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### Backward Progress Toward Reinstating Parental Rights

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# BACKWARD PROGRESS TOWARD REINSTATING PARENTAL RIGHTS

LASHANDA TAYLOR ADAMS<sup>∞</sup>

## ABSTRACT

States have passed reinstatement statutes to address the increased number of legal orphans in the foster care system. For the most part, however, these laws have been inadequate to address the problem because they are motivated by a view of terminated parents that does not fit current realities. Terminated parents have typically been viewed as obstacles to permanence rather than a realistic placement option. The laws often punish parents who opposed the termination of their parental rights and reward those who voluntarily signed relinquishments.

Reinstatement statutes alone are inadequate to address the growing concern over youth aging out of foster care without permanence. Some states provide parents the opportunity to adopt their biological children (“re-adoption”). A system that provides for both reinstatement and adoption would offer additional opportunities for terminated parents and their children to reunite post-termination.

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## I.

## INTRODUCTION

In a 1995 law review article, Professor Martin Guggenheim coined the term “legal orphan” to refer to a child whose parents’ rights are terminated in anticipation of adoption, but who never finds a permanent adoptive family.<sup>1</sup> It is nearly impossible to determine the number of legal orphans in the United States. According to the most recent Adoption and Foster Care Analysis and Reporting System (“AFCARS”) report, on September 30, 2015, there were 111,820 foster children waiting to be adopted across the country.<sup>2</sup> Of those children, 62,378 have no legal connections to their biological parents.<sup>3</sup> This statistic is under-inclusive, however, because the number does not include children sixteen years old and older whose parents’ rights were terminated and who have a goal of emancipation.<sup>4</sup> It also does not include legal orphans whose parents’ rights were terminated in prior fiscal years.<sup>5</sup>

Legal orphans languish in a system designed to temporarily provide youth with legal and relational permanence. Ultimately, they become part of the nine percent of foster youth who emancipate from the foster care system without any legal connections.<sup>6</sup> Studies show that the absence of a legal parent has negative social, emotional, and financial consequences.<sup>7</sup> Not only do legal orphans experience the dire outcomes of other children who age out of the foster care system—including homelessness, criminal involvement, mental and physical health issues, lower education level, and increased reliance on public assistance—but the problems are compounded by the fact that these youth have

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1. Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 122 (1995).

2. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REP. 23, at 1 (2016), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport23.pdf> [<https://perma.cc/UE5W-DNZP>].

3. *Id.*

4. *Id.* at 4 n.3.

5. *Id.* at 1 n.1.

6. *Id.*

7. See LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL’Y & L. 318, 326–27 (2010).

an undermined sense of permanency and security.<sup>8</sup> In consideration of these bleak outcomes, states should explore every possible permanent family resource for youth in foster care, including the child's biological parent.

Some legal orphans have biological parents who have been rehabilitated and are now able to care for them. Many of these parents maintain relationships with their children even after the state has determined that they are not fit to parent them. Seventeen years ago, as a student advocate in the Family Defense Clinic at New York University School of Law, my clinic partner and I were assigned to represent one such parent who wanted her parental rights reinstated.<sup>9</sup> Roberta Green's<sup>10</sup> son had been removed from her care and placed into foster care about ten years prior. Her parental rights had been terminated because she had not been able to overcome her drug addiction. By the time we began working with Ms. Green, however, she had completed drug rehabilitation, was employed, and had stable housing. She was also providing care for her son, who had aged out of the foster care system without ever being adopted. By all outward appearances, she was his mother. Still, it was important to her that the state recognize that she was both the biological and legal parent to her son.

At that time, there were no statutes that allowed the court to reinstate parental rights after they had been involuntarily terminated. So, on behalf of our client, we filed a motion to vacate the original termination order due to a change in circumstances. The pleading argued that vacation was warranted given our client's successful efforts toward rehabilitation, her relationship with her son, and the negative effects of his continued legal orphan status. After a short hearing, the motion was granted and her parental rights were reinstated.

Since that time, seventeen states, including New York, have passed laws permitting parental rights to be reinstated when certain conditions are met.<sup>11</sup> On one hand, these statutes recognize that terminated parents may provide the best opportunity for permanence for youth who would otherwise languish in the foster care system. Within that recognition is an understanding that people can

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8. *Id.* at 328–29; Patrick Parkinson, *Child Protection, Permanency Planning and Children's Right to Family Life*, 17 INT'L J.L. POL'Y & FAM. 147, 159 (2003) (noting that “not chosen” for adoption is one of the worst possible outcomes for children because it places them in limbo and is likely to undermine any sense of permanence or security).

9. Because the representation through the Family Defense Clinic was so long ago and for confidentiality reasons, a case number and case files are unavailable for review.

10. This is a pseudonym to maintain our former client's confidentiality.

11. These seventeen states are: California, CAL. WELFARE & INST. CODE § 366.26(i)(3) (Deering 2015); Colorado, COLO. REV. STAT. tit. 19, § 3-612 (2014); Delaware, DEL. CODE ANN. tit. 13, § 1116 (2013); Georgia, GA. CODE ANN. § 15-11-323 (2014); Hawaii, HAW. REV. STAT. § 571-63; Illinois, ILL. COMP. STAT. 405/2-28 (2010) and 705 ILL. COMP. STAT. 405/2-34 (2010); Louisiana, LA. CHILD. CODE ANN. art. 1051 (2008); Maine, ME. REV. STAT. ANN. tit. 22, § 4059 (2017); Minnesota, MINN. STAT. § 260C.329 (2013); Nevada, NEV. REV. STAT. ANN. §§ 128.160, 128.170 (2017); New York, N.Y. FAM. CT. ACT, §§ 635–37 (Consol. 2017); North Carolina, N.C. GEN. STAT. § 7B-1114 (2016); Oklahoma, OKLA. STAT. ANN. tit. 10A, § 1-4-909; Utah, UTAH CODE ANN. tit. 78A, § 6-1401; Virginia, VA. CODE ANN. § 16.1-283.2 (2013); Washington, WASH. REV. CODE ANN. § 13.34.215; and Vermont, VT. STAT. ANN. tit. 33, § 5125 (2016).

change—even people who were once deemed unfit to parent. On the other hand, these statutes reflect a negative and biased view of terminated parents and present challenges for them and lawyers who represent them.

Specifically, in an effort to create a pathway for post-termination reunification, the reinstatement laws close avenues to reinstatement that were previously available. In 1999, when there was no reinstatement statute in New York, my clinic partner and I were able to petition the court on Ms. Green's behalf. Although we thought this concept was novel, parents across the country had, in fact, already made similar requests.<sup>12</sup> Before reinstatement statutes, biological parents employed a number of legal strategies to regain some, if not all, of their parental rights. In addition to motions to vacate the termination order, birth parents petitioned the court to adopt<sup>13</sup> or obtain custody or legal guardianship of their biological children.<sup>14</sup> They also moved to be declared the child's presumed parent.<sup>15</sup> When permitted to file, parents had party status or an opportunity to be heard or were an integral part of the proceeding to restore their rights.<sup>16</sup> By contrast, very few state reinstatement statutes grant the biological parent standing to petition the court for the reinstatement of her rights, grant the parent party status, or provide for the appointment of legal representation for the

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12. See Taylor, *supra* note 7, at 335. At that time, some states permitted termination of parental rights orders to be modified or vacated when new evidence was discovered or when there was a change in circumstances that affected the child's best interests. See, e.g., *In re D.G.*, 583 A.2d 160, 169 (D.C. 1990) (vacating the termination order and remanding the case when adoption was no longer a realistic possibility); Diane Riggs, *Permanence Can Mean Going Home*, ADOPTALK (Spring 2006) (outlining process used in several New York cases to vacate the order terminating parental rights), <http://www.nacac.org/adoptalk/permanence.html> [<https://perma.cc/6F8D-AVEG>].

13. See, e.g., *In re Cody B.*, 63 Cal. Rptr. 3d 652, 658 n.8 (Cal. 2007) (quoting the lower court stating "in the past I have had mother's parental rights terminated and who readopted their kids"). In *In the Matter of M.O.*, No. M2007-003470COA-R3-PT, 2007 WL 2827373, at \*2 n.1 (Tenn. Ct. App. 2007), the court noted that an adoption proceeding "would be the most likely available means by which to seek a legal parent/child relationship where none exists, including after a termination order." In *Thompson v. Department of Health & Rehabilitative Services*, 353 So. 2d 197, 198 (Fla. Dist. Ct. App. 1977), the court stated that the children's birth mother "may petition the Circuit Court, as anyone else, for the right to adopt the children, and appropriate means are available for a complete review of her petition."

14. See, e.g., *In the Interest of Konczak*, 371 N.E.2d 136, 138 (Ill. App. Ct. 1977), in which the court held that a birth mother had standing to seek custody under a statute that permitted any person interested in the minor to apply to the court for a change in custody. In *In re the Custody of R.R.B.*, 31 P.3d 1212 (Wash. Ct. App. 2001), a biological father petitioned for custody of a child nine years after his rights were terminated. The court upheld the lower court's decision to grant the petition by "conclud[ing] that the adoption laws d[id] not bar [the] petition." *Id.* at 1216. The court stated that "nothing in the adoption statutes preclude[d the father] from participating in a separate, unrelated proceeding. And the cases involving dependency and involuntary termination of parental rights [we]re distinguishable." *Id.* Addressing the argument that allowing such petitions is against the public policy of enhancing finality in adoption proceedings, the court stated that the biological father's "nonparent petition for custody d[id] not threaten the integrity of the adoption process." *Id.*

15. See, e.g., *In re Cody B.*, 153 Cal. App. 4th 1004, 1007-08 (Cal. Ct. App. 2007) (noting biological mother's request to be designated the presumed mother six years after the termination order was entered).

16. See *supra* note 14.

parent.<sup>17</sup> In most jurisdictions, terminated parents are systematically excluded from the process.

While reinstatement statutes contain the promise of post-termination reunification, this article discusses ways in which these statutes both further and frustrate that goal. This article examines the bias against parents whose rights have been terminated reflected in reinstatement statutes. It further discusses how these laws reinforce disincentives for parents to defend their fundamental right to the care, custody, and control of their children. Parents who litigate against the termination of their parental rights are penalized by laws and policies that give preferential treatment to parents who voluntarily relinquish their parental rights. Reinstatement statutes are compared against adoption laws that, in many states, provide a better alternative for restoring the parent-child relationship. While state interests support reinstatement statutes, the laws as currently written are ultimately ineffective at best and harmful at worst.

## II.

### TERMINATED PARENTS AND LEGAL ORPHANS

In all fifty states and the District of Columbia, a parent's rights to the care, custody, and control of her children can be terminated voluntarily or involuntarily.<sup>18</sup> Voluntary termination is often referred to as "relinquishment."<sup>19</sup> Some states provide for voluntary termination of parental rights only if the parent whose rights are to be terminated has consented in writing to the termination and if the termination will be in the best interests of the child.<sup>20</sup> By contrast, the grounds for involuntary termination of parental rights are specific circumstances under which the child cannot safely be returned home because of risk of harm by the parent or the inability of the parent to provide for the child's basic needs.<sup>21</sup> While the statutory grounds for termination vary, every state provides by statute a mechanism for the involuntary termination of parental rights.<sup>22</sup>

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17. See *supra* note 11.

18. See, e.g., 1 Thomas A. Jacobs, *Relinquishment and Consent*, in CHILDREN & THE LAW: RIGHTS AND OBLIGATIONS § 3:11 (2016); *Grounds for Involuntary Termination of Parental Rights*, CHILDREN'S BUREAU, CHILD WELFARE INFORMATION GATEWAY, at 1 (Jan. 2013), <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf> [<https://perma.cc/3ALN-R8PU>]; *Consent to Adoption*, CHILDREN'S BUREAU, CHILD WELFARE INFORMATION GATEWAY, at 1 (Apr. 2013), <https://www.childwelfare.gov/pubPDFs/consent.pdf> [<https://perma.cc/5Y3W-NFPL>].

19. See, e.g., *In re Cesar L.*, 654 S.E.2d 373 (W. Va. 2007) (distinguishing between involuntary termination and voluntary relinquishment of parental rights that sever the parent-child relationship).

20. See, e.g., MO. ANN. STAT. § 211.444 (West 2007); FLA. STAT. § 39.806 (2006).

21. See *Grounds for Involuntary Termination of Parental Rights*, CHILDREN'S BUREAU, CHILD WELFARE INFORMATION GATEWAY, at 2 (Jan. 2013), <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf> [<https://perma.cc/JLG3-2DVX>].

22. See Jenina Mella, *Termination of Parental Rights Based on Abuse and Neglect*, 9 CAUSES OF ACTION 2d 483 § 2 (2007) (finding that actions for the termination of parental rights in the context of abuse, neglect, or dependency proceedings are the centerpiece of the child welfare

Federal law establishes timelines in which states must either return the child to her parents or initiate proceedings to terminate parental rights so the child can be adopted. The Adoption and Safe Families Act (“ASFA”) requires that states initiate termination of parental rights (“TPR”) proceedings for parents of children who have been in care for fifteen of the most recent twenty-two months (except in situations in which the child is placed safely with relatives, there is a compelling reason why TPR is not in the child’s best interest, or the family has not received the services that were included in the case plan).<sup>23</sup> A termination order legally severs a parent’s rights, privileges, and responsibilities regarding her child.<sup>24</sup> Traditionally, termination orders are final, unlike other custody orders that can be modified and are not subject to *res judicata*.<sup>25</sup>

Of the 427,910 children who were in foster care on September 30, 2015, the parental rights to 62,378 of them were terminated during that fiscal year.<sup>26</sup> Agency records are customarily kept in the children’s names, so the number of parents who have had their parental rights terminated is not known.<sup>27</sup> Although there are few studies about terminated parents,<sup>28</sup> stereotypes and stock stories create prevalent bias against them. These parents are commonly portrayed as perpetrators of horrible crimes against their children—one-dimensional human beings with no ability to change.<sup>29</sup> These portrayals are perpetuated by the

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adjudication system). In some states, only the state has standing to seek termination of parental rights; however, other states grant standing to individuals, including those seeking to adopt the child.

23. 42 U.S.C. § 675(5)(E) (2015).

24. *Termination of Parental Rights*, BLACK’S LAW DICTIONARY (10th ed. 2014).

25. While few courts have expressly held that the doctrine of *res judicata* does not apply to TPR cases, including those filed post-termination of the parents’ rights, far more have failed to rule on the issue. *See, e.g.*, *B.J.H. v. State (In re Interest of T.J., A.H. & K.H.)*, 945 P.2d 158, 162 (Utah Ct. App. 1997) (“[W]e need not reach the issue of whether different notions of *res judicata* should be applied in termination of parental rights proceedings.”); *State v. J.T. (In re Interest of J.J.T. & T.J.T.)*, 877 P.2d 161, 164 (Utah Ct. App. 1994) (“Thus we save for another day the difficult question of whether, and to what extent, *res judicata* really applies in the context of termination of parental rights.”). Some states have enacted laws that explicitly apply these doctrines to termination orders. For example, the Tennessee statute prohibits a TPR to be overturned by any court or collaterally attacked by any person or entity after one year from the date of entry of the final order of termination. TENN. CODE ANN. § 36-1-113(q) (2009).

26. AFCARS Rep. 23, *supra* note 2, at 1.

27. Leslie Doty Hollingsworth, *Birth Mothers*, in *CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS* 424, 427 (Gerald P. Mallon & Peg McCartt Hess eds., 2d ed. 2014).

28. Mary O’Leary Wiley & Amanda L. Baden, *Birth Parents in Adoption: Research, Practice, and Counseling Psychology*, 33 THE COUNSELING PSYCHOLOGIST 13, 22 (2005) (“But who are these parents who no longer have the legal right to parent their children? These parents have been briefly and superficially described in the literature. The literature describes their characteristics and tends to report reasons for the termination of rights . . . and birth mother background histories . . . , but national statistics on these individuals, developmental histories, and outcomes are difficult to determine.”).

29. *See* Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1 (2010) (discussing how the confidentiality behind

media, which commonly describe child abuse as “brutal violence; children [as] innocent victims; parents [as] deviant and monstrous; and children [needing to] be separated from parents for their protection.”<sup>30</sup> In her book *Shattered Bonds*, Professor Dorothy Roberts provides a common narrative that was recounted on National Public Radio’s Talk of the Nation the night ASFA was enacted:

Children removed from a home for their safety then returned only to be killed; children who bounce from home to home for years because a parent won’t surrender legal rights to the child so he can’t be adopted; families collapsing under the weight of dysfunction, drugs, poverty; where children are raped by mom’s boyfriend or scalded, or starved, or beaten.<sup>31</sup>

Furthermore, because most parents whose rights are terminated are poor people and people of color, they face institutional bias, which “can be attributed to institutions such as the judicial system and children’s welfare agencies and can be a reflection of the system of disadvantage . . . and oppression all too commonly found in these institutions.”<sup>32</sup> Racism and class oppression affect these parents at every stage of the child welfare process, from investigation of the allegation to reinstatement of their parental rights.<sup>33</sup>

In contrast to the common narrative about terminated parents, parents lose their parental rights due to child neglect, as well as child abuse, and some have had their rights terminated due to unpaid child support.<sup>34</sup> The limited research on outcomes for terminated parents has repeatedly found long-term psychological distress associated with involuntary termination. Some common outcomes are: (a) an ongoing sense of anger and guilt; (b) significant psychological problems; (c) health problems usually associated with bereavement; and (d) relationship problems.<sup>35</sup> Not surprisingly, many parents, even after their parental rights have been terminated, care deeply about their child’s wellbeing. As one terminated parent stated, “I think it was unfair the way I lost them and it really has affected my life, worrying about them, on a daily basis. Do they have enough food to eat,

child welfare cases silences children and their parents from offering a more nuanced narrative or perspective of family court proceedings).

30. *Id.* at 8.

31. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 114 (2002).

32. O’Leary Wiley & Baden, *supra* note 28, at 23.

33. Jina Lee, Zenobia Bell & Mae Ackerman-Brimberg, *Implicit Bias in the Child Welfare, Education and Mental Health Systems*, NAT’L CTR. FOR YOUTH LAW (2015), [https://youthlaw.org/wp-content/uploads/2015/07/Implicit-Bias-in-Child-Welfare-Education-and-Mental-Health-Systems-Literature-Review\\_061915.pdf](https://youthlaw.org/wp-content/uploads/2015/07/Implicit-Bias-in-Child-Welfare-Education-and-Mental-Health-Systems-Literature-Review_061915.pdf) [<https://perma.cc/VX5X-RCGM>] (highlighting various points where decision-makers might unconsciously rely on racial biases about families and children of color when reviewing the facts of a child welfare case).

34. *See, e.g., In re T.D.P.*, 595 S.E.2d 735, 738 (N.C. Ct. App. 2004) (terminating an incarcerated father’s parental rights for nonsupport, when he earned between \$0.40 and \$1.00 a day and had failed to send “an amount greater than zero” to support his infant daughter in foster care).

35. O’Leary Wiley & Baden, *supra* note 28, at 23.



are they being taken care of emotionally, how are they doing in school, and questions like that.”<sup>36</sup>

Jurisdictions differ as to whether terminated parents still have any type of legal interest in their child or merely an emotional one. At least two appellate courts have recognized the existence of a legal interest after parental rights have been terminated. In *Wynn v. Superior Court*, the Court of Appeals, Fifth District of California, concluded that “the law recognizes some relationships between a child and his or her biological parents even after an adoption has occurred.”<sup>37</sup> In *In re Adoption/Guardianship Nos. 11387 & 11388*, the Court of Appeals of Maryland acknowledged “that a natural parent whose parental rights have been terminated has some level of interest in the status of her biological children.”<sup>38</sup>

Likewise, many legal orphans want to remain emotionally connected to their terminated parents. While there are no published studies on the relationship between legal orphans and their biological parents,

numerous studies detail the strong ties most children in foster care feel for their birth parents, even if their parents do not have custody of them or they cannot be reunified. Children’s attachments to even absent or very flawed parents are deep, as parents play a significant role in the development of their identity and self-esteem.<sup>39</sup>

A study of youth preparing to age out of foster care found that 63.6% felt close to their biological mother and 35.9% felt close to their biological father.<sup>40</sup> Furthermore, there is plenty of anecdotal evidence that many foster youth, including legal orphans, who exit foster care without legal permanency return to their biological parents.<sup>41</sup> Thus, the court order terminating parental rights does not, in fact, terminate the parent-child relationship.

### III.

#### LEGAL ORPHANS AND PERMANENCY

The foster care system is designed to be temporary.<sup>42</sup> The overarching goal of the system is child permanency—specifically, legal permanence.<sup>43</sup> However,

36. Hollingsworth, *supra* note 27, at 434–35.

37. *Wynn v. Superior Court*, 98 Cal. Rptr. 3d 86, 91 (Cal. Ct. App. 2009).

38. *In re Adoption/Guardianship Nos. 11387 & 11388*, 731 A.2d 972, 984 (Md. 1999).

39. Cynthia Godsoe, *Parsing Parenthood*, 17:1 LEWIS & CLARK L. REV. 113, 130–31 (2013).

40. MARK E. COURTNEY, SHERRI TERAQ & NOEL BOST, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: CONDITIONS OF YOUTH PREPARING TO LEAVE STATE CARE 25 (Chapin Hall Center for Children, Univ. Chicago 2004), [http://www.chapinhall.org/sites/default/files/CS\\_97.pdf](http://www.chapinhall.org/sites/default/files/CS_97.pdf) [https://perma.cc/YC2Z-ZQKX].

41. See, e.g., *Emancipated Foster Youth Returning to Birth Parents*, HONORING EMANCIPATED YOUTH, <http://www.issuelab.org/resources/3855/3855.pdf> [https://perma.cc/5YW3-ZCUG] (last visited Apr. 18, 2017).

42. *Foster Care*, CHILDREN’S BUREAU, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/topics/outofhome/foster-care/> [https://perma.cc/6Q88-U96Z] (last

critics allege that while legal permanence “can create both relational permanence and [physical] permanence, the pursuit of legal permanence at the expense of relational and [physical] permanence may be contributing to a state of impermanence among foster care youth.”<sup>44</sup> In an effort to ensure a child’s timely transition to a permanency, ASFA sets specific timeframes in which the state must act on a child’s permanency plan.<sup>45</sup> It prefers that children reunite with their home of origin; this preference changes when the court determines that returning home is no longer in the child’s best interest.<sup>46</sup> Where that determination is made, the state has an obligation to ensure the child’s move toward another permanency option: adoption, legal guardianship, permanent placement with a fit and willing relative, or “another planned permanent living arrangement.”<sup>47</sup>

ASFA’s emphasis on legally secure permanent placement is meant to provide the child with psychological stability and a sense of belonging and to limit the likelihood of future disruption of the permanent relationship.<sup>48</sup> Unfortunately, many legal orphans exit the foster care system without permanency.<sup>49</sup> As one author argues, “[i]t is inconsistent to argue that children’s need for legal permanency justifies shortened timelines for permanency hearings and TPR efforts, and then downplay the importance of legal permanency once parental rights are terminated.”<sup>50</sup> The lack of available options for legal orphans

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visited May 5, 2017) (defining foster care as a temporary service provided by states for children who cannot live with their families).

43. 42 U.S.C. § 671(a)(15)(C) (2014) (establishing specific timelines to achieve permanency for foster youth).

44. Tonia Scott & Nora Gustavsson, *Balancing Permanency and Stability for Youth in Foster Care*, 32(4) CHILDREN & YOUTH SERVS. REV. 619, 619 (2010) (defining relational (or psychological) permanence as consisting of long-term, loving, and accepting relationships and including relationships with parental figures such as biological parents; physical permanence as consisting of stability in community; and legal permanence as consisting of a legal relationship between the youth and a caretaker).

45. 42 U.S.C. § 671(a)(15)(C) (2014).

46. 42 U.S.C. § 671(a)(15)(D) (2014).

47. 42 U.S.C. § 671(a)(15)(E) (2014).

48. See Chereese M. Phillips & Aaron Mann, *Historical Analysis of the Adoption and Safe Families Act of 1997*, 23 J. OF HUMAN BEHAVIOR IN THE SOC. ENV’T 862 (2013); Cecilia Fiermonte & Jennifer Renne, *Making it Permanent: Reasonable Efforts to Finalize Permanency Plans for Foster Children*, AM. BAR ASS’N CTR. FOR CHILDREN & THE LAW (2002), [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/2002\\_Making\\_It\\_Permanent.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/2002_Making_It_Permanent.authcheckdam.pdf) [<https://perma.cc/KGZ3-P98F>].

49. The most current estimate is from 2009, when it was estimated that 4898 legal orphans exited to non-permanency and 6474 legal orphans ages sixteen to eighteen were at risk of aging out. Hon. Sharon McCully (Ret.), *Legal Orphans, Permanent Families: Improving Outcomes by Achieving Permanency for Legal Orphans*, NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES 6 (2012), <http://www.ncjfcj.org/sites/default/files/LEGAL%20ORPHANS%20Webinar%20PPFina1.pdf> [<https://perma.cc/57X3-4Y4S>].

50. Brenda D. Smith, *After Parental Rights Are Terminated: Factors Associated with Exiting Foster Care*, 25(12) CHILDREN & YOUTH SERVS. REV. 965, 980 (2003).

has led to deleterious outcomes for these youth.<sup>51</sup> As “[y]oung people ‘ag[e] out’ of the child welfare system,” they “undergo[] a dual transition—one from the care of the system to autonomy and a second from childhood to adulthood—and they face numerous challenges in making this transition and many experience a range of negative outcomes.”<sup>52</sup> Such outcomes include homelessness, contact with the criminal justice system, mental and physical health problems, under- or unemployment, educational deficiencies, and reliance on public assistance.<sup>53</sup>

Ironically, a youth’s legal orphan status is a direct result of the state’s effort to provide permanence for the child. ASFA provides that adoption is preferred when reunification with parents or primary caregivers is deemed impossible.<sup>54</sup> To facilitate an adoption, the state petitions to terminate parental rights, assuming those rights will be replaced by the adoption.<sup>55</sup> That does not always happen, however, resulting in nearly 63,000 youth with no legal connections.<sup>56</sup> When the purpose for which parental rights were terminated—namely, adoption—is no longer a viable option, state child welfare agencies have begun to examine placement with terminated parents as a realistic permanency option.<sup>57</sup> To strengthen that placement, some states permit parental rights to be reinstated.<sup>58</sup>

#### IV.

##### REINSTATEMENT OF PARENTAL RIGHTS STATUTES

In contrast to the temporary nature of the foster care system, TPR orders have traditionally been considered permanent, and terminated parents legal strangers to their biological child.<sup>59</sup> For example, under the Alaska code, “a decree terminating parental rights . . . voids all legal relationships between the child and the biological parent so that the child is a stranger to the biological

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51. Hon. Sharon McCully (Ret.) & Elizabeth Whitney Barnes, *Forever Families: Improving Outcomes by Achieving Permanency for Legal Orphans*, NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES 4 (2013), [http://www.ncjfcj.org/sites/default/files/LOTAB\\_3\\_25\\_13\\_newcover\\_0.pdf](http://www.ncjfcj.org/sites/default/files/LOTAB_3_25_13_newcover_0.pdf) [<https://perma.cc/X2VJ-YTF2>].

52. Rosemary J. Avery, *An Examination of Theory and Promising Practice for Achieving Permanency for Teens Before They Age Out of Foster Care*, 32 CHILDREN & YOUTH SERVS. REV. 399, 402 (2010).

53. *Id.*

54. 42 U.S.C. § 675 (5)(C).

55. 42 U.S.C. § 675 (5)(E)(i)–(iii).

56. AFCARS Rep. 23, *supra* note 2.

57. *See* Riggs, *supra* note 12; MICH. COMP. LAWS § 400.207(6) (allowing the Michigan Children’s Institute superintendent to enter into an agreement with a terminated parent to restore physical custody without reinstating parental rights).

58. *See supra* note 11 (listing the seventeen states with reinstatement statutes).

59. *But see* LaShanda Taylor Adams, *(Re-)Grasping the Opportunity Interest: Lehr v. Robertson and the Terminated Parent*, 25 KAN. J.L. & PUB. POL’Y 31 (2015) (arguing that parents retain some legal connections, through their opportunity interest, to their children after termination).

parent and to relatives of the biological parent for all purposes.”<sup>60</sup> A similar Washington statute declares that a termination order severs and terminates “all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support existing between the child and parent.”<sup>61</sup> Because of this finality, due process mandates proof by clear and convincing evidence before parental rights can be terminated.<sup>62</sup>

Even before the advent of reinstatement statutes, however, termination orders did not always lead to complete and irrevocable severance of parental rights and responsibilities. Laws and policies mandate continuing obligations to pay child support,<sup>63</sup> ongoing rights of inheritance,<sup>64</sup> continued access to social security benefits,<sup>65</sup> and post-termination contact.<sup>66</sup> Post-termination contact acknowledges that youths benefit from maintaining relationships with parents. For legal orphans, post-termination visitation makes little sense when there is no option for post-termination reunification; thus, states have begun to provide this opportunity as an additional permanency option for these youths.

In 2005, the trend toward uniformly allowing terminated parents the opportunity to restore their parental rights began in California.<sup>67</sup> Legislation was introduced in response to a court decision that expressed frustration with the finality of the law as it existed at the time.<sup>68</sup> In *In re Jerred H.*, the First District Court of Appeals invited the California Legislature to consider allowing the juvenile courts limited discretion to reinstate parental rights where the child would otherwise be left a legal orphan.<sup>69</sup> The opinion suggested that “[t]o avoid

60. ALASKA STAT. § 25.23.130 (2017).

61. WASH. REV. CODE § 13.34.200 (2007).

62. *Santosky v. Kramer*, 455 U.S. 745, 756–58 (1982).

63. *See* *M.D.C. v. K.D.*, 39 So. 3d 1105 (Ala. Civ. App. 2008) (providing overview of state case law deciding whether a parent’s obligation to pay child support ends when parental rights are terminated); *see also* Theresa M. Pelfrey, *Is the Termination of Parental Rights the Termination of Parental Responsibility?*, 13(6) GLOBAL J. HUMAN SOC. SCI. ARTS & HUMANITIES 13 (2013).

64. *See* Richard Lewis Brown, *Undeserving Heirs?—The Case of the “Terminated” Parent*, 40 U. RICH. L. REV. 547 (2006); Richard L. Brown, *Disinheriting the “Legal Orphan”*: *Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125 (2005) (noting that in some states, TPR statutes expressly provide that the right of the child to inherit from the biological parent survives termination); *see also* HAW. REV. STAT. § 571-63 (2013) (“No judgment of termination of parental rights . . . shall operate to terminate the mutual rights of inheritance of the child and the parent or parents involved, or to terminate the legal duties and liabilities of the parent or parents, unless and until the child has been legally adopted.”).

65. *See* SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS), PR 01215.028 Mo. (June 14, 2006), <https://secure.ssa.gov/poms.nsf/lnx/1501215028> [<https://perma.cc/AF5Z-G4AW>].

66. *See* FLA. STAT. ANN. § 39.811(7)(b) (2013) (providing for post-termination contact, in some circumstances, by statute); *see also* TEX. FAM. CODE ANN. § 161.2061 (2003).

67. *See* Assemb. B. 519, Reg. Sess. (Cal. 2005) (as passed Oct. 7, 2005); CAL. WELF. & INST. CODE § 366.26(i)(3) (2015) (providing a method for reinstating parental rights over a child who has not been adopted).

68. A.B. 519, Gen. Assemb., Reg. Sess. (Cal. 2005), [www.leginfo.ca.gov/pub/05-06/bill/asm/ab0501-0550/ab519cfa20050607161843sencomm.html](http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab0501-0550/ab519cfa20050607161843sencomm.html) [<https://perma.cc/NQ8B-B6SQ>].

69. *In re Jerred H.*, 17 Cal. Rptr. 3d 481, 485–86 (Cal. Ct. App. 2004).

such an unhappy consequence, legislation may be advisable authorizing judicial intervention under very limited circumstances following the termination of parental rights and prior to the completion of adoption.”<sup>70</sup>

Developing the first reinstatement legislation was not easy. Adoption proponents argued that families would be reluctant to adopt children from foster care if they believed that a terminated parent might seek to interfere with a pending adoption by means of the reinstatement process. One scholarly record described the debate accordingly:

Legislative history from California, along with the consensus of some practitioners in the field, indicates a fear that parents might abuse the right to petition the court and disrupt the life of a child who does not want to reunify with a parent. There were also concerns in California among prospective adoptive parents that an overly broad statute and the ability of a biological parent to re-enter the picture would chill or destabilize prospective adoptions.<sup>71</sup>

Proponents in Nevada faced similar challenges passing its reinstatement statute. The common concern was that birth parents would create chaos in the child’s life.<sup>72</sup> One opponent stated, “I feel strongly that we do not go down that road[.] I would hate to see a circumstance where a parent is, for example, in prison and is sending petition after petition through the courts trying to regain parental rights, disrupting the child’s life.”<sup>73</sup> Over some objection and with some compromise, the statute, which allows a Nevada court to restore parental rights if a child is not likely to be adopted and if such reinstatement is in the child’s best interest, was passed in 2007.<sup>74</sup> Reinstatement statutes have also been enacted in Washington,<sup>75</sup> Louisiana,<sup>76</sup> Oklahoma,<sup>77</sup> Illinois,<sup>78</sup> New York,<sup>79</sup> Hawaii,<sup>80</sup> Alaska,<sup>81</sup> Maine,<sup>82</sup> North Carolina,<sup>83</sup> Virginia,<sup>84</sup> Delaware,<sup>85</sup> Utah,<sup>86</sup>

70. *Id.*

71. Randi J. O’Donnell, *A Second Chance for Children and Families: A Model Statute to Reinstatement Parental Rights After Termination*, 48 FAM. CT. REV. 362, 372 (2010).

72. Amanda Fehd, *Law Would Let Courts Restore Parental Rights*, NEV. APPEAL (Apr. 4, 2007), <http://www.nevadaappeal.com/news/law-would-let-courts-restore-parental-rights/> [https://perma.cc/KY3G-EGG8].

73. *Id.*

74. NEV. REV. STAT. ANN. § 128.190(3)(a)–(b) (LexisNexis 2013).

75. WASH. REV. CODE § 13.34.215 (2011).

76. LA. CHILD. CODE ANN. art. 1051 (Supp. 2012).

77. OKLA. STAT. ANN. tit. 10A, § 1-4-909 (West 2009).

78. 705 ILL. COMP. STAT. 405/2-34 (2013).

79. N.Y. FAM. CT. ACT §§ 635–37 (McKinney 2012). The New York reinstatement statute is only available if the basis for court involvement was abandonment, mental illness/intellectual disability, or permanent neglect. Parents who have been found to have inflicted severe or repeated abuse cannot petition for reinstatement of parental rights.

80. HAW. REV. STAT. § 571-63 (2006).

81. ALASKA STAT. § 47.10.089(h) (2010).

82. ME. REV. STAT. tit. 22, § 4059 (2011).

Minnesota,<sup>87</sup> Georgia,<sup>88</sup> and Colorado.<sup>89</sup> In 2015, acts concerning restoration of parental rights were introduced in the Connecticut, Michigan, and Iowa legislatures.<sup>90</sup> In 2017, a bill was introduced in Arkansas.<sup>91</sup>

Individual reinstatement statutes vary, but they contain common provisions detailing: (1) whether a waiting period is required before a motion or petition can be filed; (2) the duration of trial home visits prior to the reinstatement of parental rights; (3) the role of the child welfare agency; (4) the criteria for the entry of a reinstatement order, including the standard of evidence and the required court findings; and (5) the effect of the reinstatement order on the earlier termination decree.<sup>92</sup> Also common among the statutes are provisions relating to who can file.<sup>93</sup> Because of general distrust of biological parents and a belief that the best interests of their children are not their paramount concern, most states deny parents standing.<sup>94</sup> Illinois has gone further by also imposing sanctions on parents who are found to have interfered with a potential adoption. The law requires that a motion to reinstate parental rights be dismissed with prejudice if the court finds by a preponderance of the evidence that a parent intentionally acted to prevent or otherwise disrupt the child's adoption after relinquishing parental rights.<sup>95</sup>

The fears expressed by opponents in California, Nevada, and elsewhere have not borne out in New York, where terminated parents can petition for reinstatement of their parental rights. The New York Family Court Act provides that:

a proceeding to modify the disposition in order to restore parental rights may be originated by the filing of a petition by the

83. N.C. GEN. STAT. § 7B-1114 (2013).

84. VA. CODE ANN. § 16.1-283.2 (2013).

85. DEL. CODE ANN. tit. 13, § 1116 (2013).

86. UTAH CODE ANN. § 78A-6-1404 (LexisNexis 2013).

87. MINN. STAT. § 260C.329 (2013).

88. GA. CODE ANN. § 15-11-323 (2014).

89. COLO. REV. STAT. ANN. § 19-3-612 (West).

90. See H.B. 6562, Gen. Assemb., Jan. Sess. (Conn. 2015) (died in committee); S.B. 994, Gen. Assemb., Reg. Sess. (Mich. 2014) (passed Senate, but died in House committee); H.B. 333, 86th Gen. Assemb., 1st Sess. (Iowa 2015).

91. H.B. 1973, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

92. *Reinstatement of Parental Rights State Statute Summary*, NAT'L CONFERENCE OF STATE LEGISLATURES (Apr. 21, 2016), <http://www.ncsl.org/research/human-services/reinstatement-of-parental-rights-state-statute-sum.aspx> [<https://perma.cc/4SSH-GVTN>]; see also Meredith L. Schalick, *The Sky Is Not Falling: Lessons and Recommendations from Ten Years of Reinstating Parental Rights*, 51 FAM. L.Q. 2 (forthcoming Summer 2017) (on file with the author).

93. *Id.*

94. See O'Donnell, *supra* note 71.

95. 705 ILL. COMP. STAT. 405/2-34(3). A reinstatement of a parental rights bill pending before the Arkansas legislature contains a similar provision: "(e) A court may deny a petition filed under this section if the court finds by a preponderance of the evidence that the parent who is the subject of the petition engaged in conduct that interfered with the child's ability to achieve permanency." H.B. 1973, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

child's attorney, by the agency or individual to whom guardianship and custody of the child had been committed or by the respondent or respondents in the termination of parental rights proceeding.<sup>96</sup>

In 2010, the year the reinstatement statute was enacted, 43.3% of children in New York's foster care system exited to adoption.<sup>97</sup> Five years later, 48.5% were adopted.<sup>98</sup> Despite the lack of evidence to support the need to systematically exclude terminated parents and deny them standing, exclusionary provisions remain. These and other anti-parent provisions in state reunification statutes are solely based on bias against terminated parents.

#### A. *Bias Against Terminated Parents Reflected in Reinstatement Statutes*

The National Center for State Courts, in a publication designed to help courts address bias, makes a distinction between explicit and implicit bias:

Unlike *explicit bias* (which reflects the attitudes or beliefs that one endorses at a conscious level), *implicit bias* is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control.<sup>99</sup>

In recent years, social scientists have attempted to determine whether important decisions are shaped by these biases. Studies have found that implicit bias influences professional decision-making, including decisions made by judges and legislators.<sup>100</sup> While the majority of research has focused on bias associated with race, gender, and age, studies have found a correlation between the individual's bias and her decision-making. The authors of a recent study of

96. N.Y. FAM. CT. ACT § 636(a). The respondent in the proceeding is the biological parent.

97. *Kid's Well-being Indicators Clearinghouse*, NEW YORK STATE COUNCIL ON CHILDREN & FAMILIES, [http://www.nyskwic.org/get\\_data/indicator\\_profile.cfm?subIndicatorID=81](http://www.nyskwic.org/get_data/indicator_profile.cfm?subIndicatorID=81) [https://perma.cc/HA6M-4V92] (last visited May 3, 2017).

98. *Id.*

99. *Helping Courts Address Implicit Bias: Frequently Asked Questions*, NAT'L CTR. FOR STATE COURTS 1 (2012), <http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx> [https://perma.cc/PD3G-VFHN].

100. See, e.g., Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006); Matthew Mendez & Christian Grose, *Doubling Down: Inequality in Responsiveness and the Policy Preferences of Elected Officials* (2014) (Class Research Paper No. 14-17, University of Southern California), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2422596](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422596) [https://perma.cc/9U8E-7HJZ]. But see Jennifer G. May, *Decision-Making Processes of Judges in Family Court: An Investigation of Salient Features Relating to Termination of Parental Rights Hearings* 47 (May 2015) (unpublished Ph.D. dissertation, University of South Carolina), <http://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=4145&context=etd> [https://perma.cc/DD44-AM29] ("Despite acknowledging that their background experience impacts the way they process information on the bench, judges did not perceive their own personal background making a difference in their ultimate decision.").

legislator preference and responsiveness bias<sup>101</sup> theorize that the policy preferences of legislators may be biased due to electoral, personal, and resource considerations.<sup>102</sup> Thus, there is no reason to believe that those creating and enforcing reinstatement laws are immune from the effects of implicit and explicit bias against parents whose rights were terminated due to abuse or neglect.

The single-story narrative that parents who have involvement with the child welfare system are abusive, drug-addicted, or uncaring ignores the realities of why parental rights are terminated. Parents lose their parental rights due to child neglect,<sup>103</sup> rather than child abuse, and some have had their rights terminated due to unpaid child support.<sup>104</sup> Historically, stock stories of horrific child abuse and child death have been used to justify the passage of legislation that adversely affects parents. For example, “[a]dvocates drummed up support for ASFA by pointing to cases where family preservation failed miserably. They recounted tragic stories of children who were killed after caseworkers returned them to blatantly dangerous parents. They passed around photographs of abused children to members of Congress.”<sup>105</sup> These persuasive narratives were designed to discourage reuniting children with parents whose rights had not yet been terminated. The assumption is that those concerns must only be amplified when one considers post-termination reunification. Thus, it is not surprising that reinstatement laws and policies reflect bias against terminated parents. Once adjudicated as “bad,” it is nearly impossible for them to shed the label and prove that they are “good” enough to have their parental rights reinstated.<sup>106</sup> This skewed image has resulted in reinstatement statutes that disempower parents while empowering youth, create a disincentive for parents to challenge the state’s effort to terminate their parental rights, and encourage unpredictability in the law.

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101. “Responsiveness bias is when legislators respond to some constituents’ requests more than others due to the constituents’ backgrounds.” Mendez & Grose, *supra* note 100, at 4.

102. *Id.* at 13.

103. AFCARS Rep. 23, *supra* note 2, at 1.

104. *See, e.g., In re T.D.P.*, 595 S.E.2D 735 (N.C. Ct. App. 2004) (holding that sufficient grounds existed to terminate parental rights of father, who failed to use prison wages to pay any portion of costs of child’s foster care).

105. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 107 (2002) (telling the story of ASFA advocates’ efforts to persuade Congress to pass ASFA by arguing to Congress and the public that the needs of children and family reunification were at odds, and that foster child safety was being jeopardized by family reunification policies). Advocates also wrote inflammatory newspaper articles with titles like “The Little Boy Who Didn’t Have to Die” and “Family Preservation—It Can Kill.” *Id.* at 107–08.

106. *See* Richard Cozzola & Andrya Soprych, *Representing Parents in Civil Child Protection Cases*, 31 *FAMILY ADVOCATE* 22, 22 (2009) (“A fear that ‘something bad might happen if the child is returned’ permeates the proceeding. Thus, although U.S. Supreme Court precedent has repeatedly held that family integrity is a fundamental right, the in-court reality often is the opposite.”).



### B. Disempowering the Terminated Parent

The state child welfare department plays a major role in any TPR case involving a child in foster care.<sup>107</sup> These departments are also similarly involved in reinstatement cases. In most states, these departments not only have standing to file petitions, but they also serve as the points of contact for terminated parents.<sup>108</sup> Few states, however, require the department to respond to the parent's request for information or to act on her inquiry.<sup>109</sup> As one parent advocate noted, "These parents won't have the ability to potentially access this bill through [] the . . . social worker who may be too overburdened and too busy to add this onto their task list."<sup>110</sup>

Few parents feel comfortable contacting the department after their rights have been terminated, especially if the termination was involuntary. According to the sociologists Kathy Mason and Peter Selman,

The adversarial process means evidence has to be gathered by social workers for presentation in court to support their case for the adoption of the child against their parents' wishes. It is the selective nature of this evidence which gives most concern to non-relinquishing birth parents, many of whom feel they are being blamed for everything.<sup>111</sup>

In a study of non-relinquishing birth parents, participants were asked who they would and would not go to for help if in the future they wanted to contact their children.<sup>112</sup> Mason and Selman reported "a mixture of responses, one or two being adamant that they would not go to social services for help."<sup>113</sup> Only a few acknowledged that they would have to contact the social services agency that handled their child's case.<sup>114</sup>

107. See *Understanding Child Welfare and the Courts*, CHILDREN'S BUREAU, CHILD WELFARE INFORMATION GATEWAY (2016), <https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf> [<https://perma.cc/UFN3-QX7E>].

108. COLO. REV. STAT. ANN. § 19-3-612 (West); see also Carla Burks, *Mission Impossible: CPS Is Helping to Reconnect My Son and Me Even Though I Lost My Rights*, RISE MAGAZINE (May 2, 2013), <http://www.risemagazine.org/2013/05/mission-impossible/> [<https://perma.cc/R8GF-3TRH>] ("After a period when I wasn't in touch with anyone at CPS, I was contacted by a Texas child protective caseworker. He wanted to know if I was interested in reuniting with my son.")

109. COLO. REV. STAT. ANN. § 19-3-612 (West). The Colorado Administrative Code is unusual in that it requires the county to notify the guardian ad litem within thirty calendar days after the contact if a terminated parent contacts the county inquiring about reinstatement of parental rights. See 12 COLO. CODE REGS. 2509-4:7.301.24(S)(4)(c). The county must also provide the guardian ad litem with the name and address of the terminated parent. *Id.*

110. Fehd, *supra* note 72.

111. Kathy Mason & Peter Selman, *Birth Parents' Experiences of Contested Adoption*, 21(1) ADOPTION & FOSTERING 21, 24 (1997).

112. *Id.* at 26.

113. *Id.*

114. *Id.*

This unwillingness to work with the social services agency stems from complicated identity issues within the caseworker-parent relationship. Research on the topic noted that “differences in financial resources and educational levels mark a social distance between caseworker-parent pairings which can be profoundly felt by the parent accused of neglect.”<sup>115</sup> Reinstatement statutes reinforce this uneven power dynamic. In a survey of eighteen parents who had experienced child protection intervention, sixteen parents spoke of child protection services using power “over” them in ways they considered negative, seven of whom considered this power to be “absolute,” “tyrannical,” or “frightening.”<sup>116</sup> Studies have confirmed this feeling of powerlessness even when the parent was represented by legal counsel.<sup>117</sup> Because parents seeking to have their rights reinstated have no access to counsel, the power imbalance can have a significant impact on their ability to work toward post-termination reunification.<sup>118</sup>

Even if a parent communicates her interest in post-termination reunification to the state child-placing agency, the social worker determines her “worthiness” to have rights reinstated.<sup>119</sup> Anecdotal evidence suggests that caseworkers and others working in the child welfare system are “firmly entrenched in the belief that ‘once a bad parent, always a bad parent.’ Rather than assess the deeper causes of child maltreatment, workers may erect barriers to reinstatement out of

115. Jennifer Sykes, *Negotiating Stigma: Understanding Mothers’ Responses to Accusations of Child Neglect*, 33 CHILDREN & YOUTH SERVS. REV. 448, 449 (2011).

116. Gary C. Dumbrill, *Parental Experience of Child Protection Intervention: A Qualitative Study*, 30 CHILD ABUSE & NEGLECT 27, 30 (2006). In another study, social workers were described as: judgmental (forty-six percent); cold and uncaring (forty-four percent); poor listeners (thirty-eight percent); critical (thirty-eight percent); and insincere (twenty percent). Sarah Maiter, Sally Palmer & Shehenaz Manji, *Strengthening Social Worker-Client Relationships in Child Protective Services: Addressing Power Imbalances and ‘Ruptured’ Relationships*, 5 QUALITATIVE SOC. WORK 167, 179 (2006). While there are no current studies of parents involved in the United States foster care system, a published first-hand account reveals that this power imbalance is also prevalent in the United States. Jeanette Vega, *‘Keep a Sharp Eye Out for People Like Me’: Speech to Child Welfare Investigators and Attorneys*, RISE MAGAZINE (May 23, 2016), <http://www.risemagazine.org/2016/03/keep-a-sharp-eye-out/> [<https://perma.cc/9TUD-CPMZ>] (“The workers had so much power over me, and I was in so much pain. I really needed them to explain things to me in a reasonable way. Instead, they were quick to judge and took the worst out of me.”).

117. See Mason & Selman, *supra* note 111, at 24 (“A major problem for several birth parents had been getting good legal representation, and many were unhappy with their solicitors. . . . Many of these solicitors had little experience of working with such types of cases and the parents felt their cases had not been presented in court as well as they might have been.”); LYNN CHARLTON, MAUREEN CRANK, KINNI KANSARA & CAROLYN OLIVER, *STILL SCREAMING: BIRTH PARENTS COMPULSORILY SEPARATED FROM THEIR CHILDREN* 38 (After Adoption 1998) (“[Birth parents] looked to their solicitors for a more personal advocacy and were often dismayed to find that solicitors were ‘playing a game.’ . . . Many birth parents lost faith in their solicitors and changed them in panic at the time of key hearings.”).

118. Studies have found that reunification was positively associated with caseworkers’ engagement with the biological family. See Tyrone C. Cheng, *Factors Associated with Reunification: A Longitudinal Analysis of Long-Term Foster Care*, 32 CHILDREN & YOUTH SERVS. REV. 1311, 1314 (2010).

119. Godsoe, *supra* note 39, at 153–54.

a stereotype that parents whose rights have been terminated will never be worthy of parenthood.”<sup>120</sup> These barriers might explain why few petitions for reinstatement have been filed nationwide.<sup>121</sup>

### C. Empowering the Foster Child

As previously stated, restrictions on who may file a petition for reinstatement of parental rights varies from state to state. However, the majority of states permit the youth to file for herself, either as the only person with standing or in combination with the department.<sup>122</sup> These statutes reflect the belief among some child welfare practitioners that the affected youth should initiate the petition.<sup>123</sup> Little research has been done on whether the youth’s minority might compromise her ability to assume this responsibility, however. Furthermore, “research indicat[es] that abused and neglected children tend to trail behind other children in a range of developmental spheres,”<sup>124</sup> and reinstatement statutes requiring child initiation do not adequately account for these developmental setbacks.

Children do not commonly receive this degree of decision-making authority in the welfare system. Youth have no standing to petition the court to terminate their parents’ rights; nor do they have standing to object to the termination of their parents’ rights.<sup>125</sup> In many states, the foster youth is not even present during termination or adoption hearings on the basis that<sup>126</sup> “[t]he state has traditionally shielded children from the adversarial system because children are deemed to lack the requisite capacity and experience to function in such an environment.”<sup>127</sup>

Empowering the child while simultaneously disempowering the terminated parent has contributed to the under-utilization of reinstatement laws.<sup>128</sup> As one proponent warned, where

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120. *Id.*

121. Schalick, *supra* note 92. The recent study has collected data for six states: Colorado, Delaware, Maine, Minnesota, Virginia, and Washington. Colorado enacted its reinstatement statute in 2014 and averages just over one reinstatement a year. Delaware enacted its statute in 2013 and averages one a year. Maine enacted its statute in 2011 and averages one a year. Minnesota enacted its statute in 2013 and averages six a year. Virginia enacted its statute in 2013 and averages less than one a year. Washington enacted its statute in 2007 and averages eight a year.

122. *Id.*

123. See O’Donnell, *supra* note 71, at 372.

124. See Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 918 (1999).

125. Claudio DeBellis & Marta B. Soja, *Gregory K.: Child Standing in Parental Termination Proceedings and the Implications of the Foster Parent-Foster Child Relationship on the Best Interests Standard*, 8 J. CIVIL RIGHTS & ECON. DEV. 501, 507 (1993).

126. See Erik S. Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. DAVIS J. JUV. L. & POL’Y 233 (2008).

127. DeBellis & Soja, *supra* note 125, at 501, 507–08 (1993).

128. See Schalick, *supra* note 92.

the child's lawyer and the Department of Human Services disagree with the child's petition, or the child is too young to know that his parent is rehabilitated, . . . it may be placing too much of a burden on children by permitting them to be the only party that can petition the court.<sup>129</sup>

Youth are often shielded from prior stages of the child welfare proceedings for their protection; thus, it is incongruous, and even harmful, for them to be given authority to initiate the reinstatement process.

*D. Rewarding Voluntariness or Punishing Parents for Exercising Their Rights?*

Several states, either through their reinstatement statutes or through case law deciding whether to reinstate parental rights, have drawn a distinction between voluntary and involuntary termination. In *In re the Custody of R.R.B.*, the Court of Appeals of Washington held that adoption laws did not bar a biological father from filing a petition for custody.<sup>130</sup> The court distinguished between voluntary relinquishment and involuntary termination, finding that involuntary termination precludes a parent from participating in all future proceedings involving the child, while voluntary relinquishment only prevents the parent from further participation in a particular proceeding.<sup>131</sup>

Similarly, in *In the Matter of M.O.*, the Court of Appeals of Tennessee interpreted a Tennessee statute to permit reinstatement of parental rights where a parent has consented to a TPR or voluntarily surrendered parental rights.<sup>132</sup> The court was "unwilling to hold that there are no circumstances in which a parent whose rights have been terminated by court order may have his or her legal relationship with a child reinstated."<sup>133</sup> This language suggests that parents whose rights had been involuntarily terminated would have to overcome a higher burden to have their rights reinstated.

Both of the states that allow parents the right to petition for reinstatement of parental rights, Alaska and New York, limit applicability to certain parents.<sup>134</sup> Alaska's reinstatement of parental rights statute, for example, permits only parents who voluntarily relinquished their parental rights to request a review hearing where, upon a showing of good cause, the court can vacate the termination order and reinstate parental rights.<sup>135</sup> Thus, reinstatement is unavailable to parents who made attempts to retain their parental rights.

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129. O'Donnell, *supra* note 71, at 372.

130. *In re the Custody of R.R.B.*, 31 P.3d 1212, 1215 (Wash. Ct. App. 2001).

131. *Id.* at 1216.

132. *In the Matter of M.O.*, No. M2007-00347-COA-R3-PT, 2007 WL 2827373, at \*1 (Tenn. Ct. App. Sept. 28, 2007).

133. *Id.* at \*2 n.1.

134. N.Y. FAM. CT. ACT §§ 635–37; ALASKA STAT. § 47.10.089.

135. ALASKA STAT. § 47.10.089 (West 2016).

The legal distinction between those who relinquished and those who did not is not universal. Some states treat all parents similarly, regardless of how their rights were terminated. Texas adoption law, which denies standing to terminated parents to initiate a case, makes no distinction between voluntary and involuntary terminations.<sup>136</sup> In *In Interest of Hughes*, the appellant, who voluntarily relinquished her rights, argued that the statute violated her right to due process because “it treats alike persons whose parental rights have been involuntarily terminated and those who have voluntarily relinquished their rights.”<sup>137</sup> The court denied the claim, finding a rational relationship between the statute and the state’s interest in “prevent[ing] parents who have lost or given up their rights to their children from later attempting to adopt them.”<sup>138</sup>

There is no reason for differential treatment based on the voluntariness of the termination. The literature on the subject notes:

[T]he distinction between voluntary and involuntary relinquishments is actually a continuum rather than a dichotomy. Whereas some birth parents who sign voluntary relinquishment papers actually feel coerced by loved ones, spouses, parents, or even their culture . . . to relinquish their children, other birth parents who formerly have their rights terminated by the court system can be in agreement with that plan.<sup>139</sup>

Whether a parent ultimately decides to relinquish her parental rights also says little about the underlying facts of the case.

The trend toward encouraging relinquishment and punishing parents who challenge the termination of their rights is in line with ASFA and post-adoption contact legislation. ASFA mandates that a parent who unsuccessfully challenges the state’s efforts to sever her legal relationship with her child is not entitled to reasonable efforts to reunite her with other children who might be in the foster care system.<sup>140</sup> One study found an eighteen-percent decrease in the number of involuntary terminations after the enactment of ASFA and held that a corresponding increase in voluntary relinquishments may be attributable to the penalty that ASFA imposes on parents whose rights have been involuntarily terminated.<sup>141</sup> This penalty, the state’s ability to bypass reunification efforts, is

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136. TEX. FAM. CODE ANN. § 102.006 (West 2007).

137. *In Interest of Hughes*, 770 S.W.2d 635, 637 (Tex. App. 1989).

138. *Id.*

139. Wiley & Baden, *supra* note 28, at 21.

140. 42 U.S.C. § 671(a)(15)(D)(iii) (2012).

141. Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions, Legislative Reform*, 28 J. LEGIS. 239, 274 (2002) (noting that in the year that ASFA became effective, nearly ninety-six percent of all terminations were involuntary, compared to seventy-eight percent in 2000).

“rooted in research that indicated that some abusive parents were beyond rehabilitation.”<sup>142</sup>

Voluntary termination provides an opportunity for post-adoption contact that is unavailable if a parent contests the termination petition.<sup>143</sup> When faced with the prospect of having their rights terminated involuntarily and never seeing their child again, many parents choose to relinquish voluntarily after negotiating a post-adoption contact agreement.<sup>144</sup> This decision can be reinforced and encouraged by attorneys working with the parents. “Lawyers merely need to tell parents that the chances of dismissing an involuntary termination are remote and the clients should choose voluntary termination because it comes with the potential for future visitation.”<sup>145</sup>

No evidence supports the notion that relinquishing parents are more likely to position themselves to have their rights reinstated. In fact, the opposite may be true. Some research suggests that parents whose rights are involuntarily terminated have as much, if not more, motivation to rehabilitate than those who voluntarily relinquish their rights. A study of birth mothers’ experiences of being compulsorily separated from their children found that the former

found themselves renegotiating their identity to move away from the stigma of being labelled a “bad” or “failed” parent. For some this meant that they tried to “better” themselves by finding a new career, moving away and getting out of destructive relationships, and many expressed a wish to “repair themselves”.<sup>146</sup>

The much-reported case of Peggy Fugate and her daughter Selina McBride illustrates the change that terminated parents can make in an effort to repair themselves. When her parental rights were involuntarily terminated, Ms. Fugate was addicted to cocaine and had been in and out of jail, serving three separate prison sentences for theft.<sup>147</sup> After several years, she entered recovery, married, obtained full-time employment, and was living in stable housing with enough room for her daughter.<sup>148</sup> Summing up her efforts toward rehabilitation, Ms.

142. Øyvind S. Tefre, *The Justifications for Terminating Parental Rights and Adoption in the United States*, 48 CHILDREN & YOUTH SERVS. REV. 87, 90 (2015).

143. See, e.g., TEX. FAM. CODE ANN. § 161.2061(a) (West 2014).

144. Baldwin, *supra* note 141, at 274–75.

145. *Id.* at 275.

146. Nina Memarnia, Lizette Nolte, Clare Norris & Alex Harborne, ‘*It Felt Like It Was Night All the Time*’: *Listening to the Experiences of Birth Mothers Whose Children Have Been Taken into Care or Adopted*, 39 ADOPTION & FOSTERING 303, 311 (2015). Two cases in states with reinstatement statutes illustrate this point: In *In re Dependency of G.C.B.*, 870 P.2d 1037 (Wash. Ct. App. 1994), married couple Megan and Wade Lucas sought to adopt Mrs. Lucas’s biological child nearly a year after she voluntarily relinquished her parental rights, and in *Theresa O. v. Arthur P.*, 809 N.Y.S.2d 439 (N.Y. Fam. Ct. 2006), a biological mother who surrendered her parental rights filed a petition to adopt after the child had been adopted by his foster parents.

147. Sharon Coolidge, *Mom Wants to Adopt Daughter She Lost*, CINCINNATI ENQUIRER (Oct. 28, 2004), [http://www.enquirer.com/editions/2004/10/28/loc\\_fosterkid.html](http://www.enquirer.com/editions/2004/10/28/loc_fosterkid.html) [https://perma.cc/52FM-FENL].

148. *Id.*

Fugate declared, “People can change. I’ve changed so much, I deserve a second chance.” Despite her efforts toward post-termination reunification, the court determined that she had no standing to seek custody of her daughter.

## V.

### CHANGING ATTITUDES TOWARD TERMINATED PARENTS

In her article *Parsing Parenthood*, Cynthia Godsoe criticizes reinstatement statutes, writing, “Rather than address the underlying risks and challenges to families that result in child welfare involvement, reinstatement statutes instead purport to distinguish between the incorrigibly bad parents and the select few bad parents who can be redeemed. Accordingly, reinstatement is framed as an exceptional measure for morally worthy families.”<sup>149</sup> Over time, the notion of who is “worthy” has changed in some states. Alaska and Illinois provide two illustrative examples of states where the definitions of worthiness have evolved in sometimes counterintuitive ways.

Current Alaska law permits parents who voluntarily relinquished their parental rights to request a review hearing, upon a showing of good cause, to vacate the termination order and reinstate parental rights.<sup>150</sup> The statute requires a good cause showing and proof by clear and convincing evidence that reinstatement is in the child’s best interest and that the parent is rehabilitated and capable of providing the care and guidance that will serve the moral, emotional, mental, and physical welfare of the child.<sup>151</sup> Such a request can only be made before the entry of an adoption or legal guardianship decree.<sup>152</sup> There is no similar statutory provision for parents whose rights were terminated involuntarily,<sup>153</sup> which creates a disincentive for parents to defend their fundamental right to the care, custody, and control of their children. Parents who litigate against the termination of their parental rights are foreclosed from being reunited with their children post-termination. Alaska law did not always discriminate in this way.

Before Alaska Statute section 47.10.089 was enacted in 2005, parents whose rights were involuntarily terminated were permitted to petition for review hearings to reinstate their parental rights before their children had been adopted. In *Rita T. v. State*, the Supreme Court of Alaska held that “parents are entitled to a review of the order terminating their parental rights upon a showing of good cause for the hearing.”<sup>154</sup> The court added, “While it may not be true of all, some parents are capable of changing and overcoming the problems that caused

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149. Godsoe, *supra* note 39, at 150.

150. ALASKA STAT. § 47.10.089(h) (2005).

151. *Id.*

152. *Id.*

153. See ALASKA STAT. § 47.10.088 (2005).

154. *Rita T. v. State*, 623 P.2d 344, 347 (Alaska 1981).

the termination of their parental rights.”<sup>155</sup> Not only did the court grant standing to a birth parent whose parental rights had been terminated involuntarily, the court granted the application for a hearing after adoption proceedings had commenced. The court explained its decision by emphasizing the effect of a final decree of adoption, which had not yet been entered. The court reasoned that prior to an entry of a final decree of adoption, a legal relationship between the parent and child still exists.<sup>156</sup>

Twenty-four years after *Rita T.* was decided, the Supreme Court of Alaska in *Alden H. v. State* narrowly defined the *Rita T.* holding to apply only to parents whose parental rights had been terminated involuntarily, stating, “We have never decided whether the right announced in *Rita T.* is available to parents who voluntarily relinquish their parental right . . . and we need not address this issue here.”<sup>157</sup> The issue was addressed in 2005 by the enactment of Alaska Statute section 47.10.89, which provides:

After a termination order is entered and before the entry of an adoption or legal guardianship decree, a person who voluntarily relinquished parental rights to a child . . . may request a review hearing, upon a showing of good cause, to vacate the termination order and reinstate parental rights relating to that child. A court shall vacate a termination order if the person shows, by clear and convincing evidence, that reinstatement of parental rights is in the best interest of the child and that the person is rehabilitated and capable of providing the care and guidance that will serve the moral emotional, mental and physical welfare of the child.<sup>158</sup>

This, combined with the repeal of the statute upon which the *Rita T.* decision was based, created a system that rewarded parents for voluntarily relinquishing their parental rights.

It is unclear why some parents are rewarded while others are not. The theory that “parents who voluntarily surrender their rights are more worthy than those whose rights are terminated after contested hearing”<sup>159</sup> can be refuted by *Lara S. v. State*, which illustrates the overwhelming similarities between cases where parents surrender their parental rights and where rights are terminated involuntarily.<sup>160</sup> There, the mother struggled with a cocaine addiction, failed in two inpatient treatment programs, and experienced difficulty working on her case plan.<sup>161</sup> After the permanency goal was changed to adoption and a petition to terminate parental rights was filed, the mother relinquished her rights.<sup>162</sup> By

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155. *Id.*

156. *Id.*

157. *Alden H. v. State*, 108 P.3d 224, 231 (Alaska 2005).

158. ALASKA STAT. § 47.10.089(h).

159. Godsoe, *supra* note 39, at 149 n.220.

160. *Lara S. v. State*, 209 P.3d 120 (Alaska 2009).

161. *Id.* at 121.

162. *Id.* at 123.



doing so, Alaska law granted her standing to petition for reinstatement.<sup>163</sup> However, if she had contested the termination and failed, she would have had no ability to file. This case further illustrates the rewards given to parents who do not litigate against efforts to terminate their fundamental rights.

A similar change in attitude toward terminated parents has occurred in Illinois. The Appellate Court of Illinois in *Partington v. Illinois Department of Children & Family Services* held that a mother whose rights were terminated by valid consent could assume the preferred status of “parent” in petitioning to adopt her biological daughter.<sup>164</sup> There, the mother filed an adoption petition sixteen months after executing a “Final and Irrevocable Surrender to an Agency for Purposes of Adoption of a Born Child.”<sup>165</sup> The child was three years old at the time of the filing.<sup>166</sup> On the issue of standing, the court held, “The ‘termination’ of the parent’s right by her giving consent to an adoption should not prevent the parent from seeking to establish new rights by independent adoption proceedings so long as there has not been an intervening placement for adoption.”<sup>167</sup> Several years later, the Illinois legislature amended the adoption statute’s definition of “related child,” rejecting the result reached in *Partington*.<sup>168</sup> The amendment provides that a parent who has executed a final irrevocable consent to adoption or a final irrevocable surrender for purposes of adoption or has had her parental rights terminated is not “related” to her child.<sup>169</sup>

The changing attitude toward terminated parents and their “worthiness” to reunite with their children post-termination reflects a general bias and unwillingness to accept that rehabilitation is possible. Furthermore, frequently changing attitudes create unpredictable outcomes for terminated parents seeking to legally reconnect with their biological children. Such uncertainty makes it difficult for parents’ attorneys and advocates to represent terminated parents in reinstatement and TPR proceedings.

## VI.

### UNEXPECTED CHALLENGES FOR PARENTS’ ATTORNEYS

Attorneys representing parents in TPR proceedings face an uphill battle. Not only must parents’ attorneys combat the evidence presented at trial, they also must litigate against the ever-present “bad mother” stereotype.

The task of identifying and attacking the stereotype in the prevalent cultural consciousness and unconsciousness has been, and continues to be, onerous. But the challenge of confronting

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163. *Id.* at 125 (citing ALASKA STAT. § 47.10.089).

164. *Partington v. Dep’t of Children & Family Servs.*, 414 N.E.2d 540 (Ill. App. Ct. 1980).

165. *Id.* at 541.

166. *Id.*

167. *Id.* at 542.

168. 750 ILL. COMP. STAT. 50/1(B) (2017).

169. 750 ILL. COMP. STAT. 50/1(B), (E) (2017).

the “bad mother” figure in contexts where it is unquestionably clear that a mother has caused harm to her children has been even more difficult.<sup>170</sup>

As a result, it is no wonder the majority of petitions to terminate parental rights are granted. National data is unavailable but a study of the outcome of TPR hearings in New York State in 2015 revealed that 50.7% of proceedings resulted in a termination judgment.<sup>171</sup> While parents’ attorneys expect certain challenges, reinstatement statutes present an unexpected one.

A 2009 study exploring judicial perspectives and experiences around TPR proceedings found that “some judges are concerned about the prospect of creating legal orphans, and the absence of an identified adoptive family does make some judges more apprehensive about TPR.”<sup>172</sup> Of the judges interviewed, forty-five percent indicated that they were concerned with the possibility that children whose parental rights were terminated would not subsequently be adopted “due to: 1) not having an identified adoptive resource in place before TPR and/or 2) different child characteristics, such as older age, that make it more difficult to find an adoptive resource for them.”<sup>173</sup> The surveyed judges further indicated that their concerns about creating legal orphans are reflected in the varied practices surrounding TPR proceedings. Specifically, nearly forty percent (nine of twenty-four judges) reported that, in most cases, they grant motions to terminate parental rights only after an adoptive family is identified.<sup>174</sup>

With the advent of reinstatement statutes, some judges no longer view the creation of legal orphans as a concern. In *In re Deandre D.*, the Appellate Court of Illinois failed to reach the issue of whether a court could give consideration to the possibility that parental rights might be reinstated in the future when determining whether TPR was in a child’s best interest.<sup>175</sup> There, the trial judge stated:

[G]iven that the law has recently changed as well, the parents do have the option of coming forward if several years down the line he is still not in a pre-adoptive placement and it would be in his best interest to vacate this termination order, given the changes in the law, it would be in my power to do so.<sup>176</sup>

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170. Marie Ashe, *The “Bad Mother” in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017, 1020 (1992).

171. *Kids’ Well-being Indicators Clearinghouse*, *supra* note 97.

172. Raquel Ellis, Karin Malm & Erin Bishop, *The Timing of Termination of Parental Rights: A Balancing Act for Children’s Best Interests* 1, CHILD TRENDS (2009), [http://www.childtrends.org/wp-content/uploads/2009/09/Child\\_Trends-20090909RBLegalOrphans.pdf](http://www.childtrends.org/wp-content/uploads/2009/09/Child_Trends-20090909RBLegalOrphans.pdf) [<https://perma.cc/A4BW-S582>].

173. *Id.* at 6.

174. *Id.* at 7.

175. *In re Deandre D.*, 940 N.E.2d 246 (Ill. App. Ct. 2010).

176. *Id.* at 252.

The California Court of Appeals, the intermediate appellate court, has also cited reinstatement laws as the basis for affirming lower court termination decisions. For example, in *In re S.O.*, the California Court of Appeals stated:

The concern about “legal orphaning” of children . . . is outmoded, however, in that the statute . . . provides that if a child has not been adopted after three years following the termination of parental rights, the child may petition the juvenile court to reinstate parental rights. Thus, under the current statute, there is no danger of any child becoming a legal orphan.<sup>177</sup>

Similarly, in *In re T.K.*, the California Court of Appeals stated that the Legislature “obviated” the concern of a child becoming a legal orphan when it enacted the reinstatement statute.<sup>178</sup> The lack of concern over the creation of legal orphans as a result of reinstatement statutes will inevitably lead to more termination orders, thereby creating an extra and unanticipated challenge for attorneys representing parents in TPR proceedings.

When deciding whether and to what extent terminated parents should be permitted to reinstate their parental rights, states must determine which governmental interest prevails when there is a conflict—specifically, whether the state’s interest in ensuring finality of termination orders<sup>179</sup> trumps its interest in achieving permanence for youth in foster care.<sup>180</sup> States have indicated an interest in ensuring the finality of the termination order.<sup>181</sup> Through the enactment of reinstatement statutes, however, they have begun to move away from absolute finality when in the child’s best interests.<sup>182</sup> Several reinstatement

177. *In re S.O.*, No. E048744, 2010 WL 570491, at \*18 (Cal. Ct. App. Feb. 18, 2010) (referencing CAL. WELF. & INST. CODE § 366.36).

178. *In re T.K.*, No. E057082, 2013 WL 647609, at \*5 (Cal. Ct. App. Feb. 22, 2013).

179. See *In re M.M.*, 589 N.E.2d 687, 690 (Ill. App. 1 Dist. 1992) (“The finality of an order terminating parental rights should be of primary concern since the termination order is the first step in the adoption procedure and there is a strong public policy favoring finality and stability in adoptions. If we were to allow for a conditional termination of parental rights, it would leave the question of termination of parental rights open to attack indefinitely, thereby jeopardizing the entire adoption scheme.”); *In re Sade C.*, 920 P.2d 716, 796 (1996) (acknowledging the state’s “strong” interest in the expeditiousness of dependency proceedings and its “stronger” interest in the finality of orders affecting children).

180. Casey Family Services has put forward a comprehensive definition of permanence:

having an enduring family relationship that is (1) safe and meant to last a lifetime; (2) offers the legal rights and social status of full family membership; (3) provides for physical, emotional, social, cognitive and spiritual well-being; and (4) assures lifelong connections to extended family, siblings, other significant adults, family history and traditions, race and ethnic heritage, culture, religion, and language.

Lauren L. Frey, Sarah B. Greenblatt & Jim Brown, *A Call to Action: An Integrated Approach to Youth Permanency and Preparation for Adulthood*, CASEY FAMILY SERVS. 3 (2005), <http://www.aecf.org/m/resourcedoc/AECF-AnIntegratedApproachtoYouthPermanency-2005.pdf> [<https://perma.cc/K7QQ-EVTU>].

181. States have an interest in ensuring finality of orders terminating parental rights. See *In re M.M.*, 589 N.E.2d at 690; *In re Sade C.*, 920 P.2d at 796.

182. An appellate court in Florida, which does not have a reinstatement statute, also rejected the notion that finality should be maintained at all costs. See, e.g., *C.A. v. Dep’t of Child. &*

statutes acknowledge this tension by indicating that the reinstatement has no effect on the underlying termination order. Specifically, Hawaii, Oklahoma, Washington, and Colorado statutes provide that granting the petition for reinstatement does not vacate or otherwise affect the validity of the original order terminating the parent-child legal relationship.<sup>183</sup> Therefore, the state's interest in the finality of its termination order is not undermined.

Unrelated to child safety and permanency, states might also have fiscal concerns that support allowing reinstatement of parental rights and other forms of post-termination reunification. The pending bill in Michigan notes:

If a child were removed from foster care and returned to a parent, the State, and in some cases the county where the child resided, would no longer pay for foster care services for the child. In FY 2013–14, the projected average annual cost of care for a foster care child is \$26,978.<sup>184</sup>

Although other state fiscal impact statements do not acknowledge the cost savings,<sup>185</sup> it is clear that states pay less for children who exit foster care prior to emancipation.<sup>186</sup> Thus, states have at least two governmental interests that support the enactment of reinstatement statutes that encourage utilization.

#### A. Another Option for Reinstatement of Parental Rights: Adoption

Because reinstatement statutes provide few options for terminated parents, some parents have sought to adopt their children to restore their legal relationship with their biological child.<sup>187</sup> Adoption is “the creation by judicial

Families, 16 So. 3d 888, 890 (Fla. Dist. Ct. App. 4th 2009) (“[T]he State’s interest in vindicating judgments presumed correct must give way to that paramount concern, the best interests of the child . . .”).

183. See *supra* notes 75, 77, 80 & 89.

184. S. 994, 113th Cong. (Mich. 2014), <https://www.legislature.mi.gov/documents/2013-2014/billanalysis/senate/pdf/2013-SFA-0994-G.pdf> [<https://perma.cc/EBG6-LYPF>].

185. For example, neither the fiscal impact statement filed in 2012 nor the statement filed in 2013 in support of reinstatement of parental rights bills in Virginia acknowledge the cost savings that results from early exit from foster care. See DEPARTMENT OF PLANNING AND BUDGET: 2013 FISCAL IMPACT STATEMENT, S.B. 1076, Gen. Assemb., Reg. Sess. (Va. 2013), <https://lis.virginia.gov/cgi-bin/legp604.exe?131+oth+SB1076F122+PDF> [<https://perma.cc/6LPE-FY3X>]; DEPARTMENT OF PLANNING AND BUDGET: 2013 FISCAL IMPACT STATEMENT, H.B. 450, Gen. Assemb., Reg. Sess. (Va. 2012), <https://lis.virginia.gov/cgi-bin/legp604.exe?131+oth+HB450F122+PDF> [<https://perma.cc/92X8-V6S3>].

186. A recent study found a significant cost benefit to exiting children to permanency. Although the study focused on one permanency option, adoption, it is arguable that states would enjoy similar fiscal benefits when children who would have otherwise remained in foster care exit to post-termination reunification. Nationally, states spend \$25,782 per child per year on administrative and maintenance costs associated with foster care. In addition to this cost, the study found longer-term savings in lessened financial burden on public education systems, social welfare agencies, and the criminal justice system. Nicholas Zill, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption*, 35 ADOPTION ADVOCATE 1 (May 2011), [https://www.adoptioncouncil.org/images/stories/NCFA\\_ADOPTION\\_ADVOCATE\\_NO35.pdf](https://www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf) [<https://perma.cc/RHQ7-7YCW>].

187. See Taylor, *supra* note 7, at 338–39.

order of a parent-child relationship” between the adopted child and the adoptive parents “with all the rights, privileges, and responsibilities that attach to that relationship.”<sup>188</sup> Thus, the biological parent once again becomes the child’s legal parent through the adoption process. Individual state courts have decided whether to allow parents to establish new rights by independent adoption proceedings.<sup>189</sup> In states where re-adoption is permitted, terminated parents might find this to be a better option. Not only do they have standing to initiate the proceeding, they may do so without regard to a waiting period or the age of the child.<sup>190</sup>

As will be discussed below, states such as Illinois, California, and North Carolina permit birth parent re-adoption while also having reinstatement statutes that deny standing to terminated parents. Others, such as Florida and Tennessee, do not have reinstatement statutes but allow re-adoption. Still other states allow reinstatement and not adoption, and some states provide no mechanism for terminated parents to restore their parental rights.

### B. Adoption and Reinstatement

Terminated parents in Illinois, California, and North Carolina have two legal options for having their parental rights restored: adoption and reinstatement. While the Illinois reinstatement statute only gives standing to the state child welfare department and the minor,<sup>191</sup> another Illinois law allows a terminated parent to adopt her child if that child was adopted previously by a relative and that relative can no longer provide care due to disability or death.<sup>192</sup> The law was passed soon after the case of a mother who wished to adopt her biological children after their adoptive mother, their biological maternal grandmother, had died.<sup>193</sup> The lawyer who drafted the law did so because “she wanted to establish a process for [the] specific situation so that the outcome would not have to depend upon how willing a judge was to change a previous decision.”<sup>194</sup>

While limited to specific circumstances when a child is adopted by a blood relative, the law provides greater benefit to terminated parents and their children than the reinstatement statute. The adoption law grants standing to the parent to bring the case and allows restoration of parental rights for those who would have

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188. *Adoption*, BLACK’S LAW DICTIONARY (10th ed. 2014).

189. See Taylor, *supra* note 7, at 338–39.

190. See *Who May Adopt, Be Adopted, or Place a Child for Adoption?*, CHILDREN’S BUREAU, CHILD WELFARE INFORMATION GATEWAY (2015), [https://www.childwelfare.gov/pubPDFs/parties.pdf#page=3&view=Who may be adopted?](https://www.childwelfare.gov/pubPDFs/parties.pdf#page=3&view=Who%20may%20be%20adopted%3F) [<https://perma.cc/M48M-LZCF>].

191. 750 ILL. COMP. STAT. 405/2-34(1).

192. 750 ILL. COMP. STAT. 50/14.5 (2017).

193. Ali Elkin, *Chicago Mother First to Adopt Her Own Children Under New Law*, CNN (July 7, 2011), <http://news.blogs.cnn.com/2011/07/07/chicago-mother-first-to-adopt-her-own-children-under-new-law/> [<https://perma.cc/2CQS-63DM>].

194. *Id.*

otherwise aged out of the foster care system.<sup>195</sup> Parents who do not meet the narrow definition for standing can restore their parental rights through the state's reinstatement statute.

California law provides that any unmarried minor may be adopted by an adult at least ten years older than her.<sup>196</sup> Prior to the passage of its reinstatement law, parents in California had been permitted to adopt their biological children post-termination.<sup>197</sup>

Terminated parents in North Carolina need not rely solely on case law. North Carolina statute provides that "a former parent may readopt a minor adoptee."<sup>198</sup> One of the primary purposes of the statute is "to advance the welfare of minors by facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support."<sup>199</sup> The statute permitting re-adoption became effective in 1996,<sup>200</sup> while the state did not enact its reinstatement statute until 2011.<sup>201</sup>

At first blush, it may seem unnecessary for a state to permit both re-adoption and reinstatement of parental rights. From the parent advocate's perspective, the reinstatement statute provides no benefit and is a less viable option. However, from the vantage point of the child or state, the reinstatement process may provide additional opportunities for post-termination reunification. While neither the child nor the agency can petition for adoption, they can petition for reinstatement. In cases where a parent does not have the resources to hire an attorney to initiate the adoption process,<sup>202</sup> the resources available to the child and the child-placing agency might be used to facilitate reinstatement of parental rights.

### C. Adoption, Not Reinstatement

States such as Florida and Tennessee have not introduced or passed statutory language allowing for reinstatement of parental rights. Perhaps legislators have not seen the need to enact reinstatement statutes since re-adoption is an available avenue for reinstating parental rights. In *Thompson v. Department of Health & Rehabilitative Services*, the District Court of Appeal of

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195. 750 ILL. COMP. STAT. 50/14.5 (2017). The first cases filed under this law involved twenty-four-year-old twins.

196. CAL. FAM. CODE § 8601(a).

197. *In re Cody B.*, 63 Cal. Rptr. 3d 652, 658 n.8 (Cal. Ct. App. 2007) ("[I]n the past I have had mother's [sic] parental rights terminated and who readopted their kids.").

198. N.C. GEN. STAT. § 48-6-101 (1995).

199. S.B. 159, Gen. Assemb., Reg. Sess. (N.C. 1995).

200. *Id.*

201. N.C. GEN. STAT. § 7B-1114.

202. Adoptive Families Magazine conducts an annual survey on the cost of adoption in the United States. The most recent study estimated attorney fees for a foster care adoption to be \$610. *Cost & Timing of Adoptions in 2013–2014*, ADOPTIVE FAMILIES MAGAZINE (2015), <https://www.adoptivefamilies.com/resources/adoption-news/adoption-cost-and-timing-2013-2014/> [<https://perma.cc/VUD8-MF6B>].

Florida held that a terminated mother could petition, as anyone else, to adopt her biological children.<sup>203</sup> The mother argued that, where adoption proceedings have not been instituted, the statute should not preclude the court from hearing a terminated parent's custody petition.<sup>204</sup> She further argued that unless permitted to re-open the proceeding, she would have no avenue to seek custody.<sup>205</sup> While barring her claim to custody, the court found that the statute did "not preclude her from establishing new rights through independent adoption proceedings."<sup>206</sup>

Likewise, in *In the Matter of M.O.*, the Court of Appeals of Tennessee interpreted a Tennessee statute to permit reinstatement of parental rights where a parent has consented to a TPR or voluntarily surrendered parental rights.<sup>207</sup> It noted:

The State has suggested that the only proper method available would be a petition for adoption . . . . We do not disagree that such a proceeding would be the most likely available means by which to seek to establish a legal parent/child relationship where none exists, including after a termination order.<sup>208</sup>

Where re-adoption is an option, parents may find that it offers more flexibility and greater access to justice than reinstatement statutes. If states that currently allow birth parents to adopt enact reinstatement statutes, the goal should be to broaden, rather than limit, opportunities for post-termination reunification.

#### *D. Reinstatement, Not Adoption*

Terminated parents in Washington can have their rights reinstated through the reinstatement process but are prohibited by case law from petitioning to adopt. Washington's reinstatement of parental rights statute was enacted in 2007.<sup>209</sup> At that time, there were 10,418 youth in its state foster care system and 2855 youth waiting for adoption.<sup>210</sup> Of those waiting, 2147 were legal orphans.<sup>211</sup> Under the Washington statute, a child who has not achieved permanency within three years after TPR may petition to have her parents' rights reinstated.<sup>212</sup> The statute was passed fourteen years after the Washington Court

203. *Thompson v. Dep't of Health & Rehab. Servs.*, 353 So. 2d 197 (Fla. Dist. Ct. App. 1977).

204. *Id.* at 198.

205. *Id.*

206. *Id.*

207. *In the Matter of M.O.*, No. M2007-00347-COA-R3-PT, 2007 WL 2827373 (Tenn. Ct. App. Sept. 28, 2007).

208. *Id.* at \*2 n.1.

209. WASH. REV. CODE ANN. § 13.34.215.

210. *Child Welfare Outcomes 2007–2010: Report to Congress*, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS. 340–41 (2012), <https://www.acf.hhs.gov/cb/resource/cwo-07-10> [<https://perma.cc/V85W-QKRB>].

211. *Id.* at 341.

212. WASH. REV. CODE ANN. § 13.34.215(1)(c) & (d).

of Appeals, the intermediate appellate court, held that “a parent whose rights have been terminated may not relitigate that issue through a petition for adoption, or through any other legal proceeding.”<sup>213</sup> In that case, a terminated mother sought to adopt her biological child nearly fifteen months after she voluntarily relinquished her parental rights.<sup>214</sup> With the passage of the reinstatement statute, there is hope that adoption will become an option.

*E. No Reinstatement, No Adoption Without Consent*

Generally, reinstatement statutes have been enacted in response to concerns over the growing number of legal orphans. Although Texas has recognized that it must address this problem, there has been no movement toward the enactment of a law permitting parental rights to be reinstated when in the child’s best interest.<sup>215</sup> As previously discussed, those rights could be restored through reinstatement or adoption.<sup>216</sup> Texas does not have a reinstatement of parental rights statute; adoption is only permitted if the parent has “the consent of the child’s managing conservator, guardian, or legal custodian to bring the suit.”<sup>217</sup> The purported governmental interest that supports this statute is the “interest in promoting the welfare of children and ensuring that ‘children’s lives are not held in limbo while judicial processes crawl forward.’”<sup>218</sup>

In *In the Interest of R.N.R.R.*, the Court of Appeals of Texas affirmed the trial court’s dismissal of a biological father’s adoption petition.<sup>219</sup> The biological father had voluntarily relinquished his parental rights nearly nine years prior to filing the petition to adopt.<sup>220</sup> Under Texas law, he lacked standing and the Court of Appeals refused to create an exception.<sup>221</sup> The court noted, “Children voluntarily given up in compliance with the Family Code . . . cannot be snapped

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213. *In re* the Dependency of G.C.B., 870 P.2d 1037, 1043 (Wash. Ct. App. 1994).

214. *Id.* at 1039–40 (explaining that the Relinquishment of Custody and Consent to Termination/Adoption was signed on August 12, 1992, and the Adoption Petition was filed on November 1, 1993).

215. Texas is a participant in the National Council of Juvenile and Family Court Judges (“NCJFCJ”) Legal Orphans Project. Judge R. Michael Key, President of the NCJFCJ 2010–2011, initiated the NCJFCJ Legal Orphans project as an ad hoc committee, with the goal that juvenile and family courts across the United States focus their attention on the legal orphans within their jurisdictions. States with large populations of children in foster care, and thus the greatest numbers of legal orphans, were invited to participate in this project, with the goal of reducing the numbers of legal orphans in those states, and provide practice recommendations for all court systems seeking similar results. The Legal Orphans Project focuses on legal orphans ages fourteen and above who are at risk of aging out of foster care. See *Forever Families*, *supra* note 51.

216. *Supra* Part VIA.

217. TEX. FAM. CODE ANN. § 102.006(b)(2) (West 2007).

218. *In re* A.M., 312 S.W.3d 76, 86–87 (Tex. App. 2010) (quoting *In re* B.L.D., 113 S.W.3d 340, 353 (Tex. 2003)).

219. *In the Interest of R.N.R.R.*, No. 11-06-00142-CV, 2007 WL 2505629, at \*2 (Tex. App. Sept. 6, 2007).

220. *Id.* at \*1.

221. *Id.*



back at the whim of the parent.”<sup>222</sup> As a result of the lack of post-termination reunification options in the state, there were over 13,000 youth in Texas waiting to be adopted in 2013.<sup>223</sup> Unknown, however, is how many could exit to permanency rather than age out without any legal connections.

## VII. CONCLUSION

Nearly twenty years have passed since my law school clinic partner and I helped our client vacate the court order terminating her parental rights. Since that time, seventeen states have enacted laws that permit parental rights to be reinstated. Reinstatement statutes provide an avenue through which legal orphans and their birth parents can legally reconnect. While on their surface these statutes appear promising, they evidence a bias against terminated parents that impact their efficacy. Furthermore, in some states, reinstatement laws provide fewer opportunities to terminated parents than were available previously.

While reinstatement statutes contain the promise of post-termination reunification, family defense attorneys, advocates, and legislators must be mindful of the ways these statutes both further and frustrate that goal. Effective advocacy on behalf of families requires knowledge of existing laws and awareness of the potential bias against terminated parents, both implicit and explicit. Only with this knowledge and awareness can reinstatement statutes accomplish their goal of reducing the number of youth that age out of the foster care system without permanent connections.

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222. *Id.* (quoting *Brown v. McLennan Cty. Children’s Protective Servs.*, 627 S.W.2d 390, 394 (Tex. 1982)).

223. *Child Welfare Outcomes: 2010–2013 Report to Congress*, CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS. 317 (2016), [https://www.acf.hhs.gov/sites/default/files/cb/cwo10\\_13.pdf](https://www.acf.hhs.gov/sites/default/files/cb/cwo10_13.pdf) [<https://perma.cc/A6HM-LGKF>]. Of the 13,123 waiting to be adopted, 9230 are legal orphans. *Id.*