ASFA: How Policy and Prejudice Undermine Immigrants' Rights

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The Supreme Court has consistently held that the Constitution protects parents' rights to make decisions regarding the raising of their children independent of state interference.[1] *Because this right is protected by the Fourteenth Amendment—which applies to "any person within [a State's] jurisdiction"*[2]*—it shields both citizen and noncitizen parents. Despite this inalienable right, however, the law has overlooked undocumented parents, and as a result, noncitizens are having their children ripped from them—and their parental rights terminated*[3]*—at alarming rates.*[4] *And even though there is little information available regarding the frequency of these types of cases, experts "fear that the published instances [of separation] are merely the tip of the iceberg."*[5]

Although the reasons for the inequitable handling of citizen versus noncitizen parental rights cases are many and varied, this Note argues that two causes prevail over the others. First, the Adoption and Safe Families Act of 1997 (ASFA) throws hurdles in the way of undocumented parents that are nearly impossible to overcome amid detainment and deportation proceedings.[6] *And second, even if these parents could meet the standards required by ASFA, courts' flawed application of settled law related to the termination of parental rights (TPR) makes losing custody of their children almost an inevitability for undocumented parents.*[7] *In response, I propose policy and legislative changes at*

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1. *E.g.*, Troxel v. Granville, 530 U.S. 57, 75 (2000); Santosky v. Kramer, 455 U.S. 745, 747–48 (1982); Stanley v. Illinois, 405 U.S. 645, 658 (1972).

2. U.S. CONST. amend. XIV, § 1.

3. For ease's sake, I will be referring to termination of parental rights cases as "TPR cases" or "TPR proceedings."

4. *See* SETH FREED WESSLER, APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 6 (2011) (estimating that in 2011, at least 5,100 children were being held in foster care "whose parents [had] been either detained or deported" and predicting that "in the [following] five years, at least 15,000 *more* children" would experience similar separation from their undocumented parents).

5. C. Elizabeth Hall, Note, *Where Are My Children . . . and My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459, 1459 (2011).

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

7. *See generally* Hall, *supra* note 5 (describing how courts have failed to apply the appropriate standards for both the fitness and unfitness inquiries).

the federal, state, and local levels that will help rectify this blatant flaunting of constitutional doctrine—particularly addressing judicial cultural bias, which contributes heavily to this issue.

Introduction

Mercedes was a single mother of two children—Mainor and Estela, both American citizens—who came to the United States from Guatemala in 1992, seeking asylum.[8] She spoke no English and very little Spanish—her native tongue was an obscure Mayan dialect—and in 2000, she moved to Grand Island, Nebraska, to live in a community of fellow Mayan transplants.[9]

In March 2001, Mercedes was arrested for hitting her son Mainor for being rough with his sister, and that same day her children were taken into protective custody.[10] Because Mercedes had failed to appear at an asylum hearing a few years before, the court had issued a default order of removal against her although she was unaware of her status because she had previously "been granted temporary protected legal status and had continued to receive work permits each year."[11] Regardless, Mercedes was deported back to Guatemala in May 2001.[12] She was not permitted to see her children before her deportation.[13]

One month before being deported, the "court conducted an adjudication hearing regarding her children."[14] Although Mercedes was being held in the jail next-door to the courthouse, she was only notified of the hearing in English (which she could not understand) and no effort was made to bring her to the courtroom.[15] Once in Guatemala, she attempted to get in touch with her children, writing letters and making phone calls, but was unsuccessful.[16]

Finally, just over fifteen months since Mercedes's children were removed from her custody, the State filed a motion to terminate her parental rights to Mainor and Estela—"alleging as its sole basis for termination of those rights that the children had been in out-of-home placement for 15 or

8. *In re* Interest of Mainor T., 674 N.W.2d 442, 448–49 (Neb. 2004).

9. *Id.* at 449.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 449–450.

14. Olivia Saldaña Schulman, *"Now They've Robbed Me:" The Use of Termination of Parental Rights in Government-Fractured Immigrant Families*, 43 N.Y.U. REV. L. & SOC. CHANGE 361, 371 (2019).

15. *In re Mainor T.*, 674 N.W.2d at 450.

16. Schulman, *supra* note 14.

more months [out] of the most recent 22 months."[17] The motion was granted, and in the eyes of the law, Mercedes was no longer her children's mother.[18]

Mercedes's story is only one of an unknowable number of similarly sad cases.[19] If an undocumented parent is arrested or detained, they often trigger the Adoption and Safe Families Act (ASFA) requirement that if children have been in state care for fifteen of the last twenty-two months, the state will initiate proceedings to terminate the parent's rights to their children.[20] Undocumented parents often do not qualify for any of the exceptions to this requirement, and in many instances a parent's placement in a detention facility that may be hundreds of miles away. This is compounded by a lack of communication among ICE officers, CPS workers, and the parents themselves—making ASFA an insurmountable obstacle in these cases. Undocumented parents are therefore placed between a rock and a hard place: either "fight their immigration case to the utmost" and risk running out the fifteen-month timeline, or drop their immigration case to keep their families together, but face deportation.[21] It is an impossible choice.

Other than purely procedural hardship, however, undocumented parents also must overcome a court system that has consistently misapplied settled law to these types of cases. Although the Supreme Court laid out the definitive test for judges in parental rights termination proceedings in *Stanley v. Illinois*[22]—determining the fitness of the parent before considering the best interests of the child[23]—courts have flaunted that holding and have continued to apply faulty legal analysis.[24] The courts making these decisions frequently rely upon misapplication of state statutes and blatant cultural prejudice in order to reach results unfavorable to undocumented parents.

This Note addresses major obstacles to undocumented family unity—unconstitutional court decisions facilitated by the Adoption and Safe Families Act, wrongly applied statutory law, and cultural bias—and discusses changes that should be made to both law and agency policy to help

17. *In re Mainor T.*, 674 N.W.2d at 453.

18. *Id.*

19. It is important to note that the juvenile court's termination decision in Mercedes's case was overturned upon review by the Nebraska Supreme Court. *Id.* at 464. The Court held that she had been denied due process in the termination of her parental rights and remanded the case to the juvenile court for a new hearing. *Id.* And although Mercedes had a chance at a happy resolution to her case, most parental rights termination proceedings involving undocumented parents do not make it to appeal. Schulman, *supra* note 14, at 375; *see also* Hall, *supra* note 5, at 1462 ("[T]he parents [in these cases] 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.").

20. 42 U.S.C. § 675(5)(E) (2018).

21. Schulman, *supra* note 14, at 365.

22. 405 U.S. 645 (1972).

23. *Id.* at 649.

24. Hall, *supra* note 5, at 1472.

keep children with their parents, regardless of their citizenship status. In particular, this Note argues for a comprehensive change to our legal system's approach to undocumented family unity, starting at the local level and reaching all the way up to Congress.

I. The Constitutional Right to Your Children

Family law has traditionally been the province of state lawmakers, and the federal government often defers to state regulations concerning children and their families.[25] However, the Supreme Court has consistently held that under the Due Process Clause, parents have a constitutional right to control the upbringing of their children that shall not be infringed by state action.[26] This "fundamental liberty interest[]"[27]—one which the Court recognizes as perhaps the oldest right given constitutional protection—applies not only to United States citizens, but also to noncitizens, regardless of immigration status.[28] Because the Fourteenth Amendment protects the rights of "any person within [a state's] jurisdiction,"[29] the Supreme Court has interpreted the Due Process Clause to protect "all 'persons' within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent."[30]

Given parents' constitutional protections and the drastic nature of the remedy, the standard that must be met before the state can terminate parental rights is understandably high. In *Santosky v. Kramer*[31] and *Stanley v. Illinois*,[32] the Supreme Court put into place institutional safeguards meant to curb the number of meritless TPR cases brought to court and to protect the fundamental liberty interests of parents. In every TPR case, the parent is entitled to a court hearing to determine whether or not she is a fit parent,[33]

25. Rose v. Rose, 481 U.S. 619, 625 (1987) (quoting *In re* Burrus, 136 U.S. 586, 593–94 (1890)).

26. For instance, in *Troxel v. Granville*, a relatively recent case, the Court struck down a Washington law allowing family members to petition courts for visitation rights to related children over the objection of the children's parents. 530 U.S. 57, 72–73 (2000). This law, the Court said, "violated [the petitioner's] due process right to make decisions concerning the care, custody, and control of her daughters." *Id.* at 75.

27. *Id.* at 65.

28. Schulman, *supra* note 14, at 367.

29. U.S. CONST. amend. XIV, § 1.

30. Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

31. 455 U.S. 745 (1982).

32. 405 U.S. 645 (1972).

33. *Id.* at 658 ("[A]ll . . . parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."); *see also In re* Interest of Angelica L., 767 N.W.2d 74, 92 (Neb. 2009) ("[T]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court. Accordingly, before the State attempts to force a breakup of a natural family, . . . the State must prove parental unfitness.") (internal footnote omitted).

and the parent's fitness must be decided under a clear and convincing evidence standard.[34] It is only after a court has found a parent to be unfit—perhaps by a showing that the parent is neglectful or abusive—that a court may then turn to the question of the child's best interests.[35] In other words: Is it in the child's best interests to remain with his or her parent, or would separation be a better course of action?

The order in which courts answer these questions is incredibly important. It is much easier for a court to find that separation is in the child's best interests than it is to find a parent unfit. Indigent parents would be disadvantaged if courts were permitted to ignore the question of parental fitness and to skip straight to the best interests of the child. For instance, a court might think that, because the child might have access to better accommodation and opportunities as a ward of the state or as an adoptee than he or she would have with their birth parents, that the child should be separated from their parents after all, regardless of whether or not the parents are legally fit. To nip that circumstance in the bud, "parents, theoretically, need only meet a minimum degree of acceptable care of their children to ward off government intervention in their family life."[36]

II. State and Federal Application of the Constitutional Doctrine: ASFA

Although the Constitution defines the broad limitations of state and federal law enforcement's discretion in termination of parental rights cases, it is still up to lawmakers and lower courts to determine "when termination proceedings should be initiated against a parent" and "what qualifies as unfitness in those proceedings."[37] No one is suggesting that state and federal lawmakers go out of their way to remove children from their undocumented parents. However, the practical application of laws made to protect children often leads to monumental consequences for undocumented immigrants in the process of deportation proceedings. One important federal law with a

34. *Santosky*, 455 U.S. at 747–48 ("[T]he 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.").

35. *Stanley*, 405 U.S. at 657–58.

36. Schulman, *supra* note 14, at 368; *see also* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'") (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment)).

37. Hall, *supra* note 5, at 1467.

huge impact on undocumented parents' rights is the Adoption and Safe Families Act of 1997 (ASFA).[38]

President Clinton signed ASFA into law on November 19, 1997 "in response to growing concerns that child welfare systems across the country were not providing for the safety, permanency, and well-being of affected children in an adequate and timely fashion."[39] Primarily, the federal government was concerned that children were languishing for years in foster care, waiting to be reunited with their parents, due to the "reasonable efforts" requirement of previous legislation, which mandated that states must make reasonable efforts to reunite natural families.[40] Congress also worried that an interpretation of the reasonable efforts requirement might, in practice, jeopardize children's safety "by keeping them with parents who harmed them."[41] As a result of these fears, the goal of ASFA was to get children settled into safe, permanent families as quickly as possible—a goal actualized by ASFA's 15/22 rule.[42]

The Adoption and Safe Families Act's 15/22 rule states that if a child has been in foster care for fifteen of the last twenty-two months (consecutively or not), then the state must file a petition to terminate the parents' rights to the child.[43] The rule lays out three exceptions to this requirement, the most relevant for our purposes being that if the child is in out-of-home custody, but is being cared for by a relative who has been approved by the court, then the 15/22 rule does not apply.[44] In other words, if the child is out of their parent's custody, but is living with a court-approved relative, then the state is under no obligation to file a petition for termination of parental rights.

Fifteen months in foster care is a long time. And no one wants children to be without their families for that long. This rule, however, presents a special challenge for undocumented immigrants facing deportation

38. Because "[t]he ASFA is a federal funds act," states that receive monetary aid from the federal government related to their foster care programs are obliged to implement ASFA's requirements if they want to keep federal money flowing into their programs. *Id.*

39. Susan Notkin, Kristen Weber, Olivia Golden & Jennifer Macomber, *Preface: The Adoption and Safe Families Act (ASFA) in* URBAN INST., CTR. FOR THE STUDY OF SOC. POLICY, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 5, 5 (2009), https://www.urban.org/sites/default/files/publication/30016/1001351-Intentions-and-Results-A-Look-Back-at-the-Adoption-and-Safe-Families-Act.PDF [https://perma.cc/64S7-M3JS].

40. Olivia Golden & Jennifer Macomber, *Framework Paper: The Adoption and Safe Families Act in* URBAN INST., CTR. FOR THE STUDY OF SOC. POLICY, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTIONS AND SAFE FAMILIES ACT 8, 9 (2009), https://www.urban.org/sites/default/files/publication/30016/1001351-Intentions-and-Results-A-Look-Back-at-the-Adoption-and-Safe-Families-Act.PDF [https://perma.cc/64S7-M3JS].

41. *Id.*

42. *Id.* at 10–11.

43. 42 U.S.C. § 675(5)(E) (2018).

44. *Id.* § 675(5)(E)(i).

proceedings, as well as all other incarcerated parents. The average sentence of an inmate in state custody far exceeds fifteen months,[45] so for parents who must put their children in foster care while they serve their time in prison, ASFA becomes an inevitability unless they can meet an enumerated exception. While citizen inmates may be able to leave their children in the custody of a state-sanctioned relative, that route is more difficult for undocumented parents to take. It is more difficult for undocumented parents to find suitable caregivers both because fewer of their relatives may live in the U.S. and because those relatives who do live in the U.S. are likely undocumented immigrants themselves: "[I]f the only relatives [of the child] available in the United States are illegal,[46] it is unlikely that the state would sanction the child's placement with those relatives to meet the statutory requirement [of ASFA's 15/22 rule]."[47] Further, undocumented immigrants may be reluctant to act as a state-sanctioned caregiver in the first place because they may become vulnerable to deportation themselves as a result.[48]

All of these conditions make it so that ASFA's 15/22 rule is inescapable for undocumented parents facing deportation. Therefore, nearly every undocumented parent in this situation triggers a TPR proceeding under ASFA because, while parents are being held in state custody, their children are necessarily outside of the parent's care. However, triggering the 15/22 rule requires *only* that the state file a TPR proceeding against the parent. What ASFA is not meant to do is to act as a measuring post for unfitness—that is to say that triggering the 15/22 requirement does not automatically make a parent unfit, and both citizen and undocumented parents are still constitutionally entitled to a hearing on fitness. The statute requires only that the state "file a petition to terminate the parental rights,"[49] and at least one court has held that "[r]egardless of the length of time a child is placed outside the home, it is always the State's burden to prove by clear and convincing evidence that the parent is unfit . . . ."[50] Despite this plain interpretation of the statute, however, some courts have mistakenly held that an undocumented parent's mere triggering of the 15/22 requirement is sufficient to show that

45. DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, NCJ 252205, TIME SERVED IN STATE PRISON, 2016, at 1 (2018), https://www.bjs.gov/content/pub/pdf/tssp16.pdf [https://perma.cc/5CW4-F73W] ("The average time served by state prisoners released in 2016, from . . . initial admission to . . . initial release, was 2.6 years. The median amount of time served was 1.3 years . . . .").

46. I take the position that no person—regardless of their immigration status—is an "illegal" person. Regardless, some sources cited in this Note use unfortunate terminology for undocumented immigrants.

47. Hall, *supra* note 5, at 1468 n.52.

48. *Id.*

49. 42 U.S.C. § 675(5)(E).

50. *In re* Interest of Angelica L., 767 N.W.2d 74, 92 (Neb. 2009).

the parent is unfit, transforming ASFA's purely procedural role into an unfairly substantive one.[51]

Consider Mercedes's case, recounted in the introduction to this Note.[52] After forcing the Adoption and Safe Families Act's 15/22 rule due to her deportation back to Guatemala, the state petitioned for Mercedes's parental rights to be terminated.[53] At her hearing, the only evidence that the state used to prove Mercedes's unfitness was the fact that her children had been in state custody for fifteen months—with no mention that they had only been out of her custody because she had been deported.[54] The juvenile court also added a charge of abandonment, despite Mercedes's continual attempts to get into contact with her children from Guatemala—making phone calls and writing letters without any success.[55] The judge did not examine Nebraska's legal standard for abandonment or consider Mercedes's attempts to communicate with her children, "the involuntary nature of [her] deportation," or her efforts to involve herself in the Nebraska termination proceedings from her tiny village in Guatemala before concluding that Mercedes had indeed abandoned her children.[56] With ASFA's fifteen-month time stamp as the instrument of her demise, the court declared her an unfit parent, and Mercedes lost her rights to her children.[57]

III. Erroneous Determinations of Unfitness

Although the Adoption and Safe Families Act's 15/22 rule is occasionally misused as a factor to determine a parent's unfitness, its application merely opens the door to more egregious harms, especially against undocumented parents who either have been or are being deported. Ostensibly applying constitutional doctrine, courts have used termination proceedings initiated by ASFA as a smear campaign against undocumented parents, failing to find them either fit or unfit "based on state statutory definitions."[58] Rather, courts focus first on the difficulties that incarcerated

51. Hall, *supra* note 5, at 1469–70.

52. *See supra* note 8 and accompanying text.

53. *In re* Interest of Mainor T., 674 N.W.2d 442, 452 (Neb. 2004).

54. Schulman, *supra* note 14, at 372.

55. *Id.*

56. *Id.* Court findings of unfitness of undocumented parents often rely erroneously upon abandonment or neglect theories, an issue which this Note examines further in Part III.

57. *See id.* (noting that although "the state's only evidence in favor of termination was the fact that [Mercedes's children] had been in foster care for fifteen months," the judge found it sufficient to support termination and abandonment). Mercedes's case was eventually remanded for a new trial, and according to the majority, "[t]he record contain[ed] no specific findings of fact upon which the juvenile court determined that Mercedes abandoned her children." *In re Mainor T.*, 674 N.W.2d at 462.

58. Hall, *supra* note 5, at 1472. Hall points out that these courts have terminated parental rights in these cases without any determination of parental fitness at all, erroneous or not, blatantly flaunting constitutional law. *Id.* (describing factors that lead courts to fail to address the question of

parents face while in state custody that make it harder for them to actively participate in their children's lives, and second on the cultural differences that saturate most of these cases, in order to declare an undocumented parent unfit and to ultimately sever their rights to their children.[59] Neither of these methods is constitutionally supported, and the cases that rely on these ideas are often reversed on appeal. However, most TPR cases involving undocumented immigrants never make it to the appellate level, forcing parents to comply with this blatant obfuscation of justice.[60]

A. Failure to Comply with Statutory Requirements

States control what standards constitute "unfitness" within their respective jurisdictions. Accordingly, the requirements for what qualifies as unfitness varies by state. However, there are a few actions that have received almost unanimous treatment as probative of a parent's lack of fitness. These are: "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."[61] Undocumented parents who have been deported or detained often run afoul of these three actions—and often as a result of the complications of their deportation or confinement. Although the facts of many TPR cases dealing with an undocumented parent charged with abandonment would not support an affirmative result under the language of the statutes at issue, an unsettling number of judges have failed to apply the statutory language of these actions correctly.

Take abandonment, for example. Although the statutory requirements for a charge of abandonment vary by state, most state statutes call for 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."[62] In most states, a finding of abandonment requires that the state find that the abandonment of the child was willful, or that the circumstances that led to the so-called abandonment were within the parent's control.[63] However, in at least two cases, courts have failed to apply this language, ignoring the intent or willfulness requirement of the applicable abandonment statute, and have improperly held undocumented parents unfit, giving custody of their children to the state.[64]

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fitness); *see also* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding that due process of law requires a hearing on a parent's fitness before her children are taken away from her).

59. Hall, *supra* note 5, at 1472.

60. *See supra* note 19 and accompanying text.

61. Hall, *supra* note 5, at 1470.

62. *Id.* (emphasis added) (quoting JOHN DEWITT GREGORY, PETER N. SWISHER & SHERYL L. WOLF, UNDERSTANDING FAMILY LAW 186 (3d ed. 2001)).

63. *Id.* at 1474.

64. *Id.*

In re Adoption of C.M.B.R.,[65] a 2011 case from the Supreme Court of Missouri, is a prime example. Like Mercedes in the case above, Bail was a citizen of Guatemala when she entered the United States in 2006, pregnant with her son Carlos.[66] Carlos was born in October 2006, and a couple of months later, mother and child moved in with Bail's brother, his wife, and their three sons, although the condition of the home was poor.[67]

Bail obtained work at a poultry processing plant in Barry County, Missouri.[68] In May 2007, the plant was raided by Immigration and Customs Enforcement, and Bail was arrested as an undocumented immigrant.[69] Carlos was bounced around between Bail's brother and sister, before he finally ended up with Jennifer and Oswaldo Velasco, a clergy couple who, although initially were only responsible for watching Carlos a few days a week, eventually took care of him full time.[70] It was via the Velascos that an unnamed couple (Adoptive Parents), who were interested in adopting a child, met Carlos, and by September 2007, they were visiting him with the intention of adopting him.[71] On October 5, 2007, Adoptive Parents filed a petition with the state to terminate Bail's parental rights.[72]

Bail was not listed on the notice of the hearing to transfer custody (the first step in the process), nor was the notice sent to Bail in prison.[73] Regardless, the hearing to transfer custody proceeded without Bail's presence and without counsel for Bail.[74] When she later caught wind of the hearing, Bail wrote a letter to the Adoptive Parents' attorney stating that she did not want her parental rights terminated, and she requested visitation with her son.[75] Following the hearing to transfer custody a second hearing took place, this time to terminate Bail's parental rights, and an attorney paid for by the Adoptive Parents—an attorney who had never met with Bail before—represented her in court.[76] Despite her pleas, however, the court granted the petition for termination and allowed the Adoptive Parents to proceed with Carlos's adoption.[77]

65. 332 S.W.3d 793 (Mo. 2011) (en banc).
66. *Id.* at 801.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 802.
71. *Id.*
72. *Id.*
73. *Id.* at 803.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 804.

The court held that Bail had abandoned Carlos under two Missouri statutes, both requiring "willful" abandonment.[78] The judge based this finding upon Bail's failure to contact Carlos or to provide him with financial support while she was in prison, but the record is not at all clear that Bail did, in fact, fail in this way.[79] For instance, Bail claims that she "went to court six times during her incarceration and requested help finding her son each time . . . ."[80] No one helped her. When Bail received notice of the forthcoming hearing in English, she found a cellmate to translate the notification and to help her to write a letter to the court requesting visitation with her son.[81] Her letter received no results. "No evidence was presented at trial to show whether [Bail] . . . was capable of providing support for [Carlos] while she was imprisoned. Additionally, nothing in the record indicate[d] that [Bail] knew how to contact [Carlos] or where to find him."[82] Despite Bail's efforts, she was never able to see her son, and she was later moved to a prison in West Virginia, more than 600 miles from the adoption proceedings.[83] It is difficult to say from these facts that Bail's "abandonment" of her son was "willful" or "intentional"—the standard that the statute requires. Regardless, the court terminated her parental rights.[84]

In 2009, an appellate court in Virginia found on similar facts that Victor Perez-Velasquez had "abandoned" his children under a statute that required "a lack of good cause for failing to maintain contact with his children."[85]

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78. *See* MO. ANN. STAT § 211.447(2)(2)(b) (2020) ("The parent 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*." (emphasis added)); MO. ANN. STAT § 453.040(7) (2020) ("A parent who has . . . willfully abandoned the child . . . ."); *In re Adoption of C.M.B.R.*, 332 S.W.3d at 814–19 (holding that Bail abandoned her child under Missouri law).

79. Hall, *supra* note 5, at 1475.

80. *Id.*

81. *Id.* at 1475–76.

82. *In re* Adoption of C.M.B.R., No. SD 30342, 2010 WL 2841486, at *3 (Mo. Ct. App. July 21, 2010), *rev'd* 332 S.W.3d 793 (Mo. 2011) (en banc).

83. Hall, *supra* note 5, at 1476.

84. I would like to note here the difficulties that incarcerated parents face in communicating with their children—barriers that are even more difficult to overcome for detained undocumented immigrants. Prisons use "expensive collect calling systems" that require the person receiving the call to pay charges for telephone calls. *Id.* at 1488. Many foster parents may refuse to accept the charges, thereby limiting phone contact between parent and child. *Id.* Additionally, prisons often limit the number of phone calls prisoners are allowed to receive. *Id.* Arranging face-to-face visitation is similarly difficult, and may be even more difficult for undocumented immigrants, who are "routinely transferred to more remote jails" and could be "moved from state to state without notice." *Id.* at 1490 (quoting Nina Bernstein, *Immigrant Jail Tests U.S. View of Legal Access*, N.Y. TIMES (Nov. 1, 2009), https://www.nytimes.com/2009/11/02/nyregion/02detain.html [https://perma.cc/ACP8-8UGG]). Detained immigrants are subject to such relocation because official ICE facilities are sparse and "located in only a handful of states." *Id.* at 1490 n.185.

85. *Id.* at 1476; *see also* VA. CODE ANN. § 16.1-283(C)(1) (West 2012) (permitting parental rights to be terminated when "[t]he parent . . . ha[s], without good cause, failed to maintain

Victor and his wife Miriam were both undocumented immigrants from Guatemala, and they had three children who had been born in the United States.[86] In 2006, their children were removed from their home by social workers after the kids were found alone and unsupervised—Miriam had gone to a job interview, and Victor was incarcerated at the time.[87] Miriam was offered limited services, but no services were offered to Victor.[88] Victor appeared at one foster care proceeding before he was deported back to Guatemala in October 2007. Either while he was in custody of the federal authorities or after he had been deported, notice of a termination of parental rights proceeding—printed in English, which Victor did not understand—was published in the *Culpeper Star-Exponent*.[89] Regardless, the court held that this notice was sufficient to inform Victor of the termination proceeding, and it further held that since Victor's own decisions had contributed to his deportation, his deportation provided a sufficient basis for the lower court's decision that he had abandoned his children.[90]

Again, it is questionable whether Victor's "abandonment" of his children met the legal definition codified in the statute that the court applied. The statute requires a lack of good cause for a parent's failure to maintain contact with his children, but Victor had not been told where his children were being held—how could he contact them?[91] To get around this obvious problem, the court reasoned that since it was Victor's deportation that contributed to him not knowing his children's whereabouts, the deportation was dispositive of his unfitness as a parent.[92] However, the "statute further required that the failure to communicate be in spite of 'reasonable and appropriate efforts of . . . rehabilitative agencies to communicate with the parent or parents and to strengthen the parent-child relationship.'"[93] Victor pointed to the fact that he had not been provided any services to speak of to show that these "reasonable efforts" had not been made, but the court, relying on a singular statement in a case decided on different facts, held that "the state was not required to provide services to help a parent regain custody while he was in prison."[94] Based on these findings, the court upheld the state's termination of Victor's parental rights.

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continuing contact with . . . the child for a period of six months after the child's placement in foster care . . . .").

86. Perez-Velasquez v. Culpeper Cty. Dep't. of Soc. Servs., No. 0360–09–04, 2009 WL 1851017, at *1 (Va. Ct. App. June 30, 2009) (per curiam).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at *1–2, 4.

91. VA. CODE ANN. § 16.1-283(C)(1) (West 2012).

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

93. Hall, *supra* note 5, at 1476 (quoting VA. CODE ANN. § 16.1-283(C)(1)).

94. *Id.*

Another action that is almost universal among the fifty states as dispositive of unfitness is the parent's failure to remedy a persistent condition that led to their children's removal. Like abandonment in the cases above, the statutory requirements of failure to remedy are often misapplied in cases involving the parent's deportation. In Victor's case, for example, the appellate court supported the trial court's declaration of the following:

> [Victor's] imprisonment as a result of the serious crime and his subsequent deportation eliminated any chance that he could maintain contact with the children and be involved in the foster care plan during the time period after the children's placement in foster care, or that he could participate in remedying, within a reasonable time, the conditions resulting in the placement and continuation of the children in foster care.[95]

The condition in Victor's case that led to his children's removal was his inability to contact them due to his incarceration and eventual deportation. However, he could not remedy that condition because he was *incarcerated and eventually deported*, and no one told him where his children were. The statute that the court relied upon for the failure to remedy issue would have required the Department of Social Services (DSS) to provide Victor with services in order to help him remedy this condition.[96] However, even though Victor would have been able to benefit from these services, the court held that it would have been unreasonable for DSS to provide them, citing a case based on entirely different facts (see above). How could Victor be expected to remedy his inability to contact his children without some kind of help from the judicial system?[97]

In 2005, the Tennessee Court of Appeals upheld a similar ruling against a woman named Binta Ahmad, an undocumented immigrant from Nigeria whose parental rights were terminated based on a finding that she had failed to remedy "persistent conditions" that required her children to enter foster care.[98] Binta was arrested for theft and, because she was unable to pay her bond, was incarcerated for one year before subsequently being detained by immigration authorities for an additional two years.[99] In 2002, Binta was deported to Nigeria (despite her claims that she was actually a citizen of Egypt—an issue for another day), and her children remained in foster care in

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

96. Hall, *supra* note 5, at 1477–78.

97. Although most cases involving termination of parental rights for undocumented immigrants that are appealed to a higher court are reversed, Victor's case was upheld even on appeal; he currently has no rights to his children. *See id.* at 1462 (noting that, when appealed, decisions to terminate illegal immigrants' parental rights are frequently reversed on appeal).

98. State Dep't of Children's Servs. v. Ahmad, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at *4 (Tenn. Ct. App. Apr. 26, 2005).

99. *Id.* at *1.

the United States.[100] Binta claimed that she had a plan to reunite with her children once she could relocate to a "safe country."[101] Regardless, her parental rights were terminated under a Tennessee statute "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.'"[102] Binta's incarceration was the condition that led to her children's removal, and she was unable to remedy that condition *due to her incarceration*. Binta appealed the termination of her rights, but the appellate court affirmed the ruling of the lower court, stating, "[p]erhaps termination of the mother's parental rights would not have been necessary had the mother not migrated illegally to the United States, or had she not committed a felony in Alabama . . . ."[103]

B. Cultural Bias in Removal and Termination Proceedings

Cultural bias and preference for traditional American values also play an unfortunate part in parental rights termination proceedings, especially in cases involving undocumented immigrants. Bias appears when courts assume that a child's life with American adoptive parents will naturally be better for the child than life with the child's biological, but foreign-born, parents. When parental rights termination cases are decided based on cultural prejudices, courts overlook the guidelines that the Supreme Court laid out in cases like *Santosky v. Kramer* and *Stanley v. Illinois*. These guidelines protect parents' rights by requiring courts to first determine that the parent is unfit at a clear and convincing evidence standard before making a best interest of the child decision. As scholars have noted, "[b]est interest decisions are highly subjective and courts and agencies increasingly base their custody determinations on subjective criteria such as negative perceptions regarding undocumented immigrants and their countries of origin, and on extremely positive beliefs regarding the benefits of an American upbringing."[104] Some judges have been explicit in their preference for the best interest of the child standard over the parents' rights, and have let it influence their court decisions.[105] The result is the unconstitutional and unfair removal of undocumented immigrants' children and termination of their parental rights.

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100. *Id.*

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

102. Hall, *supra* note 5, at 1478 n.105 (quoting TENN. CODE ANN. § 36-1-113(g)(1), (3)(A) (West 2010)).

103. *Ahmad*, 2005 WL 975339, at *3; *see also* Schulman, *supra* note 14, at 376 (arguing that the *Ahmad* case is an example of an appellate court upholding improper reasoning by a lower court in a parental rights case).

104. Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J. L. & SOC. JUST. 63, 63 (2012).

105. *See, e.g.*, Fairfax Cty. 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) ("[T]he evidence . . . is clear

Although the Adoption and Safe Families Act has served as the catalyst for thousands of TPR proceedings against undocumented immigrants over the years, I would argue that ASFA is only a stepping stone toward the biggest challenge immigrants face in TPR cases: implicit (and, in some cases, explicit) cultural bias. The repeal or amendment of ASFA may reduce the number of TPR cases that are brought to court, but in those cases that *are* brought, undocumented immigrants will still have to face the bias of their judge, their caseworkers, and their attorneys. No legislative change can act as a one-stop fix for implicit bias.

In some of the most appalling cases of bias, undocumented immigrant parents have had their children removed by the Department of Human Services (DHS) because the parent did not speak English. Cirila Baltazar Cruz, an undocumented immigrant from the state of Oaxaca in Mexico, migrated to the United States to send money back to her mother and two children in her hometown.[106] She spoke no English and very little Spanish, primarily speaking Chatino, an "obscure indigenous language."[107] She found work in Pascagoula, Mississippi, and in 2008 went to Singing River Hospital in that town to give birth to a baby girl, Rubí.[108] While mother and child were recovering, the hospital called DHS (for unknown reasons), and they removed the child from Cirila's custody because her lack of English would "place the baby in danger in the future."[109] Rubí was later given to a native Mississippi couple (either for foster care or adoptive purposes—the case is unclear), and Cirila challenged the ruling.[110] The state's primary concern seemed to be letting a child live with a parent who could not articulate a 911 call in an easily understandable language: however, "children have been raised safely in the [United States] by non-English-speaking parents for well over a century."[111] The fact that a court would not apply this same standard to Italian or Russian immigrant parents—as illustrated by history—speaks volumes about the particular biases that influenced the court's decision in this case.

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and convincing that it is in the best interests of these children that the father's parental rights be terminated. However, . . . we . . . [are] required by 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))).

106. Tim Padgett & Dolly Mascareñas, *Can a Mother Lose Her Child Because She Doesn't Speak English?*, TIME (Aug. 27, 2009), http://content.time.com/time/nation/article/0,8599,1918941,00.html [https://perma.cc/EQ8Q-VYHT].

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* A translator for DHS also stated that Cirila had "put Rubí in danger" because she had not bought a crib or baby formula by the time of her child's birth. *Id.* However, mothers indigenous to Cirila's hometown traditionally breastfeed their children for a year, and they rarely use bassinets, instead carrying infants around with them in a sling called a *rebozo*. *Id.*

Cirila's case is just one of many instances in which non-English-speaking parents have had their due process rights to their children thwarted based on their inability to speak English. Tellingly, the most prevalent cases typically involve immigrants from South American countries, rather than those migrating from Europe or other more "Western" societies. In 2004, a Mixtecan mother—an immigrant native of an indigenous group from a poor area of central Mexico, whose language and customs keep them cut off even from other Hispanic groups—living in Tennessee was accused by her daughter's elementary school teacher of child neglect.[112] The mother's lawyers requested that she and her daughter receive counseling—a common facet of many reunification plans—but the judge in that case ruled that before any reunification plan could be made, the mother, who spoke only Mixtecan, would first have to learn to speak English at a fourth grade level in only six months.[113] The court "prohibited contact with the daughter until the mother demonstrated her 'commitment to her daughter' by learning to speak English."[114]

In a 2009 case, undocumented immigrant parents from South Carolina had their child removed from their custody "because the police mistook their indigenous dialect for slurred Spanish and charged them with public intoxication."[115] Coincidently, it was the couple's babysitter who "provided the initial information regarding the parents' intoxication to the police."[116] She openly acknowledged that she wanted to gain custody of the couple's daughter herself, and after the child was placed into state custody, the babysitter requested that the child be put into her own custody instead.[117]

Cultural bias is not only limited to removals—it carries over into parental rights termination cases as well. In those cases, courts express a preference for the dominant cultural norms of "typical" American life, and ignore the due process rights of the parents in favor of weighing an American lifestyle as more within the child's best interests. In fact, "[c]ourts have demonstrated a preference for American parents with 'comfortable li[ves], . . . stable home[s], and . . . support from their [local] extended family' in a number of cases."[118] In Bail's parental rights termination proceeding, recounted above, the judge blatantly compared the life that her child would

112. Shaila Dewan, *2 Families, 2 Very Different Cultures and the Little Girl Between Them*, N.Y. TIMES (May 12, 2005), https://www.nytimes.com/2005/05/12/us/2-families-2-very-different-cultures-and-the-little-girl-between-them.html [https://perma.cc/JS2U-7FP8].

113. *Id.*

114. Yablon-Zug, *supra* note 104, at 83.

115. *Id.*

116. *Id.* at 83 n.139.

117. *Id.*

118. Hall, *supra* note 5, at 1481 (quoting Ginger Thompson, *After Losing Freedom, Some Immigrants Face Loss of Custody of Their Children*, N.Y. TIMES (Apr. 22, 2009), https://www.nytimes.com/2009/04/23/us/23children.html [https://perma.cc/R6HA-MN33]).

have with the American adoptive parents—focusing on the "stable home" that they could provide—with the life that her child would have with her immigrant mother.[119] The "'only certaint[y]' in Ms. Bail's future," the judge said, "was that she would 'remain incarcerated . . . and . . . be deported.'"[120]

In a similar case involving an undocumented Guatemalan mother living in Nebraska, the court, in terminating the mother's parental rights, "relied on testimony about the lack of 'economic opportunities' and the 'unfamiliar . . . educational system [and] athletic opportunities available in Guatemala.'"[121] This last case was overturned on appeal, and the appellate court denounced the lower court's ruling with a scathing admonition and an ode to due process: "[U]nless [Ms. Luis] is found to be unfit, the fact that the State considers certain adoptive 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."[122]

A court's or state agency's placing the supposed best interests of the child ahead of the due process rights of the parent seems like a natural—and perhaps even a desirable—practice. No reasonable person would want any harm to come to any children anywhere. However, a court's determination that one course of action is better for the child than another path is entirely subjective, and judges—like the vast majority of people—are susceptible to biases that, when factored into best interest decisions, may actually end up hurting children. Judges want to place children with "good parents," and to take them away from "bad" ones. But the definition of a good parent is often, if not always, defined according to the dominant cultural norms of society. In the case of America, a "good parent" would be white, middle class, and Protestant.[123] Undocumented parents are often the opposite of this picture, and "[b]ias against . . . undocumented immigrants in particular . . . is widely viewed as acceptable. Such discrimination is not only tolerated, it is frequently encouraged."[124] When judges, even unconsciously and with the best intentions, use cultural bias in considerations of children's best interests, their immigrant parents are put at an unreasonable disadvantage. Furthermore, since parents have an undeniable interest in taking care of their children, it is often the case that remaining with their biological parents *is* in the best interests of the child—and if that is not the case, then it is likely that

119. *Id.* at 1482.

120. *Id.* (quoting Ginger Thompson, *After Losing Freedom, Some Immigrants Face Loss of Custody of Their Children*, N.Y. TIMES (Apr. 22, 2009), https://www.nytimes.com/2009/04/23/us/23children.html [https://perma.cc/R6HA-MN33]).

121. *Id.* (quoting *In re* Interest of Angelica L., 767 N.W.2d 74, 85 (Neb. 2009)).

122. *In re Interest of Angelica L.*, 767 N.W.2d at 94.

123. Yablon-Zug, *supra* note 104, at 110.

124. *Id.* at 112.

that parent would not be considered legally fit by a court of law. Guaranteeing parents' due process rights to their children—especially undocumented parents' rights—benefits all parties.

IV. Solutions

It is evident that this problem of undocumented immigrants' unconstitutional loss of custody of their children is not improving. The Supreme Court's decisions in *Stanley* and *Santosky*, meant to protect parents from undue governmental interference with their parental rights, are not being followed. The Adoption and Safe Families Act's 15/22-month provision is facilitating the systematic creation of an unknowable number of legal orphans, and judicial cultural bias has only exacerbated the rate at which immigrant parents are having their children removed from their custody. Scholars on this subject have argued that a comprehensive remedy that reaches into both state and federal law is necessary to fix the problem created by ASFA's 15/22-month problem—and the problem of loss of immigrants' parental rights in general.[125] However, I would suggest that guaranteeing immigrants their constitutional rights requires an approach that is particularly involved at the local court level. Even if ASFA were amended or repealed, judges' cultural biases would still remain, and fit parents would still be at risk of losing their children for constitutionally impermissible reasons. High-level problems often necessitate ground-level solutions.

A. Federal Legislative Changes

The first and most obvious action that needs to be taken is Congressional legislative reform. In 2009, 2011, 2014, and, most recently, 2018, Congress introduced the Humane Enforcement of Legal Protection for Separated Children (HELP) Act, but it has not gained enough traction to be passed into law.[126] The bill would have amended the Adoption and Safe Families Act to require states to implement protocols for 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."[127] The bill also would have required that states provide the parent with a case manager who speaks the parent's native language, and that should the parent wish to take their child with them when they are deported, that they be given adequate time to get all

125. *See, e.g.*, Hall, *supra* note 5, at 1493–94 (suggesting Congressional legislative reform, as well as compliance with international law, as solutions to guarantee the rights of undocumented immigrants).

126. Schulman, *supra* note 14, at 392–93.

127. Hall, *supra* note 5, at 1495.

necessary documents in order.[128] The most important provision of the prospective bill, however, is a requirement that states create guidelines that "require that . . . all decisions . . . relating to care, custody, and placement of [] a child . . . are based on clearly articulated factors that do *not* include predictions or conclusions about immigration status or pending Federal immigration proceedings."[129] All of these provisions would help to make sure that undocumented parents receive the legal tools they need to navigate the court system and would create further bright-line rules that immigration status and cultural bias are not to be used as markers of parental unfitness. One of the most helpful things that Congress can do to rectify these due process violations is to pass the HELP Act. But I would argue that the HELP Act, even if it were to be passed, would not go far enough to address the inequities that ASFA creates. For instance, although the HELP Act would amend ASFA to require that states implement protocols to deal with separated children, it does not specify whether the 15/22 rule would continue to apply in those cases. It should not apply.

It is time to reconsider ASFA as a whole. The Adoption and Safe Families Act was adopted (for lack of a better word) in 1997—more than twenty years ago today.[130] There is no question that ASFA accomplished what it set out to do—to increase permanent placements of children in foster care and decrease the number of children languishing in the system.[131] But it did so by taking an unknowable number of children from immigrant and incarcerated parents, shamelessly flouting their constitutional rights. As far as research can tell, the Act has never been officially reviewed by Congress, and the exact number of children and undocumented immigrants affected by this flawed policy is a mystery. It is well past time that Congress took another look at the policies underlying ASFA, making sure to examine whether children truly are better off with *any* permanent placement or a permanent placement with their *parent*. If it is found that ASFA cannot accomplish what is in the best interests of fit parents and preserve their constitutional rights, then it should be repealed, and a new policy should be enacted that can achieve these goals. Regardless of Congress' findings on ASFA's merit, the Act—or any new policy affecting the parent-child relationship—should come under frequent review to take into account new information on the policy's impact. Parents' rights to their children is one of the foundational bedrocks of American life, and any law affecting the ability of parents to raise their children should be heavily and frequently scrutinized, not set on the shelf for twenty years.

128. *Id. See generally* HELP Separated Children Act, H.R. 3531, 111th Cong., § 6(a) (2009) (proposing that the Social Security Act be amended).

129. H.R. 3531 § 6(a)(3)(E) (emphasis added).

130. Notkin et al., *supra* note 39, at 5.

131. *Id.*

B. Resolving Judicial Cultural Biases

Removals of children of undocumented immigrants (and citizens from different, less "Western" cultures) from fit parents by culturally biased judges is another violation of immigrants' constitutional rights to their children. Although a repeal of ASFA as a whole or of the 15/22 rule would decrease the number of TPR proceedings brought to court, it would do nothing for the pervasive cultural bias within those courts. This is a huge issue in immigration and family law and should be addressed through as many facets as possible to provide immigrant parents a fair shot in court in general, but especially in removal proceedings in which their children are on the line.

Several studies show that educating people on implicit bias theory leads to increased awareness of and reduced implicit bias.[132] Although such training is unlikely to eliminate implicit bias entirely,[133] our judges should be required to undergo rigorous implicit bias training in order to create a judiciary that is, if not completely unaffected by bias, at least aware of the effect that their biases have on their decisions. To that end, creating culturally aware judges should begin in law school and should continue throughout a judge's career. I would advocate for a requirement that law students and judges attend CLE programs designed to inform participants about common aspects of different cultures that come up in various legal proceedings. For instance, a family law judge should be required to attend presentations about parenting norms in Honduras, Mexico, etc. By becoming exposed to parenting practices that are unlike those common in the "traditional" American family, judges will not be taken by surprise when confronted with situations similar to those outlined in Part III of this Note,[134] and will be able to at least recognize that parenting practices that are different than the American norm do not necessarily equate to unfit parenting.

Judges should also be required to participate in regular implicit bias *testing*. That is not to say that judges who are more implicitly biased than others should not be judges; rather, testing individual judges would enable courts to provide an individualized training plan tailored specifically to that judge, something that will almost certainly result in more effective

132. DOYIN ATEWOLOGUN, TINU CORNISH & FATIMA TRESH, EQUALITY & HUMAN RIGHTS COMM'N, UNCONSCIOUS BIAS TRAINING: AN ASSESSMENT OF THE EVIDENCE FOR EFFECTIVENESS 22 (2018).

133. *Id.* at 6.

134. For instance, if the judge in Binta Ahmad's TPR proceeding had understood why Ms. Ahmad perhaps would want to wait until she could relocate out of Nigeria—why did she consider the country unsafe?—before reconnecting with her child, the case might have turned out differently. Similarly, what if the judge in Bail's case had understood dependence on extended family that is prevalent in Guatemala? *See also supra* note 111 (explaining that one of the reasons that Cirila's parental rights were terminated was because she had not bought her child a crib, when mothers indigenous to Cirila's hometown traditionally carry their infants with them in a sling called a *rebozo*).

remediation, or at least awareness, of bias. All people are "prone to egocentric bias," or the belief that they are better or smarter than the average person. In other words, the judges may believe that the risk factors that might contribute to others' mistaken judgments would have no effect on them.[135] Judges are people too. Therefore, generalized training sessions (although helpful in raising awareness of the presence of general biases) would likely not be as useful as training regimens developed with a particular judge in mind. Secondarily, a judge who has knowledge of his own implicit biases because he has been tested for them may be more likely to rely on that awareness in order to second-guess his initial biased reactions to certain circumstances.[136]

In addition to instituting continuing implicit bias training and testing, local courts that see a lot of removal proceedings against immigrant parents should create a requirement that a cultural expert be present and give expert testimony in removal cases, or that a cultural expert is otherwise at the judge's disposal. In 2016, only thirty-seven percent of all immigrants obtained legal counsel in their removal proceedings.[137] The numbers for representation of undocumented immigrants in child removal cases are likely similar. It goes without saying that unrepresented respondents are at a disadvantage in court, and even if they were to seek to introduce expert testimony, it may be excluded because the respondent does not understand the nuances of the law. Requiring cultural experts to testify to common parenting practices in different regions in removal cases, although likely not a fool-proof method of neutralizing cultural biases, may at least help to make the court aware of the cultural differences at issue, and may mitigate some of the problems that unrepresented respondents face in child removal cases. Awareness may help to ensure that a judge will not overlook their bias in considering the outcome of the case, although a judge may still rely on that bias in making a decision. Judges are people too, and bias is an inescapable feature of decision-making, but assuring the presence of someone who knows about the intricacies of various cultures can only help to create a fair atmosphere.

Finally, judges who blatantly ignore Supreme Court precedent requiring a determination of parental unfitness before any consideration of the best interests of the child should be disciplined by an appropriate authority. Reversal by a higher court is not enough. Misconduct of this nature, even if perpetuated for the goal of giving a child what the judge considers the best life possible, should be dealt with by a public review board (perhaps one

135. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1228 (2009).

136. *Id.*

137. INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court [https://perma.cc/2MYM-BJ52].

without any judges sitting as members[138]), and discipline should constitute more than a slap on the wrist. Yet, "[m]ost states afford judges accused of misconduct a gentle kind of justice," so much so that an examination of the difficulties associated with punishing judges for misconduct would require an entirely different Note.[139] But ignoring the constitutional rights of immigrants by taking their children away from them without a preliminary determination of unfitness has no place in our court system and should be treated as the serious violation of due process that it is. No matter how many rules and protections we create to keep parents with their children, judges motivated by cultural biases will continue to flaunt precedent unless they face some type of consequence.

C. Other Necessary State and Federal Action

Outside broad policy reform (amending/repealing ASFA) and a tough crackdown on judicial cultural bias, there remain additional federal and state actions that must be taken in order to ensure that undocumented parents maintain their constitutional rights to their children.

The federal government can and should require that undocumented parents facing immigration proceedings be held at a facility within a reasonable distance from their children, rather than being shipped to an ICE facility hundreds of miles away.[140] Although a parent's involvement in deportation proceedings should have no effect on their TPR case (in what way does being forcibly separated from your child speak to your ability to effectively parent your child at home?), logistics in these intertwining cases often make it more difficult for parents to see or talk with their children, which may affect a judge's perception of the parent. Additionally, at the state level, legislatures should adopt rules that explicitly state that a parent's involvement in deportation proceedings is not to be considered in a determination of that parent's fitness. As others have commented, "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.'"[141]

138. *See* Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained on the Bench*, REUTERS INVESTIGATES (June 30, 2020), https://www.reuters.com/investigates/special-report/usa-judges-misconduct/ [https://perma.cc/WL49-RPRC] (examining at least one case in which a judge accused of misconduct also had a position on a judicial oversight board).

139. *Id.*

140. Hall, *supra* note 5, at 1497.

141. *Id.* at 1498–99 (quoting *In re* Interest of Angelica L., 767 N.W.2d 74, 94 (Neb. 2009)).

Conclusion

The due process protections of the Fourteenth Amendment of the Constitution apply to everyone on United States soil, no matter their citizenship status. State and federal government actions—the flawed nature of the Adoption and Safe Families Act, improper court determinations of unfitness, and pervasive cultural biases—rob undocumented immigrants of their due process right to be their children's parents. An unknowable number of loving parents have been separated from their children with little hope of reunification, and this result flies in the face of the values that America stands for. However, it is never too late to improve, and our governments, by opening their eyes to the problems outlined in this Note, can take legislative action to help rectify this situation by passing the HELP Act, amending ASFA, and defining state policies with more specificity in regards to undocumented immigrant parents. By taking action, we can start on the path to assuring that every fit parent gets to be a parent for their kids.