



Spring 3-1-2004

Focusing on Children: Providing Counsel to Children in Expedited Proceedings to Terminate Parental Rights

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Bridget A. Blinn, *Focusing on Children: Providing Counsel to Children in Expedited Proceedings to Terminate Parental Rights*, 61 Wash. & Lee L. Rev. 789 (2004).

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Focusing on Children: Providing Counsel to Children in Expedited Proceedings to Terminate Parental Rights

Bridget A. Blinn*

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* Candidate for Juris Doctor, Washington and Lee University School of Law, May 2004; B.A., Centre College, 2000. I want to thank Professor C. Quince Hopkins and Carrie Bowden for their feedback, advice, and encouragement. Thanks also to my family, Rick and Joan Blinn and their many small children, for teaching me to value the voices of even the very young. My friends also have been invaluable in writing this note, especially Bart Forsyth and Rebecca Wetzel, whose help and patience with me are priceless.

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I. Introduction

A. Children in the System: Stories to Consider

1. Younger Children

Three-year-old Frank Torres had been in state custody for two years when a judge returned him to his biological mother, a newly recovering drug addict, in April 1997. By August, Frank’s mother had drowned him in the bathtub, and the authorities had charged both of Frank’s parents with first-degree murder.¹ The judge who returned Frank to his mother’s care was a veteran of the juvenile system who claimed that she rarely lost sleep over terminating the rights of parents who could not choose their children over a drug addiction.²

1. See John Gibeaut, *Nobody’s Child*, 83 A.B.A. J., Dec. 1997, at 44, 44 (reporting Veronica Diaz’s admission to drowning Frank in a bathtub and that the state had charged both Diaz and Frank’s father with his murder).

2. See *id.* (noting Judge McCarthy’s statement to a woman who appeared in her

But, she did not terminate Frank's mother's rights in time to save his life. The system designed to protect Frank Torres failed him. No federal statute encouraged the state to provide an attorney to represent Frank in the proceedings that led to his death.

Social Services first removed Angelo Marinda from his parents' custody when he was twelve days old after his parents injured him so badly that he was hospitalized.³ He spent most of his very short life in foster care, occasionally visiting his biological family.⁴ After one of these visits, his foster mother reported bruises and bumps on his head, but the visits continued.⁵ When Angelo was eight months old, during a visit to his biological family over Christmas, his father shook him to death.⁶ Angelo's foster mother had reported concerns about the unsupervised visit to a social worker.⁷ Angelo was never represented by his own attorney, who might have argued that a holiday visit was not worth risking this child's life.

Frank Torres and Angelo Marinda died at the hands of their biological parents, even though previous injuries inflicted by those same parents resulted in earlier removals to state custody.⁸ These children suffered injuries that could qualify for expedited termination of parental rights under the Adoption and Safe Families Act of 1997 (ASFA),⁹ Congress's latest attempt to guide the disposition of child welfare cases.¹⁰ However, even the most current federal child-welfare legislation would not entitle these children to individual attorneys in proceedings to determine whether a court should terminate the biological parents' rights.

courtroom). Judge McCarthy told the woman, "If you cannot figure out a way to choose your kids over drugs, I'm going to do it I do it every day."

3. See Katherine Seligman, *Baby's Death Poses Painful Question: Tragic Case Stuns Child Advocates*, S. F. CHRON., Jan. 10, 2003, at A21, 2003 WL 374731 (stating that an injury to Angelo Marinda landed him in the hospital and in the care of social services at twelve days old).

4. See *id.* (stating that the child spent his life in foster care but visited his biological family).

5. See *id.* (stating that Angelo's foster mother found bruises and bumps on his head after a visit with his biological family).

6. See *id.* (describing Angelo's death at his biological father's hands).

7. See *id.* (relating the foster mother's comments).

8. See *supra* notes 1-7 and accompanying text (telling the stories of each child's death).

9. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

10. See *infra* Part II.D.3 (describing the provisions of the Adoption and Safe Families Act regarding expedited termination of parental rights).

A sixteen-month-old girl in Rhode Island is now in foster care along with her five-month-old sister.¹¹ The sixteen-month-old lost her right eye to a puncture wound shortly after returning to her mother's care after an earlier stay in foster care.¹² Medical records indicate that the girl had already suffered two spiral fractures on her legs when she was seven months old, and that she had a healing fracture on her left forearm.¹³ This little girl and her sister will go through the termination process under the provisions of ASFA, and their mother's parental rights could be terminated in an expedited process because of the cruel and abusive treatment the sixteen-month-old suffered.¹⁴ As this Note will demonstrate, Congress intended courts to focus on the safety and well-being of children like these.¹⁵ This purpose remains unrealized, however, because Congress failed to provide any incentive for states to provide a voice for children like these girls.

2. Older Children

Lucas Ciabrone seemed luckier than Frank and Angelo. The State of Florida removed him from his biological mother and her abusive boyfriend after repeated reports of the boyfriend's physical abuse of Lucas and his siblings.¹⁶ Three-year-old Lucas and his older sister found a foster home with Heather and Joe Ciabrone, who planned to adopt them.¹⁷ An agency had licensed the Ciabrones despite concerns about Heather's youth and her inability to handle children with behavioral and emotional problems.¹⁸

11. See David McFadden, *State Moves to Terminate Woman's Parental Rights*, PROVIDENCE J., Dec. 6, 2002, at C1, 2002 WL 103170223 (stating that the little girl and her sister are in foster care).

12. See *id.* (stating that the little girl suffered the puncture wound after returning to her mother's home from foster care).

13. See *id.* (describing the child's medical history).

14. See *id.* (stating that the case falls under the latest federal legislation).

15. See *infra* Part III.A.1 (describing the focus of Congress on individual stories much like this one).

16. See John Gibeaut, *Lucas Deserved Better*, 83 A.B.A. J., Dec. 1997, at 52, 53 (stating that social services removed Pedro Garcia, later renamed Lucas, and his siblings from his biological family following allegations of physical abuse).

17. See *id.* at 54 (stating that Lucas and his sister arrived at the Ciabrones' in September 1991, three months before Lucas's fourth birthday).

18. See *id.* at 53 (stating that the agency licensed the Ciabrones in December of 1990 despite concerns about their competence as foster parents).

The agency received reports that Lucas had been locked in a room for days, fed only oatmeal, and thrown against the wall.¹⁹ But, the agency never investigated repeated complaints about the Ciambrones' parenting, nor did it complete a homestudy before the adoption took place, as required by agency policy.²⁰ After the adoption was finalized, the Ciambrones moved to an isolated area, where they were essentially alone with the children.²¹ Lucas spent the last months of his life in a room with a painted-over window which was screwed shut.²² Neighbors heard him crying to be let out.²³ In May 1995, Lucas's adoptive parents brought him unconscious to Manatee Memorial Hospital, claiming he had self-inflicted the injuries that eventually killed him.²⁴

The medical examiner did not believe that Lucas could have inflicted the final lethal blow to his own head or the more than 200 other injuries to his twenty-six pound body, including fractured ribs and scars on his penis.²⁵ State prosecutors charged Joe and Heather Ciambrone with the beating and starvation of their seven-year-old adopted son.²⁶ The state terminated their rights to their other adopted children.²⁷ The Ciambrones have appealed those decisions.²⁸

Neither Lucas nor his siblings had the right to an attorney during the proceedings that terminated their biological parents' rights, nor did Lucas's siblings have that right during the proceedings to terminate the Ciambrones' parental rights. Lucas's siblings could each qualify under ASFA's provision that expedites proceedings to terminate parental rights.²⁹ Congress's intention in passing ASFA was that Lucas's siblings would not suffer the same fate he did, and that their health and safety would be the paramount concern in the

19. *See id.* at 56 (relating complaints about possible abuse by the Ciambrones).

20. *See id.* at 53 (describing the failure of the agency to follow its own procedures to protect the children in the Ciambrone home).

21. *See id.* at 56 (stating that the Ciambrones moved to Rubonia, an isolated section of Manatee County, Florida).

22. *See id.* (describing the room where Lucas spent his last year).

23. *Id.*

24. *See id.* at 52 (stating that the Ciambrones claimed that Lucas self-inflicted his fatal injuries).

25. *See id.* at 52–53 (describing the medical examiner's findings).

26. *See id.* at 53 (stating that the Ciambrones have been charged with Lucas's murder).

27. *See id.* at 56 (stating that the state has terminated their rights to their surviving children).

28. *See id.* (describing the disposition of the proceedings to terminate the Ciambrones' rights as to their other children).

29. *See infra* Part II.D.3 (describing ASFA's provision regarding expedited termination of parental rights for siblings of a child killed by a parent).

expedited proceeding to terminate the Ciambrones' parental rights.³⁰ Each of Lucas's siblings might have a voice in the termination proceedings if ASFA contained a provision providing financial incentives to states to provide counsel to children in these proceedings.

B. Problems and Solutions: A Roadmap

The dual dangers of risking harm to a child and unnecessarily breaking up a family unit provoke strong sentiments in the public and in the legislatures. Choosing between the two can be an agonizing process for decision makers.³¹ Congress reacts to stories like those above by shifting statutory policy from reunification to termination and back again in an attempt to create a one-size-fits-all solution to the complex problems that children face in abusive homes and in the system.³² Reunification focuses on parental rights, emphasizing values of family privacy, parental autonomy, and the importance of the family of origin, while proceedings to terminate parental rights focus on rescuing children from dangerous and irresponsible parents.³³ This Note demonstrates how Congress's latest legislation on adoption attempts to balance the disparate goals of reunification and termination. This balance includes a partial shift from the traditional focus on parental rights to a greater focus on protecting children in circumstances in which they face physical danger at their parents' hands.³⁴ This Note contends that Congress's change in focus—to protection of children in extremely dangerous circumstances—is incomplete if states fail to provide counsel to advocate the children's interests, giving their stories a voice in proceedings to terminate parental rights.³⁵

Part II of this Note examines ASFA and the background of child welfare law that informed congressional policymaking in passing that legislation. Part II also describes Congress's intent in passing ASFA and argues that the

30. See *infra* Part III.A (describing the health and well-being of the child as Congress's paramount concerns in ASFA).

31. See Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 30 (2001) (describing the difficult choices facing decisionmakers when a child may be in danger in a family).

32. See *infra* Part II.D (describing the pendulum swing of Congressional policy-making).

33. See Adler, *supra* note 31, at 23 (describing the broader social values that inform Congress's fluctuation between "irreconcilable poles").

34. See *infra* Part III.A (describing Congressional emphasis on protecting the well-being of children).

35. See *infra* Part III.A–B (explaining Congress's intent in passing ASFA and the ways the legislation falls short of that intent).

legislation falls short of those goals. Part III notes the inability of legislation to meet every unique circumstance and provides a solution: offering financial incentives to states to provide counsel for children in expedited proceedings to terminate parental rights. This Note argues that providing children with their own attorney in expedited proceedings to terminate parental rights will better equip the system to cope with each individual child's unique situation.

This Note contends that in order to tailor the system's response to a child's individual circumstances, Congress should amend ASFA to encourage states to provide legal representation for children in expedited proceedings to terminate parental rights.³⁶ As the stories above demonstrate, not every family is safe for reunification, and not every abused child is best served by adoption. Each child's circumstances and options are unique, and no one-size-fits-all solution, whether it be reunification or termination, can provide every child with justice. Congress has previously used the power of the purse³⁷ to encourage states to conform to federal statutes affecting family law,³⁸ and this Note argues that ASFA should be amended to similarly use financial incentives for states to provide counsel to children in expedited termination cases.

II. Background

States initially developed adoption law to cope with the problems of families who could not, or would not, raise their own offspring. As the states developed procedures for removing children from dangerous or neglectful families, the Supreme Court applied constitutional principles to protect the right of parents to raise their own children. The resulting system inadequately protected children in abusive situations, so Congress introduced federal regulations regarding child welfare in an attempt to provide protection for all children in the United States. This Section will trace the background of modern federal child welfare law as it responded to shortcomings in state law.

36. See *infra* Part III.B.2 (explaining how providing counsel for children in expedited proceedings to terminate parental rights will tailor the system's response to individual circumstances).

37. See U.S. CONST. art. I, § 8, cl. 1 (authorizing Congressional spending power).

38. See, e.g., Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670 (2000) (tying financial benefits to compliance with federal standards). One scholar explains, "It is well settled in Constitutional jurisprudence that Congress may exercise its spending power, conditioning the receipt of federal funding on passing legislation or complying with other federal mandates, to impose a national agenda on the states." C. Quince Hopkins, *Rescripting Relationships: Towards a Nuanced Theory of Intimate Violence as Sex Discrimination*, 9 VA. J. SOC. POL'Y & LAW 411, 447 (2001).

It will then describe Supreme Court decisions that constitutionalized the rights of parents without balancing the rights of children.

A. States' Development of Early Child Welfare Law

As a branch of family law, adoption practices—including proceedings to terminate parental rights³⁹—fall within the traditional province of a state's police power.⁴⁰ Early development of child welfare law in the United States grew out of practical efforts by states to handle the problem of parents who could not adequately raise their own children. American adoption law finds its roots in ancient Roman law, which dictated that new families incorporate adoptees as full members of their new families and that adoptees completely sever ties with their biological families.⁴¹ Roman adoption emphasized the idea that a person could maintain a connection to only one family.⁴² Early state statutes followed the Roman tradition and provided that once a court approved an adoption, the adopted child effectively became the child of the adoptive parents, and the decree of adoption deprived the biological parents of all legal rights and obligations to the adopted child.⁴³

39. Termination of parental rights generally requires complete dissolution of the parent-child relationship. See, e.g., ARIZ. REV. STAT. ANN. § 8-539 (West 1989) ("An order terminating the parent-child relationship shall divest the parent and child of all legal rights, privileges, duties and obligations with respect to each other."); accord COLO. REV. STAT. § 19-3-608 (2001); DEL. CODE ANN. tit. 13, § 1113 (1999); D.C. CODE ANN. § 16-2361 (2001); FLA. STAT. ANN. § 39.811(5) (West 2003); GA. CODE ANN. § 15-11-80 (1994); IND. CODE ANN. § 31-35-6-4 (Michie 1997); KY. REV. STAT. ANN. § 625.100 (Michie 1990); MINN. STAT. ANN. § 260.241 (West 1998); MONT. CODE ANN. § 41-3-611 (2003); N.M. STAT. ANN. § 32A-4-29(m) (Michie 1999); N.C. GEN. STAT. § 7B-1112 (1999); N.D. CENT. CODE § 27-20-46 (1991); 23 PA. CONS. STAT. ANN. § 2521 (West 2001); S.C. CODE ANN. § 20-7-1576 (Law. Co-op. 1985); TEX. FAM. CODE ANN. § 161.206 (Vernon 2002); WASH. REV. CODE ANN. § 13.34.200 (West 1993); WYO. STAT. § 14-2-317 (Michie 2001).

40. See Mary Ann Mason & David W. Simon, *The Ambiguous Stepparent: Federal Legislation in Search of a Model*, 29 FAM. L.Q. 445, 446 (1995) (describing adoption as one of several family law matters traditionally within state law).

41. See Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 744 (1956) (describing adoption practices of the ancients, including the Romans); Sanford N. Katz, *Rewriting the Adoption Story*, 5 FAM. ADVOC., Summer 1982, at 9, 9 (providing a brief history of American adoption law).

42. See Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 446-447 (1971) (describing the origins of Roman advanced adoption law). Presser explains that a Roman adopted child subjected himself to the parental power of the adoptive father, a power so complete that it encompassed "the power of life and death." *Id.* at 447. This idea of belonging to only one family continues to inform the law today. See *infra* notes 74-76 (explaining that a child legally cannot have two fathers).

43. See Presser, *supra* note 42, at 465 (listing the provisions of the 1851 Massachusetts

Adoption gradually shifted from functioning as a service for infertile couples to focusing on child welfare, as states struggled to cope with older, harder-to-place children.⁴⁴ Until the mid-nineteenth century, most adoptions involved placing an infant with an infertile couple who could support that infant.⁴⁵ The process involved voluntary placement of a child by its biological family, not adversarial proceedings to remove children from their parents' care.⁴⁶ The growth of children's aid societies, which removed children from poor houses and orphanages and placed them in families, altered the typical situation in which an adoption took place because the societies removed older abused or neglected children from their parents' care.⁴⁷ Unlike early adoption laws, which had simply standardized a mutually consensual transfer of a child from one family to another,⁴⁸ these aid societies often removed children against their parents' will.⁴⁹

adoption statute).

44. Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L. Q. 173, 177-78 (1983) (characterizing adoption as a child welfare service rather than a service for wealthy, infertile couples); Dianne Klein, "Special" Children—Dark Past Can Haunt Adoption, L.A. TIMES, May 29, 1988, at 35 (describing how public agencies now place hard-to-place children).

45. See Katz, *supra* note 41, at 9 (stating that until recently, most American adoptions involved the placement of infants born to unwed mothers released for adoption directly from the hospital). The 1851 Massachusetts legislature passed a statute authorizing adoption to remedy situations in which foundling societies were facilitating adoptions for children whose adoptive parents had not provided for them and had died intestate. See Presser, *supra* note 42, at 471-72 (stating that the Massachusetts legislature was reacting to distressing situations in which the adoption left the child in a worse position than if he remained unadopted because his adoptive parents died intestate).

46. See Katz, *supra* note 41, at 9 (describing the options of a mother who chooses to relinquish her parental rights so her child can be adopted).

47. See Corinne Schiff, *Child Custody and the Ideal of Motherhood in Late Nineteenth Century New York*, 4 GEO. J. ON FIGHTING POVERTY 403, 413 (1997) (stating that children's aid societies were focused on enforcing child protection laws regarding abandonment, abuse, and neglect). The founders of the New York Society for the Prevention of Cruelty to Children started the organization in 1874 after the publicized story of a neighbor finding a little girl locked in an apartment. Wright S. Walling & Gary A. Debele, *Private Chips Petitions in Minnesota: The Historical and Contemporary Treatment of Children in Need of Protective Services*, 20 WM. MITCHELL L. REV. 781, 795 (1994). The girl's caretakers had left her "severely malnourished, inappropriately dressed, and physically abused." *Id.* New York did have statutory protection for abused children, but the enforcement of the legislation was lacking. Schiff, *supra*, at 413. The Society for the Prevention of Cruelty to Animals intervened on the girl's behalf in court. Walling & Debele, *supra*, at 794 n.94. Legislatures soon gave agents of this society and others like it the power to remove children from abusive homes and arrest their caretakers. *Id.* at 795.

48. See Presser, *supra* note 42, at 461-64 (explaining the practice of authorizing adoption by private act and providing examples of acts that authorized those adoptions).

49. See Walling & Debele, *supra* note 47, at 792 (explaining that societies frequently and

From laws about infant adoption to newly forming child welfare policies, states struggled to cope with the realities of children in different kinds of family circumstances. By the 1950s, states had developed adoption practices that satisfied at least one legal scholar as complete and satisfactory:

The questions of who may adopt and who may be adopted, when the consent of the child is necessary and when the consent of others may be necessary, have been litigated and settled in most jurisdictions. The effect of adoption and the problem of inheritance by and from the adopted child are, in most places, no longer subject to doubt.⁵⁰

However, those "complete and satisfactory" adoption laws did not focus on the needs and interests of children.

Adoption cannot take place until a court terminates parental rights.⁵¹ Abuse and neglect proceedings often take place in different courts from terminations of parental rights.⁵² Some states' laws recognize that justice requires that children have their own counsel in certain proceedings, but the laws limit those provisions to specific circumstances.⁵³ However, many states do not provide counsel for children in proceedings to terminate parental rights.⁵⁴ This Note argues that without an attorney to focus the courts' attention on the interests of children, the system fails to protect children adequately.

cruelly removed children without justifiable reasons).

50. Huard, *supra* note 41, at 750.

51. See 42 U.S.C. § 675(5)(C) (2000) (stating that a permanency plan involving adoption must include termination of parents rights).

52. See Howard A. Davidson, *Collaborative Advocacy on Behalf of Children: Effective Partnership Between CASA and the Child's Attorney*, in ABA CTR. ON CHILDREN AND THE LAW, LAWYERS FOR CHILDREN 17, 37 (1990) (stating that cases of abused and neglected children's cases often appear before more than one court).

53. See, e.g., VA. CODE ANN. § 16.1-266(A) (1982) (requiring appointment of an attorney as the guardian ad litem for children when the state alleges that parents abuse or neglect their child, or the state initiates proceedings to terminate parental rights); Howard A. Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 268 (1991) ("[I]n almost every state, children in civil child protective proceedings initiated by the state or county (child abuse and neglect cases) have a right to have a representative appointed by the court to independently protect their interests in the litigation."). Virginia's statute typifies one of the problems in state systems that appoint attorneys as guardians ad litem: lack of guidance as to the role of the attorney and confusion in attorneys' perceptions of that role. See Davidson, *supra*, at 263 (stating that appointment of attorneys as guardians ad litem causes confusion).

54. See Davidson, *supra* note 53, at 269 (stating that in termination proceedings that are separate from adjudications of abuse and neglect, children are not likely to have counsel because state statutes and appellate courts rarely require them to have counsel).

B. Case Law History on Children's Rights in the System

While state law developed around child welfare and adoption, the Supreme Court shaped the law surrounding termination of parental rights through its constitutionalization of parental rights and its limited recognition of children's rights. States developed statutes allowing for removal of children from unfit parents. However, the Supreme Court limited the states' efforts to protect children by emphasizing and enforcing the rights of parents to raise their own children.

1. The Supreme Court's Historical Focus on Parental Rights

Early American law defining the relationship between parents and children emphasized the idea of ownership.⁵⁵ Before adoption statutes developed, American fathers exercised ownership over their children and "could indenture their children, collect their wages or bequeath them by will."⁵⁶ Although American family law now operates on a presumption that parents will promote their children's best interests⁵⁷ and no longer accepts the idea of ownership of another person,⁵⁸ Supreme Court cases in family law continue to use property concepts to define the rights of parents in their children.⁵⁹

The Supreme Court decided two seminal cases defining parental rights to the care, custody, and control of their children in the first half of the twentieth century. The Court established in *Meyer v. Nebraska*⁶⁰ that Fourteenth

55. See Virginia Mixon Swindell, Comment, *Children's Participation in Custodial and Parental Right Determinations*, 31 HOUS. L. REV. 659, 665 (1994) ("Early Americans . . . exercised property rights over their children.").

56. See *id.* (describing the property rights of nineteenth century American fathers in their children).

57. See *id.* at 660 ("[F]amily law presumes that parents will promote the best interests of their children.").

58. See *id.* at 665 ("[M]odern Americans abhor the idea of one person's ownership of another . . .").

59. See *id.* ("[F]amily law continues to accept property-like rights asserted by parents over their children in its analysis.").

60. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (describing the constitutional right to parental control of children). Meyer appealed his conviction under a Nebraska statute that forbade teaching a modern foreign language to a child who had not completed eighth grade. *Id.* at 396–97. The Nebraska Supreme Court had upheld his conviction, specifically refusing to find a conflict with the Fourteenth Amendment because the state was exercising a valid police power to ensure that English became the mother tongue of children reared in Nebraska. *Id.* at 397–98. In reversing the Nebraska court's decision, the United States Supreme Court noted that the Fourteenth Amendment protected the rights to establish a home and bring up children as

Amendment due process protects liberty interests including the right to establish a home and bring up children.⁶¹ The Court followed and furthered that holding in *Pierce v. Society of Sisters*,⁶² declaring that "the child is not the mere creature of the state; those who nurture him and direct him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."⁶³ *Meyer* and *Pierce* both focused on the parental right to control and educate children, and declined to recognize a child's liberty interest in education, acquiring knowledge, or pursuing intellectual development.⁶⁴

This doctrine of parental control has become a cornerstone of American family law. The Supreme Court clearly summarized its position: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."⁶⁵ The Supreme Court's strict constitutional requirements in proceedings to terminate those rights evidences the importance of parental rights in their children. As the Court established in *Santosky v. Kramer*,⁶⁶ when the state threatens the constitutional rights of

rights that are "essential to the orderly pursuit of happiness by free men." *Id.* at 399. Corresponding to the parental right of control under the Fourteenth Amendment, the Court described the duty of parents to give children a suitable education. *Id.* at 400. The Nebraska statute materially interfered with "the power of parents to control the education of their own." *Id.* at 401. The Court cited and rejected Plato's Republic, in which parents hold their children in common and no parent knows which child is his own, as an unconstitutional concept of child rearing. *Id.* at 401-02.

61. See *id.* at 399 (listing freedoms protected by Fourteenth Amendment due process requirements).

62. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). *Pierce* also involved an educational question in which parochial and private schools challenged an Oregon statute that required all children between the ages of eight and sixteen to attend public schools. *Id.* at 530. Following *Meyer*, the Court declared that the statute violated the Fourteenth Amendment because it unreasonably interfered with the liberty of parents to direct the education of their children. *Id.* at 534-35. The Court discussed the rights of the private and parochial schools and their teachers to engage in a useful profession. *Id.* at 532-33. Despite the private school's allegation that children have a right to influence parent's choice of a school, the Court did not discuss the rights of children in this case. *Id.* at 532.

63. *Id.* at 535.

64. See Swindell, *supra* note 55, at 666-67 (describing the Supreme Court's focus on parental and state rights and the Court's omission of any discussion of the child's rights).

65. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

66. *Santosky v. Kramer*, 455 U.S. 745 (1982). *Santosky* concerned a New York court's decision to terminate the parental rights of Annie and John Santosky and to ratify the removal of their oldest three children from their home. *Id.* at 751. The New York courts had terminated parental rights because the state proved by a preponderance of the evidence that Annie and John had permanently neglected their three children. *Id.* at 751-52. The Supreme Court reversed

parents to raise their children—even when the parents' violation of the "high duty" to care for those children has motivated state action—the state must meet a "clear and convincing" evidence standard before severing the parent/child relationship through a termination of parental rights.⁶⁷

Although the proceeding in *Santosky* was premised on the neglect of the Santosky children, the *Santosky* Court focused on the rights of the natural parent and those of the state.⁶⁸ The Court declared that the fact-finding hearing in a proceeding to terminate parental rights adjudicates only the rights of the states and those of the parents, specifically rejecting any balancing of the child's interest in a normal family home with the parents' interest in raising the child.⁶⁹ The New York courts had terminated the Santoskys' parental rights after balancing the rights of the child and the rights of the natural parent.⁷⁰ The Supreme Court characterized New York's balancing theory as assuming that termination of parents' rights will always benefit the child and faulted the New York courts for their failure to recognize that parents and the child share an interest in avoiding erroneous termination.⁷¹ Notably, *Santosky* involved a termination of parental rights based on neglect rather than on abuse.⁷² Had the Santoskys physically abused or murdered their children, the Court might have

and remanded, stating that the New York courts must rely on a clear and convincing evidence standard because the private interest affected in the parent's right to the companionship, care, custody and management of their children is commanding and the state's countervailing interest is comparatively slight. *Id.* at 758. The Court explicitly refused to weigh the interests of the child or his foster parents at the fact-finding stage of a termination proceeding. *Id.* at 759.

67. *See id.* at 747–48 (declaring that due process requires the state to support its allegations by clear and convincing evidence before a state may terminate parental rights).

68. *See id.* at 759–60 (stating "emphatically" that the focus is not on the child in a proceeding to terminate parental rights and that the rights of the natural parent and the state are at issue in those proceedings).

69. *See id.* at 759 (stating that the fact-finding hearing pits the state directly against the parents and is not intended to balance the child's interest in a normal family home against the parents' interest in raising the child).

70. *See id.* at 765 (describing New York's balancing test).

71. *See id.* (rejecting the theory that termination will invariably benefit the child and stating that children and parents share an interest in avoiding erroneous termination). The Court noted that the state had removed Jed Santosky from his parents' care when he was three days old and focused on the permanent foreclosure of the possibility that he would ever know his natural parents. *Id.* at 760 n.11. The Court insisted that the interests of the child do not diverge from those of the natural parents until the dispositional stage, after a declaration of parental unfitness. *Id.* at 760.

72. *See id.* at 751–52 (stating that the trial court terminated the Santoskys' parental rights in a neglect proceeding).

been more willing to recognize a divergence in the interests of the children and their parents.⁷³

The Court's intense focus on parents rather than children is apparent in cases in which two potential parents present conflicting claims to the same child. The husband of a child's mother and that child's natural father presented such conflicting claims in *Michael H. v. Gerald D.*⁷⁴ In *Michael H.*, the Court focused on the rights of those claiming parenthood rather than on the rights of Victoria, the child herself.⁷⁵ The Court refused to consider visitation between Victoria and her natural father because it found that the California statute established one father for Victoria, and legally she could not have two fathers.⁷⁶

One scholar summarizes the Supreme Court's perspective as a presumption that "the child's best interest subsists within the best interest of the parent."⁷⁷ Professor O'Brien criticizes the Court for framing its inquiry in such a way that the child never enters the debate.⁷⁸ From *Meyer and Pierce* to

73. Severe physical abuse and neglect involve different family dynamics. The relevant federal statute currently expedites termination proceedings for children whose parents have severely physically abused them or murdered one of their siblings, treating those situations very differently from neglect cases. See Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(5)(E) (2000) (describing the circumstances in which the state must file for termination of parental rights); see also *infra* Part III.B.1 (explaining the split between the interests of children and parents in expedited termination proceedings).

74. See *Michael H. v. Gerald D.*, 491 U.S. 110, 116 (1989) (rejecting a child's claim to visitation with her natural father). Victoria's mother had conceived Victoria while she was married to Gerald D., but Michael H., a neighbor, was Victoria's natural father. *Id.* at 113. Michael held Victoria out as his child and had lived with her and her mother at some times during her early childhood. *Id.* at 114. Victoria's mother's husband, who Victoria's birth certificate listed as the father, also held Victoria out as his daughter, and they had lived together as well. *Id.* at 113-14. In a plurality opinion, the Court upheld a California statute's conclusive presumption that the child of a wife cohabiting with her husband who is not impotent or sterile is a child of the marriage. *Id.* at 117. The statute provided that only the mother and her husband may challenge this presumption. *Id.* at 118. The Court's analysis of Michael's claim to Victoria rejected each of his arguments, ultimately resting on the state's right to prefer the husband of the marriage over the natural father. *Id.* at 129-30. The Court refused to consider Victoria's claims separately because it considered her claims the obverse of his claims, destined to fail for the same reasons that his failed. *Id.* at 130-31. Victoria actually claimed she had a *de facto* relationship with Michael as well as with Gerald, but the Court did not consider this claim separately from Michael's. *Id.* at 116.

75. See *id.* at 130 (stating that courts need not decide if "a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship").

76. See *id.* at 130-31 (stating that the claim that a state must recognize multiple fatherhood has no support in the history or the traditions of this country).

77. See Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209, 1211 (1994) (stating that the question considered by the Court in cases like *Santosky* presumes that the child's best interest is contained within the best interests of the parents).

78. See *id.* at 1210 (explaining that the Court frames the question: "Should natural

Santosky and *Michael H.*, the Court remains intensely focused on the rights of parents, sheltered by the presumption that parents will protect their children and act in their children's best interests. This presumption does not require consideration of the best interests of the child, and it remains the controlling principle in proceedings to terminate parental rights.⁷⁹ This complete focus on the parents fails to protect the interests of the most vulnerable people affected by those proceedings: the children.

2. Limited Constitutional Recognition of Children as Persons

Under some circumstances, the Supreme Court has recognized children as persons under the Constitution. This recognition brings with it some due process rights, but the Court has limited the circumstances in which due process rights apply to children. Children have far less protection than their parents under the Constitution.⁸⁰

a. Declaration of Some Rights for Children

The Supreme Court did not begin to treat children as persons for Fourteenth Amendment due process purposes until the mid-1960s. In *In re Gault*,⁸¹ the Court required due process, including the right to an attorney, in juvenile delinquency proceedings and declared that childhood is not a sufficient excuse for courts to deny children certain rights.⁸² In determining the goals of

parents have the right to procreate, raise, and enjoy their children?" and then answers it with a resounding "yes").

79. See *id.* at 1211 (stating that the presumption that parents will protect their children fails to consider the child's best interests).

80. See *id.* at 1246 ("The constitutional protections afforded parents in termination proceedings outweigh the protections afforded the child.").

81. *In re Gault*, 387 U.S. 1 (1967). After fifteen-year-old Gerald Gault made a lewd phone call to a neighbor and was on parole for an earlier offense, a police officer detained him. *Id.* at 4. The police provided no notice to his parents that, effectively, he had been arrested. *Id.* at 5. At his hearing, his accuser was not present, no one was sworn in, and no transcript or other recording of the proceedings was made. *Id.* at 5. Witnesses gave conflicting statements, and the judge never spoke with the accuser. *Id.* at 6-7. The juvenile court then committed Gerald to the state industrial school for the period of his majority (for seven years until he turned twenty-one) unless he was released sooner by due process. *Id.* at 7-8. The Court stated that the real difference between Gerald's case and that of an adult was that safeguards available to the adult had been discarded in Gerald's case. *Id.* at 29. The Court required that Fourteenth Amendment due process be applied to the juvenile process. *Id.* at 30-31.

82. See *id.* at 28 ("[T]he condition of being a boy does not justify a kangaroo court.").

the juvenile justice system, the Court focused on the historical background of the juvenile court. Child welfare reformers created the juvenile court system to determine the problem with the accused delinquent, to discover how the problem arose, and to decide what society should do to save the delinquent from a downward career.⁸³ Because the goal was not determination of guilt or innocence, but rather the child's salvation from a criminal career, the "rules of criminal procedure [were] inapplicable."⁸⁴

The Supreme Court recognized that the reality of the juvenile court system failed to match the rhetoric of its conception.⁸⁵ Rather than the careful, compassionate treatment that the reformers had visualized, the juvenile system, with its absence of substantive standards, resulted in arbitrariness and deprived juveniles of fundamental rights without due process.⁸⁶ Emphasizing the severe consequences of a delinquency proceeding,⁸⁷ the Court required states to provide due process to juveniles, including the representation of counsel "at every step in the proceedings against him."⁸⁸

b. Limitations on Children's Fourteenth Amendment Rights

Although the *Gault* Court had granted children some rights under the Fourteenth Amendment, it refused to extend those rights far beyond the context of delinquency proceedings and quickly returned to a focus on parental rights.⁸⁹ *DeShaney v. Winnebago County Department of Social Services*⁹⁰ demonstrates

83. *See id.* at 15–16 (describing the beginning of the juvenile courts' and child reformers' early goals in their formation).

84. *Id.* at 15.

85. *See id.* at 29–30 (stating that the rhetoric of the juvenile court movement developed without any close correspondence to the realities of the juvenile system).

86. *See id.* at 18–19 (quoting the Pennsylvania Council of Juvenile Court judge's criticism of the juvenile court's "loose procedures, high-handed methods and crowded court calendars," which result in the denial of due process).

87. *See id.* at 27 ("His world becomes 'a building with whitewashed walls, regimented routine and institutional hours' Instead of a mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide." (citations omitted)).

88. *See id.* at 36–38 (stating that the juvenile needs counsel to cope with various aspects of the legal process during all delinquency proceedings against him).

89. *See Bellotti v. Baird*, 443 U.S. 622, 634 (1979) ("[T]he constitutional rights of children cannot be equated with those of adults.").

90. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989). The courts placed Joshua DeShaney with his father after his parents divorced when he was an infant. *Id.* at 191. After a hospital admission during which the Department of Social Services (DSS)

the Court's fixation on the parental perspective in child welfare cases. In *DeShaney*, the Court refused to provide relief against the state for a child whose record was full of reported abuse, even though the child ultimately suffered severe brain damage at his father's hands.⁹¹ The state of Wisconsin removed Joshua DeShaney from his father's care after an abusive episode landed the boy in the hospital, but it quickly placed him back with his father, who inflicted the severe brain damage.⁹² The Court continued its singular focus on parental rights, noting that had Wisconsin acted earlier, it might have moved too soon to remove Joshua from his father's custody and violated the father's due process rights by improperly intruding into the parent-child relationship.⁹³ That the state removed Joshua too late and too impermanently, as evidenced by his severe injury, did not sway the majority.

The Court declared that the Due Process Clause of the Fourteenth Amendment did not require the state to protect the life, liberty, or property of its citizens from private actors.⁹⁴ Therefore, the Court determined that a state could not be held liable under the Clause for injuries the state could have prevented.⁹⁵ Returning four-year-old Joshua DeShaney to his father's custody, according to the Court, "placed him in no worse position than that in which he would have been had it not acted at all."⁹⁶

awarded the hospital temporary custody because of suspected child abuse, DSS returned Joshua to his father. *Id.* at 192–93. During multiple visits to the DeShaney home, Joshua's caseworker observed various suspicious injuries to his head, resulting in continuing suspicion of abuse in the home. *Id.* at 192. During two visits, she was not allowed access to the boy but was informed he was "too ill to see her." *Id.* at 193. When Joshua's father beat the four-year-old so severely that he suffered permanent brain injury sufficient to confine him for life to an institution for the profoundly retarded, Joshua and his mother sued the state of Wisconsin claiming the state had deprived Joshua of his liberty without due process of law under the Fourteenth Amendment when it failed to protect him from the violence it knew he suffered at his father's hands. *Id.* at 193. The Court resolved the case by stating, "If the Due Process clause does not require the State to provide . . . particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." *Id.* at 196–97.

91. *See id.* at 203 (affirming lower court's summary judgment in favor of defendant).

92. *See id.* at 192 (stating that Joshua was hospitalized and temporarily removed from his father's custody).

93. *See id.* at 203 (stating that had Wisconsin removed Joshua from his father's custody too soon, it would have risked improper intrusion into the parent-child relationship, resulting in a different Due Process Clause claim).

94. *See id.* at 195 ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors.").

95. *See id.* at 196–97 ("If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.").

96. *See id.* at 200.

Joshua's case differed from Gerald Gault's because it occurred in a different context in the court system: Joshua's was a child protective proceeding, and Gerald's was a delinquency proceeding. However, the goal of both systems—the juvenile delinquency proceeding underlying *Gault* and the child protection proceeding underlying *DeShaney*—was to help the child.⁹⁷ Depending on the circumstances of a child's life, the effects of both types of proceedings "are indistinguishable and equally traumatic."⁹⁸ The description in *Gault* of the impact on a child in juvenile detention could easily apply to a child placed in foster care. The physical environment and primary caretakers in each child's world are dramatically altered in both situations.⁹⁹

Professor Guggenheim notes that the rationale of *Gault* logically extends to child protective proceedings, including the right to counsel.¹⁰⁰ Notably, Joshua DeShaney did not have his own attorney when the state initially removed him from his father's home, but he did have an attorney when he and his mother sued the state for allowing him to remain in his father's home.¹⁰¹ That attorney provided the Court with Joshua's story, related from Joshua's perspective, and that advocacy focused some of the Justices on his interests. Had the government provided Joshua with counsel earlier, the attorney could have presented Joshua's entire story and interests before the court that returned him to his father's custody, possibly averting his tragedy. The sad circumstances of Joshua's life were far more relevant to the decision to replace him in his father's abusive care than they were to the Supreme Court's

97. See Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 91 (1984) (explaining the similarities between the child protection and juvenile justice systems). Delinquency courts also have the goal of treating and rehabilitating young offenders. See BARRY C. FELD, READINGS IN JUVENILE JUSTICE ADMINISTRATION 3 (1999) (stating that the juvenile justice system is at least nominally dedicated to treatment and rehabilitation rather than punishment). These goals, like the goal of permanency in child protection discussed later in this Note, are specific examples of ways the system attempts to help children.

98. See Guggenheim, *supra* note 97, at 91 (explaining that for a child who wants to be with his parents, removal in either context can be very traumatic). Although Professor Guggenheim limits his observation to children who want to remain with their parents, his reasoning also can make the broader point that a poor decision in either context can have a very negative impact on the most fundamental aspects of a child's life—where that child lives and who is responsible for that child's welfare.

99. See *In re Gault*, 387 U.S. 1, 27 (1967) (describing the change in environment and people in a delinquent's life).

100. See Guggenheim, *supra* note 97, at 91 (stating that in so far as *Gault* provides counsel for children in delinquency proceedings, the law should also provide counsel for children in child protective proceedings).

101. Donald J. Sullivan argued *DeShaney* for the petitioners before the Supreme Court. See *DeShaney*, 489 U.S. at 190 (listing Donald J. Sullivan as attorney for petitioners).

determination of whether he had a cause of action against the State of Wisconsin. An attorney did not present Joshua's interests to the state court, yet an effective presentation of those interests before the Supreme Court prompted two strong dissents.

Justice Brennan's dissent argued that because all child abuse reports filtered to the same Department of Social Services (DSS) that refused to act on Joshua's behalf, the State of Wisconsin effectively confined Joshua to the four walls of his father's abusive home.¹⁰² The existence of Wisconsin's child-protection program, and its failure to carry out its duties, kept other sources of aid from reaching him.¹⁰³ The state effectively isolated Joshua from any source of aid other than DSS, then failed to provide relief through that agency.

Joshua's story impacted Justice Blackmun's dissent as well. Justice Blackmun wrote the majority position in *Santosky*, which focused narrowly on parental rights,¹⁰⁴ but in *DeShaney* he advocated a decision that would comport with the "dictates of fundamental justice."¹⁰⁵ In this case, because he focused on Joshua's position of defenselessness, Justice Blackmun would have preferred a decision that "recognize[d] that compassion need not be exiled from the province of judging."¹⁰⁶ Justice Blackmun's focus was on the horrific circumstances of Joshua's position,¹⁰⁷ which was finally before the Court because Joshua then had a lawyer to tell his story, and he believed that Joshua should have had his day in court.¹⁰⁸

102. See *DeShaney*, 489 U.S. at 208–09 (Brennan, J., dissenting) (arguing that the state confined Joshua to his father's home). Justice Brennan stated:

[T]he State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him.

Id.

103. See *id.* at 210 (Brennan, J., dissenting) (suggesting that when child-protection programs fail to protect children like Joshua, those children are in a worse position than if the programs never existed at all).

104. See O'Brien, *supra* note 77, at 1229–30 (describing Justice Blackmun's dissent in *DeShaney* as particularly significant because he authored the majority opinion in *Santosky*, which focused entirely on parental rights).

105. *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting).

106. *Id.* (Blackmun, J., dissenting).

107. See *id.* (Blackmun, J., dissenting) (characterizing Joshua as "the victim of attacks by an irresponsible, bullying, cowardly, and intemperate father" and as abandoned by the state that had placed him in that dangerous situation).

108. See *id.* (Blackmun, J., dissenting) (arguing that the Court should allow Joshua and his mother to present the claim for relief that the majority denies). Although Justice Blackmun

The current rhetoric informing a court's determination of termination of parental rights limits the power of children's stories by focusing on the interests of parents.¹⁰⁹ Focus on the parents limits the impact of children's stories on the remedy for the situation that brought them to court in the first place.¹¹⁰ Often the child's story is not found in the majority opinion, but in the dissent, which is arguing for a change in the law's focus.¹¹¹ Justice Blackmun's dissent in *DeShaney* is a good example of the power a child's story can have over a judge's decision.¹¹² Unfortunately for Joshua, his story was not presented by his own attorney at the proceeding that returned him to his father's care.

Limitations on the child's due process rights are not exclusive to child protection cases. Twelve years before *DeShaney*, the Court laid out other limitations in *Parham v. J.R.*¹¹³ Whether involuntary confinement occurs in a juvenile detention center or a mental hospital, its primary goal is identical to that of the juvenile delinquency and child protective systems: to help the child.¹¹⁴ Despite these similarities, in *Parham* the Court refused to require formal or quasi-formal hearings under the Due Process Clause for minors committed to mental institutions by their parents or guardians.¹¹⁵ *Gault's*

characterizes the claim as belonging to both Joshua and his mother, his focus is on Joshua's own situation, not on the connection to Joshua's mother's claim. *Id.* (Blackmun, J., dissenting).

109. See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1836 (1993) ("Substantive and procedural rules define the terms, frame the 'issues,' determine whether evidence is admissible, who has standing, and the like. A rhetoric of parental possessory rights shapes both the discourse and the remedies.").

110. See *id.* at 1835–36 (contending that law invents ways to contain children's stories through its definitions of issues and its rhetoric).

111. See *id.* at 1831 (stating that frequently one must turn to the dissent to find a child's story); see also *supra* notes 102–08 and accompanying text (describing the Supreme Court's dissenting opinions and their focus on children).

112. See *DeShaney*, 489 U.S. at 212–13 (Blackmun, J., dissenting) (describing Joshua's story).

113. *Parham v. J.R.*, 442 U.S. 584, 606–07 (1977) (stating that the committing physician need not conduct formal or quasi-formal hearings to satisfy due process in committing a minor to a medical institution). Two minors committed to state-run mental institutions at the request of their parents or guardians challenged their commitments because they took place without an adversary proceeding before or after the commitment, which the minors asserted was a violation of their due process rights. *Id.* at 587. Despite the risk that parents might use the state institutions as dumping grounds for unwanted children, the court refused to consider the children's interests separately from their parents. *Id.* at 597–98, 606. The Court allowed parents and guardians to commit children to state mental hospitals "voluntarily" without a formal adjudication that such commitment was necessary. *Id.* at 607.

114. See *supra* at notes 97–99 and accompanying text (describing the similarities between child protective services and juvenile delinquency proceedings as a focus on helping the child).

115. See *Parham*, 442 U.S. at 607 (refusing to require hearings).

protection of children in juvenile delinquency proceedings did not extend to commitment. The Court declared that the state did not violate due process through the use of "informal traditional medical investigative techniques."¹¹⁶ It rejected a formalized hearing requirement in part because it believed such a hearing would endanger the parent-child relationship.¹¹⁷ The Court feared the adversarial nature of such a hearing, characterizing it as pitting parents against their children in determining whether the parents' motivation is consistent with the child's interests.¹¹⁸

Justice Brennan provided an insightful rationale for focusing on children's interests in his *Parham* dissent.¹¹⁹ He rejected the idea that parental authority and family autonomy must bar assertions of children's rights.¹²⁰ When family autonomy already has been fractured, he noted, the interest in avoiding discord is less significant.¹²¹ Justice Brennan's perspective that children's interests deserve more focus is compelling in light of ASFA's expedited termination proceedings, in which not only is family autonomy broken, but parents have harshly abused their power.¹²² Justice Brennan explained that especially in cases in which a break in family autonomy has already occurred, a child has a need for an independent advocate to protect his rights.¹²³ A clear division of interests emerges in these situations.¹²⁴

116. *Id.*

117. *See id.* at 610 (rejecting the formalized fact-finding hearing in part because it posed a significant danger to the parent-child relationship).

118. *See id.* (describing the Court's fear of an adversary proceeding that would place parents and children on opposite sides to determine whether the commitment was necessary).

119. *See id.* at 627 (Brennan, J., dissenting) (explaining that the Constitution protects minors as well as adults and suggesting that it may indeed entitle minors to more protection).

120. *See id.* at 631 (Brennan, J., dissenting) ("Notions of parental authority and family autonomy cannot stand as absolute and invariable barriers to the assertion of constitutional rights by children.").

121. *See id.* at 635 (Brennan, J., dissenting) ("[T]he interest in avoiding family discord would be less significant at this stage since the family autonomy already will have been fractured by the institutionalization of the child.").

122. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a)(3), 111 Stat. 2115, 2118 (codified at 42 U.S.C. § 675(5)) (describing the circumstances triggering expedited proceedings to terminate parental rights).

123. *See Parham*, 442 U.S. at 635 (Brennan, J., dissenting) (suggesting that when a break in family autonomy has already occurred, a child's need for an independent advocate is greater than in other disputes between parent and child).

124. *See infra* Part III.B.1 (detailing the interests of parents and children).

C. Criticisms of the Failure to Focus on Children in Court Decisions

Supreme Court Justices are not the only critics of the Court's focus on parents in child welfare cases. Other critics have noted that the traditional legal status of children as private property, which the Supreme Court constitutionalized in *Meyer* and *Pierce*, distorts family law by refusing to recognize and validate children as individuals with their own interests.¹²⁵ Critics argue that focus on family privacy and parental rights results in a child's "voicelessness, objectification, and isolation from the community."¹²⁶ One prominent scholar argues that fairness and realism require a child-centered evaluation of power over children because children are powerless and adults are not.¹²⁷ The powerlessness of children in the system would be mitigated by providing them with an attorney, as Part II.B.2 of this Note explains.

Current law ignores the common sense idea that justice in intergenerational relationships requires respect for children rather than objectification of children.¹²⁸ Children are alternately treated as property or as persons depending on the convenience of the adults who exercise power over them, a treatment reminiscent of slavery.¹²⁹ Americans reject the idea of ownership of human beings,¹³⁰ yet children are often relegated to the status of property. The legal issues defined in current family law cases, which focus on parental rights, shape remedies in ways that do not match the reality of

125. See Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992) (stating that the vision constitutionalized in *Meyer* and *Pierce* distorts family law and policy so that lawmakers fail to respect children or to recognize and legitimize them).

126. *Id.* at 1001.

127. See Woodhouse, *supra* note 109, at 1816 ("Realism compels a consciously child-centered evaluation of power over children as a necessary antidote to children's own powerlessness Fairness also compels a child-centered perspective. Adults enter into relationships of power with children at a time when children have no say in the matter.").

128. See *id.* (stating that treating children as deserving respect and refusing to objectify them is "a principle that has a long history in descriptions of just relations between people and generations").

129. See *id.* at 1846 (noting the similarity of treatment of children and slaves in United States legal history). Professor Woodhouse notes:

Scholars of laws on slavery have observed that slaves were treated sometimes as property and sometimes as persons according to the convenience and interests of their masters/owners. Similarly, legal rules regarding children treat them as persons or treat them as objects in ways that tend to advance and preserve adults' interests and power.

Id.

130. See Swindell, *supra* note 55, at 665 (stating that modern Americans abhor the notion of ownership of people).

children's lives because they fail to account for the experiences and circumstances of children.¹³¹ Joshua DeShaney's reality was entrapment in an abusive, dangerous home, yet the Court applauded the State of Wisconsin for refraining from removing Joshua too early, an action that would have threatened his father's constitutional rights.¹³²

D. Federal Response: Focus on Children

The federal legislative response to child protection has been far more child-centered than the Supreme Court's response. Legislative action shows a gradual shift toward recognizing that children's interests differ from their parents' interests when severe abuse is implicated and that no single solution can solve every problem. Far more than the Supreme Court, Congress has focused on the child as the center of child protection cases, and it has encouraged states to follow suit.

1. Growing Attention to Child Abuse: CAPTA

The problem of child abuse drew congressional attention when the Senate Subcommittee on Children and Youth investigated the issue after the publication of Dr. Henry Kempe's 1962 study of battered child syndrome.¹³³ Committee members visited hospitals, met the young victims of abuse, and found their stories appalling.¹³⁴ As a result, the federal government mandated the reporting of child abuse in the Child Abuse Prevention and Treatment Act

131. See Woodhouse, *supra* note 109, at 1836 (describing the rhetoric of parental possessory rights as bearing little relation to children's reality).

132. See *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 203 (1989) (stating that had Wisconsin moved too soon to remove Joshua from his father's custody, it would have risked improper intrusion into the parent-child relationship, resulting in a different Due Process Clause claim).

133. See Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 *BUFF. L. REV.* 835, 851 (2000) (recognizing Dr. Kempe's study as the catalyst for the modern child abuse movement). Dr. Kempe studied suspicious injuries to children with the help of pediatricians and radiologists, studying injuries that only child abuse could cause, such as spiral breaks in children's limbs. *Id.* Many experts cite Dr. Kempe's article as the contemporary discovery of child abuse. See, e.g., Libby S. Addler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 *HARV. J. ON LEGIS.* 1, 17 (2001) (citing Dr. Kempe's article).

134. See Mangold, *supra* note 133, at 851-52 (describing the reaction of Senators to their visits to hospitals to meet victims of child abuse).

of 1973 (CAPTA),¹³⁵ six years after the *Gault* Court's decision that children were persons for some purposes under the Constitution. CAPTA tied federal funds for child welfare to a requirement that states set up their own programs for mandatory reporting of child abuse.¹³⁶ It required reporting, investigation, cooperation of law enforcement officials, and confidentiality of record keeping.¹³⁷

As CAPTA's reporting programs began to take effect, and states received more reports of child abuse, states removed more children from their biological parents' homes.¹³⁸ Foster care was the primary solution to the states' problem of caring for their new wards.¹³⁹ Federal law reporting requirements also made it easier to track children once they entered foster care.¹⁴⁰

State systems had been based on the model of infant adoption, which placed children immediately into new families with the consent of their biological families.¹⁴¹ The systems were not equipped to handle the influx of abused children into their foster care programs.¹⁴² Consequently, children placed in foster care frequently spent years in the system shifting from foster home to foster home, a phenomenon experts call "foster care drift."¹⁴³ An

135. See Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247 § 4, 88 Stat. 4, 5-7 (codified at 42 U.S.C. § 5101) (1974) (mandating reporting of child abuse).

136. See *id.* (conditioning federal assistance on state implementation of reporting requirements); see also Mangold, *supra* note 133, at 852 (describing CAPTA's provision tying funds for child welfare to reporting requirements).

137. See Child Abuse Prevention and Treatment Act § 4(B)(2) (listing CAPTA's requirements).

138. See Mangold, *supra* note 133, at 853 ("Following passage of CAPTA, the number of children reported as abused and neglected exploded, and state-based foster care systems were flooded with children placed as a result of reporting and investigation through child protective services."); see also Adler, *supra* note 31, at 18 (describing the increase in reported child abuse cases from 10,000 in 1967 to 669,000 in 1976 following the implementation of CAPTA's reporting requirements).

139. See Mangold, *supra* note 133, at 854 (stating that children were often lost in foster care limbo when authorities removed them from their parents' homes).

140. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 125 (1995) ("[F]ederal legislation has made it easier to study the foster care process than ever before.").

141. See Katz, *supra* note 41, at 9 (stating that most American adoptions in the early part of the 20th century involved the placement of infants born to unwed mothers released for adoption directly from the hospital).

142. See Mangold, *supra* note 133, at 853 (describing the influx of children into the foster care system and the inadequacy of the state systems to handle that influx).

143. See Adler, *supra* note 31, at 2 (describing foster care drift). Professor Adler notes: "[F]oster care drift" [is] a term used to describe the shepherding of children through a series of foster homes, sometimes for years, while state agencies attempt to

influential book published in the mid-1970s harshly criticized the removal of children from their biological parents and emphasized the importance of attachment in child development.¹⁴⁴ *Beyond the Best Interests of the Child* publicized the theory of psychological parenthood and the importance of attachment,¹⁴⁵ two interests that are damaged when children are removed from their homes. Focused on children's interests, Congress became concerned about states unnecessarily removing children from their homes. As a result, Congress passed legislation to encourage reunification efforts.¹⁴⁶ The federal pendulum was set in motion, swinging from a focus on reunification to a focus on termination of parental rights to allow for adoptions. Both reunification and termination grew from the desire to help children, but neither could help all children in all abusive homes.

2. Increased Emphasis on Reunification: AACWA

Seven years after CAPTA and three years after *Parham*, Congress passed the Adoption Assistance and Child Welfare Act of 1980 (AACWA).¹⁴⁷ In an effort to prevent unnecessary family break-ups, Congress required states to make "reasonable efforts" to prevent removal of children from their parents' homes or to reunite children temporarily removed from their parents and emphasized the importance of maintaining the integrity of the parent-child

provide the services necessary to enable safe family reunification. Child welfare advocates condemn "foster care drift" as insensitive to children's sense of time and threatening to their future ability to form attachments.

Id.

144. See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 17-20 (1973) (describing the phenomenon of psychological parents). The book also described the impact of separation from their psychological parents on children, who are not fully developed psychologically and have intense intolerance for extended separation. *Id.* at 11. The authors noted that an infant adoption may result in the adoptive parents becoming the psychological parents of the adopted child, but that adoption of older children is less likely to result in this bond because of previous broken attachments. *Id.* at 22.

145. See *id.* at 19 (describing the psychological parent as a biological parent or other caring adult who cares for a child's day-to-day needs, including companionship and shared interaction). Interference with a child's tie to a psychological parent is extremely painful for the child, regardless of that psychological parent's fitness. *Id.* at 20.

146. See Jennifer Ayres Hand, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1258-59 (1996) (describing the "reasonable interests" requirement of the AACWA).

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

relationship.¹⁴⁸ Although the law also provided adoption subsidies for those children whose families could not achieve reunification, the states' implementation of AACWA primarily focused on the reasonable efforts requirement.¹⁴⁹ AACWA provided that whenever a foster care placement was pending, the state had to make reasonable efforts to prevent that placement.¹⁵⁰ AACWA included financial incentives for states to emphasize reunification.¹⁵¹ As a consequence of the financial incentives, family preservation efforts flourished, and the number of foster care placements appeared to drop.¹⁵² But less than a decade after the legislation's enactment, the number of children entering foster care exploded,¹⁵³ demonstrating that reunification efforts had not solved the problem of child welfare.

Congress's demand for reunification had not adequately focused state agencies on the needs of the children in their care. As stories like Richard Gelles's *The Book of David*¹⁵⁴ hit the newspapers and Joshua DeShaney's case made its way to the Supreme Court, it became apparent to the public and to Congress that many families were simply not safe for family preservation or for reunification efforts.¹⁵⁵ *The Book of David* told the story of a boy whom the state returned to his mother's abusive home, where his mother suffocated him.¹⁵⁶ The deaths of children in their homes occurring after child welfare agencies had received notice of their dangerous situations raised the urgency of reform efforts.¹⁵⁷ States interpreted AACWA as requiring family preservation

148. See *id.* (requiring reasonable efforts to protect and assist biological families).

149. See Elizabeth Bartholet, *Taking Adoption Seriously: Radical Revolution or Modest Revisionism?*, 28 CAP. U. L. REV. 77, 87 (1999) ("Something went wrong as the [AACWA] moved from the design to the implementation stage. The family preservation piece took over while the adoption piece largely disappeared.").

150. See Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15) (requiring states to make reasonable efforts to provide services to keep biological families intact).

151. See *id.* at § 670 (tying financial benefits to compliance with federal standards).

152. See Mangold, *supra* note 133, at 854 (describing the initial success of AACWA).

153. See David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L.J. 183, 190 n.50 (1995) (describing the dramatic increase in the number of children in foster care during the late 1980s).

154. See generally RICHARD GELLES, *THE BOOK OF DAVID* (1996) (detailing the story of David as he returns to his mother's home).

155. See Paul Anthony Wilhelm, *Permanency at What Cost? Five Years of Imprudence Under the Adoption and Safe Families Act of 1997*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 617, 629 (2002) (stating that congressional testimony and newspaper articles pre-ASFA focused on failures in the system like the suffocation of the young boy in Gelles's book).

156. See generally GELLES, *supra* note 154 (relating the story of a boy's death in his mother's care).

157. See Mangold, *supra* note 133, at 856 (stating that reform efforts became more urgent

at all costs, regardless of the nature of the maltreatment or the family involved.¹⁵⁸ Under these interpretations of AACWA, children still were not the focus of the system.

3. *Specific Protection for Some Abused Children: ASFA*

In response to public outrage over the state of the foster care system,¹⁵⁹ Congress passed the Adoption and Safe Families Act of 1997 (ASFA).¹⁶⁰ One of Congress's primary objectives in ASFA was to clarify that the health and safety of the child would be the primary focus in child welfare cases, outweighing the reasonable efforts requirement.¹⁶¹ Representative Deborah Pryce announced that ASFA would elevate children's rights in order to prevent marginalizing their health and safety.¹⁶² With enormous bipartisan support, the legislation easily passed both the House and Senate.¹⁶³ The new law garnered support in the media as well.¹⁶⁴

ASFA's stated purpose is "to promote the adoption of children in foster care."¹⁶⁵ Congress provided exceptions to AACWA's reasonable efforts requirements when certain aggravated circumstances are present.¹⁶⁶ The swift

as the reports of children dying in their homes after child welfare agencies had notice of their dangerous situations (citing New York State Commission on Child Abuse, Final Report (1996)).

158. See Barthelet, *supra* note 149, at 87 ("The Act came to be read by many as requiring efforts to preserve families at all costs, and regardless of whether the efforts were 'reasonable' given the nature of the family and of the maltreatment involved.").

159. See Adler, *supra* note 31, at 20 (describing the "tearful tales of children drifting through multiple foster care placements" as part of the impetus behind ASFA).

160. See Mangold, *supra* note 133, at 858 (describing the motivation for ASFA).

161. See *id.* (noting exceptions in ASFA to the "reasonable efforts" requirement).

162. See 143 CONG. REC. H10,789 (daily ed. Nov. 13, 1997) (statement of Rep. Pryce) ("[ASFA] will elevate children's rights so that a child's health and safety will be of paramount concern under the law.").

163. See Wilhelm, *supra* note 155, at 624 (stating that ASFA passed both houses of Congress with substantial bipartisan support).

164. *The Washington Post* stated that ASFA put a "new and welcome emphasis on the children." Editorial, *From Foster Care to Adoption*, WASH. POST, May 10, 1997, at A24. A Milwaukee columnist said that ASFA would be "to the abused and neglected children in our nation's foster-care system what the Voting Rights Act was to black Americans in 1965." Jeff Katz, *Finally the Law Puts These Kids' Interests First*, MILWAUKEE J. SENTINEL, Dec. 28, 1997, at 1.

165. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

166. See *id.* § 101(a), Adoption and Safe Families Act of 1997, Pub. L. No. 105-89 § 101(a), 111 Stat. 2115, 2116-17 (codified at 42 U.S.C. § 671(a)(15)(D) (2000)) (describing circumstances that avoid the reasonable efforts requirement).

timetable for commencement of termination proceedings illustrates the legislature's preference for adoption. It also demonstrates that the pendulum between reunification and termination is moving again.¹⁶⁷ Under ASFA, if the state decides that a case does not require reasonable efforts for reunification, the state must hold a permanency hearing¹⁶⁸ within thirty days of that determination, and the state must make reasonable efforts to place that child in a timely manner in accordance with the resulting permanency plan.¹⁶⁹ Even when ASFA requires reasonable efforts to reunify the family, it allows concurrent efforts to place the child for adoption or with a legal guardian, reflecting Congressional recognition of the child's interest in timely permanency.¹⁷⁰ Preparing children for both reunification and adoption, as mandated by ASFA, creates conflicting initiatives for the child welfare organizations responsible for their placement.¹⁷¹ Unlike past legislation, it encourages agencies to focus on the child's need for permanency.

Under ASFA, the state generally must initiate proceedings to terminate parental rights—without reasonable efforts to reunite the family—if a court finds that the parent murdered one of the child's siblings or otherwise assisted in such a murder.¹⁷² Additionally, if the parent has committed a felony assault that resulted in serious bodily injury to the child or one of its siblings, the state generally must initiate termination proceedings.¹⁷³ The circumstances

167. See Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 113–14 (1999) (describing how ASFA provisions providing for a quick timetable for proceedings demonstrates a preference for adoption).

168. A permanency hearing determines the permanency plan for a child's future—whether the state will free the child for adoption, return the child to the parents, or place the child in a legal guardianship. See 42 U.S.C. § 675(5)(C) (2000) (describing the purpose of the permanency hearing).

169. Adoption and Safe Families Act of 1997, Pub. L. No. 105–89 § 101(a), 111 Stat. 2115, 2117 (codified as amended at 42 U.S.C. § 671(a)(15)(E) (2000)).

170. See Adoption and Safe Families Act of 1997, 42 U.S.C. § 671(a)(15) (2000) (stating that the state may simultaneously work to place the child in an adoptive home or find a guardian and attempt to reunify the family).

171. See Roberts, *supra* note 167, at 114 (explaining how the dual purposes of reunification and preparation for adoption create conflicting incentives for child welfare agencies).

172. See Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(5)(E) (2000) (stating that the state must generally file a petition for termination if the parent has "committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter").

173. See *id.* (stating that the state generally must file a petition to terminate parental rights if the parent has "committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent").

triggering this expedited filing for termination of parental rights involve situations in which the child's life and health are in immediate, obvious danger. In those circumstances, the child's interests overcome the traditional focus on parents' rights. Each of the children in the stories at the beginning of this Note could meet ASFA's criteria for expedited termination of parental rights.¹⁷⁴ In those cases, the focus of the statute should have been on the child's interests rather than the traditional parental rights of care, custody, and control of the child.¹⁷⁵

The provisions for expedited termination proceedings in ASFA make sense on their surface. Congress designed these provisions to protect children in severe physical danger at their parents' hands.¹⁷⁶ Importantly, the statute provides some flexibility by requiring states to begin proceedings to terminate parental rights in severely dangerous circumstances unless the state can demonstrate a compelling reason why those proceedings should not occur.¹⁷⁷ However, as the next Part demonstrates, termination of parental rights is not always the best solution to an abused child's situation. Providing the child with his own attorney would help to ensure that justice is served in expedited termination proceedings by presenting the child's perspective and advocating for his individual interests.

III. Repairing the Current System

A. The Problem: Incomplete Realization of Congressional Intent

Despite Congress's intent that the child's well-being be the focus of the child welfare system, ASFA fails to provide a voice for the child to explain and protect the child's interest once the system begins deciding that child's fate.¹⁷⁸ Once the state begins proceedings to terminate parental rights, a court still must make a determination regarding the fate of the individual child before it.

174. See *supra* notes 1–28 and accompanying text (describing the lethally abusive family situations of children in the system).

175. See *supra* notes 159–75 and accompanying text (describing the Supreme Court's traditional focus on care, custody, and control of the child).

176. See *supra* Part II.D.3 (describing the situations in which ASFA requires expedited termination of parental rights).

177. See Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(5)(E)(ii) (2000) (creating an exception to the requirement that states initiate proceedings to terminate parental rights when the agency has documented a reason in the case plan that initiating those proceedings would not be in the child's best interest).

178. See *generally* Adoption and Safe Families Act of 1997 (failing to provide counsel to present a child's interests).

Unlike the Supreme Court in *Santosky* and *Parham*, Congress recognized that the child's interests do diverge from the parents' interests, especially in the circumstances that lead to an expedited termination proceeding.¹⁷⁹ However, in ASFA, it failed to provide a voice dedicated solely to advocating for the children's interests it sought to protect. The children protected by ASFA still face the problem Joshua DeShaney faced: No one presents the story and circumstances on which the court should focus and therefore the court never focuses on that vital perspective. Congress's provisions in ASFA do not adequately implement the intended goal of the statute that the system focus on the children within it.

1. Specific Stories of Children

The discussion on the floor of both houses of Congress during the debates on ASFA demonstrates members' awareness of the stories of individual children in the system and their strong desire to help them.¹⁸⁰ Constant references to newspaper stories and headlines pepper the legislative record of the House and Senate alike,¹⁸¹ demonstrating Congress's heightened focus on high profile failures of the system. Beyond newspaper headlines, members of Congress related stories of children with whom they themselves had contact, including an eighteen-month-old boy not yet free for adoption by his foster mother,¹⁸² a two-year-old girl removed from her biological family who spent the

179. See 143 CONG. REC. H2017 (daily ed. Apr. 30, 1997) (statement of Rep. Kennelly) ("The tension between the rights of parents and the needs of children will be a perennial debate when we talk about child welfare.").

180. See 143 CONG. REC. S9653 (daily ed. Sept. 18, 1997) (statement of Sen. Bond) (describing the death of a little girl whose mother's boyfriend beat and drowned her because she could not recite the alphabet); 143 CONG. REC. H10,790 (daily ed. Nov. 13, 1997) (statement of Rep. Shaw) (describing the first encounter of a three-year-old girl and her adoptive family, during which she placed her hands on her hips and repeatedly asked them where they had been).

181. See 143 CONG. REC. H10,790 (daily ed. Nov. 13, 1997) (statement of Rep. Shaw) (describing the *Orlando Sentinel's* account of a little girl named Baby Jasmine abandoned in a toilet at Disney World); 143 CONG. REC. S3947 (daily ed. May 5, 1997) (statement of Sen. DeWine) (referencing a story in the *Washington Post Magazine* about three-and-a-half year old twins who the court returned to their natural mother after they spent two years with a loving foster mother); 143 CONG. REC. H2018-20 (daily ed. Apr. 30, 1997) (statement of Rep. Roemer) (referencing a *Chicago Tribune* story concerning children abused or killed upon return to their biological families and a *New York Times* story about ways families are trying to protect their children from the system); 143 CONG. REC. H2021 (daily ed. Apr. 30, 1997) (statement of Rep. Hoyer) (referencing a *Washington Post* article about a child raised in a crack house).

182. See 143 CONG. REC. H2020 (daily ed. Apr. 30, 1997) (statement of Rep. Pomeroy) (describing an encounter with an eighteen month old boy and his foster mother, whom the congressman mistook for the child's natural mother). In a conversation with the mother,

next sixteen years in the foster care system,¹⁸³ a young man who had been in 130 foster homes by age fourteen while the state tried to reunify his family,¹⁸⁴ and a five-year-old removed from his abusive father's custody who would return to the father's custody without a showing of extraordinary circumstances to compel termination of the father's rights.¹⁸⁵ As one member of Congress noted, the goal of ASFA was not merely to react to these situations but to prevent them from recurring.¹⁸⁶

2. *Rapid Removal from Foster Care to Permanent Homes*

When children lose their parents through a termination proceeding, Congress expects that those children will be placed in loving, permanent, adoptive homes.¹⁸⁷ Congress's motivation stems largely from its members' knowledge that such a large number of children are in the foster care system,

Representative Pomeroy learned that despite their appearance of being an intact family, the relationship between the little boy and his mother was indeterminate as they waited for the system to ratify it. *Id.* Although the boy might not be aware that he is not free to be adopted, he still has an interest in the permanent disposition of his case. *See infra* notes 237–44 and accompanying text (describing the importance of permanence for young children).

183. *See* 143 CONG. REC. H2028 (daily ed. Apr. 30, 1997) (statement of Rep. Tiahrt) (describing the life of Halie, who was removed from her biological family at two years old and remained in the foster care system until she turned eighteen).

184. *See* 143 CONG. REC. H2020 (daily ed. Apr. 30, 1997) (statement of Rep. Tiahrt) (telling the story of a Kansas boy who spent eleven years in 130 foster homes waiting for his parents to be rehabilitated enough to regain his custody).

185. *See* 143 CONG. REC. H2021 (daily ed. Apr. 30, 1997) (statement of Rep. Hoyer) (describing the boy's circumstances and the statements of judges that absent an extraordinary finding, he would be returned to that father's care).

186. *See* 143 CONG. REC. H2017 (daily ed. Apr. 30, 1997) (statement of Rep. Kennelly) ("[T]his legislation is not only a reaction to these kinds of situations; this legislation is on the floor today so these situations will not make headlines.").

187. *See* 143 CONG. REC. H10,787 (daily ed. Nov. 13, 1997) (statement of Rep. Kennelly) (congratulating Congress for "putting children on a fast track from foster care to safe and loving and permanent homes"); 143 CONG. REC. S9652 (daily ed. Sept. 18, 1997) (statement of Sen. Rockefeller) ("The main objective of this bill is to move abused and neglected children into adoptive or other permanent homes and to do so more quickly and more safely than ever before."); 143 CONG. REC. H2015 (daily ed. Apr. 30, 1997) (statement of Rep. Shaw) ("[T]he number of adoptions in the United States will increase substantially and the number of children languishing in foster care will at last decline."); 143 CONG. REC. H2017 (daily ed. Apr. 30, 1997) (statement of Rep. Camp) ("This legislation puts the system in their corner and makes sure that our children grow up in a permanent loving home."); 143 CONG. REC. S2729 (daily ed. Mar. 20, 1997) (statement of Sen. Dodd) (declaring that the legislation would move children rapidly from the foster care system to permanent, loving homes).

many of them waiting for termination of parental rights to allow for adoption.¹⁸⁸ However, when the state terminates parental rights, not all children start a new life because of a shortage of adoptive homes.¹⁸⁹ Hard-to-place children are particularly susceptible to becoming legal orphans.¹⁹⁰ ASFA has initially increased the numbers of adoptions, but no research is available to accurately predict whether that result will be permanent.¹⁹¹ Like the legislation before it,¹⁹² ASFA also has increased the number of children in foster care.¹⁹³ Congress slightly tailored the one-size-fits-all approach to fit some extreme circumstances, but even that tailoring will not guarantee all children a good outcome. Without a voice for the individual experience and circumstances of each child, and with the accompanying realization that not every termination of parental rights results in adoption, relevant court proceedings will often thwart the purposes of ASFA.

3. *Balance Between Conflicting Values*

An important focus of Congress in passing ASFA was achieving balance between conflicting values in the child welfare system. Congress wanted to

188. See 143 CONG. REC. H2018 (daily ed. Apr. 30, 1997) (statement of Rep. Burton) (quoting statistics that over 500,000 children are in the foster care system while somewhere between 50,000 and 80,000 are legally free to be adopted); see also 143 CONG. REC. H2020 (daily ed. Apr. 30, 1997) (statement of Rep. Pomeroy) (describing an encounter with an eighteen-month-old boy and his foster mother who were waiting for his release for adoption).

189. See Adler, *supra* note 31, at 11 (stating that shortages of adoptive homes leave many children without a permanent place to begin a new life); see also Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 FAM. CT. REV. 25, 30 (2001) (stating that termination alone does not ensure permanence because permanence requires adoption or guardianship and that no one can guarantee that children whose parent's rights are terminated will not become legal orphans).

190. See Adler, *supra* note 31, at 11 (explaining that children of color, older children, and children with disabilities particularly fall prey to the problem of lack of permanent adoptive placement upon termination of parental rights).

191. See Gendell, *supra* note 189, at 33 (stating that it is unclear whether the trend in increased adoptions following ASFA's implementation will continue and that no method of research currently available can accurately predict the permanence of the increase).

192. See Mangold, *supra* note 133, at 853 (stating that the foster care system was "flooded" with children following the implementation of CAPTA); see also Katherine A. Hort, Note, *Is Twenty-Two Months Beyond the Best Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J. 1879, 1892 (2001) (stating that the number of children in foster care exploded less than a decade after states implemented AACWA).

193. See Gendell, *supra* note 189, at 33 (stating that the number of children coming into foster care has decreased post-ASFA, but the number of children in foster care has increased).

resolve the primary conflict between the rights of parents and those of children so that children received some protection.¹⁹⁴ Similarly, the need to balance the goal of keeping families intact with that of allowing children to find permanent, loving homes informed Congress's perspective on the bill.¹⁹⁵ Another balance Congress sought to steady was parental rights versus children's safety.¹⁹⁶ These balances cannot become a reality when a family enters a courtroom, and everyone but the child has an attorney. An attorney is vital to presentation of the child's individual interests, as this Note discusses in Part III.B.2 below.¹⁹⁷ Courts will be unable properly to balance the competing interests in child protection cases if they do not hear the stories of everyone involved. If children do not have their own attorneys, the scales of justice will not register or weigh their interests in the balance.

4. Remaining Holes in ASFA's Plan

Despite the Congress's focus on the unique situations of individual children, legislators could not draft legislation that covered every story. With ASFA, Congress began working toward eliminating the chance that a child would return to a home where death or severe abuse would be likely to occur. However, in reacting to protect a child from an abusive parent or parents, courts may wrench a child from other important positive adult influences, especially in domestic violence situations in which only one parent is abusive.¹⁹⁸ One critic

194. See 143 CONG. REC. S3947 (daily ed. May 5, 1997) (statement of Sen. DeWine) ("[W]e have to start worrying about the children's rights and less about the rights of the natural parents."); 143 CONG. REC. H2017 (daily ed. Apr. 30, 1997) (statement of Rep. Kennelly) ("The tension between the rights of parents and the needs of children will be a perennial debate when we talk about child welfare."); 143 CONG. REC. H2018 (daily ed. Apr. 30, 1997) (statement of Rep. Levin) (stating that Congress should keep its "eye on the ball" and "not go overboard one way or the other," but balance the positions of parents and children). Representative Levin noted that termination of parental rights that happens too soon is not in the child's best interest, but neither is failing to terminate those rights if that action becomes necessary. *Id.*

195. See 143 CONG. REC. H2022 (daily ed. Apr. 30, 1997) (statement of Rep. Harman) (stating that the bill balances intact families and permanent loving homes for children).

196. See 143 CONG. REC. H2016 (daily ed. Apr. 30, 1997) (statement of Rep. Camp) (describing how ASFA strikes the proper balance between the rights of parents and the safety of children).

197. See *infra* Part III.B.2 (describing how an attorney is necessary to represent a child's interests).

198. See generally Rachel Venier, Note, *Parental Rights and the Best Interests of the Child: Implications of the Adoption and Safe Families Act of 1997 on Domestic Violence Victims' Rights*, 8 AM. U. J. GENDER SOC. POL'Y & L. 517 (2000) (discussing the negative impact of ASFA on domestic violence victims).

has noted that the statutory language encourages states to hold battered women legally liable for failure to protect their children and then allows states to terminate parental rights on those grounds.¹⁹⁹ Although the child may want to stay with the nonabusive parent and may feel emotionally secure in that parent's presence, the system can remove the child because of the abuse of the other parent.²⁰⁰ Lucas Ciambrone is an example of this kind of termination: His mother's boyfriend abused him and she lost her parental rights.²⁰¹ Some children in this circumstance would be better served by remaining with the nonabusive parent, although others might remain in danger for various reasons, such as when that parent is chronically unable to choose nonabusive partners.²⁰² In these complex circumstances, an attorney for the child would help the court to navigate the intricacy of that child's life to achieve the best individual result.²⁰³

Beyond the stories of older, hard-to-place children or children from homes with domestic violence are countless other individual circumstances informing the best interests of every child entering the child welfare system. No law can perfectly predetermine the best outcome for each child, but the law can provide each child with the means to bring all the unique circumstances and factors of that child's life to the court's attention as it makes its determination of the child's future. The unique circumstances of each individual child's life do not come into every courtroom through the parents' attorney or the state's attorney; the child's own perspective can only come from his own representative, as the next Part demonstrates.²⁰⁴

B. *The Solution: Providing Children's Counsel*

After ASFA, children are still outsiders to the system that decides their fate and, therefore, they are still marginalized, powerless, and voiceless.²⁰⁵

199. *Id.* at 520–21.

200. *See id.* at 545–46 (describing the likelihood of a victimized child being victimized again by a system that removes the child from a nonabusive parent rather than providing assistance to both the child and the nonabusive parent in escaping their abuser).

201. *See* John Gibeaut, *Lucas Deserved Better*, A.B.A. J., Dec. 1997, at 52, 53 (discussing how the state removed the children because of the mother's boyfriend's abuse).

202. *See* Venier, *supra* note 198, at 546 ("In some cases, terminating an abused woman's parental rights may be the only way to ensure her children's safety. However, in some cases termination may not be appropriate.")

203. *See infra* Part III.B.2 (describing the importance of an attorney for the child).

204. *See infra* Part III.B.1 (describing the divergence of the interests of the state, parents, and children).

205. *See* Woodhouse, *supra* note 109, at 1756 ("It should not surprise us, given children's outsider status, that children are marginalized or even damaged by a system that claims to serve

Congress intended that ASFA would focus the system on the interests of children.²⁰⁶ For that goal to become a reality, children's stories must enter the courtroom as a part of the cases that decide their ultimate fate.

The Supreme Court has insisted that in proceedings to terminate parental rights, the interests of children are protected by the child's parents.²⁰⁷ According to the Court, only after a court has declared the parent unfit can the child's interest diverge from the parents'.²⁰⁸ As the next section demonstrates, these views of a child's interests are too narrowly drawn and fail to reflect the truly diverse interests of the three sets of players in a proceeding to terminate parental rights.

1. *Conflict Between Interests of the State, Parents, and Children*

ASFA does not address the need for separate legal counsel for children in proceedings to expedite parental rights, and neither most states nor the Supreme Court has addressed that need. Cases like *Santosky*, with its errant presumption that all children share an interest with their parents in avoiding termination, continue to be the norm for disposition of these cases. Yet, the interests of the players in a proceeding to terminate parental rights are far more diverse than the Court recognized. An attorney's duty is to his client, not to interested third parties.²⁰⁹ Therefore, each set of players in one of these proceedings requires its own attorney to present its interests effectively to the court.²¹⁰

a. *Interests of Parents and the State*

The most obvious state interest in a proceeding to terminate parental rights is the duty to protect citizens who cannot protect themselves, the traditional role

them but in which they are powerless and voiceless.").

206. See *supra* Part III.A (describing Congress's intent in passing ASFA).

207. See *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (stating that children and parents share an interest in preventing erroneous termination of their relationship).

208. See *id.* (stating that the interests of children and their parents in a termination proceeding do not diverge until a court declares the parent unfit).

209. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2002) (stating that lawyers generally cannot represent a client whose interests are materially limited by the lawyer's responsibility to another client). The parent's attorney has the parents as clients and the state's attorney's client is the state. Because these attorney's clients have conflicting interests with the child, as described in this Part, they cannot represent the child as a client.

210. See *infra* Part III.B.2 (describing the importance of the attorney's role in achieving justice for the client).

of *parens patriae*.²¹¹ In termination proceedings, however, states also are trying to comply with federal statutes like ASFA, which encourage counsel for the state to recommend one of the two traditional options (reunification or termination) emphasized by Congress. Because of Congress's focus in ASFA on quick timing and permanent placement, the state's counsel may not adequately advocate all of the child's interests in the proceeding.²¹² Counsel for the state has the state as its client, not the child. State's counsel also could focus on termination because it would protect interests other than the child's welfare, such as access to the adoption subsidies contained within ASFA.²¹³ These subsidies provide significant financial benefits to the states.²¹⁴

An attorney representing the parents also is ill-suited to represent a child's interests in a proceeding to terminate parental rights. Parental interests in proceedings to terminate parental rights enjoy ample attention and explanation in Supreme Court decisions regarding child welfare cases.²¹⁵ The Court has protected the "sacred private interest" of parents to the care, custody and nurture of their children.²¹⁶ When the state initiates proceedings to terminate parental rights, it threatens the constitutional right of parents to choose the education and upbringing of their children.²¹⁷ However, the Supreme Court

211. See Jennifer Bellah, Note, *Appointing Counsel for the Child in Actions to Terminate Parental Rights*, 70 CAL L. REV. 481, 487 (1982) (describing the state's interest in proceedings to terminate parental rights as based on duty to protect citizens who cannot protect their own interests). When a state proceeds as *parens patriae*, it provides protection to those who cannot care for themselves. BLACK'S LAW DICTIONARY 511 (2d pocket ed. 2001) (defining *parens patriae*).

212. See Bellah, *supra* note 211, at 498–99 (stating that some cases involve a state's counsel that is unlikely to adequately advocate the child's interests or is ill-prepared to advocate that interest).

213. See Adoption and Safe Families Act of 1997, Pub. L. No. 105–89 § 201, 111 Stat. 2115, 2122–25 (codified at 42 U.S.C. §§ 670–79) (providing incentives to states for increasing the number of adoptions). Congress reauthorized adoption subsidy payments and re-emphasized its focus on adoption in the Adoption Promotion Act of 2003, which stressed Congress's focus on placing older children in adoptive homes. Adoption Promotion Act of 2003, Pub. L. No. 108-145, 117 Stat. 1879 (codified at 42 U.S.C. § 673b (2003)).

214. The Department of Health and Human Services announced that the bonuses paid for increases in adoptions in 2002 totaled approximately \$14.9 million paid to twenty-five states and Puerto Rico. Press Release, Department of Health and Human Services, HHS Awards \$14.9 Million in Bonuses to States for Increasing the Number of Adoptions of Foster Children (Sept. 12, 2003), at <http://www.hhs.gov/news/press/2003pres/20030912.html> (on file with the Washington and Lee Law Review).

215. See *infra* Part II.B (describing the focus of the Supreme Court in child protection cases).

216. See *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (describing the interest of parents in their children as a "sacred private interest").

217. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) (describing the right of

never has held that parents have the right to treat their children in the violently abusive manner described by ASFA as warranting an expedited proceeding to terminate parental rights. In expedited termination proceedings, the parents have threatened the child's physical welfare through actions that can no longer be characterized as being in the child's best interest.²¹⁸ Parents who have been charged with violent and life-threatening behavior toward their children logically cannot be relied on to protect the child's interests in a proceeding to terminate parental rights.²¹⁹ Additionally, parents are not guaranteed the right to counsel in proceedings to terminate parental rights.²²⁰ If the parent does not have an attorney, then the only party represented by counsel is the state and the child's interests are even less likely to be fully represented.

b. Interests of Children

A child's due process liberty interests in family life should exist separately from their parents.²²¹ The Constitution, especially the Bill of Rights, protects individual liberty, not group or family liberty.²²² The Constitution does protect

parents to provide a suitable education for their children); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (same).

218. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a)(3), 111 Stat. 2115, 2118 (codified at 42 U.S.C. § 675(5)(E)) (listing the kinds of severe physical abuse that trigger a requirement for the state to file a petition to terminate parental rights).

219. See *Bellah*, *supra* note 211, at 497-98 (stating that, even in an ordinary proceeding to terminate parental rights, "[b]ecause the parents are charged with being generally unwilling or unable to protect the child's welfare, they cannot be assumed to be acting to protect the child's interests in the proceedings"). Ms. Bellah's argument is even more potent with regards to expedited proceedings, where parents themselves are charged with physically endangering their child, rather than merely failing to protect that child's welfare. See also *Swindell*, *supra* note 55, at 681 ("[B]oth the child's and parents' interests are at stake, and . . . because of potential conflicting interests, parents may not adequately represent the child's position in the termination proceeding.").

220. See *Lassiter v. Dep't. of Soc. Servs.*, 452 U.S. 18, 33 (1981) (holding that the trial court did not err in failing to provide counsel for a parent in a termination proceeding because counsel was not required for due process).

221. See *Swindell*, *supra* note 55, at 678 (disagreeing with the Michigan Supreme Court's belief that a child's due process interest in family life is inseparable from her family's interest).

222. See *id.* (explaining that constitutional liberty rights belong to the individual, not to a group, family or corporation (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 10.2, 10.5 (4th ed. 1991))). Congress has sometimes chosen to protect group rights as well as individual rights. See Indian Child Welfare Act of 1978, 25 U.S.C. § 1902 (2000) (describing the policy underlying the Indian Child Welfare Act (ICWA)). ICWA protects not only the individual interests of Indian children but also the stability and security of Indian tribes and families. *Id.*

liberty rights belonging to a child as a person under the Fourteenth Amendment.²²³

The Supreme Court found that the Constitution does not necessarily require counsel for parents²²⁴ and it might not do so for children, but Congress can create incentives for states to provide counsel despite the lack of a constitutional requirement. In a proceeding to terminate parental rights, the child's liberty interests in his family relationship are threatened, and the child's best interests should be part of the court's primary focus. These interests may be very different from those of the parent or the state. One of the child's primary interests is freedom from severe physical abuse or impending death, as recognized by Congress's special treatment of these circumstances in ASFA.²²⁵ The subjects of expedited proceedings to terminate parental rights are children whose parents have not only failed to protect their interests, but who themselves have proved to be a threat to the child's physical safety.

Additionally, the child has an interest in the quick determination of his fate by the court.²²⁶ Children's perception of time differs from adults'.²²⁷ Longer proceedings result in greater harm to the children involved.²²⁸ Although Congress has mandated that the child's best interests be paramount,²²⁹ the Supreme Court still requires the state to meet a clear and convincing standard of proof before termination.²³⁰ This standard of proof can necessitate an extended period of time for adjudication, during which the child

223. See *In re Gault*, 387 U.S. 1, 28 (1967) (noting that "[t]he condition of being a boy does not justify a kangaroo court" when the state threatens a child's liberty interests).

224. See *Lassiter*, 452 U.S. at 32 (holding that due process does not necessarily require providing counsel to parents in termination proceedings).

225. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101(a), 111 Stat. 2115, 2116 (codified at 42 U.S.C. § 671(a)(15)(D)) (allowing states to avoid the reasonable efforts requirement in situations in which certain physical abuse has taken place); *id.* at § 103(a)(3) (requiring the state to file a petition to terminate parental rights in situations in which certain physical abuse has taken place).

226. See GOLDSTEIN ET AL., *supra* note 144, at 42 (explaining that a child's unique sense of time requires a decisionmakers' speedy determination of their future so that stability may be restored to an existing relationship or so that old relationships may be replaced with new ones).

227. See Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 716 (1992) (explaining that, for a four-year-old, next week may seem a decade away).

228. See *Bellah*, *supra* note 211, at 501 ("The longer the uncertainty about his or her status, the greater the harm to the child.").

229. See *Mangold*, *supra* note 133, at 858-59 (stating that ASFA's purpose was to make the child's health and safety paramount).

230. See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (requiring the state to meet at least a clear and convincing standard in proceedings to terminate parental rights).

is suffering irreparable harm and trauma.²³¹ ASFA's supporters were aware of the damage long proceedings could inflict and of the extreme vulnerability of the children their legislation sought to protect.²³² Experts have criticized that, absent any procedural or other delays by attorneys, proceedings to terminate parental rights take too long and are traumatic to children.²³³ During the termination proceeding, the child is in foster care, which can approximate abuse in its harmful effects upon the child because of the uncertainty it entails.²³⁴ Timing also may impact whether the child finds a new adoptive home because the older a child is, the worse that child's chances are of being adopted.²³⁵ Included in the child's interest in speedy determination of his future is an interest that the proceedings be free from errors that could encourage an appeal that would drag out the uncertainty of his position.²³⁶

Closely tied to the child's need for rapid judicial determination of his future is the need for permanence in a secure and stable home.²³⁷ Childhood experiences shape the child's future, including school performance, criminal activity, social development, and employment capability.²³⁸ Children with long experiences in the foster care system lack the essentials of a healthy home environment, such as continuity and stable relationships with caring adults.²³⁹

231. See O'Brien, *supra* note 77, at 1246 ("Proceedings subject to a clear and convincing standard simply take too long. The child is traumatized and often suffers irreparable harm, the result of which is often tragic."); see also *infra* notes 237–41 and accompanying text (explaining the negative impact of a child spending time without a permanent home).

232. 143 CONG. REC. S12,668–73 (daily ed. Nov. 13, 1997) (statement of Sen. Chuck Grassley) (lamenting that three years in foster care encompassed three birthdays, three Christmases, and three grades without a family, and noting that children who experience abuse from their own parents are "the most vulnerable of all").

233. See O'Brien, *supra* note 77, at 1246 (stating that the Supreme Court's requirement of a clear and convincing standard in termination proceedings makes those proceedings last too long, during which time the child is traumatized).

234. See *id.* at 1242 ("During a termination proceeding, foster care can approximate actual abuse in its injurious effect upon a child.").

235. See *id.* at 1246 ("[T]he likelihood of adoption decreases as the child grows older.").

236. See GOLDSTEIN ET AL., *supra* note 144, at 35 ("[E]ach child placement [should] be final and unconditional and . . . pending final placement a child must not be shifted to accord with each tentative decision.").

237. See *id.* at 31–34 (describing the necessity of a physically secure and emotionally stable permanent home for children to avoid developmental problems associated with uncertainty).

238. See Swindell, *supra* note 55, at 663–64 (describing the impact of childhood experiences on a child's future).

239. See O'Brien, *supra* note 77, at 1244–45 (explaining the disadvantages awaiting children who repeatedly return to the foster care system); see also GOLDSTEIN ET AL., *supra* note 144, at 31–32 ("Continuity of relationships, surroundings, and environmental influence are essential for a child's normal development.").

If a child fails to establish a secure, bonded relationship during childhood, that child is at risk for difficulty in forming relationships for the rest of that child's life.²⁴⁰ For children who risk returning to the foster care system because reunification efforts may fail, the goals behind permanence might never be realized.²⁴¹ A child's connection to his parents is not easily transferable.²⁴² Thus a court's determination of who a child's parents should be is particularly important, so that bonding can occur as soon as possible.²⁴³ The younger the child, the more important a permanent decision is, so the benefit of permanent decisions quickly outweigh the benefits of waiting for a better option that may never arise.²⁴⁴

Finally, a child's interests may include retaining a connection to that child's biological parents or others who have had a positive role in the child's life.²⁴⁵ Terminations can result in painful permanent separation from family members, school, and the surrounding community.²⁴⁶ Children with emotional attachments to a non-abusive parent and/or siblings, as well as to other important adults like foster parents, have an interest in guarding those relationships throughout the proceeding.²⁴⁷

240. ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* 193 (1993).

241. See O'Brien, *supra* note 77, at 1245 ("Significant numbers of children never reach this goal, and if they do, it is only after prolonged periods of time have elapsed.")

242. See Woodhouse, *supra* note 109, at 1813 ("From the child's perspective, the parent is not fungible. When [children] say 'Daddy' they mean 'this daddy,' and not just any 'daddy.'"). While children may attach to more than one psychological parent, abruptly severing a connection to any psychological parent is inherently harmful. See GOLDSTEIN ET AL., *supra* note 144, at 32-35 (describing the implications of severing connection with parents at various stages of child development).

243. See GOLDSTEIN ET AL., *supra* note 144, at 22 (explaining that infants may bond to an adoptive parent as their psychological parent, but older children have difficulty doing so).

244. See HARALAMBIE, *supra* note 240, at 193-94 (stating that for all children, but especially for younger children, the benefits of permanence outweigh the benefits of waiting for a potentially better option).

245. See Woodhouse, *supra* note 109, at 1812 (explaining that children's interests suffer when courts deny the reality that parenting includes mutuality and support among adult care givers).

246. See O'Brien, *supra* note 77, at 1234 (describing the results of separation from a family where only one part of that family is responsible for abuse).

247. See Bellah, *supra* note 211, at 488-89 (noting possibility of unnecessarily damaging a child by severing salvageable relationships with the child's parents and siblings).

2. Importance of the Child's Attorney

The unique set of circumstances in an expedited proceeding to terminate parental rights, in which a parent has behaved violently toward the child, draws the contrast between the parents' and the child's interests into sharp relief. As discussed above, the child has interests separate from both the parents' and the state's and needs representation presenting a best interests argument and the child's perspective on the possibilities for that child's future. Professor Richard Gelles notes that the concept of family reunification is so entrenched in child welfare law that nothing can change until judges and social workers change their focus to the child.²⁴⁸

As discussed above, Congress wanted the focus to be on the child in child welfare proceedings.²⁴⁹ However, without an attorney dedicated to the child as the client, a focus on the child is unlikely to occur because vital information will not be presented to the court.²⁵⁰ The Supreme Court itself has clearly articulated the importance of counsel: "[T]he lawyer occupies a critical position in our legal system Frequently in child welfare dispositions, the state's decision is based mostly on the good intentions of under-informed and over-worked players."²⁵¹ Children are still outsiders to the system, and therefore they are still marginalized, powerless, and voiceless.²⁵² Professor Woodhouse argues that the best interests of the child standard should require a closer look at the interests of the child rather than substitution of the interests of adults.²⁵³ For that goal to become a reality, children's stories must enter the courtroom as part of the cases that decide their ultimate fate.

Although states require counsel for children in a variety of court settings, rarely do they require such representation in proceedings to terminate parental rights, even though these proceedings have the greatest long-term

248. See Mary McGrory, *At the Expense of Children*, WASH. POST, July 12, 1998, at C1 (quoting Richard Gelles's statement that family reunification is the pillar of the child welfare culture which will not change until judges and social workers see the child as their client rather than the child's family).

249. See *supra* Part III.A (discussing Congress's intent in passing ASFA).

250. See Gibeaut, *supra* note 201, at 44 ("All too often the state's decision hangs only on good intentions in a world populated by poorly trained judges, inexperienced lawyers, and incompetent and stubborn child welfare agencies.").

251. *Arizona v. Roberson*, 486 U.S. 675, 682 n.4 (1988).

252. See Woodhouse, *supra* note 109, at 1756 ("It should not surprise us, given children's outsider status, that children are marginalized or even damaged by a system that claims to serve them but in which they are powerless and voiceless.").

253. See *id.* at 1827 (stating that courts should focus on the interests of children rather than on the interests of adults).

consequences.²⁵⁴ Courts disservice children when they fail to attach legal significance to the children's experiences.²⁵⁵ Cases like *Santosky*, *Parham*, and *DeShaney* reflect the types of stories Congress reacted to in passing ASFA, but a mismatch remains between those stories and the current reality of child welfare law. The presence of a lawyer speaking on the child's behalf is vital to the creation of the necessary link between reality and disposition of children's cases.

Older children are capable of explaining those experiences to a court and assisting in finding the best solution to the problem of their future care.²⁵⁶ The rights of parents to their children are based on the rebuttable presumption of their constitutional right to care, custody and control of their children,²⁵⁷ which ASFA leaves in the hands of the state to rebut.²⁵⁸ Providing counsel for the older child would provide that child with the opportunity to rebut the presumption of the parents' rights, based on the child's interests rather than, or in addition to, the state's interests.²⁵⁹ Many children know what their experience has been, whether that experience is abuse, neglect, abandonment, or a misunderstanding of their family's circumstances.²⁶⁰ The interests of a child vary with the child's age and experience, but these interests are always vital to a just outcome in a system designed to protect children.

254. See Davidson, *supra* note 53, at 269 ("In particular, it seems odd and unfortunate that all states do not clearly mandate appointment of counsel for the child in termination of parental rights hearings, since the long-term consequences are greatest in these cases.").

255. See Woodhouse, *supra* note 109, at 1831 (stating that cases like *DeShaney* and *Santosky* evidence the law silencing children by failing to attribute legal meaning to their experiences by declaring that they fail to state a claim).

256. See Guggenheim, *supra* note 97, at 85 (stating that at some age less than eighteen, children should have the right to, and are capable of directing, their own attorney). The Adoption Promotion Act of 2003 specifically emphasizes Congress's focus on moving older children into adoptive homes, continuing the pattern of one-size-fits-all legislative solutions. Adoption Promotion Act of 2003, Pub. L. No. 108-145, 117 Stat. 1879 (codified at 42 U.S.C. § 673b (2003)).

257. See *supra* Part II.B (describing Supreme Court precedent regarding parental rights).

258. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a)(3), 111 Stat. 2115, 2118 (codified at 42 U.S.C. § 675(5)(E)(ii) (2000)) (creating an exception to the requirement that states file a petition to terminate parental rights when a state has documented a compelling reason for determining that a petition to terminate parental rights would not be in the best interests of the child).

259. See *supra* Part III.B.1.a (describing the interests of the state as different from the interests of a child).

260. See Swindell, *supra* note 55, at 683-84 ("Children, who know firsthand if they are abused, neglected, or abandoned, may not bring their experiences to the court's attention because of parents' overriding due process rights.").

C. Role of Counsel

Several roles exist in various forms throughout the states for representation of children in the court system;²⁶¹ these roles differ from state to state, but this Part will provide a broad outline of some possibilities. Most states have guardians ad litem (g.a.l.) whose primary role is to represent the child's best interests, as the g.a.l. understands those interests.²⁶² Many states now incorporate Court Appointed Special Advocates (CASAs) in the role of guardian ad litem; they serve as lay volunteers who monitor foster children and provide independent feedback to the court on the welfare of those children.²⁶³

Neither a g.a.l.²⁶⁴ nor a CASA²⁶⁵ fulfills the traditional role of an attorney, zealously representing the child's interests within the bounds of the law.²⁶⁶ An attorney is required for presenting evidence, cross-examining witnesses, and contesting actions by the state or the child's parents that are contrary to the child's interests.²⁶⁷ Some states incorporate the role of attorney and the role of g.a.l. into one lawyer and describe that person as a law guardian.²⁶⁸ Depending on the age of the child, different roles will be necessary for a child's attorney in an expedited proceeding to terminate parental rights.

This Note proposes that older children should have both an attorney and a g.a.l. or CASA, but a younger child is best represented by a law guardian who combines those roles. The distinction between a child old enough to have sufficient perspective to require both an attorney and a g.a.l. and a child young enough to be served by a law guardian does not lend itself to a bright line rule. Because of differences in development and maturity in individual children, an amendment providing both options should leave the choice to the discretion of the judge.

261. See HARALAMBIE, *supra* note 240, at 2 ("No uniformity exists with respect to what it means to be appointed to represent a child . . .").

262. See Paula A. Monopoli, *Using the Legislative Process to Improve the Legal Representation of Children*, in ABA CTR. ON CHILDREN AND THE LAW, LAWYERS FOR CHILDREN 76, 79 n.7 (1990) (describing the role of guardian ad litem).

263. See ROBERT C. FELLMETH, CHILD RIGHTS & REMEDIES: HOW THE U.S. LEGAL SYSTEM AFFECTS CHILDREN 319 (2002) (describing the role of the CASA).

264. See HARALAMBIE, *supra* note 240, at 6 (describing various roles of g.a.l.s and noting that not all are attorneys).

265. See *id.* (stating that the CASA program does not substitute for professional and competent representation of children in the system).

266. See *id.* (describing the role of the attorney).

267. For example, delay in the process may be in the interests of parents or the state, but most children's interests include resolution of their cases quickly so that they can find a stable, permanent home. See *supra* Part III.B.1.b (describing the importance of timing for children).

268. See N.Y. FAM. CT. ACT § 249 (2003) (describing the role of a law guardian).

a. Older Children

The American Bar Association advocates the use of both a g.a.l. or a CASA and an attorney to represent children in abuse and neglect proceedings.²⁶⁹ This model would work well in expedited termination proceedings for older children who can form and articulate their own wishes regarding the disposition of their cases. In this model, the g.a.l. or CASA would be independently responsible for evaluating the child's circumstances, including outside relationships that might be preserved to meet the child's need for continuity, the child's maturity level and capabilities, and developing an independent idea of the child's best interests to report to the court.²⁷⁰ This role is important because even older children might not have a complete idea of what their best interests are because of their limited experience and upbringing in a dysfunctional and abusive world. Children's wishes and their best interests may not be the same, and both should be presented to the court.

The attorney, on the other hand, would be responsible for presenting the child's wishes as the child expresses them, in the traditional role of advocate. The Model Rules of Professional Conduct suggest that an attorney for a child should maintain the traditional role of the attorney, zealously representing the client's position within the bounds of the law.²⁷¹ Attorneys balance the relative competency of clients regularly in cases involving the elderly and mentally ill.²⁷² Representation of an older child need not be substantially different. The child can articulate the experiences and circumstances of the child's life, and the child's attorney can zealously advocate the child's wishes about the disposition of the child's case before the court.²⁷³ These wishes would be balanced or supported, depending on the circumstance, by the g.a.l. or the CASA who would advocate an independent view of the child's best interests.

269. See Davidson, *supra* note 52, at 21 (describing the American Bar Association's policy resolution adopted in 1989).

270. See *id.* at 27 (noting that CASAs have more time committed to each case and may do more thorough investigation, interviewing, and contact with children and their caretakers).

271. See MODEL RULES OF PROF'L CONDUCT R. 1.14(a) cmt. 1 (2002) (explaining that the lawyer should maintain the relationship with the represented child as a client as much as possible, especially in obligations regarding communication).

272. See *id.* (noting that an attorney representing a client who suffers from a decreased mental disability might not be able to maintain the traditional lawyer-client relationship in all respects, but that the lawyer should respect whatever ability the client has "to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being").

273. See Swindell, *supra* note 55, at 683-84 ("Children, who know firsthand if they are abused, neglected, or abandoned, may not bring their experiences to the court's attention because of parents' overriding due process rights.").

b. Younger Children

Very young children are not capable of forming opinions regarding their own welfare, nor can they direct an attorney regarding their interests.²⁷⁴ Young children do not always comprehend long range consequences of choices.²⁷⁵ Young children, however, do have a much stronger and more viable interest than older children in placement in an adoptive home and in the traditional idea of a fresh start.²⁷⁶

One example of effective representation for young children can be found in New York's law guardian program. In that system, an attorney is responsible for presenting all information affecting the child's interests, including the child's own perspective if he or she is old enough to have one.²⁷⁷ Like the guardian ad litem,²⁷⁸ the lawyer is not bound by the child's expressed wishes and may form his or her own opinion concerning the child's best interests.²⁷⁹ This role is particularly important when the child does not have the cognitive ability or maturity to decide wisely with due consideration for the consequences of that child's decision.²⁸⁰

Because a law guardian is an attorney in addition to a g.a.l., the law guardian is bound by Model Rules of Professional Conduct, which suggest that an attorney for the child should maintain the traditional role of the attorney as closely as possible.²⁸¹ Therefore, the law guardian would be responsible for

274. See Guggenheim, *supra* note 97, at 93–94 (explaining that infants lack the linguistic capacity to direct counsel, and young children capable of communication "equivocate" as to their preferences and views).

275. See *id.* at 94 (describing the incapacity of very young children).

276. See GOLDSTEIN ET AL., *supra* note 144, at 22 (explaining that infants may bond to an adoptive parent as their psychological parent, but older children have difficulty doing so).

277. See N.Y. FAM. CT. ACT § 249 (2003) (describing the role of a law guardian).

278. See HARALAMBIE, *supra* note 240, at 6 (describing the role of the guardian ad litem).

279. See *Carballeira v. Shumway*, 710 N.Y.S.2d 149, 152 (App. Div. 2000) ("[A] Law Guardian may properly attempt to persuade the court to adopt a position which, in the Law Guardian's independent judgment, would best promote the child's interest, even if that position is contrary to the wishes of the child." (quoting *In re Amkin P.*, 684 N.Y.S.2d 761, 763 (Fam. Ct. 1999))).

280. See HARALAMBIE, *supra* note 240, at 6 (stating that some children lack the cognitive ability and maturity to make wise choices or appreciate consequences).

281. See MODEL RULES OF PROF'L CONDUCT R. 1.14(a) cmt. 1 (2002) (explaining that the lawyer should maintain the relationship with the represented child as client as much as possible, especially in obligations regarding communication). Professor Guggenheim has suggested that the role of the attorney for a very small child is problematic because the child cannot direct counsel in the traditional manner and the parents and the state will adequately represent the child's interests. See Guggenheim, *supra* note 97, at 126–35 (explaining that in child protective services, the child's interests are adequately represented by the parents and the state). Professor

presenting the child's point of view if and when the child is old enough to have one.²⁸² Even a very young child has perspectives on his circumstances. As Professor Woodhouse notes, when a baby says "Daddy," she is referring to one specific person in the world.²⁸³ A law guardian can present this perspective to the court. A law guardian would also present evidence of the baby's best interest, including facts like the person the baby refers to as Daddy is a dangerous drug addict whose physical abuse of that baby is too severe to allow her to continue contact with him.²⁸⁴

D. Logistics of Finding and Paying Attorneys

Congress has previously used the power of the purse to encourage states to conform to federal statutes affecting family law,²⁸⁵ and ASFA should be amended to similarly provide those types of incentives for provision of counsel to children in expedited termination cases. Throughout the history of federal involvement with adoption law, Congress used financial incentives to pull states into line with the current politically expedient solution.²⁸⁶ In AACWA, Congress authorized payments to states for carrying out the legislation's foster care and adoption provisions.²⁸⁷ The Supreme Court has explicitly authorized this type of financial incentive to comply with federal initiatives in *South*

Guggenheim's article focuses almost entirely on cases involving neglect, however, not on cases involving severe physical abuse. *See id.* at 126–29 (analyzing the child's position in neglect cases and mentioning abuse cases briefly without a separate analysis). The differences in the child's interests and those of the parents and the state are clearly laid out in Part III.B.1 of this Note. Without an attorney, those interests will not be adequately presented to the court.

282. *See* N.Y. FAM. CT. ACT § 249 (2003) (describing the role of a law guardian).

283. *See* Woodhouse, *supra* note 109, at 1813 ("From the child's perspective, the parent is not fungible. When [children] say 'Daddy,' they mean 'this daddy' and not just any 'daddy.'"). The child's connection may be to adults other than biological parents, to a psychological parent or another adult, but the principle of attachment remains. *See generally* C. Quince Hopkins, *Lessons from Cultural Anthropology: The Supreme Court's Kinship Doctrine Revisited* (2003) (manuscript on file with author) (describing diverse ways of creating lasting relationships).

284. *See supra* notes 1–7 and accompanying text (describing the stories of two children whose parents abused them to death).

285. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 471(a), 94 Stat. 500, 501–03 (codified as amended in scattered sections of 42 U.S.C.) (tying financial benefits to compliance with federal standards).

286. *See* Wilhelm, *supra* note 155, at 628 ("Congress has provided significant financial incentives for states to fall into line with whatever policy is politically expedient.").

287. *See* Adoption Assistance and Child Welfare Act of 1980 § 471 (tying financial benefits to compliance with federal standards).

Dakota v. Dole.²⁸⁸ Conditions on federal spending are legitimate so long as federal spending is in pursuit of general welfare,²⁸⁹ is unambiguous in its requirements,²⁹⁰ is related to federal interest in a particular program,²⁹¹ and does not violate other constitutional provisions.²⁹²

ASFA itself already contains financial incentives that encourage states to place more children in adoptive homes than were placed in the previous year.²⁹³ These financial incentives are available after an adoption is finalized, even if the adoption later fails.²⁹⁴ Congress's intent was that children find permanence, not that they be placed for adoption.²⁹⁵ Rather than providing \$4000 for every child adopted above the number of children placed for adoption in the previous year,²⁹⁶ Congress should provide an incentive for states to provide attorneys to children in expedited proceeding hearings.

Unlike past manipulation of statutes, which encouraged states to use one approach or another for the vast majority of children, the requirement that states

288. See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds . . ."). In this case, South Dakota challenged a federal statute refusing a percentage of highway funds to states where persons under the age of twenty-one years could legally purchase or publicly possess alcohol. *Id.* at 205. Rather than directly regulating the consumption of alcohol, Congress encouraged uniformity in state laws through the use of its spending powers. *Id.* at 206.

289. See *id.* at 207 (stating that the exercise of a spending power must be in pursuit of the general welfare).

290. See *id.* (stating that conditions on federal funds must unambiguously enable the states to exercise a knowing choice).

291. See *id.* (stating that federal spending might be illegitimate if unrelated to federal interest in particular national projects or programs).

292. See *id.* at 208 (stating that other constitutional provisions could bar conditions on federal funds).

293. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 201, 111 Stat. 2115, 2122-25 (codified at 42 U.S.C. § 673b (2000)) (providing incentives for adoptions over the number of adoptions in the previous year).

294. See Jim Moye & Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 390 (2002) (describing the disincentive for states to find permanent adoptive homes for children built into ASFA's adoption incentive placement). Mr. Moye and Ms. Rinker explain that the adoption subsidy in ASFA is paid upon finalization of the adoption and not retracted if the adoption fails. *Id.* Therefore, a state could collect more than one incentive for a particular child by placing them in consecutive, but not permanent, adoptive homes. *Id.*

295. See *supra* Part III.A (describing Congress's intent in passing ASFA).

296. See Adoption and Safe Families Act of 1997 § 201, 111 Stat. at 2122-25 (codified at 42 U.S.C. §§ 670-79) (providing \$4000 for every adoption exceeding the base number of adoptions and an additional \$2000 for every special-needs adoption exceeding the base number of special-needs adoptions).

provide counsel for children in expedited proceedings to terminate parental rights will encourage courts to focus on the individual circumstances of each child who comes before those courts. Provision of counsel could help ASFA to succeed where other legislation has failed by providing a method to focus the system on each child's interests.

States can provide counsel for children, just as they do for all indigent parties when a statute or the Constitution requires it.²⁹⁷ In places where the government has made the provision of counsel for children a priority, systems are in place to find attorneys to provide the service. New Jersey has a law guardian system that allows attorneys in the guardian pool to choose the counties and numbers of cases they are comfortable handling.²⁹⁸ Canada's Ontario Province also maintains an "Official Guardian" child representation program.²⁹⁹ New York's law guardian program includes four regional programs and directors, advisory committees, a series of training programs, and a periodical.³⁰⁰ Encouraging states to appoint counsel for children does not necessitate mandating where those attorneys come from. Each state may find a unique method of providing counsel, using creative processes more suited to state than federal legislation.³⁰¹

Some children's rights advocates have criticized federal involvement in proceedings to terminate parental rights because states are closer to the events in which a child's health or safety is endangered.³⁰² Additionally, some experts express concern that the government does not serve children's best interests as it adheres to a constitutional standard protecting parents that, in turn, prevents states from addressing domestic problems within their own borders.³⁰³ While

297. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (providing that states must provide indigent criminal defendants with counsel).

298. See *Parental Representation Unit and Law Guardian Need Pool Attorneys*, NEW JERSEY LAWYER, Jan. 6, 2003, at 31 [hereinafter *Parental Representation*] (describing New Jersey's law guardian system and noting that "[p]ool attorneys are assigned cases in the counties they request and are also able to set the number of cases that they can handle").

299. See Davidson, *supra* note 53, at 259-60 (stating that Ontario maintains an "Official Guardian" child representation program and that there is no comparable agency in the United States to protect children's interests in all civil litigation).

300. See *id.* at 260 (describing the extent of New York's law guardian program).

301. See *Santosky v. Kramer*, 455 U.S. 745, 791 (1982) (Rehnquist, J., dissenting) (criticizing "a trend of federal intervention in state family law matters which surely will stifle creative responses to vexing problems").

302. See, e.g., Wilhelm, *supra* note 155, at 628 (concluding that states should be given maximum leeway in guidelines relating to termination because they are closer to the scene of events that lead to termination).

303. See, e.g., O'Brien, *supra* note 77, at 1211 ("[T]he best interest of the child is not served by adherence to a constitutional standard that deprives states of their legislative ability to

states have developed novel approaches to family law problems, the federal legislature and judiciary have not done so.³⁰⁴ Justice Rehnquist specifically addressed this problem in his dissent in *Santosky*, noting "a trend of federal intervention in state family law matters which surely will stifle creative responses to vexing problems."³⁰⁵ By incentivizing appointment of counsel for children, federal law can provide guidance and focus states' attention on children without dictating individual methodology on details of implementation.

Family law has traditionally been part of the state police power,³⁰⁶ and the circumstances and cultures of individual states may lend themselves to different systems of representation for children. New York³⁰⁷ and New Jersey³⁰⁸ already provide attorneys to children through their law guardian programs. Urban areas might rely on pro-bono work from attorneys in large firms, and smaller, more rural areas may need to use public funds to compensate smaller local practices for their time. States provide different kinds of representation now,³⁰⁹ and those systems could be modified in different ways to access federal funds for attorneys for children in expedited proceedings to terminate parental rights. The federal government intended to spend its money in ASFA to serve the best interests of children,³¹⁰ and providing attorneys will better accomplish that goal than across-the-board adoption incentives. However, the mechanism by which each child receives an attorney should vary as these provisions are incorporated into already existing child welfare systems.

address the significant domestic relations problems within their borders.").

304. See *id.* at 1257 (remarking that states have innovated and produced novel solutions to domestic relations problems, while Congress and the Supreme Court have not).

305. *Santosky*, 455 U.S. at 791 (Rehnquist, J., dissenting).

306. See Mary Mason & David W. Simon, *The Ambiguous Stepparent: Federal Legislation in Search of a Model*, 29 FAM. L.Q. 445, 446 (1995) (noting that state laws on non-traditional families focus on "traditional family law matters of marriage, divorce, adoption and inheritance").

307. See N.Y. CLS FAM. CT. ACT § 249 (2003) (describing the appointment of a law guardian).

308. See *Parental Representation*, *supra* note 298, at 31 (describing New Jersey's law guardian system).

309. See HARALAMBIE, *supra* note 240, at 7-8 (noting that states provide various guidelines for guardians ad litem).

310. See *supra* Part III.A (describing Congress's intent in passing ASFA).

V. Conclusion

Congress's provision for expedited termination of parental rights came too late for Frank Torres and Angelo Marinda. Both boys, subject to the mandate to reunify at almost any cost, became victims of extreme violence in their biological families' homes.³¹¹ Congress intended that these kinds of deaths cease after ASFA,³¹² and it provided a way for states to expedite the process to remove children permanently from these kinds of dangerous environments. However, Congress also demanded that the health and safety of the children be the court's focus in determining the outcome of a case.³¹³

The sisters in foster care in Rhode Island discussed in the introduction of this Note may have a chance for bonding with a new family, and adoption may still be a real option for them, especially while they are still young.³¹⁴ Their mother is fighting to get them back, despite the physical damage she has inflicted on their bodies.³¹⁵ The state will have an interest in protecting itself from liability because its social workers gave the mother a favorable report and returned the baby to her care.³¹⁶ Without an amendment to ASFA, these little girls will not have their own advocate presenting their stories and interests to the court. As very young children, this Note suggests the little girls be given a law guardian, who can inform the court of any wishes they can express as to their futures as well as independently advocate a disposition in their best interests.

Lucas Ciambrione's biological sister and the other child adopted by the Ciambrones are now the subjects of a second proceeding to terminate parental rights.³¹⁷ The state already has terminated parental rights to these children once, then placed the children in a no better (and perhaps worse) situation than

311. See Gibeaut, *supra* note 1, at 44 (describing the death of Frank Torres); Seligman, *supra* note 3 (describing the death of Angelo Marinda).

312. See 143 CONG. REC. H2017 (daily ed. Apr. 30, 1997) (statement of Rep. Kennelly) ("This legislation is not only a reaction to these kinds of situations; this legislation is on the floor today so these situations will not make headlines . . .").

313. See *supra* Part II.D.3 (describing the mandate that children be the focus of these proceedings).

314. See GOLDSTEIN ET AL., *supra* note 144, at 22 (stating that young children may bond with an adoptive family as their psychological parents if they are placed early enough).

315. See McFadden, *supra* note 11 (stating that the case is proceeding through the courts).

316. See *id.* (stating that social workers gave the mother a favorable report and the agency returned the baby to her care); see also Bellah, *supra* note 211, at 500-01 (describing situations in which the state's counsel might be forced to concentrate on defending state conduct or the state's "unclean hands" might prejudice the court).

317. See Gibeaut, *supra* note 16, at 53 (stating that the parental rights of the Ciambrones are now the subject of a termination proceeding).

that in which they were born. The Ciambrones are fighting the termination, despite the documentation of their abuse of Lucas and his resulting death.³¹⁸ Without an amendment to ASFA, Lucas's siblings will not have an attorney to present their chances for re-adoption, their perspectives on the abusive household, their connections to other important adults in their lives, or numerous other factors that might be important to the disposition of their cases. The Ciabrone children are now veterans of the system who have lost a brother to parental abuse; they are likely old enough to have their own wishes and perspective on the disposition of their cases. This Note contends that the state should give them both a CASA and an attorney to ensure that both their wishes and their best interests come before the court deciding their fate.

Children's interests differ substantially from those of their parents and those of the state in expedited termination proceedings.³¹⁹ The state and often parents have their own lawyers in those proceedings, but federal law does not similarly provide counsel for children.³²⁰ The circumstances of each individual child are unique, and no one solution can be drafted to meet all children's needs. Congress intended for states to focus on children in determining child welfare cases.³²¹ Requiring states to provide counsel for children in expedited proceedings to terminate parental rights, in which the state quickly determines a child's ultimate fate, will assist courts in focusing on children in those proceedings, and thus adheres to the ultimate goal of ASFA. Congress should change the financial incentives in ASFA to encourage states to provide a voice for children in expedited proceedings to terminate parental rights.

318. *See id.* (stating that the termination of the Ciabrone's rights as to their other children is under appeal).

319. *See supra* Part III.B.1 (discussing differences between the interests of the players in a termination proceeding).

320. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.) (failing to provide counsel to present child's interests).

321. *See supra* Part III.A (describing the incomplete realization of Congress's intent to require courts to focus on children).

