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The Yearning for Zion Raid and Its Impact on Texas Child Welfare Cases: How a Botched Rescue Effort Exposed a Need to Refocus Efforts on Effective Service Plans Comment.

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THE YEARNING FOR ZION RAID AND ITS IMPACT ON TEXAS CHILD WELFARE CASES: HOW A BOTCHED RESCUE EFFORT EXPOSED A NEED TO REFOCUS EFFORTS ON EFFECTIVE SERVICE PLANS

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I. INTRODUCTION

Schleicher County, Texas, an idyllic, mesquite-covered community that is home to fewer than 3,000 residents,[1] has a

1. *See* The County Information Project, Tex. Ass'n of Counties, Schleicher County

smaller population than some high schools.[2] As in most rural communities, life moves slowly here—in Schleicher County, out-of-the-ordinary happenings are few and far between, and the excitement that can accompany life in the big city is almost unheard of. But in the spring of 2008, the normal tranquility of Schleicher County disappeared overnight when it was, without warning, thrust into the glare of a worldwide spotlight after a state child protection raid on the property of the county's most infamous inhabitants—the 700 members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS) living at the Yearning for Zion ranch in Eldorado, Texas.[3]

In late March and early April 2008, the Texas Department of Children and Family Services (the Department) took custody of 468 children without a court order and removed them from their homes at the Yearning for Zion ranch.[4] Based on little more than an anonymous telephone tip,[5] the Department alleged that the

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Profile, http://www.txcip.org/tac/census/profile.php?FIPS=48413 (last visited Dec. 14, 2009) (listing population estimates for Schleicher County compiled by the U.S. Census Bureau from 1950 to 2006); *see also* The Handbook of Texas Online, Schleicher County, http://www.tshaonline.org/handbook/online/articles/SS/hcs6.html (last visited Dec. 14, 2009) (describing the landscape, history, and climate of Schleicher County).

2. In San Antonio alone, there are nine high schools—Clark, Jay, Stevens, Taft, Churchill, MacArthur, Madison, Roosevelt, and Southwest—with enrollment of over 2,700 students. *See* University Interscholastic League, 2008–2010 Official Enrollment Data (5A Enrollment), http://www.uil.utexas.edu/2008align/pdf/5A_fb_enroll.pdf (last visited Dec. 14, 2009) (listing the Texas schools classified as 5A for purposes of interscholastic football and basketball competition).

3. *See* Stephanie Francis Ward, *Discovering Eldorado*, A.B.A. J., Oct. 2008, at 59, 59 (describing the Yearning for Zion ranch and "the massive child protection action" the state of Texas initiated against the compound in early April of 2008). The Yearning for Zion ranch, situated on 1,700 acres of land, was first established in Schleicher County in 2004 under the leadership of the current FLDS prophet, Warren Jeffs. *See id.* (relating the brief history of the Yearning for Zion ranch in West Texas).

4. *See id.* at 60 (describing the state's removal of the children living at the Yearning for Zion ranch).

5. *See* David A. Fahrenthold, *An Unusual Prosecution of a Way of Life*, WASH. POST, Apr. 27, 2008, at A03 (describing the impetus behind the state's removal of the children living at the Yearning for Zion ranch). The Department was unable to verify the anonymous tip in its initial raid of the ranch. *E.g.*, Petition for Writ of Mandamus at 4, *In re* Allred, No. 03-08-00351-CV (Tex. App.—Austin May 28, 2008) (on file with the *St. Mary's Law Journal*) ("No person was found who matched the description of the initial report that caused the caseworker to investigate."). In fact, the entire episode was probably set in motion by a fraudulent abuse report. *E.g.*, *id.* ("It appears that the phone call which precipitated the Department's raid on the YFZ ranch was a complete hoax."); *accord* Press Release, Tex. Dep't of Pub. Safety, Rangers Release New Details in FLDS Case (Apr. 18, 2008) (on file with the *St. Mary's Law Journal*) (discussing a "possible

children's removal was necessitated by "immediate danger to [their] physical health or safety," and relied on section 262.201 of the Texas Family Code[6] to justify taking the children into custody.[7] The Department's raid on the ranch, and its removal of the children living there, sparked an almost immediate uproar about what should remain within the private confines of one's home, as well as the proper boundaries to which the state should be restricted in policing those confines.[8]

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connection" between Rozita Swinton of Colorado Springs, Colorado, and the phone call that led to the Yearning for Zion raid). Compounding the case against Swinton is the fact that she is also suspected of making false abuse reports about an FLDS compound in Colorado City, Arizona. Press Release, Tex. Dep't of Pub. Safety, Rangers Release New Details in FLDS Case (Apr. 18, 2008) (on file with the *St. Mary's Law Journal*).

6. *See* TEX. FAM. CODE ANN. § 262.201(b)(1) (Vernon 2008) (providing that after a full adversary hearing: "[T]he court shall order the return of the child to the parent . . . unless the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that: [] there was a danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child[.]"). The children taken from the Yearning for Zion ranch by the Department were not returned to their parents after the full adversary hearing. This prompted the mothers to initiate a mandamus proceeding in Texas's Third Court of Appeals in Austin, requesting a reversal of the district court's order. *See In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *1 (Tex. App.—Austin May 22, 2008, orig. proceeding) (mem. op.) (explaining the procedural history that led the Yearning for Zion parents to file a petition for writ of mandamus requesting the immediate return of their children).

7. *See In re Steed*, 2008 WL 2132014, at *1 (discussing the Department's justification for the mass removal of all 468 children from the Yearning for Zion ranch). The Department presented no evidence of any danger to boys or pre-pubescent girls and insisted that its removal of all the children was justified based on the FLDS's "pervasive system of belief," which the Department asserted turns boys into sexual abusers and girls into unwilling child brides. The Department also argued that because of the Yearning for Zion residents' communal style of living, the children effectively all belonged to one household, meaning that the sexual abuse of one child would allow for the removal of all of the children. *See id.* at *3 (addressing and dismissing the Department's justifications for the removal of all 468 children from the Yearning for Zion ranch); *see also* TEX. FAM. CODE ANN. § 262.102(b)(2) (Vernon 2008) (providing that, when a court is attempting to discern the presence of an immediate danger to a child, one of the factors the court may consider is whether a member of the child's household has sexually abused another child). Since the courts dismissed the Department's classification of the entire compound as one "household," the Department essentially lacked evidence of neglect or abuse with regard to any of the boys or pre-pubescent girls. *See* Gretel C. Kovach, *A Sect's Families Reunite, and Start to Come Home*, N.Y. TIMES, June 6, 2008, at A17, *available at* http://www.nytimes.com/2008/06/06/us/06polygamy.html?_r=1 (discussing the courts' decision to return the Yearning for Zion children because the Department failed to present sufficient evidence that the children were in imminent danger).

8. *Cf.* Amy Joi O'Donoghue, *Fallout from FLDS Raid Is Intense*, DESERET NEWS, Apr. 16, 2008, *available at* http://www.deseretnews.com/article/1,5143,695270818,00.html

The raid of the Yearning for Zion ranch exposed fundamental flaws in the operation of the Texas Department of Children and Family Services. The most obvious is the Department's ability and willingness to ignore the strictures and mandates set forth in the Texas Family Code.[9] In the Yearning for Zion case, one of the most glaring examples of the Department's disregard for the Texas Family Code was the Department's failure to create, and the court's failure to insist upon, service plans that were unique to each family involved.[10] The service plans created for the

(discussing the state of Texas's acceptance of "the inevitable fallout of such a large-scale operation" and recognizing that the state "came under fire" for its abrupt removal of the Yearning for Zion children from the ranch).

9. Chapter 261 of the Texas Family Code deals with the Department's investigation of a report of child abuse. TEX. FAM. CODE ANN. §§ 261.001–.410 (Vernon 2008 & Supp. 2009). Chapter 262 outlines the steps the Department and other government entities are required to take before, during, and after the removal of a child from his home. *Id.* §§ 262.001–.309 (defining the procedures that state agencies are required to follow in taking possession of children whose homes are alleged to be unsafe, and providing for adversarial hearings in cases where the child is not returned to his parents within fourteen days). Chapter 263 contains the procedures that are to be followed in reviewing the child's placement after he has been removed from his home, including the requirement of a service plan. *Id.* §§ 263.001–.502 (promulgating a system of service plans, status hearings, permanency hearings, and final orders to ensure proper placements and status reviews of children within the state child welfare system).

10. *See* E-mail from Rebecca G. Flanigan, Deputy Director of Litigation, Texas RioGrande Legal Aid, to Shannon Dunn (Oct. 21, 2008) (on file with the *St. Mary's Law Journal*) (stating that in general, "unworkable service plans abound" in Texas child welfare cases); *see also* Stephanie Francis Ward, *Discovering Eldorado*, A.B.A. J., Oct. 2008, at 59, 63 (describing the frustration felt by attorneys in the Yearning for Zion case when they discovered that their clients' service plans were not in accordance with state law); Ben Winslow, *Plans for FLDS Families Are Not So Individual*, DESERET NEWS, May 14, 2008, *available at* http://www.deseretnews.com/article/1,5143,700225988,00.html (expressing the annoyance of the Yearning for Zion families and their attorneys when they discovered that "the only thing individual about [the service plans] is the case number assigned to each child"). In addition, the trial court in the Yearning for Zion proceeding "did not make a single individual or fact specific finding as to any child," compounding the Department's blunder in the mass-produced service plans. Petition for Writ of Mandamus at 26, *In re* Allred, No. 03-08-00351-CV (Tex. App.—Austin May 28, 2008) (on file with the *St. Mary's Law Journal*). This lack of individual treatment is not limited to the Yearning for Zion situation in particular or to service plans in general, but is instead pervasive throughout the child welfare system. *Accord In re* C.E.K., 214 S.W.3d 492, 499–500 (Tex. App.—Dallas 2006, no pet.) (detailing a typical service plan, which required the mother to: (1) attend weekly, supervised hour-long visits with her children; (2) attend scheduled unsupervised visits with her children; (3) complete a twelve-week anger management course; (4) complete parenting classes; (5) attend counseling sessions; and (6) visit her doctor monthly "to monitor her medications for attention-deficit disorder"); *cf.* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 131 (2001) (bemoaning the fact that parents are "almost always" required to

Yearning for Zion families consisted mostly of boilerplate language that was not specific to each individual family, which is in direct opposition to the requirement of specificity contained in the Texas Family Code.[11] Just as it did in the Yearning for Zion case, the Department and its counterparts at the county level regularly oversee the creation of service plans that are unworkable and impractical, plans that serve only to make it more likely that Texas children who have been seized from their homes will be permanently separated from their natural parents.[12] Once the

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participate in counseling and parenting classes in order to have their children returned, "[n]o matter what problem may have led to [the] removal of the children," and even if the adults' parenting skills are not in question, such as in cases where the children are removed due to inadequate housing).

11. *See* TEX. FAM. CODE ANN. § 263.102(a)(1) (Vernon 2008) ("The service plan must . . . be specific."); *see also* Stephanie Francis Ward, *Discovering Eldorado*, A.B.A. J., Oct. 2008, at 59, 63 (describing the frustration felt by an attorney who, after telling her FLDS clients "'[t]his is how the law works,'" was forced to change her explanation to "'[w]ell, this is how the law is supposed to work, but it didn't work out that way'"). The Yearning for Zion service plans were accompanied by a letter explaining what constitutes child abuse under Texas law, the reason the children were removed from the ranch, and the purpose of the service plan. Letter from Tex. Dep't of Family & Protective Servs. to Anonymous Parent from the Yearning for Zion Ranch (May 6, 2008) (on file with the *St. Mary's Law Journal*).

12. *See* TEX. FAM. CODE ANN. § 161.001(1)(O) (Vernon Supp. 2009) (identifying a parent's failure to follow an established service plan as sufficient grounds for involuntary termination of the parent-child relationship). The parent's progress on the service plan is subject to a three-prong evaluation: (1) the completion of the task listed in the plan; (2) satisfactory achievement of the plan's goals; and (3) the Department's evaluation of the parent's ability to provide for the child's long-term well-being. *See, e.g.*, Letter from Tex. Dep't of Family & Protective Servs. to Anonymous Parent from the Yearning for Zion Ranch (May 6, 2008) (on file with the *St. Mary's Law Journal*) (explaining the standard the Yearning for Zion parents were required to meet in order to ensure the prompt return of their children). The statutory grounds for termination, including a failure to follow a service plan, must also be accompanied by a finding that termination is in the child's best interest. *See* TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 2009) (providing that "[t]he court may order termination of the parent-child relationship if the court finds by clear and convincing evidence . . . that the parent has" committed one of the statutory grounds for involuntary termination); *cf. In re* S.R.L., 243 S.W.3d 232, 234 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (overturning a trial judge's decision to terminate a father's parental rights, partly because it was clear that the trial judge had struggled with the decision to terminate because he believed that continued contact with their father would benefit the children in question). The Texas Supreme Court has identified nine factors to consider in determining the child's best interest: (1) the outcome the child prefers; (2) the child's present and future needs, both physical and emotional; (3) any present and future dangers to the child; (4) the parenting abilities of the person seeking (or seeking to maintain) custody; (5) the existence of parenting and support programs that are available to help the person seeking custody; (6) the plans the person seeking custody has with regard to the child; (7) the stability of the proposed home; (8) the severity of the parent's acts or

state becomes a child's legal "parent," that child, if he is not adopted, faces the prospect of spending the remainder of his childhood in state custody, bouncing from one foster home to another.[13] This is intolerable, especially in cases where the Department fails to give the parents a full and fair opportunity to prove their ability to create a safe home for their children.[14] Appropriate service plans, written and implemented with the full cooperation of both the parents and the Department, give parents and children the very best opportunity to enjoy their constitutional right to the integrity of the family unit.[15]

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omissions in creating an improper parent-child relationship; and (9) the excuses the parent gives for the acts or omissions. Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976). The Department must prove both the statutory ground for termination and the best interest finding by clear and convincing evidence before a court may grant the Department's petition for involuntary termination. TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 2009); *see* Santosky v. Kramer, 455 U.S. 745, 747 (1982) (holding that a state's allegations in termination proceedings must be supported by at least clear and convincing evidence). Clear and convincing evidence is defined by the Texas Family Code as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (Vernon 2008).

13. *See* Ana M. Novoa, *Count the Brown Faces: Where Is the "Family" in the Family Law of Child Protective Services*, 1 SCHOLAR 5, 22 (1999) (noting that children in state custody are usually subjected to "a series of temporary placements over an extended period of time"). Additionally, when a state agency removes a child from what it believes to be an abusive or neglectful home, the agency rarely takes the time to weigh the potential harm of the child's staying in the home versus the possibility of the emotional and physical harm the child may suffer in state custody. *See id.* (criticizing the state's lack of willingness to perform balancing tests in child welfare situations).

14. *Cf. In re C.E.K.*, 214 S.W.3d at 500 (reporting a CPS caseworker's assertion that the mother was "'intentionally stalling'" and "not cooperating with CPS," based on the caseworker's observation that the mother would delay the end of the supervised visits with her children by kissing "one child, then the other, going back and forth between them"; the caseworker argued that the mother's "stalling" was evidence in favor of terminating her parental rights); Doty-Jabbaar v. Dallas County Child Protective Servs., 19 S.W.3d 870, 872–73 (Tex. App.—Dallas 2000, pet. denied) (explaining the trial court's decision to terminate the natural parents' rights, which was based in part on the fact that neither parent attended the review hearing, despite being given notice that the hearing was taking place; on cross-examination, however, the county's caseworker admitted that, while she had told the mother that a "pretrial hearing" would be taking place, she neglected to mention "the possibility of a prove-up on the termination petition").

15. The creation and implementation of a service plan that complies with the requirements of the Texas Family Code is consistent with the stated opinions of both the United States Supreme Court and the Texas Legislature. *Compare* Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . . ." (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923))), *with* House Research Org., Bill Analysis, Tex. H.B. 957, 73d Leg., R.S. (1993) (discussing the legislative committee's rationale behind the creation of the service

"It would be difficult to find anyone who does not see any need to improve the current child welfare system in the United States."[16] Everyone seems to know that our current system of child protective services (CPS) is broken, but no one knows how to fix it.[17] This problem is especially acute in Texas.[18] Over 30,000 Texas children, more than ten times the population of Schleicher County,[19] are legal wards of the state because their own homes have been deemed unfit.[20] These children deserve better than

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plan requirement and explaining that the implementation of a service plan requirement in child welfare cases will help parents "understand the seriousness of the family's problem or the potential for loss of parental rights").

16. 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, 437 (2000); *see also* Donald N. Duquette et al., *We Know Better Than We Do: A Policy Framework for Child Welfare Reform*, 31 U. MICH. J.L. REFORM 93, 93 (1997) ("The need for comprehensive reform of child welfare policies and systems has long been evident."); *cf.* RENNY GOLDEN, DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM 199 (1997) (arguing that people who are resistant to changing the current child welfare system feel that way not because they support the current system, but because they fear that fixing the current system is impossible).

17. *See* ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 98 (1999) ("There is widespread agreement that we are in the midst of a child welfare crisis...."); *see also* RENNY GOLDEN, DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM 20 (1997) (discussing "the human cost" of the dominant approach to child welfare cases and the history of the "continual resistance" to that system).

18. Texas's foster care system is home to almost 6% of the country's entire child welfare population. *Compare* The Supreme Court of Texas, Permanent Judicial Commission for Children, Youth, and Families, http://www.supreme.courts.state.tx.us/children.asp (last visited Dec 14, 2009) ("The state of Texas is the legal parent to some 30.000 children because of allegations of abuse or neglect."), *with* National Foster Care Month, Facts About Children in Foster Care, http://www.fostercaremonth.org/AboutFosterCare/StatisticsAndData/Documents/FCM07_Fact_Sheet_(national).pdf (last visited Dec. 14, 2009) (citing U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE AFCARS REPORT (2006), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.htm (last visited Dec. 14, 2009)) (analyzing the age, gender, and ethnic makeup of the 513,000 children who were living in foster care in the United States in 2005). In 2004, Texas's foster care system was home to 4,151 children who were available for adoption because their biological parents' rights had been involuntarily terminated. *See* Charlotte D. Booker et al., *The Eyes of Texas Children Are Upon Us: Child Welfare Reforms Mean More Children Need Homes, So What Can the Bar Do to Help?*, HOUSTON LAW., Nov.–Dec. 2004, at 20, 21 (discussing the number of Texas children still living in foster care after their natural parents' rights had been terminated).

19. *See* THE COUNTY INFO. PROJECT, TEX. ASS'N OF COUNTIES, SCHLEICHER COUNTY PROFILE, http://www.txcip.org/tac/census/profile.php?FIPS=48413 (last visited Dec. 14, 2009) (providing population estimates for Schleicher County from 1950 to 2006 as collected by the U.S. Census Bureau).

20. The Supreme Court of Texas, Permanent Judicial Commission for Children,

what the system is currently offering them.[21] Their natural parents deserve an opportunity to show that they, with the help of the state as well as their friends and relatives, have the ability to provide good homes for their children.[22] When these families are lucky enough to receive individualized, effective service plans, the parents then have an opportunity to work toward the goal of reuniting their families into healthy and productive units.[23] Without a practical, workable service plan, however, too many natural parents are denied this opportunity, and their children, left languishing in temporary foster care with only the state as their "parents," are denied the security, the consistency, and the family that they crave.[24]

This Comment addresses the problems that are caused when the Department fails to create appropriate service plans for children in state custody. Part I of this Comment focuses on the Department's raid of the Yearning for Zion ranch and the raid's unique psychological impact on the families living on the ranch. It continues by addressing the purpose of a service plan in child welfare cases, as well as the current state of Texas and federal child welfare laws. In Part III, this Comment considers the duty owed by Texas practitioners who represent parents in child welfare disputes, especially in cases involving poor or minority families, and how that duty may be influenced by other jurisdictions' approaches to family law. Finally, this Comment concludes that

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Youth, and Families, http://www.supreme.courts.state.tx.us/children.asp (last visited Dec. 14, 2009).

21. *Cf.* RENNY GOLDEN, DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM 22 (1997) (arguing that the establishment of adequate and appropriate public assistance programs would be cheaper than a traditional child welfare system and would better address the actual needs of poor families, rather than simply responding to a professional interpretation of what poor families' needs are).

22. *See generally id.* (describing several jurisdictions' experiments with family preservation programs, both those that worked and those that did not, and focusing on Washington State's Homebuilders program, a successful Seattle-based family preservation program that has been in operation since 1974).

23. *See* House Research Org., Bill Analysis, Tex. H.B. 957, 73d Leg., R.S. (1993) (explaining that the implementation of a service plan requirement in child welfare cases will help parents "understand the seriousness of the family's problem or the potential for loss of parental rights").

24. *See* Ana M. Novoa, *Count the Brown Faces: Where Is the "Family" in the Family Law of Child Protective Services*, 1 SCHOLAR 5, 21–22 (1999) ("The state makes a bad parent.... [C]hild welfare workers, supervisors, and administrators will readily concede that the foster-care system is harmful for children." (citing G.M. v. Tex. Dep't of Human Res., 717 S.W.2d 185, 188 (Tex. App.—Austin 1986, no writ))).

the suffering of the FLDS families in West Texas will not have been in vain if their experiences serve to better the practice of child welfare law in Texas.

II. BACKGROUND

A. *The Raid on the Yearning for Zion Ranch*

The residents of the Yearning for Zion ranch are members of a group known as the Fundamentalist Church of Jesus Christ of Latter-Day Saints.[25] The FLDS is the largest of a number of polygamist sects that splintered off from the mainstream Mormon Church when the mainstream church abandoned polygamy in the late nineteenth century.[26] These splinter groups believe that the mainstream church's decision to abandon polygamy was nothing less than a betrayal of one of the most sacred doctrines of their faith.[27] Mormon fundamentalists, including the FLDS, believe that no man can enter heaven unless he has at least three wives,[28] and it is not uncommon for FLDS women to marry as early as their mid-teens.[29]

When the Department raided the Yearning for Zion ranch in 2008, it did so on the basis that "the culture of the church, which encouraged girls to marry and bear children in their early teens, was a danger to any child immersed in it."[30] The Department failed to produce any evidence, however, that *every* child on the ranch was in immediate danger of physical, emotional, or sexual abuse—the standard required by the Family Code in order to

25. David A. Fahrenthold, *An Unusual Prosecution of a Way of Life*, WASH. POST, Apr. 27, 2008, at A03.

26. *See* JON KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH 10 (2003) (discussing the formation of various Mormon fundamentalist sects, including the FLDS).

27. *See id.* at 7 (describing the rift between the mainstream Mormon Church, which abandoned polygamy over a century ago, and the fundamentalist sects that continue to practice polygamy in accordance with the teachings of the Mormon Church's founder, Joseph Smith).

28. *See id.* at 6 (discussing Joseph Smith's teaching that a man must have at least three wives in order to reach the highest level of glory in heaven).

29. *See id.* at 12, 18, 25–26 (discussing the various teenage brides of Rulon Jeffs, the previous FLDS prophet and the father of its current prophet, Warren Jeffs, and describing the forced marriages of various young FLDS women).

30. David A. Fahrenthold, *An Unusual Prosecution of a Way of Life*, WASH. POST, Apr. 27, 2008, at A03.

justify the immediate removal of all of the children without a court order.[31] Essentially, the Department sought "to portray the entire sect and its compound as unfit for children" instead of providing specific, concrete evidence about the potential for danger with regard to each individual child.[32]

The district court initially upheld the Department's decision to remove the FLDS children from their parents at the Yearning for Zion ranch.[33] On mandamus review, the court of appeals overturned the district court, vacating the orders that gave the Department custody of the FLDS children.[34] The Texas Supreme Court affirmed the decision of the court of appeals, rejecting the Department's rationale behind the raid.[35]

B. *The Raid's Impact on the Residents of the Yearning for Zion Ranch*

The raid itself, which would have been traumatic for any family, had a unique psychological impact on the residents of the Yearning for Zion ranch. Although these FLDS members are isolated from much of the dominant culture,[36] they are no strangers to the idea of state intervention into their personal

31. *See* TEX. FAM. CODE ANN. § 262.104 (Vernon 2008) (listing the limited circumstances that justify the Department's taking immediate possession of a child without first obtaining a court order).

32. David A. Fahrenthold, *Court Rejects Seizure of Texas Sect's Children*, WASH. POST, May 23, 2008, at A01.

33. *See In re* Tex. Dep't of Family & Protective Servs., 255 S.W.3d 613, 615 (Tex. 2008) (per curiam) (discussing the procedural history of the Yearning for Zion case).

34. *See In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *4 (Tex. App.—Austin May 22, 2008, orig. proceeding) (mem. op.) (holding that the Department had failed to meet its burden of proof and directing the district court to vacate its order granting custody of the Yearning for Zion children to the Department).

35. *See In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d at 615 (holding that the record before the court did not support the removal of the children from the Yearning for Zion ranch); *see also* Gretel C. Kovach, *A Sect's Families Reunite, and Start to Come Home*, N.Y. TIMES, June 6, 2008, at A17, *available at* http://www.nytimes.com/2008/06/06/us/06polygamy.html?_r=1 (explaining that the lack of evidence that the Yearning for Zion children were in immediate danger of abuse led the court to order their return home).

36. Actually, the isolation of the FLDS and its members may lead to more, rather than less, state intervention into these families. *See generally* Nell Clement, Note, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L.J. 397 (2008) (arguing that groups whose beliefs or lifestyles differ from the dominant American culture are subject to child welfare intervention more often than groups whose lives adhere more closely to the mainstream).

choices.[37] On July 26, 1953, a similar polygamist community[38] in Short Creek, Arizona, awoke before dawn to find their town besieged by "one hundred [Arizona] state police officers, forty county deputies, and dozens of troops from the Arizona National Guard."[39] This phalanx of state authority arrested dozens of adults, both men and women, and seized 263 children, shipping them to foster care in a town 400 miles away.[40] The goal of this onslaught, which became known as the Short Creek raid, was to expose and eradicate the practice of polygamy in the state of Arizona.[41] Although the state conducted the Short Creek raid with the full support of leaders of the mainstream Mormon Church in Utah,[42] many saw the state's actions as government overreaching and religious persecution, a perception that caused a public outcry as far away as New York.[43] Eventually, all of the adults arrested in the raid were released, and all of the families affected by the raid were reunited by 1956.[44] Arizona's goal of

37. *See* Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 136–41 (2006) (describing several government raids on the Short Creek community in Arizona, including the infamous 1953 raid, and discussing the long-held fears of FLDS mothers "that they [could] lose their children to arbitrary government action"). After the Short Creek raid, but before the state was forced to reunite the families that had been separated, one FLDS father remarked of Arizona's stated intention, "[N]othing hurt like the . . . discovery that the state of Arizona had spirited 154 innocent women and children away to Phoenix just to keep us husbands and fathers from our families." *Id.* at 138.

38. The community in Short Creek, like the community living at the Yearning for Zion ranch in Eldorado, was made up of members of the FLDS. *See id.* at 137 (describing the formation of the FLDS church in 1949, when its members decided to split from another group of Mormon fundamentalists based in Salt Lake City).

39. JON KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH 16 (2003).

40. *Id.* In executing the Short Creek raid, however, the crime the state of Arizona focused on was polygamy, not child abuse, which was the rationale for the Eldorado raid occurring fifty-five years later in Texas.

41. *Id.*

42. *See id.* (explaining that Arizona's governor was careful to clear all aspects of the Short Creek raid with "the Quorum of the Twelve Apostles," the twelve men in charge of the mainstream Mormon Church).

43. *Id.* at 17 (discussing the wave of unfavorable press that followed the Short Creek raid).

44. JON KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH 17 (2003). Howard Pyle, then-governor of Arizona and architect of the Short Creek raid, did not fare as well as the polygamists whose activities he sought to stamp out. Due largely to the bad press the raid generated across Arizona and the rest of the United States, Governor Pyle lost his 1954 campaign for re-election. *See id.* (discussing elements contributing to Governor Pyle's failure to win re-election to office in 1954). Nor did the

eradicating polygamy within its borders remains unfulfilled.[45]

The events in Short Creek, though they happened fifty-six years ago and 1,200 miles away[46] from the Yearning for Zion ranch, essentially run parallel to the 2008 proceedings in Eldorado.[47] Perhaps the most compelling parallel is that in both cases, the FLDS parents were vindicated and their children were returned to them, while the state was forced to ponder its decision to interfere in its citizens' private home lives.[48]

III. THE PURPOSE OF A SERVICE PLAN

In order to justify the involuntary termination of parental rights, the Department must show a statutory basis for the termination and that termination would be "in the best interests of the child."[49] The determination of the child's best interest is its own question, separate from the question of whether statutory grounds for termination exist.[50] One statutory basis for involuntary

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state of Arizona itself emerge unscathed—the raid, the arrests, and the trials that followed cost Arizona's taxpayers an estimated $600,000—an amount equal to over $4.8 million in 2008 dollars. *See id.* (detailing the fiscal impact of the Short Creek raid on Arizona's taxpayers); *see also* U.S. Bureau of Labor Statistics, CPI Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm (last visited Dec. 14, 2009) (estimating the 2008 buying power of 600,000 1954 dollars). Before the raid took place, the state of Arizona appropriated $50,000 to pay for it, but the legislature's decision to originally label the funds as going toward "grasshopper control" seems to indicate that the state wished to keep its plans for the raid as secret as possible. *See* Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 137 (2006) (discussing Arizona's financial preparations for the Short Creek raid). Despite the legislature's secrecy, the FLDS community in Short Creek was prepared for the raid, posting lookouts and charging them with the task of alerting the community to the approach of law enforcement. *Id.* at 138.

45. *See* JON KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH 10–15 (2003) (describing Colorado City, Arizona, an area that remains home to "at least three" fundamentalist sects, including the FLDS, all of which continue to practice polygamy).

46. Short Creek was re-christened Colorado City in the last half of the twentieth century and is located in the northwest corner of Arizona, near the border between Arizona and Utah. *See id.* (describing Colorado City and its inhabitants).

47. Geoffrey Fattah, *Parallels to Short Creek Raid in 1953 Are Pointed Out*, DESERET NEWS, Apr. 10, 2008, *available at* http://findarticles.com/p/articles/mi_qn4188/is_/ai_n25145601.

48. *See* Ben Winslow, *All FLDS Children Returned to Parents*, DESERET NEWS, June 5, 2008, *available at* http://www.deseretnews.com/article/1,5143,700231922,00.html (discussing the return of the Yearning for Zion children to their parents).

49. TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 2009) (promulgating rules for the involuntary termination of parental rights).

50. *See In re* S.R.L., 243 S.W.3d 232, 235 (Tex. App.—Houston [14th Dist.] 2007, no

termination of parental rights is a failure to abide by an established service plan.[51]

Subchapter B of section 263 of the Texas Family Code provides for the creation and implementation of a comprehensive service plan when the Department removes a child from her home.[52] The service plan must be implemented no more than forty-five days after the Department has been named temporary managing conservator of the child,[53] it must be filed with the court,[54] and before it can be signed, there must be a discussion about the plan between the child's parents and the Department.[55] The service plan must include, *inter alia*, the Department's ultimate plans for the child and her family, whether that plan is family reunification, the child's continuing placement in foster care, or involuntary termination of parental rights.[56]

One of the statute's requirements is that the service plan must "be prepared by the department . . . in conference with the child's parents."[57] The rationale behind this requirement is common-sensical—if the parents are involved in the creation of the plan, they are more likely to feel ownership in the plan and therefore to work toward compliance with it.[58] Despite the requirements of

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pet.) (discussing a trial judge's choice to terminate parental rights on statutory grounds without a finding that the children's best interests would be served by termination). The Department's idea of the child's best interests may differ sharply from the parent's, and even the judge's, concept of how to best serve the child's needs. *See* RENNY GOLDEN, DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM 21 (1997) (discussing the inherent subjectivity of the best interests standard, pointing out that "what constitutes the child's best interests depends on your point of view").

51. TEX. FAM. CODE ANN. § 161.001(1)(O) (Vernon Supp. 2009).

52. TEX. FAM. CODE ANN. § 263.101–.106 (Vernon 2008).

53. *Id.* § 263.101.

54. *Id.* § 263.105.

55. *Id.* § 263.103. The service plan ordinarily must be signed by the child's parents and a representative of the Department before it can be filed with the court. However, if the Department finds "that the child's parents are unable or unwilling to sign the service plan," it can be filed bearing only the signature of the Department's representative. *Id.* § 263.103(c).

56. *See* TEX. FAM. CODE ANN. § 263.102 (Vernon 2008) (listing the required elements of a service plan).

57. TEX. FAM. CODE ANN. § 263.102(a)(3) (Vernon 2008).

58. *Cf.* House Research Org., Bill Analysis, Tex. H.B. 957, 73d Leg., R.S. (1993) (explaining that the implementation of a service plan requirement in child welfare cases will help parents "understand the seriousness of the family's problem or the potential for loss of parental rights," implying that this will increase the parents' cooperation with the proposed plan).

the Family Code, however, the parents' involvement in the creation of the service plan is often limited.[59] As was the case with the Yearning for Zion families, parents are rarely given the opportunity to be full partners in the creation of the plan, even though the Family Code specifically mandates their involvement in it.[60]

Another requirement for the service plan is specificity.[61] The Department may not simply produce a document culled primarily from a template, consisting of standard boilerplate; the service plan must be made specific to each family's individual circumstances.[62] One of the major problems with the Yearning for Zion case in West Texas was the lack of specificity in the service plans.[63] Some service plans, however, are so specific as to be impractical, unworkable, or unfair.[64] In one case, a mother was

59. *See* E-mail from Rebecca G. Flanigan, Deputy Director of Litigation, Texas RioGrande Legal Aid, to Shannon Dunn (Nov. 25, 2008) (on file with the *St. Mary's Law Journal*) (explaining that sometimes the only "parental involvement" the Department allows in the service plan is the parent's signature on the document).

60. *See* TEX. FAM. CODE ANN. § 263.102(a)(3) (Vernon 2008) (establishing that the service plan must be a joint effort between the Department and the parents); *see also* Ben Winslow, *Plans for FLDS Families Are Not So Individual*, DESERET NEWS, May 14, 2008, *available at* http://www.deseretnews.com/article/1,5143,700225988,00.html (explaining that because the Yearning for Zion families had no opportunity to become involved in the creation of their service plans, the plans lacked sufficient individuality to reflect the needs and situation of each family); *cf.* Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 436 (1996) (explaining that, especially in situations where parents do not have the benefit of competent counsel, "most agreements are presented to parents to accept or reject," leaving the parents feeling that their only option is to accept the plan, fearing that "rejection will signal uncooperativeness and will inspire the state to adopt a more aggressive posture before the court").

61. TEX. FAM. CODE ANN. § 263.102(a)(1) (Vernon 2008).

62. *See id.* § 263.102 (Vernon 2008) (describing in detail the required elements of a service plan, all of which are fact-specific and would be difficult, if not impossible, to comply with in a document consisting primarily of boilerplate language). For a general discussion of the system's tendency to devalue individual treatment of families, see Ana M. Novoa, *Count the Brown Faces: Where Is the "Family" in the Family Law of Child Protective Services*, 1 SCHOLAR 5, 33 (1999) (advancing a theory that, when it comes to child welfare cases, "[w]e allow ourselves to fall into the rut of treating every case as substantially the same").

63. *See* Ben Winslow, *Plans for FLDS Families Are Not So Individual*, DESERET NEWS, May 14, 2008, *available at* http://www.deseretnews.com/article/1,5143,700225988,00.html (illuminating the dissatisfaction felt by the Yearning for Zion families and their attorneys at the Department's inability to create unique service plans for each family).

64. When parents are subjected to unfair or unworkable service plans, they may not realize that they have the right to collaborate in the creation of the plan. *Cf.* Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation*

ordered to separate from her husband, the child's natural father, if she wanted any chance of having her child returned to her, despite the Department's acknowledgment that the husband and father had never abused, neglected, or harmed his wife or their child in any way.[65] Problems with service plans are not unique to Texas—in one California case, the service plan produced by CPS contained nothing specifically tailored to the mother's limitations even though the mother was mildly mentally retarded.[66]

Although one of the purposes of a service plan is to make parents aware of the steps they must take to ensure their child's return to them,[67] sometimes the Department decides, seemingly on a whim, that the parents' compliance with the service plan is not enough. In these cases, the Department will seek involuntary termination of the parent-child relationship, even though the parents have done everything the Department required of them.[68]

Decision and a Proposal for Change, 65 TENN. L. REV. 835, 842–43 (1998) (explaining that state agencies occasionally wield the possibility of judicial proceedings as a threat, essentially telling people that "'[y]ou are going to go my way or I'll force you to go to court'").

65. *See In re* S.A.P., 169 S.W.3d 685, 711 (Tex. App.—Waco 2005, no pet.) (emphasizing the Department's insistence that S.A.P.'s natural parents separate from one another, even though they married, in part, because the trial court judge in their custody case urged them to do so for S.A.P.'s benefit).

66. *In re* Victoria M., 255 Cal. Rptr. 498, 504–05 (Cal. Ct. App. 1989) (emphasizing that "no accommodation was made for [the mother's] special needs" even though "[e]veryone was aware that [the mother] had mental limitations"). The court eventually concluded that "failure is inevitable" when "generic reunification services are offered to a parent suffering from a mental incapacity such as retardation." *See id.* at 507 (expressing the court's displeasure at the lack of individual treatment with regard to the mother's mental deficiencies, and remanding the case so the lower court could reconsider the involuntary termination of the mother's rights).

67. *See* TEX. FAM. CODE ANN. § 263.102(a)(6–11) (Vernon 2008) (outlining the information a service plan must include when the Department's long-term goal for the child is family reunification).

68. *See In re* D.T., 34 S.W.3d 625, 628–29 (Tex. App.—Fort Worth 2001, no pet.) (analyzing the Department's decision to change a child's long-term goal from reunification to adoption, despite the caseworker's admission that the mother had done "everything she could . . . to comply with the service plan"); *cf.* Doty-Jabbaar v. Dallas County Child Protective Servs., 19 S.W.3d 870, 875 (Tex. App.—Dallas 2000, pet. denied) (holding that the evidence presented by the county CPS office was insufficient to justify an involuntary termination of parental rights, and explaining that the county CPS office sought, and the trial court granted, involuntary termination of parental rights even though the county's caseworker admitted at trial that the mother had complied with the service plan). Sometimes, of course, the parent's failure to abide by her service plan fully justifies the Department's decision to seek termination of parental rights. *See* Williams v. Tex. Dep't of Protective & Regulatory Servs., No. 05-97-00401-CV, 1998 WL 423474, at *2 (Tex.

Caseworkers for the Department have also admitted in court proceedings that the Department occasionally seeks termination for no other reason than that the Department has "run out of time" to work with the parents and is faced with the choice of either terminating the parent-child relationship or dismissing the case.[69] When a service plan does not meet the mandates of the Family Code, the parent has little incentive to challenge the plan; having already been subjected to the Department's "inherently coercive" investigation, the parent knows that any showing of defiance or "uncooperativeness" may mean that their child will never return home.[70]

IV. THE CURRENT STATE OF CHILD WELFARE LAW

A. *Federal Law*

There are two sides to the child welfare debate. One is that too many children are in foster care and the states do not work hard enough to reunite families; the other is that states work too hard to keep families together, and children who could have been adopted into loving homes suffer in the name of family preservation.[71]

App.—Dallas Jul. 29, 1998, pet. denied) (not designated for publication) (affirming the trial court's termination of a mother's parental rights where the service plan required the mother to allow the father only supervised visits with the children; the mother's failure to comply with this provision led to the father beating one of the children so brutally that the boy died of massive internal injuries).

69. *See In re S.A.P.*, 169 S.W.3d at 711 (examining the Department's reasons for seeking termination of the parent-child relationship between S.A.P. and his natural parents). While more time would obviously have been beneficial for S.A.P.'s parents, taking a slower approach in this case would probably have helped the Department as well, by allowing its caseworkers to do their jobs properly. *See, e.g.*, Martin Guggenheim & Christine Gottlieb, *Justice Denied: Delays in Resolving Child Protection Cases in New York*, 12 VA. J. SOC. POL'Y & L. 546, 573 (2005) ("Intentional delays designed around the particular needs of a family are not merely appropriate, they are essential to good practice.").

70. *See* Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 433–36 (1996) (complaining that abuse and neglect investigations are often handled by caseworkers who are poorly trained in how to investigate, how to deal with families, and how to make an appropriate assessment of the evidence gathered, and explaining that parents cooperate in these incompetent investigations out of fear that if they do not cooperate, their children will remain in state custody).

71. *See* Martin Guggenheim & Christine Gottlieb, *Justice Denied: Delays in Resolving Child Protection Cases in New York*, 12 VA. J. SOC. POL'Y & L. 546, 546 (2005) (discussing two different viewpoints in the debate over child welfare reform); *see also* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 652 (2006)

In 1997, Congress passed the Adoption and Safe Families Act (ASFA),[72] which links federal funding to state compliance with the federal goal of promoting the adoption of children who are in foster care.[73] Unlike previous federal child welfare laws,[74] ASFA "subordinates parental rights to the child's right to safety and a permanent home" and puts a time limit on the states' need to use reasonable efforts to maintain children's natural families.[75] Under

(arguing that any debate attempting to balance children's rights with the rights of their parents inevitably amounts to a discussion about the merits of family preservation, an approach that "disfavor[s] intervention with a bias toward removal," versus child protectionism, a view that "favor[s] more aggressive state intervention").

72. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 2 & 42 U.S.C.).

73. *See* Kurtis A. Kemper, Annotation, *Construction and Application by State Courts of the Federal Adoption and Safe Families Act and Its Implementing State Statutes*, 10 A.L.R. 6TH 173, 192 (2006) (detailing the policy considerations behind ASFA).

74. The Adoption Assistance and Child Welfare Act of 1980 (AACWA) tied federal funding for child welfare programs to increased state efforts to *either* make it possible to preserve natural families *or* place foster children with permanent adoptive homes. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.); *see* Kurtis A. Kemper, Annotation, *Construction and Application by State Courts of the Federal Adoption and Safe Families Act and Its Implementing State Statutes*, 10 A.L.R. 6TH 173, 191 (2006) (explaining the goals that had to be met in order to obtain federal funding under AACWA). AACWA required states to make reasonable efforts "to prevent or eliminate the need for removal of children from their homes prior to placement in foster care and make it possible for children to return to their home[s]." Kurtis A. Kemper, Annotation, *Construction and Application by State Courts of the Federal Adoption and Safe Families Act and Its Implementing State Statutes*, 10 A.L.R. 6TH 173, 191 (2006) (describing AACWA's "reasonable efforts" requirement, which required states to work diligently toward family reunification in order to receive federal child welfare money). Under AACWA, "permanency planning" required the state to use methods like family service plans, close monitoring of children in state custody, and state-supplied supportive services in order to smooth the way toward family reunification whenever possible. *See* Robert F. Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L.Q. 359, 364 (2000) (explaining the goals and procedures mandated by AACWA). When AACWA was passed in 1980, the foster care population numbered more than 500,000. Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 135 (2001). By 1982, that number had dropped to 243,000, but began to creep upward again when the Reagan Administration pulled back on enforcement of AACWA's "reasonable efforts" requirements. *Id.*

75. Kurtis A. Kemper, Annotation, *Construction and Application by State Courts of the Federal Adoption and Safe Families Act and Its Implementing State Statutes*, 10 A.L.R. 6TH 173, 193 (2006). ASFA's permanency goals, however, are met at a great cost—that "of unnecessary state termination proceedings for increasing numbers of families." *See* Amy Wilkinson-Hagen, Note, *The Adoption and Safe Families Act of 1997: A Collision of* Parens Patriae *and Parents' Constitutional Rights*, 11 GEO. J. ON POVERTY L. & POL'Y 137, 138 (2004) (criticizing the negative effect of the policy goals implemented by ASFA).

ASFA, adoption, not reunification, becomes the primary goal for children who have spent a certain amount of time in foster care.[76] While ASFA requires states to provide efforts toward family reunification during a child's first fifteen months in foster care,[77] the legislation also requires states to begin the process of terminating parental rights when a child has been in state custody for fifteen out of the last twenty-two months, even if the child's lengthy tenure in state custody is due to the state's own failure to provide services specified in the child's case plan.[78] In certain "aggravated" circumstances, which the states are free to define by statute, termination proceedings can begin without reasonable efforts and without the fifteen-month waiting period.[79] In Texas, the aggravated circumstances that can lead to immediate termination proceedings include a parent's having been convicted of murdering the child's other parent,[80] a parent's having previously had her parental rights terminated with regard to another child,[81] or a parent's failure to follow a service plan that

76. ASFA provided additional funding for family preservation programs until 2001, but it also contains provisions that "were motivated by concerns that the states were making too many, rather than too few, efforts to preserve and/or reunite families." Robert F. Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L.Q. 359, 364 (2000). ASFA modified AACWA by reducing the amount of time states must wait before releasing foster children for adoption and by making more stringent the time requirements in which states must seek to place children in permanent adoptive homes. In addition, some cases that would have required family preservation and reunification under AACWA are now exempted from those requirements under ASFA. *Id.* Despite ASFA's goal of reducing the amount of time children spend in foster care, the actual *number* of children in foster care has risen since ASFA was passed—from 520,000 children in 1997 to 588,000 children in 2000. *See* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 144 (2001) (providing statistics on the number of children living in foster care under ASFA regime).

77. *See* Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 258 (2002) (providing the time limits established by ASFA for determining how long a child may remain in foster care).

78. *See id.* at 259 (indicating when states may begin termination proceedings under ASFA).

79. *See id.* at 260–61 (discussing how ASFA allows states to establish aggravated circumstances that allow for the acceleration of the termination process).

80. TEX. FAM. CODE ANN. § 161.001(1)(T)(i) (Vernon Supp. 2009) (establishing that a judge may order the involuntary termination of the parent-child relationship if there is clear and convincing evidence that the parent has been convicted of the murder of the child's other parent).

81. *Id.* § 161.001(1)(M) (establishing that a judge may order the involuntary termination of the parent-child relationship if there is clear and convincing evidence that

has been approved by the court.[82]

ASFA's mandates force states to refocus their efforts in child welfare cases from reunification of families to the adoption of children in state custody.[83] Because compliance with ASFA is tied to federal funding for foster care and child welfare programs, it is perhaps not surprising that states are willing to go to almost any lengths to comply with the statute's requirements.[84] Under ASFA, it is in a state's best interests, at least financially speaking, to dispose of child welfare cases as quickly and efficiently as possible so as to remain eligible for federal funds.[85]

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the parent has previously had a parent-child relationship involuntarily terminated with regard to another child, because the parent had either engaged in conduct injurious to that child or because the parent had allowed the child to remain in a situation that was injurious to that child).

82. *See id.* § 161.001(1)(O) (establishing that a judge may order the involuntary termination of the parent-child relationship if there is clear and convincing evidence that the parent has failed to comply with a court order that specifies the actions the parent must take before a child can be returned to the parent—in other words, if the parent does not comply with the service plan).

83. Justice Brandeis once noted, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967). Although ASFA's goals certainly sound laudable, the legislation, especially its link between federal funding and compliance with more stringent child placement mandates, is not without its critics. One author has noted:

> [T]he new federal policies may engender a whole new set of problems. Critics say the reforms put a bounty on the heads of unwanted children. They fear that timetables tied to disbursement of money may keep social workers from trying harder to rehabilitate biological parents and reunite families, because government leaders now consider adoption a panacea.

Timothy Roche, *Is Adoption the Solution?*, TIME, Nov. 13, 2000, at 82. Another commentator has sharply criticized ASFA, referring to it as "take the child and run" legislation that "has caused untold misery for thousands of children," and charging the act with "creating a generation of legal orphans." Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 130 (2001).

84. *See* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 132 (2001) (discussing a study by the National Commission on Children that found that federal aid incentives, primarily those established by ASFA, encourage states to sponsor legislation that makes it easier to unnecessarily remove children from their homes instead of passing legislation that would provide funds for services encouraging family preservation).

85. *See* Ana M. Novoa, *Count the Brown Faces: Where Is the "Family" in the Family Law of Child Protective Services*, 1 SCHOLAR 5, 35 (1999) (explaining that ASFA establishes a federal funding preference for state custody and involuntary termination over family reunification). It is possible, however, for states to comply with ASFA while still working toward goals of family preservation. For example, none of ASFA's mandates

Unfortunately for children and their parents, one of the most valuable ways to maintain a natural family—a detailed, appropriate service plan—is neither quick nor efficient; for a service plan to be effective, the Department and the parents need time to work together, both to design the plan and to ensure the parents' full compliance.[86]

B. *Texas Law*

While the Yearning for Zion raid occurred on a large scale, drawing the attention of the entire world, the Department makes similar decisions on a much smaller scale every single day in Texas.[87] When the Department decides to remove a child from

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prevents states from providing funding for rent subsidies (to help families whose children were removed because of deficient housing) or state-subsidized day care (to help working parents avoid having their children removed due to "lack of supervision"). *See* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 151 (2001) (suggesting means by which states can comply with ASFA's permanency goals by preserving the child's original family instead of removing the child to foster care). In some states, parents are often pressured "by well-meaning, although perhaps overzealous, social workers" to sign so-called voluntary separation agreements when the parents are suspected of abuse or neglect. *See* Katherine C. Pearson, *Cooperate or We'll Take your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 836–38 (1998) (illustrating that sophisticated decisions relating to the drastic consequences of child removal are often made by frightened, unsophisticated parents). These agreements, which separate parent and child during the investigation of the alleged abuse or neglect, are often initiated through "blatantly coercive" tactics and occasionally are treated as though they constitute a voluntary waiver of all of the parents' rights to their child. *See id.* (criticizing caseworkers' methods of securing parents' cooperation with voluntary separation agreements). In the hands of an unscrupulous or negligent caseworker, these voluntary agreements can be abused in a way that allows the state to circumvent parents' due process rights. *Id.* at 841.

86. *Cf. In re* S.A.P., 169 S.W.3d 685, 711 (Tex. App.—Waco 2005, no pet.) (analyzing a caseworker's admission that the Department sought termination of the parents' rights because the caseworker felt that "she had run out of time to work with" the parents, who had neither abused nor neglected their child). *But see* Kay P. Kindred, *God Bless the Child: Poor Children,* Parens Patriae, *and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 521 (1996) (arguing that absent a compelling state interest, such as protecting children from the very worst cases of abuse and neglect, the state's proper constitutional role in the family is one of noninterference).

87. In 2003, Texas had a population of roughly six million children; during that year, the state investigated 186,000 reports of abuse or neglect and confirmed those reports in 78,000 cases. News Release, Texas Health and Human Services, HHSC Begins Investigation of CPS Programs (July 2, 2004), *available at* http://www.hhs.state.tx.us/news/release/070204_CPS.shtml; *cf.* Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 140–41 (1995) ("Government has a legitimate obligation, if not a constitutional duty, to protect the youngest members of the national community against

her home,[88] it rarely troubles itself with taking the time to ensure that the evidence is sufficient or weighing the costs associated with the child's removal into state custody.[89] Judges who review the Department's decisions may place too much emphasis on the Department's evidence and unintentionally disregard evidence presented by the allegedly abusive or neglectful parent, thus inadvertently serving as little more than a rubber stamp for the Department's findings.[90]

In an attempt to overhaul Texas's child welfare system, the Supreme Court of Texas, under the leadership of Chief Justice Wallace B. Jefferson, created the Permanent Judicial Commission for Children, Youth, and Families in 2007.[91] The Commission

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neglect and abuse.").

88. Children are removed from their homes not only by the Department, a state agency, but also by various equivalent agencies that exist at the county level. *See* Texas Council of Child Welfare Boards, Council Connection, Tex. Dep't of Family & Protective Servs. Regional Boundaries, http://www.tccwb.org/County_Region.asp (last visited Dec. 14, 2009) (providing information regarding the counties covered by the eleven regional councils, which "serve as an informational conduit between county [child welfare] boards and the Texas Council of Child Welfare Boards").

89. *See* Ana M. Novoa, *Count the Brown Faces: Where Is the "Family" in the Family Law of Child Protective Services*, 1 SCHOLAR 5, 22 (1999) (criticizing the state's lack of willingness to perform balancing tests in child welfare situations); *see also* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 132 (2001) (commenting on the premature removal of children from their families).

90. *See* Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 151 (1995) (explaining that because "the more dramatic and tangible risks of abuse or neglect" may seem to be more of a risk than the "psychological or developmental harm" that can be the result of the child's removal from his home and separation from his family, judges may unintentionally fail to properly weigh which living situation, either foster care or family preservation, presents the least risk to the child's physical and emotional well-being). Texas's model of child welfare rests on the assumption that, because the judge is a neutral and detached observer, her review of the Department's decisions serves to "maximiz[e] the well-being of children by minimizing risks of physical and psychological harm." *Id.* at 144. While "[a] judge does not choose directly between intervention and non-intervention," her decisions on matters of law and fact will ultimately decide the fate of the child and his family, either through temporary or final orders. *See id.* at 143–44 (addressing the means by which a judge may either prevent or promote intervention into family members' lives). Unfortunately, it is nearly impossible to perform any meaningful investigation into the motives and rationale behind a judge's decision in a child welfare case because formal written opinions are rarely issued in these cases. *See* Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 435 (1996) (explaining that the lack of written opinions and records that are "often difficult to retrieve" result in many child welfare decisions going unchallenged).

91. The Supreme Court of Texas, Permanent Judicial Commission for Children, Youth, and Families, http://www.supreme.courts.state.tx.us/children.asp (last visited Dec.

represents an effort on the part of the court to implement a high-level, multidisciplinary unit "to coordinate and implement comprehensive efforts to improve child protection courts."[92] Chief Justice Jefferson moved to create the Commission because of reports "that children in foster care are often referred to as forgotten children . . . [and] we demonstrate by creating this commission that we have not forgotten these children."[93] In many instances, however, there are people who have not, and will not, forget the children languishing in foster care—their natural parents and families. While no one would suggest that the Department's work is easy,[94] its mission may be better served by a stricter adherence to the requirements promulgated in the Texas Family Code, as well as a greater focus on the possibility of family preservation rather than state custody of children.

V. AN APPROPRIATE SERVICE PLAN PROTECTS FAMILIES' RIGHTS

A. *CPS's Disproportionate Targeting of Poor and Minority Families*

Families of color, as well as those whose belief structures or

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14, 2009).

92. *Id. But see* Martin Guggenheim & Christine Gottlieb, *Justice Denied: Delays in Resolving Child Protection Cases in New York*, 12 VA. J. SOC. POL'Y & L. 546, 569–70 (2005) ("Recognition that the child welfare system cannot necessarily offer the outcomes we most want for children has led to the principle that the court should seek the least detrimental alternative.").

93. State Bar of Texas, Texas Supreme Court Advisory—Court Creates Commission to Improve Judicial Handling of Foster Care Cases (Nov. 20, 2007), http://www.texasbar.com/PrinterTemplate.cfm?Section=Home&CONTENTID=19920&TEMPLATE=/ContentManagement/ContentDisplay.cfm. For a discussion of the nationwide problem in keeping track of child welfare cases, see Cheryl Wetzstein, *Lost in Foster Care? Data Only Now Reflect Needs of the Children*, WASH. TIMES, Apr. 29, 2001, at A1 (expressing one Iowa expert's concern that "[y]ou can go to the car dealer and he can tell you how many cars they have on the lot . . . but these child welfare people can't even come close to knowing how many kids they have [in state custody]").

94. *See* Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 141–42 (1995) (acknowledging that in the child protection context, the state is forced to make the difficult decision of when intervention may be more destructive than is necessary to ensure the child's well-being).

family situations "fall outside the dominant American culture,"[95] are regularly subjected to state intervention into their family situations in numbers disproportionate to their representation in the general populace.[96] There is also evidence suggesting that poor families are subjected to the child welfare system far more often than their wealthier counterparts,[97] possibly because the

95. Nell Clement, Note, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L.J. 397, 412 (2008). The residents of the Yearning for Zion ranch fall into this category because of their polygamist lifestyle, which falls decidedly "outside of the dominant American culture." *See id.* at 413–14 (describing types of population groups that are disproportionately represented in the child welfare system); *see also* Ana M. Novoa, *Count the Brown Faces: Where Is the "Family" in the Family Law of Child Protective Services*, 1 SCHOLAR 5, 17 (1999) ("It is disheartening that the child welfare system is overpopulated to such an extent by people of color, by the poor, the uneducated, and the marginal.").

96. *See* Nell Clement, Note, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L.J. 397, 413–14 (2008) (discussing the "overwhelming" overrepresentation in the child welfare system of families of color, impoverished families, and other families who fall, for whatever reason, outside the mainstream); *see also* LISA ARONSON FONTES, CHILD ABUSE AND CULTURE: WORKING WITH DIVERSE FAMILIES 82 (2005) (pointing out that black children make up a disproportionate percentage of the child welfare population and are more likely to be "permanently removed from their homes, despite similar rates of abuse across racial groups"); Donald N. Duquette et al., *We Know Better Than We Do: A Policy Framework for Child Welfare Reform*, 31 U. MICH. J.L. REFORM 93, 95–96 (1997) (pointing out that "American foster children are disproportionately children of color," and stating that 30% of Texas's child welfare population is made up of Latino children, even though Latino children only represent 21% of Texas's overall child population). In 2003, 27% of the children living in Texas foster homes in 2003 were African-American, even though African-American children make up only 12.8% of the child population in Texas. TEX. DEP'T OF FAMILY AND PROTECTIVE SERVS., CHILD PROTECTIVE SERVICES ANNUAL REPORT 16 (2004) (on file with the *St. Mary's Law Journal*).

97. *See* Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 432 (1996) ("The child welfare system is a system that, in dramatic disproportion to their numbers, affects poor people."); Ana M. Novoa, *Count the Brown Faces: Where Is the "Family" in the Family Law of Child Protective Services*, 1 SCHOLAR 5, 7 (1999) (analyzing the reasons state intrusion into parenting decisions is most common in poor families); Amy Wilkinson-Hagen, Note, *The Adoption and Safe Families Act of 1997: A Collision of* Parens Patriae *and Parents' Constitutional Rights*, 11 GEO. J. ON POVERTY L. & POL'Y 137, 138 (2004) ("The vast majority of children in foster care are from poor families, and they are disproportionately African-American."); *cf.* Kay P. Kindred, *God Bless the Child: Poor Children,* Parens Patriae, *and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 534 (1996) (hypothesizing that state agencies use neglect statutes as a vehicle to remove children from impoverished, but not abusive, homes, creating a situation in which the state frequently violates the privacy rights of poor families without any appreciable benefit to the children of those families). One commentator has suggested that poor families are subject to greater state intrusion into their private lives than wealthier families

living conditions of poor families leave them more open to official scrutiny than the conditions of middle and upper-income families.[98] Because poor and minority families are more likely to be subjected to Department intervention, special care must be taken to ensure that the service plans drawn up for these families are culturally and linguistically appropriate.[99]

The Texas Family Code's requirements for service plans have special significance for culturally diverse families, particularly those for whom English is not their first language. According to section 263.102 of the Family Code, "the service plan must . . . be in writing in a language that the parents understand[.]"[100] Texas has the second-highest population of foreign-born, limited English proficient (LEP) residents in the nation.[101] Of the fifty states and the District of Columbia, Texas ranks first in its percentage of

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simply because they are the ones who are most likely to already be on the state's radar, due to poor families' greater reliance on public support and social services. *See* Kay P. Kindred, *God Bless the Child: Poor Children,* Parens Patriae*, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 532–33 (1996) (suggesting a rationale for the disproportionately high number of impoverished families ensnared in the nation's child welfare systems). Nearly 25% of America's young children are members of poor families, giving special significance to the child welfare system's tendency to overintervene in the lives of the poor. *See id.* at 519 (explaining that children under the age of six are nearly twice as likely to be poor as adults between the ages of eighteen and sixty-four). A common reason given for state intervention into poor families is neglect, a vague concept around which "there is a general lack of consensus"; a common link among families charged with the neglect of their children is that they tend to be poor. *Id.* at 530. Roughly 50% of child welfare cases involve neglect that can be tied to conditions resulting from poverty. Clare Huntington, *Missing Parents*, 42 FAM. L.Q. 131, 140 (2008).

98. *See* Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 432 (1996) (explaining some circumstances of the poor, such as increased interaction with their neighbors, use of public and social services, and lack of access to private resources, that increase the likelihood that a poor family will be reported for abuse or neglect).

99. *See* Elaine M. Chiu, *The Culture Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773, 1775–77 (2008) ("Culture dictates what are optimal, appropriate, and acceptable parenting practices . . . . [W]hen the laws of a community reflect only one culture and they are applied to individuals who are from other cultures, the potential for injustice is serious."); *cf.* RENNY GOLDEN, DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM 200 (1997) (insisting that, even in cases where a child cannot be returned to his home, an individualized care approach "recognizes culture as a deep aspect of 'home'" and the application of this approach requires that services provided by the state "be culturally and ethnically appropriate").

100. TEX. FAM. CODE ANN. § 263.102(a)(2) (Vernon 2008).

101. *See* Migration Policy Institute, Fact Sheet on the Foreign Born (Texas), http://www.migrationinformation.org/DataHub/state2.cfm?ID=TX (last visited Dec. 14, 2009) (listing Texas's national rankings in several categories related to immigration, migration, and LEP issues).

foreign-born residents who are LEP.[102] Because these LEP Texans fall outside the "dominant" American culture, they are statistically more likely than their white, English-speaking neighbors to receive a visit from the Department and are also more likely to receive fewer services and be offered fewer reunification options than white families.[103] The attorneys for these LEP parents have a duty to ensure their clients receive a service plan that is written in their dominant language so that the parents have the best opportunity to understand the service plan and what it requires of them.[104]

This requirement should be read to refer not only to the specific language in which the plan is written, but also to the actual words that are used. "[A] language that the parents understand" must be interpreted to mean that a parent who never finished the ninth grade will receive a service plan much different than the one

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102. *Id.*

103. Nell Clement, Note, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L.J. 397, 427 (2008).

104. The rights of a criminal defendant, and how or whether those rights may be waived, are occasionally compared to the rights of parents whose children have been removed because of suspicion of abuse or neglect in the home. *See* Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 864 (1998) (discussing what constitutes a voluntary waiver of rights in the child welfare context as opposed to the criminal context). An attorney unfamiliar with a LEP client's dominant language owes that client the duty to ensure a competent interpreter is part of the team creating the client's service plan. *Cf.* Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 340 (1999) (indicating that the Constitution establishes a right to procedural due process for everyone, not just criminal defendants). *Compare* United States v. Perez, 918 F.2d 488, 489 (5th Cir. 1990) (holding that a federal criminal defendant had no need of an interpreter at a plea hearing), *with* Garcia v. State, 149 S.W.3d 135, 145 (Tex. Crim. App. 2004) (holding that the lack of effective translation during a criminal trial violates the defendant's Sixth Amendment right to confrontation). While the Sixth Amendment, from which a criminal defendant's right to an interpreter flows, does not apply in the child welfare context, some of the same due process rights are implicated in child welfare cases. *See* U.S. CONST. amend. VI (establishing rights available to the defendant during a criminal prosecution). *Compare* U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."), *with* Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (holding that the Fourteenth Amendment's Due Process Clause is implicated when the state attempts to terminate a natural parent's rights to her child). Due process rights serve two goals: the promotion of accurate decision-making, and the protection of the parties' right to be heard. Both of these goals are "particularly compelling" in the context of child welfare cases. Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 340 (1999).

prepared for a parent who holds a doctorate in English literature. To interpret section 263.102 differently is to ignore the legislature's basic intent: that a parent whose children have been removed by the state must be kept informed about the seriousness of the situation and the steps necessary to ensure the best chances of having her children returned to her.[105] Here, the less well-educated parent's legal advocate owes a duty similar to that owed to an LEP parent, even though the language barrier may be less apparent in the case of a native English speaker.[106] The attorney representing a parent of limited education in a child welfare case must take special care to ensure that her client understands the service plan, its requirements, and the penalties (especially involuntary termination) for noncompliance. Because the parents may be embarrassed or ashamed about their lack of education, the attorney should, without being asked to do so, go over the service plan word-by-word and line-by-line until she is satisfied that her clients truly understand what the plan requires of them.[107]

B. *Mistakes by CPS Violate the Rights of Both Parent and Child*

The United States Supreme Court has repeatedly recognized that the right to parent one's children is "a fundamental liberty interest protected by the Fourteenth Amendment."[108] A parent's

105. *See* House Research Org., Bill Analysis, Tex. H.B. 957, 73d Leg., R.S. (1993) (explaining that without the help of a clear and understandable service plan, most parents fail to grasp the "seriousness of the family's problem" until it is too late). Though not expressed in the legislative history, the service plan requirement, when viewed through the lens of law and emotion, can be understood as the state's attempt to play into a parent's natural sense of guilt about the child's situation. *See* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1263 (2008) (explaining that guilt can be "a productive emotion, fueling the reparative drive .... [G]uilt is the recognition that the person feeling it played a role in hurting another[, thus becoming] a signal to that person that a relationship is threatened and some action should be taken.").

106. This is especially true in light of the Texas Legislature's intent in promulgating the service plan requirement. *See* House Research Org., Bill Analysis, Tex. H.B. 957, 73d Leg., R.S. (1993) (showing the importance of implementing easily understandable service plans in order to better serve Texas families).

107. Helping a client understand the service plan is part of the attorney's duty to be a problem solver, and is an important part of reaching the best outcome. *See* Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer As Problem Solver*, 28 HOFSTRA L. REV. 905, 912 (2000) (arguing that "problem solvers need to seek information, first from clients and then from the other people in the legal matter," in order to collaborate with the other side to reach a mutually acceptable outcome).

108. *See Santosky*, 455 U.S. at 747 (holding that a state's allegations in termination proceedings must be supported by at least clear and convincing evidence, and invalidating

a New York statute allowing termination on a preponderance of the evidence, a standard which allowed termination on "[a] factual certainty . . . no greater than that necessary to award money damages in an ordinary civil action"); *see also* Troxel v. Granville, 530 U.S. 57, 65 (2000) (describing a parent's right to direct the upbringing of her child as "perhaps the oldest of the fundamental liberty interests recognized by this Court"); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'" (quoting Prince v. Mass., 321 U.S. 158, 166 (1944))); Smith v. Org. of Foster Families, 431 U.S. 816, 845 (1977) (recognizing that "the liberty interest in family privacy has its source . . . in intrinsic human rights"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (reasserting that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (declaring unconstitutional a Nebraska law that required parents to enroll their children in public schools because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (reasoning that the "right to the preservation of family integrity encompasses the reciprocal rights of both parent and children"); *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980) (holding that Texas courts must apply the standard of clear and convincing evidence in all cases where the state seeks involuntary termination of the legal relationship between a parent and her child); *In re* S.L.R., 243 S.W.3d 232, 235 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("Termination of the parent/child relationship is a complete severance and divests for all time the parent's rights to the child. Because it is such a drastic remedy, termination proceedings should be strictly scrutinized." (citation omitted)); *In re* C.E.K., 214 S.W.3d 492, 495 (Tex. App.—Dallas 2006, no pet.) (discussing the Texas Supreme Court's interpretation of the United States Supreme Court's decisions in *Santosky* and *Stanley*); Ruiz v. Tex. Dep't of Family & Protective Servs., 212 S.W.3d 804, 811–12 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("[T]he Texas Supreme Court has also concluded that 'this natural parental right' is 'essential,' 'a basic civil right of man,' and 'far more precious than property rights'" and has insisted that "'involuntary termination statutes [be] strictly construed in favor of the parent.'" (citations omitted)); *In re* C.D.S., 172 S.W.3d 179, 186 (Tex. App.—Fort Worth 2005, no pet.) ("The natural rights existing between a parent and his (her) natural child are of constitutional dimensions, and involuntary termination of parental rights statutes must be strictly construed in favor of the parent[.]"); *In re* E.R., No. 2-04-117-CV, 2005 WL 327263, at *3 (Tex. App.—Fort Worth Feb. 10, 2005, no pet.) (mem. op.) (stating that parents' rights to their children are "'far more precious than any property right'" (quoting *Santosky*, 455 U.S. at 758–59)); Doyle v. Tex. Dep't of Protective & Regulatory Servs., 16 S.W.3d 390, 393 (Tex. App.—El Paso 2000, pet. denied) ("The natural right that exists between parents and their children is one of constitutional dimension."); Ana M. Novoa, *Count the Brown Faces: Where Is the "Family" in the Family Law of Child Protective Services*, 1 SCHOLAR 5, 6–7 (1999) (stressing that the right to parent one's children is so fundamental that the proper application of clear and convincing evidence requires an insistence on "evidence . . . so clear as to leave no substantial doubt; it must be sufficiently strong to command the unhesitating assent of every reasonable mind"); *cf.* Kay P. Kindred, *God Bless the Child: Poor Children,* Parens Patriae, *and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 521 (1996) (arguing that the family's constitutional right to avoid unnecessary state interference, "coupled with the state's power as *parens patriae*," presents the state with an affirmative duty to supply poor families with the income assistance necessary to ensure that children are protected while still allowed to remain part of their intact natural families).

right to "'the companionship, care, custody and management'" of her child is a constitutional right "'far more precious than any property rights.'"[109] In Texas, "there is a strong presumption that the best interest of the child will be served by preserving the parent-child relationship."[110] Children, too, have a constitutional interest in not being removed from their homes unnecessarily.[111] When the state removes a child on less-than-sufficient evidence, the rights of both parent and child are violated, and both parent and child suffer because of the state's mistake.[112] The parents' suffering in the indignity of having their children unnecessarily or prematurely removed is obvious. Less obvious, however, are the psychological effects suffered by a child who is removed from his home—effects that can persist even if the child is eventually returned to his parents.[113]

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109. *In re C.E.K.*, 214 S.W.3d at 495 (quoting *Santosky*, 455 U.S. at 758–59).

110. *In re* S.A.P., 169 S.W.3d 685, 707 (Tex. App.—Waco 2005, no pet.).

111. *See* Burgess v. Houseman, 268 F. App'x 780, 783 (10th Cir. 2008) (establishing that children, like adults, have a Fourth Amendment right to avoid unreasonable seizure, a right that includes freedom from being improperly removed from an established home). A child's constitutional right to remain in his natural home is supported by data showing that children in foster care are twice as likely to die because of abuse as are children in the general population. *See* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 137 (2001) (reporting national data on foster care abuse fatalities).

112. *See* Nell Clement, Note, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L.J. 397, 419–20 (2008) (discussing the "distressing" psychological impact inflicted on both parent and child due to the state's removal of a child and instigation of proceedings to terminate parental rights). Even a child who is removed from her home for a good reason, such as a parent's crippling drug addiction, suffers tremendous distress due to the separation from her natural parent. In a Florida study of infants born addicted to crack, researchers found that the babies who were allowed to remain with their birth mothers reached developmental milestones sooner than the babies who were placed in foster care, leading one commentator to note, "For the foster children, the separation from their mothers was more toxic than the cocaine." Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 134 (2001). In addition to the psychological damage of being removed from their natural parents, children who are removed to foster care are also more likely to be killed by an abusive caregiver than children whose families participate in well-designed, state-sponsored family preservation programs. *See id.* at 138–39 (comparing Washington State's Homebuilders family preservation program, in the course of which one child out of 12,000 died because of abuse in over twenty years, to Illinois's more traditional child welfare program, which saw the deaths of five foster children in one year in the mid-1990s).

113. *See* Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 439 (1996) (discussing the effects suffered by children who witness "the disrespect shown to their parents by the system," including the development of "a distrust of public

The Supreme Court of Texas has recognized that a Texas court may not grant the Department's motion for termination of parental rights "'based solely on what the trial court determines to be in the best interest of the child.'"[114] In order to prevail in a lawsuit seeking the involuntary termination of parental rights, the Department must prove by clear and convincing evidence that the parents' conduct conforms to one of the justifications for termination contained within section 161.001 of the Family Code *and* that termination is in the best interest of the child.[115] One of the permitted grounds for involuntary termination of parental rights is the parents' failure to comply with a service plan.[116]

C. *How Texas Practitioners Can Protect Their Clients' Rights*

One of the goals of the Permanent Judicial Commission for Children, Youth, and Families is to improve attorney training in the handling of child welfare cases.[117] This is a worthy goal, as one of the most important things an attorney can do to make sure

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institutions," an ingrained notion that the system is unfair and ineffective, and the idea that their parents have been victimized by the state).

114. *In re* D.T., 34 S.W.3d 625, 629 (Tex. App.—Fort Worth 2000, pet. denied) (quoting Holley v. Adams, 544 S.W.2d 367, 370 (Tex. 1976)).

115. TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 2009); *cf.* Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (proclaiming that "due process requires that the State support its [abuse or neglect] allegations by at least clear and convincing evidence" before a state may involuntarily terminate a natural parent's rights in her child).

116. *See* TEX. FAM. CODE ANN. § 161.001(1)(O) (Vernon Supp. 2009) (establishing that a parent's rights with regard to her child may be terminated if she "fail[s] to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child").

117. *See* The Supreme Court of Texas, Permanent Judicial Commission for Children, Youth, and Families, http://www.supreme.courts.state.tx.us/children.asp (last visited Dec. 14, 2009) (establishing nine goals for the Commission, including: (1) the development of new strategies to strengthen courts and court practices in child welfare cases; (2) the identification of the needs of child welfare courts, including more effective means to ensure goals of "safety, permanency, well-being, fairness and due process"; (3) the promotion of best practices; (4) the improvement of communication and collaboration between the legal players in the child welfare community; (5) the maximization of resources in the child welfare system; (6) the promotion of adequate training for all parties involved in the child welfare system; (7) the creation of a collaborative model that will guide future members of the Commission; (8) the increased use of oversight in "administration of designated funds"; and (9) the presentation of "an annual progress report to the Court").

the rights of parents, as well as the safety of children, do not fall by the wayside is to keep her own legal education up-to-date.[118] Attorneys who work on child welfare cases must, at all times, be aware of the unique need that children and families, especially those who have found themselves in the grip of the child welfare system, have for continuity in their lives.[119] The means for establishing this continuity will, of course, vary from case to case, but the most common methods will include "consistent casework, comprehensive assessments, stable placements, and timely movement through the system."[120]

One possibility for improving the child welfare system is to rethink the way we approach it.[121] The current system is notorious for its refusal to intervene in families until they are already in a crisis situation.[122] Some jurisdictions are experimenting with a technique called "family group conferencing," in which the parents and CPS work together with the child's extended family, friends, teachers, clergy, and other members of the child's

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118. *Cf.* Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer As Problem Solver*, 28 HOFSTRA L. REV. 905, 919 (2000) (suggesting that attorneys who are trained in effective questioning and active listening are better able to apply characteristics of alternative dispute resolution in situations "where all kinds of facts may be important beyond what is legally discoverable or admissible"). Such training would be especially useful in child welfare cases, when a number of relevant facts may not be "legally discoverable or admissible." For example, whether or not a mother loves her child is probably not "legally discoverable" with any certainty, and what appears to be evidence of a mother's love is occasionally interpreted by overzealous caseworkers as uncooperativeness. *See In re* C.E.K., 214 S.W.3d 492, 500 (Tex. App.—Dallas 2006, no pet.) (reporting a CPS caseworker's assertion that the mother was "'intentionally stalling'" and "not cooperating with CPS," based on the caseworker's observation that the mother would delay the end of the supervised visits with her children by kissing "one child then the other, going back and forth between them"; the caseworker argued that this "stalling" was evidence in favor of terminating the mother's parental rights).

119. *See* Donald N. Duquette et al., *We Know Better Than We Do: A Policy Framework for Child Welfare Reform*, 31 U. MICH. J.L. REFORM 93, 148–49 (1997) (explaining that lawyers who work with child welfare cases need to be aware of, and remain up-to-date with, the special training that is required to properly address the needs of parents and children in the child welfare system).

120. *Id.*

121. *See generally* Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer As Problem Solver*, 28 HOFSTRA L. REV. 905, 906 (2000) (proposing an understanding of "problem solving" as a legal goal with a focus that is distinct from "winning").

122. *See* Clare Huntington, *Missing Parents*, 42 FAM. L.Q. 131, 131 (2008) ("Currently, the state largely ignores parents until a crisis occurs in a family and then overrides parents afterwards.").

support network to reach a collective solution to the family's problems.[123] This kind of cooperative approach, which is applicable to all aspects of the child welfare case, could be applied with great usefulness to the creation of the service plan. The resulting plans would include the input of an entire group of people, not just a single caseworker,[124] who are all working toward the child's best interest. This would ensure that the parent, in her fear and confusion about being subjected to the child welfare system, and the caseworker, in her natural desire to complete the case as expeditiously as possible,[125] would not

123. Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1252 (2008). This idea of "family group decision making" has been implemented with some success in Oregon, California, Canada, and New Zealand. In these jurisdictions, the extended family helps in determining the needs of the child and the members of her household, how to best meet those needs through informal methods, and what kinds of formal state services are required to help meet the family's needs. *See* Ana M. Novoa, *Count the Brown Faces: Where Is the "Family" in the Family Law of Child Protective Services*, 1 SCHOLAR 5, 38–39 (1999) (summarizing different jurisdictions' application of family group conferencing as an alternative to traditional state protective intervention into the family). In 2003, CPS agencies in several Texas cities began to apply the concept of family group conferencing in a program called "the Family Group Decision-Making Initiative," a program in which "the child's family is invited to participate in a facilitated conference along with the extended family and trusted friends." TEX. DEP'T OF FAMILY AND PROTECTIVE SERVS., CHILD PROTECTIVE SERVICES ANNUAL REPORT 9 (2004) (on file with the *St. Mary's Law Journal*).

124. *See* E-mail from Rebecca G. Flanigan, Deputy Director of Litigation, Texas RioGrande Legal Aid, to Shannon Dunn (Nov. 25, 2008) (on file with the *St. Mary's Law Journal*) ("All too often, CPS'[s] definition of parental involvement in developing the service plan is 'sign here.'").

125. *See* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1275–76 (2008) (asserting that one of the core values of our adversarial legal system is judicial efficiency, especially the speedy resolution of claims). Judicial efficiency, along with our system's emphasis on finality and uniformity, is thought to best protect due process rights, as well as "increase accuracy in fact-finding, ensure the integrity of the decisionmaking process, and instill a sense of legitimacy among participants." *Id.* When applied to family law disputes, however, the adversarial system's preference for efficiency and finality "discourages disputants from revisiting [the court's] judgments" and, no matter the outcome of the case, interferes with the family's ability to heal by interfering with "the cycle of intimacy." *Id.* at 1274–78. This is especially true in child welfare cases, in which the "only two legally recognized outcomes—parents must regain custody of their children or face termination of their parental rights"—lead inextricably to a winner-take-all mentality that can make it difficult to focus on what is truly best for the family in crisis. *Id.* at 1276. In contrast, settling child welfare cases through mediation or other collaborative and non-adversarial means empowers parents, allowing them to feel capable of making important decisions about how to raise their children, while also avoiding the financial and emotional costs of adversarial litigation. *See* Charlotte D. Booker et al., *The Eyes of Texas Children Are Upon Us: Child Welfare Reforms Mean More Children Need Homes, So What Can the Bar Do to Help?*, HOUSTON LAW., Nov.–Dec. 2004, at 20, 22 (discussing the

inadvertently miss an important element of the case. This approach would also reassure the parents that help is available to them, and that the people in their lives support them and their efforts to become better parents.[126] In part because of the mandates established by ASFA, the state of Texas has made funding available for this kind of approach to child welfare cases.[127]

Some commentators have suggested the application of a new approach to child welfare cases that approximates the restorative justice model used more commonly in criminal law.[128] This approach finds fault in the traditional adversarial model of family law, which operates on a "love-hate" model.[129] In contrast, this

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benefits of using family group conferencing instead of the traditional adversarial model of dispute resolution in family law cases, especially child welfare cases); *see also* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 655 (2006) (arguing that the adversarial system is poorly suited to child welfare cases because it does not allow for "accommodations between the rights of parent and child, between preservation and protection").

126. The method of family group conferencing attempted by several Texas CPS agencies is predicated on the idea that involving the child's extended family and friends will lead to a better result than a traditional approach to child welfare. TEX. DEP'T OF FAMILY AND PROTECTIVE SERVS., CHILD PROTECTIVE SERVICES ANNUAL REPORT 9 (2004) (on file with the *St. Mary's Law Journal*).

127. *See* Charlotte D. Booker et al., *The Eyes of Texas Children Are Upon Us: Child Welfare Reforms Mean More Children Need Homes, So What Can the Bar Do to Help?*, HOUSTON LAW., Nov.–Dec. 2004, at 20, 21–22 (describing the move toward funding family group conferencing through the Children's Justice Act of Texas ("CJA"), which was established by the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101–5107(2000)). The family group conferencing projects sponsored by the CJA are modeled on a New Zealand program that was designed to better address the unique needs of New Zealand's indigenous Maori population. *Id.* at 22. The CJA's reliance on a program originally intended to meet the needs of indigenous people reflects a desire on the part of the state to find "unique and culturally sensitive ways to meet a child's needs." *See id.* (analyzing why the CJA relies on family group conferencing as a way to encourage a child's extended family to take an active role in helping to resolve problems associated with child abuse and neglect cases).

128. *Compare* William J. Howe & Hugh McIsaac, *Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents When the Interests of Children Are at Stake*, 46 FAM. CT. REV. 78, 83 (2008) (referring to restorative justice in the family law context as "an extension of mediation"), *with* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1246 (2008) (proposing a "Reparative Model" that would "reform the process of family law by de-emphasizing adversarial decisionmaking").

129. *See* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1247 (2008) (defining the "cyclical nature of familial relationships" as "love, hate, guilt, and reparation[,]" and explaining that most people repeat this cycle throughout their lives). "Hate," in this context, is defined as both symbolic ("rupture without the possibility of repair") and real (the actual emotion of hatred). *Id.* at 1248. The traditional "Love-Hate

"individualized care" model is an approach to child welfare cases that is more closely related to restorative justice than to Texas's current adversarial model of child protection. Individualized care models have been implemented with some success in several jurisdictions, including Alaska, Vermont, Pennsylvania, and Washington.[130] This approach, which could work within the existing child welfare system in Texas without requiring a major overhaul of the system, is especially suitable for developing an appropriate service plan. One of the tenets of individualized care is "the assumption that families have strengths, not simply deficits."[131] If a parent is allowed to be an active participant in the creation of the service plan, she and her attorney, along with CPS, can create a plan that recognizes the strengths of the natural family, instead of focusing on its weaknesses.[132] The service plan will then serve to tell the parent not only what she must fix but also what she is doing well and should continue to do in parenting her child.

A parent's rights need not be incompatible with those of her child,[133] but that is exactly what happens when we rely on an

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Model," which ignores both guilt and reparation, "recognize[s] only rupture but not repair." *Id.* at 1248–49. In child welfare proceedings, the love-hate model "reinforces the acrimony between former family members" rather than allowing parties to work together toward amicable resolution. *Id.* at 1250. The "acrimony" in child welfare cases can be between family members (such as in cases of abuse), but it can also be the result of our adversarial system, in which either the parent or the state will emerge as the "winner" and the other party becomes the "loser." *See* Elaine M. Chiu, *The Culture Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773, 1777 (2008) (asserting that "many jurists view the goal of the child welfare system as the protection of the rights of children *against the conflicting rights* of parents" (emphasis added)). The idea of treating child welfare cases as "acrimony between former family members" is also reflected in one commentator's discussion of the two "paradigms" of family law. *See id.* (identifying two archetypal approaches to the state's role in family life: first, that of "*parens patriae*," in which the state effectively becomes part of the family by "shar[ing] the tasks of parenting with individual parents," and second, the idea of the state not as a de facto member of the family, but "as an arbiter in disputes between parent and child").

130. *See* RENNY GOLDEN, DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM 202–04 (1997) (reporting various states' attempts to implement individualized care models in their child welfare systems).

131. *Id.* at 200.

132. *Cf. id.* at 150 (discussing Homebuilders, a Seattle-based family preservation program that is highly successful in part because it helps families analyze and appreciate the strengths of their living situation, in addition to identifying and correcting weaknesses).

133. *See* Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1206 (1999) (arguing that respecting the

adversarial model of family law in child welfare cases.[134] Under the traditional model, one party (usually the state) emerges as the "winner" while the other (usually the parent) ends up as the "loser" who no longer has the right to parent the child.[135] This model respects the rights of neither parent nor child, instead subjugating the family's rights to the "better" judgment of the state and its court system.[136]

D. *Should CPS Be Subject to Civil Liability for Its Mistakes?*

Child protective service offices often operate as an arm of the county government.[137] The Supreme Court of Texas has held that

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integrity of the family unit need not equate with leaving children in jeopardy because the rights of parent and child "generally do not conflict" and in fact "overlap significantly" in nearly all cases); *see also* Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer As Problem Solver*, 28 HOFSTRA L. REV. 905, 916 (2000) (contending that attorneys who consider problem solving to be an essential part of their jobs will recognize that legal adversaries often share complementary interests).

134. *But see* ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 7–8 (1999) (arguing that even within the adversarial system, states' concerns for family preservation and parents' individual autonomy have the potential to overshadow the interests of abused and neglected children).

135. Even a child welfare model that establishes a clear "winner" and "loser" can end in what essentially amounts to a loss for both sides. This is especially true in situations where parents are denied their statutory right to participate fully in the creation and implementation of the service plan, yet are still required to strictly adhere to the plan's mandates. *Cf.* Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer As Problem Solver*, 28 HOFSTRA L. REV. 905, 907 (2000) ("Even a 'win' will be a loss if the other side is so beaten down or regretful that it will resist complying with a negotiated agreement.").

136. *See* Clare Huntington, *Missing Parents*, 42 FAM. L.Q. 131, 131 (2008) (arguing that if the states were really most interested in supporting children, they would design child welfare systems that would support those children's parents). *See generally* Kay P. Kindred, *God Bless the Child: Poor Children,* Parens Patriae, *and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 521 (1996) (arguing that "the constitutional right to family integrity" means that parents who are willing to properly care for their children, but are economically unable to do so, should receive at least a minimal level of financial assistance from the state before the state may allege that the parents are neglecting their children). By the time the state intervenes in an abuse or neglect case, the state and the parents are already established as adversaries, and this posture "hinders the possibility of cooperation and highlights the power imbalance between the state and families." *See* Clare Huntington, *Missing Parents*, 42 FAM. L.Q. 131, 133 (2008) (arguing in favor of a more cooperative and less adversarial approach to child welfare cases, especially with regard to formal state intervention into families).

137. *See* Doty-Jabbaar v. Dallas County Child Protective Servs., 19 S.W.3d 870, 870 (Tex. App.—Dallas 2000, pet. denied) (analyzing an appeal fought between a biological mother and a county child protection agency).

Texas counties "possess sufficient indicia of independence that they are not arms of the state for purposes of the Eleventh Amendment."[138] Because the Eleventh Amendment of the United States Constitution[139] does not apply to Texas counties, those counties lack the protection of sovereign immunity against causes of action brought under federal law.[140]

However, in *DeShaney v. Winnebago County Department of Social Services*,[141] the United States Supreme Court held that the Constitution did not require a county agency to face civil liability for its failure to remove a child from his abusive father.[142] The Court suggested that child protection agencies face a unique dilemma—if they fail to act and a child is harmed, they are accused of contributing to the harm, but if they act too soon, they are accused of unnecessarily interfering with the natural family.[143] In *Suter v. Artist M.*,[144] the Court appears to have closed at least one route to the possibility of state agency liability that was mentioned in dicta in *DeShaney*.[145]

138. Hoff v. Nueces County, 153 S.W.3d 45, 50 (Tex. 2004) (per curiam).

139. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

140. *See Hoff*, 153 S.W.3d at 50 (explaining that counties do not possess "Eleventh Amendment immunity from federal claims brought in state court").

141. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

142. *Id.* at 203 (holding that the Due Process Clause of the Fourteenth Amendment does not require civil liability to attach based on a county child protection agency's failure to act).

143. *See id.* (reasoning that if the county's caseworkers had moved too quickly to remove the child from his abusive father, "they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection").

144. Suter v. Artist M., 503 U.S. 347 (1992), *superseded by statute*, Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 555(a), 108 Stat. 3518, 4057–58 (codified at 20 U.S.C. § 6301 (2006)) (overturning grounds applied in *Suter* to affect an action brought to enforce a provision of the Social Security Act regarding a state plan but not intending to alter the holding in *Suter*).

145. In *Suter*, the Supreme Court held that AACWA did not create a private right of action enforceable under 42 U.S.C. § 1983. *Id.* at 350. The *Suter* respondents sued the Illinois Department of Children and Family Services in a class action, alleging that the agency violated AACWA because it neither made reasonable efforts toward preventing the need to remove children from their homes nor made reasonable efforts toward family reunification in cases where children had actually been removed from their homes. *Id.* at 351–52. The result of the Court's decision in *Suter* was that individuals "could not sue to enforce" AACWA's requirement that states use reasonable efforts to prevent the removal

Contrary to the Supreme Court's holding in *DeShaney*, Texas courts have declined to extend immunity from civil liability to CPS supervisors who are sued in their official capacity for failing to properly investigate allegations of child abuse.[146] On the other hand, at least one Texas court has also refused to hold individual CPS caseworkers civilly liable for mistakenly, but in good faith, removing a child from her home.[147] While individual caseworkers acting in good faith are immune from civil liability for the act of removing children from their homes,[148] it remains unclear if liability can attach for a caseworker's failure to create an appropriate service plan.[149]

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of children from their homes. Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 136 (2001). Although the Supreme Court rejected both arguments, *Suter* and *DeShaney* are distinguishable in that the complaint in *DeShaney* was a due process violation, while the respondents in *Suter* relied on 42 U.S.C. § 1983. *Compare DeShaney*, 489 U.S. at 203 (finding no Fourteenth Amendment violation in the state agency's failure to act), *with Suter*, 503 U.S. at 350 (holding that § 1983 does not create a private right of action in AACWA).

146. *See* Gonzalez v. Avalos, 866 S.W.2d 346, 348 (Tex. App.—El Paso 1993, writ dism'd w.o.j.) (affirming a trial court's decision to deny official and governmental immunity to a CPS supervisor who failed to investigate a father's report that his children were being abused by their mother's boyfriend).

147. *See* Albright v. Tex. Dep't of Human Servs., 859 S.W.2d 575, 580 (Tex. App.—Houston [1st Dist.] 1993, no writ) (holding that CPS caseworkers who removed a child from her home when the child had tested positive for a sexually transmitted disease and had made statements that implied she may have been sexually abused acted in good faith and were properly granted summary judgment based on official immunity).

148. *See* TEX. FAM. CODE ANN. § 261.106(a) (Vernon 2008) (establishing that someone who acts in good faith while investigating a report of abuse or neglect is immune from liability, both civil and criminal); *cf.* Mattix-Hill v. Reck, 923 S.W.2d 596, 597–98 (Tex. 1996) (refusing to hold a CPS caseworker liable for a claim of intentional infliction of emotional distress arising from a daughter's removal from her mother's home).

149. Sovereign immunity protects governmental entities, as opposed to individuals, from civil liability. Kassen v. Hatley, 887 S.W.2d 4, 8 (Tex. 1994). County child protection agencies are not eligible for the protection of sovereign immunity in Texas, at least with regard to federal causes of action brought in state court. *Cf.* Hoff v. Nueces County, 153 S.W.3d 45, 47 (Tex. 2004) (per curiam) (explaining that counties and their agencies are not arms of the state for purposes of the Eleventh Amendment). Individual government employees are protected by official immunity, which requires the government employee to have performed in good faith a discretionary function that falls within the scope of her authority. Gross v. Innes, 930 S.W.2d 237, 239 (Tex. App.—Dallas 1996, writ dism'd w.o.j.). The creation of a service plan almost certainly qualifies as a discretionary function for the purposes of official immunity. *See* City of Lancaster v. Chambers, 883 S.W.2d 650, 654 (Tex. 1994) (stating that any act that requires deliberation, decision, or judgment is discretionary). A county agency, while it would probably not qualify for sovereign immunity, would be able to assert the defense of governmental immunity against any claim for monetary damages. *See* Anderson v. City of McKinney, 236 S.W.3d 481, 482–83

VI. CONCLUSION

Currently, not all states require the creation and implementation of service plans, and the fact that Texas does (and has since 1993) is a step in the right direction.[150] Service plans have been described as something that should be part of "[a] mandated set of core services,"[151] and with good reason: a well-crafted, individualized service plan, especially if the parents are involved in its creation, allows parents to take responsibility for their own actions in a positive way and with the most positive of goals—the return of their children to a home that is safer, healthier, and more rewarding for both parent and child.[152]

Ultimately, regardless of the mistakes in the service plan, all of the FLDS children were eventually returned to their homes and parents on the Yearning for Zion ranch.[153] The vindication of

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(Tex. App.--Dallas 2007, no pet.) (defining "governmental immunity" as a defense that protects governmental entities from lawsuits in which monetary damages are "the only plausible remedy"). If, however, a parent sued a county child protection agency in an effort to force the agency to follow the Family Code's service plan requirements, then the agency would be unlikely to succeed in any attempt to assert governmental immunity. *See id.* at 483 (explaining that governmental immunity does not apply when a lawsuit seeks only to prevent future violations).

150. *See* Donald N. Duquette et al., *We Know Better Than We Do: A Policy Framework for Child Welfare Reform*, 31 U. MICH. J.L. REFORM 93, 119 (1997) (advocating the adoption of statutes requiring and providing financing for service plans); *see also* House Research Org., Bill Analysis, Tex. H.B. 957, 73d Leg., R.S. (1993) (explaining that the implementation of a service plan requirement in child welfare cases will help parents "understand the seriousness of the family's problem or the potential for loss of parental rights").

151. *See* Donald N. Duquette et al., *We Know Better Than We Do: A Policy Framework for Child Welfare Reform*, 31 U. MICH. J.L. REFORM 93, 110 n.64 (1997) (listing specific "core services" that should be guaranteed to families in crisis, including emergency care transportation assistance, service plans and other opportunities for parenting training, educational and legal services, and quality medical care, including mental health services).

152. *See* Kay P. Kindred, *God Bless the Child: Poor Children,* Parens Patriae, *and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 529 (1996) (suggesting that a child's removal from his natural home is very rarely beneficial to him, and may be beneficial only in cases where the child is being very seriously harmed in his natural home). *But see* ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 7 (1999) (insisting that the most commonly followed child welfare programs in this country are too heavily influenced by "blood bias," the presumption that remaining with his natural family will be the most advantageous living situation for a child).

153. *See* Ben Winslow, *All FLDS Children Returned to Parents*, DESERET NEWS, June 5, 2008, *available at* http://www.deseretnews.com/article/1,5143,700231922,00.html (discussing the return of the Yearning for Zion children to their parents).

these families, however, does not make up for the initial violation of their rights. This kind of Pyrrhic victory is not limited to the families who were targeted in the Yearning for Zion raid—the same drama plays itself out every time the Department removes a child on insufficient evidence.[154] In all of these situations, there is nothing the courts can do to help these families regain the time that was stolen from them. Instead, the duty falls on attorneys who represent the parents of these children to ensure that the family's state-mandated separation lasts no longer than is necessary. While reunification is not always a viable goal,[155] the benefits of family preservation are, in most cases, compelling enough to justify more sustained efforts than are currently used in Texas.[156] An appropriate service plan is integral to this goal.

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154. Little data is available about situations in which children were mistakenly or unnecessarily removed from their homes by state agencies, probably because these situations do not arouse the same kind of anger and dismay as situations in which a child is killed or hurt due to the state's failure to act. *See* Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 142 (1995) ("Regrettable interventions come less easily to light [than cases where CPS failed to act and a child was killed or harmed] . . . ."); *see also* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191–93 (1989) (discussing the "undeniably tragic" facts of the *DeShaney* case, in which Joshua DeShaney was beaten so severely that he suffered life-threatening brain hemorrhages, even though the county child protection agency knew the child was probably being abused by his father). One commentator has asserted that case readings are of little use in determining whether state intervention into a family was justified because case readings "reflect only the case worker's view of events" and do not fairly present the family's side of the situation. *See* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 133 (2001) ("Judging whether a family should have been destroyed based on reading a case record, is like judging the guilt or innocence of a criminal defendant based solely on reading an indictment.").

155. *See* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 140 (2001) (conceding that, although the evidence in favor of family preservation programs is considerable, "it would be ludicrous—and dangerous—to leap to the conclusion that therefore every family should be offered such services and no child should be placed in foster care").

156. Roughly half of the children who spend time in foster care are eventually returned to their natural homes, but even the children who are allowed to return home are likely to suffer from post-traumatic stress disorder as adults, in rates that are twice those that are found among combat veterans. *See* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 660–61 (2006) (discussing the lifelong psychological impact of a childhood stint in foster care). A carefully written service plan, designed and implemented with the help of the child's extended family and other members of the child's support system, would allow these children to remain in their natural homes instead, thus avoiding the psychological trauma of living in state custody. *Cf.* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 141–42 (2001) (analyzing the results of successful family preservation programs in Michigan, Utah,

When parents and the Department work together to create and implement an appropriate service plan, the parents can begin to take a proactive role in making their lives, and the lives of their children, better, happier, and more productive.[157] When the Department supplies a boilerplate or unworkable service plan—whether it is because of bureaucratic malfeasance or indifference, a bulging caseload, or an active attempt to stymie the parents' hopes for reunification of their family—the children are the ones who ultimately suffer.[158] An attorney's job is not always easy, but in this case, it is at least straightforward. We owe it to our clients, their children, and the state of Texas to ensure that each service plan prepared after the Department takes possession of a child is individualized, fair, and appropriate.[159]

Washington, California, North Carolina, and Minnesota).

157. *See* RENNY GOLDEN, DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM 16 (1997) (describing family preservation programs as an alternative to a child's removal into foster care that is more healing for the child and his family than the foster care system, creating an end result that will strengthen the natural family even more than the application of the services that family preservation programs provide).

158. *See id.* (explaining that children who are removed from their homes and placed into foster care often run away or begin to act out, behavior that is usually prompted by the child's desire to return to his natural home after the state has decided, without the input of the child or his family, that the natural home is abusive or neglectful).

159. *See* Ana M. Novoa, *Count the Brown Faces: Where Is the "Family" in the Family Law of Child Protective Services*, 1 SCHOLAR 5, 33 (1999) ("Analysis, critical thinking, and creativity of social workers, attorneys, and judges are essential if we are truly interested in what is best for the child.").