

CHILD WELFARE’S SCARLET LETTER: HOW A PRIOR
TERMINATION OF PARENTAL RIGHTS CAN
PERMANENTLY BRAND A PARENT AS UNFIT

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ABSTRACT

In many jurisdictions, once a parent has her rights terminated to one child, the State can use that decision to justify the termination of parental rights to another child. The State can do so regardless of whether the parent is fit to parent the second child. This article explores this practice, examines its origins, and discusses its constitutional inadequacies.

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I.
INTRODUCTION

Generally speaking, the law does not allow courts to decide cases based solely on irrebuttable presumptions created by an individual’s past transgressions. For example, a defendant in a criminal case cannot be found

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guilty of a new offense simply because she committed crimes in the past.¹ In fact, generally speaking, evidence of those past crimes is only admissible for specific purposes and cannot be used to prove a defendant's bad character or propensity to commit the type of crime at issue.² Similarly, rules of evidence strictly limit the admissibility of past crimes to impeach a witness's credibility at trial, recognizing that an individual's character can change over time.³ These basic recognitions are rooted in the longstanding principle that "in our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not defendants' prior acts in reaching its verdict."⁴ In other words, a prior bad act does not forever render an individual guilty of future crimes.

But child welfare cases—actions in which the State tries to forcibly take children from unfit parents and potentially terminate parental rights—are more complicated. Predicting whether a parent will harm a child and is therefore unfit is an imprecise, subjective task, requiring courts to consider a myriad of factors including a parent's prior acts of abuse, use of drugs, or criminal history. The general proposition that a juvenile court must consider a parent's history as one factor in determining whether a parent is unfit is beyond dispute.⁵

Even so, the United States Supreme Court has limited the types of inferences that the State may rely upon when it seeks to infringe upon the fundamental right to parent. For over a century, the Court has recognized the sacred, constitutional right of parents to raise their children without unreasonable government interference⁶ and has observed that parents need not be "model parents" to retain their parental rights.⁷ In *Stanley v. Illinois*, the United States

1. See, e.g., FED. R. EVID. 404(b) (proscribing admission of evidence of past crimes to prove that a defendant has a propensity for certain crimes and is, therefore, guilty).

2. *Id.* But see FED. R. EVID. 414 (allowing prior crimes to be admitted in specific cases for any relevant purpose, including a person's propensity to commit this specific type of crime, in child molestation cases).

3. See, e.g., FED. R. EVID. 609(a) (limiting uses for which evidence of past convictions may be admitted to attack a witness's credibility).

4. *People v. Allen*, 420 N.W.2d 499, 504 (Mich. 1988).

5. See, e.g., *In re Adam B.*, 2016 IL App (1st) 152037, ¶ 48 ("[T]he neglect of one minor is admissible as evidence of the neglect of another minor under a parent's care."); *In re LaFlure*, 210 N.W.2d 482, 489 (Mich. Ct. App. 1973) ("How a parent treats one child is certainly probative of how that parent may treat other children.").

6. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (invalidating a grandparent visitation statute that did not give deference to the wishes of parents and holding that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (finding that a law prohibiting parents from sending children to private schools "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (striking down a law that prevented parents from choosing that their children be taught German, recognizing that liberty interests protected by the Fourteenth Amendment include the right to "establish a home and bring up children" and "the power of parents to control the education of their own" children).

7. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

Supreme Court circumscribed a juvenile court's ability to rely on irrebuttable presumptions in lieu of determining a parent's actual unfitness.⁸ There, the Court rejected a statutory scheme that allowed the State to conclusively presume that fathers were unfit based solely on the fact that they had failed to marry the children's mothers—making their actual fitness irrelevant.⁹ The Court emphasized that juvenile courts cannot ignore “present realities in deference to past formalities.”¹⁰ In striking down the law, the Court famously noted that “[p]rocedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, . . . it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.”¹¹

The *Stanley* Court clearly articulated the constitutional mandate that juvenile courts determine the actual fitness of parents prior to intervening in the parent-child relationship. Yet unsurprisingly, legislatures have tried to relieve courts of this mandate in the guise of protecting children. For example, a longstanding practice in some jurisdictions places children in foster care based solely on the fitness of one parent, regardless of whether the other parent is actually unfit.¹² In 2014, the Michigan Supreme Court struck down that practice, noting that “[m]erely describing the doctrine foreshadows its constitutional weakness.”¹³

This article explores another legislative attempt to deny courts of their constitutional obligation to adjudicate the actual unfitness of parents. When Congress passed the Adoption and Safe Families Act (“ASFA”) in 1997, it invited states to violate *Stanley*'s holding by encouraging them to create irrebuttable presumptions of unfitness based solely on a parent's prior termination of parental rights (“TPR”). While ASFA continued to require states to make reasonable efforts to reunify a family once it places a child in foster care,¹⁴ it allowed states to forgo making such efforts when a parent's rights to another child had been terminated in the past—regardless of the circumstances of the prior TPR and the parent's current fitness—and permitted them to proceed immediately to terminate that parent's rights again.¹⁵ States embraced this invitation and enacted statutes that now authorize courts to find grounds to

8. *Stanley v. Illinois*, 405 U.S. 645 (1972).

9. *Id.* at 658.

10. *Id.* at 657.

11. *Id.* at 656–57.

12. See Angela Greene, *The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases*, 24 ALASKA L. REV. 173, 182–89, 198 (2007); Vivek S. Sankaran, *Parrens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 63–64 (2009).

13. *In re Sanders*, 852 N.W.2d 524, 527 (Mich. 2014).

14. Adoption and Safe Families Act, 42 U.S.C. § 671(a)(15)(B) (2012).

15. See *id.* § 671(a)(15)(D)(iii).

terminate parental rights based solely on a parent's prior TPR.¹⁶ These statutes permit courts to terminate a parent's rights based on that prior TPR rather than a parent's actual unfitness. For example, if a court in such a jurisdiction terminated a parent's rights two years prior due to the parent's addiction to drugs, it could use that decision to automatically establish grounds to terminate rights to a new child regardless of evidence of the parent's present sobriety. A parent's past actions are conclusively determinative of future conduct.

Take, for example, the case of *J.S.L. v. Jefferson County Department of Human Resources*, in which the trial court relied upon a parent's prior TPR to terminate parental rights to another child.¹⁷ The court issued its decision even though there was no evidence that the mother was still using controlled substances, engaging in relationships with domestic violence, or lacking the ability to care for her children—factors that led to her prior terminations.¹⁸ These facts prompted the children's guardian ad litem to remark, “[N]o case in this [lawyer's] experience has caused greater angst to the soul of this humble lawyer than the case presently before this [c]ourt”¹⁹ But due to the statutory framework created by ASFA, the court still terminated the parent's rights. These types of stories are not uncommon to practitioners in the field.

This article challenges the constitutionality of this practice and argues that federal and state statutes must be amended to prohibit the use of irrebuttable presumptions in TPR cases. Part II discusses the constitutional floor in TPR cases created by *Stanley* and subsequent United States Supreme Court case law. Part III explores how and why Congress invited states to take unconstitutional shortcuts when a case involves a parent with a prior TPR and describes how states embraced Congress' request. Part IV examines how courts have responded to constitutional challenges to statutes establishing a parent's unfitness based on a prior TPR and demonstrates how many courts have failed to properly interpret *Stanley*'s central holding. Finally, Part V details possible legislative fixes to bring statutes in conformity with constitutional mandates and Part VI provides concluding remarks.

16. See, e.g., ALA. CODE § 12-15-319(a)(8) (LexisNexis 2012 & Supp. 2016); ARK. CODE ANN. § 9-27-341 (2015 & Supp. 2015); COLO. REV. STAT. § 19-3-604(2)(m) (2016); DEL. CODE ANN. tit. 13, § 1103(a)(6) (2009); FLA. STAT. ANN. § 39.806(1)(i) (West Supp. 2011); KAN. STAT. ANN. § 38-2271(a)(1) (Supp. 2016); MD. CODE ANN. FAM. LAW § 5-323(d)(3)(v) (LexisNexis 2012); MICH. COMP. LAWS ANN. § 712A.19b(3)(1) (West 2012 & Supp. 2016); MINN. STAT. ANN. § 260C.301(b)(4) (West 2015); MONT. CODE ANN. § 41-3-609(1)(d) (2015) (referencing MONT. CODE ANN. § 41-3-423(2)(e) (2015)); NEB. REV. STAT. § 43-292(2) (2016); NEV. REV. STAT. § 128.105(1)(b) (2015) (referencing NEV. REV. STAT. § 432B.393(3)(c) (2015)); S.D. CODIFIED LAWS § 26-8A-26.1(6) (2016); TEX. FAM. CODE ANN. § 161.001(b)(1)(M) (West Supp. 2016); VA. CODE ANN. § 16.1-283(E) (2015); W. VA. CODE ANN. § 49-4-604(b)(7)(C) (LexisNexis 2015 & Supp. 2016); WYO. STAT. ANN. § 14-2-309(c)(i) (2015).

17. *J.S.L. v. Jefferson Cty. Dep't of Human Res.*, 180 So. 3d 872 (Ala. Civ. App. 2015).

18. *Id.* at 880 (Moore, J., dissenting).

19. *Id.* at 883.

II.

THE CONSTITUTIONAL FLOOR IN TERMINATION OF PARENTAL RIGHTS CASES

A. Overview of Supreme Court Jurisprudence

The right of parents to direct the care, custody, and control of their children is an element of liberty protected by due process that is well established under the law. Numerous Supreme Court “decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”²⁰ This right protects reciprocal interests held by both parents and children. It is “the interest of a parent in the companionship, care, custody, and management of his or her children,”²¹ and of the children in not being dislocated from the “emotional attachments that derive from the intimacy of daily association” with the parent.²²

The law’s understanding of the family rests on a belief “that the natural bonds of affection lead parents to act in the best interests of their children.”²³ Any legal adjustment of these rights and obligations affects this fundamental human relationship, so courts have zealously guarded this relationship from unwarranted governmental intrusion, even noting that the fundamental liberty interest “does not evaporate simply because [parents] have not been model parents or have lost temporary custody of their child to the State.”²⁴ In fact, “[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”²⁵

Three United States Supreme Court cases, *Stanley v. Illinois*,²⁶ *Santosky v. Kramer*,²⁷ and *Quilloin v. Walcott*,²⁸ set forth, respectively, three basic constitutional requirements before a State can permanently terminate the rights of a parent: 1) that the State must prove that a parent is actually unfit; 2) that unfitness must be proven by clear and convincing evidence; and 3) that such a decision cannot be based solely on a finding that termination would be in the child’s best interest.

As noted above, in *Stanley*, the Court prevented the State from taking children away from their parents absent a finding of actual unfitness.²⁹ The

20. Michael H. v. Gerald D., 491 U.S. 110, 123–24 (1989) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)); see also *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“[T]he 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.”).

21. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

22. *Smith v. Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977).

23. *Parham v. J.R.*, 442 U.S. 584, 602 (1979); see also *Troxel*, 530 U.S. at 69 (noting the “traditional presumption that a fit parent will act in the best interest of his or her child”).

24. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

25. *Id.*

26. *Stanley*, 405 U.S. at 645.

27. *Santosky*, 455 U.S. at 745.

28. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

29. *Stanley*, 405 U.S. at 658.

Court noted that the State registers “no gain towards its declared goals when it separates children from the custody of fit parents.”³⁰ As such, although creating an irrebuttable presumption of unfitness would always be “cheaper and easier than [an] individualized determination[,]” the Court still required the State to prove a father’s unfitness prior to stripping him of his right to care for his child.³¹ It recognized that the Constitution has “higher values than speed and efficiency.”³²

Next, in *Santosky*, the Court held that to terminate parental rights, the State must prove parental unfitness by at least clear and convincing evidence.³³ In TPR cases, the State seeks “not merely to infringe that fundamental liberty interest, but to end it.”³⁴ The “parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.”³⁵ The Court observed that “until the State proves parental unfitness, the child and his parents share a vital interest in preventing [the] erroneous termination of their natural relationship.”³⁶

Finally, in *Quilloin*, the Court—in a private adoption case—observed that the State may not permanently sever the ties between a father and his child based solely on a finding that terminating parental rights was in the child’s best interest.³⁷ The Court noted, “We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’”³⁸ This statement is consistent with the Court’s observations—on numerous occasions—that “the ‘best interests of the child’ standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values.”³⁹ For example, in *Troxel v. Granville*, the Court invalidated a visitation statute that permitted a court to infringe upon a parent’s rights and order grandparent visitation—over a parent’s objection—based solely on its finding that visitation would be in the child’s best interest.⁴⁰

30. *Id.* at 652.

31. *Id.* at 656–57.

32. *Id.* at 656.

33. *Santosky v. Kramer*, 455 U.S. 745, 768–69 (1982).

34. *Id.* at 759.

35. *Id.*

36. *Id.* at 760.

37. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

38. *Id.* (quoting *Smith v. Foster Families for Equal. & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment)).

39. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 45 n.13 (1981) (Blackmun, J., dissenting).

40. *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000).

B. Application of Supreme Court Jurisprudence

Read together, these decisions demonstrate that the Constitution requires that the State prove a parent's actual unfitness by clear and convincing evidence prior to terminating that parent's rights to her child. Relying on these and other decisions, a few appellate courts have struck down TPR statutes that relieved courts of their constitutional obligation to determine a parent's actual unfitness. For example, the Kansas Court of Appeals struck down a scheme that permitted courts to presume a parent's unfitness based solely on the fact that a child had been out of the home for a year and that the parent had refused to complete the court-approved treatment plan.⁴¹ The Court of Appeals held that the father was constitutionally entitled to a hearing to contest the unfitness presumption prior to the court's finding.⁴²

Similarly, the Illinois Court of Appeals rejected two statutory provisions that allowed courts to automatically find a parent's unfitness without actually assessing that parent's fitness. In *In re S.F.*, the Court of Appeals struck down a provision that conclusively established grounds for termination based on a parent's criminal conviction that resulted from the death of another child due to child abuse.⁴³ It found that the automatic presumption denied parents of their "right of rebuttal."⁴⁴ Similarly, in *In re H.G.*, the Supreme Court of Illinois invalidated a statute that presumed a parent's unfitness if a child had been in foster care for fifteen out of the past twenty-two months and the parent failed to establish that it was in the child's best interest to be reunified within six months.⁴⁵ The court observed that the statute "fails to account for the fact that, in many cases, the length of a child's stay in foster care has nothing to do with the parent's ability or inability to safely care for the child"⁴⁶ and declined to recognize that the "State has a compelling interest in removing children from foster care in an expeditious fashion when that removal is achieved in an unconstitutional manner."⁴⁷ These decisions—correctly applying Supreme Court jurisprudence—reaffirm that the Constitution does not permit the creation of statutes that allow courts to terminate a parent's rights without first adjudicating a parent's current fitness.

Yet, unsurprisingly, in times where legislatures perceive the need to address a crisis, they may be susceptible to overlooking constitutional doctrine when passing laws. This is precisely what happened when Congress passed ASFA and encouraged states to terminate a parent's rights based on a prior termination, regardless of the circumstances of the prior termination and the parent's current

41. *In re X.D.*, 340 P.3d 1230, 1232–34 (Kan. Ct. App. 2014).

42. *Id.* at 1232–33.

43. *In re S.F.*, 834 N.E.2d 453, 457 (Ill. App. Ct. 2005).

44. *Id.*

45. *In re H.G.*, 757 N.E.2d 864, 874 (Ill. 2001).

46. *Id.* at 872.

47. *Id.* at 874.

level of fitness. These developments are detailed in the next section of this article.

III.

ASFA INVITES STATES TO TERMINATE PARENTAL RIGHTS BASED ON PRIOR DECISIONS TO TERMINATE PARENTAL RIGHTS

A. Enactment of ASFA

President Clinton signed ASFA into law on November 19, 1997, with wide bipartisan support.⁴⁸ In passing the law, Congress sought to “shift the pendulum of the child protection system away from what many saw as an unreasonable emphasis on family preservation and towards permanency, and thus health and safety, for the children.”⁴⁹ Congress noted a “growing belief that Federal statutes, the social work profession, and the courts sometimes err[ed] on the side of protecting the rights of parents” and, supporters of the legislation argued, “[a]s a result, too many children [were] subjected to long spells of foster care or [were] returned to families that reabuse[d] them.”⁵⁰

Specifically, Congress was concerned that the provision in the Adoption Assistance and Child Welfare Act of 1980 requiring states to make reasonable efforts to reunify children with their families had become unreasonable and was forcing child welfare agencies to provide services to dangerous parents.⁵¹ In other words, Congress was concerned that “[s]tates were too focused on efforts to return abused and neglected children to their homes, thus endangering children in the name of family preservation.”⁵² Senator Mike DeWine, who authored the legislation, proclaimed that providing services to dangerous parents was “unnecessary,” “unwise,” and “simply wrong.”⁵³ As such, Congress sought to allow states to adjust their practices “to move more efficiently toward terminating parental rights and placing children for adoption.”⁵⁴

The legislative history details a specific concern shared by various stakeholders and legislators about providing services to parents whose rights to previous children had been terminated. Sue Badeau, representing the group Voices for Adoption, urged Congress to include “termination of parental rights of a sibling as one of the exceptions [to the reasonable efforts requirement], with

48. For more information about the events leading up to ASFA, see Katherine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. TIMES (Nov. 17, 1997), <http://www.nytimes.com/1997/11/17/us/clinton-to-approve-sweeping-shift-in-adoption.html> [<https://perma.cc/64QA-8CCJ>].

49. Kathleen S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 B.C. THIRD WORLD L.J. 223, 224 (2009).

50. H.R. REP. NO. 105-77, at 8 (1997).

51. *See id.* at 7–11.

52. Bean, *supra* note 49.

53. 143 CONG. REC. S12,670 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine).

54. H.R. REP. NO. 105-77, at 8 (1997).

the provision applying to a parent whose rights have been terminated and who will not respond to rehabilitative services and a court finds it unlikely that further services would result in reunification.”⁵⁵

Professor Richard Gelles, then director of the Family Violence Research Program at the University of Rhode Island, supported this view and told Congress the story of a child named David,⁵⁶ a fifteen-month-old boy killed by his mother, whose rights to a previous child had been terminated.⁵⁷ Despite the fact that the mother had severely abused a sibling and had failed to benefit from services, Gelles stated that the agency had allowed the mother to take David home one week after his birth.⁵⁸ Gelles observed that “the workers when we interviewed them said we could not have gotten a court to act on this because we had to make reasonable efforts to reunify David with his mother.”⁵⁹

Senator DeWine seized on this story and noted that Gelles recommended ending “parental rights quickly in cases like David’s in which abusing parents have already lost custody of another youngster.”⁶⁰ Senator DeWine also presented a hypothetical that involved a cocaine-addicted mother whose rights to seven children had been terminated and who had a new baby born addicted to cocaine.⁶¹ According to Senator DeWine, case workers, when presented with the hypothetical, stated that under the old statutory framework, they would still be legally obligated to put the family back together, a result DeWine described as favoring “the interests of dangerous and abusive adults over the health and safety of children.”⁶²

Congress also heard examples from Professor Gelles of state laws that already permitted states to terminate parental rights based on a parent’s prior terminations. Professor Gelles described a Rhode Island law, enacted three years prior to ASFA, which allowed courts to consider a prior termination as “prima facie evidence for terminating parental rights” to another child.⁶³ Gelles justified this law by arguing that it would be better for the system to unnecessarily

55. *Child Welfare Reform: Hearing on S. 511, S. 742, and H.R. 867 Before the Subcomm. on Social Security and Family Policy of the S. Comm. on Finance*, 105th Cong. 40 (1997) (statement of Susan Badeau, Rep., Voice for Adoption).

56. Gelles published a book about David’s story. See generally RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES* (1996).

57. *Improving the Well-Being of Abused and Neglected Children: Hearing on S. Hrg. 104-692 Before the S. Comm. on Labor and Human Res.*, 104th Cong. 11 (1996) (statement of Richard J. Gelles, Director, Family Violence and Research Program) [hereinafter *Improving the Well-Being of Abused and Neglected Children Hearing*].

58. *Id.*

59. *Id.*

60. 142 CONG. REC. S80,5713 (daily ed. June 4, 1996) (statement of Sen. DeWine).

61. *Barriers to Adoption: Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 104th Cong. 8 (1996) (statement of Sen. DeWine) [hereinafter *Barriers to Adoption Hearing*].

62. *Id.*

63. *Federal Adoption Policy: Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 104th Cong. 93 (1995).

terminate a fit parent's rights rather than place a child in a potentially dangerous home. He challenged Congress:

Do you want to make mistakes that ultimately end up in children having poor developmental outcomes or even being killed, or do you want to take children away, maybe inappropriately from parents, maybe a little bit early because the system is tilted toward the best interest of the child? It would be the latter system I think that we need.⁶⁴

Supporting Gelles' perspective, an official from the Rhode Island Office of the Child Advocate argued that it would be "really ridiculous" to have a child welfare agency "start all over again in making reasonable efforts" where a parent has previously had her parental rights terminated.⁶⁵ Advocates agreed, describing laws in states like Utah⁶⁶ and California⁶⁷ that allowed agencies to proceed directly to the termination of parental rights stage where parents had rights to another child terminated. Together, these advocates and others persuaded Congress for the need to act.

To remedy these perceived problems, Congress passed ASFA and gave states wide discretion not to make reasonable efforts to reunify when a parent had her rights to another child terminated involuntarily in the past.⁶⁸ Congress allowed states to do this regardless of how long ago the prior TPR had occurred, the reasons for the prior TPR, or the current fitness of that parent. In other words, Congress permitted states to ignore the circumstances surrounding the prior TPR and the steps the parent had taken in the interim to change those circumstances. Additionally, Congress invited states to create their own list of aggravating circumstances that excused them from making any effort to work with a family.⁶⁹ In short, Congress, responding to the impassioned testimony it heard, encouraged states to take shortcuts in cases involving a parent with a prior TPR, with the hope of expediting the adoption of children in such cases.

B. States' Embrace of ASFA

States broadly accepted Congress' invitation. Every state, the District of Columbia, Puerto Rico, and the Virgin Islands enacted laws that allowed them to

64. *Id.*

65. *Barriers to Adoption Hearing*, *supra* note 61, at 124.

66. *Id.* at 78–79 (testimony of Robert Dean, foster parent from Omaha, Nebraska).

67. *Improving the Well-Being of Abused and Neglected Children Hearing*, *supra* note 57, at 57 (statement of Peter Digre, Director, Dep't of Children and Family Services, Los Angeles County).

68. 42 U.S.C. § 671(a)(15)(D)(iii) (2012). Congress also invited states to forgo reasonable efforts where a parent committed murder or voluntary manslaughter of another child of the parent, aided or abetted to commit such a murder or voluntary manslaughter, or committed a felony assault that resulted in serious bodily injury to the child or another child of the parent. *Id.*

69. *Id.* § 671(a)(15)(D)(i).

bypass the provision of reasonable efforts where parents had prior TPRs,⁷⁰ a practice that has been upheld by appellate courts examining the issue.⁷¹ Although a few states require the agency to demonstrate that the parent failed to remedy the situation that led to the prior TPR, most do not.⁷² Thus, in most jurisdictions, upon the filing of a petition involving a parent with a prior TPR, a court can make a finding that the child welfare agency need not make any efforts to reunify the family and can proceed immediately to consider the agency's request to terminate the parent's rights to the child. The agency is relieved of any obligation to try to salvage the family unit.

But many states have gone beyond what Congress specifically encouraged and have passed laws permitting courts to actually find grounds to terminate a parent's rights to another child based on the prior TPR.⁷³ Over thirty states have done so. These statutes fall into three broad categories. Seventeen states permit courts to find grounds to terminate parental rights based solely on that parent's prior TPR.⁷⁴ In these states, courts can rely exclusively on the prior TPR to find grounds to terminate. Courts need not consider any other factors in making this finding. In other words, the prior TPR—regardless of how long ago it occurred—relieves the State from proving that a parent is currently unfit.

Approximately ten states allow courts to rely upon a prior TPR but also require the State to demonstrate something in addition to the prior TPR.⁷⁵ For

70. CHILD WELFARE INFORMATION GATEWAY, *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children 2* (2016), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/reunify/> [<https://perma.cc/LV6X-BCQT>].

71. See, e.g., *In re Baby Boy H.*, 63 Cal. App. 4th 470, 478 (1998); *In re G.B.*, 754 N.E.2d 1027, 1032 (Ind. Ct. App. 2001); *In re Heather C.*, 2000 ME 99, ¶¶ 31–32, 751 A.2d 448, 457; *In re L.N.*, 2004 SD 126, ¶ 15, 689 N.W.2d 893, 898.

72. See, e.g., ALASKA STAT. § 47.10.086 (2016); ARIZ. REV. STAT. ANN. § 8-846 (Supp. 2016); CAL. WELF. & INST. CODE § 361.5 (West Supp. 2017); IOWA CODE ANN. § 232.102 (West 2014 & Supp. 2017); TEX. FAM. CODE ANN. § 262.2015 (West 2014 & Supp. 2016). Connecticut only allows the state to bypass reasonable efforts for a parent with a prior termination that occurred within the past three years. CONN. GEN. STAT. ANN. § 17a-111b (West 2016).

73. In every state, in addition to finding grounds for termination, the court must also find that termination is in the child's best interest, an inherently subjective determination.

74. See ALA. CODE § 12-15-319(a)(8) (LexisNexis 2012 & Supp. 2016); ARK. CODE ANN. § 9-27-341 (2015 & Supp. 2015); COLO. REV. STAT. § 19-3-604(2)(m) (2016); DEL. CODE ANN. tit. 13, § 1103(a)(6) (2009); FLA. STAT. ANN. § 39.806(1)(i) (West Supp. 2011); KAN. STAT. ANN. § 38-2271(a)(1) (Supp. 2016); MD. CODE ANN. FAM. LAW § 5-323(d)(3)(v) (LexisNexis 2012); MICH. COMP. LAWS ANN. § 712A.19b(3)(l) (West 2012 & Supp. 2016); MINN. STAT. ANN. § 260C.301(b)(4) (West 2015); MONT. CODE ANN. § 41-3-609(1)(d) (2015) (referencing MONT. CODE ANN. § 41-3-423(2)(e) (2015)); NEB. REV. STAT. § 43-292(2) (2016); NEV. REV. STAT. § 128.105(1)(b) (2015) (referencing NEV. REV. STAT. § 432B.393(3)(c) (2015)); S.D. CODIFIED LAWS § 26-8A-26.1(6) (2016); TEX. FAM. CODE ANN. § 161.001(b)(1)(M) (West Supp. 2016); VA. CODE ANN. § 16.1-283(E) (2015); W. VA. CODE ANN. § 49-4-604(b)(7)(C) (LexisNexis 2015 & Supp. 2016); WYO. STAT. ANN. § 14-2-309(c)(i) (2015).

75. See ALASKA STAT. § 47.10.086(c)(8); CAL. WELF. & INST. CODE § 361.5(b)(1)–(b)(17); IOWA CODE ANN. § 232.116(1)(d) (West 2014 & Supp. 2017); KY. REV. STAT. ANN. § 625.090(2)(h) (LexisNexis Supp. 2014); LA. CHILD. CODE ANN. art. 1015(3)(k) (2004 & Supp. 2009); ME. REV. STAT. ANN. tit. 22, § 4055 (1-A)(D) (2004 & Supp. 2016); N.C. GEN. STAT. ANN. § 7B-1111(a)(9) (West 2004); OKLA. STAT. ANN. tit. 10A, § 1-4-904(B)(6) (West 2009 & Supp.

example, Kentucky requires evidence that the “[t]he conditions or factors which were the basis for the previous termination finding have not been corrected.”⁷⁶ Arizona, in addition to only allowing courts to consider prior TPRs that occurred within the past two years, also requires proof that the parent is “currently unable to discharge parental responsibilities due to the same cause.”⁷⁷ North Carolina requires a finding that “the parent lacks the ability or willingness to establish a safe home.”⁷⁸ In these jurisdictions, courts might consider—among other factors—the circumstances of the prior TPR, how long ago it occurred, and the parents’ efforts to remedy past neglect.

Finally, a small number of jurisdictions permit courts to base a TPR on a prior TPR but limit this application to prior TPRs that occurred within a specific time period. For example, in Connecticut, Missouri, and Wisconsin, courts may only rely upon prior TPRs that occurred within three years of the current action.⁷⁹ So while these jurisdictions do not require the State to prove that a parent is currently unfit, they do establish some time limits on how long a parent’s prior TPR can be used as a proxy for continued unfitness.

Unsurprisingly, lawyers have challenged these statutory schemes by directly appealing TPR decisions on the grounds that they violate the fundamental principles of *Stanley*, *Santosky*, and other Supreme Court cases. But while lawyers have succeeded in a few of these cases, most have failed. The next section details challenges to these statutes and explains why courts affirming these statutes have erred.

IV.

CONSTITUTIONAL CHALLENGES TO PRIOR TPR STATUTES

Lawyers challenging the constitutionality of prior TPR statutes have relied upon *Stanley* to frame their arguments. Prior TPR statutes violate *Stanley* by relieving courts of their constitutional obligation to determine whether a parent is actually unfit prior to stripping her—permanently—of her right to care for her child. In doing so, the statutes create an irrebuttable presumption of unfitness, which is exactly the type of practice that *Stanley* condemns.⁸⁰ As the United States Supreme Court unequivocally decreed in *Vlandis v. Kline*, “[A] statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.”⁸¹

2017); OR. REV. STAT. § 419B.502(6) (2015); 15 R.I. GEN. LAWS § 15-7-7(a)(2)(iv) (2013 & Supp. 2016).

76. KY. REV. STAT. ANN. § 625.090(2)(h) (LexisNexis 2014).

77. ARIZ. REV. STAT. ANN. § 8-533(B)(10) (2014 & Supp. 2016).

78. N.C. GEN. STAT. ANN. § 7B-1111(a)(9).

79. CONN. GEN. STAT. ANN. § 17a-111b(b) (West 2016); MO. REV. STAT. § 211.447(5)(6)(b) (West Supp. 2017); WIS. STAT. ANN. § 48.415(10)(b) (West 2011 & Supp. 2016).

80. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

81. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973) (quoting *Heiner v. Donnan*, 285 U.S. 312, 329 (1932)).

A. Some Courts Have Invalidated Prior TPR Statutes

A few appellate courts have embraced this argument. The Florida Supreme Court, in *Florida Department of Children & Families v. F.L.*,⁸² interpreted Florida's prior TPR statute to require the State to prove, in addition to the prior termination of parental rights, that there is a "substantial risk of harm to the current child."⁸³ While the court noted that "the circumstances leading to the prior involuntary termination" would be highly relevant to the court's determination of whether the current child is at risk,⁸⁴ it also explained that "[w]hile a parent's past conduct necessarily has some predictive value as to that parent's likely future conduct, positive life changes can overcome a negative history."⁸⁵ It therefore provided the following instructions to trial courts:

[I]f the parent's conduct that led to the involuntary termination involved egregious abuse or neglect of another child, this will tend to indicate a greater risk of harm to the current child. The amount of time that has passed since the prior involuntary termination will also be relevant. A very recent involuntary termination will tend to indicate a greater current risk. Finally, evidence of any change in circumstances since the prior involuntary termination will obviously be significant to a determination of risk to a current child.⁸⁶

The Michigan Court of Appeals reached a similar outcome in *In re Gach*.⁸⁷ There, the court struck down a statute that allowed trial courts to presume parental unfitness for parents with prior TPRs, requiring that the decision, instead, be based on the child's best interests, as established by clear and convincing evidence.⁸⁸ In finding this practice "constitutionally deficient[.]"⁸⁹ the court found that the statute failed to require courts to find, by clear and convincing evidence, "that the parent had failed to remedy the earlier abuse or negligence that led to the earlier termination."⁹⁰ In the court's eyes, this was a fatal defect.

The Kansas Court of Appeals, in *In re J.L.*, embraced a similar argument.⁹¹ There, the State based its entire case on the fact that a parent's rights to her children had been terminated eight years prior to the current case.⁹² The Court of

82. Fla. Dep't of Children & Families v. F.L., 880 So. 2d 602, 607 (Fla. 2004).

83. *Id.* at 609.

84. *Id.* at 610.

85. *Id.*

86. *Id.*

87. *In re Gach*, 2016 Mich. App. LEXIS 783 (Apr. 19, 2016).

88. *Id.* at *18–19.

89. *Id.* at *16.

90. *Id.* at *18–19.

91. *In re J.L.*, 891 P.2d 1125 (Kan. Ct. App. 1995).

92. *Id.* at 1127.

Appeals observed that permitting the State to terminate the parent-child relationship “by relying on a journal entry filed in an eight-year-old termination procedure makes the process much too easy on the part of the government.”⁹³ It noted its disbelief that “presumptions derived from eight-year-old lawsuits should shift the burden of proof in parental termination cases”⁹⁴ and concluded that the net result of these statutes is an “unacceptable risk that a parent judged unfit many years ago will erroneously be adjudged unfit today for no other reason than a presumption based on the result in a case which has become irrelevant.”⁹⁵ To remedy the unconstitutional statute, the court instructed trial courts to consider additional factors, including the passage of time, whether the facts in the current case resembled those from the past, and whether the cases involved the same children.⁹⁶ Employing this reasoning, the Supreme Court of Rhode Island, in interpreting its statute to prohibit terminations based solely on past TPRs, observed that “[p]ast actions are not sufficient to brand a parent unfit for life.”⁹⁷

B. Many Courts Have Refused to Invalidate Prior TPR Statutes

In contrast to these decisions, other courts have refused to invalidate prior TPR statutes, citing a variety of differing, but equally unpersuasive, rationales. Some courts have simply stated that a prior TPR is evidence of a parent’s continuing and permanent unfitness, an argument that contravenes the legal system’s recognition that an individual’s guilt cannot be defined solely based on prior findings. A Minnesota court noted that “[a] parent who has had his or her parental rights involuntarily terminated has been adjudicated as posing a threat to the child now and into the future.”⁹⁸ One in New Mexico found that “in most of the reported cases, there is a very real relationship between the past conduct and the current abilities.”⁹⁹ A third from California concluded, “Experience has shown that with certain parents . . . the risk of recidivism is a very real concern. Therefore, when another child of that same parent is adjudged a dependent child, it is not unreasonable to assume [that future parenting] efforts will be unsuccessful.”¹⁰⁰

The reasoning in these cases flatly contradicts *Stanley*, which barred courts from relying on irrebuttable presumptions to find a parent to be currently unfit based solely on past conduct.¹⁰¹ But independent of the legal analysis, the logic

93. *Id.* at 1130.

94. *Id.*

95. *Id.* at 1131.

96. *Id.* at 1136.

97. *In re Kelly S.*, 715 A.2d 1283, 1287 (R.I. 1998).

98. *In re Child of P.T. & A.T.*, 657 N.W.2d 577, 588 (Minn. Ct. App. 2003).

99. *State ex rel. Children Youth & Families Dep’t v. Amy B.*, 61 P.3d 845, 850 (N.M. Ct. App. 2002).

100. *In re Baby Boy H.*, 73 Cal. Rptr. 2d 793, 799 (Ct. App. 1998).

101. *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972).

is nonsensical. To suggest that a parent whose rights were terminated ten years ago due to a toxic domestic violence relationship will therefore remain unfit forever—regardless of the choices she has made in the interim—ignores the reality that people are capable of changing.¹⁰² Even state legislatures have recognized this. At least nine states now permit the reinstatement of parental rights after a court terminates the rights of the parent, allowing children to return home to parents previously found to be unfit.¹⁰³ These statutes reflect the reality that the ability of parents to care for children can—and does—change.

Other courts have upheld the constitutionality of prior TPR statutes, suggesting that *Stanley* only required courts to give parents notice and an opportunity to be heard.¹⁰⁴ Thus, as long as courts give parents the ability to appear and present their case, their constitutional rights are not disturbed. But this reasoning reflects a complete misunderstanding of *Stanley*. While *Stanley* did discuss the father's opportunity to be heard, its central holding required the State to prove the father's current unfitness prior to removing his child from his custody.¹⁰⁵ Thus, *Stanley* announced that demonstrating the father's unfitness was a substantive burden shouldered by the State prior to placing a child in foster care.¹⁰⁶ Simply providing parents with notice and an opportunity to be heard cannot satisfy this constitutional burden.

Courts in Wisconsin have taken a more creative approach—they have upheld their prior TPR statute by applying a theory based on the interconnected nature of decisions made by the juvenile court prior to the TPR hearing.¹⁰⁷ These

102. See, e.g., *In re Gach*, 2016 Mich. App. LEXIS 783, at *18–19 (Apr. 19, 2016) (reversing TPR where the mother's prior TPR was based on her involvement in a domestic violence relationship she was no longer in).

103. For more information about reinstatement of parental rights statutes, see *Reinstatement of Parental Rights State Statute Summary*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 21, 2016), <http://www.ncsl.org/research/human-services/reinstatement-of-parental-rights-state-statute-sum.aspx#Statutory Charr> [https://perma.cc/A3YL-SBEL].

104. See, e.g., *In re T.S.B.*, 2008 MT 23, ¶ 38, 341 Mont. 204, 177 P.3d 429; *In re A.P.*, 2007 MT 297, ¶ 22, 340 Mont. 39, 172 P.3d 105; *In re W.L.P.*, 678 N.W.2d 703, 713 (Minn. Ct. App. 2004).

105. *Stanley*, 405 U.S. at 649 (“[A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him . . .”).

106. *Id.*

107. See, e.g., *Dane Cty. Dep't of Human Servs. v. P.P. (In re Diana P.)*, 2005 WI App 32, ¶ 32, 279 Wis. 2d 169, 694 N.W.2d 344 (“The findings that are required for a court to proceed against a parent at each of the steps prior to the final step . . . involve an evaluation of a parent's fitness. It is the cumulative effect of the determinations made at each of the previous steps that causes the findings made under [the statute] to amount to unfitness.”); *Oneida Cty. Dep't of Soc. Servs. v. Nicole W. (In re Tatiana A.W.)*, 2009 WI App 56U, ¶ 11–12, 317 Wis. 2d 64, 768 N.W.2d 64 (finding that requirements for a showing of abandonment, abuse, or neglect and for a termination of parental rights to another child within the prior three years “ensure[] courts will have made specific findings reflecting the parent's fitness over a short span of time before the parent's rights can be terminated”); *Brown Cty. Dep't of Human Servs. v. Ivan L.-C. (In re Ivannies L.)*, 2008 WI App 36U, ¶ 12, 308 Wis. 2d 397, 74 N.W.2d 606 (citing *In re Diana P.*, 2005 WI App 32, ¶ 32); *State v. Lawana R. (In re Damone R.)*, 2007 WI App 230U, ¶ 13, 306 Wis. 2d 126, 740 N.W.2d 902 (same).

courts have found the statute to be narrowly tailored because the series of decisions prior to the TPR decision—the initial removal order, the adjudication decision, and the dispositional judgments—ensure that only the rights of unfit parents are terminated. As one court described, “This series of steps acts as a funnel, making smaller and smaller the groups of parents whose relationships with their children are affected at each step”¹⁰⁸ Another noted that *Stanley*, while requiring unfitness findings, did not require these findings to occur at one particular stage.¹⁰⁹ Thus, according to these courts, the series of interim findings can satisfy the constitutionally required unfitness determination.

This reasoning, however, has two principal flaws. First, prior to terminating a parent’s rights, due process requires that a parent’s unfitness be proven by clear and convincing evidence.¹¹⁰ But many of the interim decisions that occur in the child protective process require far lower standards of proof. For example, a child can be removed from her home under a probable cause standard.¹¹¹ Many states permit courts to adjudicate a claim related to a child if there is a preponderance of evidence demonstrating abuse or neglect.¹¹² Similarly, courts making decisions at the dispositional stage, involving whether a child should visit her parent or return home, apply a lower—and often undefined—standard.¹¹³ Relying on a series of interim findings that apply lower standards of proof does not satisfy the constitutional mandate that unfitness be proven by clear and convincing evidence.

108. *In re Diana P.*, 2005 WI App 32, at ¶ 32.

109. *In re Damone R.*, 2007 WI App 230U, at ¶ 14.

110. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (holding that a clear and convincing evidence standard “adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process”).

111. WIS. STAT. ANN. § 48.205(1)(a) (West 2011 & 2016 Supp.).

112. *See, e.g.*, ALASKA STAT. § 47.10.011 (2016); ARIZ. REV. STAT. § 8-844 (2014 & Supp. 2016); ARK. CODE ANN. § 9-27-325(h)(2)(B) (2015 & Supp. 2015); CAL. WELF. & INST. CODE §§ 355 & 355.1 (West 2016); COLO. REV. STAT. § 19-3-505(1) (2016); CONN. GEN. STAT. ANN. § 46b-129 (West Supp. 2016); D.C. CODE § 16-2317(b)(2) (2001–2012); FLA. STAT. ANN. § 39.507(1)(b) (West 2010); HAWAII REV. STAT. § 587A-4 (West Supp. 2016); IDAHO CODE § 16-1619(4) (2009 & Supp. 2016); KY. REV. STAT. ANN. § 620.100(3) (LexisNexis 2014); LA. CH. CODE art. 665 (2004 & Supp. 2009); ME REV. STAT. ANN. tit. 22, § 4035(2) (2004 & Supp. 2016); MD. CTS & JUD. PROC. § 3-817(c) (LexisNexis 2013); MICH. CT. R. § 3.972(C)(1); MISS. CODE ANN. § 43-21-561(3) (West 2008 & Supp. 2013); MONT. CODE ANN. § 41-3-422(5)(a) (2015); N.H. REV. STAT. ANN. § 169-C:13 (LexisNexis 2010); N.J. STAT. ANN. § 9:6-8.46(b) (West 2013); N.Y. FAM. CT. ACT § 1046(b) (Consol. Supp. 2016); OKL. STAT. ANN. tit. 10A, §§ 1-4-602 & 1-4-603 (West 2009); OR. REV. STAT. § 419B.310(3) (2015); P.R. LAWS ANN. tit. 8, § 447h (2014); S.C. CODE ANN. § 63-7-1660(A) (2010 & Supp. 2016); TEX. FAM. CODE ANN. § 105.005 (West 2014 & Supp. 2016); VER. STAT. ANN. tit. 33, § 5315(a) (2014 & Supp. 2016); VA. CODE ANN. § 16.1-252(G) (2015); WASH. REV. CODE ANN. § 13.34.130 (West 2013 & Supp. 2014); WYO. STAT. ANN. § 14-3-425(a) (2015).

113. Most state statutes do not define the standard of proof for court decisions made at the dispositional stage before a TPR hearing.

Second, the legal standard for these interim decisions does not require the courts to actually find a parent to be unfit.¹¹⁴ Justice Abramson of the Wisconsin Supreme Court discussed this concern extensively in her dissent in *In re Diana P.* She wrote:

The problem with this statutory scheme is that the grounds for denying visitation or placement are not based on the unfitness of the parent, but are instead based upon the best interests of the child. No finding or evidence of unfitness is required for these visitation decisions. This becomes important because there may be reasons the court did not modify the order denying placement and visitation, including serious illness, temporary incarceration or involuntary absence from the jurisdiction, or a judge's illness or death, that have little or nothing to do with the unfitness of a parent.

Wisconsin Stat. § 48.13 provides the grounds that need to be established to show that a child is in need of protection or services. Again, the court views these grounds with the focus on the best interest of the child. Assessing parental unfitness is irrelevant. . . . The long and the short of it is that a parent may ultimately be found to be unfit even though the parent's reasons for losing visitation and/or placement of one's child has nothing to do with whether that parent is unfit. All that need be shown is that a parent lost placement or visitation and failed to meet the conditions necessary for reinstating that placement or visitation.¹¹⁵

Taken together, relying on interim decisions that apply a lower standard of proof and do not assess a parent's unfitness cannot satisfy the constitutional test that a parent's unfitness be proven by clear and convincing evidence prior to terminating that parent's rights.

Finally, a few courts have upheld prior TPR statutes by noting that the government still bears the burden of clear and convincing evidence at the best interest stage of the TPR hearing, irrespective of findings or statutory presumptions of parental unfitness.¹¹⁶ In every jurisdiction across the country, after a court finds that there are statutory grounds to terminate a parent's rights, the parent still has the ability to demonstrate why TPR is contrary to the child's

114. See Dane Cty. Dep't of Human Servs. v. P.P. (*In re Diana P.*), 2005 WI App 32, ¶ 28, 694 N.W.2d 344 (2005) (acknowledging that not every ground in the removal statute goes to a parent's fitness).

115. *Id.* at 365 (Abramson, J., dissenting) (citations omitted).

116. See, e.g., *In re R.D.L.*, 853 N.W.2d 127, 137 (Minn. 2014) (noting that neither a finding of unfitness nor a finding of the best interests of a child alone is enough to warrant involuntary termination of parental rights); *In re K.W.*, 925 N.E.2d 181, at ¶ 2 (upholding grant of permanent custody to child services agency where the parent's other children had also been removed and where the best interests of the child were demonstrated by clear and convincing evidence).

best interests. According to these courts, during the best interest stage, the parents have a right to present evidence that their circumstances have changed and that they are currently fit, which the court must consider. Thus, the statutes pass constitutional muster.

This argument misunderstands the burdens placed on a court by *Stanley* and *Santosky*. *Stanley* and *Santosky* require the court, prior to terminating a parent's rights, to hold a hearing on parental fitness and to find that a parent is unfit by clear and convincing evidence.¹¹⁷ When considering the child's best interests, however, a court need not make a finding that a parent is unfit. Rather, the best interest finding is a vague, subjective standard that permits the court to consider a limitless range of factors, including the advantages of the child remaining in her foster home, to determine what it believes is best for the child.¹¹⁸ It does not require the court to assess a parent's fitness. Additionally, when considering best interest factors, the court, in some jurisdictions, need only find by a preponderance of evidence—and not clear and convincing evidence—that TPR is in the child's best interest.¹¹⁹

In *Stanley*, the Supreme Court was presented with, and rejected, a similar argument. There, the State of Illinois argued that even though its statutory scheme presumed unwed fathers to be unfit without establishing unfitness in fact, the father nonetheless retained the ability to regain custody through other proceedings.¹²⁰ The court summarily dismissed this argument, explicitly stating that treating parents as presumptively unfit, legal strangers to their children and then asking them to prove why it would be in their children's best interest to have custody violated the Constitution.¹²¹ In short, simply giving parents the opportunity to present evidence related to a child's best interest is very different than the constitutional mandate that the State must demonstrate a parent's current unfitness by clear and convincing evidence. To equate these two standards would eviscerate the holdings of *Stanley*, *Santosky*, and *Quilloin*.

As described above, state statutes that permit courts to find grounds to terminate a parent's rights based solely on a parent's prior TPR violate the

117. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (holding that due process requires parental unfitness to be demonstrated by clear and convincing evidence); *Stanley v. Illinois*, 405 U.S. 345, 658 (1972) (holding that reliance on a presumption of parental unfitness for unwed fathers is impermissible under equal protection where other parents are guaranteed a hearing).

118. *See, e.g., In re Foster*, 776 N.W.2d 415, 418 (Mich. 2009) (allowing courts to consider the advantages of the foster home in best interests determination); *In re K.W.*, 925 N.E.2d at ¶ 20 (noting that the court may consider factors other than parental fitness including “(1) the interaction and interrelationship of the child with the child's parents, siblings, relatives, [or] foster caregivers, . . . (2) the wishes of the child, . . . (3) the custodial history of the child, . . . [and] (4) the child's need for a legally secure placement”).

119. *See, e.g., In re Moss*, 836 N.W.2d 182, 187 (Mich. Ct. App. 2013) (holding that best interests need only be proven by a preponderance of evidence); *B.J.H. v. B.J.H. (In re B.J.H.)*, 356 S.W.2d 816, 835 (Mo. Ct. App. 2012) (same).

120. *Stanley*, 405 U.S. at 647 (rejecting adoption or guardianship proceedings as suitable alternatives).

121. *Id.* at 648–49.

constitutional rights of those parents. The next section proposes a slight, but substantive, change to federal and state child welfare statutes to fix this constitutional problem.

V.

A LEGISLATIVE FIX

As the Court noted in *Stanley*, while the State has an interest in separating children from dangerous parents, it “registers no gain towards its declared goals when it separates children from the custody of fit parents.”¹²² In fact, it “spites its own articulated goals when it needlessly separates” fit parents from their family.¹²³ Thus, federal and state statutes must be narrowly tailored to ensure that the State permanently separates children from only truly unfit parents.

When cases involve a parent whose rights have been previously terminated, statutes should instruct courts to carefully consider the parent’s prior termination. To ensure that the State does not unnecessarily terminate the rights of fit parents, those statutes should also require the State to demonstrate—by clear and convincing evidence—that the conditions that led to the prior termination continue to exist. A number of state statutes provide examples of how this might be done. For example, in Kentucky, a court must find that “the conditions or factors which were the basis for the previous termination finding have not been corrected.”¹²⁴ In Iowa, a court must conclude that “[s]ubsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.”¹²⁵ And in Oregon, a court must determine whether “the conditions giving rise to the previous action have not been ameliorated.”¹²⁶ These statutes require the State to demonstrate that a parent has not remedied the conditions that led to the prior determination of her unfitness.

As described in Part III, many state statutes do not do this. Some allow courts to create irrebuttable presumptions of unfitness based solely on a parent’s prior TPR regardless of her current fitness.¹²⁷ Others allow irrebuttable presumptions, but limit the use of the prior decisions to TPRs that occurred within a specific time period.¹²⁸ And a small subset of states provide some limiting language on how courts can use prior TPRs, but still fail to provide clear instructions to courts in assessing whether the conditions leading to the previous

122. *Id.* at 652.

123. *Id.* at 653.

124. KY. REV. STAT. ANN. § 625.090(2)(h)(3) (LexisNexis 2014).

125. IOWA CODE ANN. § 232.116(1)(d)(2) (West 2014 & 2016 Supp.).

126. OR. REV. STAT. § 419B.502(6) (2015).

127. *See* state statutes cited *supra* note 74.

128. *See* state statutes cited *supra* note 79.

termination continue to exist.¹²⁹ For example, Maine places the burden on the parent to demonstrate that she has the “ability or willingness” to show the court that she has sought services on her own or could benefit from future services.¹³⁰ This level of ambiguity invites constitutional violations, especially when the burden is placed on the parent to make such an undefined showing.

The federal government can guide states on this issue by amending ASFA to make clear that states must make reasonable efforts to reunify children with fit parents. It can do so by requiring reasonable efforts to reunify even when parents have a prior termination *unless* there is evidence that the parent has failed to remedy the conditions that led to the prior termination. The current statute does not contain this limiting language.¹³¹ As a result, the government’s invitation for states to bypass reasonable efforts at reunification for any parent with a prior termination increases the risk that a state will terminate the parental rights of a fit parent who successfully addressed the issues that led to the prior TPR. As recognized by the Supreme Court, the State spites its own goals when it terminates the rights of currently fit parents.¹³² By making these small, but substantive, tweaks to state and federal statutes, legislatures can achieve the proper balance between protecting children and preserving the important relationships children have with fit parents.

Until these changes occur, advocates representing parents and children should continue to challenge the constitutionality of current statutes. Where a parent has remedied the conditions that led to a previous termination, they must demand that the State make reasonable efforts to keep the family together.¹³³ They must require the State to demonstrate that a parent is currently unfit and not allow it to prove its case by relying solely on evidence of the parent’s past conduct. And they must be diligent in preserving these constitutional challenges at the trial court level so that appellate courts—like those in Florida, Michigan, and Kansas¹³⁴—can have the opportunity to invalidate unconstitutional statutes.

VI. CONCLUSION

Unless states amend their current statutes, a strong possibility exists that courts will terminate the rights of fit parents based solely on their past

129. See state statutes cited *supra* note 75.

130. ME. REV. STAT. ANN. tit. 22, § 4055 (1-A)(D) (2004 & Supp. 2016).

131. 42 U.S.C. § 671(a)(15)(D)(iii) (2012) (providing that states are not obligated to make reasonable efforts to preserve or reunify families when “the parental rights of the parent to a sibling have been terminated involuntarily”).

132. *Stanley v. Illinois*, 405 U.S. 645, 653 (1972).

133. See *infra* Part IV.A. (discussing cases from Florida, Kansas, and Michigan in which appellate courts have required the State to show that the parent did not remedy the conditions that led to the prior TPR).

134. Fla. Dep’t of Children & Families v. F.L., 880 So. 2d 602, 607 (Fla. 2004); *In re Gach*, 2016 Mich. App. LEXIS 783 (Apr. 19, 2016); *In re J.L.*, 891 P.2d 1125, 1125 (Kan. Ct. App. 1995).

transgressions. Not only does this practice violate the Constitution, but it also undermines the State's interest in keeping children with fit parents. Courts must be vigilant in protecting the constitutional rights of parents in these cases, and federal and state legislatures should amend current statutes to prevent this from happening. Small, but substantive, legislative changes can ensure the protection of important rights. Until then, advocates must be diligent in protecting the rights of parents.