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# Holding on to What is Most Precious: Ohio Juvenile Law after In re C.R.

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**HOLDING ON TO WHAT IS MOST PRECIOUS: OHIO JUVENILE  
LAW AFTER *IN RE C.R.***

*Rose Semple, Esq.\**

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## I. INTRODUCTION

Following the decision in *In re C.R.*, it became far too easy for the state of Ohio to take people's children away from them. Gone are the days when only bad parents lose custody of their children. This is because the courts in Ohio no longer have to make sure that a parent is bad before it orders that legal custody be severed.<sup>1</sup> Stated differently: "when a juvenile court adjudicates a child to be abused, neglected, or dependent, it has no duty to make a separate finding at the dispositional hearing that a noncustodial parent is unsuitable before awarding custody to a nonparent."<sup>2</sup>

This is the Ohio Supreme Court's holding in *In re C.R.* If this rule seems unsettling, there are several explanations. One is that it is unconstitutional, as it falls short of the requirements for procedural due process. In many ways it is also unwise. Ohio juvenile courts are charged with considering the best interests of children above anything else.<sup>3</sup> Though the *In re C.R.* ruling may seem to adhere to this admirable ideal, a closer look shows that it has the capability of harming children by forever separating them from their fit, biological parents.

The justices of the United States and Ohio Supreme Courts have examined how best to ensure the best interests of children on numerous occasions.<sup>4</sup> They have generally decided that if a court is going to award legal custody of a child to a nonparent, that court must first make two separate findings: 1) that it is in the best interests of the child, and 2) that the child's parent is an unfit parent.<sup>5</sup>

The two-pronged test for legal custody was used in Ohio for many years. Then, in 2006, the Ohio Supreme Court's decision in *In re C.R.* changed the standard to a one prong test (the best interest of the child) in cases where the child has first been adjudged abused, dependent, or neglected.<sup>6</sup>

This article will endeavor to show that the Ohio Supreme Court's ruling in *In re C.R.* makes it too difficult for parents to retain custody of their own children. By exploring United States Supreme Court precedent, it will be shown that the rule emerging from *In re C.R.* does

1. See *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, at ¶ 1-24.

2. *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, at ¶ 30.

3. *Id.*

4. See generally *Lassiter v. Dep't of Soc. Serv. of Durham Cnty.*, N. C., 452 U.S. 18, 27 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

5. See *In re Perales*, 369 N.E.2d 1047 (Ohio 1977); See generally *Lassiter*, 452 U.S. at 27; *Santosky*, 455 U.S. 745; *Stanley*, 405 U.S. at 656.

6. See *In re C.R.*, 843 N.E.2d at ¶ 1-24.

not pass procedural due process muster. It will also be shown that the Ohio Supreme Court disregarded its own precedent and in doing so, created a rule that undermines the policies of its own juvenile law system. By providing the rudiments of juvenile jurisprudence, the facts and decision of *In re C.R.*, and an analysis that shows the Ohio Supreme Courts' oversights and errors in its decision, the author hopes to persuade Ohio lawmakers to reevaluate the way that juvenile court custody cases should be conducted in the future.

## II. BACKGROUND

In 1877, the Ohio Supreme Court issued a seminal juvenile law decision, *Clark v. Bayer*, in which it ruled that a parent is generally, but not absolutely, entitled to the custody of his or her children.<sup>7</sup> The child's welfare is the paramount consideration and the state may separate a child from her parents "if necessary to attain that end."<sup>8</sup> Since that time, it has been up to the courts and legislators to figure out how those difficult decisions should be made.<sup>9</sup>

This section will explain some basic principles and rules of juvenile law that derive from the United States Constitution and Ohio law. First, the article will explore U.S. Supreme Court rulings on constitutional due process and the importance of a parent's right to have custody of their children. This exploration will show that due process requires that a parent be found unfit before a court may sever legal custody of his children. The article will then explain the procedures used in juvenile court custody cases in Ohio, the formation of those rules and the way that they have changed since being formed. Through this analysis, the author hopes that the reader will begin to see how Ohio law changed after *In re C.R.* in such a way that renders the current procedures unconstitutional.

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7. See 32 Ohio St. 299, 306 (Ohio 1877). The Ohio Supreme Court held that when a father had given custody of his children to their grandfather, the father was not then allowed to take the children back by force without going through the court. "While the father has *prima facie* right to the custody of his minor children, his right is not an absolute and unqualified right. He may relinquish or forfeit it by contract, by his bad conduct, or by his misfortune in being unable to grant proper care and support." *Id.* at 307.

8. *Id.* at 305. After the affections of both child and adopted parent become engaged and a state of things has arisen which cannot be altered without risking the happiness of the child, and the father wants to reclaim it, the better opinion is that he is not in a position to have the interference of a court in his favor. His parental rights must yield to the feelings, interests, and rights of other parties acquired with his consent.  
*Id.* at 306.

9. See *id.*

A. *Parents have a Fundamental Right to the Care, Custody, and Control of their Children*

Juvenile law is a matter of state jurisdiction.<sup>10</sup> The Due Process Clause of the United States Constitution requires that certain safeguards be provided to those who enter that system.<sup>11</sup>

The United States Supreme Court announced in 1923 that the right to “establish a home and bring up children” is among the rights guaranteed by the Fourteenth Amendment to the United States Constitution.<sup>12</sup> The result of that recognition is that a parent's right to take care of his own children may not be interfered with by the state “without reasonable relation to some purpose within the competency of the state to effect.”<sup>13</sup>

In 1942, the U.S. Supreme Court fortified that right by stating that procreation is a basic civil right.<sup>14</sup> Further guidance was provided to the nation's juvenile courts two years later when the Court came out with their decision in *Prince v. Massachusetts*.<sup>15</sup> In *Prince*, the U.S. Supreme Court recognized that the care, custody, and control of children reside first in their parents.<sup>16</sup> The decision goes on to emphasize that states

10. OHIO REV. CODE ANN. § 2151 (West 2006). The juvenile laws of Ohio can be found in the Ohio Revised Code section 2151.

11. *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (citing *Vitek v. Jones*, 445 U.S. 480, 491 (1980)). The “minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.” *Id.*

12. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).

13. *Id.* at 400. The Court held that the Nebraska law that forbade the teaching of foreign languages to children was an unconstitutional burden on the rights guaranteed by the Fourteenth Amendment. *Id.*

14. *See Skinner v. Oklahoma*, 316 U.S. 535 (1942). The Court found it unconstitutional to punish criminals through sterilization. *Id.*

15. *See Prince v. Massachusetts*, 321 U.S. 158 (1944). The Court ruled that the state had the authority to interfere with a mother's ability to allow her child to sell religious magazines on the street. *Id.*

16. *Id.* at 166 (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)). “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.” *Id.*

have an interest in protecting children and may limit parental freedom when doing so is necessary for the welfare of a child.<sup>17</sup>

After *Prince*, a precarious balancing theory was established in custody cases.<sup>18</sup> The goal was to balance a parent's fundamental right to rear his own children against the state's interest in ensuring the wellbeing of those children.<sup>19</sup> Disregarding that necessary balance in favor of the state's interests would result in a violation of a parent's fundamental right to the care, custody and control of his children. The United States Supreme Court would later establish a clearer standard, which would specifically include an inquiry into the fitness of the parent.<sup>20</sup>

#### B. *Termination of Custody Proceedings Require Procedural Due Process Safeguards*

In 1981, the United States Supreme Court considered what procedures are constitutionally due to a parent at risk of losing custody of his or her children.<sup>21</sup> The United States Supreme Court explained that both the state and the parents have an interest in the outcome of a custody case, but at some point, their interests diverge.<sup>22</sup> This divergence is the reason parents need the protection of the Due Process Clause.<sup>23</sup>

One year later, the United States Supreme Court announced that a natural parent involved in a state's parental rights termination proceeding must be provided with fundamentally fair procedures.<sup>24</sup> The Court

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17. *Prince*, 321 U.S. at 165 (“It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. Between contrary pulls of such weight, the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on.”).

18. *See infra* pp. 901-02.

19. *Id.*

20. *See Stanley v. Illinois*, 405 U.S. 645 (1972).

21. *See Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 27 (1981). This case decided that an indigent parent who is in danger of losing custody is required to have appointed counsel only on a case-by-case basis. *Id.*

22. *Id.* at 28.

23. *Id.* (“The State's interests, however, clearly diverge from the parent's insofar as the State wishes the termination decision to be made as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause. But though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here....”),

24. *See Santosky v. Kramer*, 455 U.S. 745 (1982).

mentioned specifically that a parent's liberty interest does not diminish because they have failed to be a model parent.<sup>25</sup>

The Due Process Clause protects private citizens from the government's desire for efficiency and economy.<sup>26</sup> If a parent is not ensured appropriate due process and he loses custody of his child, other remedies, such as attempting to become guardian or adopted parent to the child, are not adequate.<sup>27</sup>

*C. Due Process Requires a Finding of Parental Unfitness in a Custody Dispute between a Parent and Nonparent*

Performing a due process analysis in the context of juvenile adjudications is fundamentally the same as that which is done in other types of cases. Due process requirements for a particular case depend on the facts and the nature of the interests of both the state and the private party.<sup>28</sup>

The U.S. Supreme Court's decision in *Mathews v. Eldridge* is a seminal ruling on what is necessary to ensure due process.<sup>29</sup> The Court held that "the fundamental requirement of due process is the opportunity

25. *Id.* at 753 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.").

26. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.").

27. *Id.* at 647 (citing *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969)) ("[W]e reject any suggestion that we need not consider the propriety of the dependency proceeding that separated the Stanleys because [Father] might be able to regain custody of his children as a guardian or through adoption proceedings . . . . This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone. Surely, in the case before us, if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.").

28. *See id.* at 650-51 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894 (1961)). That case explained that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation" and firmly established that "what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id.*

29. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). The Court held that a man who was denied welfare assistance by an administrative agency decision was not deprived of constitutional procedural due process. *Id.*

to be heard ‘at a meaningful time and in a meaningful manner.’”<sup>30</sup> They announced three factors that require consideration in order for the necessary procedural elements to be decided:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>31</sup>

The *Eldridge* factors were subsequently used by the United States Supreme Court in deciding what procedures were constitutionally due in termination of custody cases.<sup>32</sup>

The procedural safeguard that needs to be in place between the adjudication of abuse, dependency, or neglect and the disposition of custody to a nonparent is a finding of parental unfitness. Thirty years after *Prince*, the United States Supreme Court began in earnest to confront some of the ways the states were inadequately achieving the balance between a parent’s interest in raising his children and the state’s interest in insuring the welfare of those children.<sup>33</sup>

In 1972, the United States Supreme Court issued its opinion in *Stanley v. Illinois*.<sup>34</sup> That opinion strengthened a parent’s right to prevent the state from severing custody of his children and ruled that the Fourteenth Amendment required that a father be allowed a hearing on his fitness as a parent before being deprived of the custody of his children.<sup>35</sup> The United States Supreme Court reasoned that the interest of a parent in keeping his family intact is due high deference.<sup>36</sup>

*Stanley* did not disturb the state’s power to separate children from their neglectful parents.<sup>37</sup> Instead, the United States Supreme Court held

30. *Id.* at 333 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

31. *Mathews*, 424 U.S. at 335.

32. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 755 (1982).

33. *See Stanley v. Illinois*, 405 U.S. 645 (1972).

34. *Id.*

35. *See id.* The Court held that the Illinois statute that made it a presumption that an unwed father is unfit was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Id.*

36. *Id.* at 651.

37. *See id.* at 652.

that in order to do so, the state must use the appropriate means.<sup>38</sup> The means that the state must allow before severing a parent's custody include a finding that the parent is unfit.<sup>39</sup> The United States Supreme Court reasoned that the fitness adjudication would be dispositive in most cases because if the parent is found to be fit, then the state's interest in caring for the children is *de minimis*.<sup>40</sup>

Later, in *Troxel v. Granville*, the U.S. Supreme Court expanded its discussion of parental fitness, holding that “there is a presumption that fit parents act in the best interests of their children.”<sup>41</sup> In so holding, *Troxel* stands for the rule that if the parent is fit then there is probably no need for the state to interfere.<sup>42</sup> *Troxel* also stated that in custody termination cases, the Due Process Clause requires more than a judge deciding what is best.<sup>43</sup>

#### E. Juvenile Law in Ohio

In Ohio, the juvenile courts are required to have bifurcated hearings in abuse, neglect and dependency cases.<sup>44</sup> The first hearing is an adjudication of whether the child is abused, dependent, or neglected and the second hearing is a disposition on custody.<sup>45</sup> Such bifurcated hearings were first statutorily required in 1969.<sup>46</sup>

38. *Id.* at 652 (“But we are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible.”).

39. *Id.* at 658. The convenience of having a presumption of unfitness is “insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.” *Id.*

40. *Id.* at 652-53 (“What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.”); *id.* at 657-58.

41. *See* 530 U.S. 57, 58 (2000). The Court held that a Washington statute giving grandparents the right to visitation was too broad because it did not give due deference to the wishes of fit parents. *Id.*

42. *Id.* at 68-69 (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)) (“[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.”).

43. *Id.* at 72-73 (“[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a “better” decision could be made.”).

44. *In re Murray*, 556 N.E.2d 1169, 1173 (Ohio 1990). *See* Am. Sub. H.B. No. 320 (133 Ohio Laws, Part II, 2040, 2061); *cf.* Juv. R. 29 and 34, respectively, on the treatment of adjudicatory and dispositional hearings. *Id.*

45. *Id.*

46. *In re Murray*, 556 N.E.2d 1169, 1172-74 (Ohio 1990).

The Ohio Revised Code section 2151.23 gives Ohio juvenile courts the authority to make custody decisions in cases in which a child has been adjudicated dependent, neglected, or abused.<sup>47</sup> The statute does not offer criteria upon which the courts should base their decision of custody, so the Ohio Supreme Court established a two-prong test to use in deciding whether to award the custody of a child to a nonparent.<sup>48</sup> The two-prong test balances the interests of the parent with the welfare of the child.<sup>49</sup> The first prong asks what would be in the child's best interests.<sup>50</sup> The second prong asks whether the parent is unfit.<sup>51</sup> Unfitness is established if a preponderance of the evidence indicates "abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parent is otherwise unsuitable—that is, that an award of custody would be detrimental to the child."<sup>52</sup>

The foundation of the two-pronged test is found in both Ohio Supreme Court and United States Supreme Court jurisprudence.<sup>53</sup> Many decisions depend on the proposition that parents have a fundamental right to the care, custody, and control of their children.<sup>54</sup>

In 1926, Ohio's juvenile jurisprudence was expanded by the Ohio Supreme Court's decision in *Rarey v. Schmidt*.<sup>55</sup> In that case, the Ohio

47. OHIO REV. CODE ANN. § 2151.23 (West 2006). The relevant section states: Jurisdiction of juvenile court. (A) The juvenile court has exclusive original jurisdiction under the Revised Code as follows: (1) Concerning any child who on or about the date specified in the complaint, indictment, or information is alleged to have violated section 2151.87 of the Revised Code or an order issued under that section or to be a juvenile traffic offender or a delinquent, unruly, abused, neglected, or dependent child and, based on and *In relation* to the allegation pertaining to the child, concerning the parent, guardian, or other person having care of a child who is alleged to be an unruly or delinquent child for being an habitual or chronic truant; (2) Subject to divisions (G) and (V) of section 2301.03 of the Revised Code, to determine the custody of any child not a ward of another court of this state.

*Id.*

48. *See In re Perales*, 369 N.E.2d 1047 (Ohio 1977). That case held that a mother who signed a contract purporting to give custody of her child to the babysitter must have an unsuitability hearing before the court can sever her custody and award it to a nonparent. *Id.*

49. *Id.* at 1052.

50. *Id.* ("The welfare of the child is the interest given priority the 'first' interest.").

51. *Id.* As opposed to a custody proceeding in a divorce case, which would be under the guise of O.R.C. § 3109.04, a decision of custody between a parent and a nonparent requires more than an inquiry into the best interest of the child. *Id.*

52. *Id.* The Court states that the parents may be denied custody only if one of the circumstances on that list is found to exist. The Court further explained they did not intend a "finding of unsuitability to connote only some moral or character weakness." *Id.* at n.12.

53. *See generally* *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

54. *See generally* *Lassiter*, 452 U.S. at 27; *Santosky*, 455 U.S. 745; *Stanley*, 405 U.S. at 656.

55. *See Rarey v. Schmidt*, 154 N.E. 914 (Ohio 1926).

Supreme Court expounded on the use of dependency, abuse, and neglect adjudications in relation to custody issues.<sup>56</sup> The Court's jurisdiction to find a child to be abused, dependent, or neglected exists for the purpose of ensuring the welfare of the child, not for empowering nonparents against parents.<sup>57</sup>

#### F. *The Rule Begins to Change in Ohio*

The rule that there must be a finding of parental unfitness before custody can be awarded to a nonparent began to erode in Ohio with the Ohio Supreme Court's 1979 decision of *In re Cunningham*.<sup>58</sup> *Cunningham* held that once there has been an adjudication of dependency, there is no statutorily mandated requirement for a separate finding of parental unfitness before making an award of permanent custody to a nonparent.<sup>59</sup> The decision emphasizes that the best interest of the child are paramount and the parent's interest in custody must be subordinate to that.<sup>60</sup> Three years after the Ohio Supreme Court's decision in *In re Cunningham*, the United States Supreme Court reiterated their decisions that a parent has a fundamental right to the care, custody, and control of their children.<sup>61</sup> Over the next several

56. *See id.* The Supreme Court held that the trial court did not have jurisdiction to award custody of a child to the caregiver through a dependency adjudication when the mother was not given notice of the hearing. *Id.*

57. *Id.* at 522 (“That section and related sections were enacted to promote the health, morals, and well-being of dependent and otherwise unfortunate children, and, as an incident and means of accomplishing such purpose, the power was conferred upon certain courts to confide the custody elsewhere than with the parents. The legislation was intended as a shield for the infant, but not as a sword to be wielded by a stranger to deprive the parent of his day in court upon an issue of the custody of his minor child, and was not designed for the purpose of judicially creating a nominal custodian and empowering such custodian to surrender custody of the child to another without the knowledge or consent of the parent.”).

58. 391 N.E.2d 1034 (Ohio 1979). The Court purported not to have overruled *In re Perales* and cited that decision in explaining how the concepts of best interest and unfitness overlap. *See id.* at 1034 n.7 (quoting *In re Perales*, 369 N.E.2d 1047, 1051-52 (Ohio 1977)).

59. *See id.* at 102. The Court looked to O.R.C. 2151.353(D) and found no explicit requirement “that a finding of parental unfitness is a prerequisite to its implementation.” *Id.* at 103.

60. *Id.* at 106. The court quoted an Alabama ruling in stating that “the mere fact that a natural parent is fit, though it is certainly one factor that may enter into judicial consideration, does not automatically entitle the natural parent to custody of his child since the best interests and welfare of that child are of paramount importance.” *Id.* (citing *Willette v. Bannister*, 351 So. 2d 605, 607 (Ala. Civ. App. 1977)).

61. *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (quoting *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18, 27 (1981), quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

It is plain that a natural parent’s “desire for and right to” the companionship, care, custody, and management of his or her children’ is an interest far more precious than any property right. When the State initiates a parental rights termination proceeding, it seeks

years, the Ohio Supreme Court bolstered this rule with several opinions in which it states that a parents holds this fundamental and paramount right.<sup>62</sup>

In 2002, the Ohio Supreme Court again examined the necessity of a finding of parental unfitness before legal custody may be awarded to a nonparent in *In re Hockstok*.<sup>63</sup> It was decided that the dictates of the Fourteenth Amendment to the United States Constitution and precedent from both the United States and Ohio Supreme Courts require that "in custody cases between a natural parent and a nonparent, a parental unsuitability determination must be made and appear in the record before custody can be awarded to a nonparent."<sup>64</sup> The Ohio Supreme Court went on to state that a parent must be given only one unsuitability determination, and then the focus shifts to the best interests of the child.<sup>65</sup> As will be discussed in the next section, *In re C.R.* changed that rule completely.<sup>66</sup> The father in that case and parents in many cases to follow received no such determination.<sup>67</sup>

### III. STATEMENT OF THE CASE

This section will present the facts of the case of *In re C.R.*, the issue presented in that case, the parties' arguments, and the courts' decisions and dissents. The author hopes that by learning the facts of this particular case, which acutely altered juvenile law in Ohio, the reader may be better able to contextualize the issues of child custody, neglect, and parental unfitness. Learning the facts will also help the reader appreciate the complexities that often accompany these types of cases and realize the unfairness of Ohio's new rule, especially as applied to the case from which it originated.

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not merely to infringe that fundamental liberty interest, but to end it.

*Santosky*, 455 U.S. at 758-59.

62. *In re Murray*, 556 N.E.2d 1169, 1171-72 (Ohio 1990), *In re Shaeffer Children*, 621 N.E.2d 426, 429-30 (Ohio Ct. App., Van Wert County 1993), *In re Adoption of Mays*, 507 N.E.2d 453, 455-56 (Ohio Ct. App., Hamilton County 1986), *Masitto v. Masitto*, 488 N.E.2d 857, 859-60 (Ohio 1986)

63. 781 N.E.2d 971 (Ohio 2002). In that case, the Court decided that the lower court erred in awarding legal custody of a child to her grandparents because there was no finding that the mother was unfit. *Id.*

64. *Id.* at 246.

65. *Id.* at 247. Such a determination establishes or takes away "a parent's fundamental custodial rights." *Id.*

66. See *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, at ¶ 1-24.

67. *Id.*

The child C.R. was born in 2000.<sup>68</sup> She was a drug dependent infant.<sup>69</sup> On July 20, 2001, Cuyahoga County Department of Children and Family Services (CFS) removed C.R. from her mother's home.<sup>70</sup> Emergency custody was awarded to CFS and C.R. was placed in the care of her maternal uncle and his wife, Clifford and Stephanie Reust (Aunt and Uncle).<sup>71</sup> When this occurred, CFS did not know the identity of C.R.'s father.<sup>72</sup>

The child's father, Jesse Crowler (Father), was also unaware of his paternity at that time.<sup>73</sup> When Susan Reust (Mother) was pregnant with C.R., she lied to Father and told him that she was not pregnant.<sup>74</sup> Statements made by representatives of CFS also led Father to believe that he was not the father.<sup>75</sup>

Patricia Brennan (Paternal Grandmother) was in contact with baby C.R. because she was caring for Mother and Father's two older children and the siblings were able to visit with each other.<sup>76</sup> At some point before Aunt and Uncle motioned for custody of C.R., they told Paternal Grandmother that they believed Father was C.R.'s biological father.<sup>77</sup>

68. Brief of Appellants Clifford and Stephanie Reust at 4, *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188 (No. 2004-2031).

69. *In re C.R.*, No. 82891, slip op. ¶ 2 (Ohio App. 8 Dist. Aug 26, 2004), *rev'd*, *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188. The removal occurred when C.R.'s mother was arrested on drug charges. Brief of Appellants Clifford and Stephanie Reust, *supra* note 68, at 4. Shortly after birth, C.R. also contracted hepatitis and had to be hospitalized. *Id.* at n.1.

70. Merit Brief of Appellee Jesse Crowder at 1, *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188 (No. 2004-2031). C.R.'s mother had custody until this date. *Id.*

71. Brief of Appellants Clifford and Stephanie Reust, *supra* note 68, at 4. Pursuant to a probable cause hearing, C.R. was placed with her aunt and uncle immediately after being taken out of the custody of her mother. *In re C.R.* at ¶ 4. Emergency custody was not awarded to CSF until July 24, 2001. *Id.*

72. Merit Brief of Appellee Jesse Crowder, *supra* note 70, at 1. The father was listed as "John Doe, address unknown" on CFS's complaint. *Id.*

73. *Id.* at 8. Mother and Father had a long-standing inconstant relationship and had two older children together who were in the custody of their maternal grandmother. *In re C.R.*, No. 82891, slip op. ¶¶ 1-2 (Ohio App. 8 Dist. Aug 26, 2004), *rev'd In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188.

74. Merit Brief of Appellee Jesse Crowder, *supra* note 70, at 8. Father heard through a separate court proceeding that Mother might be pregnant. He called her and asked her if it were true and she said that it was ridiculous. "Mother testified that she lied to Father about being pregnant." *Id.*

75. *Id.* Paternal Grandmother told Father that a social worker from CFS informed her that the father of C.R. was "a man that Susan lived with or lived by, and was dead or no longer around." *Id.*

76. *In re C.R.*, No. 82891, slip op. ¶ 2.

77. *Id.* Aunt and Uncle testified to this in the trial. *Id.* Father's two older children also told him that he might be the father. Merit Brief of Appellee Jesse Crowder, *supra* note 70, at 8.

After hearing these rumors, Father decided to initiate genetic testing.<sup>78</sup> As a result of the genetic tests, paternity was established in November 2001.<sup>79</sup> Father hired a lawyer and filed a motion for temporary placement/custody and temporary orders and a motion for legal custody.<sup>80</sup> CFS filed a case plan that included requirements for Father, which he completed.<sup>81</sup> Aunt and Uncle also filed a motion for legal custody.<sup>82</sup>

An adjudicatory hearing on CFS's complaint for neglect was held on July 8, 2002.<sup>83</sup> Pursuant to that hearing, C.R. was adjudicated to be a neglected child.<sup>84</sup> Father was not referenced in CFS's complaint,<sup>85</sup> but appeared at the hearing with his attorney.<sup>86</sup>

#### A. *The Trial Court Awards Legal Custody to Aunt and Uncle*

A dispositional hearing was held over three days on October 15, 2002, November 21, 2002, and December 10, 2002.<sup>87</sup> The issue before the trial court was whether Aunt and Uncle, Paternal Grandmother, or

78. Merit Brief of Appellee Jesse Crowder, *supra* note 70, at 8. Establishment of paternity was delayed because of two failed attempts by Father to have CFS, Aunt, and Uncle appear for genetic testing. *Id.*

79. Brief of Appellants Clifford and Stephanie Reust, *supra* note 68, at 4. The genetic testing results showed a 99.8% possibility that Father was the biological father. Merit Brief of Appellee Jesse Crowder, *supra* note 70, at 8.

80. Merit Brief of Appellee Jesse Crowder, *supra* note 70, at 8.

81. *Id.* at 2. The case plan requirements for Father were to establish paternity and to attend parenting classes. *Id.* In addition to satisfying the requirements of the case plan, Father "visited the child regularly, bonded with the child, had a stable and appropriate home, an appropriate job and income, did everything [CFS] asked him to do, took parenting classes successfully, did a drug and alcohol evaluation, took random urine screens and attended domestic violence classes." *Id.*

82. *Id.* at 1.

83. *Id.* at 2. The adjudicatory hearing had been continued several times. *Id.*

84. *Id.* Mother consented to an amended complaint admitting neglect. Brief of Appellants Clifford and Stephanie Reust, *supra* note 68, at 10.

85. *Id.* Father's brief states that he did not admit to neglecting his minor child. Merit Brief of Appellee Jesse Crowder, *supra* note 70, at 2. In their brief, Aunt and Uncle argue that by failing to object to the finding of neglect at the trial, Father lost his right to require the court to make a finding that "the neglect was the result of action on behalf of both parents." Brief of Appellants Clifford and Stephanie Reust, *supra* note 68, at 13.

86. Brief of Appellants Clifford and Stephanie Reust, *supra* note 68, at 12.

87. Merit Brief of Appellee Jesse Crowder, *supra* note 70, at 8. In the Ohio Supreme Court decision, the judge chastises the trial court for taking two months to complete a three-day disposition, stating that "[i]t is a disservice to litigants and lawyers when judges or magistrates do not conduct hearings on consecutive days." *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, at ¶ 19.

Father should be granted legal custody of C.R.<sup>88</sup> After the trial, the court awarded legal custody to Aunt and Uncle.<sup>89</sup>

The trial court explained that it would be detrimental to remove the child from Aunt and Uncle's home where she had lived almost all of her life.<sup>90</sup> The Court also expressed doubt about whether Father was really committed to raising C.R.<sup>91</sup> The court found that any of the three moving parties could provide a good home for the child.<sup>92</sup> Ultimately, the trial court found by a preponderance of the evidence that it was in the best interests of C.R. to remain with her Aunt and Uncle, and so legal custody was awarded to them.<sup>93</sup> The trial court did not make a determination as to whether Father was an unsuitable or unfit parent.<sup>94</sup>

### *B. The Court of Appeals Reverses the Trial Court's Ruling*

Father appealed the trial court's disposition.<sup>95</sup> On appeal, the Eighth District Court of Appeals addressed the issue of whether "the trial court committed an error when it applied the 'best interest of the child' standard in making its decision to award custody to the aunt and uncle" rather than "finding that he was unsuitable as a parent before depriving him of custody."<sup>96</sup>

88. *In re C.R.* at ¶ 6. Paternal Grandmother moved for custody of C.R. six months after Father filed his motion for custody. *In re C.R.*, No. 82891, slip op. ¶ 3 (Ohio App. 8 Dist. Aug 26, 2004), *rev'd In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188.

89. *In re C.R.*, No. 82891, slip op. ¶ 5. The disposition was originally heard before a magistrate in the juvenile court.

90. *Id.* The Magistrate's report stated that "[i]f the child was moved from the [Aunt and Uncle] she could face confusion and/or loss of security and stability. This risk is not justified when the child is presently placed in a loving home which meets all the child's needs." *Id.*

91. *Id.* The decision stated that "Father's demeanor during trial indicated that he has not been committed to [the older two children] in the past and his present demeanor shows less than vigorous desire to take legal custody of [C.R.]. If the child was granted into the legal custody of dad it is questionable if father or [paternal grandmother] would raise the child." *Id.*

92. *Id.* ¶ 4. The Eighth District Court of Appeals decision expresses that Court's belief that the two days' worth of testimony showed that Father, Paternal Grandmother, or Aunt and Uncle could provide a good home for C.R. *Id.*

93. *Id.* ¶ 6.

94. *Id.* ¶ 20. "In fact, it expressly found that he could provide an adequate home for her."

95. *Id.* ¶ 7.

96. *Id.* ¶ 11. Specifically, the Appeals Court addressed three of Father's alleged grounds for reversal:

- 1) The juvenile court erred and abused its discretion by denying appellant-father his federal constitutional rights and fundamental liberty interest in the care, custody and management of his child as protected by the due process clause of the Fourteenth Amendment to the United States Constitution and by Section 16, Article I of the Ohio Constitution;
- 2) The juvenile court erred and abused its discretion by denying appellant-father custody of his minor child because the juvenile court failed to make a

The appeals court reversed the trial court's decision.<sup>97</sup> The appeals court found that the lower court had misinterpreted the case law and misapplied it to this case.<sup>98</sup> Specifically, the appeals court found that the applicable statute "does not provide a test or standard for the juvenile court to use to determine child custody cases," but that the case law offers an overriding principal.<sup>99</sup> That overriding principal, the appeals court said, is where there is a custody dispute between a parent and nonparent, the lower court must recognize the natural parent's fundamental right to the care, custody, and control of his or her child.<sup>100</sup>

The appeals court cited the 2002 Ohio Supreme Court decision, *In re Hockstok*, as the applicable precedent.<sup>101</sup> In quoting *Hockstok*, the appeals court stated that "[t]o protect [the natural parent's] fundamental interest, 'a finding of parental unsuitability has been recognized by this court as a necessary first step in child custody proceedings between a natural parent and nonparent.'"<sup>102</sup>

The appeals court pointed out that CFS's argument relied on a prior decision of the Eighth District Court of Appeals, *In re C.F.*, which held that "when a child has been adjudicated neglected, a suitability finding is not required."<sup>103</sup> The appeals court rejected that reasoning, viewed CFS's reliance as misplaced, and found that "the C.F. court misinterpreted the case law and its applicability to the situation at hand."<sup>104</sup> They held instead that *Hockstok* was controlling.<sup>105</sup>

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determination that appellant-father was unsuitable prior to awarding custody to a nonparent as recognized by the Ohio Supreme Court in *In re Hockstok*....; and 3) The juvenile court erred and abused its discretion in using the 'best interest' standard in making its custody determination in this matter and denying appellant-father custody based on this standard, and erred and abused its discretion in determining that the best interest of the minor child would be served by awarding legal custody to the maternal aunt and uncle.

*Id.* ¶¶ 7-11.

97. *Id.* ¶ 27.

98. *Id.* ¶ 19. The Court sustained all three of Father's assignments of error that they addressed. *Id.* ¶ 20.

99. *Id.* ¶¶ 17-18. The statute that the Court said was applicable in this case is OHIO REV. CODE ANN. § 2151.23(A)(2) (West 2006).

100. *In re C.R.*, No. 82891, slip op. ¶ 18 (quoting *In re Hockstok*, 98 Ohio St. 3d 238, 2002-Ohio-7208, 781 N.E.2d 971, at ¶ 15).

101. *Id.* ¶ 18 (quoting *In re Hockstok*).

102. *Id.* (quoting *In re Hockstok* at ¶ 18).

103. *Id.* ¶ 19 (citing *In re C.F.*, 8th Dist. No. 82107, 2003-Ohio-3260).

104. *Id.*

105. *Id.* ¶ 19.

One judge concurred in the court of appeal's majority decision and one judge dissented with a separate dissenting opinion.<sup>106</sup> In the dissenting opinion, the judge expressed the opinion that "there is no requirement that the trial court make an explicit finding of parental unsuitability before awarding custody to a nonparent in such a situation."<sup>107</sup> In addition, the dissenting judge stated that if a finding of unsuitability were necessary, there was sufficient evidence presented at trial to show that Father was an unsuitable parent.<sup>108</sup>

### C. *The Ohio Supreme Court Certifies the Issue and Reverses the Appeals Court*

After the Eighth District Court of Appeals decided in Father's favor, the Ohio Supreme Court certified the case in order to answer a question upon which the appellate courts had disagreed.<sup>109</sup> The Ohio Supreme Court examined whether: "In a case in which a juvenile court has adjudicated a child to be abused, neglected, or dependent, is the court also required to make a separate determination of parental unsuitability as to each parent at the dispositional hearing before awarding legal custody to a nonparent?"<sup>110</sup>

CFS, Aunt and Uncle, and Father all submitted briefs to the Court on this question. CFS took the position that because the best interests of the child are paramount, this is the only inquiry that needs to be made at disposition.<sup>111</sup> CFS relied on the Ohio Supreme Court's decision in *In re Cunningham* for the proposition that the parent's right to care, custody, and control must be subordinate to the child's best interests.<sup>112</sup> CFS

106. See *id.* ¶ 27. The Honorable Diane Karpinski, P.J. concurred and the Honorable Anthony O. Calabrese, Jr., J. dissented.

107. *Id.* ¶ 30 (citing *In re C.F.*, 8th Dist. No. 82107, 2003-Ohio-3260).

108. *Id.* ¶ 33 ("The evidence presented casts doubt on appellant's ability to provide for the best interests of C.R. Appellant has two other children that he was under order to visit while supervised. In addition, appellant was in arrears with child support regarding those children. Appellant did not keep in regular contact with C.R., did not offer financial support, and failed to visit her in the hospital. Appellant never sought custody of his two other children. The fact that appellant never sought custody of his two other children demonstrates to me his propensity to leave his children's upbringing to his mother, P.B.")

109. *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, at ¶ 1.

110. *Id.* at ¶ 8. Stated another way, the Court was answering the question "whether, before awarding legal custody to a nonparent, a trial court must first find the noncustodial parent unsuitable when a child has been determined to be abused, neglected or dependent." *Id.* at ¶ 1.

111. Merit Brief of Appellant Cuyahoga County Department of Children and Family Services at 3-4, *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188 (No. 2004-2031).

112. *Id.* at 3 (quoting *In re Cunningham*, 391 N.E.2d 1034, 1038 (Ohio 1979)). The brief quotes *Cunningham*, stating that "the fundamental or primary inquiry at the dispositional phase of

asserted that the Appellate Court misapplied *Hockstok*.<sup>113</sup> CFS asked that the Ohio Supreme Court decide that C.R. remain in the custody of Aunt and Uncle.<sup>114</sup>

Aunt and Uncle, through their brief, advocated for the same result as CFS, but their arguments were different.<sup>115</sup> First, Aunt and Uncle asserted that Father acquiesced to the finding that C.R. was neglected by both parents when he failed to object to the holding of neglect.<sup>116</sup> Next, they argued that a finding of neglect is equivalent to a finding that Father is an unsuitable parent and the purpose at the disposition is solely to decide the best interests of the child.<sup>117</sup> Lastly, Aunt and Uncle asserted that, based on the facts, Father is an unsuitable parent.<sup>118</sup>

Father argued in his brief that “a trial court must make an explicit finding that a parent is unsuitable before awarding legal custody to a nonparent.”<sup>119</sup> Father supported this contention by asserting that according to United States Supreme Court precedent, a natural parent has a fundamental right to the care, custody, and control of his child which is protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.<sup>120</sup> Father asserted that the evidence does not support a finding that he was an unfit parent.<sup>121</sup>

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these juvenile proceedings is not whether the parents of a previously adjudicated ‘dependent’ child are either fit or unfit.” *Id.*

113. *See id.* at 4-5. CSF asserts that *Hockstok* is limited to custody proceedings that fall under 2151.23(A)(2) (jurisdiction of the juvenile court to determine the custody of any child not a ward of another court of this state) whereas this case comes under the purview of 2151.23(A)(1) (concerning any child who is alleged to be delinquent, unruly, abused, neglected, or dependent). CFS also argues that a reversal of the appellate court will “promote the integrity of the legislative process and will preserve the unmistakable legislative intent which requires abuse, neglect and dependency matters to be decided on the best interests of the child.” *See id.* at 8.

114. *Id.* at 8.

115. Brief of Appellants Clifford and Stephanie Reust, *supra* note 68, at 11-31.

116. *Id.* at 12-13. Aunt and Uncle state in their brief that “[b]y failing to raise the issue at the adjudicatory hearing appellee waived his right to require a finding of suitability or unsuitability.” *Id.* at 14.

117. *Id.* at 13-14. Aunt and Uncle assert that implicit in the finding of neglect is “the suitability of the natural parents.” *Id.* at 13.

118. *Id.* at 30. “The Evidence was overwhelming and the Magistrate had the opportunity to view the demeanor of all the witnesses and observe their interaction. It was clear that the complained of behavior of appellee was likely to continue.” The complained of behavior was that Father did not care for his older children and had yet shown little interest in C.R. *Id.* at 10.

119. Merit Brief of Appellee Jesse Crowder, *supra* note 70, at 9. He also argues that distinction between 2151.23(A)(1) and 2151.23(A)(2) effects only jurisdiction, and not the substance of claims. *Id.* at 10. *See supra* note 113.

120. Merit Brief of Appellee Jesse Crowder, *supra* note 70, at 10-11 (citing *Troxel v. Granville*, 528 U.S. 1151 (2000)).

121. *Id.* at 16.

Ultimately, the Ohio Supreme Court decided in favor of CFS and Aunt and Uncle, holding that “when a juvenile court adjudicates a child to be abused, neglected, or dependent, it has no duty to make a separate finding at the dispositional hearing that a noncustodial parent is unsuitable before awarding legal custody to a nonparent.”<sup>122</sup>

The Ohio Supreme Court proclaimed that there is no statutory obligation to find unfitness when there has been an adjudication of abuse, dependency, or neglect.<sup>123</sup> It reasoned that the decision that a child is abused, dependent, or neglected “implicitly involves a determination of the unsuitability of the child’s custodial and/or noncustodial parents.”<sup>124</sup> The Ohio Supreme Court limited their holding to proceedings for legal custody.<sup>125</sup>

Three justices concurred and three justices dissented in the majority’s decision.<sup>126</sup> In his dissenting opinion, Justice Pfeifer writes that the majority’s holding is “too sweeping and does not allow the trial judge discretion to determine that a non-custodial natural parent is suitable.”<sup>127</sup> The dissent also echoed Father’s brief in asserting that a natural parent has a fundamental right to the care, custody, and control of his natural children which is protected by the Fourteenth Amendment.<sup>128</sup>

The dissent avers that at no point in the proceedings were Father’s constitutional rights to the custody of his child appropriately considered.<sup>129</sup> Finally, Justice Pfeifer expressed concern at the far reaching consequences of this decision, “and the negative effect it will

122. *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, at ¶ 24.

123. *Id.* at ¶ 20-21.

124. *Id.* at ¶ 23.

125. *Id.* at ¶ 17. “The important distinction is that an award of legal custody of a child does not divest parents of their residual parental rights, privileges, and responsibilities.” The Court also states that an adjudication of abuse, dependency, or neglect does not “permanently foreclose the right of either parent to regain custody, because it is not a termination of all residual parental rights, privileges, and responsibilities, and therefore a motion for a change of custody could be filed in a proper case in accordance with law.” *Id.* at ¶ 23 (citing OHIO REV. CODE ANN. § 2151.42 (West 2006)).

126. *Id.* at ¶ 24. The Honorable Justice O’Donnell wrote the majority opinion. The Honorable Chief Justice Moyer, Justice O’Connor and Justice Lanzinger concurred. The Honorable Justice Resnick, Justice Pfeifer, and Justice Lundberg Stratton dissented. Justice Pfeifer wrote the dissenting opinion. *Id.*

127. *Id.* at ¶ 25.

128. *Id.* at ¶ 26. The Justice cites *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) and *In re Murray* 556 N.E.2d 1169, 1171-72 (Ohio 1990).

129. *In re C.R.*, 843 N.E.2d at ¶ 29. (“[W]hen his child was adjudicated neglected, his constitutional rights transmogrified into ‘residual rights,’ even though his behavior did not contribute to the adjudication of neglect.”).

have on noncustodial parents seeking custody of their natural children.”<sup>130</sup>

#### IV. ANALYSIS

This section will first analyze the unconstitutional nature of the *In re C.R.* holding by showing that the United States Supreme Court has explicitly ruled that an unfitness standard is necessary before the court rules against a parent in a custody case. In addition, a close look at the factors used by the United States Supreme Court in deciding whether certain procedures meet procedural due process requirements will show that the procedures used by the Ohio juvenile courts fall below the constitutionally mandated standard.

The article will then briefly explore the way in which the *In re C.R.* ruling is overreaching. Though the author sees the ruling as unconstitutional as a whole, there are independent reasons why it should not be applied to dependency cases in particular.

There follows a discussion of several of the policies upon which juvenile law is bolstered and the ways in which the rule from *In re C.R.* fails to uphold or further those policies. Finally, the author asserts that the *C.R.* rule does not allow an adequate safeguard for the parents against state power. By showing that a parental unfitness prong is an essential part of the custody process and that a finding of abuse, neglect, or dependency is not the same as a finding of unfitness, the author portrays the defective nature of the procedures currently being used by the Ohio juvenile courts.

##### A. *In re C.R. is Contrary to United States Supreme Court and Ohio Supreme Court Precedent*

The United States Supreme Court has established a clear policy that a finding of parental unfitness is necessary before the state can sever a parent’s custody.<sup>131</sup> Justice Stevens expounded on this policy in 1993 when he explained that no law “authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit, simply because they may be better able to provide for her.”<sup>132</sup>

It was almost one hundred years ago that the United States Supreme Court announced that a parent’s right to care, custody, and control of the

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130. *Id.* at ¶ 30.

131. *See Stanley v. Illinois*, 405 U.S. 645 (1972).

132. *DeBoer v. DeBoer*, 509 U.S. 1301, 1302 (1993) (Stevens, Circuit Justice) (denying adoptive parents’ application for a stay in a case where a child was wrongfully adopted).

parent's children is protected by the Fourteenth Amendment to the United States Constitution.<sup>133</sup> Thereafter, a parent's right to the care, custody, and control of her child could not be deprived without due process of the law.

Precisely what is required to satisfy due process in regard to parental rights has been examined many times in the past one hundred years.<sup>134</sup> For one, parents need fundamentally fair procedures.<sup>135</sup> The United States Supreme Court has pointed out that efficiency and economy are not adequate reasons to deprive a parent of due process protection.<sup>136</sup>

More specifically, the United States Supreme Court has established that constitutional due process requires a finding of parental unfitness in a custody dispute between a parent and nonparent.<sup>137</sup> If one applies the *Eldridge* factors to a custody dispute, it is clear that an unfitness finding is necessary.<sup>138</sup>

First, the private interest that will be affected by the official action is the parent's fundamental right to the care, custody, and control of her child.<sup>139</sup> In addition, some would argue that the child also has an inherent right to be cared for by her biological parent.<sup>140</sup> It is already well established that the parent's right to their child is extremely valuable and deserving of protection.<sup>141</sup> The right of the child to stay with her parents is held by such a vulnerable party (the child) that the state must take extra caution, restraint and wisdom when exercising its power to take that right away from that child.<sup>142</sup>

133. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

134. See generally *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley*, 405 U.S. at 656 (1972).

135. See *Santosky*, 455 U.S. 745.

136. *Stanley*, 405 U.S. at 656.

137. See *id.*

138. See *supra* note 29 and accompanying text.

139. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

140. The Children's Commission for Wales created a list of children's rights, under which Article 9 includes: "You should not be separated from your parents unless it is for your own good." *List of Rights*, CHILDREN'S COMMISSION FOR WALES, <http://www.childcomwales.org.uk/en/know-your-rights-list> (last visited Jan. 27, 2011).

141. The parent's right to care, custody, and control is an established fundamental right under the United States Constitution. *Meyer*, 262 U.S. at 399.

142. *Convention on the Rights of a Child*, UNICEF, [http://www.unicef.org/crc/index\\_protecting.html](http://www.unicef.org/crc/index_protecting.html) (last visited Jan. 27, 2011). "Human rights apply to all age groups; children have the same general human rights as adults. But children are particularly vulnerable and so they also have particular rights that recognize their special need for protection." *Id.*

The second factor requires analysis of whether there is a high risk of erroneous deprivation of such interest through the procedures used and whether there may be probable value in additional procedures.<sup>143</sup> The ruling of *In re C.R.* fails in this factor.

The purpose of taking a child away from her parents is to keep the child safe when she will not be safe at home. When the court does not require a showing of parental unfitness, it jumps from the finding of abuse, dependency, or neglect to the finding that the child will not be safe at home without making the necessary inquiry that connects the two issues.<sup>144</sup> The finding of abuse, dependency, or neglect is a finding (or a plea) as to the condition of the child at one point in time that could be caused by a multitude of factors that may have little to do with whether the child will be safe at home in the future.<sup>145</sup> The finding of unfitness is a finding about whether the child will be safe at home with the parent for the future.<sup>146</sup> When the court makes that leap of equating the two findings, the risk of erroneously finding that the child will not be safe at

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143. *Supra* note 29 and accompanying text.

144. *See In re Perales*, 369 N.E.2d 1047 (Ohio 1977); *See Generally* *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

145. OHIO REV. CODE ANN. § 2151.03 (West 2006) (“(A) As used in this chapter, ‘neglected child’ includes any child: (1) Who is abandoned by the child’s parents, guardian, or custodian; (2) Who lacks adequate parental care because of the faults or habits of the child’s parents, guardian, or custodian; (3) Whose parents, guardian, or custodian neglects the child or refuses to provide proper or necessary subsistence, education, medical or surgical care or treatment, or other care necessary for the child’s health, morals, or well being; (4) Whose parents, guardian, or custodian neglects the child or refuses to provide the special care made necessary by the child’s mental condition; (5) Whose parents, legal guardian, or custodian have placed or attempted to place the child in violation of sections 5103.16 and 5103.17 of the Revised Code; (6) Who, because of the omission of the child’s parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child’s health or welfare; (7) Who is subjected to out-of-home care child neglect.”); OHIO REV. CODE ANN. § 2151.031 (West 2006) (“As used in this chapter, an ‘abused child’ includes any child who: (A) Is the victim of ‘sexual activity’ as defined under Chapter 2907. of the Revised Code, where such activity would constitute an offense under that chapter, except that the court need not find that any person has been convicted of the offense in order to find that the child is an abused child; (B) Is endangered as defined in section 2919.22 of the Revised Code, except that the court need not find that any person has been convicted under that section in order to find that the child is an abused child; (C) Exhibits evidence of any physical or mental injury or death, inflicted other than by accidental means, or an injury or death which is at variance with the history given of it. Except as provided in division (D) of this section, a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody, or control, or person in loco parentis of a child is not an abused child under this division if the measure is not prohibited under section 2919.22 of the Revised Code. (D) Because of the acts of his parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child’s health or welfare. (E) Is subjected to out-of-home care child abuse.”); OHIO REV. CODE ANN. § 2151.04 (West 2006) (defining dependent child).

146. *See In re Perales*, 369 N.E.2d 1047 (Ohio 1977).

home is substantial. An additional safeguard to help the court decide whether the parent is unfit would substantially improve the chance that the court will make the correct finding of whether the child will be safe at home with her parents for the future.

The third *Eldridge* factor is to ask where the government's interests lie in regard to requiring the additional procedure.<sup>147</sup> In this context, the government has a high interest in making court proceedings economically efficient.<sup>148</sup> Requiring one less finding by the court before it severs a parent's legal custody of her child would be more economically efficient. By equating abuse, dependency, and neglect with parental unfitness, the court is required to do less fact checking, interview fewer witnesses, and spend less time sitting in the courtroom. Court appointed guardian ad litem and lawyers have less to investigate and argue about, so their fees are lower.<sup>149</sup> Altogether, cutting one prong out of the previously two-pronged test could save the government several hundred dollars on each case.<sup>150</sup> Unfortunately, for the state coffer, however, efficiency and economy are not adequate reasons to deprive a parent of due process protection.<sup>151</sup>

As will be discussed in the following pages, the government has no interest in conducting custody disputes if a parent is fit to care for their child.<sup>152</sup> The government, therefore, has a high interest in determining whether the parent is fit because if he is, then the custody dispute and drain on state resources can end.<sup>153</sup> The third *Eldridge* factor for sufficient due process is satisfied only if there is a requirement for finding parental fitness.

Application of the *Eldridge* factors make it clear that a finding of parental fitness or unfitness is required in order to afford a parent her constitutional right to due process. Until the ruling in *In re C.R.*, in cases where the United States Supreme Court and Ohio Supreme Court

147. See *supra* note 29 and accompanying text.

148. Lori Lee Fehr, *Dependency: The Unknown Battlefield*, FLORIDA BAR NEWS, Sept. 15, 2003, available at [http://goliath.ecnext.com/coms2/gi\\_0199-3397696/Dependency-the-unknown-battlefield.html](http://goliath.ecnext.com/coms2/gi_0199-3397696/Dependency-the-unknown-battlefield.html) (last visited Jan. 27, 2011). "Dependency hearings fill the dockets of judges. In one afternoon session as many as 50 judicial review hearings are held. It is not unheard of for hearings to go on past 8 p.m." *Id.*

149. *Id.* "These attorneys are the lowest paid state employed attorneys; they have large caseloads, some as high as 250 cases; they work long hours; have an extremely limited budget for support services; are publicly scrutinized and criticized, and yet are driven by the children whose lives they advocate for relentlessly." *Id.*

150. See *id.*

151. *Stanley v. Illinois*, 405 U.S. 645 (1972).

152. See *infra* pp. 919-23

153. See *id.*

asked that question, those Courts explicitly came to the same conclusion.<sup>154</sup>

In addition to disregarding federal constitutional due process requirements, the *C.R.* Court did not follow its own precedent.<sup>155</sup> The Ohio Supreme Court does not purport in its opinion to overrule precedent.<sup>156</sup> The Ohio Supreme Court had little power to overrule the United States Supreme Court's ruling in *Stanley v. Illinois* or *Troxel v. Granville*, which both emphasized how necessary it is to find parental unfitness before a court could assign the care, custody, or control of a child to a nonparent.<sup>157</sup> The Ohio Supreme Court got around that barrier by equating the finding of abuse, neglect, or dependency with parental unfitness, an equation that is hugely flawed.<sup>158</sup>

The Ohio Supreme Court established a clear two-prong test in *In re Perales*.<sup>159</sup> If a court was going to award custody of a child to a nonparent the court must find: 1) that it is in the best interest of the child and 2) that the parent is an unfit parent.<sup>160</sup> *Perales* was consistent with United States Supreme Court rulings and it reinforced the policies of the Ohio juvenile justice system, which will be discussed in the following pages.<sup>161</sup>

In that case, a mother had signed a contract purporting to give custody of her child to the babysitter.<sup>162</sup> As in many cases of this type, the mother in *Perales* may have been in an abusive relationship.<sup>163</sup> She testified that she feared that if she brought the child home, her husband might hurt the baby.<sup>164</sup> The mother took the child to a sitter and left the

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154. See *In re Perales*, 369 N.E.2d 1047 (Ohio 1977); see also *Stanley*, 405 U.S. 645.

155. See *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, at ¶ 1-24.

156. *Id.*

157. See *Stanley*, 405 U.S. 645; *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

158. See *In re C.R.*, 843 N.E.2d at ¶ 1-24.

159. See *In re Perales*, 369 N.E.2d 1047.

160. See *id.*

161. See *id.*

162. See *id.* at 1047.

163. See *id.* and *infra* note 164.

164. *In re Perales*, 369 N.E.2d at 1048. With the realization in recent years that children who witness domestic violence are, themselves, victims of domestic violence, came the "unanticipated effect" that children were often removed from their mother's custody after their mother had successfully extricated herself from the abusive relationship. Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 218 (2004). This cycle has been dubbed "double abuse." *Id.*

baby there for roughly two years.<sup>165</sup> During that time, the mother signed an agreement purporting to give custody of the child to the babysitter.<sup>166</sup>

One must ask how an Ohio Supreme Court would rule in the case of *In re Perales* if it were presented to a bench today. After mother's husband moved out, she presented a motion requesting the Court to order the babysitter to return the child.<sup>167</sup> First, would the court have found the child to be abused, dependent, or neglected at any time before such motion? Under Ohio Revised Code section 2151.03(A), a neglected child is any child "(1) Who is abandoned by the child's parents, guardian, or custodian."<sup>168</sup> From the limited facts given in the case, it appears that the child in *In re Perales* would qualify as a neglected child.<sup>169</sup>

If the battle over custody between the babysitter and the mother of baby Perales came to an Ohio court today and there had already been a finding that the baby had been neglected by her mother, then no finding that the mother is unfit would be necessary before the court could award custody to the babysitter.<sup>170</sup> The only finding that the court would need to make is whether it is in the best interests of the child to stay with the babysitter, who raised her all her life, or go back to her mother, with whom she had not lived for two years.<sup>171</sup> It would be no surprise for the court to find that it is in the best interest of baby Perales to be placed in the legal custody of her babysitter, but that would be the opposite conclusion that the court came to in that case, which is still good law in Ohio.<sup>172</sup>

The Ohio Supreme Court ruled in *In re Perales* that custody could not be awarded to the nonparent without first making a finding of parental unsuitability or unfitness.<sup>173</sup> *Perales* was rightly decided because it is consistent with United States Supreme Court precedent.<sup>174</sup> The ruling in *In re C.R.* creates a new standard that, if applied to *In re Perales*, could come out with a completely different outcome.<sup>175</sup> *Perales*

165. See *In re Perales*, 369 N.E.2d at 1048.

166. See *id.*

167. See *id.*

168. OHIO REV. CODE ANN. § 2151.03 (A)(1) (West 2006).

169. See *id.*

170. See *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, at ¶ 1-24.

171. See *id.*

172. See *In re Perales*, 369 N.E.2d 1047.

173. *Id.*

174. See *Stanley v. Illinois*, 405 U.S. 645 (1972); *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

175. See *In re C.R.*, 843 N.E.2d at ¶ 1-24.

was rightly decided and the *C.R.* Court was wrong to decide contrarily.<sup>176</sup>

The Ohio Supreme Court in *In re C.R.* distinguished itself from *In re Perales* by explaining that it is not eliminating the prong of parental suitability, just replacing it with the finding of abuse, neglect, or dependency, if there has been one.<sup>177</sup> The problem with this, as will be explained in this article, is that the abuse, neglect, and dependency are not the same as parental unfitness.<sup>178</sup> It is an inadequate replacement. Having an inadequate replacement is unacceptable because, as pointed out by the application of the *Eldridge* factors, the finding of parental unfitness is a necessary part of the parent's due process.<sup>179</sup>

The post-*C.R.* procedure for awarding custody of a child to a nonparent violates the federal constitution and is contrary to Ohio Supreme Court precedent. As Ohio case law confirms, the strictures of procedural due process require that a finding of parental unfitness be made before a court can award custody of a child to a nonparent.<sup>180</sup>

#### B. *The Ruling in In re C.R. is Overreaching*

Dependency is the least extreme of the three classifications used by Ohio juvenile courts to categorize children who are in need of the state's services.<sup>181</sup> Under the Ohio Revised Code, the definitions of abuse and neglect include both explicit and implicit references to the child being in that condition by the fault of the parent.<sup>182</sup> The definition of a delinquent child, on the other hand, explicitly excludes situations where the parent is at fault.<sup>183</sup>

The *In re C.R. Court* ruled that the court does not need to make a separate finding of parental unfitness before awarding custody of a child to a nonparent when there has previously been a finding that the child was abused, neglected, or dependent.<sup>184</sup> *C.R.* was adjudicated a neglected child.<sup>185</sup> The rule of the case is overreaching because it states

176. *See infra*, pp. 919-29.

177. *See infra*, pp. 919-29.

178. *See supra* note 29 and accompanying text.

179. *See supra* note 29 and accompanying text.

180. *See In re Perales*, 369 N.E.2d 1047 (Ohio 1977).

181. *See supra* note 145 and accompanying text.

182. *See supra* note 145 and accompanying text.

183. OHIO REV. CODE ANN. § 2151.04(A) (West 2006).

184. *See In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, at ¶ 1-24.

185. *See id.*

that findings of dependency will also allow the court to forego making a finding that the child is unfit before awarding custody to a nonparent.

This differentiation is very important, especially in the context of a subsequent custody battle. The Ohio Supreme Court in *In re C.R.* replaced the parental unfitness prong of the test with the finding of abuse, neglect, or dependency.<sup>186</sup> This prong was originally meant to focus on the parent's ability to parent.<sup>187</sup> In that context, there may be a big difference between whether the child was abused or neglected by the fault of their parent or if she was dependent through no fault of the parent.

The inquiry into parental unfitness should never have been equated by the *In re C.R.* court to a finding of abuse, neglect, or dependency.<sup>188</sup> By stretching their ruling in a case that involved neglect to cover cases that involve dependency, the Ohio Supreme Court not only made a faulty ruling, it also stretched that faulty ruling into cases where it should never apply.

### C. *Parens Patriae*

According to the age old theory of *parens patriae*, the government is empowered to use its authority to protect those who cannot protect themselves.<sup>189</sup> The theory depends on a viewpoint of society that is patriarchal.<sup>190</sup> In that viewpoint, the government is the father of all the people it governs.<sup>191</sup> Just as fathers must make decisions to ensure the wellbeing of their children, the United States government is empowered to decide what should be done to protect those who are not otherwise cared for.

The government's fathering functions are especially important to children.<sup>192</sup> Most societies work upon the assumption that people below

186. *See id.*

187. *See In re Perales*, 369 N.E.2d 1047 (Ohio 1977).

188. *See supra* note 186.

189. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004). *Parens Patriae* extends back to the time of kings and means literally that the king is the father of the country. "*parens patriae* (par-enz pay-tree-ee or pa-tree-I). [Latin in "parent of his or her country"] 1. The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves <the attorney general acted as *parens patriae* in the administrative hearing>; in Roman law, the emperor." *Id.*

190. *In re C.R.*, 843 N.E.2d at ¶ 30.

191. *Id.*

192. SUSAN REACH WINTERS & THOMAS D. BALDWIN, 11 N.J. PRAC. FAMILY LAW AND PRACTICE § 26.6 (2010). The right of *parens patriae* protects children and prohibits their abuse and neglect. *Id.*

a certain age need the care and influence of an adult.<sup>193</sup> This is certainly true for very young children and it is generally accepted that the need for adult supervision extends to young people until they are nearly out of their teenage years.

In Ohio, a person is a juvenile until he or she is eighteen.<sup>194</sup> If a child under eighteen is not being adequately cared for by her parents, then the state is authorized to step into the role of a parent and make decisions for the welfare of that child.<sup>195</sup> The power of the government to step into the parents' shoes is known as "*in loco parentis*," which literally means "place of a parent."<sup>196</sup>

The state has an interest in making decisions for children in lieu of the children's parents when the parents are not able or willing to take adequate care of their children. The state's interest has several facets. One facet is that the state has a high interest in children attending school and being able to positively contribute to society.<sup>197</sup> The state is also interested in children having a role model to teach them that it is wrong to break the law, so that they will grow up to be law-abiding citizens.<sup>198</sup> Another theory is that a child owes allegiance to her country from the moment that she is born and so she is entitled to the protection of that government.<sup>199</sup> Lastly, and most importantly, people are compelled to

193. See generally Vincent R. Johnson & Claire G. Hargrove, *The Tort Duty of Parents to Protect Minor Children*, 51 VILL. L. REV. 311 (2006) (arguing that parents should have an affirmative duty in tort to protect their children from harm).

194. OHIO REV. CODE ANN. §2151.353(E)(1) (West 2006).

195. *Id.* The juvenile court retains jurisdiction over a child until he is eighteen unless the child is developmentally disabled, mentally retarded or physically impaired, in which case the juvenile court retains jurisdiction until the age of twenty-one. *Id.*

196. BLACK'S LAW DICTIONARY 803 (8th ed. 2004) ("*in loco parentis* (in loh-koh p<<schwa>>-ren-tis), *adv. & adj* [Latin 'in the place of a parent'] Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent."). For example, when a child is at school, her teacher is regarded to as acting in loco parentis. *Id.*

197. Ibtisam S. Barakat & Janet A. Clark, *Positive Discipline and Child Guidance*, UNIVERSITY OF MISSOURI EXTENSION (revised Apr. 2007), available at <http://extension.missouri.edu/publications/DisplayPub.aspx?P=GH6119> (last visited Jan. 27, 2011). Giving a child positive influence and teaching him discipline are crucial to allowing him to become able to make thoughtful choices. *Id.*

198. Ariel Ledesma, *On Teaching Children the Rules and the Law*, HOUSTON TEACHERS INSTITUTE (2004), available at <http://hti.math.uh.edu/curriculum/units/2004/08/04.08.05.php> (last visited Jan. 27, 2011). In learning about the law, children begin to understand what will happen if they transgress the law. *Id.*

199. *The Government's Duty to Protect the Lives of its Citizens under the Due Process Clause*, EXPLORING CONSTITUTIONAL CONFLICTS, available at <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/stateactionprotect.html> (last visited Jan. 27, 2011). The question of whether the government owes a duty of affirmative protection without a special relationship was answered in the negative in the case of *DeShaney vs Winnebago Department of Social Service*. See *DeShaney v.*

ensure the wellbeing of those who cannot care for themselves because it is human nature and the mark of a civil society that the strong should care for the weak.

The government acts for the wellbeing of children through all three of its branches.<sup>200</sup> In Ohio, the legislature has devoted nearly an entire section of the Ohio Revised Code to juvenile matters.<sup>201</sup> There are juvenile courts throughout the state that handle juvenile delinquency and dependency, abuse, and neglect cases.<sup>202</sup> In a dependency, abuse, and neglect case, the juvenile court decides whether to classify a child under one of those three categories. If a classification is appropriate, the court then decides what should happen to ensure the welfare of the child.<sup>203</sup> Members of the executive branch, such as the police, do what needs to be done on the outside to make sure the court's order is followed.

The most extreme act that the government is empowered to do to protect children is to take children out of the custody of their parents against the parents' wills.<sup>204</sup> The legislature has recognized its responsibility to protect children by drafting legislation that requires a finding of the best interest of the child before a court is authorized to transfer legal custody away from a parent.<sup>205</sup> The Ohio Supreme Court later interpreted the legislation to require a two-prong test of best interest as well as parental unfitness before custody may be transferred.<sup>206</sup>

The decision to require this specific two-pronged finding is in line with the rationale that the government is allowed to intercede on behalf of a child in the first place. In order to satisfy all of the interests that the state has in the proper care of its children, each child must have a willing and capable caretaker.<sup>207</sup> In the most common and best case situations, a child's parents will fill that role. If the child's parent is willing and able to fill that role, then the state does not have a reason or justification for

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Winnebago County Dep't of Soc. Serv., 489 U.S. 189 (1989). The question is still up for debate, though, as evidenced by Justice Blackmun's dissent in that case where he states that he would have held that the Due Process Clause of the Fourteenth Amendment required this affirmative duty. *See id.* at 212-13.

200. *See infra* pp. 27-28.

201. *See* OHIO REV. CODE ANN. § 2151 (West 2006).

202. *See id.* § 2151.23.

203. *Id.*

204. *In re Hayes*, 679 N.E.2d 680, 682-83 (Ohio 1997) (citing *In re Smith*, 601 N.E.2d 45, 54 (Ohio Ct. App. 6th 1991)). "Permanent termination of parental rights has been described as "the family law equivalent of the death penalty in a criminal case." *Id.*

205. OHIO REV. CODE ANN. § 2151.42(A) (West 2006).

206. *See In re Perales*, 369 N.E.2d 1047 (Ohio 1977).

207. Ibtisam S. Barakat & Janet A. Clark, *Positive Discipline and Child Guidance*, University of Missouri Extension (revised April 2007), available at <http://extension.missouri.edu/publications/DisplayPub.aspx?P=GH6119> (last visited Jan. 27, 2011).

stepping into the parent's role. The state needs to be in *loco parentis* only when the parent is not willing or able to be an adequate parent.

The state has an adverse interest in filling the role of parents who are fit to fill the role themselves. The separation of a child from her parents is very traumatic for all parties involved.<sup>208</sup> The system that the child enters once out of the parent's care and into the government's is praiseworthy but imperfect.<sup>209</sup> In addition, the cost upon the state to provide for the care of children who could be adequately cared for by their parents is an unnecessary drain to the state's economy.<sup>210</sup>

For these reasons, the state has a very high interest in requiring the unfitness prong of the two-pronged test. Furthermore, if a parent is found to be fit, then the state no longer has any interest in acting in *loco parentis*.

The state serves an important function when it intercedes in a family to make decisions for the care of a child when that child will otherwise not receive necessary care.<sup>211</sup> The important function is only served, however, when it is truly necessary for the state to intercede. If a child will be properly cared for by her parents, then the state's interference will result in many negative consequences to child, parents and state. The unfitness factor of a custody decision is the protective tool that keeps that from happening. Without the unfitness factor, the state's important function would cease to be efficient or effective.

208. Karen DeBord, Ph.D., *When Parents Must Go Away: Staying Connected to the Children*, NORTH CAROLINA STATE UNIVERSITY COOPERATIVE EXTENSION, available at <http://www.ncpen.org/Separation.pdf> (last visited Jan. 27, 2011). "Children who are separated from their parents can exhibit anxiety, withdrawal, anger, aggression, and other disorders that affect socialization and ultimate school performance." *Id.*

209. Lisa Kim Bach, *Child Welfare: Inaction on Problems with Child Welfare System Unacceptable, Assemblywoman Warns*, REVIEWJOURNAL.COM (Feb. 04, 2007), [http://www.reviewjournal.com/lvrj\\_home/2007/Feb-04-Sun-2007/news/12038818.html](http://www.reviewjournal.com/lvrj_home/2007/Feb-04-Sun-2007/news/12038818.html) (last visited Jan. 27, 2011). The article in the Las Vegas Review Journal reports that in Clark County Nevada in 2006 four or more children who had been taken into protective custody had died, one foster child had gone missing and two cases were filed alleging child endangerment. *Id.*

210. *Study Notes Child Welfare Problems*, TRAVERSE CITY RECORD-EAGLE.COM, (Sept. 30, 2009), available at <http://record-eagle.com/statenews/x546321745/Study-notes-child-welfare-problems> (last visited Jan. 27, 2011).

211. Committee on Professional Practice and Standards, *Guidelines for Psychological Evaluations in Child Protection Matters*, 54 AMERICAN PSYCHOLOGIST 586 (1999), available at <http://www.apa.org/practice/guidelines/child-protection.pdf>. "According to the U.S. Advisory Board on Child Abuse and Neglect (ABCAN), conservative estimates indicate that almost two thousand infants and young children, or 5 children every day, die from abuse and neglect by parents or caretakers each year." *Id.* at 586.

#### D. Safeguard Against State Power

##### 1. Abuse, Neglect, and Dependency do not Equal an Unfit Parent

Without the unfitness prong of the two-prong custody test, parents do not have an adequate safeguard against the power of the state in a battle to keep their children. Without the unfitness standard, all that is left for the court to find before it may sever legal custody is a question of best interests.<sup>212</sup> The best interest of the child is an extremely important but very imprecise factor. The finding of best interest is based on a multitude of subjective criteria.<sup>213</sup> Such an inexact measure of judgment should not be the sole basis upon which a court makes such a crucial decision as severing the legal relationship between parent and child.<sup>214</sup>

The Ohio Supreme Court in *In re C.R.* did not presume that the best interest factor alone was enough to transfer legal custody.<sup>215</sup> Instead, the Ohio Supreme Court held that a finding of abuse, dependency, or neglect could supplant the unfitness factor so that if there had been such a finding in the dispositional phase of the case then a finding of the best interests of the child alone was sufficient in the adjudication phase of a custody case.<sup>216</sup> The Ohio Supreme Court reasoned that an abuse, dependency, or neglect finding was similar enough to an unfitness finding that the former could replace the latter.<sup>217</sup>

The Ohio Supreme Court's reasoning in this respect was flawed. Dependency, neglect, and abuse each have separate, distinct definitions in the Ohio Revised Code.<sup>218</sup> None of those definitions are the same as an unfit parent.<sup>219</sup> The classifications of dependency, abuse, and neglect

212. See *In re Perales*, 369 N.E.2d 1047 (Ohio 1977).

213. OHIO REV. CODE ANN. § 2151.414(D) (West 2006). The court must consider all relevant factors, including, but not limited to (a) interaction and interrelations parents, siblings, relatives etc important people, (b) wishes of the child as reported by guardian ad litem, (c) custodial history of the child, (d) child's need for permanent placement and whether that can be achieved without the grant of permanent custody, (e) whether factors in §2151.414(E) (7) to (11) apply (pertains to whether the parents have been convicted or pleaded guilty to certain offenses). *Id.* § 2151.414 (D), (E)(7)-(11).

214. Retired Judge William Bailey emphasizes the subjectivity of the best interests test by teaching the juvenile law classes at the University of Akron School of Law about "swimming pool cases," in which one party argues that it is in the best interest of the child to live with them because they have more resources and more to offer the child, a.k.a. they have a swimming pool and the other party does not. (Judge Bailey presided over the Wayne County juvenile court in Ohio.)

215. *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, at ¶ 23.

216. *Id.*

217. *Id.* at ¶ 22-24.

218. See *supra* note 145 and accompanying text.

219. *Id.* Unfit parent has been harder to define. Ohio's Seventh District Court of Appeals defined an unfit parent as "one who is unsuitable to raise a child," which is circuitous at best. *In re*

focus on the child alone.<sup>220</sup> The finding of any of them depends on the condition of the child regardless of the fitness of a parent.<sup>221</sup> A parent is not convicted of any crime or given any punishment as a result of his or her child being adjudicated abused, dependent, or neglected.<sup>222</sup> Only the unfitness standard focuses on the parent.

The disposition phase of litigation, where custody is decided, is different than the adjudication phase, where the classification of abuse, neglect or dependency is decided.<sup>223</sup> The importance of having a standard that focuses on the parent during disposition is that this phase is meant to be forward-looking.<sup>224</sup> Commentators David G. Duff and Roxanne Mykitiuk state in their article, *Parental Separation and the Child Custody Decision: Toward a Reconceptation*:

while the focus of traditional adjudication is uniformly retrospective, evaluating *past* acts and events against judicially elaborated norms to govern the specific relationship giving rise to the dispute, custody decisions based on the best interests of the child are implicitly forward-looking, based on the court's assessment as to the optimal placement to promote the *future* welfare of the child.<sup>225</sup>

At the disposition, the court asks whether the parent has been able to remedy the parenting issues and, if so, whether the parent will be able to maintain a good environment for the child in the future.<sup>226</sup> This temporally-minded decision making is one important way in which disposition is different than adjudication and why an unfitness standard is necessary.

At the time of the adjudication, the court focuses on the facts leading up to the hearing and how the child should be classified based on those facts.<sup>227</sup> If the child is adjudged to have been abused, dependent, or neglected, then the court will order that the parties act to improve the

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Kaiser, 2004 Ohio 7208, 14 (Ohio Ct. App. 7th 2004) (As an example of unfit parents, the court describes ones who grew marijuana and took their child along when doing drug deals.)

220. See *supra* note 145 and accompanying text.

221. See *supra* note 145 and accompanying text.

222. *General Information about Child Abuse and Neglect*, LEGAL AID NETWORK OF KENTUCKY (reviewed Aug. 2009), available at <http://www.kylawhelp.org/node/596> (last visited Jan. 27, 2011). This site gives general information about abuse, neglect and dependency cases and explains that a parent is not convicted of anything or receive criminal penalties as the direct result of an abuse, neglect or dependency adjudication. *Id.*

223. See *supra* note 44.

224. David G. Duff & Roxanne Mykitiuk, *Parental Separation and the Child Custody Decision: Toward a Reconceptation*, 47 U. TORONTO FAC. L. REV. 874, 894 (1989).

225. *Id.*

226. *Id.*

227. *Id.*

situation.<sup>228</sup> If the child has been taken from her parent by recommendation of the child services agency, the agency must create a plan of reunification.<sup>229</sup>

The plan of reunification is commonly called a case plan.<sup>230</sup> The case plan is a list of objectives that the children's services agency recommends the parent complete in order to correct the situation that led to the child being adjudicated abused, dependent, or neglected.<sup>231</sup> If the child has been separated from his parents, the parents are told by the agency that they need to complete their case plan in order to get their child back.<sup>232</sup>

At the time of disposition, the court inquires into whether the parent has substantially completed the objectives of his or her case plan.<sup>233</sup> This inquiry reflects the forward looking character of the disposition. The case plan objectives are those things that the parent can do to correct the situation that caused the child to be abused, dependent, or neglected.<sup>234</sup> If the parent has completed the case plan, he will likely believe that the child's future with the parent is secure.<sup>235</sup> He would be wrong.<sup>236</sup> According to *In re C.R.*, if the child was adjudicated abused, neglected, or dependent, then the court may keep the child out of the custody of her parent, whether or not the parent completed his case plan, if that is in the best interests of the child.

Some may argue that if a parent, through his action or inaction, allows his child to become dependent, neglected, or abused, then that parent is unfit. It is not adequate to assume that if a child has been abused, dependent, or neglected then that means that the child's parent is unfit. In the case of *In re C.R.*, C.R. was neglected before her father even knew that he was her father.<sup>237</sup> The court made no finding that it

228. OHIO REV. CODE ANN. § 2151.28(B) (West 2006) ("At an adjudicatory hearing held pursuant to division (A)(2) of this section, the court, in addition to determining whether the child is an abused, neglected, or dependent child, shall determine whether the child should remain or be placed in shelter care until the dispositional hearing.").

229. *See id.* § 2151.412(A).

230. *See id.* § 2151.412 (entitled "case plans").

231. *Id.*

232. *Id.* § 2151.28(F)(1) ("All case plans for children in temporary custody shall have the following general goals . . . . To eliminate with all due speed the need for the out-of-home placement so that the child can safely return home.").

233. *Id.* § 2151.415(H)(2) (entitled Motion for order of disposition upon termination of temporary custody order).

234. *See id.* § 2151.412(F).

235. *Supra* note 81 and accompanying text.

236. *See In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, at ¶ 1-24.

237. *See supra* note 72 and accompanying text.

was Father's fault either that the child was neglected or that he did not know that the child was his.<sup>238</sup> This is an especially unfair assumption when it comes to dependent children.

The standards for abuse, dependency, and neglect are not the same as parental unfitness.<sup>239</sup> In the case of dependency, especially, there is no finding of parental unfitness.<sup>240</sup> The Ohio Revised Code definition of a dependent child is any child:

- (A) Who is homeless or destitute or without adequate parental care, **through no fault of the child's parents, guardian, or custodian;**
- (B) Who lacks adequate parental care by reason of the mental or physical condition of the child's parents, guardian, or custodian;
- (C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship;
- (D) To whom both of the following apply:
  - (1) The child is residing in a household in which a parent, guardian, custodian, or other member of the household committed an act that was the basis for an adjudication that a sibling of the child or any other child who resides in the household is an abused, neglected, or dependent child.
  - (2) Because of the circumstances surrounding the abuse, neglect, or dependency of the sibling or other child and the other conditions in the household of the child, the child is in danger of being abused or neglected by that parent, guardian, custodian, or member of the household.<sup>241</sup>

Part (A) of the statute points out specifically that the term "dependency" does not apply if there has been a finding that the parent is at fault.<sup>242</sup> It is injudicious and inexplicable for a court to equate a finding of dependency with a finding of parental unfitness.

By the terms of the statute, a child could be dependent for many reasons that are no fault of the parents'.<sup>243</sup> Under (A), a child could be adjudged dependent if his parents are very poor, a condition that the legislation of this country has yet to find personal fault in.<sup>244</sup> Under (B)

238. See *In re C.R.*, 843 N.E.2d at ¶ 1-24.

239. *Supra* note 145 and accompanying text.

240. OHIO REV. CODE ANN. § 2151.04 (West 2006) (defining dependent child).

241. *Id.* (emphasis added).

242. *Id.* § 2151.04(A).

243. See *id.* § 2151.04.

244. *Id.* § 2151.04(A). New York Times Op-ed contributor Barbara Ehrenreich was convinced otherwise by a new study done by the National Law Center on Homelessness and Poverty which showed that ordinances against things typically done by the very poor such as sleeping on the sidewalk or under a bridge have increased since 2006. Barbara Ehrenreich, Op-Ed, *Is It Now a*

a child could become dependent if her parent was in an accident that left the parent in the hospital under medical care for months.<sup>245</sup> If that parent, through care and rehabilitation, is able to leave the hospital and return to adequate physical form, would it be fair for a court to rule that the parent is effectively unfit for the future just because her child was dependent on the state for a period of time?

By equating unfitness with abuse, dependency, or neglect, the courts ignore the future and focus only on the past. It no longer matters if the parent completes their case plan. The label “plan of reconciliation” becomes a mockery if at the point of adjudication, before the plan commences, the disposition of custody is a foregone conclusion. The only way for the court to properly focus on whether the child can reconcile with their parent and have a better future is to require a separate inquiry into parental fitness.

## 2. Parents Often Plead to Abuse, Dependency, or Neglect

Another reason why there are not adequate safeguards against state power unless a finding of parental unfitness is required in these cases is that parents who are facing adjudication will often enter a plea deal, permanently giving up their rights to try the issue of whether the child really is abused, neglected, or dependent.<sup>246</sup> When they get to the stage of disposition, they may lose custody of their child without the court ever finding that the child was unsafe in her parents’ care, just as in the case *In re C.R.*

It is not difficult to imagine a situation in which a parent involved in such an adjudication would be tempted to enter into a plea bargain.<sup>247</sup> One possible situation is where the children’s services agency has reason to believe that the parent is using drugs in the home. A concerned neighbor could have reported that he saw through a window that the mother (Mother) was smoking marijuana.<sup>248</sup> The neighbor tells the

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*Crime to Be Poor?*, N.Y. Times, Aug. 15, 2009, available at <http://www.nytimes.com/2009/08/09/opinion/09ehrenreich.html?pagewanted=all>.

245. OHIO REV. CODE ANN. § 2151.04(B) (West 2006).

246. Allan R. De Jong, *Impact of Child Sexual Abuse Medical Examinations On the Dependency and Criminal Systems*, 22 CHILD ABUSE & NEGLECT 645 (1998) (analyzing the percentage of cases which were decided by plea before the hearing).

247. The following is a hypothetical created by the author for the purpose of examining a realistic, though fictional, situation in which a parent would plead to abuse, neglect or dependency without realizing the far-reaching consequences of that action.

248. In 1988, the Fifth Appellate District of Ohio held that a child to be abused, dependent and neglected after a police raid revealed a large amount of marijuana in the family’s home. *In re Campbell*, No. CA-383, 1988 Ohio App. LEXIS 3508 (Ohio Ct. App. Aug. 11, 1988).

agency that they should become involved because there is a child in the home.

The agency does become involved when it has reason to believe that Mother is using marijuana and left the marijuana out where her fifteen year old son found it and also smoked some.<sup>249</sup> The agency files a complaint alleging that the fifteen year old is neglected under Ohio Revised Code section 2151.03 (2) because the fifteen year old “lacks adequate parental care because of the faults or habits of the child’s parents.”<sup>250</sup>

When the mother attends her pretrial for the pending case, she finds out that the prosecutor is offering a plea where she will find the child dependent, rather than neglected, if the mother will only plead to the charges.<sup>251</sup> If Mother does not plead, she will have to proceed to a trial on whether the child was actually neglected. Mother does not want to go to trial for several reasons: 1) she does not want to pay for an attorney and is not poor enough to have appointed counsel, 2) if the prosecution proves that the marijuana was hers, she could be criminally liable, and 3) she doesn’t realize at the time that the plea of dependency means giving up the right to a finding of parental fitness should there be a disposition of custody. Therefore she pleads. No one ever knows for sure whether the state would have been able to prove their case.

Would it be fair in a situation like this one to presume that the mother is unfit just because she entered a plea, admitting that her child was dependant? Is it fitting that the custody of that child could be awarded to another solely on the basis of a finding that it is in the best interests of the child to live somewhere else?

The answer to both questions is no. The right to the care and custody of one’s children is a constitutionally protected, fundamental right.<sup>252</sup> The safeguards that control the state’s power to sever custody must be formidable.<sup>253</sup> Without the requirement of a parental unfitness finding, the safeguards are far from formidable; they are feeble.

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249. “When Congress adopted [Adoption and Safe Families Act of 1997], it noted that, along with poverty, substance abuse is ‘one of the three most common reasons for children entering foster care.’” Ross, *supra* note 164, at 210 (citing H.R. Rep. No. 105-77, at 19 (1997)).

250. OHIO REV. CODE ANN. § 2151.03(A)(2) (West 2006).

251. The differences between “dependent” and “neglected” are explained in *supra* note 145.

252. See Prince v. Massachusetts, 321 U.S. 158 (1944).

253. In *Santosky v. Kramer* the United States Supreme Court found that it was important enough that parents have an adequate safeguard to protect their rights to care, custody, and control of their child that they saw fit to announce that those rights shall be protected by the Fourteenth Amendment of the United States Constitution. 455 U.S. 745, 755 (1982).

## V. CLOSING

The state of Ohio has the power to deprive its people of life, liberty, and property, but not without the due process of law.<sup>254</sup> Severing the legal and physical relationship between a child and her mother or father requires no less. This rational conclusion is in harmony with the common understanding that there is a deep and valuable bond between parents and their children.

There are good reasons why the Ohio courts, up until the decision in *In re C.R.*, required a parental unfitness standard before severing a parent's legal custody. It has been this author's goal to show those reasons in order to express that a prior adjudication of abuse, neglect, or dependency is not an adequate or appropriate replacement for a finding of unfitness. In order to truly ensure the best interests of the child, the family, and the community, the courts or the legislature should re-adopt the prior standard of requiring a showing of parental unfitness before awarding legal custody to a nonparent. Anything less is both unwise and unconstitutional.

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254. U.S. CONST. amend. XIV.