

## **Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings**

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### **Abstract**

In practice and theory, termination of parental rights proceedings are framed in terms of the individual rights of parents or the individual rights of children. However, because of the intertwined familial relationships that exist between parents and children, situating these rights within individuals leads to confusion. Instead, these rights, such as the care, custody, and control of children, can be more properly conceived of as the rights of families as associational unit—familial rights— rather than as rights of the individual members thereof. Supreme Court case law has long recognized the importance of the family and the rights that accrue within the family unit. Yet the Supreme Court has almost always granted the rights of the family to the parents. Conceiving of these rights, as familial rights enhances the discussion of the doctrines and standards within child-welfare litigation.

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## Introduction

The rights that parents have in the care, custody, and control of their children are among the most fundamental of all liberty interests.<sup>1</sup> And children may enjoy reciprocal rights to correspondingly be raised and nurtured by their parents.<sup>2</sup> When parents are unfit and act contrary to the best interests of their children, the state may intervene, untangling the intertwined rights of parents and children, and possibly terminating the parent-child relationship, allowing the child to re-form alternative parent-child relationships. The United States Supreme Court acknowledged that termination of parental rights works “a unique kind of deprivation,”<sup>3</sup> and that termination proceedings “involve the awesome authority of the State ‘to destroy permanently all legal recognition of the parental relationship.’”<sup>4</sup> While extreme situations where there is “almost no humanity left in the relationship of the parent to the child” may clearly demand severance of parental rights, many cases present complicated and unclear fact patterns where parents and children maintain lingering relationships of varying closeness.<sup>5</sup> Termination is not an infrequent outcome in child welfare cases: between 2007 and 2011 more than 350,000 children and their parents had their legal relationships severed through a termination of parental rights proceedings (hereinafter “termination proceeding”).<sup>6</sup>

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<sup>1</sup> See *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000).

<sup>2</sup> See *Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002).

<sup>3</sup> *Santosky v. Kramer*, 455 U.S. 745, 759 (1982). In some states, termination of parental rights, while accepted as necessary, is viewed as a violation of the “natural rights” of parents. See, e.g., *Trout v. Dep’t of Human Servs.*, 197 S.W.3d 486, 487 (Ark. 2004) (describing termination as “an extreme remedy in derogation of the natural rights of parents.”).

<sup>4</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996). For a brief discussion on whether termination actually permanently destroys the parent-child relationship, see *infra* note 6.

<sup>5</sup> David Fanshel, *Urging Restraint in Terminating the Rights of Parents and Children in Foster Care*, 12 N.Y.U. REV. L. & SOC. CHANGE 501 (1984), 502.

<sup>6</sup> CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE AFCARS REPORT, NO. 19 (2012), [hereinafter AFCARS REPORT 19] available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf>. The AFCARS Report reports 400,540 children in foster care on September 30, 2011, and that from October 1, 2010 to September 30, 2011 61,361 children had the parental rights for all parents terminated during the fiscal year. The number of terminations reported for the previous years were as follows: 65,611 in 2010; 71,093 in 2008; 79,376 in 2008; and 82,020 in

Beginning with the law and practice involved in parental rights terminations, Part I of this paper situates termination proceedings in constitutional terms, reviewing the different ways that the constitutional rights of parents and children are treated. Part II discusses the child's place in a termination proceeding, including the "best interest of the minor child" standard, its history, diverse applications, and limitations. In addition, Part II evaluates the possible constitutionalization of the interest of children in termination proceedings, placing the rights of children at the same level as the rights of parents. Next, in Part III, this paper analyzes the road-not-yet-taken in termination cases: conceiving of the rights of an intact family unit as collective rights. Part III continues by outlining a termination procedure which considers unified familial rights.

## I. Termination of Parental Rights

To contextualize the termination proceeding, it is important to understand the role that it plays in the overall arc of a child welfare proceeding.<sup>7</sup> Child abuse and neglect courts are continually balancing and

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2007. A note on the severance of the parent-child relationship: Whether in law or in fact, the permanent separation of parents and children following a termination proceeding is not ubiquitous—in fact it may even be the exception rather than the rule. About a dozen states have even taken statutory action to allow the re-establishment of a parental relationship following a termination. *See* Randi J. O'Donnell, Note, *A Second Chance for Children and Families: A Model Statute to Reinstate Parental Rights After Termination*, 48 FAM. CT. REV. 362 (2010). Moreover, even where there is legal permanence to the termination of parental rights, it is not uncommon for children to reach out to parents who have lost their rights and to maintain a relationship with those parents. *See* MARK COURTNEY, AMY DWORSKY, GRETCHEN RUTH CUSICK, JUDY HAVLICEK, ALFRED PEREZ, & TOM KELLER, CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHICAGO, MIDWEST EVALUATION OF ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21 17–18 (Dec. 2007) *available at* [http://www.chapinhall.org/sites/default/files/ChapinHallDocument\\_2.pdf](http://www.chapinhall.org/sites/default/files/ChapinHallDocument_2.pdf) (finding that over fifty percent of former foster youth in the study sample report feeling close to their biological mother, and that over thirty percent report feeling close to their biological father. Further finding that forty-five percent of former foster youth reported contacting their biological mother at least once a week, along with twenty percent reporting contact with their father at least once a week).

<sup>7</sup> Terminations occur within the context of the particularized child welfare proceeding. That proceeding itself is situated within the broader context of the practice of American jurisprudence. Though not developed herein, the custom and practice of individual participants in that particular context may be usefully analyzed as a 'field.' Field is a principle concept developed by sociologist Pierre Bourdieu to describe a setting where participants interact in a certain manner, constrained by explicit and implicit codes of behavior (as individuals and as a setting). Field theory may provide some systematic approach for understanding the exercise of discretion and how participants interact to arrive at a decision in termination proceedings. *See* Pierre Bourdieu & Richard Terdiman,

re-balancing along a fine line, subject to myriad, and frequently conflicting, policy goals: between child protection and family preservation (assuring a permanent placement for children and the reunification of families), the rehabilitation of unfit parents and the healthy development of children, and expediency and the time necessary for effective treatments and education programs.<sup>8</sup> The official participants (attorneys, judges, and social workers) must attempt to resolve and mediate those tensions in consideration of the rights and needs of parents and children over the entire life course of a child protection case—from the time that the state takes protective custody of a child, through the initial findings of the need for state intervention in the family unit, and over many intermediate status hearings. The entire proceeding exists within a complex web of constitutional law, federal statutes, state law, and administrative rules.<sup>9</sup> Some cases reach the point where the equities tilt away from parental reunification toward termination—creating an opportunity for the minor child or children at issue to become legally free to re-establish familial bonds with alternate caretakers. The termination of parental rights is a judicially entered order, following a formal, adversarial proceeding, where the state must prove parental unfitness by clear and convincing evidence.<sup>10</sup> A termination order severs the legal relationship between parent and child and usually ends the participation of that parent in the juvenile case. Termination proceedings most often focus exclusively on the actions or inactions of parents, with a severely restricted concern for the particular circumstances or needs of the minor children at issue. The decisions to seek termination involve the discretion of multiple individuals in child welfare agencies, and, often, attorneys who represent the state or the minor children. Judges<sup>11</sup> then engage in an often fact-

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*The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805 (1987).

<sup>8</sup> See generally MICHAEL LIPSKY, *STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL PUBLIC SERVICE* (1980) (discussing the often contradictory charges that are given to street-level policy implementers—in this case social workers, attorneys, and judges—who must use their discretion to resolve the ambiguity).

<sup>9</sup> See William Vesneski, *State Law and the Termination of Parental Rights*, 49 FAM. CT. REV. 364, 364–65 (2011).

<sup>10</sup> *Id.* The Court articulated the “clear and convincing” in *Santosky v. Kramer*, 455 U.S. 745, 768-70 (1982).

<sup>11</sup> Usually judges hear the matter; Oklahoma and Wisconsin have jury trials in termination of parental rights proceedings. See 10A OKLA. STAT. ANN. TIT. § 1-4-502

specific and broadly discretionary determination of whether the termination order should be entered.

Section A of Part I reviews the legal justifications that the states, guided by the Federal government, employ in termination proceedings. Termination proceedings are often framed as parents losing their parental rights over their minor children.<sup>12</sup> Consequently, much of the constitutional law in termination proceedings concerns the rights of parents. Section B briefly reviews that constitutional law.

#### A. *Grounds for the Severance of the Parent-Child Relationship*

Termination of parental rights is a state proceeding and state laws vary considerably in their justifications for termination.<sup>13</sup> While this does mean that there are at least fifty different legal regimes in which terminations take place, all states are bound by Federal guidelines for terminations contained within the Adoption and Safe Families Act of 1997 (“ASFA”).<sup>14</sup> Examining the ranging legal justifications for the severance of the parent-child relationship serves two purposes: (1) to further contextualize the termination proceeding by reviewing the standards that states apply; and (2) to highlight the kinds of parental actions and inactions that support the state intrusion into the family unit and justify ending the legal parent-child relationship. Subsection 1 briefly discusses how ASFA frames and guides termination proceedings. Subsection 2 explores state-level variation in termination of parental rights regimes.

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(West 2012) (the state, parents, and children can demand a jury trial on termination of parental rights under certain circumstances); WIS. STAT. ANN. § 48.424 (West 2012) (stating that the facts in a termination of parental rights proceeding are determined by a jury).

<sup>12</sup> See Orly Rachmilovitz, *Achieving Due Process Through Comprehensive Care for Mentally Disabled Parents: A Less Restrictive Alternative to Family Separation*, 12 U. PA J. CONST. L. 785, 822–23 (2010) (nicely summarizing and analyzing *Santosky v. Kramer* as to how and why parental rights merit enhanced Constitutional protection, and briefly summarizing the family preservation argument as to why children’s rights are bound to the protection of the family unit).

<sup>13</sup> See generally Vesneski, *supra* note 9; *infra*, Part I.A.2.

<sup>14</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997). The Adoption and Safe Families Act makes changes to a number of parts within 42 U.S.C., though this paper will concern itself primarily with the termination provisions contained within 42 U.S.C. § 675(5)(E) (2012), and the aggravated circumstance provisions contained within 42 U.S.C. § 671(a)(15)(D) (2012).

## 1. The Adoption and Safe Families Act and Termination of Parental Rights

Enacted in 1997, AFSA is the latest iteration of the tradition of Federal law, dating back to the early 1970s<sup>15</sup>, governing the way that the states handle their foster care systems. AFSA, located within the Social Security code, regulates the ways states can qualify for reimbursements for foster-care services, financially pushing several significant policy requirements. Perhaps the most prominent goal of AFSA is reducing the time that children spend in the foster care system and, ultimately, achieving permanent placement, whether through reunification or adoption. AFSA also emphasizes the welfare of children as its fundamental goal.<sup>16</sup>

AFSA clearly articulates this policy within its 15/22 rule, which requires that states initiate termination proceedings for children who have been in foster care for fifteen of the last twenty-two months.<sup>17</sup> There are several exceptions to that general rule including: children who are in the care of a relative, children whose best interest is not served by adoption, and cases where the state failed to make reasonable efforts to reunify the family.<sup>18</sup> While the fact that a child has been in foster care for fifteen of the last twenty-two months is insufficient alone as a ground for parental unfitness,<sup>19</sup> it articulates the clear goal that states need to demand condensed timelines to prevent children from lingering in foster care.<sup>20</sup>

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<sup>15</sup> The first Federal law on the subject was the Child Abuse Prevention and Treatment Act (CAPTA), passed in 1974. Pub. L. No. 93-247 (1974). For an early history of child protection legislation in the United States, see BARBARA NELSON, *MAKING AN ISSUE OUT OF CHILD ABUSE* (1986) (analyzing the shifting political forces from the 1950s through the 1970s which framed the way that American policy makers reacted to child abuse, and further discussing the initial Federal actions in the late 1960s and early 1970s that led to the first Federal involvement in child protection).

<sup>16</sup> Amy Wilkinson-Hagen, *The Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Constitutional Rights*, 11 *GEO. J. ON POVERTY L. & POL'Y* 137, 137-41 (2004).

<sup>17</sup> 42 U.S.C. § 675(5)(E) (2012).

<sup>18</sup> 42 U.S.C. § 675(5)(E)(i-iii) (2012).

<sup>19</sup> *See, e.g., In re H.G.*, 757 N.E.2d 864 (Ill. 2001) (holding that 15/22 cannot stand as a presumption absent an actual showing of unfitness).

<sup>20</sup> In 2011, the median time in care for children exiting foster care was 13.2 months, and the mean time was 21.1 months. The mean time in care is likely pulled up substantially

AFSA's provisions on the early cessation of reasonable efforts also exemplify the expedited pace of termination. AFSA contains additional "shall file" provisions for situations where the parent has intentionally killed or caused serious bodily injury to a child or a sibling of a child who is the subject of a child welfare proceeding.<sup>21</sup> AFSA provides that in those situations—along with other situations where parents subject children to aggravating circumstances and where a parent's parental rights have previously been terminated—the state is not required to make reasonable efforts to reunify the family in cases where no such efforts would be reasonable.<sup>22</sup> These situations encompass fairly clear and extremely detrimental behavior by parents. The AFSA resolves those situations by no longer requiring that family reunification services be offered in those cases and encouraging the disposition of those cases expediently and through parental rights terminations. One explanation for this is that sometimes a set of circumstances exist under which the family unit is so irreparably fractured or where parents have failed in such a manner that it is impossible for them to either form or maintain a family unit, and therefore it would not be in the best interest of the minor to mandate that states provide reunification services. Indeed, in these cases AFSA promotes the idea that it is in the best interest of the minor to encourage states to make children available for adoption by terminating parental rights.

The provisions of AFSA encapsulate the tensions that are prevalent throughout the child welfare system—balancing the welfare of children against efficiencies needed by the state, all within the context of parental

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due to the population of foster children who are aging out of foster care—a full eleven percent of the total population. Over half of the exits in 2011 were returns to the home of the parent of primary caregiver. However, twenty percent of the exits, or almost 50,000 children, were adopted. In addition there were 104,236 children "waiting to be adopted." AFCARS REPORT 19, *supra* note 6, at 1, 3.

<sup>21</sup> 42 U.S.C. § 675(5)(E) (West 2012). The same exceptions as in 15/22 apply in these cases. *See supra* note 20.

<sup>22</sup> 42 U.S.C. § 671(a)(15)(D) (2012). The statute leaves open to the states how they choose to define "aggravating circumstances," but states that those circumstances may include "abandonment, torture, chronic abuse, and sexual abuse". 42 U.S.C. § 671(a)(15)(D)(i).

<sup>22</sup> It should be noted that 42 U.S.C. § 671 was held unconstitutional on other grounds by *Florida ex rel. Attorney General v. United States Department of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011) (holding this portion of the Social Security code unconstitutional as a result of the nonseverability provisions of the Affordable Care Act), which was subsequently reversed, in part, by *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012). Though this particular statutory point was left unresolved, the Supreme Court did reverse the 11th Circuit's determination of nonseverability, which means that 42 U.S.C. § 671 is likely still good law. *Id.* at 2607.

rights. A considerable amount of space has been dedicated in law journals to that topic over the course of the last fifteen years and consideration of the wisdom of AFSA is beyond the scope of this paper.<sup>23</sup> However, what is important is the way that the statute articulates the twin policy goals—permanency and expediency—and how those goals balance against the constitutional rights of parents.<sup>24</sup> Moreover, there is a temporal component based in child development that suggests that the ties that hold a family together weaken as parents and children are living separate and apart for an extended period of time.<sup>25</sup>

## 2. Termination of Parental Rights in the Several States

In 2011, there were 676,569 unique victims of child maltreatment in the United States.<sup>26</sup> By far the most frequently reported maltreatment type was child neglect—78.5% of total reports included a neglect allegation, whereas 17.6% included an allegation of physical abuse.<sup>27</sup> And those numbers are fairly reflective of the foster care population as a whole, meaning that neglect and abuse cases are indicated and adjudicated at roughly the same rate. As these cases wind their way from entry toward a determination about termination, neglect cases continue to make up a majority of cases ultimately brought to termination hearings.<sup>28</sup> Interestingly, however, the reasons for the state pursuing a termination reveal a different profile. About a third of termination petitions have an allegation based on the severity of the abuse or neglect of the child.<sup>29</sup> Three quarters of termination petitions have allegations that are based either on a parent not participating in services or on a lack of change in

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<sup>23</sup> A Westlaw search of (“Adoption and Safe Families Act” & “termination of parental rights”) in the law journal database returns 633 unique results.

<sup>24</sup> See *infra* Part I.B.

<sup>25</sup> See Rebecca Ryan, Ariel Kalil, and Kathleen Ziol-Guest, *Longitudinal patterns of nonresident fathers’ involvement: The role of resources and relations*, 70 THE JOURNAL OF MARRIAGE AND FAMILY 962, 975 (2008).

<sup>26</sup> CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH AND HUMAN SERVS., *Child Maltreatment 2011* 44, available at <http://www.acf.hhs.gov/sites/default/files/cb/cm11.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> DEBORAH GIBBS, BARBARA DALBERTH, STEPHANIE HAWKINS & SHELLY HARRIS, *TERMINATION OF PARENTAL RIGHTS FOR OLDER FOSTER CHILDREN: EXPLORING PRACTICE AND POLICY ISSUES* 5-7 (2004), available at [http://www.rti.org/pubs/tpr\\_final\\_report\\_sept04.pdf](http://www.rti.org/pubs/tpr_final_report_sept04.pdf).

<sup>29</sup> *Id.* at 4–5.

parental behavior.<sup>30</sup> Slightly more than sixty percent are filed because a parent failed to correct the conditions that brought the child into care within certain time limits.<sup>31</sup> About forty percent of terminations are filed because the parent has abandoned the child.<sup>32</sup>

With an eye toward those statistics, we now consider the state statutory criteria for termination of parental rights. States have long had their own criteria for the termination of parental rights, which have developed since the 1940's onward. States vary substantially in the number and kinds of statutory criteria governing parental terminations.

In a 2011 article, William Vesneski analyzed the termination statutes of the fifty states and the District of Columbia in an effort to categorize the typologies of criteria that are used in termination proceedings<sup>33</sup> Vesneski outlines twelve subcategories contained within four categories of criteria, to-wit: (1) physical presence, comprising abandonment, incarceration, and lack of visitation; (2) harm to children, comprising physical harm (murder, serious bodily injury, torture, or chronic abuse), sexual abuse, and non-specific harm (neglect, emotional/mental abuse, abusive behavior, or cruelty); (3) parental fitness, comprising parental failure (failure to assume responsibility, make reasonable efforts, provide financial support, or establish paternity), impaired capacity (mental illness, substance abuse, or fetal exposure to drugs or alcohol), parental history (prior termination or involvement with child welfare), and egregious incidents (criminal incidents or lack of biological relationship); and (4) harm to a family member (domestic violence or abandoning the biological mother during pregnancy).<sup>34</sup> Not all states have codified all of the above criteria. In fact, individual criterion range broadly in their adoption<sup>35</sup> and the states differ broadly in the

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* Additional reasons for filing a termination petition included incarceration (11.3%) or incapacitation (14.1%) of the parent, and other reasons not otherwise specified (18.3%). These data are drawn from the National Survey of Child and Adolescent Wellbeing, a longitudinal study of a nationally representative sample of 6,228 children whose families were investigated by child protective services in 2000, which followed the progress of these cases throughout their time in the child welfare system.

<sup>33</sup> See generally, Vesneski, *supra* note 9

<sup>34</sup> Vesneski, *supra* note 9, at 368–70.

<sup>35</sup> *Id.* at 367 (noting that all fifty states and the District of Columbia have adopted abandonment, intentional death of a child, and serious bodily injury to a child as criteria for termination proceedings while only four states have adopted lack of biological relationship, abandonment of mother during pregnancy, and child born exposed to drugs or alcohol).

number of criteria for termination that they employ.<sup>36</sup> Interestingly, not all states have adopted all of the grounds for justifying expedited terminations articulated within ASFA.<sup>37</sup>

In the inverse, these criteria paint a picture of a family unit that is safe from state interference—even where the conditions may have been less than optimal. There is a relational component to these criteria: Families need to be cohesive, with family members present and engaged. Families care for each other, emotionally as well as materially, and are responsible for each other's wellbeing. Members of family units do not harm other members of the family unit. However, there is also a bureaucratic element to these criteria: families need to comply with administrative responsibilities under certain circumstances that implicate family wellbeing where there has been a judicial finding of parental unfitness. Deviations from this pro-social family unit are then, both in policy and in practice, viewed as failures of the family unit and of parents in particular.<sup>38</sup>

Termination criteria lie along a continuous scale where a court's determination of the conditions that justify the termination of parental rights is in degrees of objectivity and subjectivity. For example, aside from the generalized difficulty of establishing facts in court, determining whether a parent has been physically present or has caused a child physical harm to such a degree that justifies termination is a more straightforward factual inquiry. This factual determinations are more objective than determining whether a parent has failed to assume

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<sup>36</sup> *Id.* at 366–67 (Kansas has twenty-two different criteria which support termination of parental rights, while Indiana has only seven. The median number of termination criteria is fourteen).

<sup>37</sup> *Id.*; see also *supra* notes 18–25.

<sup>38</sup> Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 121 (2013) (noting the “bad mother” trope in public family law, and arguing that that it leads to the devaluation of family relationships in favor of identifying individual moral failings); see generally William Michael Vesneski, *Judging Parents: Courts, Child Welfare, and Criteria for Terminating Parental Rights* (2012) (unpublished Ph.D. dissertation, University of Washington) available at [https://dlib.lib.washington.edu/dspace/bitstream/handle/1773/22572/Vesneski\\_washington\\_0250E\\_10838.pdf?sequence=1](https://dlib.lib.washington.edu/dspace/bitstream/handle/1773/22572/Vesneski_washington_0250E_10838.pdf?sequence=1) (analyzing North Carolina appellate court opinions in termination of parental rights cases, and identifying parental failure as a continuing theme within those opinions.).

responsibility, made reasonable efforts, or neglected a child to the degree that justifies termination. Considering the subjectivity or objectivity of a given termination criterion highlights the level of discretion that child welfare courts hold, particularly in the light of the fact-based inquiries required to determine whether a parent's behavior has changed, the degree to which conditions have been corrected, or the level of parental engagement with protective services.

The Illinois statutory scheme illustrates the complication of child welfare within these termination criteria. In Illinois, the standards for opening abuse and neglect cases are found in the Juvenile Court Act.<sup>39</sup> Abuse and neglect cases proceed (including the removal of children from the home of parents) following a finding of abuse or neglect as defined within that act. The Adoption Act defines the standards for parental unfitness.<sup>40</sup> The standards include "substantial neglect . . . if continuous or repeated,"<sup>41</sup> "[e]xtreme or repeated cruelty to the child,"<sup>42</sup> "[t]wo or more findings of physical abuse,"<sup>43</sup> "[o]ther neglect of, or misconduct toward the child,"<sup>44</sup> and "[f]ailure to protect the child from conditions within his environment injurious to the child's welfare."<sup>45</sup> Many of those termination criteria map directly on to the criteria for adjudicating child abuse or neglect, with the former three being adjusted for duration or degree and the latter two paralleling most closely similar provisions of the Juvenile Court Act.<sup>46</sup> It is, then, in many cases as much a matter of discretion as it

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<sup>39</sup> 705 ILL. COMP. STAT. ANN. 405/2-3 (West 2013) (Defining neglect, generally, as (a) not receiving "proper or necessary support" or medical care; (b) environments that are injurious to a child's welfare; (c) substance-exposed infants; and (d) unsupervised children. Defining abuse, generally, as (a) physical harm; (b) substantial risk of physical harm; (c) sexual abuse; and (d) excessive corporal punishment).

<sup>40</sup> 750 ILL. COMP. STAT. ANN. 50/1(D) (West 2013) (Defining "unfit parent" as a parent who (a) abandons his or her child; (b) fails to "maintain a reasonable degree of interest, concern or responsibility" for the child; (c) desertion of the child for more than three months; (d) substantial neglect; (e) repeated or extreme physical abuse; (f) failure to protect a child from an environment injurious to that child's welfare; (g) depravity—often proven by criminal convictions; (h) "[o]pen and notorious adultery or fornication"; (i) drug or alcohol addiction; (j) failure to care for an infant; (k) failure to make reasonable efforts to or reasonable progress toward the return of the child; (l) failure to provide for the child; (m) inability to discharge parental responsibilities due to mental disease or deficiency; (n) repeated incarceration; and (o) substance exposure at birth.)

<sup>41</sup> 750 ILL. COMP. STAT. ANN. 50/1(D)(d).

<sup>42</sup> 750 ILL. COMP. STAT. ANN. 50/1(D)(e).

<sup>43</sup> 750 ILL. COMP. STAT. ANN. 50/1(D)(f)(1).

<sup>44</sup> 750 ILL. COMP. STAT. ANN. 50/1(D)(h).

<sup>45</sup> 750 ILL. COMP. STAT. ANN. 50/1(D)(g).

<sup>46</sup> Compare 750 ILL. COMP. STAT. ANN. 50/1(D)(g) (stating that "[f]ailure to protect the child from conditions within his environment injurious to the child's welfare"), with 705

is a matter of law to determine the level of state intervention in a family unit fractured by abuse or neglect.

Where the court deems a level of intervention and intrusion somewhat less than termination of parental rights appropriate, the Adoption Act stresses compliance with state mandated treatment plans in “correct[ing] the conditions that were the basis for the removal of the child from the parent.”<sup>47</sup> Thus, it is likely that Illinois typically initiates termination proceedings based not on the direct parental conduct that led to the harm of the child, but rather on a parent’s failure to make reasonable efforts or progress toward complying with treatment plans.<sup>48</sup> This shifts the meaning of termination proceedings away from child protection based on direct harm to children, and consequently, changes the nature of the state’s role in remaking family units that have been touched by abuse and neglect. Most importantly, however, because of these provisions, there is a decrease in the level of statutory protection for a family unit where a child has been adjudicated as abused and neglected and placed into foster care.

Almost all of the termination criteria across states are based on the actions or inactions of parents, and it is those acts or omissions that become the subject for termination proceedings. Reading the Illinois criteria listed above, all of the criteria are focused directly on parental conduct, most often—but not always<sup>49</sup>—with the child as the object. A direct result of this emphasis is that parental behavior is frequently litigated at the appellate level, and, consequently, the constitutional law

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ILL. COMP. STAT. ANN. 405/2-3(1)(b) (stating that “[t]hose who are neglected include . . . any minor under 18 years of age whose environment is injurious to his or her welfare . . .”).

<sup>47</sup> 750 ILL. COMP. STAT. ANN. 50/1(D)(m).

<sup>48</sup> See Eve Brank, Angela Williams, Victoria Weisz & Robert Ray, *Parental Compliance: Its Role in Termination of Parental Rights Cases*, 80 NEBRASKA LAW REVIEW 335, 348–49 (2001) (finding a significant relationship between compliance with a court-mandated treatment plan and the willingness of child welfare professionals (attorneys, judges, and caseworkers) to recommend a termination of parental rights. In fact, 48% of respondents emphasized plan compliance, compared to 16% who emphasized the best interest of the child).

<sup>49</sup> Depravity, “[o]pen and notorious adultery or fornication,” and “[h]abitual drunkenness or addiction to drugs” all focus on parental conduct exclusive of their conduct toward their children. 750 ILCS 50/1(D)(i–k).

that has built up in this area is primarily concerned with establishing the rights of parents.

*B. The Termination Proceeding: A Constitutional Primer*

Though some commentators have argued that the current legislative regime at the Federal level is significantly less protective of parental rights than previous law,<sup>50</sup> termination proceedings are still framed by the rights of parents. The necessity of this framing is partially due to the lack of articulated rights for children in this area and the fact that the family unit has not been clearly recognized as a constitutional actor.<sup>51</sup> Consequently, parental rights are the only clearly, formally defined set of rights that govern these proceedings.<sup>52</sup> Those constitutional parental rights are significant and rooted in a nearly century-long tradition of Supreme Court case law.

The Supreme Court has stated that the jurisprudence in this area is a continuation of “[t]he history and tradition of Western civilization” which “reflect[s] a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of parents in the upbringing of their children is now established beyond debate . . . .”<sup>53</sup> Simply stated, fit custodial parents have the constitutional right to make decisions about the care, custody, and control of their minor children without interference

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<sup>50</sup> See Wilkinson-Hagen, *supra* note 16, at 140. Even in its most current iteration, though, notes that “[t]he court process[es] may slow or hinder efforts toward permanency. Even when agencies and workers are focused on permanency for youth, their efforts can be hindered by court processes that are slow or by judges who are reluctant to termination parental rights” [emphasis added]. CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH AND HUMAN SERVS., CHILDREN’S BUREAU, ENHANCING PERMANENCY FOR YOUTH IN OUT-OF-HOME CARE 15 (2013) available at <https://www.childwelfare.gov/pubs/focus/enhancing/enhancing.pdf> (continuing by stating that “[a]nother barrier in some cases may be the lack of a good working relationship between child welfare workers and courts and the lack of youth voice in court”).

<sup>51</sup> Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. OF GENDER L. & POL’Y 63, 64–66 (1995) (noting two competing interests in the child welfare context: the protection of family integrity and the protection of children, but noting that those are often balanced as a false dichotomy between rights of parents and the best interests of minor children).

<sup>52</sup> These rights are most comprehensively acknowledged in *Santosky v. Kramer*, 455 U.S. 745 (1982).

<sup>53</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); see also *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (recognizing the Western tradition of parental authority within the family unit).

from the State or from third parties.<sup>54</sup> As a matter of substantive due process, parents have a constitutionally protected relationship with their child,<sup>55</sup> and the right to “establish a home and bring up children.”<sup>56</sup> Moreover, parents have a fundamental liberty interest in controlling and directing the upbringing of their children.<sup>57</sup> For the Supreme Court, “it is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for the obligations that the state can neither supply nor hinder.”<sup>58</sup> Accordingly, the “interest of a parent in the companionship, care, custody, and management” of children is one of the most fundamental rights of parents.<sup>59</sup> Moreover, “[t]he law’s concept of the family rests on a presumption that a parent possesses what a child lacks in maturity, experience, and capacity for judgment, . . . [and] that natural bonds of affection lead parents to act in the best interests of their children.”<sup>60</sup>

Although the parental role is constitutionally protected, rights of parents are not unlimited. In 1944, the Supreme Court first recognized that in matters where the safety of children is concerned, the state has “a wide range of power” for protecting the welfare of children, even at the expense of parental authority.<sup>61</sup> The constitutional law of parental terminations is an extension of that harm-based tradition.<sup>62</sup>

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<sup>54</sup> *Troxel v. Granville*, 530 U.S. 57, 71 (2000). For a historical perspective on this kind of analysis, see *U.S. v. Green*, 2 D.C. (2 Cranch) 520 (1824) (considering the inalienable rights of a parent balanced against circumstances that endangered the child).

<sup>55</sup> *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

<sup>56</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925) (considering the rights of parents in the context of directing their children’s education).

<sup>57</sup> *Pierce*, 268 U.S. at 535 (stating that “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

<sup>58</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Pierce*).

<sup>59</sup> *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

<sup>60</sup> *Parham v. J.R.*, 442 U.S. 584, 602 (1979)

<sup>61</sup> *Prince*, 321 U.S. at 167 (establishing a harm standard for state intervention in the relationship between parents and children).

<sup>62</sup> The “unmarried father” cases are not discussed in this section, though they are relevant to the determination of the limits of state power to sever parent-child relationships. See notes 150 & 151, *infra*.

In *Santosky v. Kramer*, Justice Blackmun writes that the Constitution requires the state to prove by clear and convincing evidence that a parent is unfit, and that the unfitness inquiry must focus directly on the conduct of the parent.<sup>63</sup> The *Santosky* Court is directly concerned with parental rights vis-à-vis the state in these proceedings and explicitly rejects a “balancing” of parental interests and children’s interests.<sup>64</sup> The Court recognizes the integrity of the familial relationship and presumes that the interests of the children and the parents align to protect family integrity, unless there is some sort of demonstrated harm by the parents to sever that unified position.<sup>65</sup> The *Santosky* Court presumes that by protecting parental rights, that the rights of children are also protected.

The ‘aligned rights’ perspective is somewhat obscured in practice, where termination proceedings continue to be governed by *Santosky*’s focus on parental unfitness as the constitutional criterion. That enduring focus has created an increased formality in termination proceedings, where parental rights are protected by elevated standards of proof and more elaborate procedures. Such increasing formality narrows the contribution of the child’s interest in the termination proceeding or even an acknowledgment that children hold reciprocal familial rights to parents; thus, relegating the protection of the child’s rights to the mercy of interpretation, often as defined by the discretionary world of the best interest standard. It is, however, important to consider whether the rights of the minor child<sup>66</sup> or the rights of the family unit itself<sup>67</sup> should be considered as an alternative to the current practice of focusing exclusively on parental rights or on children’s interests predominantly through the lens of parental rights.

## II. The Child’s Voice in the Termination Proceeding: The Best Interest Standard

Though parents enjoy clearly defined rights and strong constitutional protections in the termination context, the same cannot be said for children. The United States Supreme Court has yet to recognize

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<sup>63</sup> *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

<sup>64</sup> *Id.* at 759 (stating “[t]he factfinding does not purport—and is not intended—to balance the child’s interest in a normal family home against the parents’ interest in raising the child.”).

<sup>65</sup> *Id.* at 760.

<sup>66</sup> See *infra* Part II.

<sup>67</sup> See *infra* Part III.

independent rights of children in termination proceedings.<sup>68</sup> Nevertheless, the states give a voice to children—in varying degrees—through the application of the best interest of the child standard.<sup>69</sup>

In most cases where a minor finds herself in an American courtroom, the specter of the best interest of the child standard haunts the proceeding—at times playing a critical role, while sometimes quietly serving as an unarticulated backdrop to the case as a whole or as it concerns a minor child. Court decisions in adoptions; guardianships; divorce custody, third-party custody, visitation, and parentage cases; civil settlements; name changes; contested medical procedures, including mental health treatment; probate matters; emancipation proceedings; juvenile delinquency; and abuse and neglect proceedings, among other cases, are all guided to some degree by the child’s best interest.<sup>70</sup> In general, the best interest standard attempts to impress upon the court the importance of viewing the facts, circumstances, and law of the case by the subjective needs of the child affected by the outcome of the proceeding. The subjectivity of this standard is not without its critics. The most

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<sup>68</sup> In fact, the Court has, on several occasions, hesitated to make such a determination on children’s associational rights. *See Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (stating in dicta that “[w]e have never had occasion to decide whether a child has a liberty interest symmetrical with that of a parent, in maintaining her filial relationship. We need not do so here . . .”). *Contra Duchesne v. Sugarman*, 566 F.2d 817, 825 (2nd Cir. 1977) (stating that “the right of the family to remain together without the coercive interference of the awesome power of the state . . . encompasses the reciprocal rights of both parent and child”).

*See also* *Palmore v. Sidoti*, 466 U.S. 429, 431–32 (1984) (noting that, in Equal Protection jurisprudence, the government had a substantial government interest in evaluating custody determinations under the best interest of the minor child); *Reno v. Flores*, 507 U.S. 292, 304 (noting that ‘best interest’ is a constitutional criteria). Neither case, however, contains a clear statement about the place of the best interest standard in any litigation, and neither case is concerned with termination hearings in particular.

<sup>69</sup> This paper does not provide analysis of the Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (2012). In child welfare cases where the Indian Child Welfare Act applies, best interest considerations are further complicated because the interests of the parent, child, and the state must also be considered alongside of the interests of the relevant Indian tribe and their members.

<sup>70</sup> Claire Breen opens her comparative law volume on the best interest of the child standard with the statement that “[a]rguably, the standard of best interest of the child is the universal principle guiding the adjudication of all matters concerning the welfare of the child.” CLAIRE BREEN, *THE STANDARD OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW* 1 (2002).

prominent objection is that the judgment substituted for that of the child is not necessarily taken in terms of the child's subjective needs, but in the subjective moral, social, and intellectual biases of the substitute decision maker.<sup>71</sup>

As the statutory ability for states to terminate parental rights became more common, courts often considered those proceedings in the context of the needs of the child, even where the statute did not.<sup>72</sup> While the phrase "best interest" itself did not become ubiquitous until the 1940s—and really did not take hold in juvenile courts until the late 1950s—it appears in American case law as early as the first decade of the twentieth century, particularly in divorce proceedings.<sup>73</sup> Even before that in child custody proceedings in early America, the courts have often mitigated the harsh effect of paternal preferences<sup>74</sup> or abrupt custody changes<sup>75</sup> by considering the wellbeing of the child in their decisions—sometimes as the predominant consideration.<sup>76</sup>

This section analyzes the application by the states of the best interest standard in termination proceedings, beginning with a brief examination of the statutory formulation of best interest standards, and discussing how those standards are applied in state courts. It concludes with a review of the problems inherent in elevating the best interest standard to a constitutional level.

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<sup>71</sup> See *infra* Part II.D; see also Emily Buss, *Children's Associational Rights? Why Less Is More*, 11 WM. & MARY BILL RTS. J. 1101 (2003) (voicing a pragmatic objection to claims of children's associational rights based on who is situated as the claimant); Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 279 (1979); Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW AND CONTEMPORARY PROBLEMS 226, 242-43 (1975).

<sup>72</sup> See *In re Aronson*, 69 N.W.2d 470, 476 (Wis. 1955) (considering the case in the context of the best interests of the minor child); *In re Zerick*, 129 N.E.2d 661, 666 (Ohio Juv. 1955) (stating "[i]n controversies affecting the custody of a minor child, the interest and welfare of the child is the primary and controlling question by which the court must be guided and will prevail over any mere preponderance of legal right.").

<sup>73</sup> See *Horton v. Horton*, 86 S.W. 824, 824 (Ark. 1905) (discussing the courts consideration of the child's best interest in a habeas corpus proceeding grounded in a divorce case).

<sup>74</sup> *Prather v. Prather*, 4 S.C. Eq. (4 Des. Eq.) 33, 44 (1809).

<sup>75</sup> *Commonwealth v. Addicks*, 5 Binn. 520, 521-22 (Pa. 1813).

<sup>76</sup> *Mercein v. Berry*, 25 Wend. 64, 102 (N.Y. 1840) (arguing that "[t]he rights of the parents must in all cases yield to the interests and welfare of the infant."); *Commonwealth v. Wales Briggs*, 33 Mass. (16 Pick.) 203, 205 (Mass. 1834).

A. *The Statutory Formulation of Best Interest Standard in Termination of Parental Rights Cases*

The idea of a child's best interest, even if it was not articulated as such, has co-evolved with child welfare proceedings since the development of the first juvenile courts.<sup>77</sup> Unlike the standard for parental unfitness, however, the standards—both statutory and in case law—for the consideration of a child's best interest vary widely across the states.<sup>78</sup>

The best interest standard is found within the statutory schemes pertaining to the termination of parental rights in each of the fifty states.<sup>79</sup> In some states, termination must be proven to be in the best interest of the minor child by clear and convincing evidence—a heightened standard that elevates the best interest determination to the same level the rights of parents.<sup>80</sup> In others the court must simply find that termination is in the best interest of the child – a more amorphous standard.<sup>81</sup> There are states

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<sup>77</sup> See DAVID TANENHAUS, *JUVENILE JUSTICE IN THE MAKING*, 164–65 (2004).

<sup>78</sup> See Brian C. Hill, *The State's Burden of Proof at the Best Interests Stage of a Termination of Parental Rights Proceeding*, 2004 U. CHI. LEGAL F. 557, 565–67 (2004).

<sup>79</sup> See *infra* notes 80–88.

<sup>80</sup> Arkansas, Connecticut, Ohio, and Virginia require a clear and convincing finding. See ARK. CODE ANN. § 9-27-341 (West 2013) (requiring consideration of the child's likelihood of adoption and the potential harm from returning a child to parental custody); CONN. GEN. STAT. ANN. § 17a-112(k) (West 2013) (factors include the timeliness of the services offered, the reasonable efforts of the agency, the terms of any court order, the feelings and emotional ties of the child and the parent, the age of the child, the efforts of the parents, and the extent to which the parent has been prevented from maintain a relationship); see also OHIO REV. CODE ANN. § 2151.414 (West 2013); VA CODE ANN. § 16.1-283 (West 2013).

<sup>81</sup> Florida (FLA. STAT. § 39.802(4) (West 2013)); Georgia (GA. CODE ANN. § 15-11-58 (West 2013)); Hawaii (HAW. REV. STAT. § 571-63 (West 2013)); Idaho (IDAHO CODE ANN. § 16-2005 (West 2013)); Illinois (705 ILL. COMP. STAT. 405/2-29 (West 2013)); Kansas (KAN. STAT. ANN. 38-2269 (West 2013)); Kentucky (KY. REV. STAT. ANN. § 625.090 (West 2013)); Louisiana (LA CHILD. CODE ANN. art. 1037 (West 2013)); Maine (ME. REV. STAT. ANN. tit. 22, § 4055 (West 2013)); Massachusetts (MASS ANN. LAWS CH. 119, § 26 (West 2013)); Michigan (MICH. COMP. LAWS § 712A.19b (West 2013)); Montana (MONT. CODE ANN. § 42-2-608 (West 2013)); New Jersey (N.J. ANN. STAT. § 30:4C-15.1 (2013)) (by case law, New Jersey requires that best interest be proven by clear and convincing evidence; see *In re Guardianship of Jordan*, 764 A.2d 503 (N.J. 2001)); Oklahoma (OKLA. STAT. ANN. tit. 10A, § 1-4-904 (West 2013)); South Carolina (S.C. CODE ANN. § 63-7-2570 (West 2013)); South Dakota (S.D. CODIFIED LAWS § 25-5A-18 (West 2013)); Texas (TEX. FAM. CODE ANN. § 161.001 (West 2013)); Utah (UTAH

in which the proceedings must be conducted in the best interest of the minor child, without the statutory requirement of any specific finding.<sup>82</sup> And somewhere the best interest must be the primary consideration of the court in the proceeding.<sup>83</sup> In some states, termination can only be initiated when the proceeding is in the best interest of the minor child.<sup>84</sup> In other states, the child's best interest acts as a bar to termination, either within the proceeding,<sup>85</sup> or as an exception to ASFA's must-file 15/22 rule.<sup>86</sup> While all states require to some degree a separate consideration of parental unfitness and best interests, some states clearly articulate that distinction in process by requiring a two-step termination proceeding, where the initial question is whether the parent is unfit, and only then will the proceeding shift to consider the best interest of minor children.<sup>87</sup> And,

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CODE ANN. § 78A-6-506 (West 2013)); Vermont (VT. ANN. STAT. tit. 15A, § 3-504 (West 2013)); Washington (WASH. REV. CODE § 13.34.132 (West 2013)).

<sup>82</sup> Arizona (ARIZ. REV. STAT. ANN. § 8-533); California (CAL. FAM. CODE § 7890 (West 2013)); Pennsylvania (23 PA. CONS. STAT. ANN. § 2511 (West 2013)); and Tennessee (TENN. CODE ANN. § 36-1-113 (West 2013)). In Rhode Island the phrase "best interest" is not used, however the physical, psychological, mental, and intellectual needs of the child are considered in termination proceedings (R.I. GEN.LAWS 1956 § 15-7-7 (West 2013)).

<sup>83</sup> Nevada (NEV. REV. STAT. § 128.105 (West 2013)); Wisconsin (WIS. STAT. ANN. § 48.426(2) (West 2013)).

<sup>84</sup> Delaware (DEL. CODE ANN. tit. 13, § 1103 (West 2013)); Maryland (MD. CODE ANN., FAM. LAW § 5-525.1 (West 2013)); Missouri (MO. ANN. STAT. § 211.447 (West 2013)); Nebraska (NEB. REV. STAT. § 43-292 (West 2013)).

<sup>85</sup> In Indiana, the court can dismiss a termination petition if it is not in the best interest of the minor child. IND. CODE ANN. § 31-35-2-4.5 (West 2013). North Carolina statutes state that termination be ordered unless it is not in the best interest of the minor child. N.C. GEN. STAT. § 7B-1110(a) (West 2013).

<sup>86</sup> Alabama (ALA. CODE § 12-15-317 (West 2013)); Alaska (ALASKA STAT. § 47.10.088 (West 2013)); Colorado (COLO. REV. STAT. § 19-3-604 (West 2013)); Minnesota (MINN. STAT. ANN. § 260C.301 (West 2013)); New York (N.Y. SOC. SERV. LAW § 384-b (West 2013)); Oregon (OR. REV. STAT. § 419B.498 (West 2013)); West Virginia (W.V. CODE ANN. § 49-6-5b (West 2013)); Wyoming (WYO. STAT. ANN. § 14-3-431 (West 2013)).

<sup>86</sup> ASFA, in its emphasis on expediting permanent placements for children in foster care, provides that the government initiate termination of parental rights proceedings for children who have been in foster care for fifteen of the last twenty-two months (15/22) (42 U.S.C. §675(5)(E) (2012)). Even so, there are several statutory exceptions to that rule. Exemptions include children who are in the care of a relative, children whose best interest is not served by adoption, and cases where the state failed to make reasonable efforts to reunify the family (42 U.S.C. §675(5)(E) (2012)).

<sup>87</sup> *In re Carissa K.*, 740 A.2d 896, 902 (Conn. 1999) (explaining the 'dispositional' phase of the termination of parental rights proceeding as the proper forum for the consideration of whether it is in the best interest of the child to sever the parent-child relationship); *Ex parte E.R.G.*, 73 So.3d 634, 657 (Ala. 2011) (arguing that "the best interests of a child normally requires protecting parental rights[]" and noting that even in the case of termination of parental rights proceedings that clear and convincing evidence of parental unfitness alone permits the consideration of a child's best interest—and even then best

finally, in one state, alternatives to termination must be pursued in lieu of termination when those alternatives are in the best interests of the child.<sup>88</sup>

By its very nature, the best interest standard is not as easily defined in law as what makes a parent unfit—best interest standards do not have even the thin sheen of objectivity provided by parental fitness standards. In fact, a universal proactive statutory definition of what is in a child’s best interest may run contrary to the purpose of the best interest standard in the first place because it seeks to impose specific guidelines on a condition that is as varied as human experience. In addition, it is difficult to not define a child’s best interest solely in reactionary or comparative terms, so there is great latitude for what that best interest might consist of or mean. Defining a parent as unfit, however, seems much easier because there already exists a proactive—though normative and somewhat fraught—definition of how fit parents should conduct themselves.

Based solely on a review of the statutory law surrounding the best interest of the minor child, it is difficult to pull together any kind of determinable doctrine at the national level explaining how, when, or in what context the interests of the child should be considered in termination

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interests alone are not controlling); *In re Tashika F.*, 775 N.E.2d 304, 307 (Ill. App. Ct. 2002) (holding that during the adjudicatory phase of the termination proceeding that the court must focus solely on the parent’s conduct and must not consider the best interest of the child).

*See also In re Termination of Parental Rights to Prestin T.B.*, 648 N.W.2d 402, 409–10 (Wis. 2002) (contrasting the fact-finding portion of the termination proceeding, where parental rights are “paramount” with the dispositional phase of the hearing where the inquiry is focused on the needs and interests of the minor child). *See, e.g.*, WISC. STAT. §48(2012). As the Wisconsin Supreme Court elaborated in *Prestin T.B.*, “[n]otwithstanding [the] broad language, the “best interest of the child” standard does not dominate every step of the proceeding because other vital interests must be accommodated. When the government seeks to terminate parental rights, the best interest of the child standard does not “prevail” until the affected parent has been found unfit . . . .” *Prestin T.B.*, 648 N.W.2d at 408.

There are also interesting modifications of this two-step finding. California, for example, requires that unfitness be proved by clear and convincing evidence, at which point a termination order can be entered if the court makes an additional finding by clear and convincing evidence that the child is likely to be adopted. CAL.WELF. & INST. CODE §366.26 (West 2013).

<sup>88</sup> MISS. CODE ANN. § 93-15-103 (2013).

proceedings. If anything, matters become muddled when those standards are applied.

*B. Application of the Best Interest Standard in Termination of Parental Rights Cases*

The diverse application of the best interest standard in the termination context exemplifies the amorphous place of the child within those proceedings. At the same time, its ubiquitous presence does not mean that state courts have universally grappled with questions of the application of the best interest standard. The standard—by its discretionary and fact-specific nature—remains difficult to analyze because of the lack of information that accompanies the number of individual courts implementing it and the confidentiality that surrounds child welfare court proceedings. And the state courts that have engaged the issue struggle to balance statutory aspirations, substantive rights of parents, and the place of the best interest standard. State statutory law is one matter—in spite of providing the positivist illusion of certainty in implementation within jurisdictions (if not doctrinal consistency across jurisdictions) there remains an uneven landscape. In the messy reality of child welfare practice, application of the best interest standard reveals additional complications through an often contradictory set of considerations and significant differences in implementation within and between jurisdictional units.

The tension between parent's rights and children's rights manifests itself differently in each of the states.<sup>89</sup> For example, a case from the Court

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<sup>89</sup> See generally *In re* Guardianship of Ann S., 202 P.3d 1089, 1100–01 (Cal. 2009) (noting the complex nature of the “least detrimental alternative” as being subsumed within the best interest standard, and wholly separate from the question of parental unfitness); *In re* Adoption of D.D.H., 184 P.3d 967, 971 (Kan. 2008) (wrestling with the place of the best interest standard in termination proceedings, and reaffirming a previous holding that while best interest is a factor that it cannot be a controlling or determinative factor in a finding of termination); *Kent K. v. Bobby M.*, 110 P.3d 1013, 1017 (Ariz. 2005) (noting the ambiguous nature of the Arizona best interest statute, and bemoaning the lack of a clear standard for best interests); *In re* C.B., 611 N.W.2d 489, 492 (Iowa 2000) (holding that the primary interest in termination proceedings is the best interests of the minor child, while in the same paragraph noting the constitutional importance of finding parental unfitness by clear and convincing evidence); *In Interest of Stevens*, 652 A.2d 18, 25–26 (Del. 1995) (favoring the interests of the parents over the statutory mandate that the child's interests should be paramount, noting the due process concerns that accompany a violation of parental rights); *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (listing factors to be considered in determining the best interest of the minor child, and noting that a termination cannot simply be based on best interest considerations).

of Appeals of Maryland, *In re Adoption of Ta’Niya C.*,<sup>90</sup> highlights the tension that is present in the best interest standard. Under Maryland law, parental rights can be terminated when a court finds that a parent is unfit or where exceptional circumstances exist that render a continued parental relationship not in the best interests of the minor child.<sup>91</sup> The court noted, “while the parental rights are recognized and the statutory requirements . . . must be met, the child’s best interest standard trumps all other considerations.”<sup>92</sup> The parental rights spoken of clearly have a constitutional foundation, and are subject to constitutional restrictions. The court continues, however, with an incisive analysis of how the trial court misapplied Maryland law by conflating the interests of parents with the interests of children in consideration of the child’s best interest—a conflation not unusual in case or statutory law.<sup>93</sup> The court found, perhaps tautologically, that when a court is considering the best interests of a minor child, that the child’s interests must be considered.<sup>94</sup> While the Maryland court should be praised for its emphasis on the best interest inquiry, its assertion that “the child’s best interest standard trumps all other considerations” is internally contradicted by the precedential requirement that a parent be shown to be unfit before an inquiry can be made into those best interests.<sup>95</sup> The court, then, is caught in an internally

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<sup>90</sup> 8 A.3d 745 (Md. 2010).

<sup>91</sup> MD. CODE ANN., FAM. LAW §5-323(b) (West 2013) (stating “[i]f, after consideration of factors as required in this section, a juvenile court finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that termination of the rights of the parent is in a child’s best interest, the juvenile court may grant guardianship of the child without consent otherwise required under this subtitle and over the child’s objection.”).

<sup>92</sup> *In re Adoption of Ta’Niya C.*, 8 A.3d at 758.

<sup>93</sup> *Id.* at 758–61.

<sup>94</sup> *Id.* at 761 (holding that “[s]ince one cannot make a determination of whether there are exceptional circumstances that would overcome the presumption of parental rights and make continuation of parental rights detrimental to the child’s best interest without looking into the child’s best interest, the ultimate focus of the juvenile court’s inquiry must be on the child’s best interest”).

<sup>95</sup> *Id.* at 752 (stating that “in making those determinations, a juvenile court must consider and make specific findings with respect to the relevant statutory factors [], and, ‘mindful of the presumption favoring a continuation of the parental relationship, determine expressly whether those findings suffice either to show an unfitness . . . or to constitute an exceptional circumstance that would make the continuation of the parental relationship

contradictory web of law and policy where the best interests of children are supposed to dominate, but the interests of parents actually dominate. The Maryland court's difficulty in attempting to assert the primacy of children's rights while being bound by the constitutional requirements to protect parental rights is reflected in the Maryland statute and is understandable given the state's interest in protecting the safety of children.

The Delaware Supreme Court, in *In Interest of Stevens*,<sup>96</sup> considered a case where the natural father's parental rights were balanced against the interest of the minor being adopted by his long-time foster parents. Attorneys for the natural mother and the child argued that the child's best interest demanded that the adoption proceed regardless of the father's fitness.<sup>97</sup> The court rejected that argument, however, citing Supreme Court precedent and the "dangerous potential" of the best interest standard "placing the welfare of the child over the legitimate familial interests of parents . . . ."<sup>98</sup> The court reasoned that there are countless examples of when parents could be substituted for other caregivers who would provide children with a "higher level of material and emotional support" and that there needs to be some sort of standard which protects parents from such intrusion.<sup>99</sup> Notable here, the court rejected ruling on the independent rights of the child, even though they are existent and "fundamentally-vested."<sup>100</sup> Such independent rights did not become operative until the state proved by clear and "convincing evidence that the parent has forfeited the parental entitlement."<sup>101</sup> Though there is no question that the *Stevens* court appropriately complied with the relevant constitutional law, it is interesting that while the court was willing to elevate the interests of the child to the level of a fundamentally vested right that at the same time the court was unwilling to actually apply the child's best interest as such a right. This further illustrates the complexity of articulating the child's interest in termination and adoption proceedings.

Even following a finding of unfitness, best interest determinations continue to be framed in the context of a balance between the parent-child relationship and other considerations – some states even conceive of "best

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detrimental to the best interest of the child" (citation omitted) (quoting *In re Adoption/Guardianship of Rashawn H.*, 937 A.2d 177, 192 (Md. 2007)).

<sup>96</sup> *In Interest of Stevens*, 652 A.2d 18, 20–21 (Del. 1995).

<sup>97</sup> *Id.* at 25.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

interest” as a balancing test of sorts between the interests of parents and children.<sup>102</sup> By framing a best interest determination in terms of conflicting interests of parents and children, these courts rhetorically minimize the best interests of the child—predominately from the perspective of that child—into terms of the individual child’s developmental, emotional, and physical needs. Oddly, some states give parents, under the guise of best interests, the opportunity to litigate or re-litigate the quality and timeliness of service provision during the pendency of the child welfare proceeding.<sup>103</sup> This suggests the integration of parental rights and children’s best interests is deeply held within American law<sup>104</sup> and efforts by the states to resolve tension between acting in the child’s best interests and being constrained by rights of parents.<sup>105</sup>

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<sup>102</sup> See, e.g., *Matter of Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992) (holding “[i]n analyzing the best interest of the child, the court must balance three factors: (1) the child’s interest in preserving the parent-child relationship; (2) the parent’s interest in preserving the parent-child relationship; and (3) any competing interest of the child. ... ‘both the interests of the parent and child are considered along with the circumstances of the particular case’” (quoting *In re Welfare of Udstuen*, 349 N.W.2d 300, 304 (Minn. App. 1984)).

<sup>103</sup> See MD. CODE ANN., FAM. LAW, §5-323(d)(1), (2) (West 2013) (delineating factors for consideration when determining the best interests of the minor child, including (1) the services offered and whether the department fulfilled their obligations; and (2) whether those services were appropriate and timely in facilitating reunification); see also *In re J.T.C.*, 652 N.E.2d 421, 426 (Ill.App. Ct. 1995) (holding that a best interest hearing is a necessary part of the termination proceeding and that the question of the best interest of the child should not be treated lightly, however at the same time noting that best interest hearings may allow for “evidence not admissible in a fitness hearing” and “[e]valuations not relevant in fitness hearings” to be presented on behalf of the parent).

Compare *In re Kayla M.*, 785 A.2d 330, 334 (Me. 2001) (focusing the best interest determination on the present status of the child, the child’s needs, the child’s stability, the important relationships in the child’s life, and the child’s wellbeing), with *In re Petition of J.D.K.*, 37 P.3d 541, 544–45 (Colo. App. 2001) (determining best interests based on the stability of the child’s present family, the adjustment of the child to her living situation, and the emotional needs of the child—noting that the best interest standard so articulated “encompasses consideration of the benefit of a parent’s future relationship”).

<sup>104</sup> See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (stating “natural bonds of affection lead parents to act in the best interest of their children”); see also *Matter of Welfare of S.Z.*, 536 N.W.2d 37, 38 (Minn. Ct. App. 1995) (stating that parents are presumed to be fit and acting in the best interest of their children, but despite that presumption that the best interest of the child standard is the “paramount consideration”); *In re Parental Rights as to K.D.L.*, 58 P.3d 181, 186 (Nev. 2002) (stating “[a]lthough the best interests of the child and parental fault are distinct considerations, determining the best interest of the

New Jersey, for example, has several statutory factors derived from case law, which contribute to a best interest determination. New Jersey outlines the following considerations in the determination of a child's best interest in a termination proceeding: "(1) [t]hat the child's health and development have been or will be seriously impaired by the parental relationship . . . (2) [t]he parents are unable or unwilling to eliminate the harm and delaying permanent placement will add to the harm . . . (3) [t]he court has considered alternatives to termination . . . [and] (4) [t]he termination of parental rights will not do more harm than good."<sup>106</sup> While these statutory guidelines contain subjective language which would allow a court to exercise broad discretion in determining what is best for the child, New Jersey appellate courts have continually limited discretionary evaluations by finding that "parental fitness is the key to determining the best interests of the child in termination of parental rights cases."<sup>107</sup> Thus a best interest standard already focused on the parent's needs and conduct is further confined by a narrow focus on parental fitness.

The problem is, perhaps, that the best interest standard is too ambiguous and consequently too fraught with discretion to be truly useful.<sup>108</sup> Moreover, any attempt to define the standard clearly may ultimately be inexorably bound to the language of parental care: past, present or future. The best interest standard, by its nature, is suggestive of

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child necessarily includes considerations of parental fault . . ."); *In re Guardianship of DMH*, 736 A.2d 1261, 1267 (N.J. 1999) (analyzing the integrated parental unfitness/best interest of the minor child determinations required by New Jersey law); *In Interest of S.L.B.*, 449 S.E.2d 334, 336–37 (Ga. Ct. App. 1994) (analyzing best interest through the frame of the parent's abilities, and, moreover, noting that in some cases showings of parental unfitness can also support a finding that termination is in the best interest of the minor child).

<sup>105</sup> See, e.g., *In re Interest of Z.R.*, 415 N.W.2d 128, 137 (Neb. 1987) (stating the problem eloquently as "[the best interest] standard means that the ultimate decision of the court, after sufficient evidence has been presented, must be rendered in the best interests of the child") (emphasis added).

<sup>106</sup> *New Jersey Div. of Youth and Family Services v. A.W.*, 512 A.2d 438, 445–48 (N.J. 1986). This standard was later codified as N.J. STAT. ANN. § 30:4C-15.1(a) (West 2013).

<sup>107</sup> *New Jersey Div. of Youth and Family Services v. F.H.*, 608 914 A.2d 318, 336 (N.J. Super. Ct. App. Div. 2007) (quoting *In re Guardianship of J.N.H.*, 799 A.2d 518, 536 (N.J. 2002)).

<sup>108</sup> See Appell & Boyer, *supra* note 51, at 66 (stating that "[t]he lack of a uniform understanding of the term 'best interests,' coupled with the uncertainty inherent in its use, raises significant concerns about 'social engineering.' Furthermore, such ambiguity will have the greatest impact on the least visible and respected population of families whose racial and economic status already place them at great risk of destructive state intervention").

alternatives and begging for a comparison group. It is natural for courts in termination proceedings to look to the determination of parental fitness as some fixed point that decreases the subjectivity of the overall evaluation. Alternatively, the problem could be that the focus on parental rights effectively hinders any effective best-interest inquiry. A sober reflection on this topic would likely show that there are as many problems with the best interest standard as there are jurisdictions in which it is applied. For that reason, perhaps the best interest standard, or some other articulation of a child's rights, should be standardized and elevated to the same level as parental rights.

*C. Constitutionalization of the Child's Interest in a Termination Proceeding*

Although the state cannot infringe upon the rights of parents to raise their children "simply because a state judge believes a 'better' decision could be made,"<sup>109</sup> there may still be room to base consideration of termination proceedings in the context of the constitutional rights of children. State courts have had a difficult time dealing with the tension between parental rights and the best interests of minor children, primarily because of the conflict between the policy goals of child protection and the sharply defined rights of parents. It may be that the appropriate way to resolve these tensions is by elevating the rights of the child to be even with the rights of parents.<sup>110</sup>

We could conceive of what we are now calling "best interest" in constitutional terms, and then balance the interests of the child against those of the parents, as an attempt to straighten out the doctrine. The jurisprudence of the family could then become a set of competing interests, where parents have the right to nurture and raise children, while children have the right to be nurtured and raised by caring and interested parental figures.<sup>111</sup> Children would then have a constitutionally protected

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<sup>109</sup> *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000).

<sup>110</sup> See Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994), for a review of the child's rights approach in general.

<sup>111</sup> Reframing *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) and *Parham v. J.R.*, 442 U.S. 584, 602 (1979) through the lens of children's rights.

relationship between themselves and their parental figures,<sup>112</sup> and the right to be brought up in their established home.<sup>113</sup> The interest of a child in the companionship, care, custody, and management by their parental figure would then be one of the most fundamental rights of children.<sup>114</sup>

This is an oversimplification and the idea of fundamental rights for children is problematic. First, there is a question about whether children can be said to possess these kinds of reciprocal rights to parents or independent associational rights in the family setting. Though many child advocates would argue for an expanded role of children's rights in legal and policy discourse, this is certainly not a widely shared view, and the establishment of such rights—especially in direct conflict with parental rights—will likely be fraught with contention.<sup>115</sup> While some states require that best interest be proven by clear and convincing evidence, other states have rejected an explicit constitutionalization of children's rights in termination proceedings.<sup>116</sup> Through the years the Supreme Court has been engaged to varying degrees in the project of clearly defining the familial and associational rights of minor children—most often passing on the questions.<sup>117</sup>

However, even if the rights of children were to be afforded constitutional protection, it would likely not resolve many of the issues that were presented in this part and in Part I. Though the risk might be reallocated slightly, courts would still need to balance the rights of parents and children and determine which right supersedes: that of parents to raise

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<sup>112</sup> Reframing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

<sup>113</sup> Reframing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (considering the rights of parents in the context of directing their children's education). See also *infra* notes 138–150 (examining the definitions of 'family' and 'home' in the familial rights context).

<sup>114</sup> Reframing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

<sup>115</sup> In fact, I strongly agree with the views of Barbara Woodhouse who sagely notes that it is impossible to have parental rights without children, and it is the transformational process of raising children that generates those rights. Additionally, I agree with her view that a rights-based discourse obscures important considerations about healthy child development and community concern for children. See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *Cardozo L. Rev.* 1747 (1993).

<sup>116</sup> See generally *supra* notes 80–108.

<sup>117</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (stating in dicta that “[w]e have never had occasion to decide whether a child has a liberty interest symmetrical with that of a parent, in maintaining her filial relationship. We need not do so here ...”); *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, dissenting) (arguing that the harm standard may not always be appropriate, and that there may be circumstances based on a child's associational interests that a best interest standard may be appropriate).

their children or the rights of children to be raised by parental figures. This would, moreover, raise important procedural questions about how to balance the co-equal rights of parents and children as well as whether that balancing would bring parents and children into direct conflict and who would assert the rights on behalf of the children.<sup>118</sup>

Whether parents or substitute decision makers are asserting rights on behalf of children, the children will “be at the mercy of some set of adults,”<sup>119</sup> and thus the least restrictive alternative seems to be the current regime where parents are presumed to be the appropriate decision makers until the state presents clear and convincing evidence to the contrary. This recognizes the fact that determining the interests of children is difficult in any case and particularly so when they are especially young. Most substitute decision makers are unable to directly discern a child’s interests and have imperfect information for advancing any position benefitting the child. So in spite of the sometimes conflicting nature of the legal parent-child relationship, the law should favor the set of persons who know the child best.

Thus, there are three major problems preventing the constitutionalization of the “best interest” rights of children as a balance against parental rights. First, there is the established tradition of parental preeminence in matters of the family, accompanied by the constitutional protections of the family (as long as parents are fit). Second, elevating the rights of children will create direct conflict between the interests of children and parents in termination proceedings and the state will no longer serve as a buffer. Third is the question of who becomes the substitute decision maker in asserting the best interests of the child. Framing the rights of children as reciprocal and equal to parental rights is as difficult as articulating a best interest standard.

The elevation of children’s rights may also ultimately be misleading. If advocates seek to protect the associational interests of parents and children in the family, then instead of evaluating that construct in terms of parent’s rights or children’s rights, perhaps the most direct approach would be to assess the locus of association: the family. Moving away from individual-level analysis turns the discussion from individual

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<sup>118</sup> See Appell & Boyer, *supra* note 51, at 74–82; Buss, *supra* note 71, at 1115–16.

<sup>119</sup> Buss, *supra* note 71, at 1116.

rights of parents and children toward an analysis which directly considers the rights of the family as an associational unit.

### III. The Termination of Familial Rights Proceeding

Is it sensible to assert the rights that arise from the parent-child relationship simply in terms of the parental authority or parental rights to the care, custody, and control of their children? Is the parental rights formulation alone the best way to litigate the complex relationships that arise in child welfare proceedings? More specifically, if children hold reciprocal rights to be cared for by their parents,<sup>120</sup> would acknowledging those rights simplify termination proceedings? For the reasons elaborated in the previous two parts, the answer to those questions is likely no.

Situating these rights within individuals leads to confusion, consternation, and unnecessary linguistic gymnastics. This is due, in part, to the muddling of what exactly is protected by articulating this individualized set of rights. Among the goals of Parts II and III was to illustrate how deeply ingrained and intertwined conceptualization of the interests of minors and their parents are—even though those interests frequently are distinctly articulated. Even in termination proceedings—occasions where parental interests and children’s interests are at their most adversarial—the rights of parents and children are difficult to disambiguate.<sup>121</sup> Reading the parental rights and unwed father cases as a group, specifically noting the ways that courts struggle with differentiating the interest of children and parents, highlights a theme that is often absent in the conception of the rights of children and the rights of parents as dichotomous. Public opinion, and legal emphasis, in family matters is often described as a pendulum that swings between the rights of parents and the protection of children.<sup>122</sup> The interests of the child welfare system, too, are frequently described as a pendulum that swings between a focus

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<sup>120</sup> See *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (acknowledging the “reciprocal rights of both parents and children”); *In re Juvenile Appeal*, 455 A.2d 1313, 1318 (Conn. 1983) (holding that the right of family integrity is not a right of parents alone, but is reciprocal as between parents and children).

<sup>121</sup> See, e.g., *In Interest of Stevens*, 652 A.2d 18, 25 (Del. 1995) (stating “[a]pplication of a best interest of the child standard without a determination of unfitness carries the dangerous potential of placing the welfare of the child over the legitimate *familial interests* of parents who have sought to assert their parental rights in good faith.”) (emphasis added).

<sup>122</sup> See, e.g., KASIA O’NEIL MURRAY & SARAH GESRIECH, A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM (2004), available at [http://www.pewtrusts.org/our\\_work\\_report\\_detail.aspx?id=48994](http://www.pewtrusts.org/our_work_report_detail.aspx?id=48994).

on support for parents and permanency for children.<sup>123</sup> The polar nature of the pendulum metaphor underscores the perception that as rights are granted to children that they must be taken from parents and vice versa.<sup>124</sup> As further illustration, perceptions of tensions between parental rights and children's rights have stymied debate on the ratification of United Nations Convention on the Rights of the Child in the United States Senate—based on conservative objections that the acknowledgment of children's rights will interfere with parental rights.<sup>125</sup> If anything, changing the language describing these issues may in itself be a useful step forward in thinking about the legal rights within families. If we were to focus on familial rights instead of tensions, conflicts, and rights-in-opposition, then the discourse itself may achieve a higher level of clarity. Thinking about these rights in terms of familial rights identifies the particular kind of relationship that deserves protection, and moreover, it highlights the associational aspect of that relationship—the key piece which is partially obscured when focusing on the individual rights of parents and children.

The establishment of an amalgamated family unit as a separate party paints a picture of flexible associational rights between parents and children—not fixed rights. In some instances, the United States Supreme Court has articulated the rights of parents and children in the family context not as individual rights, but as rights belonging to the family

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<sup>123</sup> See, e.g., Dorothy Roberts, *Racial Harm*, COLORLINES, Sept. 22, 2002. (stating that “[i]t is often said that American child welfare policy operates like a pendulum. It swings between two main objectives: keeping troubled families together on one end, and protecting children from parental harm on the other.”); Kathleen S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 THIRD WORLD L.J. 223 (2009).

<sup>124</sup> In fairness, few people, when presented with this question, would describe an absolute dichotomy between parental rights and children's rights; however, the polar formulation of the question creates unnecessary tension and is ultimately distracts from the true underlying question, to wit: What are the rights of families?

<sup>125</sup> The United States and Somalia are the only two countries that are not signatories to the Convention. Lawrence J Cohen & Anthony T. DeBenedet, *Why is the U.S. Against Children's Rights?*, TIME, Jan. 24, 2012, available at <http://ideas.time.com/2012/01/24/why-is-the-us-against-childrens-rights/>; Stephanie Mencimer, *GOP Spanking Caucus Fights UN Treaty*, MOTHER JONES, Aug. 24, 2010, available at <http://www.motherjones.com/mojo/2010/08/gop-spanking-caucus-fights-un-treaty>; Human Rights Watch, *Join the World in Embracing Children's Rights*, HUFFINGTON POST (Nov. 21, 2009), [http://www.huffingtonpost.com/human-rights-watch/join-the-world-in-embraci\\_b\\_366370.html](http://www.huffingtonpost.com/human-rights-watch/join-the-world-in-embraci_b_366370.html).

unit.<sup>126</sup> And a liberal reading of the classic quintet of parental rights cases—*Meyer v. Nebraska*,<sup>127</sup> *Pierce v. Society of Sisters*,<sup>128</sup> *Prince v. Massachusetts*,<sup>129</sup> *Wisconsin v. Yoder*,<sup>130</sup> and *Troxel v. Granville*<sup>131</sup>—could easily define parental rights described therein as familial rights. Read together, those cases outline a protected sphere of family decision making that cannot be interfered with by the state, except where a child’s safety is at issue or where parents are unfit. These rights are strongest when parental interests are aligned with children’s interests in the family unit, and weakest when parents’ interests diverge from children’s interests, leaving no intact family unit.

An illustration of this diminished interest is *Lassiter v. Department of Social Services of Durham County*.<sup>132</sup> Touching the limits of procedural due process in termination cases, the Supreme Court in *Lassiter* determined that parents were not universally entitled to appointed counsel in all termination proceedings as a matter of constitutional law.<sup>133</sup> While *Lassiter* can certainly be read as a more conservative Supreme Court attempting to reign in the perceived excesses of substantive due process of the Warren Court or as a Court simply drawing a bright-line test at the risk of imprisonment, there is also analysis that is relevant to the unitary right of children and parents within the family unit. More specifically, the Court reasoned that “as a litigant’s interest in personal liberty diminishes, so does his right to appointed counsel.”<sup>134</sup> This same Court has noted that “by now [the Court has] made plain beyond the need for multiple citation that a parent’s desire for and right to ‘the companionship, care, custody and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection . . . ,’” and that a termination does “not simply . . . infringe upon that interest but end[s] it.”<sup>135</sup> The Court has also noted that “[i]f the State prevails, it will have worked a unique kind of

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<sup>126</sup> See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (finding that “[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment.”); see also *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (noting that choices about family life receive due process protection).

<sup>127</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>128</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>129</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>130</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>131</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>132</sup> *Lassiter v. Dep’t of Social Servs. of Durham Cnty.*, 452 U.S. 18 (1981).

<sup>133</sup> *Id.* at 32.

<sup>134</sup> *Id.* at 26 (comparing termination of parental rights proceedings with proceedings where a defendant’s personal liberty is at stake).

<sup>135</sup> *Id.* At 27.

deprivation.”<sup>136</sup> How, then, does one reconcile the proclamations on diminishing personal liberty interest of parents with the termination’s interference with parental rights?

One of the ways that the Court acknowledged the “commanding”<sup>137</sup> interest of parents in termination proceedings—while also refusing to proclaim a universal right to appointed counsel for indigents in termination proceedings—was by splitting familial rights and aligning the rights of the child with the interests of the state.<sup>138</sup> If the state’s interest was not aligned with that of the child, the only interest that the state has for refusing the appointment of counsel is economic.<sup>139</sup> The balance of the *Matthews v. Eldridge* test changes significantly if the child’s interests were removed from the state and aligned—as separate interests—with those of the parent. In applying *Matthews*, the *Lassiter* Court anticipates possible circumstances where the interests of the parents, the interests of the state, and the risk of error are such that the Fourteenth Amendment would require appointment of counsel in termination proceedings.

*Lassiter* focuses on the essential subject of this inquiry in termination cases: the family unit. It is not the rights of any one individual that are ultimately the issue, but the rights of the collective group of individuals. Rather than focusing the constitutional inquiry on any one member, it should focus on what rights a family should have—to be free from government intrusion—as well as when those rights arise and should be severed.

This part will more fully explore the proposition that the family unit should have constitutional protection over and above the protection of any individual within that unit—starting with a brief exploration of whether a family, an association of individuals, is a constitutional actor. The substance of this part is the outline of the rights that should be afforded to a family in the termination proceedings, and a proposal for a procedure for familial rights termination proceedings.

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<sup>136</sup> *Id.* at 27 (quoting, in the first instance, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (applying *Matthews v. Eldridge*, 424 U.S. 319 (1976)).

<sup>139</sup> *Id.* at 28.

First, the question is whether the family as a unit can qualify for constitutional protection independent from the individuals who comprise the family. Although current law indicates the importance of the family unit,<sup>140</sup> there is no direct precedent acknowledging that the family-as-aggregate has constitutional rights. We can, however, draw analogies from corporate law. In 2010, the Supreme Court made headlines in *Citizens United v. Federal Election Commission*<sup>141</sup> by ruling that corporations had constitutional protection for their free speech rights.<sup>142</sup> In part, this decision was based on the fact that the corporation was simply an aggregation of individuals who have independent constitutional rights.<sup>143</sup> Though the *Citizens United* decision continues to resonate within the political press<sup>144</sup> and some voters,<sup>145</sup> the Supreme Court has almost a century and a half of jurisprudence acknowledging the constitutional rights of corporations and associations.<sup>146</sup> Similarly, families are interdependent associations of individual actors.<sup>147</sup> The kind of familial rights that the Supreme Court has recognized are bound in the relational and associational aspect of family life.<sup>148</sup> And it is this interdependency that makes the family an important protected space.<sup>149</sup> The Supreme Court recognized, with slightly more traditionalist overtones the difficulty in disambiguating individual partners in a marital union in *Griswold v. Connecticut*, stating that “[m]arriage is a coming together . . . , and

<sup>140</sup> See *supra* Part I.

<sup>141</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>142</sup> Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 21, 2010 at A1.

<sup>143</sup> *Citizens United*, 558 U.S. at 349.

<sup>144</sup> Jared Bernstein, *Blame Citizens United for the IRS Scandal*, SALON, May 15, 2013, available at: [http://www.salon.com/2013/05/15/blame\\_citizens\\_united\\_for\\_the\\_irs\\_scandal\\_partner/](http://www.salon.com/2013/05/15/blame_citizens_united_for_the_irs_scandal_partner/).

<sup>145</sup> Nicole Flatow, *77 Percent of Los Angeles Voters Call For Overturning Citizens United*, THINK PROGRESS, May 24, 2013, available at: <http://thinkprogress.org/justice/2013/05/24/2058961/77-percent-of-los-angeles-voters-call-for-overturning-citizens-united/>.

<sup>146</sup> See *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (noting, in holding that corporations were entitled to the due process and equal protection rights of the Fourteenth Amendment, that “corporations are merely associations of individuals united for a special purpose.”).

<sup>147</sup> Acknowledging, of course, that some individual will likely still be required to assert the rights of the family. However, continuing with the corporate metaphor, hopefully by locating the right in the aggregate, rather than presumptively within a class of individuals, this approach may open up opportunities for potential asserters of those rights.

<sup>148</sup> See *supra* notes 50–67.

<sup>149</sup> See generally, MARTHA FINEMAN, *THE AUTONOMY MYTH* (2004) (reacting against the individualistic conception of society, instead arguing that independence is impossible and associational interdependence is the way that society can most honestly be described).

intimate to the degree of being sacred.”<sup>150</sup> Thus, it is constitutionally reasonable to situate a bundle of rights within the aggregate association of the family.

Families are the primary locus for the “custody, care, and nurture” of children.<sup>151</sup> As long as that family unit exists its members should have constitutionally protected rights of association<sup>152</sup> and privacy.<sup>153</sup> The interests of individuals within a family should be presumed to be aligned with the interests of the family.<sup>154</sup> By protecting the rights of the family, the rights of children and parents that arise from within the family relationship are also protected. Absent a showing of harm to its members, the family sphere should be inviolate and there should be a legal presumption that the allocation of risks, responsibilities, and authority which arise from within that sphere are in the best interests its members. Moreover, families should be presumed to function in the best interest of the children, and should be free from state interference, unless family functioning—not simply unfitness of a legal parent—brings harm to those children.<sup>155</sup> As long as the familial relationship is healthy there is a presumption that the interests of family members are unified and that the familial relationship should not be disrupted. However, when the

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<sup>150</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“[Marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”).

<sup>150</sup> *But see Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals....”). The unfortunate loose language in *Eisenstadt* seems to reject the conception of the rights of a familial unit deserving special protection. The quote from *Eisenstadt* is lightly cited, most often used in the acknowledgment that there are times when the interests of couples or families diverge, and in those instances that the rights of the individual cannot be superseded by the fact of the couple. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 896, 12 S.Ct. 2791, 2830 (1992). Thus a fair reconciliation of the policy statement in *Griswold* with *Eisenstadt* is that interdependence of a family unit can be used as a shield against state action, but not as a sword to deny individuals similar rights (like *Eisenstadt*) or as a wedge to break into the family unit (like *Planned Parenthood*).

<sup>151</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>152</sup> *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

<sup>153</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

<sup>154</sup> *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

<sup>155</sup> *Prince*, 321 U.S. at 167.

relationship is disrupted by maltreatment by parents, separation of parents, death of parents, willing relinquishment of parental custody, inability of a parent to provide care, a child's attainment of majority, or in any other way, the presumption of unified family interests are stretched and consideration must be given to alternate ways in which rights of the parties should be allocated.<sup>156</sup>

Defining the family for the purpose of this inquiry is essential. However, American families assume many complicated forms designed to accommodate the individual needs of their members, and this diversity of form complicates any singular definition of the caretaker relationship.<sup>157</sup> A flexible, fact-specific definition of family should be based on a non-exclusive combination of the following criteria: where children live, who lives there with them, who performs the care and nurturing tasks for those children, who provides materially for the children, and the history of the child's relationships with persons who have cared for, nurtured, and materially provided for that child. This may extend the familial relationships of a child to one or several adults, who could be related by blood or not, and focuses on individuals who have assumed responsibility for the child and individuals with whom the child is attached.<sup>158</sup> These persons can be thought of as parent-like figures if they are not legal parents.<sup>159</sup> A consequence of this is that children and adults may be part of several different constituted family units, which should be afforded different levels of protection based on the quality and quantity of the above criteria provided by each family unit. Presumptions of an extant family should arise when children and their caretakers have been living in the same household for some significant portion of the child's life, and wide deference should be given to plausible claims, based on the above criteria, of close familial relationships. There should be a series of rebuttable presumptions based on parentage, care, custody, and control,

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<sup>156</sup> See *In re Juvenile Appeal*, 189 Conn. 276, 284 (1983) (proposing a gradient along which parental rights can lie).

<sup>157</sup> Judith Stacey, *Good Riddance to "The Family": A Response to David Popenoe*, 55 J. OF MARRIAGE & FAM. 547 (1993); see also, S.B. 274 (Cal. 2013) (expanding the legal definition of the family to include multiple parents when the requirements of parentage can be established and such a result would not be "otherwise detrimental to the child." This expanded, and flexible, definition of the family relationship may work, in some limited cases, to bridge the lived reality of California children with the legal reality in which they are bound.).

<sup>158</sup> See Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 152-64 (2009) (arguing for a child's constitutional right to a loving and nurturing *parent-like* relationship, contrasting exclusively looking for parental relationships).

<sup>159</sup> *Id.*

and residence of the child. When those presumptions arise, the state should be required to rebut them by clear and convincing evidence. Where those presumptions do not arise, however, adults should be able to prove the existence of an intact family unit and meet certain relational criteria with the children if they wish to assert familial rights.

In *Smith v. Organization of Foster Families*,<sup>160</sup> Justice Stewart, in concurrence, suggested that due process would be violated “[i]f a State were to attempt to force the breakup of a natural family over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.”<sup>161</sup> In the context of *Smith*, this is an interesting formulation. *Smith* throws into stark relief the legal differences between *de facto* families<sup>162</sup> and natural families. Focusing on the family-like relationships and emotional bonds that may form between foster families and foster youth, Stewart nevertheless rejected the idea that those relationships, compared to those of natural families, deserved due process protection.<sup>163</sup> Stewart bases this argument on the genesis of the naturally formed family relationship compared to the state-created foster parent-foster child relationship.<sup>164</sup> The subjective inquiry into the family and Stewart’s argument in *Smith* can be reconciled by the importance of non-exclusivity in the above definition as well as acknowledging the historical relationships and the requirement of further findings of unfitness, discussed below, before a family unit can be dissolved and reordered. Thus, under the familial rights formulation, the result in *Smith* may have been different – the foster parents may have been found to have some sort of protectable interest.

In the termination proceedings, protecting the family unit as a whole shifts the focus from a balance between the rights of parents and

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<sup>160</sup> *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977).

<sup>161</sup> *Id.* at 862–63 (differentiating between the due process rights of natural parents and the rights of foster parents concerning the removal of children from the home).

<sup>162</sup> *Smith* focuses the inquiry on the state-created foster family, though the ruling likely extends, to some extent, to other kinds of *de facto* family units—particularly in the area of a *de facto* parents exerting superior rights to a natural parents.

<sup>163</sup> *Smith*, 431 U.S. at 863.

<sup>164</sup> *Id. Contra Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (holding that the ability of an unwed father, who failed to seek legal custody of his minor child, to object to an adoption would disturb a “family unit already in existence”).

children—and the muddled ways in which those rights intertwine<sup>165</sup>—to the family. We can then ask: (1) the threshold question—is there a family entitled to protection? and (2) is that family a fit locus for healthy child development? If the answer to the first question is no, then we can proceed with the analysis under any policy formulation deemed appropriate—most likely the best interest of the child standard. If the answer to the first question is yes, but the answer to the second question is no then we can deepen our inquiry by looking at a developmentally oriented balance between: (a) the level of harm associated with the unfitness; (b) the length of time that it would take to mitigate that harm or correct the conditions that brought about that harm; (c) the strength of the relationships within that family, including attachment, closeness, and affection; and (d) alternative formulations of family relationships that may exist for members of the family unit.

The re-orientation of the inquiry as the protection of family unit as opposed to the rights of parents also refocuses the discussion of whether a parent is making reasonable efforts or reasonable progress toward family reunification.<sup>166</sup> In fact, almost two-thirds of all termination petitions are based on either parents not correcting the conditions that brought the child into care in the first place or because parents are not participating in services.<sup>167</sup> As opposed to asking the question in terms of fit or unfit parents, if we evaluate the family as a unit then we must inquire into the quality and quantity of the services being provided and how those services directly protect family unity. Although this may seem facially protective of parents, it is also protective of children. Instead of an objective test of the level of parent participation in the process of the child welfare proceeding, the court would be forced to open up the black box of services and consider whether parental participation (or nonparticipation) in that service was actually protective of the cohesive family unit. Because of the ultimately discretionary determination by the social work agency of what services are offered and how progress in those services is evaluated, if we are going to terminate parent-child relationships based on service participation, then the court should specifically determine what services should be and are offered, the quality of those services, and why those services are important to the protection of the cohesive family unit.<sup>168</sup>

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<sup>165</sup> See *supra* notes 89–108 (discussing the complicated interrelationship between children’s rights and parental rights).

<sup>166</sup> See *supra* notes 29–32.

<sup>167</sup> *Id.*

<sup>168</sup> There will hopefully, then, be a trickle-down effect to earlier proceedings in child welfare cases which ensures a more thoroughly and specifically tailored service plan with

Where there is no existing family unit, there are no rights for a parent-like adult to dictate or restrict a court's decisions about whom a child can associate with. The Court's treatment of a quartet of unmarried father cases highlights the constitutional importance of extant, *formed* familial relationship as opposed to a potential family relationship.<sup>169</sup> In *Stanley v. Illinois* and *Caban v. Mohammed* the Court extended parental protection to unmarried fathers who had substantial and sustained relationships with their children. Those cases are distinguished from *Quilloin v. Walcott* and, to a lesser extent, *Lehr v. Robertson* wherein the Court extended less constitutional protection to fathers who had not established relationships with mother or child. This differential treatment of facially similarly situated litigants is cohesive because extant familial relationships are particularly special. The Court has stated that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association and from the role it plays in 'promot(ing) a way of life' through the instruction of children as well as from the fact of blood relationship."<sup>170</sup> Even where parentage is conclusively established, the rights that inure based on a parental relationship exist solely on the basis of the existence of that relationship. Thus, associations outside of a family unit are afforded the least amount of protection from state interference in termination proceedings—though the court can still inquire into whether the generalized associational rights, independent of parental rights, continue to support the maintenance of a relationship between adult and child.

This threshold question is supported by AFSA's criteria for early termination of reasonable efforts<sup>171</sup> and many state based termination

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significant justifications for how those services are related to the maintenance of the family unit.

<sup>169</sup> *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>170</sup> *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (nevertheless, the court held that foster parents do not acquire a parent-like right to have say in the custody and care of their foster children).

<sup>171</sup> 42 U.S.C. § 671(a)(15)(D) (West 2012) (including abandonment and other family formation problems); *see supra* notes 19–23 (discussing AFSA and its relationship to the family unit).

criteria, which look to the existence of a family relationship.<sup>172</sup> In both policy and practice<sup>173</sup> there are already determinations being made about the existence of a parent-child relationship, which drives a substantial portion of the termination proceedings that are taking place. By reorienting the language to look for a family unit rather than a parent-child relationship, we are able to reconcile some of the tension between parental rights and best interests of the child by clearly articulating the objective of legal protection directly related both to underlying policy goals and our legal inquiry in the threshold question.

When there is an existing family unit, the job of the court is to determine whether and under what circumstances that family unit deserves continued legal protection. The existence of an intact, healthy family unit generates the presumption that fit parents act in the best interests of their children,<sup>174</sup> and after addressing whether the family is intact, the court next proceeds to ask whether the family unit is healthy.<sup>175</sup> Stated simply, families should meet a minimum standard of care for family members (emotionally as well as materially), appropriately care for each other's wellbeing, and not harm other members within it.<sup>176</sup> The determination of the family unit as unhealthy or unfit becomes threshold criteria for state intervention. Because child welfare proceedings necessarily involve the wellbeing of children, the orientation of this question will be directed towards the actions or inactions of the caretakers in the family unit, and the inquiry should be generally framed as whether a particular family unit is meeting the child's needs. More specifically, the familial rights question should refocus the entire fact finding mission of the court almost exclusively on family environments that promote a minimum standard of

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<sup>172</sup> See *supra* note 34 (noting that one of the phylogenetic categories for termination of parental rights proceedings is "physical presence").

<sup>173</sup> See *supra* note 32 (reporting that about forty percent of all terminations are filed because a parent has abandoned a child).

<sup>174</sup> *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (arguing the presumption that fit parents act in the best interests of their children emerges from the special place of the family unit); see also *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (stating that "absent a finding of neglect or abuse . . . [that] the traditional presumption that parents act in the best interests of their children apply").

<sup>175</sup> It may be said that such an inquiry into the "health" of a family is value-laden and may act to idealize the normative family without regard to socioeconomic or cultural differences. I would argue that such normative inquiries are already taking place, veiled by the squishy language of "neglect" and "best interest of the minor child," and that the proposed inquiry is at least marginally more transparent in the way it operates to evaluate family and decide whether such family deserves protection at law.

<sup>176</sup> These criteria form the backbone of the existing law surrounding terminations of parental rights. See *supra* note 34.

healthy child development, thereby explicitly protecting the best interest of minor children.

In the child welfare context, particularly in the termination proceedings, it is likely that the subject family unit is not currently meeting the child's needs—it would be the rare termination where this is true. So the health and fitness of the family should be gauged historically, with an eye toward how family conditions appropriately fit into a child's development, in the past, present, and future. There are two critical benefits to this approach: (1) it allows family units to retain some continued protection even if they are temporarily rearranged because of foster placements, while still focusing on the central role of the family in the wellbeing of children; and (2) it inserts a time-critical component to the life course of child welfare cases—as cases continue over months and years the impact of the historical presence of a former family unit attenuates and the rights that inure to that unit because of its existence must proportionally diminish.<sup>177</sup>

If the state seeks to dissolve a family unit, the failure of that family unit to meet minimum standards as to the health, safety, care, and wellbeing should be proven by clear and convincing evidence. The inquiry should find that these minimum standards would not be met within a developmentally appropriate period of time for the child in question.

This portion of the familial rights proceeding is analogous to the unfitness portion of the termination of parental rights hearing, and, thus, the questions may focus specifically on parents. Although we can articulate the rights at issue in terms of the rights of the family, the persons asserting those familial rights should be entitled to procedural protections. The parties at interest can be defined by the members of a family unit as established under the criteria above, and those parties should be entitled to all of the due process rights that are currently enjoyed by parents in termination proceedings. However, the important distinction is that the substantive rights of families<sup>178</sup> are no longer held by individuals (though

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<sup>177</sup> This also acknowledges AFSA's emphasis on expedient permanency. 42 U.S.C. § 675(5)(E) (West 2012). Though analyzing timelines through the developmental needs of the child does relieve some of the strictness of AFSA's hard and fast 15/22 rule in a way that makes it more appropriate for the developmental range of children involved in the child welfare system.

<sup>178</sup> See *supra* notes 50–67.

individuals can assert their existence), but by the collective association that is the family.

Where the court finds that the family unit is no longer deserving of protection, the court may dissolve the familial relationships which comprise that unit, sever any legal ties between members, and allow the children to reform legal relationships with other caring and nurturing parent-like figures. When a family unit fails to meet minimum standards, then the presumption that its individual members' interests are unified fades and the burden shifts in favor of the child's associations. Parents and children can have distinct, identifiable, interests, which may justify court action in dissolving the legal relationships and protections that exist within the family unit.<sup>179</sup> At this stage, the state must show, by a preponderance of the evidence, justification for the severance of family relationships based on the associational interests of the minor children in consideration of the level of harm, the time it would take to correct that harm, and the strength of relationships that the child has within the family unit and in alternative family units. Those parties interested in the maintenance of the family relationship should have the opportunity to assert their own independent associational rights claims, evaluated in the context of the best interests of the minor child, and subject to a higher burden of proof.

This procedure presumes there should not be highly protected parental rights in the absence of a parental relationship, and that those rights are appropriately restated as rights not of parents but of families. It seeks to identify the family as the appropriate unit of analysis, and focus the inquiry on that family unit. In the absence of a family unit, it allows the court to base its decisions on the independent associational rights of children. The court is also tasked with determining whether a family is a fit and proper place for healthy child development. This inquiry is distinct from the analysis of whether a particular parent is unfit—instead focusing more holistically on the family environment in a way that may resolve the tension between parent's rights and children's best interests in the termination context. Finally, if a family unit does not meet minimum standards, the court is allowed to dissolve and reorder legal relationships based on the independent associational rights of children.

## **Conclusion**

This article focused on termination proceedings because of the dramatic reordering of rights within families that flows from those

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<sup>179</sup> See *Kent K. v. Bobby M.*, 110 P.3d 1013, 1020 (Ariz. 2005) (noting that, after a finding of unfitness, that children's interests diverge from those of their parents).

proceedings—the sharp lines that are drawn dividing families into parents and children allow for clearer pictures of rights and interests to emerge, especially when compared to legal actions which are more contingent or that have less severe effects. However, enunciating familial rights as distinct from parental rights and children’s rights has consequences for other proceedings conducted in child welfare courts and in various other courts which decide matters affecting families with children. In fact, parentage, divorce custody, and guardianship proceedings may be positively affected by a familial rights reformulation.

It is true that this solution is not a panacea. Decisions in child welfare courts will still be made by street-level implementers who are given broad discretion, and those decisions may still default to balancing the perceived rights of parents with the perceived best interests of children. Courts are designed to address society’s toughest questions. Few of those questions are harder or more complicated than the termination of a family unit. By reframing the definition of the parties at interest in a child welfare proceeding, courts, or more importantly, advocates for the wellbeing of children, are given more latitude to advance the interests of children in their close associations. Moreover, while this article may add little insight as to how to appropriately resolve messy child welfare issues, its value is in problematizing the conception of child welfare proceedings as parents’ rights versus children’s best interest and in trying to resolve that tension by restating the problem in terms of families that favor or disfavor healthy child development. That family-focused emphasis places at the forefront exactly the kind of relationship that is at risk for parents and children in termination proceedings.