providing parents with resources violates parents' due process rights

parent has— (I) committed murder (which would have been an offense under section 1111(a) of title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent; (II) committed voluntary manslaughter (which would have been an offense under section 1112(a) of title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent; (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or (iii) the parental rights of the parent to a sibling have been terminated involuntarily. *Id.*

5. *E.g.*, CAL. WELF. & INST. CODE § 361.5(b)(1)–(17) (allowing bypass based on seventeen different aggravating factors); NEV. REV. STAT. ANN. § 432B.393(3) (including twelve different aggravating circumstances); ALASKA STAT. § 47.10.086(c) (listing sixteen different aggravating circumstances permitting bypass).

as the new shortened process does not adequately protect their fundamental rights. It will also discuss how the scope of the law has been widened to such a degree that the family regulation system has the power to easily strip countless parents of their rights and separate families unnecessarily. Lastly, it will discuss how, regardless of due process concerns, the provisions allowing the courts to skip providing parents with resources are fundamentally misguided, imposing more harm on families than good.

Part III of this Note explains potential solutions to begin to lessen the harm created by the ASFA. It suggests completely eliminating provisions allowing courts to terminate parental rights without providing services or, alternatively, raising the burden of proof for such cases and narrowing the law's reach. These changes will provide parents with services, ensure the TPRs that do occur are constitutional, and protect family integrity by reducing the number of TPRs.

I. CREATION OF BYPASS PROVISIONS IN THE FAMILY REGULATION SYSTEM

A. Background: Parental Rights and the Constitution

1. Constitutionally Recognized Parental Rights

On numerous occasions and in various contexts, the Supreme Court has recognized that a parent's ability to make decisions for their child is a fundamental right and liberty.⁶ *Troxel v. Granville* defines these parental rights as the ability to "make decisions concerning the care, custody, and control of their children," and applied these rights to neglect cases, requiring the state to prove

6. See *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Santosky*, 455 U.S. at 753 (noting the court's recognition that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment" (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1958))); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); U.S. CONST. amend XIV, § 1 (noting that states cannot deprive any person of their liberty).

unfitness before removing children from their parents.⁷ The Court's recognition of parental rights is well-established and has persisted even as the Court's understanding of fundamental rights evolved from the *Lochner* era through the post-New Deal Era.⁸

2. Parental Due Process Rights

Because of the fundamental nature of their rights, parents are guaranteed substantive and procedural due process.⁹ Procedurally, this guarantee means that the state must grant a parent "heightened protections" before it can limit their rights significantly, such as breaking up their families and terminating their parental rights.¹⁰ Granting "heightened protection" can be done through methods such as requiring high burdens of proof or increasing the procedural safeguards in a legal process.¹¹ However,

7. *Troxel*, 530 U.S. at 66.

8. See *supra* note 6 and accompanying text (discussing parents' liberty interest in matters of family life as fundamental under the Fourteenth Amendment, as recognized in key Supreme Court decisions); see also *Troxel*, 530 U.S. at 66 ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'" (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972))); *Yoder*, 406 U.S. at 232 ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin*, 434 U.S. at 255 ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky*, 455 U.S. at 753 (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child").

9. See Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975) (exploring what constitutes a fair hearing and other key elements of procedural due process).

10. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (explaining that rights falling into the "fundamental" category are deemed so integral and important to our societal structure that the need for certainty and accuracy before a deprivation of them is incredibly high (citing *Reno v. Flores*, 507 U.S. 292, 301-02 (1993))).

11. See *In re Winship*, 397 U.S. 358, 363 (1970) (considering the heightened standard of proof used in criminal prosecutions to be "a prime instrument for reducing the risk of convictions resting on factual error"). Procedural safeguards, such as continual review of the decision and the facts allowing for continued court

what sufficiently meets the heightened protections standard is largely up for debate amongst practitioners, scholars, and courts, and varies across rights.¹²

3. States' *Parens Patriae* Power

Every U.S. citizen, including children, has the right to life and liberty, and the state has a valid and important interest in protecting these rights for its citizens.¹³ In order to act on these interests, the state can utilize its *parens patriae* power.¹⁴ This doctrine is intended to provide an avenue for the state to care for its citizenry by bringing legal action when people have been harmed, and the state has “a quasi-sovereign interest either where the health and well-being of its residents is affected.”¹⁵ Historically, states have brought legal actions on behalf of citizens who are less able to bring one themselves, such as minors and people with severe mental illnesses.¹⁶

In the context of neglect cases, the state has a *parens patriae* interest in “preserving and promoting the welfare of the child.”¹⁷

involvement, as well as review by a neutral factfinder, all help reduce the risk of erroneous decisions. *See Parham*, 442 U.S. at 606–07 (emphasizing the importance of a “neutral factfinder” in parental commitment of minors to mental health facilities).

12. For example, criminal convictions deprive a person of their liberty and require the state to prove the person’s guilt beyond a reasonable doubt. *See In re Winship*, 397 U.S. at 361–62 (holding that the Constitution requires proof beyond a reasonable doubt in criminal cases). Meanwhile, to deprive someone of their liberty in a civil commitment context, the state must only meet a clear and convincing burden. *Addington v. Texas*, 441 U.S. 418, 433 (1979).

13. *See State of Minn. by Humphrey v. Standard Oil Co.*, 568 F. Supp. 556, 563 (D. Minn. 1983) (“*Parens patriae*’ means literally ‘parent of the country’ . . . As recently defined by the Supreme Court, the *parens patriae* doctrine allows a state to maintain a legal action where state citizens have been harmed, where the state maintains a quasi-sovereign interest.” (citations omitted)).

14. *See id.* (“[T]he *parens patriae* doctrine allows a state to maintain a legal action where state citizens have been harmed, where the state maintains a quasi-sovereign interest.”).

15. *See id.* (“A state maintains a quasi-sovereign interest either where the health and well-being of its residents is affected, or where the state works to assure that its residents enjoy the full benefit of federal laws.”).

16. *See, e.g., Addington*, 441 U.S. at 426 (allowing the state to use the *parens patriae* power to bring legal action to civilly commit an individual deemed mentally ill and a danger to themselves); *Santosky*, 455 U.S. at 754 (allowing the state to use the *parens patriae* power to bring legal action to terminate parental rights as deemed to be in the best interest of the child).

17. *Santosky*, 455 U.S. at 766.

When the state believes that a child is subject to neglect or abuse as defined by state statute, it has the right to use its *parens patriae* power to bring a lawsuit and allegations against the parent(s), leading to a hearing in neglect court.¹⁸

4. Balancing Parents' Rights and State Power

A vast majority of the time, both the parents' and government's interests align: doing what is in the best interest of a child. Generally, it is assumed that a parent is acting in a child's best interest and the state should not be involved in family life.¹⁹ This assumption changes when the state establishes maltreatment by a parent.²⁰

A neglect case accusing a parent of providing below a minimum sufficient degree of care typically begins by the referral of a parent to the state's department of children services.²¹ The state investigates this referral, and if it sufficiently determines the parents may have provided below a minimum sufficient degree of care, it will bring a case against the parent in neglect court.²² During the

18. *See id.* (“Since the State has an urgent interest in the welfare of the child, it shares the parent’s interest in an accurate and just decision’ at the factfinding proceeding.” (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981))).

19. *Parham v. J. R.*, 442 U.S. 584, 604 (1979) (“[A]bsent a finding of neglect or abuse . . . the traditional presumption [is] that the parents act in the best interests of their child....”); *see also Troxel v. Granville*, 530 U.S. 57, 58 (2000) (“There is a presumption that fit parents act in their children’s best interests; there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents’ ability to make the best decisions regarding their children” (citations omitted)).

20. *See id.* (holding that absent findings of neglect or abuse, there exists a presumption that parents have their child’s best interest).

21. Different states have different names for their agencies handling child neglect reports. For example, New York reports are made to the Office of Children and Family Services, while in California, the Department of Social Services operates different hotlines depending on the county the child is in. *Compare Child Protective Services*, OFF. OF CHILD. & FAM. SERVS., <https://ocfs.ny.gov/programs/cps> [<https://perma.cc/8AKF-U4ST>] with *Report Suspected Child Abuse or Neglect*, DEP’T OF SOC. SERVS., <https://www.cdss.ca.gov/reporting/report-abuse/child-protective-services/report-child-abuse> [<https://perma.cc/RHX7-RXAF>].

22. Each state has its own procedures for investigating child neglect claims. However, all states have adopted the Child Abuse Prevention and Treatment Act (CAPTA), which provides a uniform set of guidelines that states must follow to receive program funding. This includes the requirement to investigate all referrals, and CAPTA requires that states set standards for receiving, screening, and investigating allegations of child neglect; appointing legal representation;

adjudication, the state must prove its neglect allegation(s) against the parent.²³ Once allegations are sustained, the state “has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare.”²⁴

Even when neglect or abuse allegations have been sustained, parents still have rights that must be honored as a valid interest.²⁵ Since neither a parent’s nor a state’s rights are absolute and—while not always diametrically opposed—often conflicting, legislative schemes regulating child neglect must create a system fairly balancing each party’s interest.²⁶ The state’s statutory scheme

maintaining confidentiality of records; etc. See CONG. RSCH. SERV., R40899, THE CHILD ABUSE PREVENTION AND TREATMENT ACT (CAPTA): BACKGROUND, PROGRAMS, AND FUNDING 16–20 (Nov. 2009), https://www.everycrsreport.com/files/20091104_R40899_52b107ff31f0e25899f3e35212a7435e09a9a385.pdf [<https://perma.cc/KA5T-N52C>] (citing Section 106(b) of CAPTA).

23. See *Child Protective Proceedings (Abused or Neglected Children): FAQs (Frequently Asked Questions)*, N.Y. STATE UNIFIED COURT SYS., https://www2.nycourts.gov/COURTS/nyc/family/faqs_abusedchildren.shtml [<https://perma.cc/CHJ4-4BBU>].

24. See *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (“Acting to guard the general interest in youth’s well-being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways”). States have their own statutes regarding the restriction of parental rights and the standards for doing so. For example, in California, after the original court filing, the state can temporarily limit “the right of the parent or guardian to make educational or developmental services decisions for the child.” CAL. WELF. & INST. CODE § 319(j)(1). California courts can also temporarily assume physical custody of a child after the state files a petition. CAL. WELF. & INST. CODE § 305.

25. While physical custody and decision-making rights are limited, many states recognize various parental rights while children are in foster care. These rights include the right to regular visitation with their children while they are in foster care and the right to remain updated regarding their child’s health, development, and schooling. See *Reunification: Bringing Your Children Home from Foster Care*, CHILD’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., (2016), <https://www.childwelfare.gov/pubPDFs/reunification.pdf> [<https://perma.cc/XD4Z-WKC6>].

26. “Two state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings. A standard of proof more strict than preponderance of the evidence is consistent with both interests.” *Santosky v. Kramer*, 455 U.S. 745, 766–67 (1982); “The [Due Process] Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without ‘due process of law,’ but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to

therefore serves a rehabilitative purpose, and the stated goal is to return children to their parents. Typically, in addition to making reasonable efforts to prevent the removal of a child, the state is required to provide parents with reunification services such as substance abuse counseling with the goal of rehabilitation; however, this process can be skipped under certain circumstances.²⁷

5. Harms of Termination of Parental Rights

When the court decides that a child cannot be returned to their parents, the state may request a TPR hearing.²⁸ States have varying grounds for terminating a parent's rights. However, they all generally require proof that (1) the parent is unfit to raise their child, and (2) terminating the family relationship is in the child's best interest.²⁹ When a TPR is granted, it "denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child."³⁰

TPRs sever every connection and relationship between the parent and child, making it a drastic, permanent, and often harmful decision described as the "civil death penalty."³¹ Given the severity of this action, the Supreme Court stated, "persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."³²

harm through other means." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

27. See discussion *infra* Section I.B.1; see also discussion *infra* Section I.D.1.

28. After a judge determines reunification is not possible, the termination of parental rights is the next favored option rather than guardianship. See 42 U.S.C. § 673(d)(3)(A) ("A child is eligible for a kinship guardianship assistance payment under this subsection if the State agency determines . . . (ii) Being returned home or adopted are not appropriate permanency options for the child"). Therefore, most bypass cases move to a termination of parental rights hearing rather than guardianship unless special circumstances apply.

29. See generally 32 AM. JUR. PROOF OF FACTS 3d 83 § 3 (2003).

30. *Santosky*, 455 U.S. at 749.

31. See *Drury v. Lang*, 776 P.2d 843, 845 (Nev. 1989) ("[T]ermination of a parent's rights to her child is tantamount to imposition of a civil death penalty. . . .").

32. *Santosky*, 455 U.S. at 753-54; Federal guidance on adoptions emphasizes the harms of terminations, not just to the parents, but also to the

Not only is terminating a parent's rights a massive invasion into family life, but it also causes many severe and irreversible harms to the children and parents alike. Disrupting—let alone severing—a child's relationship and bond with their parent causes serious mental health concerns, such as depression.³³ This trauma can lead to physical symptoms in young children such as bedwetting, speech defects, disordered eating, and excessive crying.³⁴ Children who experience this loss are also more likely to demonstrate “aggressiveness,” “attention demanding behavior,” “shyness and sensitiveness,” “stubbornness and negativism,” and “selfishness.”³⁵ Psychologists have expressed concern that “[p]rofessionals seem to ignore that for the child, the maltreating parents are the only parents he or she has, and that any separation, particularly if long and abrupt, will evoke strong and painful emotional reactions.”³⁶ Children additionally experience “ambiguous loss,” which occurs when a child experiences “a lack of clarity about a loved one's physical and/or psychological presence.”³⁷ Ambiguous loss can be extremely distressful because without the sense of a loved one, a child's experience with separation “is unclear, [has] no closure, and without meaning, there is no hope.”³⁸

Parents also experience deep emotional and psychological trauma when they have their children removed by the state—in particular after a TPR severing all ties between them. Parents cite constant worry about their children and the pain and stress of not knowing whether they are doing okay. “My heart just fell to my

children and urges states to ensure familial connections are preserved with only an exception for safety. “Decisions for adoption finalization should be contingent upon whether the family will in fact support what is best for the child in preserving connections. Agencies and courts should insist on protecting a child's key connections even if it means losing a potential adoptive family.” *Achieving Permanency for the Well-being of Children and Youth*, ADMIN. ON CHILD., YOUTH & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., 18–19 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf> [<https://perma.cc/U6YK-Y3CD>].

33. Trivedi, *supra* note 3, at 528 (“Attachment theory’ suggests that emotional distress and later problems such as aggression and depression can be attributed to early childhood disruption of the parent-child bonding process.”).

34. *See id.*

35. *See id.*

36. *See id.*

37. MB Mitchell, *The Family Dance: Ambiguous Loss, Meaning Making, and the Psychological Family in Foster Care*, 8 J. FAM. THEORY & REV. 361, 362 (2016).

38. *Id.*

knees,” said a parent who had their rights terminated. “It felt like I had just died. Like everything had been taken out of me.”³⁹ Parents continue to feel the loss of their child—and the severe harm that accompanies it—for the rest of their lives.

B. Federal Legislation

Invoking its spending power, the federal government has legislated in the area of child welfare. Acts generally focus on establishing permanent placements for children, which often involves pushing for a TPR.⁴⁰ Federal legislation has standardized state practice while incentivizing all states to adopt and expand harmful policies such as bypassing reunification services.

1. Adoption Assistance and Child Welfare Act, 1980

The Adoption Assistance and Child Welfare Act (AACWA) brought several changes to the child neglect system. It took a more family-centered approach to child neglect law, aiming to balance family preservation with moving children towards permanency and avoiding the psychological and social harms TPRs cause.

One of the most significant changes implemented was, if the state has removed a child from their parents, the agency is required to make “reasonable efforts” to reunify the family in order to receive federal funding under this Act.⁴¹ The reasonable efforts requirement forces states to provide parents with referrals to reunification services such as parenting courses, individual and family counseling, housing resources, alcohol and drug rehabilitation programs, and domestic violence classes for victims or perpetrators.⁴² What exactly

39. Agnel Philip & Eli Hager, *The “Death Penalty” of Child Welfare: In Six Months or Less, Some Parents Lose Their Kids Forever*, PROPUBLICA (Dec. 20, 2022), <https://www.propublica.org/article/six-months-or-less-parents-lose-kids-forever> [<https://perma.cc/V9TY-LF8K>].

40. *See supra* notes 28–29.

41. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96–272, § 471(a) (requiring reasonable efforts to prevent removal and to reunify the family if removed in order to receive federal funding).

42. *Id.* at § 471 (a)(15), 94 Stat. 511. AACWA does not require states to pay for these services in order to be eligible for funding. It simply requires states to provide parents with referrals. Most counties have at least some funding for parents based on income levels; however, Los Angeles County (the county with the largest child neglect court) punishes those in poverty. *See* Jeremy Loudonback, *Los Angeles County Tackles Long-Standing Problem of Parents Unable to Afford Court-Ordered Programs*, IMPRINT (Nov. 18, 2023), <https://imprintnews.org/child->

meets the “reasonable efforts” requirement remains unclear and is interpreted differently amongst courts; however, most agree that this reasonable services requirement includes state agencies tracking and reporting a parent’s engagement with reunification services, maintaining minimum contact with parents, helping facilitate visits, and ensuring proper placement of the children.⁴³

The AACWA provided that these “reasonable efforts” be made for at least eighteen months.⁴⁴ Throughout these eighteen plus months, parents demonstrate to the court their ability to effectively parent by completing these courses, displaying insight into the issues that brought their case, and creating and implementing safety plans to eliminate any risk to the family.⁴⁵ The time frame of eighteen months as set by the AACWA is also key for parental success. Parents may be assigned to complete multiple programs. There are countless barriers to successful completion of programs within short time frames such as long waitlists, cost, and difficult work hours. Further, some concerns such as finding alternative housing or eliminating substance use take longer to remedy than others. Giving parents a realistic time frame to complete their programs is necessary for their success and family reunification.⁴⁶

While states have different rules on filing motions for parents to accelerate the reunification process, as provided by the AACWA, parents receive review hearings every six months while their case is

welfare-2/los-angeles-county-tackles-long-standing-problem-of-parents-unable-to-afford-court-ordered-programs/245408 [https://perma.cc/CD32-J6FE] (detailing a new state law and a recent move by the Los Angeles County Board of Supervisors to tackle this widely acknowledged injustice in the local child welfare system).

43. “Generally, these efforts consist of accessible, available, and culturally appropriate services that are designed to improve the capacity of families to provide safe and stable homes for their children. . . . These services may include family therapy, parenting classes, treatment for substance use, respite care, parent support groups, and home visiting programs.” CHILD WELFARE INFO. GATEWAY & ADMIN. FOR CHILD. & FAMS., ADMIN. ON CHILD., YOUTH & FAMS. BUREAU AT U.S. DEP’T OF HEALTH & HUM. SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 2 (2019) [hereinafter REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES].

44. *See id.* (noting the length of time for reasonable efforts is 18 months).

45. ADMIN. FOR CHILD. & FAMS., ADMIN. ON CHILD., YOUTH & FAMS. BUREAU AT U.S. DEP’T OF HEALTH & HUM. SERVS., FACTSHEETS FOR FAMILIES: KINSHIP CARE AND THE CHILD WELFARE SYSTEM 12–13 (2022), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/f_kinshi.pdf, [https://perma.cc/86D3-CE7A].

46. *See discussion infra* Section II.D.1.c (detailing the recovery process for substance abuse).

ongoing.⁴⁷ These hearings are the primary opportunity for parents to make requests—such as increased visitation or for their child to be returned home—and to show their ability to safely reunify their family. Additionally, at these hearings, parents are able to contest whether they are being given reasonable services and express other general concerns with the court such as bias by the state, too infrequent visits, and improper placement.⁴⁸

If the parents have not eliminated the risk in the eighteen months, the state could set a goal for the case that does not include family reunification.⁴⁹ Given the requirement to provide services, the eighteen-month time frame for parents to complete services, and the minimum of three review hearings in addition to the initial hearing, adjudication, and dispositional hearings, the AACWA struck a balance between enabling parents to reunify and providing procedural safeguards to protect parents' due process rights and the children's need for permanency.

The AACWA attempted to embody the rehabilitative process that the federal and state governments claim the family regulation system serves.⁵⁰ "By focusing on preserving a child's connections and nurturing parental attachment" through reasonable services, families are best served, and the harm of permanent separation is avoided, providing better outcomes.⁵¹ However, the ASFA, as discussed below, altered the requirements and timeline for providing reasonable

47. Adoption Assistance and Child Welfare Act of 1980, *supra* note 41.

48. *Id.*

49. *Id.* (at the eighteen-month hearing, the court "shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis.")).

50. See ADMIN. ON CHILD., YOUTH & FAMS. BUREAU AT U.S. DEP'T OF HEALTH & HUMAN SERVS., ACHIEVING PERMANENCY FOR THE WELL-BEING OF CHILDREN AND YOUTH (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf> [<https://perma.cc/U6YK-Y3CD>] (explaining that it is not in the child's best interest to terminate parental rights in the name of "timely permanency," and rather, focusing on their familial connections can promote healing).

51. See *id.*

services.⁵² The rollback in AACWA's requirements has refocused the system on separation over reunification, harming families.⁵³

Notably, despite multiple federal acts, due process requirements for TPRs remained unclear as the federal government did not specify exact standards. This silence created the need for clarification from courts and further legislation.

C. Judicial Review of the Balancing of Parents' Rights and States' Power: *Santosky v. Kramer*

1. Background: *Santosky v. Kramer*

In *Santosky v. Kramer*, parents challenged the standard of proof used to terminate parental rights in New York.⁵⁴ In order to terminate parental rights at the time of the case, New York's statutes required the state to show a child was "permanently neglected" by a "fair preponderance of the evidence."⁵⁵ To have proven permanent neglect, the state must:

52. See discussion *infra* Section I.D.1 (noting how the ASFA significantly incentivizes terminating parents' constitutional rights as it provides more funding for states the more adoptions a state completes while no such funding exists for reunifying families).

53. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002), <https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/roberts.html> [<https://perma.cc/V9LS-AGMU>]. The AACWA encouraged states to "replace costly and disruptive out-of-home placements with preventive and reunification programs." *Id.* Further, the law requires that state agencies make "reasonable efforts' to enable [children] to remain safely at home" before placing children in foster care and mandates that states make "reasonable efforts to safely return children in foster care to their parents. [Signaling how in] the past several years, the pendulum of child welfare philosophy has swung decisively in the opposite direction."

54. See *Santosky v. Kramer*, 455 U.S. 745, 751–52 (1982). By August 22, 1974, the Santosky parents had three children removed from their physical custody by the state of New York based on evidence of neglect. The children remained in the care and custody of the state for four and a half years while parents engaged in services to allow the children to return to their care. In October 1978, Social Services petitioned to terminate the Santoskys' parental rights. The trial court granted the termination. The Santosky parents appealed and the New York Supreme Court, Appellate Division, affirmed, 75 A.D.2d 910. The Supreme Court granted cert to review the standard of proof applied in termination of parental rights hearings.

55. *Id.* at 748. See also N.Y. FAM. CT. ACT § 622 (detailing the new standard of proof required of "clear and convincing", mandated in 1982 by the United States

[E]stablish, among other things, that for more than a year after the child entered state custody, the agency “made diligent efforts to encourage and strengthen the parental relationship.” The State must further prove that during that same period, the child’s 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.”⁵⁶

The parents in *Santosky* challenged the preponderance standard for proving both factors.⁵⁷ After weighing the factors outlined in *Mathews v. Eldridge*, the Supreme Court found the preponderance standard violated due process, leading states to adopt a clear and convincing standard and thus demonstrating the higher level of scrutiny required when parental rights are implicated.⁵⁸

2. Risk of Error

The analysis of the risk of error in this area of the law was a huge factor in determining the need for a higher burden of proof. Both the parents and the states have an interest in protecting against erroneously terminating parental rights, again noting and citing the harms of doing so.⁵⁹ Family preservation is preferred over dissolution when a family can be preserved.⁶⁰ As stated in *Stanley v. Williams*,

Supreme Court, which held that the earlier Section 622 “preponderance of the evidence” standard was constitutionally defective).

56. *Santosky*, 455 U.S. at 748; see N.Y. FAM. CT. ACT §§ 614(1)(c)–(d) (requiring a finding that (1) the agency made “diligent efforts to encourage and strengthen the parental relationship” and (2) the parent has failed to maintain contact with the child and has not planned for the child’s future).

57. See *Santosky*, 455 U.S. at 750–51 (“The question here is whether New York’s ‘fair preponderance of the evidence’ standard is constitutionally sufficient.”).

58. See *id.* at 754 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (When deciding the proper standard, the court must balance three factors: “the private interests affected by the proceedings; the risk of error created by the State’s chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.”); see *id.* at 754–55 (citing *Mathews*, 424 U.S. 335) (The court should also consider “societal judgment about how the risk of error should be distributed between the litigants.”); see also *id.* at 768 (“The logical conclusion of this balancing process is that the ‘fair preponderance of the evidence’ standard prescribed by [N.Y.] Fam. Ct. Act § 622 violates the Due Process Clause of the Fourteenth Amendment.”).

59. See discussion *infra* Section I.A.5.

60. See *id.* at 766–67 (“Yet while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds.”).

“[t]he State registers no gain towards its declared goals when it separates children from the custody of fit parents.”⁶¹

When examining the risk of error, the court in *Santosky* discussed many concerns regarding erroneous decision-making.⁶² These concerns include the fact that the “imprecise substantive standards” utilized by courts in neglect cases often leave the parents “unusually open to the subjective values of the judge,” and that the “court possesses unusual discretion to underweight probative facts that might favor the parent.”⁶³ Further, the Court noted the significant disproportion of are Black, Brown, low-income, or uneducated parents forced into neglect courts.⁶⁴ The risk of bias leading to error is thus incredibly high and must be protected against. The Court also noted that, compared to the state, there is an extreme imbalance of resources available to parents when undergoing litigation.⁶⁵ Additionally, the Court highlights the lack of procedural safeguards for parents in neglect courts, such as no protection against double jeopardy.⁶⁶

Furthermore, “because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.”⁶⁷ Referring to the parents’ claims regarding agency actions, the court states: “We need not accept these statements as true to recognize that the State’s unusual ability to structure the evidence increases the risk of an erroneous factfinding.”⁶⁸ Concerns of erroneous decision-making can be

61. *Id.* at 767 (quoting *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)).

62. *Santosky*, 455 U.S. at 762.

63. *See id.*

64. *See id.* at 762–63 (“Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.” (citation omitted)).

65. “The State’s ability to assemble its case almost inevitably dwarfs the parents’ ability to mount a defense.” The Court cites the state’s unlimited spending ability, the state attorney’s expertise in the area, the state’s open access to public records, the fact that the primary witnesses work for the state, and that the government “even has the power to shape the historical events that form the basis for termination.” *See id.* at 763.

66. *See id.* at 764 (“Coupled with a ‘fair preponderance of the evidence’ standard, these factors [referring to demographic disparities and unequal resources] create a significant prospect of erroneous termination.”).

67. *Id.* at 763.

68. *Id.* at 763 n.13.

alleviated by requiring a high standard of proof—a major factor in the Court's implementation of a higher burden on the state.⁶⁹

The Court in *Santosky* spent little time discussing the issue of determining society's thoughts on the issue of family rights. It recognized society's high value on family and parents' rights to make decisions for their children as they see fit.⁷⁰ In its constitutional rights analysis, the court stated that most of society would agree that family integrity needs more protections than financial concerns. Most civil lawsuits regarding financial concerns only require a preponderance of the evidence while most fundamental rights such as personal liberty are awarded a clear and convincing or beyond a reasonable doubt standard due to the relative importance of the interest at stake.⁷¹ With all these considerations, recognizing the importance of family life and the harms of infringing on this fundamental right, the Court established a clear and convincing burden of proof to terminate parental rights.⁷²

69. "The Court has long considered the heightened standard of proof used in criminal prosecutions to be 'a prime instrument for reducing the risk of convictions resting on factual error.' An elevated standard of proof in a parental rights termination proceeding would alleviate 'the possible risk that a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior.'" *Id.* at 764 (first citing *In re Winship*, 397 U.S. 358, 363 (1970), then citing *Addington v. Texas*, 441 U.S. 418, 427 (1979))

70. *See id.* at 759 (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)) ("If the State prevails, it will have worked a unique kind of deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.").

71. *See id.* at 758–59 (citing *Lassiter*, 452 U.S. at 27 ("*Lassiter* declared it 'plain beyond the need for multiple citation' that a 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.")).

72. *See id.* at 747–48 ("Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

D. Post-*Santosky* Federal Legislation: Adoption and Safe Families Act, 1997

1. Adoption and Safe Families Act: General Background

Leading up to the passage of the ASFA, the idea that the “instability of foster care damages children’s psychological and social development” became widely popular among scholars.⁷³ Following criticisms that the system focuses too much on the parents and family unit, legislators began focusing on the need for permanency, centering their views on what is “best” for the child rather than on family preservation.⁷⁴ However, as noted in *Parham v. J.R.*, parents’ and children’s interests cannot be assumed to oppose each other absent a finding of neglect.⁷⁵ Many scholars and advocates have expanded this further, arguing this extends throughout the entire case as reunification is typically best for the child.⁷⁶ These criticisms and the ASFA’s policies, which push families to permanency, are not only in tension with *Parham*’s explicit rejection of assuming opposition of interest, but also contradict its stated goal of better serving children.⁷⁷

The explicit aim of the ASFA was to decrease the number of children in the foster care system and their time spent in foster

73. ROBERTS, *supra* note 53. “CB believes that efforts to achieve permanency for children and youth must include safe and deliberate preservation of familial connections in order to successfully ensure positive child well-being outcomes. This focus on family connections is imperative in the work done by agencies and courts because it can mitigate the effects of trauma that children and youth in foster care have already experienced and can also reduce further trauma.” U.S. DEP’T OF HEALTH AND HUM. SERVS., ADMIN. ON CHILD. & FAMS., ACHIEVING PERMANENCY FOR THE WELL-BEING OF CHILDREN AND YOUTH 2 (2021), <https://www.cwla.org/wp-content/uploads/2021/01/ACYF-CB-IM-20-09.pdf> [<https://perma.cc/DYX5-SNP7>]

74. ROBERTS, *supra* note 53 (“They [proponents of ASFA] argued that keeping families together often sacrifices children’s interests for the sake of parental rights.”).

75. *Parham v. J. R.*, 442 U.S. 584, 602 (1979).

76. ROBERTS, *supra* note 53 (“[I]n family preservation, to my mind, there’s a commonality of interests.’ Typically, furthering a family’s interests will also benefit the children who belong to that family. Children also have an interest in maintaining a bond with their parents and other family members.” (citation omitted)).

77. *Id.*; *Parham*, 442 U.S. at 584.

care.⁷⁸ To promote permanency, the ASFA did not work towards lowering the number of children entering foster care through preventive services or other methods.⁷⁹ It also did not work to better support families through the system leading to more reunifications by implementing policy changes argued to promote reunification—changes as simple as funding programs rather than adoptions.⁸⁰ Instead, the ASFA put in policies to expedite a case through the system, focusing on terminating parental rights much more quickly, thus reducing the number of children in foster care as those children are adopted.⁸¹

The ASFA significantly incentivizes terminating parents' constitutional rights as it provides additional funding for states the more adoptions a state completes; no such funding exists for reunifying families.⁸² The ASFA's impact was significant and immediate. In 1999, just two years after the ASFA was passed and later implemented, there were 46,000 adoptions of foster children, “a

78. “In response to rising numbers of children in foster care and concerns about the safety of children that remain with or return to their families after placement in foster care, the 105th Congress enacted the Adoption and Safe Families Act of 1997 (ASFA, P.L. 105-89) with two primary goals: . . . (2) to ensure that necessary legal procedures occur expeditiously, so that children who cannot return home may be placed for adoption or another permanent arrangement quickly.” KAREN SPAR & MATTHEW SHUMAN, CONG. RSCH. SERV., P.L. 105-89, CHILD WELFARE: IMPLEMENTATION OF THE ADOPTION AND SAFE FAMILIES ACT 1 (2004)

79. ASFA shifted the emphasis and goal of family courts from reunification to adoption. The average time in foster care in 1998 was 32.6 months compared to 20.1 months in 2017. ROBERTS, *supra* note 53 (“The number of children passing through the system has remained similar, but they tend to move through the system more quickly and more often lead to the breakup of families rather than reunification.”); *see also* Kim Phagan-Hansel, *One Million Adoptions Later: Adoption and Safe Families Act at 20*, THE IMPRINT (Nov. 28, 2018), <https://imprintnews.org/adoption/one-million-adoptions-later-adoption-safe-families-act-at-20/32582> [<https://perma.cc/AXY2-54WF>] (providing an analysis of the AFSA on its 20th anniversary and its impact on adoption trends).

80. Jeremy Loudonback, *Los Angeles County Tackles Long-Standing Problem of Parents Unable to Afford Court-Ordered Programs*, THE IMPRINT (Oct. 18, 2023), <https://imprintnews.org/child-welfare-2/los-angeles-county-tackles-long-standing-problem-of-parents-unable-to-afford-court-ordered-programs/245408> [<https://perma.cc/8NFB-JLRN>].

81. *See id.*

82. *See* 42 U.S.C. § 673b (establishing adoption and legal guardianship incentive payments which provide state funding of \$5,000 multiplied by the number of foster child adoptions for the year and \$7,500 multiplied by the number of “special needs” adoptions).

28 percent increase from the previous year.”⁸³ States have adopted and expanded the ASFA at different rates and to different extents, creating similar increases in adoptions at the state level. For example, also in 1999, “the number of adoptions doubled in Illinois, and they went up 75 percent in Texas and 57 percent in Florida.”⁸⁴ The elevated number of adoptions has continued. In fiscal year 2020, 56,568 children were adopted from foster care.⁸⁵

One tool the ASFA used to increase the number of TPRs was limiting the time a state may spend providing services for a family. In order to keep funding, the act requires states to petition to terminate parental rights if a child is in foster care for fifteen out of the most recent twenty-two months.⁸⁶ The act also requires states to issue a TPR even sooner, a large change from the eighteen months of reunification services as required by the AACWA.⁸⁷ However, there are limited exceptions to this requirement including if the child is “being cared for by a relative,” the state has “a compelling reason for determining that filing such a petition would not be in the best interest of the child,” or if reasonable services were required and have not been provided.⁸⁸

2. ASFA’s Creation of Federal Bypass Provisions

Another ASFA tool is the creation of bypass provisions. These statutes exempt a state from providing (or allow it to “bypass”) reunification services if specific aggravated circumstances are found.

83. See SPAR & SHUMAN, *supra* note 78, at i (establishing incentive payments for states that increased adoptions from the previous year, ASFA was reauthorized in subsequent years and contributed to a nearly 70% increase in adoptions between 1997 and 2002).

84. ROBERTS, *supra* note 53.

85. See U.S. DEP’T OF HEALTH AND HUM. SERVS., ADMIN. FOR CHILD. AND FAMS., ADMIN. ON CHILD., YOUTH AND FAMS., CHILD’S BUREAU, THE ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) REPORT 3 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf> [https://perma.cc/9GDZ-3VFP].

86. 42 U.S.C. § 675(5)(E)

87. See 42 U.S.C. § 675(5)(E) (requiring the filing of a TPR, with few exceptions, if the court determines the parent did any of the following: abandoned the child; murdered one of their other children; committed voluntary manslaughter of one of their other children; aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; committed a felony assault that has resulted in serious bodily injury to the child or to one of their other children).

88. See *id.*

When a parent's reunification services are sidestepped via bypass provisions, the case typically goes straight to a TPR hearing. Given the speediness of this process, the parent has almost no time to address the concerns that brought their family under the court's jurisdiction, increasing the odds of a TPR and the harms that come with it to an extreme degree.

These provisions allow bypass when the court enters a finding that the parents murdered or aided or abetted in the murder of a different child of theirs; committed or aided or abetted voluntary manslaughter of a different one of their children; committed a felony assault of the child or a different child of theirs; or had their parental rights to a sibling involuntarily terminated.⁸⁹ The list of aggravating circumstances can be expanded under each state's laws.⁹⁰

Many states have taken these bypass provisions much further, adding various other avenues to bypass a parent's reunification services.⁹¹ Those significantly differing from and expanding the ASFA's bypass scheme are summarized as follows, though this list is not comprehensive: the parent or guardian has a mental disability "that renders the parent or guardian incapable of utilizing those services"; the child had prenatal exposure to drugs or alcohol; the parent or guardian is a chronic user of drugs or alcohol; the child was previously removed; a parent previously did not receive reunification services or had their reunification services terminated; the harm is described as "severe"; the parent "indicated a lack of interest in reuniting with the child"; and the parent is incarcerated for a lengthy period of time and has not made arrangements for the child's care.⁹²

89. 42 U.S.C. § 671(15)(D).

90. *See id.*

91. *See, e.g.,* CAL. WELF. & INST. CODE § 361.5(b)(1)–(17) (allowing bypass based on 17 different aggravating factors); NEV. REV. STAT. ANN. § 432B.393(3) (including 12 different aggravating circumstances); ALASKA STAT. § 47.10.086(b) (including 16 different aggravating circumstances permitting bypass).

92. *See* REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES. Along with all states accepting ASFA bypass, the following provisions have also been signed on by various states: "The child was removed from the home previously due to abuse or neglect and was removed again due to a subsequent incident of abuse or neglect" (Puerto Rico, the Virgin Islands, AK, AZ, AR, CA, FL, NV, NY, SD, and UT); "The parent failed to comply with the terms of a reunification plan" (Puerto Rico, the Virgin Islands, AL, AK, CA, FL, KS, ME, MN, NY, WA, and WV); "The parent suffers from chronic abuse of drugs or alcohol and has refused or failed treatment" (Puerto Rico, the Virgin Islands, AL, CA, FL, KY, ND, OH, SC, SD, and WV); "The parent has subjected the child to prenatal exposure to alcohol or a

II. CUTTING REUNIFICATION SERVICES: BAD POLICY THAT VIOLATES DUE PROCESS

Parent and children advocates alike have criticized the ASFA for attacking family preservation and favoring severance of family ties over reunification.⁹³ It is well noted in social science research that the best place for a child is with their parents, except in conditions presenting extreme health and safety concerns.⁹⁴ Since placements outside of the home can cause severe psychological and emotional harm, rushing families through the system is not in the best interest of the child; instead, it is the product of the state's desire to have low foster care numbers and attempt to show that concerns with families and children do not exist within their state.⁹⁵ In reality this policy of shortening or eliminating the timeframe for reunification services

controlled substance" (AZ, FL, ND, and UT); "The parent indicated a lack of interest in reuniting with the child" (Puerto Rico, the Virgin Islands, AL, AZ, and CA); "The parent sexually exploited or allowed the sexual exploitation of a child" (AZ, AR, CA, CT, FL, ME, and MA); "The parent was convicted of a sexual offense that resulted in the child's conception" (CA, CT, NE, and WA); "The parent is a registered sex offender or required to register on a sex offender registry" (District of Columbia, AR, GA, HI, KY, MI, MN, NV, NC, OK, PA, SD, TX, UT, WV, and WY); "The parent has been incarcerated for a substantial term in relation to the child's age, and there is no suitable relative to care for the child" (AL, AK, KY, NY, ND, and SD); "The parent suffers from a mental illness of such duration or severity that there is little likelihood that the parent will be able to resume care for the child within a reasonable time" (Puerto Rico, the Virgin Islands, AL, AK, AZ, CA, KY, ND, SC, and UT); "The parent repeatedly withheld medical treatment or food from the child" (OH); "A putative father has failed to establish paternity of the child (MT and NV); "The parent allowed the child to be present where a clandestine illegal laboratory is operated" (ND and UT); "The parent is a convicted sexually violent predator" (WA); "The parent has abducted the child or a sibling from his or her placement" (CA). *Id.* See also 42 U.S.C.A. § 671(15)(D)(i).

93. See Shanta Trivedi, *The Adoption and Safe Families Act is Not Worth Saving: The Case for Repeal*, FAM. CT. REV. (forthcoming 2023), at 6, <http://dx.doi.org/10.2139/ssrn.4201525> (on file with the *Columbia Human Rights Law Review*) ("From top to bottom, ASFA is problematic in its enthusiastic promotion of adoption over family reunification"); see Trivedi, *supra* note 3 ("Preeminent family regulation scholars Dorothy Roberts and Martin Guggenheim have respectively called ASFA "an assault on family preservation" and "the worst law affecting families ever enacted by Congress").

94. See Trivedi, *supra* note 3.

95. See Trivedi, *supra* note 3; FACTSHEETS FOR FAMILIES, *supra* note 45; see also *Nicholson v. Scopetta*, 820 N.E.2d 840, 849 (N.Y. 2004) ("[I]n many instances removal may do more harm to the child than good.").

harms the entire family as it promotes adoption and forces the trauma of permanent separation on families.⁹⁶

A. Large Impact of Bypass

Bypassing reunification services is a nationwide issue that can affect any family within the United States. All states have a child neglect system and have implemented bypass provisions which, when utilized, typically lead to TPR hearings.⁹⁷ The permanent separation caused by TPRs can have many adverse psychological effects on both the child and their parents, causing behavioral and mental health issues as well as grief and pain.⁹⁸ Because of this, all parties and non-parties involved or affected, including the state and society, have a strong incentive to ensure due process is adhered to and families are not erroneously separated.⁹⁹

96. West Virginia has the shortest average time span it provide parents with reunification services. Meanwhile, New York has the longest time frame for providing reunification services. In 2021, 39.1% of children in the system in West Virginia were placed for adoption while only 16.3% of children in New York were. Compare U.S. DEP'T OF HEALTH AND HUM. SERVS., ADMIN. FOR CHILD. & FAMS., ADMIN. ON CHILD., YOUTH & FAMS., CHILD.'S BUREAU, THE ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) REPORT FOR WEST VIRGINIA 3 (Oct. 2021), <https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/west%20virginia.html> (on file with the *Columbia Human Rights Law Review*) with U.S. DEP'T OF HEALTH AND HUM. SERVS., ADMIN. FOR CHILD. & FAMS., ADMIN. ON CHILD., YOUTH & FAMS., CHILD.'S BUREAU, THE ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) REPORT FOR NEW YORK 3 (Oct. 2021), <https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/new%20york.html> (on file with the *Columbia Human Rights Law Review*).

97. See CHILD WELFARE INFO. GATEWAY, *supra* note 93; see also *supra* note 28.

98. See Trivedi, *supra* note 3, at 528; see also U.S. DEP'T OF HEALTH AND HUM. SERVS., ADMIN. ON CHILD., *supra* note 45, at 3.

99. "Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision' at the fact finding proceeding. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S., at 27. As *parens patriae*, the State's goal is to provide the child with a permanent home. See N.Y. SOC. SERV. LAW § 384-b.1.(a)(i) (statement of legislative findings and intent). Yet while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds. § 384-b.1(a)(ii). '[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents.' *Stanley v. Illinois*, 405 U.S., at 652." *Santosky v. Kramer*, 455 U.S. 745, 766-67 (1982).

Based on the system at the time, *Santosky* determined the appropriate burden of proof for TPR hearings.¹⁰⁰ However, *Santosky* did not involve or consider cases that skip reunification services as it predated the ASFA; yet the standard decided in *Santosky* is commonly applied to bypass cases.¹⁰¹ The issue of all TPRs, regardless of whether the reunification services were bypassed or not, receiving the same standard of proof has yet to receive judicial review.

Reunification services and the multiple permanency review hearings¹⁰² that occur throughout the life of a case are not provided for parents who have been bypassed.¹⁰³ Therefore, the typical procedural safeguards have been eliminated, thus drastically lowering the protection of parents' fundamental rights and increasing

100. "In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. Evaluation of the three Eldridge factors compels the conclusion that use of a "fair preponderance of the evidence" standard in such proceedings is inconsistent with due process." *Santosky*, 455 U.S. at 758 (1982).

101. These bypass cases were separate from the permanent neglect cases and received different procedures and standards; "New York Family Court judges already are familiar with a higher evidentiary standard in other parental rights termination proceedings not involving permanent neglect. See N.Y. SOC. SERV. LAW §§ 384-b.3.(g), 384-b.4.(c), and 384-b.4.(e) (requiring "clear and convincing proof" before parental rights may be terminated for reasons of mental illness and mental retardation or severe and repeated child abuse)." *Id.* at 767. *E.g.*, CAL. WELF. & INST. CODE § 361.5(b) (establishing clear and convincing evidence for bypass of services in CA); *e.g.*, N.Y. SOC. SERV. LAW §§ 384-b(4); 358-a(3)(b), (12) (establishing clear and convincing evidence for bypass of services in NY); *e.g.*, ALASKA STAT. § 47.10.086 (establishing clear and convincing evidence for bypass of services in AK); *e.g.*, ARK. CODE ANN. § 9-27-303 (establishing clear and convincing evidence for bypass of services in AR).

102. 42 U.S.C. § 675(5)(B) (requiring each state to review the case and permanency plan a minimum of every six months. These hearings review case plan compliance, review visitation updates, address whether removal continues to be necessary, review whether reasonable efforts have been made by the agency, and hear any other concerns related to the parents or the children.)

103. Reasonable services may include "family therapy, parenting classes, treatment for substance use, respite care, parent support groups, and home visiting programs" and reasonable efforts by caseworks include "safety checks and home visits, that are performed on an ongoing basis to ensure that parents and other family members are participating in needed services and are making progress on case plan goals." When bypassed, agencies do not provide reasonable efforts or provide services. Rather, these services are determined to not be in the best interest of the child and the permanency goal is changed from reunification. See REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES.

the risk of erroneous termination.¹⁰⁴ Because the ASFA and state legislation imposed significant changes that substantially weakened procedural safeguards without requiring different assurances of accuracy and parental rights protection, bypass provisions violate parents' due process rights.¹⁰⁵

Further, the scope of some states' bypass statutes has been expanded to an incredible degree since the ASFA was implemented.¹⁰⁶ Even without the issue of requiring the same burden of proof as non-bypass cases, the scope of modern bypass is so broad that, once again, due process is violated due to its inability to be definitively proven and its over-inclusivity.

B. Applying *Santosky's* Standard of Proof to Bypass Cases Without Additional Protections Violates Due Process

1. Background: Procedural Safeguards Are Essential to Ensuring Due Process

Many types of hearings take away fundamental rights with varying levels of burden.¹⁰⁷ Criminal trials (taking away a person's right to liberty) require proof beyond a reasonable doubt to convict, whereas involuntary civil commitment hearings (also taking away a liberty interest) require the lower clear and convincing burden.¹⁰⁸ This difference is largely due to the extent to which safeguards are embedded in the court processes, which limit the risk of erroneous decisions.¹⁰⁹

In *Addington v. Texas*, the court noted that because of the many procedural safeguards—including constant medical review of patients, the numerous mandatory hearings an involuntarily civilly

104. Procedural safeguards such as continual review of the decision and the facts allowing for continued court involvement, review by a neutral factfinder, etc. all help reduce the risk of erroneous decisions. See *Parham v. J. R.*, 442 U.S. 584, 606–07 (1979).

105. See discussion *supra* Section I.D.1.

106. See discussion *supra* Section I.D.2.

107. See generally Friendly, *supra* note 9.

108. *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (“When the State brings a criminal action to deny a defendant liberty or life. . .” (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)); *Addington*, 441 U.S. at 425 (“This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”).

109. *In re Winship*, 397 U.S., 358, 363 (1970); *Parham v. J. R.*, 442 U.S. 584, 604–06 (1979); *Santosky*, 455 U.S. at 775.

committed patient is part of, and the patient's ability to request a release hearing at any time—the court can allow a lower burden of proof without risking erroneous decisions and consequently violating a patient's due process rights.¹¹⁰ This is quite different from the criminal system, which allows a person only one opportunity to be heard, and is a significant factor in explaining why the criminal system requires a higher burden of proof than involuntary civil commitment.¹¹¹

2. Elimination of Procedural Safeguards via Bypass Violates Due Process

As described in *Addington*, clear and convincing evidence before a TPR or similar invasion of individual liberty is only permissible when other meaningful checks on state power exist over an extended time. Neglect cases generally include something analogous to these repeated hearings that were so essential in *Addington*—regular review hearings to evaluate reunification services and the continuing need for placement. But bypass provisions take those review hearing and services away and go straight to TPRs, thus increasing the risk of erroneous terminations, and violating due process.

During the time of *Santosky*, parents were given numerous procedural safeguards within the neglect system. Parents had a minimum of eighteen months to complete their court-ordered services to reunify with their child.¹¹² The state was required to make “diligent efforts to encourage and strengthen the parental relationship” for a

110. *Addington*, 441 U.S. at 428–29 (1979) (“However, even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected.”).

111. *See id.* at 422 (“It also distinguished a civil commitment from a criminal conviction by noting that under Texas law the mentally ill patient has the right to treatment, periodic review of his condition, and immediate release when no longer deemed to be a danger to himself or others.”).

112. “[A]t the eighteen month hearing, the court ‘shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis.’” Adoption Assistance and Child Welfare Act of 1980, 96-272, Sec 471 (a)(15), 75 Stat. 424.

minimum of one year.¹¹³ These timelines were often lengthened as many families received additional time to reunify. For example, the Santoskys had five years between the start of their case and the state's petition to terminate their parental rights.¹¹⁴ Further, the state had the burden to "prove that during that same period, the child's 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" before setting a TPR hearing.¹¹⁵ Parents were awarded multiple hearings, including an initial removal hearing, a trial on those facts, multiple review hearings, a permanent neglect fact-finding hearing, and a dispositional hearing to determine the child's best interest, all of which ultimately led to the TPR hearing.¹¹⁶ At these hearings, parents could update the court on their progress, discuss difficulties with completing their services, provide any evidence they felt was necessary to benefit their argument for family reunification, and

113. N.Y. FAM. CT. ACT §§ 614.1(c), 611. In his dissent in *Santosky v. Kramer*, Justice Rehnquist "noted that a lengthy and complicated process precedes any order terminating parental rights under the New York statutes, and that all state efforts prior to the termination proceeding are carried out in pursuit of the stated goal of ultimately reuniting the child with his parents by encouraging the parents to resume a role of responsibility." Ann E. Ward, *Standard of Proof in Parental Rights Termination: Santosky v. Kramer*, 36 SW. L. J. 1069, 1081-82 (1982). "The family court has no jurisdiction over a child unless action has been taken to remove him temporarily from his parents' custody and place him in the care of a state agency." *Id.* Thus, temporary removal without the parents' consent, "entails a notice and hearing procedure, which the statute carefully delineates and which provides the parents with many procedural protections as well as court-appointed counsel, if necessary." *Id.* The statute also requires "regular review of a temporary removal order." *Id.* Accordingly, only "after the child has been in the state's custody for a year or more may the state seek termination of parental rights. The state must notify the parents of its action, the potential outcome of the termination proceeding, and the parents' right to appointed counsel." *Id.* This proceeding consists of an "initial fact-finding hearing to determine whether the child is neglected and, if neglect is established, dispositional hearing to determine the best placement for the child. Any termination order may, of course, be appealed to higher courts." (citations omitted). *See also id.* at 1081, n. 136.

114. "In November 1973, after incidents reflecting parental neglect, respondent Kramer, Commissioner of the Ulster County Department of Social Services, initiated a neglect proceeding under FAM. CT. ACT § 1022 and removed Tina from her natural home. . . . In October 1978, respondent petitioned the Ulster County Family Court to terminate petitioners' parental rights in the three children." *Santosky*, 455 U.S. at 751.

115. *See id.*; *see also* N.Y. FAM. CT. ACT § 614.1(d).

116. *See Santosky*, 455 U.S. at 751.

showcase their parenting abilities.¹¹⁷ Affording parents numerous check-ins and opportunities to present their case constituted extensive and valuable procedures that protected parents' rights.

However, in bypass cases, none of these protections are in place for parents. Parents receive an initial hearing, a trial, and then, at disposition, the decision to bypass their reunification services, leading them straight to a TPR hearing.¹¹⁸ They are not afforded progress hearings and do not have the opportunity to fully explain their familial situation or difficulties with the court, nor are they given time to demonstrate changes in their home or parenting. Parents' opportunities to show the court their ability to effectively parent are incredibly limited as their cases receive little review, and since they do not receive services, they cannot show their competence through the completion of programs.

3. Due Process Violation

Before the ASFA, no federal law or program regarding child neglect cases included bypass provisions.¹¹⁹ While states had to individually adopt the AACWA, the legislation established providing reasonable efforts to parents but did not include legislation allowing the state to skip providing those efforts.¹²⁰

Years after *Santosky*, ASFA pushed states to create and expand bypass procedures and states responded by merging their bypass systems with their existing child neglect systems.¹²¹ This merging included applying the *Santosky* burden of proof to all TPR hearings, disregarding the elimination of procedural safeguards which allow a clear and convincing burden rather than a beyond a

117. See *id.*; see also 42 U.S.C. § 675(5)(B).

118. See *supra* note 28.

119. Since the ASFA's passing, other legislation such as CAPTA have been renewed to incorporate bypass provisions; however, the original laws did not include them. CAPTA was originally enacted on January 31, 1974. P.L. 93-247. In 2003, CAPTA was amended to include bypass provisions in the statute. 42 U.S.C. § 5106a(b)(2)(A)(xii).

120. Adoption Assistance and Child Welfare Act of 1980, 96-272, Sec 471 (a)(15), 75 Stat. 424.

121. *E.g.*, CAL. WELF. & INST. CODE § 361.5(b) (establishing clear and convincing evidence for bypass of services in CA); *e.g.*, N.Y. SOC. SERV. LAW §§ 384-b(4); 358-a(3)(b), (12) (establishing clear and convincing evidence for bypass of services in NY); *e.g.*, ALASKA STAT. § 47.10.086 (establishing clear and convincing evidence for bypass of services in AK); *e.g.*, ARK. CODE ANN. § 9-27-303 (establishing clear and convincing evidence for bypass of services in AR).

reasonable doubt burden to be permissible.¹²² The Supreme Court has not reviewed the burden of proof required for implementing bypass or TPR hearings involving bypass. Lower courts have assumed that clear and convincing evidence suffices in all TPRs, regardless of whether the parents were bypassed or not as evidenced by courts utilizing the same standard in bypass cases.¹²³

As demonstrated in *Santosky*, risk of error is a key component to evaluating if due process has been followed.¹²⁴ Accuracy is crucial when taking someone's fundamental rights.¹²⁵ Eliminating the procedural safeguards afforded to parents, particularly when the court notes prevalent bias and parents' other disadvantages within the system,¹²⁶ while utilizing the same burden of proof drastically increases the risk of erroneously terminating parents' rights and permanently severing families that could reunify. It therefore stands to reason that taking away many of parents' safeguards without providing more protections violates their due process rights. Further, the respective powers of the state to put on a case and its ability to shape the facts of the case prior to a TPR is particularly problematic for bypass cases.¹²⁷ Given the speed of a bypass case, parents are given few court appearances and other opportunities to address and defend against the root causes of their case, and they are not able to show compliance with court ordered services since they are not granted. Bypass cases essentially create a near-certain TPR regardless of a parent's willingness to work in the system.

122. *E.g.*, *supra* note 121.

123. *See Santosky v. Kramer*, 455 U.S. 745, 758, 767 (1982).

124. *Santosky*, 455 U.S. at 754–55 (1982) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

125. *See id.* at 756 (discussing the standard of proof necessary in proceedings threatening a significant deprivation of liberty).

126. *See supra* notes 56–58 and accompanying text.

127. *See id.*

C. Comparisons of the Bases for Pre- and Post-*Santosky* Termination of Parental Rights

1. Pre-*Santosky*

Prior to *Santosky*, there were minimal alternative grounds for TPR that did not require the state to provide reunification services.¹²⁸ As noted in *Santosky*, in New York—where the *Santosky* case originated and therefore the framework the courts were utilizing when making their decision—these cases were part of an entirely separate Family Court system and were governed by different regulations.¹²⁹ Further, because of this separate system’s lack of procedural protections, these cases required a relatively higher burden of proof (clear and convincing) than typical TPR hearings (at the time utilizing a preponderance standard).¹³⁰

Additionally, these opportunities were limited. For example, the exhaustive list of provisions allowing for TPR on alternative grounds that did not require reunification services in New York at the time were as follows: both parents were deceased, the child was willfully abandoned by both parents, both parents were diagnosed with such “mental illness and mental retardation” that they were unable to care for the child (or complete reunification services), or there was severe and repeated physical abuse that rendered the parents unable to care for the child.¹³¹ The severe and repeated

128. *E.g.*, N.Y. SOC. SERV. LAW §§ 384-b.3.(g), 384-b.4.(c), and 384-b.4.(e) (noting grounds for which reunification services aren’t required, such as if the parents are unable to provide proper care or repeatedly abused the child).

129. “New York Family Court judges already are familiar with a higher evidentiary standard in other parental rights termination proceedings not involving permanent neglect. See Soc. Serv. Law §§ 384–b.3.(g), 384–b.4.(c), and 384–b.4.(e) (requiring ‘clear and convincing proof before parental rights may be terminated for reasons of mental illness and mental retardation or severe and repeated child abuse.’) *Santosky v. Kramer*, 455 U.S. 745, 767 (1982). Typical cases received no higher than a preponderance of the evidence standard throughout the life of a case.

130. *See id.*; *Parham v. J. R.*, 442 U.S. 584, 606–07 (1979); *Santosky*, 455 U.S. at 754, 762.

131. For example, the exhaustive list of bypass provisions in New York at the time are as follows: both parents were deceased, the child was willfully abandoned by both parents, both parents were diagnosed with such “mental illness and mental retardation” that they were unable to care for the child (or complete reunification services), or there was severe and repeated physical abuse that makes the parents unable to care for child. *See* N.Y. SOC. SERV. LAW §§ 384-b.3.(g), 384-b.4.(c), (e) (listing bypass provisions for TPR).

physical abuse provision could not be invoked for someone's first interaction with the court system, requiring multiple findings in order to establish severe and repeated abuse.¹³² While there are valid criticisms of provisions such as these, particularly among scholars noting the ableism apparent in neglect courts, these provisions were designed for parents who decisively and unarguably could not parent their children or did not wish to be a parent. The statutes are more rooted in fact and although issues such as intellectual capacity are difficult to determine, the basis of historical bypass were designed to include what at the time was considered easily determinable facts compared to today's provisions.

2. Post-*Santosky*

After *Santosky*, the ASFA implemented provisions that established the ability to execute TPRs without providing reasonable reunification services in the family regulation courts, ignoring the fact that these only took place in a separate court system with different procedures and eliminated the relatively higher burden of proof needed for these types of cases. The ASFA's bypass provisions expanded TPRs without providing reunification and stated that these bypass allowances were not exhaustive.¹³³ Consequently, most states have significantly expanded them.¹³⁴ For example, California allows bypass based on seventeen different aggravating factors, Alaska has sixteen different aggravating circumstances permitting bypass, and Nevada includes twelve different aggravating circumstances allowing for bypass.¹³⁵

Many of these expansions are far less straightforward and objective than the bypass provisions in existence at the time *Santosky* was decided. For example, twelve states or territories authorize bypass when "The parent failed to comply with the terms of a reunification plan."¹³⁶ Eleven states or territories expanded the provisions to include when "The parent suffers from chronic abuse of drugs or alcohol and has refused or failed treatment."¹³⁷ Another five

132. *See id.*

133. *See* REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES.

134. *Id.*

135. *See* CAL. WELF. & INST. CODE § 361.5(b)(1)–(17); NEV. REV. STAT. ANN. § 432B.393(3); ALASKA STAT. § 47.10.086(b), *supra* note 91.

136. *See* REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES.

137. *Id.*

states or territories include “The parent indicated a lack of interest in reuniting with the child” in their expansion.¹³⁸

D. Expansion of Bypass Provisions Is Overinclusive

The intended role of bypass provisions is to avoid spending time and resources on cases where parents will not reunify with their children or be helped by the court system, instead moving the children straight to other permanency arrangements.¹³⁹ In this sense, the provisions are forward-looking. All current bypass provisions and statutory frameworks for bypass violate due process because of their inadequate protections of parents; however, it is worth exploring how certain bypass provisions further harm families due to their illogical nature, inaccurate assumptions, or reliance on stigma to justify their use.

1. Allegation-Specific Issues

a. Presumption of Increased Risk Unsupported in Severity of Abuse Cases

To begin, there is no fact-driven or logical reason to force bypass on families due to the severity of the abuse. There is no shown correlation between the severity of the harm of the first incident and an increased risk of the harm repeating.¹⁴⁰ The model of the family regulation system is to teach parents the necessary skills to parent, not assume they will always be unfit due to the type of allegation against them.¹⁴¹ Parents whose allegations are “severe” are no less capable of reunification. Since reunification is typically in the best

138. *Id.*

139. SPAR & SHUMAN, *supra* note 78.

140. N. Hindley, et al., *Risk Factors For Recurrence of Maltreatment: A Systematic Review*, 91 ARCHIVES DISEASE IN CHILDHOOD 744, 751 (2006) (“It is notable that some factors identified elsewhere did not emerge as significant risk factors in this review. These include quality of attachment or closeness in the relationship between parent and child, and severity of abuse.”); *see also* J. Michael Murphy, et al., *What Happens After the Care and Protection Petition?: Reabuse in a Court Sample*, 16 CHILD ABUSE & NEGLECT 485, 489–90 (1992) (“Once again, the severity and type of mistreatment, and the parents’ acceptance of court-ordered services (variables associated in previous studies with reabuse) did not predict return to court in this subsample.”).

141. *See* discussion *infra* Section I.B.1.

interest of the child, the bypass provisions of the ASFA do not serve this interest; instead, they are rooted in assumptions and stigma.

b. Oversimplification – Assuming Unfitness Based on Previous Court Interactions

The ASFA and state legislation also permit bypass on multiple grounds simply because it is a parent's second interaction with the court.¹⁴² Courts can bypass parents based on previous removals, or terminations of their reunification services or rights.¹⁴³ These provisions exaggerate the implications of previous interactions and ignore the many issues with assuming unfitness.

In all other operations of child neglect law, previous findings of neglect do not automatically punish parents. For example, in many jurisdictions, courts allow the state to file derivative neglect petitions. These petitions solely contain an allegation stating that a finding of neglect was previously entered against the parent, and it is therefore possible that the parent will also neglect the different child that is subject to the new petition. A New York court stated, “[t]o sustain a finding of derivative neglect, the prior finding must be so proximate in time to the derivative proceeding so as to enable the factfinder to reasonably conclude that the condition still exists.”¹⁴⁴ Thus, in the context of derivative neglect, courts clearly consider the time passed and openly embrace the idea that family circumstances can change in the time between court cases.¹⁴⁵ Meanwhile, bypass statutes that allow the state to skip reunification services based on previous court

142. 42 U.S.C. § 671 (a)(15)(D)(iii) (allows termination of parental rights when “the parental rights of the parent to a sibling have been terminated involuntarily”); *e.g.*, CAL. WELF. & INST. CODE § 361.5(b)(3) (bypass based on a child having been previously removed for physical abuse); CAL. WELF. & INST. CODE § 361.5(b)(7) (bypass based on being previously bypassed); CAL. WELF. & INST. CODE § 361.5(b)(10) (bypass based on having reunification services previously terminated); CAL. WELF. & INST. CODE § 361.5(b)(11) (bypass based on a previous termination of parental rights).

143. *See id.*

144. *Matter of Dana T. (Anna D.)*, 71 A.D.3d 1376, 1376 (2010) (quoting *Matter of Landon W.*, 35 A.D.3d 1139, 1141 (2006)).

145. “The mother consented to a prior adjudication of neglect with respect to her two other children based on, *inter alia*, the condition of her home and her failure to obtain medical treatment for the children. Five years later, the child at issue herein was born, and petitioner commenced this proceeding with respect to that child. We conclude under the circumstances of this case that the prior adjudication of neglect was too remote in time to sustain the court’s finding of derivative neglect. . . .” *See id.* at 1376.

interactions disregard the length of time between parents' cases and any changes in a parent's circumstances.

In contradiction to the adoption of the idea that circumstances change in the time between court cases, bypass provisions assume that a parent's life and ability to parent has been stagnant in the time between their cases, which is often not the case. Parents have often become better equipped to raise children in the intervening years by finding stable employment, securing permanent housing, completing an alcohol or drug treatment program, maturing (an important issue for parents who lose custody of their children as a teen or young parent who later want to have more children), gaining a strong support network, etc. Courts and legislators cannot predict all the ways in which a person may become better equipped to be a parent; however, these changes in circumstances should be considered in bypass cases similarly to how they are considered in derivative neglect cases.

Additionally, the allegations in the first and the second cases are not required to be the same. Parents may have remedied the first allegation, and now they are facing expedited TPR simply because they have a new finding of neglect, leading to erroneous terminations.¹⁴⁶

In *Division of Family Services v. James*, the state filed to bypass reunification services for Ms. James despite her changed life circumstances and her demonstration of "significant positive child rearing and parental responsibility changes in her life."¹⁴⁷ The trial judge ordered services to be provided, and the appeals court agreed.¹⁴⁸

146. ASFA allows for bypass when the parental rights for a child's sibling(s) has been involuntarily terminated. 42 U.S. Code § 671(D)(iii). Further, states have expanded ASFA to bypass reunification services as follows: "The child was removed from the home previously due to abuse or neglect and was removed again due to a subsequent incident of abuse or neglect" (Puerto Rico, the Virgin Islands, AK, AZ, AR, CA, FL, NV, NY, SD, and UT); "The parent failed to comply with the terms of a reunification plan" (Puerto Rico, the Virgin Islands, AL, AK, CA, FL, KS, ME, MN, NY, WA, and WV). See REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES.

147. *Division of Family Services v. James*, 2009 WL 6328182, at *14 (Del. Fam. Ct. Dec. 18, 2009) (noting the mother being 14 years old when she had her first child and now being 19, as well as a demonstrating a shift in mind set by gaining employment, attending substance abuse counseling, and obtaining housing).

148. See *id.* at *15 ("The Division's motion to not offer reunification services to Mother is hereby DENIED.").

The state code does not specify what courts should consider when making bypass decisions and case law on this issue is minimal, making bypass an unsettled area of the law.¹⁴⁹ Given the differing judicial opinions on this exact issue and the existence of broader bypass provisions in other jurisdictions it is quite possible that if in front of a different judge, Ms. James' case could very well have been analyzed and bypassed—or even denied review—meaning she likely would have had her parental rights terminated.¹⁵⁰ Given their demonstrated ability to parent and the harm that breaking up families causes, parents like Ms. James should be granted services and go through the regular court system.

c. Assumptions and Stigma in “Chronic” Substance Misuse

Further, the idea that “chronic” alcoholism or drug misuse cannot be resolved is incorrect and rooted in stigma. People who have misused drugs or alcohol have an average of 5.35 recovery attempts before becoming sober long-term.¹⁵¹ The courts have decided to give up on people simply due to their previous struggles, disregarding the social science research that shows why continued services are necessary and may be successful.¹⁵²

Bypass provisions regarding chronic misuse and previous interactions with the court create a once unfit, always unfit system. A

149. “The Court has been able to find in its research two Decisions on this very issue written by two other Judges of the Family Court, as well as one Decision which touches on this subject written by this particular Judge. These three previous Decisions represent different outlooks on this issue. To the Court’s knowledge, the issue has never been brought to the attention of the Supreme Court of the State of Delaware.” *Id.* at *7.

150. “Whereas this Judge concludes such a decision to not offer reunification efforts may be recommended by the Division, but must be finally determined by the Court, Judge Millman concluded that the Division of Family Services had the sole power, given the existence of one of those enumerated events, to make that crucial determination without Court approval or review.” *Id.* at *7.

151. See John F. Kelly, et al., *How Many Recovery Attempts Does It Take to Successfully Resolve an Alcohol or Drug Problem? Estimates and Correlates from a National Study of Recovering U.S. Adults*, 43 *ALCOHOLISM: CLINICAL & EXPERIENTIAL RSCH.* 1533, 1536 (2019) (discussing the mean number of serious recovery attempts made among adults).

152. See Alexandre B. Laudet, et al., *Pathways to Long-term Recovery: A Preliminary Investigation*, 34(3), *J. OF PSYCHOACTIVE DRUGS*, 305, 309 (“Findings from this study attest to the fact that individuals with extensive substance use histories can and do recover to become productive members of society.”).

driving idea of this type of policy is that people cannot and will not change, which goes against the entire scheme of neglect courts (providing parents with services to allow them to become effective and safe parents) and general principles of fairness.¹⁵³

For example, in *In re Priscilla D.*, the court denied Cindy C. reunification services and placed her three children in a legal guardianship, bypassing her based on her thirty-year use of phencyclidine.¹⁵⁴ Three years after being denied reunification services, Cindy C. showed to the court that she had “completed substance abuse treatment and parenting classes, maintained her sobriety for three years and attended Alcoholics/Narcotics Anonymous meetings. She had liberal visitation with the children, which included every weekend from Friday through Sunday and all school breaks, including summer vacation.”¹⁵⁵ The trial court denied her petition to modify the guardianship; however, the appellate court determined that the denial was in error and ordered a new hearing.¹⁵⁶

If the court had initially ordered a TPR instead of legal guardianship, Cindy C. would not have had standing to bring her case, meaning this family would have been unnecessarily separated forever.¹⁵⁷ Further, Cindy C. was able to enroll in and complete all her sobriety programs without aid from the legal or welfare system via reunification services. Not all parents have the resources and ability to navigate complex social service systems that offer these programs. Neglect courts claim to be a rehabilitative system; however, if parents are left on their own and do not have resources, the courts erroneously and improperly break up families who could and should have remained together.

153. See discussion *supra* Section I.B.1.

154. *In re Priscilla D.*, 234 Cal. App. 4th 1207, 1210 (2015) (“At that time, she had been using PCP for 30 years. The juvenile court denied Cindy reunification services and the department placed Priscilla, Isaiah and David in the home of their maternal uncle, Frank, and his wife, Denise.”).

155. *Id.* at 1211.

156. *Id.* at 1219 (“The order denying Cindy’s section 388 petition is reversed and the juvenile court is directed to conduct a new hearing and consider the merits of Cindy’s petition under section 388 and any evidence developed subsequent to the filing of her petition.”).

157. See, e.g., *In re Lambert*, 993 S.W.2d 123, 132 (Tex. App. 1999) (“Former parents do not have standing to invoke the trial court’s continuing jurisdiction over managing conservatorship issues.” (citing to *Glover v. Moore*, 536 S.W.2d 78, 79–80 (Tex.Civ.App.—Eastland 1976, no writ)).

2. Broad Lack of Certainty in Modern Bypass Statutes

The provisions allowing TPR without providing services available at the time of the *Santosky* decision were based on situations where the parent's inability to parent was rooted in uncontestable fact, such as the death of all parents, rather than contestable issues in court.¹⁵⁸ These provisions allowed for extremely minimal room for error due to not necessitating substantive decisions by judges, instead focusing on straightforward and clear facts (e.g., a parent surrendered a child at a hospital and has not returned or called state agencies to reunite with the child for a set period of time). This means decisions surrounding allegations of child abandonment have less room for error, making procedural safeguards less crucial to protect parents from erroneous terminations of their rights.

Many of the TPRs allowed by current state laws, such as those justified by chronic alcoholism, are based on less provable allegations than the simple classification of prior conviction as those explicitly stated by the ASFA. Thus, any bypass based on these allegations relies more on a court's perception of the parent. This requirement of subjectivity, which *Santosky* warned about, increases the risk of error and harms parents.¹⁵⁹

3. Conclusion – Overinclusive and Increased Error

Bypass provisions are rooted more in stigma than the desire to help families. The policies include inappropriate assumptions and leaps in logic that cause the provisions to be overinclusive, resulting in erroneous skipping of reunification services and TPRs. Given the expansive legislation that stole parents' procedural protections, in bypass cases, the state should not be able to bypass a parent based on unproven assumptions and stigma in areas such as substance use recovery and parents previously being adjudicated neglectful.

Additionally, bypass provisions are supposedly forward-looking but have no requirement to show future harm or a clearly provable permanent risk to the child. However, at review and TPR hearings, future predictions are often invoked and required, ensuring that a family is not separated without ongoing and future risk that warrants state intervention.¹⁶⁰ These provisions have strayed

158. See *supra* note 132 and accompanying text.

159. *Santosky v. Kramer*, 455 U.S. 745, 763 (1982).

160. “[T]he court shall order the return of the child to the physical custody of their parent or legal guardian unless the court finds, by a preponderance of the

dramatically from the pre-*Santosky* allowances, which were designed to be more rooted in certainty.¹⁶¹

III. STRATEGIES FOR LIMITING THE HARM OF THE FAMILY REGULATION SYSTEM

In order to entirely alleviate the increased risk of erroneous TPRs caused by bypass provisions, the best and most obvious solution is not to use them. Therefore, the primary focus should be on eliminating bypass provisions from state and federal law. A secondary solution is to narrow the scope of the laws and raise the standard of proof required to utilize bypass provisions. This could be achieved through either legislation or litigation. While it does not eliminate all issues with bypass provisions, this solution will still help alleviate the harm of the family regulation system.

A. Solution 1: Eliminate Bypass

The best way to prevent the harm caused by bypass provisions is to eliminate them from state and federal law. These provisions are unnecessary for a functioning child neglect system as all cases, regardless of whether or not courts utilized bypass provisions, have the same potential outcomes—reunification, legal guardianship, or adoption.

Eliminating bypass means that each family receives a chance of reunification, benefiting everyone involved. Further, even if reunification is not possible, the parents receive beneficial resources. Most importantly, eliminating bypass adequately protects parents'

evidence, that the return of the child to their parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child" See, e.g., CAL. WELF. & INST. Code § 366.21(e).

161. In this section addressing specific bypass provisions, I did not argue against the utilization of bypass based on a parent's mental capacity. Many articles address this issue as ableist and argue for its removal from legislation. Ableism has a long history in the family regulation system and extends far beyond bypass provisions. I strongly agree with the scholars arguing against this provision. However, this topic is beyond the scope of this Note as a full discussion of ableism in the family regulation system is needed to fully understand the harm of this element of bypass. For an introduction to this topic see Robyn M. Powell, *Legal Ableism: A Systematic Review of State Termination of Parental Rights Laws*, 101 WASH. U. L. REV. 423 (2023).

fundamental rights and lowers the risk of erroneous TPRs which cause immeasurable harm to families.

1. Implementation

Eliminating bypass from law will likely have to be done by the state legislature or the state agency itself by refusing to pursue bypass cases. The likelihood of these passing will vary greatly from state to state.¹⁶² While bypass does significantly increase the risk of erroneous TPRs, thus violating the Due Process Clause, court cases addressing this issue are unlikely to result in the elimination of bypass provisions entirely.¹⁶³ The more likely response from the courts will be finding that parents need increased protections for their fundamental rights and taking actions such as increasing the burden of proof required in such cases — as addressed below, this is an incomplete solution as it does not fully ameliorate the many issues bypass provisions prevent.¹⁶⁴

162. I predict that the number of times bypass is used, and the expansiveness of the state bypass provisions will be indicative of the resistance to that state passing measures to eliminate or limit bypass. However, as of the writing of this Note, there is no state or federal legislation pending to eliminate these provisions. A state-by-state analysis of existing bypass provisions and the likelihood of elimination of those provisions while interesting is beyond the scope of this Note.

163. See discussion *supra* Section II.C.

164. The doctrine of constitutional doubt requires the courts to modify unconstitutional statutes to make them constitutional rather than determine the legislation is unconstitutional. Therefore, rather than eliminating bypass provisions, the courts would likely instead increase procedural protections to make them constitutional. See Larry M. Eig, CONG. RSCH. SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, 24–25 (2014) available at <https://sgp.fas.org/crs/misc/97-589.pdf> (last visited Jan. 24, 2024) (on file with the *Columbia Human Rights Law Review*). “[W]here an otherwise acceptable construction of a statute would raise serious “constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Id.*

B. Solution 2: Limit Bypass Provisions and Raise the Required Burden of Proof

1. Limit Bypass Provisions

Alternatively, rather than fully getting rid of bypass provisions, the types of cases subject to bypass can be significantly narrowed. These should be held to the provisions that are easily provable and include families with no chance of reunification, eliminating the state's ability to skip parent's services for issues such as substance use or previous interactions with the court. Therefore, bypass should be limited to cases of surrender or abandonment for a specified period of time and incarceration lasting until the minor is over eighteen years of age without opportunity for earlier release (with the ability to reestablish parental rights if the parent is released early or their conviction is overturned). Any cases with less certainty regarding a parent's inability to care for their child should not be bypassed to ensure constitutional standards are met.

Additionally, bypass statutes should include an option for judicial discretion on the matter. For example, New York has a bypass escape clause stating that if aggravated circumstances are present, the court can skip reunification services "unless the court determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future."¹⁶⁵ For bypass based on previous interactions with the court system, this limitation on bypass should go even further, stating a requirement that the state proves there have been no distinguishable changes in the parent's life since their first court case and consequently that the risk for neglect remains the same.

Creating and expanding this requirement of best interest of the child provides another protection for parents, limiting erroneous TPRs. Further, restricting the provisions would help alleviate some of the many policy concerns caused by skipping parents' reunification services.

165. N.Y. FAM. CT. ACT § 1039-b.

2. Raise the Standard of Proof

In addition to narrowing the terms of bypass, in order to adequately protect parents' fundamental rights and ensure accuracy in child neglect cases, the standard of proof required to initiate the bypass reunification services should be raised from "clear and convincing" to "beyond a reasonable doubt."¹⁶⁶ This mimics the original New York system as cases that used alternative basis for TPR that did not require providing reunification services necessitated a higher standard of proof (clear and convincing) than typical cases (requiring a preponderance of the evidence) due to a lack of procedural protections.¹⁶⁷ This important differential in the standards should be acknowledged and re-adopted.

Raising the burden of proof to initiate bypass will still allow bypass provisions to operate and do what they were stated to be designed for—skipping reunification services for families who would decisively not benefit from such services and thus fail to reunify. For example, bypass cases based on the willful abandonment of a child or the willful termination of rights by the parents would easily meet this heightened burden. Willful abandonment as defined as leaving the child "without any provision for support; physical custody of the child has been voluntarily surrendered pursuant to Section 1255.7 of the Health and Safety Code and the child has not been reclaimed within the 14-day period" is clearly provable.¹⁶⁸ The legislation notes that for bypass provisions "'willful abandonment' shall not be construed as actions taken in good faith by the parent without the intent of placing the child in serious danger."¹⁶⁹ Therefore, raising the standard would still allow the courts to move to a TPR hearing immediately.

This heightened standard would function as a check on the bypass provisions, ensuring they are sufficiently narrow. For example, proving someone to be a "chronic" substance user who will not benefit from treatment cannot be proven beyond a reasonable doubt, as success with sobriety depends on many factors and typically

166. *Santosky v. Kramer*, 455 U.S. 745, 750–51 (1982) ("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.").

167. *Id.* at 767.

168. CAL. WELF. & INST. CODE § 300(g).

169. *Id.* at § 361.5(b)(9).

comes after multiple attempts.¹⁷⁰ No substance misuse allegation will be able to meet the burden, thus signaling that bypass should not be eligible based on substance use. Cases unable to meet such a high standard to trigger bypass and allow a case to go directly to a TPR hearing would go through the system and receive reunification services, limiting erroneous decision-making.

3. Counterarguments Specific to Raising the Standard of Proof

The court in *Santosky* chose to require a clear and convincing burden rather than requiring evidence beyond a reasonable doubt to terminate parental rights.¹⁷¹ While the hearing was not a dispositional hearing determining whether or not to utilize bypass provisions, these arguments supporting the choice of the lower burden apply to raising the standard to trigger bypass as well.

The first concern discussed by the court, as also stated in *Addington*, is that the imprecision of psychological and sociological evidence relied on makes it impossible for the courts to make conclusions beyond a reasonable doubt.¹⁷² However, as discussed above, the decision to grant reunification services should not rely on social sciences to prove the underlying allegation; instead, the only cases bypassed should be obvious cases of families unable to reunify.¹⁷³ Basis for bypass that rely on this type of evidence, such as “chronic addiction,” would have to be removed from the law due to their uncertainty and risk of erroneous TPRs.¹⁷⁴ While relying on this

170. See Alexandre B. Laudet, et al., *Pathways to Long-term Recovery: a Preliminary Investigation*, 34(3), J. PSYCHOACTIVE DRUGS, 305, 309 (“In addition, the data elucidate how long-term recovery is maintained and suggest that several factors previously identified as predictors of short-term abstinence - consequences of substance use, social support and affiliation with 12-step groups - may also be beneficial to long-term recovery.”); see also Kelly, et al., *supra* note 151.

171. *Santosky*, 455 U.S. at 769 (1982) (“A majority of the States have concluded that a “clear and convincing evidence” standard of proof strikes a fair balance between the rights of the natural parents and the State’s legitimate concerns. We hold that such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process”).

172. See *id.* at 768–69 (“... because the psychiatric evidence ordinarily adduced at commitment proceedings is rarely susceptible to proof beyond a reasonable doubt”) (citing to *Addington v. Texas*, 441 U.S. 418, 429–30, 432–33 (1979)).

173. See discussion *supra* Section II.B.2.

174. See discussion *supra* Section II.B.1.c.

type of evidence is a legitimate concern in TPR hearings, dispositional hearings determining if bypass can be appropriately invoked do not share this issue.

Next, *Santosky* states that “a “clear and convincing evidence” standard of proof strikes a fair balance between the rights of the natural parents and the State’s legitimate concerns.”¹⁷⁵ However, dispositional hearings allowing states to skip resources send families straight to a TPR hearing remove the safeguards that allow for this fair balance. If procedural protections are taken away, we must add new protections, such as raising the burden of proof for the allegation, ensuring they are taken away only in cases that clearly meet well-defined standards.

Additionally, even if the state relies on this type of imprecise evidence, a beyond a reasonable doubt standard can be used successfully. *Santosky* states that courts are hesitant to apply the beyond a reasonable doubt standard to hearings other than criminal trials as “[T]his unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the ‘moral force of the criminal law.’”¹⁷⁶ However, regardless of its historical use in criminal courts, the reasonable doubt standard has already been utilized in neglect courts, thus limiting the reasons for non-expansion. Congress requires evidence beyond a reasonable doubt to the termination of parental rights for families that have Native Tribal Affiliations.¹⁷⁷ While this pertains explicitly to TPR hearings, it shows that the beyond a reasonable doubt standard can be achieved when making bypass decisions in child neglect cases.

4. Implementation and Unresolved Concerns

Raising the burden of proof to apply bypass to a case is likely achieved through litigation efforts rather than legislation. Courts can adopt the argument that requiring the same burden of proof for cases that receive far fewer procedural protections violates due process. This will likely be a much quicker change than those requiring

175. *Santosky*, 455 U.S. at 769.

176. *Addington v. Texas*, 441 U.S. 418, 428 (citing to *In re Winship*, 397 U.S. 358, 364 (1970)); *see also Santosky*, 455 U.S. at 769 (. . . our hesitation to apply that unique standard [beyond a reasonable doubt] “too broadly or casually in noncriminal cases. . .”) (citing to *Addington v. Texas*, 441 U.S. 418, 428, 432–33 (1979)).

177. H.R. REP. NO. 95–1386, at 22 (1978).

legislative action. While not resolving all issues, the higher burden could begin functioning as a check on bypass immediately.

Yet, limiting the opportunities for bypass could also be done through legislative action. The opportunity for legislative compromise is greater for this effort when compared to eliminating bypass overall, increasing its likelihood of success if pushing for change through state political bodies.

However, even when taken together and especially when implemented individually, raising the burden of proof, and legislatively limiting the provisions does not address every concern with bypass. If not limited enough, even with a higher burden, there remains ample room for judicial discretion when granting reunification services, making parents vulnerable to racial, class, and other biases, and negative judicial opinions on emotional cases.¹⁷⁸

C. General Counterarguments to Changing the System

1. Child Safety

One of the largest counterarguments to altering the family regulation system is that the proposed change will risk children's safety. However, eliminating or altering bypass does not affect the safety of children. Barring the state from skipping reunification services does not mean the child will return to their parents, the parents will not be subjected to the supervision of the state, or the parents cannot have their rights terminated if the court deems it necessary.¹⁷⁹ Eliminating bypass does not change the immediate dynamic of the family; it simply means that parents receive services, and their fundamental rights are adequately protected.

178. See *Santosky*, 455 U.S. at 745; see also *supra* notes 60-66 and accompanying text.

179. "When the termination proceeding occurs, the child is not living at his natural home. . . Under New York law, a judge has ample discretion to ensure that, once removed from his natural parents on grounds of neglect, a child will not return to a hostile environment. In this case, when the State's initial termination effort failed for lack of proof, the court simply issued orders under Fam. Ct. Act § 1055(b) extending the period of the child's foster home placement." *Santosky*, 455 U.S., at 766 n.16 (internal citations omitted).

2. Assumed Failure to Reunify

Another common argument is that states don't want to waste their time and resources on a family that will not reunify. This argument, however, is overly simplistic and does not account for the impact that resources can have on a parent. As discussed above, previous attempts at reunification, substance use, or criminal charges are not indicative of the potential success of a parent.¹⁸⁰

Further, the stated purpose of neglect courts is to center a family's needs and act in the best interest of a child. Most of the time, a child's best interest is to remain with their parents as destroying bonds can be traumatic.¹⁸¹ States often recognize this in their statutes. For example, many states have a "parental bond exception" to TPRs.¹⁸² In California this exception is used if the court determines "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."¹⁸³ Given the importance of family bonds to the well-being of children, they should be accounted for throughout the entire court process, including at dispositional hearings determining if services will be granted. If reunification is best for a child's interest, we should do everything possible to serve that interest, including providing family resources.

180. See discussion *supra* Section II.B.1.; see also discussion *supra* Section II.B.2.

181. See Trivedi *supra* note 3; see also U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON CHILDREN, *supra* note 45.

182. *E.g.*, *In re T.S.M.*, 620 Pa. 602, 629 (2013) ("In *In re E.M.*, this Court held that the determination of the child's "needs and welfare" requires consideration of the emotional bonds between the parent and child. The "utmost attention" should be paid to discerning the effect on the child of permanently severing the parental bond.") (citing to *In re E.M.*, 620 A.2d 481, 485 (1993); *In re K.M.*, 53 A.3d 781, 791 (2012), overruled on other grounds by *In re Adoption of L.B.M.*, 639 Pa. 428, 161 (2017); 23 Pa. C.S.A. § 2511(b)); *e.g.*, IOWA CODE ANN. § 232.116(c)(3) ("The court need not terminate the relationship between the parent and child if the court finds any of the following: . . . There is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship"); *e.g.*, *In re Gonzales/Martinez*, 871 N.W.2d 868, 873 (Mich. App. 2015) ("[T]he child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home," are all factors for the court to consider when deciding whether termination is in the best interests of the child") (citing to *In re White*, 303 Mich.App. 701, 713 (2014)).

183. CAL. WELF. & INST. CODE § 366.26(c)(1)(B)(i).

3. Previously Received Services

Additionally, some may argue that terminating parental rights based on previous TPRs is acceptable because parents have already received services. However, countless variables may have changed between the two court cases. For example, years may have passed, the parents may be in different financial circumstances, the issues bringing the family under court supervision may be entirely different, etc. The specific issue bringing the family into court might be easily addressed with services, regardless of whether or not the family previously had a separate case serviced. Further, while parents may have previously received adequate procedural protections, that does not ensure the parents will have their fundamental rights protected in the current case.

4. Parents Will Receive Due Process at their Termination of Rights Hearing

Lastly, some may argue that regardless of bypass, parents will receive due process at their TPR hearing. However, this argument is also invalid. *Santosky* dealt with parents' due process concerns and determined the appropriate burden of proof (a procedural protection) based on the system in place.¹⁸⁴ If the system was different, for example if there were fewer protections for parents throughout the entirety of the system, then the Court's due process analysis would have been different. The court likely would have required more protections at this hearing, potentially through the imposition of a beyond a reasonable doubt burden.

Since bypass takes away protections, more must be granted for TPRs in bypass cases to remain constitutional and satisfy due process. A TPR hearing does not guarantee due process on its own, which is why the Court noted several times the other protections in the system that allowed for a clear and convincing burden rather than a beyond a reasonable doubt burden.

CONCLUSION

Throughout the country, children are ripped from their parents, and their familial relationships are completely severed. The

184. See discussion *infra* Section II.C.2.I.

family is such an essential and integral part of life it must be respected, and its importance should be recognized.

This importance means that family dissolution should be an absolute last resort, not something states push to happen quicker to decrease foster care numbers and receive more federal funding. Unfortunately, families are now separated more quickly, and parents are not given the opportunity to address concerns regarding their families.

Bypass provisions not only push families to this harmful end result, but they infringe on a parent's due process rights. Parents are not given adequate protections and are left vulnerable to a racist and classist family regulation system, stripping them of their rights and their children.