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SOUND CONSTITUTIONAL ANALYSIS, MORAL PRINCIPLE, AND WISE POLICY JUDGMENT REQUIRE A CLEAR AND CONVINCING EVIDENCE STANDARD OF PROOF IN PHYSICIAN DISCIPLINARY PROCEEDINGS

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INTRODUCTION

Medical boards license and discipline physicians pursuant to statutory authority in each state.[1] The precise structure and function of these boards varies although the vast majority of them share certain characteristics: (1) they include non-physician members but are dominated by physicians; (2) they frequently combine investigative, prosecutorial, and judicial duties; (3) their decisions are subject to judicial review under a very deferential standard; and (4) they can apply an array of sanctions upon a finding of "unprofessional conduct."[2] The definition of unprofessional conduct differs from state-to-state. It commonly includes criminal activity that relates to professional attributes, incompetence, impairment from drugs or alcohol, and gross negligence.[3]

Scholars' observations about medical boards ventured over a decade ago remain true today:

> Given the importance of [their] tasks, it is surprising that very little is known about how well boards are able to perform them. Most discussions about the effectiveness of medical boards have been based on counts of disciplinary actions (e.g., number of revocations, suspensions and probations imposed per one thousand physicians), which do not give us a full picture of board activity. Very little is known about who complains to medical boards, how allegations of incompetence or unprofessional conduct are investigated, and

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1. Timothy Jost et al., *Consumers, Complaints, and Professional Discipline: A Look At Medical Licensure Boards*, 3 HEALTH MATRIX 309, 309-10 (1993).

2. BARRY R. FURROW ET AL., HEALTH LAW §§ 3-18 (combination of functions); 3-19 & 3-23 (limited judicial review); 3-22 & 3-25 (grounds for discipline & domination by professionals).

3. *Id.* at §§ 3-22 & 3-25.

how boards react once a problem has been confirmed.[4]

This article examines a single but central element of medical board proceedings: the standard of proof. It concludes that although approximately three-fourths of the states employ a preponderance of the evidence standard,[5] sound constitutional analysis, moral principle, and wise policy judgment support the use of a clear and convincing evidence standard.

I. A BRIEF HISTORY PRECEDING, AND EXPLANATION FOR, THE STATUS QUO

Should physicians be subject to losing their reputations, careers, and livelihoods—with the attendant catastrophic risks to their families, personal and provider-patient relationships, and physical and mental wellbeing—based on disciplinary authorities' beliefs that, metaphorically speaking, it is *anything* more than fifty percent likely that they are guilty of "professional misconduct"? We think not, but the fact is that physicians are at risk in the approximately three-quarters of our states that employ the preponderance of the evidence standard of proof in disciplinary proceedings.[6] Conversely, attorneys are protected from such risk in most of the states, probably in part because the American Bar Association has long officially endorsed the position that lawyers should be subject to discipline only upon clear and

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4. Jost, *supra* note 1, at 309-10 (reviewing complaints closed by the Ohio State Medical Board in 1990 and focusing on who files complaints and "the process of complaint investigation and the types of action taken by boards against physicians as a result of complaints").

5. Federation of State Medical Boards ("FSMB"), *Summary of 2004 Board Actions*, *available at* http://www.fsmb.org (last visited June 9, 2006). The statements in the text concerning the percentage of boards that use the competing standards of proof is based on the Report's data for each state's medical board, not counting separate medical boards that govern only osteopathic physicians. The Report has separate pages summarizing each state's actions for the year, and each such compilation also lists the standard of proof each board reports using. The following boards report using the preponderance of the evidence test: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, and Wisconsin. The following boards report using the clear and convincing evidence test: Alabama, California, Florida, Illinois, Indiana, Kansas, Maryland, Nebraska, Oklahoma, South Dakota, Virginia, Washington, West Virginia, and Wyoming. *See* Johnson v. Bd. of Governors of Registered Dentists of Okla., 913 P.2d 1339 (Okla. 1996) and Ettinger v. Bd. of Med. Quality Assurance, 135 Cal. App. 3d 853 (Cal. App. 1983) discussed *infra* note 21 for different articulations of the stricter standard. Similarly, Alabama Code § 34-24-360 (West 1975, as amended 2002) sets forth a confusing amalgam of "substantial evidence" and "reasonableness" tests. The respective boards have ignored such different articulations of the various standards when reporting to the FSMB. Further research is warranted concerning whether respective boards are aware of and/or are influenced by disparate articulations of the various standards of proof in governing statutes, regulations, and case law.

6. *Id.*

convincing proof (metaphorically speaking, say, a seventy-five percent probability of guilt).[7]

The American Medical Association ("AMA") is generally supportive of civil rights, including due process of law for physicians,[8] but it has not taken a position on the question of which standard of proof should apply in disciplinary proceedings. Perhaps the AMA is preoccupied with the admittedly important question of medical malpractice suits. It is also likely that organized medicine is hesitant to push for greater protections in disciplinary proceedings because of likely complaints from some quarters of catering to its members', rather than the public's, interests. It is time for physicians and persons concerned with basic fairness and good public policy to focus on this important issue. Greater protections for physicians are consistent with both public interests and physicians' rights, and, considering both the magnitude and probability of liability, the overall risks to physicians are of similar import in the medical malpractice and disciplinary contexts.

Physicians are about a third as likely to be convicted of professional misconduct reportable to the National Practitioner Data Bank as they are to have to make a reportable medical malpractice payment.[9] Although the likelihood of a reportable misconduct conviction is less, the magnitude of the harm is arguably greater. Misconduct proceedings can cost tens (rarely, hundreds) of thousands of dollars in legal fees, are sometimes covered by limited or no insurance, are not graced by all the protections attendant to liability suits (e.g, hearsay evidence is commonly accepted),[10] and can lead to professional death via license revocation. Similarly, while the number of malpractice payouts has been fairly stable for a number of years,[11] misconduct sanctions increased by thirty-six percent from 2000 to 2004 and by twenty

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7. David M. Appel, Note, *Attorney Disbarment Proceedings and the Standard of Proof*, 24 HOFSTRA L. REV. 275, 281, and 285 n.86 (1995) (citing to Rule 18(C) of the ABA's Model Rules for Lawyer Disciplinary Enforcement (1993)); *In re* Benjamin, 698 A.2d 434, 439 (D.C. App. 1997) ("In New York, unlike most states, misconduct must be proven only by a fair preponderance of the evidence rather than by clear and convincing evidence.").

8. *See, e.g.*, AMA Code of Medical Ethics, Ethical Opinion 9.05 Due Process, Council On Ethical And Judicial Affairs, *available at* http://www.ama-assn.org (last visited June 9, 2006).

9. The National Practitioner Data Bank, 2003 Annual Report, *available at* http://www.npdb-hipdb.com, p. 3 (showing 15,289 physician malpractice payment reports in 2003) (last visited June 9, 2006); FSMB, *Summary of 2003 Board Actions*, *available at* http://www.fsmb.org (showing 5,230 reportable (including 4,590 prejudicial) disciplinary actions in 2003) (last visited June 9, 2006).

10. Bruce E. Vodick, AMA Office of the General Counsel, *Medical Discipline, Part VIII. Procedural Matters*, 235 JAMA 1051, 1051-53 (1976).

11. National Practitioner Data Bank, *supra* note 9, at 18-19 (Physician Malpractice Payment Reports increased by five reports from 2002 to 2003; however, there were 8.2% fewer physician Malpractice Payment Reports in 2002 than there were in 2001); Geoff Boehm, *Debunking Medical Malpractice Myths: Unraveling The False Premises Behind "Tort Reform,"* 5 YALE J. HEALTH POL'Y L. & ETHICS 357, 358 (2005).

percent from 2003 to 2004 alone.[12] This increase is likely due at least in part to continued demands that disciplinary boards—which are themselves judged by the number and severity of convictions they achieve—deal more severely with physicians.[13]

The grave risks associated with disciplinary proceedings are such that one might expect that the proceedings would be subject to not just the clear and convincing evidence standard, but the beyond a reasonable doubt standard which is constitutionally required in criminal cases. To the contrary, however, the history of the standard of proof in disciplinary proceedings is largely one of embrace of the preponderance standard and an unsophisticated and sometimes completely erroneous understanding of the dynamics and realities of board proceedings in the various states. For example, in late 1990 the Inspector General of the United States published, *State Medical Boards And Medical Discipline*. This report erroneously claimed that "most boards must base any disciplinary actions they take on a 'clear and convincing' standard of proof," attributing its statement to unnamed Federation of State Medical Boards ("FSMB") personnel and "discussions with board officials in many states."[14] A state-by-state review of the standard of proof published in 1992 found, however, that only fifteen states utilized the clear and convincing standard.[15] This was confirmed in 1993 by the FSMB in the first of what are now biennial tables on the issue contained in its publication, *The Exchange*.[16]

The Inspector General's 1990 Report recognized that the higher standard "provides greater protection for physicians," but found this protection not to be justified because of the standard's supposed interference with "the boards' capacity to review cases expeditiously and effectively."[17] The Report did not provide support for its conclusions and was thus willing to sacrifice physicians' rights based on speculation. Its cavalier attitude toward due process was out-of-date even then, but nevertheless reflects a posture that has endured concerning the standard of proof and medical discipline. For example, the FSMB continues to endorse the preponderance standard using the same reasoning "informing" the Inspector General's 1990 Report,[18] and

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12. Damon Adams, *Medical Board Discipline Up; Lawmakers Demand Even More*, AM. MED. NEWS, May 9, 2005, at 1.

13. *Id.*

14. RICHARD P. KUSSEROW, INSPECTOR GENERAL, OEI-01-89-00560, STATE MEDICAL BOARDS AND MEDICAL DISCIPLINE, C-3 n. 21 (Aug. 1990).

15. DAVID A. SWANKIN, A RESOURCE GUIDE FOR RESPONDING TO ATTEMPTS TO WEAKEN STATE MEDICAL LICENSING BOARDS BY LEGISLATING A HIGHER STANDARD OF EVIDENCE 6 (Citizen Advoc. Center 1992).

16. *Section 3: Physician Licensing Boards And Physician Discipline*, THE EXCHANGE (FSMB 1992-1993), *available at* http://www.fsmb.org (last visited June 9, 2006).

17. *Id.* at 9-10.

18. The FSMB's embrace of the preponderance standard is set forth in its, A GUIDE TO THE ESSENTIALS OF A MODERN MEDICAL PRACTICE ACT, § X. D. (10th ed.), *available at* http://www.fsmb.org (last visited June 9, 2006). An explanation for embrace of the preponderance standard is set forth in the FSMB's *Maintaining State-based Medical Licensure*

today still only approximately one quarter of the states utilize the clear and convincing standard. [19]

Nevertheless, careful application of the test the Supreme Court has promulgated for usually determining what procedural protections the Due Process Clause requires establishes that the clear and convincing standard is both constitutionally and prudentially mandated. The Court announced this test in *Mathews v. Eldridge*, which requires balancing:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[20]

Although subsequent to *Mathews* several state courts have addressed physician disciplinary proceedings and which standard of proof is required by either federal and state constitutional protections or wise choice, many of these divergent opinions are conclusory and, although there are some well-reasoned opinions, none covers all the relevant legal, moral, and policy issues.[21] Similarly, a lack of rigor marks the limited amount of

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and Discipline: A Blueprint for Uniform and Effective Regulation of the Medical Profession, available at http://www.fsmb.org, the recommendations of which were adopted as policy by the FSMB's House of Delegates, May 1998 (last visited June 9, 2006).

19. *See supra* note 6 and accompanying text.

20. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *Cf.*, for example, Medina v. California, 505 U.S. 437, 445 (1992) (holding that Mathews test does not apply to criminal cases).

21. *See, e.g.*, Nguyen v. Wash. Dept. of Health Med. Quality Assurance Comm., 29 P.3d 689, 690-97 (Wash. 2001) (relying on constitutional analysis to support use of the clear and convincing standard); Painter v. Abels, 998 P.2d 931, 940-941 (Wyo. 2000) (holding legislature's 1995 change from higher to lower standard unconstitutional under both federal and state constitutional due process protections; apparently also relying on state equal protection analysis and finding distinction between lower standard for physicians and higher standard for other professionals "irrational" (an unlikely result under federal rational basis analysis but a viable argument under state constitutions that use an enhanced rational basis test); invoking due process precedents under both constitutions but reasoning, inconsistently with the above, that its holding might go beyond federal requirements; and mentioning quasi-criminal nature of the proceedings, loss of livelihood and reputation, "substantial" state interest in protecting citizens, and high risk of error where the agency acts as investigator, prosecutor, and judge); Cooper v. Bd. of Prof. Discipline of the Idaho State Bd. of Med., 4 P.3d 561, 566, 568 (Idaho 2000) (holding that proper burden of proof is higher one but court defers to boards unless their findings are "clearly erroneous and unsupported by substantial evidence"); McFadden v. Miss. State Bd. of Med. Licensure, 735 So.2d 145, 151-52 (Miss. 1999) ("Because the licensure statutes and regulations at issue in this case are penal in nature, the Board is required to prove

comment on the standard of proof in the medical and legal literature.[22] We

its case against Dr. McFadden by clear and convincing evidence . . . "); Johnson v. Bd. of Governors of Registered Dentists of Okla., 913 P.2d 1339, 1345-47, 1353-56 (Okla. 1996) (holding that higher standard required under state and federal constitutions because proceedings are penal in nature, physician can lose livelihood and reputation, and risk of error is high because of combination of investigatory, prosecutorial, and adjudicatory functions; partial dissent asserting that "[t]hirty-nine state medical boards profess to use the preponderance . . . standard for all offenses, eighteen use the clear and convincing standard for all offenses, and four use some variation of standards . . . " and citing health provider cases assertedly showing "[a] majority of other states [had] upheld the preponderance . . . standard as constitutional" while only four jurisdictions had by then struck the preponderance standard); Robinson v. Okla., 916 P.2d 1390, 1393 (Okla. 1996) (extending *Johnson* to physicians); Ettinger v. Bd. of Med. Quality Assurance, 135 Cal. App. 3d 853, 855-58 (Cal. App. 1982) (adopting "clear and convincing proof to a reasonable certainty" standard—which is an example of one of the slightly different sets of words used to articulate the competing standards in some states due to public policy considerations). *But cf.* Anonymous v. State Bd. Of Med. Examiners, 496 S.E.2d 17, 19-20 (S.C. 1998) (holding that neither due process nor equal protection requires the higher standard, and with no reasoning other than implication that only a property interest is involved); Rife v. Dept. Of Prof. Regulation, 638 So.2d 542, 543 (Fla. Dist. Ct. App. 1994) (applying a higher standard but contending that, "[a]lthough there is a growing trend toward use of the more rigorous standard, it is apparent that such standard is not essential to satisfy due process under the United States Constitution . . . "); Gandhi v. Wis. Med. Examining Bd., 483 N.W.2d 295, 298-300 (Wis. 1992) (holding that given physicians' threat to health, equal protection does not require higher standard even though attorneys are afforded the same and that due process not violated because substantial loss can be vitiated by reinstatement, public protection is more important than doctors' rights, medical licensure is a privilege rather than a fundamental right such as protection of parent-child relationships, notice and hearing are sufficient safeguards, and, because physicians are the primary judges, they are likely to be uniquely qualified to understand the evidence and standards); Rucker v. Mich. Bd. Of Med., 360 N.W.2d 154 (Mich. App. 1984) (rejecting due process argument without reasoning or authority); In Re Polk, 449 A.2d. 7, 10-17 (N.J. 1982) (concluding erroneously that procedural due process requires a fundamental right to support the higher standard and rejecting that standard under federal and state constitutions, noting possibility of reinstatement, reasoning that public protection outweighs doctors' rights, and rejecting higher standard because "neither an intrinsically elusive or esoteric subject matter, nor the absence of reliable evidence, nor the exclusive possession of evidence by one party" is present, physicians are uniquely qualified judges, and the substantive standards supposedly generally require flagrant misconduct and are objective); Sherman v. Dist. of Columbia Ct. of App., 407 A.2d 595, 600-01 (D.C. App. 1979) (holding that license is not sufficiently important to require higher standard because discipline is "not a penalty or forfeiture," other safeguards are sufficient, public protection is paramount, and the "mixture of expert and lay consideration of issues . . . may be technically complex").

22. T. Widner, *South Dakota Should Follow Public Policy and Switch to the Preponderance Standard For Medical License Revocationa After* In re Medical License of Dr. Reuben Setliff, M.D., 48 S.D. L. REV. 388, 403 (2002-03) ("due process is still protected without a clear and convincing standard of proof . . . ;" "logic suggests that all professional license revocation hearings do not require the same standard of proof . . . ;" "individual physician's rights are less important than a governmental interest in protecting the public . . . ;" and "many boards don't have [adequate] resources, autonomy, or leadership . . . "); Wayne J. Guglielmo, *Medical Boards: Facing a Disciplinary Dilemma*, 76 MED. ECON. 138 (1999) (attributing FSMB's recommending use of lower standard to higher standards making it too hard to discipline errant physicians); James Gray & Eric Zicklin, *Why Bad Doctors Aren't Kicked Out of Medicine*, 69 MED. ECON. 126 (1992) ("In unison, from 63 boards: 'We need more funding'" and attributing dearth of disciplinary actions based on clinical competence to strict

will consider arguments made by many of the authorities as we explore what standard of proof is required by careful application of each prong of the *Mathews* test.

II. PRIVATE INTERESTS AT STAKE

A. The Impact Of Disciplinary Sanctions Is Similar To That Of Criminal Punishment

The first prong of the *Mathews* test considers the private interests at stake. Disciplinary proceedings threaten physicians' reputations, lives, and careers in a manner and magnitude similar to that involved in criminal proceedings. This is established by consideration of *In the Matter of Ruffalo*[23] in which the United States Supreme Court refused to disbar an attorney based on a prior state disciplinary board conviction. The Court refused to rely on the state proceeding because Ruffalo was not given notice adequate to constitute due process. The Court found it important to observe that "[d]isbarment . . . is a punishment or penalty imposed on the lawyer."[24]

Subsequent courts have attached or refused to attach the label *quasi*-criminal or penal when determining due process requirements, including the standard of proof.[25] However, they have not uniformly paid due deference to the Supreme Court's finding in *Ruffalo* that disciplinary sanctions are "penal." In addition, they have also failed to fully explore whether the reasoning behind the Supreme Court's later holding that the beyond a reasonable doubt standard is constitutionally required in criminal proceedings applies, at least with near equal force, to professional disciplinary proceedings.[26] Such an analysis illuminates important values at risk in disciplinary proceedings, facilitates application of *Mathews*, and indicates the clear and convincing standard is constitutionally and prudentially required.

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burdens of proof, including the sometimes used and "daunting" clear and convincing evidence standard); Richard P. Kusserow et al., *An Overview of State Medical Discipline*, 257 JAMA 820, 820-24 (1987) (attributing dearth of disciplinary actions based on clinical competence to "(1) the complexity, length, and cost of cases . . . ; (2) the substantial burden of proof that tends to call for 'clear and convincing' evidence rather than the 'preponderance of evidence'; and (3) the considerable variations among physicians themselves about what constitutes acceptable practice in many facets of medicine.").

23. In re Ruffalo, 390 U.S. 544 (1968).

24. *Id.* at 550.

25. *Painter*, 998 P.2d at 940-41 (holding that quasi-criminal nature supports clear and convincing standard); *McFadden*, 735 So.2d at 151-152 (stating that penal nature supports higher standard); *Johnson*, 913 P.2d at 1353-1356; *Robinson*, 916 P.2d at 1393 (extending Johnson to physicians); *Sherman*, 407 A.2d at 600-601 (holding that discipline not a penalty and so lower standard sufficient).

26. In Re Winship, 397 U.S. 358, 363-68 (1970) (holding that the Due Process Clause of the Fourteenth Amendment requires the reasonable doubt standard in criminal cases and extending requirement to juvenile proceedings involving supposed non-criminal offenses).

The reasonable doubt standard is a cornerstone of American jurisprudence, reflecting that we prefer to allow many guilty persons to escape conviction before tolerating even one person being erroneously punished. It recognizes that conviction invariably blights a person's reputation, usually considerably limits one's life opportunities even to the extent of often taking away physical liberty, can involve but does not require either the existence or initiative of a victim, can involve but does not require compensation to an adverse party, and involves a uniquely powerful opponent. Conversely, general use of the preponderance standard in civil proceedings reflects that here the government is an arbiter between contending parties as to whom there generally is no reason for allocating any other than the minimum possible disparity of risk of error in decision making.[27] Finally, the reasonable doubt standard conveys that the foregoing values and considerations outweigh the purposes that might be served by convictions that would be obtained under a lesser standard of proof: deterring the offender from future misconduct, deterring other potential offenders, rehabilitation, incapacitation of the offender (e.g., by confinement or monitoring), or meting out just deserts. This conclusion reflects a hesitance to use persons as mere means to governmental ends and a favoring of justice over utility.

The reasoning favoring the criminal standard applies almost uniformly to disciplinary cases. Disciplinary cases are brought by a governmental body and might involve, but do not require, either the existence of, initiative of, or payment to a victim. The goals are the same as in criminal proceedings: deterrence, rehabilitation, incapacitation, or just punishment. Conviction invariably blights a professional's reputation and can destroy one's career and life. Although disciplinary proceedings do not lead to confinement or brand one a criminal, most professionals would probably prefer a criminal conviction and at least some jail time to the destruction of a career implicit in serious disciplinary action. Consider, for example, the case discussed in the next subsection (in which the disciplinary board utilized the preponderance standard). This case is not offered to contend that disciplinary proceedings are typically corrupt. As with so many factual questions raised as to the functioning of disciplinary boards, there is no good empirical evidence as to either their proper functioning or the accuracy of their findings. Therefore, the case is offered solely as an example of how disciplinary proceedings can result in grave and unjust consequences for physicians. The mere existence of such risks is significant because, as will be further explored below, the United States Supreme Court has indicated that matters of justice and principle, as opposed to utilitarian concerns, should predominate when determining the proper standard of proof.

Disciplinary proceedings can involve relatively minor charges and lead to light sanctions. One might argue that a preponderance standard would be

27. *Id.* at 371-372 (Justice Harlan's concurring opinion).

appropriate in such proceedings. This is a possibility, but any benefits this approach might lead to would have to be balanced against confusion that might result if medical board personnel untrained in law were asked to apply different standards of proof depending on the severity of the charges or potential sanctions involved in each proceeding. Moreover, professional reputations are threatened regardless of the level of "unprofessional conduct" at issue.

B. A Case Study Regarding The Impact Of Disciplinary Proceedings

In *Mishler v. Nevada Board of Medical Examiners,*[28] whistle-blowing neurosurgeon Alan Mishler's hospital privileges at Washoe Medical Center ("WMC") were not renewed in 1983 when, in the words of the court, "[a]ccording to uncontroverted evidence, Dr. Mishler's colleagues, in retaliation against him for his candor, combed the hospital records for any negative findings they could generate against him."[29] Local anesthesiologists refused to service Dr. Mishler's patients and he was forced to leave the state. Although the Nevada Board had not yet filed any proceedings against Dr. Mishler, it refused to respond to inquiries from other medical boards. This made it impossible for Dr. Mishler to work elsewhere. Three years later, in late 1986, the Nevada Board finally filed charges and subsequently revoked Dr. Mishler's license. This action was overturned by the Nevada appellate court and, upon remand, the Board changed its sanction to a public reprimand and license reapplication restrictions. Finally, in 1993, the Nevada Supreme Court overturned the Board's action, observing:

> [T]he Board wielded its power to ruin the career of an outspoken physician while simultaneously protecting a possibly negligent or incompetent practitioner who had questionable billing procedures. Although only one patient had complained about Dr. Mishler, and that complaint was subsequently found to be unjustified, the Board purposely scrutinized Dr. Mishler's charts to find evidence with which to discipline Dr. Mishler. The Board timed its proceedings against Dr. Mishler to limit the evidence available to him for his defense, because WMC's retention policy operated to destroy important films. Also, while the Board used its own rules of confidentiality as an excuse to obstruct Dr. Mishler's access to evidence, it violated the same policy with respect to Dr. Mishler's confidential reports. The Board knew that Dr. Mishler was so impoverished that he had declared

28. Mishler v. Nev. State Bd. Of Med. Examiners, 849 P.2d 291 (Nev. 1993).
29. *Id.* at 296-97.

> bankruptcy, and that he could ill afford to hire counsel. Finally, even though the Board had the right to obtain the records and Dr. Misher did not, the Board attempted to shift the burden for the preservation of evidence to Dr. Mishler. Despite the absence of this evidence—office X-rays, and diagnostic films—at the hearing, the Board disciplined Dr. Mishler.
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> In short, we conclude that the Board's actions and proceedings against Dr. Mishler constituted a disturbing abuse of its power.[30]

Dr. Mishler spent another eleven years ping ponging between federal trial and appellate courts seeking damages against members of the Board for the violations of his constitutional rights.[31] He was finally thrown out of court in 2004 because his attorney had waited too long to seek permission to add as a defendant the Nevada Board Secretary, the person apparently responsible for ignoring inquiries from other state boards.[32]

C. Case Law Concerning The Weight Of The Private Interests At Stake

The Washington Supreme Court's opinion in *Nguyen v. Washington Department of Health Medical Quality Assurance Commission*[33] correctly explains how the private interests at stake in disciplinary proceedings favor application of a clear and convincing standard:

> The intermediate clear preponderance standard is required in a variety of civil situations "to protect particularly important individual interests," that is, those interest more important than the interest against erroneous imposition of a mere money judgment. *Addington* [*v. Texas*], 441 U.S. at 424. Examples of such proceedings include involuntary mental illness commitment, fraud, "some other quasi-criminal wrongdoing by the defendant" as well as the risk of having one's "reputation tarnished erroneously." *Id.* Medical disciplinary proceedings fit triply within this intermediate category because they (1) involve much more than a mere money judgment, (2) are quasi-criminal, and (3) also

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30. *Id.* at 297.

31. Mishler v. Nev. State Bd. of Med. Examiners, 94 F.3d 652, 1996 WL 467667, at *4 (9th Cir. 1996) (unpublished disposition); Mishler v. Clift, 191 F.3d 998, 1004-08 (9th Cir. 1999); Mishler v. Avery, 90 Fed. Appx. 230, 231-32 (9th Cir. 2004).

32. *Id.*

33. Nguyen v. Wash. Dept. of Health Med. Quality Assurance Comm., 29 P.3d 689 (Wash. 2001).

> potentially tarnish one's reputation.
>
> *Addington* makes yet a further distinction: It observes while the interest of the individual may dictate a higher standard of proof to avoid erroneous deprivation, important interests of the state are likewise vindicated by the higher burden . . . .
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> . . . .
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> By the same token society also has the important dual interests that (1) Dr. Nguyen's standard of practice not fall below the acceptable minimum and (2) he not be erroneously deprived his license, as that would erroneously deprive the public access to and benefit from his services. Here *each* interest dictates a more exacting burden than mere preponderance.[34]

On the other hand, cases holding that the preponderance standard is constitutionally sufficient either ignore the importance of the private interests, erroneously imply that mere property interests are at stake, or incorrectly reason that only permanent deprivations or intrusions on fundamental rights can require a higher standard.[35] The position that only intrusions on fundamental rights can justify the clear and convincing evidence test not only ignores controlling procedural due process opinions such as *Addington v. Texas*,[36] but also misapplies substantive due process doctrine to the procedural due process context.[37]

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34. *Id.* at 693.

35. Rucker v. Michigan Bd. of Med., 360 N.W.2d 154 (Mich. Ct. App. 1984) (rejecting due process argument in favor of clear and convincing standard without reasoning or authority); Anonymous v. State Bd. of Med. Examiners, 496 S.E.2d 17, 19-20 (S.C. 1998) (holding that neither due process nor equal protection requires the clear and convincing standard with no reasoning other than the implication that only a property interest is involved); In re Polk, 449 A.2d 7, 10-17 (N.J. 1982) (erroneously concluding that procedural due process requires a fundamental right to support the clear and convincing standard).

36. Addington v. Texas, 441 U.S. 418 (1979) which is discussed in the quotation from *Nguyen* in the text at note 34 and in the text accompanying notes 40-46, and Santosky v. Kramer, 455 U.S. 745 (1982) which is discussed in the text at notes 47-52.

37. Substantive due process doctrine provides that strict scrutiny in the form of the compelling state interest test will apply if there is a substantial intrusion on a fundamental right, but procedural due process analysis determines the degree of protections necessary by comparing the respective governmental and private interests involved without a predetermined threshold concerning the nature or weight of the governmental interest. The possible exception is that Court opinions have stated that enhanced procedural protections are only indicated when private interests greater than money are involved, but this is far short of requiring a "fundamental right." Concerning substantive due process and fundamental rights, *see* JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 11.4, at 449 (6th ed. 2000). Concerning procedural due process and private interests *see supra* notes 23-34 and the accompanying text.

III. RISKS OF ERRONEOUS DEPRIVATIONS

A. Who Has The Burden Of Proof Regarding The Standard Of Proof

The second prong of the *Mathews* test focuses on the degree of risk of erroneous decision making. There are multiple factors that portend error in board proceedings if they are conducted under a mere preponderance standard. However, it must be admitted that there are no empirical studies that demonstrate that the preponderance standard will result in more erroneous convictions than would occur if the clear and convincing standard were used.[38] This raises an important question regarding who has the burden of proof concerning the factual issues that arise when one attempts to apply the *Mathews* test. Such issues include the magnitude of the risk of erroneous deprivations when the preponderance standard is used, the degree of amelioration of the risk of error that would occur under the clear and convincing standard, and the nature and amount of state interests that might be sacrificed under the clear and convincing standard.

The Supreme Court has not clarified who has the burden of proof regarding questions raised by application of the *Mathews* test. One might argue that the party asserting violation of procedural due process should have the burden of proving the facts necessary to establish her claim.[39] There is a strong indication from the Court's opinions, however, that the burden of proof concerning the standard of proof in disciplinary proceedings should be placed on the government and/or that matters of individual justice should predominate over utilitarian or societal concerns when striking the ultimate balance dictated by the test. Consider the Court's opinion in *Addington v. Texas*,[40] where it held that a standard intermediate to the preponderance and

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38. The Court observed in *Addington*, 441 U.S. at 425 & n.3 (1979):
"[c]andor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise; there are no directly relevant empirical studies. There have been some efforts to evaluate the effect of varying standards of proof on jury factfinding, *see, e.g.*, L.S.E. Jury Project, *Juries and the Rules of Evidence*, 1973 CRIM.L.REV. 208 [concluding that somewhat unique articulations of the standard of proof did not seem to have an effect in a given criminal law context], but we have found no study comparing all three standards of proof to determine how juries real or mock, apply them" (Bracketed material added).

39. One might counter that at least substantive due process or equal protection claims involving values stronger than mere property interests commonly involve establishing a deprivation of or intrusion on a right or interest, followed by application of a standard of review to determine whether the deprivation or intrusion was justified, for example, by "due process." Here the individual has the burden of proving the interest and the deprivation or intrusion, but the government commonly has the burden of justifying the deprivation or intrusion once it is established.

40. Addington v. Texas, 441 U.S. 418 (1979).

beyond reasonable doubt standards was constitutionally compelled for involuntary civil commitment proceedings. The Court reasoned:

> Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise; there are no directly relevant empirical studies. Indeed, the ultimate truth as to how the standards of proof affect decision making may well be unknowable, given that factfinding is a process shared by countless thousands of individuals throughout the country . . . . Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a "standard of proof is more than an empty semantic exercise." (citation omitted) In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty." (citation omitted).
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> . . . .
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> The expanding concern of society with the problems of mental disorders is reflected in the fact that in recent years many states have enacted statutes designed to protect the rights of the mentally ill. However, only one state by statute permits involuntary commitment by a mere preponderance of the evidence [citation], and Texas is the only state where a court has concluded that the preponderance-of-the-evidence standard satisfies due process. We attribute this not to any lack of concern in those states, but rather to a belief that the varying standards tend to produce comparable results. As we noted earlier, however, standards of proof are important for their symbolic meaning as well as for their practical effect.[41]

In the quoted passage, the Court finds that although there are no empirical studies, and perhaps none that could be conducted or designed, that demonstrate that the risk of erroneous commitments will be ameliorated by use of a standard stronger than the usual civil preponderance standard, this is not a reason to find against the appellant's constitutional claim to an intermediate standard. Similarly, it seems to find that appellant's constitutional claim should not be rejected just because there might be little or no difference in the outcomes under either standard. This is because of the important symbolic value of embracing respect for individual liberty.

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41. *Id.* at 424-26.

The Court made further observations that indicate its apparent presumption in favor of an elevated standard of proof. It stated, for example:

> In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof.
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> . . . .
>
> The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill. Under the Texas Mental Health Code, however, the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others. Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings.[42]

Here the Court does not discount the individual's interest by considering only the additional risk posed by use of a preponderance standard instead of a clear and convincing standard. It does limit the state's interest to the extent it is implicated "under a particular standard of proof." It also seems to place a burden of actual proof on the state when it discounts the state's interest by observing that "it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard . . . . "

The Court also reasoned: "Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions."[43] Here the Court seems to be stating that the *Mathews* test is to be applied in a manner that favors the overall goal of minimizing erroneous deprivations of individual rights.

The Court further observed:

> At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable.

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42. *Id.* at 425-26.
43. *Id.* at 425 (citation omitted).

> Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. 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 commitments will be ordered.[44]

In the just quoted language the Court considers significant the mere possibility that the elevated, clear and convincing standard will ameliorate the risk of erroneous deprivations. As pointed out above, however, it was not willing to consider significant the possibility that the state's interests might be placed at risk by the use of that standard. Rather, it discounted that possibility by stating: "it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings."[45]

Finally, the Court flatly stated: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[46] The actual harm to the individual is the incremental harm of confinement and stigma, if any, posed by use of the preponderance, rather than the clear and convincing, standard. The actual harm to the state includes the incremental risk, if any, of physical harm to persons and property because of a failure to commit a dangerous person because of use of the clear and convincing, rather than the preponderance, standard. In the abstract, the relative interests on both sides seem to be of comparable value. The Court's finding that the individual's interest is clearly superior can only be logically explained by the Court implicitly placing upon the state the burden of proving the relative risks and/or the Court giving great weight to a moral principle against allowing erroneous deprivations of individual rights.

The Court's opinion in *Santosky v. Kramer*[47] also reflects a presumption in favor of greater procedural safeguards and/or giving great weight to the symbolic value of eschewing erroneous deprivations. There the Court held that the clear and convincing standard is constitutionally mandated in termination of parental rights cases.[48] It approvingly quoted the *Addington* Court's observations that the standard of proof "reflects the value society

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44. *Id.* at 426-27.
45. *Id.* at 426.
46. *Addington*, 441 U.S. at 427.
47. Santosky v. Kramer, 455 U.S. 745 (1982).
48. *Id.* at 769-70.

places on individual liberty" and that an elevated standard is constitutionally required when the individual faces "a significant deprivation of liberty" or "stigma."[49] It also distinguished *Lassiter v. Department of Social Services*,[50] where it had held that a parent's right to counsel in parental rights termination proceedings would be determined case-by-case.[51] The reasoning in *Lassiter* was that the Court had created a presumption against a right to counsel in cases not involving possible confinement. This reasoning was found not to apply to other procedural due process contexts such as determination of the proper standard of proof.

Although the Court did not explicitly say this, it can be argued to logically follow that, in the absence of a presumption against a claim to greater procedural protections, the burden of proof must then logically be placed on the government if there is to be a non-arbitrary way for decision makers to resolve a case when there is equipoise in the decision maker's mind concerning important factual questions. Once again, the *Santosky* Court seemed to exercise such a presumption in favor of an intermediate standard of proof in its observations just quoted above. The same presumption seems implicit in the *Santosky* Court's further observation: "At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interest of the child and the natural parents do diverge."[52] The State could argue that it has an interest in preventing erroneous failures to find parental unfitness because they might result in serious harm to children. The Court, however, ignores such a point and discounts the State's asserted interest while not discounting the individual's interest.

If the Court's opinions in *Addington* and *Santosky* are not considered controlling concerning placement of the burden of proof, for guidance one can turn to factors authorities consider relevant when determining the proper placement of burdens of proof. These include placing the burden of proof on the party who: (1) asserts the disputed proposition; (2) is attempting to change the *status quo*; (3) has superior access, logistically or by virtue of superior resources, to relevant data; or (4) invokes the stronger interest or policy rationale.[53] Application of these factors raises complex questions such as how to treat the relationship between who asserts a proposition and who, how, and when parties find themselves involved in adjudication, what constitutes the *status quo*, what counts as "access," and how to compare the weight of interests or policy considerations prior to assignment of a burden of proof. In

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49. *Id.* at 755-756 quoting *Addington*, 441 U.S. at 427, 424.

50. Lassiter v. Dept. of Social Servs., 452 U.S. 18, 31-32 (1981).

51. *Santosky*, 455 U.S. at 751-54.

52. *Santosky*, 455 U.S. at 760.

53. CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 337 (John Strong ed., West Group 5th ed. 1999).

the present context, for example, one can argue: (1) either that a physician asserts a procedural violation or that the government asserts that deprivation of a liberty interest is justified by sufficient due process in the form of a hearing based on a preponderance of the evidence; (2) either that the government is attempting to change the *status quo* in which the physician is in good standing or that the physician is attempting to change the *status quo* which includes use of a preponderance standard; (3) either the physician has greater access to evidence concerning her own conduct or that the government has access to data concerning the effect of different standards of proof; and (4) either that the individual asserts a paramount interest in practicing her profession and avoiding stigma or the government has a superior interest in protecting the public. We will not attempt to resolve these disputes, but two points are clear. First, disciplinary proceedings usually involve interactions with alleged victims. The victims and the physicians have relevant evidence. Even if a victim has died, there will usually be either surviving relatives, other medical personnel, or written records that are accessible to the government. Moreover, the government has superior resources and access to data necessary to perform any empirical studies that might provide insight into the effects of different standards of proof. Second, the Supreme Court has found that the individual's interests in avoiding adverse action and stigma, especially that associated with a finding of misconduct, along with the moral principle of avoiding erroneous serious deprivations outweigh the government's interest in proving by a mere preponderance of the evidence, as opposed to an intermediate standard, that a person is dangerous. These two points favor placing the burden of proof on the government.

B. Practical Or Logical Factors Relevant To Proving Risks Of Erroneous Deprivations

Regardless of which party ought to have the burden of proof, there are several practical or logical factors that indicate physicians could meet the burden of proving that a clear and convincing standard is constitutionally required. The burden of proof is not a requirement that a party establish that factual contentions are more likely than not according to formal social science, statistical analyses. To the contrary, the burden of proof refers to the subjective level of certainty that the decision maker must reach.[54] If one party presents several practical or logical arguments that are sufficient to allow the decision maker to reach the required subjective level of certainty in light of any contrary arguments made by the other party, then the burden of proof has been met. We will now turn to these several practical or logical considerations regarding proof of risk of erroneous deprivations.

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54. *Id.* at § 339, *see* note 4.

1. External pressures on medical boards pose a risk of bias in favor of conviction.

The media, governmental officials, and consumer interest groups put pressure on medical boards to secure convictions; they judge boards by the number of convictions boards secure proportionate to the number of physicians boards have jurisdiction over. This is exampled by Public Citizen's Health Research Group's annual rankings of boards according to how many "serious disciplinary actions" they secure per 1,000 physicians.[55] Although the FSMB contends that such statistics should not be used to compare boards, it publishes a yearly Composite Action Index based on the number and severity of convictions by which boards can judge their own performance over time.[56] FSMB's concession that its members should judge their progress by the number of convictions they secure comes close to an admission that boards' comparative performance should be similarly judged. Given further that the FSMB is devoted to enhancing the functioning of its member boards, it is not surprising that it supports use of the preponderance standard with nothing other than the speculation that it makes the job of protecting the public easier.[57] It also seems to follow that the boards are likely to reflect the same attitudes, judge their own progress by convictions, and therefore be subject to bias in favor of convictions.

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55. The Public Citizen's Health Research Group ("HRG"), Dr. Sidney Wolfe Director, has published rankings of state medical boards every year since 1991 based on the data collected by the FSMB. These rankings are available as HRG publications *at* http://www.citizen.org/publications (last visited June 9, 2006).

56. In its 2005 Report for disciplinary actions taken in 2004, the FSMB expanded its annual summary to include disciplinary data for each board from 2000-2004 and continued use of its Composite Action Index ("CAI") begun in 1993. *Summary of 2004 Board Actions*, *supra* note 5. The CAI is computed as follows:

> 1. A board's total number of actions is divided by the total number of licensed physicians in a state. 2. A board's total number of actions is divided by the total number of physicians practicing in the state. 3. A board's total number of prejudicial actions is divided by the total number of physicians licensed by the state, whether they practice in the state or not. 4. A board's total number of prejudicial actions is divided by the total number of physicians practicing in the state. A state medical board's CAI is determined by the average of lines one through four. Lines three and four are weighted more heavily to reflect the more serious nature of prejudicial actions. (*Id.* at 2).

57. The FSMB's embrace of the preponderance standard is set forth in its GUIDE TO THE ESSENTIALS, *supra* note 18. An explanation for embrace of the preponderance standard is set forth in the FSMB's *Maintaining State-based Medical Licensure and Discipline: A Blueprint for Uniform and Effective Regulation of the Medical Profession*, *available at* http://www.fsmb.org (last visited June 9, 2006). The recommendations were adopted as policy by the FSMB's House of Delegates, May 1998.

2. Vague standards of conduct are another source of serious risk of erroneous convictions.

This is one of the reasons that, in 2001, the Washington Supreme Court held that its Board's use of the preponderance standard violated the due process clause of the Fourteenth Amendment to the United States Constitution, observing:

> The risk of erroneous deprivation is . . . aggravated when one recalls the ultimate standard of conduct the Commission applies is almost entirely subjective in nature: incompetency, negligence, malpractice, moral turpitude, dishonesty, and corruption were the claims upon which the Commission based its discipline of Dr. Nguyen . . . . It is difficult to imagine a more subjective and relative standard than that applied in a medical discipline proceeding where the minimum standard of care is often determined by opinion, and necessarily so.[58]

Other courts have claimed that matters of discipline involve objective medical facts as to which physician board members have special expertise, thus indicating a minimum risk of erroneous deprivations.[59] These courts are wrong for multiple reasons. The majority of board actions relate to alleged improper use of drugs or alcohol as opposed to matters of clinical performance or competence, judging adequate clinical performance or competence involves normative as well as technical questions, and, in any event, boards invariably have non-physician members.[60]

3. Medical boards are invariably structured with some combination of investigatory, prosecutorial, and adjudicatory functions that presents a conflict of interest between objective decision making and securing convictions.

Although the United States Supreme Court has refused to find that the mere blending of functions in state medical boards itself violates due

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58. *Nguyen*, 29 P.3d at 696.

59. Gandhi v. Wisconsin Med. Examining Bd., 483 N.W.2d 295, 298-300 (Wis. 1992) (noting physicians are likely to be uniquely qualified to understand the evidence and standards); *In re Polk*, 449 A.2d at 10-17 (noting physicians are uniquely qualified judges and the substantive standards are objective).

60. FURROW, *supra* note 2 at 76-77 (regarding bases of board actions) & at 80-81 (domination by professionals but there are lay members). As to normative issues involved, consider, for example, that determining whether a criminal conviction reflects on the attributes necessary to a professional and should therefore lead to professional discipline obviously entails more than factual or empirical questions.

process,[61] one State Supreme Court has held that it does.[62] It is obvious that this blending of functions is at least one factor to consider within the *Mathews* test. Thus, the Oklahoma Supreme Court observed in a 1996 opinion that the *Mathews* test requires use of the clear and convincing standard in disciplinary proceedings: "There is high risk [of error] when an agency seeks to revoke a professional license. As in this case, revocation proceedings have the agency acting as investigator, prosecutor, and decision maker. The risk is increased where, as in this case, a competitor . . . serves as the investigator and makes prosecutorial recommendations . . . ."[63]

4. *Risks of decision making error inhere in the very wording of the "preponderance of the evidence test" and in boards' informal administrative processes that lack the safeguards, such as the rule against hearsay, associated with civil trials;[64] an elevated standard of proof is the only way to ameliorate these risks.*

An attorney who represents physicians in board proceedings correctly wrote:

> [B]oard and hospital proceedings must be conducted in a manner that affords the doctor . . . due process. This does not mean that disciplinary hearings are held on an even playing field. They are held before panels comprised mostly of other doctors who are familiar with the system. The panel members know that before a case ever gets to a hearing, other medical professionals, during the investigation . . . already have decided that the doctor has . . . committed unprofessional conduct. This creates a predisposition to find against the doctor.[65]

Some authorities have argued that basic protections such as notice and a hearing are sufficient due process, but the Supreme Court recognized the fallacy of this argument in *Santosky v. Kramer*, the termination of parental rights case discussed above.[66] Even though such cases involve all the formalities of civil trials, the Court nevertheless held that states must employ

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61. Withrow v. Larkin, 421 U.S. 35, 54-58 (1975).

62. Lyness v. State Bd. of Med., 605 A.2d 1204, 1210-11 (Pa. 1992).

63. *Johnson*, 913 P.2d at 1346; *Robinson*, 916 P.2d at 1393 (extending Johnson to physicians).

64. Vodick, *supra* note 10 at 1051-53; Fred M. Zeder, *Defending Doctors In Disciplinary Proceedings*, 10 ARIZ. ATT'Y 22, 25-27 (2004).

65. Zeder, *supra* note 64 at 27.

66. *Gandhi*, 483 N.W.2d at 298-300; *Sherman*, 407 A.2d at 600-01; *Santosky*, 455 U.S. at 745 (discussed *supra* notes 47-52 and accompanying text).

at least a clear and convincing standard, observing:

> [W]e reject . . . that the constitutionality of New York's statutory procedures must be evaluated as a "package." . . . Indeed, we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous assessment of the "cumulative effect" of state procedures . . . .
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> . . . [T]he standard of proof is a crucial component of legal process, the primary function of which is "to minimize the risk of erroneous decisions." . . . Notice, summons, right to counsel, rules of evidence, and evidentiary hearings are all procedures to place information *before* the factfinder. But only the standard of proof "instructs the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions" he draws from the information.[67]

The Court also explained that the preponderance standard exacerbates the risk of erroneous decision making by falsely implying that the focus should be on the respective *amounts* ("preponderance"), rather than quality, of evidence.[68]

5. Court appeals do not significantly reduce the risk of board error.

This is because the standard or degree of *review* exercised by the courts is very limited. The specific articulations of the standard of review vary somewhat, but they all essentially reduce to the reality that courts will only overturn board findings if they are irrational.[69] Even then courts usually do not substitute their own decisions, but simply remand for further proceedings. Correcting an erroneous board decision is almost impossible and extremely expensive. The Washington Supreme Court recognized this in its *Nguyen* decision: "Moreover, with respect to the risk of erroneous deprivation in this proceeding, there is little solace to be found in the availability of judicial review which is high on deference but low on correction of errors . . . . Problems inherent in an interest-depriving procedure are . . . only compounded when the possibilities for factual review are extremely limited."[70]

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67. *Santosky*, 455 U.S. at 757 n.9.
68. *Id.* at 764.
69. FURROW, *supra* note 2 at 3-19 & 3-23.
70. *Nguyen*, 29 P.3d at 695.

IV. THE NATURE AND WEIGHT OF THE GOVERNMENT'S INTERESTS AND RISKS TO THESE INTERESTS

The third prong of the *Mathews v. Eldridge* balancing test requires consideration of the nature and weight of the government's interests and the extent to which they are at risk under the contending procedural alternatives. The paramount governmental interest commonly argued to be threatened by utilization of the clear and convincing standard is "protection of the public." "Protection of the public" has a powerful ring, but it is almost as amorphous and easy to abuse as the concept of "national security." The former (1990) Inspector General, the FSMB, and some court decisions take positions concerning the appropriate standard of proof that consist of nothing other than an invocation of this interest and an assumption that it is powerful enough to trump any possible competing interest such as physicians' rights.[71]

The Court's opinions in *Addington* and *Santosky* preclude any such conclusory resolution concerning the appropriate standard of proof. They require a careful explanation of various governmental interests, which standard each interest seems to favor, and the relative extents to which each interest is at risk under the contending standards of review. The government's interests include: (1) protecting the public from physical, financial, or psychological injury resulting from physician "misconduct"; (2) preserving existing physician-patient relationships and general public access to physicians; (3) generally maintaining the integrity of, and respect for, the civil justice system; (4) specifically fostering public security and respect for the law through the symbolic statement that our society will not tolerate a significant risk of erroneous deprivations when interests more important than money are at risk, especially in proceedings that entail accusation, adjudication, and punishment upon conviction; (5) avoiding administrative inconvenience and pecuniary expenses that might be associated with enhanced procedural protections; and (6) fostering respect for the medical profession. Only interests (1) and (5) in the foregoing list, if actually at issue, clearly favor use of the preponderance standard, while only interests (2) and (4) are obviously best protected by use of the clear and convincing standard. Interest (3) is closely associated with interest (4) and would thus seem to favor use of the clear and convincing evidence standard.[72]

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71. Kusserow, *supra* note 14 at I; *Gandhi*, 483 N.W.2d at 305.

72. One could argue that erroneous board decisions exonerating physicians could undercut the integrity of the civil justice system, but this seems highly unlikely. What little evidence there is in the published literature indicates that complainants are given little feedback concerning what actions boards take. Jost, *supra* note 1 at 333 ("Of the 200 public complaints studied, only 7 complainants received individualized letters from the Board responding to the specific allegations made in their compliant. A further 141 (70.5%) were sent a standard form letter drafted by the Board at the close of the case. A staggering 26% (52) got no reply at all."). What is much more likely is that physicians erroneously convicted would come to disrespect the system and use whatever status they maintained to inform others about the injustices. Finally,

Interest (6) is often supported by the argument that the public will respect the medical profession only if it diligently polices itself. This would favor use of the preponderance standard because that standard portends easier convictions. On the other hand, it can be argued that the medical profession's general embrace of the preponderance standard evidences a willingness to curry uninformed public favor by tolerating a significant risk that convictions will be the result of public pressure rather than careful decision making. It could be said to reflect a willingness to destroy individual physicians' lives, careers, and reputations even when there is a forty-nine percent chance that charges are false. It embraces utility, not justice; image, not integrity. In this perspective, maintaining respect for the medical profession would best be achieved by embrace of the clear and convincing standard. Although there can be disputes regarding which standard the various interests seem to favor in the abstract, it is clear that some of them actually support use of the clear and convincing, as opposed to the preponderance, standard.

Having delineated the government's interests and which standard they seem to favor in the abstract, we will turn to a closer examination of the interests and the extent to which they are actually at risk under the contending standards.

A. Interests That Can Be Claimed To Favor The Preponderance Standard

When public protection is mentioned, the first thought that occurs is protecting patients from physical or psychological harm caused by substandard clinical care. As indicated above, however, most board proceedings do not even involve issues of clinical care, but, rather, alleged abuse of drugs or alcohol.[73] It is true that physicians with an addiction problem might become incompetent clinicians. Regardless, there is no good evidence that medical disciplinary proceedings offer significant protection to patients from substandard clinical care beyond that already afforded by a panoply of alternative regulatory mechanisms: criminal prosecutions; quality assurance activities by hospitals, other providers, employers, and medical societies; and medical liability suits. The conclusions of a study published in 1993 remain true today: "At this point, confidence that medical licensure boards are capable of systematically identifying incompetent practitioners, and that board interventions can address the problems caused by such practitioners, are probably misplaced."[74]

In short, the primary government interest invoked to justify the preponderance standard appears to be little at issue under any standard of proof.

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respect for the civil justice system stems, at least in part, from the notion that the government will not sanction citizens without clear justification.

73. *See supra* note 60 and accompanying text.

74. Jost, *supra* note 1, at 336.

Protecting the public from financial, as opposed to physical or psychological, harm is a weak justification for facilitating relatively easy convictions under a preponderance standard. This is not to say that financial fraud is not an important social problem.[75] However, most of the costs of medical care are covered by insurance, and private and governmental insurers have the resources, incentives, and mechanisms to police physician financial misconduct. These mechanisms include a panoply of fraud and abuse laws at both the federal and state levels.[76] Although it is an issue that merits research, it might well be that most physician disciplinary board proceedings concerning financial misconduct are started because of prior proceedings initiated by other governmental authorities rather than complaints from the general public.[77] If so, board proceedings would seem to be redundant.

Maintaining respect for the medical profession also seems like a weak justification in favor of use of a preponderance standard. It is difficult to understand why this has even been mentioned as a governmental interest. The most that can be said in favor of this interest is that the public conceivably will only feel secure, and therefore best benefit from medical treatment, if it respects physicians generally. It can be argued, to the contrary, that patients better protect themselves through a healthy skepticism and inquiring attitude toward medical professionals.

A final state interest that might be suggested to support the preponderance standard is preventing administrative inconvenience or expense. This too is an issue that might merit research. However, what little practical or logical argument that exists suggests that use of the clear and convincing standard will not cause significant administrative inconvenience or expense. Consider the *Santosky* Court's observations concerning use of the clear and convincing standard in parental termination proceedings: "[A] stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State . . . 35 States already have adopted a higher standard by statute or court decision without apparent effect on the speed, form, or cost of their factfinding proceedings."[78] Although only about a quarter of the states use the clear and convincing standard, there has been no indication that these states have experienced any significant increase in inconvenience or expense. To the contrary, as indicated below, the state with

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75. *See* H.R. REP. NO. 104-161 (1996) (stating that "[a]ccording to the [Government Accounting Office], [ten percent] of every health care dollar spent in this Nation is lost to fraudulent and wasteful provider claims").

76. See the various statutes and regulations described in FURROW, *supra* note 2, Chapter 15, *Medicare And Medicaid Fraud And Abuse.*

77. Jost, *supra* note 1 at 312 tbl. 1 (showing one study that revealed only [thirty-eight] percent of complaints during 1990 came from the public).

78. *Santosky*, 455 U.S. at 767 (1982).

the most convictions per one thousand physicians uses the clear and convincing evidence standard.[79]

Finally, concerning administrative convenience and expense and all the state interests that might be argued to support use of the preponderance standard, as indicated above, *Addington* and *Santosky* provide that either (1) the state cannot claim an interest that might be based on erroneous convictions facilitated by a lower standard of proof, or, at the very least, (2) the state's interest must be discounted by the amount it would be protected under an enhanced standard of proof.[80] The *Addington* Court noted the lack of empirical data and surmised that there was probably little difference in the results under the preponderance and clear and convincing standards. What little evidence there is indicates that the ability to establish firm cases is primarily a function of the overall resources and autonomy a board has. Many boards are severely under-funded and some lack adequate autonomy.[81] The actual performance of boards in taking action against errant physicians indicates that the resources, autonomy, and competence of boards, rather than the standard of proof, are the keys to success. Thus, the medical board with the highest reported rate of convictions proportionate to physicians within each board's jurisdiction, as set forth in the FSMB's Composite Action Index for 2004, utilized the clear and convincing evidence standard. The two boards with the lowest reported rates of convictions employed the preponderance of the evidence standard.[82] Invoking the need to allow easy convictions under a preponderance standard, as has essentially been done by the former Inspector General, the FSMB, and certain judges, draws attention away from the problems of inadequate funding and autonomy that plague many boards.

Furthermore, legislatures are not likely to allocate more funds to boards just because of a voluntary or forced switch to the higher standard. It is likely that given a switch from the preponderance to the clear and convincing standard and holding resources constant, medical boards will be more careful in choosing cases to pursue. They could become more efficient and effective. Thus, for example, we doubt that the then members of the Nevada Medical Board would have had the temerity to pursue their above-described vendetta against Dr. Mishler if they knew that they could be called upon to show that their actions were based on clear and convincing evidence.

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79. *See infra* notes 80-82 and accompanying text.

80. *Id.*

81. Kusserow, *supra* note 14 at i-ii.

82. The board with the highest CAI was Florida, and the two boards with the lowest CAI's were Mississippi and Nevada. *Summary of 2004 Board* Actions, *supra* note 5.

B. Interests That Apparently Support Use Of The Clear And Convincing Standard

It should be evident from the preceding discussion that preventing increased administrative inconvenience or expense and fostering respect for the medical profession might be better advanced by the clear and convincing, as opposed to the preponderance, standard. Moreover, public safety or well-being can be threatened by false acquittals *and* convictions. When a physician is suspended or expelled from the profession, there is not only destruction of ongoing specific physician-patient relationships but also a possible impact on the overall access to physician services. This is particularly true as to rural communities with limited physician coverage.

There are also related state interests that the Supreme Court has indicated are of paramount importance in this context: (1) generally maintaining the integrity of, and respect for, the civil justice system, and (2) specifically fostering public security and respect for the law through the symbolic statement that our society will not tolerate a significant risk of erroneous deprivations when interests more important than money are at risk, especially in proceedings that entail accusation, adjudication, and punishment upon conviction. These interests are only advanced through use of the clear and convincing standard. Here it is appropriate to recall and add to our previous quotation from the Washington Supreme Court's opinion concluding that the clear and convincing standard is constitutionally mandated:

> *Addington* makes yet a further distinction: It observes while the interest of the individual may dictate a higher standard of proof to avoid erroneous deprivation, important interests of the state are likewise vindicated by the higher burden as they are potentially compromised by a lower burden of proof which inevitably increases the incidents of erroneous results. (citation omitted). Aside from vindicating interests of accuracy in professional disciplinary proceedings, as Dean Roscoe Pound observed, "There is a public policy in maintaining the interests of individuals as well as one in upholding the agencies of government."
>
> It is important to focus on the nature of the interest at stake in the sense that the more important the interest, the more process is required. The interest of the individual is the primary concern; however, important interests of the state likewise merit a higher burden. A traffic infraction results in a fine . . . . However, charges of aggravated first degree murder may result in the death penalty on the one hand or a killer on the loose on the other. We, as a civilized society, will risk a mistake in the former but tolerate no wrongful conviction in the latter. So too with Dr. Nguyen: His

> professional license, his reputation, his ability to earn a living for his family are very important interests—much more important than money alone.
>
> By the same token society also has the important dual interests that (1) Dr. Nguyen's standard of practice not fall below the acceptable minimum and (2) he not be erroneously deprived his license, as that would erroneously deprive the public access to and benefit from his services. Here *each* interest dictates a more exacting burden than mere preponderance.[83]

In fact, it can be argued that the integrity of the civil justice system and preservation of our commitment to preventing unjust punishment require use of the beyond a reasonable doubt standard employed in criminal cases. The *Santosky* Court confronted a similar argument when it considered the constitutionally required standard of proof in termination of parental rights cases. The Court's explanation there concerning why it favored the clear and convincing standard even in light of the severe and permanent deprivation at issue is apt here. The Court reasoned:

> In *Addington,* the Court concluded that application of a reasonable-doubt standard is inappropriate in civil commitment proceedings for two reasons—because of our hesitation to apply that unique standard "too broadly or casually in noncriminal cases," (citation omitted) and because the psychiatric evidence ordinarily adduced at commitment proceedings is rarely susceptible to proof beyond a reasonable doubt . . . .
>
> Like civil commitment hearings, termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty . . . . The substantive standards applied vary from State to State. Although Congress found the "beyond a reasonable doubt" standard proper in [termination of Indian parental rights case], another legislative body might well conclude that a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption.[84]

The same reasoning applies to physician disciplinary proceedings. First, they often involve complex medical or scientific matters that can be

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83. *Nguyen*, 29 P.3d at 693 (citation and footnote omitted)(emphasis in original).
84. *Santosky*, 455 U.S. at 768-769 (citations omitted).

impossible to prove beyond a reasonable doubt. Second, they are *quasi* criminal, but not criminal in nature. Third, the substantive definition of "unprofessional conduct" varies among the states.

V. BALANCING THE VARIOUS INTERESTS

The final step in the *Mathews* test is to balance the weights of the respective public and private interests. This balancing is not to be done in the abstract, but with careful consideration of each competing interest, the degree to which it is at risk, and which procedural alternative places each interest at risk. Those who have made the clear and convincing standard of proof a straw man to attack as the source of poor medical board performance ignore rigorous analysis and posit a false clash between physicians' rights, on the one hand, and public safety, on the other hand. First, the interests that have been argued to be threatened by use of the clear and convincing standard can just as well be placed at risk by the preponderance standard. As explained above, public safety can be threatened both by making convictions too easy and too difficult to secure. The same is true concerning respect for the medical profession. No profession is worthy of respect if it is willing to sacrifice the rights of some of its members to allay public pressure for more control of the profession as a whole.

Second, even if public safety or other interests are assumed for purposes of argument to be at some risk under the clear and convincing evidence test, questions remain as to the extent of such risks and their relative value when balanced against physicians' constitutional and moral rights and the integrity of the disciplinary process. Despite this axiomatic proposition, the former Inspector General, the FSMB, and certain judges have in essence abstractly argued: "Protecting citizens is one of the fundamental reasons for a government's existence. This obligation of the state is superior to the privilege of any individual to practice his or her profession."[85] This is akin to arguing that we should all sacrifice our rights on the altar of "national security."

We suggest, instead, that longstanding constitutional precepts should guide the analysis. Careful application of the *Mathews* test in light of subsequent Supreme Court opinions that consider the standard of proof constitutionally required in involuntary civil commitment and termination of parental rights proceedings shows that the scales of justice tip in favor of use of the clear and convincing standard in physician disciplinary proceedings. The Supreme Court has indicated that the government has the burden of proof concerning the constitutionally required standard of proof and/or that matters

85. *Gandhi*, 483 N.W.2d at 305.

of individual justice and avoidance of unjust punishment outweigh utilitarian or societal concerns in this context.

The clear and convincing standard should be kept in the quarter of the states that now use it, and it should be extended as a matter of policy to the remaining states. Intransigent states should be confronted with litigation that attempts to extend the holdings of the few state courts that have given close attention to the matter and found that the clear and convincing standard is mandated by either federal or state constitutions *or* wise moral or policy analysis.[86]

86. *See* sources cited *supra* note 21.