

# NOTES

## PREVENTING UNDUE TERMINATIONS: A CRITICAL EVALUATION OF THE LENGTH-OF-TIME-OUT-OF-CUSTODY GROUND FOR TERMINATION OF PARENTAL RIGHTS

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### INTRODUCTION

The American legal system views the relationship between parent and child as sacrosanct,<sup>1</sup> only to be severed through a knowing, voluntary relinquishment by the parent or through a formal court proceeding known as a termination of parental rights (TPR). Termination of parental rights fundamentally affects the relationship between parent and child.<sup>2</sup> For the parent, termination means the irretrievable loss of “the companionship, care, custody, and management of his or her children.”<sup>3</sup> For the child, termination raises the specter of total loss of the parent as well as loss of “the right of support . . . ; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . . , but forever.”<sup>4</sup>

While grounds for the termination of parental rights include abuse, abandonment, mental illness, and extended incarceration,<sup>5</sup> the most commonly used ground for termination is a finding that a child has been out of the custody of the parent, usually in foster care, for a statutory period of time during which the parent has failed to remedy the circumstances that led to the child’s removal from the home.<sup>6</sup> This

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<sup>1</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 752-61 (1982) (discussing liberty interests in parent-child relationship); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (same).

<sup>2</sup> See Mark I. Soler et al., *Representing the Child Client* (MB) No. 16, ¶ 4.14[2] (July 1996) (“[T]ermination is, in effect, a death sentence for the parent-child relationship.”).

<sup>3</sup> *Stanley*, 405 U.S. at 651.

<sup>4</sup> *Santosky*, 455 U.S. at 760 n.11 (alteration in original) (quoting *In re K.S.*, 515 P.2d 130, 133 (Colo. Ct. App. 1973)).

<sup>5</sup> See 2 Ann M. Haralambie, *Handling Child Custody, Abuse and Adoption Cases* §§ 13.08, .10, .13, .16 (1993).

<sup>6</sup> For a discussion of the prevalence of this ground, see *infra* notes 64-65 and accompanying text.

ground, referred to by this Note as the length-of-time-out-of-custody ground, allows for the termination of parental rights without a showing of abuse, abandonment, or other separate statutory grounds. It is the result of concern over the amount of time children spend in foster care. Although foster care is "intended to be a *temporary* child welfare service providing assistance and residential care to children unable to live safely with their own parents,"<sup>7</sup> many children spend years drifting in the foster care system.<sup>8</sup> The length-of-time-out-of-custody ground for termination of parental rights is intended to end this "foster care drift" and achieve "permanency" by freeing children for adoption.<sup>9</sup>

Surprisingly, despite their prevalence, length-of-time-out-of-custody statutes have undergone little thorough analysis. Many commentators have criticized TPR in general, making convincing arguments that parental rights are often terminated without substantial attempts to reunite the biological family, that the parental rights of minorities and the poor are disproportionately terminated, and that a termination does not, in many cases, promote the well-being of the child. Few commentators, however, have focused solely on the length-of-time-out-of-custody ground.

This Note attempts an in-depth survey and doctrinal analysis of this widespread, yet underexamined, ground for termination of parental rights. While recognizing the benefits that such a ground can offer, this Note concludes that the length-of-time-out-of-custody ground for termination, as drafted in many state statutes, can lead to the termination of parental rights without any corresponding permanency for the child. This Note recommends ways in which states can redraft their termination statutes to diminish this risk.

Having thus identified and addressed doctrinal problems in the length-of-time-out-of-custody statute, this Note then targets problems in implementation by state child welfare agencies. It argues that the

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<sup>7</sup> Richard P. Kusserow, Inspector General, U.S. Dep't of Health & Human Servs., *Barriers to Freeing Children for Adoption 1* (1991) (emphasis added).

<sup>8</sup> See *LaShawn A. v. Dixon*, 762 F. Supp. 959, 966 (D.D.C. 1991) ("Thirty-seven percent of children in the District's foster care system have been in care for four or more years . . ."); Children's Defense Fund, *Children Without Homes 6* (1978) (citing survey of 140 counties in which 13% of children had been in foster care for over four years and 20% had been in foster care for over six years). Note, however, that the average lengths of stay in foster care have declined since 1977. See Richard P. Barth et al., *From Child Abuse to Permanency Planning 4* (1994) (citing data from Voluntary Cooperative Information System (VCIS)). In 1987, half of the children in foster care had been in care for 2.4 years. See *id.* at 5. In 1989, half of the children were in foster care for 1.4 years. See *id.* For a detailed analysis of time-in-foster-care studies, see *id.* at 79-104.

<sup>9</sup> For a discussion of the terms "foster care drift" and "permanency," see *infra* notes 27-33 and accompanying text.

length-of-time-out-of-custody ground contains an inherent contradiction, seeking both to preserve the biological family and to terminate the biological parent's rights. This leads to conflicting incentives for the actors in the termination drama. This Note outlines a proposal for realigning these conflicting incentives in order to ensure that length-of-time-out-of-custody statutes achieve swift yet reasoned judgments.

Part I gives a brief overview and history of the foster care system and termination of parental rights. It then surveys the length-of-time-out-of-custody statutes in existence, enumerating their common features.

Part II sets forth a doctrinal critique of the length-of-time-out-of-custody ground. It identifies four frequent shortcomings of these statutes: a failure to consider the child's age and bonds with the biological parent; a failure to consider the likelihood of the child being adopted; a failure to make reasonable efforts at reunifying the biological family a prerequisite to termination; and a failure to define clearly what those reasonable efforts at reunification require. Part II concludes by identifying ways in which states can redraft their length-of-time-out-of-custody statutes to remedy these failures.

Part III then posits that, even given a perfectly drafted statute, the length-of-time-out-of-custody ground presents problems of implementation because it creates conflicting incentives in the state child welfare agency—incentives for and against termination of the parent's rights. Part III then goes on to suggest that a statutory time cap, limiting the time frame in which a length-of-time-out-of-custody termination proceeding can be brought, combined with active lawyering by counsel for the state, parent, and child may help alleviate the problem of such conflicting incentives.

## I

### TERMINATION OF PARENTAL RIGHTS AND THE LENGTH-OF-TIME-OUT-OF-CUSTODY GROUND

#### A. *An Overview of Termination of Parental Rights in the Context of Foster Care*

Termination of parental rights is governed by state law.<sup>10</sup> It is achieved through a formal court proceeding brought by the state, or another party,<sup>11</sup> against the parent to sever all legal ties between par-

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<sup>10</sup> See Wallace J. Mlyniec, *Prosecuting a Termination of Parental Rights Case*, in *Foster Children in the Courts* 193, 194 (Mark Hardin ed., 1983) (noting development of state statutory and common law governing termination proceedings).

<sup>11</sup> Foster parents or guardians ad litem may also be able to petition for termination, depending on the jurisdiction. See Soler et al., *supra* note 2, ¶ 4.14[5] (enumerating state

ent and child,<sup>12</sup> and it is a legal prerequisite to adoption of the child where the parent does not consent to the adoption.<sup>13</sup> Termination usually occurs only after a child has been placed in foster care.<sup>14</sup>

The state may remove a child from her home and place her in the foster care system for reasons of neglect, abuse, abandonment, mental or physical illness of the parent, the child's own behavior problems, or other "family problems" such as a parent's death, extended incarceration, alcoholism, or drug addiction.<sup>15</sup> In addition, a parent may voluntarily place a child in foster care for a variety of reasons.<sup>16</sup> When a child enters foster care, the state takes custody of the child.<sup>17</sup> The state child welfare agency then determines an appropriate placement

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agencies, natural parents, adoptive parents, guardians ad litem, and foster parents as possible petitioners).

<sup>12</sup> See *id.*, ¶ 4.14[2].

<sup>13</sup> See 2 Haralambie, *supra* note 5, § 14.01.

<sup>14</sup> This Note will address TPR only in the context of foster care. While the biological parent may voluntarily relinquish her parental rights without placing the child in foster care, such as when a parent gives a child up for adoption, see Mlyniec, *supra* note 10, at 196-97, termination is a court action brought against the parents who do not wish to relinquish their rights. In such a situation, the child usually has been taken out of the biological parent's home and placed in foster care for her safety. A termination proceeding also may occur without the child being in foster care—for example, when the child is living with a stepparent who wishes to adopt. Another, more dramatic, situation outside the foster care system entails a child "switched at birth," such as the highly publicized termination case that Kimberly Mays brought against her biological parents after she discovered that the parents by whom she had been raised had accidentally taken her home from the hospital in place of their own biological daughter. See generally Andrew L. Shapiro, *Children in Court—The New Crusade*, 257 *The Nation* 301, 301 (1993) (discussing suits by children to "divorce" their parents).

<sup>15</sup> See David Fanshel & Eugene B. Shinn, *Children in Foster Care 45-51* (1978) (listing varied reasons for foster care placement); Martha J. Cox & Roger D. Cox, *The Foster Care System: An Introduction*, in *Foster Care: Current Issues, Policies, and Practices* at x, xviii (Martha J. Cox & Roger D. Cox eds., Child and Family Policy Series No. IV, 1985) (same); Marsha Garrison, *Why Terminate Parental Rights?*, 35 *Stan. L. Rev.* 423, 427 (1983) (same). In recent years there has been an increased number of infants entering foster care due to in utero drug exposure. See Barth et al., *supra* note 8, at 6-7; see also Children's Defense Fund, *The State of America's Children 1991*, at 122-24 (1991) (citing increase in number of infants born drug exposed and concurrent increase in foster care caseload).

<sup>16</sup> It has been estimated that nationally less than 5% of children in foster care have been placed voluntarily, see Kevin M. Ryan, *Stemming the Tide of Foster Care Runaways: A Due Process Perspective*, 42 *Cath. U. L. Rev.* 271, 299 n.155 (1993), although state statistics on state-classified voluntary placements have ranged from 2% to 95%, see Garrison, *supra* note 15, at 427 n.19 (citing National Comm'n on Children in Need of Parents, *Who Knows? Who Cares? Forgotten Children in Foster Care 6* (1979)). Some commentators suggest that "voluntary" placements are not truly voluntary. See, e.g., *id.* Frequently they are the only form of "service" provided to a family in crisis, see *id.* at 433 & n.49, or are a form of "plea bargain . . . to avoid the initiation of neglect proceedings," *id.* at 427 n.19.

<sup>17</sup> See Garrison, *supra* note 15, at 427.

for the child:<sup>18</sup> either with a relative in a “kinship” foster home,<sup>19</sup> in a foster family home, in a group home, or in an institutional setting. The state provides funding for the child in each of these settings.<sup>20</sup> Under federal and state law, the state child welfare agency works to reunite the biological family or, if that effort fails, searches for other permanent alternatives for the child. The court supervises the foster care placement by a series of periodic case reviews.<sup>21</sup> The child may exit foster care through return to her parent, through adoption,<sup>22</sup> or through “aging out” of the system.

Termination of parental rights is a necessary step to “freeing” children for adoption if the parent does not relinquish those rights voluntarily.<sup>23</sup> Grounds for termination vary according to jurisdiction but generally include abandonment, mental illness, extended incarceration, chronic abuse and neglect, and length of time out of custody.<sup>24</sup> In most states the child welfare agency must also show that termination is in the “best interests of the child.”<sup>25</sup> Many states require a showing that the state child welfare agency made “reasonable” efforts to help reunite the biological family before a parent’s rights can be terminated.<sup>26</sup>

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<sup>18</sup> See *id.* at 428. Federal law requires that in order to receive funds the state must develop a “plan” for each child that achieves “placement in the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents’ home, consistent with the best interest and special needs of the child.” 42 U.S.C. § 675(5)(A) (1994).

<sup>19</sup> Placement with relatives is considered to be the “least restrictive setting,” *Cox & Cox*, *supra* note 15, at xiii, and is gaining acceptance as a placement option, see *Barth et al.*, *supra* note 8, at 122-23. There has been resistance, however, to placing children with relatives. See *id.* at 196-97 (noting skepticism regarding quality of care and costs associated with kin placement). Some doubt the ability of kin to protect the child from an abusive relative. See *id.* at 197.

<sup>20</sup> 42 U.S.C. § 672 (1994) (describing funding obligations of state).

<sup>21</sup> See *infra* note 49 and accompanying text.

<sup>22</sup> See Mark Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, in *Foster Children in the Courts*, *supra* note 10, at 128, 140-41 (discussing means by which child may exit foster care). In addition, options such as long-term foster care and guardianship may permit the child to remain legally in foster care for an extended period of time without severing the biological parent’s legal ties. See *id.* at 129 (describing number of long-term placement options).

<sup>23</sup> See *Kusserow*, *supra* note 7, at 5-6 (stating that legal rights between parents and children are severed prior to entering adoption process).

<sup>24</sup> See *Soler et al.*, *supra* note 2, ¶ 4.14[4] (discussing grounds for termination).

<sup>25</sup> See *infra* note 89 and accompanying text.

<sup>26</sup> For a detailed discussion of the “reasonable efforts” standard, see *infra* notes 47, 83-88 and accompanying text and Part II.B.3-4. Note that states’ reasonable efforts requirements are often driven by federal law: in order to get federal funds for foster care services, states must require the child welfare agency to show that it made reasonable efforts towards preventing the removal of the child from the home and towards reunifying the family once the child has been removed. See 42 U.S.C. § 671(a)(15) (1994). Federal law,

### B. *Historical Background: The "Permanency" Movement*

Since the 1970s, the foster care system in this country has been guided increasingly by a philosophy of "permanency planning."<sup>27</sup> Permanency planning arose as a solution to the problem of "foster care drift":<sup>28</sup> children being removed from their homes, remaining in foster care for lengthy periods, losing contact with their biological parents, floating from one foster home to another, often not receiving adequate care, and missing the opportunity to establish close bonds with any parental figure.<sup>29</sup>

The permanency movement calls for preventive services coupled with periodic case review and swift planning to secure a permanent home once a child enters foster care.<sup>30</sup> Its advocates emphasize the importance of providing families in crisis with preventive services to keep the child from entering foster care at all.<sup>31</sup> Once the child is

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however, does *not* specify that reasonable efforts should be a condition to termination of parental rights. This is purely a matter of state law.

<sup>27</sup> See Anthony N. Maluccio & Edith Fein, *Permanency Planning Revisited*, in *Foster Care: Current Issues, Policies, and Practices*, supra note 15, at 113, 116 (discussing emergence of permanency planning); see also Kusserow, supra note 7, at 1 ("The Adoption Assistance and Child Welfare Act of 1980[ ] gave statutory recognition to permanency planning procedures.").

<sup>28</sup> See Garrison, supra note 15, at 423-24, 426. Foster care drift was first documented in Henry S. Maas & Richard E. Engler, Jr., *Children in Need of Parents 1* (1959) (reporting on 10-month national survey of children in foster care).

<sup>29</sup> See Barth et al., supra note 8, at 81 (describing negative aspects of foster care system); Cox & Cox, supra note 15, at xi (same); Garrison, supra note 15, at 423 (same). Maas and Engler found that in six of the nine communities they examined, 25% or more of the children in foster care had had four or more placements. See Maas & Engler, supra note 28, app. at 422. The trend in multiple placements has been attributed to lack of care in matching children with appropriate families, inadequate foster parent training, and agency fears that the foster parents will become "too attached" to the child. See Garrison, supra note 15, at 429-30. Some have pointed to the 1950s perception that many children in foster care were unadoptable as another cause of "drift." See id. at 438 ("Healthy white foundlings were slated for adoption because they were most in demand; older, nonwhite, and chronically ill children were slated for foster care—even if their natural parents were willing to relinquish them permanently—largely because they were not in demand."); see also Joseph H. Reid, *Action Called For—Recommendations*, in Maas & Engler, supra note 28, at 378, 383 ("Only a very small percentage of [children in foster care] may now be considered 'readily adoptable'—that is, . . . under five years of age, white, average or above in intelligence, with no irremediable physical disabilities and no serious personality problems."). The permanency movement has made strides in changing the view that older, minority, or chronically ill children are "unadoptable." See Elizabeth S. Cole, *Advocating for Adoption Services*, in *Foster Children in the Courts*, supra note 10, at 453, 453-54 (citing efforts of Child Welfare League of America and Council on Adoptable Children).

<sup>30</sup> See Kusserow, supra note 7, at 1 (describing philosophy of permanency planning).

<sup>31</sup> For detailed descriptions of an intensive preventive initiative—family preservation services—see Children's Defense Fund, supra note 15, at 127-30, and Child Care and Child Welfare: Joint Hearing Before the Subcomm. on Human Resources of the Comm. on Ways and Means and the Subcomm. on Early Childhood, Youth, and Families of the Comm. on Econ. and Educ. Opportunities, 104th Cong., 1st Sess. 106 (1995) (testimony of

placed in foster care, however, the goal of "permanency planning" shifts to getting the child out of foster care as soon as possible, preferably by returning her to the parent,<sup>32</sup> but if that is not possible, by terminating parental rights in order to free her for adoption.<sup>33</sup>

At the heart of the permanency planning concept lies the notion of the "psychological parent" as developed in the collaborative works of Joseph Goldstein, Anna Freud, and Albert Solnit.<sup>34</sup> The guiding principle of this tremendously influential theory is to honor the child's different sense of time and need for continuity.<sup>35</sup> Basing their conclusions on psychoanalytic theory and clinical observation,<sup>36</sup> Goldstein, Freud, and Solnit argued that a child's normal psychological development depends on a secure, uninterrupted relationship with one caregiver—the "psychological parent."<sup>37</sup> They further argued that children have "an intense sensitivity to the length of separations"<sup>38</sup> and that even brief separation can have profoundly damaging effects on the child.<sup>39</sup> Applying these principles, Goldstein, Freud, and Solnit launched a scathing critique of the laws governing foster care in their

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Carol S. Bevan, Vice President for Research and Public Policy, National Council for Adoption).

<sup>32</sup> See Kusserow, *supra* note 7, at 2 (noting that both state and federal policies favor family reunification). In California roughly two-thirds of children in foster care exit the system by returning to their parents. See Barth et al., *supra* note 8, at 261.

<sup>33</sup> See Kusserow, *supra* note 7, at 2 (noting that "the purpose of permanency planning is to insure that children leave foster care as safely and rapidly as possible"). For a critical perspective on this policy, see Garrison, *supra* note 15, at 442-43:

[T]he permanency program has focused less effort on the admittedly difficult task of improving foster care than on getting as many children as possible out of foster care. Toward this . . . end, the program has called for . . . termination of parental rights to free the child for adoption in those cases in which it appears that the parents will not be able to resume custody in the near future.

<sup>34</sup> See Joseph Goldstein et al., *Beyond the Best Interests of the Child* (1973) [hereinafter Goldstein et al., *Beyond the Best Interests*]; Joseph Goldstein et al., *Before the Best Interests of the Child* (1979). For discussions of the influence of Goldstein, Freud, and Solnit, see Garrison, *supra* note 15, at 446-47 ("Every subsequent proposal to reform the child welfare system has drawn its vocabulary and central ideas from [the] framework [established by Goldstein, Freud, and Solnit]."); Nadine Taub, *Assessing the Impact of Goldstein, Freud, and Solnit's Proposals: An Introductory Overview*, 12 N.Y.U. Rev. L. & Soc. Change 485, 485 (1983-1984) (observing that every subsequent proposal for reform of child welfare system has drawn its vocabulary and central ideas from Goldstein, Freud, and Solnit's conceptual framework).

<sup>35</sup> See Goldstein et al., *Beyond the Best Interests*, *supra* note 34, at 31; see also *id.* at 34 ("[C]ontinuity is a guideline because emotional attachments are tenuous and vulnerable in early life and need stability of external arrangements for their development.").

<sup>36</sup> See *id.* at 7. For criticism of Goldstein, Freud, and Solnit's methodology, see *infra* note 99 and accompanying text.

<sup>37</sup> Goldstein et al., *Beyond the Best Interests*, *supra* note 34, at 17-20.

<sup>38</sup> *Id.* at 11.

<sup>39</sup> See *id.* at 40-42.

1973 book, *Beyond the Best Interests of the Child*.<sup>40</sup> Foster care, they argued, because of its impermanent nature, had little likelihood of promoting the child's emotional well-being.<sup>41</sup> Thus, they advocated a legal overhaul of the foster care system that would "minimize disruptions of continuing relationships between a psychological parent and the child"<sup>42</sup> and provide for rapid adjudication of disputes.<sup>43</sup>

In the 1970s, state laws began incorporating these permanency principles based on the concept of the psychological parent.<sup>44</sup> Moreover, major reform occurred at the federal level in 1980 with the passage of the Adoption Assistance and Child Welfare Act (Child Welfare Act),<sup>45</sup> which remains the federal law governing foster care today. Its purpose was "to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes."<sup>46</sup> To qualify for federal funding, the Child Welfare Act requires that states demonstrate they have made "reasonable efforts" at preventing the removal of the child from the home and reunifying the family once the child has been

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<sup>40</sup> See *id.* at 24-26. In addition, Goldstein, Freud, and Solnit critiqued the laws governing custody disputes in divorce, going so far as to argue that the "non-custodial parent should have no legally enforceable right to visit the child." *Id.* at 38. Interestingly enough, although the law was quick to embrace Goldstein, Freud, and Solnit's ideas regarding foster care, it never adopted their recommendations regarding divorce custody. See Garrison, *supra* note 15, at 453.

<sup>41</sup> See Goldstein et al., *Beyond the Best Interests*, *supra* note 34, at 25.

<sup>42</sup> *Id.* at 99.

<sup>43</sup> See *id.* at 41-42 (noting that child's sensitivity to breaches in continuity is factor in determining "with what urgency the law should act"); see also *id.* at 101 (proposing model statute in which "trials and appeals shall be conducted as rapidly as is consistent with responsible decisionmaking").

<sup>44</sup> In particular, New York, California, and South Carolina responded to the permanency movement. See Martha J. Cox & Roger D. Cox, *A History of Policy for Dependent and Neglected Children, in Foster Care: Current Issues, Policies, and Practices*, *supra* note 15, at 1, 21; see also Children's Defense Fund, *supra* note 8, at 161 (describing New York's early efforts). See generally Garrison, *supra* note 15, at 449-50 ("Goldstein, Freud, and Solnit's premises have strongly influenced recent state foster care legislation and several model acts dealing with termination of parental rights.").

<sup>45</sup> Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.). For a detailed discussion of the influence of permanency principles on the Child Welfare Act, see Judge Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, 45 *Juv. & Fam. Ct. J.* 3, 3 (1994).

<sup>46</sup> S. Rep. No. 336, 96th Cong., 1st Sess. 1 (1979), reprinted in 1980 U.S.C.C.A.N. 1448, 1450. Permanency advocates also worked to alter the conception that certain children were "unadoptable." In particular, the permanency movement successfully changed the view that older, minority, or chronically ill children were "unadoptable." See Reid, *supra* note 29, at 383 (noting that some families are willing to adopt children who are not "readily adoptable"); see also Garrison, *supra* note 15, at 443-44 (discussing shift towards adoption of foster children).

removed.<sup>47</sup> The Act also requires that the state child welfare agency develop a case plan for each child under its care<sup>48</sup> and that there be periodic case reviews by a court or by administrative review.<sup>49</sup>

An increased focus on the termination of parental rights accompanied the rise of the permanency planning movement. Maas and Engler's pathbreaking 1959 treatise on foster care drift, *Children in Need of Parents*,<sup>50</sup> articulated termination as an important tool for creating permanency<sup>51</sup> and then called for enactment of state legislation governing the termination of parental rights, little of which existed at the time.<sup>52</sup> By the late 1970s, children's advocates were forcefully lobbying for the reworking of state termination statutes based on permanency principles.<sup>53</sup> Academics published articles pressing for legislative reform.<sup>54</sup> The Children's Defense Fund and the Child Welfare League of America issued detailed guidelines for state TPR legislation.<sup>55</sup> By 1981, at least nine different model acts on termination of parental rights had been drafted by various organizations, including the American Bar Association, the United States Department of Health and Human Services, and the National Council of Juvenile

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<sup>47</sup> 42 U.S.C. § 671(a)(15) (1994). For a further discussion of the provisions of the Child Welfare Act, see MaryLee Allen et al., *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in *Foster Children in the Courts*, supra note 10, at 575, 575-85. For detailed discussions of the much litigated "reasonable efforts" standard, see Debra Ratterman et al., *American Bar Ass'n, Reasonable Efforts to Prevent Foster Placement: A Guide to Implementation* 4 (2d ed. 1987); Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 Cal. W. L. Rev. 223 (1989-1990); Rorie Sherman, *Suits Seek to Reform Foster Care*, Nat'l L.J., June 27, 1994, at A1.

<sup>48</sup> See 42 U.S.C. § 671(a)(16) (1994).

<sup>49</sup> See 42 U.S.C. § 675(5)(B), (C) (1994) (requiring review of child's case every six months and requiring hearing regarding permanent plan after 18 months).

<sup>50</sup> Maas & Engler, supra note 28.

<sup>51</sup> See Reid, supra note 29, at 383 ("[O]ne of the first priorities is to clarify each child's legal status and to sever parental rights in all situations where it is obvious that the parents will never take responsibility for the child.").

<sup>52</sup> See id. at 393-94 (citing New York as example of state that passed TPR legislation permitting social agencies to petition for termination of parental rights whenever parents failed to visit their children for more than one year and evidence was produced of agency's attempt to work cooperatively with parents).

<sup>53</sup> These advocates also pressed for legislation on the federal level, resulting in the enactment of the Child Welfare Act. See supra notes 44-45 and accompanying text.

<sup>54</sup> See, e.g., Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 Stan. L. Rev. 623, 690-700 (1976) (proposing specific state TPR legislation).

<sup>55</sup> See, e.g., Children's Defense Fund, supra note 8, at 81-85 (setting forth priority issues to be addressed by state TPR legislation); National Comm'n on Children in Need of Parents, supra note 16, at 10 (criticizing lack of state legislation and proposing standards).

Court Judges.<sup>56</sup> Today every state and the District of Columbia have enacted detailed TPR legislation.<sup>57</sup>

The emphasis on speedily achieving permanency for children, whether by return to the biological parent or by termination, was a dominant theme in these groups' proposals.<sup>58</sup> The concern with speed was premised both on psychological parent theories regarding the child's sense of time and need for continuity<sup>59</sup> and on studies that suggested that a child's chances of achieving a permanent home dramatically decreased after the first year in placement.<sup>60</sup>

The state statutes that ensued clearly articulated this theme of speed. Today, most states have legislated measures designed to hasten termination. Several strategies are common: the establishment of "expedited tracks" for children in special circumstances, such as where the parent has been convicted of killing another child or has previously abused the child;<sup>61</sup> the creation of timetables for termination either via legislation or court rules;<sup>62</sup> and the granting of jurisdic-

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<sup>56</sup> See Mark Hardin & Patricia Tazzara, *A Comparison of Model Acts on Parental Rights Termination*, 7 *Fam. L. Rep. (BNA)* No. 35, § 4, at 4025 (July 14, 1981) (summarizing nine model acts).

<sup>57</sup> See generally North Am. Council on Adoptable Children, *A Numerical Analysis of All Fifty-One State Termination of Parental Rights Statutes 1, 3* (on file with author) (analyzing 1993 statutory language). States continue to tinker with these statutes, adding new provisions and clarifying old ones. In 1994, 21 states modified already existing TPR legislation. See National Conference of State Legislatures, *NCSL 1994 State Legislative Summary 67-69* (1994) (listing state legislation).

<sup>58</sup> See, e.g., Hardin & Tazzara, *supra* note 56, at 4030 (listing "general considerations or goals" of nine model termination of parental rights acts).

<sup>59</sup> See, e.g., Wald, *supra* note 54, at 667-72 (relying on Goldstein, Freud, and Solnit's theories in arguing harm of foster care drift); see also Hardin & Tazzara, *supra* note 56, at 4030 (describing general considerations of the National Council of Juvenile Court Judges Termination of Parental Rights Statute as including acknowledgment "that time perception of children differs from adults").

<sup>60</sup> See, e.g., Wald, *supra* note 54, at 662 n.158 (citing the following studies: David D. Fanshel, *The Exit of Children from Foster Care: An Interim Report*, 50 *Child Welfare* 65, 68 (1971); Shirley Jenkins, *Duration of Foster Care: Some Relevant Antecedent Variables*, 46 *Child Welfare* 450, 451 (1967)).

<sup>61</sup> As of 1989, 16 states had established expedited tracks for terminating parental rights in special circumstances: Arizona, California, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maine, Michigan, Minnesota, Montana, North Carolina, Oklahoma, Pennsylvania, Rhode Island, and Wisconsin. See Tommy Neal, *National Conference of State Legislatures, Termination of Parental Rights app. A-1* (1989) (summarizing state TPR statutes); see also Kusserow, *supra* note 7, at 17-18 (detailing various state initiatives to improve efficiency of termination process).

<sup>62</sup> As of 1989, 13 states had established time frames for completing the actual termination proceeding: Alabama, Arkansas, California, Florida, Iowa, Michigan, Missouri, Montana, Nevada, New Hampshire, Rhode Island, Tennessee, and West Virginia. See Neal, *supra* note 61, app. A-2 (summarizing state TPR statutes).

tion for individual TPR cases to the court that oversaw the foster care case.<sup>63</sup>

### C. Length-of-Time-Out-of-Custody Legislation

The most pervasive method of hastening the termination of parental rights, however, is legislation that allows for termination on the ground that the child has been out of the custody of the parent for a statutorily specified length of time during which the parent has failed to do what is necessary to regain custody.<sup>64</sup> Length of time out of custody is the most frequently used ground for termination.<sup>65</sup> It is a ground for termination in thirty-four states.<sup>66</sup>

<sup>63</sup> See, e.g., Cal. Welf. & Inst. Code § 361 (West 1984 & Supp. 1996); see also Kusserow, *supra* note 7, at 17 (describing California system).

<sup>64</sup> See 2 Haralambie, *supra* note 5, § 13.17 (describing length-of-time-out-of-custody ground); Soler et al., *supra* note 2, ¶ 4.14[4][e] (same). New York calls this ground "permanent neglect." N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney 1992).

<sup>65</sup> See Soler et al., *supra* note 2, ¶ 4.14[4][e].

<sup>66</sup> See Ariz. Rev. Stat. Ann. § 8-533(B)(7) (Supp. 1995) (nine months or eighteen months, depending on parent's behavior during that time); Ark. Code Ann. § 9-27-341(b)(2)(A) (Michie Supp. 1995) (twelve months); Cal. Fam. Code § 7828 (West 1994) (one year); Del. Code Ann. tit. 13, § 1103(a)(5)(a)(1) (1993) (one year; six months for infant or if other factors are present); Ga. Code Ann. § 15-11-81(b)(4)(C) (1994) (one year); Ill. Ann. Stat. ch. 750, para. 50/1(D)(m) (Smith-Hurd Supp. 1996) (twelve months); Ind. Code Ann. § 31-6-5-4(c) (Burns Supp. 1996) (six months); Iowa Code Ann. § 232.116(1)(d), (e), (g) (West Supp. 1994) (six or twelve months, depending on certain factors); Kan. Stat. Ann. § 38-1585(a)(5), (6) (Supp. 1994) (one year if parent substantially neglects or willfully refuses to carry out reasonable plan; two years if parent fails to carry out reasonable plan and there is substantial probability that she will not carry out such plan in near future); La. Children's Code Ann. art. 1015(5) (West 1995) (one year); Me. Rev. Stat. Ann. tit. 22, § 4055(1-A)(E) (West Supp. 1995) (twelve months); Md. Code Ann., Fam. Law §§ 5-312(b), -313(a)(3) (1991 & Supp. 1995) (six months; one year); Mass. Gen. Laws Ann. ch. 210, § 3(c)(iv), (v) (West Supp. 1996) (twelve of last fifteen consecutive months if child four years or older; six of last twelve consecutive months if child younger than four); Minn. Stat. Ann. § 260.221(1)(b)(5)(i) (West Supp. 1996) (one year); Miss. Code Ann. § 93-15-103(3)(c) (1972) (one year); Mo. Rev. Stat. § 211.447(2)(3) (1994) (one year); Mont. Code Ann. § 41-3-410 (1995) (one year if parent substantially neglects or willfully refuses to remedy circumstances that cause child to be out of her custody; two years if parent is unable to remedy circumstances and there is substantial likelihood that she will not be capable of exercising proper and effective parental care and control in near future); Neb. Rev. Stat. § 43-292(7) (1993) (eighteen months); Nev. Rev. Stat. §§ 128.105, .109(1)-(2) (1957) (eighteen of any twenty-four consecutive months gives rise to presumption of ground that parent has demonstrated only token efforts to care for child; six months is evidence of ground of failure of parental adjustment); N.M. Stat. Ann. §§ 22A-5-15(B)(3), 32A-4-28(B)(3) (Michie 1995) ("extended period of time"); N.Y. Soc. Serv. Law § 384-b(4)(d), (7)(a) (McKinney 1992) (one year); N.C. Gen. Stat. § 7A-289.32(3) (1995) (twelve months); Ohio Rev. Code Ann. § 2151.414(E)(1) (Baldwin 1994) (six months); Okla. Stat. tit. 10, § 7006-1.1(A)(3) (Supp. 1995) (three months); Or. Rev. Stat. § 419B.504(5) (1995) ("extended duration of time"); 23 Pa. Cons. Stat. Ann. § 2511(a)(5) (1991) (six months); R.I. Gen. Laws § 15-7-7(1)(c) (Supp. 1995) (twelve months); S.C. Code Ann. § 20-7-1572(2) (Law. Co-op. 1976) (six months); Tenn. Code Ann. § 36-1-113(g)(3)(A) (Supp. 1995) (six months); Tex. Fam. Code Ann. § 161.001(1)(N) (West 1996)

The length-of-time-out-of-custody ground was prominently featured in most of the TPR legislative reforms proposed in the 1970s and 1980s.<sup>67</sup> From the beginning this ground was conceived as a means to prevent children from lingering in foster care by making "[t]ermination . . . the norm after a child [had] been in care a given period of time unless there [were] specific reasons why termination would be harmful to the child."<sup>68</sup> Professor Michael Wald formulated one of the most articulate and influential proposals for the length-of-time-out-of-custody ground in 1976.<sup>69</sup> He argued that although such a ground might terminate the rights "of some parents who would regain custody if given more time and help," it was necessary because data indicated "that length of time in care [was] the critical variable with regard to the likelihood of a child's being returned home, the amount of harm a child [was] likely to suffer as a result of being in foster care, and the likelihood of finding a permanent placement following termination."<sup>70</sup>

The structure and requirements of the length-of-time-out-of-custody ground vary from state to state. At a minimum, length-of-time-out-of-custody statutes include two requirements for termination: (1) the child must be out of the custody of the parent for a statutorily specified period of time and (2) the parent must substantially have failed to fulfill her parental responsibilities. These two requirements are formulated in a variety of ways. For instance, the required length of time out of custody ranges from three months<sup>71</sup> to two years,<sup>72</sup> depending on the jurisdiction. Some statutes key the length of time to

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(one year); Utah Code Ann. § 78-3a-408(3) (Supp. 1996) (six months); Va. Code Ann. § 16.1-283(C) (Michie 1996) (twelve months); Wash. Rev. Code Ann. § 13.34.180 (West Supp. 1996) (six-month minimum; twelve months to give rise to rebuttable presumption that there is little likelihood that conditions that led to removal will be remedied so that child can be returned to parent in near future); Wis. Stat. § 48.415(2) (1993-1994) (one year; six months for child less than three years old).

<sup>67</sup> See Hardin & Tazzara, *supra* note 56, at 4025-30 (listing length of time out of custody as ground in eight out of nine model acts discussed).

<sup>68</sup> Wald, *supra* note 54, at 690.

<sup>69</sup> See *id.* at 636-700 (proposing that termination be based on two factors: length of time child has been in foster care and likelihood that termination will harm rather than help child).

<sup>70</sup> *Id.* at 691. It should be noted that Professor Wald included in his proposal extensive safeguards to protect against unwarranted termination. For further discussion of these safeguards, see *infra* notes 83, 112, 134, 141 and accompanying text.

<sup>71</sup> See Okla. Stat. tit. 10, § 7006-1.1(A)(3) (Supp. 1995).

<sup>72</sup> See Kan. Stat. Ann. § 38-1585(a)(6) (Supp. 1994).

the parent's behavior,<sup>73</sup> the age of the child,<sup>74</sup> or certain aggravating factors.<sup>75</sup> In addition, the statutes in some jurisdictions specify that the length of time may accrue cumulatively rather than consecutively.<sup>76</sup>

Formulation of the parental inadequacy requirement also varies. Almost all of the statutes premise parental inadequacy on the parent's failure to correct harmful behavior that led to the child's removal from the parent's custody in the first place. Some statutes phrase the requirement as a failure to "maintain contact with or plan for the future of the child."<sup>77</sup> Other statutes phrase it as a failure "to remedy the circumstances which cause[d] the child to be in an out-of-home placement."<sup>78</sup> Some statutes focus on the parent's past and ongoing inability to provide for the child<sup>79</sup> while other statutes require an additional specific finding that the parent most likely will be unable to

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<sup>73</sup> See, e.g., Ariz. Rev. Stat. Ann. § 8-533(B)(7) (Supp. 1995) (requiring 18 months where parent is "unable to remedy the circumstances which cause the child to be in an out-of-home placement" but requiring only nine months where "parent has substantially neglected or willfully refused to remedy" those circumstances).

<sup>74</sup> See, e.g., Del. Code Ann. tit. 13, § 1103(a)(5)(a)(1) (1993) (lowering length of time from one year to six months if child "comes into care as an infant"); Wis. Stat. § 48.415(2)(c) (1993-1994) (requiring one year for child of three years or older; six months for child less than three years old).

<sup>75</sup> See, e.g., Del. Code Ann. tit. 13, § 1103(a)(5)(a)(1) (1993) (lowering length of time from one year to six months if there is history of previous placement, neglect, abuse, or lack of care; if parent has been convicted of felony involving child; or if parent is incapable of discharging parental responsibilities because of extended or repeated incarceration).

<sup>76</sup> See, e.g., Ariz. Rev. Stat. Ann. § 8-533(B)(7) (Supp. 1995) (requiring cumulative total of 9 months or 18 months, depending on circumstances); Wis. Stat. § 48.415(2)(c) (1993-1994) (requiring cumulative total of one year or six months, depending on age of child); cf. Cal. Fam. Code § 7828(d) (West 1994) (placing child in custody of parent on nonpermanent, trial basis does not "interrupt the running of the one-year period").

<sup>77</sup> N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney 1992); see also Va. Code Ann. § 16.1-283(C)(1) (Michie 1996) (requiring finding that parent "failed to maintain contact with and to provide or substantially plan for the future of the child").

<sup>78</sup> Ariz. Rev. Stat. Ann. § 8-533(B)(7)(a), (b) (Supp. 1995); see also Mo. Rev. Stat. § 211.447(2)(3) (1994) (requiring finding that "conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist"); Okla. Stat. tit. 10, § 7006-1.1(A)(3)(d) (Supp. 1995) (requiring parent's failure to show that "the condition which led to the making of [finding of deprivation] has been corrected"); 23 Pa. Cons. Stat. Ann. § 2511(a)(5) (1991) (requiring finding that "conditions which led to the removal or placement of the child continue to exist"); Va. Code Ann. § 16.1-283(C)(2) (Michie 1996) (requiring finding that parent has been "unwilling or unable . . . to remedy substantially the conditions which led to the child's foster care placement").

<sup>79</sup> See, e.g., N.Y. Soc. Serv. Law § 384-b(4)(d), (7)(a) (McKinney 1992) (allowing termination of parental rights in cases involving "permanently neglected" children where parent has or parents have continuously failed to maintain contact with or plan for future of child); Okla. Stat. tit. 10, § 7006-1.1(A)(3) (Supp. 1995) (allowing termination of parental rights where child is judged to be deprived due to acts or omissions of parent and where parent has failed to correct such condition); Va. Code Ann. § 16.1-283(C) (Michie 1996) (providing for termination of parental rights where parent has failed to maintain contact

provide for the child in the future.<sup>80</sup> In all instances, the Due Process Clause of the Fourteenth Amendment mandates that states employ a standard of proof requiring at least clear and convincing evidence.<sup>81</sup>

Despite these many permutations, all length-of-time-out-of-custody statutes boil down to one central theme: the provision of a catch-all ground for termination which allows the state to terminate where there is no clear showing of chronic abuse, mental illness, abandonment, or other separate statutory grounds for termination.<sup>82</sup>

Since length-of-time-out-of-custody statutes thus lower the standards for terminating parental rights, many include provisions which attempt to protect parents and children from unwarranted termination. Some, but not all, statutes require as a prerequisite to termination a finding that the state child welfare agency made "reasonable efforts" to reunite the family.<sup>83</sup> In some states, courts have judicially

with child, to provide or plan for child's future, or to remedy conditions that led to foster placement).

<sup>80</sup> See, e.g., *Ariz. Rev. Stat. Ann. § 8-533(B)(7)(b)* (Supp. 1995) (requiring finding of substantial likelihood that parent will not be capable of providing proper care in near future); *Cal. Fam. Code § 7828(a)(2)* (West 1994) (requiring finding that parents are likely to fail in future); *Del. Code Ann. tit. 13, § 1103(a)(5)(a)(2)* (1993) (requiring finding that conditions that led to foster care placement likely will not be remedied in near future to enable parent to properly discharge responsibilities); *Mo. Rev. Stat. § 211.447(2)(3)* (1994) (same); *23 Pa. Cons. Stat. Ann. § 2511(a)(5)* (1991) (requiring that services available to parent will be unlikely to help remedy conditions that led to foster placement); *Wis. Stat. § 48.415(2)* (1993-1994) (requiring "substantial likelihood" that parent will not meet conditions necessary for return of child to home).

<sup>81</sup> See *Santosky v. Kramer*, 455 U.S. 745, 768-70 (1982).

<sup>82</sup> See 2 Haralambie, *supra* note 5, § 13.17 ("This ground addresses the problem of the parent whose rights cannot be terminated under other grounds but whose child would otherwise be relegated to the uncertain life of long-term foster care.").

<sup>83</sup> See *Ariz. Rev. Stat. Ann. § 8-533(B)(7)* (Supp. 1995) (requiring finding that agency "has made a diligent effort to provide appropriate remedial services"); *Ark. Code Ann. § 9-27-341(b)(2)(A)* (Michie Supp. 1995) (requiring showing of "meaningful effort by the Department of Human Services to rehabilitate the home and correct the conditions which caused removal"); *Cal. Fam. Code § 7828(e)* (West 1994) (requiring court to "make a determination that reasonable services have been provided or offered to the parents which were designed to aid the parents to overcome the problems which led to the deprivation or continued loss of custody"); *La. Children's Code Ann. art. 1015(5)(c)* (West 1995) (requiring showing that "department has made every reasonable effort to reunite the child with his parents"); *Me. Rev. Stat. Ann. tit. 22, § 4055(1-A)(E)* (West Supp. 1995) (requiring showing that "parents have been offered or received services to correct the situation"); *Mass. Gen. L. ch. 210, § 3(c)(iv), (v)* (Supp. 1996) (requiring showing that "parents were offered or received services intended to correct the circumstance and refused or were unable to utilize such services on a regular and consistent basis"); *Minn. Stat. Ann. § 260.221(b)(5)* (West 1992) (requiring showing that "reasonable efforts have been made . . . to rehabilitate the parent and reunite the family"); *Miss. Code Ann. § 93-15-103(3)(c)* (1972) (requiring that "agency has made diligent efforts to develop and implement a plan for return of the child to its parents"); *Neb. Rev. Stat. § 43-292(7)* (1993) (requiring showing of parental failure "in spite of reasonable efforts and services to the parents ordered by the court or offered" by agency); *Nev. Rev. Stat. § 128.109(3)* (1957) ("The presumptions

constructed a reasonable efforts standard where none is statutorily required.<sup>84</sup> Making reasonable efforts a prerequisite to TPR may help enable the state to receive federal funding under the Child Welfare Act. While the Act does not mandate reasonable efforts as a prereq-

specified . . . must not be overcome or otherwise affected by evidence of failure of the state to provide services to the family.”); N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney 1992) (requiring finding that agency has made “diligent efforts to encourage and strengthen the parental relationship”); N.C. Gen. Stat. § 7A-289.32(3) (1995) (presuming “diligent efforts” of agency); Ohio Rev. Code Ann. § 2151.414(E)(1) (Baldwin 1994) (requiring showing of parental failure “notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home”); Or. Rev. Stat. § 419B.504(5) (1995) (requiring “reasonable efforts by available social agencies for such extended duration of time that it appears reasonable that no lasting adjustment can be effected”); R.I. Gen. Laws § 15-7-7(1)(c) (Supp. 1995) (requiring showing that “parents were offered or received services to correct the situation which led to the child being placed”); Tex. Fam. Code Ann. § 161.001(1)(N)(i) (West 1996) (requiring that agency make “reasonable efforts to return the child to the parent”); Utah Code Ann. § 78-3a-403 (Supp. 1996) (requiring showing of parental failure “notwithstanding reasonable and appropriate efforts” by agency to return child home); Va. Code Ann. § 16.1-283(C)(1), (2) (Michie 1996) (requiring showing of parental failure “notwithstanding the reasonable and appropriate efforts of social, medical, mental health or other rehabilitative agencies”); Wash. Rev. Code Ann. § 13.34.180(4) (West Supp. 1996) (requiring that services “have been offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided”); Wis. Stat. § 48.415(2)(b) (1993-1994) (requiring showing that agency “made a diligent effort to provide the services ordered by the court”).

Some states require that courts consider the agency's efforts at reunification but do not make reasonable efforts an absolute prerequisite. See Kan. Stat. Ann. § 38-1583(b)(7) (1993) (requiring court to “consider . . . reasonable efforts by appropriate public or private child caring agencies”); Md. Code Ann., Fam. Law § 5-313(c)(1) (1991) (requiring court to “consider . . . the timeliness, nature, and extent of the services offered by the child placement agency to facilitate reunion of the child with the natural parent”); Mo. Rev. Stat. § 211.447(2)(3)(a), (b) (1994) (requiring court to “consider and make findings” on whether agency “made progress in complying” with terms of social service plan and success or failure of agency in its efforts “to aid the parent on a continuing basis in adjusting his circumstances or conduct to provide a proper home for the child”); Tenn. Code Ann. § 36-1-113(h)(2) (Supp. 1995) (“court shall consider” parental failure “after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible”).

Professor Wald's proposal also required “maximum efforts to reunite families after removal.” Wald, *supra* note 54, at 692.

<sup>84</sup> See, e.g., *In re Hanks*, 553 A.2d 1171, 1179 (Del. 1989) (“[W]hen termination of parental rights is based primarily on the ground that a parent was unable to plan adequately for a child's needs ‘the trial court is required to make appropriate findings of fact and conclusions of law as to the State's *bona fide* efforts to meet its own obligations.’” (quoting *In re Burns*, 519 A.2d 638, 649 (Del. 1986))); *In re T.C.*, 522 N.W.2d 106, 103 (Iowa Ct. App. 1994) (“Reasonable efforts to reunite the parent and child are required prior to termination.”); see also David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. Pitt. L. Rev. 139, 174 & n.102 (1992) (discussing *In re Burns* and citing other state cases that imply reasonable efforts standard).

uisite to termination,<sup>85</sup> it does require that the state show reasonable efforts at reunification in order to receive federal funding for the child's placement.<sup>86</sup> Thus, reasonable efforts will have to be shown at some point before termination, whether required as a prerequisite to TPR or not, in order for the state to receive funding. While a showing of reasonable efforts at another stage of the dependency process would satisfy the Child Welfare Act,<sup>87</sup> attaching the reasonable efforts requirement to termination provides an extra incentive to the state child welfare agency to make those efforts because if it fails to do so, it will lose its suit to terminate.<sup>88</sup>

Many states also include a "best interests of the child" requirement in their termination statutes as another safeguard against unwarranted termination.<sup>89</sup> A best interests requirement prohibits the court from terminating parental rights except when it is in the best interests of the child to do so. It is usually applied only during what is sometimes called the "dispositional" stage of the termination proceedings where once the court has made a determination that statutory grounds for termination exist, it determines the proper disposition of the case: termination, no termination but continued foster care, return to the parent, or some other alternative.<sup>90</sup> Although critics have long complained that the best interests standard is vague and susceptible to judicial bias,<sup>91</sup> it does permit judges to consider factors not specified

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<sup>85</sup> See Herring, *supra* note 84, at 155-60 (noting different stages at which reasonable efforts requirement can be incorporated in state statutes); Shotton, *supra* note 47, at 226 (commenting that federal regulations do not specify when reasonable efforts determination must be made).

<sup>86</sup> See *supra* note 26.

<sup>87</sup> This Note uses the phrases "dependency process" and "dependency system" to refer to all stages of the state's supervision of a child who is under its custody for reasons of "parental misconduct or negligence, or other [parental] inadequacies." Soler et al., *supra* note 2, ¶ 4.01[1].

<sup>88</sup> But see Herring, *supra* note 84, at 143-44 (arguing that such an incentive is weak); see also *infra* notes 147-51 and accompanying text.

<sup>89</sup> See, e.g., Del. Code Ann. tit. 13, § 1103(a) (1993) (allowing initiation of termination "whenever it appears to be in the child's best interest" and other statutory ground exists); Mo. Rev. Stat. § 211.447(2) (1994) (requiring finding that termination is in "best interests of the child"); N.Y. Fam. Ct. Act § 631 (McKinney 1983) (allowing disposition to be made "solely on the basis of the best interests of the child"); Okla. Stat. tit. 10, § 7006-1.1(A)(3)(c) (Supp. 1995) (requiring finding that "termination of parental rights is in the best interests of the child"); 23 Pa. Cons. Stat. Ann. § 2511(a)(5) (1991) (requiring showing that "termination of the parental rights would best serve the needs and welfare of the child"); Va. Code Ann. § 16.1-283(C) (Michie 1996) (requiring finding that termination is "in the best interests of the child"). As of 1989, 41 states required that the court consider the best interests of the child in termination proceedings. See Neal, *supra* note 61, at 2.

<sup>90</sup> See 2 Haralambie, *supra* note 5, § 13.31.

<sup>91</sup> See *infra* notes 128-30 and accompanying text.

expressly in the termination statute in order to prevent termination that would be harmful to the child.

## II

### THE PROS AND CONS OF LENGTH-OF-TIME-OUT-OF-CUSTODY STATUTES

Although much has been written discussing termination of parental rights in general, there have been few studies focusing solely on the length-of-time-out-of-custody ground. This Part seeks to fill that gap by drawing on and consolidating previous critiques of termination of parental rights and the length-of-time-out-of-custody ground and creating a comprehensive overview of the benefits and dangers that the length-of-time-out-of-custody ground presents.

Criticisms of termination in general provide a backdrop to the specific evaluation of the length-of-time-out-of-custody ground. A central critique of termination of parental rights suggests that termination practices are imbedded with institutional racism and classism and characterizes the permanency movement as an attempt to "rescue" children from their poor or minority parents.<sup>92</sup> Critics point to the fact that most children placed in foster care are poor, nonwhite,<sup>93</sup> and often lack the resources on which wealthier families rely during times of crisis, thus forcing them to rely on the dependency system.<sup>94</sup> These

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<sup>92</sup> See Deborah Shapiro, *Agencies and Foster Children 210-12* (1976) (explaining greater likelihood of black and Puerto Rican children remaining in foster care system); Anthony N. Maluccio, *Biological Families and Foster Care: Initiatives and Obstacles, in Foster Care: Current Issues, Policies, and Practices*, supra note 15, at 147, 148-49 (commenting that modern child welfare system is not much different than its nineteenth-century predecessor, which characterized immigrants as "dangerous classes" and was responsible for moving thousands of poor children of immigrants from streets of New York City to midwestern farms).

<sup>93</sup> See Garrison, supra note 15, at 432-33 (reporting that "60-80% of the children in foster care come from families receiving public assistance, and almost all come from the bottom rung of the economic ladder" (footnote omitted)); Martin Guggenheim, *The Political and Legal Implications of the Psychological Parenting Theory*, 12 N.Y.U. Rev. L. & Soc. Change 549, 550 (1983-1984) ("[T]he overwhelming percentage of families who are involved in child protective proceedings—proceedings whose purpose it is to 'involuntarily' separate children from parents to 'help the children'—are poor and nonwhite.").

<sup>94</sup> As one commentator has observed:

[M]iddle and upper income families can obtain substitute care at the home of a friend or relative or at a boarding school, or they can employ services, such as day care or housekeeping assistance, that obviate the need for child care outside the home. But for the marginal family that cannot obtain such private services, public child care—foster care placement—is usually the only alternative.

Garrison, supra note 15, at 433; see also Guggenheim, supra note 93, at 549 ("[F]amilies with adequate economic means manage to cope during crises without resorting to public institutions for support.").

critics further charge that the termination process often fails to acknowledge strong kinship networks prominent in the family structures of people of color<sup>95</sup> and frequently overlooks kin groups as resources or placement alternatives.<sup>96</sup> As a result, children may be removed—against their best interests—from the kin to whom they are deeply attached and who have served as their primary caretakers.<sup>97</sup>

In a similar vein, an often repeated critique of termination of parental rights as conceived by the permanency movement is that its foundational principle, the “psychological parent,” is misconceived.<sup>98</sup> Critics have not only attacked Goldstein, Freud, and Solnit’s research methods,<sup>99</sup> but also have argued that their theory focuses too much on the “exclusivity”<sup>100</sup> of the parent-child relationship without regard for the child’s ability to form multiple attachments.<sup>101</sup> Critics argue that current termination policy is too quick to overlook long-term placement options other than the termination-adoption route. They note that ending foster care is not the only means of achieving stability for the child.<sup>102</sup> Guardianship and long-term foster care, for instance, are options in which the child remains within the system under the care of an adult other than the biological parent, but the parent’s rights are

<sup>95</sup> See Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. Rev. L. & Soc. Change 539, 543-44 (1983-1984) (noting varied forms of kinship support for children in Native American and African American communities).

<sup>96</sup> See *id.* at 540.

<sup>97</sup> See *id.* at 545-47. When a parent’s rights are terminated, so too are the rights of the corresponding grandparents. See Soler et al., *supra* note 2, ¶ 4.14[2].

<sup>98</sup> For a summary of criticism regarding the psychological parent theory, see Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. Rev. L. & Soc. Change 397, 405-11 (1996).

<sup>99</sup> See, e.g., Everett Waters & Donna M. Noyes, *Psychological Parenting vs. Attachment Theory: The Child’s Best Interests and the Risks in Doing the Right Things for the Wrong Reasons*, 12 N.Y.U. Rev. L. & Soc. Change 505, 510-11 (1983-1984) (criticizing research on which Goldstein, Freud, and Solnit rely).

<sup>100</sup> Taub, *supra* note 34, at 491.

<sup>101</sup> This notion traces its roots to the work of psychologist and psychoanalyst John Bowlby, who reframed attachment theory in terms of motivational, rather than psychoanalytic, theory. See Waters & Noyes, *supra* note 99, at 508-09. Contemporary attachment theory posits that children can maintain a number of significant attachments to caring adults. For an overview of studies reaching this conclusion, see Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. Rev. L. & Soc. Change 347, 354-62 (1996); see also Committee on the Family of the Group for the Advancement of Psychiatry, *New Trends in Child Custody Determinations 80-81* (1980) (discussing importance of child’s network of attachments as opposed to sole attachment to one psychological parent). Contemporary attachment theory highlights the environmental factors that may contribute to a child’s response to separation. See Waters & Noyes, *supra* note 99, at 509-10. In addition, attachment theorists distinguish between the breaking of an existing bond with a parental figure and the lack of opportunity to ever form such a bond, arguing that the latter is more destructive and results in more problems later in life. See, e.g., Michael Rutter, *Maternal Deprivation Reassessed 102-09* (2d ed. 1981).

<sup>102</sup> See, e.g., Garrison, *supra* note 15, at 444-46.

not terminated, and the possibility of parental contact remains open.<sup>103</sup>

Thus, the role of termination of parental rights in general has come under significant attack in recent years. With these larger criticisms in mind, this Part evaluates the specific benefits and problems of length-of-time-out-of-custody statutes.

### A. *The Benefits of Length-of-Time-Out-of-Custody Statutes*

Length-of-time-out-of-custody statutes can serve as an important tool in some termination cases. There are many situations in which a parent's behavior does not rise to the level of a separate statutory ground for termination but in which the child clearly will be harmed by a continuing relationship with the parent.

One example of a troubling case in which a parent's rights might not have been terminated had it not been for a length-of-time-out-of-custody statute is *In re Desire Star H.*<sup>104</sup> In that case, a brother and sister, under the ages of one and two respectively, were placed in a foster home due to their mother's drug abuse and inadequate care. Two years later, their infant sister was placed in foster care when she was born with a positive toxicology for cocaine.<sup>105</sup> During the three years following the older children's placement, the mother visited the children approximately five times and did not attempt to enter a drug treatment program, obtain permanent housing, or attend parenting classes.<sup>106</sup> Furthermore, during an almost eleven-month period, the mother had no contact at all with the agency, despite the agency's efforts to locate and help her.<sup>107</sup> All three children had been placed with the same foster family, who wished to adopt them.<sup>108</sup> The family court terminated the mother's parental rights under New York's length-of-time-out-of-custody statute.<sup>109</sup> Without the length-of-time-out-of-custody provision, this mother's rights might not have been terminated. The statutory grounds for abandonment might not have been met because she maintained some contact with the children and expressed a desire to regain custody at the time of the termination

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<sup>103</sup> See *id.* at 444 (discussing guardianship orders and long-term foster care); Taub, *supra* note 34, at 491-92 (discussing permanent guardianship and open adoption). For a detailed description of long-term placement options, see generally Hardin, *supra* note 22, at 128-92.

<sup>104</sup> 609 N.Y.S.2d 268 (App. Div. 1994).

<sup>105</sup> See *id.* at 269.

<sup>106</sup> See *id.*

<sup>107</sup> See *id.* at 269-70.

<sup>108</sup> See *id.* at 270.

<sup>109</sup> See *id.* at 269.

proceeding.<sup>110</sup> The children might have lingered indefinitely in foster care, never to be adopted by the parents who had raised them.

Thus, length-of-time-out-of-custody statutes can serve an instrumental role in protecting children. This is especially true where the concerns of the permanency movement are at their highest: the child has been placed at a very young age and has not bonded with the biological parent, the foster family has bonded with the child and wishes to adopt, and the parent's behavior suggests that she will not be able to form a close relationship or provide a stable home for the child any time in the foreseeable future, as was the case in *Desire Star H.*<sup>111</sup> A length-of-time-out-of-custody statute can prevent the loss of foster care drift of a child in such a situation. Without such a ground, the foster parents would not be able to adopt the child. The parent with whom the child had only minimal bonding would be able to be a continuing, potentially disruptive force in the child's life or even regain custody after the child had developed significant bonds with her foster parents despite the fact that the parent had done little to develop a relationship with, or provide a home for, the child.

### *B. Problems with Length-of-Time-Out-of-Custody Statutes*

The flip-side of the preceding argument, however, is that those instances lacking the factors described above present a much less compelling case for the use of length-of-time-out-of-custody statutes. This Note argues that length of time out of custody rarely should give rise to termination when a child has substantial bonds with the parent, when the child is not likely to be adopted, or when the state child welfare agency has not made reasonable efforts at helping the parent to remedy the circumstances that led to the child's placement. In cases where these factors are present, permanency, the driving principle behind length-of-time-out-of-custody statutes, will not be achieved

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<sup>110</sup> N.Y. Soc. Serv. Law § 384-b(5) (McKinney 1992) requires a showing of actual or implied intent to abandon the child in order to terminate on the ground of abandonment. Although there had been extended periods where the mother did not maintain contact with the children, at the time of the termination proceeding she had reentered their lives. See *Desire Star H.*, 609 N.Y.S.2d at 269.

<sup>111</sup> See also *St. Vincent's Services ex rel. Joseph Bernard H. v. Jean H.*, 621 N.Y.S.2d 664 (App. Div. 1995), a case involving a child initially placed in foster care because of his mother's alcohol abuse. The mother's rights were terminated under New York's length-of-time-out-of-custody statute because of her failure to overcome her alcohol problem and because she had only sporadically contacted her son, who had developed strong bonds with his foster parents with whom he had lived since infancy. See *id.* at 664-65.

through these statutes. Thus, the state should pursue alternatives to termination in such situations.<sup>112</sup>

Nevertheless, courts do sometimes terminate a parent's rights under the length-of-time-out-of-custody ground even when permanency will not result from such an action. In *In re Verona Jonice N.*,<sup>113</sup> the court terminated a parent's rights despite minimal efforts by the agency at reunification and despite the strong bonds between the parent and her children. The case involved a mother who had voluntarily placed her three children in foster care after an anonymous caller had reported to the police that the children, ages ten, six, and just under two, were unattended. The mother had left the children unsupervised for lengthy periods of time because she was working two jobs in order to provide for the family. The agency initially said that it would return the children to the mother once she had obtained a three-bedroom apartment.<sup>114</sup> Eight months later the mother found such an apartment, and plans were made to return the children. The caseworker assigned to the case left the agency, however, before she could approve the apartment as required, and a new caseworker was assigned. The new caseworker was reluctant to give approval for the apartment because he felt that it was too expensive for the mother's salary. The caseworker did nothing, however, to help the mother obtain public housing or other public assistance. The mother ultimately complained to the child welfare agency about her dissatisfaction with this caseworker.<sup>115</sup> Throughout this period she maintained close relationships with her children and visited them regularly.<sup>116</sup> Then, fifteen months after she had initially placed her children, the mother encountered a series of serious problems. She lost one of her jobs, struggled with serious health problems, lost her apartment, and discovered that her own mother was terminally ill with cancer. At this point the mother began living on the streets and lost all contact with her children for eleven months.<sup>117</sup>

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<sup>112</sup> In fact, one of the initial architects of the length-of-time-out-of-custody ground, Professor Wald, discouraged use of that ground when termination would be detrimental to a child because of a close parent-child relationship, a child is placed with a relative who does not wish to adopt, a child is in a residential treatment center but termination is not needed to place the child in a permanent family environment, or a "permanent placement is not feasible or desired by the child." Wald, *supra* note 54, at 691, 696-99, 706.

<sup>113</sup> 581 N.Y.S.2d 11 (1992).

<sup>114</sup> See *id.* at 12.

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*

<sup>117</sup> See *id.* at 13.

Eventually the mother regained contact with the children and again visited them regularly.<sup>118</sup> Nonetheless, the agency, eight months later, petitioned for termination of the mother's parental rights based on New York's length-of-time-out-of-custody statute.<sup>119</sup> The family court terminated the mother's rights, but the appellate court reversed, citing the close bonds shared by the children and their mother, the agency's failure to exercise reasonable efforts at reunification, and the fact that after the termination the foster mother had declined to adopt the children.<sup>120</sup> As the appellate court acknowledged, "[i]t would appear that, throughout these difficult years, the sole consistent parental figure these children . . . had [was] their natural mother."<sup>121</sup>

This case exemplifies the way in which length-of-time-out-of-custody statutes can result in terminations that do not achieve permanency. The court terminated the biological parent's rights despite the presence of factors that indicated that permanency would not be achieved through such termination: the biological parent shared a close relationship with her children, the children were older and had been raised for many years by their mother, the foster parent was hesitant about adoption, and the agency had failed to assist the mother in achieving the steps necessary to regain custody.

Protective measures must be included in length-of-time-out-of-custody statutes to ensure that unwarranted terminations like that in *Verona Jonice N.* do not occur. Yet, despite the strong case for consideration of the child's age, bonds with the biological and foster parents, likelihood of adoption, and the extent to which the child welfare agency has assisted the biological parent in remedying her circumstances, many length-of-time-out-of-custody statutes fail to account for these factors.

### 1. *Lack of Consideration of the Child's Age and Bonds with the Biological Parent*

The strength of the bonds a child shares with her parent should be an important factor in deciding whether to terminate a parent's rights under the length-of-time-out-of-custody ground. Studies suggest that children in foster care, even those who have been abused or neglected, maintain emotional attachments to both their foster and biological families.<sup>122</sup> If a child has developed bonds and has lived

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<sup>118</sup> See *id.*

<sup>119</sup> See *id.*

<sup>120</sup> See *id.* at 13-14.

<sup>121</sup> *Id.* at 14.

<sup>122</sup> See Davis, *supra* note 101, at 349 n.11 (surveying such studies); see also Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental*

with her parent over an extended period of time, termination may be harmful to the child,<sup>123</sup> particularly where the parent's behavior falls short of abuse or abandonment, as it often does in the situations where the length-of-time-out-of-custody ground is applied. In such instances, alternatives such as long-term foster care, placement of the child with a relative of the parent, or other arrangements that would allow the parent to maintain contact with the child might provide better long-term resolutions for the family than termination.

In addition, the age of the child and the length of time she has lived with her biological and foster parents are other important factors to be considered before termination. The age of the child may indicate the degree of bonding she has with the biological and foster parents. For instance, an eighteen-month-old child who has been in foster care for one year is less likely to have close bonds with her biological mother than a six-year-old child who has been in foster care for one year. Furthermore, the age of the child can also indicate the likelihood that she will be adopted.<sup>124</sup> All other things being equal, a one-year-old child has a much better chance of being adopted than a twelve-year-old child.

Currently, of the thirty-four states with length-of-time-out-of-custody statutes, only five explicitly include age as a factor to be considered in determining whether grounds for termination exist or whether termination is in the best interests of the child.<sup>125</sup> Less than half of the

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Rights of Children in Foster Care—An Empirical Analysis in Two States, 29 *Fam. L.Q.* 121, 135 (1995) (citing Juvenile Justice Standards Project, Institute of Judicial Admin.-ABA Joint Comm'n on Juvenile Justice Standards, Standards Relating to Abuse and Neglect, Standard 8.4 commentary at 173 (1981)).

<sup>123</sup> See *Santosky v. Kramer*, 455 U.S. 745, 765 n.15 (1982) ("Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare."); see also Garrison, *supra* note 15, at 473 ("[T]he permanency program's solution to the problem of foster care drift will probably hurt the interests of foster children more than it will help them.").

<sup>124</sup> See *supra* note 29; see also Cole, *supra* note 29, at 455 (noting that "majority of children who are adopted continue to be problem-free infants or preschool white children"); Guggenheim, *supra* note 122, at 134 n.29 (citing 1992 New York State report claiming that "the population of children awaiting adoption after termination includes many children who, because of their age and other characteristics, are unlikely ever to be adopted").

<sup>125</sup> See Del. Code Ann. tit. 13, § 1103(a)(5)(a)(1) (1993) (reducing statutory length of time where child is an infant); Iowa Code Ann. § 232.116(1)(e), (g) (West 1994) (reducing statutory length of time where child is three or younger); Me. Rev. Stat. Ann. tit. 22, § 4055(2) (West Supp. 1995) ("In deciding to terminate parental rights, the court shall consider the needs of the child, including the child's age . . ."); Mass. Gen. Laws Ann. ch. 210, § 3(c)(iv), (v) (West Supp. 1996) (reducing statutory length of time where child is younger than four); Wis. Stat. § 48.415(2)(c) (1993-1994) (reducing statutory length of time where child is younger than three). Other states, while not considering the age of the child, do consider the length of time the child has stayed in the current foster home. See Nev. Rev.

states with length-of-time-out-of-custody statutes explicitly require consideration of the extent to which a child has bonded with the biological and/or foster parents.<sup>126</sup> In the majority of states with length-of-time-out-of-custody statutes, if such bonding is considered at all, it is judicially implied as a factor to be weighed in evaluating the best interests of the child at the dispositional stage of the termination proceeding.<sup>127</sup>

This reliance on the courts to fill the gaps in length-of-time-out-of-custody statutes is problematic. On the one hand, legislatures should give courts flexibility in making these delicate, fact-specific decisions. On the other hand, giving judges too much discretion in deciding what factors should be weighed in the best interests determination may require complex policy decisions which are best

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Stat. § 128.108(4) (1957) (mandating consideration of length of time child has lived in "stable, satisfactory foster home"); R.I. Gen. Laws § 15-7-7(3) (Supp. 1995) (same); Utah Code Ann. § 78-3a-410(3) (Supp. 1996) (same).

<sup>126</sup> See, e.g., Del. Code Ann. tit. 13, § 722(a) (1993) (requiring court to consider the "interaction and interrelationship of the child with his or her parents . . . or persons who may significantly affect the child's best interests"); Me. Rev. Stat. Ann. tit. 22, § 4055(2) (West Supp. 1995) (requiring consideration of child's attachment to "relevant persons"); Md. Code Ann., Fam. Law § 5-312(c)(2)(i) (1991) (requiring consideration of "child's feelings toward and emotional ties with the child's natural parents" and foster family); Mass. Gen. Laws Ann. ch. 210, § 3(c)(vii) (West Supp. 1996) (requiring consideration of child's "strong, positive bond with his substitute caretaker"); Miss. Code Ann. § 93-15-103(1) (1972) (requiring consideration of "strength of the child's bonds to his natural parents"); Mo. Rev. Stat. § 211.447(3)(1) (1994) (requiring consideration of "emotional ties to the birth parent" where appropriate and applicable to case); Nev. Rev. Stat. § 128.108(1) (1957) (requiring consideration of "love, affection and other emotional ties existing between the child and the parents, and the child's ties with the foster family"); N.M. Stat. Ann. §§ 32A-4-28(B)(3)(b), (c), -5-15(B)(3)(b), (c) (Michie 1995) (requiring showing that "parent-child relationship has disintegrated" and that "psychological parent-child relationship has developed between the substitute family and the child"); Ohio Rev. Code Ann. § 2151.414(D)(2) (Baldwin 1994) (requiring consideration of "interaction and interrelationship of the child with his parents, siblings, relatives, foster parents and out-of-home providers"); R.I. Gen. Laws § 15-7-7(3) (Supp. 1995) (requiring consideration of whether "child has been integrated into the foster family"); Tenn. Code Ann. § 36-1-113(h)(4) (Supp. 1995) (requiring consideration of whether "meaningful relationship has otherwise been established between the parent . . . and child"); Utah Code Ann. § 78-3a-410(1) (Supp. 1996) (requiring consideration of "love, affection, and other emotional ties existing between the child and the parents, and the child's ties with the foster family"). Note that some have challenged any direct comparison between the biological and foster parents on constitutional grounds. See, e.g., *In re C.O.W.*, 519 A.2d 711, 713-14 (D.C. 1987) (considering appellant's argument that D.C. Code permitting comparison between natural and foster parents violates Due Process Clause of Fifth Amendment). Courts, however, have found that consideration of the child's bonds with the foster parent is permissible as long as it falls short of a "direct comparison" of the foster parent to the biological parent. See, e.g., *id.* at 714-15.

<sup>127</sup> See, e.g., *In re T.J.O.*, 527 N.W.2d 417, 421-22 (Iowa Ct. App. 1994) (considering child's bonds with foster parents and parents). See *supra* text accompanying note 90 for an explanation of the dispositional stage of the termination proceeding.

left to the legislature, and may extend an open invitation to judicial bias. As mentioned briefly in Part I.C, numerous critics have objected to the best interests determination claiming that it "allows the judge to import his personal values . . . and leaves considerable scope for class bias."<sup>128</sup> Even where judges have only the best of intentions, they still may inject the best interests determination with their own untested and "independently acquired notions about child development and parental bonding."<sup>129</sup> Professor Peggy Cooper Davis, in an empirical study of 193 judicial opinions addressing psychological parent principles, reported on judges' pervasive use of psychological theories and principles that had not been introduced into evidence in making custody decisions, including best interests analyses.<sup>130</sup> Thus, if the length-of-time-out-of-custody statute does not specifically require consideration of the child's age and attachment to parents and foster parents, the judge may overlook or misapply these factors according to what her personal theory of child development dictates.<sup>131</sup> Explicit guidance from the legislature would help overcome such problems by instructing the judge as to those factors she must consider and those which she must not.

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<sup>128</sup> Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 *Harv. Educ. Rev.* 599, 619 (1973) (discussing best interests standard in context of initial removal of child from parental custody); see also Martin Guggenheim, *The Best Interests of the Child: Much Ado About Nothing?*, in *Child, Parent, and State* 27, 27 (S. Randall Humm et al. eds., 1994) (cataloging "defects" of best interests standard).

<sup>129</sup> Peggy C. Davis, "There Is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts, 100 *Harv. L. Rev.* 1539, 1541 (1987).

<sup>130</sup> See *id.* at 1546-92.

<sup>131</sup> Moreover, Professor Davis also has argued that "subtle, systemic factors" unique to the judicial role "are likely to produce bias in child protective decisionmaking." Peggy C. Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 *U. Chi. L. Sch. Roundtable* 139, 143 (1995). Davis and Barua reject the notion that judges are intentionally biased, see *id.* ("We do not imagine decisionmakers as thoughtless libertarians or as arrogant paternalists."), and instead point to bias-producing elements in the structure of child welfare proceedings. They argue that "custodial decisions made at one stage of a child protective proceeding are likely to influence decisions at the next stage," *id.* at 146, that decisionmakers tend to prefer the status quo to change, see *id.* at 148-50 (citing empirical evidence regarding choice behavior), that "resource disparities often affect the extent to which the attention of the court is called to [relevant] facts and theories," *id.* at 150, and that judges' vulnerability to public feedback makes them more adverse to "a wrongful decision not to intervene [than] a wrongful decision to intervene," *id.* at 152. Applying these factors to a termination case predicts judicial bias in favor of termination. The judge would prefer the status quo of the child's remaining out of the parent's custody, the state would be likely to have more resources than the parent and thus be able to draw more attention to its evidence, and the judge would be more vulnerable to criticism about harm to the child that resulted from a decision not to terminate than a decision to terminate.

## 2. *Lack of Consideration of the Likelihood of Adoption*

Consideration of whether a child is likely to be adopted also should be a factor in deciding whether to terminate a parent's rights under a length-of-time-out-of-custody statute. Consideration of this factor is especially pressing given a recent study by Professor Martin Guggenheim showing that terminations in some jurisdictions far outpace adoptions<sup>132</sup>—a trend leaving many children whose biological parents' rights have been terminated with no parents at all. When parental rights are terminated without a high likelihood of adoption, the goals of permanency and continuity are frustrated and children are left to drift in foster care.

Rather than terminating when the likelihood of adoption is low, the state should preserve the one parental tie that the child does have, however tenuous. Children in foster care may continue to have psychological and emotional bonds to their biological parents,<sup>133</sup> and the biological parent should be viewed as an ongoing or potential future source of emotional and perhaps financial support for the child. This is especially so when termination is premised on the length-of-time-out-of-custody ground because such cases typically do not involve chronic abuse, which would make continued contact with the parent potentially harmful to the child. Indeed, Professor Wald, in his original proposal for the length-of-time-out-of-custody ground for termination, argued against termination when adoption or some other permanent placement was not likely.<sup>134</sup> More recent commentators have forcefully argued that termination should not occur unless "a high probability for adoption exists."<sup>135</sup>

Despite these arguments, many states do not require consideration of whether the child is likely to be adopted in order to terminate the parent's rights under a length-of-time-out-of-custody statute.<sup>136</sup>

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<sup>132</sup> See Guggenheim, *supra* note 122, at 132 (presenting study of terminations and adoptions in Michigan and New York City); see also Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 *N.Y.U. Rev. L. & Soc. Change* 557, 566-67 (1983-1984) (reviewing study of 29 children, only 12 of whom were adopted); cf. Garrison, *supra* note 15, at 473 (noting that "termination of parental rights by no means ensures a child a more stable placement").

<sup>133</sup> See *supra* note 122 and accompanying text.

<sup>134</sup> See *supra* note 112 and accompanying text.

<sup>135</sup> Guggenheim, *supra* note 122, at 135. Another commentator has gone slightly further, stating that "termination of parental rights is not a wise option unless there is a prospective adoptive parent available for the child." Patrick R. Tamilia, *A Response to Elimination of the Reasonable Efforts Required Prior to Termination of Parental Rights Status*, 54 *U. Pitt. L. Rev.* 211, 217 (1992).

<sup>136</sup> See, e.g., *Ariz. Rev. Stat. Ann.* § 8-533 (1989 & Supp. 1995) (omitting consideration of likelihood of child's adoption in termination of parental rights); *Del. Code Ann. tit. 13, § 1103* (1993) (same); *Mo. Rev. Stat. § 211.447* (1994) (same); *N.Y. Soc. Serv. Law § 384-b*

Moreover, some permanency advocates themselves have been wary of "adoptability" criteria.<sup>137</sup> Such hesitance is based on the fear that certain children will be wrongly labeled "unadoptable" by the court due to their race, age, or other factors and thus doomed to a life in foster care.<sup>138</sup> This criticism, however, presupposes that the consideration of whether the child is likely to be adopted will always be biased. As unfortunate as it may be, factors such as race, age, or a child's special needs may in fact reduce her chances of adoption. Pretending that this is not the case and forging ahead with a termination, only to find that no adoptive home awaits the child, is shortsighted and overlooks the goal of permanency—a goal that the length-of-time-out-of-custody ground is meant to achieve. Furthermore, while some judges may continue to misperceive certain children as "unadoptable,"<sup>139</sup> the permanency movement has made great strides in changing such views.<sup>140</sup> Therefore, whether a child is likely to be adopted can be a legitimate inquiry for the court to make in its termination decision. Each state should create a system that permits judges to consider factors that would affect the chances of a child's being adopted, but that also gives judges guidance and limits the potential for bias.

### 3. *States Without Reasonable Efforts Requirements*

States, in addition, should require that, as a prerequisite to termination on the ground of length of time out of custody, the child welfare agency show it used reasonable efforts to reunite the child with her biological parents. Virtually all commentators agree that the state should have some obligation to make reasonable efforts at reunification.<sup>141</sup> While the reasonable efforts requirement may not rise to the level of a due process requirement,<sup>142</sup> it does recognize the parent's

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(McKinney 1992) (same); Okla. Stat. tit. 10, § 7006-1.1 (Supp. 1995) (same); Or. Rev. Stat. § 419B.504 (1995) (same).

<sup>137</sup> One such advocate has included "the question of whether a child is adoptable" in a list of "barriers and delays" to freeing children for adoption, Kusserow, *supra* note 7, at ii, and has further noted that judges "frequently have more limited views of which children can be adopted than experience indicates is true," *id.* at 16.

<sup>138</sup> For a discussion of the problem of "unadoptability," see *supra* note 29.

<sup>139</sup> See Kusserow, *supra* note 7, at 16 (noting that "judges without experience in juvenile matters" may have misperceptions about which children can be adopted).

<sup>140</sup> See *supra* note 29.

<sup>141</sup> Professor Wald's original proposal included the requirement of maximum efforts to keep families together. See Wald, *supra* note 54, at 692. Professor Wald also advocated providing counsel and other procedural safeguards to parents. See *id.*

<sup>142</sup> The Supreme Court has held that termination affects a fundamental liberty interest of the parent, thus triggering certain due process protections. See *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982). The Court has held, for example, that parents are entitled to a hearing before they can lose custody. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972). The Court also has held that the state must prove its case in termination proceedings by at least

fundamental liberty interest in parenting as well as the stated purpose of many state child welfare statutes of preserving the biological family whenever possible. New York's TPR statute, for instance, maintains that "the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home."<sup>143</sup>

The only serious point of disagreement is whether reasonable efforts should be a *prerequisite* to termination. While the Child Welfare Act requires that states make reasonable efforts at reunification in order to get federal funding,<sup>144</sup> it does not require that a finding of reasonable efforts be made as a prerequisite to termination of parental rights.<sup>145</sup> Although most states do make reasonable efforts a prerequisite to termination, a few do not.<sup>146</sup> Professor David Herring has argued that making the state child welfare agency show that it made reasonable efforts as a requirement to termination "punishes children for the failures of the state agency by trapping them in 'temporary' foster care placements."<sup>147</sup> Professor Herring argues that reasonable efforts should not be a requirement for termination, but that the court instead should focus on "assessing the possible effectiveness of future services" in providing "a realistic hope that the parents will be able to provide a permanent home for the child within a time period that will meet the child's developmental needs."<sup>148</sup>

While this argument has appeal, it fails to address the fact that not including reasonable efforts as a prerequisite to termination punishes the parent, and perhaps the child who might have been reunified with the parent, for the agency's failures. While Professor Herring

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"clear and convincing" evidence. *Santosky*, 455 U.S. at 748. Although the Supreme Court has refrained from entitling parents to a right to counsel in termination proceedings, it has suggested that parents should be given counsel in certain cases and that such determination should be decided on a case-by-case basis. See *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 31-32 (1981). See generally Soler et al., *supra* note 2, ¶ 4.14[3] (discussing constitutional protections for parents in termination proceedings). Although the Court has not decided the issue of whether reasonable efforts are constitutionally required, some commentators argue that under the test set out in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), due process does not require the state to make reasonable efforts at family reunification. See, e.g., Herring, *supra* note 84, at 163-70 (discussing whether due process calls for reasonable efforts as precondition to termination of parental rights).

<sup>143</sup> N.Y. Soc. Serv. Law § 384-b(1)(a)(iii) (McKinney 1992).

<sup>144</sup> See 42 U.S.C. § 671(a)(15) (1994).

<sup>145</sup> See Shotton, *supra* note 47, at 226 (discussing lack of guidelines for when judges should make reasonable efforts determinations).

<sup>146</sup> Of the states that have length-of-time-out-of-custody statutes, Delaware, Georgia, Illinois, Indiana, Iowa, Montana, New Mexico, Oklahoma, Pennsylvania, and South Carolina do not have statutory reasonable efforts requirements. See *supra* notes 83-84.

<sup>147</sup> Herring, *supra* note 84, at 143.

<sup>148</sup> *Id.* at 195.

argues that reasonable efforts should be rigorously enforced by the courts at earlier stages in the dependency process,<sup>149</sup> under his proposal an agency's failure to make those efforts by the TPR stage would not preclude termination. Thus, a parent who might well be able to reunite with her children given the appropriate services might have her rights terminated even though the agency had provided her with little assistance.<sup>150</sup> The requirement of reasonable efforts at the termination stage is intended not merely to create an incentive for the agency to provide services, as Professor Herring suggests,<sup>151</sup> but to ensure both that children are not taken from their parents unless absolutely necessary and that the goal of permanency is achieved.

Insistence on reasonable efforts as a prerequisite to termination is especially important given that historically agencies often have failed to make sufficient attempts at reuniting the biological family.<sup>152</sup> Studies in the late 1970s showed that agency caseworkers contacted biological parents only sporadically<sup>153</sup> and often impeded parents from maintaining contact with the child.<sup>154</sup> The case books are replete with instances in which agency workers either intentionally obstructed steps that would lead to reunification or failed to make the reasonable efforts that would help parents reunite with their children.

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<sup>149</sup> See *id.* at 204 ("In an ideal world, in conjunction with removing the reasonable efforts requirement from TPR statutes [sic], state legislatures would enact child welfare statutes that require the courts to enforce the reasonable efforts requirement actively at all the key stages of a civil child protection proceeding prior to the TPR stage.").

<sup>150</sup> Reliance on the court's consideration of whether future services realistically would lead to reunification as outlined by Herring would be a poor substitute for the prior provision of reasonable efforts. Requiring speculation about what might happen in the future asks the court to go beyond its already difficult task of balancing interests and become a prognosticator of future events. Besides demanding the near impossible, such a scheme opens up tremendous opportunity for judicial bias. Moreover, the fact that the parent had not been able to regain custody at the time of the termination hearing might weigh heavily in the court's future predictions *even if* such inability had been due largely to lack of reasonable efforts.

<sup>151</sup> Herring claims that the "strongest argument for inclusion of the reasonable efforts requirement at the TPR stage is that, theoretically, it will provide an incentive for the child welfare agency to make reasonable efforts at every stage of a case." Herring, *supra* note 84, at 143. He rejects the argument that the reasonable efforts requirement provides such an incentive, however, "[s]ince only a small fraction . . . of the child welfare cases that enter the judicial system ever proceed to the TPR stage." *Id.*

<sup>152</sup> See Garrison, *supra* note 15, at 428-29.

<sup>153</sup> See, e.g., Shirley M. Vasaly, *Foster Care in Five States* 32 (1976). This study showed that in Iowa only 65%, and in Massachusetts less than 65%, of the biological mothers surveyed had been contacted by the child welfare agency in the previous six months. *Id.* Contacts between the agency and the parents drop sharply after the child had been in placement for one year. See Shapiro, *supra* note 92, at 73-75.

<sup>154</sup> See, e.g., Alan R. Gruber, *Foster Home Care in Massachusetts* 49 (1973) (stating that 37.5% of parents reported that agency caseworker informed them that visiting their child was inappropriate).

Caseworkers have been known to fail to assist parents in obtaining housing,<sup>155</sup> to unreasonably oppose visitation of the child by the parent,<sup>156</sup> to place children in homes that are not easily accessible to the parent,<sup>157</sup> to fail to tailor the reasonable efforts to the specific problems facing the family,<sup>158</sup> and, in some instances, to not do much of anything at all.<sup>159</sup>

#### 4. *Vague Reasonable Efforts Requirements*

While most states do require the child welfare agency to show that it made reasonable efforts at reunification as a prerequisite to termination, the definition of "reasonable efforts" is often unclear. The Child Welfare Act does not define reasonable efforts,<sup>160</sup> and only a few state statutes outline specific steps and time lines mandated by "reasonable efforts" at reunification.<sup>161</sup> At best, this lack of legislative definition leads to inconsistencies from case to case, as well as confusion on the part of child welfare agencies and judges as to what at-

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<sup>155</sup> See, e.g., *In re Verona Jonice N.*, 581 N.Y.S.2d 11, 12 (App. Div. 1992) (finding that caseworker, by his own admission, failed to "do anything" to help mother obtain housing, despite her request for letter that would assist her in getting Section 8 housing); see also Shotton, *supra* note 47, at 248-49 (describing cases in which agencies failed to provide assistance in finding housing).

<sup>156</sup> See, e.g., *In re Amber "W"*, 481 N.Y.S.2d 886, 888-89, 890 (App. Div. 1984) (agency refused to allow mother to visit with her daughter on Christmas day); cf. Shotton, *supra* note 47, at 249-50 (citing study that found that frequency of visits was determined by "agency policy and resources, where the child is placed, the cooperation of the foster parents, and caseworker attitudes" and *not* by wishes of parents).

<sup>157</sup> See, e.g., *Amber "W"*, 481 N.Y.S.2d at 890 ("Although [the agency] did attempt to supply transportation, it located [the child] in minimally accessible homes.").

<sup>158</sup> See, e.g., *In re Sean "F"*, 547 N.Y.S.2d 938, 940-41 (App. Div. 1989) (agency failed to provide mother with "services to help her cope with her husband's alcohol abuse"); cf. Shotton, *supra* note 47, at 241-45 (discussing extent to which courts demand that agencies' reasonable efforts be specifically tailored to circumstances of individual case).

<sup>159</sup> See, e.g., *In re Kimberly "I"*, 421 N.Y.S.2d 649, 651 (App. Div. 1979) (finding that agency gave "little help" to biological mother).

<sup>160</sup> See Shotton, *supra* note 47, at 223.

<sup>161</sup> No state with a length-of-time-out-of-custody ground gives a comprehensive definition of what reasonable efforts entails. Some states, however, have outlined a few considerations. See, e.g., Me. Rev. Stat. Ann. tit. 22, § 4041(1) (West 1964) (requiring reunification plan that includes reasons for child's removal, necessary changes for child to return home, services available to parents, visitation schedule, and reunification timetable); Minn. Stat. Ann. § 257.071 (West Supp. 1996) (requiring case plan describing, among other things, reasons for child's removal, actions necessary to correct problems, and timetable); Wash. Rev. Code Ann. § 13.34.130(3) (West Supp. 1996) (requiring plan specifying steps to be taken to return child home); see also Kusserow, *supra* note 7, at 11 ("Few States have in statute a specific definition of what constitutes 'reasonable efforts to reunite.'"); North Am. Council on Adoptable Children, *supra* note 57, at 3 (reporting that six states have specific steps and time lines for reasonable efforts).

tempts at reunification are necessary before termination can occur.<sup>162</sup> At worst, it creates a termination system that is vulnerable to the individual biases of caseworkers and judges. Many judges and agencies have no clear understanding of what "reasonable efforts" means.<sup>163</sup> Without clear guidelines, the reasonable efforts standard becomes a rubber stamp that lends official imprimatur to the subjective decisions of caseworkers and judges. Indeed, more than one commentator has suggested that some judges "'rubber stamp' reasonable efforts" on cases without insisting that the agency meet its burden.<sup>164</sup>

### *C. Redrafting Length-of-Time-Out-of-Custody Statutes to Include Protective Measures*

As demonstrated above, substantial flaws exist in many length-of-time-out-of-custody statutes. They often do not specify clearly what factors a court should consider in adjudicating a termination case—factors such as the child's bonds with the biological and foster parents, the child's likelihood of adoption, and the specific reasonable efforts that the agency must make at reunification—thereby compromising their ability to achieve the intended goal of permanency for the child. The question remains as to what steps will remedy these failures.

As a threshold matter, it could be argued that length-of-time-out-of-custody statutes should be eliminated altogether. Under such a scenario, states could terminate parental rights only upon a showing of other grounds such as abandonment or abuse. Such a situation currently exists in the states that do not use length of time out of custody as a ground for termination. Given the benefits to length-of-time-out-of-custody statutes,<sup>165</sup> however, eliminating this ground for termination would be unwarranted. Despite its flaws, the length-of-time-out-of-custody ground serves an important role in allowing for the termination of the rights of a parent whose behavior does not rise to the level of abuse yet clearly harms the child. This is especially true when

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<sup>162</sup> See Kusserow, *supra* note 7, at 11 ("Without such a definition, State agencies and courts are left without guidance concerning the legally adequate level of help which they must provide to families in order to guarantee that parental rights to due process have been met."); see also Shotton, *supra* note 47, at 225 (noting that lack of definition has been "significant obstacle" to successful implementation of child welfare reform).

<sup>163</sup> See Shotton, *supra* note 47, at 227 ("[M]any judges simply ignore the reasonable efforts requirement or else make positive findings based on inaccurate or incomplete information."); cf. *id.* at 241 ("Many child welfare workers want to know what their duty under the reasonable efforts requirement is in engaging families to accept services.").

<sup>164</sup> Edwards, *supra* note 45, at 13; see also Shotton, *supra* note 47, at 227 ("For many judges, determining whether reasonable efforts have been made involves little more than checking a box on a court form, with no discussion of the issue.").

<sup>165</sup> See *supra* Part II.A.

the child has had little contact with the parent and is placed in a foster family that wishes to adopt. This Note strongly advocates that all states adopt length of time out of custody as a ground for termination, provided that certain protective measures are included.

The goal of such protective measures should be to prevent children from losing parents with whom they have bonded when the family could be reunited given the proper services or when there is little likelihood that the child will be adopted after termination. Specifically, states should include at least three protective components in their length-of-time-out-of-custody legislation: (1) a list of specific factors that the court should consider in evaluating the best interests of the child; (2) an incorporation of different statutory time periods for children of different ages; and (3) a detailed definition of "reasonable efforts."

### *1. Statutory Best Interests*

While courts should be given flexibility in making the sensitive and fact-specific determination of whether termination of a parent's rights would be in the best interests of the child, judicial discretion should not go unbounded. States that have not done so already should tailor statutory guidelines specific to the context of the length-of-time-out-of-custody ground. While the best interests standard pervades most disputes involving children, clear delineation of the best interests determination is particularly important in the context of termination of parental rights and length-of-time-out-of-custody statutes. Since the length-of-time-out-of-custody ground is already broad—allowing termination with no showing of abuse or neglect—the best interests determination should not broaden the ground further or become a permit for unbridled judicial discretion.

Such a statutory best interests standard should, at a minimum, include consideration of the closeness of the relationships of the child with the parent and foster parent, as well as factors that would point to the likelihood of the child being adopted, such as whether she is currently placed in a preadoptive home. These considerations go directly to the central goal of the length-of-time-out-of-custody ground—achieving permanency for the child. The statute should mandate that the judge consider each of these factors in making the best interests determination. This gives the judge guidance and lessens the opportunity for bias while also allowing the judge to engage in the delicate balancing of factors required in almost all termination cases.

The statutory best interests standard should list specific factors to be considered in determining the strength of the child's bonds with

her parent and foster parents. Some states already have taken steps in this direction. In Ohio, for example, the termination statute provides a list of factors that the court must consider and evaluate in deciding what is in the child's best interests, including "[t]he interaction and interrelationship of the child with his parents, siblings, relatives, foster parents and out-of-home providers" as well as the likelihood of adoption.<sup>166</sup> These factors specifically direct the court's attention to the quality of relationships that the child has with the biological and foster parents and the extent to which termination would disrupt or promote these relationships and the health of the child.<sup>167</sup> While these guidelines do not necessarily restrict the judge from considering other factors, in practice they may limit the scope of discretion by requiring the judge to consider affirmatively those factors that are specified.

In addition, the statutory best interests standard should require consideration of the likelihood of the child's adoption were the parent's rights to be terminated. Some states have already attempted to address the concern that the length-of-time-out-of-custody termination ground will create a new generation of legal orphans by requiring that termination also be accompanied by a showing that the child will likely be adopted. Rhode Island, for example, considers whether the

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<sup>166</sup> Ohio Rev. Code Ann. § 2151.414(D)(2) (Baldwin 1994). Delaware also provides a list of factors to be considered in determining the child's best interests. See Del. Code Ann. tit. 13, § 722(a) (1993) (listing six relevant factors including desires of child's parents, desires of child, child's relationship with others in household, child's adjustment to her environment, health of all individuals involved, and prior and current actions of parents). Despite the benefits that the Delaware statutory criteria provide, they are somewhat problematic in that they are judicially implied from the state's custody-dispute statute. See *In re Burns*, 519 A.2d 638, 644 (Del. 1986) (holding that statutory criteria listed in Del. Code Ann. tit. 13, § 722(a) for the determination of child's best interests in custody action "apply with equal force" to termination proceeding). As a result, factors that are uniquely important in termination cases, such as the likelihood of the child's adoption, are not included among the criteria. Delaware and other states would benefit from a statutory scheme, such as that of Ohio, that tailors specific best interests criteria for consideration solely in termination proceedings. For examples of other state statutes that specify factors to be considered in the best interests determination, see, e.g., Me. Rev. Stat. Ann. tit. 22, § 4055(2) (West Supp. 1995) (requiring consideration of child's needs, including age, attachments to persons, periods of attachments and separation, ability to integrate, and physical and emotional needs); Md. Code Ann., Fam. Law §§ 5-312(c), -313(c) (1991) (requiring consideration of child's emotional ties and adjustment to current environment); Nev. Rev. Stat. § 128.108 (1957) (requiring consideration of child's emotional ties and comparison between natural and foster parents); R.I. Gen. Laws § 15-7-7(3) (Supp. 1995) (requiring consideration of child's needs, including level of integration into foster home); Tenn. Code Ann. § 36-1-113(h) (Supp. 1995) (requiring consideration of parent's actions and child's emotional needs); Utah Code Ann. § 78-3a-410 (Supp. 1996) (requiring consideration of child's emotional ties and relationship with parents and foster parents).

<sup>167</sup> It should be noted, however, that a statute that permits comparison between the biological and foster parents might be subject to constitutional challenge. See *supra* note 126.

child has been "integrated" into the foster family in deciding whether to terminate.<sup>168</sup> Rhode Island law further requires that the court review any case where a child has not been placed in an adoptive home within 180 days after the termination of her parent's rights.<sup>169</sup> Both Rhode Island and California require that the state child welfare agency submit a detailed report to the court relating to a child's likelihood of being adopted.<sup>170</sup> In California, this report must include information regarding the current search efforts for absent parents, the amount and nature of contact between the child and her parents or other extended family members, an evaluation of the child's characteristics and whether any of these "would make it difficult to find a person willing to adopt" the child,<sup>171</sup> the "eligibility and commitment of any identified prospective adoptive parent,"<sup>172</sup> and the relationship of the child to any prospective adoptive parent, including, if possible, a statement from the child concerning the placement and adoption.<sup>173</sup>

The California statute is not part of a length-of-time-out-of-custody statute but is incorporated into the statute requiring state courts to make periodic reviews of foster care placements. Nevertheless, it would be an excellent addition to other states' length-of-time-out-of-custody statutes. Requiring the court to weigh a specific group of factors, like those listed in the California statute, would allow the court to consider other options to termination if it determined that adoption was unlikely. At the same time, limiting the inquiry to specific factors would restrict judges' discretion and possibly limit judicial bias.<sup>174</sup> The criteria included in the California statute are particularly well suited to achieving these ends as they focus not only on the child's characteristics but also on her situation, such as whether she is in a potentially adoptive home or whether there are relatives who might be willing to adopt her. While the court might conclude, after evaluating these criteria, that the child is not likely to be adopted, such a

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<sup>168</sup> See R.I. Gen. Laws § 15-7-7(3) (Supp. 1995).

<sup>169</sup> See *id.* § 15-7-7(7) (requiring also that state file report describing permanent plans for child).

<sup>170</sup> See Cal. Welf. & Inst. Code § 366.22(a) (West Supp. 1996); R.I. Gen. Laws § 15-7-7(7) (Supp. 1995). In California, the court is required to direct the agency to prepare this assessment for a hearing that is held once a child has been in foster care for 18 months. See Cal. Welf. & Inst. Code § 366.22(b) (West Supp. 1996).

<sup>171</sup> Cal. Welf. & Inst. Code § 366.22(b)(3) (West Supp. 1996).

<sup>172</sup> *Id.* § 366.22(b)(4).

<sup>173</sup> *Id.* § 366.22(b)(5).

<sup>174</sup> The California statute does not require the court to consider the factors listed but only to order the child welfare agency to prepare a report evaluating such factors. In incorporating these or similar factors into a length-of-time-out-of-custody statute, a solution that would limit judicial bias more effectively would require the court itself to consider each factor.

conclusion would be based on a weighing of carefully considered factors rather than a quick judgment influenced by stereotypes that the judge might have.<sup>175</sup>

## 2. *Statutory Time Frames*

States, in addition, should tailor the statutory time period to the age of the child involved. There are strong arguments for making the length-of-time-out-of-custody requirement shorter for younger children. First, at a young age the child is more likely to be adopted. Second, a young child who has been away from her parents for the statutory length of time is likely to have spent little time with her biological parent and may well have formed a close bond and spent most of her life with her foster parent. A shorter statutory period would allow for speedier termination in those cases in which Goldstein, Freud, and Solnit's theory of the psychological parent is at its strongest—where a young child has been placed since infancy with a foster parent and has had little meaningful contact with the biological parent. It would then slow termination in cases where there is potential for a child having formed attachments to her biological parent—when she is older and has lived with or had significant contact with that parent. Thus, statutes, such as those of Delaware and Wisconsin, that create shorter statutory time requirements for infants are desirable.<sup>176</sup> Wisconsin, for instance, requires that the child be out of the custody of the parent for one year if the child is older than three but that the child only be out of custody for six months if the child is younger than three.<sup>177</sup>

This is just one example of how such a scheme might look. This Note does not suggest specific length-of-time requirements appropriate to each age. Roughly, such a system should take into account

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<sup>175</sup> Admittedly, such a design relies on agency caseworkers' willingness to place even "hard to place" children in adoptive homes and not label such children as "unadoptable." That the agency would have to report specific findings to the court, however, might ameliorate the problem of agency bias. Furthermore, agencies could develop policies to minimize bias and maximize the chances of adoption for children for whom it will be difficult to find adoptive parents. Some child welfare agencies, for instance, have developed criteria for identifying children whose parents' rights are most likely to be terminated. The agency can then work to place such children in potentially adoptive homes from the outset. See Linda Katz & Chris Robinson, *Foster Care Drift: A Risk-Assessment Matrix*, 70 *Child Welfare* 347, 347-49 (1991) (proposing method of identifying children who have least chance of returning to their families).

<sup>176</sup> See, e.g., Del. Code Ann. tit. 13, § 1103(a)(5)(a)(1) (1993) (lowering length of time from one year to six months if child "comes into care as an infant"); Wis. Stat. § 48.415(2)(c) (1993-1994) (lowering length of time from one year for child of three years or older to six months for child less than three years old).

<sup>177</sup> See Wis. Stat. § 48.415(2)(c) (1993-1994).

well-established developmental stages first developed in the work of Erikson and Piaget,<sup>178</sup> as well as the effect that separation from a caregiver might have on children of different ages as discussed in the works of attachment theorists.<sup>179</sup> Ultimately, however, this determination should be made by state legislatures after obtaining the advice of child-development experts as well as practitioners experienced in the realities of the child welfare system. Although such a statutory scheme does not prevent judicial bias based on class, race, or other factors, it does give guidance to both the state child welfare agency and the court as to when the speediest terminations are appropriate and when they are not.

Even if states decline to take this approach, they should carefully review their current length-of-time-out-of-custody statutes to ensure that they provide parents with enough time to make the changes necessary for reunification. Some states have very short length-of-time requirements that may not allow a reasonable amount of time for a parent to demonstrate that she can provide an appropriate home for the child. Oklahoma, for example, triggers the length-of-time-out-of-custody ground after only three months.<sup>180</sup> By almost any standard, this is too short an amount of time in which to expect a parent to show considerable progress.<sup>181</sup> As a result, a parent and child who might be able to reunite, given a reasonable amount of services and time, would lose each other forever.

### 3. *Statutorily Required Reasonable Efforts*

Finally, states should develop a detailed definition of “reasonable efforts” that should serve as a prerequisite to termination on length-of-time-out-of-custody grounds. As was argued in Part II.B, a requirement of reasonable efforts is necessary to protect children from being removed from parents who might be able to provide for them given the right services. Many commentators, however, have observed that the lack of definition of reasonable efforts leaves agencies

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<sup>178</sup> For an overview of the importance of the developmental stages developed by Erikson and Piaget to child abuse and neglect issues, see 2 Haralambie, *supra* note 5, §§ 24.01-07.

<sup>179</sup> See *supra* note 101; see also 2 Haralambie, *supra* note 5, § 24.06-07 (giving overview of attachment theory and its application to child welfare cases).

<sup>180</sup> See *supra* note 66.

<sup>181</sup> The American Bar Association (ABA) has explicitly rejected time requirements under two years, concluding that parents would not reasonably be able to remedy their situation in less time. See Standards Relating to Abuse and Neglect, Standard 8.3 commentary at 167 (Juvenile Justice Standards Project, Institute of Judicial Admin.-ABA Joint Comm’n on Juvenile Justice Standards 1981). While two years may be an excessive amount of time in some instances—especially if the child was placed as an infant—the ABA’s position suggests that three months may be too short.

and courts in a state of confusion, makes termination statutes difficult to implement, and opens the door to judicial and agency bias against the biological parent.<sup>182</sup>

In formulating a clearer definition of "reasonable efforts," state legislatures should attempt to establish specific guidelines without unduly restricting the flexibility of agencies and courts. The definition of reasonable efforts in a state statute should require that the services provided specifically address the problems that led to the child's removal from the home.<sup>183</sup> It also should mandate consideration of the availability of such services to the parent in terms of time and location, and the diligence of the agency in finding appropriate services and following up with parents.<sup>184</sup> Furthermore, it should establish guidelines for permitting frequent visitation by the parent where it would not be harmful to the child, and should facilitate such frequent visitation by requiring the agency to make diligent efforts to place the child close to the parent's home or with friends or family where possible.<sup>185</sup>

In addition, states should list specific services that must be provided to families where appropriate. A starting place for developing such a list would be the Department of Health and Human Services's suggested services, which include: emergency caretaker and homemaker services; day care; crisis counseling; individual and family counseling; emergency shelters; emergency financial assistance; self-help groups; services to unmarried parents; mental health, drug, and alcohol abuse counseling; and vocational counseling or rehabilitation.<sup>186</sup> Other services that should be incorporated into such a list would be help in obtaining housing and public assistance as well as a provision of parenting training. State legislatures also should consult with local child welfare agencies and service providers about what services are especially needed within the community and should be included in a

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<sup>182</sup> See *supra* notes 162-64 and accompanying text.

<sup>183</sup> For a discussion of the importance of tailoring reasonable efforts to the "strengths and needs" of the family, see Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. Rev. L. & Soc. Change 311, 315-18 (1996). Beyer also emphasizes that the standard for returning the child to the home should be one of minimal adequacy, not optimality. See *id.* at 318-23.

<sup>184</sup> For a discussion of these factors and others, see Ratterman et al., *supra* note 47, at 10-13.

<sup>185</sup> Beyer also emphasizes the importance of "immediate and frequent" visitation in working towards reunification of the biological family. See Beyer, *supra* note 183, at 336.

<sup>186</sup> See 45 C.F.R. § 1357.15(e)(2) (1986) (listing available services). Minnesota provides a good example of a statutory definition of reasonable efforts; Minn. Stat. § 260.012(b) (1992), which cross-references a specific list of services, contained in Minn. Stat. § 256F.03(5) (Supp. 1996), that may be provided, including counseling, life-management skills services, and mental health services.

definition of "reasonable efforts." Legislatures should be open to revising the definition as new problems arise and new treatments become available in the community. The codification of such factors would give a clear, consistent signal to the child welfare agency and the courts as to what their duties are and would help to contain bias against the biological parent.

While the legislature should be responsible for defining "reasonable efforts" in order to give clear guidance to judges and avoid inconsistent determinations, courts nevertheless have an important role to play. Currently, many courts do not actively inquire at initial placement and foster care review hearings as to whether the agency has provided reasonable efforts.<sup>187</sup> This may lull caseworkers into believing that little need be done to satisfy "reasonable efforts" at the TPR stage. Courts can limit this problem by putting caseworkers and parents alike on notice as soon as the child enters foster care as to what will be required of them during the statutory length-of-time-out-of-custody period.<sup>188</sup> Research shows that the articulation of such a time frame to the parent, coupled with adequate services, results in higher rates of permanency for the children, either by termination/adoption or return to the family.<sup>189</sup>

### III

#### ADDRESSING THE UNDERLYING THEORETICAL PROBLEM IN LENGTH-OF-TIME-OUT-OF-CUSTODY STATUTES

Inclusion of protective measures in length-of-time-out-of-custody statutes undoubtedly will decrease the likelihood of terminations that do more harm than good and that do not lead to permanency for the child. Nevertheless, the length-of-time-out-of-custody ground remains problematic. While Part II focused on doctrinal criticisms of length-of-time-out-of-custody statutes and their repair through statutory reworking, this Part identifies problems of implementation even assuming a perfect statute. Specifically, this Part demonstrates that length-of-time-out-of-custody statutes engender conflicting incentives in state child welfare agencies—creating incentives to preserve the parent-child relationship while at the same time creating opposing incentives to terminate that same relationship. This Part then develops

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<sup>187</sup> See Herring, *supra* note 84, at 203-04.

<sup>188</sup> See generally Edwards, *supra* note 45, at 19 (arguing for more active judicial involvement in enforcing reasonable efforts standards).

<sup>189</sup> See, e.g., Linda Katz, *Effective Permanency Planning for Children in Foster Care*, 35 Soc. Work 220, 220 (1990) (describing model project that increased permanency in Washington and Idaho).

a scheme by which such incentives can be realigned to better ensure that a parent's rights are terminated only when necessary.

*A. The Conflicting Goals of Length-of-Time-Out-of-Custody Statutes*

While the problems in the drafting and implementation of length-of-time-out-of-custody statutes discussed in Part II.B have received attention, few legal commentators have examined the underlying theoretical conflict that is at the heart of the length-of-time-out-of-custody ground. This conflict stems from the dual purposes that length-of-time-out-of-custody statutes attempt to serve: reunification (before the statutory period) and termination (after the statutory period). During the specified period, length-of-time-out-of-custody statutes promote reunification and prevent termination of parental rights for anything not rising to the level of other grounds such as abuse. The parent's behavior is presumed not to have reached a level that merits termination, and state and federal laws mandate that the state child welfare agency use reasonable efforts to reunite the biological parent and child.<sup>190</sup> Once the statutory period has passed, however, the statute becomes a tool for effecting termination. The state child welfare agency may shift gears and actively pursue termination instead of reunification.

These dual purposes create conflicting incentives for both the child welfare agency and the biological parent. Length-of-time-out-of-custody statutes cast the child welfare agency in the conflicting roles of family preserver and advocate for termination. The goals of one role are likely to dampen the goals of the other. For example, the agency, by virtue of its institutional position, may fail to assume fully the role of family preserver and instead maintain an ambivalent position toward the biological parent and ally itself with the foster parent.<sup>191</sup> The agency is usually responsible for investigating the biological family and making the initial recommendation to remove the child from the home.<sup>192</sup> Thus, from the start the agency's role is more that of an adversary than that of an advocate. Furthermore, the agency is responsible for recruiting and training foster parents, thus

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<sup>190</sup> This is the case even in states that do not make reasonable efforts a prerequisite to termination because those states must still require reasonable efforts at reunification in order to receive federal funding.

<sup>191</sup> See generally Peg McCartt Hess & Gail Folaron, *Ambivalences: A Challenge to Permanency for Children*, 70 *Child Welfare* 403 (1991) (describing ambivalence of caseworkers regarding reunification of child with parent).

<sup>192</sup> See Soler et al., *supra* note 2, ¶ 4.06[4] (noting that primary decisionmaking power rests with agency).

creating a certain allegiance to them.<sup>193</sup> Despite the possibility that the agency, because of these factors, may be closely allied to the foster parent and even antagonistic to the biological parent, the length-of-time-out-of-custody statute assigns to the agency the role of reunifying the biological family. Given these conflicting incentives, it is not surprising that child welfare agencies are often found not to have made reasonable efforts at reunification.<sup>194</sup> While underfunding and heavy caseloads are also factors in the failure to make reasonable efforts at reunification,<sup>195</sup> these problems cannot explain all such failures.

Another conflict that the dual nature of the statute creates for the agency relates to the point in time at which the agency will decide to shift gears from reunification to termination. While length-of-time-out-of-custody statutes, by definition, specify the point in time after which termination proceedings may be brought under length-of-time-out-of-custody grounds, they do not make TPR proceedings mandatory at that point. Rather, the agency usually has broad discretion in deciding when it will shift gears from reunification to termination, if it does so at all.<sup>196</sup> This unbounded discretion may magnify the conflict in cases where the agency is ambivalent about the biological parent. Caseworkers who harbor mixed feelings towards the biological parents have "no real incentive to provide immediate effective services for the parents" in the absence of time lines from the courts and legislatures.<sup>197</sup> The underlying attitude of the agency often is to give the parent just enough rope to hang herself. The agency may convey little urgency to the parent and delay the onset of termination

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<sup>193</sup> See Theodore J. Stein, *Child Welfare and the Law* 60 (1991) ("Agencies recruit foster parents, license their homes, pay a board rate for each child placed in the home, generally provide training for foster parents, and offer services to help them deal with the children placed in their care.").

<sup>194</sup> See *supra* notes 152-59 and accompanying text; see also Herring, *supra* note 84, at 180 n.117 (citing Federal Adoption Program: Hearing Before the Subcomm. of Human Resources of the House Comm. on Ways and Means, 102d Cong., 1st Sess. 79, 111 (1991) (report of Department of Health & Human Servs. Office of Inspector Gen., *Barrier to Freeing Children for Adoption*), as stating that more than 75% of respondents in state survey reported that primary barrier to permanency was failure of child welfare agencies to meet reasonable efforts standards).

<sup>195</sup> See Robert Pear, *Many States Fail to Meet Mandates on Child Welfare*, N.Y. Times, Mar. 17, 1996, at A1 (quoting statistic from executive director of Child Welfare League of America that social workers often handle 50 to 70 cases each).

<sup>196</sup> See Hess & Folaron, *supra* note 191, at 416-17 (noting that regulations and courts frequently do not provide agencies with timetables for case plans).

<sup>197</sup> Paul Johnson & Katharine Cahn, *Improving Child Welfare Practice Through Improvements in Attorney-Social Worker Relationships*, 54 U. Pitt. L. Rev. 229, 236 (1992). Caseworkers also may delay filing termination petitions due to fear of the adversarial nature of the termination proceeding and the possibility that they will come under attack. See Herring, *supra* note 84, at 180.

proceedings until “the parent’s inadequacies . . . surface.”<sup>198</sup> The more time that passes without the parent doing what is necessary to regain custody, the stronger the agency’s case for termination becomes.

The dual purposes of the length-of-time-out-of-custody statutes also create conflicting incentives for the biological parents. Because termination only becomes an impending threat once the statutory length of time out of custody has been reached and the agency decides to move forward with TPR proceedings, length-of-time-out-of-custody statutes initially may lull parents into believing that their rights will not be terminated. The biological parent may feel no sense of urgency in making life changes that will enable her to regain custody of her child, despite her desire to do so. This lack of urgency may be conveyed by the court as well as the caseworker. As discussed above, caseworkers may not have strong incentives to press for change in the parent’s behavior, but courts also may be lax in monitoring the parent’s progress during foster care review hearings.<sup>199</sup>

Moreover, even if the threat of termination always loomed large in the mind of a parent whose child was in foster care, it might not effect the desired changes in her behavior. The threat of termination alone, without supportive services, is unlikely to motivate many parents to take the necessary steps for reunification with their children in foster care. This is especially so if the parent is drug addicted. Some studies have shown that the threat of loss of custody alone does not motivate many drug-using parents to participate in court-ordered drug treatment programs.<sup>200</sup> Other commentators have suggested that women addicts tend to have “intense feelings of fear, isolation, and low self-esteem,”<sup>201</sup> which make it difficult for them to seek treatment.<sup>202</sup> These commentators argue that services must be delivered to such parents in a way that “provide[s] support and hope, rather than compound[ing] guilt.”<sup>203</sup> Thus, to be successful, reasonable efforts not only need to be provided, but also need to be provided in a support-

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<sup>198</sup> 2 Haralambie, *supra* note 5, § 13.20 (discussing use of such strategy by attorney for petitioner).

<sup>199</sup> See Johnson & Cahn, *supra* note 197, at 236 (“[W]ithout specific consequences for delay, parents who were making only minimal progress were able to obtain extensions [to their court-ordered plans] easily.”). For a description of the foster care review hearing, see *supra* note 49 and accompanying text.

<sup>200</sup> See Wendy Chavkin et al., *Drug-Using Families and Child Protection: Results of a Study and Implications for Change*, 54 U. Pitt. L. Rev. 295, 311 (1992) (citing Richard Famularo et al., *Parental Compliance to Court-Ordered Treatment Interventions in Cases of Child Maltreatment*, 13 Child Abuse & Neglect 507, 512 (1989)).

<sup>201</sup> *Id.* at 297.

<sup>202</sup> See *id.* at 297, 319-20.

<sup>203</sup> *Id.* at 320.

ive, nonthreatening way. Indeed, the implied ultimatum of the length-of-time-out-of-custody statute may actually backfire in cases where the parent suffers from drug addiction or other emotional problems. Rather than motivating these parents to change their problematic behavior, the threat of loss of custody may exacerbate those problems.<sup>204</sup>

### *B. Addressing the Problem of Conflicting Incentives*

Length-of-time-out-of-custody statutes create a system in which neither the state child welfare agency nor the biological parent may have incentives to actively and speedily work towards reunification of the family and permanency for the child. This section suggests reforms that might realign these incentives so that the agency and parent both make greater efforts for reunification in the early stages of the child's placement out of the home. These reforms are designed as additions to, not replacements for, the recommendations made in Part II.C. Statutorily defined best interests, time frames, and reasonable efforts are integral to the effectiveness of the following proposals.

#### *1. Putting a Time Cap on Use of the Length-of-Time-Out-of-Custody Ground*

One possible means of realigning incentives would be to put a time cap on the period in which a length-of-time-out-of-custody statute can be used. Under this system, the length-of-time-out-of-custody ground could be used only during a specified window of time. For instance, once a child has been out of the parent's custody for the period required by the length-of-time-out-of-custody statute, the state would then have one more year, or another statutorily specified amount of time, to file a termination suit based on length-of-time-out-of-custody grounds. After that period expires, the parent's rights can be terminated only upon a showing of other grounds such as abandonment or abuse. While the parent's rights cannot be terminated short of such a showing, the court could determine that it was in the best interests of the child for her to remain in the custody of the foster parent rather than to return to the biological parent. Such an arrangement would permit visitation between the child and parent if no harm to the child would result, and it would allow the parent to regain cus-

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<sup>204</sup> See *id.* at 319 ("These problems are likely to be exacerbated by the uncertainty about continued custody of the child . . ."). The fact that many caseworkers are not trained in alcohol and drug abuse treatment will also exacerbate those problems. See Elizabeth M. Tracy & Kathleen J. Farkas, *Preparing Practitioners for Child Welfare Practice with Substance-Abusing Families*, 73 *Child Welfare* 57, 57 (1994).

tody if it appeared to be in the best interests of the child.<sup>205</sup> In extraordinary circumstances, the child welfare agency could petition the court for permission to bring a length-of-time-out-of-custody termination suit after the statutory time cap has expired. Such a measure would be disfavored, however, and the agency would carry a heavy burden in order to go forward. The agency would need to demonstrate both that the child would otherwise suffer irrevocable harm and that the agency most likely would succeed on the merits.

This scheme would introduce the urgency that heretofore has been lacking in the length-of-time-out-of-custody ground. With a time cap, the agency would have only a limited time to file a termination suit; therefore, it would focus much earlier on whether the facts of the situation merited such a resolution. Rather than permitting the parent to continue along without making substantial progress toward reunification, the agency would have to evaluate whether the parent's behavior rose to a level that required termination. The agency also would evaluate the child's condition and the possibility of achieving permanence. If neither the parent's behavior nor the child's condition required termination, the agency still would have every incentive to provide comprehensive services to the parent since in all likelihood she would retain her parental rights barring termination on other grounds. If the parent's lack of progress towards reunification or the child's condition did merit termination, the agency still would have an incentive to use reasonable efforts since if it failed to do so it would not succeed in the termination proceeding and the time cap might expire before it has a chance to bring another suit.<sup>206</sup> A time cap would also convey a sense of urgency to the parent. The pressure placed on the agency would no doubt be passed along to the parent both explicitly and through the provision of services that would meet the reasonable efforts requirement. It is likely under this model that the parent would comprehend more fully the extent to which her parental rights were imperiled.

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<sup>205</sup> Professor Garrison suggests that guardianship and long-term foster care that permit visitation with the biological parent and other relatives may actually be preferable to outright termination. See Garrison, *supra* note 15, at 425 ("[A]vailable evidence suggests that, even for a child who will never again live with his natural parents and whose contacts with them are infrequent, permanent placement that permits continued contact is better than adoption or any other placement that entails a total loss of contact with the natural parent."). Garrison argues that such an arrangement could be made permanent by foreclosing the possibility of the parent regaining custody or the foster parent relinquishing custody without a court order. See *id.* at 444 & n.103.

<sup>206</sup> This reasoning assumes that the state requires a showing of reasonable efforts as a prerequisite to termination, as recommended in Part II.C.

Several problems can be anticipated under such a time-cap model. First, such a scheme might not change the possibility that the agency would have ambivalent or biased attitudes towards the biological parent. While this point is no doubt true, a time cap would, when combined with the clearly developed reasonable efforts criteria recommended in Part II.C, substantially mitigate the effect of such attitudes. Under the time-cap model, even if the agency were grossly biased against the biological parent, it would have every incentive to provide reasonable efforts early on in the dependency process because it otherwise would fail in any length-of-time-out-of-custody termination suit it brought. Because the time cap would limit the time in which the agency has to bring such a suit, the agency could not rely merely on the parent's situation worsening over time, but also would have to demonstrate affirmatively that *despite the agency's reasonable efforts* the parent had not made the changes necessary for reunification. Furthermore, with clearly developed reasonable efforts guidelines in place, neither the agency nor the court would be in the dark as to the reasonable efforts required under the circumstances. Whether the agency liked it or not, under a clear reasonable efforts standard and a statutory time cap, it would have to provide reasonable efforts in a timely fashion.<sup>207</sup> Finally, agencies might consider assigning two different caseworkers to each case—one to advocate for reunification and provide reasonable efforts, the other to recommend termination if necessary. This division of roles might, to some extent, relieve the problem of conflicting incentives.<sup>208</sup>

A second potential criticism of the time-cap model is that because the agency would be under pressure to file termination suits before the statutory period ended, it would bring unwarranted suits for fear of losing the possibility of termination altogether. This problem, however, would be addressed, in part, by the heightened protections outlined in Part II.C. While the agency might well bring unwarranted suits, it should succeed in terminating the parent's rights only in cases where the claim is shown to be meritorious and in the best interests of the child under a set of specific guidelines.

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<sup>207</sup> Moreover, the provision of services might in and of itself provide a strong countervailing force against possible allegiance to the foster family and ambivalence toward the biological parents. Not only would the agency, in spite of any ambivalence it had towards the parent, be obligated to provide reasonable efforts earlier on, but also in so doing it might develop a loyalty to the parent. If the parent responded to the early provision of services, the agency would have reason to reconsider its ambivalence about the parent rather than simply to write her off.

<sup>208</sup> Such a division is unlikely to eliminate all conflicting incentives, however. Even if the tasks of family preservation and termination of parental rights were divided within the agency, at the supervisory level the agency would have to take on both roles.

The fact that such unmeritorious suits most likely would not succeed does not address a third criticism that even unsuccessful suits would be traumatic to the child and her family. This criticism ignores the central premise of the time-cap model—greater reasonable efforts provided earlier on will lead to fewer unmeritorious suits because more children who can safely return to home will have done so. In those circumstances where reasonable efforts have failed, termination may be appropriate, not unwarranted. In addition, the risk of unmeritorious suits would be further mitigated by the agency's ability, in extraordinary circumstances, to petition to bring a suit after the time cap has expired. As a final measure, judges could sanction attorneys who bring flagrantly unmeritorious suits.

A fourth conceivable criticism of the time-cap model is that it might foreclose the possibility of termination under length-of-time-out-of-custody grounds in some cases where it is needed. This might happen if an agency let a case slip through the cracks and did not file a timely termination suit. Nevertheless, while this danger certainly exists under the time-cap model, it is no greater than the dangers created by agency negligence under the current system—dangers such as the disruption of a parent-child relationship that might have been preserved through the provision of proper services. Furthermore, even where the possibility of termination is foreclosed by an agency error, the child would not return to her parent unless a court determined that it would be in her best interests. Thus, a stable environment could be created for the child despite foreclosed termination under the time-cap model.<sup>209</sup> Additionally, as outlined, the time-cap model would allow the agency to bring a length-of-time-out-of-custody suit beyond the statutory time cap if it could show that the child would otherwise be irrevocably injured and that the agency would likely succeed on the merits. This extraordinary measure would alleviate harm to the child in the most extreme cases.

Finally, one might argue that a time-cap scheme would put too much pressure on the parent. As was discussed in Part III.A, such pressure might have a tendency to backfire—causing the parent to withdraw from, rather than participate in, necessary treatment. This is one of the most difficult problems raised by the time-cap model. Not only does the time-cap model not address the way in which the length-

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<sup>209</sup> It should be noted here that even though the possibility of a stable environment would remain for the child where the agency let a case slip through the cracks, this would not lessen the incentive for the agency to provide reasonable efforts early on. Failing to file a termination petition where the agency deemed it necessary clearly would be an error. Caseworkers and lawyers who allowed this to occur likely would be censured by their supervisors and the court.

of-time-out-of-custody ground creates incentives for the parent to avoid treatment, it enhances those incentives. Its very purpose is to create a sense of urgency; thus, it will inherently have the effect of pressuring the parent in a potentially detrimental manner. Consequently, we must look to solutions outside the model that will assist the parent in taking steps towards reunification. One such solution may be found in the role that lawyers can play in realigning incentives during the child's placement outside of the home.

## 2. *The Role of Lawyers in the Time-Cap Model*

Lawyers may be an important resource in encouraging the agency to make reasonable efforts and the parent to work towards reunification. In fact, the lawyer for the parent may provide the support that the parent lacks under the above time-cap model.<sup>210</sup> Since the agency may have mixed incentives towards providing reasonable efforts at reunification, the lawyer for the parent is the only true advocate for her position. As such, the lawyer for the parent should determine what factors the agency believes led to the removal of the child from the home and what services are needed to help remedy those problems. She should then ensure that those services are provided. In particular, the lawyer can play an important role in lowering the stress of the parent who may feel under siege. The lawyer should make clear to the parent that if difficulties arise with the agency, the parent can rely on the lawyer to act as her advocate. For instance, if the agency wishes to place the child in a foster home that is located far from the parent's residence, the parent's lawyer should push for a closer placement or seek acceptable alternatives such as the agency providing transportation of the parent to the child.

Ironically, the time-cap model may create incentives for the parent's lawyer not to act as a strong advocate for reasonable efforts in the initial stages of the child's placement. If the agency, without policing, fails to make reasonable efforts, the parent's lawyer will have a strong defense should termination proceedings be brought. While this is always the case, the time-cap model raises the stakes by reducing the possibility that the agency will have a second shot at termination if it fails to demonstrate reasonable efforts during the first termination proceeding.

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<sup>210</sup> As an initial matter it bears mentioning that although parents in termination cases are not automatically guaranteed representation by counsel, see *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 31-32 (1981), courts should appoint counsel in almost every case for the reasons discussed in this section.

Lawyers for parents should avoid using such strategies. For one thing, the defense that reasonable efforts were not made may fail. This may be even more likely if the lawyer does not act as the parent's ally throughout the process. The agency may make a minimum of reasonable efforts, but without the support of her attorney the parent may fail to take full advantage of them. Using the above example, a court may find that reasonable efforts were made if the agency provides carfare for the parent to reach a remotely placed child. This set-up, however, may be too frustrating for a distraught parent to handle, and she may give up on visitation altogether. Had her attorney stepped in and demanded a closer placement or more support in accommodating visitation, the parent might have been able to continue visitation while she worked through other problems that were preventing reunification.

Under the time-cap model, the attorney for the agency also has an important role to fill early in the placement. Rather than stepping in once the agency is considering termination, the lawyer should be involved throughout the dependency process. This would be especially important under the time-cap model. The time-cap model would pressure the agency to focus on reasonable efforts early in the process, and the lawyer could be instrumental in advising caseworkers about what the reasonable efforts standard might demand in a given situation. The attorney would have an incentive to identify carefully what reasonable efforts required and to monitor the caseworker's implementation of such efforts, because if the agency could not show that it made reasonable efforts when it brought a length-of-time-out-of-custody proceeding, it likely would not have a second chance under the time-cap rule. Thus, ironically, under the time-cap rule, the lawyer for the agency would become an enforcer of the reasonable efforts standard.

Finally, there is an important role for the child's lawyer to play in the time-cap model. There is no constitutional requirement that children be represented in dependency and termination proceedings.<sup>211</sup> Most states, however, do provide counsel for the child, at least on a conditional basis.<sup>212</sup> Since the child's lawyer is likely to represent the party that has the fewest incentives to avoid the reasonable efforts standard, she can neutrally monitor the other parties' efforts at reunification. Unlike the agency, the child's lawyer will have no institutional allegiances to the foster parent. Nor will she inherently be

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<sup>211</sup> See Soler et al., *supra* note 2, ¶ 4.06[1] (concluding that children have no such constitutional right by analogizing to *Lassiter*).

<sup>212</sup> See *id.*

allied with the biological parent. Instead, she will be able to evaluate the best interests of the child from a neutral stance. Unlike the lawyer for the parent, the lawyer for the child will not benefit her client by overlooking an agency's failure to vigorously make reasonable efforts.<sup>213</sup> While the court can and should serve as a neutral monitor of the efforts being made at reunification by all parties, it must wait until a motion is filed or a foster care review hearing is scheduled in order to get involved. The child's lawyer, on the other hand, is in a position to monitor the case on a day-to-day basis, advocating for her client's interests in an informal way, or if all else fails making a motion to the court.<sup>214</sup>

Thus, there are compelling reasons for a child to be appointed counsel as soon as she is placed in foster care. Nevertheless, some states provide the child with counsel "only under specified circumstances, such as when there are allegations of abuse . . . or where there is a clear conflict between the child and the parent or the child and the agency."<sup>215</sup> Cases that have the potential to end in a length-of-time-out-of-custody termination, however, tend not to involve physical abuse. Thus a rule restricting appointment of counsel to only those

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<sup>213</sup> This argument presumes that the lawyer for the child will not act in an unethical manner by allowing any personal biases she holds for or against the biological parent to affect her representation of her client. A great deal has been written recently on the ethical role of the lawyer for the child in child-protection proceedings. See, e.g., Special Issue, Ethical Issues in the Legal Representation of Children, 64 *Fordham L. Rev.* 1279 (1996) (presenting more than 20 articles regarding legal representation of children). The issues involved in the ethical representation of the child-client are numerous and complex. For instance: Should a lawyer ever be able to substitute her own judgment for the wishes of her child-client? What if the child is preverbal or otherwise impaired in a way that makes her unable to express her wishes to her lawyer? What if the child can verbalize her wishes, but the attorney believes that they are the result of immature thinking or coercion by another party? What is the scope of positions for which an attorney is legally permitted to advocate in a given situation? This Note does not attempt to resolve these intricate questions, which have been debated at length in other forums. Rather, it merely suggests the useful role that a generally unbiased lawyer for the child can serve in encouraging reasonable efforts in the context of the time-cap model.

<sup>214</sup> Commentators have pointed out that "[m]uch of the work of the attorney [for the child] in dependency cases is done outside of the courtroom." Soler et al., *supra* note 2, ¶ 4.06[4]. Nevertheless, resort to the court can be necessary to ensure that services are provided. See *id.* ¶ 4.07[3]. One forceful exposition of the child's need for a lawyer early on in the placement states:

[T]he child's attorney should make intensive efforts on behalf of the child as soon as the case is initiated. Too often, a meaningful attempt to champion the child will not be made until the end of the proceeding. By that time, the state may have moved to terminate parental rights and it may be too late to obtain a favorable result for the child. From the child's viewpoint, then, early resolution of the matter is essential. Successful early advocacy for the child-client can obviate the need for intensive, and often unavailing, late efforts.

*Id.* ¶ 4.01[1] (citation omitted).

<sup>215</sup> *Id.* ¶ 4.06[1].

children who have been abused would eliminate the benefit that counsel for the child could provide not only to her client but to the system as a whole.

A rule that would provide counsel for the child only when clear conflict arose between the child and either the parent or agency is equally problematic. Such conflicts may not become clear until the child's chances for reunification are low. For instance, an agency might claim to work for reunification of the parent and child but do little to achieve that end. In such a case, if the child also desired reunification, the positions of the child and agency would not, technically, be in conflict. The reality, however, would be that the child would have no advocate to monitor and push the agency to help her reunite with her parent. Such an underlying conflict would be especially problematic in jurisdictions where the child is actually represented by the agency's lawyer.<sup>216</sup>

Although providing counsel to all children in foster care presents costs, the importance of ensuring permanency for the child may outweigh them. Furthermore, given the astounding expense of keeping children in foster care,<sup>217</sup> representation for children, which may help reunite them with their parents, is worth the cost.

### CONCLUSION

Length-of-time-out-of-custody legislation is a powerful yet unwieldy tool. Without the right protections it often can do more harm than good: terminating the rights of parents who might, with proper treatment, be able to care for their children; "freeing" children for adoption when no adoptive parents are likely to appear; separating children from parents whom they love and need despite their inadequacies. Most current TPR legislation was passed in the heyday of the permanency movement when these dangers were less obvious. It is now essential, with two decades-worth of insight into the benefits and dangers of termination, that states reevaluate their TPR statutes to ensure that they do in fact provide permanency for the child—that

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<sup>216</sup> See *id.* ¶ 4.06[2] (highlighting potential for conflict of interest where child is represented by lawyer for agency); see also Christopher N. Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases*, 64 *Fordham L. Rev.* 1857, 1865-68 (1996) (pointing to two jurisdictions, California and Oregon, which allow dual representation of agency and child in dependency cases, and discussing potential conflicts of interest that might arise from such rule).

<sup>217</sup> In fiscal year 1994, \$2,898,862,000 was awarded under Title IV-E to support children in foster care. See Facsimile Transmission from Jim Rich, Administration for Children & Families, Office of Program Support, Department of Health & Human Services, to Peter Rosenthal, Staff Editor, *New York University Law Review* 2 (Sept. 10, 1996) (on file with the *New York University Law Review*).

they not only include length-of-time-out-of-custody grounds but that they also provide the proper incentives and protections to accompany their use. Furthermore, courts should appoint lawyers to all parties involved in the foster care process, as lawyers can be important enforcers and monitors of the reasonable efforts standard. In so doing, states will treat their most vulnerable children with the care they deserve.