
NOTES

IN THE BEST INTERESTS OF THE CHILD ASYLUM-SEEKER: A THREAT TO FAMILY UNITY

Children need family. And children need safety.

The “best interests of the child” principle attempts to balance those needs in child protection disputes, asking judges to focus on the child’s interests when determining whether to remove the child from an allegedly abusive or neglectful home. In practice, the principle has tipped the scale, overprotecting children at the expense of family unity for poor and disproportionately nonwhite families. Nevertheless, advocates for child refugees promote the best interest principle’s extension to asylum cases involving children, recognizing its potential to increase procedural protections and substantive asylum eligibility for some of the world’s most vulnerable kids.

This Note argues that the weaknesses of the best interests principle are not particular to the child protection context, but are endemic to the principle itself. Its harms may extend to asylum, separating refugee children from fit parents unnecessarily. As in child protection, the principle’s subjectivity may invite decisionmakers to expand children’s access to asylum with no parallel expansion for adults, based in part on cultural and socioeconomic biases. Then, due to the principle’s false dichotomy, decisionmakers may limit their choices to asylum for the child but separation from his family, or preservation of the child’s family but deportation of the child along with his parents. To be clear at the outset — this Note does not argue against the incorporation of the best interests principle into asylum cases, but rather attempts to raise awareness of the shortcomings that may accompany the principle’s many benefits to asylum. It will then conclude optimistically by proposing both a tailored version of the principle and a safeguard against its destructive potential, thereby serving child refugees’ entitlements to asylum and to family.

After detailing the unique issues that children confront in the asylum system, Part I presents the arguments in favor of applying the best interests principle to children’s asylum claims, and it details the specific procedural and substantive changes the principle would entail. Part II reviews the failure of the principle in the child protection context, where biased decisionmaking and the political choice to remove children from impoverished families, rather than supporting those families so they can succeed on their own, have resulted in the unwarranted disintegration of families. Part III posits that those same failures will persist in asylum, resulting in the separation of children from fit parents on the basis of subjective best interest determinations and a political choice to deny

derivative asylum to the parents of child asylum-seekers. Part IV proposes a two-step solution that will serve the dual interests of protecting child refugees and keeping their families intact through a detailed and uniform definition of a child's best interests, paired with the guarantee of derivative asylum for the parents of child asylum-seekers.

I. BEST INTERESTS IN CHILDREN'S ASYLUM CLAIMS

The asylum system is no friend to the child refugee. It is blind to accompanied minors, treating them as derivatives (that is, objects) of their parents, rather than recognizing them as persons with independent needs for protection.¹ This means that accompanied minors are often out of luck when their parents are unable to obtain asylum, even if they have a separate claim of persecution that their parents fail to raise. These failures may be procedural, as when a parent forgets to raise the child's claim or fails to file within the one-year deadline.² These failures may also be intentional, as when the parent is implicated in or condones the child's alleged persecution³ — for instance, if the child is the victim of domestic violence, or if the parent does not oppose female genital mutilation (FGM).

Unaccompanied minors fare even worse. The asylum system assumes that child refugees will derive asylum through accompanying parents,⁴ ignoring the reality that tens of thousands of minors arrive each year without adult relatives.⁵ Due to this incorrect assumption, the United States does not offer an alternative route to asylum for unaccompanied minors. They must navigate the asylum system alone, as though they were adults,⁶ usually without the aid of counsel, much less an appointed guardian ad litem.⁷ They must satisfy the same eligibility

¹ See David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 991–97 (2002).

² See Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 129 (2009).

³ See Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84, 107–08 (1999); Carr, *supra* note 2, at 132, 134–35; Danuta Villarreal, Comment, *To Protect the Defenseless: The Need for Child-Specific Substantive Standards for Unaccompanied Minor Asylum-Seekers*, 26 HOUS. J. INT'L L. 743, 766 (2004).

⁴ See Joyce Koo Dalrymple, Note, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131, 137–39 (2006).

⁵ See ANDREW R. ARTHUR, CTR. FOR IMMIGR. STUD., UNACCOMPANIED ALIEN CHILDREN AND THE CRISIS AT THE BORDER 2 (Mar. 2019), <https://cis.org/sites/default/files/2019-03/arthur-uacs.pdf> [<https://perma.cc/FPT5-2MGY>].

⁶ See Thronson, *supra* note 1, at 997–1003.

⁷ See Dalrymple, *supra* note 4, at 139, 156–57; Maura M. Ooi, Note, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 899–900 (2011).

requirements,⁸ which are particularly demanding for children, who may not understand the basis of their persecution,⁹ or who may experience persecution differently from adults. Due to their heightened vulnerability, certain forms of persecution are unique to children, including “infanticide, conscription as a child soldier, child abuse, incest, female genital mutilation . . . , bonded or hazardous child labour, child sale, child marriage, and religious sexual servitude.”¹⁰ And due to their heightened vulnerability, “[a]ctions which when directed at adults might be considered mere harassment or interference, could amount to persecution when applied to children.”¹¹ Professors Jacqueline Bhabha and Wendy Young offer empty threats as one example: a child may perceive an empty threat to be a true threat to his life or safety, whereas an adult hearing the same threat would not.¹² Because the immigration system is designed for adults, these child-specific forms of persecution do not always “fall neatly into the rigid framework of successful asylum claims.”¹³ Courts are reluctant, for instance, to recognize “youth” as a particular social group, meaning that children who are persecuted for being children may not qualify for asylum, even though their “status as children is central to many of their claims.”¹⁴ These challenges, combined with the language and cultural barriers faced by almost any asylum-seeker, make asylum practically inaccessible to many unaccompanied minors.

To address the difficult situation of child asylum-seekers, both accompanied and unaccompanied, child advocates argue that the United States should incorporate the “best interests of the child” principle into its asylum process and analysis. Some base their argument in the United Nations Convention on the Rights of the Child¹⁵ (CRC),¹⁶ which instructs: “In all actions concerning children . . . the best interests of the child shall be a primary consideration.”¹⁷ The United States is the only

⁸ See Dalrymple, *supra* note 4, at 133–34.

⁹ See *id.* at 139 (“[C]hildren may not understand the persecutor’s intent, and furthermore, they may lack a complete understanding of the situation itself.”); Ooi, *supra* note 7, at 893 (“[Unaccompanied minors] may be less able than an adult to talk to an asylum officer about their reasons for leaving their home country in sufficient detail to establish a claim.”).

¹⁰ Bhabha & Young, *supra* note 3, at 101–02 (footnotes omitted).

¹¹ *Id.* at 104.

¹² *Id.*

¹³ Villarreal, *supra* note 3, at 763.

¹⁴ Ooi, *supra* note 7, at 894.

¹⁵ Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

¹⁶ See, e.g., Bhabha & Young, *supra* note 3, at 97; Erin B. Corcoran, *Deconstructing and Reconstructing Rights for Immigrant Children*, 18 HARV. LATINO L. REV. 53, 89–94 (2015); Ann Laquer Estin, *Child Migrants and Child Welfare: Toward a Best Interests Approach*, 17 WASH. U. GLOBAL STUD. L. REV. 589, 595–98 (2018).

¹⁷ CRC, *supra* note 15, art. 3.1.

country not to have ratified the convention.¹⁸ Still, advocates argue that the United States cannot contravene the convention's principles, both because the United States is a signatory¹⁹ and because the convention's mandates have achieved the status of customary international law through their near-universal adoption.²⁰ In any case, one need not rely on international law to advocate for the inclusion of the best interests principle in asylum law. The principle already plays a preeminent role in child custody and protection cases in the United States, with judges granting custody to mom or dad, family or state, based on their determination of the child's best interests.²¹ Aside from international law, then, proponents contend that the best interests principle should extend from proceedings involving American children to those involving immigrant children, whose interests should be treated with no less importance.²²

Already, the United States has taken small steps toward including the best interests principle in its asylum determinations. Special Immigrant Juvenile Status (SIJS) is available for a narrow class of unaccompanied minors — those who have been abused, neglected, or abandoned by one or both parents, and for whom it would not be in their best interests to return to their home countries.²³ SIJS is the only relief available to child refugees that incorporates a substantive determination of their best interests.²⁴ For all other child refugees, a 1998 Immigration and Naturalization Service memorandum provides their only best interests protection: “[T]he internationally recognized ‘best interests of the child’ principle is a useful measure for determining appropriate interview procedures for child asylum seekers”²⁵ As guidance, this memorandum does not have the force of law.²⁶ In any event, it puts forth only a watered-down version of the best interests principle that applies only to the narrow subtopic of interview procedure, recommending the presence of a trusted adult and a child-friendly atmosphere.

¹⁸ See Olga Byrne, *Promoting a Child Rights-Based Approach to Immigration in the United States*, 32 GEO. IMMIGR. L.J. 59, 68 (2018).

¹⁹ See Corcoran, *supra* note 16, at 70–71; Estin, *supra* note 16, at 595.

²⁰ See Bhabha & Young, *supra* note 3, at 93.

²¹ See Corcoran, *supra* note 16, at 59–61.

²² See Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331, 354 (2013) (“In fact, one of the ironies regarding the United States’s failure to ratify the CRC is the fact that the ‘best interests of the child’ standard is taken from [the United States] and this principle has been guiding U.S. law in [child custody and dependency cases] for more than 125 years.”); Becky Wolozin, *Doing What’s Best: Determining Best Interests for Children Impacted by Immigration Proceedings*, 64 DRAKE L. REV. 141, 163 (2016).

²³ See Immigration and Nationality Act, 8 U.S.C. §§ 1153(b)(4), 1101(a)(27)(J).

²⁴ See Dalrymple, *supra* note 4, at 165.

²⁵ Memorandum from Jeff Weiss, Acting Dir., Office of Int’l Affairs, to Asylum Officers, Immigration Officers, Headquarters Coordinators 2 (Dec. 10, 1998), <https://www.uscis.gov/sites/default/files/document/memos/ChildrensGuidelines121098.pdf> [<https://perma.cc/Z32M-D2GE>].

²⁶ See Ooi, *supra* note 7, at 894.

Nice as these recommendations may sound, child-friendly interviews do not compensate for a lack of counsel or guardianship. And as for a substantive application of the best interests principle, the memorandum is explicit: “[The best interests principle] does not play a role in determining substantive eligibility under the U.S. refugee definition.”²⁷ A 2017 memorandum reaffirms that prohibition: “[The best interests] concept alone cannot provide a legal basis for granting relief or protection not otherwise sanctioned by law.”²⁸

As imagined by scholars such as Professor Bridgette Carr, the principle would reach much farther: “Procedurally, the ‘best interests’ approach prioritizes allowing the child to have a voice. Substantively, the ‘best interests’ approach prioritizes the child’s safety, permanency, and well-being. It is these priorities — voice, safety, permanency, and well-being — that immigration law and procedure must incorporate.”²⁹ Such a prioritization would ease access to asylum protections otherwise unattainable due to the current procedural hurdles and substantive gaps in asylum protection for minors. More concretely, the principle would require procedural protections in the form of free legal representation,³⁰ as well as a guardian ad litem for unaccompanied children who are too young to formulate their own interests.³¹ It would also require judges to consider accompanied minors’ asylum claims separately and in addition to those of their parents.³² Substantively, the principle would, at minimum, require judges to use the child’s best interests as an interpretive tool in their evaluation of a child’s asylum eligibility, as promoted by Bhabha and Young.³³ Judges would need to be on the lookout for forms of persecution unique to children and recognize that harms that do not amount to persecution for adults may so amount for children.³⁴ Some advocates go one step further, arguing that the child’s best interests should offer a completely alternative route to asylum.³⁵ In other words,

²⁷ Memorandum from Jeff Weiss, *supra* note 25, at 2.

²⁸ Memorandum from MaryBeth Keller, Chief Immigr. J., to All Immigration Judges, All Court Administrators, All Attorney Advisors and Judicial Law Clerks, All Immigration Court Staff 3 (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-03/download> [<https://perma.cc/9BTF-HT9S>].

²⁹ Carr, *supra* note 2, at 127 (footnotes omitted).

³⁰ Bhabha & Young, *supra* note 3, at 118–19; King, *supra* note 22, at 345, 348–51, 354–55, 376–77; Wolozin, *supra* note 22, at 184–85.

³¹ See Bhabha & Young, *supra* note 3, at 116–18; King, *supra* note 22, at 378–80; Wolozin, *supra* note 22, at 184–85.

³² See Carr, *supra* note 2, at 150–51.

³³ See Bhabha & Young, *supra* note 3, at 98.

³⁴ See *id.* at 104–05.

³⁵ See, e.g., Erin B. Corcoran, Essay, *Getting Kids out of Harm’s Way: The United States’ Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors*, 47 CONN. L. REV. ONLINE 1, 11–12 (2014); Jane McAdam, *Seeking Asylum Under the Convention on the Rights of the Child: A Case for Complementary Protection*, 14 INT’L J. CHILD.’S RTS. 251,

the United States should not deport children against their best interests, even if they do not satisfy the adult requirements for asylum.

Although these changes would bring immeasurable benefits to children's asylum claims, with those benefits may come harms. The United States has a troubled history with the best interests principle, which it has used to disintegrate families, especially those who are poor and nonwhite. Specifically, the U.S. child protection system has used the subjective best interests principle to remove children from poor families rather than giving parents the resources they need to thrive. For this reason, advocates for child migrants should be wary of the principle's adoption into immigration proceedings in its simplest form and without protective measures. Yet in the existing scholarship, there is a notable silence surrounding the principle's use in child protection and the havoc it has already wreaked in that context. When scholars do mention this connection, they usually shrug it off;³⁶ others, including Carr, go so far as to acknowledge the "history" of the best interests principle in child welfare, only to argue that that history "should serve as a guide for the treatment of children in immigration proceedings."³⁷ The remainder of this Note will attempt to speak into the silence, as well as respond to those who explicitly ignore the inherent and transcendent danger the best interests principle poses to family unity. The next Part will discuss the principle's damage to families via the child welfare system, so that Part III can evaluate the risk that similar harms may befall immigrant families if the principle is incorporated into asylum.

II. BEST INTERESTS IN CHILD PROTECTION PROCEEDINGS

The United States has always been in the business of separating children from parents. At its founding, it condoned the sale of slave children.³⁸ Now, it condones family separations with the more benign appearance of child protection. This Part will discuss the best interests principle in that context: the history of the best interests principle in child protection, the theory behind its use, its botched application, and the two shortcomings that have led to its failure — the principle's subjectivity and false dichotomy.

Since the early twentieth century, states have exercised their power of *parens patriae*, which calls on governments to protect those citizens who cannot protect themselves, by removing children from unsafe

259 (2006); Jason M. Pobjoy, *The Best Interests of the Child Principle as an Independent Source of International Protection*, 64 INT'L & COMP. L.Q. 327, 333–44 (2015).

³⁶ See, e.g., Dalrymple, *supra* note 4, at 144–46.

³⁷ Carr, *supra* note 2, at 125.

³⁸ See Thomas D. Russell, *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales*, 1996 UTAH L. REV. 1161, 1168, 1171–72; see also Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 179.

homes and terminating parents' rights to their children.³⁹ This power is not unfettered: in *Santosky v. Kramer*,⁴⁰ the Supreme Court held that states can terminate parental rights only with clear and convincing evidence of abuse or neglect,⁴¹ recognizing the "fundamental liberty interest of natural parents in the care, custody, and management of their child."⁴² Nevertheless, states have removed children and severed their familial ties with great and growing frequency,⁴³ with encouragement from the Adoption and Safe Families Act⁴⁴ (ASFA). Enacted in 1997, this federal legislation marked a shift from child protection's commitment to family reunification to an even greater emphasis on child safety.⁴⁵ Specifically, ASFA requires that child protection agencies move for the termination of parental rights (TPR) whenever a child has spent fifteen out of twenty-two months in foster care.⁴⁶ More than 400,000 children spent 2019 in foster homes.⁴⁷ More than 70,000 had parents whose parental rights were terminated.⁴⁸ And all under the guise of the child's best interests, which emerged as the national standard for removal and TPR proceedings in the latter half of the twentieth century.⁴⁹

In theory, the best interests principle means prioritizing the child's elusive interests in judicial proceedings affecting their custody. Critics complain that courts continue to place too much emphasis on parental rights.⁵⁰ The best interests principle does not, for instance, mean taking

³⁹ See Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 403–10 (2000).

⁴⁰ 455 U.S. 745 (1982).

⁴¹ See *id.* at 747–48.

⁴² *Id.* at 753.

⁴³ See Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, CHILD MALTREATMENT, Feb. 2020, at 32, 35 ("Starting in around 2012, the rate of the termination of parental rights started to accelerate, reaching a high of around 1.1% by the end of the study period. This 0.4% increase is equivalent to a 60% increase from 2010 to 2016."); *Foster Care Numbers Up for Fifth Straight Year*, N. AM. COUNCIL ON ADOPTABLE CHILD., <https://www.nacac.org/2019/01/18/foster-care-numbers-up-for-fifth-straight-year> [https://perma.cc/59C2-P38Y].

⁴⁴ Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

⁴⁵ See *Developments in the Law — The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2114–17 (2003).

⁴⁶ 42 U.S.C. § 675(5)(E).

⁴⁷ CHILDREN'S BUREAU, TRENDS IN FOSTER CARE AND ADOPTION: FY 2009–FY 2019, at 1 (2020), https://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption_10thru19.pdf [https://perma.cc/BE6P-DBEZ].

⁴⁸ *Id.*

⁴⁹ See Note, *In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings*, 51 N.Y.U. L. REV. 446, 448–49 (1976).

⁵⁰ See generally, e.g., Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV. 1323 (2012) (arguing that "the child welfare system actually focuses not on child welfare but rather on adult rights and interests," *id.* at 1323).

children from “good” homes to place them in “great” homes. In general, however, a judge will allow removal, or terminate parental rights, when convinced that doing so is in the child’s best interests, balancing her interest in safety against her interest in family unity. The primacy of the best interests principle in child protection cases reflects a well-meaning shift from a property-based conception of children to one that recognizes them as individual rights bearers.⁵¹ Although the child’s best interests lack clear definition, the principle generally encompasses the child’s rights to health, well-being, and family.⁵² Regarding the final item, courts presume that parents act in their children’s best interests and that children have a powerful interest in remaining with their biological families whenever possible.⁵³ In the abstract, then, the best interests principle is consonant with family integrity except in egregious cases of abuse or neglect.

In application, the principle has trampled over that limit. Most children in foster care are not victims of the sort of violence we imagine when we hear the words “child abuse”; rather, they are victims of poverty that resembles neglect.⁵⁴ And many children whose parents saw their parental rights terminated are not freed up for adoption; rather, they languish in the foster system, cut off from their biological families without any prospect of adoption.⁵⁵ Together, these outcomes mean that many children are legally orphaned due only to their family’s poverty. It also means that black families, who are disproportionately poor, are also disproportionately engaged with the child welfare system,⁵⁶ perpetuating the national tradition of separating black children from their

⁵¹ See Dalrymple, *supra* note 4, at 142–43.

⁵² See Carr, *supra* note 2, at 127.

⁵³ See *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion) (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

⁵⁴ See Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 453 (2002) (“Poverty — not the type or severity of maltreatment — is the single most important predictor of placement in foster care . . . [T]he public child welfare system often equates poverty with neglect.”); Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1724–26 (2000) (book review) (asserting that “the great majority of children in foster care” are there due to inadequate income, housing, or child-care arrangements and could otherwise “remain safely at home,” *id.* at 1724); Roberts, *supra* note 38, at 175 (“When child protection agencies find that children have been neglected it usually relates to poverty. Most neglect cases involve poor parents whose behavior was a consequence of economic desperation as much as lack of caring for their children.” (footnote omitted)).

⁵⁵ See H. RINGEISEN ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING NO. 19: RISK OF LONG-TERM FOSTER CARE PLACEMENT AMONG CHILDREN INVOLVED WITH THE CHILD WELFARE SYSTEM 5 (2013), https://www.acf.hhs.gov/sites/default/files/opre/nscaw_ltfc_research_brief_19_revised_for_acf_9_12_13_edit_clean.pdf [<https://perma.cc/38RY-CBX3>].

⁵⁶ See CHILD WELFARE INFO. GATEWAY, ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE 3 & tbl.1 (Jan. 2011), http://centerforchildwelfare.fmhi.usf.edu/kb/cultcomp/racial_disproportionality2011.pdf [<https://perma.cc/6M8S-US36>]; Roberts, *supra* note 38, at 174–76; Dorothy E. Roberts, *Poverty, Race and New Directions in Child Welfare Policy*, 1 WASH.

families. The same goes for Native American families, whose children are represented in foster care at a rate more than twice their proportion in the general population.⁵⁷ Professor Dorothy Roberts calls it “an apartheid institution,”⁵⁸ noting that the disparate impact of child protection is due not only to disparate poverty rates, but also to the structural racism inherent to a system with “deeply embedded stereotypes about black family dysfunction.”⁵⁹ “Poor black mothers are stereotyped as deviant and uncaring; . . . black fathers are simply thought to be absent.”⁶⁰ In these ways, the best interests principle both overreaches and bends too easily. Overreaches, because TPR is simply not in a child’s best interests where adequate resources would allow his family to stay intact. Bends too easily, because if best interests are best served by family integrity, then the principle should not permit removal or TPR with their present regularity. Instead, the principle should require states to provide sufficient support to families unable to provide for their children on their own, thereby serving the child’s interests in both health and family. Foster care serves only the former.

This misalignment between best interests in theory and best interests in practice arises from two of the principle’s fundamental flaws. First, its subjectivity: what constitutes the “child’s best interests” is woefully vague. Without legislative elaboration or even one of those fancy, multiple-pronged, judge-made tests, the best interests principle invites judges to decide for themselves, on a case-by-case basis, which outcome best serves the child’s interests.⁶¹ But judges who have had the privilege

U. J.L. & POL’Y 63, 64, 71 (1999); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1483–84 (2012) [hereinafter Roberts, *Prison*].

⁵⁷ NAT’L INDIAN CHILD WELFARE ASS’N, DISPROPORTIONALITY IN CHILD WELFARE FACT SHEET 1 (2019), <https://www.nicwa.org/wp-content/uploads/2019/10/2019-AIAN-Disproportionality-in-Child-Welfare-FINAL.pdf> [<https://perma.cc/9QTL-3WLU>]; see also Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 218 (2013) (“The nation’s poorest children, not surprisingly, make up most of the foster care population. African Americans and Native Americans are disproportionately poor, and that correlation increases the probability of foster care for these races.” (footnote omitted)).

⁵⁸ Roberts, *supra* note 38, at 172.

⁵⁹ *Id.* at 176.

⁶⁰ Dorothy E. Roberts, *Is There Justice in Children’s Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 131 (1999).

⁶¹ See Martin Guggenheim, *Ratify the U.N. Convention on the Rights of the Child, but Don’t Expect Any Miracles*, 20 EMORY INT’L L. REV. 43, 63 (2006) (“One of the reasons [the best interests] ‘standard’ invites the judge to rely on his or her own values and biases is that the inquiry fails to inform the judge about even the most basic matters.”); Cheryl M. Browning & Michael L. Weiner, Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 228 (1979) (“Vague statutory standards for removal and low standards of evidentiary proof combine to maximize judicial discretion and minimize substantive protection.”); Note, *supra* note 49, at 473 (“The major flaw in most neglect statutes is a vagueness that permits intervention in the parent-child relationship on the basis of subjective, class-based norms of judges rather than on specified, objective harms delineated by the legislature.”).

of growing up in the white, middle- or upper-class tradition will inevitably conjure different images of a “nutritious” meal or a “clean” living space than a family living on food stamps in government housing.⁶² Cultural and socioeconomic differences may also influence a family’s approach to disciplining, its ability to provide after-school care, its substance use, and its ability to properly outfit its children — all of which affect a judge’s assessment of parental fitness. The best interests principle fails to accommodate these differences in spite of and due to its subjectivity. Too often, judges treat the subjective principle as an objective standard, imposing white, middle-class norms on families monitored by the child welfare system, who are mostly poor and disproportionately nonwhite, as though they were objective criteria.⁶³ As a result, they condone removal and TPR merely because parents do not conform to their personal views of “good parenting.”

The subjectivity of the best interests principle then multiplies with the appointment of individuals to represent those interests in court — lawyers and guardians who amplify judges’ biases by advocating a similarly prejudiced view of proper parenting.⁶⁴ By nature of its subjectivity, the principle is a pliable tool that empowers representatives to “champion” their desired outcome.⁶⁵ As Professor Martin Guggenheim explains: “Similar cases will be decided differently merely because of assignment of a different [representative]. . . . The only differences in these cases frequently will be the personalities, values, and opinions of the randomly chosen [representatives].”⁶⁶ Because few child representatives are child experts, allowing them to represent the child’s interests is a value judgment that favors mainstream views over those of the parents.⁶⁷ This allocation of power is dangerous in light of judges’ tendency

⁶² See Annette R. Appell, Essay, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 585 (1997).

⁶³ See Brooks & Roberts, *supra* note 54, at 453–54; Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 61–62 (1994).

⁶⁴ See Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23, 26 (2016) (“However kindly intentioned their work may be, . . . [court appointed special advocates] essentially give voice to white supremacy — the same white supremacy that permeates the system as a whole . . .”).

⁶⁵ See Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 100–07 (1984).

⁶⁶ Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1415 (1996).

⁶⁷ See Guggenheim, *supra* note 65, at 154–55 (“When lawyers are assigned to speak for children, we are assured only that another adult will be heard; with the class and cultural differences that separate many lawyers from their clients, what the lawyer has to say frequently tells us nothing about what the child wants or needs. Instead, we are informed only about the attorney’s values.”); Roberts, *supra* note 60, at 138 (“Children rarely speak for themselves, so the issue underlying a claim of children’s rights frequently involves determining which adult will speak for them. These contests are often political struggles that are influenced by hierarchies of race, class, and gender.”).

to rely on child representatives to reach a conclusion for them;⁶⁸ representatives' predisposition to credit allegations of abuse or neglect;⁶⁹ and representatives' incentive to "play it safe" by arguing for state custody and TPR.⁷⁰ They do not want to argue for reunification in a borderline case, only to become responsible for a child's injury upon her return home. The subjectivity of the best interests principle accommodates these tendencies.

Second, the best interests principle rests on a false dichotomy: reunification with the family in its present form, otherwise foster care and adoption. These dramatic alternatives ignore the universe of solutions that lie in between — most notably, reunification with the family, sufficiently resourced. Reimagined, child protection could operate in the gulf between reunification and adoption by giving families the resources necessary to remedy their children's neglect, rather than giving those resources to foster families to do it for them.⁷¹ Better yet, prophylactic child protection would give families sufficient resources up front, so that child protective services would not have to intervene — and children would not have to suffer neglect — in the first instance.⁷²

The infrastructure for these reforms already exists in the welfare system and the "reasonable efforts" requirement, which requires child welfare agencies to make reasonable efforts to reunite children with their parents once removed.⁷³ Yet in the past few decades, the welfare state has shrunk as the child welfare regime has grown,⁷⁴ reflecting a "political choice to investigate and blame mothers for the cause of startling rates of child poverty rather than to tackle poverty's societal roots."⁷⁵ As for the "reasonable efforts" requirement, those efforts have only ever been minimal,⁷⁶ in spite of and in concert with ASFA's unforgiving time frame for TPR. And so we are left with the best interests principle,

⁶⁸ See Guggenheim, *supra* note 65, at 102.

⁶⁹ See *id.* at 139, 141.

⁷⁰ See Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805, 823–24 (2006) ("The potential for [lawyers'] advocacy to place children at risk convinces them to argue their conscience rather than clients' desires." *Id.* at 824 (quoting Andrew Hoffman, *The Role of Child's Counsel in State Intervention Proceedings: Toward a Rebuttable Presumption in Favor of Family Reunification*, 3 CONN. PUB. INT. L.J. 326, 356–57 (2004))).

⁷¹ See Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1213–22 (1999) ("Given the disparities between the amount of money expended when a child remains in her home as opposed to being placed in foster care, maintaining in-home placements could be supported without additional money." *Id.* at 1213.).

⁷² See Guggenheim, *supra* note 54, at 1747–48 ("[I]t is critical that we restructure child welfare to include, for example, early intervention services for health care, child care, and education. . . . The goals are to reach these families before a crisis occurs . . .").

⁷³ 42 U.S.C. §§ 671(a)(15), 672(a)(1).

⁷⁴ See Roberts, *supra* note 60, at 132–35; Roberts, *Prison*, *supra* note 56, at 1484–85, 1490.

⁷⁵ Roberts, *Prison*, *supra* note 56, at 1484.

⁷⁶ See Guggenheim, *supra* note 54, at 1731 ("The overwhelming conclusion in the scholarly literature is that family reunification efforts have never been adequate.").

which does not come into play until the initiation of child protection proceedings. As a result, it cannot address the dire financial conditions that bring families into contact with child welfare to begin with. Then, because the principle is an interpretive tool rather than a weapon of social change, judges can use it only to choose between those options already in existence: the foster system or the family as it arrives in the courtroom. Due to this false choice, “best interests” become “best we can do,” and family unity is sacrificed on the altar of safety and well-being — a worthy sacrifice, were it necessary.

No doubt, children should not remain in homes where they are the victims of violence, sexual abuse, or neglect within their parents’ control. But the best interests principle has not stopped there. With its subjectivity and narrow set of contemplated outcomes, the principle has shattered families because they are poor, in contravention of the children’s interest in family unity. The next Part discusses the possibility that the best interests principle, without modification or augmentation, would be equally destructive if applied to immigrant families, as a warning to those who advocate for its incorporation into children’s asylum proceedings without any needed adjustments or protections.

III. BEST INTERESTS: A THREAT TO FAMILIES IN CHILDREN’S ASYLUM CLAIMS

Child protection and asylum are not the same. Child protection cases investigate the parental fitness of parents charged with abuse or neglect, who no longer enjoy the presumption that they act in their children’s best interests. The parents are the party “on trial.” In asylum cases, that party is the asylum applicant’s country of origin, whom the asylum-seeker charges with persecution or impotence in the face of private persecution. Asylum claims, then, do not by their very nature cast doubt on parental fitness. Many go so far as to call the U.S. immigration system family centered, due to its historical prioritization of keeping families intact.⁷⁷ Recognizing this dissimilarity between the child welfare and immigration systems, one may doubt that the best interests principle poses the same threat to family unity in asylum as in child protection. In fact, many of the United States’ sister jurisdictions, who are parties to the 1951 Refugee Convention, have used the best interests principle to uphold family unity by preventing the removal of parents otherwise deportable. In Canada, for instance, judges consider the child’s best

⁷⁷ See, e.g., Javeria Ahmed, Note, *No Parents Allowed: The Problem with Special Immigrant Juvenile Status*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 131, 132 (2017) (“Since early in the nation’s history, the U.S. has had a family-centered approach to immigration, and family reunification continues to be the most common legal basis for immigration to the United States.”).

interests when evaluating applications for humanitarian and compassionate relief by parents subject to deportation.⁷⁸ The United Kingdom also treats children's best interests with such "primacy of importance" in their parents' deportation proceedings that the child's interests "rank higher than any other" countervailing consideration.⁷⁹ "Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them."⁸⁰ In application, this means that judges weigh children's interests in their parents' removal proceedings. Where powerful countervailing considerations, such as national security, do not outweigh those interests, judges will allow the parents to remain.

Though this application of the best interests principle in the international context may seem promising for immigrant families in the United States, its promise is misleading. The symmetry between the child's best interests and family preservation in the United Kingdom and Canada reflects a policy choice to apply the best interests principle not only in child asylum cases, but also in any deportation proceeding implicating a child — including their parents' petitions for immigration status. In the absence of a similar policy decision in the United States, this Note predicts that the best interests principle will be insufficient to protect children from both persecution and separation from their families. The same subjectivity and false dichotomy that color the principle in child protection will likely bleed into asylum, as the rest of this Part will explain theoretically and with the concrete examples of SIJS and an influential Seventh Circuit decision.

First, the principle's subjectivity — the child's best interests are no more clearly defined in asylum than in child protection. Bhabha puts it plainly: "Clearly this is an arena of opinion rather than fact: information about the relative benefits, short and long-term, of migration over return home has to be weighed taking account of objective and subjective considerations."⁸¹ As in child protection, this subjectivity may invite biased decisionmaking by asylum officers and judges confronting cultural and socioeconomic differences that span national borders. Admittedly, that bias would have positive immigration outcomes for child refugees. Decisionmakers' familiarity with childhood in America would compel the conclusion that asylum would better serve a child's interests than would

⁷⁸ See *Baker v. Canada*, [1999] 2 S.C.R. 817, para. 75 (Can.).

⁷⁹ See *ZH (Tanzania) v. Sec'y of State for the Home Dep't* [2011] UKSC 4 [¶ 46] (Lord Kerr SCJ) (appeal taken from Eng.) (agreeing with and emphasizing the majority opinion's focus on the best interests of the child).

⁸⁰ *Id.*

⁸¹ Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 285 (2000).

deportation to a place like the Northern Triangle, where children confront violence and poverty to a degree unknown to the United States.⁸² But for a prudent incorporation of the principle into children's asylum cases, advocates must confront the bitter that comes with the sweet. While enhancing children's asylum claims, the principle's subjectivity may simultaneously result in children's separation from parents who are not themselves eligible for asylum, an inexcusable outcome.⁸³

Lest this concern seem hypothetical, the immigration system already does separate refugee children from fit parents on the basis of subjective "best interests" calculations. Children are eligible for SIJS only if they were abused or neglected by at least one parent and if it is not in their best interests to return to their home country. By design, SIJS determinations are in the hands of the same juvenile court judges who decide child protection cases,⁸⁴ so it comes as no surprise that SIJS cases also mislabel poverty as neglect with some regularity.⁸⁵ Some say with greater regularity, perhaps because children and their representatives are motivated to exaggerate allegations of abuse or neglect to reach their desired immigration outcome.⁸⁶ A recent student note describes how SIJS applicants "frequently feel conflicted about the need to paint one or both of their parents as abusive."⁸⁷ One applicant explained: "My mom has to be the bad one. She wants the best for me. She will understand."⁸⁸ SIJS then forbids not only derivative asylum for parents, but also a SIJS recipient's sponsorship of any parent for any immigration

⁸² The Northern Triangle comprises El Salvador, Honduras, and Guatemala, the home countries of many asylum-seekers in the United States due to the intense poverty, violence, and corruption in the region. See Amelia Cheatham, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELS. (Oct. 1, 2019), <https://www.cfr.org/background/central-americas-turbulent-northern-triangle> [<https://perma.cc/284L-Q52G>].

⁸³ See Villarreal, *supra* note 3, at 758 ("One cannot rule out the possibility that 'the value judgments and impressions of those responsible for determining the . . . refugee status . . . of immigrant minors, can potentially interfere with the application of the best interests test,' which can become especially problematic in the asylum interview context where an adult interviewer must filter child experiences through the interviewer's own value system." (omissions in original) (quoting Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 609-10 (1998))).

⁸⁴ See Gregory Zhong Tian Chen, *Eliau or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 612 (2000).

⁸⁵ See Ellyn Jameson, Comment, "Best" Interests and "Bad" Parents: Immigration and Child Welfare Through the Lens of SIJS and Foster Care, 168 U. PA. L. REV. 513, 543-44 (2020).

⁸⁶ Cf. David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 60 (2005) (describing "utilitarian decisions that manipulate family court outcomes to facilitate particular immigration results").

⁸⁷ Jameson, *supra* note 85, at 527.

⁸⁸ *Id.* (quoting Lauren Heidbrink, *Unintended Consequences: Reverberations of Special Immigrant Juvenile Status*, J. APPLIED RSCH. ON CHILD., no. 2, 2020, art. 9, at 23).

status at any time, even after becoming an adult and even if only one parent is charged with abuse or neglect.⁸⁹ In effect, SIJS and its malleable foundation in the child's best interests sanction a family's breakup even where one parent is neither abusive nor neglectful nor mistaken to be so.⁹⁰

Although separation is a more predictable outcome in the context of SIJS, which turns on a finding of parental abuse or neglect, SIJS foreshadows the destruction that may befall immigrant families were the best interests principle, in all its subjectivity, extended to all asylum claims made by children. As discussed in Part I, a substantive application of the best interests principle would entail (1) recognizing types of persecution that are unique to children; (2) treating harms that would be considered nonpersecutory for adults as persecutory for children; and possibly (3) granting asylum whenever it is in a child's best interests, even if she does not satisfy the traditional requirements. As in SIJS, each of these expansions rests on subjective determinations of the child's best interests that would allow asylum eligibility for children but not for accompanying adults (or for relatives who may later wish to join them). The second expansion, for instance, would allow decisionmakers to grant asylum to children but not to their parents for identical harms, such as empty threats, whenever warranted by their subjective assessment of the child's sensitivity. The third expansion would give decisionmakers unbridled discretion to grant asylum to children on any number of factors that may inform a child's elusive "best interests" — education, nutrition, equality of opportunity, and so forth. In these ways, the subjectivity of the best interests principle may once again be a medium for biased decisionmakers to separate parents from children (or to risk their ultimate separation) whenever the decisionmaker opines that doing so is best, given that derivative asylum is available only to the children of adult asylees, and not to the parents of child asylum-seekers.⁹¹

The procedural protections of the best interests principle may then make matters worse by appointing lawyers for child asylum-seekers, as

⁸⁹ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(iii)(II).

⁹⁰ See Ahmed, *supra* note 77, at 133 ("This reality is neither family centered, nor in the best interest of the child, and therefore contradicts the underlying principles of both U.S. immigration law, and of the SIJS provision in particular."); see also Irene Scharf, *Second Class Citizenship? The Plight of Naturalized Special Immigrant Juveniles*, 40 CARDOZO L. REV. 579, 587 (2018) ("[The prohibition on derivative asylum for either parent of a SIJS recipient] will cause [the] child, once naturalized, to live in a perpetual state of second class citizenship, with her rights to petition for the immigration of her non-abusing parent forever foreclosed. This is not only illogical, but also constitutionally unacceptable." (footnote omitted)).

⁹¹ 8 U.S.C. § 1158(b)(3). Counterintuitively, children can petition for their noncitizen parents to join them in the United States only after they are "considered an adult at age twenty-one." David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393, 404 (2010).

well as guardians for the younger ones, thereby substituting “a culturally alien adult’s view of best interest over that of a culturally akin adult.”⁹² Like the lawyers and guardians in child protection cases, these representatives may reinforce asylum officers’ and judges’ biases with their own. They may face “pressure to generate simplistic, even derogatory characterizations of asylum-seekers’ countries of origin, as areas of barbarism or lack of civility in order to present a clear-cut picture of persecution.”⁹³ And they may be incentivized to err on the side of caution by using any arguments at their disposal to prevent their clients’ possible return to harm — including arguments that come at a cost to a family’s preservation. Again, this will benefit the child’s asylum application, which is a good outcome. But it will not always be the better one. Bhabha explains: “The stark contrast between family unity ‘back home’ in a familiar (even if oppressive) social and cultural setting, and isolation, exploitation and dislocation in the host country may militate against . . . [the conclusion] that staying on in the host country is preferable.”⁹⁴

The best outcome would of course be to use the best interests principle to expand children’s avenues to asylum and to keep their families intact, as occurs in the United Kingdom and Canada. Part IV contemplates that very solution. But in light of the current state of asylum law, there is reason to fear that the false dichotomy of the best interests principle in the child protection setting would crop up in asylum cases as well. Namely, asylum officers and judges may perceive their options to be limited to asylum for the child paired with separation from the parent, or the preservation of the child’s family paired with the child’s return to his home country and all of its dangers. Decisionmakers may resist the third option — asylum for both the child and the parent — even though that outcome would address all of the child’s interests. Textually, the explicit statutory authorization of derivative asylum for children of adult asylees may evidence a congressional intent to prohibit derivative asylum for the parents of child asylees.⁹⁵ “In this statutory scheme, the parent-child relationship is favored, but only when the parent holds legal immigration status”⁹⁶ — a paradox that supports Professor David Thronson’s thesis that the United States systematically devalues immigrant children and diminishes their interests.⁹⁷ Politically,

⁹² Bhabha, *supra* note 81, at 286.

⁹³ Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155, 162 (2002) (footnote omitted).

⁹⁴ Bhabha, *supra* note 81, at 286.

⁹⁵ See Meredith Aherne, Casenote, *Olowo v. Ashcroft: Granting Parental Asylum Based on a Child’s Refugee Status*, 18 PACE INT’L L. REV. 317, 331 (2006).

⁹⁶ David B. Thronson, *You Can’t Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL’Y & L. 58, 71 (2006).

⁹⁷ *Id.* at 67.

officers and legislators may be disinclined to reverse that legislative intent, due to the mythical floodgates concern that parents use “anchor babies” to “cut” in the immigration line.⁹⁸

The Seventh Circuit’s decision in *Olowo v. Ashcroft*⁹⁹ confirms the existence of this false dichotomy. There, the court upheld a mother’s deportation even though her citizen daughters would be subject to FGM if returned to Nigeria.¹⁰⁰ The court acknowledged that it was in the daughters’ best interests to remain in the United States. In fact, the court was so concerned that Ms. Olowo might defy those interests by “allow[ing] her daughters to face FGM in Nigeria rather than arrang[ing] for them to remain [without their mother] in the United States,”¹⁰¹ it directed the case to child protection authorities to contemplate the daughters’ forcible separation from Ms. Olowo.¹⁰² In so doing, the court confined the best interests principle to the realm of available options — FGM or the loss of a parent — rather than using it to expand that realm to include an option that would protect the daughters’ right to safety and their right to family integrity — allowing Ms. Olowo to stay.¹⁰³ As in child protection, this false choice is really a political decision about resource allocation: the United States would rather pay for these daughters’ foster care than allow their mother to compete for American jobs and resources.¹⁰⁴ Unfortunately, the Board of Immigration Appeals (BIA) sealed that political decision in 2007, when it adopted the *Olowo* approach in its own decision in *In re A-K*.¹⁰⁵ Until this false dichotomy has been eradicated and replaced with a more comprehensive approach to the best interests principle, advocates for child refugees must be prudent. They must not promote the wholesale adoption of a principle with such destructive potential for immigrant families.

⁹⁸ See Carr, *supra* note 2, at 157–58; Thronson, *supra* note 96, at 66–76.

⁹⁹ 368 F.3d 692 (7th Cir. 2004).

¹⁰⁰ *Id.* at 701; see also *Oforji v. Ashcroft*, 354 F.3d 609, 611, 616 (7th Cir. 2003) (same).

¹⁰¹ *Olowo*, 368 F.3d at 702.

¹⁰² *Id.* at 703–04.

¹⁰³ See Aherne, *supra* note 95, at 337 (“The consequences of the [*Olowo*] court’s decision therefore conflicted with the best interests of the children to grow up with their mother present and to avoid FGM.”); Corcoran, *supra* note 16, at 87 (“[T]hese cases illustrate how the State’s best interest of the child standard is being misapplied by courts in parental termination proceedings because the court and child welfare agencies alike fail to understand that a parent’s deportation . . . may in fact cause serious harm to the child, as well as violate the Convention on the Rights of the Child’s presumption that family unity is in the best interest of the child.”); David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1211 (2006) (“The alternatives, children’s separation from parents or exit from the United States, are outcomes that necessarily diminish either the children’s rights in the parent-child relationship or their immigration rights. The rights of children are threatened most when the court fails to respect the parent-child relationship and thus reduces the possibility that children’s rights will be vindicated.” (footnote omitted)).

¹⁰⁴ See Miriam R. Cahan, Note, *An Impossible Choice: Denial of Parents’ Derivative Asylum Claims Based on Their Citizen Daughter’s Risk of Female Genital Mutilation*, 8 WASH. U. GLOB. STUD. L. REV. 545, 562–64 (2009).

¹⁰⁵ 24 I. & N. Dec. 275 (B.I.A. 2007).

IV. PROPOSAL: A TAILORED AND SAFEGUARDED APPLICATION OF THE BEST INTERESTS PRINCIPLE TO ASYLUM

The preceding analysis leads to a quandary. The best interests principle is essential to child refugees' meaningful access to asylum. Yet the same principle that vows to protect them portends the destruction of the families on which they depend for care and affection. Given the importance of the competing interests at stake, advocates for child refugees must promote neither the best interests principle as is, nor the total exclusion of the principle from the asylum arena. Rather, advocates must incorporate the principle in such a way that it accomplishes its goals without the attendant shortcomings. On its own, the best interests principle is insufficient at best, catastrophic at worst. But with appropriate tailoring to remedy the principle's subjectivity and one much-needed safeguard to eliminate its false dichotomy, the principle could be hugely advantageous.

First, to remedy the principle's subjectivity, advocates must cabin decisionmakers' discretion by tailoring the definition of "best interests," contrary to Carr's proposal, which advances "increased decision-maker discretion" as the solution.¹⁰⁶ Moreover, advocates should direct this effort to Congress, the proper vehicle for implementing a national conception of the child's best interests. A legislative definition with sufficient detail would avoid the haphazard case-by-case, judge-by-judge application of the principle that has plagued juvenile courts with bias and caprice. The Young Center for Immigrant Children's Rights has already offered a useful starting point for such a definition, which would include the following considerations:

1. The views of the child.
2. The safety and security considerations of the child.
3. The mental and physical health of the child.
4. The parent-child relationship and family unity, and the potential effect of separating the child from the child's parent or legal guardian, siblings, and other members of the child's extended biological family.
5. The child's sense of security, familiarity and attachments.
6. The child's well-being, including the need of the child for education and support related to child development.
7. The child's ethnic, religious, and cultural and linguistic background.¹⁰⁷

¹⁰⁶ Carr, *supra* note 2, at 152.

¹⁰⁷ Corcoran, *supra* note 16, at 90–91 (quoting *Young Center Proposal for Best Interests of the Child Standard*, YOUNG CTR. FOR IMMIGRANT CHILD'S RTS. (archived at <https://perma.cc/B28X-D8ED>)).

This seven-factor definition is commendable, in that it makes a lofty principle more concrete¹⁰⁸ and includes family unity as a relevant consideration, rather than a countervailing one. Even more effective for purposes of family preservation would be a definition that included a negative provision, clarifying what a child's best interests do not include. In particular, a statutory definition of the child's best interests should include a prohibition on a finding of parental abuse or neglect on the sole basis of poverty. The definition could achieve this prohibition with a high scienter requirement, requiring decisionmakers to find purpose or intent before finding abuse or neglect. That way, asylum decisionmakers would not find well-meaning but underresourced parents to be their children's "persecutors" for asylum purposes, as child-welfare decisionmakers all too often find poor parents to be "abusers."

Second, as a safeguard against the principle's false dichotomy, advocates must secure derivative asylum for immigrant parents before the realization of a best interests approach to asylum. This would serve as a security measure for fit parents who would otherwise be separated from children granted asylum in accordance with their best interests. Legislation would perhaps be most effective, as a statute would safeguard against executive and judicial whim by making derivative asylum for parents a textual guarantee.¹⁰⁹ A useful model might be T and U visas, which do allow immigration relief for parents of children who are the "victim[s] of a severe form of trafficking in persons"¹¹⁰ or the victims of "substantial physical or mental abuse as a result of having been . . . victim[s] of [specified] criminal activity."¹¹¹ Indeed, the ease with which T and U visas extended derivative asylum to parents is concrete evidence that extending derivative asylum to the parents of child refugees "would be quite simple to implement."¹¹² Such a change would require no "vast reworking of the systemic structures" or "complex new immigration process mechanisms."¹¹³ "[S]imple changes in eligibility language" would suffice.¹¹⁴

Without congressional action, advocates could alternatively target the BIA to circumvent the legislative bar on derivative asylum for the parents of child refugees. In fact, the path for such adjudicative reform has already been laid out. The same year the Seventh Circuit decided

¹⁰⁸ Though this definition would still be subject to manipulation as a standard rather than a bright-line rule, it nonetheless offers significantly more guidance than the vague term "best interests."

¹⁰⁹ See Aherne, *supra* note 95, at 341; Corcoran, *supra* note 16, at 90–91.

¹¹⁰ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(T)(i)(I).

¹¹¹ *Id.* § 1101(a)(15)(U)(i)(I).

¹¹² David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239, 260 (2010).

¹¹³ *Id.*

¹¹⁴ *Id.*

Olowo, the Sixth Circuit granted asylum on nearly identical facts in *Abay v. Ashcroft*¹¹⁵: a mother with credible fear that her daughter would face FGM if returned to Ethiopia.¹¹⁶ Rather than award the mother derivative asylum per se, the *Abay* court used creative reasoning to award the mother direct asylum, on the basis that watching her daughter endure FGM would amount to independent persecutory harm to the mother.¹¹⁷ Derivative asylum, in the guise of asylum. The Ninth Circuit also signaled its willingness to use this approach in 2005 in *Abebe v. Gonzales*.¹¹⁸ That approach is no longer accepted, given the BIA's holding in *In re A-K-*, which technically distinguished itself from *Abay*,¹¹⁹ but practically foreclosed asylum claims by the parents of child asylum-seekers: "Automatically treating harm to a family member as being persecution to others within the family is inconsistent with the derivative asylum provisions . . ." ¹²⁰ A child may derive immigration status from a father who is granted asylum, but "the converse is not true; there is no statutory basis for a grant of derivative asylum status to a parent based on the grant of asylum to his child."¹²¹ Despite this holding, under basic principles of administrative law, the BIA can always change its mind, so long as it remains within the realm of reasonable interpretations of the statute it is charged with interpreting¹²² — here, the Immigration and Nationality Act. With one circuit's decision granting direct asylum to the mother of a child refugee, and another circuit's decision signaling its support of that analysis, such an approach would likely fall within the wide range of "reasonable" interpretations available to the BIA in exercising its delegated power. It would also be consonant with the U.S. immigration system's overarching commitment to family unity,¹²³ as well as guidance from the U.N. High Commissioner for Refugees urging a broad interpretation of "persecution" to include parents who would witness their child's pain and suffering if returned to their home countries.¹²⁴ Advocates should pressure the BIA to return to this sensible approach, which respects both families and the country's promise of sanctuary to those fleeing persecution.

¹¹⁵ 368 F.3d 634 (6th Cir. 2004).

¹¹⁶ See *id.* at 642–43.

¹¹⁷ See *id.* at 642.

¹¹⁸ 432 F.3d 1037 (9th Cir. 2005); see *id.* at 1043 (remanding for the BIA to consider the parents' eligibility for asylum based on their fear that their daughter would face FGM in Ethiopia).

¹¹⁹ *In re A-K-*, 24 I. & N. Dec. 275, 277 (B.I.A. 2007).

¹²⁰ *Id.* at 278.

¹²¹ *Id.* at 279.

¹²² See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

¹²³ Thronson, *supra* note 112, at 262 ("While the suggestion of such changes in immigration law seems to be a radical shift, such changes would also serve to correct the massive misalignment of immigration law with the treatment of children in other areas of the law.")

¹²⁴ See Jennifer L. 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, 324 (2012).

CONCLUSION

The best interests principle has wreaked havoc on American families: Its subjectivity invites bias against families who are poor and nonwhite. Its narrow conception of available solutions makes the wrong answer (removal) the right one. These weaknesses transcend child protection, posing the same risks to parents of children pursuing asylum. But with those risks come benefits. The best interests principle would bring procedural protections to amplify the voices of child asylum-seekers and substantive changes to increase their avenues for relief. With such potential, the answer is not to end the movement toward a best interests approach to children's asylum claims. Instead, advocates should incorporate the principle in a way that will protect children from both persecution and family separation. A detailed, universal definition of a child's best interests can undermine the principle's subjectivity, and the guarantee of derivative asylum to parents of child refugees can eliminate the principle's false dichotomy.

Children need family. *And* children need safety. The best interests principle, properly used, would give them both.