WHERE ARE MY CHILDREN . . . AND MY RIGHTS? PARENTAL RIGHTS TERMINATION AS A CONSEQUENCE OF DEPORTATION

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ABSTRACT

The U.S. Supreme Court has set out a constitutional framework under which termination-of-parental-rights cases must be adjudicated in state courts. In all cases, this framework requires proof of parental unfitness by clear and convincing evidence before parental rights can be terminated, even when the parents in question are illegal immigrants. Despite this framework, in a rash of recently published cases, courts have terminated the parental rights of illegal immigrant parents without regard for these requirements. Those who work closely with immigrants fear that the published instances are merely the tip of the iceberg.

This Note aims to shed light on this problem by discussing instances of such termination and identifying reasons that may have led courts to terminate parental rights outside of the constitutional framework. After identifying two primary reasons—cultural bias against immigrants and prison conditions that render maintaining parent-child relationships difficult—this Note suggests possible legislative changes that may decrease the number of such terminations.

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INTRODUCTION

On May 22, 2007, Encarnación Bail Romero, an illegal immigrant, was taken into Immigration and Customs Enforcement (ICE) custody during a raid on a Carthage, Missouri poultry processing plant where she worked.[1] Her son, Carlos, was ultimately placed in the custody of an American couple who petitioned for the termination of Ms. Bail's parental rights so that they could adopt Carlos.[2] The petition was filed on October 5, 2007, less than five months after Ms. Bail was taken into custody; the petition was served on Ms. Bail on October 16, two days before the termination hearing.[3] Two DLA Piper attorneys took on Ms. Bail's case,[4] which subsequently attained a significantly heightened public profile.[5] Consequently, commentators and legal scholars began to take note of what some fear is a widespread problem in the United States—the termination of illegal immigrants' parental rights as a result of the initiation of deportation proceedings against them.[6]

For now, Ms. Bail's custody battle has a potentially encouraging outcome: on January 25, 2011, the Missouri Supreme Court reversed the appellate court's decision and remanded the case for a new trial on all claims.[7] Every supreme court judge agreed that the trial court

1. S.M. v. E.M.B.R. (*In re* Adoption of C.M.B.R.), No. SC 91141, slip op. at 3 (Mo. Jan. 25, 2011) (en banc), *available at* http://www.courts.mo.gov/file.jsp?id=43941.

2. S.M. v. E.M.B.R. (*In re* Adoption of C.M.B.R.), No. SD 30342, 2010 WL 2841486, at *2 (Mo. Ct. App. July 21, 2010); *see also* Ginger Thompson, *After Losing Freedom, Some Immigrants Face Loss of Custody of Their Children*, N.Y. TIMES, Apr. 23, 2009, at A15 (discussing details of Ms. Bail's case). For more on Ms. Bail's case, see *infra* notes 85–94 and accompanying text.

3. *S.M.*, slip. op. at 5.

4. Marcia Yablon-Zug, Separation, Deportation, Termination 26 n.129 (July 26, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1648999.

5. Ms. Bail has told her story to at least one congressional committee. *See* Emily Butera, *Are Children of Immigrants Becoming Needless Statistics in the Child Welfare System?*, RESTORE FAIRNESS (Nov. 16, 2009), http://restorefairness.org/2009/11/are-children-of-immigrants-becoming-needless-statistics-in-the-child-welfare-system ("When Encarnación told her story during a briefing in the House of Representatives last week you could have heard a pin drop."). At the time of her testimony, Ms. Bail was awaiting deportation from the United States. *See id.* (noting that, as of November 2009, Ms. Bail was "scheduled for deportation to Guatemala in February [2010]").

6. *See infra* notes 16–20 and accompanying text.

7. *S.M.*, slip op. at 45–46.

had "plainly erred."[8] The supreme court split 4–3, however, on the appropriate remedy. The dissenters argued that, based on the admitted miscarriage of justice, Ms. Bail should be given custody of her son immediately.[9] The majority remanded for a new trial instead,[10] despite its agreement that the case was "a travesty in its egregious procedural errors, its long duration, and its impact on Mother, Adoptive Parents, and, most importantly, Child."[11] The remand means that, even with a favorable outcome at the trial level, much more time will pass before Ms. Bail and Carlos reunite.[12]

It is difficult to determine exactly how many illegal immigrant parents have found themselves in Ms. Bail's situation. And in many other cases, second chances at review—such as Ms. Bail will receive—are not forthcoming. As recently as 2009, the Virginia Court of Appeals affirmed the termination of an illegal immigrant father's parental rights, in part because his deportation prevented him from maintaining contact with his children.[13] Similarly, in 2005, the Tennessee Court of Appeals upheld the termination of the parental rights of a Nigerian illegal immigrant after she was taken into deportation proceedings.[14]

At least two other cases have dealt with termination of parental rights as a result of entering deportation proceedings, both with results favorable to the immigrant parents.[15] Despite the relatively

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8. *Id.*, slip op. at 45; *see also id.*, slip op. at 46 n.25 (describing points of agreement and disagreement among the judges).

9. *See id.*, slip op. at 46 n.25 ("The dissenting members believe passionately that custody of Child should be returned to Mother without further proceedings. That result can be reached only by disregarding the law.").

10. *Id.*, slip op. at 45–46.

11. *Id.*, slip op. at 46 n.25.

12. *See Missouri Ruling Extends Legal Battle for Immigrant's Son*, CNN (Jan. 26, 2011), http://articles.cnn.com/2011-01-26/us/missouri.immigrant.child_1_parental-rights-adoptive-parents-maternal-rights?_s=PM:US ("[M]any more months are likely to pass before it's known who will have custody of [the] 4-year-old boy . . . .").

13. Perez-Velasquez v. Culpeper Cnty. Dep't of Soc. Servs., No. 0360-09-4, 2009 WL 1851017, at *2, *4 (Va. Ct. App. June 30, 2009). For discussion of another situation in which deportation made it difficult for an immigrant parent to meet the requirements necessary to regain custody of her children, see *infra* note 123 and accompanying text.

14. State Dep't of Children's Servs. v. Ahmad, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at *2 (Tenn. Ct. App. Apr. 26, 2005).

15. *See* State v. Maria L. (*In re* Interest of Angelica L.), 767 N.W.2d 74, 96 (Neb. 2009) (overturning the lower court's termination of an illegal immigrant mother's parental rights after she was taken into deportation proceedings); Fairfax Cnty. Dep't of Family Servs. v. Ibrahim, No. 0821-00-4, 2000 WL 1847638, at *4 (Va. Ct. App. Dec. 19, 2000) (affirming the lower court's

small number of cases that have come before appellate courts and the relatively high percentage of those cases that have had parent-friendly outcomes, there is reason to suspect that parent-friendly outcomes are the exception, not the rule. Professor Marcia Yablon-Zug has noted that although decisions to terminate illegal immigrants' parental rights are "frequently reversed" on appeal, the parents often do not appeal, either because they are too poor or because they have already been deported and are unable to access the U.S. legal system.[16] In addition, access to information about these cases is scarce because records are sealed in most cases.[17]

Reports from staffers of legal organizations confirm that this problem is serious and far-reaching. Based on information from its immigrant clients, the National Network for Immigrant and Refugee Rights has observed the growing "practice of stripping away immigrants' parental rights . . . on the basis of their immigration status, often in the quartet of courts, immigration, local law enforcement and foster care agencies."[18] Similarly, Legal Momentum, another nonprofit that provides legal services to immigrants, has commented,

> The separation of U.S. citizen children and immigrant parents due to immigration raids and detentions has emerged as a nation-wide issue. . . . A pattern is emerging in which some state departments of social services are taking U.S. born children from undocumented immigrant parents and placing them in foster care, in violation of the undocumented immigrant [parents'] right to custody of their children.[19]

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refusal to terminate an illegal immigrant father's parental rights after he was deported).

16. Yablon-Zug, *supra* note 4, at 26 & n.129.

17. *Id.* at 26 n.129; *see also* Butera, *supra* note 5 ("Because it is difficult to gather accurate data about the undocumented population it is impossible to know how many children have already been affected.").

18. *Human Rights Abuses Against Immigrant Parents*, NAT'L NETWORK FOR IMMIGRANT & REFUGEE RTS., http://org2.democracyinaction.org/o/5702/t/4329/content.jsp?content_KEY=1766 (last visited Feb. 8, 2011).

19. *Immigration Raids Separate Children from Parents*, LEGAL MOMENTUM, http://www.legalmomentum.org/our-work/immigrant-women-program/immigration-raids-separate.html (last visited Feb. 8, 2011).

Further, a number of people who work closely with illegal immigrants have recounted first-hand stories that indicate the increasing frequency of situations like Ms. Bail's.[20]

This Note traces the problem of termination due to deportation through recent cases and suggests legislative changes that would decrease the number of illegal immigrants who lose their children because of the commencement of deportation proceedings. Part I discusses the constitutional background that governs termination of parental rights for all parents, including illegal immigrant parents. Despite their constitutional right to raise their children absent proof of parental unfitness,[21] these individuals are losing parental rights as a consequence of their detainment for immigration violations, and without adequate determinations that they are unfit parents.[22] Part II discusses how, within the boundaries of that constitutional framework, state and federal laws normally operate to terminate parental rights. Part III argues that trial judges have departed from the proper application of the constitutional procedures in the few reported termination cases involving illegal immigrants. That Part goes on to identify two problems—cultural bias and prison-life constraints—that cause courts to misapply the law, and it explains how state and federal laws exacerbate the problem. Part IV then discusses three potential solutions—at the state, federal, and international levels—that together address both cultural bias and prison-life issues. Implementation of any number of these solutions may begin to remedy a problem that those closest to it believe to be widespread.

I. THE CONSTITUTIONAL RIGHTS OF PARENTS

Family law issues are indisputably the province of state law and state courts.[23] The U.S. Supreme Court, however, has found that the

20. *See, e.g.*, Thompson, *supra* note 2 ("In visits to detention centers across the country, Ms. Schriro [an adviser to the Homeland Security Secretary] said, she has heard accounts of parents losing contact or custody of their children."); *id.* ("[L]awyers and advocates for immigrants say that cases like [Ms. Bail's] are popping up across the country as crackdowns against illegal immigrants thrust local courts into transnational custody battles and leave thousands of children in limbo."); Butera, *supra* note 5 ("[M]y inbox has been flooded with stories such as Encarnación Bail Romero's.").

21. *See infra* Part I.

22. *See infra* Part III.A.

23. *See* Rose v. Rose, 481 U.S. 619, 625 (1987) ("[T]he whole subject of the domestic

Constitution restricts states' authority to interfere with family decisions and rights.[24] The Court has repeatedly placed great emphasis on the right of natural parents to the "companionship, care, custody, and management of [their] children."[25] The right has been deemed "far more precious than any property right"[26] and one that "undeniably warrants deference and, absent a powerful countervailing interest, protection."[27] Indeed, the Court considers this interest fundamental,[28] protected by the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[29]

Termination of parental rights is perhaps the greatest interference that the state can impose on the fundamental right of parents to raise their children and is consequently approached with great skepticism by the Supreme Court. As the Court has noted, "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe [on a] fundamental liberty interest, but to end it."[30] Consequently, the termination of parental rights "'must be accomplished by procedures meeting the requisites of the Due Process Clause.'"[31]

To avoid undue deprivations of parental rights, the Supreme Court has put into place procedural safeguards designed to protect the fundamental liberty interests of the parent. As a whole, the procedural safeguards as set out by the Supreme Court require several steps. First, the parent is entitled to a hearing, which takes

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relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." (quoting *In re* Burrus, 136 U.S. 586, 593–94 (1890))).

24. *See generally* Troxel v. Granville, 530 U.S. 57 (2000) (plurality opinion) (addressing whether grandparents may be given visitation rights against the wishes of the child's parents); Santosky v. Kramer, 455 U.S. 745 (1982) (addressing the evidentiary standard required to prove unfitness before parental rights may be terminated); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (addressing whether indigent parents must be provided an attorney in termination-of-parental-rights proceedings); Stanley v. Illinois, 405 U.S. 645 (1972) (addressing whether unfitness must be proven before parental rights may be terminated).

25. *Stanley*, 405 U.S. at 651.

26. *Santosky*, 455 U.S. at 758–59.

27. *Lassiter*, 452 U.S. at 27 (quoting *Stanley*, 405 U.S. at 651).

28. *Santosky*, 455 U.S. at 759; *see also Troxel*, 530 U.S. at 65–66 (plurality opinion) ("In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

29. *Stanley*, 405 U.S. at 651.

30. *Santosky*, 455 U.S. at 759.

31. *Id.* at 753 (quoting *Lassiter*, 452 U.S. at 37 (Blackmun, J., dissenting)).

place in state court, to determine whether she is a fit parent.[32] At this hearing, "[statutory] allegations of abuse or neglect are presented to the court, which must determine whether there is a sufficient factual and legal basis for state intervention."[33] A parent's rights can be terminated only if she is found to be unfit.[34] A finding of unfitness requires a clear statutory basis and clear and convincing evidence that the facts of the case support that finding under the statute.[35] Then—and only then—may the court go on to consider the best interests of the child.[36] Only if the court finds that the parent is unfit and that termination would be in the child's best interests may the parent's rights be terminated.

These procedural safeguards are guaranteed by the Fourteenth Amendment—as specified in *Stanley v. Illinois*[37] and *Santosky v. Kramer*[38]—and thus they apply not only to U.S. citizens but also to illegal immigrant parents. In one of its earliest discrimination cases, the Court held that the Fourteenth Amendment's protections, which are granted to "any person within [a state's] jurisdiction,"[39] are "not confined to the protection of citizens."[40] Later, in *Plyler v. Doe*,[41] the

32. In its earliest case addressing the termination of parental rights, the Court determined that "all . . . parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." *Stanley*, 405 U.S. at 658.

33. HOMER H. CLARK, JR. & ANN LAQUER ESTIN, DOMESTIC RELATIONS CASES AND PROBLEMS 561 (7th ed. 2005).

34. *Stanley*, 405 U.S. at 658.

35. In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Supreme Court held that "the Due Process Clause of the Fourteenth Amendment demands . . . [that] [b]efore a State may sever completely and irrevocably the rights of parents in their natural child . . . the State [must] support its allegations [of parental unfitness] by at least clear and convincing evidence." *Id.* at 747–48.

36. *See id.* at 760 (suggesting that until the unfitness of a parent is proven, the parent and the child have the same best interests, by stating, "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship"); CLARK & ESTIN, *supra* note 33, at 571 ("[T]ermination of parental rights must be premised on parental unfitness rather than a determination of the child's best interests . . . ."); *see also* JOHN DEWITT GREGORY, PETER N. SWISHER & SHERYL L. WOLF, UNDERSTANDING FAMILY LAW 191 (3d ed. 2005) ("[I]t is only after a determination of parental unfitness that the best interests of the child will outweigh other considerations in a proceeding for termination of parental rights.").

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

38. Santosky v. Kramer, 455 U.S. 745 (1982).

39. U.S. CONST. amend. XIV, § 1.

40. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); *see also* Boumediene v. Bush, 553 U.S. 723, 781 (2008) (assuming that aliens have due process rights in determining that they are entitled to habeas corpus); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that

Court went on to explain that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, *even aliens whose presence in this country is unlawful*, have long been recognized as 'persons' guaranteed due process of law by the . . . Fourteenth Amendment[]."[42] The Court has given no indication that parental rights of immigrants should be treated as an exception to these principles.[43] Indeed, even some courts that have deprived illegal immigrants of their parental rights through

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"all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments], and that even aliens shall not . . . be deprived of life, liberty or property without due process of law").

41. Plyler v. Doe, 457 U.S. 202 (1982).

42. *Id.* at 210 (emphasis added).

43. *See* S. Adam Ferguson, Note, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85, 92 (2007) ("[T]he fundamental right to raise children [is not limited] to U.S. citizens only."); *see also* Yablon-Zug, *supra* note 4, at 10–11 ("The constitutional rights of parents are not confined to citizens. Immigrant parents also have the right to the care and custody of their children." (footnote omitted)). Because of the importance of the parental rights held by illegal immigrants, if, by following the procedures set out by the Supreme Court, an illegal immigrant parent is found to be fit, and thus retains custody of her child, the parent has the right to take the child to the parent's country of origin when the parent is deported. This is the case even if the child is a U.S. citizen. *See* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1189–97 (2006) (discussing cases that hold that parents may take their U.S. citizen children with them when they are deported from the United States). Numerous circuits have held that no constitutional rights of citizen children are violated when their parents are deported, even if that deportation results in the child's exit from the United States. *See, e.g.*, Garcia v. Holder, 320 F. App'x 288, 290–91 (5th Cir. 2009) ("Though [the alien's] minor daughter is a United States citizen, her constitutional rights are not affected by the deportation of [her] parent, even where her de facto deportation will result." (citing Perdido v. INS, 420 F.2d 1179, 1181 (5th Cir. 1969))); Niang v. Gonzales, 492 F.3d 505, 512 n.11 (4th Cir. 2007) ("While . . . U.S. citizen children . . . may be forced to accompany their parents to the country of removal, we and our sister circuits have held that this . . . is countenanced by the INA and not violative of the children's constitutional rights."); *see also* Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 708 (2005) (noting that "[v]irtually all the U.S. circuit courts have denied that any constitutional right of a citizen . . . is violated or even implicated when the citizen's noncitizen family members are excluded from the United States or not allowed to remain here"). The deportation of an illegal immigrant parent and the parent's removal of the citizen child "merely postpone[s]" the child's right to live in the United States until the child is old enough to exercise that right; it does not end the right entirely. Thronson, *supra*, at 1194 (quoting Acosta v. Gaffney, 558 F.2d 1153, 1158 (3d Cir. 1977)); *see also* Ayala-Flores v. INS, 662 F.2d 444, 446 (6th Cir. 1981) (holding that the child in question would be able to decide to return to the United States and exercise her citizenship rights when she "reach[ed] the age of discretion" and that her rights would not be permanently barred because of her parents' decision to take her to Mexico with them when they were deported). Finally, though the Supreme Court has not addressed this specific issue, it has noted that citizens may be "compelled by family . . . reasons" to "reside abroad indefinitely" and that doing so will not cause the citizen to "suffer[] loss of citizenship." Schneider v. Rusk, 377 U.S. 163, 168–69 (1964).

termination have implicitly acknowledged that those protections apply by citing them as the framework within which the courts' decisions must be made.[44]

II. APPLYING THE CONSTITUTIONAL PROCESS: STATE AND FEDERAL LAWS

Against this constitutional background, state and federal laws determine when termination proceedings should be initiated against a parent, and state laws determine what qualifies as unfitness in those proceedings. Although the Supreme Court's jurisprudence regarding the termination of parental rights provides the framework for handling such cases, it is up to the states to develop laws that dictate the actual termination of rights. These laws, designed with the best of intentions, have proven to be an enormous hurdle to some illegal immigrant parents who attempt to defend their parental rights from within the confines of deportation-related proceedings. Through a federal funds law,[45] the federal government also plays a role in determining when termination proceedings will be initiated against a parent. An understanding of how these rules operate within the constitutional framework is necessary to understand the problems facing immigrant parents in some courts.

A. The Adoption and Safe Families Act of 1997

The federal Adoption and Safe Families Act of 1997 (ASFA)[46] was adopted to "achieve permanence for children in the foster care system."[47] The ASFA is a federal funds act,[48] so states receiving

44. *See, e.g.*, State Dep't of Children's Servs. v. Ahmad, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at *2 (Tenn. Ct. App. Apr. 26, 2005) (stating that "[a] court may terminate a parent's parental rights if it finds by clear and convincing evidence that one of the statutory grounds for termination of parental rights has been established and that the termination of such rights is in the best interests of the child" and citing *Stanley v. Illinois* as governing law).

45. A federal funds act is one that "[c]ondition[s] federal funding upon state performance of a particular function." MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32390, VIENNA CONVENTION ON CONSULAR RELATIONS: OVERVIEW OF U.S. IMPLEMENTATION AND INTERNATIONAL COURT OF JUSTICE (ICJ) INTERPRETATION OF CONSULAR NOTIFICATION REQUIREMENTS 21 (2004); *see also infra* note 251 and accompanying text.

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

47. Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 1 (2001).

48. 42 U.S.C. § 670 (2006) ("The sums made available under this section shall be used for

federal funds for foster care maintenance payments or adoption incentives are obliged to abide by its requirements.[49] Of greatest relevance here, the ASFA requires states to initiate termination proceedings against parents if their children have been in foster care for fifteen of the preceding twenty-two months.[50] There are three narrow exceptions,[51] including if the child is being cared for by a relative under state supervision.[52] Because the average sentence for an inmate exceeds fifteen months, these guidelines affect a considerable number of parents whose children must go into foster care during their incarceration.[53]

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making payments to States which have submitted, and had approved by the Secretary, State plans under this part.").

49. The ASFA falls under Title IV-E of the Social Security Act. This Title provides states with "such sums [of federal funds] as may be necessary to carry out the provisions of this part." *Id.* The provisions of the part are designed to "enabl[e] each State to provide . . . foster care and transitional independent living programs for [certain] children . . . and adoption assistance for children with special needs." *Id.*

50. *Id.* § 675(5)(E) ("[I]n the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State *shall* file a petition to terminate the parental rights of the child's parents . . . ." (emphasis added)); *see also* Jade S. Laughlin, Bruce A. Arrigo, Kristie R. Blevins & Charisse T.M. Coston, *Incarcerated Mothers and Child Visitation: A Law, Social Science, and Policy Perspective*, 19 CRIM. JUST. POL'Y REV. 215, 222 (2008) ("ASFA stipulates that when a child has been in the system for 15 months, parental rights can be terminated, making the child eligible for adoption. For criminally confined mothers who function as the primary care providers, this legislation poses a considerable threat to their children and to the family unit.").

51. The three exceptions are that the child is being cared for by a relative, that the state agency has documented a compelling reason that filing such a petition is not in the best interests of the child, or that the state agency has not provided reasonable, required services to the family of the child. 42 U.S.C. § 675(5)(E).

52. *Id.* ("[I]n the case of a child who has been in foster care . . . for 15 of the most recent 22 months . . . the State shall file a petition to terminate the parental rights of the child's parents . . . *unless at the option of the State*, the child is being cared for by a relative." (emphasis added)). Many state versions of the Act have similar provisions. *See, e.g.*, ALA. CODE § 12-15-317(1)(b), (2)(a) (LexisNexis Supp. 2009) (adopting language similar to the ASFA); MD. CODE ANN., FAM. LAW § 5-525.1(b)(1)(i), .1(b)(3)(i) (LexisNexis 2006) (same); WYO. STAT. ANN. § 14-3-431(m)(i) (2009) (same). Unfortunately, many illegal immigrant parents have difficulty finding a relative to care for their children while they are incarcerated. Additionally, if the only relatives available in the United States are illegal, it is unlikely that the state would sanction the child's placement with those relatives to meet the statutory requirement, and the relatives may fear deportation if they do choose to provide care for the children of the incarcerated immigrant. *See, e.g.*, Thompson, *supra* note 2 (noting that Ms. Bail's son was initially sent to live with two aunts but was later put into foster care when "[t]he women—each with three children of their own, no legal status, tiny apartments and little money" could no longer care for Carlos). Non-state-supervised care provided by a relative, such as non-state-sanctioned care by a relative illegally present in the United States, would not be sufficient to meet this exception.

53. *See* JEREMY TRAVIS, ELIZABETH CINCOTTA MCBRIDE & AMY SOLOMON, FAMILIES

In general, if a child has been in foster care for fifteen of the previous twenty-two months and does not qualify for any of the exceptions, a state will initiate proceedings against the child's parents as required by the ASFA. At that time, the parent's constitutional rights require that she be given a hearing on her fitness. If it is proven by clear and convincing evidence that the parent is unfit, the court then asks whether termination is in the best interests of the child. If it is, the parent's rights are terminated.[54]

What the ASFA does not do is establish that the parent has been unfit by virtue of leaving her child in foster care for the statutory period. On its face, the language of the statute merely requires that the state "file a petition to terminate the parental rights."[55] This phrasing, as well as its implementation by the courts,[56] suggests that a child's placement in foster care for the statutory period is only the beginning of the process of terminating parental rights. The remainder of the process must still be carried out under the ordinary constitutional procedures.[57] Indeed, at least one court has explicitly

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LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 1, 6 (rev. 2005), *available at* http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf ("Because women serve an average of 18 months in prison, many female inmates whose children are in nonrelative foster care may face the possibility of losing their parental rights."); Creasie Finney Hairston, Prisoners and Families: Parenting Issues During Incarceration 7 (Dec. 2001) (unpublished manuscript), *available at* http://aspe.hhs.gov/hsp/prison2home02/hairston.pdf ("The average prison stay is longer than the period in which termination procedures are required to begin . . . .").

54. *See supra* notes 33–36 and accompanying text; *see also* CLARK & ESTIN, *supra* note 33, at 562 (noting that the ASFA must be "interpret[ed] and appl[ied]" in accordance with the constitutional procedures set out by the Supreme Court).

55. 42 U.S.C. § 675(5)(E).

56. An example is a 2001 challenge to an Illinois statute that allowed a child's presence in foster care for fifteen of the previous twenty-two months to be the basis for an unfitness determination. *In re* H.G., 757 N.E.2d 864, 866–67 (Ill. 2001). The statute was challenged on constitutional grounds. *Id.* at 868. The Supreme Court of Illinois held that the presumption of unfitness created by the mere fact of a child being in foster care for fifteen out of the previous twenty-two months was unconstitutional because it

> is not narrowly tailored to the compelling goal of identifying unfit parents because it fails to account for the fact that, in many cases, the length of a child's stay in foster care has nothing to do with the parent's ability or inability to safely care for the child but, instead, is due to circumstances beyond the parent's control.

Id. at 872. In so holding, the court required that unfitness be shown apart from the statutory timeframe requirements. *Id.*

57. Professors Homer Clark, Jr., and Ann Estin agree, stating, "Courts must interpret and apply the requirements of th[is] statute[] against a background of constitutional protections for parental rights." CLARK & ESTIN, *supra* note 33, at 562; *see also* State v. Maria L. (*In re* Interest of Angelica L.), 767 N.W.2d 74, 92 (Neb. 2009) ("Regardless of the length of time a child is

held that "the fact that a child has been placed outside the home for 15 or more of the most recent 22 months does not demonstrate parental unfitness" but instead "provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum level of fitness."[58] Some state courts, however, have erroneously assumed that a child's placement in foster care for fifteen of the previous twenty-two months is dispositive of unfitness, allowing the ASFA to play a substantive, rather than a procedural, role in the termination process.[59]

B. State Laws

Beyond their application of the ASFA, state courts play another major role in termination proceedings. Family law issues are the province of state courts.[60] Accordingly, it is state law that defines parental unfitness for termination purposes. States have varying rules on what constitutes unfitness, but there are several basic actions that virtually always constitute unfitness.[61] The most relevant bases for the purposes of this Note are abandonment, including failure to support or maintain contact with the child, failure to remedy a persistent condition that caused the removal of the child, and failure to comply with a reunification or rehabilitation plan.[62]

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placed outside the home, it is always the State's burden to prove by clear and convincing evidence that the parent is unfit . . . .").

58. *Maria L.*, 767 N.W.2d at 92.

59. *See infra* note 124 and accompanying text.

60. *See supra* note 23.

61. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2–3 (2010), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf; *see also* GREGORY ET AL., *supra* note 36, at 184 ("Typical statutory grounds for termination of parental rights include abandonment, child abuse, neglect or dependency, [and] non-support . . . ."). Failure to remedy a persistent condition that caused the child to be placed in foster care is another cause for termination of parental rights in many states. *E.g.*, State Dep't of Children's Servs. v. Ahmad, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at *2 (Tenn. Ct. App. Apr. 26, 2005); Perez-Velasquez v. Culpeper Cnty. Dep't of Soc. Servs., No. 0360-09-4, 2009 WL 1851017, at *2 n.2 (Va. Ct. App. June 30, 2009) (citing VA. CODE ANN. § 16.1-283(C)(1) (2006)); Fairfax Cnty. Dep't of Family Servs. v. Ibrahim, No. 0821-00-4, 2000 WL 1847638, at *2–3 (Va. Ct. App. Dec. 19, 2000).

62. *E.g.*, S.M. v. E.M.B.R. (*In re* Adoption of C.M.B.R.), No. SC91141, slip op. at 1 (Mo. Jan. 25, 2011) (en banc), *available at* http://www.courts.mo.gov/file.jsp?id=43941; *Maria L.*, 767 N.W.2d at 84; *Perez-Velasquez*, 2009 WL 1851017, at *2 & n.1.

Abandonment typically includes a "failure to communicate with the child for a specified period of time, failure to provide support, or other evidence of an intent to relinquish parental claims to the child."[63] Some states require that, to support a finding of unfitness, the failure to communicate or other acts of abandonment must be willful.[64] Others require that the actions purported to constitute abandonment, including failure to maintain contact, must have been within the parent's control.[65]

Abandonment may also be defined to encompass other bases for a finding of unfitness, such as failure to support or maintain contact with the child. Failure to provide support, whether as a stand-alone requirement or as a factor showing abandonment, is typically demonstrated when the parent, for a particular period of time, has "'failed significantly without justifiable cause to provide support.'"[66]

Another common statutory basis for finding unfitness in these immigrant cases is failure to remedy the persistent condition that led to the removal of the child. This failure is generally established by a showing that the circumstances that led to the child's removal have not changed and are not likely to change in the near future.[67] It appears that it is unnecessary for the conditions to be completely remedied by the time of the termination hearing, so long as they will be remedied reasonably soon after the proceedings.[68]

Failure to comply with a reunification or rehabilitation plan can also be sufficient grounds for termination of parental rights. In general, the failure to comply must be substantial or material to the overall goal of providing a fit life for the child.[69] Before terminating

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63. GREGORY ET AL., *supra* note 36, at 186.

64. *See* CLARK & ESTIN, *supra* note 33, at 580 (noting that some courts have found that "acts of abandonment must be willful").

65. *See* GREGORY ET AL., *supra* note 36, at 187 ("Lack of parental contact might not constitute abandonment if its cause is not within the parent's control.").

66. *Id.* at 189 (quoting *In re* J.J.J., 718 P.2d 948, 949 (Alaska 1986)). Support includes food, clothing, shelter, and education expenses, as well as other care necessary for the child's development. *Id.* at 188–89 (citing MINN. STAT. ANN. § 260.221(1)(b)(2) (West 1992) (current version at MINN. STAT. ANN. § 260C.301(1)(b)(2) (West 2007))).

67. *E.g.*, *In re* M.J.B., 140 S.W.3d 643, 658 (Tenn. Ct. App. 2004) (terminating parental rights where the mother was unable to show that she would "be able at any time in the foreseeable future to provide . . . the financial support [and the structured living environment] that the children need").

68. *See id.* at 657–58 (noting that there was "very little likelihood that the[] conditions would be remedied at an early date" or in the "foreseeable future").

69. Failure to comply with parts of the plan that are not material to this end will generally

parental rights on this basis, the state generally must take reasonable steps to assist the parent in complying with the plan,[70] and the plan must be one with which the parent is able to comply.[71]

III. SETTLED LAW, UNSETTLING OUTCOMES

What is disconcerting about the cases addressing termination of illegal immigrants' parental rights after deportation proceedings begin is the lack of strict adherence to the constitutional requirement that a parent be found unfit based on state statutory definitions. The cases, even those that do adhere to well-established constitutional principles, reveal two important factors that have allowed courts to terminate parental rights without a showing of unfitness. First, each court to address these matters has either displayed or noted a "culture clash" that resulted in passing over the question of parental fitness and moving directly to a best-interests analysis. That analysis easily devolves into a determination that "one environment or set of circumstances is superior to another."[72]

Second, the daily struggles that incarcerated parents face in maintaining sufficient contact with their children make it easier for courts to find the parents unfit, despite the efforts of the parents to contact their children and the system's failure to aid them in doing so.[73] This is exacerbated by the particular situation of immigrant detainees—incarceration far from the foster homes of their children

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not suffice for termination. *See, e.g.*, 25 FLA. JUR. 2D *Family Law* § 292 (2010) ("The court must advise the parents that, if they fail to *substantially* comply with the case plan, their parental rights may be terminated . . . ." (emphasis added)); 4 NEB. PRAC. *Juvenile Court Law & Practice* § 5:8 (2010) ("A parent's failure to follow a court-ordered plan of rehabilitation cannot result in the termination of parental rights unless the terms of the plan are material to the situation, and to the basis of the adjudication.").

70. *See* 25 FLA. JUR. 2D § 292 ("The parent must have had the substantial ability and a viable opportunity to comply with the case plan . . . .").

71. *See, e.g.*, *id.* ("[T]he Department must have made diligent efforts to assist the parent in meeting the goals of the plan and have made reasonable efforts to reunify the parent and child.").

72. State v. Maria L. (*In re* Interest of Angelica L.), 767 N.W.2d 74, 94 (Neb. 2009); *see also* Butera, *supra* note 5 ("In some cases . . . judges base termination decisions on the fact that the mother does not have legal status and may be deported. In others, child welfare workers oppose family reunification because they think that a U.S. citizen child should not live in another country.").

73. *See infra* Part III.C.

and frequent, unexpected moves to different detention centers, often out of state.[74]

A combination of these factors has resulted in some courts failing to address the question of whether illegal immigrant parents are statutorily fit before going on to determine whether their rights should be terminated. In doing so, courts have failed either to apply the appropriate evidentiary standard in the fitness inquiry or to rigorously adhere to the statutory requirements for unfitness, even as they purport to apply the clear and convincing evidence standard.

A. Inadequate Inquiry into Unfitness

In several recent cases, illegal immigrant parents have faced state-court termination hearings after being taken into deportation proceedings. In these cases, the issue has been whether the immigrant parent's parental rights should be terminated, and, in each of these cases, at least one court that heard the case found that they should.[75] Admittedly, two of these cases were later reversed by higher courts, but as Professor Yablon-Zug suggests, such cases frequently do not reach states' higher courts, where termination is more likely to be denied.[76] It is, therefore, instructive to note the problems in the lower courts' rationales even when their decisions are overturned, as they can illuminate why this problem exists.

The outcomes in these recent cases are problematic for two reasons. First, in some cases, courts fail to apply the clear and convincing evidentiary standard to the fitness inquiry, even though the Supreme Court has made it clear that such a standard applies. Second, even when courts ostensibly apply the clear and convincing evidence standard, it is not clear that they properly apply the statutory requirements of finding abandonment, failure to remedy the persistent condition that caused the child to enter foster care, or failure to comply with the reunification plan before proceeding to a best-interests analysis.

1. *Failure to Apply the Clear and Convincing Evidence Standard*. In at least one case, the clear and convincing evidence standard appears to have been wholly ignored by courts examining the

74. *See infra* Part III.C.

75. *See infra* Part III.A.1–2.

76. *See supra* note 16 and accompanying text.

question of a statutory basis for termination. Ostensibly, the Virginia Court of Appeals validated the lower court's failure to apply the correct standard in 2009 when the appellate court upheld the trial court's termination of the parental rights of a Guatemalan father who had been deported from the United States.[77] Victor Perez-Velasquez, an illegal immigrant, was incarcerated when the Department of Social Services removed his children, and the Department offered him no services for reunification.[78] The trial court terminated his parental rights in part because he failed to maintain adequate contact with his children, one statutory way to establish unfitness.[79] The court did find a statutory basis for the termination,[80] but the court referenced the clear and convincing standard only with respect to the best-interests inquiry and not with respect to the unfitness question.[81] Statutory language and previous cases,[82] as well as the Supreme Court's holding in *Santosky*,[83] demonstrate that this standard is required at the unfitness determination stage.

2. *Failure to Remain Faithful to the Requirements of Statutory Unfitness*. Even in cases in which courts purport to apply the clear and convincing evidence standard, there is good reason to question whether the standard was met, based on a failure to adhere to the

77. Perez-Velasquez v. Culpeper Cnty. Dep't of Soc. Servs., No. 0360-09-4, 2009 WL 1851017, at *1–2 (Va. Ct. App. June 30, 2009).

78. *Id.* at *1.

79. *Id.*; *see also* VA. CODE ANN. § 16.1-283(C)(1) (2010) (providing for termination of parental rights if a parent "without good cause, failed to maintain continuing contact" with the child).

80. For further discussion of the basis for the termination of Perez-Velasquez's rights, see *infra* Part III.A.2.

81. *See Perez-Velasquez*, 2009 WL 1851017, at *1 (noting that certain evidence could "support a court's finding by clear and convincing evidence that the best interests of the children will be served by termination" (quoting Ferguson v. Stafford Cnty. Dep't of Soc. Servs., 417 S.E.2d 1, 5 (Va. App. 1992))).

82. *See, e.g.*, Fairfax Cnty. Dep't of Family Servs. v. Ibrahim, No. 0821-00-4, 2000 WL 1847638, at *2 (Va. Ct. App. Dec. 19, 2000) (reciting the statutory requirement that unfitness must be established by clear and convincing evidence); *see also* VA. CODE ANN. § 16.1-283(C)(1)–(2) (requiring clear and convincing evidence to establish unfitness). Tellingly, these code sections were the basis for termination of Perez-Velasquez's parental rights, but the court declined to quote the language requiring clear and convincing evidence to establish unfitness through abuse, neglect, or failure to remedy, choosing only to quote the additional statutory requirement that the child's best interests also be demonstrated by clear and convincing evidence. *Perez-Velasquez*, 2009 WL 1851017, at *2.

83. Santosky v. Kramer, 455 U.S. 745, 747–58 (1982).

requirements of the statutes in question. In each of the three primary areas of findings of unfitness, courts have deviated from the statutory language in making findings of unfitness.

a. Abandonment. Finding parental unfitness based on abandonment of the child generally requires a finding either of willfulness or circumstances within the parent's control.[84] In at least two cases, courts have ignored or brushed aside that requirement despite clear evidence suggesting that the failure to contact or support the child was neither willful nor desired by the parent. This treatment is out of step with the requirements of the fitness inquiry, as it does not sufficiently assess fitness under the relevant state statute.

Ms. Bail's case is a good example. When her son's foster parents petitioned the court for the termination of Ms. Bail's parental rights and the right to adopt her son Carlos, Ms. Bail protested.[85] She wrote a letter to the foster parents' attorney stating that she did not want the adoption to occur and requesting visitation with her son.[86]

Despite Ms. Bail's pleas, Judge David Dally granted both the petition to terminate her parental rights and the adoption petition.[87] The termination of Ms. Bail's parental rights was ostensibly based on her abandonment of Carlos by failing to contact him or send financial support while she was incarcerated,[88] but serious questions remain as to whether Ms. Bail in fact failed in this way. The abandonment statutes under which she was found to be unfit required a showing of willful abandonment or of ability to communicate and failure to do so.[89] Ms. Bail claims that she went to court six times during her

84. *See supra* notes 63–65 and accompanying text.

85. S.M. v. E.M.B.R. (*In re* Adoption of C.M.B.R.), No. SC91141, slip op. at 12–13 (Mo. Jan. 25, 2011) (Stith, J., concurring in part and dissenting in part), *available at* http://www.courts.mo.gov/file.jsp?id=43941.

86. *Id.*, slip op. at 6 (majority opinion).

87. *Id.*, slip op. at 9.

88. *Id.*, slip op. at 32–34; *see also* MO. ANN. STAT. § 211.447(5)(1)(b) (West Supp. 2010) (authorizing termination of parental rights if a child is abandoned, defined in part as the parent having "left the child without any provision for parental support and without making arrangements to visit or communicate with the child, although able to do so"); Thompson, *supra* note 2 ("[T]he judge found that she had made no attempt to contact the baby or send financial support for him . . . .").

89. The trial court found that Ms. Bail abandoned her son under Missouri Statutes §§ 453.040(7), 211.447(2)(2)(b). *S.M.*, slip op. at 9. Section 453.040(7) requires "willful[] abandon[ment]" or "willful[], substantial[] and continuous[] neglect[]." MO. ANN. STAT. § 453.040(7) (West Supp. 2010). Likewise, section 211.447(2)(2)(b) allows a court to determine

incarceration and requested help finding her son each time; no help was provided.[90] It appears that Ms. Bail had no way of knowing where her son was or where she could contact him.[91] After receiving notification of the adoption petition only in English, she found a cellmate to translate for her and immediately wrote to the court requesting visitation with her son.[92] Essentially "no effort was made to locate [Ms. Bail] or to ensure she had knowledge of the termination and adoption proceeding."[93] In the meantime, she was transferred to a prison in West Virginia, far from the proceedings that were ensuing to terminate her parental rights.[94]

Mr. Perez-Velasquez's parental rights were also terminated based in part on abandonment, though it is not clear that he met the statutory requirements of abandonment. The statute under which he was found to have abandoned his children required a lack of good cause for failing to maintain contact with his children.[95] He had not been told where his children were, however, so he could not contact them. The court's response was that the father's deportation was to blame for the lack of communication, so he was responsible for failing to maintain contact, proving him unfit.[96] The court, however, provided no basis in either statutes or case law for its conclusion.

The statute further required that the failure to communicate be in spite of "reasonable and appropriate efforts of . . . rehabilitative

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that a parent has abandoned her child if she has "without good cause, left the child without any provision for parental support and without making arrangements to visit or communicate with the child, *although able to do so*." MO. ANN. STAT. § 211.447(2)(2)(b), .447(5)(1)(b) (emphasis added).

90. Thompson, *supra* note 2; *see also* S.M. v. E.M.B.R. (*In re* Adoption of C.M.B.R.), No. SD 30342, 2010 WL 2841486, at *3 (Mo. Ct. App. July 21, 2010) ("No evidence was presented at trial to show whether Mother . . . was capable of providing support for Child while she was imprisoned. Additionally, nothing in the record indicates that Mother knew how to contact Child or where to find him . . . .").

91. *S.M.*, slip op. at 12 (Stith, J., concurring in part and dissenting in part) ("[T]here is no evidence that the mother had the opportunity to contact her family to inquire about her son. . . . [A]ny lack of evidence demonstrating the mother's efforts to contact her son does not prove that she in fact did not undertake such efforts. It is simply a gap in the record that reflects nothing more than the fact that the adoptive parents introduced no evidence tending to disprove the allegations in their own petition.")

92. *See id.*, slip op. at 13 (describing the letter requesting visitation).

93. *S.M.*, 2010 WL 2841486, at *3.

94. Thompson, *supra* note 2.

95. VA. CODE ANN. § 16.1-283(C)(1) (2010).

96. Perez-Velasquez v. Culpeper Cnty. Dep't of Soc. Servs., No. 0360-09-4, 2009 WL 1851017, at *2 (Va. Ct. App. June 30, 2009).

agencies to communicate with the parent or parents and to strengthen the parent-child relationship."[97] Mr. Perez-Velasquez argued that he was provided no such services to help him maintain contact with his children,[98] but the court, in contravention of the language of the statute, found that it would have been unreasonable to expect such services to be provided.[99] The court's only basis for this finding was a statement in a case holding, in different factual circumstances, that the state was not required to provide services to help a parent regain custody while he was in prison.[100] In the case relied upon by the court, the incarcerated father had, in fact, been provided "communicat[ion] . . . as to his daughter's placement situation,"[101] giving him the information necessary to find and contact his child, even from prison.

b. Failure to Remedy the Condition Leading to Removal. Mr. Perez-Velaquez's case also demonstrates another problem: when unfitness is based on the failure to remedy the condition that led to removal, courts often fail to properly apply the fitness inquiry. The court appeared to view his deportation as removing all chance of future communication with his children, quoting with approval the trial court's statement that "his subsequent deportation eliminated any chance that . . . he could participate in remedying, within a reasonable time, the conditions resulting in the placement and continuation of the children in foster care."[102] Like the abandonment statute, the statute basing unfitness on a failure to "remedy substantially the conditions which led to . . . the child's foster care

97. VA. CODE. ANN. § 16.1-283(C)(1).

98. *Perez-Velasquez*, 2009 WL 1851017, at *2.

99. *Id.*

100. *See id.* (adopting the rationale of *Harrison v. Tazewell County Department of Social Services*, 590 S.E.2d 575 (Va. Ct. App. 2004)). *Harrison* is distinguishable from *Perez-Velasquez* on two grounds. First, Mr. Perez-Velasquez was denied services even after he left prison, whereas Mr. Harrison was denied services only during his incarceration. *See Harrison*, 590 S.E.2d at 583 (describing how Mr. Harrison was offered resources before his incarceration and remained advised of his child's placement while incarcerated). Additionally, Mr. Harrison had previously refused the services offered to him to better his relationship with his child. *Id.* ("[T]he record reflects that the Department in fact offered Harrison services before he became incarcerated and before L.H. was placed in foster care. However, Harrison refused to take advantage of those services."). No evidence that Mr. Perez-Velasquez had previously refused services was presented.

101. *Harrison*, 590 S.E.2d at 583.

102. *Perez-Velasquez*, 2009 WL 1851017, at *2 (internal quotation marks omitted).

placement" required that the Department of Social Services provide him services to that end.[103] In determining that it would have been unreasonable to require the Department to provide such services, the court relied on a case that arose in circumstance different from *Perez-Velasquez*.[104] Because he would have been able to benefit from the services, Mr. Perez-Velasquez should have been granted them under the statute before being determined unfit.

Similarly, in 2005, the Tennessee Court of Appeals upheld the termination of the parental rights of an illegal Nigerian immigrant on the ground that she had failed to remedy the persistent condition that required her children to enter foster care.[105] Binta Ahmad was arrested for theft charges and was unable to make bond, so she

103. VA. CODE ANN. § 16.1-283(C)(2) (2010). Notably, *Perez-Velasquez* calls into question a positive result in a previous Virginia Court of Appeals case. In 2000, the court affirmed the denial of Virginia's petition to terminate the parental rights of Usman Ibrahim, a Ghanaian national whose three children were placed in foster care after he was arrested. Fairfax Cnty. Dep't of Family Servs. v. Ibrahim, No. 0821-00-4, 2000 WL 1847638, at *1 (Va. Ct. App. Dec. 19, 2000). After Mr. Ibrahim's deportation, the Commonwealth of Virginia initiated proceedings to terminate his parental rights. *Id.* The trial court refused to rule that deportation alone was sufficient to terminate Mr. Ibrahim's parental rights and required the state to show that there was some statutory basis for terminating his parental rights. *Id.* at *2. The state, however, failed to do so because the conditions that led to the children entering foster care had been corrected and because Mr. Ibrahim had not abandoned his children given that he attempted to maintain contact with them but was thwarted by both the children's foster parents and the Department of Family Services. *Id.* at *2–3 (discussing how Mr. Ibrahim's attempts to maintain contact with his children via phone were ruined when the foster parents changed their phone number, and explaining the numerous failures of the Department of Family Services to keep in contact with Mr. Ibrahim and to provide him services). On appeal in *Ibrahim*, the Court of Appeals affirmed, holding that the "framework for terminating parental rights . . . 'provides detailed procedures designed to protect the rights of the parents and their child[ren] . . . . [and] must be strictly followed.'" *Id.* at *4 (first alteration in original) (quoting Rader v. Montgomery Cnty. Dep't of Soc. Servs., 365 S.E.2d 234, 235–36 (Va. Ct. App. 1988)). In *Perez-Velasquez*, of course, under similar facts, the Virginia Court of Appeals found that the Department of Social Services had no responsibility to help an illegal immigrant father maintain contact with his children while they were in foster care and consequently upheld the termination of his parental rights. *Perez-Velasquez*, 2009 WL 1851017, at *2–3.

104. *See supra* note 100. As noted, Mr. Harrison was denied services while in prison, where he would not have been able to take advantage of them. Mr. Perez-Velasquez, by contrast, was denied services even after he was deported, when he would have been able to regain custody of his children. *See* State v. Maria L. (*In re* Interest of Angelica L.), 767 N.W.2d 74, 96 (Neb. 2009) (noting that Ms. Luis would be able to regain custody of her children after deportation).

105. State Dep't of Children's Servs. v. Ahmad, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at *2 (Tenn. Ct. App. Apr. 26, 2005); *see also* TENN. CODE ANN. § 36-1-113(g)(1), (3)(A) (2010) (authorizing termination when there is "[a]bandonment by the parent" and when the child has been removed from the parent's custody and "[t]he conditions that led to the child's removal . . . still persist").

remained incarcerated for over a year.[106] Subsequently, she was turned over to immigration officials, who detained her for an additional two years before deporting her to Nigeria.[107] During the course of her incarceration, her children had primarily resided in foster care;[108] when she was deported, she felt it was in the best interests of her children to leave them in foster care until she could "relocate to a safe country and reclaim [them]."[109] In spite of her plan to reclaim her children, her parental rights were terminated.[110]

In upholding the termination of Ms. Ahmad's parental rights, the Tennessee Court of Appeals found that she "ha[d] been unable to remedy the conditions which led to the removal of her children."[111] The condition that led to the removal of her children was her incarceration.[112] The statute under which her purported unfitness was determined stated that parental rights could be terminated if "[t]he conditions that led to the child's removal . . . still persist."[113] Although she was no longer incarcerated at the time of the hearing,[114] the court found that she nonetheless failed to remedy the condition that led to the removal of her children.[115] In finding Ms. Ahmad to be unfit, the court avoided the clear language of the statue.

c. Failure to Comply with the Reunification Plan. In finding that parental rights should be terminated based on a failure to comply with a reunification plan, courts have ignored the statutory requirement that the state provide assistance in the completion of that plan. For example, in 2007, the Nebraska Juvenile Court

106. *Ahmad*, 2005 WL 975339, at *1.

107. *Id.*

108. *See id.* at *1 n.3.

109. *Id.* at *2 & n.4.

110. *Id.* at *4.

111. *Id.* at *2.

112. *Id.* at *1 n.3.

113. TENN. CODE ANN. § 36-1-113(g)(3)(A) (2010).

114. *Ahmad*, 2005 WL 975339, at *1.

115. *Id.* at *2. Courts have dealt differently with this issue, though the approach that appears most logically consistent is found in *Fairfax County Department of Family Services v. Ibrahim*. *Compare Ahmad*, 2005 WL 975339, at *1 (terminating custody of a mother because she "has been unable to remedy the conditions which led to the removal of her children" when those conditions were her continued incarceration), *with* Fairfax Cnty. Dep't of Family Servs. v. Ibrahim, No. 0821-00-4, 2000 WL 1847638, at *2 (Va. Ct. App. Dec. 19, 2000) ("The trial court found the conditions that brought the children into foster care had been substantially corrected because . . . the father was no longer incarcerated.").

terminated the parental rights of a Guatemalan illegal immigrant after she was put into deportation proceedings.[116] In 1998, Maria Luis first immigrated to the United States, where she gave birth to her son, Daniel.[117] She again illegally entered the country in 2004.[118] Around the time of her second immigration, she gave birth to her daughter, Angelica.[119] She was arrested in 2005 for "obstructing a government operation" and was subsequently turned over to ICE custody.[120] When she was deported in 2005, the state refused to return her children to her.[121] The state subsequently developed a case plan that Ms. Luis was required to complete before regaining custody.[122] Because of a lack of services in Guatemala and the failure of her case manager to adequately monitor her progress, Ms. Luis failed to "strictly comply with the case plan."[123] This, combined with the fact that the children had remained in foster care for fifteen of the previous twenty-two months, led the lower court to terminate her parental rights.[124] The court "questioned whether parental unfitness needed to be established in this case in order to terminate parental rights, but it concluded that, regardless," "the State had met its

116. State v. Maria L. (*In re* Interest of Angelica L.), 767 N.W.2d 74, 88 (Neb. 2009).

117. *Id.* at 80.

118. *Id.*

119. *Id.* Angelica's citizenship status is unclear because it is unknown whether she was born in the United States or in Guatemala, during a period in which Ms. Luis briefly returned to that country. *Id.*

120. *Id.* at 82. Ms. Luis's "obstructi[on of] a government operation" entailed misidentifying herself as Angelica's babysitter to a Department of Health and Human Services social worker and a police officer who came to her home to investigate allegations of abuse. *Id.* at 81–82. She misidentified herself in such a fashion because "she was afraid she would lose her children and be deported" if she gave her real name. *Id.* at 81.

121. *Id.* at 82.

122. *Id.* at 83; *see also* NEB. REV. STAT. ANN. § 43-1312 (LexisNexis Supp. 2010) (requiring the state to create a permanency plan for the child after she is placed in foster care, with an apparent preference for family reunification).

123. *Maria L.*, 767 N.W.2d at 84. The plan required Ms. Luis to maintain a job and appropriate residence, complete a psychological exam, maintain contact with the case manager and children, and take a parenting class. Ms. Luis failed to comply because she was unable to obtain parenting classes and a psychological exam in Guatemala. *Id.* at 83.

124. *Id.* at 84; *see also id.* at 83 ("The court instructed Maria's counsel to advise her that failure to comply with the case plan, combined with the children's being out of the home for 15 or more of the most recent 22 months, would trigger a motion to terminate parental rights."); *supra* Part II.A.

burden of proof and that termination was in the children's best interests."[125]

On appeal, the Nebraska Supreme Court recognized the lower court's failure to follow established law for finding unfitness and thus overturned the termination.[126] With regard to the failure to complete the reunification plan, the court explained that the goals of the plan must be reasonable and that the state must assist the parent in complying with the plan.[127] The court found that the requirements with which Ms. Luis had not complied were "not necessary for [her] to become a fit parent" and that the state had provided insufficient help to her in complying with the plan.[128] Consequently, the statutory grounds for a finding of unfitness had not been met.[129] In dismissing the other basis for the termination, the court stated that to terminate parental rights, the state must first prove parental unfitness based on a statutory reason and asserted that placement of a child in foster care for fifteen of the previous twenty-two months was in itself insufficient to establish unfitness.[130]

These cases demonstrate situations in which parental rights were terminated without clear and convincing evidence of parental unfitness or with an unconvincing application of the statutory standard for finding unfitness. The next Sections will discuss the two underlying issues that appear to have caused the problem.

B. Cultural Difference as Unfitness

Cultural bias, as used here, means expressing a preference for one's own culture and cultural practices over those of another.[131] Cultural bias in family law cases that involve immigration generally

125. *Maria L.*, 767 N.W.2d at 87.

126. *Id.* at 92.

127. *Id.* at 95.

128. *Id.* at 95–96.

129. *Id.* at 96.

130. *Id.* at 92.

131. Cultural bias is displayed frequently in discourse over immigration in the United States, such as the statement made by the attorney for Carlos's adoptive parents in the Bail case that "[the U.S. courts] afforded [Bail] more due process than most people get who speak English." Thompson, *supra* note 2; *see also* Tim Padgett & Dolly Mascareñas, *Did a Mother Lose Her Child Because She Doesn't Speak English?*, TIME (Aug. 27, 2009), http://www.time.com/time/nation/article/0,8599,1918941,00.html (discussing a recent case in which a Mexican mother was found unfit by the Mississippi Department of Human Services because "her lack of English 'placed her unborn child in danger and will place the baby in danger in the future'").

appears in one of two ways. Courts demonstrate this bias by expressing the belief that life with American adoptive parents will, necessarily, be superior to the life that a child could have with her birth parent in the parent's home country.[132] Alternatively, courts display cultural bias when addressing the fitness question, failing to fully adhere to the statutory language on unfitness and instead allowing considerations such as the parent's immigration status or deportation to affect the termination decision.[133]

Courts have demonstrated a preference for American parents with "comfortable liv[es,] . . . stable home[s], and . . . support from their [local] extended family"[134] in a number of cases. Some courts state it directly; others state it more subtly, by comparing the environment that the parent can provide in her country of origin to the environment provided by American foster parents.[135] For example, in terminating Ms. Bail's parental rights, Judge Dally contrasted the "stable home" of the American adoptive parents with the "only certaint[y]" in Ms. Bail's future, which was that she would "remain incarcerated . . . and . . . be deported."[136] Similarly, the Nebraska Juvenile Court, in terminating Ms. Luis's parental rights,

132. *See* Yablon-Zug, *supra* note 4, at 16 (noting that the definition of a good parent is "defined in relation to dominant cultural norms"). This focuses on what the court believes to be the child's best interests and, by failing to apply the clear and convincing standard at all or by applying it weakly, passes over the imperative first question of whether the parent was unfit. Some judges have explicitly expressed their desire to approach the termination inquiry in this fashion. Fairfax Cnty. Dep't of Family Servs. v. Ibrahim, No. 0821-00-4, 2000 WL 1847638, at *5 (Va. Ct. App. Dec. 19, 2000) (Clements, J., concurring) ("To me, the evidence before us is clear and convincing that it is in the best interests of these children that the father's parental rights be terminated. However, in this case we have been required by the statute to elevate the 'technical legal rights of the parent' over the paramount consideration—the best interests of the children." (quoting Forbes v. Haney, 133 S.E.2d 533, 536 (Va. 1963))).

133. *See supra* Part III.A.2.

134. Thompson, *supra* note 2.

135. *See infra* notes 136–40 and accompanying text.

136. Thompson, *supra* note 2; S.M. v. E.M.B.R. (*In re* Adoption of C.M.B.R.), No. SC91141, slip op. at 2 (Mo. Jan. 25, 2011) (Wolff, J., concurring in part and dissenting in part), *available at* http://www.courts.mo.gov/file.jsp?id=43941 ("The law does not allow the government to act on an assumption that one family would be better than another, for to do so would be to authorize the courts to take away the children of the poor and give them to the rich and to take the children of foreign-born parents and give them to native-born American families."); S.M. v. E.M.B.R. (*In re* Adoption of C.M.B.R.), No. SD 30342, 2010 WL 2841486, at *8 (Mo. Ct. App. July 21, 2010) ("While the trial court did not expressly say that Respondents could provide a better home in the United States for Child, it did so through its actions because it found for Respondents even though it had no knowledge of the type of home Mother could offer to Child in Guatemala.").

relied on testimony about the lack of "economic opportunities" and the "unfamiliar . . . educational system [and] athletic opportunities available in Guatemala."[137]

These comparisons, in themselves, suggest a cultural bias against immigrants. They place an emphasis on the "dominant cultural norms" in American society that define a good parent.[138] These norms include the notion that a "good parent" will be able to provide a large home with private space for the child, along with education and medical care that meet American standards.[139] The suggestion that the adoptive parents would be better parents for Carlos because of their "comfortable lives" may reflect the norm that a good parent is one who can provide a private space for her child. Likewise, the restatement of testimony indicating that economic and educational opportunities might not be as great in Guatemala as in the United States may reflect the norm that good parents are those able to provide their children with the best educational and economic options, as defined by American standards. More directly, scholars have noted the increasingly common norm that a good parent is a nonimmigrant parent.[140] This embodies a view that anything incident to status as an undocumented immigrant—including deportation or incarceration pending deportation—makes one a bad parent. Recognition of this bias suggests that Judge Dally's comment about Ms. Bail's future may have been laced with unconscious bias, rather than fully based in concern over the impact of a temporary separation of mother and child.

The Nebraska Supreme Court recognized this as an unacceptable practice that had been used by the juvenile court to terminate Ms. Luis's parental rights. In acknowledging the cultural bias displayed by the lower court, the appellate court stated that

> the "best interests" of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another. . . . [U]nless [Ms. Luis] is found to be unfit, the fact that the state considers certain adoptive

137. State v. Maria L. (*In re* Interest of Angelica L.), 767 N.W.2d 74, 85 (Neb. 2009).

138. *See* Yablon-Zug, *supra* note 4, at 16.

139. *Id.* at 17.

140. *See, e.g.*, *id.* at 19 (noting that immigrant parents "may also be subject to the proliferating negative views of undocumented immigrants" and that "the language, culture, and values associated with undocumented immigrants are openly considered undesirable").

> parents . . . "better," or this environment "better," does not overcome the commanding presumption that reuniting the children with [their parent] is in their best interests—no matter what country [the parent] lives in.[141]

Cultural bias also plays a role in each of the three ways that courts have established unfitness in these cases—abandonment, failure to remedy the condition that caused the child to enter foster care, and failure to comply with the reunification plan. When abandonment is used to prove unfitness, it is based on the parent's incarceration pending deportation—something for which courts blame parents,[142] even when the decision to immigrate and risk deportation was made for the benefit of the child.[143] When courts look to failure to remedy as proof of unfitness, they demonstrate cultural bias in two ways. First, as with the abandonment basis, the condition that caused the child to enter foster care is the parent's arrest for deportation proceedings, something that some courts have considered a significant-enough fault to justify inferior treatment vis-à-vis entitlements to the services that help to remedy the condition.[144] Second, some courts have expressed the opinion that once deported, parents cannot remedy the condition[145] because they have forfeited their rights to their children by leaving the country.[146]

Finally, courts display cultural bias in applying failure to complete a reunification plan as a means to establish unfitness. This bias is most often based on a belief that once deported, the parent will be unable to comply with the reunification plan or on an assessment

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141. *Maria L.*, 767 N.W.2d at 94; *see also S.M.*, 2010 WL 2841486, at *8 (quoting with approval the Nebraska Supreme Court's statement that "the 'best interests' of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another").

142. *See, e.g.*, Perez-Velasquez v. Culpeper Cnty. Dep't of Soc. Servs., No. 0360-09-4, 2009 WL 1851017, at *2 (Va. Ct. App. June 30, 2009) ("[F]ather's own actions led to this situation. . . . [H]is incarceration and deportation affected his ability to contact his children and participate in the foster care proceedings.").

143. *See infra* note 153 and accompanying text.

144. *See Perez-Velasquez*, 2009 WL 1851017, at *2 (finding that it would be "unreasonable" to provide someone who had been incarcerated and taken into deportation proceedings services that would enable him to reunite with his child).

145. *See, e.g.*, *id.* at *2 ("His . . . subsequent deportation eliminated any chance that he could maintain contact with the children . . . ." (quoting the trial court opinion)).

146. But see *supra* note 43, discussing a fit illegal immigrant parent's right to take her U.S. citizen child with her upon deportation.

of plan completion that does not recognize the variation in services available in other countries.[147] In determining that parental rights should be terminated because of failure to complete a reunification plan, one court has found that the parent failed to strictly comply with the plan,[148] despite evidence that compliance was sufficient given the circumstances.[149]

In addition to importing cultural bias into analysis of existing statutory bases for unfitness, cultural bias against immigrants allows courts to find unfitness based on a parent's illegal entry into the United States or on the parent's status as an undocumented immigrant. In terminating Ms. Bail's parental rights, for example, Judge Dally condemned Ms. Bail's choice to come to the United States, writing that her "lifestyle, that of smuggling herself into a country illegally . . . is not a lifestyle . . . for a child."[150] Similarly, in upholding the termination of Ms. Ahmad's parental rights, the Court of Appeals of Tennessee blamed her choice to come to the United States for the termination of her rights, noting that, "[p]erhaps termination of [Ms. Ahmad's] parental rights would not have been necessary had [she] not migrated illegally to the United States."[151] In terminating Ms. Luis's parental rights, the Nebraska Juvenile Court cited her "unauthorized trip to the United States with a newborn premature infant or . . . g[iving] birth to a premature infant in the United States" and "[b]eing in the status of an undocumented immigrant" as examples of her failures as a parent.[152] Likewise, Mr. Perez-Velasquez's "own actions" were found to have "led to" the termination of his parental rights because "his incarceration and deportation affected his ability to contact his children."[153]

147. *See supra* notes 13, 123 and accompanying text.

148. *See supra* notes 122–23 and accompanying text.

149. *See supra* notes 127–29 and accompanying text.

150. S.M. v. E.M.B.R. (*In re* Adoption of C.M.B.R.), No. SD 30342, 2010 WL 2841486, at *4 (Mo. Ct. App. July 21, 2010).

151. State Dep't of Children's Servs. v. Ahmad, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at *3 (Tenn. Ct. App. Apr. 26, 2005).

152. State v. Maria L. (*In re* Interest of Angelica L.), 767 N.W.2d 74, 88 (Neb. 2009).

153. *Perez-Velasquez*, 2009 WL 1851017, at *2. Despite what some might perceive as a valid position—that immigrating to and living in the United States illegally is a poor situation in which to raise a child—that view has been challenged by courts, academics, and non-profits. The Nebraska Supreme Court, for example, recognized that illegally entering the United States and having the status of an undocumented immigrant was an insufficient reason—one based on cultural bias—for terminating parental rights. In overturning Ms. Luis's termination, the court

These cases suggest that cultural bias affects courts' termination decisions. The Supreme Court has warned that such cultural biases may improperly affect termination-of-parental-rights proceedings.[154] It is up to state courts to heed this warning and follow the law fairly. At least two courts have been successful, though not without having to chastise lower courts for their willingness to allow a "culture clash"[155] to dictate the outcome of their decisions.[156] Although these courts can serve as a model for other courts, other measures will be necessary to address the second problematic factor in these cases—the incarceration of the parents.

C. The Prisoner's Dilemma

The realities of prison life present special challenges for parents facing termination of their parental rights, often exacerbated for illegal immigrants who are in prison pending deportation proceedings. The most important of these challenges are barriers to communication and the use of parental incarceration as a ground for

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refused to "conclude that [Ms. Luis's] attempt to bring herself and her child into the United States, in the belief that they would have a better life here, shows an appreciable absence of care, concern, or judgment." *Maria L.*, 767 N.W.2d at 93. Professor David Thronson has similarly labeled judges as culturally biased when, for example, a judge terminated a father's parental rights based on the father's failure to gain legal status in the United States and on his likelihood of deportation. David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 54 (2005). A 2010 report from First Focus and the Migration and Child Welfare National Network noted that "biased family court judges may inappropriately base their decision[s] on . . . parent[s'] immigration status rather than their demonstrated parenting capacity." Wendy Cervantes & Yali Lincroft, *The Impact of Immigration Enforcement on Child Welfare*, CAUGHT BETWEEN SYS. (First Focus & Migration & Child Welfare Nat'l Network, Wash., D.C.), Mar. 2010, at 1, 4–5, *available at* http://www.firstfocus.net/sites/default/files/CaughtBetweenSystems.pdf.

154. *See* Santosky v. Kramer, 455 U.S. 745, 763 (1982) ("Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias." (citation omitted)).

155. *Maria L.*, 767 N.W.2d at 93 ("What we are dealing with here is a culture clash.").

156. *See* S.M. v. E.M.B.R. (*In re* Adoption of C.M.B.R.), No. SD 30342, 2010 WL 2841486, at *7 (Mo. Ct. App. July 21, 2010) ("If Mother's immigration status was considered as a factor, we note that immigration status has never been one of the factors to consider when determining whether to terminate parental rights. . . . While the trial court did not expressly say that Respondents could provide a better home in the United States for Child, it did so through its actions because it found for Respondents even though it had no knowledge of the type of home Mother could offer to Child in Guatemala."); *Maria L.*, 767 N.W.2d at 94 ("[W]hether living in Guatemala or the United States is more comfortable for the children is not determinative of the children's best interests.").

termination of parental rights because of the length of incarceration or the fact of incarceration itself.

Illegal immigrants can arrive in prison in one of two ways. First, they may be arrested strictly for immigration violations, resulting in their detention in an ICE facility.[157] Second, they may be arrested for a crime by local, state, or federal law enforcement officials.[158] After the arrest, they can be sentenced for the crime through the state or federal court system and then will generally be held in state or federal prison for the duration of their sentence before being transferred into ICE custody.[159] If the crime is an immigration crime for which an arrest is made at the local or state level, the arresting officer must contact federal authorities and transfer the immigrant to ICE custody.[160] Alternatively, the criminal charges may be dropped, at which time the immigrant would most likely be transferred to ICE custody for deportation proceedings.[161]

When an illegal immigrant is arrested by state or local authorities, a provision of the Immigration and Nationality Act (INA)[162] allows those officials to carry out the functions of immigration officials, provided the officials meet certain requirements.[163] Section 287(g) of the INA allows state and local

157. *See Fact Sheet: Detention Management*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/detention-mgmt.htm (last visited Feb. 8, 2011) (noting that, as of November 20, 2008, "ICE . . . uses more than 300 local and state facilities operating under intergovernmental service agreements; seven contract detention facilities and eight ICE-owned facilities" to hold detainees).

158. *See* Solomon Moore, *Study Shows Sharp Rise in Latino Federal Convicts*, N.Y. TIMES, Feb. 19, 2009, at A14 (discussing the transfer of illegal immigrants into ICE custody after they have served their federal criminal sentences); Jennifer Steinhauer, *Arizona Prisons Plan to Transfer Illegal Immigrants to Federal Custody*, N.Y. TIMES, Dec. 22, 2009, at A23 (discussing the transfer of illegal immigrants convicted of state crimes to federal custody).

159. *See* Moore, *supra* note 158 ("Federal prisoners who are illegal immigrants are usually deported to their home countries after serving their sentences.").

160. Kris W. Kobach, *State and Local Authority to Enforce Immigration Law: A Unified Approach for Stopping Terrorists*, BACKGROUNDER (Ctr. for Immigration Studies, Wash., D.C.), June 2004, at 1, *available at* http://www.cis.org/articles/2004/back604.pdf.

161. *See, e.g.*, *Maria L.*, 767 N.W.2d at 82 ("Shortly after her arrest. [*sic*] [for criminal charges] Maria was taken into custody by . . . [ICE]. The original [criminal] charges . . . were not pursued.").

162. Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

163. INA § 287(g), 8 U.S.C. § 1357(g); *see also Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Feb. 8, 2011)

officials who have been trained by ICE to detain illegal immigrants and charge them for immigration violations, which begins the removal process.[164] They may do so after arresting an immigrant for federal immigration violations or after arresting the immigrant for other criminal charges and subsequently identifying her as an illegal alien.[165] This contributes to the number of illegal immigrants being held in state and local prisons and jails.[166]

1. *Barriers to Communication*. Incarcerated parents face a number of hurdles when attempting to communicate with their children. These difficulties are present in state and federal prisons, where illegal immigrants are often held,[167] and it is reasonable to assume that they also exist at ICE facilities.[168]

Telephone is one of the primary methods of communication for incarcerated parents and their children. Because prisons use expensive collect calling systems that require the receiving party to pay costly charges,[169] however, this form of communication may be

(describing the § 287(g) program and listing requirements for participation).

164. *See* INA § 287(g), 8 U.S.C. § 1357(g) ("[T]he Attorney General may enter into a written agreement . . . pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . may carry out such function . . . ."); *see also* Jessica M. Vaughan & James R. Edwards, Jr., *The 287(g) Program: Protecting Home Towns and Homeland*, BACKGROUNDER (Ctr. for Immigration Studies, Wash., D.C.), Oct. 2009, at 3, *available at* http://www.cis.org/articles/2009/287g.pdf ("Memoranda of agreement . . . enable local police to assist federal authorities in the investigation, arrest, detention, and transportation of illegal aliens . . . ."); *id.* at 3 ("While state and local officers have inherent legal authority to make immigration arrests, 287(g) provides additional enforcement authority to the selected officers such as the ability to charge illegal aliens with immigration violations, beginning the process of removal.").

165. *See* Vaughan & Edwards, *supra* note 164, at 3 ("[S]tate and local officers have inherent legal authority to make immigration arrests."); *id.* at 6 ("Having jail intake officers identify illegal aliens at the time of booking [for non-immigration crimes] ensures that they will be flagged for removal before release.").

166. *See Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 163 ("Since January 2006, the 287(g) program is credited with identifying more than 185,000 potentially removable aliens—*mostly at local jails*." (emphasis added)).

167. *See supra* Notes 156–65.

168. This is a reasonable assumption both because ICE facilities, by their limited nature, are often farther from the immigrant's home and because ICE facilities are federal facilities, suggesting that federal statistics provided herein are relevant to ICE facilities.

169. *See* TRAVIS ET AL., *supra* note 53, at 6 (discussing the high costs of collect calls in prisons).

unavailable to incarcerated parents if the child's caregiver is unable or unwilling to accept the charges.[170] Furthermore, foster parents may be unwilling to allow communication via telephone at all and may refuse to accept collect call charges or provide the correct phone number to the biological parent.[171] Finally, correction facility policies often limit the number of calls a prisoner is allowed to receive.[172]

Whatever the reason, in 2004, 15 percent of parents incarcerated in federal prisons had never spoken with their children via telephone.[173] Nearly another 30 percent of parents spoke to their children via telephone only monthly or less frequently.[174] In state prisons, the numbers were worse: 47 percent of parents had never contacted their children via telephone.[175] Given that "[t]he probability of termination increases as a result of . . . limited contact [between] incarcerated parents . . . [and] their children,"[176] this communication barrier represents a significant problem for incarcerated parents who want to maintain custody of their children.

As difficult as telephone communication is, problems arranging face-to-face visitation for incarcerated parents are even greater. Foster parents may be reluctant to arrange, participate in, or

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170. Laughlin et al., *supra* note 50, at 222.

171. Because foster parents are not required to help maintain contact of any sort, it is possible that problems of foster parents withholding communication are prevalent in this area. *See id.* ("When children of incarcerated [parents] are placed in foster homes, foster parents are under no obligation to facilitate visits or any other type of contact between the child and the [parent] . . . ."); *see also* State v. Maria L. (*In re* Interest of Angelica L.), 767 N.W.2d 74, 83 (Neb. 2009) ("Although [the immigrant mother] wanted to initiate telephone calls with her children [in foster care], she was not provided with a telephone number to contact the children and any contact with the children had to be initiated by their foster parents."); Fairfax Cnty. Dep't of Family Servs. v. Ibrahim, No. 0821-00-4, 2000 WL 1847638, at *2 (Va. Ct. App. Dec. 19, 2000) (noting that communication between an incarcerated illegal immigrant parent and his children was terminated because the children's foster parents changed their phone number).

172. *See* TRAVIS ET AL., *supra* note 53, at 1 ("The number of calls . . . per prisoner is typically limited by corrections policy."); *see also* RANDY CAPPS, ROSA MARIA CASTAÑEDA, AJAY CHAUDRY & ROBERT SANTOS, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 2 (2007) ("Detained immigrants had very limited access to telephones to communicate with their families . . . .").

173. LAUREN E. GLAZE & LAURA M. MARUSCHAK, PARENTS IN PRISON AND THEIR MINOR CHILDREN 18 (Bureau of Justice Statistics, Special Report No. NCJ 222984, 2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf.

174. *Id.*

175. *Id.*

176. Ellen Barry, River Ginchild & Doreen Lee, *Legal Issues for Prisoners with Children*, *in* CHILDREN OF INCARCERATED PARENTS 147, 151 (Katherine Gabel & Denise Johnston eds., 1995).

otherwise facilitate in-person visits.[177] This reluctance may be aggravated by the distances that must often be traveled for a personal visit to occur. Prisons are generally located in rural areas, far from the urban and suburban areas where the majority of the population resides. This is often worse for mothers than for fathers, as there are fewer prisons for women, which results in incarcerated mothers being held further from their last place of residence.[178] In 1997, 84 percent of parents incarcerated in federal prisons were housed more than one hundred miles from their last place of residence, often the place of residence they shared with their child prior to incarceration.[179] Forty-three percent of parents in federal prisons were held more than five hundred miles from their last place of residence.[180] The picture is slightly better for parents incarcerated in state prisons, though over half of those parents were held in a prison more than one hundred miles from their homes.[181] Recent reports suggest that this trend continues today.[182] In 2004, these often-insurmountable difficulties resulted in 45 percent of federally incarcerated parents never having a personal visit with their child and another 36 percent having personal visits less than once a month through the duration of their incarceration.[183] Additionally, nearly 60 percent of parents incarcerated in state prisons had never been personally visited by their children.[184]

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177. *See* TRAVIS ET AL., *supra* note 53, at 5 (listing "[f]oster parents . . . who are unwilling to facilitate visits" as an "obstacle[] to parent-child visits in prison"); *see also supra* note 171.

178. Laughlin et al., *supra* note 50, at 222.

179. CHRISTOPHER J. MUMOLA, INCARCERATED PARENTS AND THEIR CHILDREN 5 (Bureau of Justice Statistics, Special Report No. NCJ 182335, 2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf.

180. *Id.*

181. *Id.*

182. *See, e.g.*, LIS Inc., NAT'L INST. OF CORRECTIONS INFO. CTR., U.S. DEP'T OF JUSTICE, SERVICES FOR FAMILIES OF PRISON INMATES 4 (2002) (noting that although some corrections agencies use proximity to family as a basis for inmate assignment to a particular location, an equal number do not or cannot because of facility limitations); Laughlin et al., *supra* note 50, at 222 (discussing geographic distance as a continuing impediment to personal visitation between incarcerated parents and their children); *Immigrant Detainees Denied Access to Lawyers*, THE BLOG OF LEGAL TIMES, (Sept. 14, 2010, 4:13 PM), http://legaltimes.typepad.com/blt/2010/09/thousands-of-people-in-immigration-detention-facilities-are-unable-to-get-lawyers-because-of-geographically-isolated-facili.html ("The geographic isolation of many of the facilities is stark . . . . For example, [one jail] is 346 miles from the nearest city. [Another] facility . . . is 315 miles from the closest city.").

183. GLAZE & MARUSCHAK, *supra* note 173, at 18.

184. *Id.*

This problem is likely to be even worse for illegal immigrants who are held pending deportation because they are "routinely transferred to more remote jails" and may be "moved from state to state without notice."[185] In at least one case, transfer out of the state has been used as a factor in terminating an illegal immigrant parent's rights.[186] On the whole, barriers to personal visitation for immigrant and nonimmigrant parents alike are immense; the special circumstances of immigrant parents only serve to lessen their ability to successfully organize a personal visit.

If a visit is successfully arranged, the problems have not ceased for the incarcerated parent. Poor visiting conditions are rampant because of prison procedures that restrict visitation for security reasons, subject visitors to embarrassing searches,[187] and create conditions that are inhospitable to children.[188] In the prison setting, a "security and safety rationale [often] dominates,"[189] leading prisons to develop visitation policies in conformity with the "institution's schedule, space and personnel constraint[s],"[190] rather than those conducive to meaningful visits. These policies often mean that children visiting their parents must come at a certain time of day, wait long periods of time to be let in for the visit,[191] and avoid physical contact during the visit, often being required to speak via phone to

185. Nina Bernstein, *Immigrant Jail Tests U.S. View of Legal Access*, N.Y. TIMES, Nov. 2, 2009, at A1. This movement generally occurs when an immigrant is being transferred to an official ICE facility, located in only a handful of states. *See also* CAPPS ET AL., *supra* note 172, at 2 (noting that "many [detained immigrants] were moved to remote detention facilities out of the states in which they were arrested").

186. *See* State Dep't of Children's Servs. v. Ahmad, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at *2 (Tenn. Ct. App. Apr. 26, 2005) (finding that termination was proper in part because Ms. Ahmad's children had only been able to visit her twice during the six years of her incarceration due to her transfer from a facility in Alabama to one in Louisiana).

187. Hairston, *supra* note 53, at 10. Hairston also notes that visitors are subject to body scans. *Id.*; *see also* Barry et al., *supra* note 176, at 151 ("[T]here have been several instances where children have been strip-searched or pat-searched by correctional staff who claimed they had to do so because of 'security concerns.'").

188. *See, e.g.*, TRAVIS ET AL., *supra* note 53, at 5 (listing "obstacles to parent-child visits in prison"); Hairston, *supra* note 53, at 10 (describing the conditions faced by prison visitors, particularly child visitors).

189. Hairston, *supra* note 53, at 10.

190. Pamela Lewis, Comment, *Behind the Glass Wall: Barriers that Incarcerated Parents Face Regarding the Care, Custody and Control of Their Children*, 19 J. AM. ACAD. MATRIM. LAW. 97, 108 (2004).

191. *See* Hairston, *supra* note 53, at 10 (discussing how prison visitors must wait for visitation times).

their parent. Consequently, even when prison visits are granted for incarcerated parents, these obstacles may make visits difficult for children to attend and even more difficult for the parent and child to enjoy in a productive way.

2. *Incarceration as a Demonstration of Unfitness*. The ASFA requires that states begin termination proceedings against any parent whose child has been in foster care for fifteen out of the previous twenty-two months. For many undocumented parents, entering deportation proceedings means that the ASFA will inevitably be triggered. Once the parent is arrested, the child is likely to be placed in foster care,[192] and between spending time in jail and being deported, the parent is likely to be unable to care for the child for a period of fifteen or more months.[193]

In addition to the ASFA, at least twelve states have laws that base termination of parental rights on the length of a parent's stay in prison, regardless of the type of crime committed by the parent.[194] These statutes make it difficult for any incarcerated parent to maintain parental rights and can be quite hard on illegal immigrant parents who may be held pending deportation for years. These

192. *See* Wendy Cervantes, *Protecting the Children of Immigrants*, IMMIGR. PROF BLOG (May 30, 2010), http://lawprofessors.typepad.com/immigration/2010/05/protect-the-children-of-immigrants.html ("Often, detained parents are not able to make child care arrangements, resulting in the unnecessary placement of their children in the child welfare system. Once a child is placed into foster care, it is extremely difficult for a detained parent to reunify with his or her child, especially if that parent is transferred to an out-of-state detention facility or deported before regaining custody of his or her child.").

193. *See, e.g.*, State v. Maria L. (*In re* Interest of Angelica L.), 767 N.W.2d 74, 81–82, 84 (Neb. 2009) (noting that because Ms. Luis was taken into custody and subsequently deported, her children had been in foster care for seventeen months when the petition to terminate her parental rights was filed); State Dep't of Children's Servs. v. Ahmad, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at *1–2 (Tenn. Ct. App. Apr. 26, 2005) (noting that Ms. Ahmad was held in prison for over a year on criminal charges and then transferred to immigration custody before being deported in December 2002, and that her children had been in foster care since September 2000).

194. *See, e.g.*, IDAHO CODE ANN. § 16-2005(1)(e) (2009) (allowing termination of parental rights based on incarceration for "a substantial period of time during the child's minority"); LA. CHILD. CODE ANN. art. 1015(6) (2004) (allowing termination of parental rights if incarceration will prevent the parent from caring for the child for "an extended period of time"); OHIO REV. CODE. ANN. § 2151.414(E)(12) (West 2005 & Supp. 2009) (allowing termination of parental rights based on incarceration for at least eighteen months); S.D. CODIFIED LAWS § 26-8A-26.1(4) (2004 & Supp. 2010) (allowing the court to find good cause to terminate the parental rights of a parent who "[i]s incarcerated and is unavailable to care for the child during a significant period of the child's minority").

statutes range from providing a short, specific number of years of incarceration that proves unfitness[195] to broader statutes that allow incarceration for a "substantial" or "extended" period of time to be a ground for finding parental unfitness.[196] The short duration of the former is difficult for illegal immigrants to avoid given that many of them are incarcerated first for the crime that brought them to the attention of the criminal justice system and then for a longer period of time pending deportation.[197] The indefinite language of the latter statutes can be especially difficult on illegal immigrants because a judge who is culturally biased in favor of American adoptive parents will have plenty of leeway to find that the immigrant parent has been incarcerated long enough to meet the statutory definition of unfitness.[198]

Finally, at least ten states have other statutes that could lead to the termination of an incarcerated parent's parental rights. These statutes generally allow courts to find that a parent is unfit or to refuse to attempt to reunite the parent and child if the parent has failed to maintain contact with the child for a period of time.[199] Many

195. *See, e.g.*, KY. REV. STAT. ANN. § 600.020(2)(b) (West 2006) (providing that a period of incarceration of at least one year is an aggravating circumstance and allowing the state to dispense with making "[r]easonable efforts" toward reunification if the child has been subjected to an aggravating circumstance); MICH. COMP. LAWS ANN. § 712A.19b(3)(h) (West 2002 & Supp. 2010) (providing that a period of incarceration in excess of two years combined with a failure to provide for the child's care and custody is grounds for terminating the parent's rights).

196. *See, e.g.*, DEL. CODE ANN. tit. 13, § 1103(a)(5)(a)(3) (2009) (allowing termination of parental rights if the parent "is incapable of discharging parental responsibilities due to extended . . . incarceration"); FLA. STAT. ANN. § 39.806(1)(d)(1) (West 2003 & Supp. 2010) (allowing termination of parental rights when the parent is incarcerated for "a substantial portion of the period of time before the child" turns eighteen); R.I. GEN. LAWS § 15-7-7(a)(2)(i) (2003) (requiring the court to terminate parental rights if the parent is imprisoned for "an extended period of time").

197. *See, e.g.*, *Ahmad*, 2005 WL 975339, at *1 (discussing the case of a mother who was arrested for felony theft charges for which she was incarcerated for one year before being turned over to immigration officials and imprisoned for another two years before deportation); *see also supra* Notes 156–65.

198. In many cases involving the termination of incarcerated immigrants' parental rights, courts focus on the length of time that the immigrant's child is in foster care. For example, one court pointed out that the children had been in foster care for "more than half of each child's life" before terminating an immigrant mother's parental rights. *Ahmad*, 2005 WL 975339, at *2.

199. *See, e.g.*, CAL. WELF. & INST. CODE § 366.26(c)(1) (West Supp. 2010) (providing that courts do not have to offer reunification services before terminating parental rights if "the parent has failed to visit or contact the child for six months"); 750 ILL. COMP. STAT. ANN. § 50/1(D) (West 2008) ("The grounds of unfitness [include] . . . (n) [e]vidence of intent to forgo . . . parental rights . . . (1) as manifested by . . . failure for a period of 12 months: (i) to visit

of these statutes make no exceptions for the parent's inability to maintain contact, which can be a problem for any incarcerated parent who is unable to reach her children via telephone or to arrange an in-person visit.[200] These statutes can be particularly perilous for incarcerated immigrant parents who often face considerable geographic barriers to communication with their children.[201]

IV. APPROACHING A SOLUTION

As explained in Part I, the state of constitutional law currently views the termination of parental rights with a wary eye and affords parents protection from termination in the form of procedural safeguards designed to prevent undue violations of their rights. In the context of illegal immigrants taken into deportation proceedings, however, these safeguards are failing. To begin to remedy the growing problem of illegal immigrants losing their parental rights during incarceration, both contributing factors—cultural bias and prison issues—must be addressed. Amendments or additions to state and federal law, as well as stricter adherence to an existing international treaty, can begin to address these problems to varying degrees. The general approach should be a preference for keeping families together, indifferent to the ultimate country of residence.[202] This approach is consistent with Supreme Court jurisprudence, which

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the child, (ii) to communicate with the child . . . or (iii) to maintain contact with . . . the child . . . ."); MASS. ANN. LAWS ch. 210, § 3(c)(iii) (LexisNexis Supp. 2010) (stating that when a child has been placed outside of the home for at least six months, the court may consider in the unfitness inquiry a parent's failure to "maintain[] significant and meaningful contact with the child during [those] six months"). Other states with similar statutes include Arkansas, Iowa, Michigan, Mississippi, Pennsylvania, Virginia, and Washington. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 61, at 10, 13, 22, 30, 32, 48, 58–59.

200. *See supra* Part III.C.1.

201. *See supra* notes 178–86 and accompanying text.

202. Professor Thronson notes that when immigration law attempts to achieve family integrity, it is "indifferent to place" and expresses "no preference for a family staying in the United States over leaving." Thronson, *supra* note 43, at 1185–86. Thronson further notes that in considering hardship applications, which allow illegal immigrants to stay in the United States upon a showing that their deportation would create an extreme hardship to one of their dependents, courts will generally not grant applications that only argue that "children will not have the same levels of education, health care and economic opportunities [in their home country] that they would have in the United States." *Id.* at 1172.

expresses a preference for family unity,[203] and draws on immigration law principles.[204]

The road to a solution is not an uncharted one. At the national level, legislation was introduced in the 111th Session of Congress to work toward keeping immigrant families together, even when parents and children are separated because of prison or deportation issues.[205] At the state level, court opinions and statutes exist in a handful of states that, if adopted in other states, would resolve many of the bias- and prison-related issues.[206] Additionally, the United States is party to an international agreement that, if followed, would provide relief from the effects of cultural bias.[207] Widespread adoption and faithful implementation of these existing laws collectively represent the path to success. If this path is followed, the United States can begin to ensure that no matter the other problems with the current immigration system, unnecessarily robbing immigrant parents of their parental rights will not be one of them.

A. Help Family Integrity by HELPing the ASFA

A serious problem for undocumented immigrant parents is the ASFA's requirement that states initiate termination proceedings against any parent whose child has been in foster care for fifteen out of the previous twenty-two months. For immigrants who are taken into deportation proceedings and forced to leave their children in foster care while they are in prison or deported, state compliance with the ASFA's requirements can often result in termination proceedings in which many immigrants lack the resources to defend themselves. Federal legislation proposed in the last congressional session[208] would

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203. *See supra* Part I.

204. *See supra* note 202. Although authorities on the intersection of family and immigration law generally agree that immigration law practices are dangerous to families, this is one area in which immigration law's approach can be beneficial. *See, e.g.*, Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 123 (2009) (arguing that immigration law's failure to consider the best interests of children has a negative effect on families).

205. *See infra* Part IV.A.

206. *See infra* Part IV.B.

207. *See infra* Part IV.C.

208. As of the beginning of the 112th Session of Congress, the HELP Separated Children Act is off the table for consideration unless reintroduced. *H.R.3531—HELP Separated Children Act*, OPENCONGRESS, http://www.opencongress.org/bill/111-h3531/show (last visited Feb. 8, 2011); *H.R. 3531: HELP Separated Children Act*, GOVTRACK.US, http://www.govtrack.us/

have amended the ASFA to require states to "create and implement protocols"[209] on dealing with separated children, defined as individuals who are legally in the United States, have a parent or legal guardian who has been detained for immigration reasons or who has been deported, and are in the foster care system.[210] Titled the Humane Enforcement and Legal Protections (HELP) Separated Children Act,[211] this Act would, if reintroduced and adopted, require that states develop separated-children guidelines that account for the best interests of the child *and* the best outcome for the child's family.[212] The law would also require that parents and children be provided with a case manager or interpreter who speaks their native language and that parents who wish to take their children with them during deportation be given adequate time to collect all necessary documents.[213] These requirements would make cultural sensitivity and respect for the parental rights of illegal immigrants a part of the law by recognizing the barriers that immigrant parents face in custody matters and affirming their right to take their citizen children with them upon deportation.

Most importantly, the Act would require states to implement protocols that "ensure that . . . decisions [about care, custody, and placement of the child] are based on clearly articulated factors that do *not* include predictions or conclusions about immigration status or pending Federal immigration proceedings."[214] This requirement would effectively shift the focus from the parent's immigration status to the proper inquiry—parental fitness. With proper interpretation and execution, this provision could prevent states from ignoring the clear and convincing evidentiary standard in the fitness inquiry or from avoiding the required language of fitness statutes in favor of an inquiry focused on what the parent can provide in her country of origin.

The inclusion of consideration of the best interests of the family and the prohibition of the use of immigration status as a factor in the

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congress/bill.xpd?bill=h111-3531 (last visited Feb. 8, 2011).

209. HELP Separated Children Act, H.R. 3531, 111th Cong. § 6(a)(3)(A) (2009).

210. *Id.* § 6(c).

211. HELP Separated Children Act, H.R. 3531, 111th Cong. (2009).

212. *Id.* § 6(a)(3)(B), (E).

213. *Id.* § 6(a)(3)(D), (F).

214. *Id.* § 6(a)(3)(E) (emphasis added); *see also supra* notes 142, 144–53 and accompanying text.

placement determination are good beginnings, but to eradicate the use of cultural bias by the courts, the Act, if reintroduced, should be amended to go further. In its initial formulation, it relied heavily on best-interests-of-the-child language,[215] which is the same language on which some courts have relied to improperly terminate immigrants' parental rights.[216] A reintroduced version of the Act should clearly define best interests of the child and best interests of the family, including in those definitions a presumption that family reunification is in the best interests of all parties, absent a showing of parental unfitness. An updated version should also specify that the fitness inquiry is to be undertaken before the best-interests inquiry, keeping with current constitutional law.

If adopted, the HELP Separated Children Act might also address some of the difficulties that prison life poses for retention of parental rights. As initially proposed, the Act might have removed some of the barriers to communication faced by undocumented parents while in prison. For example, the proposed version of the legislation would have required that detention facilities holding parents for immigration reasons "take steps to preserve family unity and ensure the best outcome for families," in part by ensuring that detained parents are given "free and confidential phone calls with their children on a daily basis . . . ."[217] The adoption of such a law at the federal level would make great strides toward ensuring sufficient communication between incarcerated immigrant parents and their children.

Additionally, barriers to visitation can be reduced by requiring that immigrants with children be held in facilities within a reasonable distance of their children, that they not be moved to new facilities without notice and before necessary to place them in an ICE facility, and that foster parents participate in personal visits.[218] The proposed version of the HELP Separated Children Act would have begun to implement these changes by requiring that detained parents be "permitted regular contact visits with their children."[219] The proposed

215. *E.g.*, H.R. 3531 §§ 3(b)(14), 6(a)(6).
216. *See supra* note 141 and accompanying text.
217. H.R. 3531 § 9(a), (c)(1).
218. *See supra* Part III.C.1.
219. H.R. 3531 § 9(c)(2).

version of the Act would also have mandated that the location of the parent be noted in the plan to provide services to the child.[220]

The HELP Separated Children Act, however, could be modified to more fully address prison barriers to retention of parental rights. Since adoption of the Act would require its reintroduction in the new session of Congress, there is presently an opportunity for such modification. First, although the proposed language would have mandated regular contact visits for detained parents, it did not specify what type of contact would have been required, and would not have explicitly required foster parents to facilitate the contact.[221] Additionally, though the Act would have required that the service plan note the parent's location, it would not have made any provisions for keeping that location the same throughout the incarceration or notifying the child and the child's foster parents of any changes in that location. To better address the problem of failed communication between incarcerated parents and their children, a reintroduced version should require that parents be held in facilities within a certain distance of their children and that they not be moved without notice,[222] and it should define the parameters of the foster parent's responsibilities explicitly.

One final problem relates to the application of the fifteen-out-of-the-previous-twenty-two-months rule currently in the ASFA. The initial version of the HELP Separated Children Act did not specifically address how separated children are to be treated with regard to this ASFA requirement.[223] Though the proposed version would have added the definition of "separated child" to the section of the ASFA imposing this requirement,[224] it would not have given any indication whether the fifteen-month requirement would continue to apply to separated children. For the Act to work toward eradicating

220. *Id.* § 6(b).

221. *See id.* § 9(c)(2) (granting detained parents, guardians, and caregivers "regular contact visits with their children").

222. Some states already do this. *See* Laughlin et al., *supra* note 50, at 222 (noting that half of all prisons try to house inmates in the facilities that are closest to their families). Alternatively, children could be placed in foster homes that are close to the facility where their parent will be held. *See* Barry et al., *supra* note 176, at 154 ("Children who must be placed in foster care outside of their families should be placed in homes as near to their parents as possible in order to decrease traveling time and distance . . . ."). This works, however, only if parents are not frequently transferred to other facilities.

223. 42 U.S.C. § 675(5)(E) (2006).

224. H.R. 3531 § 6(c).

prison-life issues, a reintroduced version should be amended to make the fifteen-month termination-proceeding-initiation requirement inapplicable to separated children.[225] Reintroduced with these modifications, this piece of legislation would be a valuable first step in ameliorating prison-life issues in custody proceedings for illegal immigrants and should therefore be reintroduced and adopted.[226]

Adoption of a modified version of the HELP Separated Children Act would help prevent cultural bias from driving judicial determinations regarding parental rights. Providing parents with consistent contact with their children would help address some of the prison-life barriers to parental rights—a goal that the modified Act could achieve. Changes to state and international law, however, are also required.

B. State Law Changes

States should adopt two types of laws to alleviate cultural bias and remedy prison-life barriers to the maintenance of parental rights. First, states should adopt laws that explicitly assert that initiation of deportation proceedings is not a ground for terminating parental rights. Such laws would set a statutory threshold of unfitness that rises above merely facing deportation proceedings. This would provide immigrants with statutory protection from judges who believe that immigration status alone bears on a parent's fitness.[227]

This approach is not without precedent. At least one state court has recognized that "[parents do] not forfeit [their] parental rights because [they are] deported."[228] A model for such an approach is

225. In its state version of the fifteen-month requirement, New Mexico makes a similar exception. It provides that termination proceedings should not be initiated by the state, even if the child has been in foster care for fifteen out of the previous twenty-two months, "if the child is an unaccompanied, refugee minor and the situation regarding the child involves international legal issues or compelling foreign policy issues." N.M. STAT. § 32A-4-29(G)(7) (Supp. 2009). Alternatively, states could take the position adopted in *State v. Maria L.* (*In re* Interest of Angelica L.), 767 N.W.2d 74 (Neb. 2009). There, the Supreme Court of Nebraska stated that "a child ha[ving] been placed outside the home for 15 or more of the most recent 22 months does not demonstrate parental unfitness" but "merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum level of fitness." *Id.* at 92.

226. *See supra* note 208.

227. *See* Thronson, *supra* note 153, at 54 (discussing a family law case in Georgia in which the trial judge terminated the parental rights of both a child's father, because of his immigration status, and the child's mother, because she lived with and was financially dependent on a man who was an illegal immigrant).

228. *Maria L.*, 767 N.W.2d at 94.

provided by states that already make this the law for incarceration. For example, Massachusetts provides that "[i]ncarceration in and of itself shall not be grounds for termination of parental rights."[229] Oklahoma's termination of parental rights statute has similar language.[230] In a slightly different approach, Nebraska prohibits the filing of petitions to terminate if the sole basis for the petition is that the parent is incarcerated.[231] Following the lead of these states by adopting similar positions for deportation proceedings could address the cultural bias problem for many immigrant parents.[232]

States should also adopt laws that make illegal entry into the country irrelevant to the fitness inquiry. At least one state court has acknowledged that entering the United States is often undertaken for the benefit of the child.[233] By adopting such laws, legislatures would prevent state courts from terminating a parent's rights simply because she took an action believed to be in the best interests of her child.

C. Adherence to and Furtherance of the Vienna Convention

Finally, to begin to solve the problem, it is necessary to ensure that the United States complies with its obligation to provide consular access to detained noncitizens. Article 36 of the Vienna Convention on Consular Relations (Vienna Convention) guarantees that when a noncitizen is "detained in any . . . manner" in another country, that country will notify the noncitizen's own consular post so that consular officers can communicate, correspond, and visit with the noncitizen.[234] The consular officers may also arrange for legal representation for the

229. MASS. ANN. LAWS ch. 210, § 3(c)(xiii) (LexisNexis 2003 & Supp. 2010).

230. *See* OKLA. STAT. ANN. tit. 10A, § 1-4-904(B)(12) (West 2009) ("[T]he incarceration of a parent shall not in and of itself be sufficient to deprive a parent of parental rights . . . .").

231. *See* NEB. REV. STAT. ANN. § 43-292.02(2) (LexisNexis 2005) ("A petition shall not be filed on behalf of the state to terminate . . . parental rights . . . if the sole factual basis for the petition is that . . . (b) the parent or parents . . . are incarcerated.").

232. Of course, a number of states take the opposite approach and make incarceration a factor that can demonstrate unfitness if it lasts for a certain period of time. *See supra* notes 194–96. Although this is an understandable position in many cases, taking the opposite approach in the case of deportation is not incongruent. Parents have the right to take their children with them upon deportation, *see supra* note 43 and accompanying text, and in most circumstances will be able to resume a normal, healthy relationship with the child.

233. *See Maria L.*, 767 N.W.2d at 93 ("[W]e do not conclude that Maria's attempt to bring herself and her child into the United States, *in the belief that they would have a better life here*, shows an appreciable absence of care, concern, or judgment." (emphasis added)).

234. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

noncitizen.[235] The United States is a party to the Vienna Convention and relies on it heavily in conducting U.S. consular activities.[236] Two regulations adopted prior to the ratification of the Vienna Convention "fulfill the notification requirements" of Article 36.[237] One regulation requires that upon arresting a foreign national, the arresting officers "inform the foreign national that his consul will be advised of" the arrest unless the foreign national does want the consul to be notified.[238] Though this regulation applies only to foreign nationals who are criminally detained,[239] another regulation requires that "[e]very detained alien [including those held for immigration reasons] shall be notified that he or she may communicate with the consular or diplomatic officers of the country of her nationality in the United States."[240]

Rigorously adhering to the Vienna Convention could help alleviate cultural bias against illegal immigrant parents detained for deportation in several ways. The involvement of foreign consular officers might cause the United States to treat the immigrant more fairly and with less bias against her country of origin.[241] The consular authority could also bring cultural sensitivity to the process through her knowledge of the culture from which the immigrant arrived in the United States, knowledge of the language of the immigrant, and—particularly relevant to child custody cases—knowledge of the conditions in which children are raised in the immigrant's country of

235. *Id.*

236. GARCIA, *supra* note 45, at 2.

237. *Id.* at 4–5.

238. 28 C.F.R. § 50.5(a)(1) (2010). If there is a treaty requiring notification, however, the consul will be notified regardless of the detainee's wishes. *See id.* ("On the other hand, some of the treaties require notifying the consul of the arrest of a foreign national whether or not the arrested person requests such notification.").

239. *Id.* § 50.5(a). Additionally, this regulation explicitly states that it is inapplicable to arrests made purely for noncriminal INS purposes. *Id.* § 50.5(b). Given that many illegal immigrants are first arrested for a crime before being recognized as noncitizens and transferred into immigration custody, it is possible that many would be covered by subsection (a) of the regulation.

240. 8 C.F.R. § 236.1(e) (2010).

241. *See* GARCIA, *supra* note 45, at 3 (noting that if a consular authority is involved, it "might take diplomatic or other steps to ensure that its national is treated fairly by the receiving State"). Presumably, involvement of the consular authority would also encourage the receiving state to engage in diplomatic behavior to ensure appropriate treatment of the state's own nationals held in the sending state's jurisdiction.

origin.[242] Finally, the consular authority could help the immigrant navigate the U.S. justice system and attempt to ensure that the immigrant is not treated unfairly or differently because of her nationality and immigration status.[243]

Despite the benefits of consular involvement, under the United States' agreement to be party to the Vienna Convention and the regulations that serve to fulfill its notification requirements,[244] "foreign nationals are not always provided with requisite consular notification information following their arrest or detention."[245] When they are not notified, actual remedies, such as an injunction or damages, are often not available.[246] Changes to federal law based on the Vienna Convention could ensure that immigrants are given notification of consular information and remedies when notification is not forthcoming.

First, regulations for notifications to consular authorities in cases of immigration violations should be rephrased to mirror the more demanding level of notification required for criminal detainees. Federal officers are required to notify consular authorities of a foreign national's criminal detention, unless she requests that notification not be made.[247] Detainees held for immigration purposes, however, are merely notified of their right to communicate with their consulate.[248] Requiring notification to the consulate of foreign nationals held for immigration purposes would better ensure that the

242. *See, e.g.*, State v. Maria L. (*In re* Interest of Angelica L.), 767 N.W.2d 74, 83, 86 (Neb. 2009) (relying on the testimony of a Guatemalan missionary to demonstrate the safety of Ms. Luis's home for her children based on an understanding of Guatemalan community and educational standards).

243. *See* GARCIA, *supra* note 45, at 3 (listing "expertise in the laws and practices of the receiving State" and the ability to "arrange for the arrested national to receive better legal representation than he might otherwise receive" as benefits of the involvement of consular authorities); *see also Maria L.*, 767 N.W.2d at 97 (Gerrard, J., concurring) ("The full participation of the consulate can help the juvenile and the juvenile's parents by ensuring that their interests are represented . . . .").

244. *See supra* notes 237–40 and accompanying text.

245. GARCIA, *supra* note 45, at 5–6.

246. *See id.* at 6 ("[T]he State Department has historically taken the view that '[t]he [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law.'" (third and fourth alterations in original) (quoting United States v. Li, 206 F.3d 56, 63 (1st Cir. 2000))); *see also Maria L.*, 767 N.W.2d at 90 ("Other jurisdictions have concluded that state courts do not lose jurisdiction for failing to notify the foreign consulate as required by the Vienna Convention . . . .").

247. 28 C.F.R. § 50.5(a)(1) (2010).

248. 8 C.F.R. § 236.1(e) (2010).

consular authorities receive notification of the detention and are able to provide their services to the detainee.[249]

Second, because "no federal law or regulation has been adopted to compel state or local law enforcement officials" to comply with the Vienna Convention, such law and regulations should be promulgated.[250] Though there are some federalism concerns, the federal government can nonetheless achieve compliance by state and local law enforcement through the use of a federal funds act.[251] To be most effective in child custody and parental rights cases, such regulations could also extend to requiring notification to consular authorities whenever the child of an immigrant is taken into custody by a state's social services department.[252]

Finally, for these laws to have meaningful force at the state and local level, immigrants should have recourse in court if federal, state, or local authorities fail to notify them of their consular rights or fail to contact their consulate. Some courts have recognized judicial remedies for violations of the Vienna Convention, but others have not.[253] To make Article 36 effective as a tool for eliminating cultural

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249. The HELP Separated Children Act would have required the Department of Homeland Security to ensure that detained parents of separated children are "granted regular, confidential and in-person access to consular officials," as well as "free, unlimited, confidential phone calls to consular officials." H.R. 3531, 111th Cong. § 9(c)(7) (2009).

250. GARCIA, *supra* note 45, at 5.

251. *See id.* at 21 ("Congress . . . might instead consider legislation that influences states and localities . . . through . . . legislation conditioning federal funding for state services upon state compliance with . . . Article 36 . . . ."). Federal funds acts are quite common in various areas of the law, such as drinking age laws, education, and family law. Such laws are likely to be upheld. *Id.*

252. At least one state has already adopted such a regulation. Nebraska law requires that the consular authorities be notified whenever the Department of Social Services takes custody of a foreign national minor or of a minor with dual citizenship. NEB. REV. STAT. ANN. § 43-3804(2) (LexisNexis Supp. 2010).

253. *Compare* United States v. Banaban, 85 F. App'x 395, 396 (5th Cir. 2004) (per curiam) (determining that the Vienna Convention creates no enforceable remedy for individuals), *and* United States v. Ademaj, 170 F.3d 58, 67 (1st Cir. 1999) ("[T]he Vienna Convention itself prescribes no judicial remedy or other recourse for its violation . . . ."), *with* Standt v. City of New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) ("[T]he language of the [Convention], coupled with its 'legislative history' and subsequent operation, suggest that Article 36 of the Vienna Convention was intended to provide a private right of action to individuals detained by foreign officials."), *and* United States v. Hongla-Yamche, 55 F. Supp. 2d 74, 78 (D. Mass. 1999) ("[T]his Court finds that Article 36 of the Vienna Convention does confer an individual right to consular notification, and that Hongla-Yamche has, therefore, standing to contest the alleged violation of that right."). For a description of the various positions that federal courts have taken on the matter, see GARCIA, *supra* note 45, at 6 & nn.7, 29–30.

bias, the view of the former courts should be adopted. The most effective route would be to encourage states to codify this position in their own statutes under the suggested federal funds act.[254]

CONCLUSION

The increasing problem of illegal immigrants having their parental rights terminated as a result of their arrest and the initiation of deportation proceedings against them is one of the most troubling aspects of current immigration policy. It flouts well-settled constitutional law regarding the importance of the parent-child relationship and the due process rights of all parents, even those who have entered the country illegally.

This problem, likely more widespread than published cases would suggest, exists primarily for two reasons. Cultural bias has caused judges to avoid applying or to misapply the clear and convincing evidence standard to questions of unfitness and to rely heavily on biased views of what is in the best interests of the child. This cultural bias has combined with the issues faced by prisoner parents in preventing the termination of their parental rights to form a perfect storm for immigrant parents.

To solve this problem, the United States should address the issue at both the state and the federal level. Laws should reflect greater cultural sensitivity and should diminish the opportunities for judges to display their cultural bias. Government at all levels should comply with international treaties that provide a culturally sensitive advocate to immigrant parents. The federal government should reconsider the implications of the ASFA for illegal immigrant parents, as should states. Finally, laws regarding treatment of immigrant prisoners should be modified so that they are no longer a barrier to parents maintaining custody of their children. It is only with this comprehensive approach that the United States will be able to protect the constitutional rights of immigrants and their children.

254. *See supra* notes 45, 251 and accompanying text.