Court Delay and the Waiting Child*

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* J.D. Candidate 2004, University of San Diego School of Law.

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"[I]f we are willing to open our eyes to the suffering of the child, we will soon realize that it lies within us as adults either to turn the newborn into monsters by the way we treat them or to let them grow up into feeling . . . human beings."[1]

I. INTRODUCTION

"Richard" was born on March 16, 1991.[2] Four days later, his mother consented to his adoption, and Richard was immediately placed with adoptive parents.[3] The new family began their life together—sharing birthdays, first words, and first steps. But their lives would eventually be consumed by court dates, lawyers, and the heartbreak of saying goodbye. The little boy, who looked to his two adoptive parents for comfort, nurturing, and the knowledge that he was the most cherished person in their world, would be taken away from them and handed over to total strangers. This would not happen to Richard as an unaware infant, but as a young child whose tears signaled an understanding that something was terribly wrong.

Daniella Janikova gave birth to Richard unbeknownst to Richard's biological father, Otakar. Daniella falsified the consent to adoption by asserting that she did not know the father's identity.[4] When Otakar made inquiries about the child, he was told the child had died.[5] Daniella later confessed her deceit, and Otakar consulted a lawyer.[6] In June of 1991, Otakar attempted to contest the adoption of his son, but he was denied standing by the court.[7] Otakar married Daniella in September, filed a petition to declare paternity in December, and was subsequently declared Richard's biological father.[8] Six months later, as Richard was growing increasingly attached to his adoptive parents, the adoption trial commenced.[9]

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1. ALICE MILLER, THE DRAMA OF THE GIFTED CHILD: THE SEARCH FOR THE TRUE SELF xv (Ruth Ward trans., 1990).
2. *In re* Doe, 627 N.E.2d 648, 650 (Ill. App. Ct. 1993), *rev'd*, 638 N.E.2d 181 (Ill. 1994).
3. *Id.*
4. *Id.* at 649–50. While Daniella was pregnant, she lived with and was supported by Otakar. While Otakar was attending to family business in Czechoslovakia, his aunt called Daniella and told her that Otakar had married another woman while in Czechoslovakia. Devastated by the news, Daniella moved out of their apartment and into a shelter. She soon decided that she would give the baby up for adoption. *Id.* at 649.
5. *Id.* at 650.
6. *Id.* at 651.
7. *Id.*; *see also In re* Doe, 638 N.E.2d 181, 182 (Ill. 1994).
8. *In re Doe*, 627 N.E.2d at 651.
9. *Id.*

The trial court terminated Otakar's parental rights, determining that Otakar was unfit due to his lack of a reasonable interest in Richard during the child's first thirty days of life.[10] Otakar appealed from this judgment.[11] The appellate court affirmed the termination of parental rights, taking more than a year to render the decision.[12] After almost another full year had passed, the Supreme Court of Illinois reversed the lower courts,[13] and Otakar, who had never even been introduced to Richard, was given the legal authority to take Richard from his adoptive family.[14] This tearful transfer would finally occur when Richard was the tender age of four.[15]

Justice Heiple, delivering the opinion of the Supreme Court of Illinois, noted that "[t]he adoption laws of Illinois are neither complex nor difficult of application."[16] Given this admission, why did it take more than three years to decide such a simple application of law while a child continued to be raised by two "parents" he would never see again? When addressing the issue of the long delay in resolving the case, Justice Heiple laid blame on the biological mother, the adoptive parents, and even the attorney for the adoptive parents.[17] However, the court avoided any acknowledgement of its own failure to provide Richard with a timely resolution.[18]

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10. *Id.* Once Otakar was determined unfit, his consent was rendered unnecessary to the adoption proceedings. *Id.* Note that Otakar was not made aware that his child was alive until Richard was already fifty-seven days old. *In re Doe*, 638 N.E.2d. at 181–82.

11. *In re Doe*, 627 N.E.2d at 651.

12. *See id.*

13. *In re* Doe, 638 N.E.2d at 183.

14. Gregory A. Kelson, *In the Best Interest of the Child: What Have We Learned from Baby Jessica and Baby Richard?*, 33 J. MARSHALL L. REV. 353, 369 (2000)

15. *Id.* at 354.

16. *In re Doe*, 638 N.E.2d at 182.

17. *Id.* Justice Heiple's opinion denying the rehearing in this case offers further insight into his views. He again blames the adoptive parents for the long and ultimately fruitless appeal. *Id.* He then launches into a scathing commentary on the "journalistic terrorism" practiced by Bob Greene, a *Chicago Tribune* columnist who criticized Justice Heiple's actions in the case. *Id.* at 189. He ends his rant with a less than compassionate remark about the effect of this decision on Richard. He states, "It will not be an insurmountable trauma . . . . It will work itself out in the fullness of time." *Id.* at 190.

18. Some courts have recognized the failure of the court system to resolve matters quickly in child placement cases. In the Baby Richard case, the Illinois Appellate Court acknowledged, "It has taken two years and five months for this case to sluggishly move through our judicial system. In a case of this nature, where plainly time is critical, it is a sad commentary on our judiciary." *In re* Doe, 627 N.E.2d 648, 656 (Ill. App. Ct. 1993), *rev'd*, 638 N.E.2d 181 (Ill. 1994); *see also In re* Adoption of Baby E.A.W., 658 So. 2d 961, 979 (Fla. 1995). Justice Kogan, concurring in part and dissenting in part to the

This Comment directly addresses this failure, which affects countless children such as Richard. It first exposes the problem by providing evidence of delay in both private adoption and foster care placement cases. The devastating effects of this delay are also revealed. Next, this Comment explores the current legal framework within which courts make these life-altering child placement decisions.[19] Then this Comment confronts the question of why delay occurs, citing a number of contributing factors. Finally, recommendations are offered for reducing delay and ensuring that a greater number of children can be placed in safe, stable homes.

II. THE PROBLEM

In the United States, children were once viewed as economic assets[20] or property,[21] devoid of individual rights.[22] Today, the words of our courts and our politicians indicate a new status for children, whereby they are not only entitled to many of the same rights as adults,[23] but their rights and needs are considered paramount to all other concerns.[24] A

Florida Supreme Court's decision to allow the adoption of Baby Emily to proceed, stated, "I cannot suppress a sense of abiding outrage at what our legal . . . system has done to [Emily]. . . . Where does the fault lie?—It rests on inadequate laws, procedural rules incapable of recognizing the needs of a small growing child, . . . judges and lawyers who let the child's fate bog down in a quagmire of legal technicality." *Id*.

19. The term "child placement" is used in this Comment to encompass "all legislative, judicial, and executive decisions concerned with establishing, administering, or rearranging parent-child relationships." JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 6 (1996).

20. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES xii (1994).

21. Recognizing and departing from this historical perspective on children, the Illinois Appellate Court stated in the Baby Richard case that "[f]ortunately, the time has long past when children in our society were considered the property of their parents. . . . To hold that a child is the property of his parents is to deny the humanity of the child." *In re Doe*, 627 N.E.2d at 651–52.

22. For a discussion of the development of children's rights, beginning with colonial society, see generally MASON, *supra* note 20.

23. *See In re* Gault, 387 U.S. 1 (1967) (recognizing that juveniles are entitled to constitutional due process in delinquency proceedings). In this landmark case, the Court held that juveniles in delinquency court were entitled to many of the same rights as adults in criminal proceedings, such as notice of charges, opportunity for confrontation and cross-examination, prohibition against self-incrimination, and right to counsel. Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, JUV. & FAM. CT. J., Fall 1998, at 17, 27–28. This was a departure from the traditional structure of the juvenile court, which was developed as an alternative to the adversarial system. *In re Gault*, 387 U.S. at 16.

24. For example, Justice Rizzi of the Illinois Appellate Court stated, "In an adoption, custody or abuse case . . . the child is the real party in interest. . . . [I]t is his best interest and corollary rights that come before anything else, including the interests and rights of biological and adoptive parents." *In re Doe*, 627 N.E.2d at 652. This priority has also been voiced by politicians enacting legislation to benefit children. For

new commitment to children is voiced in statutes and court holdings of the last decade that purport to consider "the best interests of the child."[25] Much of this new concern with children's well-being focuses on foster children, those children whose homes are so abusive or neglectful that the state must remove the child and step into the role of parent under the principle of parens patriae.[26]

It can be said that caring parents consider the basic needs of their children and attempt to satisfy those needs with little delay. Nothing less should be expected of the state when acting as a parental decisionmaker for a child. However, despite the state's oft-stated commitment to children's best interests, many children suffer because of the failure in practice to consider their needs as meritorious as the claims and needs of adults.[27] The child's need for swift and permanent placement in a loving home is thus compromised, often irretrievably.[28] When a child lingers in "foster care drift,"[29] or when a child is taken from a loving adoptive home

example, in passing the Adoption and Safe Families Act, Representative Mike DeWine stated that the "overriding principle is that the health and safety of the child must always, always, always come first." 143 CONG. REC. S12670 (daily ed. Nov. 13, 1997) (statement of Rep. DeWine).

25. Despite its frequent use, the phrase has a hollow ring when unsupported by action in accordance with its spirit. One scholar has noted that the phrase is "tossed around loosely" and questions whether it is more than just "mere rhetoric." Anthony S. Zito, *Baby Richard and Beyond: The Future for Adopted Children*, 18 N. ILL. U. L. REV. 445, 446 (1998).

26. Parens patriae is defined as "the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1137 (7th ed. 1999). "[T]he State in its recognized role of parens patriae is the ultimate protector of the rights of minors." Kelson, *supra* note 14, at 373.

27. Justice Heiple's attitude illustrates this failure as he states, "These laws are designed to protect natural parents in their preemptive rights to their own children wholly apart from any consideration of the so-called best interests of the child." *In re* Doe, 638 N.E.2d 181, 182 (Ill. 1994).

28. Child advocates have concluded, "Only a minority of children achieve quick and certain stability . . . ." ROBERT C. FELLMETH, CHILD RIGHTS & REMEDIES 317 (2002). Statistics regarding foster care outcomes exemplify this statement. Thirty-two percent of children in foster care remained in care for three or more years. The estimated number of months that children waiting to be adopted have been in continuous foster care breaks down as follows: less than one month—1%; one to five months—4%; six to eleven months—8%; twelve to seventeen months—10%; eighteen to twenty-three months—11%; twenty-four to twenty-nine months—10%; thirty to thirty-five months—8%; thirty-six to fifty-nine months—24%; and sixty or more months—24% (over 30,000 children). CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2001 ESTIMATES AS OF MARCH 2003 (8), at 4 (2003), *available at* http://www.acf.hhs.gov/programs/cb/publications/afcars/report8.pdf.

29. The term "foster care drift" refers to the numerous placement changes that children are subjected to while in foster care. FELLMETH, *supra* note 28, at 317. It has

after years of bonding and given to biological parents, psychological trauma[30] and discouraging predictions for the future often follow.[31]

Various administrative and legislative entities report that court delay is a major obstacle in establishing permanency for children. According to the U.S. Department of Health and Human Services, "One of the most profound and intractable problems in child welfare litigation is that of delay."[32] The United States General Accounting Office (GAO) states: "Our previous work, all the states we visited, and over half of our survey respondents identified problems with the court system as a barrier to moving children from foster care into safe and permanent homes."[33] Despite these observations, the courts proceed unchecked and unaccountable, regardless of their obligation to protect and foster the children in their care.

A. Evidence of Delay

Although the legal processes are in some ways distinct, both private adoptions and dependency proceedings for children in foster care share many of the same barriers to timely resolution and the children involved confront many of the same challenges.[34] In fact, adoption professionals have concluded that the profiles of children placed for voluntary adoption often reflect many of the known risk factors for child abuse and neglect.[35] Whatever the circumstances bringing children to the attention of the legal system, those in need of stable families find their lives in the hands of the courts.

A significant number of children are impacted when court proceedings suffer delay. The number of children in foster care alone who are affected by decisions of the courts is substantial. The U.S. Department of Health

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been noted that many foster children have been subject to three or more different placements within a six year period. *Id.*

30. *See generally* GOLDSTEIN ET AL., *supra* note 19.

31. *See supra* Part II.B.

32. Children's Bureau, U.S. Department of Health and Human Services., *Court Process*, *at* http://www.acf.dhhs.gov/programs/cb/publications/adopt02 (last updated Jan. 17, 2001).

33. U.S. GEN. ACCOUNTING OFFICE, FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN 36 (2002). The GAO does the investigative work of Congress, assessing how public funds are used, evaluating federal programs and activities, and making recommendations for effective use and implementation. This specific report was an effort to determine how outcomes for children in foster care have changed since the enactment of the Adoption and Safe Families Act of 1997. *Id.* at 46.

34. "The decisions or actions of adults which bring a child to a court's attention tend to reflect the presence of insecurity, instability, and even the danger of abuse or neglect in the life of the child." Cheryl Ryon Eisen, *Using a "Brief Case Plan" Method to Reconcile Kinship Rights and the Best Interests of the Child When an Unwed Father Contests a Mother's Decision to Place an Infant for Adoption*, 23 NOVA L. REV. 339, 356 (1998).

35. *Id.* at 356–57.

and Human Services estimates that 581,000 children were in foster care on September 30, 1999,[36] with 127,000 children waiting to be adopted.[37] However, statistics show that only 46,000 were adopted during the entire year of 1999.[38]

The media has provided important evidence of the devastating problem of court delay. In the 1990s, several cases regarding contested private adoptions became highly publicized.[39] Images of children—ages three or four—torn crying and screaming from the arms of the only parents they had ever known, to be awarded to biological parents who had never met the children, fueled public outrage.[40] In these dramatic cases, courts were criticized for the unreasonable length of time taken to render decisions in cases of such urgency.[41]

During the last decade, the media has also uncovered horror stories about the fate of abused children in state custody, including instances of children dying as a result of the system's failures.[42] The public has been

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36. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE AFCARS REPORT: INTERIM FY 1999 ESTIMATES AS OF JUNE 2001 (6), at 1 (2001), *available at* http://www.acf.hhs.gov/programs/cb/publications/afcars/june2001.pdf.

37. *Id.* at 3.

38. *Id.* at 4. On average, a child in California will wait between three and five years for permanency. Leonard Edwards, *Too Many Kids in Foster Care: California Can Do Better* (2002), http://www.lhc.ca.gov/lhcdir/foster/EdwardsAug02.pdf. Leonard Edwards is the president-elect of the National Council of Juvenile and Family Court Judges. *Id.*

39. *See In re* Clausen, 502 N.W.2d 649 (Mich. 1993) (known as the Baby Jessica case); *In re* Doe, 627 N.E.2d 648 (Ill. App. Ct. 1993), *rev'd*, 638 N.E.2d 181 (Ill. 1994) (known as the Baby Richard case); *In re* E.A.W., 647 So. 2d 918 (Fla. Dist. Ct. App. 1994), *aff'd and certified question answered*, 658 So. 2d 961 (Fla. 1995) (known as the Baby Emily case).

40. Throughout the Baby Richard ordeal, *Chicago Tribune* columnist Bob Greene wrote impassioned commentary, generating more than sixty columns on the case and garnering an unprecedented response from readers. Theresa Grimaldi Olsen, *Bob Greene's Richard File*, COLUMBIA JOURNALISM REV., Sept./Oct. 1995, at 11. One commentator on the Baby Jessica case noted:

> The fate of the child called Jessica . . . was a matter of agitated public debate before, during, and after it was decided by a legal system slow to resolve the conflicting claims of the adoptive and birth parents and even slower to recognize the young child's interest in a quick decision.

Joan Heifetz Hollinger, *Adoption and Aspiration: The Uniform Adoption Act, the DeBoer-Schmidt Case, and the American Quest for the Ideal Family*, 2 DUKE J. GENDER L. & POL'Y 15, 15 (1995).

41. *See In re* E.A.W., 658 So. 2d 961, 978–79 (Fla. 1995) (Kogan, J., dissenting in part and concurring in part); Eisen, *supra* note 34, at 344–45; Hollinger, *supra* note 40, at 15; Suellyn Scarnecchia, *A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case*, 2 DUKE J. GENDER L. & POL'Y 41, 41 (1995).

42. Cheryl Romo of the *Los Angeles Daily Journal* has written a number of stories highlighting the abuses of the foster care system in Southern California. *See, e.g.*, Cheryl Romo, *Beatings Cause Death of Child in Foster Care*, L.A. DAILY J., May 18, 2001;

shocked by reports of foster children lingering in a system that often fails to protect them, where foster care providers, entrusted by the courts, may themselves abuse already victimized children.[43]

Although the media has brought to light the weaknesses of the child protective system and the courts, media exposure has been limited due to rules of confidentiality in the juvenile courts and the foster care system.[44] Where there has been coverage, it has not led to systemic reform and these unfortunate cases persist.[45]

Further evidence of delay can be found in the details of case law, which reveal practices and procedures that contribute to unnecessary delay. In a recent case in California, foster parents expressed a desire to adopt E.L.W., who was removed from his mother when she failed to provide him with adequate food, shelter, clothing, or medical treatment.[46]

Cheryl Romo, *L.A. Ranks First by Far in Foster-Care Abuse*, L.A. DAILY J., Aug. 7, 2002, at 2. *The Washington Post* featured a four-part series profiling the case of two-month old Wesley Lucas, who died due to the failure of D.C. social workers to provide needed services. *See, e.g.*, Sari Horwitz et al., *'Protected' Children Died as Government Did Little*, WASH. POST, Sept. 9, 2001, at A1; *see also* Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1, 4–6 (2001); Marcia Lowry, *Foster Care & Adoption Reform Legislation: Implementing the Adoption and Safe Families Act of 1997*, 14 ST. JOHN'S J. LEGAL COMMENT. 447, 449–50 (2000).

43. Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 207–12 (1988).

44. Dependency proceedings have traditionally been closed to the public and the media in order to protect the child and the family from stigmatization. However, this approach has been reconsidered in light of the inadequate treatment that children are receiving in the proceedings. Some advocates argue that access to the dependency proceedings will result in greater accountability in the dependency court. Bean, *supra* note 42, at 4. *See generally* Mary McDevitt Gofen, Comment, *The Right of Access to Child Custody and Dependency Cases*, 62 U. CHI. L. REV. 857 (1995) (asserting a First Amendment right of the press to attend juvenile court proceedings).

45. *See* Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1036 (2002) ("Despite pro-adoption federal policy and case law protecting the parental rights of birth parents, contested adoptions continue to arise."). For examples of cases that have arisen since the publicized cases of Richard, Jessica, and Emily, see *Ex parte S.C.W.*, 826 So. 2d 844, 846 (Ala. 2001) (regarding a child born in October 1998 who continued to await the judgment of the trial court after the Supreme Court of Alabama remanded the case in order for the trial court to vacate the judgment of adoption and hold a contested hearing); *Ex parte C.V.*, 810 So. 2d 700 (Ala. 2001) (reversing the termination of parental rights and ordering the circuit court to determine proper custody of four-year-old "Baby Sam," who had lived with his adoptive parents since he was three days old); *In re A.F.S.*, 793 So. 2d 91 (Fla. 2001) (deciding a case three and a half years after the contested adoption proceeding was first filed); *In re D.L.*, 727 N.E.2d 990, 996 (Ill. 2000) (criticizing the fact that an evidentiary hearing was not commenced for nearly two years after the petition for termination of parental rights was filed). In *Ex parte C.V.*, Justice Stuart, concurring in part and dissenting in part, stated that "[t]his case has been before the courts of this State for an unreasonably long period." 810 So. 2d at 731 (Stuart, J., concurring in part and dissenting in part).

46. *In re* E.L.W., No. E029923/E030241, 2002 WL 127369, at *1 (Cal. Ct. App. Jan. 31, 2002).

E.L.W. was taken into protective custody on April 8, 1999.[47] He was not freed for adoption until almost three years later.[48]

The case of E.L.W. was plagued by delay, caused in part by the allowance of numerous continuances. The six-month review hearing was continued, and the twelve-month review hearing, referred to as a permanency hearing, was scheduled for fourteen months after the child was removed.[49] That permanency hearing was then continued so that a later hearing could be held on a contested matter. What followed was a "series of continuances," with a final date set for December 20, 2000.[50] On this December date, the hearing was once again continued.[51] The permanency hearing at last began twenty-two months after the child had been taken into custody.[52] It was then continued another two days, with the court finally ordering a termination of parental rights (TPR) hearing to be held four months later.[53] The TPR hearing was also eventually continued.[54]

On July 12, 2001, more than two years after the child had been removed from his mother, parental rights were finally terminated.[55] Then the child was placed for adoption with his current foster parents, who had cared for him for more than a year.[56] But the foster parents could not yet call themselves a family; instead, they had to await a decision from the court of appeal. That decision, affirming the judgment, came more than six months later.[57]

This case was processed through a system that is federally mandated to consider the child's need for safety and stability the highest priority.[58]

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47. *Id*.
48. *See id.* at *1–4.
49. *Id.* at *2–3.
50. *Id.* at *4. The reasons for the continuances included the social worker's illness, a change of social workers, and the fact that the mother's counsel had just been presented with a new psychological evaluation of his client. *Id.* at *3–4. These delays occurred despite statutory guidelines that state: "A continuance may be granted only upon a showing of good cause. Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause." CAL. FAM. CODE § 7871 (West 1994).
51. *In re E.L.W.*, 2002 WL 127369, at *4.
52. *Id*.
53. *Id*.
54. *Id.*
55. *Id.*
56. *Id.* at *7–11.
57. *See id.* at *12.
58. The Adoption and Safe Families Act, discussed *infra* Part II.B, provides that "the child's health and safety shall be the paramount concern." 42 U.S.C. § 671(a)(15)(A) (2002); *see also* James R. Marsh, *Federal Impact on Adoptions*, *in* 2 ADOPTION LAW AND PRACTICE § 17.02[2], at 17-5 (Joan Heifetz Hollinger ed., 2001).

This case was processed in a state where public policy demands that judicial proceedings to free children from parental control reach conclusions "as expeditiously as possible."[59] After considering this evidence, the question remains: If the law and the policy are clear, why does it take years for the courts to resolve issues of permanency for waiting children, when the detrimental effects of delay are clearly recognized?

B. The Impact of Delay on Children

Studies have shown that delays in resolving child placement matters have a significant impact on children. Relationships that remain in abeyance are unable to provide security and stability for a developing child.[60] Research has demonstrated that a child who suffers the loss of a parent figure, even through separation rather than death, suffers an increased risk of emotional and social problems in adulthood.[61] This risk further increases if the child develops bonds with a potential family and then is forced to separate from these new parental figures.[62] Researchers have thus concluded that "[c]ontinuity of relationships is essential for a child's healthy development."[63]

At the root of this conclusion is the theory of attachment.[64] This theory focuses on the effect of children's early experiences on their later functioning.[65] Attachment is generally established within a family structure,

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59. CAL. FAM. CODE § 7870(a) (West 1994).

60. "Even in a loving, long-term foster home, the uncertainty of the foster care status may cause hardship." Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 655 (1999) (footnotes omitted). This same uncertainty can be attributed to the status of a child involved in a contested adoption, as the child is being cared for by would-be adoptive parents who may be anxious and tentative in developing bonds with the child. *See* Eisen, *supra* note 34, at 356 ("[A] child in [a contested adoption] is 'at risk' by any criteria used for such assessments in child welfare cases.").

61. MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT 98 (1999).

62. "Where continuity of . . . relationships is interrupted more than once, as happens with multiple foster placements in the early years, the children's emotional attachments become increasingly shallow and indiscriminate." GOLDSTEIN ET AL., *supra* note 19, at 19. "Disruptions to early relationships resulting in insecure attachment experiences and representations make it difficult for these individuals to relate well to other people for the rest of their lives." Marcus T. Boccaccini & Eleanor Willemsen, *Contested Adoption and the Liberty Interest of the Child*, 10 ST. THOMAS L. REV. 211, 219 (1997).

63. GOLDSTEIN ET AL., *supra* note 19, at 19.

64. One definition of attachment reads: "[A]n attachment is a reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver." BEVERLY JAMES, HANDBOOK FOR TREATMENT OF ATTACHMENT-TRAUMA PROBLEMS IN CHILDREN 2 (1994).

65. Peter Fonagy et al., *Morality, Disruptive Behavior, Borderline Personality Disorder, Crime, and Their Relationship to Security of Attachment*, *in* ATTACHMENT AND PSYCHOPATHOLOGY 223, 229 (Leslie Atkinson & Kenneth J. Zucker eds., 1997). The foundations of attachment theory were developed by John Bowlby beginning in the

providing the child with a sense of safety and security.[66] When children experience disruptions in their attachments, specifically prolonged separations, they can reach a state called "detachment," which results in a failure to restart normal attachment when relationships are resumed or replaced.[67] When children have been mistreated or placed outside of their homes, trust is lacking, making successful attachment formation difficult or impossible.[68] Research suggests that this disruption in attachment during childhood can be correlated with later aggressive, even criminal, behavior in adolescence and adulthood.[69]

To understand what constitutes a disruption of this sort, one must recognize that children experience lapses of time differently than adults.[70] To appreciate this, one need only think back to childhood and remember the eternity that seemed to pass while awaiting an upcoming birthday. Compare this to the oft-heard complaint of adults that each birthday seems to arrive all too quickly. Children's unique sense of time centers on the urgency of their basic and psychological needs, and the lapse of time that takes place before these needs are met can create harmful disruptions.[71] Depending on the children's developmental phase, there is a limited time during which they can endure these losses and uncertainties.[72]

1950s. This theory, controversial at the time, pointed out that long-term institutional care and frequent changes of maternal figures negatively affected the personality development of children. Michael Rutter, *Clinical Implications of Attachment Concepts: Retrospect and Prospect*, *in* ATTACHMENT AND PSYCHOPATHOLOGY, *supra*, at 17, 17; *see* 1 JOHN BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT (1969); 2 JOHN BOWLBY, ATTACHMENT AND LOSS: SEPARATION (1973).

66. JAMES, *supra* note 64, at 1.

67. Fonagy et al., *supra* note 65, at 229.

68. JAMES, *supra* note 64, at 3–4.

69. Fonagy, *supra* note 65, at 230–60; *see also* FELLMETH, *supra* note 28, at 403 (discussing the correlation between child abuse and later violence perpetrated by juveniles). Studies have yielded the following results: A study of medical and institutional records of violent delinquents revealed that 75% had been severely physically abused; a study of 150 delinquents in a residential center found that 98% had been abused; a researcher reported that 80% of the adult sex offenders that she was treating had histories of childhood abuse. Hon. Betty Friedlander, *Child Maltreatment and Delinquency: Making the Case for Preventive Criminal Justice*, *in* DAVID N. SANDBERG, THE CHILD ABUSE-DELINQUENCY CONNECTION 149, 152 (1989). A child's attachment to the parent and the parent's attachment to the child are considered factors that protect against delinquency. Sharon G. Elstein, *Understanding the Relationship Between Maltreatment and Delinquency*, 18 CHILD L. PRAC. 136, 139 (1999).

70. GOLDSTEIN ET AL., *supra* note 19, at 41.

71. *Id.*

72. *Id.* at 41–42. "Loss of the primary attachment figure represents a loss of

When considering the effects of the length of court proceedings on children, these concepts illustrate that children can suffer serious psychological harm when denied prompt decisionmaking.[73] In the landmark work *The Best Interests of the Child*,[74] the authors recommend placement decisions that acknowledge children's need for continuity of relationships[75] and reflect children's unique perspective on time.[76] The next Section will examine how well these concepts are reflected in current law.

III. LEGISLATIVE BACKGROUND

In exploring the problem of court delay, it is important to understand the legal framework within which the courts must function. It is also important to recognize the contexts in which families come to the courts for the application of these legal standards. Children and parents, biological or prospective, require the assistance of the courts when issues arise in either direct private placements or agency placements.

Under state laws, a direct private placement[77] of a child requires that a biological parent or parents voluntarily relinquish parental rights to another adult.[78] The consent of the biological parents must be obtained in order for a private adoption to be valid, unless there has been a waiver or forfeiture of parental rights.[79] When the adoption is contested, which is most often done by a biological parent who did not officially consent to the adoption,[80] the state court must determine custody.[81]

Agency placements, on the other hand, can arise from a voluntary or an involuntary process.[82] In a voluntary scenario, the biological parent surrenders all parental rights to the state or privately licensed agency, which then has the responsibility of placing the child.[83] Currently, however,

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everything to a child—loss of love, safety, protection, even life itself, and prolonged unavailability of the primary attachment is the same as total loss for a young child." JAMES, *supra* note 64, at 7.

73. *See* GOLDSTEIN ET AL., *supra* note 19, at 42–43.

74. This edition is a compilation of the work of Joseph Goldstein, Albert J. Solnit, Sonja Goldstein, and Anna Freud, and was originally published in three volumes. This work introduced principles that laid the groundwork for contemporary child custody guidelines based on the child's special needs. *Id.* at xi–xiii.

75. *Id.* at 19.

76. *Id.* at 41.

77. Most healthy infants are adopted through the process of private placement. Joan Heifetz Hollinger, *Introduction to Adoption Law and Practice*, *in* 1 ADOPTION LAW AND PRACTICE § 1.05[3], at 1-68 (Joan Heifetz Hollinger ed., 2002).

78. *Id.* § 1.03[3], at 1-69.

79. Katherine G. Thompson, *Contested Adoptions: Strategy of the Case*, *in* 2 ADOPTION LAW AND PRACTICE § 8.02[1], at 8-11 (Joan Heifetz Hollinger ed., 2002).

80. *Id.* § 8.01[1], at 8-8.16.

81. *Id.*

82. Hollinger, *supra* note 77, § 1.05[3][a], at 1-66 to 1-67.

83. *Id.* Furthermore, if the biological father is not a part of the transaction, the

most agency placements are involuntary, occurring as a result of a child's removal from his or her home because of abuse or neglect and the subsequent termination of parental rights.[84]

Traditionally, individual state governments have been the source of laws regarding adoption.[85] This has led to a lack of uniformity in adoption procedures, which complicates the process.[86] The following Sections will examine specific laws that govern child placement matters. Provisions specifically developed to achieve timely and permanent placements will be highlighted.

A. State Laws

1. Uniform Acts

In order to bring consistency to the legal issues of adoption and child placement, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has made efforts to devise uniform legal frameworks.[87]

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agency may have to attempt to locate him and notify him of the proposed adoption. If the father cannot be located, the agency may have to ask the courts to terminate his rights. *Id.* at 1-66.

84. *Id.* at 1-67. In fact, the largest group of children available for adoption is children in foster care. Marsh, *supra* note 58, § 17.01, at 17-2.

85. Marsh, *supra* note 58, § 17.01, at 17-2. State courts have jurisdiction over consensual and contested adoptions, although federal courts often deal with the issues of constitutional due process and equal protection. Hollinger, *supra* note 77, § 1.01[1], at 1-5. Consideration of these constitutional issues has become more prevalent. Many scholars, practitioners, and students have crafted commentary arguing that children have the constitutional rights of due process and equal protection, which require as much, if not more, consideration as the constitutional rights of the parents in these situations. *See* Boccaccini & Willemsen, *supra* note 62, at 220; Scarnecchia, *supra* note 41, at 48–61; Carrie L. Wambaugh, Comment, *Biology Is Important, But Does Not Necessarily Always Constitute a "Family": A Brief Survey of the Uniform Adoption Act*, 32 AKRON L. REV. 791, 827–28 (1999).

86. Hollinger, *supra* note 77, § 1.01[1], at 1-5. The Uniform Adoption Act notes that "there now appear to be more inconsistencies than ever from one state to another as judges, agencies, lawyers, child welfare experts, and birth parents, adoptive parents, and adoptees squabble over . . . basic questions." Joan Heifetz Hollinger, *Adoption Procedure*, *in* 1 ADOPTION LAW AND PRACTICE app. 4-A at 4A-7 (Joan Heifetz Hollinger ed., 1994). Despite legislative efforts, there is inconsistent treatment among courts when dealing with cases of termination of parental rights and adoption. Justice Evelyn Lundberg Stratton, *Expediting the Adoption Process at the Appellate Level*, 28 CAP. U. L. REV. 121, 123–24 (1999).

87. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is a nonprofit group organized to draft and propose uniform state legislation on various topics. Hollinger, *supra* note 86, at 4A-1. The NCCUSL is made up of state legislators, judges, lawyers, and law professors who are appointed by governors of each state. *Id.* A number of the acts proposed by this group, including the Uniform

The result of these efforts has been proposed legislation such as the Uniform Adoption Act (UAA), the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and the Uniform Parentage Act (UPA).

In 1994, the NCCUSL approved the UAA.[88] The stated purpose of the UAA is to "create a coherent framework for legitimizing and regulating both direct-placement and agency-supervised adoptions . . . [and to] facilitate the completion of consensual adoptions and expedite the resolution of contested adoptions."[89] The UAA provides for expedited hearings regarding contested adoptions and authorizes the courts to "make interim custody arrangements to protect minors against detrimental disruptions of stable custodial environments."[90] Despite endorsement by the American Bar Association, the UAA has been mired in controversy[91] and few states have adopted it as a whole or in part.[92]

Efforts at uniformity have also resulted in the drafting of the UCCJEA.[93] This Act addresses problems of interjurisdictional custody order enforcement, which accounted for much of the delay in the well-publicized Baby Jessica case.[94] The UCCJEA clarifies which state would be the proper forum for disputed custody matters when more than one state could assert jurisdiction[95] and provides for expedited enforcement of custody orders.[96] These clarifications can prevent harmful and time-consuming conflicts. This legislative effort has proven more fruitful; thirty-five states have enacted the UCCJEA and five more states introduced the legislation in 2003.[97]

Commercial Code, have been enacted unanimously by the states. *Id*.

88. *Id.*

89. UNIF. ADOPTION ACT, 9 U.L.A. 11, 14 (1994 & Supp. 2002).

90. *Id.* at 15.

91. Many lobbying groups have voiced opposition to the UAA. According to the Reporter for the UAA, critics of the UAA are "either hostile to adoption or . . . want much more public agency control over adoption practices." Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345, 377 (1996).

92. To date, only Vermont has adopted the UAA in its entirety. UNIF. ADOPTION ACT, 9 U.L.A. at 11.

93. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 U.L.A 649 (1997).

94. *See In re* Clausen, 502 N.W.2d 649 (Mich. 1993). In this case, Ms. Clausen consented to the adoption of her daughter Jessica in the state of Iowa but then attempted to revoke her release of custody nine days after Jessica was placed with the DeBoers, a Michigan couple. When the Iowa District Court denied the adoption of Jessica, the DeBoers asked the Circuit Court of Michigan to assume jurisdiction. The interplay between the courts of Iowa and Michigan dragged out until Jessica was two and a half years old. In the end, the Clausens were awarded custody of Jessica. Kelson, *supra* note 14, at 353–61.

95. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 101 cmt. 1, 9 U.L.A. 649, 657 (1997).

96. *Id.* at 653. The UCCJEA specifically addresses the need for a uniform strategy of expeditious treatment of child custody matters as it states: "Lack of uniformity . . . can turn enforcement [of a child custody order] into a long and drawn out procedure." *Id.* at 652.

97. Uniform Law Commissioners, *A Few Facts About the . . . Uniform Child Custody Jurisdiction and Enforcement Act (2001)*, *at* http://www.nccusl.org/nccusl/uniformact_

Finally, the Uniform Parentage Act (UPA) addresses the issue of putative fathers, the central problem in the Baby Richard case.[98] The most recent version of the UPA includes a registry law that clarifies the rights of men who do not fall into the categories of acknowledged, presumed, or adjudicated fathers.[99] This clarification and the subsequent action of many states to institute a putative father registry[100] are steps that legislatures have taken to prevent the difficulties that arose in the Baby Richard case and to address issues that continually contribute to delays in case resolution.[101] Sixteen states enacted the original act.[102] Since then, the UPA has been updated, and Delaware, Texas, Washington, and Wyoming have adopted the latest version.[103] Two more states are introducing the UPA in 2003.[104]

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factsheets/uniformacts-fs-uccjea.asp (last visited Aug. 26, 2003). The previous version of the UCCJEA, the Uniform Child Custody Jurisdiction Act (UCCJA), was adopted in all fifty states. *See* Kelson, *supra* note 14, at 357 n.40.

98. *See* discussion *supra* Part I.

99. UNIF. PARENTAGE ACT PREFATORY NOTE, 9B U.L.A. (West Supp. 2003). According to California law, which has implemented the UPA, the child of a presumed father cannot be adopted without the father's consent unless some other grounds to terminate parental rights exist. The child of an alleged natural father can be adopted even where the father does not acquiesce as long as the court determines that the adoption is in the best interests of the child. *See* CAL. FAM. CODE § 7660 (West 1994); *see also* Kristine Alton, *Casenote:* In re Adoption of Kelsey S., 11 J. CONTEMP. LEGAL ISSUES 547, 547–48 (2000). A presumed father is one who meets statutory criteria; this includes a man who receives the child into his home and openly holds out the child as his natural child. CAL. FAM. CODE § 7611 (West 2002). An alleged father is a man who alleges that he is the biological father of a child, but does not meet any of the statutory criteria for presumption of fatherhood. CAL. CODE REGS. tit. 22, § 35000(a)(9) (2001).

100. This registry is intended to protect the rights of both unwed fathers and adoptees by requiring that notice of adoption be given to fathers who have registered their paternity within the prescribed period of time. Beck, *supra* note 45, at 1032.

101. David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 756–57 (1999). The issue of putative fathers has also received attention in the U.S. Supreme Court. *See generally* Lehr v. Robertson, 463 U.S. 248 (1983) (holding that an unmarried father was not entitled to notice of adoption proceedings because he had failed to establish any significant relationship with his child); Caban v. Mohammed, 441 U.S. 380 (1979) (finding that the New York statute denying unwed fathers the right to consent to or to veto their children's adoptions, while giving the same rights to unwed mothers, violated the fathers' equal protection rights); Stanley v. Illinois, 405 U.S. 645 (1972) (determining that a statutory presumption that all unwed fathers are unfit violates their equal protection and due process rights).

102. Joan Heifetz Hollinger, *Consent to Adoption*, *in* 1 ADOPTION LAW AND PRACTICE, *supra* note 77, § 204[2][i], at 2-32.

103. Uniform Law Commissioners, *A Few Facts About the . . . Uniform Parentage Act*, *at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-upa.asp (last visited Aug. 20, 2003).

104. *Id.*

2. *Sample State Statutes and Rules: California*

Given the previously discussed legislative backdrop, states have developed their own guidelines for addressing child placement issues. On their faces, many of the provisions appear to place the child's need for timely resolution at the forefront. However, in their application, these laws do little to protect children's needs. For example, the California Family Code provides that on the date set for trial, the termination of parental rights proceedings will be given precedence over all other matters.[105] It also states that a continuance in an adoption hearing may only be granted for "good cause."[106] The California Code of Civil Procedure states that appeals from judgments freeing minors from parental control or denying recommendations to free minors from parental control take precedence over all other appeals.[107] California court rules require judges and clerks of the superior and reviewing courts to adopt procedures that expedite parental termination proceedings.[108] Although these instructions acknowledge the importance of expediting adoption and placement matters, they omit specific guidelines and compliance mechanisms. Furthermore, these provisions fail to designate any repercussions for failure to implement this policy. Therefore, many of these directives often go unheeded in practice.

B. Federal Law: The Adoption and Safe Families Act

Since 1997, the Adoption and Safe Families Act (ASFA)[109] has set the standards for procedures pertaining to adoptions from foster care. ASFA evolved out of an effort to reform the Adoption Assistance and Child Welfare Act of 1980, which established a requirement to provide "reasonable efforts" to keep children with their families.[110] In contrast, ASFA designated the health and safety of the child as the top priority.[111]

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105. CAL. FAM. CODE § 7667 (West 1996).

106. *Id.* § 7871(a). The section continues: "A continuance shall be granted only for that period of time shown to be necessary by the evidence considered at the hearing on the motion." *Id.* § 7871(c).

107. CAL. CIV. PROC. CODE § 45 (West Supp. 2003). For a summary of various statutes relating to expediting the appeals process of child placement cases, see Stratton, *supra* note 86, 126 app. A..

108. CAL. CT. R. 39.1A(f).

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

110. Marsh, *supra* note 58, § 17.02[1], at 17-3 to 17-5. It was actually in 1983, when the Adoption Assistance and Child Welfare Act was amended, that the requirement for reasonable efforts was included. FELLMETH, *supra* note 28, at 311.

111. Marsh, *supra* note 58, § 17.02[2], at 17-5. The impetuses for creation of ASFA were the numerous cases of children returned to parents who subsequently killed them, the evidence of the detrimental effect of the eighteen-month period allowed for

Specific provisions were devised to address the problem of children spending too much time in foster care, children for whom a permanent placement was a seemingly unattainable goal. These provisions are as follows: (1) whenever a child's permanency plan is adoption, ASFA requires states to make reasonable efforts to place the child in a timely manner;[112] (2) ASFA requires states to document their specific efforts to put children up for adoption;[113] (3) ASFA provides for concurrent planning, which allows states to make efforts to place children for adoption at the same time efforts are being made to reunify the families;[114] (4) when interjurisdictional issues arise, the states must utilize cross-jurisdictional resources so these issues do not create barriers to permanency;[115] (5) ASFA requires that a permanency hearing be held within twelve months of placement;[116] (6) the "fast track"[117] provision relieves states of the requirement to make reasonable efforts to reunify families in certain circumstances;[118] (7) the "15 of 22" provision requires

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parents to work toward reunification, the common extension of that time frame in practice, and the "permanency plans" that allowed children to remain in unstable, long-term foster care placements. FELLMETH, *supra* note 28, at 314.

112. Marsh, *supra* note 58, § 17.02[2], at 17-5 to 17-6. Note that the list of permanency goals no longer includes long-term foster care; this is a departure from the Child Welfare Act of 1980. *Id.* § 17.03[7], at 17-17 to 17-18.

113. *Id.* § 17.02[2], at 17-6.

114. *Id.*

115. *Id.* ASFA requires that a state must take steps to ensure that when an approved family is found outside of the relevant jurisdiction, there is no denial of or delay in the adoption. In fact, states that violate this provision can be subject to penalties against federal foster care funds. Child Welfare League of America, *Implementing Two Key Provisions of ASFA*, *at* http://www.cwla.org/programs/adoption/asfa2.htm (last visited Aug. 26, 2003). ASFA also requires the GAO to investigate and report on the success or failure of the efforts to facilitate adoptions between jurisdictions. *Id.*; *see also* U.S. GEN. ACCOUNTING OFFICE, FOSTER CARE: HHS COULD BETTER FACILITATE THE INTERJURISDICTIONAL ADOPTION PROCESS 1 (1999). The GAO reports that candidates for interjurisdictional placement are the children who are the hardest to place. These children usually have special needs and often are older or part of a sibling group. *Id.* at 10. The GAO concluded that because interjurisdictional adoptions are more complex and take more time than adoptions within a single state, the Department of Health and Human Services should implement a more organized strategy and a widely available plan that would standardize important procedures. *Id.* at 17.

116. Marsh, *supra* note 58, § 17.02[2], at 17-6. The term "permanency hearing" replaced the term "disposition hearing." A disposition hearing implied "a continued 'holding pattern' status for affected children." FELLMETH, *supra* note 28, at 314.

117. U.S. GEN. ACCOUNTING OFFICE, *supra* note 33, at 1.

118. Marsh, *supra* note 58, § 17.02[2], at 17-5. These circumstances include the following: if there is a judicial determination that a parent has killed another of his or her children or committed felony assault against the child or a sibling, if parental rights to another child had previously been involuntarily terminated, or if the parent had subjected the

states to file TPR petitions as well as pursue adoptive placement for a child who has been in foster care for fifteen of the most recent twenty-two months.[119] The last two provisions have been considered key to eliminating much of the delay that results from unreasonably long stays in foster care.[120]

In order to ensure state compliance with ASFA, Congress requires state agencies that receive federal funds pursuant to Titles IV-B and IV-E of the Social Security Act to follow the provisions and regulations of ASFA in order to receive these funds.[121] Furthermore, state court judges and specifically juvenile courts have the jurisdiction and the obligation to enforce ASFA and its regulations.[122]

Although this legislative endeavor is a step in the right direction, it has been criticized for failing children both in practice and in principle.[123] It has been asserted that the goals of the statute go unmet if the system, in executing its plan, fails to apply its guidelines with common sense.[124] In essence, the legislation can only be as effective as those implementing it.

IV. THE FACTORS CONTRIBUTING TO DELAY

Given the legislative outline for handling child placement cases, what factors create delays when these matters enter the court system? Although there are numerous factors that hinder prompt resolution,[125]

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child to "aggravated circumstances." *Id.* ASFA offers examples of aggravated circumstances, including abandonment, torture, chronic abuse, and sexual abuse. *Id.*

119. *Id.* at 17-6. Exceptions to this requirement include (1) when children are in kinship care (in the custody of a relative), (2) when there exists a documented compelling reason that this petition would not be in the best interest of the child, or (3) when the state agency has failed to provide required reunification services. *Id.* at 17-6 to 17-7.

120. U.S. GEN. ACCOUNTING OFFICE, *supra* note 33, at 1–2.

121. DEBRA RATTERMAN BAKER ET AL., AM. BAR ASS'N, MAKING SENSE OF THE ASFA REGULATIONS: A ROADMAP FOR EFFECTIVE IMPLEMENTATION 178–81 (2001). The U.S. Supreme Court has consistently held that Congress can require states to comply with federal regulations as a condition for receiving federal funds. *Id.* at 179. For a database collection of the state legislation enacted in response to ASFA, see National Conference of State Legislature, *Child Welfare Project: Adoption and Safe Families Act of 1997 Resources*, *at* www.ncsl.org/programs/cyf/asfa97.htm (last visited Aug. 26, 2003).

122. BAKER ET AL., *supra* note 121, at 181–85. "All players, including judges, attorneys, and agencies, must abide by the obligations outlined in the regulations." *Id.* at 181. The authority for this can be found in the language of the Supreme Court: "[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the *Judges* in every State shall be bound thereby . . . ." *Id.* (quoting Printz v. United States, 521 U.S. 898, 907 (1997) (alterations in original)).

123. *See* Gordon, *supra* note 60.

124. *See* Lowry, *supra* note 42, at 450.

125. The social service system is certainly a partner in ensuring that guidelines are followed in order to bring permanence to waiting children's lives. This part of the system shares responsibility for making decisions that are based in common sense and

this Comment focuses on the structure that the law provides the judiciary and the judiciary's responsibility to work effectively within this framework. In this context, delay can be attributed to a lack of (1) specific guidelines based on a child's sense of time, (2) judicial leadership, and (3) measures of accountability for noncompliance with established guidelines.

A. The Lack of Specific Guidelines Based on a Child's Sense of Time

Despite legislative efforts to accelerate permanency decisions for children, barriers remain to eliminating delay.[126] Critics have articulated concern that, because of ambiguous guidelines and various exceptions, parts of the system driven by outdated ideologies may interpret legislation such as ASFA so as to minimize its positive effects.[127]

Lacking clear guidance, states often have been unable or unwilling to act in the spirit of the law. For example, there is no federal provision that mandates a time frame for the litigation and finalization of a TPR.[128] In fact, when addressing the failure of ASFA to establish this time frame, federal regulators commented:

> We understand the concern that court and State agency delays occur once a petition for TPR is filed such that it could be *several years* before a child is finally adopted. However, our authority does not extend into the finalization of proceedings for termination of parental rights as this is a matter of State law.[129]

This abdication of regulation to the states means that there is no check on whether the state law requires efficient processing.

Even when timetables have expressly been set by ASFA, some effectively undermine goals of efficiency. For example, the time frames set by ASFA begin to run on the earlier of "the date of the first judicial finding that the child has been subjected to child abuse or neglect; or . . .

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stem from a commitment to comply with legislation such as AFSA, which can improve outcomes for many children. *See id.* at 453–54. This part of the system also confronts many of the same challenges that make timely action difficult. Gordon, *supra* note 60, at 679 (stating that "[e]very facet of the child welfare system is now overburdened").

126. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 33, at 4; Gordon, *supra* note 60, at 668–70.

127. *See* Gordon, *supra* note 60, at 673.

128. Marsh, *supra* note 58, § 17.06[8], at 17-47.

129. *Id.* (quoting Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020, 4062 (Jan. 25, 2000) (codified at 45 C.F.R. pt. 1356)) (emphasis added).

the date that is 60 days after the date on which the child is removed from the home."[130] This option results in many cases remaining in abeyance for an extra two months,[131] which pushes back the permanency hearing to fourteen months from time of removal, rather than the prescribed twelve months.[132] The 15 of 22 provision effectively becomes the 17 of 22 provision.[133]

Other issues seem to have eluded legislators altogether, leaving courts uninstructed as to how to expedite very specific situations. For instance, no law specifically addresses the situation in which the parent or parents of a dependent child have been convicted of certain felonies, a circumstance that requires two different sets of court proceedings.[134] In most cases, the children are removed at the time the crime is committed and spend an extended period of time in foster care awaiting resolution of the parent's criminal case.[135] Judges often will not approve the fast track until the parent is actually convicted, which is usually at least a year after the actual crime has been committed.[136]

It is also argued that the established time frames do not adequately reflect a child's sense of time. For infants, the standard of terminating parental rights after fifteen months in foster care is far too long.[137] Aside from the psychological damage that occurs from this lapse of time, the practical fact is that a child's chances for adoption decrease with age.[138] Under current time frames, infants entering foster care will often be toddlers by the time they are freed for adoption, and thus will have missed out on their prime opportunity for successful adoptions.[139]

To address the lengthy appeal process, half the states have enacted statutes or court rules providing for expedited appeals in child placement cases.[140] However, most provisions offer nothing more than vague directives, suggesting that courts "decide[] on an expedited basis"[141] or

130. 42 U.S.C. § 675(5)(F) (2002).
131. Gordon, *supra* note 60, at 670. A judicial finding of abuse or neglect is not a prerequisite to the removal of a child from the home, and therefore this finding often does not occur within that two-month period. *Id.* Note that in *The Best Interests of the Child*, the authors state: "For children under the age of five years, an absence of parents for more than two months is intolerable." GOLDSTEIN ET AL., *supra* note 19, at 41.
132. Gordon, *supra* note 60, at 670.
133. *Id.*
134. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 33, at 25–26.
135. *Id.*
136. *Id.* at 26.
137. Gordon, *supra* note 60, at 667; *see also* GOLDSTEIN ET AL., *supra* note 19, at 41 n.*.
138. Gordon, *supra* note 60, at 667–68. In fact, almost half of the children adopted from foster care in 2001 were five years old or younger. CHILDREN'S BUREAU, *supra* note 28, at 5.
139. Gordon, *supra* note 60, at 668.
140. Stratton, *supra* note 86, at 124.
141. *Id.* at 126 app. A (quoting IND. CODE § 31-19-14-1 (1999)).

"render a decision as soon as possible."[142] This leaves courts without specific guidance as to how to implement these unclear mandates. It is human nature to react to ambiguity with inaction or to fall back on one's own biases in the absence of decisionmaking criteria. Thus, many courts are lax in their commitment to improving court performance. This lack of leadership is another factor that contributes to the problem of court delay.

B. The Lack of Judicial Leadership

Although improvements in the legal framework regarding child placement matters can be beneficial, one commentator aptly points out that "legislative change is not a panacea."[143] The courts have an obligation to comply with the law as it is set out, and furthermore, to be partners, or even leaders, in the reformation of the systems that serve children. This judicial leadership is critical.[144] Judicial attitudes that clash with the policy concerns underlying legislation, coupled with a lack of specific guidelines, result in an allowance of judicial discretion that can harm waiting children.

For decades, the concept of court delay has been studied intensely and theorized about extensively.[145] Results of this research show that the commitment of the courts to the reduction of court delay is one of the most important factors in successfully expediting court cases.[146]

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142. *Id.* (quoting MONT. CODE ANN. § 42-2-619 (1998)).

143. Scarnecchia, *supra* note 41, at 43; *see also* ORANGE COUNTY GRAND JURY, A CHILD IS WAITING . . . AND WAITING . . . TO BE ADOPTED IN ORANGE COUNTY 4 (2000), *available at* http://www.occourts.org/grndjury/GJAdopted.pdf (pointing out that even though federal legislation greatly influences child adoption policies, the systems that deal directly with the children are primarily governed by state law and states implement the law); Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1068 (1995) (declaring that "laws are no more effective than the judges who interpret, apply, and enforce them"); Zito, *supra* note 25, at 479 (stating that "legislatures can create as many laws as they want, but such laws will not make a difference if the amount of time taken to administer these laws through the court system takes three to four years in each case").

144. COURT DELAY REDUCTION COMM., NAT'L CONFERENCE OF STATE TRIAL JUDGES, LITIGATION CONTROL: THE TRIAL JUDGE'S KEY TO AVOIDING DELAY 62 (1996) [hereinafter LITIGATION CONTROL]. "The necessity for judicial commitment to delay reduction is a new and essential emphasis. It makes delay reduction both an important goal of the court system and of the individual judge." *Id.* at 9.

145. *See generally id.*; THOMAS CHURCH, JR. ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978) (reporting the findings of eighteen months of research by the National Center for State Courts and the National Conference of Metropolitan Courts); NAT'L CTR. FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS (1988) (presenting the findings from a study that collected and analyzed data from over one thousand jury trials in New Jersey, Colorado, and California).

146. "[T]he pace of criminal litigation, like the speed of processing civil cases, is

Implementation of policies designed to address this specific concern has been an effective tool. Studies have shown that courts with firm policies limiting continuances experience less delay.[147] Similarly, courts that exercise a policy of beginning trials on the originally scheduled dates also have succeeded in their efforts to reduce delay.[148] This research indicates that judges, through their leadership, have the ability to orchestrate court proceedings so as to produce timely outcomes.

Additional research specifically examines the problems of the courts in child placement cases. The 1999 and 2002 reports from the GAO reveal systemic problems such as a lack of court resources, insufficient training of judges (resulting in judges who are unsupportive of legislative goals and public policy dealing with children), and a lack of cooperation between the courts and child welfare agencies.[149] Studies conclude that there must be strong judicial leadership in order to reform the juvenile court system.[150] The GAO states, "[J]udges set the tone for how reform will occur; have the authority to institute new court rules, policies, and practices; and are key to bringing all child welfare system participants on board."[151]

Given this leadership role and responsibility, it is troubling that a number of states report that judges make decisions based solely on their personal beliefs, which can conflict with the stated law and policy.[152] Some judges feel parents should always be given a chance to reunify with their children, thus disregarding the specific fast track provision of

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strongly dependent on the attitudes and expectations of court system participants . . . ." CHURCH ET AL., *supra* note 145, at 61. "If any one element is essential to the effort to reduce pretrial delay, it is concern by the court with delay as an institutional and social problem." *Id.* at 5.

147. LITIGATION CONTROL, *supra* note 144, at 12.

148. *Id.*

149. U.S. GEN. ACCOUNTING OFFICE, *supra* note 33, at 36. The study notes that twenty-nine states reported that their child welfare systems did not have enough judges or court staff; twenty-eight reported that not enough training was available for judges or other court personnel; and twenty-three states reported the existence of judges who were not supportive of ASFA goals. *Id.*

150. U.S. GEN. ACCOUNTING OFFICE, JUVENILE COURTS: REFORMS AIM TO BETTER SERVE MALTREATED CHILDREN 21 (1999); *see also* IDAHO CHILD PROTECTION MANUAL I-8 (Elizabeth Barker Brandt ed., 2002) ("The court must demonstrate an unmistakably strong commitment to timely decisions in child abuse and neglect cases. . . . The court must design explicit processes to ensure timely hearings and must make sure all judges and administrative staff implement them."). This manual was produced by the Idaho Supreme Court's Committee to Reduce Delays for Children in Foster Care. *Id.* at 1.

151. U.S. GEN. ACCOUNTING OFFICE, *supra* note 150, at 21.

152. In fact, some judges fail to comply with federal laws because they believe funding is not conditioned on their compliance. They tend to think the regulations were intended for the child welfare agencies rather than the courts. Cecilia Fiermonte, *When the Judge Declines to Follow ASFA*, CHILD L. PRAC., July 2001, at 62. This belief is inaccurate, as funding does depend upon ASFA compliance. *Id.* It is suggested that practitioners make an effort to educate these ignorant courts through in-service training and simple explanations to the judges of the consequences of noncompliance. *Id.*

ASFA.[153] This results in decisions to delay scheduling TPR trials. North Carolina reports that scheduling these trials can take up to twelve months,[154] and Massachusetts reports that appeals of TPR decisions can also take a year to schedule.[155] Furthermore, some courts give parties great leeway to waive deadlines and are very lenient both in allowing continuances and in accepting excuses for delay.[156] It is reported that some judges mistrust the judgments of caseworkers and thus order numerous additional assessments, which expends additional time and resources.[157]

These instances of judicial decisionmaking based on personal agendas or opinions, in defiance of statutes and rules to the contrary, can be inappropriate and harmful. It has been stated that the judicial oath of office requires that where rights are given by statute, judges must do their best to apply the law, "regardless of any personal views as to the wisdom of the Legislature."[158] Therefore, along with the strong need for specific guidelines set forth by the legislature, judicial commitment to follow these guidelines must be present. Because this commitment can be lacking, accountability mechanisms must be established and utilized.

C. The Lack of Accountability Mechanisms

State welfare agencies have been criticized for their handling of child welfare cases, and critics have pointed to a lack of accountability.[159] This criticism can apply to the courts as well.[160] Accountability mechanisms for judges are few and far between.[161] Judicial immunity limits the ways in which judges may be evaluated, thus reducing the means by which judges can be held accountable for harmful decisionmaking.[162] Furthermore, the common restrictions on public access to dependency proceedings foster an atmosphere of secrecy and leave courts unscrutinized as to their handling of these cases.[163]

153. U.S. GEN. ACCOUNTING OFFICE, *supra* note 33, at 24. In addition, most of the states that reported on their use of the 15 of 22 provision said that the number of children exempted from the provision greatly exceeded the number of children to whom it was applied. *Id.* at 27.
154. *Id.* at 25.
155. *Id.* at 30.
156. Children's Bureau, *supra* note 32.
157. U.S. GEN. ACCOUNTING OFFICE, *supra* note 150, at 9.
158. *Ex parte* C.V., 810 So. 2d 700, 707 (Ala. 2001) (Lyons, J., concurring specially).
159. ORANGE COUNTY GRAND JURY, *supra* note 143, at 20.
160. Schafran, *supra* note 143, at 1067.
161. *Id.*
162. CHURCH ET AL., *supra* note 145, at 75.
163. Bean, *supra* note 42, at 54–55.

Judicial immunity plays an important role in the functioning of the court system.[164] It allows judges to maintain judicial independence, ensuring that the resources of the judicial system will not be exhausted in frivolous efforts to second-guess judges' decisions.[165] Nevertheless, those who have studied the problem of court delay in civil and criminal trials point out that judges should not be completely excused from measures to assess their performance.[166] Researchers conclude that providing "meaningful measures of both individual judge and aggregate court performance" will help to promote awareness of and concern for the issue of delay.[167]

The practice of closed dependency hearings is also not without merit. It is argued that closed courtrooms protect children from invasions of their privacy, ensuring that the children do not have to deal with the humiliation of public knowledge of their trauma.[168] Defenders of the closed court system also point to the advantages of its less formal atmosphere, which encourages a more social work-like approach to determining what is in the best interests of the child.[169]

However, some advocates argue that the practice of closed dependency proceedings impairs efforts to reform child welfare systems.[170] Courts can act in anonymity and secrecy with few checks and little criticism. Furthermore, the incongruence between allowing access to juvenile delinquency proceedings but not to dependency proceedings reflects a failure to realize that the two processes are unavoidably linked.[171] Although there is a public interest in exposing juvenile delinquents who may pose a threat to the public, would long-term interests not be better served by exposing the failures of the protective systems, which can contribute to the development of these delinquents in the first place?

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164. Schafran, *supra* note 143, at 1067–68.

165. The concept of judicial immunity has also functioned to ensure that judges will make decisions based on their own convictions, without concern for what actions might be taken by unhappy litigants. Hon. Patricia Walther Griffin & Rachel M. Pelegrin, *A Look at Judicial Immunity and Its Applicability to Delaware and Pennsylvania Judges*, 6 WIDENER J. PUB. L. 385, 387 (1997).

166. CHURCH ET AL., *supra* note 145, at 75 ("[A]ppropriate assessment of individual judicial performance is both proper and desirable.").

167. *Id.*

168. Bean, *supra* note 42, at 3.

169. *Id.*

170. *Id.* at 7–8. Even courts that have decided to deny public access to juvenile courts have recognized the value of an open court. *See In re* T.R., 556 N.E.2d 439, 450 (Ohio 1990). "As with all operations of government, the public has an interest in scrutinizing the working of the juvenile court. Public access to the juvenile court process can promote informed public involvement in government and enhance public confidence in the judicial branch." *Id.* (citation omitted).

171. Bean, *supra* note 42, at 7.

V. WHAT SHOULD BE DONE?

It is clear that the goal of quickening the pace of providing permanency for children must be undertaken as a partnership between the legislature and the judiciary. The call has come from the judiciary itself, with judges urging the legislature to lead the way toward reform,[172] encouraging lower courts to take responsibility for expediting matters,[173] and sometimes shouldering the burden of reform themselves.[174]

This Comment suggests an outline by which the goal of expediency may be met. First, statutes and court rules must establish standards that reflect the child's sense of time. These standards must be specific and unambiguous. Second, the courts must take responsibility for decisionmaking that complies with these standards. Systems of accountability, both internal and external, must be put in place. Below are two models, one for efficiency and one for accountability, which serve as starting points in creating a system through which the judiciary can become responsible for, and effective in, reducing delay in child placement cases.

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172. *See In re* E.A.W., 658 So. 2d 961, 979 (Fla. 1995) (Kogan, J., concurring in part, dissenting in part) ("There is a pressing need for reforming the way these cases are handled . . . . I personally urge the Family Law Rules Committee of The Florida Bar and the Florida Legislature to study possible methods of expediting review of disputes between biological and adoptive parents.").

173. *See Ex parte* C.V., 810 So. 2d 700, 731 (Ala. 2001) (Stuart, J., concurring in the result in part and dissenting in part) ("This case has been before the courts of this State for an unreasonably long period; therefore, the trial court should act promptly."); Brown v. Div. of Family Servs., 803 A.2d 948, 960–61 (Del. 2002) (remanding the matter to the family court to hold subsequent hearings and stating, "Mindful of the impact that such delay has on the children, we instruct the Family Court to schedule this matter on an accelerated, priority basis"); *In re* A.F.S., 793 So. 2d 91, 93 (Fla. Dist. Ct. App. 2001) (affirming the trial court's jurisdiction and stating, "We are concerned . . . about the delay in [the case's] resolution. The interests of a five-year-old child are at stake. As such, we strongly encourage the trial court and all parties to take whatever steps necessary to expedite this proceeding."); *In re* D.L., 727 N.E.2d 990, 996 (Ill. 2000) ("[W]e direct the courts below to consider, in an expedited manner, cases involving children like D.L., so that the minors whose futures are at stake in these proceedings can obtain a prompt, just, and final resolution of their status.").

174. *Brown*, 803 A.2d at 958. Recognizing that it frustrates the purpose of ASFA to have children remain in foster care while additional hearings are scheduled to determine the merits of termination, the Delaware Supreme Court adopted Rule 26.1, which requires its clerk's office to schedule any appeal in a termination case "for submission on a date certain that assumes no extensions for the filing of the record or the parties' briefs." *Id.* at 958 n.48.

A. A Model for Efficiency

1. Efficiency in Action

Specific and detailed timetables for the stages of the court process are vital to reducing delay.[175] These guidelines are found in statutes and court rules, leaving courts to simply "ascertain and give effect to the intention of the legislature."[176] To achieve this, the courts first look to the words used in the statutes or rules.[177] Therefore, such mandates must set out specific deadlines and be made legally binding upon the courts.[178] As long as the statutory language is unmistakable, the courts are prevented from "reading into" the statute any meaning other than its plain meaning.[179] This prevents the courts from giving effect to exceptions, limitations, or conditions not expressly provided for in the statute.[180]

An effective model for the successful tightening of time frames in court processes can be found in the San Diego civil courts. In 1986, San Diego County implemented a pilot program called "fast track."[181] This program was sanctioned by the California state legislature as part of the Trial Court Delay Reduction Act (TCDRA).[182] The premise underlying this reform effort throughout the state was to shift responsibility for the expeditious treatment of civil cases from the attorneys and their clients to the judiciary.[183] This Act gave the Judicial Council of California the responsibility of adopting standards of timely disposition.[184] Based on these legislative initiatives, the San Diego program set its own goal of having 90% of civil cases processed within twelve months.[185]

As a result of the pilot program, the number of cases completed within one year of the filing of the complaint significantly increased.[186] Prior to the implementation of fast track, only 19% of the San Diego County superior courts' cases had been completed within one year of filing.[187] In fiscal year 1996–97, 56% of general civil unlimited cases and 76% of

175. IDAHO CHILD PROTECTION MANUAL, *supra* note 150, at I-8 to I-9.
176. *In re D.L.*, 727 N.E.2d at 994.
177. *Id.*
178. IDAHO CHILD PROTECTION MANUAL, *supra* note 150, at I-8 to I-9.
179. *In re D.L.*, 727 N.E.2d at 994.
180. *Id.*
181. Michael A. Friedrichs, *Fast Track: A Panacea for a Delayed and Cluttered Court System?*, 1 SAN DIEGO JUST. J. 443, 443 (1993).
182. CAL. GOV'T CODE §§ 68600–19 (West Supp. 2003).
183. Patrick O'Donnell, *Civil Case Management: New Statewide Rules and Case Management Statement*, 24 CIV. LITIG. REP. 141, 141 (2002).
184. CAL. GOV'T CODE § 68603.
185. Friedrichs, *supra* note 181, at 446.
186. *Id.* at 444.
187. *Id.*

limited civil cases were disposed of in less than twelve months.[188] Progress has been made in more recent years as well; 64% of all general civil cases and 85% of limited civil cases were disposed of in twelve months in fiscal year 2000–01.[189] These results indicate that the combination of specific goals set by the legislature and a commitment to reform by the courts can accomplish meaningful change.

Unfortunately, the fast track procedures in San Diego County have not been applied to juvenile or domestic cases.[190] In fact, the TCDRA specifically excludes juvenile and domestic relations cases from the delay reduction programs.[191] This excludes from delay reduction efforts those cases where urgency is most essential. Rather than excluding these cases, special efforts should be made to address the court delay problem in child placement cases, and similar guidelines and standards should be imposed throughout all jurisdictions.

Rules should address common court procedures and how they should function in the context of child placement matters. Model court rules drafted by the Judicial Council of California's Center for Families, Children and the Courts have put forward a number of recommendations for improving court processes in these cases.[192] The proposed rules recommend that courts not continue hearings beyond the statutory time limit unless it is determined that the continuance will not be contrary to the best interests of the child.[193] Court dates should be regarded as firm, and the courts must enforce this principle in order for the dates to have credibility.[194] Continuances should only be granted on a showing of good cause.[195] These recommendations can be helpful, but they lack the specificity that is necessary in order to truly guide child placement matters.

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188. JUDICIAL COUNCIL OF CAL., 2002 COURT STATISTICS REPORT 48 tbl.6 (2002), *available at* http://www.courtinfo.ca.gov/reference/documents/csr2002.pdf.

189. *Id.* Furthermore, in an effort to enhance the effectiveness of the previous program, the Judicial Council developed new and amended civil case management rules that became effective in all state trial courts in 2002. These rules include uniform deadlines for serving pleadings and requesting default judgments. O'Donnell, *supra* note 183, at 141–45.

190. Friedrichs, *supra* note 181, at 446.

191. CAL. GOV'T CODE § 68608(a) (West Supp. 2003).

192. Center for Families, Children and the Courts, Judicial Council of California, *Draft Model Local Rules*, http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/localrules.htm (last visited Aug. 20, 2003).

193. *Id.*

194. *See id.*

195. *Id.*

2. Recommendations

This Comment recommends that change begin with amended federal statutes that guide states in conducting child placement proceedings efficiently. These statutes should set time frames even tighter than those prescribed in ASFA in order to truly acknowledge children's sense of time.[196] In the absence of amended federal statutes, state legislatures can ask for a federal waiver in order to implement a more expedient framework on their own.[197]

First, in any situation where a child is taken from the parent, either by voluntary surrender or involuntary protective custody, a petition for a hearing shall be filed within twenty-four hours, and in the case of a child in protective custody, a detention hearing shall be held twenty-four hours after filing. In any situation, an adjudication hearing shall be held within ten calendar days. At this hearing, the court shall appoint a guardian ad litem for the child and make a temporary custody determination, be it with prospective adoptive parents or in foster care.

The preliminary hearing shall take place no more than seven days after the adjudication hearing. A number of things can be determined at the preliminary hearing. In the situation of a dependent child, a case plan shall be approved. In the case of a contested adoption, parental rights can be terminated or the court can set an evidentiary hearing date when contested issues will be addressed. This evidentiary hearing shall be held no later than ten days after the preliminary hearing.

Next, in the case of a dependent child, if the case plan calls for reunification efforts, then review hearings shall be held each month in order for the court to consider the progress of a case. The permanency hearing shall be held six months after the case plan is defined as reunification. If reunification is not the case plan, then the permanency hearing should be held within thirty days of that decision. In the case of a contested adoption, the judgment of whether parental rights should be terminated shall occur within ten days after the evidentiary hearing.

Finally, in any case in which an appeal is filed, the reviewing court shall consider the case for immediate decision. If oral argument is necessary, it shall be heard within thirty days after the briefs have been

196. Although it could be argued that these matters need to proceed slowly in order to be handled responsibly, Part V.A.3 will address the feasibility of the following suggestions.

197. Children's Bureau, U.S. Department of Health and Human Services, *Child Welfare Waiver Demonstration Projects*, *at* www.acf.dhhs.gov/programs/cb/initiatives/cwwaiver.htm (last updated June 25, 2003).

filed.[198] The court shall then enter judgment within thirty days of either the submission of the briefs or oral argument.[199]

3. Feasibility

It may be argued that these time frames are unrealistic and impossible to administer. Many point out that courts are already congested, noting unreasonably large caseloads.[200] However, research has shown that caseloads, which have long been considered an impediment to efficient case management, have not proven to be a factor in court delay.[201] One school of thought holds that work will expand to fill the time frames allowed.[202] It is conceivable that additional time pressures will necessarily motivate courts to devise methods of expediting cases. In fact, it has been reported in some states that the time pressures of ASFA standards have helped child welfare staff work more effectively.[203]

Courts have demonstrated they can work quickly when certain interests are at stake. Specifically, when the physical well-being of a child is the concern, as in the case where parents refuse a lifesaving blood transfusion for a deathly ill child, the courts have sprung into action and rendered decisions within hours.[204] This action is made feasible simply by the willingness of those within the court system to make this issue a top priority.

It can be argued that the decisions in child placement cases should not be made too hastily because of the importance and complexity of the interests at stake.[205] However, the decision of whether to allow a blood transfusion over parental objection is arguably as complex as, and even

198. Stratton, *supra* note 86, at 130–31.
199. *Id.* at 131.
200. U.S. GEN. ACCOUNTING OFFICE, *supra* note 150, at 11.
201. "One of the interesting sets of findings in the *Justice Delayed* study was that several of the structural factors conventionally thought to be responsible for court delay—large courts, heavy caseloads, and high trial rates—had no relation to the pace of litigation in the 21 courts examined . . . ." MAHONEY ET AL., *supra* note 145, at 12.
202. C. NORTHCOTE PARKINSON, PARKINSON'S LAW 2 (1957). This work contains the well-researched theories on public administration that were first revealed in *The Economist*. *Id.* at viii–ix, 3.
203. U.S. GEN. ACCOUNTING OFFICE, *supra* note 33, at 28.
204. GOLDSTEIN ET AL, *supra* note 19, at 42. For specific examples of the prompt decisionmaking in these cases, see *Wallace v. Labrenz*, 104 N.E.2d 769, 771–72 (Ill. 1952) (holding a hearing and concluding it the day after the petition for guardianship was filed); *State v. Perricone*, 181 A.2d 751, 754 (N.J. 1962) (providing a decision after the following measures were taken to expedite the case: the complaint was submitted orally, formal pleadings and notice were waived, and the trial was held at 8:30 and concluded at 11:30).
205. U.S. GEN. ACCOUNTING OFFICE, *supra* note 33, at 28.

more vital than, a decision regarding a child's placement. The interplay of life and death, freedom of religion and the child's right to life, creates a complicated legal conundrum. Yet the glaring need for prompt resolution provides the impetus for quick and meaningful decisionmaking.

It is clear that when the concern is with the child's *physical* well-being, the courts can make meaningful and swift decisions.[206] However, when the concern is with the child's *psychological* well-being, the courts are less willing to take on a role of such urgency.[207] The specific timetables proposed above will send the unambiguous message that the psychological well-being of a child must be given the same regard as the physical well-being. Once the laws are adjusted to reflect this perspective, the courts must then be held accountable for administering these laws as they are designed.

B. A Model for Accountability

1. Accountability in Action

Accountability is a cornerstone of this country's justice system. Individuals are accountable for the actions they take, and consequences are rendered for actions that do not comply with the standards designated by law.[208] Similarly, when systems fail to evolve with public policy established by the community, these systems must also be held accountable. As the policy on child placement matters evolves so as to prioritize the protection of children from unreasonable delay, the systems that serve those children should be held accountable for complying with such a framework. This sort of accountability came into play when public perception of domestic violence underwent a transformation in the last half of the twentieth century.[209] The court system and law enforcement agencies were slow to comply with the new laws and recently recognized rights of protection.[210] Where traditional norms dictated that domestic conflicts were private matters,[211] new laws regarding such abuse demanded involvement by the state.[212]

Law enforcement was forced to recognize this change in public policy

206. GOLDSTEIN ET AL., *supra* note 19, at 42.
207. *Id.* at 42–43.
208. *See* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 429 (1981) (Burger, C.J., dissenting) (asserting that the accountability of each individual is central to law and society).
209. *See Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1502–03 (1993).
210. *Id.*
211. *Id.*
212. *Id.* at 1528–29.

through cases such as *Thurman v. City of Torrington*,[213] in which police officers were held accountable for failing to protect a woman who was attacked by her estranged husband.[214] A multi-million dollar judgment was entered against the police department, motivating the department to improve its response to domestic violence.[215] Here, the court was the instrument through which an organization serving the public was held accountable for complying with the spirit of the law. This method of accountability has altered the way in which the systems charged with the protection of citizens view and respond to domestic abuse.

In a similar fashion, social services systems have been held accountable for failure to comply with laws that serve to protect children in the foster care system. In the case of *Jeanine B. v. McCallum*,[216] the plaintiffs argued that the defendants had "continuously and systematically" failed to petition for the termination of parental rights in a timely manner.[217] In addition, the plaintiffs complained that the system had failed to take the appropriate steps to place foster children in adoptive homes.[218] Judge Randa of the U.S. District Court for the Eastern District of Wisconsin held that ASFA created enforceable federal statutory rights that gave the plaintiff children a claim against the defendant governor and others.[219] This allowed those in charge of the system to be held accountable for the system's failures.

Both of the above cases utilized 42 U.S.C. § 1983, which imposes liability on anyone who deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws."[220] This can translate into a private right of action for the violation of a federal statute.[221] This federal right was the basis for the above decisions, which held state actors accountable for their failure to evolve along with the newly

213. 595 F. Supp. 1521 (D. Conn. 1984).
214. *Id.* at 1524–26. The woman had complained to the police department on several previous occasions that the husband had harassed, threatened, and attacked her. The police department continually failed to take action to protect the woman and her infant son. *Id.*
215. Schafran, *supra* note 143, at 1068.
216. No. 93-C-0547, 2001 WL 748062 (E.D. Wis. June 19, 2001).
217. *Id.* at *2.
218. *Id.*
219. *Id* at *5.
220. 42 U.S.C. § 1983 (2000); *see also* JAMES R. MARSH, *JEANINE B. V. MCCALLUM*: ESTABLISHING A FEDERAL STATUTORY RIGHT TO ADOPTION OPPORTUNITIES FOR FOSTER CHILDREN, Decision page 3, *at* http://www.e-lawpublishing.com/images/JeanineB.e-Book.pdf (last visited Aug. 20, 2003).
221. MARSH, *supra* note 220, at Decision page 3.

formed public policy embodied by the law.

In order to determine whether a statute gives rise to such a federal right, a three-prong test, developed by the Supreme Court and referred to as the *Blessing* test, must be applied.[222] This test has three requirements: (1) Congress must have intended the statute to benefit the plaintiff, (2) the right must not be so "vague and amorphous" that its enforcement would "strain judicial competence," and (3) the statute must impose a binding obligation on the states.[223]

Whereas this technique has motivated both law enforcement and social service agencies to respond to developing public policy, judicial immunity prevents the use of such a tool to motivate the judiciary.[224] Although the Supreme Court itself interpreted § 1983 as allowing for injunctive relief against a judicial officer,[225] Congress effectively overruled this decision with the Federal Courts Improvement Act (FCIA).[226] The FCIA amended § 1983 to provide that injunctive relief shall no longer be granted in an action brought against a judicial officer.[227] Therefore, § 1983 cannot be used as a tool for holding courts accountable to any legislatively imposed time frames for processing child placement cases. What remains is a framework of accountability that must be largely internal, consisting of court rules that are specific and largely nondiscretionary, informal methods of evaluation and discipline, and the allowance of limited public access to court proceedings.

2. Recommendations

a. Accountability Through Court Rules

In creating court rules that include mechanisms for accountability, the *Blessing* test can be informative, although not determinative, as a framework for accountability.[228] Using the *Blessing* test, it is essential

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222. Blessing v. Freestone, 520 U.S. 329, 340 (1997).

223. *Id.* at 340–41.

224. The courts of today have enjoyed absolute immunity for official actions. Griffin & Pelegrin, *supra* note 165, at 385.

225. Pulliam v. Allen, 466 U.S. 522, 541–42 (1984). In this case, a civil rights suit was brought under § 1983 seeking injunctive relief against a magistrate who continually imposed bail for nonjailable offenses. Griffin & Pelegrin, *supra* note 165, at 409. The Supreme Court held that judges were not immune from suits for injunctive relief, rationalizing that Congress had intended that § 1983 apply to all state actors. *Id.* at 411.

226. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996); *see also* Guerin v. Higgins, 8 Fed. Appx. 31, 32 (2d Cir. 2001) (articulating the fact that the FCIA overruled *Pulliam*). The FCIA was passed in response to the holding in *Pulliam* and states that injunctive relief against a judicial officer is barred unless declaratory relief is violated or unavailable. Griffin & Pelegrin, *supra* note 165, at 391.

227. Federal Courts Improvement Act of 1996 § 309(c).

228. The Supreme Court, through the *Blessing* test, detailed standards by which one

that guidelines (1) are intended to benefit waiting children, (2) are not vague or amorphous, and (3) impose a binding obligation on the courts.[229]

Following this helpful framework, the first step suggests that language in a court rule should specifically state that the rule is intended to apply to any child who is awaiting a permanent placement. The rule must clearly refer to children residing with prospective adoptive parents, as well as those who have been removed from their parents involuntarily and are now in the care of the state.

Second, given the above model for efficiency, the guidelines and timetables should be adequately clear. Actual deadlines should be used, rather than vague phrases such as "as expeditiously as possible."[230] When the goal is vague, courts are only evaluated against each other. If general practices are inadequate, then evaluators can only discern which courts are the most or least inadequate. When the goals are specific, on the other hand, it is possible for courts to be evaluated effectively. It then becomes clear when courts are meeting or failing to meet specified deadlines, thus alerting review panels of a potential problem.

Finally, the rule should clearly be made binding upon the courts. This is achieved through the use of mandatory, rather than precatory, language. Rules governing child placement matters should clearly delineate standards for performance and introduce these standards using the word "shall." The word "shall" signals to courts that the directive is mandatory, rather than just suggestive.[231] This formal approach to creating court rules provides a necessary backdrop to the informal disciplinary techniques that are used internally in order to promote change and accountability.[232]

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could be held accountable to federal laws. Blessing v. Freestone, 520 U.S. 329, 340–41 (1997). By following the same standards, courts can devise their own rules and guidelines that will send an unambiguous message that their standards are to be taken seriously.

229. *Id.*

230. Stratton, *supra* note 86, at 129.

231. Rea Enters. v. Cal. Coastal Zone Conservation Comm'n, 125 Cal. Rptr. 201, 203 (1975) (setting forth the "well established rule of statutory construction that the word 'shall' connotes mandatory action and 'may' connotes discretionary action").

232. "[T]he mere presence of more formal means for remedying judicial misconduct provides an incentive for judges to take seriously the informal suggestions of the [administrative] judge." Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 283 (1993).

b. Internal Accountability

Given the freedom and protection furnished to judges, internal methods of accountability, sometimes referred to as the "tools of judicial administration,"[233] must be employed to ensure compliance with imposed standards. The courts and their administrative bodies must institute practices that manifest a commitment to evaluating judges on the basis of how effectively they handle child placement cases. This provides judicial review panels with a basis upon which to take disciplinary action when necessary.[234]

The actions of judicial councils and chief judges have been effective methods in addressing issues such as decisionmaking delays in federal courts.[235] The most effective techniques are not punitive, but instead focus on "consultation, reasoned arguments, persuasion, and publicity."[236] In fact, simple tactics, such as a visit or communication from a chief judge, are capable of bringing about a transformation in a judge's attitude.[237] This sort of judicial leadership has been identified as a necessary ingredient in reducing court delay, and the reported effectiveness of these approaches supports this premise.[238]

Informal mechanisms that acknowledge successful efforts and bring to light a lack of compliance can be effective in motivating the courts toward reform.[239] Peer influence has been identified as a useful tool in promoting judicial accountability.[240] Judicial self-monitoring, where the

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233. Judicial administration refers to the practice of developing and administering policies that make it possible for courts to handle matters fairly, economically, and expeditiously. *Id.* at 259.

234. It has been asserted that judicial discipline serves three main purposes. Sambhav N. Sankar, Comment, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233, 1237–38 (2000). The first is public accountability. *Id.* The second is enforcing adherence to the law, "so that neutral principles rather than a judge's personal preferences motivate her decision in each individual case." *Id.* at 1238. The third is ensuring that judges "conform to professional standards of behavior and conduct—so that in exercising their authority they do not alienate or lose the respect of those who are subjected to it." *Id.*

235. Geyh, *supra* note 232, at 260.

236. *Id.* at 262. These are the methods that are utilized by circuit judicial councils, which are administrative bodies existing in each judicial circuit. *Id.* at 262.

237. *Id.* at 268.

238. *Id*. at 276–77.

239. It has been observed that more "informal" actions are both "extremely efficient and effective in many situations." Sankar, *supra* note 234, at 1254. These informal actions are more appropriate to the issues discussed in this Comment, as more formal methods, such as elections and impeachment, are unavailable except as a response to the most extreme objectionable conduct. *Id.* at 1269.

240. Geyh, *supra* note 232, at 304. "A judge who falls significantly behind in his work is coaxed—and usually effectively—to keep up. . . . Few judges are willing to risk public attention by persistently rejecting their colleagues' overtures." *Id.* (quoting Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 708 (1979) (referring specifically to cases of judges who create delay)).

courts review their own levels of efficiency and report the results to the judges, has also proven to be effective.[241]

Although these informal methods are regarded as the most effective, there is nevertheless a sense that these procedures are designed to handhold judges and hide their weaknesses from the public. This directly conflicts with the ultimate objective of accountability, which is the obligation to answer to the public itself. Therefore, in addition to informal internal accountability mechanisms, practices that allow for public scrutiny must be developed.

c. Accountability to the General Public

"Open courtrooms . . . place our system of justice before the public and thus make it accountable."[242] While some states have reconsidered closed courtrooms in juvenile delinquency proceedings, there is still a strong presumption of closed courtrooms in dependency proceedings.[243] However, it is argued that this secrecy is detrimental to the system of justice, as it protects the decisionmakers from scrutiny and allows them to operate with incompetence, disregard, or abusive discretion.[244] This is especially troublesome in the context of child placement matters. It has already been shown that judicial attitudes have a great bearing upon whether standards will be adhered to and whether personal agendas will be injected into decisionmaking. Thus, the closed dependency courtroom can be a breeding ground for impropriety.

In contrast, the juvenile delinquency system has undergone reform in this area. Where it was once believed that the state could successfully step into the role of a substitute parent for delinquent children, able to nurture and rehabilitate them, it became clear that the state was failing, to the detriment of the juveniles and the rest of society.[245] Hence, juvenile

241. A most effective device is information that compares judges within the same court system. Many courts provide the judges with a weekly status report that ranks the individual dockets according to age and size and includes the number of pending cases in the pretrial and trial stages. This is a form of accountability. Although few judges would admit that they compete with their colleagues, no judge wants to have the largest or oldest docket. LITIGATION CONTROL, *supra* note 144, at 13.

242. Bean, *supra* note 42, at 1.

243. *Id.* For a comprehensive list of state statutes regarding access to dependency proceedings, see *id.* at 1 n.5.

244. *See* Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n, 710 F.2d 1165, 1179 (6th Cir. 1983) (holding that "secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption").

245. Arthur R. Blum, Comment, *Disclosing the Identities of Juvenile Felons:*

delinquency hearings have recently allowed for greater access in order to expose the weaknesses of the system, as well as to protect the public by alerting them to the identities of the juvenile offenders in their midst.[246]

This wave of reform has washed right by those who are most in need of a protective and watchful eye.[247] The children involved in dependency proceedings are the ones whose plights should most clearly signal the need for public awareness. Exposing the public to the realities facing these children of the court can serve as the impetus for reform. Public scrutiny can be influential in ensuring that decisions are made according to standards of public policy rather than individual biases.[248]

Media attention can be a strong motivator for compliance. A great amount of public attention was focused on the issue of contested adoptions in the mid-1990s because of the media's coverage of the issue.[249] In fact, Justice Heiple himself referred to the impact of this kind of attention during the Baby Richard case.[250] He lashed out at columnist Bob Greene, who had generated much commentary on the case, stating that Green's columns were "designed to discredit [Heiple] as a judge and the Supreme Court as a dispenser of justice by stirring up disrespect and hatred among the general population."[251]

Although the judges denounced Greene's characterization of the case and asserted that public opinion had no place in judicial decisionmaking, the media attention did effect some change. The public outcry resulted in new legislation,[252] as well as many scholarly examinations of the concepts of due process rights of parents and the best interests of children.[253] If nothing else, public attention can put pressure on judges to explain their actions.[254] This prevents decisions from being made in anonymity, isolated from scrutiny.[255]

Introducing Accountability to Juvenile Justice, 27 LOY. U. CHI. L.J. 349, 370–72 (1996).

246. Bean, *supra* note 42, at 2–4.

247. *Id.* at 7.

248. *Id.* at 52.

249. *See supra* note 39.

250. *In re* Doe, 638 N.E.2d 181, 189–90 (Ill. 1994).

251. *Id.* at 189.

252. Kelson, *supra* note 14, at 369 n.115; *see also* Zito, *supra* note 25, at 455–57.

253. *See* Kelson, *supra* note 14 (analyzing the best interest of children standard); *see also* Boccaccini, *supra* note 62 (arguing for the prioritization of children's liberty interests over those of the biological parents); Eisen, *supra* note 34 (outlining a brief case plan approach to contested adoptions); Scarnecchia, *supra* note 41 (arguing for a child's constitutionally protected liberty interest in security from state-imposed harm).

254. *See Ex parte* C.V., 810 So. 2d 700, 707–08 (Ala. 2001) (Lyons, J., concurring specially). Justice Lyons states that "being aware of the degree of . . . the public discussion concerning this case, I am compelled to preface my views on the merits of this case with some observations on the authority and responsibility of judges." *Id.*

255. *See* Schafran, *supra* note 143, at 1064, 1080.

VI. CONCLUSION

These cases involve a most fundamental decision: the determination of who will serve as a child's parent. They touch the most vulnerable among us: those who need protection and placement in order to mitigate the effects of the trauma they have undoubtedly suffered before coming to the court. Through a partnership of the legislature, the courts, and the public, and the commitment to efficiency and accountability, standards can be set and enforced in order to provide these children with the stability they need in an expeditious manner.

The plan begins with Congress continuing to reshape and redefine federal laws in order to align them with the goal articulated by one of its own members: "an America . . . where every child has the opportunity to live in a safe, a stable, a loving, and a permanent home."[256] Federal and state lawmakers must dedicate themselves to creating specific and unambiguous statutes and rules that stipulate time frames for child placement decisions, reflecting an understanding of the child's perspective on time and need for stability and permanency.

Next, the public must continue to advocate on behalf of those without a voice, engaging the media in the investigation and publication of the failures of the systems. In order to assist this effort, courtrooms that were once closed to the public should now be open so that the public may have the access it needs to keep watch over the system.

Ultimately, responsibility falls on the shoulders of the courts themselves. Courts at all levels must obligate themselves to designing strategies that will comply with legislative mandates. Judicial training and education must stress that courts have an irrefutable responsibility to the well-being of children. Evaluators and review panels must communicate specific standards to the courts, honestly and fairly report where weaknesses exist, and hold their members accountable for noncompliance.

As one child advocate suggests:

> We shall know the courts have fulfilled their obligation when we find them open at 2:00 a.m., with counsel ordered present, with social workers examined as to whether they can finish their tasks within the next twenty-four hours; when these children of the court are given the kind of "stay up all night and worry" attention of a responsible parent when his or her child is in danger or adrift.[257]

256. 143 CONG. REC. S12670 (daily ed. Nov. 13, 1997) (statement of Rep. DeWine).

257. Interview with Robert Fellmeth, Executive Director, Children's Advocacy Institute, University of San Diego School of Law, in San Diego, Cal. (Oct. 14, 2002).

It has often been said that a society is judged by the way it treats its children. By this standard, our society can do much better. It is now upon us to judge the judges, to insist that our society becomes one that values its children and ensures that a loving home awaits each child at the end of the day.

JESSICA K. HELDMAN