

## **Do the Best Interests of the Child End at the Nation's Shores? Immigration, State Courts, and Children in the United States**

by  
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Child protection in the U.S. immigration context is often a complex and divisive issue. While international instruments such as the United Nations Convention on the Rights of the Child (CRC) have been adopted by other nations, the U.S. government has signed on to, but not ratified, the Convention. Thus, there is no requirement that immigration officials comply with the spirit or text of the CRC when conducting hearings related to asylum, torture, or interpersonal violence concerning migrant children housed or detained in the United States and whose parents may be subject to removal proceedings. This article will examine the extant literature on the use of such humanitarian or best interests' standards in immigration proceedings and its analog in U.S. child custody litigation. From that analysis, procedural and substantive changes are proposed as a means to provide competent and culturally-sensitive voices for children caught in the midst of removal proceedings, including guardians ad litem as independent, investigative advocates.

### **I. Introduction**

As has often been observed in writings on citizenship, state sovereignty is indeed at its zenith in areas of access to citizenship

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and national residency.<sup>1</sup> At the same time, nations have long promoted certain standards for universal application at the international level to contextualize this sovereignty.<sup>2</sup> One of the most prominent examples of this contextualization is in the area of children or juvenile rights and its intersection with recognized-national borders and internal state responsibility for children once a border is transgressed.<sup>3</sup>

As a threshold matter, this article is concerned with specific asylum application processes, and co-extensive removal processes, which implicate the legal rights and psychosocial vulnerabilities of children when their parents are subject to these

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<sup>1</sup> See Hans E. Andersson, *International Conventions and the Regulation of Migration: The Convention on the Rights of the Child and Sweden*, 20 INT'L J. CHILD. RTS. 122 (2012); see also Timothy Faden & Guy Charlton, *Humanitarian Concerns and Deportation Orders Under the Immigration Act 2009: Are International Obligations Enough Protection for the Immigrant with Mental Illness*, 43 VICTORIA U. WELLINGTON L. REV. 423, 425 (2012) (citing CATHERINE DAUVERGNE, *MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW* (2008)).

<sup>2</sup> The argument in the United States that federal preemption *automatically* bars states from a role in immigration policy is subject to rather complex and emotional scholarly and political debate. See David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 82, 151 (2013) ("For many skeptics, any abstract appeal of leaving a role for sub-federal governments disassembles in the crucible of reality. But it is here, I caution, that the political question of what to do about immigration should not be made to distort the constitutional question of *which* institution has the power to do it. Waving the immigration-exceptionalism flag may help to win a battle or two in the subfederal revolution. Yet it may cost the war.").

<sup>3</sup> See Andersson, *supra* note 1. For purposes of this article, the terms "child" and "juvenile" may be used interchangeably. Both terms implicate a minor who by virtue of that status is considered legally disabled. For the frequently invoked language of Blackstone in American case law, see *Smith v. Smith*, 11 S.E. 496 (Ga. 1890) ("In all our books, except the Code, the contracts of infants are treated as generally voidable; yet the Code says, (section 2731) 'The contracts of an infant under twenty-one years of age are void, except for necessities,' etc."), and *State v. Sellers*, 134 S.E. 873, 875 (S.C. 1926) ("The next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; a fortiori therefore it ought to avoid this, the most important contract of any. Therefore if a boy under 14, or a girl under 12 years of age, marries, this marriage is only inchoate and imperfect; and, when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual Court. This is founded on the civil law.").

proceedings. While other linkages between the best interests' standard and broader immigration law context are implicated,<sup>4</sup> the emphasis on the asylum process is selected because of the often overlooked best interests of the child in such proceedings. This also permits a narrowing of the discussion to include grounds upon which an asylum application can be made, including a duty of governments, and state actors in the United States, to protect children from interpersonal or intimate partner violence (IPV) irrespective of that child's migration status within the United States.<sup>5</sup>

## II. A Primer: Relevant International Conventions

There are three primary avenues for a child to remain in the United States after removal proceedings have begun: asylum,<sup>6</sup> a Convention Against Torture (CAT) claim,<sup>7</sup> and/or moving to cancel an order of removal.<sup>8</sup> Among other limiting factors, can-

<sup>4</sup> For example, when a child has been the victim of "severe trafficking," that child can petition to remain in the United States on his or her own behalf and for their parents. These are the so-called "T" and "U" visas.

<sup>5</sup> See Jay G. Silverman, et al., *Child Custody Determinations in Cases Involving Intimate Partner Violence: A Human Rights Analysis*, 94 AM. J. PUB. HEALTH 951, 951 (2004) ("Under human rights law, governments are obliged to prevent violations of rights by state actors (e.g., judges, probation officers, state-appointed custody evaluators, child protective service workers) as well as nonstate actors. This extends human rights protections to IPV and child abuse, prevalent forms of violence suffered by women and children at the hands of family members.").

<sup>6</sup> 8 U.S.C. § 1158(b)(1)(A) (2006) (a grant of asylum is based on a finding that the applicant is a refugee under §1101(a)(42)(A)).

<sup>7</sup> The United States ratified CAT, subject to certain reservations, on Oct. 21, 1994. See Claire Wright, *Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN'S L.J. 457, 562 (2013) (citing U.N. Treaty Collection, CAT, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en)); see also *id.* ("The CAT's definition of 'torture greatly assists in the effort to develop a workable definition of domestic violence. First, the definition makes no distinction whatsoever between the significance of severe mental pain and suffering and physical pain and suffering. If a government agent's intentional infliction of severe mental pain and suffering on a person can constitute 'torture,' so too should a person's intentional infliction of severe mental pain and suffering on someone with whom he or she is in a domestic relationship constitute 'domestic violence.'").

<sup>8</sup> 8 U.S.C. § 1229b(b); 8 C.F.R. §§ 1240.11(a), 1240.20 (2008).

cellation of removal applies in very narrow circumstances where the child has been a continuous resident of the United States for ten years leading up to the removal order. This petition, in and of itself, might consider the best interests of the child by permitting the fact finder to weigh the benefits of removal to the body politic against the likelihood of harm to the child in disrupting his or her accustomed-to life in the United States. In contrast, the critical question in petitions for asylum, as well as under the CAT, is whether the child has a fear of persecution in the country of origin or that it is more likely than not that the child would be tortured if removed.<sup>9</sup>

In this particular immigration removal process, the sought after outcome, ultimately, is the cessation of a removal action or the staying of an order of removal. The grounds, however, are narrow and the discretion of judges has been severely limited since Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>10</sup> Prior to this tightening of the law, the United States followed an approach similar to many other countries belonging to the Organization for Economic Co-Operation and Development,<sup>11</sup> countries by permitting judges to consider humanitarian factors when deciding to cancel a removal order.<sup>12</sup> Under those circumstances, an immigration official could cancel an order of removal after, essentially, applying a balancing test between the state's interest and humanitarian considerations. For the individual adult or parental applicant, factors

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<sup>9</sup> This policy analysis often occurs in the area of child-soldiers and victims of mutilation but it can apply more broadly. See Tina Javaherian, *Seeking Asylum for Former Child Soldiers and Victims of Human Trafficking*, 39 PEPP. L. REV. 423 (2011); Jennifer Mesko, *Toward a Compassionate Solution: The UNHCR Guidance Note and Asylum for Parents of Female Genital Mutilation Vulnerable Children*, 11 WHITTIER J. CHILD. & FAM. ADVOC. 299 (2011).

<sup>10</sup> Pub. L. No. 104-132.

<sup>11</sup> On Dec. 1960, 20 countries originally signed the Convention on the Organization for Economic Co-operation and Development. Since then, 14 countries have become members. See <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm>

<sup>12</sup> Section 1151 of article 8 now excludes consideration of humanitarian grounds to cancel deportation for lawful residents. For a discussion of the Board of Immigration Appeals grounds for Humanitarian appeals formerly available under INA § 212 (c), see *Yepes-Prado v. INS*, 10 F.3d 1363 (9th Cir. 1993).

such as hardship on the family through separation, health, or other grounds could suffice.<sup>13</sup>

Even before the adoption of the AEDPA, the standard in America was more stringent than other countries by requiring the existence of an “extreme hardship.”<sup>14</sup> Yet this standard became even more difficult to meet with AEDPA’s requirement of “exceptional and extremely unusual hardship.”<sup>15</sup> Why anyone saw the need to further muddle the concept of “extreme hardship” is a matter for another article but suffice it to say that the U.S. government has lead the way by enacting ever more restrictive immigration standards affecting children in the modern era of globalization.<sup>16</sup>

For children, however, severely limited historically in terms of independent power or autonomy by legal status alone, and without the cognitive or economic capacity to advocate for themselves, the impact of policies that enhance risks of violence, abuse, poverty, or trafficking represents a rather callous form of policy choice. Thus, this article proceeds in three sections. The first section discusses current limits on the use of the “best interests of the child” standard in U.S. immigration law. This section argues that children, by status as minors alone, are virtually invisible in most phases of an asylum or removal proceeding.<sup>17</sup>

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<sup>13</sup> See *Yepes-Prado*, 10 F.3d 1363.

<sup>14</sup> Erica Stief, *Impractical Relief and the Innocent Victims: How United States Immigration Law Ignores the Rights of Citizen Children*, 79 UMKC L. REV. 477, 481 (2010) (internal citations omitted).

<sup>15</sup> *Id.* at 489.

<sup>16</sup> This is a topic of significant controversy in both social welfare policy and political rhetoric. What matters here is that the United States has struggled since its inception with the scope and criteria for immigration. See generally MAE N. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA*; DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* (2009).

<sup>17</sup> For purposes of this paper, differences in the status of children born in marriage or out-of-wedlock will not be distinguished. ANN LAQUER ESTIN, *INTERNATIONAL FAMILY LAW DESK BOOK* 118 (2012) (“Legitimacy of birth remains relevant to the immigration and citizenship rights of nonmarital children born outside the United States.”). Federal immigration law defines the term “child” to “include six separate categories of children.” *Id.*; 8 U.S.C. §1101(b)(1) (2015).

Following that discussion, this article will consider the role of international law in the child removal process with particular reference to the United Nations Convention on the Rights of the Child. Although the CRC has been signed but not ratified by the U.S. government, it has been acceded to by many other nations.<sup>18</sup> Whether the politics of poverty and nationalism limit ratification of this treaty for children, Congress can still enact legislation, with the cooperation of the President, which is consistent with the “best interests” standard for children in immigration proceedings. These legal principles currently in existence internationally, and indeed embedded in the law of every state, should be applicable to federal immigration law. This article will then briefly survey other international immigration standards embodying the “best interests” standard. This section suggests several pathways for policy change relevant to the child migrant context.

Emerging from this discussion is the importance of an independent investigatory advocate for the child in the context of immigration removals. Given several options available to policymakers (e.g., appointed counsel, humanitarian advocate, guardian ad litem), this article argues that including a role akin to that of a guardian *ad litem* in state court custody proceedings is likely the most cost-effective and efficient way to implement institutional services for children irrespective of the parent’s migration status. What is known is that many more migrant and unaccompanied children are subject to juvenile and immigration proceedings in the United States and that this demographic shift is unlikely to abate soon.<sup>19</sup>

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<sup>18</sup> *Lopez v. Richardson*, 647 F. Supp. 2d 1356, 1366 (N.D. Ga. 2009) (“Further, the Supreme Court has noted in general that the United States has not ratified the United Nations Convention on the Rights of the Child, which might arguably give broader human rights protection to minors.”)

<sup>19</sup> TRAC REPORTS, NEW DATA ON UNACCOMPANIED CHILDREN IN IMMIGRATION COURT (June 2014), <http://trac.syr.edu/immigration/reports/359/> (“It is well established that the odds of prevailing in court are much better for an individual who has the assistance of a lawyer. Yet the government is under no obligation to provide legal counsel to the indigent — even if they are children — in Immigration Court proceedings. Meanwhile, the government itself is always represented by an attorney.”).

### III. Immigration Law and “Best Interests”

Defining just what the “best interests” of a child are in any universal sense has consistently eluded policymakers. As Mary Banach has observed, there is no universally recognized *operational definition* of just what those are or are not; and that lack of precision generates significant problems for the implementation of the law across culture and socio-economic status.<sup>20</sup> Before taking up this specific problem, this article will consider what evidence has been used to support the inclusion of the “best interests” standard in the migration policy context before returning to possible definitions that might be operationalized within the immigration law context.

Qingwen Xu has provided a helpful summary of the core elements of the “best interests of the child” standard in American state court matters involving immigrant and refugee children. Xu begins by citing the American Bar Association’s embrace of the Uniform Marriage Divorce Act many years ago to include:

1. the wishes of the child’s parents as to his or her custody;
2. the wishes of the child as to his or her custody;
3. the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child’s best interests;
4. the child’s adjustment to home, school and community; and
5. the mental and physical health of all individuals involved.<sup>21</sup>

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<sup>20</sup> Mary Banach, *The Best Interests of the Child: Decision-Making Factors*, 79 *FAM. IN SOC.: J. CONTEMP. SOC. SERV.* 331, 331 (1998).

<sup>21</sup> Qingwen Xu, *In the “Best Interest” of Immigrant and Refugee Children: Deliberating on Their Unique Circumstances*, 84 *CHILD WELFARE* 752 (2005). The lack of determinacy and the power that is derived from indeterminacy, particularly in cases of SES and culture, has been acknowledged for decades and continues to this day in the courts. *See, e.g. In re Welfare of B.P.*, 353 P.3d 224, 248 (Wash. App. Ct. 2015) (Fearing, J., dissenting) (“The emptiest element of parental termination cases is the “best interest” component. The term “best interest” is a vague construct. Its overuse renders the term meaningless. *See* John Thomas Halloran, *Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings*, 18 *U.C. DAVIS J. JUV. L. & POL’Y* 51, 76-77 (2014). “[N]umerous critics have objected to the best interests determination claiming that it ‘allows the judge to import his personal values and leaves considerable scope for class bias.’” Jennifer Ayres Hand, Note, *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.*

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From a survey of fifty states, Xu found that most states have adopted these standards but then contextualized the phrase to suit each state's prerogatives or policy preferences in the area of family relations.<sup>22</sup> At the same time, Xu finds a lack of uniformity in interpretation across the states in cases involving immigrant and refugee children. The solution proposed is to develop "an approach that encourages negotiations and communications between the courts and social workers" and avoid what has become an arbitrary and subjective imposition of the purported best interests of the child in the eyes of a particular fact finder.<sup>23</sup> Yet despite decades of scholarly and political debate on this point, a concrete definition remains elusive.

From a policy perspective in this arena, however, what does matter is what Andrew Schoenholtz aggregated from across the migration policy research: children should be treated differently in the migration policy context than the conventional child custody case.<sup>24</sup> These underlying factors, including particular vulnerability to harm during formative years, are supported through an

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1251, 1275 (1996) (quoting Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599, 619 (1973))."

<sup>22</sup> *Id.* (citing Alex S. Hall et al., *Psychology of Best Interests Standard: Fifty State Statutes and Their Theoretical Antecedents*, 24 AM. J. FAM. THERAPY 171 (1996)).

<sup>23</sup> *Id.* at 767; see, e.g., *Custody of Minor*, 389 N.E.2d 68, 75 (Mass. 1979) ("(A)s every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of (one's) duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper." *United States v. Forness*, 125 F.2d 928, 942 (2d Cir.), cert. denied sub nom. *Salamanca v. United States*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942) (Frank, J.).").

<sup>24</sup> Andrew I. Schoenholtz, *Developing the Substantive Best Interests of Child Migrants: A Call for Action*, 46 VAL. U.L. REV. 991, 1000 (2011). Martin identifies what she terms a "geopolitics of vulnerability" for children detained in an immigration proceeding. This vulnerability stems from their effective role in the process not as individuals in their own right, rather as "child objects" where a balancing of national sovereignty against the subordinate integrity of the individual child migrant is weighted in favor of the state. See also Lauren Martin, *The Geopolitics of Vulnerability: Children's Legal Subjectivity, Immigrant Family Detention and US Immigration Law and Enforcement Policy*, 18 GENDER, PLACE & CULTURE 477, 477 (2011); see also U.S. Citizenship and Immigration Services – RAIO – Asylum Division, *Guidelines for Children's Asylum Claims*,



international normative context constructed around the CRC and the importance of the best interests of the child standard. Schoenholtz is concerned, however, with whether and how these protections have been integrated into the U.S. immigration law framework. For example, guidelines for asylum officers instructed them on how to create “child-friendly” environments while being sensitive to the child’s needs and point of view.<sup>25</sup>

At the same time, similar to the earlier immigration official guidance that Schoenholtz references in his article, the revised guidelines persist in recognizing that while the “best interests” of the child are to be considered in making an asylum determination, they are not dispositive.<sup>26</sup> Even still, CRC provides promise as a pathway for recognizing the child as a unique, independent rights-bearing individual when found in a country without parental protection or with parents who themselves are subject to immigration removal. As addressed below, Article 3 of the CRC applies the best interests of the child standard in state administrative and judicial proceedings. Article 3(2), for instance, requires state support commensurate with the child’s maintenance of his or her well-being. The CRC thereby requires nation-state parties to promote the child’s “survival and development,”<sup>27</sup> as well as maintain the family unit except when the best interests of the child necessitate such separation. Schoenholtz cautions that this aspiration does not guarantee admission for all migrants because the standard may still result in the removal of the child.<sup>28</sup>

Mina Fazel and Alan Stein remind us that children generally require “consistent and reliable care-giving; on their family, school, and peer-group environment; and on the wider social community” in order to fully develop as individuals.<sup>29</sup> At the same time, they also draw attention to the fact that many of the children involved in adversarial immigration proceedings have experienced profound hardships in their short lives and that con-

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for-Childrens-Asylum-Claims-31aug10.pdf (accessed on Sept. 28, 2015) [hereinafter “U.S. Citizenship and Immigration Services].

<sup>25</sup> *Id.* at 1003.

<sup>26</sup> U.S. Citizenship and Immigration Services, *supra* note 24, at 36.

<sup>27</sup> CRC, art. 6.

<sup>28</sup> See Schoenholtz, *supra* note 24, at 1017.

<sup>29</sup> Mina Fazel & Alan Stein, *UK Immigration Law Disregards the Best Interests of Children*, 363 LANCET 1749 (2004).

tinued exposure to “chronic adversity, additional life stressors and events can increase their risk of developing psychological disorders in an additive and possibly multiplicative fashion” all of which increase the “vulnerabilities to psychological disorders.”<sup>30</sup> Thus, policymakers should take a more inclusive and sympathetic view towards the experiences of such child-migrants in asylum and removal processes.

As an extension of that argument, Angela Morrison and David Thronson find incompatible policy objectives—or at least outcomes—inherent in immigration and “child welfare law.” Immigration law “often operates in a way to hinder family unity” while family unity is a primary (if too often unavailable) value-preference in child welfare law.<sup>31</sup> Immigration law, however, can be *deceptive* in its apparent appeal to the principles of family unity. Although immigration law has long encouraged preferences for family relationships when bestowing immigration status, these policies, as the authors argue, are *deceptive* because they essentially provide “parents with opportunities to align their children’s status with their own.”<sup>32</sup>

These authors focus on two factors from the immigration law perspective that speak to this incongruity: first, immigration law does not “recognize the variety of family structures that exist” in foreign cultures and immigration law “does not recognize children’s interests as a valid factor in immigration decisions.”<sup>33</sup> Although the best interests of the child are not effectively or consistently recognized in U.S. immigration law, the literature tends to be divided between an approach focused on the apparent incompatible and competing policy objectives of the standard itself,

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<sup>30</sup> *Id.* For a thoughtful discussion concerning the consequences of deportation orders for an undocumented parent and the creation of single-parent or third-party care-giver households for a child, see Caitlin Cavanagh & Elizabeth Cauffman, *The Land of the Free: Undocumented Families in the Juvenile Justice System*, 39 *LAW & HUM. BEHAV.* 152, 152 (2015) (“These forced separations are associated with a myriad of physical and mental health problems for the displaced child.”). As the authors noted, it is “estimated that 46% of undocumented Latino immigrants are parents to a minor, compared with 38% of U.S.-born adults.” *Id.*

<sup>31</sup> Angela D. Morrison & David B. Thronson, *Beyond Status: Seeing the Whole Child*, 33 *EVALUATION & PROGRAM PLAN.* 281, 281 (2010).

<sup>32</sup> *Id.* at 283.

<sup>33</sup> *Id.*

and national security imperatives mixed with a call-to-arms on behalf of children on the basis of their vulnerable legal and developmental status.

The literature is, however, a relatively united view that more precise and effective interventions need to be employed to protect children; especially as the law evolves in new directions related to families and individuals who have been historically marginalized or discriminated against in various nations.<sup>34</sup> At the same time, immigration status may become a more important factor when deciding the best interests of the child in state court proceedings.<sup>35</sup> But how do the best interests of the child get humanely, ethically, and effectively considered within the current U.S. immigration law context?

#### **IV. Immigration Policy and Children All Alone?**

The “best interests” of the child are currently not a required consideration for an immigration law judge as a matter of law. This section considers how children are currently treated in the removal process and how the child’s status at the time they enter the system can have a considerable impact on the degree to which the child’s interests are considered at all. In addition, this section briefly considers the implications of the Violence Against Women Act (VAWA)<sup>36</sup> as a vehicle for advocating on behalf of juvenile clients.

Thornson examined U.S. immigration law’s effect on children in three scenarios: first, where they arrive as lawfully immigrating dependents of adults; second, where they arrive on their own or outside of the typical immigration law context; and third,

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<sup>34</sup> Jennifer Mertus, *Barriers, Hurdles, and Discrimination: The Current Status of LGBT Intercountry Adoption and Why Changes Must Be Made to Effectuate the Best Interests of the Child*, 39 *CAP. U. L. REV.* 39 (2011) (arguing in favor of extending the best interests analysis to LGBT inter-country adoptions procedures).

<sup>35</sup> See Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 *VA. J. SOC. POL’Y & L.* 87 (2006).

<sup>36</sup> Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1941-42 (1994) [hereinafter VAWA 1994]. See generally Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 *AM. U.J. GENDER SOC. POL’Y & L.* 95 (2002).

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as individuals who could “generate immigration rights in others.”<sup>37</sup> He concludes that in all U.S. immigration law marginalizes children by not recognizing them as individuals with their own rights and independent interests, the law can have spillover negative consequences for children for the wrongful acts of their parents and the law forbids a child with legitimate immigration status from extending such legitimacy to their parents.<sup>38</sup>

In a 2009 review of the best interest of the child approach in the U.S. immigration policy context, Bridgette Carr advocated for both procedural and substantive changes to U.S. immigration law to incorporate a best interests of the child standard.<sup>39</sup> Under U.S. immigration law, a child is defined as any “unmarried person under twenty-one years of age.”<sup>40</sup> Mia Lisa McFarland and Evon Spangler argued that U.S. immigration policy with its historical emphasis on family reunification bears a marked similarity with the general intent of American state-based family law.<sup>41</sup>

Carr observed that unlike typical family law proceedings, in the immigration context, children could be parties to removal proceedings with or without a parent or guardian present or party to the action.<sup>42</sup> Carr’s argument is a simple one: “under current United States immigration law, accompanied children who are directly affected by immigration proceedings have no opportunity for their best interests to be considered.”<sup>43</sup> She argues for statutory change incorporating a “best interests of the child” approach into immigration law and procedure.<sup>44</sup>

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<sup>37</sup> David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 *FORDHAM URB. L.J.* 393 (2010).

<sup>38</sup> *Id.* at 395; 8 U.S.C. § 1151(b)(2)(A)(i) (2000).

<sup>39</sup> Bridgette A. Carr, *Incorporating a ‘Best Interests of the Child’ Approach into Immigration Law and Procedure*, 12 *YALE HUM. RTS. & DEV. L.J.* 120 (2009).

<sup>40</sup> 8 U.S.C. § 1101(b)(1)(2006).

<sup>41</sup> Mia Lisa McFarland & Evon M. Spangler, *A Parent’s Undocumented Immigration Status Should Not Be Considered Under the Best Interest of the Child Standard*, 35 *WM. MITCHELL L. REV.* 247, 252 (2008).

<sup>42</sup> Carr, *supra* note 39, at 123 (The accompanied minor can often be at greater risk in the U.S. immigration proceedings since their claim for asylum is often derivative of the parent(s) claim—thus giving rise to potential conflicting interest with the claim asserted by their parent or parents.)

<sup>43</sup> *Id.* at 124.

<sup>44</sup> *Id.*

Carr, however, also acknowledged that “despite its prevalence as a standard, there is no agreed-upon definition for the best interests of the child,” but that “there is now widespread appreciation that the child’s best interests are a policy goal and not an administrable legal standard.”<sup>45</sup> Ultimately, however, she provides a functional definition of “best interests” for use in immigration proceedings as both a procedural practice that is “child-centered” and permits the child a voice in the proceedings and “a substantive legal standard that considers the “safety, permanency, and well-being of the child.”<sup>46</sup>

Erica Stief has taken this argument further and argued that U.S. immigration law, as currently constructed, violates international law.<sup>47</sup> She argues for U.S. policymakers to adopt a “best interests of the child”—already the “primary consideration” in a wide range of U.S. domestic law matters—as the approach under U.S. immigration law through the inclusion of “discretionary” authority for immigration officials.<sup>48</sup> At the same time, she reminds us that the “best interests of the child has never been a required consideration during a deportation proceeding of a parent,” a problem exacerbated by the tightening of relief in the mid-1990s.<sup>49</sup>

Stief reads the existing case law as demonstrating that “family preservation alone” which means “financial considerations, health considerations, dependents” and detrimental effects to the child from the relocation process will not meet any of the current hardship standards.<sup>50</sup> One of the areas Stief considers is the application of the VAWA, which provides particular forms of removal relief for victims of domestic violence who meet certain criteria. Given the overarching policy prerogative to constrain migration, a “child-focused” form of relief along the lines envisaged under VAWA might be more palpable in the U.S policy context if “humanitarian” grounds are seen as more broad-based (and less politically controversial).<sup>51</sup> She argues that a combina-

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Stief, *supra* note 14, at 480.

<sup>48</sup> *Id.* at 500.

<sup>49</sup> *Id.* at 481.

<sup>50</sup> *Id.* at 490 (internal citations omitted).

<sup>51</sup> *Id.* at 501.

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tion of a VAWA waiver with consideration of the best interests of the child in the immigration context may provide an excellent foundation for a broader discussion of relief from removal.<sup>52</sup>

Along similar lines, Joyce Koo Dalrymple has argued in favor of providing special protections for unaccompanied minors in deportation proceeding by adopting a “best interests” standard similar to special immigrant juvenile status.<sup>53</sup> This approach splits jurisdictions over the juvenile asylum applicant between the immigration adjudications process and state juvenile court. The idea here seems to be that rather than adding more actors to the immigration adjudication process itself, using an existing tribunal (state juvenile courts), already adept at applying the best interests of the child status, fosters judicial economy.<sup>54</sup>

The current conundrum, however, is that the intersection of most federal and state laws presents so many economic and legal barriers to even the most sophisticated litigant, including most

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<sup>52</sup> See *id.*

<sup>53</sup> Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131 (2006). Special Immigrant Juvenile (SIJ) status applies when a minor is subject to a state court order that places the child in state custody (or with a private agency or individual) with specific findings that it is not in the child’s best interests to return to the country of origin due to “abuse, abandonment (or) neglect.” Eligibility extends to those juveniles (under 21) who are unmarried and present in the United States at the time of petition. See U.S. Citizenship & Immigr. Servs., *Eligibility Status for SIJ*, <http://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij> (last visited Oct. 28, 2015).

<sup>54</sup> This policy implicates budgetary limitations imposed upon state family court systems with the more unlimited resources of the federal courts. In fairness, however, concerns that the immigration court system is underfunded and understaffed raise the specter that the combination of immigration and state courts may act with the best of intentions but lack the resources to coordinate and deliver effective services for children caught between both systems. See Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1639 (2010) (“There have been fundamental problems with the fairness of the proceedings, the accuracy and consistency of the outcomes, the efficiency of the process (with respect to both fiscal resources and elapsed time), and the acceptability of both the procedures and the outcomes to parties and to the public. This Article argues that the principal sources of these problems are severe underfunding, reckless procedural shortcuts, the inappropriate politicization of the process, and a handful of adjudicators personally ill-suited to the task.”).

lawyers or law professors. For a child, without any advocacy at all beyond volunteers or sheer luck, the barriers are daunting if not insurmountable. At the present time, the “two steps involved in petitioning for Special Immigrant Juvenile (SIJ) status are (1) obtaining juvenile court findings at the state level and (2) filing forms with USCIS [U.S. Citizenship and Immigration Services] at the federal level. These steps must occur consecutively.”<sup>55</sup> While “immigration officials have the final say on whether they will grant a SIJ petition, the individual cannot even apply to USCIS for the remedy without first having the necessary findings issued by a state juvenile court.”<sup>56</sup>

This section presented the patchwork application of the “best interests of the child” standard in U.S. immigration removal proceedings. This section demonstrates that the best interests standard is only considered at present in the context of special juvenile status—children having a state juvenile court matter (sort of) open during the pendency of the removal proceeding. In other cases where the child faces removal, the “best interests” of the child alone are not grounds for cancellation of removal. Thus, evidence is seldom taken from a child in his or her own right but instead a child’s immigration claims are considered derivative of the parent’s claim.

In the absence of affirmative legislation establishing the best interests’ standard as a relevant consideration in *all* such matters, and increasing the fluidity and sharing of information between state and federal courts, there are few options other than the appointment of an advocate concerned with a juvenile’s rights, safety, stability, and the future interest of the state in children who are educated and responsible members of society. At the international level, there is much legal support for the best interests of the child as a relevant factor so it is worth looking for a clear embodiment of the principle in an established legal instrument. This next section, therefore, considers the Convention on the Rights of the Child as a basis for an independent advocacy standard for children-in-migration.

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<sup>55</sup> Heryka Knoespel, *Special Immigrant Juvenile Status: A Juvenile Here Is Not a Juvenile There*, 19 WASH. & LEE J. C.R. & SOC. JUST. 505, 512 (2012).

<sup>56</sup> *Id.*

## V. Convention on the Rights of the Child

The earliest pronouncement on children's rights in the international domain was the 1959 United Nations Declaration on the Rights of the Child, which directed that "the best interests of the child shall be the paramount consideration."<sup>57</sup> After a thirty-year gap, The United Nations Convention on the Rights of the Child was adopted in 1989. The United States signed on to the Convention in 1995 but has not ratified it. The reasons for this failure to ratify are many and beyond the scope of this article; though most commentators focus on an unfortunate moment in history when U.S. lawmakers feared the Convention would lead to an undue encroachment upon parental right should the Convention be incorporated into domestic law.<sup>58</sup> Notwithstanding the U.S. government's failure to ratify, there are strong arguments that the Convention serves as the basis for international norms about best practices in the area of child rights. To operationalize these norms, this article shall focus on two aspects of the convention most relevant to the area of advocacy in judicial and administrative settings: Articles 3 and 12.

Many of the sources footnoted below cite Article 3 as the source for the "best interests of the child" standard in the international context. The relevant language states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."<sup>59</sup> In addition, Article 12 indicates that children have the right to have their views given "due weight" in all

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<sup>57</sup> Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), princ. 2, 14 U.N. GAOR Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959).

<sup>58</sup> Andersson, *supra* note 2 (arguing that ratification by the United States might not offer immediate protection for children because serious concerns about the CRC's implementation remain even in the formal adopting states; largely due to broad reservation statements added at signing); *see also* Paula S. Fass, *An Historical Context for the United Nations Convention on the Rights of the Child*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 17 (2011); Maria Grahn-Farley, *The UN Convention on the Rights of the Child and the Forgotten History of the White House Children's Conferences, 1909-1971*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 307 (2011); Rachel Hagues, *The US and the Convention on the Rights of the Child: What's the Hold-up?*, 13 J. SOC. WORK 319 (2013).

<sup>59</sup> UNCRC, art. 3.



matters affecting them—including and in particular “any judicial and administrative proceedings.”<sup>60</sup>

Yet scholars such as Jonathan Todres have observed that this language is often cited as merely a “guiding principle” in CRC interpretation.<sup>61</sup> Barbara Bennett Woodhouse argues that the “twentieth century shift to a theory of parental powers centered on the child’s interests is consistent with an international human rights revolution taking place around the globe. The principle that court orders must serve the best interests of the child is a key element of the 1989 [CRC].”<sup>62</sup> There are three unifying themes that undergird this Convention, often referred to as the “3Ps”: provision, protection, and participation. At the international level, CRC implementation is monitored by the Committee on the Rights of the Child, a body of independent experts who publish statements on the Convention and issue recommendations to craft a universal approach to meeting its various strictures.

While it is demonstrable that the best interests of the child standard itself is an inherent part of the CDC, defining the concept is not as simple: “The indeterminate nature of the concept of ‘the best interests of the child’ is highly problematic. The notion is not clearly defined in international law, and the Committee on the Rights of the Child . . . has been less than successful” in defining the term.<sup>63</sup> Although the best interests of the child is not an explicit consideration in U.S. immigration law, there are at least two areas where it is explicitly evaluated: claims arising under the Convention Against Torture and in cases of special immigrant juveniles, e.g. where a juvenile court has jurisdiction over a child and family reunification is not possible.<sup>64</sup>

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<sup>60</sup> UNCRC, art. 12.

<sup>61</sup> Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 171 (1998).

<sup>62</sup> Barbara Bennett Woodhouse, *Child Custody in the Age of Children’s Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 831 (1999).

<sup>63</sup> SONJA GROVER, CHILDREN DEFENDING THEIR HUMAN RIGHTS UNDER THE CRC COMMUNICATIONS PROCEDURE: ON STRENGTHENING THE CONVENTION ON THE RIGHTS OF THE CHILD COMPLAINTS MECHANISM 110 (2015).

<sup>64</sup> Morrison & Thornson, *supra* note 31 (citing INA § 101 (a)(27)(J), 8 U.S.C. § 1101 (a)(27)(J)).

One of the issues at the CRC's core is the issue of the social construction of children's rights.<sup>65</sup> In a comprehensive review, Didier Reynaert, Maria Bouverne-de Bie and Stijn Vandeveldde identify three central themes from the CRC literature.<sup>66</sup> First, is a growing emphasis on the ascendancy of a child's autonomy and participation rights, second, is a theme emphasizing the competition between children's and parental rights, and, third, is what they label "the global children's rights industry." The authors argue that the CRC is essentially the culmination of a counter-narrative to what they identify as that concerning the "incompetent child."

This counter-narrative promotes child autonomy and participation rights as tools for child empowerment. On this point, Woodhouse argues, "In the age of children's rights, we no longer accept the proposition that the child must be a passive object rather than an active participant in a custody case."<sup>67</sup> Nevertheless, an embedded tension between parental and child rights highlights the erosion of the *parens patriae* doctrine as a guiding principle. The phrase "parens patriae" has often been misused or its roots diluted but, as one author has noted, *parens patriae*

'was an expression of the king's prerogative.' As explained by Chitty: The king is in legal contemplation the guardian of his people, and in that amiable capacity is entitled (or rather it is his Majesty's duty, in return for the allegiance paid him) to take care of his subjects as are legally unable, on account of mental incapacity[sic], whether it proceed from first nonage [children]: second, idiocy: or third, lunacy: to take proper care of themselves and their property.<sup>68</sup>

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<sup>65</sup> As Trude Haguli and Elena Shinkareva observed, the UN Working Group as well as the authors who reviewed practices in implementation, felt that Articles 3, 9 and 10 should be read together in cases of immigration removals where a child is involved. See Trude Haugli & Elena Shinkareva, *The Best Interests of the Child Versus Public Safety Interests: State Interference into Family Life And Separation of Parents and Children in Connection with Expulsion/Deportation in Norwegian and Russian Law*, 26 INT'L. J. L., POL'Y & FAM. 351 (2012).

<sup>66</sup> Didier Reynaert, Maria Bouverne-de-Bie, & Stijn Vandeveldde, *A Review of Children's Rights Literature Since the Adoption of the United Nations Convention on the Rights of the Child*, 16 CHILDHOOD 518 (2009).

<sup>67</sup> Woodhouse, *supra* note 62, at 827.

<sup>68</sup> George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant*, 25 DEPAUL L. REV. 895, 896 (1975). For a scholarly decision of this doctrine and its roots in courts of equity, see *Roussel v. State*, 274 A.2d

While parents continue to be seen as the primary advocates for their children's best interests, parental prerogatives, which derive from the rights of their children, do not resolve the more common situation during immigration when a child is without a biological or familial advocate. The emerging question therefore is whether the *parens patriae* doctrine, traced to ancient common law and the inherent authority of the "king," is peculiarly lost or abdicated when a child, ensconced on foreign land, is an immigrant to whom that state owes no duty.

Article 3 of the CRC enshrines the best interests of the child and is considered one of the "general principles of the convention."<sup>69</sup> At the same time, the best interests of the child are "indeterminate."<sup>70</sup> Beyond the preferences in many jurisdictions for biological parents over other family systems, and for the maintenance of material, spiritual, and physical well-being, there are murkier areas such as the role of culture in the best interests' equation. These issues are far from resolved in the literature but must be part of any future effort to more clearly delineate and implement the best interests' standard. Similarly, how the standard has been interpreted in state signatory courts is of particular interest. We will now turn to the ways in which other jurisdictions that have grappled with the requirement of the best interests standards in domestic law may provide guidance and precedent.

## VI. "Best Interests" in Other Nations

This section shall briefly consider the domestic court interpretation of the "best interests" standard in the United Kingdom, Norway, Canada, and Australia as each jurisdiction has incorpo-

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909, 918 (Me. 1971) ("In a leading American case *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925) Cardozo, J. reveals the nature of this original equity jurisdiction as being unconcerned with adversary rights. 'The chancellor in exercising his jurisdiction \* \* \* does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate, and careful parent' \* \* \*, and make provision for the child accordingly.' (p. 626).")

<sup>69</sup> MICHAEL FREEMAN, ARTICLE 3: THE BEST INTERESTS OF THE CHILD—A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1 (2007).

<sup>70</sup> *Id.* at 27.

rated some version of the best interests' standard into the removals process in response to advocacy centered on the CRC standard. Rebecca Wallace and Fraser Janeczko considered the best interests of the child as interpreted in the United Kingdom in light of a recent landmark court decision.<sup>71</sup> This decision followed the government's withdrawal of its general reservation concerning immigration issues in 2008.<sup>72</sup> In short, the decision affirmed that when a determination is made that would necessitate that a U.K. citizen child leave the country, then sufficient weight must be given to the meaning of Article 3 and the best interests of the child standard.

In this case, the court had to weigh the competing interests of the right of respect in regards to one's private and family life and the state's prerogative to define the composition of its own citizenry.<sup>73</sup> While not solely dispositive, the court determined that, from the perspective of best interests, the negative impact on the children should removal be carried out outweighed the state's legitimate interest in removal because removing the mother would undoubtedly lead to the removal of the U.K. citizen children. Indeed, the presence of a "trump card" here—the children's possession of U.K. citizenship—was a unique factor.

Prior to this decision, the United Kingdom had an approach to children in immigration law similar to the one the United States currently holds: children's claims were generally derivative of the parents' claims.<sup>74</sup> At the same time, the U.K. experience has witnessed an interesting back and forth between the courts and Parliament. While the courts have clearly set forth rules that

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<sup>71</sup> Rebecca Wallace & Fraser Janeczko, *The Best Interests of the Child in the Immigration and Asylum Process: The Case of ZH (Tanzania) v. Secretary of State for the Home Department*, 31 CHILD. LEGAL RTS. J. 46 (2011).

<sup>72</sup> The United Kingdom's example might provide encouragement for U.S. based advocacy organizations to lobby for CRC ratification or for the inclusion of similar best interests language per CRC Article 3 in domestic law. See Georgina Firth, *Still a Migrant First? The Detention of Asylum Seeking Children After the BCIA 2009*, 2 WEB J. CURRENT LEGAL ISSUES (2010) ("As argued above, the politicization of the category of asylum seeker over the last twenty years has had serious consequences for children in asylum seeking families.").

<sup>73</sup> *ZH (Tanzania) v. Secretary of State for the Home Dep't.* [2011] UKSC 4 (1 Feb. 2011).

<sup>74</sup> See Ayesha Christie, *The Best Interests of the Child in UK Immigration Law*, 22 NOTTINGHAM L.J. 16 (2013).

immigration decision-makers must take into account, including best interests factors like education, social network, health, and family ties to the United Kingdom, and consideration of hardship likely to be encountered from removal from the United Kingdom, the Prime Minister and Parliament have legislated against these rulings in an effort to thwart such protections by, for example, removing the right to legal aid for immigration matters.

Ada Engebrigtsen decried the prevailing immigration adjudications process in Norway that turns “an individual child with individual interests into a judicial and generalized prototype that appears to have the same interests as immigration authorities.”<sup>75</sup> This is a consequence of each aspect of the process but, in particular, seems to follow from her observation that immigration officers who handle such determinations tend to be drawn from the community of lawyers. These professionals are adept at “legal texts and bureaucratic procedures” but are lacking in “psychology and child care skills” which she sees as essential to reaching the best interests of the child determination.<sup>76</sup>

Importantly, Engebrigtsen identifies the necessarily culture-laden dimension courts use when deciding the best interests of the child. With a Western preference for values of individualism and independence, the fact that most children subject to this process arrive from vastly different cultures, with different individual and collective values, has not altered the complex calculus required to determine of just what the best interests of a particular child ought to be. Finally, Engebrigtsen questions the utility of the best interests standard as a “judicial principle.”<sup>77</sup> Her criticism (common in the literature but without a substitute yet) is that the standard is “incomplete” and can lead to inconsistent outcomes that are not in the best interests of a child (or even worse).

This may be true, but unraveling what is essentially an embedded mantra for policy and law is unlikely. What is possible is a re-framing of the standard. Canada has employed a humanitarian and compassionate relief vehicle where the interests of an

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<sup>75</sup> Ada Engebrigtsen, *The Child's—or the State's—Best Interests? An Examination of the Ways Immigration Officials Work with Unaccompanied Asylum Seeking Minors in Norway*, 8 CHILD & FAM. SOC. WORK 191, 191 (2003).

<sup>76</sup> *Id.* at 192.

<sup>77</sup> *Id.* at 198.

affected child can be considered. Canada's approach resembles a family conference in U.S. termination of parental rights and related family law proceedings with the appointment of a best interests' designee and potentially a lawyer for the child when the interests of parent and child diverge. Carr advocates for such a policy change in the U.S. context that would include advocates—known as a “best interest's representative” at the beginning of the process.<sup>78</sup> Importantly, in matters where a parent and child face removal from Canada, the best interests analysis is only triggered where a parent is ordered removed. If the parent prevails in her right to remain in Canada, then the child's case is similarly resolved.<sup>79</sup>

Implicit in this analysis, however, is an argument to increase discretion for immigration fact finders. In recent years, this trend has tended in the direction of less discretion in the U.S. fact-finder's hands. This provides little room for an immigration judge, for example, to stay a removal order on “humanitarian” or other grounds. This does not, however, preclude Department of Homeland Security lawyers from stipulating to particular hardships and thereby administratively staying an order of removal. Indeed, this is a critical practice point for asylum advocates in particular where there are cases of extreme hardship that would face a child upon removal.

Mark Evenhuis has argued that, particularly in the case of unaccompanied minors, Australian immigration law regarding asylum seekers fails to address the best interests of the child as embodied in international law.<sup>80</sup> In fact, Evenhuis takes this argument a step further and contends that by effectively limiting a child's voice in such proceedings, children are at a unique disadvantage more so than adults in a similar position. Of particular concern, Australia's equivalent of the Department of Homeland Security, the Federal Minister for Immigration and Citizenship, serves as both the “guardian” of the child's “best interests” *and* the decision-maker.

Among other measures, separating these roles as well as developing a system that provides a forum for the child, within the

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<sup>78</sup> Carr, *supra* note 39, at 150.

<sup>79</sup> *Id.* at 152.

<sup>80</sup> Mark Evenhuis, *Child-Proofing Asylum: Separated Children and Refugee Decision Making in Australia*, 25 INT'L J. REFUGEE L. 535 (2013).

capacity of each child, to fully and intelligently participate is essential to securing immigration decision-making in accordance with international law. Under U.S. law, a best interests guardian, currently quite common in state court proceedings concerning child custody and jeopardy or termination of parental rights, could be transmuted to the immigration removal process without inventing new practices or procedures.<sup>81</sup>

## VI. Guardian ad Litem (or Advocate by Other Name)

Before commencing down this pathway, it is worth noting the criticism of efforts to empower children by correlatively diluting the “superior rights” of parents or, as Reynaert, Bouverne-de Bie, and Vandeveldel define that form of empowerment, the “child rights industry.”<sup>82</sup> This debate over priority between parents’ and child “rights” is contentious and international; and truth be told rather ancient.<sup>83</sup> But this debate profoundly shifts shape when “rights” language collides with “rights” of government institutions with the aggregate authority to rend or dissolve rights between individuals. If there is a legal status beyond *being* a minor, then any rights dissolve with that mere status, such as citizenship or immigrant, not the vulnerability or disability which the common law recognized for centuries as children *qua* children.

There is substantial literature arguing the substantive and procedural due process rights of children in the United States from juvenile crime to child custody to institutionalization to guardianships. The issue here is not the availability of constitu-

<sup>81</sup> This is not to say that the power and authority and training of guardians ad litem is without legitimate concern or controversy. See Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106 (2001); Dana E. Prescott, *Inconvenient Truths: Facts and Frictions in Defense of Guardians ad Litem for Children*, 67 ME. L. REV. 43 (2014) (This is not to say that the power and authority and training of guardians ad litem is without legitimate concern or controversy).

<sup>82</sup> Reynaert, et al., *supra* note 66, at 528.

<sup>83</sup> See Jane Fortin, *Accommodating Children’s Rights in a Post Human Rights Act Era*, 69 MOD. L. REV. 299, 325 (2006) (“Children may indeed have some rights to self-determination based on their interest *in* choice, without having a right to complete autonomy.”).

tional rights in the United States as a predicate to triggering protection for children, but policies and practices that assure that the child has a voice which is not blurred by language or poverty or government obfuscation or posturing. As one state supreme court unanimously wrote decades ago:

Although the law imposes procedural limitations on children, it does so to protect their interests. In the realm of divorce and other family litigation, this protective purpose finds expression in the best interest standard. In Maine, as in the multitude of other states which have adopted the best interest standard, courts faced with the task of rearranging parental rights and responsibilities must strive for an outcome that will maximize the best interest of children. . . . This standard protects children who lack the ability because of youth, inexperience, and immaturity to protect themselves. The protective purpose of this standard is also important in analyzing the constitutional claim of the Miller children.<sup>84</sup>

The CRC brought with it the expectation that the adoption of state established policies and a regulatory framework, irrespective of a nation's constitutional framework, *might* bring the CRC provisions into full legal effect *for all children by virtue of being a child* (however defined by international or state law). As Ursula Kilkelly aptly summarized:

The Convention breaks fresh ground by providing for child-specific versions of existing rights, like the freedom of expression and the right to a fair trial. It also establishes new standards by codifying for the first time the right of the child to be heard, both in general and, more specifically, in all proceedings that affect the child. This right to participate, together with the principles of non-discrimination in Article 2 and provision for the child's best interests in Article 3, form the guiding principles of the Convention, which reflect the vision of respect and autonomy which the drafters wished to create for all children.<sup>85</sup>

Even though the United States has not ratified the CRC, all U.S. states have historically tended to operate along the same lines *when the state* is exercising *parens patriae* authority in child custody, or child abuse and neglect, or where intrafamilial violence creates a risk that implicates the separation of parent and

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<sup>84</sup> Miller v. Miller, 677 A.2d 64, 68 (Me. 1996).

<sup>85</sup> Ursula Kilkelly, *The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child*, 23 HUM. RTS. Q. 308, 311 (2001).



child by the reduction or termination of parental rights.<sup>86</sup> By erecting and re-erecting an organic standard like the “best interests of the child,” states have developed and promoted policies designed to empower children’s voice, protective participation, and the right to be safe and secure from conflict and parental malfeasance or nonfeasance. Although this standard may be aspirational in too many cases, it is, nevertheless, as much a moral trumpet today as a legal touchstone for judicial decision making.<sup>87</sup>

If federal and state law in the United States would not ever consider a child (however defined) as without individual rights upon birth or the state was without *parens patriae* authority to protect the individual child and the future of the state itself, then much of modern civil rights law would dissolve in a muddled puddle. The universe of children should not be divided by child statelessness, but by the status of vulnerability and the risk of violence and exploitation.<sup>88</sup>

This argument is not merely a function of state law, as a matter of vertical federalism that the federal government should respect as a matter of constitutional comity, but is consistent with international law.<sup>89</sup> Under Articles 3, 12, and 19 of the CRC, a child:

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<sup>86</sup> Susan A. Roche, *Maneuvering Immigration Pitfalls in Family Court: What Family Law Attorneys Should Know in Cases with Noncitizen Parties*, 26 J. AM. ACAD. MATRIM. LAW. 79 (2013).

<sup>87</sup> See, e.g., *In re B & J*, 756 N.W.2d 234, 236 (Mich. Ct. App. 2008) (“Even assuming arguendo that the family court properly relied on § 19b(3)(g) to terminate respondents’ parental rights, we conclude that the family court erred by holding that termination was not clearly contrary to the children’s best interests. The record establishes that respondents were bonded with their children and that they did not want to leave the children behind in the United States at the time of their deportation. Nonetheless, because the family court continued to exercise jurisdiction over the children, respondents were apparently never given the opportunity to take the children with them to Guatemala.”).

<sup>88</sup> See Jacqueline Bhabha, *Arendt’s Children: Do Today’s Migrant Children Have a Right to Have Rights?*, 31 HUMAN RTS Q. 410, 412 (2009) (“But the reality of child statelessness today is anything but straightforward. The unenforceability of fundamental rights related to nationality impinges on a heterogeneous group of children that includes undocumented immigrants, ‘irregular’ migrants, and trafficking victims.”).

<sup>89</sup> See Estin, *supra* note 16, at 142.

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- Must be accorded by courts and agencies, as a primary consideration, decisions which are in the best interests of that child;
- Who is capable of forming his or her own views has the right to express those views in all matters affecting the child;
- The opportunity to be heard in any judicial or administrative proceedings;
- To be heard in a manner consistent with the procedural rules of national law;
- Views should be given due weight in accordance with the age and maturity of the child; and
- Should be protected from all forms of physical or mental abuse, neglect, or exploitation including sexual abuse.<sup>90</sup>

What these bullet points highlight is what Kacy Wothe<sup>91</sup> emphasizes as significant under the Indian Child Welfare Act's requirement for a qualified expert witness on culture in cases of parental rights termination.<sup>92</sup> The need to inform the decision maker about foreign cultural insights into the child's development is coextensive with the degree of risk that a child may suffer and the benefits of stability and safety. Cultural respect and sensitivity are not, however, *the* policy driver but *a* factor among the standard factors for best interests which drive tens of thousands of cases involving children in the United States. Immigration or

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<sup>90</sup> *Id.* at 142, 146.

<sup>91</sup> Kacy Wothe, *The Ambiguity of Culture as a Best Interests Factor: Finding Guidance in the Indian Child Welfare Act's Qualified Expert Witness*, 35 *HAMLIN L. REV.* 729 (2012).

<sup>92</sup> The U.S. Supreme Court has generated a discussion regarding the context of policy and culture in *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013) ("The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one— was an Indian."). Justice Scalia's dissent expresses, rather bluntly, his perspective on the differences between state and federal law. *Id.* at 2572 (Scalia, J., dissenting) ("The Court's opinion, it seems to me, needlessly demeans the rights of parenthood. It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is 'in the best interest of the child.' It sometimes is not; he would be better off raised by someone else. But parents have their rights, no less than children do.").

migration should not alter the legal disability of a child irrespective of national status or international limbo.

The inclusion of a guardian ad litem (GAL) in the immigration process would emphasize the primacy of the child's best interests in the proceedings and allow the child—or at least the child's perceived best interests—a voice in them.<sup>93</sup> Immigration judges do not reach decisions without humanity or respect for the dignity of children. But the *authority* to reach a decision and the *data* required to inform that decision within established legal constructs should always implicate best interests within an underlying cultural or demographic context.

For nearly a century now, the role of a judge (and that means any person acting with the power and force of the government in the role of fact finder and decider) in a child custody case remains bounded by the “sobering responsibility of deciding the care and custody of a minor child act[ing] not at all as a mere arbiter between the two adult adversaries, simply reacting to the evidence they may see fit to adduce in support of their respective positions.”<sup>94</sup> Instead, the judge's function is that described in the oft-quoted words of then New York Court of Appeals Judge Cardozo in *Finlay v. Finlay*:

He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a “wise, affectionate and careful parent” and make provision for the child accordingly . . . . He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights “as between a parent and a child” or as between one parent and another. He “interferes for the protection of infants, qua infants, by virtue of the prerog-

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<sup>93</sup> This holding is consistent since the advent of the “best interest” standard a century ago. See *Grover v. Grover*, 54 A.2d 637, 638 (Me. 1947) (“The law looks, however, only to the child's welfare; and the father, mother, and other blood relatives, as such, have no rights in or to the child. A child is not ‘owned’ by anyone. The State has, and for its own future well-being should have, the right and duty to award custody and control of children as it shall judge best for their welfare.”). While researching this article, the authors found a case with a different point of view. The courts of this state have not always respected this fundamental right. See *Ex parte R.G.*, 73 So.3d 634, 656 (Ala. 2011) (Parker, J., concurring specially) (“A statist philosophy that appeared briefly and sporadically in American jurisprudence in the early 20th century during the growth, worldwide, of national socialism represented an aberration from our founding principles and was quickly rejected.”).

<sup>94</sup> *Ziehm v. Ziehm*, 433 A.2d 725, 728 (Me. 1981).

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ative which belongs to the [state] as *parens patriae*.” The “paramount consideration for the court at the time of divorce, or at the time of a requested alteration of a decree regarding custody, is the present and future welfare and well-being of the child.”<sup>95</sup>

The act of judging in a child custody case, however, is not a solo or silo effort. For all its flaws, strengths, and myths, the contemporary domestic relations’ system, whether international or intranational, is a market triangulated by government, parent/child, and judge. The difference at the international level is whether inputs and outputs from guardians ad litem, therapists, and all other manner of appointed or employed professionals available for children as a matter of human rights *and* civilized *and* rational *and* intelligent *and* informed fact finding. These gaps in this calculus for minors are a matter of a peculiar international industry that treats children as possessing choice.

Every state has some form of professional representation for children. The nuances are not as important as the historical predicates that date from the earliest evolution of Western law.<sup>96</sup> One scholar, while persuasively noting how this doctrine was (and is) misconstrued notes that in:

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<sup>95</sup> 148 N.E. 624, 626 (N.Y. 1925) (In a dissent, then Justice Rudman expounded on these equitable principles and Justice Cardozo’s formulation in a child custody case:

But that “rational support,” the reason for the court’s determination, must fall within the principle established by equity, articulated by Cardozo, and adopted by this Court. Just any reason will not do. Mere evidence on the record will not do. Discretionary justification is not a question of clear error of fact. A court is not free to disregard professional witnesses’ advice without articulating a principled rationale, grounded in the best interest of the child, for having done so. A court is not free to seek to assign parental rights and responsibilities by balancing them “equally” between one parent and another. It is not enough for the court to simply declare its determination to be in the best interest of the child. The record in the instant case provides no rational support for the court’s determination that it is in the best interest of this child to be divided equally between two warring parents.)

Rodrigue v. Brewer, 667 A.2d 605, 609 (Me. 1995) (Rudman, J., dissenting).

<sup>96</sup> Prescott, *supra* note 81, at 54 (“From the 19th century, the GAL was a means to assure the protection of those whom the law considered unable to protect their own interests when the state (in the guise of a court) required a means for independent advocacy.”).

the famous case of *Eyre v. The Countess of Shaftsbury*<sup>97</sup> that the Countess herself relied on this doctrine to keep the infant Earl within her care: ‘The Crown, as *parens patriae*, was the supreme guardian and superintendent over all infants; and since this was a trust, it was consequently in the discretion of the Court, whether or no they would do so hard a thing, as to take away an infant under thirteen years of age.’<sup>98</sup>

The second prong pertains to a constitutional penumbra which treats children’s rights as falling on a continuum between a procedural due process right to participate in a legal proceeding because of the stakes and a fundamental right to substantive due process to be free from arbitrary and capricious application of the law.<sup>99</sup> The role of a lawyer and the role of a guardian ad litem can be quite different because a lawyer is an advocate within ethical standards of representation and the GAL must operate within the constraints of the best interests standard.<sup>100</sup> As one authority noted:

In this rather conflicting role of lawyer-protector, the attorney representing the child must tread delicately. He must advance and protect the child’s rights so as not to permit the child to be treated as a “chat-tel” or the property of the marriage. Yet, he cannot become an avenging angel, as amateur social worker, or a psychologist. The lawyer for the child is, in fact, that child’s spokesperson, and, to the degree possible, the child must be permitted to express his wishes or desires, and to have them presented to the court. One of the most important duties of the lawyer representing the child in an abuse proceeding is to present the court with all relevant information, which will permit the court to

<sup>97</sup> 2 P. Wms. 102, 24 Eng. Rep. 659 (Ch. 1722).

<sup>98</sup> *Id.* at 104, 24 Eng. Rep. at 659, quoted in George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant*, 25 DEPAUL L. REV. 895, 897 (1975).

<sup>99</sup> Jonathon O. Hafen, *Children’s Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 423, 424-25 (1993) (“However, when the parents forfeit that right through abuse, neglect or abandonment of the child, or where a conflict of interest exists between the parents and the child, the role of speaking for the child then traditionally has gone to a guardian ad litem, who may be an attorney.”).

<sup>100</sup> James R. Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521, 540 (1978) (“It was precisely this disunity between the role of a guardian ad litem who determines his own concept of the “best interest” of the child and the role of an advocate which led the Wisconsin federal district court in *Lessard v. Schmidt* to find that the appointment of a guardian ad litem did not fulfill the constitutional requirement of the right to counsel.”).

make an informed decision. This requires extensive investigation, and communication with the child, if possible.<sup>101</sup>

Accepting, for the moment, that constitutional rights are not transferable in the sphere of international child custody and immigration, this does not mean that *courts* should be stripped of the authority to assure that fact finding for minors possesses all the rudiments of independent investigation and details concerning those factors that courts utilize for all children solely by reason of status. In some cases, the child may be of an age in which the child's informed and mature preference is an issue. The actual and core point is that the court is making a decision that may enhance danger for a minor unable, for reasons of disability, language, education, poverty, cognition, or mental health to adequately describe and consolidate the facts, including risks and benefits. And that is no difference for a child from the wealthiest communities in the world to the poorest communities in the United States.

## VII. Conclusion

The foregoing sections have presented two intertwined policy issues for discussion. First, the question of substantive rights beyond just due process or a common law protection of children who the law declines to recognize as independent of parental rights? Given both a state law and international law context sandwiching U.S. immigration law, what might the best interests of the child look like in the U.S. immigration removals setting if informed advocacy and investigation was a child's right because of that status of *being* a child? Second is a question of process: How should a fact finder go about determining the best interests of the child? And mixed between these layers is the deeper question of whether children exposed to violence, terrorism, or trafficking require special protection within any adjudicatory process when confronted with asylum or removal petitions which implicates the "best interests of that child" as defined by decades of case law and statutes in the U.S.

Essentially, the nation-state examples examined here provide several valuable lessons. First, while certainly not necessary to a full consideration of a child's best interests in the immigra-

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<sup>101</sup> *Id.* at 544 (footnotes omitted).

tion process, it does seem in light of the selected examples that a state's accession to the UNCRC creates pathways for domestic child's rights advocates to demand protections for minors in such matters. Should the United States ratify the convention, which is admittedly a remote possibility in the current U.S. domestic political climate, there is precedent from the cases considered here to believe that CRC ratification will have an impact on the consideration of children's rights in the immigration removals process. At the same time, it would fall to federal courts to define the "best interests" standard. The discussion above presented the lack of consensus on a functional definition of the standard, yet there is ample material from which the court might draw in crafting one.

The second important point emerging from this review is how as a matter of process the best interests, as they come to be defined, are identified and interrogated within the immigration adjudications process. The simplest solution is to require immigration judges and officials to give regard to international obligations or some defined best interests standard, whether in statute or regulation. This approach, however, presents challenges. Judges would likely find themselves in a similar place as state court family law judges had prior to the creation of special advocates for children and guardians ad litem.

Many U.S. states have created these specialized roles of attorneys, social workers, and other qualified individuals to serve as an extension of the court to investigate and report on the child's unique circumstances, familial, cultural, circumstantial, and historical elements that all contribute to make up a unique being with special needs in need of heightened protection and thus more thorough consideration. The inclusion of such a role in the immigration removals process will constitute a major positive step towards giving the child voice in the process and ensuring judges have adequate discretion to take into account the complex mosaic of the child's existence in determining his or her immigration fate and to assure that an investigation independently protect the state and the child.

Nevertheless, this conclusion by Jacqueline Bhabha is on point and worthy of repetition: "Human rights instruments will never deliver on their aspirations without the political honesty and the mobilizing muscle that transform them into live de-

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mands. Alas, there are no short-cuts to justice.”<sup>102</sup> Nowhere is this truer than in the situation of a child caught, without representation or advocacy, in a divine comedy played by adults and nations. There will be some modicum of social and legal justice only when a child, by status of childhood alone, not wealth or parentage or passport, is sufficiently protected within adjudicatory processes such that borders do not trump historical duty or more modern rules of law concerning the best interests of children.

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<sup>102</sup> Bhabha, *supra* note 88, at 451.