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Termination of Parental Rights: Should There be a “Three-Strike Rule” for a Parent to Lose Parental Rights After Three Felony Convictions?, 53 UIC J. Marshall L. Rev. 283 (2020)

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TERMINATION OF PARENTAL RIGHTS: SHOULD THERE BE A “THREE-STRIKE RULE” FOR A PARENT TO LOSE PARENTAL RIGHTS AFTER THREE FELONY CONVICTIONS?

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I. INTRODUCTION

Convictions and the potential incarceration of parents have a severe effect on the lives of their children who are left as helpless victims in the process.¹ A woman in Texas had her parental rights

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1. Dan Levin, *As More Mothers Fill Prisons, Children Suffer ‘A Primal Wound’*, N.Y. TIMES (Dec. 28, 2019), www.nytimes.com/2019/12/28/us/prison-

terminated as to her three children after testing positive on a drug test, following a conviction for writing bad checks.² Not only are her children left without one of their parents, but they are also facing the severe effects that result from the disruption of their family.³ Depending on the state, parents who have been convicted of a variety of crimes may never regain the right to parent their children.⁴ When children are taken from the care of their parents, it has been noted that “[l]osing your children is the ultimate price to pay.”⁵ These scenarios present the question: to what extent should a parent or guardian’s prior convictions be used to terminate his or her rights to a child? When criminal convictions are used against a parent or guardian as grounds for termination of his or her parental rights to a minor child, it becomes difficult to determine, based on several different factors, whether the termination of parental rights should occur.⁶ Oftentimes, states rely on the use of criminal convictions as grounds for termination of parental rights.⁷ However, this reliance has resulted in the potential problem of violating the due process rights of parents and children being left in precarious situations.

The purpose of this Comment is to explore how state systems, particularly Illinois’ system that relies on the three felony conviction rule as automatic grounds for a finding of depravity in seeking the termination of parental rights, presents potential due process violations. Part II of this Comment will explain the theories behind child custody, including the liberty interests of parents and what constitutes the best interests of the child. This section will then also assess the overall process of the termination of parental rights in the United States, including a focused look at New Hampshire, California, and Illinois. Part III will analyze and explore the differences exhibited by Illinois in the execution of its

mothers-children.html (presenting the difficult situations that occur throughout the United States when parental rights are involuntarily terminated, and the effects that these terminations have on children).

2. *Id.*

3. *Id.*

4. *Id.*; see generally Child Welfare Information Gateway, *Determining the Best Interests of the Child*, U.S. DEP’T HEALTH & HUM. SERV. (Mar. 2016), www.childwelfare.gov/pubPDFs/best_interest.pdf (setting forth the various grounds that states use when deciding whether to involuntarily terminate a parent’s rights to his or her child).

5. Levin, *supra* note 1.

6. See *In re N.G.*, 115 N.E.3d 102, 116-17 (Ill. 2018) (presenting the idea that each parental termination case is different, and the difficulties that may be presented when the court needs to determine if a conviction, based off a statute declared unconstitutional, can be used to terminate a father’s parental rights to his minor child).

7. See, e.g., 750 ILL. COMP. STAT. 50/1(D)(i) (2020) (showing how Illinois’s statutory language for termination of parental rights, includes a finding of unfitness based off of specific criminal convictions, that typically relate to a child or a child’s parent, or a combination of any three felony convictions).

system of terminating parental rights and the due process concerns that are raised. Part IV then proposes the direct changes that Illinois needs to make to its current system, with adoptions of provisions from the New Hampshire and California systems for the involuntary termination of parental rights. These changes will result in the elimination of the automatic finding of depravity for deciding to terminate parental rights based on three felony convictions.

II. BACKGROUND

The following sections will set forth the background behind child custody in the United States. Part A will discuss overall theories behind child custody, including a necessary focus on the best interests of the child. Part B will then explain systems set forth by Congress, to be adopted by the states. This section will also include a look at the relevant termination systems and statutes used by New Hampshire and California. Part C will discuss the system used by Illinois when terminating parental rights and the problems presented in the implementation of its strict statutory provisions.

A. Theories Behind Child Custody

Child custody and parental termination hearings involve a judge making a determination as to what is in the “best interest of the child.”⁸ The judge will make the determination whether parents will be allocated parenting time based on an evaluation of the best interests of the child.⁹ This consideration requires the court to look at all relevant factors, which may include whether there is any evidence of abuse in the household, if a parent is a convicted sex offender, and the wishes of the child.¹⁰ Custody or parenting time means that the parent has “the right to direct the child’s activities and to make decisions regarding the child’s care and control, education, health and religion.”¹¹ However, it is not always simple for courts to determine what is truly in the best interests of the child.¹² Specifically, it is not entirely clear how to define the best

8. See 750 ILL. COMP. STAT. 5/602.7 (2016) (describing the numerous factors that are considered by Illinois courts when deciding what is in the best interest of the child).

9. *Id.*

10. *Id.*

11. *Parental custody*, 12 ILL. FORMS LEGAL & BUS. § 38:24 (2019); see 750 ILL. COMP. STAT. 5/600(e) (2017) (defining parenting time as the primary period when a parent performs in a caretaker role for his or her child, apart from making important decisions).

12. See Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 384-85 (2008) (describing the difficulty, as time has gone on, in determining

interests of the child; rather, it is for the judge to make this determination during a hearing involving child custody and whether to terminate parental rights.¹³

In making these determinations, the United States Supreme Court has established that there is a fundamental right to parent, and this right “does not evaporate simply because they have not been model parents or have lost temporary custody of their child.”¹⁴ Therefore, loss of custody of a child and the possible subsequent termination of parental rights is a carefully weighed process that must not deny a parent his or her guaranteed due process rights.¹⁵ Additionally, the Supreme Court has noted that when proceedings begin to involuntarily terminate parental rights, there is an increased need for proper procedures to be used and more protection afforded to parents.¹⁶ As a result, when parents are faced with termination of parental rights hearings, it is recognized that there is a greater need for the court to protect the process by allowing for increased protections for the parents.¹⁷

The greater need for protection is based on the recognition of the Supreme Court’s assertion that parental rights are a fundamental right.¹⁸ As it has been established that parental rights are fundamental, strict scrutiny must be applied when courts assess whether due process rights are alleged to have been violated.¹⁹ If a

what is in the best interest of the child when making general custodial decisions and the long-lasting, detrimental effects this could have on the child when being removed from his or her parents’ care).

13. See Allison Glade Behjani, *Delegation of Judicial Authority to Experts: Professional and Constitutional Implications of Special Masters in Child-Custody Proceedings*, 2007 UTAH L. REV. 823, 825 (2007) (explaining the judge’s use of professionals, such as child psychologists and mental health professionals, to aid him or her in making determinations as to what would be in the child’s best interest); see also Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265, 270 (2002) (explaining that mental health professionals will be allowed to make recommendations to the court in order to help the judge make a decision that is ultimately in the child’s best interests).

14. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

15. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) (analyzing the equal rights of mothers and fathers in child custody hearings that guarantee due process to both sides).

16. *Santosky*, 455 U.S. at 753-54 (providing an explanation that when states proceed in forcibly taking parental rights away, there is an increased need for guaranteed procedural rights).

17. *Id.*

18. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (asserting that there is a fundamental right to parent and the Due Process Clause of the Fourteenth Amendment protects this right); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (establishing the right of individuals to raise children, which is recognized amongst the protected fundamental rights guaranteed by the United States Constitution).

19. See *Troxel v. Granville*, 530 U.S. 57, 59 (2000) (showing that when the fundamental right to parent is potentially infringed, then strict scrutiny must be used).

statute is alleged to infringe on a fundamental right, leading to a potential due process violation, then it must be shown that the challenged statute survives a strict scrutiny analysis.²⁰ Furthermore, when a statute is challenged under strict scrutiny, on the basis of infringing on the fundamental right to parent, it must be shown that the government has a compelling interest in infringing on the right and the statute must be narrowly tailored to achieve its compelling interest.²¹

B. Termination of Parental Rights in the United States

Over time, Congress has developed regulations regarding the termination of parental rights and for children being removed from the care of their biological parents.²² In particular, Congress has established grounds to determine when parental rights should be terminated.²³ Oftentimes the grounds Congress uses to determine custody and whether parental rights should be terminated results in someone other than the biological parents being granted custody of the child.²⁴ Involuntary termination of one's parental rights is a last resort and serious undertaking by the state.²⁵ Thus, Congress passed the Adoption and Safe Families Act of 1997 ("ASFA") to govern the child adoption process and the regulations that govern the foster care system.²⁶ ASFA also provides guidelines for adoptions that ensue as a result of the termination of parental rights.²⁷ Additionally, ASFA sets out guidelines for the foster care system, including the process of awarding legal guardianship and the termination of parental rights.²⁸ Of note, ASFA mandates termination of parental rights if certain crimes have been committed, including murder or manslaughter of the child's sibling

20. *Poe v. Ullman*, 367 U.S. 497, 553-54 (1961) (Harlan, J., dissenting) (explaining that infringements to fundamental liberty interests are valid when they are able to survive a strict scrutiny analysis).

21. *Hamit v. Hamit*, 715 N.W.2d 512, 526-27 (Neb. 2006) ("Under strict scrutiny review, the law must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." (quoting *Douglas Cty. v. Anaya*, 694 N.W.2d 601, 605 (Neb. 2005))).

22. See generally Elizabeth O'Connor Tomlinson, *Termination of Parental Rights Under Adoption and Safe Families Act (ASFA)*, 115 AM. JUR. TRIALS 465 (2020) (discussing the provisions put in place by Congress when enacting the ASFA).

23. *Id.*

24. *Id.* § 9.

25. *Id.* § 16.

26. Judge Ernestine Steward Gray, *The Adoption and Safe Families Act of 1997*, 46 LA. B.J. 477, 478 (1999) (analyzing the history of the passage of the ASFA and the resulting effects on the foster and adoption system within the United States).

27. *Id.*

28. 42 U.S.C.A. § 675 (West 2018).

and felony assault against the child or sibling.²⁹ However, “incarceration alone does not provide grounds for termination of parental rights although a parent’s incarceration may be considered along with other factors in determining whether parental rights can be terminated.”³⁰ States have taken ASFA and adopted it to their own statutes governing the foster care system and adoption processes.³¹ This incorporation includes the termination of parental rights as a penalty for prior felony convictions.³²

When considering incarceration and felony convictions as grounds for termination of parental rights, ASFA looks to a variety of factors.³³ The following considerations are examples used by ASFA: murder, felony assault involving a child or another child of the parent, and whether the court previously terminated the subject parent’s rights to another child.³⁴ Therefore, the ASFA sets basic grounds for the state to adhere to within their own foster and adoption systems.³⁵ However, many states have adopted their own respective statutes that set strict guidelines for termination of parental rights to a minor.³⁶

1. Termination of Parental Rights in New Hampshire

In its revised statutes, New Hampshire takes a different approach when determining whether parental rights should be

29. *Id.* § 675(5)(E) (further explaining that among crimes committed, the ASFA requires that parental rights must be terminated for an abandoned child or for a child that has been in foster care for “15 of the most recent 22 months”).

30. M. Elaine Buccieri et al., *Determinative Factors*, 43 C.J.S. INFANTS § 27 (Mar. 2020) (delineating the numerous factors that the court can use when making a determination whether to involuntarily terminate parental rights); *see also* In re Adoption of C.M., 414 S.W.3d 622, 669 (Mo. Ct. App. 2013) (explaining that before parental rights can be involuntarily terminated, an analysis needs to be done as to whether the subject child is being harmed by the parent or whether the child could be harmed in the future if parental rights are allowed to stay in place).

31. *See* Katherine A. Hort, *Is Twenty-Two Months Beyond the Best Interest of the Child? ASFA’s Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L. J. 1879, 1881 (2001) (noting that to be in compliance with reunification requirements under the ASFA, states have adopted broad approaches; these state-specific approaches are different from state to state).

32. *See, e.g.*, In re Vivienne Bobbi-Hadiya S., 126 A.D.3d 545, 547 (N.Y. App. Div. 2015) (holding that a father’s parental rights were properly terminated following abuse, neglect and a prior manslaughter conviction); *see also* In re E.A., 114 A.3d 207, 210 (Me. 2015) (finding that a father’s parental rights were properly terminated by the state after he was charged with assault for hitting one of his children).

33. 42 U.S.C.A. § 675.

34. *Id.* § 675(5)(E).

35. *Id.*

36. *See generally* KAN. STAT. ANN. § 38-2269 (2018) (setting forth provisions that the court must follow when considering whether to terminate parental rights). The statute provides various grounds for the court to consider when deciding whether a parent is unfit. *Id.*

terminated.³⁷ The relevant statute provides that parental rights can be terminated, for example, as a result of abandonment of the child, neglect, and mental instability of the parent.³⁸ However, in recognition of the difficult decisions that must be made in termination proceedings, the parents are granted a 12 month period to correct conditions that led to a state determination of neglect or abuse.³⁹ Furthermore, when using convictions as a consideration for termination, New Hampshire notes that convictions for murder, manslaughter, or felony assault of a child or the child's other parent, will be used as grounds for termination of parental rights.⁴⁰ However, for all other felony convictions, New Hampshire allows for a case-by-case determination to be made as to whether the conviction and incarceration would have so great an effect on the child, that termination of the parent's rights would be proper.⁴¹ Therefore, for convictions other than murder, manslaughter, or felony assault, the New Hampshire state court will make a case-by-case analysis to determine if the felony conviction, combined with the possible prison time, will lead to the child being detrimentally affected and "deprived of proper parental care and protection."⁴² Furthermore, New Hampshire's process of assessing whether a felony conviction should constitute grounds for termination of parental rights leaves the court to make a decision that ultimately must be in the best interests of the child.⁴³

Although incarceration can be used, New Hampshire does warn that the parent's incarceration cannot be the sole factor when deciding whether to terminate parental rights.⁴⁴ A case-by-case analysis needs to be done by the court, considering incarceration amongst all other relevant factors for the termination of parental rights.⁴⁵ Additionally, a party must seek termination and the

37. N.H. REV. STAT. ANN. § 170-C:5 (2020).

38. *Id.* § 170-C:5(vi).

39. *Id.* § 170-C:5(iii) (delineating the standard that before parental rights are irretrievably terminated, parents have twelve months to mitigate circumstances that led to a finding of abuse or neglect); *see, e.g.*, In re Jonathan T., 808 A.2d 82, 85 (N.H. 2002) (applying § 170-C:5(iii), the court found that parental rights were properly terminated after the parents were given the chance, yet failed to mitigate the circumstances that resulted in their children being removed from their care).

40. N.H. Rev. Stat. Ann. § 170-C:5(vii).

41. *Id.* § 170-C:5(vi) (asserting that although a felony conviction may be used as grounds for termination of parental rights, it will be left for the court, on a case-by-case basis, to decide whether the child is left adversely affected by the nature of the crime or the period of incarceration).

42. *Id.* § 170-C:5(vi).

43. John Burdeau, *Termination of Relationship*, 59 AM. JUR. 2D PARENT & CHILD § 16 (2020).

44. N.H. REV. STAT. ANN. § 170-C:5(vi) (implementing in New Hampshire that the mere fact a parent is in prison does not mean that it can be the only factor considered by the court in terminating parental rights).

45. Burdeau, *supra* note 43.

evidence presented must prove that termination is proper beyond a reasonable doubt.⁴⁶ Then, if a statutory ground is found as a basis for termination, the court will look to the best interests of the child and make a final determination as to the status of the parent's rights to his or her child.⁴⁷

However, when relying on statutory grounds to terminate parental rights, it is noted that the child's best interest is considered to be more determinative and more important than the interests of the parents, who are contesting the involuntary termination of their parental rights.⁴⁸ Therefore, the child's welfare will be considered more important than that of the parent, but the due process rights of parents must still be recognized and adhered to.⁴⁹ Although the child's interests are considered of utmost importance when deciding whether to terminate parental rights, the state does recognize, in its own constitution, that parents have guaranteed due process rights.⁵⁰ Thus, in seeking termination of parental rights, New Hampshire recognizes the due process rights of parents but finds that so long as these requirements are met, the child's welfare is more important than a parent's interests.⁵¹

2. Termination of Parental Rights in California

California, in adopting provisions from the AFSA, also provides a broad basis for determining whether parental rights should be

46. *In re Haley K.*, 37 A.3d 377, 379, 381-82 (N.H. 2012) (holding that a violation of a statute had to be shown beyond a reasonable doubt, before parental rights were terminated, and the father's incarceration was not the sole ground for terminating his parental rights).

47. *In re C.M.*, 103 A.3d 1192, 1199 (N.H. 2014) (quoting *In re Sophia-Marie H.*, 77 A.3d 1139 (N.H. 2013)) (noting that after a statutory ground is found as a basis for termination, the court's primary concern must be in the child's best interest before terminating parental rights); *see also* *In re Antonio W.*, 790 A.2d 125, 129 (N.H. 2002) (showing that statutory grounds must be established before parental rights are terminated, but the ultimate decision the court makes must be in the best interests of the child, beyond the statutory grounds).

48. *In re Adam R.*, 992 A.2d 697, 707 (N.H. 2010) (asserting that when the court decides whether to terminate parental rights, the best interest and welfare of the child must be the ultimate concern of the court, over the interests of the parents).

49. *Id.* at 700 (recognizing that although there is a fundamental right to parent, the state can step in where necessary so long as it acts properly under due process).

50. *Id.* (ruling that "Parental rights are 'natural, essential, and inherent' within the meaning of Part I, Article 2 of the New Hampshire Constitution"); N.H. CONST. pt. 1, art. 2 (stating that "[a]ll men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty," and going on to assert the due process rights of citizens where "[e]quality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex, or national origin").

51. *In re Adam R.*, 992 A.2d at 707.

terminated as a result of felony convictions.⁵² The state provides, through its own statutes, general grounds for termination of parental rights.⁵³ For example, California has established that grounds for termination include abandonment of the child, abuse of another child, and mental disability of the parent.⁵⁴ The governing California statute notes that two requirements must be met to determine whether convictions should be used as automatic grounds for termination of parental rights.⁵⁵ The first ground that must be met is whether the parent has a prior felony conviction.⁵⁶ Subsequently, the court must then decide whether the felony conviction and the facts associated with it would result in finding that the parent is unfit.⁵⁷ Therefore, a fact-based analysis must be done as to whether prior crimes will be determinative factors in the ultimate decision whether to terminate parental rights.⁵⁸ Accordingly, if it is established that the child's parent is a convicted felon, the court can then decide whether the crime and the facts associated with it would make the parent unfit.⁵⁹ This broad basis allows courts to establish the types of crimes that make a parent unfit and whether any prior crimes create concern for the court as to the parent's ability to care for his or her child.⁶⁰ Notably, most courts in California have recognized "unfitness" to mean "a probability that the parent will fail in a substantial degree to discharge parental duties toward [the] child."⁶¹

52. *But see* Jana Micek, *Termination of Parental Rights Based on a Felony Conviction*, 11 J. CONTEMP. LEGAL ISSUES 565, 566 (1999) (arguing that because courts are given a large amount of discretion in finding bases for an unfit parent, this leads to a lack of clarity in establishing how to regularly find unfitness. As California is loose in its interpretation of what convictions constitute parental unfitness, this has resulted in courts making "decisions [that] are sometimes inconsistent and unpredictable").

53. CAL. WELF. & INST. CODE § 361.5 (West 2018).

54. *Id.* at (b)(2),(9), and (i)(4).

55. CAL. FAM. CODE § 7825(a) (West 2020).

56. *Id.* § 7825(a)(1) (establishing that in order to find a conviction as grounds for termination of parental rights, it must first be found whether one or both parents have a felony conviction).

57. *Id.* § 7825(a)(2) (asserting that the court needs to determine whether the actual crime, along with any criminal record the parent has, makes the parent unfit, rather than broadly allowing for any crime to be used as grounds for termination). *But see* Deseriee A. Kennedy, *Children, Parents & The State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78 (2011) (arguing that the California, and other state standards of allowing for incarcerations to be considered, as part of the best interests analysis, fails to consider the interests of parents when proceedings are initiated to terminate parental rights).

58. CAL. FAM. CODE § 7825(a)(2).

59. *Id.*

60. Micek, *supra* note 52, at 566 (noting that the court's fact-based determination allows it to examine whether a felony conviction would allow it to find the convictions as proper grounds for unfitness, before the court attempts to terminate parental rights).

61. *Id.* (quoting *In re Christina P.*, 175 Cal. App. 3d 115, 133 (Cal. Ct. App.

California has further allowed for courts to find that certain felonies or a pattern of prior crimes amount to a parent being unable to properly care for his or her child.⁶² However, California has warned that the mere fact that a parent has been convicted of a felony does not automatically lead to a finding of parental unfitness.⁶³ Rather, the court must make a fact-based analysis before ultimately deciding whether to terminate parental rights on grounds of parental unfitness.⁶⁴ Therefore, it must be shown that the conviction itself, and the nature of the crime, must be the ground for parental unfitness.⁶⁵ Additionally, California courts are allowed to use the parent's criminal record in making the determination of whether to terminate parental rights.⁶⁶

C. Termination of Parental Rights in Illinois

The termination of parental rights in Illinois is governed in the court system by the Juvenile Court Act and the Adoption Act.⁶⁷ First, a determination of parental fitness must be established under the Adoption Act.⁶⁸ Specifically, the Adoption Act asserts that a parent's rights to his or her child will be terminated if he or she is deemed to be *depraved*.⁶⁹ In particular, Illinois has strictly set forth that grounds for depravity include any three felony convictions.⁷⁰ Furthermore, at least one of the convictions, according to the Adoption Act, must have occurred "within 5 years of the filing of the petition or motion seeking termination of parental rights."⁷¹ Therefore, Illinois sets a strict standard, where three felony

1985)).

62. See Micek, *supra* note 52, at 566 (noting that a felony, alone, is not instant grounds in California for termination of parental rights). Rather, broad terms are provided where unfitness needs to be shown based on the felony, on a case-by-case basis. *Id.*

63. CAL. FAM. CODE § 7825(a) (setting out proper grounds for termination of parental rights, where a felony conviction can be used for a finding of unfitness if the facts of a prior conviction support the court's conclusion that it would be in the child's best interest and welfare).

64. *Id.*

65. See *In re Terry E.*, 225 Cal. Rptr. 803, 815 (Cal. Ct. App. 1986) (showing that a conviction alone may not be grounds for termination of parental rights as the mother was rehabilitated and had shown her ability to carry out her duties as a parent).

66. Cal. Fam. CODE § 7825(a).

67. *In re N.G.*, 115 N.E.3d at 115-16 (mentioning that in Illinois, parental rights can be involuntarily terminated only when the termination follows the procedures set out by both the Juvenile Court Act and the Adoption Act, where various grounds are provided for proper termination).

68. 750 ILL. COMP. STAT. 50/1(D) (explaining that there can be an official finding of unfit if there was an abandonment of the child, desertion, continuous or repetitive neglect, and extreme cruelty).

69. *Id.* § 50/1(D)(i).

70. *Id.*

71. *Id.*

convictions are deemed to be automatic grounds for depravity, resulting in the termination of parental rights, so long as one of these convictions took place within five years of the official proceedings for termination.⁷² Furthermore, depravity can also be found and used by the court as a basis for termination of parental rights on the grounds that the parent was previously convicted of a single instance of first or second-degree murder.⁷³ However, if first or second-degree murder is used as grounds for termination, then this particular conviction has to be within 10 years from the action before the court.⁷⁴

Additionally, incarceration of the parent is a factor that can be considered in Illinois when determining whether a parent's rights should be terminated to his or her child.⁷⁵ Notably, if the parent has been incarcerated, even before the child has been born, then the incarceration can be a factor if the court finds that the time spent away from the child would have a significant effect on the child's needs and well-being.⁷⁶ Therefore, convictions and incarcerations are two factors that can be assessed in the decision to terminate parental rights, based on the potential effects of the parent's incarceration on the child.⁷⁷

The Juvenile Court Act of 1997 (the "Act") also provides a framework that the courts must follow in determining whether to terminate parental rights in Illinois.⁷⁸ The Act provides ways for the Department of Child and Family Services ("DCFS") to ensure the safety of children and take necessary means of intervention when the best interests of the child are not met.⁷⁹ According to the Act, a

72. *Id.*; *see, e.g.*, In re J.E., 2018 IL App (5th) 180149-U, ¶ 1 (holding that a father's parental rights were properly deprived as a result of his time in prison and his lack of contact with his child before he actually entered prison).

73. 750 ILL. COMP. STAT. 50/1(D)(i) (finding that the proper grounds for termination of parental rights and a finding of depravity includes convictions for murder within the previous ten years).

74. *Id.*

75. *Id.* § 50/1(D)(r).

76. Jack K. Levin, *Incarcerated Parent*, 6A NICHOLS ILL. CIV. PRAC. § 114:62 (2019) (noting that a parent's incarcerations do not have to be after the child is born; the incarceration would need to have a significant effect on the parent's ability to care for the child); *see also* In re Gwynne P., 830 N.E.2d 508, 521 (Ill. 2005) (holding that a mother's rights to her child were properly terminated as her repeated incarcerations prevented her from being able to raise her child, and the incarcerations led to her inability to, "acquire the skills and knowledge necessary," to raise her child); *see, e.g.*, In re D.D., 752 N.E.2d 1112, 1121 (Ill. 2001) (finding that a father's repeated incarcerations led to his parental rights being properly terminated and although the incarcerations were before his child was born, he would be unable to properly provide for his child and take care of the needs of his child).

77. Levin, *supra* note 76.

78. 705 ILL. COMP. STAT. 405/1-1 (2019).

79. *Id.* § 405/1-2(1) (noting that, "[t]he purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his or her own home, as will serve the safety and moral, emotional, mental, and physical

parent needs to be found unfit, under the Adoption Act, before the court proceeds in terminating parental rights.⁸⁰ The standard by which the court must establish unfitness is clear and convincing evidence.⁸¹ Furthermore, in conjunction with the Illinois Adoption Act, the Juvenile Courts Act of 1997 will be used to ensure the placement of children as directed by juvenile courts and the Illinois Department of Child and Family Services.⁸²

Illinois utilizes a “three-strike” felony conviction rule as grounds for the finding of depravity in the termination of parental rights, but this strict rule presents a host of problems in its implementation.⁸³ Congress took a broad approach when it passed the Adoption and Safe Families Act of 1997, but Illinois is much stricter in its approach.⁸⁴ Problems particularly may arise if it is found that one of the three convictions relied on by the court as grounds for termination is later overturned.⁸⁵ The overturning of any of the three convictions, for example, could be done based on a later finding of unconstitutionality.⁸⁶ Thus, if a parent’s rights to his or her child are terminated based on three felony convictions, including one that is later overturned, questions arise as to whether due process is properly followed if the termination is allowed to proceed.⁸⁷ However, the statute as it stands in Illinois must be followed, unless action is taken to amend or reverse it.⁸⁸ Therefore,

welfare of the minor and the best interests of the community”).

80. *In re N.G.*, 115 N.E.3d at 116 (asserting the need to find parental unfitness before termination of parental rights can take place).

81. *Id.* (explaining that the Adoption Act requires that clear and convincing evidence of unfitness needs to be shown before the state can involuntarily and irretrievably terminate parental rights).

82. *See In re K.B.J.*, 713 N.E.2d 253, 257 (Ill. App. Ct. 1999) (noting that the Juvenile Court Act acts alongside the Adoption Act, with the main goal of having courts and the state act within the best interests to protect the child’s wellbeing and general welfare); *see also In re M.M.*, 619 N.E.2d 702, 710-11 (Ill. 1993) (establishing that different findings of best interests can be found under either the Juvenile Court Act or the Adoption Act, but when it needs to be determined if the child’s best interests are being protected during parental termination proceedings, it must be determined if the child’s interests would be best served by his or her potential adoption).

83. 750 Ill. Comp. Stat. 50/1(D)(i).

84. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997); 750 ILL. COMP. STAT. 50/1.

85. *In re N.G.*, 115 N.E.3d at 134-35 (holding that an overturned conviction, on the basis of an unconstitutional statute, could not be used against a father in finding that there were three felony convictions used as grounds to terminate his parental rights to his minor daughter).

86. *Id.*

87. *Id.* at 115 (noting that as following necessary due process provisions in the parental custodial process, “Parental rights, such as the right to rear one’s children or control their education, are included in the parental rights protected by the due process clause”); *see also Santosky*, 455 U.S. at 758-59 (holding that the fundamental right to parent “is an interest far more precious than any property right”).

88. *In re N.G.*, 115 N.E.3d at 115 (explaining that when infringing on the

the three-strike felony conviction rule in Illinois, as strictly followed, is subject to debate as to whether it can be expressly followed when such problems arise.

The Illinois system differs in key aspects from both of the systems adopted in New Hampshire and California for the involuntary termination of parental rights. Most notably, Illinois' usage of the three-strike felony conviction rule creates a strict basis for the finding of depravity, resulting in the termination of parental rights, when compared to the case-by-case fact analyses that are utilized by the court systems in California and New Hampshire.

III. ANALYSIS

The following sections will discuss the issues presented by the strict standards set out by the Illinois Adoption Act and Juvenile Court Act, which require automatic termination of parental rights after it is established that a parent has been convicted of three felonies.⁸⁹ Section A will discuss the determination made by the Illinois Supreme Court that unconstitutional convictions cannot be used as part of the three-strike determination.⁹⁰ Section B will discuss the due process rights of parents in the raising of their children.⁹¹ This section will also assess the due process concerns that are raised by the three-strike felony conviction rule in Illinois. Section C will analyze the existing sections of the Illinois system that comply with due process requirements, absent the three-strike felony conviction rule.

A. *Illinois' Requirement of Three Felony Convictions for Involuntary Termination of Parental Rights*

In the case of *In re N.G.*, the Illinois Supreme Court determined it was improper to declare a father ("Floyd F.") unfit after he was convicted of three felonies under Illinois law.⁹² DCFS

fundamental right to parent, courts must be careful before proceeding with the termination of parental rights); *see also In re Gwynne P.*, 830 N.E.2d at 514 (noting that in order for the state to find necessary grounds to terminate parental rights to a minor child, its petition must then include, "an allegation that the parent is unfit and include the specific statutory grounds on which the charge of unfitness is based"); *see also In re D.C.*, 807 N.E.2d 472, 476 (Ill. 2004) (holding that only one proper statutory ground is necessary to terminate parental rights).

89. 750 ILL. COMP. STAT. 50/1(D)(i).

90. *In re N.G.*, 115 N.E.3d at 135.

91. *See Troxel*, 530 U.S. at 65 (asserting that in recognition of due process rights, "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court").

92. *In re N.G.*, 115 N.E.3d at 110 (noting that the issue is "whether the circuit court of Will County erred when it terminated Floyd F.'s parental rights

argued that Floyd F. was unfit, based on a finding of depravity, due to his three felony convictions; the basis for this finding were the standards set out under the Adoption Act.⁹³ However, one of the convictions was later overturned, after it was determined that the conviction was based on an unconstitutional statute.⁹⁴ In its ruling, the Court agreed with the appellate court's determination and found that the original basis for depravity was improper as Floyd F. no longer had the three required felony convictions under Illinois law.⁹⁵ The Illinois Supreme Court opined that once the state could no longer rely on the third conviction, now overturned, "the State would have failed to meet its burden of showing by clear and convincing evidence that Floyd F. was depraved and therefore unfit under section 1(D)(i) of the Adoption Act."⁹⁶ Further, the Illinois Supreme Court noted that as the statute was found to be unconstitutional, then it could no longer be used against Floyd F. when making a basis for terminating his parental rights.⁹⁷ The Illinois Supreme Court, therefore, found the original grounds for termination to no longer be present as the conviction, found to be unconstitutional, is removed from consideration of determining whether the father is depraved.⁹⁸ Thus, in its decision, the Illinois Supreme Court set the precedent that if a felony conviction is overturned, then it cannot be used in finding depravity, and therefore, cannot be used as a basis or finding unfitness to

to his minor child, N.G.").

93. *Id.* at 112 (explaining, "The three convictions on which DCFS relied were a 2008 AUUW conviction, a Class 4 felony; a 2009 conviction for unlawful use of a weapon by a felon, a Class 2 felony; and a 2011 conviction for being an armed habitual criminal, a Class X felony arising from an arrest months before N.G.'s birth").

94. *Id.* (noting "the 2008 conviction on which that determination depended was based on the specific statutory provision struck down by this court as facially unconstitutional in *Aguilar*, 2013 IL 122116").

95. *Id.* at 120 (explaining that "[b]ecause the finding of depravity depended on a void conviction based on a constitutionally nonexistent statute, we must, in turn, reverse that finding," and that the Court had, "an affirmative duty to invalidate Floyd F.'s AUUW conviction and to treat the statute on which it was based as never having existed"); 750 ILL. COMP. STAT. 50/1(D)(i) (explaining that depravity of a parent can be found if he or she was previously convicted of "at least 3 felonies under the laws of this State or any other state, or under federal law, or the criminal laws of any United State territory; and at least one of these convictions took place within 5 years of the filing of the petition or motion seeking termination of parental rights").

96. *In re N.G.*, 115 N.E.3d at 120.

97. *Id.* at 116; *see also* *People v. Gersch*, 553 N.E.2d 281, 283 (Ill. 1990) (noting that an unconstitutional statute can no longer be considered as having existed or used in any way once the determination is made to overturn it (quoting *People v. Manuel*, 446 N.E.2d 240, 244-45 (Ill. 1983)); *see also* *Van Driel Drug Store, Inc. v. Mahin*, 265 N.E.2d 659, 661 (Ill. 1970) (stating that, if it is found that part of a law is no longer constitutional, then the existing law can stand, with the stricken part removed from the statute and no longer used by the state or the court in enacting any decisions).

98. *In re N.G.*, 115 N.E.3d at 134.

terminate parental rights.⁹⁹

In its decision, the Illinois Supreme Court argued that allowing for an unconstitutional statute to stand and be used in terminating parental rights, raises due process concerns.¹⁰⁰ As noted by the Court, “[Illinois] seeks to use that unconstitutional conviction to secure an additional sanction: termination of Floyd F.’s parental rights. Those parental rights are fundamental.”¹⁰¹ Furthermore, the Court found:

Because a natural parent’s right to raise his or her child is a fundamental liberty interest, involuntary termination of parental rights is a *drastic measure*. Where a parent has not consented to relinquishment of his or her parental rights, a court has no power to terminate the parent’s rights involuntarily except as authorized by statute.¹⁰²

Therefore, it is a drastic measure to terminate one’s right to his or her child, and the Illinois Supreme Court cautions the state from violating the due process rights of parents in using the three-strike felony conviction rule.¹⁰³ Thus, if the court makes a finding of depravity, leading to a finding of parental unfitness and termination of parental rights, does the three-felony conviction rule act in accordance with the parent’s fundamental liberty interests?¹⁰⁴ If Illinois is allowed to continue in its use of the three-strike felony conviction rule, is the fundamental right to parent protected when problems arise?¹⁰⁵ Based on these questions, it will need to be determined whether the three-strike felony conviction rule, as it currently stands, is in violation of the Fourteenth Amendment Due Process Clause.

99. *Id.* at 116 (noting that the Illinois Supreme Court needed to answer if the now unconstitutional statute could be used “in determining whether DCFCS had met its burden of establishing that Floyd F. was unfit within the meaning of the depravity provisions of section 1(D)(i) of the Adoption Act and, on that basis, terminate his constitutionally protected parental rights,” and it explained that it could not be used).

100. *Id.* at 114-15; see *Troxel*, 530 U.S. at 65 (asserting that in recognition of due process rights, “the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court”).

101. *In re N.G.*, 115 N.E.3d at 114 (alteration in original).

102. *Id.* at 115 (quoting *In re Gwynne P.*, 830 N.E.2d at 516).

103. *Id.*

104. *Id.*

105. *But see* Matter of Welfare of HGB, 306 N.W.2d 821, 825 (Minn. 1981) (explaining that although there is a fundamental right to parent, the state is within its rights to terminate parental rights when it shows there is sufficient, serious reasons to justify its decision).

B. *Due Process Rights and the Liberty Interest in Raising Children*

The Fourteenth Amendment Due Process Clause guarantees that no State shall “deprive any person of life, liberty, or property, without due process of law.”¹⁰⁶ Further protected under the Fourteenth Amendment Due Process Clause is a citizen’s guaranteed right to substantive due process and procedural due process.¹⁰⁷ According to the theory of substantive due process, “the Fourteenth Amendment ‘forbids the government to infringe . . . fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”¹⁰⁸ For procedural due process, there are two steps that must be analyzed under the Due Process clause: “[w]e first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient.”¹⁰⁹ Therefore, a state can infringe on one’s fundamental liberty interest if it has a compelling reason for doing so and if it is shown that it followed adequate procedures.¹¹⁰

Additionally, all citizens have liberty interests that are protected by the United States Constitution.¹¹¹ One such liberty interest that is protected for all citizens in the United States is that of “a natural parent’s right to raise his or her child.”¹¹² Thus, a parent’s right in raising his or her child is protected under the Fourteenth Amendment Due Process Clause.¹¹³ The United States Supreme Court has noted that one of its primary concerns is attempting to keep the child with his or her natural parents, without significant interference.¹¹⁴ Furthermore, the Supreme

106. U.S. CONST. amend. XIV, § 1.

107. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011).

108. *Washington*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

109. *Swarthout*, 562 U.S. at 219 (citing *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)).

110. *Washington*, 521 U.S. at 721; *Swarthout*, 562 U.S. at 219.

111. *In re N.G.*, 115 N.E.3d at 114-15 (quoting *In re M.H.*, 751 N.E.2d 1134, 1139 (Ill. 2001)).

112. *In re N.G.*, 115 N.E.3d at 115.

113. *Troxel*, 530 U.S. at 66 (holding 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,” and it further notes that the Supreme Court has taken steps to protect families and the right to parent under the Constitution (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

114. *Troxel*, 530 U.S. at 65-66 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (finding that parents have a special bond with children and the United States Supreme Court recognizes the importance that “the custody, care and nurture of the child reside first in the parents, whose primary function and

Court has noted that parental rights, and the caring for one's natural children, are some of the most important, and longest regarded rights of citizens in the history of the United States.¹¹⁵ Therefore, it is clear that the right to raise one's own child is a fundamental liberty interest, guaranteed by the Fourteenth Amendment Due Process Clause.¹¹⁶

1. *Illinois' Three-Strike Felony Conviction Rule Creates Uncertainty with Potential Due Process Right Violations*

Illinois' three-strike felony conviction rule presents uncertainty in allowing for three felony convictions to be used as instant grounds for a finding of depravity, resulting in the termination of parental rights.¹¹⁷ The Illinois Supreme Court recognizes that parental rights are fundamental.¹¹⁸ However, if a parent's rights are terminated based on three felony convictions, but one is later overturned, the due process rights of parents are violated by the state if the court's decision to terminate is allowed to stand.

Furthermore, the Illinois Supreme Court finds that if it is determined that a statute or law is unconstitutional, then it cannot be relied on by the courts in any way and the statute must be disregarded.¹¹⁹ The Court also notes if it were to allow overturned convictions to be used against parents in the termination of parental rights, then courts would be in violation of the guaranteed right to parent under the Fourteenth Amendment Due Process Clause and a parent would be deprived of this fundamental liberty

freedom include preparation for obligations the state can neither supply nor hinder"); *see also* *In re Haley D.*, 933 N.E.2d 421, 426-27 (Ill. App. Ct. 2010) (noting Illinois's recognition of the fundamental right to parent as following Supreme Court decisions that protect this important interest under the Fourteenth Amendment Due Process Clause).

115. *Troxel*, 530 U.S. at 65 (explaining "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme Court]"(alteration in original)); *see also* *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (asserting "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition").

116. *Troxel*, 530 U.S. at 65.

117. 750 ILL. COMP. STAT. 50/1(D)(i).

118. *In re N.G.*, 115 N.E.3d at 115; *see* *Lulay v. Lulay*, 739 N.E.2d 521, 530 (Ill. 2000) (stating that "under United States Supreme Court precedent, 'parents have a liberty interest in bearing and raising their children'" (citing *People v. R.G.*, 546 N.E.2d 533, 540 (Ill. 1989)). *But see* *In re I.G.*, 383 S.W.3d 763, 768 (Tex. App. 2012) (limiting the fundamental right to parent as not being unlimited and recognizing that courts must recognize that the wellbeing of the child is still paramount over the fundamental right to parent).

119. *In re N.G.*, 115 N.E.3d at 134.

interest.¹²⁰ Therefore, by allowing an overturned conviction to be used against a parent in involuntary termination of parental rights, the parent would lose due process rights as a result.¹²¹

Yet, Illinois continues to attempt to follow its very strict approach that any three felony convictions are automatic grounds for termination.¹²² However, the case of *In re N.G.* presents the predicament that Illinois is in when it acts to deprive a parent of the right to his or her child based on an overturned conviction.¹²³ If the overturned conviction is allowed to be used as part of the state's determination of unfitness, this will be a clear violation of the parent's due process rights.¹²⁴ Once the conviction is overturned, the conviction no longer exists, and the court is unable to constitutionally use the conviction against the parent as grounds for termination of parental rights.¹²⁵ Thus, the substantive due process rights of the parent would be clearly violated as there would be no compelling constitutional interest in terminating parental rights once the unconstitutional conviction is removed from consideration.¹²⁶

2. *Illinois' Three-Strike Felony Conviction Rule and Strict Scrutiny*

In defense of its use of the three-strike felony conviction rule, the state may argue that the statute must stand against a test of strict scrutiny as it has a compelling interest in protecting children from parents convicted of felonies.¹²⁷ Here, the state will argue, based on the theory of substantive due process, that it has a right

120. *Id.* at 133 (assessing Floyd F.'s case and finding, "The issue here is whether Floyd F. is fit to be a parent. Insisting that Floyd F.'s prior AUUW conviction be given effect in this proceeding would not advance any firearms-related public safety concerns. It would have no impact on firearms policy or public safety at all").

121. *Id.* (noting that if the court were to allow the use of unconstitutional statutes and convictions against a parent, the court would be allowing a conviction that is no longer there to be used as grounds to terminate the fundamental right to parent, violating the United States Constitution).

122. 750 ILL. COMP. STAT. 50/1(D)(i).

123. *In re N.G.*, 115 N.E.3d at 133.

124. *Id.* at 134.

125. *Id.* at 133.

126. *Swarthout*, 562 U.S. at 219.

127. *See, e.g., Lulay*, 739 N.E.2d at 532 (explaining that the state has an interest in protecting children under its authority of *parens patrie*, especially when it comes to traumatic events that may have a devastating impact on children); *see also In re J.J.Z.*, 630 A.2d 186, 193 (D.C. 1993) (asserting that the doctrine of *parens patriae* allows courts to act on behalf of children to protect their best interests). *But see State ex rel. A.V.*, 164 So. 3d 853, 856 (La. Ct. App. 2014) (narrowing the right of *parens patriae* to apply only to serious circumstances when the state seeks to be allowed the right of "intervention in the parent-child relationship").

to infringe on the right to parent.¹²⁸ In making this argument, the state will assert that the termination of parental rights, despite the conviction being overturned, is still in the best interests of the child.¹²⁹ However, the state fails to provide a showing that the statutory provision of three felony convictions is narrowly tailored to justify its compelling interest in protecting children and providing for the best interests of the child.¹³⁰ Once the conviction is overturned, the issue continues as to how the statutory provision is narrowly tailored, where Floyd F. could be convicted of one more felony and have his parental rights involuntarily terminated.¹³¹ If none of these felonies have to relate to a child, then how are the child's best interests served when the parent's rights are terminated? Therefore, if the state attempts to use the best interests of the child as the single factor justifying the termination of parental rights, it would disregard the fundamental right to parent and violate the Due Process Clause.¹³²

C. *Illinois Provides Other Bases for Terminating Parental Rights, Aligning with the Due Process Rights of Parents*

Despite the use of three felony convictions as grounds for an automatic finding of depravity for termination of parental rights, Illinois provides other bases that act in accordance with a parent's right to due process, guaranteed under the Fourteenth Amendment Due Process Clause.¹³³ For example, Illinois allows for abuse and neglect, abandonment, and desertion to be used for a finding of

128. *Washington*, 521 U.S. at 721. *But see Troxel*, 530 U.S. at 72-73 (finding, “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a ‘better’ decision could be made”); *see also* Francis C. Amendola et al., *Procedural Constitutional Rights in Termination Proceedings*, 40A TEX. JUR. 3D FAMILY LAW § 1677 (2020) (noting the increased need for due process, especially procedurally, when a state seeks to terminate parental rights).

129. *But see Troxel*, 530 U.S. at 96 (Kennedy, J., dissenting) (disagreeing with the asserted state interest of the best interests of the child as a proper compelling interest provided by the state when it attempts to justify its actions under strict scrutiny).

130. *In re N.G.*, 115 N.E.3d at 110 (the court failed to find the best interests of the child was a sufficient basis to terminate the parental rights of N.G.'s father once the single conviction was overturned).

131. *Id.* at 135 (holding that the trial court would have to establish a different basis for terminating parental rights, as the original grounds of three felony convictions no longer stands).

132. *Id.*

133. 750 ILL. COMP. STAT. 50/1(D)(i); *see also* John Bourdeau, *Loss of Forfeiture of Right*, 59 AM. JUR. 2D PARENT & CHILD § 34 (2020) (noting that in recognizing the best interests of the child in termination proceedings, the state has a right to step in when parents are deemed unfit, but it must support its decision to do so).

unfitness, leading to termination of parental rights.¹³⁴ Illinois also recognizes certain crimes against children, the murder of any person, and aggravated battery as bases for termination.¹³⁵ Here, it is clear that the state would be justified in terminating parental rights in accordance with the best interests of the child.¹³⁶ Therefore, if one of the convictions falls within the Illinois statute, a finding of depravity can lead to a determination of unfitness and then termination of parental rights.¹³⁷ In listing the specific convictions that will grant automatic termination of parental rights, Illinois still allows for any three convictions together to be used as automatic grounds for termination.¹³⁸ However, according to the Illinois Supreme Court's interpretation, the intent of a finding of depravity is meant to be based on crimes in which children are victims.¹³⁹ Furthermore, the Illinois Supreme Court found that the main reason for using specific crimes as grounds for termination was based on the sole concern of protecting children who have parents with a history of crimes involving child victims.¹⁴⁰ Therefore, Illinois provides specific crimes that amount to automatic designations of depravity, leading to termination of

134. 750 ILL. COMP. STAT. 50/1(D).

135. *Id.* § 50/1(D) (stating that the trial court can make a finding of unfitness of the parent if it is able to establish that there has been abandonment, desertion or neglect).

136. *See, e.g., In re Jamie M.*, 714 N.W.2d 780, 786 (Neb. Ct. App. 2006) (holding that it was in the best interests of the child to terminate parental rights of her father after he was convicted of murder of her sibling). *But see In re Doe*, 348 P.3d 163, 167 (Idaho 2015) (asserting that the father's rights should not be terminated after the state failed to show substantial evidence to support a conviction of murder as grounds for terminating parental rights).

137. *See In re Donald A.G.*, 850 N.E.2d 172, 174 (Ill. 2006) (finding a father as depraved and terminating parental rights "due to a felony conviction for predatory criminal sexual assault of a child"); *see also In re Gwynne P.*, 830 N.E.2d at 514 (analyzing the lower court's decision and finding a determination of unfitness was proper because of the mother's repeated incarcerations and, "a single alleged ground for unfitness is sufficient to terminate a parent's rights where it has been established by clear and convincing evidence").

138. 750 ILL. COMP. STAT. 50/1(D)(i) (stating that in attempting to establish grounds for a depraved parent, before parental rights are terminated, the court can use a finding that there are three felony convictions, based on any federal or state law).

139. *In re Donald A.G.*, 850 N.E.2d at 179-80 (dissecting the Adoption Act to mean that the legislature intended to protect children from parents who were found to have committed crimes where children were victims, including depravity found based on convictions for murder of a child); *see also In re D.T.*, 818 N.E.2d 1214, 1220 (Ill. 2004) (explaining the standard for terminating parental rights is a finding of unfitness under the Adoption Act, which must be found before any action can be taken to sever the relationship between a child and parent).

140. *In re Donald A.G.*, 850 N.E.2d at 180 (analyzing the reasons for specific crimes being listed and the legislative intent was to ultimately protect children and their well-being, especially where parents have committed crimes against other children).

parental rights.¹⁴¹ However, in using the three-strike felony conviction rule for terminating parental rights, the Illinois system fails to recognize the due process rights of parents.

It is logical that the Illinois Supreme Court and state legislature provide bases for terminating the parental rights of individuals, relating to crimes where children are victims. However, if the state is truly following substantive due process and still attempts to use the three-strike felony conviction rule, problems will arise when the state attempts to provide a compelling interest to deny the parent his or her fundamental right in raising the child.¹⁴² In following this strict rule, none of the three crimes have to relate to children.¹⁴³ Therefore, the Illinois system of terminating parental rights leads to uncertainty and inconsistency. As the system stands, parents can potentially be denied their fundamental liberty interest in raising their children, despite the child not being the victim of the parent's crime.¹⁴⁴ Also, the parent can potentially be denied this right when three convictions lead to termination, but the state may later have no basis for termination if a conviction is overturned.¹⁴⁵ However, in situations of abuse and neglect, parents are afforded more protection than in situations where termination is made based on the parent's conviction of three felony convictions.¹⁴⁶

In analyzing the due process concerns of parents alongside the current system for the termination of parental rights in Illinois, it is clear that the state should adopt reforms to its current system. Although certain provisions may stand, Illinois should adopt broader approaches and remove current provisions that create due process violation concerns. Therefore, Illinois should look to the statutes and systems used in New Hampshire and California to provide broader bases for the termination of parental rights.

141. 750 ILL. COMP. STAT. 50/1(D)(i).

142. *But see* Bourdeau, *supra* note 133 (explaining that due process under the Fourteenth Amendment allows for termination based on a finding of unfitness of the parent, but the best interest of the child can also be used in the court's determination).

143. 750 ILL. COMP. STAT. 50/1(D)(i).

144. *In re N.G.*, 115 N.E.3d at 134.

145. *Id.*

146. *See In re D.F.*, 802 N.E.2d 800, 803 (Ill. 2003) (finding a mother as unfit out of abuse and neglect of the child, but the parent is allowed nine months to show that he or she has attempted to mitigate circumstances that led to the original order for the child to be taken out of the home); *see also* 750 ILL. COMP. STAT. 50/1(D)(m) (asserting that unfitness can be found when the parent fails, "to make reasonable efforts to correct the conditions that were the basis for the removal of the child from the parent during any 9-month period following the adjudication of neglected or abused minor," and can also be found when the parent fails, "to make reasonable progress toward the return of the child to the parent during any 9-month period following the adjudication of neglected or abused minor").

IV. PROPOSAL

This section will propose that Illinois should disregard its current system of the use of the three-strike felony conviction rule. The problems presented by the three-strike felony conviction rule were recently presented and left inadequately addressed in the case of *In re N.G.*¹⁴⁷ If Illinois and other states use number-based systems of convictions as automatic grounds for termination of parental rights, they face the potential violation of the United States Constitution and the possibility of acting against the best interests of the child.

In place of the three-strike felony conviction rule, Illinois should adopt provisions from state statutes in New Hampshire and California. Section A will assess the need to disregard Illinois's three-strike felony conviction rule as being non-compliant with the due process rights guaranteed under the Fourteenth Amendment and not in the best interests of the child. Section B will describe the parts of New Hampshire's state statute that Illinois should adopt as part of its system of terminating parental rights. Then, Section C will present the provisions of California's state statute that Illinois should adopt and then address how the Illinois system will then stand with the necessary changes that are proposed.

A. *To Ensure Compliance with the Due Process Rights of Parents, Illinois Should Forgo its use of Three-Strike Felony Conviction Rule as Automatic Grounds for Depravity and Termination of Parental Rights*

Illinois should strike down its use of the three-strike felony conviction rule in order to comply with the Fourteenth Amendment Due Process Clause.¹⁴⁸ The liberty interest a parent has in raising his or her child will be automatically terminated if the parent is convicted of any three felonies.¹⁴⁹ This specific provision allows state courts to forgo any argument that considers the best interests of the child. This broad basis creates uncertainty and offers the parent no recourse in protecting his or her right to raise the child. As a result of the three-strike felony conviction rule, Illinois courts have been left with discretion to decide what should happen if a conviction, used as a basis for termination of parental rights, is later overturned.¹⁵⁰ All other provisions of the Illinois system may stand,

147. *In re N.G.*, 115 N.E.3d at 135.

148. 750 ILL. COMP. STAT. 50/1(D)(i) (setting forth the provision that any three felony convictions can be used against a parent in Illinois in order to establish a finding of depravity, to be further used as grounds for termination of parental rights).

149. *In re N.G.*, 115 N.E.3d at 134.

150. *Id.* at 135.

as these sections relate directly to effects on the child, where abuse or neglect are used as grounds, or specific crimes are offered as grounds for termination.¹⁵¹ However, in place of the three-strike felony conviction rule, Illinois should adopt the broader bases that other states provide when it comes to determining whether criminal convictions should be used in terminating parental rights. Therefore, a specific number of convictions should not be used as a sole basis to terminate parental rights. In particular, adoption of legislation mirroring that of New Hampshire and California would provide significant, important additions to the Illinois system in order to serve the best interests of children and to protect the fundamental liberty interests of parents in raising their children.

B. Illinois Should Adopt Relevant Sections of the New Hampshire Statute and System of Terminating Parental Rights

Illinois should adopt sections of the New Hampshire system that govern the determination of whether to terminate parental rights. The New Hampshire system recognizes not only that the type of individual conviction be assessed to determine whether the parent is fit, but also the length of incarceration that results from the criminal conviction.¹⁵² However, New Hampshire makes clear that the incarceration of the parent alone may not be the sole basis for termination of one's parental rights.¹⁵³ Furthermore, New Hampshire allows the court to consider the effects that the termination of parental rights has on the child's best interest.¹⁵⁴

New Hampshire also specifically recognizes the need to protect the essential due process rights of parents in raising their children.¹⁵⁵ In its system, parents are guaranteed the protection, in

151. 750 ILL. COMP. STAT. 50/1(D)(i) (asserting that depravity can be determined based on charges of murder, solicitation, sexual assault of a child and sexual battery of a child).

152. See N.H. REV. STAT. ANN. § 170-C:5(vi) (2020) (specifying that convictions can be used as a basis for termination of parental rights, but these convictions must be assessed by the state to see if it has an effect on the child or whether incarceration time that results from a conviction of the parent would ultimately have an actual, adverse effect on the child due to the physical absence of the parent).

153. *Id.*

154. Bourdeau, *supra* note 133; see *In re Noah W.*, 813 A.2d 365, 371 (N.H. 2002) (discussing the idea that the child must be the primary and important concern of the court when deciding whether to terminate parental rights and must be of the upmost importance before removing the child from the care of his or her natural parents).

155. See *In re Baby K.*, 722 A.2d 470, 473 (N.H. 1998) (describing that "parental rights are 'natural, essential, and inherent rights' within the meaning of the State Constitution," and "[b]ecause of the significance of this interest, to terminate parental rights, due process requires proof beyond a reasonable doubt, the same burden of proof required for criminal conviction and

the interest of due process, that proof beyond a reasonable doubt must be shown in order to terminate parental rights.¹⁵⁶ This protection, if added to Illinois' system, will provide parents with the same protections provided to them in criminal trials.¹⁵⁷

Beyond recognition of the due process rights of parents, Illinois should also adopt New Hampshire's intense focus on the best interest of the child as a primary consideration in the court's decision whether to terminate parental rights.¹⁵⁸ Beyond looking at the fitness of parents, the best interests of the child is important as he or she will be affected most by the decision the court makes.¹⁵⁹ Therefore, Illinois must recognize, as New Hampshire does, that a conviction, recognized as meeting the grounds for termination, must be final and all appeals must be exhausted by the parent.¹⁶⁰ Once all criminal procedures and appeals are exhausted, then Illinois may proceed with deciding whether a parent is deprived or unfit and whether parental rights should be terminated. If Illinois were to keep its three-strike felony conviction rule, then children would be left hanging in the balance as a parent exhausts all appeals of each of the three felony convictions. These protections, rather than

incarceration") (quoting *State v. Robert H.*, 393 A.2d 1387, 1388 (N.H. 1978)) (alteration in original); (alteration in original); *see also In re Noah W.*, 813 A.2d at 371 (finding that due to the importance of a termination proceeding and the effects it will have on the child and the parents, "due process requires proof beyond a reasonable doubt to terminate the parent's rights").

156. *In re Noah W.*, 813 A.2d at 371.

157. *Id.*; *see* Joan Bohl, "Those Privileges Long Recognized" *Termination of Parental Rights Law, the Family Right to Integrity and the Private Culture of the Family*, 1 CARDOZO WOMEN'S L. J. 323, 324 (1994) (arguing in favor of a reasonable doubt standard for a finding of parental unfitness in order to protect the best interests of the child before making the decision to terminate parental rights involuntarily). *But see* Theresa D. Legere, *Preventing Judicially Mandated Orphans*, 38 FAM. & CONCILIATION COURTS REV. 260, 268 (2000) (advocating against the arguments of other commentary that the standard of proof beyond a reasonable doubt is the necessary standard for the termination of parental rights, as it arguably does nothing to actually protect children and families in requiring this heightened standard of evidence).

158. *In re Baby K*, 722 A.2d at 473 (recognizing that when the trial or lower court decides whether to terminate parental rights, it must make that decision as quickly as possible in order to ensure that the best interests of the child are protected).

159. *See* Child Welfare Information Gateway, *supra* note 4, at 2 (noting that when deciding what is in the best interests of the child during a parental termination hearing, the court will consider various factors, with the child's interests at stake being the most important consideration). *But see* Brian C. Hill, *The State's Burden of Proof at the Best Interests Stage of a Termination of Parental Rights*, 2004 U. CHI. LEGAL F. 557, 575 (2004) (cautioning that the United States Supreme Court has recognized only that there is the fundamental right to parent, but no fundamental rights have been found for children when children are faced with the termination of parental rights of their parents).

160. *See In re S.T.*, 151 A.3d 522, 533 (N.H. 2016) (finding the conviction process needed to be final, where all appeals must be exhausted before the court can use a conviction as its primary grounds for terminating one's parental rights to his or her child).

the three-strike felony conviction rule that currently stands in Illinois, would provide better protections for the parents, in the best interests of the child, and in accordance with the due process rights of parents.

C. Illinois Should Adopt Relevant Sections of the California Statute and System of Terminating Parental Rights

Illinois should also adopt the broader standards utilized by California's system in terminating parental rights.¹⁶¹ Rather than three convictions being used as grounds for an automatic finding of depravity for the termination of parental rights, California allows for a case-by-case determination.¹⁶² By adopting California's case-by-case approach, Illinois will be able to decide whether a particular parent's crimes truly yield a finding of unfitness of the parent and ultimately decide whether parental rights should be terminated. Using the California system, Illinois can then focus on the parent's criminal record and decide whether this is a relevant factor in finding the parent unfit, rather than instantly deciding that three felony convictions are automatic grounds for a finding that the parent is depraved, and ultimately leading to the involuntary termination of parental rights.¹⁶³

The use of a parent's criminal record will serve as a factor the court can consider, along with those already in place in Illinois, to ensure the child's best interests are served and to determine whether the parent is truly unfit.¹⁶⁴ Illinois should also recognize, as California does, that underlying facts of the crime should demonstrate why the parent is unfit.¹⁶⁵ By determining whether the individual crime makes a parent unfit, the state will not have to use a very specific three-strike felony conviction rule in its decision

161. CAL. FAM. CODE § 7825(a).

162. *Id.*

163. *Id.* (noting that prior crimes of the parent can be used when deciding whether to terminate parental rights, to the extent that prior crimes have an impact on the child's best interests and general welfare); *see also* Elizabeth Williams, *Cause of Action to Terminate Parental Rights of Incarcerated Parent*, 67 CAUSES ACTION 2D 1 (2019) (expanding the idea of how incarcerations impact the court's decision to terminate parental rights in showing that the court can consider the impact the period of incarceration would have on the parent's role in caring for the child).

164. CAL. FAM. CODE § 7825(a); 750 ILL. COMP. STAT. 50/1(D)(i).

165. CAL. FAM. CODE § 7825(a)(2); *see, e.g.*, *In re Baby Girl M.*, 135 Cal. App. 4th 1528, 1542 (Cal. Ct. App. 2006) (holding that if the court is going to rely on § 7825(a) to terminate parental rights, then the facts and details of the felony conviction being used by the court must be sufficient to justify termination of the parent's rights to his or her child; this should be used when further considering whether the decision to terminate parental rights would be in the best interests of the child).

whether to terminate parental rights.

Additionally, Illinois must recognize the general definition of “unfitness” as California does, to make clear for its courts to determine whether termination of parental rights should occur.¹⁶⁶ This broad definition will allow courts to make a determination of whether the parent is truly unfit on a case-by-case basis.¹⁶⁷ Currently, Illinois provides specific grounds for a determination of parental fitness, but the state has no general definition in its statute to show what unfitness is.¹⁶⁸ Furthermore, this definition will allow Illinois state courts to have discretion, based on the facts of a case, to decide whether a parent is truly unfit.

Illinois should also keep in place its list of specific convictions that are automatic grounds for termination of parental rights, thereby staying aligned with California’s.¹⁶⁹ Furthermore, it is important that Illinois also allows, as it currently aligns with the California system, that the abandonment or abuse of another child, and the mental disability of the parent, serve as bases for the termination of parental rights.¹⁷⁰ Yet, sufficient facts must be shown in each case to give the court a basis to deny the parent’s parental rights of the parent.¹⁷¹ Only once sufficient facts are shown, serving the state’s interest in finding a parent unfit, can the state then proceed in deciding whether to terminate parental rights.

In sum, the Illinois system will be changed with the removal of the strict three-strike felony conviction rule. In its place, Illinois should employ case-by-case analyses for each case concerning the termination of parental rights. By implementing fact-based analyses, rather than stricter approaches, Illinois will alleviate due process concerns and be able to individually assess the fitness of parents and the best interests of the child when determining whether to terminate parental rights in each case. As it currently stands, Illinois’ use of the three-strike felony conviction rule is not narrowly tailored to achieve its compelling interest of protecting children and their best interests.¹⁷² Accordingly, convictions

166. CAL. FAM. CODE § 7825(a); *see also In re Christina P.*, 175 Cal. App. 3d at 133 (defining unfitness in the state court system as “a probability that the parent will fail in a substantial degree to discharge parental duties toward child”).

167. CAL. FAM. CODE § 7825(a); *see In re Charlotte D.*, 202 P.3d 1109, 1114-15 (Cal. 2009) (finding it was in the best interests of the child to terminate the parental rights of the father after a finding of abandonment of the child).

168. 750 ILL. COMP. STAT. 50/1(D)(i).

169. *Id.*; CAL. FAM. CODE § 7825(a).

170. CAL. WELF. & INST. CODE § 361.5(b).

171. *In re Carmaleta B.*, 579 P.2d 514, 521 (Cal. 1978) (asserting sufficient facts must be shown and past acts of the parent can be used when deciding whether to terminate parental rights, along with any other necessary present circumstances).

172. *But see* Jana Micek, *supra* note 52, at 569 (arguing that judges are given a great amount of discretion when considering which crimes can serve as a proper basis for termination of parental rights).

relating directly to child victims will be left in place as grounds for automatic termination. By leaving the list of crimes in place, the protection of the child will be held firmly in place in regard to a parent's history of crimes relating to children. However, due process concerns will be alleviated once the three-felony felony conviction rule is stricken from the current Illinois system.

V. CONCLUSION

Illinois' current system of three felony convictions being used as automatic grounds for a finding of depravity to terminate parental rights has produced uncertainty in the state's system. Illinois needs to revise its system, not only to protect the children that are left hanging in the balance based on the uncertainty created by overturned convictions but also to protect the due process rights of the parents involved. Illinois' three felony conviction rule goes against the guaranteed liberty interests of parents in raising their own children. By adopting the relevant sections of the California and New Hampshire systems, Illinois can correct its unclear and inconsistent system of terminating parental rights. If Illinois leaves its system as it currently stands, the state will be left with violating the due process rights of parents. Illinois' current system allows certain convictions, which have no effect on the child, or have been overturned, to be used as a basis for terminating parental rights. The uncertainty created by the system has left courts to decide what to do after parental rights have been terminated, despite the overturning of a conviction that was originally used in the determination. In allowing for a case-by-case analysis in the termination of parental rights to find whether a conviction truly makes a parent unfit, Illinois will correct its system, and will no longer maintain a system that violates the due process rights of parents.

