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## Learning From the Past: Why Termination of a Non-Citizen Parent's Rights Should Not Be Based on the Child's Best Interest

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# Learning From the Past: Why Termination of a Non-Citizen Parent's Rights Should Not Be Based on the Child's Best Interest

STACY BYRD\*

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## I. INTRODUCTION

In 2003, Felipe Montes illegally crossed the border from Mexico into the United States and traveled to Sparta, North Carolina to find work on Christmas tree farms.<sup>1</sup> While living and working in Sparta, Felipe married a local woman named Marie and started a family.<sup>2</sup> The Montes family was not picture-perfect and had its fair share of financial troubles.<sup>3</sup> They found themselves strapped for cash at times due to a combination of Felipe's seasonal employment and injuries that kept him

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1. Seth Freed Wessler, *A Deported Father Wins a Long, Painful Fight to Keep His Kids*, COLORLINES (Nov. 28, 2012, 9:53 AM), [http://colorlines.com/archives/2012/11/nc\\_judge\\_reunites\\_deported\\_father\\_with\\_three\\_us\\_citizen\\_children.html](http://colorlines.com/archives/2012/11/nc_judge_reunites_deported_father_with_three_us_citizen_children.html) [hereinafter Wessler, *Deported Father Wins*].

2. *Id.*

3. *Id.*

from working.<sup>4</sup> Additionally, Marie had mental health problems and struggled with drug use.<sup>5</sup> In fact, the Department of Social Services investigated Marie and Felipe multiple times due to allegations that the couple neglected their children.<sup>6</sup> In each instance, however, the Department's assessment did not reveal any evidence of neglect, and the children remained in Felipe and Marie's custody.<sup>7</sup>

Felipe could not obtain a driver's license because he was an undocumented immigrant and he accumulated a series of traffic violations.<sup>8</sup> As a result of his convictions, in 2010, Felipe was deported to Mexico and forced to leave his two young children, Isaiah and Adrian, and his pregnant wife in Sparta.<sup>9</sup> Marie struggled to support herself and her family after Felipe's deportation.<sup>10</sup> She was very ill and had only her monthly disability payments with which to support her family.<sup>11</sup> With Felipe gone, Marie was unable to physically and financially support her children, and within two months of the birth of their third child, Angel, welfare officials removed all three children from Marie's care.<sup>12</sup> The children were placed with foster families who hoped to adopt them, and the Department of Social Services moved to terminate Marie and Felipe's parental rights.<sup>13</sup> At the time, Felipe was living in Tamaulipas, Mexico with his aunt and uncle.<sup>14</sup> He asked the welfare officials to send his sons to live with him, but the agency refused, claiming that his home was inadequate for the young children.<sup>15</sup>

Sadly, Felipe's loss is not unique. The Applied Research Center conducted a study, finding that in late 2011 there were at least 5,100 children of deported or detained parents living in foster care in the United States.<sup>16</sup> Another report showed that between July 1, 2010, and September 31, 2012, over 204,000 immigrant parents of United States

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*; N.C. GEN. STAT. § 7B-302(a) (2012) (Upon receipt of a report of abuse, abandonment, or neglect, the Department of Social Services "shall make a prompt and thorough assessment . . . in order to ascertain the facts of the case, the extent of the abuse or neglect, and the . . . harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition.").

8. Wessler, *Deported Father Wins*, *supra* note 1.

9. *Id.*

10. Seth Freed Wessler, *Deported Dad Begs North Carolina to Give Him Back His Children*, COLORLINES (Feb. 14, 2012, 10:38 AM), [http://colorlines.com/archives/2012/02/deported\\_dad\\_begs\\_north\\_carolina\\_not\\_put\\_kids\\_into\\_adoption.html](http://colorlines.com/archives/2012/02/deported_dad_begs_north_carolina_not_put_kids_into_adoption.html) [hereinafter Wessler, *Deported Dad Begs*].

11. *Id.*

12. *Id.*

13. Wessler, *Deported Father Wins*, *supra* note 1.

14. *Id.*

15. *Id.*

16. SETH FREED WESSLER, SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF

citizen children were deported.<sup>17</sup> Fortunately for Felipe, his story became national news.<sup>18</sup> Over 21,000 people signed a petition supported by Presente.org, a national Latino advocacy organization, demanding Felipe's children be reunited with him.<sup>19</sup> The Mexican Consulate in North Carolina petitioned federal immigration authorities, and the Immigration and Customs Enforcement ("ICE") granted Felipe permission to enter the United States for ninety days to allow him to participate in the court hearing where a judge would determine if his children could return to Mexico with him.<sup>20</sup> In late November 2012, Judge Michael Duncan of North Carolina ordered that the three children be returned to Felipe for a "trial placement."<sup>21</sup> After a long and difficult battle, Felipe and his children traveled home to Tamaulipas, Mexico in March 2013.<sup>22</sup>

Not all detained and deported parents of United States citizen children are as fortunate as Felipe Montes. In fact, when the Mexican Consulate petitioned for Felipe's humanitarian parole that eventually allowed him to reenter the United States, the Consulate was unable to cite another instance where someone who had been deported was allowed to reenter the country.<sup>23</sup> This is one of many instances in which state child welfare agencies push to terminate the parental rights of detained, deported, or even merely deportable parents.<sup>24</sup> Instead of proving that the parent is not fit to care for the child by at least clear and convincing evidence as law requires,<sup>25</sup> child welfare agencies argue that

IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 4 (Kathryn Duggan, Mónica Novoa & Rebekah Spicuglia, eds., The Matea Group, trans., 2011).

17. Seth Freed Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, COLORLINES (Dec. 17, 2012, 9:45 AM), [http://colorlines.com/archives/2012/12/us\\_deports\\_more\\_than\\_200k\\_parents.html](http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html).

18. Wessler, *Deported Father Wins*, *supra* note 1.

19. Seth Freed Wessler, *How the 'Best Interest' Bias of Family Court Threatens Immigrant Parents*, COLORLINES (Aug. 8, 2012, 9:27 AM), [http://colorlines.com/archives/2012/08/felipe\\_bautista\\_montes\\_encarnacion\\_bail\\_romero\\_and\\_the\\_biases\\_of\\_best\\_interest.html](http://colorlines.com/archives/2012/08/felipe_bautista_montes_encarnacion_bail_romero_and_the_biases_of_best_interest.html).

20. Seth Freed Wessler, *Deported Father Returns to Fight for His Children in Exceptional Case*, COLORLINES (Aug. 3, 2012, 9:57 AM), [http://colorlines.com/archives/2012/08/carrying\\_only\\_a\\_small\\_navy.html](http://colorlines.com/archives/2012/08/carrying_only_a_small_navy.html) [hereinafter Wessler, *Father Returns*].

21. Wessler, *Deported Father Wins*, *supra* note 1.

22. Seth Freed Wessler, *Felipe Montes Departs the United States for Mexico, with his Children*, COLORLINES (Mar. 22, 2013, 12:24 PM), [http://colorlines.com/archives/2013/03/felipe\\_montes\\_departs\\_the\\_united\\_states\\_for\\_mexico\\_with\\_his\\_children.html](http://colorlines.com/archives/2013/03/felipe_montes_departs_the_united_states_for_mexico_with_his_children.html) [hereinafter Wessler, *Father Departs with Children*].

23. Wessler, *Father Returns*, *supra* note 20.

24. See, e.g., *In re M.M.*, 587 S.E.2d 825 (Ga. Ct. App. 2003); *In re V.S.*, 548 S.E.2d 490 (Ga. Ct. App. 2001); *In re B. & J.*, 756 N.W.2d 234 (Mich. Ct. App. 2008); *In re Interest of Angelica L.*, 767 N.W.2d 74 (Neb. 2009); see also Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C.J.L. & Soc. Just. 63, 84–86 (2012).

25. *Santosky v. Kramer*, 455 U.S. 745, 769–70 (holding that the State must prove the statutory grounds for termination by at least clear and convincing evidence before terminating a parent's rights).

it is not in the child's best interest to leave the United States with the parent.<sup>26</sup> Even more shocking is the tendency of juvenile court judges to accept that argument and terminate the parent's rights where the State did not meet its legal burden.<sup>27</sup> While almost all of these terminations have been overturned on appeal, only a small percentage of cases involving undocumented immigrant parents are appealed as a result of the parent's poverty and inability to speak English or Spanish.<sup>28</sup>

In her recent article, *Should I Stay or Should I Go: Why Immigration Reunification Decisions Should Be Based on the Best Interest of the Child*, Professor Marcia Zug suggests that the courts should use a different standard in parental rights termination proceedings when a parent's deportation is probable.<sup>29</sup> She proposes that the fitness standard is appropriate when it is not likely that a parent will be deported, but that the child's best interest standard should be applied when it is probable that a parent will be deported.<sup>30</sup> Professor Zug focuses on the meaning of citizenship and posits that even though there is an established presumption favoring parental rights, in order to protect the future of democracy, children's rights should be superior to their parents' rights in situations where a parent is not a United States citizen.<sup>31</sup> Professor Zug's proposition begs two questions: (1) whether the fitness standard appropriately addresses each party's interests; and (2) whether the standard for terminating a parent's rights should shift based on the parent's alien or depor-

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26. See, e.g., *In re M.M.*, 587 S.E.2d at 832 ("[T]he termination of the father's parental rights was based on the possibility that the father could someday be deported and, with her mother's parental rights also severed, [the child] might be returned to [state] custody or sent to Mexico."); *In re V.S.*, 548 S.E.2d at 493 (termination of father's parental rights by the juvenile court was premature where there was less than clear and convincing evidence that he was an unfit parent but there was a finding that it was in the child's best interest to terminate the father's rights); *In re B. & J.*, 756 N.W.2d at 238 (The juvenile court wrongfully terminated the parents' rights based on a finding of "environmental neglect," consisting of inadequate sleeping accommodations for the children in [the parents'] home").

27. See, e.g., *In re V.S.*, 548 S.E.2d at 493 (juvenile court decision reversed because the State did not prove by clear and convincing evidence that the father was an unfit parent before terminating his parental rights); *In re B. & J.*, 756 N.W.2d at 238 (The juvenile court wrongfully terminated the parents' rights where the State argued only "environmental neglect."); *In re Angelica L.*, 767 N.W.2d at 87 (juvenile court decision to terminate the mother's parental rights solely on a finding that it was not in the children's best interest to return with her to Guatemala was reversed because the State did not prove by clear and convincing evidence that the mother was an unfit parent).

28. Yablon-Zug, *supra* note 24, at 98 ("When poor immigrant parents with no proficiency in English or even Spanish are deported to their home countries, their ability to pursue appeals is severely curtailed. Most cases that have been appealed involve parents lucky enough to have acquired exceptional legal assistance prior to deportation.").

29. Marcia Zug, *Should I Stay or Should I Go: Why Immigration Reunification Decisions Should Be Based on the Best Interest of the Child*, 2011 BYU L. REV. 1139, 1143 (2011).

30. *Id.*

31. *Id.* at 1141-44.

tation status. This Comment addresses both issues, arguing first that while the State's interest and the child's rights must be considered in parental rights termination proceedings, that the fitness standard appropriately accounts for all parties' interests. This Comment goes on to address a shifting standard hinged on a parent's alien or deportation status by analogizing the proposed shifting standard to two movements in American history that sought to protect children's best interests, but, in retrospect, harmed the children and only reflected American biases.

Part II of this Comment will discuss the various parties' rights and interests in child welfare proceedings. These include a parent's right to the care and custody of his or her children, the State's interest in the safety and welfare of children and in keeping its citizens connected to the United States, a child's best interest, and a child's interest in being raised by his or her biological parents. Part III of the Comment will analyze the appropriate balance of the competing interests, exploring what the best interest of a child involves and where children's rights are and should be considered and given weight. Part IV explores two movements in United States history that demonstrate the consequences of the belief that children are better off with traditional American families. Finally, Part V considers possible remedies to the tension between conflicting goals of immigration law and child welfare law.

## II. INTERESTS INVOLVED

Clearly grasping each party's interests, the differences between them, and how they work together is integral to understanding how the parental fitness standard addresses each interest. In cases involving children there is often no obvious "bad guy." Instead there are multiple parties advocating for what they sincerely believe is best for a child.

For example, Felipe Montes wanted his three children to return with him to Mexico where he believed that they would be sufficiently cared for.<sup>32</sup> The child welfare officials, on the other hand, concluded that sending the children to Mexico to live with their father and his family would subject the children to unsafe conditions.<sup>33</sup> The attorney appointed by the court to represent the children's best interest believed that the children would not have the necessary resources to survive in Mexico, and that they should remain in the United States with their foster parents.<sup>34</sup> Here, as in most proceedings involving children, there are

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32. Wessler, *Deported Father Wins*, *supra* note 1.

33. *Id.*

34. The attorney representing the Montes children was a "best interest" attorney and did not have a traditional attorney-client relationship with the children. *Id.* There is much discussion among child advocates about whether a child in dependency proceedings should be automatically

multiple competing legal interests that the court must consider.

### A. *The Parent's Constitutional Right*

In judicial proceedings involving children, the first and most fundamental interest is the parent's right. Parents have the right to raise their children without the State's interference so long as they adequately care for their children.<sup>35</sup> The Supreme Court has repeatedly recognized that this right is constitutionally protected.<sup>36</sup> Justice Blackmun, writing for the Supreme Court in *Santosky v. Kramer*, described this right as a "fundamental liberty interest of natural parents in the care, custody, and management of their child . . . ."<sup>37</sup> This fundamental right applies to both citizens and noncitizens equally,<sup>38</sup> and only unfit parents can be deprived of their right to the care and custody of their children.<sup>39</sup>

Under current law, the State has the burden to prove that a parent is not fit to have custody of his or her children by at least clear and convincing evidence before a court may terminate a parent's rights.<sup>40</sup> A parent's right to the care and custody of his or her children is described as "an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"<sup>41</sup> Therefore, unless the State meets its burden, proving that the parent is unfit by clear and convincing evidence, a court may not terminate the legal parent-child rela-

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appointed an attorney, a best interest advocate, or both. *See, e.g.*, Jacob Ethan Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 FAM. L.Q. 485 (2003). A recent study completed by First Star and Children's Advocacy Institute found that sixty-one percent of states require the appointment of attorneys for abused or neglected children, while more than thirty-nine percent of the states do not require appointment of an attorney for children where abuse and neglect are alleged. CHILDREN'S ADVOCACY INST. & FIRST STAR, *A CHILD'S RIGHT TO COUNSEL* 9 (3d ed. 2012). Of the states that require the appointment of an attorney, only thirty-one percent mandate that the attorney have a traditional attorney-client relationship with the child, including client-directed representation. *Id.* These statistics show that although more than half of the states mandate the appointment of an attorney to children in dependency proceedings, many states direct the attorney to represent the child's best interest rather than the child's stated interest. *Id.*

35. *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000).

36. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Troxel*, 530 U.S. at 65.

37. *Santosky*, 455 U.S. at 753.

38. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens . . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *see also* Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 143–45 (2011).

39. *Santosky*, 455 U.S. at 753.

40. *Id.* at 770.

41. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

tionship.<sup>42</sup> This is what is commonly referred to as the parental fitness standard.<sup>43</sup> The fitness standard benefits the parent because it prevents the State from intruding on the parent's constitutional right to raise his or her children.<sup>44</sup> In addition, it benefits children because it recognizes that children prefer to be with their parents, assuring children that "they will always be connected—emotionally, socially, and through physical custody—to their parents and that their relationship will not lightly be destroyed."<sup>45</sup>

### B. *The State's Duty to Protect Children*

The State, on the other hand, has an interest in the safety and welfare of children as *parens patriae*.<sup>46</sup> The Supreme Court acknowledged in *Prince v. Massachusetts* that society's interest in protecting children is a compelling state interest that may trump a parent's right to the care and custody of his or her children.<sup>47</sup> The Court recognized that where a child's safety and wellbeing are at risk, the State has a duty to protect that child, and if necessary, intrude on the parents' right to raise the child by both retaining custody and directing the child's religious and moral upbringing.<sup>48</sup>

The burden, however, is on the State. The State may remove children from their homes and retain custody of them only after showing that removing the children is necessary to protect them from imminent danger.<sup>49</sup> The Supreme Court has recognized that "while there is still reason to believe that positive, nurturing parent-child relationships exist, the State's interest as *parens patriae* favors preservation, not severance, of natural familial bonds."<sup>50</sup> To permanently terminate the legal parent-child relationship, the State must prove the statutory grounds for termination<sup>51</sup> by clear and convincing evidence.<sup>52</sup> The court will then issue an

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42. *Santosky*, 455 U.S. at 770.

43. Yablon-Zug, *supra* note 24, at 71.

44. Zug, *supra* note 29, at 1156.

45. *Id.* at 1157 (quoting MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 25, 37 (2005)).

46. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

47. *Id.*

48. *Id.*

49. *Santosky v. Kramer*, 455 U.S. 745, 749 (1982).

50. *Id.* at 766–67.

51. *See, e.g.*, NEB. REV. STAT. § 43–292 (2009) (grounds for termination include abandonment, neglect, conduct that is found to be seriously detrimental to the well-being of the child, permanent mental illness such that the parent is unable to care for the child, or abuse); N.C. GEN. STAT. § 7B–1111(a) (2012) (grounds for termination include abuse, neglect, willful abandonment, or the previous termination of the parent's rights of another child paired with lack of the ability or willingness to establish a safe home).

52. *Santosky*, 455 U.S. at 770.



order of termination unless the record shows that it is not in the child's best interest to terminate the parent's rights.<sup>53</sup>

The standard for terminating a parent's rights is much higher than that for removal because the loss threatened in a termination proceeding is "a significant deprivation of liberty."<sup>54</sup> Therefore, the intermediate standard of proof, clear and convincing evidence, is necessary to "preserve fundamental fairness."<sup>55</sup> Thus, while the State has a compelling interest to protect children, the State's burden to show that the child is in need of protection is heightened in proportion to the intrusion on the parent's constitutionally protected interest.

Professor Zug also identifies the State's interest in educating citizen children and keeping these children connected to the United States.<sup>56</sup> Thomas Jefferson asserted that it is necessary to educate citizens to prepare them to participate in the political system and to preserve the country's freedom and independence.<sup>57</sup> While the Supreme Court has recognized the importance of education as essential to the future of the country,<sup>58</sup> it has never held that a parent's right to the care and custody of his or her children can be terminated in favor of a democratic education and an American family. In cases where the parent's rights have been subordinated, it is not the parent's custody that is at issue, but rather the parent's right to direct the religious and moral upbringing of his or her children.

For example, in *Mozert v. Hawkins County Board of Education*, the State's interest was held to trump the parents' rights because yielding to the parents' rights concerning the direction of the child's education at a public school would be detrimental to the State.<sup>59</sup> In *Mozert*, the Tennessee Board of Education adopted a reading curriculum that exposed students to stories to which their parents objected on religious grounds.<sup>60</sup> One mother objected to the reading curriculum because the stories promoted "a religious tolerance that all religions are merely different roads to God."<sup>61</sup> The court recognized that children attending public schools must be exposed to the "fundamental values 'essential to a democratic society' . . . 'includ[ing] tolerance of divergent political and religious

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53. *In re B. & J.*, 756 N.W.2d 234, 239 (Mich. Ct. App. 2008).

54. *Santosky*, 455 U.S. at 756 (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)).

55. *Id.* at 756.

56. Zug, *supra* note 29, at 1147-52.

57. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

58. *E.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (holding that school is where children learn values essential for citizenship).

59. 827 F.2d 1058 (6th Cir. 1987).

60. *Id.* at 1060.

61. *Id.* at 1068.

views.’”<sup>62</sup> In the court’s estimation, the school’s reading curriculum did not create an unconstitutional burden under the Free Exercise Clause, and the State’s interest in educating its children outweighed the parents’ religious objections.<sup>63</sup>

Conversely, in *Wisconsin v. Yoder*, the Supreme Court held that the State’s interest in a child’s education “is not totally free from a balancing process when it impinges on fundamental rights and interests, such as . . . the traditional interest of parents with respect to the religious upbringing of their children.”<sup>64</sup> In *Yoder*, Amish parents declined to send their children to public or private school, thereby violating Wisconsin’s compulsory education law.<sup>65</sup> The Court explained that in order for the State to compel education, the State must show that there is a compelling state interest of sufficient magnitude to override the parent’s right under the Free Exercise Clause.<sup>66</sup> The Court recognized the State’s interest in formally educating its children in order to prepare its citizens to participate intelligently in the political system and to create self-sufficient citizens.<sup>67</sup> This interest, however, was not so compelling that it outweighed the Amish parents’ right to raise their children in the Amish religion, and the community was held to be exempt from the compulsory education laws.<sup>68</sup>

As the Supreme Court demonstrated in *Yoder*, the State’s interest in its citizen children may trump a parent’s constitutional right, but only in select circumstances. When compared to the parent’s constitutional right to the care and custody of his or her children, however, the State’s interest in keeping its citizen children connected to the United States and educating them is not so substantial that it would trump the parent’s rights.

For the State to keep citizen children of deported fit parents in the United States, the State would not merely be impinging on the parent’s right to the care and custody of his or her children, but would be terminating it permanently. Before taking such extreme and permanent action, the court must balance the private interests affected, the risk of error, and the countervailing government interest.<sup>69</sup> When balanced, the State’s interest does not outweigh the parent’s constitutional right to the care and custody of his or her children.

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62. *Id.* (quoting *Bethel*, 478 U.S. at 681).

63. *Id.* at 1070.

64. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

65. *Id.* at 208.

66. *Id.* at 214.

67. *Id.* at 221.

68. *Id.* at 222.

69. *Santosky v. Kramer*, 455 U.S. 745, 754 (1982).

### C. *The Child's Two-Fold Interest*

Children have an interest that must be represented on equal footing with that of the parents and the State. The child's interest in dependency and termination proceedings has been evaluated using two distinct, but commonly confused, standards of representation: the *child's best interest* and the *child's interest*.<sup>70</sup> The *child's interest* refers to the child's express wishes, whereas the *child's best interest* refers to a determination made by a court appointed advocate that is then presented to the court.<sup>71</sup> While the child's interest and the child's best interest materialize as adverse positions in many instances, the two interests are, in actuality, different manifestations of the child's rights, both statutory and constitutional. In a proceeding that determines what will happen to a child, the child's rights cannot be ignored.<sup>72</sup>

#### 1. THE CHILD'S CONSTITUTIONAL INTEREST IN PRESERVING FAMILIAL RELATIONSHIPS

Children, like their parents, have a constitutional interest in preserving their parent-child relationship.<sup>73</sup> An erroneous termination of the child's relationship with his or her parents deprives the child of "the right of support and maintenance, for which he may thereafter be dependent on society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited period], but forever."<sup>74</sup> In light of the permanent and far-reaching effect of termination, the parent and the child share an interest in preserving their relationship until and unless the state has proven the parent unfit.<sup>75</sup>

Justice Stevens has characterized the child's interest in preserving the parent-child relationship as a liberty interest protected by the Fourteenth Amendment.<sup>76</sup> In his dissenting opinion in *Troxel v. Granville*, he urged the court to consider the child's rights instead of treating the child

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70. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES A-1 cmt. (2003).

71. *About Us*, COURT APPOINTED SPECIAL ADVOCATES, [http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.6FB1/About\\_Us\\_\\_CASA\\_for\\_Children.htm](http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm) (last visited Jan. 15, 2013).

72. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES A-1 introductory cmt. (2003) (The American Bar Association's *Standards of Practice for Lawyers Representing Children in Custody Cases* indicates that one of its purposes is to keep the child's best interest "in the center of the courts' attention" and to "promote the best interests of children.").

73. *Santosky*, 455 U.S. at 760 ("But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.").

74. *In re K.S.*, 515 P.2d 130, 133 (Colo. App. 1973).

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

76. *Troxel v. Granville*, 530 U.S. 57, 87-89 (2000) (Stevens, J., dissenting).

as property in a dispute between the State and the parents.<sup>77</sup> He explained that even though the Court had not opined on the child's liberty interests, to him it was apparent that since parents and families have fundamental liberty interests in preserving familial relationships, children naturally have these same interests, which must be considered in the balancing equation alongside the parents' and the State's interests.<sup>78</sup>

## 2. THE CHILD'S STATUTORY RIGHT TO PERMANENCY

The child's rights are not only constitutional in origin but also statutory. In 1997, Congress enacted the Adoption and Safe Families Act of 1997 ("ASFA")<sup>79</sup> to encourage states to achieve permanency for the children in their care, recognizing children's right to a permanent home.<sup>80</sup> As the predecessor to the ASFA, the Adoption Assistance and Child Welfare Act of 1980 ("AACWA")<sup>81</sup> articulated the policy goal of family preservation by mandating reasonable efforts aimed at keeping families together.<sup>82</sup> This policy, however, did not lend itself to establishing permanency for children in foster care and resulted in larger foster care caseloads in the 1980s.<sup>83</sup> Congress soon recognized the benefits of permanency and sought to decrease the number of children perpetually in state custody through the enactment of the ASFA.

The ASFA shifted the focus of the AACWA by amending the latter statute in several important ways.<sup>84</sup> First, where the AACWA required child welfare agencies to make reasonable efforts to keep families together, the ASFA limits the circumstances under which states must attempt to keep families together and encourages expedited termination of parental rights proceedings.<sup>85</sup> Second, unlike the AACWA, the ASFA requires permanency hearings within the first twelve months of a child's placement in foster care to determine if the child may be "'freed' for adoption."<sup>86</sup> Moreover, the ASFA requires that states initiate termination proceedings against the parent after the child has spent fifteen of the most recent twenty-two months in foster care.<sup>87</sup>

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77. *Id.*

78. *Id.* at 88–89.

79. Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 11 Stat. 2115 (codified as amended at 42 U.S.C. §§ 673b, 678, 679b (2012)).

80. Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 1 (2001).

81. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96–272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

82. *Id.*

83. *Id.* at 3.

84. *Id.*

85. 42 U.S.C. § 671(a)(15) (2012); Adler, *supra* note 80, at 3.

86. 42 U.S.C. § 675(5) (2012); Adler, *supra* note 80, at 3.

87. 42 U.S.C. § 675(5); C. Elizabeth Hall, Note, *Where Are My Children . . . And My Rights?*

The ASFA shifted the focus of child welfare from the rights of the parents to the rights of the children. The AACWA recognized the benefits of keeping families together and statutorily forced states to enact legislation to support reunification efforts.<sup>88</sup> While noble in its efforts, the AACWA induced states to pass legislation that effectively deprived children of their right to permanency.<sup>89</sup> The ASFA, in contrast, recognized that the goal for some families should be reunification, but that this could not be the goal for every child without depriving some children of their right to a permanent and stable home.

### III. STRIKING A BALANCE

Terminating a parent's rights is the most extreme and permanent result in child welfare cases. Termination denies the parent physical custody, interferes with the right to communicate and visit with the child, and prevents the parent from ever regaining custody of the child.<sup>90</sup> Moreover, the child is negatively affected by an erroneous termination. Children permanently lose the right to their parent-child relationship and all that this relationship entails: support, maintenance, inheritance, and companionship.<sup>91</sup> To interrupt this natural relationship, the State must balance all of the interests involved and determine that the parent is not fit to care for and thus retain custody of his or her children.<sup>92</sup>

The fitness standard strikes a fair balance, ensuring the child's safety while protecting both the parent and the child from an erroneous termination. The Supreme Court has stated that "[t]here is a presumption that fit parents act in their children's best interests."<sup>93</sup> Where a parent is fit and there is no finding of abuse, abandonment, or neglect, a child's best interest is not in dispute. Alternatively, where there have been findings of abuse, abandonment, or neglect, but the State has not proven the grounds for termination by clear and convincing evidence, there are less restrictive means to protect the child than permanently ending the legal parent-child relationship.<sup>94</sup>

After a child is initially removed from his or her home and adjudi-

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*Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459, 1467-68 (2011).

88. Adler, *supra* note 80, at 3.

89. The state legislation encouraging family reunification caused children from troubled families to spend more time in foster care as the agencies made futile attempts to preserve the family relationships. *Id.*

90. *Santosky v. Kramer*, 455 U.S. 745, 749 (1982).

91. *In re K.S.*, 515 P.2d 130, 133 (Colo. App. 1973).

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

93. *Troxel v. Granville*, 530 U.S. 57, 58 (2000).

94. 42 U.S.C. § 675(5) (2012) (During periodic case review, the court identifies the least restrictive placement that is appropriate for the child's best interest and special needs. The court

cated dependent, the State must provide the child's parents with a case plan that delineates services required of the parents as well as the child while the child is in foster care.<sup>95</sup> The goal of a case plan is to facilitate the return of the child to his or her own home once it is safe to do so and the parents' issues have been resolved.<sup>96</sup> In cases where the parent has not completed or is unable to complete the required services enumerated in the case plan, termination of that parent's rights is allowable only after the parent has been proven to be unfit by clear and convincing evidence.<sup>97</sup> When the burden to terminate the parent's rights cannot be met, there are other permanency options available.<sup>98</sup>

For example, the court has the discretion to extend the parent's case plan in extraordinary circumstances, allowing the parent more time to complete it and thus reunify the family. Alternatively, there are other permanency options where reunification may not be in the child's best interest.<sup>99</sup> Permanency options that do not include terminating the parent's rights provide the child with the stability of a permanent placement, while preserving the parent-child relationship. Such options preserve not only the parent's right to communicate, visit, and possibly petition for custody of his or her child, but also the child's rights that are tied to the parent-child relationship, such as inheritance, support, maintenance, and companionship.

#### A. *Defining the Best Interest of the Child*

Where suspicions of abuse or neglect exist, the child may be taken into state custody if a court determines that this is in the child's best interest.<sup>100</sup> However, as discussed above, the standard for termination is much higher than that for a temporary removal.<sup>101</sup> A best interest standard provides little to no guidance to courts in deciding when to terminate a parent's parental rights, especially given that courts must still address the parent's constitutional considerations.<sup>102</sup> In the 1970s, Professor Michael S. Wald opined that a best interest standard for termination would result in decisions reflecting a judge's own "folk psychology," promoting discretionary, and even discriminatory,

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determines the permanency plan for the child, whether it be reunification, termination of parental rights, legal guardianship, or another planned permanent living arrangement.).

95. 42 U.S.C. § 675(1)(B).

96. *Id.*

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

98. 42 U.S.C. § 675(5).

99. 42 U.S.C. § 675(1)(E) (The child could be placed with a relative, a legal guardian, or in another planned permanent living arrangement.).

100. Zug, *supra* note 29, at 68.

101. See *supra* Part II.A.

102. *In re P.L.*, 778 N.W.2d 33, 36 (Iowa Ct. App. 2010).

removal.<sup>103</sup> In termination proceedings, however, the child's best interest is considered only after the court has determined that the parent is unfit, thereby eliminating the possibility of discretionary removal.<sup>104</sup>

Any use of the best interest standard raises issues of subjectivity. Every individual comes from a unique set of circumstances, bringing with him his own preferences, cultural norms, and customs. Ultimately, it would be impossible to completely remove the decision maker's "folk psychology" from a best interest determination.<sup>105</sup> To minimize the effect of the decision maker's personal bias in deciding what is in a child's best interest, many states' statutes delineate specific factors for courts to consider in making these determinations.<sup>106</sup> Those states that do not list factors give general goals and guidance, leaving the decision to the court's discretion.<sup>107</sup>

As murky as the best interest waters may be, the courts have consistently declared that a determination of a child's best interest is not a comparative one. In 1898, the Supreme Court of Nebraska declared that "[t]he court has never deprived a parent of the custody of a child merely because, on financial or other grounds, a stranger might better provide."<sup>108</sup> More recently, in termination cases against deported parents, courts have held that a parent cannot be deprived of their parental rights solely because the State believes the child will have a better life in the United States as opposed to another country.<sup>109</sup>

For example, in *In re Interest of Angelica L.*, Maria Luis' parental rights as to her two children, Daniel and Angelica, were terminated after the juvenile court concluded that it was in the children's best interest not

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103. Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards of Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 649–50 (1976).

104. E.g., *In re B. & J.*, 756 N.W.2d 234, 239 (Mich. Ct. App. 2008) (explaining that once a parent is found to be unfit, the court will enter an order terminating parental rights unless it is clear that termination is not in the child's best interest); *In re Interest of Angelica L.*, 767 N.W.2d 74, 91–92 (Neb. 2009) (explaining that the state must prove that one of more of the statutory grounds for termination has been met by clear and convincing evidence and that termination is in the child's best interest); *In re Interest of Xavier H.*, 740 N.W.2d 13, 25 (Neb. 2007) (explaining that the court may evaluate whether termination is in the best interest of the child only after the parent is found to be unfit).

105. Professor Wald argues that a test requiring judges and child welfare officials to weigh the likely impact of living at home or in foster care requires calculations that are extremely difficult regardless of how carefully they are defined. Wald, *supra* note 103, at 650.

106. CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD: SUMMARY OF STATE LAWS, (2010) available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.cfm#5](https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm#5).

107. *Id.*

108. *Norval v. Zinsmaster*, 77 N.W. 373, 374 (Neb. 1898).

109. E.g., *In re Interest of Angelica L.*, 767 N.W.2d 74, 94 (Neb. 2009); *In re B & J*, 756 N.W.2d 234, 241 (Mich. 2008); *In re Xavier H.*, 740 N.W.2d 13, 26 (Neb. 2007).

to return with her to Guatemala.<sup>110</sup> Angelica was born two months premature and experienced health problems as an infant.<sup>111</sup> Maria, recognizing that she needed help, sought assistance from Healthy Starts, a program that educates parents on the growth and development of infants.<sup>112</sup> Maria again took Angelica to the hospital when Angelica was having trouble breathing.<sup>113</sup> The doctor treated Angelica and instructed Maria to bring her back in two days, but believing that Angelica was recovering, Maria did not return.<sup>114</sup> When the Department of Health and Human Services ("DHHS") arrived at Maria's house, Maria panicked and misidentified herself as the babysitter.<sup>115</sup> Consequently, Maria was arrested for obstructing a government operation and her children were placed in protective custody.<sup>116</sup>

Not long after her arrest, Maria was taken into custody by immigration authorities and deported to Guatemala.<sup>117</sup> Though the distance made everything more complicated, Maria did not stop fighting for her children and attempted to complete her case plan in Guatemala.<sup>118</sup> When Maria sought help in locating the requisite parenting classes and counseling, the caseworker told her that Maria would have to "take the initiative" herself in finding and arranging those services.<sup>119</sup>

After the children had been in foster care for more than fifteen months and Maria had not strictly complied with her case plan, the State filed a petition to terminate her parental rights.<sup>120</sup> During the trial, a clinical psychologist testified that the children would experience culture shock if they were sent to Guatemala.<sup>121</sup> The psychologist also testified that the standard of living is lower in Guatemala than in the United States.<sup>122</sup> He did not, however, testify that he had concerns for the children's safety in Maria's care.<sup>123</sup> In addition, two home studies concluded that Maria's home in Guatemala was suitable for the children, and that it

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110. *In re Angelica L.*, 767 N.W.2d at 87.

111. Maria first took Angelica to the hospital when she was one-month old and was "suffering from dehydration, malnutrition, a urinary tract infection, and a left pulmonary branch stenosis." *Id.* at 81.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 82.

117. *Id.*

118. *Id.* at 83.

119. *Id.* at 84.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 85.



was in the children's best interest to return with her.<sup>124</sup> The juvenile court, however, found that Maria was unfit because she "either A) embarked on an unauthorized trip to the United States with a newborn or premature infant or B) gave birth to a premature infant in the United States" and "did not provide the basic level of postnatal care . . . ."<sup>125</sup>

The Nebraska Supreme Court overturned Maria's termination and sent the children with her to Guatemala. The Court found that Maria's attempt to bring her children to the United States did not constitute a lack of care for her children and that none of the State's evidence established that Maria was unfit.<sup>126</sup> Furthermore, the Court noted that the State's belief that growing up in Guatemala would put the children at a disadvantage as compared to growing up in the United States was insufficient to show that it was in the best interest of Daniel and Angelica to remain with their foster parents.<sup>127</sup> Specifically, the Court declared that "the 'best interests' of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another."<sup>128</sup>

Nebraska is not alone in its assertion. In *In re B. & J.*, a Michigan appellate court noted that a subjective belief that the children would have a more prosperous life in the United States in comparison to Guatemala was not evidence that it was in the children's best interest to terminate the parent's parental rights.<sup>129</sup> A Maryland appellate court has also recognized that the best interest standard is not simply a determination that one environment is superior to another.<sup>130</sup>

### B. *The Bounds of the Child's Rights*

Frequently, a child's voice gets lost and the court instead relies on a child's best interest determination. Children, regardless of age, have ideas, thoughts, and opinions that should be considered in any proceeding affecting them.<sup>131</sup> By the same token, just because a child is involved does not mean that the child's desires will determine the outcome. For example, in cases where the child is in need of protection, the child's desire to stay with an abusive or neglectful parent is outweighed by the State's duty to protect the child. The State plays a vital role in

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124. *Id.* at 87.

125. *Id.* at 88.

126. *Id.* at 93.

127. *Id.* at 93-94.

128. *Id.* at 94.

129. *In re B & J*, 756 N.W.2d 234, 241 (Mich. 2008).

130. *In re Yve S.*, 819 A.2d 1030, 1038 (Md. 2003).

131. MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS 11 (2011).

protecting children from harm, and the State occasionally must act in ways that are contrary to the child's wishes.<sup>132</sup> In such instances, even though the State is acting against the child's expressed wishes, it is asserting the child's right to protection.<sup>133</sup>

Similarly, where a parent is fit, the State will not impinge on a parent's right to make decisions about where his or her children live.<sup>134</sup> The child's wishes are not always aligned with those of the parent. Parents are charged with the duty to protect their children's rights and interests.<sup>135</sup> Children have a constitutional interest in preserving their relationship with their parents and the right to live in a home free from abuse and neglect.<sup>136</sup> Absent a finding of parental unfitness, the parents serve the child's interest in preserving the parent-child relationship by making decisions about where the family will live.<sup>137</sup> A fit parent's choice regarding where to live does not impinge on the child's rights, even where the parent's choice is contrary to the child's wish.

Children's rights are not dependent on the citizenship of their parents. A United States citizen child of a noncitizen parent has the same rights as a child of a citizen parent. When involving a parent's decision to cross a border, "a child's voice cannot be amplified beyond the consideration it would warrant in other instances where children disagree with parental decisions about where to live."<sup>138</sup> Thus, absent a finding of parental unfitness, the child's parent has equal authority to make decisions about both domestic moves and international moves without State imposition.<sup>139</sup>

After balancing the child's rights, the parents' rights, and the State's duty to protect its children, it is clear that applying a best interest standard in termination proceedings where deportation is probable will encroach on both the parent's and the child's constitutionally protected interest in preserving their relationship with each other. The deportation status of the parent is irrelevant in termination proceedings. Where there is no finding of unfitness, it is in the child's best interest and constitutional interest to reunite with his or her parent. The child's best interest analysis is not comparative, and the child's voice cannot be given more weight solely because the parent is moving the child across a border.

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132. David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1206 (2006).

133. *Id.* at 1179.

134. *Id.* at 1178.

135. *Id.* at 1179.

136. *Id.*

137. *Id.*

138. *Id.* at 1206.

139. *Id.*

Alternatively, using the fitness standard in termination proceedings regardless of the alien or deportation status of the parents protects the child from harm, while ensuring that the parent and child are not erroneously deprived of their relationship.<sup>140</sup>

#### IV. IS HISTORY REPEATING ITSELF?

This is not the first time that American society has accepted the idea that children are better off with traditional American families. This country's history is littered with prejudices against parents based on their ethnicity, religion, language, class, and marital status.<sup>141</sup> The child welfare system provides meaningful protection for children subjected to abuse and neglect, but at the same time it has frequently confused abuse and neglect with poverty and culture.<sup>142</sup> Looking through the history of child welfare, the American standard of good parents is clear: "married; White; Christian (preferably Protestant); Anglo, and relatedly, English-speaking; and middle class."<sup>143</sup> The child welfare system ignores the reality that all parents do not fit into the mold that the system has created. A good parent may look, sound, and act differently than the "ideal" parent in the nuclear family that has become the only acceptable model. When families are separated, parents lose the opportunity to pass down their language, culture, and values—and children lose their heritage.<sup>144</sup> Two major child welfare movements in history sought to "Americanize" children of culturally different families: European immigrants in the nineteenth century and Native Americans.

##### A. *The Orphan Train Movement*

In the nineteenth century, between 150,000 and 200,000 children were put on trains in the Eastern United States and relocated to live in the Western United States with farm families.<sup>145</sup> These trains came to be known as "orphan trains."<sup>146</sup> Despite the movement's name, many of these children were not orphans at all. In the early 1800s, cities began to expand and a significant number of poor and neglected children suffered

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140. The Supreme Court has held that the Fourteenth Amendment applies equally to United States citizens and aliens. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Using a different standard for termination of parental rights depending on the parent's deportation status violates the Fourteenth Amendment because it is an impermissible bait and switch, using "deportation status" as a proxy for "alien status."

141. Annette R. Appell, *"Bad" Mothers and Spanish-Speaking Caregivers*, 7 NEV. L.J. 759, 759 (2007).

142. *Id.* at 760.

143. *Id.* at 765.

144. *Id.* at 760.

145. Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 MOD. AM. at 3, 4 (2009).

146. *Id.*

terrible conditions, living in almshouses alongside disabled and poor adults.<sup>147</sup> Public services did not adequately address the children's needs, so private organizations began to intervene and implement programs to protect children and prepare them for adulthood.<sup>148</sup> These groups were known as the "child savers."<sup>149</sup> The child savers sought to better the living conditions of the children, providing basic education and placing children into apprenticeships or indentured servitude.<sup>150</sup>

The mid-1800s were also marked by an economic recession and jobs became scarce.<sup>151</sup> A growing number of children were living on the city streets, and, as a result, more private charities were formed to meet the increasing demand for children's services.<sup>152</sup> Due to the lack of employment opportunities in the East, the charities began placing the children in rural areas where the labor was needed.<sup>153</sup> States in the East enacted legislation that allowed the private charities to place children out of state with no geographic restrictions.<sup>154</sup> The children were placed on trains in mass numbers and sent to the West to work on farms as indentured servants.<sup>155</sup>

The majority of the children "saved" were not orphans, but were children of Catholic immigrant working class and poor families, often headed by single mothers.<sup>156</sup> The disproportionate number of immigrant children being removed from their homes was not a coincidence. The cultural atmosphere of the time emphasized the importance of immigrant children being raised in "good" American, Protestant homes.<sup>157</sup> The child savers sought to reform children by "removing them from their families of origin so they could be socialized into appropriate citizens."<sup>158</sup> Furthermore, the strategy of the Children's Aid Society included deliberately separating immigrant Catholic children from their families.<sup>159</sup> Child savers took children from their homes because the child savers viewed the parents as "vile."<sup>160</sup> These children were put on trains headed West and would stand humiliated and terrified on plat-

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147. Appell, *supra* note 141, at 763.

148. *Id.*

149. *Id.*

150. Trammell, *supra* note 145, at 3.

151. *Id.* at 3-4.

152. *Id.* at 4.

153. *Id.*

154. *Id.*

155. *Id.*

156. Appell, *supra* note 141, at 763.

157. Naomi Cahn, *Race, Poverty, History, Adoption, and Child Abuse: Connections*, 36 *LAW & SOC'Y REV.* 461, 466 (2002).

158. *Id.* at 467.

159. *Id.* at 464.

160. *Id.*

forms as new families inspected them as if they were cattle.<sup>161</sup> Some children were lucky enough to land in homes with loving families.<sup>162</sup> Others were not so lucky. Some disappeared en route,<sup>163</sup> while many were left with families who abused them and exploited them for their labor.<sup>164</sup>

This movement began as a sincere attempt to save destitute, orphaned children and send them to appropriate homes where they would grow up to be "American." Defenders of the movement point to the fact that "at the time, thousands of ragged children swarmed New York City streets, subsisting as scavengers, prostitutes, beggars, peddlers, [and] thieves."<sup>165</sup> In reality, families were judged and torn apart as a result of their religion and culture. Society sincerely believed that the children would be better off in American homes as opposed to living with their poor, immigrant families. In retrospect, the entire enterprise is "viewed with a jaundiced eye,"<sup>166</sup> and the child savers are "regarded as 'cruelly indifferent to the very children [they] had been designed to help.'"<sup>167</sup>

Terminating parental rights because a parent is or will be deported because a modern-day court has determined that it is in the child's best interest to stay in the United States will produce a result similar to that of the Orphan Train Movement: non-traditional and diverse families—those that diverge from the model that society has established as "normal"—will be torn apart because of the belief that children are better off in a different environment than the one the parent would provide.

### B. "Civilizing" Native Americans

A similar cultural bias has nearly destroyed the Native American tribes in the United States. It has been said that "children are the most 'logical targets of a policy designed to erase one culture and replace it with another' since they are the most 'vulnerable to change and least able to resist it.'"<sup>168</sup> This is exactly what colonial settlers attempted to

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161. LeRoy Ashby, *History Through Tears*, 57 OR. ST. B. BULL. 70 (1997). See also Trammell, *supra* note 145, at 5 (describing a newspaper report telling the readers that the children were being shipped all over the country, "given away and sold like cattle").

162. Kurt Mundorff, *Children As Chatel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 131, 176 (2003).

163. Ashby, *supra* note 161.

164. *Id.*

165. NINA BERNSTEIN, *THE LOST CHILDREN OF Wilder: The Epic Struggle to Change Foster Care* 199 (1st ed. 2001).

166. *Id.*

167. Yablon-Zug, *supra* note 24, at 107 (quoting STEPHEN O'CONNOR, *ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED* xix (2001)).

168. Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing*

do beginning as early as the 1600s.<sup>169</sup>

### 1. EARLY EFFORTS AT ASSIMILATION

During the 1600s, missionaries, with the intention of educating the Native American children, removed these children from their community and assimilated them into mainstream society.<sup>170</sup> This exercise continued into the mid-1700s when missionaries established boarding schools for Native American children.<sup>171</sup> The children were taught in a "Christian manner," effectively stripping them of their heritage and culture, while converting them into English adults.<sup>172</sup> The missionaries were relatively unsuccessful in converting the children, but their desire to civilize the "savages" set the stage for similarly inspired federal policies.<sup>173</sup>

In the 1800s, "humanitarian reformers" also aimed to assimilate the Native Americans into mainstream society.<sup>174</sup> Despite the federal government's political relationship with the Native Americans, the individual states voiced their hostility towards tribal sovereignty.<sup>175</sup> In response, Congress passed the Indian Civilization Fund Act, which funded programs to provide moral education for Native American children, thereby stripping them of their culture.<sup>176</sup> This was just the beginning of a number of federal policies aimed at "civilizing" the Native Americans. The programs removed the children from their homes and tribes and placed them in boarding schools.<sup>177</sup> When temporary removal failed to replace the cultural identities of the children, more extreme measures were utilized.<sup>178</sup> Federal boarding schools added a provision that required the Native American students to "spend a period of one or more years of their school life away from the school in selected white families, under the supervision of the school . . . thus gaining experience in practical self-support and induction into civilized family life otherwise unattainable."<sup>179</sup>

In the 1950s, Congress adopted a policy that sought to assimilate

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*Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 10 (1998) (quoting CLYDE ELLIS, *TO CHANGE THEM FOREVER* 3 (1996)).

169. *Id.*

170. *Id.*

171. *Id.* at 12.

172. *Id.*

173. *Id.* at 13.

174. *Id.* at 13-14.

175. *Id.* at 14.

176. *Id.*

177. *Id.* at 16.

178. *Id.* at 18.

179. *Id.* (quoting COMM'R OF INDIAN AFFAIRS, ANNUAL REPORT 430 (1900)).

the Native American children by permanently removing them from their tribes and families and terminating their parents' rights.<sup>180</sup> The previously constitutionally protected relationship between the federal government and the Native American tribes was fading, and Congress passed a string of laws that sought to eliminate tribal sovereignty altogether.<sup>181</sup> State governments were given jurisdiction over tribes and their members, allowing state welfare agencies to manage "matters basic to [Native American] cultural integrity such as education, adoption, and land use."<sup>182</sup> Education became the focus again, and the newly instituted programs were devoid of any instruction on Native American tribal culture.<sup>183</sup> These efforts at assimilation, however, not only failed, but left Native American children with deep-seated feelings of inferiority and self-consciousness because of their heritage.<sup>184</sup>

In addition to controlling education, the state agencies also controlled Native American child welfare cases during this time.<sup>185</sup> As outsiders, the state officials were unable and unwilling to address the cultural interests of the families they sought to help.<sup>186</sup> The cultural gap between the tribes and the welfare officials resulted in policies aimed at removing the children from their families and placing them in non-Native American homes where it was believed that they would be better off.<sup>187</sup> The Native American parents and tribes, however, continued to fight for their children and their culture throughout the assimilation efforts.<sup>188</sup> Despite the parents' and tribes' attempts, one-third of Native American children were separated from their families and their tribes and placed in non-Native American foster homes, adoptive homes, and educational institutions before Congress passed the Indian Child Welfare Act ("ICWA") in 1978.<sup>189</sup>

Ignorance of the Native American cultural and social norms of child rearing triggered the states' decisions to remove many of the children from their homes and communities.<sup>190</sup> In particular, child welfare officials had no conception of the Native American family dynamics, working under the belief that members of the nuclear family are the only

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180. *Id.* at 20.

181. *Id.*

182. *Id.* at 20–21 (quoting FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 58 (Rennard Strickland et al. eds., 1982)).

183. *Id.* at 21.

184. *Id.*

185. *Id.*

186. *Id.* at 22.

187. *Id.*

188. *Id.* at 16–17, 22.

189. *Id.* at 2.

190. *Id.* at 25.

acceptable individuals to assume parenting positions.<sup>191</sup> Tribal culture, however, recognized, and continues to recognize, that the extended family assumes the same child rearing responsibilities as the parent, while non-tribal society interpreted this shared parenting system as evidence of neglect.<sup>192</sup> This culture clash and “my-way-or-the-highway” approach adopted by child welfare agencies and juvenile courts led to the termination of Native American parents’ rights in many cases.

Additionally, societal notions of poverty led child welfare officials to remove children from homes that were perfectly suitable by Native American standards.<sup>193</sup> The American middle class typically judges what constitutes a suitable home for a child based on the home’s material attributes, which have far less value in the Native American culture.<sup>194</sup> Consequently, the rights of Native American parents were terminated on the grounds that pre-adoptive families were in a superior financial position. By child welfare standards, superior financial ability meant that the pre-adoptive families were able to provide a better home and way of life than the child’s own parents could provide.<sup>195</sup> Furthermore, because the child’s best interest standard was utilized in termination proceedings involving Native American parents, the burden was on the parents to show that they were fit to raise their children in accordance with American society’s middle class standards.<sup>196</sup>

## 2. THE INDIAN CHILD WELFARE ACT OF 1978

Congress enacted the ICWA<sup>197</sup> in 1978 to protect the Native American children, their families, and their tribes. The ICWA was designed to prevent further abuses by child welfare agencies and to remedy the severe damage that had been done to the Native American tribes, families, and culture.<sup>198</sup> The ICWA was “an official acknowledgement by the federal government that [Native American] children are not necessarily ‘better off’ far from the influence of family and community[, and] recognize[d] that [a Native American] child’s best interests may be inextricably connected to that of the tribe.”<sup>199</sup>

Prior to the enactment of the ICWA, child welfare officials removed children from their homes and terminated their parents’ rights

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191. *Id.*

192. *Id.*

193. *Id.* at 27.

194. *Id.*

195. *Id.*

196. *Id.* at 28.

197. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901-1963 (2012)).

198. Graham, *supra* note 168, at 32.

199. *Id.* at 34.



based on the officials' cultural biases and preconceived notions that Native American children would be better off in non-Native American homes.<sup>200</sup> It has been more than thirty years since Congress, through legislation, recognized that a child's best interest cannot be based on financial comparatives and societal norms about culture and education. Still, child welfare officials and judges today are using the same narrow-minded notion of what constitutes a "good" home and a "good" parent in order to terminate parents' rights. Immigrant parents, like Native American parents, are not necessarily unfit because they are poorer than most Americans, live in a culturally distinct community, and have different values regarding how to raise their own children.

The ICWA offers a model for child welfare reform to follow. It does not allow Native American parents to subject their children to abuse or harm, nor does it exempt the parents from State oversight where state interference is warranted. The ICWA, however, establishes minimum standards and procedural safeguards for the removal of Native American children from their homes.<sup>201</sup> This same approach should be utilized in the context of deported and deportable immigrant parents. The children of immigrants have the right to grow up free from abuse and neglect, and child welfare agencies and officials must continue to act in a manner consistent with this right, balancing the parent's right to the care and custody of his or her child with the State's duty to protect its children. Immigrant parents, in turn, should receive the same recognition and protections that the ICWA affords Native American parents. The idea that children are better off living with White or American families was rejected by Congress more than thirty years ago. Allowing a court to terminate a deported or deportable parent's rights under the child's best interest standard instead of the fitness standard would invite child welfare officials, consciously or not, to make the termination decision based on the idea that the child would be "better off" growing up in the United States as compared to the parent's home country.

## V. SO THERE'S A PROBLEM; HOW DO WE FIX IT?

As evidenced by the numerous juvenile court decisions terminating a parent's rights based on the parent's deportation status, there is clearly a disconnect between the law and practice.<sup>202</sup> One way to solve this problem would be to change the law. At the outset, this Comment presented Professor Marcia Zug's argument that, rather than continue to

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200. *Id.* at 32.

201. *Id.* at 33.

202. See, e.g., *In re M.M.*, 587 S.E.2d 825 (Ga. Ct. App. 2003); *In re B. & J.*, 756 N.W.2d 234 (Mich. Ct. App. 2008); *In re Interest of Angelica L.*, 767 N.W.2d 74 (Neb. 2009).

apply the parental fitness standard, the law should be changed to reflect the child's best interest.<sup>203</sup> This Comment has demonstrated that the fitness standard adequately addresses every party's interests, and that using the best interest of the child standard for situations where the parent will likely be deported is a constitutionally inadequate solution, and a historically censured approach toward cultures unlike that of mainstream America. However, the problematic intersect between child welfare law and immigration law must be addressed.<sup>204</sup> Several scholars have suggested different ways to remedy this tension.

One suggestion involves amending the Adoption and Safe Families Act of 1997 ("ASFA") to resolve the tensions between immigration law and child welfare law.<sup>205</sup> The ASFA requires that states initiate termination proceedings against the parent after the child has spent twelve consecutive months or fifteen of the most recent twenty-two months in foster care.<sup>206</sup> There are three narrow exceptions to this requirement, and if the child does not qualify for one of them, the State will be required to prove that the parent is unfit by clear and convincing evidence in order to terminate the parent's rights.<sup>207</sup> The ASFA, however, requires only that termination proceedings be commenced and does not indicate that the mere fact that a child has been in foster care for fifteen months is grounds to terminate the parent's rights.<sup>208</sup>

There are two major issues with the ASFA that, if addressed, could begin to remedy the tensions between immigration law and child welfare law. First, the ASFA does not address situations of detained or deported parents of United States citizen children. Parents of citizen children who are involved in deportation proceedings may be forced to leave their children in foster care. Depending on how long the deportation proceedings take, the incarceration may trigger termination proceedings under the ASFA's fifteen-month requirement. The fifteen-month trigger for termination proceedings poses a serious problem for undocumented immigrant parents who have been deported or are currently the subject of deportation proceedings.<sup>209</sup>

Oftentimes, children of undocumented immigrant parents land in foster care as a result of the parents' incarceration during deportation

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203. Zug, *supra* note 29, at 1143.

204. See Angela D. Morrison & David Thronson, *Beyond Status: Seeing the Whole Child*, 33 EVALUATION & PROGRAM PLAN 281, 281 (2010) ("Immigration law often operates in ways that intentionally hinder family unity, which in the child welfare context enjoys tremendous constitutional protection.").

205. Hall, *supra* note 87, at 1467-68.

206. *Id.*

207. *Id.* at 1470.

208. *Id.*

209. *Id.* at 1494.

proceedings and the parents' subsequent deportation.<sup>210</sup> These parents do not have the resources to defend themselves in termination proceedings, especially if the proceedings occur after they have been deported.<sup>211</sup> Caseworkers frequently deny help to these parents while they are incarcerated and after they have been deported by blocking access both to their children and to resources that could assist them in completing their case plan.<sup>212</sup> The ASFA's requirement that the State commence termination proceedings after fifteen of twenty-two months in foster care often results in detained and deported parents facing the possibility of losing their children forever with no access to assistance or resources that could help them defend themselves.<sup>213</sup>

The second way in which the ASFA adversely affects detained or deported parents is that when the expedited permanency process intersects with immigration law, the lack of integration of these disparate laws and policies leaves immigrant families at a severe disadvantage.<sup>214</sup> During deportation proceedings, federal immigration law does not allow courts to consider family ties or the fact that the undocumented immigrant has citizen children.<sup>215</sup> As a result, the parent's dependency or termination hearing could occur while the parent awaits his or her deportation hearing.<sup>216</sup> This intersection of criminal law, child welfare law, and immigration law and policy is not addressed, and this critical oversight results in severe consequences for immigrant families.

Additionally, communication is essential to child welfare practices.<sup>217</sup> Oftentimes, detained or deported parents are not provided access to interpreters or services tailored to their cultural needs and expectations.<sup>218</sup> This can cause faulty parental and family assessments, which in turn result in erroneous or premature termination.<sup>219</sup> The lack of culturally appropriate services further disadvantages parents when there could be placement with a relative rather than foster care placement.<sup>220</sup> Information is often lost in translation when dealing with par-

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210. *Id.*

211. *Id.*

212. See Zug, *supra* note 29, at 93 ("It is not uncommon for state child welfare agencies to withhold assistance, tell lies, and even contact immigration authorities if they believe such actions will ensure the termination of an immigrant parent's rights.").

213. Hall, *supra* note 87, at 1495.

214. Yali Lincroft & Bill Bettencourt, *The Impact of ASFA on Immigrant Children in the Child Welfare System*, 29 CHILD L. PRAC. 21, 24 (April 2010).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

ents who are not proficient in English.<sup>221</sup> Furthermore, social workers are not familiar with the process of placing children in a relative's care outside the United States because there are no guidelines for this kind of placement.<sup>222</sup> Remedying the linguistic and cross-cultural divide would begin the process of preventing erroneous terminations of deported yet fit parents.

In her student note, *Where Are My Children . . . And My Rights? Parental Rights Termination as a Consequence of Deportation*, C. Elizabeth Hall recognizes that the constitutional procedural safeguards that were designed to prevent wrongful termination of a parent's rights are failing in cases involving detained and deported parents.<sup>223</sup> She argues that one way to begin remedying the issue would be to amend the ASFA to account for the problems that detained and deported parents of citizen children face.<sup>224</sup> In 2009, such amendments were proposed in Congress as part of the Humane Enforcement and Legal Protections Separated Children Act ("HELP Separated Children Act").<sup>225</sup> The amendments would have created protocols for situations involving a detained or deported parent of United States citizen children.<sup>226</sup> If adopted, the Act would have required states to create guidelines to address both the child's best interest and the best outcome for the family.<sup>227</sup> Furthermore, deported or detained parents would be appointed a case manager or interpreter who speaks the parent's native language.<sup>228</sup> These protocols would demonstrate a respect for the immigrant parents' rights and prevent termination resulting solely from a parent's deportation.<sup>229</sup> Adoption of this Act, or one with similar protections for deported parents, would have prevented wrongful termination of a fit parent's parental rights and ensured that the child achieved permanency. Hall, however, suggests several changes that should be included in a reintroduced version of the Act.<sup>230</sup> These changes include a provision for a presumption that, absent a showing of parental unfitness, reunification is in the best interest of the both child and the family, as well as a specification that the best interest inquiries take place only after the fitness inquiry, consistent with current constitutional law.<sup>231</sup> In addition, Hall proposes that the

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221. *Id.*

222. *Id.*

223. Hall, *supra* note 87, at 1493.

224. *Id.* at 1493–94.

225. *Id.* at 1495; HELP Separated Children Act, H.R. 3531, 111th Cong. (2009).

226. Hall, *supra* note 87, at 1495; H.R. 3531 § 6(a)(3)(A).

227. Hall, *supra* note 87, at 1495; H.R. 3531 § 6(a)(3)(B), (E).

228. Hall, *supra* note 87, at 1495; H.R. 3531 § 6(a)(3)(D), (F).

229. Hall, *supra* note 87, at 1495.

230. *Id.* at 1496.

231. *Id.*

reintroduced Act indicate that the fifteen-month requirement does not apply to separated children, i.e. children legally in the United States living in foster care with a parent who has been detained by immigration authorities for deportation.<sup>232</sup>

Hall also suggests that adherence to the Vienna Convention on Consular Relations ("Vienna Convention") would aid in preventing erroneous terminations.<sup>233</sup> Fit parents who have been forced to leave their children in the United States should have access to resources that could prevent the wrongful termination of their parental rights. Adherence to the Vienna Convention in this situation would require the United States to notify the parent's consular post so that the consular officers could communicate with and provide legal representation to the detained noncitizen.<sup>234</sup> This consular involvement could provide the court with information about the parent's culture and the conditions in which the child will be raised if released with the parent upon deportation.<sup>235</sup> Whichever solution is adopted, one thing is certain: the best interest of the child standard cannot replace the fitness standard in termination of parental rights proceedings.

## VI. CONCLUSION

Current law requires that the State prove by clear and convincing evidence that a parent is unfit before the parent's legal relationship with his or her child may be permanently terminated. This standard appropriately balances the parent's and child's constitutional rights and the State's duty to protect children from harm. Immigrants' parental rights are protected by the Constitution to the same degree as the parental rights of citizen parents; therefore, a parent's country of citizenship should have no bearing on the termination of parental rights determination. Allowing a best interest of the child standard to govern termination proceedings against parents who will likely be deported invites cultural bias to taint the proceedings, whether such bias is conscious or not. The fitness standard requires the State to show that the children will be in danger if they are reunited with their parents and does not permit the court to terminate a parent's rights based solely on a subjective belief that the child might be better off in one home as compared to another.

History has demonstrated that preconceived notions about another's way of life may not only destroy an entire culture, but also adversely

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232. *Id.* at 1495, 1497-98.

233. *Id.* at 1499; Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

234. Hall, *supra* note 87, at 1500.

235. *Id.* at 1500-01.

affect the children who are torn from their families and communities. The children who were shipped from the Eastern city streets were certainly no better off with the Western farm families. In pursuit of a noble goal, the child savers sought to give the children a better life, but they failed, leaving the children to be exploited and abused. Additionally, before the ICWA was enacted in 1978, one-third of Native American children were ripped from their families, their tribes, and their cultures to be raised in White families.<sup>236</sup> The outsiders, who incidentally had power over the Native American tribes, mistakenly believed that they were helping the children. Finally, after hundreds of years of failed attempts at assimilating the Native Americans, Congress enacted the ICWA, recognizing that the forced removal Native American children was reprehensible. By the same token, immigrant parents and their citizen children deserve the same recognition and protection of their relationship that the Native Americans received under the ICWA. Terminating a deported parent's rights absent a finding of unfitness would produce the same type of forced removal that the ICWA was designed to prevent.

Rather than implement procedures that mirror heavily criticized historical movements, the federal government should enact further legislation to address and remedy the disconnect between federal immigration law and state child welfare law. Legislation that recognizes the disjuncture between these two areas of law and implements procedures and safeguards to protect the rights of detained and deported parents can prevent erroneous and wrongful terminations. Courts must consider the child's express wishes as well as the child's best interest in any proceeding affecting the child, but the current law considers these factors in termination proceedings only after the court has found that the parent is unfit. This sequence of events not only recognizes the parent's constitutional right to the care and custody of his or her children, but also ensures the child's safety and wellbeing. Because it is in keeping with this established constitutional balance, the fitness standard should be applied in termination of parental rights proceedings regardless of the parent's deportation status.

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236. Graham, *supra* note 168, at 2.





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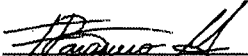
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