Are You Still My Family?  
Post Adoption Sibling Visitation  
Continuing Legal Education Materials

DATE:  Friday, October 23, 2015  
TIME:  2:10 pm - 3:25 pm  
LOCATION:  New York Law School, 185 West Broadway, New York, NY 10013

PANELISTS:  Randi Mandelbaum, Clinical Professor of Law, Director of the Child Advocacy Clinic and Annamay Sheppard Scholar, Rutgers School of Law, Newark, NJ  
Sarah B. Greenblatt, LMSW, Child Welfare Policy and Practice Consultant, New Haven, CT  
Dawn J. Post, Co–Borough Director, The Children’s Law Center, Brooklyn, NY  

MODERATOR:  Kim Hawkins, Professor of Law, New York Law School, New York, NY  

CLE:  1.5 Continuing Legal Education credits, Areas of Professional Practice, Transitional and Non-Transitional
Timed Agenda

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Kim Hawkins, Professor of Law, New York Law School, New York, NY

Panel Description:
Sibling contact is supported and promoted pre-adoption, but often stops after adoption. This panel will address the issue of post-adoption sibling contact, focusing on maintaining healthy sibling relationships while navigating the systemic and practical limits of actualizing such contact. By combining psychological evidence supporting the importance of sibling contact, legislation and case law on sibling visitation, and our own experiences in the child welfare field, we seek to explore new ways to approach the law, policy, and practices in this area and how various interests can be met in a way that maintains and fosters sibling contact. Traditionally, fears existed that contact between biological siblings would place too great a strain upon an adoption. We propose an interdisciplinary model to negotiate sibling contact, emphasizing the child’s definition of “sibling” as well as his/her wishes. We will confront the difficulties inherent in sibling contact and encourage a dialogue that balances the adoptive parents’ interest in autonomously raising a child with the child’s long-term psychological interests. Finally, we will share the current jurisprudence surrounding sibling contact, examine shortcomings in the current legal structure, and suggest how the sibling bond can be recognized within a framework of competing interests. We will explore how New York’s current law can be used to facilitate post-adoption sibling visitation.
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For speaker bios please see separate Moderator and Panelist Bios packet
§ 71. Special proceeding or habeas corpus to obtain visitation rights in respect to certain infant siblings. Where circumstances show that conditions exist which equity would see fit to intervene, a brother or sister or, if he or she be a minor, a proper person on his or her behalf of a child, whether by half or whole blood, may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such brother or sister in respect to such child.
ARE YOU STILL MY FAMILY? POST-ADOPTION SIBLING VISITATION

DAWN J. POST, ESQ., SARAH McCARTHY, ESQ., ROGER SHERMAN, PH.D.
AND SERVET BAYIMLI *

I. INTRODUCTION

On Kayla’s first birthday in July of 1998, she was placed into foster care following allegations that her seventeen-year-old mother neglected her. Kayla was initially placed with her mother in a city-operated home for teenagers with children. However, when her mother was no longer able to care for her, Kayla’s paternal grandmother took over as her foster mother. Soon after Kayla’s new placement, her mother gave birth to another baby,

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* We are practitioners in the child welfare field. Accordingly, much of what is written in this Article is our view of the situation as it currently stands. Also, the case examples mentioned contain confidential information for which citation cannot be provided. However, these cases were handled by or explained to us other attorneys, social workers, or participants in their respective cases. We are indebted to Executive Director Karen P. Simmons for her mentorship and support; Veronica Kapka and Latoya Lennard for their research and work on the narrative interviews; and CPIC Harvard fellows Allison Torsiglieri and Gene Young Chang for their insightful comments and editing.

1 Interview with Kayla, Adoptee, Children’s Law Center New York, in Brooklyn, N.Y. (Nov. 11, 2013) [hereinafter Kayla Interview] (unpublished) (on file with authors). From December 2013 through June 2014, the Children’s Law Center New York (CLCNY) conducted interviews of young people and adults who had experienced the loss of their sibling, as well as adoptive parents who had either encouraged or terminated sibling contact, and were solicited from LinkedIn or at conferences. The purpose of this study was to capture individual adoptive narratives and understand more fully the benefits of sibling contact following a legal adoption. The participants in the study were asked to participate in an interview. The estimated time of each interview was approximately one hour. Each interview was recorded, transcribed, and identifying information was coded in order to protect the identity of any individuals who wished to remain confidential.

2 Id. New York City had residential and foster care programs that offered comprehensive care—including education, employability and mental health services—for teen mothers who were in foster care, homeless, or adjudicated. Unfortunately, many of these residential facilities have been closed due to lack of funding. One of the only homes left is Inwood House. INWOOD HOUSE, Who We Are, http://inwoodhouse.com/who-we-are/ (last visited Nov. 25, 2014).

3 Kayla Interview, supra note 1.
Keisha. Keisha was also removed from her mother’s care, but was placed with a non-kinship foster mother instead. Because Kayla’s grandmother was not Keisha’s biological relative (Keisha had a different father), she was never put forward as a possible resource for Keisha, and the siblings were separated.

Despite the fact that the infant siblings were only related through their mother and had never lived in a home together, the New York City foster care agency responsible for their care was required to justify the girls’ placement in different foster homes. Furthermore, because the siblings were separated, the agency was required to document its compliance with mandated bi-weekly agency sibling visitation. In Kayla’s foster care

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4 Id.
5 Id.
6 Id. New York State law requires that the Child Welfare Agency first look for appropriate relatives who are willing to become foster parents or who are willing to provide free care to the child. New York State 2010 Foster Parent Manual, N.Y. STATE OFFICE OF CHILD. & FAMILY SERVS. (2010), http://www.ocfs.state.ny.us/main/publications/Pub5011.pdf. If a grandparent agrees to become the foster parent, the grandparent has to be able to take appropriate care of that child, and must meet all other requirements. If children are placed with maternal relatives, separation of siblings is less of an issue. However, like this case, when a child is born after a sibling has been placed into foster care with a paternal relative, and they do not share the same father, they are separated due to prioritization of kinship foster care over non-kinship foster care. See, e.g., OFFICE OF CHILDREN AND FAMILY SERVICES ADMINISTRATIVE DIRECTIVE FOR SIBLINGS PLACEMENT, VISITATION AND COMMUNICATION, at 5 (June 8, 1992) [hereinafter ADMINISTRATIVE DIRECTIVE], available at http://www.ocfs.state.ny.us/main/policies/external/OCFS_2007/INFs/07-OCFS-INF-04%20(1)%20Attachment%20-%202012-ADM-24%20Foster%20Care%20Adoption%20Requirements%20for%20Siblings%20Placement%20Visitation%20and%20Communication.pdf (“[A]n assessment may indicate that separate placements with approved relatives can best preserve the emotional ties of extended family relationships if such placements provide opportunities for continuing interaction among the siblings. In such cases, separation of the children while retaining a familiar environment and/or close contact may be preferable to placement together in an unfamiliar environment with certified foster parents. . . . When there is no documented factor for separation of the siblings other than the fact that the children would be placed with relatives, only the court can determine that placing children separately with relatives is preferable in itself to the placement of siblings together in a certified foster home or agency operated boarding home.”).

7 ADMINISTRATIVE DIRECTIVE, supra note 6.
8 Id. at 6. (“Biweekly visitation is required unless such visitation has been determined and documented to be contrary to the health, safety or welfare of one or more of the children.
records, the caseworker documented that Kayla and Keisha were “very young” but “interact[ed] well with one another” and were “active and developmentally appropriate” during the visitation. Though the girls’ biological mother never appeared for visits, their respective foster mothers nonetheless brought the siblings every other week for over a year to have visitation with one another. Both girls spoke only a few words.

The foster care agency was fulfilling its responsibility to promote visits between the siblings while simultaneously planning to fulfill its ultimate goal of discharging them from foster care into the permanency of adoption by their current caretakers. Shortly after Kayla’s third birthday, the court finalized the adoption by her grandmother. Soon thereafter, Keisha’s non-kinship foster mother became her adoptive mother. Permanency in parenting may have been achieved, but the court papers finalizing the adoptions did not provide for visitation between Kayla and Keisha. As a result of the permanency plan of adoption, the adoptive parents were no longer obligated to bring the girls together for bi-weekly visits, and the agency was no longer required to facilitate the visits. Whether the two siblings saw one another was left completely to the adoptive parents’ discretion.

or unless the siblings are placed at such a distance from each other that lack of geographic proximity precludes visitation . . . Certified foster parents, approved relative foster parents and prospective adoptive parents, as well as agency staff, are expected to cooperate in facilitating visits between siblings. However, the primary responsibility for arranging and overseeing visitation lies with the agency supervising placement of the children.”.

9 Kayla Interview, supra note 1.
10 Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 ADMINISTRATIVE DIRECTIVE, supra note 6, at 4 (“Authorized agencies have no authority or legal responsibility to maintain visitation and communication between separated siblings whose adoptions have been finalized, but should counsel with and encourage adoptive families at the time of placement regarding the importance of maintaining sibling connections in such cases.”).
Kayla is now sixteen years old and a client of The Children’s Law Center New York’s (CLCNY) Broken Adoption Project. Her grandmother passed away when she was ten years old, and the “forever home” her adoption was supposed to provide lasted for only seven years. Kayla last saw her younger sister Keisha nearly thirteen years ago, around the time that their adoptions were finalized. "I can almost remember it," Kayla said, when asked about her time visiting with her sister. "But it’s gray, and kind of fuzzy. I can’t quite picture her." Kayla still thinks about her sister and wonders where she lives, what she looks like, and if they have

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16 Kayla Interview, supra note 1. See also THE CHILD. LAW CENTER, http://www.clcny.org/?page_id=2 (last visited Nov. 30, 2014). The Children’s Law Center in New York City is a non-profit law firm that represents children in custody, visitation, guardianship, family offense, paternity, and related child protective proceedings. Id.

17 The Project is one component of CLCNY’s ongoing effort to provide advocacy support to children who are no longer with their adoptive families. Broken Adoptions Project, THE CHILD. LAW CENTER, http://web.clcny.org/home-page/initiatives/broken-adoptions-project (last visited Nov. 30, 2014). Results of a study conducted by our office show children may return to the foster care system or be placed in the home of another caretaker after a finalized adoption due to abuse or neglect by their adoptive parent. Children also may be placed back into foster care on a voluntary instrument, return to foster care or another adult’s home due to the death of their adoptive parent, or return to the home of a the biological parent or family member after running away or being put out of the home. Family Court attorneys and judges routinely see these situations, but few states systematically track the number of these broken adoptions. As a result, the scope of the problem remains unknown. Upon noticing the troubling frequency with which adopted children were returning to Family Court, CLCNY sought to have a dedicated attorney or policy advocate to represent these clients and develop the advocacy and policy strategies to assist them. See generally Dawn J. Post & Brian Zimmerman, The Revolving Doors of Family Court: Confronting Broken Adoption, 40 CAP. U. L. REV. 437 (2012).

18 Kayla Interview, supra note 1. See also Post & Zimmerman, supra note 17, at 467 (internal citations omitted) (“The underlying cause of the broken adoption in [the original CLCNY study] in the majority of cases [75%] was due to either death (53%) or infirmity (22%) of the adoptive parent. In the remaining cases, allegations of abuse and neglect were cited either in the petition [as a primary or contributory factor for filing by the petitioner], or raised during the petitioner and child’s interviews as the underlying cause of the broken adoption in 25% of the cases. Physical abuse and punishment were described most frequently.”).

19 Kayla Interview, supra note 1.

20 Id.

21 Id.
any shared interests. She hopes to one day find a way to reconnect with Keisha via social media, as she did with her biological mother following her grandmother’s death.

Kayla’s story is illustrative of the disconnect that exists in the way the child welfare system currently treats sibling relationships before and after transitioning from foster care into adoption. While Kayla and Keisha were in foster care, their relationship was protected and nurtured, but as soon as just one of their adoptions was finalized, that protection disappeared.

In the past two decades, there has been increased recognition of sibling relationships as crucial, particularly for children who are removed from their birth parents. Many children in foster care face daily uncertainty about where they will live and what will become of their families. When they are moved from home to home, they are essentially asked to start over, often creating feelings of grief and loss on top of the existing neglect, abuse, or trauma that may have precipitated their removal from their birth parents. Agency efforts towards protecting a sibling group’s relationship while in foster care seem to have improved, perhaps due to an understanding that, for a child in foster care, the sibling relationship may be the most stable and consistent relationship available.

Yet, as soon as one of the siblings is adopted, the mandated visits cease and the relationship is no longer protected, despite the fact that the emotional connection between the siblings, as in Kayla and Keisha’s case, has been encouraged by the adults and caseworkers involved in their lives.

This shift—from carefully promoted and structured visits, to a complete cessation of all contact—parallels the shift that occurs when a child first enters foster care and when they are freed for adoption. Initially, the agency was mandated to work towards a goal of reunifying Kayla and

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22 Id.
23 Id.
24 See, e.g., Post & Zimmerman, supra note 17, at 495.
25 Id.
26 Id.
27 See Randi Mandelbaum, Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption, 41 N.M. L. REV. 1, 13–15, 33–34 (2011) (referencing New Jersey, which requires “best efforts” to keep the siblings together, and Florida, which requires, if the siblings are not placed together, mandatory visitation on a “regular basis” to maintain contact with each other).
28 Id. at 15.
29 Id. at 31–32 (arguing that this second separation can often be even more intense than the initial shift).
Keisha with their mother by offering her services, parenting classes, and opportunities to visit with her daughters.\textsuperscript{30} Once their mother ceased to participate in those services, the agency moved forward with terminating her parental rights, insisting that adoption was in the siblings’ best interests.\textsuperscript{31} There was no case, however, that Kayla and Keisha’s sibling relationship should be maintained or that their relationship was in one another’s best interest.\textsuperscript{32} Their relationship was simply \emph{de facto} terminated.

These decisions are justified by a policy trend favoring “permanency” for the child and the autonomy of the adoptive foster parent.\textsuperscript{33} There is a trade-off between maintaining a sibling relationship and moving a child out of foster care into a permanent home. This trade-off, however, has serious consequences; by failing to protect the sibling relationship post-adoption, the child welfare system, which should protect children and promote their emotional health and wellbeing, harms an untold number of children.\textsuperscript{34}

As attorneys for children (AFCs), the authors work to give children like Kayla and Keisha, who have been harmed or are at risk of being harmed, a chance to meaningfully participate in their own cases. AFCs are independent actors who owe their clients a duty to understand and develop their voice through the lawyer–client counseling process, which includes building rapport, respect, and trust.\textsuperscript{35} At CLCNY “[o]ur mission is to give a child a strong and effective voice in a legal proceeding that has a critical impact on his or her life.”\textsuperscript{36} As an extension of this mission, this Article explores an issue that consistently harms our clients by overlooking their needs and calls for lasting relationships with their siblings.\textsuperscript{37}

The Post Adoption Sibling Visitations Project is an outgrowth of the Broken Adoption Project, consisting of presentations before members of the very systems that seem to overlook the complexity of sibling dynamics and also consisting of the study that inspired this Article.\textsuperscript{38} The authors’ work as

\begin{itemize}
  \item \textsuperscript{30} Kayla Interview, \textit{supra} note 1.
  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} Mandelbaum, \textit{supra} note 27, at 4.
  \item \textsuperscript{34} See \textit{id.} at 21 (arguing that courts are sometimes willing to order a sibling relationship even without statutory or constitutional authority when they feel the relationship should be maintained).
  \item \textsuperscript{35} Post & Zimmerman, \textit{supra} note 17, at 445–46.
  \item \textsuperscript{36} \textit{The Child. Law Center}, \textit{supra} note 16.
  \item \textsuperscript{37} See \textit{infra} Part IV.
  \item \textsuperscript{38} See \textit{supra} text accompanying note 1. \textit{See also} Interviews, Children’s Law Center New York, in Brooklyn, N.Y. (2014) (unpublished) (on file with authors).
\end{itemize}
AFCs with children like Kayla has put them in the unique position not only to inform child welfare systems of where they see unintended consequences, but to hear stories of people encountering those consequences first-hand.\footnote{Post & Zimmerman, supra note 17, at 445 (“In New York, the Attorney for the Child (AFC), formerly Law Guardian, takes a client-directed approach in advocating the client’s position in all proceedings before the Court. This was codified in 2007 under rule 7.2 of the New York Rules of Court. According to this rule, the AFC must zealously advocate the child’s position unless the child ‘lacks the capacity for knowing, voluntary and considered judgment’ or if ‘following the child’s wishes is likely to result in a substantial risk of imminent, serious harm to the child.’”).} Therefore, this Article is infused with the interview transcrips of former foster children, all of whom had been in contact with their siblings for some portion of their time in foster care, but had lost contact with a sibling either after they were adopted or their sibling was adopted.\footnote{See generally Interviews, Children’s Law Center New York, in Brooklyn, N.Y. (2014) (unpublished) (on file with authors). The study and this Article both address only pre-existing or existing sibling relationships, not situations where a child may be born after placement or adoption and in which the siblings never met.} These former foster children consistently described losing contact with their sibling as a traumatic and emotionally devastating event that continues to impact their emotional and psychological health and adults.\footnote{Id.}

This Article seeks to view sibling contact in a new light—one that focuses on maintaining healthy sibling relationships while realizing the systemic and practical limits of actualizing that contact. By combining psychological evidence supporting the importance of sibling contact, the current legal status of sibling visitation legislation, and the authors’ own experiences as practitioners in the child welfare field, this Article presents a new juridical approach to how various stakeholders’ interests can be met to foster and maintain sibling contact.\footnote{See infra Part V.} Often, the difference between sibling contact and sibling visitation is obscured by the fear that biological family contact will break adoptions.\footnote{See infra Part V.A.} This Article offers an interdisciplinary model to negotiate sibling contact with an emphasis towards a child’s wishes and his or her definition of “sibling.”\footnote{See infra Part V.A.} The authors confront the difficulties that haunt sibling contact and encourage a dialogue that balances the adoptive parents’ interests in autonomously raising their child with the long-
term psychological interests of the child.45 Further, this Article surveys the current jurisprudence surrounding sibling contact and discusses how our current legal framework does not equally weigh these two interests.46 Through this, the authors offer recommendations for how readers can be agents of change through a principled approach while appreciating the sibling bond.47

Part II of the Article illustrates how children are damaged by long- and short-term discontinuation of contact from their siblings by presenting examples of the extent of their resulting trauma and seeking a psychological explanation for why sibling relationships are so precious.48 Part III discusses the current state of the law concerning siblings’ rights to maintain connections while in foster care and following adoption.49 Part IV examines the challenges inherent in changing the policy and practice of post-adoption sibling visitation.50 Finally, Part V proposes potential solutions and highlights several states that have made progress towards building a system that balances a child’s need to be adopted and achieve permanency with the importance of his or her sibling relationships.51

II. WHY DO SIBLING RELATIONSHIPS MATTER?

A. In Their Own Words

In exploring whether the status quo is, in fact, causing children harm by failing to protect sibling relationships post-adoption, the authors conducted narrative interviews with adults who, as children, lost touch with a sibling after a foster care adoption. This Article also features interviews with adoptive parents who adopted a child that was part of a sibling group. The following is a moving perspective on what a sibling relationship means for a separated child:

Everything I lived for from when I was nine years old was for him. I didn’t kill myself because of him I didn’t freak out because of him. I think they wrote in the records—‘those two cannot be separated ever.’ We were like twins. If you had separated me from Rob, I would have laid down and literally died. Being apart from my sister was horrible,
but as long as I had Rob, I was OK. If they would have come to the house and split us up right away, I would have dropped dead right away. What people need to understand is that going into foster care . . . it feels like an alien abduction. And it feels like caseworkers are looking at you like a wild, caged animal. With your siblings, when they are only people you have to rely on are each other, when you grow up like we did, you can’t be separated from each other.52

T.C., now in her late 40s, was born to a drug-addicted mother who left T.C. and her siblings alone for weeks at a time in a roach- and mice-infested home.53 During some of these periods, the kids drank pancake batter because the stove was turned off.54 After she and her siblings were removed due to neglect, older boys in two different foster homes sexually abused T.C.55 And yet, despite these horrific memories, she only described one childhood experience as “traumatizing”: the day she was told her younger brother was being placed for adoption.56

It was at a foster care visit where nine-year-old T.C. and her siblings were abruptly told that their three-year-old brother Mark was going to a “permanent family.”57 T.C. remembers thinking, “[a]ren’t we his family?"58

The caseworkers assured the siblings that their brother was “young enough to forget about everything you’ve all been through, to forget about all of this, and have a normal life.”59 T.C. and her siblings did not understand, however, why they would be something that their brother would want to forget.60 After all they had been through, T.C. remembered the shock of realizing “[o]h, it can get worse?”61 To this day, she still has not been able to find her younger brother.62

53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
58 Id.
59 Id.
60 Id.
61 Id.
62 Id.
T.C. described the day she learned of her brother’s placement in an adoptive home as “traumatic,” a description that aptly characterizes what occurred.\textsuperscript{63} The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, describes a “traumatic event” as one in which the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the integrity of self or others.\textsuperscript{64} In T.C.’s case, the traumatic event was the comment about her family and her brother’s need for a “normal life,” threatening her integrity and her relationship with others in her family.\textsuperscript{65} T.C. described her helplessness in the face of the drastic change, feeling as if she could not even process what was happening.\textsuperscript{66}

It is astounding how seemingly simple choices made by a court or an adoptive parent can cause trauma to separated siblings. Many interviewees described lasting effects from the loss of contact with their siblings after adoption, consistent with the capacity for effects of trauma to be “mild or severe; disappear after a short period or last a lifetime; and affect the child physically, psychologically, behaviorally, or in some combination of all three ways.”\textsuperscript{67}

D.S., now eighteen years old, came from a large sibling group.\textsuperscript{68} Like many interviewees, she identified one sibling, fifteen years older than her, as the sibling to whom she was most deeply attached.\textsuperscript{69} That sister, she stated, was “like my mom . . . she did my hair for me, she would bathe me, make sure my homework was done, make sure I would get good grades in school. She did it all.”\textsuperscript{70} After being adopted by a kinship relative, D.S. went from seeing her older sister every day to “three times” a year.\textsuperscript{71} D.S. described this shift as:

\begin{tablenotes}
\item \textsuperscript{63} Id.
\item \textsuperscript{64} AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL, at 274 (5th ed. 2013) [hereinafter DSM V.].
\item \textsuperscript{65} T.C. Interview, supra note 52.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} See generally Interviews, Children’s Law Center New York, in Brooklyn, N.Y. (2014) (unpublished) (on file with authors). \textit{See also} DSM V., supra note 64, at 275.
\item \textsuperscript{68} Interview with D.S., Adoptee, Children’s Law Center New York, in New York, N.Y. (Dec. 16, 2013) [hereinafter D.S. Interview] (unpublished) (on file with authors).
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Id.
\end{tablenotes}
[H]orrible . . . it made me more unstable in my mind than I already was, going to school and being bullied and tortured it was horrible not to have [my older sister] there. I just felt like it was all over . . . I shut down, I didn’t want to talk to anyone.\textsuperscript{72}

Although D.S could pick up the phone and call her older sister, she felt that it was not the same.\textsuperscript{73} Only later did D.S. find out she was being denied regular sibling contact because her adoptive mother did not approve of her sister’s homosexuality.\textsuperscript{74}

Decisions like that of the adoptive mother in D.S.’s case can have adverse effects on the children involved, as well as the adoptive parents who make those contentious and limiting decisions. C.M. adopted her now thirteen-year-old daughter from foster care when her daughter was four.\textsuperscript{75} Her daughter was extremely close to her biological older sister, who was seven years old at the time of the adoption and living in a separate foster care placement.\textsuperscript{76} C.M. understood that even before their placement into foster care, the siblings had spent long stretches of time in the care of relatives and friends and had developed a close bond with one another.\textsuperscript{77} At the adoption finalization, C.M. told the judge that she planned to have her daughter continue to visit with her sister.\textsuperscript{78} The judge stated that this was “wonderful” and expressed that he was “glad she was doing that.”\textsuperscript{79} The older sister’s foster (and now adoptive) mother, however, did not consider visitation a priority once it was no longer mandated.\textsuperscript{80}

C.M.’s daughter cried herself to sleep every night and asked why she and her sister could not have been adopted together.\textsuperscript{81} From C.M.’s perspective, “it was like there was this pain from the depth of her soul.”\textsuperscript{82} As a parent, she too was made to suffer, since the system had left C.M.
powerless to enforce any visitation between her daughter and the sister who she longed for.\textsuperscript{83} About six months later, C.M. managed to convince the older sister’s adoptive mother that it was important for the sisters to see each other because they both had already “lost so much.”\textsuperscript{84} They now visit with one another at least once a year.\textsuperscript{85} While she wishes that her daughter could see her sister more often, C.M. manages to facilitate at least some contact on her own accord, without any assistance from the foster care system or any court order mandating this visitation.\textsuperscript{86}

The trauma that precipitates lasting psychological effects cannot be generalized or understated. “Almost all children entering the child welfare system have suffered trauma at various stages in their young lives, including upon removal and separation from their families.”\textsuperscript{87} The shock of losing the ability to see a sibling or being told that a sibling is no longer a part of your family, is a particular trauma that often goes unremarked in the conversation about child welfare. The interviewees in the CLCNY study, who had all experienced significant trauma in their lives, identified the loss of their siblings as one of the most significant, and in some cases, \textit{the} most significant traumatic incident they had experienced while in the system.\textsuperscript{88}

Children’s feelings of helplessness are often compounded by their perception that they are being punished for their parents’ actions and inadequacies. They are correct in assuming that, in many cases, the loss of contact has nothing at all to do with them. Two interviewees stated:

\begin{quote}
We didn’t understand why. We accepted that our parents lost their rights. That is totally fine but this is my sister. Our rights were not terminated. How can you say that? You would think that my caseworker at the time would say something but she didn’t tell me at all. [She] told me two weeks before the adoption.\textsuperscript{89}
\end{quote}

\begin{footnotes}
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Post & Zimmerman, supra note 17, at 496.}
\end{footnotes}
We’re all being punished . . . even though they’re hurting the parents, and they’re punishing the parents, you know they’re hurting the siblings, because, I mean because we’re supposed to be family and blood. And they’re separating the siblings from each other, and it’s like, who is to say that that’s the best thing in the interest for the kids? We’re still family.\textsuperscript{90}

\textbf{B. Social Science Background}

To fully explore the complexity and indispensability of sibling relationships, this Article creates a foundation from analysis in the social sciences. Research across several disciplines supports what these interviewees’ stories and experiences show—sibling relationships are crucial and have unique implications on a child’s well-being and development.\textsuperscript{91} Growing up, children engage in a network of relationships with parents, grandparents, relatives, and friends.\textsuperscript{92} Eighty percent of children in the United States and Britain have sibling relationships as a part of that network.\textsuperscript{93} Sibling relationships are often a child’s longest-lasting relationship, and they can have a profound impact on children as adults. Older siblings can work to improve their younger sibling’s social skills and help build the framework for successful adulthood and communication.\textsuperscript{94}

Siblings share not only common interests, but also an emotional intensity that can create “reciprocity” between them as they formalize their identity.\textsuperscript{95} A sibling group’s interactions influence both later relationships between siblings and the personality of each sibling as an individual; there is a recursive process of development with siblings.\textsuperscript{96} A strong sibling bond

\textsuperscript{90} Interview with L.D., Adoptee, Children’s Law Center New York, in Brooklyn, N.Y. (April 7, 2014) [hereinafter L.D. Interview] (unpublished) (on file with authors).

\textsuperscript{91} See, e.g., Kee Jeong Kim et al., Reciprocal Influences Between Stressful Life Events and Adolescent Internalizing and Externalizing Problems, 74 CHILD DEV. 127, 130 (2003).


\textsuperscript{93} Judy Dunn, Sibling Relationships in Early Childhood, 54 CHILD DEV. 787, 787 (1983).


\textsuperscript{95} Harry Stack Sullivan, \textit{The Interpersonal Theory of Psychiatry} 198 (Helen Swick Perry & Mary Ladd Gawel eds., 1953); Jean Piaget, \textit{The Moral Judgment of the Child} 138 (Marjorie Gabain trans., 1965).

leads siblings to maintain positive psychological adjustment and greater self-esteem.\footnote{Clare M. Stocker et al., \textit{Sibling Relationships in Early Adulthood}, 11 J. Fam. Psychol. 210, 216 (1997).}

In addition to the developmental benefits of sibling contact, sibling relationships support children undergoing stressful life events.\footnote{Krista Gass et al., \textit{Are Sibling Relationships Protective? A Longitudinal Study}, 48 J. Child Psychol. & Psychiatry 167, 168 (2007).} It is well understood that children who experience stressful life events and trauma are at an increased risk of developing emotional difficulties.\footnote{Elizabeth M. Swearingen & Lawrence H. Cohen, \textit{Life Events and Psychological Distress: A Prospective Study of Young Adolescents}, 21 Dev. Psychol. 1045, 1052 (1985).} Not all children exposed to trauma and life stressors show difficulties in childhood or later adolescence, but positive sibling relationships may be a protective factor for children who have experienced social deprivation.\footnote{Armeda Stevenson Wojciak et al., \textit{Sibling Relationships and Internalizing Symptoms of Youth in Foster Care}, 35 Child. & Youth Servs. Rev. 1071, 1071 (2013).} Moreover, research demonstrates that positive affection between siblings is a protective factor for children experiencing emotional difficulties.\footnote{Gass et al., supra note 98, at 168.} The warmth and care of a sibling relationship is associated with less loneliness, fewer behavioral issues, and a heightened sense of self-esteem.\footnote{Clare M. Stocker, \textit{Children’s Perceptions of Relationships with Siblings, Friends, and Mothers: Compensatory Processes and Links with Adjustment}, 35 J. Child Psychol. & Psychiatry 1447, 1452 (1994).} A positive sibling relationship that includes frequent, meaningful interactions can help sibling pairs cope with stress and grief.\footnote{Sigrid James et al., \textit{Maintaining Sibling Relationships for Children in Foster and Adoptive Placements}, 30 Child. & Youth Services Rev. 90, 91 (2008) (stating that sibling relationships and joint sibling placement provide emotional support in stressful situations).} Another study found that children experiencing emotional stress would first seek support from their mothers, but would then look to their older siblings for support if their mothers were unavailable, even before turning to their fathers.\footnote{Sibling Issues in Foster Care and Adoption, \textit{Child Welfare Info. Gateway} (Jan. 2013), https://www.childwelfare.gov/pubPDFs/siblingissues.pdf (citing Marjut Kosonen, \textit{Maintaining Sibling Relationships—Neglected Dimension in Child Care Practice}, 26 Brit. J. Soc. Work 809, 809–822 (1996)).}

The emotional power of sibling contact takes on greater significance with neglected children.\footnote{Mary Anne Herrick & Wendy Piccus, \textit{Sibling Connections: The Importance of Nurturing Sibling Bonds in the Foster Care System}, 27 Child. & Youth Services Rev. 845, 851 (2015).} For neglected children, sibling relationships may
provide support and nurturance that may not necessarily be available from parents. Therefore, sibling relationships “have the potential to ascend to primary importance” for children in foster care placements, who otherwise have a diminished network of family relationships.

The presence of a sibling relationship can also play a critical role for children in foster care who have been removed from a home due to concerns of abuse or neglect. Foster care youth often view their time in placement as characterized by worry, guilt, confusion, and identity loss. Siblings can serve as a buffer to these reactions and provide comfort and support throughout the child’s time in foster care. Siblings can also alleviate some of the fear, loss, confusion, and anxiety associated with being separated from parents.

For children separated from birth family members, sibling relationships serve as a way to maintain a “link with the past” so that they might better understand themselves and their past experiences. When asked about their placement preference, siblings in foster care have consistently preferred placement together or if separated, with frequent and regular

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106 Kosonen, supra note 104, at 812.

107 Aron Shlonsky et al., The Other Kin: Setting the Course for Research, Policy, and Practice with Siblings in Foster Care, 27 CHILD. & YOUTH SERVICES REV. 697, 699 (2005).


contact with each other. 113 Studies conducting qualitative interviews with preadolescent foster children have revealed a consistent theme of siblings relying upon each other as a means of support. 114 Further research has shown that alumni of foster care strongly preferred being placed together or having regular contact with siblings. 115 When considering the psychological importance of sibling relationships for children, it is important to consider the psychological harm youth experience when they suddenly lose contact with a sibling. The consequences of losing a sibling bond involve anxiety, trauma, grief, and guilt, not to mention the loss of shared identity and history. 116 Child and adolescent development expert Dr. Maureen C. Smith found that children who were removed from their siblings when placed into foster care often exhibited more problematic behavior towards their peers than those who remained with their siblings. 117 Further, Dr. Smith found that children who were not placed with their siblings had greater emotional and behavioral problems than children who maintained contact. 118 Studies have also shown that separated siblings underperform in school and are more likely to have their placement disrupted. 119

As AFCs, the authors of this Article are familiar with the tendency of children to act out or misbehave as a way of achieving control, particularly when their home life or stressful situations elsewhere give them little to no agency in their safety or comfort. This same tendency was discussed in interviewees’ accounts, hoping that being “bad” would cause them to be returned to the families or communities they came from. For example, D.S.,

113 Trudy Festinger, No One Ever Asked Us—A Postscript to Foster Care 89–91 (1983).
115 Herrick & Piccus, supra note 105, 845-61; Nell Bernstein, A Rage To Do Better: Listening To Young People From the Foster Care System (2000).
116 Herrick & Piccus, supra note 105, at 845.
who was moved to a different city from her sister, began to act out hoping that she would be returned to New York City where she could visit with her sister. As she put it:

I done beat half the town up. Like, how much more people you want me to beat up? I’m going to beat up everybody! In my mind I’m thinking what I got to do? I done everything in my power to get back to Brooklyn. I got kicked out of schools, there was four high schools, four of them! I got kicked out of all four! I didn’t even know I had that in me. I was like wow! You did a good job, they’ll send you home now. I still stayed.

The significant people in a child’s life provide the language he or she needs for self-definition and forming an intimate identity, and siblings play an especially crucial role in the dialogical genesis of the human mind. Siblings offer one another a shared history that cultivates their bond—a bond which grows as siblings spend more time together, go through difficult experiences, and are there for each other as a source of love and support. The loss of that shared history can have lasting effects on young people as they move into adulthood. One interviewee explained:

I think [having contact with my siblings] would have made a huge difference because even now when things happen in life, I have no one to share it with. And that is really sad. There’s times when you need to share or you need to talk to someone and have opinions of and advice of someone who has known you all your life. Everyone has that need . . . that would have made a humongous impact . . . having some kind of touching and connection throughout life is very very important . . . I think it’s more important as you age, having that connection with your past. When my husband and I get together with people, it’s very lonely for me because I have no connections from my past. It’s a strange feeling . . . it’s like everything has been erased, you have no importance,

121 D.S. Interview, supra note 68.
122 Id.
124 Cicirelli, supra note 92, at 58.
125 Id. at 60–63.
you don’t have any of those connections, any of those anchors, and there’s times in your life when you need to be anchored, in your adult life.\textsuperscript{126}

D.S. also shared with the authors how her life would have been different if this history was not fractured:

I believe I would have had more self confidence in myself, I would have had higher self-esteem. I probably would have been done with school right now. I probably would have more manners than I do. I probably wouldn’t have . . . anger issues. I would probably be better at having relationships with people.\textsuperscript{127}

When the sibling bond is shattered and the history discontinued, children lose that connection with their past they once had, leaving them with little identity and diminished self-esteem.\textsuperscript{128} Another interviewee described how he “completely cut family from [his] vocabulary:"

What really changed was when they sent me back to [the] hospital. I was told it was for severe sleepwalking that I would sleepwalk out of the house. I don’t remember it, but while I was in the hospital, I asked to speak to a family member and they said there was no one to talk to and I was like “there is no one that wants to talk to me? No grandparents, no nothing?” And they had me all drugged up and on all sorts of stuff and I just decided, fine, I don’t need anybody. That was the year I was going into fifth grade. That was the year I considered myself alone.\textsuperscript{129}

These children’s stories show the permanent effects that the loss of a sibling relationship can produce. According to E.A., who lost contact with her sister for years after her sister’s adoption, “there are times when I can’t watch certain movies, I can’t have certain conversations because I can’t stop


\textsuperscript{127} D.S. Interview, supra note 68.

\textsuperscript{128} Herrick & Piccus, supra note 105, at 849.

crying.” Seeing siblings under these circumstances acts as a trigger for the sadness she associates with losing that relationship. CLCNY interviewees persistently revealed themes of “loss of identity,” “the desire to have someone to talk to,” “loss of association with a distinct past,” “emotional imbalance,” and “compounded grief,” when discussing the sibling contact they lost.

In recounting how siblings confront separation, D.W., a foster care worker and an alumnus of foster care herself, who lost contact with her siblings after their adoption, expressed feeling “a natural instinct to have care and concern and wonder,” about a sibling’s whereabouts. Many interviewees struggled with the anxiety and uncertainty of wondering how their siblings were doing, often using coping mechanisms like “shut downs,” “greater familial detachment,” and “loss of value in the biological family.” In addition, the aftermath of separation also leaves children with a psychological mischaracterization of their family—children begin to consider certain important figures in their lives to be part of their family, while selectively disassociating from others. S.C., another foster care alumnus, completely disowned his brother in his mind after they were separated. He explained:

I am embarrassed when my brother puts something on my Facebook calling me brother. That also gets me too, because it shouldn’t be . . . I have friends in my life that knew I was in foster care but didn’t even know I had a brother. So there is this kid from Texas saying ‘I love you, big brother’ and I’m not saying anything back and they say, ‘Well, who is he?’ And my friends don’t even know my biological family. I’ll say, ‘He’s just some guy.’ They’ll say, ‘Well who is he calling you brother? That is a pretty affectionate term.’ I’ll say, ‘Well he is. He is my blood brother.’ They’ll say,

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130 E.A. Interview, supra note 89.
131 Id.
135 S.C. Interview, supra note 129.
‘Whoa he is? You have a blood brother?’ I’m like, ‘I have all sorts of siblings.’

S.C., like many interviewees, focused on “purging” himself of his connections with his biological family and cultivating a new life independent of his past.

The psychological importance of maintaining sibling relationships is clear, both for its short- and long-term effects on a child. Siblings serve as a support outlet for children, contributing to their self-esteem, emotional stability, and identity. Disrupting sibling contact can cause irreparable harm, including the rebirth of suppressed grief a child may have experienced after her removal from her birth family.

Despite the importance of maintaining the sibling relationship, the child welfare system is challenged to keep any sibling group together, both during their placement in foster care and, particularly, after adoption. There are only a few foster homes able to take more than two children at a time, which causes immediate problems for caseworkers who are trying not to disrupt a sibling group’s relationship. Recruiting families who are willing and able to take large sibling groups takes time, effort, and money, all three of which are limited in the overburdened child welfare system. In addition to these practical challenges, there are legal hurdles and a lack of clarity in what exactly the law requires agencies to do for sibling groups, both while they are in foster care and after adoption.

III. THE CURRENT STATE OF THE LAW

A. Rights of Siblings While in Foster Care

In Roberts v. U.S. Jaycees, the Supreme Court stated that the First Amendment’s Freedom of Association clause includes the right to maintain

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136 Id.
137 Id.
138 Herrick & Piccus, supra note 105, at 846.
139 Id. at 851.
140 Id. at 849.
141 Sonya J. Leathers, Separation from Siblings: Associations with Adoption and Outcomes among Adolescents in Long-Term Foster Care, 27 CHILD. AND YOUTH SERVICES REV. 793, 794 (2005).
142 Id. at 794.
143 Herrick & Piccus, supra note 105, at 853.
“certain intimate human relationships,” and posits that this right “must be secured against undue intrusion by the State.” The relationship between two family members” was cited by the Court in Aristotle P. v. Johnson as “the paradigm of such intimate human relationships.”148 The State may only infringe on this right of association when it has a compelling interest, and this interest “cannot be achieved through means significantly less restrictive of associational freedoms.”149 Thus, while the State has a compelling interest in protecting children from abuse and neglect and may remove children from parents, it should theoretically do so in a manner that does not unduly infringe upon those children’s associational freedoms.

Notably, in the late 1980s, a group of seven foster children, who were wards of the State and in the care of the Illinois Department of Children and Family Services (DCFS), alleged that the State’s practice of placing siblings in separate foster homes and refusing to facilitate visitation was an unconstitutional infringement of the right to association cited in Roberts.150 In Aristotle P. v Johnson, the foster children accused DCFS of “placing siblings in separate foster homes or residential facilities and denying the plaintiffs the opportunity to visit their sisters and brothers who are placed elsewhere.”152 DCFS moved to dismiss the entirety of the children’s complaint on the grounds that it failed to state a legal cause of action.153 In discussing DCFS’ motion to dismiss, the Illinois District Court found that the sibling’s relationships with one another fell under the Roberts definition of an “‘intimate human relationship’” that was afforded “‘a substantial measure of sanctuary from unjustified interference by the State.’”154 The Court declined to dismiss the foster children’s complaint and urged the parties to come to a settlement that would “facilitate sibling visitation.”155

145 Id. at 617–18.
146 Id.
147 721 F. Supp 1002 (N.D. Ill. 1989).
148 Id. at 1005.
149 Roberts, 468 U.S. at 623.
152 Id. at 1004.
153 Id. at 1003.
154 Id. (quoting Roberts, 468 U.S. at 617–18).
155 Id. at 1012.
The parties ultimately came to a settlement in which DCFS decreed that, in the future, siblings would be placed together when possible and have visitation rights when placed apart.\footnote{See Kernan, \textit{supra} note 150, at 6.}

The Fostering Connections to Success Act and Increasing Adoptions Act of 2008\footnote{Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified in scattered sections of 42 U.S.C.).} ("Fostering Connections") has codified in federal law the principles at issue in \textit{Aristotle P.}\footnote{Aristotle P., 721 F.Supp. at 1002.} Today, a state’s child welfare department that has practices like the ones at issue in \textit{Aristotle P.} would theoretically risk losing federal funding for its foster care system.\footnote{\textbf{CHILD WELFARE INFO., GATEWAY, MAJOR FED. LEGIS. CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION} 1, 8 (Apr. 2012) available at http://www.nrc4tribes.org/files/Tab\%204_1\%20Major\%20Federal\%20Child\%20Welfare\%20Legislation.pdf.} Fostering Connections mandates that each state make “reasonable efforts” to ensure that siblings be placed in the same “foster, kinship, or adoptive home” upon the child’s initial removal.\footnote{In New York, placement together is presumptively in the children's best interest if it would not be contrary to their health, safety, or welfare. \textit{See}, e.g., Banks-Nelson v. Bane, 625 N.Y.S. 131, 131 (App. Div. 1995) (once agency properly removed one sibling from the foster home, the other children had to be moved absent a strong countervailing reason not to); \textit{In re} Peters v. McCaffrey, 569 N.Y.S. 797, 797 (App. Div. 1991); \textit{In re} H. R., 156 Misc. 2d 856 (Fam. Ct. 1993) (the Court rejects Commissioner's claim that foster parents would be overburdened).} When such placement is not possible, the State is to ensure that “frequent visitation” occurs, unless that visitation is “contrary to the health, safety or well-being of one or more of
the children.”

A state that does not comply with this mandate could lose federal funding—a crucial source of income for many states.

Fostering Connections is an important step towards protecting sibling relationships. Yet, it far from guarantees that siblings’ relationships will be protected while they are in foster care. First of all, Fostering Connections is a funding statute which does “not provide assurance for any given group of siblings [in foster care] that contact will continue.” Second, the only District Court to directly address the issue has found that Fostering Connections creates no private right of action, nor any right which could be asserted by a child in foster care under 42 U.S.C. 1983. Third, “reasonable efforts” is an inherently amorphous term, and the statute provides no guidance as to exactly what those efforts must entail.

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161 See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 431.10 (2014) (“The social services district is responsible for ensuring that diligent efforts are made to secure a foster family boarding home or agency boarding home which is willing and able to accept the placement of the siblings together . . . . Factors to be considered in making a determination of whether siblings or half-siblings should be placed together must include, but are not limited to: (1) the age differentiation of siblings; (2) the health and developmental differences among the siblings; (3) the emotional relationship of siblings to each other; (4) the, individual services needs; (5) the attachment of individual siblings to separate families/locations; and (6) the continuity of environment standards . . . . Foster parents must be informed if any child placed with them has siblings or half-siblings, and if so, the location of siblings or half-siblings . . . . [A]gencies are responsible for ensuring that diligent efforts are made to facilitate regular biweekly visitation or communication between minor siblings or half-siblings who have been placed apart, unless such contact would be contrary to health, safety or welfare of one or more of the children, or unless lack of geographic proximity precludes visitation.”). If the agency cannot place the children together at first, it must do so within thirty days. 18 NYCRR §431 10FCA §1027-a.

162 See 45 C.F.R. § 1356.21(b)(2)(ii) (2005) (If timely determination regarding reasonable efforts to finalize permanency plan is not made, child becomes ineligible for Title IV-E foster care maintenance payments at end of month in which judicial determination was required to have been made, and remains ineligible until determination is made). In poorer states, the federal government pays more than half of the cost of keeping any child in foster care. South Dakota, for instance, receives approximately 100 million dollars a year from the federal government to run its foster care system, and handles only a quarter of the cost.

163 Mandelbaum, supra note 27, at 11.


165 For a further discussion of this point, see Jill Elaine Hasday, Siblings in Law, 65 VAND. L. REV. 897, 906 (2012).
The deeper issue, however, is that Fostering Connections is silent on what happens to sibling relationships after siblings are adopted out of the foster care system, which, statistically speaking, is a more likely outcome for a child in foster care in 2014 than it was in 1989. Prior 1989, in the era when the Aristotle P. suit was settled, it was more common for a child who was unable to return to his or her parents to remain in foster care for an indefinite period of time. The Adoption and Safe Families Act (ASFA), which was passed in 1997, caused a dramatic increase in the number of foster care adoptions by providing strict timelines for when states had to move to terminate the biological parent’s rights, as well as instituting “adoption bonuses” for states that increased their rate of adoptions. For each adoption over the state’s baseline rate—the previous year’s number of adoptions—ASFA authorized a $4,000 bonus, with an additional $2,000 if the adoption was of a “special needs” child.

In the four years after ASFA was passed, adoptions out of foster care rapidly increased 62%. Fostering Connections further increased those payments, enabling states to claim an additional $4,000 for each additional special needs adoption and providing an $8,000 bonus for each extra adoption of a child older than nine.

Although the last twenty-five years has seen an evolution in the child welfare system’s protection of the sibling relationship, an important question for a child in foster care today remains: “Will I still see my siblings after one of us is adopted, and no longer in foster care?”


167 Prior to the passage of ASFA many children languished and grew up in foster care because long term goals were not established, maintained, or carried out. Patricia Whitten, The Rights of Foster Parents to the Children In Their Care, 50 CHI.-KENT L. REV. 86, 87 (1973).

168 ASFA contains a provision mandating that the state file for the termination of parental rights after a child has spent fifteen of the past twenty-two months in foster care. 42 U.S.C. § 675(E) (2012).


170 Id. § 673b(d)(1)(A)–(B).


B. Rights of Siblings Post-Adoption

Although the court in Aristotle P. found that the sibling relationship was constitutionally protected from state interference, the U.S. Supreme Court itself has never made any statement to that effect. Courts deciding against post-adoption sibling visitation frequently cite this omission in their reasoning. In a 2011 case concerning post-adoption sibling visitation, the Supreme Court of Nebraska noted that “no court has recognized a constitutionally protected right of one sibling to a relationship with another following termination or relinquishment of parental rights.” Similarly, a Massachusetts court noted that the right to post-adoption sibling visitation “has not been found to be a constitutionally protected liberty interest requiring greater protection than in regard to other family relationships.”

In contrast, the U.S. Supreme Court has found that parents have a fundamental constitutional right to raise their children as they see fit. In Troxel v. Granville, the Court found a Washington statute, which permitted a court to order visitation with any person proven to be in the child’s best interest, unconstitutional. The Court reasoned that the Statute infringed upon a parent’s right to direct the upbringing of her child. This right is protected under the Fourteenth Amendment’s Due Process Clause, and, as Troxel clarifies, that right includes deciding who may visit with her child. Though the Troxel case did not explicitly address adoptive parents, all 50 states confer the same rights on adoptive parents as they do biological parents.

In addition to the Troxel precedent, the reluctance of state courts to order post-adoption sibling visitation is seemingly grounded in the belief that such orders would, in the words of one caseworker, be “just another shackle around a prospective adoptive family” and deter families from adopting.

175 In re Meridian H., 798 N.W.2d 96, 107 (Neb. 2011).
176 In re Pierce, 790 N.E.2d at 684.
177 530 U.S. 57 (2000) (plurality opinion).
178 Id. at 73.
179 Id. at 72.
180 Id. at 65.
even if it is found to be in the child’s best interest.\textsuperscript{183} Given this precedent and the general fear that allowing post-adoption visitation would negatively affect the number of families willing to adopt, it is not surprising that state statutes proscribing some mechanism for post-adoption contact tend to give substantial weight to the wishes of adoptive parents in determining whether visitation is in the child’s best interest.\textsuperscript{184} State statutes dealing with post-adoption sibling contact can generally be divided into three categories: those that focus on “encouraging” adoptive parents to promote the relationship; those that allow for sibling visitation orders to be issued with the consent of the adoptive parents; and those that allow for post-adoption sibling visitation contact to be ordered over an adoptive parent’s objection.\textsuperscript{185} The majority of states have laws that fall into the first two categories; statutes in the third category, which theoretically allow a court to order sibling visits without an adoptive parent’s consent, may be unconstitutional under *Troxel*.\textsuperscript{186}

A few additional states directly give siblings the right to petition for visitation with one another when separated in the child welfare system, though it is unclear whether these states provide much assistance for siblings in the post-adoption context.\textsuperscript{187} For instance, a Maryland statute states that “siblings who are separated due to a foster care or adoptive placement may petition a court . . . for reasonable sibling visitation rights.”\textsuperscript{188} A 2014 Maryland Court of Appeals decision confirmed, however, that for siblings to receive visitation rights over a parent’s objection, they must show “exceptional circumstances” and prove that the absence of such visitation would have a “significant deleterious effect” on the child seeking visitation.\textsuperscript{189} While one member of a sibling group might be able to petition and receive visitation while their siblings were in a “pre-adoptive” home, that same sibling would face the legal hurdle of proving “extraordinary circumstances” if she petitioned for sibling visits post-adoption.\textsuperscript{190}

\textsuperscript{183} *In re Donte A.*, 631 N.E.2d at 259.
\textsuperscript{184} Hasday, *supra* note 165, at 910.
\textsuperscript{185} *Id.* at 908–10.
\textsuperscript{186} *Id.* at 911.
\textsuperscript{187} Kernan, *supra* note 150, at 4.
\textsuperscript{188} Md. Code Ann., Fam. Law § 5-525.2(b) (LexisNexis 2006).
\textsuperscript{189} *In re Victoria C.*, 88 A.3d 749, 750 (Md. 2014).
\textsuperscript{190} *Id.* at 768.
The result of the tension between the constitutionally protected role of adoptive parents and the relatively unprotected sibling relationship is a patchwork of policies with no strong guarantee for any one child that they will remain in contact. Further, there are no legal protections for their relationship where either the child or one of the siblings is adopted out of foster care.

C. “Permanency”

The status quo reflects two distinct realities: First, the reality that the rights of parents are granted more robust protections than the rights of children; and second, that a child’s right to sibling contact is very often sacrificed in order to give children permanency through adoption. California, for instance, theoretically has a “sibling group” exception in termination of parental rights cases. A court will not terminate a parent’s rights if a sibling (or the parents invoking the exception on her behalf) shows that their sibling relationship outweighs “the benefit of legal permanence through adoption” and that the parents’ termination would “substantially interfere[]” with the sibling group’s ability to stay in contact with one another. Given this heavy burden, the courts have been clear: “[T]he application of this exception will be rare, particularly when the proceedings concern young children whose needs for a competent, caring and stable parent are paramount.”

Siblings in California seeking to invoke the “sibling group” exception are asked to meet the nearly impossible burden to show their relationship outweighs the benefits of the “ideal” adoption. In other states, placements that are most likely to lead to an ideal option win over placements that would facilitate sibling contact. And yet, the goal of providing children with a loving family to guide them into adulthood and provide them with stability is not guaranteed through adoption.

Kayla, the young woman whose story opened this Article, only achieved permanency for seven years; the adoption by her grandmother was finalized when she was three, and her grandmother passed away when she was ten.

191 See Kernan, supra note 150, at 5, 7.
192 Id. at 4.
194 Id.
196 See Kernan supra note 150, at 4.
197 Id. at 5.
198 Kayla Interview, supra note 1.
Kayla then returned to live with her biological father\textsuperscript{199} who surrendered his parental rights when Kayla was initially placed into foster care.\textsuperscript{200} Kayla found herself back in foster care just a few years later, when the child welfare system filed a neglect case against her father for physically fighting with his girlfriend, using drugs, and failing to meet Kayla’s basic needs.\textsuperscript{201}

There are no comprehensive national statistics on how common a story like Kayla’s is, because there are no federal standards for tracking broken adoptions.\textsuperscript{202} Even in states that do track the number of adopted children returned to foster care, no state has a mechanism for tracking how many children, like Kayla, return to biological family members through informal or private guardianship arrangements after they are no longer able to live with the adoptive parent.\textsuperscript{203} In many of these cases, it is no one’s “fault” that the adoption broke down, nor does this breakdown signify that the child’s adoptive placement was inappropriate at the time it was made. But it is crucial to acknowledge that for some children, the sibling relationship is sacrificed for “permanency” that is ultimately illusory. By the time these children return to the foster care system after their “permanent” homes turn out not to be permanent, sibling contact has already been lost. Following Kayla’s return to foster care, she was discussing the relationship that she had with Keisha when they were babies in foster care, and Kayla asked: “Since I’m back in foster care, does that mean that I’m going to get to see her again?”\textsuperscript{204} Even if, by coincidence, Keisha had likewise returned to foster

\textsuperscript{199} See Post & Zimmerman, supra note 17, at 477–78. (“Although New York has a custody statute that does not restrict the category of individuals who may apply to the court for custody of a child, there are a line of cases in which the court has found that biological parents whose parental rights have been permanently terminated due to neglect lack standing to later seek custody . . . . In practice, while there may be some members of the bench who will automatically dismiss the case at the first appearance for lack of standing, there are many judges or referees who will allow the petition to survive and will grant an order of custody of the child notwithstanding the standing issue and prevailing case law . . . . Practically speaking, these are not cases in which an appeal is likely, as generally there is no one else who wants the child.”).

\textsuperscript{200} Kayla Interview, supra note 1.

\textsuperscript{201} Id.


\textsuperscript{203} EVAN B. DONALDSON ADOPTION INST., WHAT’S WORKING FOR CHILDREN: A POLICY STUDY OF ADOPTION STABILITY AND TERMINATION 3 n.1 (2004).

\textsuperscript{204} Kayla Interview, supra note 1.
care, the two girls now had different last names and would no longer identified as members of a sibling group. As previously mentioned, the foster care agency has no real obligation to place the siblings together or to facilitate their visitation.\(^{205}\) Kayla’s current foster care paperwork states simply that she was removed from her biological father’s care due to concerns of neglect.\(^{206}\) It omits the fact that her father had already given up his rights, that Kayla had been adopted, and that she has a biological mother and a sister.\(^{207}\) Because Kayla has a different last name and case number, nothing in the system links her to the three-year-old who found “permanency” through adoption back in 2001.\(^{208}\)

Ironically, many young people who experience broken adoptions find that the one adult willing to step forward and raise them to adulthood is their biological sibling.\(^{209}\) Despite the fact that their relationship has no legal protections, these older siblings were quite often deeply involved in their younger siblings’ lives and were described by several of the younger siblings as “the one constant” and “the one stable person I can count on.”\(^{210}\) R.M., for instance, was 17 years old when his adoptive mother suddenly died in her sleep.\(^{211}\) The next day, his 23-year-old biological sister, who had moved to North Carolina to pursue graduate school, packed up all her belongings and moved back to the Bronx.\(^{212}\) A day later, she went to Family Court and petitioned for guardianship of R.M.\(^{213}\) “He needs me,” she said simply.\(^{214}\) “I cannot let my brother be a statistic, and he’ll become one if he isn’t living with someone who cares.”\(^{215}\)

Similarly, seventeen-year-old D.W. got married in order to show the judge that she was stable enough to successfully assume custody of two of


\(^{206}\) Kayla Interview, supra note 1.

\(^{207}\) Id.

\(^{208}\) Id.


\(^{212}\) Id.

\(^{213}\) Id.

\(^{214}\) Id.

\(^{215}\) Id.
her younger siblings. In another case, D.D. spent his life in foster care and learned as an adolescent that he had younger siblings who had also been removed from his mother long after he was placed into care. When D.D. turned twenty-one, he searched and found his siblings who had been put out of their adoptive home and assumed custody of them.

IV. CHALLENGES INHERENT IN CHANGING THE POLICY AND PRACTICE OF POST-ADOPTION SIBLING VISITATION

In an ideal world, siblings would always be removed from the biological parents at the same time and placed together in a loving and stable foster home. Their bond with one another would remain unbroken, and they would have regular visits with the biological parents to ease the trauma of separation. If the biological parents were unable to take the children home, the foster family would adopt the entire sibling group at the same time. Post-adoption services would be offered to help the children and parents address the identity formation and attachment issues that arise in any adoptive family. In rare cases, when siblings could not be placed in the same adoptive home, all of the adoptive families would coordinate to ensure that the siblings had regular contact and meaningful opportunities for visitation.

The realities of the child welfare system make this ideal impossible in most situations. Approximately two-thirds of children in foster care also have a sibling in care. Agencies need to find a placement for children twenty-four hours after their removal, and out of necessity, focus on finding available beds. Sibling groups may need to be split up, because many foster parents will not even consider taking multiple adolescents into their home. At times, only part of a sibling group may be taken into foster care—only one child may require out-of-home care, or at least one sibling may be over the age of eighteen and thus beyond the reach of the child welfare system. Siblings may also have dramatically different needs—a family that can provide excellent care for one member of a sibling group may be unequipped or lack the training to provide a permanent home for a

216 D.W. Interview, supra note 133.
218 Id.
219 CHILD WELFARE INFO. GATEWAY, supra note 104.
220 Post & Zimmerman, supra note 17, at 508.
222 Keely A. Magyar, Betwixt and Between but Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care, 79 TEMP. L. REV. 557, 559 (2006).
child with more specialized needs. Further complicating the issue, children may have different mothers or fathers. A paternal grandmother who is a willing foster care resource for her son’s child may be unwilling to take in her grandchild’s half-sibling, with whom the grandmother has no biological relationship.

Once siblings are placed into separate foster homes, the practical challenges to visitation become even more difficult. Children in New York City foster care at least have a public transportation system, which provides a way to keep in contact. In many other parts of the country, this is not the case. As one interviewee explained:

[My siblings] were placed with a family who realized there were other siblings that they needed to keep contact with. However, the family lived five hours away. They lived in northern West Virginia. They were kept in the state, thankfully, but they might as well have been at the other end of the world, because at that time, my situation was not of such that I could do a whole lot about keeping contact with such distance.223

Another interviewee’s half-brother was placed into foster care in California because the paternal family was interested in taking the half-brother (their biological relation) but not the interviewee, with whom they had no relation.224 He explained the problem as follows:

[F]or the sake of a foster child, California and Montana are two different countries. I think it’s crucial. If you separate [the siblings] by state not only have you just changed how they are connected, you change their culture. I lost everything when I lost my family. My mom and dad lived in Oregon, my brother lived in California and I was the only one in Montana. And Montana is it’s own little world compared to the rest if you grow up here.225

A final practical challenge to maintaining a sibling group’s visitation rights occurs after the sibling group’s adoptions are finalized and the agency stops coordinating visits with that sibling. One adoptive mother put it this way:

The visits [post-adoption] would have been nice, yes—we had to coordinate them on our own. They’re not court

223 D.W. Interview, supra note 133.
224 S.C. Interview, supra note 129.
225 Id.
mandated, so the agency doesn’t bother. *It’s one more thing they don’t have to do, they cross it off the list.* We were lucky that the foster parents managed to stay in touch. I’ve had other foster kids—they come and they go and they don’t want you to maintain any kind of contact, because there’s privacy issues. I mean, I think we could have had some social workers tell us we couldn’t stay in touch—I don’t know. So I guess we were lucky in that it was not hampered—it wasn’t facilitated, but it wasn’t hampered either.\textsuperscript{226}

Another interviewee explained that after her siblings’ adoption, an agency worker had discussed the importance of sibling visits with the adoptive parent, but provided no assistance to ensure the visits actually took place:

I mean, they talked about it, but that’s about all they did. Like, the social worker, and this is a new social worker, young and out of college, that was working with [my younger siblings] when parental rights were actually stripped. She was the person who kind of chose adoptive parents for them. She really was a great person, but when she realized that they needed to keep contact with us, it was verbally discussed with their new parents. But there was never anything in writing, and there was never anything on their part to actually physically help us make that happen. Sure, you can see them if you can arrange a five-hour trip. And I do believe that that particular social worker understood that we needed to keep contact, but she didn’t understand enough to actually go the extra mile to make sure it happened.\textsuperscript{227}

In addition to these practical challenges around distance, time, and money, serious issues in the relationship between siblings can further complicate initial efforts to coordinate contact.\textsuperscript{228} What should be done, for instance, when siblings appear to be a negative influence on one another and “act out” during or after their visits? What should happen when one sibling behaves abusively towards another? What can be done if the siblings have


\textsuperscript{227} D.W. Interview, supra note 133.

\textsuperscript{228} See Mandelbaum, supra note 27, at 2 n.5.
a disruptive dynamic, in which an older sibling tries to “parent” a younger one, and interferes with the adoptive relationship? What should be done if the child’s sibling is closely aligned with a birth parent, whom the pre-adoptive or adoptive parent does not want the child to see?

As these difficult situations suggest, maintaining sibling contact may not always be in the child’s best interest. Much like other issues in child welfare, the issues surrounding post-adoption sibling visitation and contact are nuanced. The authors are not suggesting that the techniques proposed in this Article can be universally applied to how practitioners approach children, cases, and visitation and contact plans. Each case presents unique challenges like the ones mentioned above, and requires a balancing act that involves paying attention to the law available, knowing and understanding each child and their relationships—not only what they want for the short term but for the future as well, and individualizing any plan for post-adoption contact and visitation. Too often, the overburdened system throws up its hands and visits cease while the children are in care. Even if visits continue between the siblings while they are in foster care, adoptive parents facing these issues may decide that it is in their child’s best interest to end visits as soon as the visits are no longer court-ordered after the adoption is finalized. We will discuss each of the challenging situations mentioned above, and at the conclusion of the Article, discuss what solutions might be more appropriate and child-centered than the complete cessation of visits.

A. “Acting Out” and Inter-Sibling Abuse

Many children in foster care have visits with their siblings at the beginning of their time in care, but soon lose contact after a caseworker or foster parent determines that siblings are a “negative influence on one another.” For these children, visits will stop entirely after one or two negative “write ups” by a caseworker, or after a foster parent raises an

229 See infra Part IV.A–B.
230 See Timothy Arcaro, Florida’s Foster Care System Fails Its Children, 25 NOVA L. REV. 641, 661 (2001) (“Caseloads have grown beyond the worker's ability to provide minimal care to their constituents.”).
231 See infra Part IV.A–B.
232 See infra Part V.
233 See Mandelbaum, supra note 27, at 2 (illustrating a case where one set of foster parents wanted to end sibling visitation between two biological brothers that were placed in two separate foster homes).
Children’s ability to have a continuing relationship with their siblings may thus be determined by a caseworker’s observations during a few hours at an agency. Once visits cease and there is documentation that the children should not see one another, children face virtually insurmountable obstacles in getting visits reinstated.

Upon reflection, many interviewees knew that either they or their siblings were denied visits for “acting out,” but felt that the uncertainties and anxieties around seeing their siblings contributed to their behavior problems. As one interviewee explained, “Of course [my siblings] were acting out. Because these weren’t consistent visits, and it wasn’t our fault that they weren’t consistent visits, so they didn’t know when they would see us again. –D.W.”

Other siblings, particularly the older siblings in a sibling group, felt that they were simply presumed to be negative influences on their younger siblings because they had lived in an abusive or neglectful home for more time than their younger siblings had. One interviewee explained:

There’s a stigma for foster and adoptive parents “there’s an older sister, she didn’t go into care, she’s not placed up for adoption, she’s part of this messed-up bunch.” She’s probably really messed up, she’s older and she’s been living in that environment—and really I wasn’t messed up. I was just trying to see the siblings that I had tried so hard to take care of and protect, and all of a sudden, I hadn’t done anything wrong, my mother had. But all of a sudden, they were taken from me, and not a whole lot was done to try to help me and help them keep that contact.

In addition to general “acting out” behavior, which may stem from underlying trauma, sibling groups in foster care may have an abusive dynamic between them. One of the few books to address the topic of sibling abuse opens with an acknowledgment that sibling abuse remains “largely undetected.” There can be considerable difficulty in

See id.

Id.

D.W. Interview, supra note 133.

Id.

See Herrick & Piccus, supra note 105, at 847 (stating that siblings in foster care may need to be separated due to sibling abuse or extreme trauma brought on by sibling contact).

distinguishing between normal high-conflict sibling relationships and situations in which one child is actually victimized by another:

Physical aggression within the normal range of sibling relationships needs to be differentiated from physical abuse or victimization of a weaker sibling. Distinctions need to be made between sexually reactive behavior (inappropriate sexual touching or fondling between children close in age) and sexual abuse by a more powerful sibling of another. Also, the severity of the abusive behavior needs to be assessed and a determination made as to whether the safety risks are moderate and can be managed through closer supervision, therapeutic parenting, and clinical treatment to change behaviors. If there is significant physical or sexual abuse that does not respond to treatment or if the risk of recurrence is high, the abusing sibling most likely needs to be moved to another placement.\textsuperscript{240}

Though it may be difficult to parse out which sibling relationships are high-conflict and which sibling relationships have a more abusive dynamic, it is undisputed that children in foster care have a disproportionately high prevalence of mental health disorders.\textsuperscript{241} In one New York study, it was estimated that up to “80% of children in foster care have a mental health problem serious enough to warrant treatment, yet most remain undiagnosed and untreated.”\textsuperscript{242} Moreover, even children who are diagnosed while in foster care do not receive adequate or appropriate mental health services.\textsuperscript{243} Thus, it is not surprising that adoptive parents, even when they would like to support their child’s relationship with a sibling, are concerned that their child’s sibling might present with some psychological issues that would negatively impact their child. As one adoptive parent stated, “I’ve been hesitant to have too much more contact with [my daughter’s siblings] because I’m not sure they’re terribly healthy.”\textsuperscript{244}

\textsuperscript{240} Children Welfare Info. Gateway, supra note 104, at 11.
\textsuperscript{242} Post, supra note 172 (citing Citizens’ Comm. For Children Of N.Y. Inc., Before It’s Too Late: Ending The Crisis In Children’s Mental Health 488 (1999)).
\textsuperscript{243} Id.
\textsuperscript{244} E.H. Interview, supra note 226.
Yet children will often experience the loss of contact with a difficult, mentally ill, or abusive sibling as a profound loss that is not in their best interests. For instance, Helen Ramaglia, a speaker and author who presents her experiences of child abuse, foster care, and trauma, provides some insight into the issue of sibling separation due to abuse from a victimized sibling’s perspective.\textsuperscript{245} Helen’s mother died when she was three years old, following complications from beatings by Helen’s father during their relationship.\textsuperscript{246} Following her mother’s death, Helen was sexually, psychologically, and physically abused by her father until she was removed from his care at age ten.\textsuperscript{247} For Helen and her siblings, life in their biological home was a solitary battle for survival.\textsuperscript{248} While Helen and her older sister were initially placed together after being separated from their younger brother, their foster parents quickly became concerned about the abusive dynamic between Helen and her sister.\textsuperscript{249} Helen’s sister had been diagnosed with Reactive Attachment Disorder and other psychological disabilities that manifested themselves in violent and hostile behaviors towards Helen.\textsuperscript{250} As Helen stated, “My sister . . . did take a lot of her anger out on me and [my foster parents] were scared that she would really hurt me, seriously hurt me . . . they were afraid for my life.”\textsuperscript{251} Unbeknownst to Helen, her foster parents decided that enough was enough, and ultimately removed Helen’s older sister from their home.\textsuperscript{252}

When Helen woke up one morning to find that her sister had disappeared, she was devastated, describing it as:

I didn’t know where she went, again there was no conversations, no goodbyes, I didn’t know where she went, I didn’t know what happened, I just woke up and she was gone. But we had spent our lives together, so this was a different experience for me because I actually went back into a really deep depression. My foster family did not

\textsuperscript{245} Helen Ramaglia Interview, supra note 126.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} Id.
realize what was going on because I stopped talking and I went back to my quiet little world where it was just me.  

Despite the abuse and anger she had endured, her sister had been the only constant in Helen’s chaotic world.  

One might believe that Helen should have felt relieved and grateful to have escaped her sister’s threats and violence. Yet her experience as a child was extremely different. Reflecting back nearly forty years later, Helen believes that the main trauma was not her sister’s removal from the home, but the fact that no one talked to her about it, explained the situation to her, or told her whether or not she was going to see her sister again.  

It was very traumatic, I think if I had been sat down and talked to and explained, I knew that she was dangerous to me, but again at this point no one had ever sat down and explained anything to me—ever. So just sitting down and explaining and this is what is going to happen, we are going to give you time to say goodbye, it would have been very different.  

Had she been told, “it would have been hard and [she] probably would have went through a little bit of a depression, but [she] think[s] it would have minimized what happened greatly.”  

Courts, likewise, have clearly struggled with cases in which one or more siblings have a history of abuse or mental health concerns. One New York case, In re Keenan R. v. Julie L., involved a fourteen-year-old boy in foster care who was petitioning for visits with his twin eight-year-old sisters, both of whom had been adopted into the same family. Although Keenan had initially been placed with that same family, he was removed for “sexually inappropriate behavior and temper tantrums.” The court denied Keenan’s initial case because he had only “extremely limited” contact with his sisters, and had thus not developed the “ongoing and affectionate relationship”

253 Id.  
254 Id.  
255 Id.  
256 Id.  
257 Id.  
258 775 N.Y.S.2d 468 (Fam. Ct. 2004).  
259 Id.  
260 Id. at 469.
necessary for him to have standing for visitation. Keenan appealed, and the Appellate Division remanded it back to the Family Court, finding that the Family Court must “consider whether petitioner's efforts to establish a relationship with his adopted sisters had been frustrated by their adoptive parents.” Upon remand, the Family Court again denied the petition for visitation. Keenan appealed a second time. He was close to twenty twenty and his sisters were close to fourteen when the final decision was released. In a brief opinion, the Appellate Court found that “forced visitation would serve little purpose, except to exacerbate the sisters’ anxiety.”

Similarly, in a 1999 Massachusetts case, Degrenier v. Reid, the Appellate Court found that an adoptive parent’s decision to disallow visits between an approximately fifteen-year-old and her younger siblings was proper, given the older sibling’s “‘physical, verbal and emotional abuse of [her siblings] including an, as yet, unsubstantiated allegation of sexual abuse.’” The courts in both Keenan R. and Degrenier took a somewhat punitive tone towards the older siblings, and applied the “best interest of the child” standard to only the younger children with whom visits were being petitioned. As the Family Court in the initial Keenan opinion stated, “[s]ince the childcare agency that has custody and guardianship of [fourteen-year-old Keenan] supports his request for visits, we must assume that such contact would promote [Keenan’s] best interests.” The court, however, applied the “best interest” standard only to the interests of the younger siblings.

A 2003 Massachusetts decision, denied the sibling’s petition for visitation but demonstrated a more thoughtful approach to an inter-sibling

261 Id.
264 Id.
265 Comparid id. (decided in 2010), with Keenan R., 775 N.Y.S.2d at 468 (decided in 2004 when Keenan was fourteen and his biological sisters, Kamila and Jamila, were eight).
266 Keenan R., 899 N.Y.S.2d at 52.
268 Id. at 668.
269 Compare id. at 669, with Keenan R., 899 N.Y.S.2d at 52.
270 Keenan R., 775 N.Y.S.2d at 469.
271 Id. at 469–70 (“[A best interest] hearing would be pointless since Petitioner possesses no specific information concerning the best interests of [his siblings].”).
abuse case.\textsuperscript{273} The petitioning child in that case was Louise, a teenager who “had a long history of psychological problems that included hospitalizations and antipsychotic medications” and who had “set a fire in a supermarket and had been ‘completely out of control, tipping over displays, biting and spitting.’”\textsuperscript{274} More troubling, Louise’s telephone contact and visits with her younger brother, Pierce caused him to have “flashbacks of abuse perpetuated against him [by his sister].”\textsuperscript{275} The opinion does not go into great detail about the nature of this abuse, but it is clear that there was an abusive dynamic between the two siblings.\textsuperscript{276} The Appellate Court affirmed the Trial Court’s finding that “[a]ny future contact between [Pierce and Louise] should only take place if it was safe and appropriate for Pierce.”\textsuperscript{277} The court left the door open for the petitioner to bring another case, stating “if and when Louise brings another petition under [Massachusetts’s sibling visitation statute] . . . the court will determine whether visitation is currently in Pierce’s best interests.”\textsuperscript{278} The case has no accessible subsequent history—it is unknown whether Louise was ever successful in her petition. Yet the fact that the court left the door open to the possibility that such visitation could actually be in his best interest if properly structured, is a far cry from the court’s language in \textit{Kennan R.} that visitation with an abusive sibling would “serve little purpose.”\textsuperscript{279}

The issues raised in these inter-sibling abuse cases are complex, and a one-size-fits-all approach is inappropriate. No child should be abused by a parent or a sibling, and forcing a child to have visits with a sibling that are traumatic, unhealthy, or may trigger post-traumatic stress is clearly inappropriate. The petitioners in these cases were also traumatized children, and their abusive behavior stemmed from mental health problems that required treatment in many instances.\textsuperscript{280} With appropriate therapeutic

\textsuperscript{273} Id. at 685 (internal quotations omitted) (noting the siblings’ “best interests . . . will vary with the circumstances”).

\textsuperscript{274} Id. at 682 n.3.

\textsuperscript{275} Id. at 686.

\textsuperscript{276} Id. (omitting details about abuse between siblings in the flashbacks).

\textsuperscript{277} Id. at 683.

\textsuperscript{278} Id. at 686.


\textsuperscript{280} See In re Pierce, 790 N.E.2d at 682 n.3 (“[Petitioner] had a long history of psychological problems that included hospitalizations and antipsychotic medications.”); Degrenier v. Reid, 716 N.E.2d 667, 668 (Mass. App. Ct. 1999) (indicating that plaintiff was forbidden from visiting her siblings due to her “physical, verbal, and emotional abuse” of her siblings); In re Keenan R. v. Julie L., 775 N.Y.S.2d 468, 469 (Fam. Ct. 2004) (“Since
supports, the discussion should concern how contact can occur (supervised or letter writing), not whether it can occur. As one adoptive parent expressed:

[I]f it was more a structured thing—some hang out time, but then some structured attachment work. They do care about each other way down inside, but they can’t handle the feelings and the memories. Maybe there is a role for some kind of reconciliation. I always thought that what was most important was to keep my daughter in touch in case she had questions later. So much went on in that family that was not only horrifying but . . . there’s things that I don’t even know what happened in that family. I always figured she’s going to have questions when she gets older. I thought that was something that keeping in touch with her siblings could help with that.\textsuperscript{281}

\section*{B. Parentification}

In addition to being hesitant to coordinate visits due to some siblings’ behavior problems, it is extremely common for both caseworkers and adoptive parents to struggle with supporting a sibling relationship that seems inappropriately “parental,” primarily among sibling groups in foster care. Interviewees often referred to their older sibling as “like my mom” or “the only one who looked out for me.”\textsuperscript{282} In turn, older interviewees described their younger siblings—even when the age gap was not significant—as “like my baby.”\textsuperscript{283} One adoptive mother speculated that the reason her daughter was particularly close to her older sister as opposed to her younger sister was that her older sister had “basically been her parent.”\textsuperscript{284} The CLCNY interviewees repeatedly articulated the strength of the sibling role:

I was their mother in my eyes . . . I was trying to stay really strong because I didn’t want them to be upset. I knew that they were going to be upset by being taken from me, so I was just trying to be real strong for them and as they were leaving out the door, I was telling them that they were going

\begin{footnotes}
\footnote{petitioner] had been a foster child in the home of Respondents prior to the placement of his sisters there, but was removed due to sexually inappropriate behavior and temper tantrums.
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\footnote{E.H. Interview, supra note 226.}

\footnote{See supra text accompanying note 38.}

\footnote{See supra text accompanying note 38.}

\footnote{See supra text accompanying note 38.}
somewhere to stay for a while, but I would be in contact as soon as possible. I couldn’t watch them take them out the door, so I started up the steps to go to the bedroom so I didn’t have to watch them leave, and my brother, this is how attached . . . he was in tune to me. He knew without seeing me cry, he knew that I was very upset, so he hollered, “[D.W.!]!” I didn’t turn around, and after the third time of him saying “[D.W.!]” I didn’t want him to think I was ignoring him, so I turned around and he said, “Don’t worry about us, we’ll be okay” and he was no older than six I would say, but he knew that time it was forced on him really to be strong and he was taking on some of those characteristics so many children do from those situations. Now he was trying to be the caretaker, but he wouldn’t know to do that if we didn’t have that attachment.

And usually, everywhere I went, she [my sister] went. Again, she was my child, she was not my mother’s child. If I went to visit family out of state, she went with me. I was 12 or 13, and packing her around. So that separation that took place, there was bound to have been some ramifications from the separation.285

It’s hard to set boundaries . . . because everyone knew how I felt about Danielle as a baby. You couldn’t hide it. I had an attachment to her as a baby because she was with me the whole time. She lived with me the whole time. I fed her, I gave her pampers. I went on doctor visits. It was different.286

My sister would have to steal stuff so that we could eat . . . [and] if there were diapers around—and there often weren’t—but if there was a diaper to put him on it, we were the ones changing it.287

“Parentification” refers to the phenomenon in which a child takes on responsibility for household tasks including dressing, caring for and supervising the younger siblings, cleaning the house, and acting as parents

285 D.W. Interview, supra note 133.
286 E.A. Interview, supra note 89.
287 T.C. Interview, supra note 52.
to their own parents. In addition, the child may act as an advisor or confidant for a needy parent or sibling. Parentification becomes a problem when a child no longer thinks or acts like a child, and is associated with negative outcomes for children, including depression, anxiety, and compulsive caretaking. Unfortunately, parentified older siblings are often viewed even more as a problem when they are placed into foster care. T.C. explained:

When they say the word mother, only my sister comes to mind. And I told her, I gave her a thank you letter recently . . . . We were in a foster home together when I was six and she was nine. There were three brothers there, who tried to molest me. My sister walked in when they had me on the bed and stopped them just in time. She freaked out, actually tried to burn down my foster mother’s house when she walked in. The boys said that nothing ever happened, my sister tried to explain that “they were trying to get on top of my little sister.” We went back to [the agency] and the whole incident was written off as the fact that “the sister’s crazy.” They put her in a mental home at nine years old. They wrote in my records “this sister is trying to be a mother figure, she’s a troublemaker, she’s crazy.”

This issue is compounded by the poor mental health treatment afforded to foster children. In a study of foster parents’ and workers’ views on sibling

288 See Paul Bennett, Secret Reflections: Some Thoughts about Secrets and Court Processes in Child Protection Matters, 45 ARIZ. L. REV. 713, 728 (2003) (explaining that parentification occurs when a child “sacrifices his or her own needs for attention, comfort, and guidance in order to accommodate and care for . . . the needs of the parent”).

289 See id. (“When a child is parentified, the child assumes the role of the parent including that of a protector instead of the other way around.”).

290 See Shlomsky et al. supra note 107 (explaining that children in abusive environments often assume certain roles to survive but, after being placed in a foster home and consequently separated from their siblings, will more than likely have worse outcomes).


292 T.C. Interview, supra note 52.

placement, over half of the foster mothers (55%) did not believe it was easier for a foster child to fit into the foster family if placed with siblings.\textsuperscript{294} As one foster parent explained, “the siblings depend on one another too much and shut other people out.”\textsuperscript{295} As a result of these beliefs, caseworkers may take certain actions such like the one described here:

A guest lecturer teaching permanent connections for youth in the foster care system to case managers who provide child protective services, the topic of sibling relationships was discussed related to the frequency of sibling groups being placed together. One participant in the group who is an adoption worker with several years of experience described a ‘success’ story about a sibling group that was adopted.

The case manager stated that there was a sibling group of five children, ranging from two to twelve who were taken from their family due to issues of child abuse or neglect and soon had parental rights terminated and were free for adoption. The case manager stated that the children were all placed in the same adoptive home but the eldest child was ‘parentified’ and ‘risked sabotaging the placement’ for her siblings. In order to solve this problem, she explained she removed the parentified child from the home, cut off all sibling contact with the eldest child, and finalized the adoption with the four remaining siblings. She explained this decision with a great deal of confidence and seemed to be happy with the end result. The lecturer asked if the family went to a family therapist in order to address the issue of parentification. The case manager matter-of-factly said no.\textsuperscript{296}

Some of the former foster youths interviewed believed they had lost sibling contact because they were either “acting like a parent” or “interfering” in the relationship between the adoptive parent and their

\textsuperscript{294} Smith, supra note 291, at 368, 372.
\textsuperscript{295} Id. at 368.
Caseworkers, social workers, or foster families had explicitly occasionally told them this. For instance, S.C., a former foster youth who is now thirty years old, stated that he had “basically been the caretaker” for his younger brother, even though he was only two years older. When he entered foster care at age six and was placed in a residential treatment center, he remembers being separated from his brother because “they said they had to break me of [my caretaking tendencies].” In response to losing contact with his brother after his brother’s adoption, S.C. learned to “sever everything. To quit hoping that I was going to have that connection, to have that family.” The effects of this have been long-lasting. To this day, he struggles to “live in a world where family structure is built into everything,” and still has tremendous difficulty connecting and forming attachments.

The issue of parentification appears in numerous sibling visitation cases. In re Deborah, for instance, ten-year-old Myron and his infant sister Deborah were placed in a pre-adoptive home together. When Deborah was three, the adoptive parents corporally punished Deborah, and Myron complained to the authorities. An investigation categorized the corporal punishment as a “child care deficiency” rather than abuse. After making the allegation, Myron was removed from the home and placed with a relative. He initially continued to have bi-weekly agency visits with his sister, and during those visits he asked his sister to refer to the pre-adoptive parents as “auntie” and “uncle” rather than “mom” and “dad.” Upon learning this, the pre-adoptive mother told the caseworker that these visits were “confusing” to Deborah, and asked that they cease. When his sister’s family moved forward with the adoption, Myron intervened and asked for leave to oppose the adoption or for the court to order sibling visits.

298 S.C. Interview, supra note 129.
299 Id.
300 Id.
301 Id.
303 Id.
304 Id.
305 Id.
306 Id. at 23–24.
307 Id. at 24.
308 Id.
In a dismissive opinion, the court found that Myron had no right to intervene in the adoption, and that “ordering [the adoptive family] to produce Deborah at fixed times and places to visit with her brother . . . would be unreasonable and not in Deborah's best interest.” The opinion does not acknowledge the fact that, absent such an order, Myron is unlikely to ever see his sister again. From both the court’s and the adoptive parents’ perspective, Myron overstepped his authority as a child by trying to interfere with the adoptive parents’ right to build a relationship with their daughter. Perhaps unsurprisingly, this explains why most foster parents believe that the presence of siblings makes it harder for foster parents to integrate a child into their family.

Should we be surprised that siblings who have taken care of one another will be uneasy towards the idea of a stranger taking care of them? This is further complicated because “[t]raumatized children and those with attachment issues do not easily develop positive reciprocal relationships with their new caregivers.” “Additionally, the loss of their birth parents may be unresolved, and the child may not be able to establish new relationships.” “As a result, children may be vigilant around their foster and future adoptive parents, demonstrating a lack of trust in them, [which] interferes with the children’s ability to attach to anyone in a healthy way.”

Critically, quality mental health treatment for the parentified children, siblings, and adults who are caring for them, or the caseworker’s basic understanding of the issues involved is missing. “Even for those families who [are able to] access mental health treatment . . . , they are generally restricted to one of many ‘Medicaid Mills’ which are in the business of processing as many patients as possible.” Assuming they are given a block of time, these “mills” house practitioners simply do not understand

309 Id.
310 See id. at 24–25 (affirming that the “trial court properly determined that ordering the Huttons to produce Deborah at fixed times and places to visit with her brother Myron would be unreasonable and not in Deborah’s best interest”).
311 Id. at 25.
312 Smith, supra note 291, at 368–69.
314 Post & Zimmerman, supra note 17, at 496.
315 Id.
316 Id. at 503.
317 Id. at 504.
the dynamics of foster care and adoption and cannot offer successful treatment and interventions. As a result of insufficient intervention, siblings lose physical and emotional connections to each other. T.C., whose sister protected her from molestation in a foster home and was psychiatrically hospitalized as a result, described her hope that the system would change: “I’d hope that nowadays, her records wouldn’t say that. Instead they’d say ‘This girl is really smart, she’s like a mother figure. We should warn the foster parents, this girl is really protective of her siblings. And we need to deprogram her, but in a good way, and not penalize her.’”

V. DISCUSSION - SHIFTS IN MINDSET AND APPROACHES

Throughout the life of a child protective case, advocates, judges, and referees are often faced with a steady stream of determinations that must be made in the best interest of the child. Psychological issues are frequently overlooked in the area of sibling relationships and adoption, especially those adoptions that arise out of foster care. Because family court practitioners are focused on the short-term result of achieving permanency, long-term emotional and psychological ramifications of losing sibling relationships are not well understood or taken into consideration.

318 Mines, supra note 296 ("Family therapy prescribes to a systems perspective, meaning that an individual’s behavior is reflective of what is occurring within their family system. In order for therapy to be optimally effective among siblings in the foster care system, they must be in a stable placement with caring and committed adults who are willing participants in the family therapy session. All siblings who are a part of the family must be in attendance for therapy sessions in order to gain an understanding of each individual's point of view.").

319 See Herrick & Piccus, supra note 105, at 852 ("[P]sychological counseling can help to heal the relationship between siblings. If this option has been tried, but failed to reduce the negative effects of sibling contact, then it might be better to place such siblings separately.").

320 T.C. Interview, supra note 52.

321 Id.

322 See, e.g., Office of Attorneys for Children, Appellate Div., Second Dept., Office of Attorneys for Children Administrative Handbook 2 (2013) (“The attorney for the child has the responsibility to represent and advocate the child's wishes and interests . . . .").

323 Post & Zimmerman, supra note 17, at 496.

324 See Herrick & Piccus, supra note 105, at 856 (“Approximately half of the states in the US have enacted policy on siblings in out-of-home care, though most of these only address the issue minimally . . . . New York State has . . . passed some significant legislation on siblings, but does not require child welfare agencies to consider siblings in permanency planning, nor do they require post-adoption contact between siblings.").
The CLCNY interviewees unanimously understood the need for the termination of their parents’ rights and the potential concerns adoptive parents have in maintaining sibling relationships.\textsuperscript{325} But it simply did not occur to them that their relationship with their sibling would be de facto terminated or that this loss of contact would be such a traumatic and emotionally devastating event that would continue to impact their emotional and psychological health as adults.\textsuperscript{326} It is critical that child welfare and family court professionals make changes in their approach towards sibling contact.

I understand the perspective of the adoptive parent saying I am adopting this person, not the whole family. I can understand that. I can understand how siblings can affect their siblings—their attitude how they do things. I understand how it’s difficult but I think it’s unfair that one day your sister is in the next room and then the next day they’re not. And if you want to see her you have to wait until you’re 21. That is totally not right.\textsuperscript{327}

[B]ecause you do have good arguments on either side, because there are pros and cons of having [sibling relationships], but when you really weigh the pros and the cons and you look at everything, outweighing the sibling being able to know where they come from…and to kind of erase that from a child’s mind and erase the history and to say “okay, this is your family, this is where you came from,” and knowing that that’s false, it’s going to have ramifications…that person is always gonna have that sense of yearning…That in itself is so harmful to both…you’re hurting the family, the kids, and you’re hurting everybody…you’re hurting the one that was adopted out and the ones who are still here, because we don’t have each other.\textsuperscript{328}

\textsuperscript{325} See supra text accompanying note 38.
\textsuperscript{326} See supra Parts III–IV.
\textsuperscript{327} E.A. Interview, supra note 89.
\textsuperscript{328} L.D. Interview, supra note 90.
A. Attorneys for Children – Consultation with Clients

An AFC is a zealous advocate that is prepared to litigate the particular legal and factual issues that arise from the child protective case. However, the unique role of an AFC often involves responsibilities not ordinarily associated with the job of a lawyer. An AFC often monitors the treatment and services the child is receiving while in foster care, intercedes on the child's behalf to help obtain services or financial benefits, and seeks redress if necessary. As discussed earlier, AFCs in New York City generally take a client-directed advocacy approach unless the child is of insufficient age, intelligence, or maturity to provide much information or guidance, or their decision would place them at imminent risk of physical or emotional harm. Therefore, in the context of a termination of parental rights proceeding, if a child is of sufficient age, intelligence and maturity, an AFC will take direction from the child on whether or not they wish to be freed for adoption. If not, an AFC will conduct a thorough investigation and assessment and make a best interest determination. In consulting with and advising children in termination of parental rights proceedings, an AFC “has a duty to explain to the child, in a developmentally appropriate manner, all information that will help the child to understand the proceedings, make decisions, and otherwise provide the lawyer with meaningful input and guidance.” The lawyer’s duties as counselor and advisor include:

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330 Id. at 3 (providing a non-exhaustive list of various activities an attorney may be responsible for accomplishing).
331 See id.
332 Id. at 2 (“When an attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child’s wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child’s wishes.”).
333 Id. at 2 (“If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child’s best interests.”).
334 See id. (“In ascertaining the child’s position, the attorney for the child must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.”).
335 Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings § A-2
developing a thorough knowledge of the child’s circumstances and needs, informing the child of the relevant facts and applicable laws, explaining the practical effects of taking various positions, which may include the impact of such decisions on the child and other family members or on future legal proceedings, expressing an opinion concerning the likelihood that the court will accept particular arguments, providing an assessment of the case and the best position for the child to take, and the reasons for such assessment, and counseling against or in favor of pursuing a particular position, and emphasizing the entire spectrum of consequences that might result from assertion of that position.

See also NEW YORK LAWYER’S CODE OF PROF’L RESPONSIBILITY EC 7-8 (2007) (“A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations . . . . A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer’s objective viewpoint . . . . A lawyer may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions.”); Id. at EC 7-3 (“A lawyer serving as advisor primarily assists the client in determining the course of future conduct and relationships.”); STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § B-4 cmt. background (1996) (“The lawyer may express opinion concerning likelihood of court or other parties accepting particular positions . . . . [and] may the inform child of an expert’s recommendations germane to the issue.”); Id. (“A child, however, “may agree with the lawyer for inappropriate reasons . . . . Therefore, the lawyer needs to understand what the child knows and what factors are influencing the child’s decision. The lawyer should attempt to determine from the child’s opinion and reasoning what factors have been most influential or have been confusing or glazed over by the child when deciding the best time to express his or her assessment of the case.”); Barbara Kabat et al., Report of the Working Group on the Best Interests of the Child and the Role of the Attorney, 6 N.Y. L.J. 682, 684–85 (2006) (explaining that a lawyer should “let the child talk,” “listen to the child,” “[b]egin with the child’s agenda,” “[g]ather information from collateral sources,” “explain and establish the attorney-client relationship,” “[e]ncourage the child to speak with others,” “explain the court process,” “[h]elp child to understand that [he or she] has right to have wishes advocated for without attribution,” and “[h]elp child understand the
In advising a child about termination of parental rights and adoptions, AFCs are trained to focus on exploring whether or not a child wants to be adopted. In sibling groups, particularly when children are separated and have different goals, an AFC would likely ask whether or not the child agrees or disagrees with their sibling’s adoption to assess whether a conflict of interest exists in their representation. As a practical matter, however, AFCs would likely never advise a child that consenting to a sibling’s

different pressures operating on [him or her]"); Robert D. Fleischner & Dara L. Schur, Representing Clients Who Have or May Have “Diminished Capacity”: Ethics Issues, 41 CLEARINGHOUSE REV. 346, 356 (2007) (“Clients often direct their attorneys to take positions that may undermine their long-term goals. When getting the client’s input on a strategic decision in a case, ask the client more than once and in different ways. For example, perhaps your client was experiencing disability-related difficulties when you first asked about a particular issue. Asking again at a different time may yield a more informed decision. Trying to get to know the client and gaining an understanding of the client’s long-term goals will help you in counseling the client about how to proceed in the short term.”).

342 STANDARDS FOR ATTORNEYS, supra note 335, § C-1 cmt. background.

343 In the context of sibling groups, if the children express different preferences about where and who they want to live with, or because of different ages, intelligence, or maturity, an AFC may have to substitute judgment for one while practicing direct advocacy for the other, the AFC is presented with an irreconcilable conflict of interest, in violation of the Code of Professional Responsibility. See, e.g., Sidor v. Zuhoski, 690 N.Y.S.D.2d 637, 638–39 (App. Div. 1999); In re H. Children, 608 N.Y.S.D.2d 784, 785 (Fam. Ct. 1994) (“[A]n attorney who undertakes the joint representation of two parties in a lawsuit [should] not continue as counsel for either one after an actual conflict of interest has arisen . . . . [A]ny doubt about the existence of a conflict should be resolved in favor of disqualification.”). See also Gary D.B. v. Elizabeth C.B., 722 N.Y.S.2d 323, 326 (App. Div. 2001) (“[A]fter the children began to express different preferences concerning the parent with whom they wished to live, the Law Guardian moved to withdraw from representing all of the children. The court should have granted that motion because the Law Guardian articulated a conflict of interest.”); NEW YORK LAWYER’S CODE OF PROF’L RESPONSIBILITY DR 5-105(A) (2007) (“A lawyer shall decline proffered employment if the exercise of independent judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests . . . .”). Further, it is important that an attorney avoid even the appearance of impropriety. Children who have different positions or interests could be concerned that information is or is not presented at risk of undermining another’s position, or could be concerned that the attorney would sacrifice their position in order to advocate as strongly as possible for the result that another desires. See Cardinale v. Golinello, 372 N.E.2d 26, 30 (N.Y. 1977) (“[T]he lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship.”).
adoption could possibly result in the child losing the ability to ever see that sibling again. Likewise, an AFC would probably not advise a pre-adoptive child that consenting to their own adoption could mean losing contact with their siblings entirely. Children—even teenagers—can have great difficulty understanding the difference between what could happen and what will happen, and AFCs must engage with their clients in a developmentally appropriate manner. Yet, at the same time, these attorneys must follow ethical guidelines and “emphasiz[e] the entire spectrum of consequences that might result [from the child’s decision].” Like many in the child welfare field, an AFC hopes that the adoptive parent will voluntarily facilitate relationships between biological siblings, whether some members of that sibling group reside with the birth parents, foster or adoptive parents, or in institutional care. Nevertheless, an adoptive parent’s promise that they will facilitate a relationship is not a legally binding commitment.

Thus, to be consistent with their ethical duties, AFCs must make more efforts to both fully explore the range of consequences with their client and to file independent visitation petitions on their client’s behalf when appropriate. In failing to file visitation petitions, AFCs may unknowingly fail to protect their client’s rights to have a relationship with their siblings during their minority. The ideal time to file a visitation petition is during the termination stage or before the adoption. Without an order in place, children might lose contact until they are eighteen, at which point they can file their own visitation petitions. Even an older sibling who was extremely close to his or her younger sibling may lose a visitation case as an adult, because of the court’s likely deference to the adoptive parent’s

345 Id. § A-2(6).
346 See generally CHILD WELFARE INFO. GATEWAY, supra note 104 (explaining in detail the desire of social workers that children will be able to visit with their biological siblings as well as the consequences of children being denied visitations).
347 See Herrick & Piccus, supra note 105, at 856–57 (explaining a recommended policy of considering how a child’s best interest is intrinsically linked to sibling contact, and how planning a child’s life is crucial to this link).
348 See id.
349 See id. at 854 (“[M]any children's attempts to visit their siblings have been met with so many difficulties that they have given up and attempted to move on with their lives without their brothers and sisters.”).
autonomy and a skepticism that ordering visits with someone who has been out of the child’s life for years could be in that child’s best interest.\textsuperscript{350}

When AFCs advocate in and out of the courtroom for sibling visitation, it is imperative that they develop and understand an inclusive definition of “sibling” on the child’s own terms.\textsuperscript{351} This definition should be tailored specifically towards whom the child accepts as his or her brothers and sisters while also being broad enough to encompass relationships that are still developing.\textsuperscript{352} Notably, research indicates that a biological relationship, whether full-, half-, or step-sibling, is not associated with a child’s perception of who they are close to.\textsuperscript{353} When considering how the related siblings contribute to the child’s long-term emotional health and well bring, it is important to achieve a workable definition of “sibling” that the child views as legitimate.\textsuperscript{354} The AFC plays a crucial role in counseling the child and helping him or her realize the importance of sibling contact both short and long term.\textsuperscript{355} While many AFCs may operate under the likelihood that sibling contact in some form may be in a child’s best interest, the collaborative dynamic in realizing whom the child accepts in his or her life is significant when considering the meaningfulness of those relationships.\textsuperscript{356}

\textsuperscript{350} See \textit{Child Welfare Info. Gateway}, \textit{supra} note 104, at 8 (“[O]ver half of the foster mothers (55 percent) did not believe it was easier for a foster child to fit into the foster family if placed with siblings.”).

\textsuperscript{351} See Herrick & Piccus, \textit{supra} note 105, at 847 (“[W]hat a sibling relationship means or can potentially mean to any child in foster care is as diverse as the children who have experienced life in care. As such, some authors have emphasized that child welfare workers should elicit and consider the wishes of the children in their care.”).

\textsuperscript{352} Id. at 847, 856.

\textsuperscript{353} See \textit{Child Welfare Info. Gateway}, \textit{supra} note 104, at 2 (“In child welfare, the term ‘fictive kin’ has been introduced to recognize types of relationships in a child’s life where there is no legal or biological tie, but a strong, enduring bond exists.”).

\textsuperscript{354} Id. (“[C]hild- and family-centered practice respects cultural values and recognizes close, nonbiological relationships as a source of support to the child. In these cases, the child may be one of the best sources of information regarding who is considered a sibling.”).

\textsuperscript{355} See Herrick & Piccus, \textit{supra} note 105, at 857 (explaining that there is a “presumption that it is generally in the child’s best interest to be placed with siblings and, when this is not possible, to maintain contact between siblings”).

\textsuperscript{356} Examples of age appropriate questions, could include:

- Which sibling do you enjoy spending time with?
- Which sibling enjoys spending time with you?
- Who will play a game with you?
- Which sibling do you turn to when you are afraid or hurt?
- Which sibling turns to you when he or she is afraid or hurt?
In addition to developing a working definition of “sibling,” AFCs should document their efforts to place siblings together when it is in their client’s best interest, along with the visitation plan if they are not placed together. This documentation should include information such as who the child identifies as a sibling and information about siblings who were adopted into a different family. Further, AFCs should record information on siblings who do not already have a relationship with the child. Maintaining this record will preserve institutional memory for that child and help AFCs better advocate their client’s wishes by using it as a tool to emphasize the importance of sibling contact to judges and other stakeholders. While this practice already takes place in some form either by the AFCs or caseworkers, the information could be used more productively. The information is not only useful during the pendency of the case, but also in the future if the child needs another permanency resource. As noted earlier in this Article, as well as in the Broken Adoption Project’s research, many young people whose adoptions have broken down find that the one adult who was willing to step forward and raise them to adulthood was their biological sibling.

In states that adopt a direct representation model, the responsibility falls on the AFC to petition for an order regarding sibling visitation that will

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357 See Herrick & Piccus, supra note 105, at 857 (“Documentation efforts made to place siblings together when in their best interest . . . . This documentation should include any siblings the child identifies, such as siblings who were adopted into another family or siblings who do not already have an established relationship.”).

358 Id.

359 Id.

360 Id. (“Documentation of sibling contact information in the child's case file” is a recommended policy procedure.”).

361 Id. (“Approximately half of the states in the US have enacted policies on siblings in out-of-home care, though most of these only address the issue minimally. Some states have ratified exemplary pieces of legislation, but no state has a body of legislation that holistically addresses sibling relationships.”).

362 Id. (“New York State has also passed some significant legislation on siblings, but does not require child welfare agencies to consider siblings in permanency planning, nor do they require post-adoption contact between siblings.”).

363 Post & Zimmerman, supra note 17, at 477 (“In 75% of the cases involving a broken adoption, the immediate biological family (parent, sibling, aunt, uncle, or grandparent) remained involved in the child's life, either consistently or intermittently.”).
survive the adoption. In consulting with their clients, AFCs should not only discuss whether the client wants to have a continuing relationship with the sibling post-adoption, but also whether the client wishes to take the affirmative legal steps necessary preserve it.

A potentially effective, but rarely used option in many states, is for an AFC to file for a visitation order that will survive the adoption. Like many states, New York has a “third party visitation statute” under which AFCs could file such a petition: New York Domestic Relations Law (D.R.L.) § 71. Significantly, New York does not have a statute which allows for visitation to be incorporated into the adoption, except in very narrow circumstances when a parent executes a judicial surrender. Under those circumstances, conditions can be incorporated allowing for communication with or contact between the adoptive child, the prospective adoptive parent or parents, a birth parent or parents, and biological siblings or half-siblings, as agreed upon and as set forth in the agreement, and as would be in the adoptive child’s best interest. As a result, D.R.L. § 71 would be the best legal mechanism to secure visitation, because the statute specifically authorizes the court to order visitation between siblings when such visitation would be in “the best interests of the child.”

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364 See CHILD WELFARE INFO. GATEWAY, supra note 104, at 12. See also Clare Huntington, Repairing Family Law, 57 DUKE L.J. 1245, 1309 (2008) (“Experienced attorneys acknowledge, however, that even within a direct representation model there is an inevitable counseling role for the attorney to play to help the child client see what is in the child’s best interests, particularly in the long term.”).

365 See Huntington, supra note 364, at 1309. See also CHILD WELFARE INFO. GATEWAY, supra note 104, at 12 (“[W]orkers and foster or adoptive parents have to understand the importance of sibling contact for the children for whom they are responsible in order to maintain their commitment to making these contacts happen.”).

366 E.g., N.Y. DOM. REL. LAW § 71 (McKinney 2010). See also CHILD WELFARE INFO. GATEWAY, supra note 104, at 2–4, 13; Herrick & Piccus, supra note 105, at 856–57 (providing several tenets of an “ideal” “sibling policy,” including “frequent meaningful visit[s]” for children placed in separate homes and an “opportunity for . . . professionals involved with the family to petition to assert a sibling relationship, placement of siblings together and visitation between siblings”).

367 See DOM. REL. LAW § 71.

368 See N.Y. SOC. SERV. LAW § 383-c(2)(b) (McKinney 2010).

369 See id.

370 DOM. REL. LAW § 71.
post-adoption visitation. As previously discussed, courts presume that a fit parent makes decisions in accordance with the best interests of her children, and a grandparent or sibling who seeks court-ordered visitation over the objection of the parent bears the burden of proving that the requested visitation would be in the best interest of the child.


See Troxel v. Granville, 530 U.S. 57, 69 (2000) ("The decisional framework employed by the Superior Court directly contravened the traditional test that a fit parent will act in the best interest of his or her child.").

See In re Fitzpatrick v. Youngs, 717 N.Y.S.2d 503, 506 (Fam. Ct. 2000). The cases in which post-adoptive visitation has been ordered generally involve older children who have an established warm relationship with the biological grandparent and siblings who seek visitation. Sibley, 429 N.E.2d at 1049–50. In Sibley, the court found post-adoptive visitation appropriate where the thirteen-year-old child had lived with and repeatedly visited his maternal grandparents from birth until age four, and visited with them from time to time over the following six years. Id. The Sibley Court stated that the child “knows his relatives and enjoys playing with his cousins. He is old enough to comprehend their familial relationship and to remember them over the years.” Id. at 1053. Accordingly, the court “[r]ecogniz[ed] the established family relationship” and granted post-adoptive visitation. Id. In other cases, post-adoption sibling visitation has been ordered because “the severance by adoption of the existing emotional ties between children and their . . . siblings and grandparents may be harmful to the children and that it may be beneficial to provide for visitation after adoption.” Hatch, 605 N.Y.S.2d at 428. See also In re Cocose v. Diane B., No. V-4205-04, 2005 WL 1792599, at *5 (N.Y. Fam. Ct. July 22, 2005) (holding that the children "are old enough to remember living with, and having contact with their biological family, consideration must be given to whether deprivation of sibling visitation will have a negative effect on the children’s development."); In re Carl B. v. Broome Cnty. Soc. Servs., 537 N.Y.S.2d 456, 456, 459 (Fam. Ct. 1989) (directing hearing of “grandparents’ application for visitation” where a five-year-old child “ha[d] enjoyed regular visitation with his maternal grandparents since he was three years old”); In re Anthony, 448 N.Y.S.2d 377, 378 (Fam. Ct. 1982) (ordering post-adoptive visitation where “[d]espite the separation from his birth siblings, [the child had] maintained an ongoing relationship with them . . . . [and] [b]oth the Agency and the adoptive parents agreed that [the child’s] relationship with his birth siblings was most important to [his] well being and should be continued”); cf. In re Justin H. v. Katherine H., 626 N.Y.S.2d 479, 480 (App. Div. 1995) (affirming a decision denying post-adoptive visitation where the “Family Court properly determined that the subject children established no real familial bonds with their half-siblings, and that, especially in Justin’s case, his foster family was the only real family he has ever known”). See also In re Keenan R. v. Julie L., 775 N.Y.S.2d 468, 469–70 (Fam. Ct. 2004), rev’d, 831 N.Y.S.2d 320 (App. Div. 2007) (denying fourteen-year-old post-adoption visitation with his eight-year-old sisters where the only contact between the
In deciding whether visitation will be awarded, “New York courts examine both the nature and basis of the parents’ objection to visitation as well as the nature and extent of the sibling relationship,” among other considerations.\textsuperscript{374} “Special weight is given to the parents’ decision.”\textsuperscript{375} Such deference to a parent’s right to make decisions regarding her child’s upbringing, and specifically to her reasons for opposing grandparent or sibling visitation, is required under the Supreme Court’s decision in \textit{Troxel}.\textsuperscript{376} Accordingly, D.R.L. §§ 71\textsuperscript{377} and 72\textsuperscript{378} have been held constitutional under \textit{Troxel}, precisely because in applying those sections, the New York courts have recognized and respected a parent’s due process right to raise his or her child without interference from the state, by giving “special weight” to the parent’s reasons for opposing such visitation.\textsuperscript{379} 

\textsuperscript{374} See \textit{Cocose}, 2005 WL 1792599, at *5.

\textsuperscript{375} Id.

\textsuperscript{376} Compare \textit{Troxel}, 530 U.S. at 75, with \textit{Cocose}, 2005 WL 1792599, at *5. The \textit{Cocose} Court found that “[t]he New York Court of Appeals [in \textit{Sibley}] found grandparents could seek postadoptive visitation prior to \textit{Troxel}.” \textit{Cocose}, 2005 WL 1792599, at *5 (citing \textit{Sibley}, 429 N.E.2d at 1049). However, the \textit{Cocose} court concluded “[t]hat [the New York Court of Appeals] has not yet issued an opinion determining the constitutionality of sibling or grandparent visitation in light of the Supreme Court’s decision.” \textit{Id}.

\textsuperscript{377} See N.Y. DOM. REL. LAW § 71 (McKinney 2010).

\textsuperscript{378} See id. § 72.

\textsuperscript{379} See \textit{In re Hertz v. Hertz}, 738 N.Y.S.2d 62, 64 (App. Div. 2002). In \textit{Hertz}, the Court stated that pursuant to \textit{Troxel}, “a decision regarding visitation is for the parent in the first instance and, if a fit parent’s decision becomes subject to judicial review, the court must afford at least some special weight to the parent’s decision.” \textit{Id.} It then held that “[D.R.L. section] 72 can be, and has been, interpreted to accord deference to a parent’s decision,” and therefore was constitutional. \textit{Id.} at 65. \textit{See also Cocose}, 2005 WL 1792599, *4 (quoting \textit{Troxel}, 530 U.S. at 70) (“Pursuant to \textit{Troxel}, . . . the court’s interpretation of a non-parental visitation statute must require a presumption that a fit parent acts in the best interests of his or her child. ‘Special weight’ [sic] is to be accorded the determination of the parents.”); \textit{In re Morgan v. Grzesik}, 732 N.Y.S.2d 773, 778 (App. Div. 2001); \textit{In re Davis v. Davis}, 725 N.Y.S.2d 812, 814 (Fam. Ct. 2001) (“Courts can remove doubt as to the constitutionality of DRL Sec. 72 by requiring that special weight be accorded the preference of parents.”); \textit{In re Smolen v. Smolen}, 713 N.Y.S.2d 903, 906 (Fam. Ct. 2000) (“[D.R.L. section] 72 has generally been interpreted to require substantial deference to the authority of parents in both aspects of the analysis.”).
Notably, post-adoption sibling visitation does not have to be all or nothing—visitation or severance of the relationship. Ultimately, the order will define the kind of “contact” as well as frequency. It is important to recognize that a range of actions may amount to contact including annual letters or photographs from an undisclosed address, e-mail and Skype calls, or regular in-person visits.

B. Other Stakeholders

Child welfare stakeholders, like AFCs, should have frequent, evaluative conversations with children about their relationships, visitation, and contact with siblings. Through caseworkers and AFCs, judges and referees should learn from each child’s existing or desired connection with siblings, which would allow them to determine whether it is appropriate to direct sibling contact or visitation post-adoption. These reviews of sibling interaction should occur on both the micro level and macro level to protect each child individually while also informing a larger legal practice. To meaningfully discuss how sibling contact post-adoption affects individual children, stakeholders must have a sense of the child’s definition and understanding of “sibling” and with whom they have developing relationships. These sibling contact reviews should occur regularly during court dates for termination of parental rights proceedings and other

380 See DOM. REL. LAW § 71 (stating that a court “may make such directions as the best interest of the child may require.”). See also CHILD WELFARE INFO. GATEWAY, supra note 104, at 13 (discussing “[a]rranging . . . regular visits” and “other forms of contact”).

381 See CHILD WELFARE INFO. GATEWAY, supra note 104, at 13 (examples of “other forms of contact”).

382 Id. at 12 (“Facebook and other social media make it much easier for siblings to both find and communicate with one another, regardless of the adults' feelings or concerns.”).

383 See Herrick & Piccus, supra note 105, 855–56 (citation omitted) (“Speaking with children can shed light on whether placing siblings together will contribute to a secure caregiving environment.”).

384 See generally id. (explaining the importance of sibling bonds to foster children).

385 See id. at 857 (requiring that “social workers conduct a comprehensive assessment of the sibling relationships at intake, including the wishes of the children, best interest determinations regarding sibling placement, and a plan to place siblings together or maintain contact when it is determined to be in their best interest”).

386 See id. at 854–55 (explaining that measuring the quality of sibling relationships can be determined by the “dynamics of the sibling group based on the context in which the sibling relationships developed”).
related matters.\textsuperscript{387} Both judges and AFCs should take a more active stance when considering a child’s best interest by following up on the time, place, and progress of the visitation.\textsuperscript{388} If children are separated, the parties who arrange that separation must devote extra energy to ensure that at least some sibling contact is maintained within and beyond foster care placements.\textsuperscript{389}

The importance of the dialogue between the child and the various stakeholders cannot be overemphasized, for its impact is psychologically beneficial to siblings in both the short- and long-term.\textsuperscript{390} This kind of dialogue is productive in the short-term for ensuring that the child’s voice is heard throughout the important decisions affecting his or her life, which is a major factor in protecting the child’s sense of control over a difficult situation.\textsuperscript{391} Asking questions to flesh out who the child views to be in his or her family; who his or her siblings are; and what his or her relationship with them is like are important for this same short-term reassurance of the AFC’s intention to consult and accurately represent a child’s wishes.\textsuperscript{392} Further, identifying people important to that child should help determine how a child feels about meeting potential siblings in the future, predicting how relationships that have not yet developed might contribute to the long-term well being of the child.\textsuperscript{393} The AFC’s position in any family court case with respect to the child’s well-being revolves around the understanding that a child must meaningfully participate in the system that decides her future.\textsuperscript{394}

Given the high psychological risks associated with breaking sibling bonds, quality therapeutic services must be available on a systemic level to children in foster care and post-adoption.\textsuperscript{395} Adoptive families should be

\textsuperscript{387} Leonard Edwards, \textit{Connecting with Siblings}, CASA for Children (July 2011), http://www.casaforchildren.org/site/c.mtJSJ7MPisE/h.7522095/k.9A0E/JP3_Edwards.htm (“The judge should insist that social workers include information regarding sibling contact.”).

\textsuperscript{388} See Herrick & Piccus, supra note 105, at 857 (requiring “[d]ocumentation of efforts made to place siblings together when in their best interest”).

\textsuperscript{389} Id. (“If placement together is not possible, frequent meaningful visitation would be required, including documentation of such efforts.”).

\textsuperscript{390} Id. at 849–51.

\textsuperscript{391} Id.

\textsuperscript{392} Id. at 855.

\textsuperscript{393} Id. at 855–56.

\textsuperscript{394} Id. at 858 (“[W]e hope to inspire others to . . . work toward empowering former and current foster youth to be their own advocates.”).

\textsuperscript{395} Id. at 854, 857 (explaining that “efforts should be made to mitigate difficult sibling relationships with counseling or services” and, “[w]henever possible, siblings placed separately [should be] referred to the same counseling agency when seeking therapy”).
connected with adoption-competent therapists who can work with the siblings individually or as a group to provide both supervision and a therapeutic environment that facilitates a healthy sibling dynamic. If sibling therapy is not an option, caseworkers should strive to place siblings in the same counseling agency. This arrangement improves children’s well being by localizing care for siblings who are trying to reconnect, develop a healthy relationship, and cope with similar kinds of trauma.

Despite the positive impact of quality, localized therapeutic services for sibling groups, the reality of available services to families looks like a “Medicaid Mill.” Such medical centers “are in the business of processing as many patients as possible . . . [by offering] a block of time . . . [and] practitioners who simply do not understand the dynamics of adoption.” As a result, these centers cannot prescribe successful treatment or plan successful interventions, particularly for children who are experiencing grief and attachment issues. Accordingly, it is incumbent that caseworkers seek specialists outside of the Medicaid Mills, individuals with the knowledge and experience critical to focus on a treatment plan addressing how sibling contacts can be fostered and preserved.

“Although there has been a great deal of research on the need for quality post-adoption services, even years after the adoption finalization, programs . . . have little funding and are not readily accessible.” To draw attention to the need for more funding to crucial services, it may be useful to condition the adoption subsidy on facilitating post-adoption visits. The right to an adoption subsidy is based on a contractual agreement between the state and the adoptive parent. The terms of the contract are set by respective states, rather than being uniform. Accordingly, states prioritizing post-adoption sibling contact and visitation should contractually

396 See id.
397 Id.
398 See id.
399 Post & Zimmerman, supra note 17, at 503.
400 Id.
401 Id.
402 Id. at 503–04.
403 Id. at 503.
404 Mandelbaum, supra note 27, at 62 (“[T]he adoption subsidy arrangement . . . is negotiated and agreed to between the adoptive parent(s) and the state prior to the adoption of the foster child.”).
405 Id. at 18 (“[P]ost-adoption sibling contact . . . statutes typically are part of a state's adoption laws, but statutory schemes will vary.”).
oblige adoptive parents to coordinate it in cases where it would actually benefit the child and be geographically feasible.

Finally, stakeholders understanding the importance of sibling relationships should feel a responsibility to put meaningful practices in place on a macro level. That is, the legislature and courts should work to define their authority and understanding when it comes to matters of sibling visitation, with the goal of allowing and educating them on how to petition for visitation.

When considering legislation supporting post-adoption sibling visitation and the role of stakeholders as advocates, it is critical to acknowledge the relative lack of political activism and support that siblings as a group can garner. This unfair disadvantage in the realm of self-advocacy is reflected by a parallel scenario: “[b]y 2000, every state had enacted laws providing for some type of grandparent visitation . . . [due to] the extraordinary lobbying efforts and political power of groups promoting the interests of older Americans, such as the AARP.” Thomas Downey, a member of Congress who advocated for grandparent visitation rights, noted candidly in 1991 the ‘well-known fact that seniors are the most active lobby in this country, and when it comes to grandparents there is no one group more united in their purpose.’ It is incumbent on child welfare and family court practitioners to similarly and promptly bring siblings’ voices to the forefront.

C. Statute, Case Law and Practice

One state which appears to have successfully focused on preserving post-adoption sibling relationships through statute, case law, and practice is Massachusetts. In In re Adoption of Vito, the Supreme Judicial Court of Massachusetts provided a full analysis of the power of a judge to order post-termination and post-adoption contact between a child and his

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406 Jill Elain Hasday, Siblings in Law, 65 VAND. L. REV. 897, 917 (2012) ("Many states limit their nonparent visitation laws to grandparents and do not permit other relatives, such as siblings, to seek visitation.").

407 Id. (emphasis added).


biological parents. The court recognized the limits of this equitable power as deriving from the need to respect the underlying policies governing adoptions as well as the rights of the parents, biological or adoptive, to raise their child without unwarranted intrusion. Generally, an order directing post-adoption contact would be “unwarranted” where “the child has formed strong, nurturing bonds with his preadoptive family, and there is little or no evidence of a significant, existing bond with the biological parent.” However, the court found that under other circumstances it was the court’s responsibility, pursuant to its duty of parens patriae, to intervene when it would be in the child’s best interest and issue specific orders rather than simply rely on the intent and promises of the adoptive parents or the agency. Further, the judge, in fashioning an adoption decree concerning

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411 Id. at 296, 298–304.
412 Id. at 301–04.
413 Id. at 303.
414 Id. at 299–300. See also In re Rico, 905 N.E.2d at 560 (Trial court was “obligated” to order post-adoption and post-termination contact between father and child, in proceedings in which the father’s parental rights were terminated, and could not simply “approve” contact without issuing order and leaving it in the discretion of the agency, given its findings); In re Zander, 983 N.E.2d at 1226.

The court shall, whenever reasonable and practical, and based upon a determination of the best interests of the child, ensure that children placed in foster care who are separated from siblings who are either in other foster or pre-adoptive homes or in the homes of parents or extended family members, have access to, and visitation rights with, such siblings throughout the period of placement in the care and custody of the commonwealth, or subsequent to such placements, if the children or their siblings are separated through adoption or long-term or short-term placements in foster care.

The courts shall determine, at the time of the initial placements wherein children and their siblings are separated through placements in foster, pre-adoptive, or adoptive care, that such visitation rights be implemented through a schedule of visitations or supervised visitations, to be arranged and monitored through the appropriate public or private agency, and with the participation of the foster, pre-adoptive or adoptive parents, or extended family members, and the child, if reasonable, and other parties who are relevant to the preservation of sibling relationships and visitation rights.

a child whose parents’ rights have been terminated, may revisit the question of post-adoption contact if it pertains to the best interest of the child.\footnote{415}{\textit{In re Vito}}, 728 N.E.2d at 303. \textit{See also} \textsc{Mass. Ann. Laws Ch.} 210, §§ 5B, 6D (LexisNexis 2011).

In practice, Massachusetts has defied the popular belief that ordering post-adoption contact, even with biological parents, will “shackle” adoptive families and negatively impact adoption rates.\footnote{416}{\textit{See}, e.g., \textit{supra} Part IV.C.; \textit{cases cited supra} note 414.} Consider this strong declaration which shows the court’s true focus on the child’s needs, rather than on the adults: “The purpose of post-adoption contact with the biological parent is not to strengthen the bonds between the child and his biological mother or father, but to assist as he negotiates, often at a very young age, the torturous path from one family to another.”\footnote{417}{\textit{In re Vito}}, 728 N.E.2d at 304.

But how does this work in practice? According to Mary Gambon, Assistant Commissioner of Adoption and Foster Care at the Massachusetts Department of Children and Families, there is a fundamental acknowledgement in the child welfare community that early family relationships will be sustained over the child’s lifetime, which has sprung from a decade-old pro-open adoption stance:

Certainly we give the adoptive parent the right to set some parameters around that, where they happen, when they happen – it’s not that should stop them. We try to take it from a legalistic position and what’s in this child’s best interest over a life time. With siblings, there is often more of a need to reconnect than with parents and we get more inquiries about bio siblings than we do about parents. We take a liberal view of brothers and sisters, including half siblings to really try to have the individual define the family. We don’t want them to have an antagonistic relationship and we try to set the family with an understanding of why this is going to be important over time. These kids are going to search when they are older otherwise they will push parents away.\footnote{418}{Interview with Mary Gambon, Assistant Comm’r of Adoption and Foster Care, Mass. Dep’t of Children and Families, in Brooklyn, N.Y. (June 30, 2014) [hereinafter Mary Gambon Interview] (unpublished) (on file with authors).}

Perhaps Massachusetts is most unique in that every caseworker is recommended to obtain a social work degree, and as a result, approaches
each child and case from a clinical and therapeutic perspective. Discussions with the adoptive family about post-adoption contact are held in a very child-centered way and are focused on educating them about how they are not only adopting the child but also an extended family with siblings. As a result, “they gain an understanding of why it’s so critical and that helps the conversation with them—it’s presented in a very positive manner [from the perspective of] the importance to these children.” We can all learn from this approach.

VI. RECOMMENDATIONS

The authors specialize in children’s rights, advocacy and litigation, and the central aim of their work is to give children and adolescents a voice and representation in legal proceedings that have a significant impact on their lives. Therefore, it must be acknowledged that the issues and solutions that have been discussed are necessarily from the perspective of the child. While much of what is addressed is specific to New York and published in a law review article, the authors hope that the dialogue can serve as an impetus for change. All readers, whether they are judges, lawyers, caseworkers, social workers, mental health professionals, or foster and adoptive parents, can be agents of this change, first on a micro level in how they practice and approach such issues, and then on a macro level in seeking reform within their agency and state.

A. Educate Stakeholders About the Importance of the Sibling Bond

It is important to educate stakeholders about the importance of the sibling bond with an eye towards moving away from an automatic rejection of post-adoption sibling contact based upon fear and lack of information. Social science research supports that sibling relationships are crucial, and these relationships have unique implications for the child’s well-being and development in the short and long term. Post-adoption sibling visitation does not have to be all or nothing—visitation or severance of the

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420 See supra note 418 and accompanying text.
421 Mary Gambon Interview, supra note 418.
422 See supra text accompanying notes 35–37.
423 See Child Welfare Info. Gateway, supra note 104, at 4 (“[C]hildren would first seek out their mothers but then turn to older siblings for support, even before they would go to their fathers . . . . [F]or isolated children (as is the case for many children in foster care), sibling support is especially crucial.”).
relationship. In working together, caseworkers and pre-adoptive parents can talk about the uniqueness of adoption, what the family needs and wants at the current time, and what it might want in the future when siblings are involved. Once practitioners in child welfare are familiar with sibling research and the issues which accompany the loss of the relationship to effectively address post-adoption sibling visitation issues, we will then be able to develop plans and procedures to achieve those objectives recognizing that visitation and contact can be tailored to the unique needs of the families and siblings.

B. Confront Authority, Ask Questions

To move in the direction where thinking about a sibling’s influence in a child’s life and the significance of that bond is the norm, stakeholders should ensure others are fulfilling their responsibilities to the child by asking informed questions and demanding substantive documentation. For example, when children are in separate foster care placements, stakeholders should ask for reports about the frequency and quality of visitation. In finalizing adoptions, they should ask whether or not the child has siblings who are not being adopted into the same home, and whether or not the parent plans to have the child continue to stay in contact with his or her siblings. Decision makers should assess the scope and extent of their authority and, at a minimum, ask caseworkers, practitioners, and pre-adoptive parents what is being explored, and then use this information to direct sibling contact or visitation post-adoption if appropriate.

C. Legal and Legislative Advocacy

It is also crucial to advocate for meaningful practices that allow siblings to petition for visitation and clearly define the authority of the court when it comes to matters of sibling visitation. The legislature and courts need to collaborate in achieving a clearer understanding of siblings’ rights under visitation statutes and the required procedure to petition for it in a manner informed both by emerging literature and by a social justice approach to child welfare. Within the courts, practitioners should not only discuss with children whether they want to continue to have a relationship with their siblings post-adoption, but also discuss whether the children wish to take the affirmative legal steps necessary in order to preserve it, and file for legal intervention if necessary. In New York, AFCs should become familiar with and utilize D.R.L. § 71 to secure visitation at the time or near the adoption as the statute specifically authorizes the court to order visitation between siblings consistent with the child’s best interest.
D. Involve Children in Decision-Making

Stakeholders should ensure that the child’s voice is being meaningfully heard in discussing who the child views to be in his or her family, who his or her siblings are, and what his or her relationship is like with them, then involve them in decision-making about the quality and frequency of contact or visitation they would like to have post-adoption. Working with the child to develop his or her definition and understanding of “sibling” restores that child’s agency over his or her life and legitimizes the importance of certain kinds of contact for that child’s mental well-being. That understanding should then be used to productively inform the kinds of advocacy discussed in the “Legal and Legislative Advocacy” portion of this Section.

E. Quality Therapeutic Services

When siblings are initially placed into foster care they should engage in family therapy in order to address issues that stem from living with their parents. Family therapy is especially important to those children who are parentified, due to a lack of understanding on the part of foster parents and caseworkers of the influence that those children may have on their siblings and their new families. Later, adoptive families should be connected with adoption-competent therapists who, in addition to working with the children individually, can work with the sibling group as a whole, providing both supervision and a therapeutic environment addressing how sibling contact can be fostered and preserved. Families and children should have the support and services post-adoption as often as they need, and they should have help understanding and navigating new and ongoing relationships well after the adoption is completed whether it is ordered or not.

VII. Conclusion

Last year, one of the authors was assigned to a visitation case involving a nineteen-year-old named Bianca seeking visits with her twelve-year-old sister, Michele. Michele had been adopted out of foster care at age three by a non-kinship foster parent. The adoptive mother did not want Michele to know she was adopted and thus did not allow the birth family, Bianca included, to have any contact with her post-adoption. For eight years, Bianca called her sister’s adoptive mother’s house, asking just for the chance to speak to Michele on the phone, but was repeatedly denied contact. When Bianca finally turned eighteen, old enough to file her own visitation petition, the judge yelled at her, demanding to know “where she had been all these

424 See supra notes 316–23 and accompanying text.
years. “The Judge acted like I was some deadbeat dad,” Bianca said. “I thought, what do you mean ‘where have I been?’ I’ve been trying to get in touch with my sister ever since she was taken from me.”

In response to Bianca’s story, along with Kayla and Keisha’s case, CLCNY began exploring the law’s efficacy in addressing post-adoption sibling contact. Bianca’s case captures the many deficiencies pervading the child welfare system and the obstacles she needed to overcome in order to earn sibling contact. The case highlights a judge’s skepticism with sibling contact, an adoptive mother’s fear of breaking the adoption, and a sister’s lack of access to meaningful dialogue in how she can play a role in the adopted child’s life. The solutions here, as the authors have shown, rest in an interdisciplinary reform of how stakeholders approach sibling contact. Further, the authors encourage the adoptive parent to welcome dialogue with the child and sibling, while placing heavy weight on the wishes of the child for her long term well-being and a foster care agency that meaningfully tries to promote connections through its deep understanding of the significance of the sibling bond.

As described in the Introduction, the authors combined their personal experiences, with the current legal and mental health literature surrounding this issue to reimagine a stronger foster care system that is responsive to maintaining sibling contact in a child’s lifetime. This Article touches on the needed dialogue between the child and various other stakeholders in her life when assessing the importance of sibling contact, along with collectively thinking about alternatives when sibling visitation may not be in a child’s best interest. As practitioners in the field, the authors not only came across compelling cases such as Bianca’s, but also experienced their shocking prevalence in New York City courts. The authors’ experiences in these cases have helped to form reasonable recommendations for moving forward that are applicable beyond New York City’s foster care system.

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426 Id.
427 Id.
428 See supra pp.14–16.
429 See supra pp. 15–17.
430 See supra text accompanying notes 332–35.
DELICATE BALANCES: ASSESSING THE NEEDS AND RIGHTS OF SIBLINGS IN FOSTER CARE TO MAINTAIN THEIR RELATIONSHIPS POST-ADOPTION

Randi Mandelbaum*

“[S]iblings possess the natural, inherent, and inalienable right to visit with each other.”

Three children, Jason (age six), John (age eight), and Jessica (age eleven), were removed from the home of their mother over two years ago due to severe neglect and abandonment. The children were found starving and alone in a deplorable apartment, which did not possess functioning utilities. The local child protection agency had been monitoring the family and trying to assist the mother with services and drug rehabilitation treatment to overcome her longstanding substance abuse addiction. Unfortunately, the situation worsened.

Initially, the children were placed together in a foster home. However, for various reasons this situation could not be maintained, and after about six months the children were separated from each other. Jason and John are now in separate foster homes. Jessica was placed in a group home and

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then a residential treatment facility, where she currently resides. Jessica is now saying that she does not want to be adopted.

Because their mother was not able to overcome her addiction, the state moved to terminate her parental rights over Jason and John so that they could be adopted by their respective foster parents. The child welfare agency now has made arrangements for the siblings to regularly visit each other. All of the children look forward to, and enjoy, their time together. Psychologists who have assessed the relationship between the children find that they have a positive, healthy, and strong bond with one another. The children see their mother occasionally, but not often, and only in a supervised manner.

John’s foster parents have stated that once the adoption is finalized, they want the sibling visits to end and all ties to the past extinguished. They are concerned because Jessica may continue to have some minimal contact with the children’s biological mother. However, they are not even willing to let Jason and John maintain contact. Lawyers for the children have petitioned the court presiding over the termination of parental rights proceeding to order post-adoption sibling contact. The trial judge agreed that the sibling relationship was important to the children, but did not order post-adoption sibling visitation, finding that the court had no authority to make such an order. These children reside in a state that has “closed” adoption laws. An appeal is pending.

INTRODUCTION

The subject of siblings conjures up various and personal memories for many of us. Recollections of past times playing and feuding with a

3. The father of the oldest child, Jessica, is incarcerated. A search for the father of the two younger children was unsuccessful.

4. In this instance, some or all of the children would have separate attorneys, as there might be conflicts of interest between the children. For an interesting article on this subject, see William Wesley Patton, The Interrelationship Between Sibling Custody and Visitation and Conflicts of Interest in the Representation of Multiple Siblings in Dependency Proceedings, 23 CHILD. LEGAL RTS. J., Summer 2003, at 18.

5. While this narrative and this article focus on the positive aspects of the sibling relationship, this author acknowledges that there may be negative aspects to the sibling relationship as well. These relationships, like most relationships, are complicated and complex. Thus, some of us have had negative, or at least less than positive, relations with one or more siblings. The subject of siblings also raises the important question of how “sibling” is defined. It is most often defined as two or more persons, who have at least one parent in common. See, e.g., BLACK’S LAW DICTIONARY 1506 (9th ed. 2009) (defining sibling as “[a] brother or sister”) and id. at 1513 (defining sister as “[a] female who has one parent or both parents in common with another person”). However, a sibling relationship also can develop between two people who
brother or sister are common, as are more recent accounts of family reunions and siblings relying on one another, emotionally, financially, and otherwise, as we (and hopefully our parents) get older and need more assistance. Psychologists remind us that our relationships with our own siblings are likely the longest lasting relationships that we will have—more longstanding than our relationships with our parents, friends, spouses, or partners. Simply put, our siblings are there for us, through good times and rough ones, often without our even asking.

Many of us take our sibling relationships for granted. Yet, this is not the case for all children. Many children who must enter foster care are not only separated from their biological parents, but also from siblings. have lived in the same family, but have no parent in common. This can occur for a myriad of reasons, including situations in which: unrelated foster children live in the same foster home (these are sometimes referred to as “fictive siblings”); cousins live with a grandmother or some other relative caregiver; or two adults, with children from previous relationships, get married. With advanced reproductive technology, siblings also can exist because they share a common sperm donor. Interestingly, California permits “sibling” to be defined as a “sibling related by blood, adoption, or affinity.” CAL. WELF. & INST. CODE § 388(b) (West 2009). For further discussion of how siblings can be defined, see Diane Halpern, Full, Half, Step, Foster, Adoptive, and Other: The Complex Nature of Sibling Relationships, in SIBLINGS IN ADOPTION AND FOSTER CARE: TRAUMATIC SEPARATIONS AND HONORED CONNECTIONS 1, 2-3 (Deborah N. Silverstein & Susan Livingston Smith eds., 2009); David Brodzinsky, The Experience of Sibling Loss in the Adjustment of Foster and Adopted Children, in id. at 43–46; and ROBERT SANDERS, SIBLING RELATIONSHIPS: THEORY AND ISSUES FOR PRACTICE 2-3 (2004). For purposes of this article, siblings will be defined only as two or more children who have at least one parent in common. However, much of the discussion and many of the arguments made on behalf of these siblings could extend and be applicable to any of the categories of siblings defined above. For many children and adults, the emotional connections are equally as strong and not dependent on biological ties. One study from England of 4 to 7 year-olds found that biological relatedness was associated with perceptions of closeness to fathers, but not to mothers or siblings. Susan Livingston Smith, Siblings in Foster Care and Adoption: What We Know from Research, in SIBLINGS IN ADOPTION AND FOSTER CARE, supra, at 13, 13 (referring to a study by Wendy Sturgess et al., Young Children’s Perceptions of their Relationships with Family Members: Links with Family Setting, Friendships, and Adjustment, 25 INT’L J. OF BEHAV. DEV. 521 (2001)). “Being a full, half, or step-sibling did not influence children’s perception of closeness.” Id.


7. See infra note 21 and accompanying text. Placement into foster care is not the only cause of siblings being separated. The divorce of parents with children also may lead to the loss of sibling connections. However, a discussion of the separation of siblings due to divorce is beyond the scope of this article. The rights of parents to make decisions with respect to their children are markedly different in a divorce situation, as compared to the placement of children into foster care and the potential termination of parental rights, due to the abuse, neglect, or abandonment of a child. As
When the parents are unable to remediate the situation, the assumption, which is codified in federal and state law, is that what is best and most important for most children is permanency—the identification and attainment of a new and permanent family. In fact, in 1997, with the passage of the Adoptions and Safe Families Act, the notion that we must secure “permanency” for children was elevated and prioritized, as there was a sense that too many children were languishing in foster care. Once a child is adopted, the rights of those new parents to raise the child as if he or she was their biological child gives these new parents the authority to decide whether the child will be allowed to maintain contact with his or her biological siblings. Many will see and understand the importance of the sibling relationship and permit and even encourage it to continue. Others will not, as the prospective parents of eight-year-old John, discussed above, indicate. Even in those few states that permit a court to order ongoing sibling contact, implementation and enforcement of these orders is problematic because the ultimate adoption is never permitted to be breached.

such, this paper will be limited to the potential rights of siblings who have been, or are still involved with, the foster care system.

8. See H.R. Rep. No. 105-77, at 7–8 (1997). At times, “permanency” might mean a family with relatives through a kinship guardianship situation. In fact, there are provisions in federal law, which prioritize placement with kin. 42 U.S.C.A. § 671(a)(19) (West 2008) (“In order for a State to be eligible for payments under this part, it shall have a plan which . . . provides that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement. . . .”). Yet, if this is not feasible, the priority will be to find an unrelated family to adopt the child. See generally id. Kinship family placements have been found to be most accommodating to keeping sibling groups together or in contact. William Wesley Patton, The Rights of Siblings in Foster Care and Adoption: A Legal Perspective, in SIBLINGS IN ADOPTION AND FOSTER CARE, supra note 5, at 57, 66–68 (citing Point in Time Siblings, CHILD WELFARE DYNAMIC REPORT SYS., http://cssr.berkeley.edu/ucb_childwelfare/siblings.aspx (last visited May 4, 2011)) and Rob Geen, The Evolution of Kinship Care Policy and Practice, 14 CHILD., FAMS., & FOSTER CARE 1, 131, 143.

9. See H.R. Rep. No. 105-77, at 7–8. Timelines are now in place as to how long parents have to rehabilitate and when states must move to terminate parental rights. 42 U.S.C. § 675(5)(C) (2006). States are even given fiscal incentives to increase the number of foster children who are adopted. 42 U.S.C. § 673b (2006).

10. See infra Part VI.A.1. Some social scientists have suggested that we alter the language used to describe contact among siblings. “The word ‘visit’ connotes a court- or case-plan-ordered requirement to which there is some natural resistance.” Sharon Roszia & Cynthia Roe, Keeping Sibling Connection Alive, in SIBLINGS IN ADOPTION AND FOSTER CARE, supra note 5, at 83, 93. These authors recommend the word “meeting” or “gathering” because these are more natural occurrences in families. Id.

11. See infra notes 217–221.
These situations call upon society to make difficult decisions as to what, or whose, interests are most, or more, important. Should a state favor “permanency” through adoption for children in foster care over the maintenance of biological family ties? Should such a choice even have to be made? Is a court even permitted to provide as much protection to the biological sibling relationship as it does to the newly created parent-child relationship? Is there something unique about the sibling bond between foster children that justifies prioritizing these relationships? How would such a prioritization be implemented? And finally, if we do not favor the rights of adoptive parents will we in the end create a situation where some adoptive families no longer want to adopt foster children?

Courts and child protection agencies grapple with these difficult questions and uneasy balances every day. Yet, with some notable exceptions, the balance, though difficult, tips in favor of “permanency” over the preservation of familial bonds, and toward the rights of adoptive parents to raise their newly adopted children over the interests of siblings to continue their relationships with one another. Lost in the struggle is the sister or brother who “looked out” for his or her younger siblings when no one else did, and the ability for this important relationship to continue. Judges, children’s lawyers, and child protection social workers are at a loss because they are unable to do anything to protect the sibling relationship, even when it is clearly significant. At the core of the problem is the “question of how to reconcile strong reservations against state

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12. Should a state be forced to first demonstrate that reasonable efforts have been made to keep the sibling group together and that “splitting the group is more in the best interests of the children than providing stable long-term alternative care,” such as placement with kin or long-term foster care? William Wesley Patton & Sara Latz, Severing Hansel from Gretel: An Analysis of Siblings’ Association Rights, 48 U. MIAMI L. REV. 745, 754 (1994).


14. Patton, supra note 8, at 65.

15. William Wesley Patton, The Status of Siblings’ Rights: A View into the New Millennium, 51 DePAUL L. REV. 1, 24–25 (2001) (noting that “whenever children’s constitutional rights have been balanced against parents’ or a state’s compelling interest, children have lost”).

intervention into family decision-making with a desire to protect relationships that might be important for the child." 17

There are approximately 500,000 children in foster care in the United States at any given time. 18 Children adopted out of the foster care system range in age from under one-year-old to eighteen, with the median age being 5.59 years of age. 19 Roughly, 60 percent to 73 percent of these children also have siblings in the foster care system. 20 While child welfare laws and policies have long encouraged the placement of siblings together, practice reveals different results. Only about 40 percent of these children are placed with a sibling, and often visitation between siblings, placed separately while they are in foster care, is not maintained on a regular basis. 21

18. See U.S. Dept. of Health and Human Servs., Trends in Foster Care and Adoption—FY 2002–FY 2008, available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm. In 2008, 460,000 children were in foster care in the United States and 55,000 children in the foster care system were adopted. Id. This is an increase from 51,000 children in 2006 and 53,000 in 2007. Id.
21. Patton, supra note 15, at 1–2 (citing Patton & Latz, supra note 12, at 757–58). “Experts in the field generally agree that there is only one valid child-centered reason for separating siblings early in foster placement—that one child poses a significant threat to the safety or well-being of another sibling(s).” Smith, supra note 5, at 25. However, in most cases, this is not the reason children are not placed together. In a study of child welfare caseworkers, Professor Leathers identified four primary reasons why siblings were not placed together: (1) could not find a placement willing to take the sibling group (33 percent); (2) different behavioral or mental health needs (19 percent); (3) foster parent requested removal of one child, typically due to behavioral challenges (11 percent); and (4) sexual risk posed by one sibling to others (6 percent). Sonya J. Leathers, Separation from Siblings: Associations with Placement Adaptation and Outcomes Among Adolescents in Long-Term Foster Care, 27 Child. and Youth Servs. Rev. 793, 809 (2005). Other recent studies of child welfare practice reveal that siblings entering foster care are more likely to be separated from one another when they are older, further apart in age, come from large sibling groups, enter foster care at different times, are not able to be placed with kin,
Some have begun to question whether the focus on “permanency” is appropriate, and whether, for at least some foster children, it might need to encompass more than simply securing another “forever family.” In short, whether we ought to be doing more to protect the sibling relationship needs to be explored in the context of also considering whether our child welfare and adoption laws and policies continue to make sense for all children. Social science research tells us that for children in foster care the sibling relationship may be one of, if not the most, important relationships that these children will ever have. Family law theorists encourage us to think more broadly about how family is defined—beyond the parent-child dyad—and to focus on those relationships that are most significant to the child. Those steeped in the study of adoption and adoption
law caution that adoption laws and policies, written during a time when it was mostly infants that were being adopted by two-parent families, are not well-suited to the adoption of older children who know and have emotional connections to their biological families.\footnote{See infra Part I.B.}

Perhaps most significant are the actual experiences of the children. From their perspective, their links to one another, which likely developed and were strengthened while the children were living with their biological parent or parents, and hopefully were further encouraged and nurtured during their tenure in foster care, do not magically disappear on the day their adoption, by new and different families, is finalized. The mere signing of an adoption decree does not wipe away the emotional bonds that formed over years, nor does it erase the knowledge that a child has siblings who are not with him or her.\footnote{Robert Borgman, The Consequences of Open and Closed Adoption for Older Children, 61 CHILD WELFARE 217, 219 (1982) (remarking how it is “extremely difficult, if not impossible to suddenly erase 10 or more years of relationships”).} To the contrary, psychologists opine that separation without contact leads to curiosity, concern, and longing.\footnote{Mary Ann Herrick & Wendy Piccus, Sibling Connections: The Importance of Nurturing Sibling Bonds in the Foster Care System, in SIBLINGS IN ADOPTION AND FOSTER CARE, supra note 5, at 27, 28 (citing several studies explaining that when siblings are separated from one another they seek frequent visitation and information about each other).}

By proposing that statutory changes are necessary and making suggestions as to what those reforms should be, this article attempts to further the dialogue concerning the rights of siblings in the foster care system to maintain their relationship when one or more of the children are adopted. While recently there has been some scholarly attention paid to the needs and rights of siblings in foster care and the sibling relation-
ship more generally, little of it has been in the legal arena and none has exclusively focused on the interests of these siblings post-adoption. Moreover, no one has examined the Fostering Connections to Success and Increasing Adoptions Act of October 2008 (hereinafter Fostering Connections) and explored what the mandates in this federal statute might mean for the rights of siblings, both prior to and after the point of adoption.

Specifically, Part I will summarize current federal and state statutes in the area of post-adoption sibling contact, including the new federal mandates contained within Fostering Connections. Part II will explore how courts have been addressing the issue of post-adoption visitation, including the question of whether siblings hold any constitutional rights to maintain their relationships. Then, in Part III, recent social science research will be discussed. This research elucidates why the relationships between some siblings, who are or have been in foster care, are so special and significant, and helps us to better appreciate why and when this relationship should, or even must, be maintained. Underscoring the social science is a trend that is seen in many states as favoring “open adoptions.” This term and what it might mean for foster siblings is discussed in Part IV. The article concludes in Part V with a template of proposed reforms to our child welfare and adoption laws and policies, followed in Part VI with some explanation as to the concerns that may be raised by the contemplated statutory changes. While the recommendations are based on the argument that the relationship between siblings in the foster care system should be maintained when there are existing connections, the recommendations also attempt to balance the competing, and at times conflicting interests, which are present when the state seeks to secure a new and permanent home for a child.

I. CURRENT STATE OF AFFAIRS—FEDERAL AND STATE STATUTES

A. Federal: Fostering Connections

From a statutory perspective, the most significant development has been the passage of the Fostering Connections Act, signed into law by President George W. Bush on October 7, 2008. This statute, which is the

28. See generally SIBLINGS IN ADOPTION AND FOSTER CARE, supra note 5; Eric Martin, Comment, Maintaining Sibling Relationships for Children Removed from their Parents, CHILD. LEGAL RTS. J. Winter 2002–2003, at 47.


30. Id.
most recent amendment to the Adoption Assistance and Child Welfare Act,31 initially enacted in 1980, marks the first time that Congress has expressed concern for the sibling relationship.32 Significantly, Congress did not just recognize this important relationship, it imposed a strong obligation on the states to ensure that visitation between siblings occurs while they are in foster care, as well as afterward. Fostering Connections specifically conditions the states’ receipt of federal funding on their reasonable efforts to ensure sibling contact once a child has been removed from his or her home and thereafter.33 The statute is applicable to children who have been removed from their homes and placed in temporary settings, such as “foster care,” and to children who are in permanent settings, such as “kinship guardianship, or adoptive placement.”34 Presumably, a state might be at risk of losing significant federal funding if its statutory scheme does not permit sibling contact after adoption in at least some instances.

32. A history of federal child welfare legislation is beyond the scope of this article. However, the first significant statutes were the Child Abuse Prevention and Treatment Act in 1974, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended in scattered sections of 42 U.S.C.), and the Adoption Assistance and Child Welfare Act (AACWA) of 1980, Pub. L. No. 96-272, 94 Stat. 500. AACWA stressed family preservation and reunification. See, e.g., sec. 101, § 475(B)(5)(C), 94 Stat. at 511. However, due to a sense that this led to too many children spending years in foster care, in 1997, Congress passed the Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.), with an emphasis on children’s health, safety, and permanency. See 143 Cong. Rec. S12674 (1997) (statement of Sen. James Jeffords). The most recent federal enactment is Fostering Connections, Pub. L. No. 110-351, 122 Stat. 3949, which not only has provisions concerning the sibling relationship, but also, among other things, seeks to increase assistance to youth transitioning out of foster care and to kinship caregivers, improve educational outcomes for foster children, and provide greater incentives to augment the number of children being adopted from foster care. See id.
33. At the federal level, Fostering Connections provides that reasonable efforts (by state child protection agencies) shall be made:
   (A) to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement, unless the State documents that such a joint placement would be contrary to the safety or well-being of any of the siblings; and
   (B) in the case of siblings removed from their home who are not so jointly placed, to provide for frequent visitation or other ongoing interaction between the siblings, unless that State documents that frequent visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings.

Sec. 206(3), § 471(31)(A), (B), 122 Stat. at 3962.
34. Id.
While Fostering Connections provides clear instructions to the states that they must have in place a statutory scheme that provides for ongoing sibling contact, even when children are placed in different homes through kinship guardianship or adoption, it is a funding statute, and as such, does not provide assurance for any given group of siblings that contact will continue. Moreover, a question remains as to whether the reference to “adoptive placement” in the statute refers to the adoptive home after the point in time that the adoption is finalized, or merely until then.35 One could view the term “placement” as distinct from the word “home,” and therefore imply that once the adoption is complete and the placement becomes the child’s permanent home, the provisions of Fostering Connections no longer apply. An alternate and plain language interpretation, which is also consistent with the thrust of the entire provision, finds that the statute intends to differentiate between foster care and permanent placements. As such, it extends the mandate for “frequent and ongoing contact” not only to the time in which children are in foster care, but also to permanent placements, such as kinship guardianship and adoption.36 Irrespective of its intended reach, Fostering Connections sends an important message to the states that the relationships children have with one another are critical, and that efforts need to be made to maintain and preserve these connections.

B. State Level

Yet when studying what is currently taking place at the state level, it is clear that significant reform is warranted. State statutes can be divided into three categories. First, there are statutes, like Fostering Connections, which address the needs and interests of children involved with a state’s child welfare system and send directives to individual state child welfare agencies as to what it needs to do to ensure the well-being of those children who have become its wards. These laws establish a standard of care for wards of the state, and provide a means for the courts, and others, to hold a state accountable for the children who have been placed in its

35. No legislative history exists as to the legislature’s intent concerning this issue.
36. Because the phrase “adoptive placement” is placed right after the term “kinship guardianship,” which clearly is a permanent arrangement for a child, it can be inferred that “adoptive placement,” like the term “kinship guardianship,” refers to the permanent home, in this instance the adoptive home, where the child is or will be living. In New Jersey, for example, kinship legal guardianship is viewed as an “alternative, permanent legal arrangement” when adoption is “neither feasible nor likely,” N.J. STAT. ANN. § 3B:12A-1 (West 2002). See also N.J. Div. of Youth and Family Servs. v. P.P. and S.P., 852 A.2d 1093, 1011 (N.J. Sup. Ct. 2004).
custody. Second, many states have enacted laws that provide for some sort of general visitation rights to siblings, or at least the ability to request a hearing regarding such contact. These statutes are not specific to children involved with the child welfare system. Rather, siblings are often included as one of many third-party relatives. And finally, a select number of states have laws in place that in some way recognize the continuity of the sibling relationship even after the children have been adopted by different families.

Unfortunately, these statutes have created more questions than they have answered. Worse yet, when more than one type of statute is triggered at the same time, the situation can become quite confusing, as statutory directives are not always consistent. For example, in the hypothetical above, Jessica, as a foster child, maintains the right to see her siblings, and the state has the obligation to facilitate such visitation under Fostering Connections, as well as some state statutes. Yet, because the prospective adoptive parents of John, her eight-year-old brother, are not going to permit post-adoption contact, the state cannot comply with this obligation to facilitate visitation once the adoption is finalized. In other words, the state’s obligation to ensure that children in its care are able to visit with their siblings is futile if the state cannot, through its courts, order the adoptive parents to comply.

1. Child Welfare Statutes

This example not only sheds light on one of many potential conflicts, but it helps to illustrate the three categories of statutes mentioned above. The first type concerns statutes directly connected with child protection proceedings and child welfare agencies. Most states have statutory and regulatory provisions, and often child welfare policies, requiring that children be placed together if possible, and if not, mandating, or strongly encouraging, that the children have regular contact. Some states require ‘reasonable efforts’ to place siblings together,” or “create a pre-

37. In fact, siblings were often included after other relatives, most notably step-parents, quasi-parents, and grandparents. Patton & Latz, supra note 12, at 750–51.
38. See generally Patton, supra note 15 (describing the legal status of siblings in light of new statutes).
39. In many states mandates are not included in statute, but in policies that guide the child welfare agencies. For example, in policy, six states require monthly sibling visits, five states require bi-weekly visits, and two states require weekly visits. Policies on Sibling Visits in Out of Home Care, National Resource Center for Permanency and Family Connections, http://www.hunter.cuny.edu/socwork/nrcf/cpp/downloads/policy-issues/Sibling_Visiting_Policies.pdf (last updated Dec. 28, 2005). While policy is not binding on a court, it is helpful in discerning good practice and what ought to be taking place in order to hold agencies accountable.
Sumption that sibling visitation is in the children’s best interest.” 40 For example, Iowa requires that the state “make a reasonable effort to place the child and siblings together in the same placement.” 41 If “the siblings are not placed in the same placement together,” the state shall provide the siblings with the reasons “why and the efforts being made to facilitate such placement,” and the state “shall make reasonable effort to provide for frequent visitation or other ongoing interaction between the child and the child’s siblings from the time of the child’s out-of-home placement until the child returns home or is in a permanent placement.” 42 Likewise, Virginia insists on “[a]ll reasonable steps” being taken to place siblings together and if not, then to “develop a plan to encourage frequent and regular visitation or communication between the siblings.” 43

A few states do not specifically mandate visitation or require that reasonable efforts to provide contact be made. Rather, these states permit petitions for visitation to be brought when the children are in foster care, presumably by attorneys who are appointed to represent the children in the ongoing child welfare matter, although this is not always clear. For example, in Texas, siblings who are separated because of actions taken by the child protection agency may file a “suit” for “access,” and such will be granted if it is found to be in the best interest of the children. 44 Similarly, in Maryland, any siblings who are separated due to a foster care placement “may petition a court, including a juvenile court with jurisdiction over one or more of the siblings, for reasonable sibling visitation rights.” 45

Consistent with Fostering Connections, a handful of states go even further and mandate that visitation occur between the siblings while they are in out-of-home care. A few states, like Kentucky, include the require-

42. Id. § 232.108(2).
43. Va. Code Ann. § 63.2-900.2 (2008). “The visitation or communication plan shall take into account the wishes of the child, and shall specify the frequency of visitation or communication, identify the party responsible for encouraging that visits or communication occur, and state any other requirements or restrictions related to such visitation or communication as may be determined necessary by the local department, child-placing agency, or public agency.” Id. Virginia also specifically grants the domestic-relations court the authority to order sibling contact if there was an ongoing relationship prior to being placed into foster care and it is in the best interests of the children. Va. Code Ann. § 63.2-912 (2008).
ment to provide for sibling visitation in its standards for its child welfare agencies, stating: “If siblings have been separated in placements: [t]he case record shall reflect a valid basis for the separation; [t]he decision to separate siblings shall be made by the executive director of the child-placing agency; and [c]ontinued contact between siblings shall be maintained, if possible.”

Other states have created “Bills of Rights” for children in foster care, and include within this statute the right to maintain contact between siblings. Six states have such “Bills of Rights,” or the equivalent, for children in state care. A seventh state, Florida, has a similar statute, but it sets forth “goals” for children in foster care, rather than establish entitlements or rights that the children possess. Three of these seven (California, Florida, and New Jersey) include language concerning communication and/or visitation between siblings. For example, in New Jersey, one of sixteen enumerated rights specifies that the state’s child welfare agency, when dealing with a child “placed outside his home,” assures “best efforts” are made to “place the child in the same setting with the child’s sibling.” If the children are not placed together, the state agency must ensure that the children can visit with each other on a “regular basis” and “to otherwise maintain contact” with each other. And in

50. N.J. STAT. ANN. § 9:6B-4(d), (f) (West 1991). Thus, when children are removed from their homes, New Jersey’s child welfare agency has an affirmative duty to preserve the sibling relationship. This duty is assumed once the state has acted to remove the children from their family home and continues at all times while the children are in out-of-home placements. Id. Such an affirmative obligation was recently strengthened and clarified in In re D.C. and D.C., 4 A.3d 1004 (2010):

More importantly, by devolving an “affirmative obligation” on the Division to nurture sibling relationships during the entire placement period, the Legislature ensured a continuity of support for the child from the beginning to the end of his odyssey. Indeed, the Child Placement Bill of Rights Act makes maintenance of sibling contact a responsibility. That responsibility inheres even after pre-adoptive placement, which may or may not come to fruition. It is not an option. When the Division removes a child from his home, its obligation to nurture sibling bonds exists whether or not a sibling has initiated the process and whether or not termination has occurred.

Id. at 1015. Moreover, a child has been found to have a right to bring a lawsuit pursuant to New Jersey’s Child Placement Bill of Rights. K.J. v. Div. of Youth and Family
Florida, the goal is for foster children “[t]o enjoy regular visitation, at least once a week, with their siblings unless the court orders otherwise.”

Yet, what is not always entirely clear is whether these mandates continue once the child is adopted into a new family. Depending on the wording of the statute, the rights may vest once the child is placed in out-of-home-care and continue indefinitely unless the child returns home to his or her birth family. An alternative interpretation is that the rights are only in place while a child is in foster care and end once the child is placed in any permanent home, such as an adoptive home. At times, it also is unclear whether the children’s right to maintain contact continues in legal arrangements other than adoption, such as guardianship, or whether there is a difference in the court’s jurisdiction to mandate visitation after parental rights have been terminated. However, it is incongruous to posit that this relationship that was statutorily protected, nurtured, and encouraged suddenly evaporates once a judgment of adoption is deemed final or a decision to terminate parental rights is made. These are the conflicts inherent in today’s laws and policies.

2. Third-Party Visitation Statutes

In addition to child welfare statutes, most if not all states have enacted statutory provisions that allow third parties, often grandparents, to seek visitation with their relative children. Some states may have general third-party statutes, which may include siblings without explicitly stating as much. Currently, twelve states have specific statutes regarding requests for contact with siblings or statutes where siblings are included among the relatives who can move for such visitation.
For example, New Jersey provides for grandparent and sibling visitation when visitation is in the best interest of the child. Specifically, “any sibling of a child residing in this State may make application before the Superior Court, in accordance with the Rules of Court, for an order for visitation.” In Delaware, “[a]ny child, through a guardian ad litem, may file a petition seeking visitation with any other child with whom they have at least [one] parent in common.” And in Rhode Island, the family court, upon petition, “may grant reasonable rights of visitation of the sibling to the petitioner.” These statutes are not specific to foster children, and often do not take into consideration the unique situations of foster children generally, especially those circumstances where foster siblings are being adopted by different families.

For starters, these statutes typically require that a relative seeking visitation petition the court for such authority. It is not feasible for a child who wishes to maintain a relationship with a sibling to have the knowledge, ability, and means to carry this burden. Many children are not provided any legal representation in the child protection and termination of parental rights proceedings. Even for children who do have legal representation, it is unlikely that these attorneys will have the authority to initiate separate legal proceedings.

A significant concern about general third-party visitation statutes is the fact that after *Troxel v. Granville* many were rendered to be unconstitutional. Thus, in the last decade, many third-party visitation statutes

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56. Id.
57. DEL. CODE ANN. tit. 13, § 2410(c) (emphasis added).
59. Patton, *supra* note 15, at 20 (noting that the right to bring a claim for sibling visitation “may be illusory absent a requirement that the sibling be notified of the right to visit and/or the right to have counsel represent the sibling in court”).
60. In those states that do provide legal representation to children, the attorneys typically are appointed by the court to represent the child or children in the instant child protection matter only. See Jean Koh Peters, *Representing Children in Child Protective Proceedings: Ethical & Practical Dimensions* 58–62 (3d ed. 2007) (analyzing a 2005 survey which revealed that in many jurisdictions a child may be appointed a best interest representative, but that that person is not necessarily a legal representative).
have been amended or more narrowly interpreted, rendering it more difficult for grandparents and other relatives, including siblings, to obtain visitation rights. Troxel was a 2000 U.S. Supreme Court plurality decision, which found Washington’s grandparent visitation statute to be unconstitutional based on the fact that the statute was “breathtakingly broad.” The Court was troubled by the fact that the statute permitted any person at any time to seek visitation with a child and did not give any presumption or any weight to the biological parent’s wishes. The plurality left open the question of whether a finding of harm or potential harm to the child is required for visitation to be permitted.

 Accordingly some states have required a showing of harm to the child, which can be difficult to prove without costly expert assessment; others have required parental input and/or a heightened evidentiary standard but have not gone as far as to require that harm to the child be established. For example, in Arkansas, its supreme court held that a par-
ent can decide to permit visitation with a grandparent unless “harm to the child or custodial unfitness” can be shown. And in New Jersey, the Supreme Court of New Jersey recently held that “siblings can petition for visitation with their brothers and sisters who have been adopted by non-relatives, subject to the avoidance of harm standard.” However, in other states, the courts and legislatures have determined that a best interest standard is still permissible under Troxel, so long as this standard is determined by clear and convincing evidence and/or deference is given to the wishes of the biological parent.

3. Post-Adoption Contact Statutes

The final category of statutes involves those that directly address the situation of post-adoption sibling contact. These statutes typically are part of a state’s adoption laws, but statutory schemes will vary. States with these statutes are considered to have “open” or “cooperative” adoption laws, as discussed further below. Not surprisingly, less than half of the states have statutes that specifically address post-adoption sibling contact.

Only seven states (Arkansas, Florida, Illinois, Maryland, Massachusetts, Nevada, and South Carolina) allow a court to order such contact in the absence of consent from the adoptive parents. These states’ respec-

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69. See E.H.G., 2010 Ala. Civ. App. LEXIS at *21 (referencing cases from six other jurisdictions that grandparent visitation may be awarded when sufficiently proven to be in the best interest of the child).
70. Those states are: Arkansas, Ark. Code Ann. § 9-9-215(c) (2007) (“Sibling visitation shall not terminate if the adopted child was in the custody of Department of Human Services and had a sibling who was not adopted by the same family and before adoption the circuit in the juvenile dependency-neglect or families in need of services case has determined that it is in the best interests of the siblings to continue visitation and has ordered visitation between the siblings to continue after the adoption.”); Florida, Fla. Stat. § 63.0427 (2003) (“If the court determines that the child’s best interests will be served by postadoption communication or contact with any sibling, the court shall so order, stating the nature and frequency of the communication or contact.”); Illinois, 750 Ill. Comp. Stat. 5/607 (2010) (A sibling can bring an action requesting visitation post-adoption, so long as they were siblings prior to the adoption, and so long as they were adopted by a relative.); Maryland, M.D. Code Ann., Fam. Law § 5-525.2(b)(1) (LexisNexis 2005) (“Any siblings who are separated due to a foster care or adoptive placement may petition a court, including a juvenile court with jurisdiction over one or more of the siblings, for reasonable sibling visita-
tive statutes differ as to when and how such authority is provided to the courts. In Arkansas, Florida, Maryland, and Massachusetts, the statutes specifically limit their application to child welfare cases.\footnote{Ark. Code Ann. § 9-9-215(c); Fla. Stat. § 63.0427; M.D. Code Ann., Fam. Law § 5-525.2(b)(1); Mass. Gen. Laws ch. 119 § 26B(b).} Illinois, Maryland, and Massachusetts require a sibling to actually petition the court for ongoing contact.\footnote{750 Ill. Comp. Stat. 5/607(a-3); M.D. Code Ann., Fam. Law § 5-525.2(b)(1); Mass. Gen. Laws ch. 119 § 26B(b).} In Arkansas, the visitation simply does not terminate if such contact had been ordered prior to the adoption being finalized,\footnote{Ark. Code Ann. § 9-9-215(c).} and in Florida the child has the right to have the court consider the appropriateness of post-adoption communication or contact.\footnote{Fla. Stat. § 63.0427. In Nevada, it is unclear. The statute simply states that a court “may” grant visitation rights. Nev. Rev. Stat. § 125C.050.} In all seven states, ongoing contact is permitted if it is found to be in the children’s best interests. Yet, how the children’s best interests are determined will vary, and, frequently, minimal statutory guidance is provided regarding how
courts should make these decisions and what factors should be considered.75

Sixteen additional states allow a court to order post-adoption sibling contact with the consent of the adoptive parents.76 In other words, the court will enforce agreements concerning sibling contact. However, if there is no agreement, there is no right to maintain the sibling relationship.

II. COURTS

A. Current State of Affairs

Absent statutory authority, most courts have been reluctant to find that siblings have the right to maintain contact, especially once one or

75. But see 750 ILL. COMP. STAT. 5/607(a)(4) and REV. REV. STAT. § 125C.050(6) (Illinois and Nevada statutes set forth factors to be considered by the court in determining when it would be in the children’s best interest).

more of the children are adopted. Very few cases can be found that even discuss the sibling relationship. Yet in a few instances, absent any statutory authority or any constitutional assertions, courts have been persuaded to order that the sibling relationship should be maintained. In these cases, there is usually some special circumstance, an established and strong sibling bond, or evidence of harm if the ties are severed. Some of these courts relied on general “best interest” arguments. Others found pleas to equity to be convincing.

For example, in *In re Adoption of Anthony*, a trial judge, based exclusively on the best interests of the child, ordered the adoptive parents to continue to arrange for contact between the child, Anthony, and his three siblings, who had been adopted by different parents at an earlier point. Interestingly, the court was not willing to rest on the promises of Anthony’s adoptive parents who had offered to sign a letter of consent, which could be attached to the adoption decree.

While the adoptive parents may presently feel that Anthony’s contact with his birth siblings is essential, Anthony’s interests would not be protected should his adoptive parents change their minds in the future. Therefore, this Court determined that the only way to ensure Anthony’s interests after his adoption was to include a direction in the Order of Adoption that Anthony have continued contact including visitation with his birth siblings.

Similarly, a New Jersey Superior Court judge found that the court possessed “inherent equitable jurisdiction” to decide whether it was in the best interests of two minor siblings to visit with their adult sister away from their parents’ home. In *L. v. G.*, the court found that a sibling bond

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78. See Christopher D. Vanderbeek, Note, *Oh, Brother! A California Appeals Court Reaffirms the Denial of Necessary Access for Separated Children to Build and Maintain Sibling Relationships*: *In re Miguel A.*, 13 U.C. DAVIS J. JUV. L. & POL’Y 349, 371 (2009) (reviewing cases in several jurisdictions and explaining that “in the absence of statutes directing them as to sibling visitation,” courts may look to equity principles.)

79. 448 N.Y.S.2d 377, 381 (N.Y. Fam. Ct. 1982). In this matter, the siblings had never lived together. *Id.* at 378. The three older siblings already were in their adoptive home when Anthony was born. *Id.* This family was unable to care for Anthony. *Id.*

80. *Id.*

81. *Id.*

is irreplaceable, and that siblings possess a right to visitation subject to it being in their best interest.\textsuperscript{83} Explaining its reasoning, the court declared that “[a] sibling relationship can be an independent emotionally supportive factor for children in ways quite distinctive from other relationships, and there are benefits and experiences that a child reaps from a relationship with his or her brother(s) or sister(s) which truly cannot be derived from any other.”\textsuperscript{84}

Likewise, in \textit{Adoption of Lars}, a Massachusetts appellate court held that a trial judge could order post-adoption visitation based upon the court’s “‘broad, equitable powers.’”\textsuperscript{85} Massachusetts courts have focused on whether the child, for whom parental rights have been terminated, has an identified pre-adoptive family.\textsuperscript{86} Where no family has been secured, the courts are more likely to find that post-termination and post-adoption contact orders are warranted.\textsuperscript{87}

Other courts have stressed and described the importance of the sibling relationship, but have sidestepped ordering the maintenance of sibling contact post-adoption. For example, in another New Jersey case, the Supreme Court of New Jersey looked to social science research, as well as to the reasoning of the \textit{L. v. G.} court, and expounded upon the critical nature of the sibling relationship.\textsuperscript{88} Yet, in the end, the court failed to actually authorize the provision of post-adoption sibling visits, finding that the children involved were continuing to have contact through the voluntary efforts of the adoptive parents.\textsuperscript{89} However, the court strongly

\begin{thebibliography}
\item 926 (Miss. 1997) (concluding that the question of whether sibling visitation should be permitted was a matter for the legislature to decide.). \textit{See also} Susan Solle, \textit{Sibling Relationships Should Not Be Denied by Formalistic Judges: Scruggs v. Saterfield, 693 So. 2d 294 (Miss. 1997), 23 U. DAYTON L. REV. 659 (1998) (discussing the Scruggs v. Saterfield decision).}
\item 83. \textit{L.}, 497 A.2d at 222.
\item 84. \textit{Id.} at 220–21.
\item 87. \textit{See Rico}, 905 N.E.2d at 556 \textit{and Vito}, 738 N.E.2d at 303.
\item 89. \textit{Id.} at 219–20. While finding the issues presented to be of “profound importance,” the court found it had before it “two families that, in the best interest of the
noted that caselaw and social science literature has made clear that the court cannot undervalue the relationship between siblings. 90

Worth mentioning are two additional and important arguments that have been made, albeit mostly unsuccessfully, to preserve the sibling relationship through the courts. The first relies upon the state’s parens patriae function and the state’s responsibility to both protect children from harm and to ensure the well-being of those children in its care. The second provides a constitutionally protected right of children to preserve their sibling connections. Each will be discussed briefly.

B. Parens Patriae

Parens patriae is the power of the sovereign to watch over the interests of those who are incapable of protecting themselves. 91 It originated as an equitable concept in England’s chancery courts, which were delegated to act as the “general guardian of all infants, idiots, and lunatics,” and were bound to use this power solely on behalf of the wards of the state. 92 Parens patriae has evolved over the years to be the broad basis for both the protective action that the state takes on behalf of a child whose parents have been deemed unfit, as well as the actions to serve the best interests of the child once the state has taken over as “parent.” 93

The state’s exercise of its parens patriae power over children can be broken down into three interrelated principles. 94 First, it is based primarily on the presumption that children lack the mental competence and maturity that adults have. 95 Second, before intervening into the family, the state must show that the child’s parents are unfit to care for the child adequately. 96 And finally, once the state has satisfied these two requirements, it must exercise the parens patriae power solely to further the best interests of the child. 97

children, had cooperated to allow sibling visitation” and therefore the court had no real issue to decide. Id. at 220.

90. Id. at 218. The New Jersey Supreme Court also noted that the New Jersey’s Child Placement Bill of Rights and its child welfare agency policies and procedures provide for sibling visitation for those placed in separate homes. Id. at 219–20.

91. BLACK’S LAW DICTIONARY 1144 (8th ed. 2004).


93. See Developments in the Law, supra note 92, at 1222–27.

94. See id. at 1223.

95. Id.

96. Id.

97. Id.
In the context of sibling visitation rights, parens patriae principles emerge where there is a strong sibling relationship together with evidence of emotional and psychological harm to at least one of the children if the sibling relationship is not maintained. This harm is often documented by expert evaluation and testimony. The argument that is made is that the psychological harm to the children would be so great that it overrides any constitutional rights of the prospective adoptive parents as well as any legislative intent to the contrary. In other words, based on the tenet that the state can remove children from abusive or neglectful parents, the state could intervene, through judicial action, to protect children from emotional harm due to the termination of the sibling relationship. In New Jersey, attempts have been made to have such a situation where the state must intervene on behalf of the child characterized as an “exceptional circumstance.”


99. See Ellen Marrus, “Where Have You Been, Fran?” The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation, 66 TENN. L. REV. 977, 1017 (1999) (“Just as the state can remove a child from an abusive parent, the state should at least be able to permit judicial resolution of the sibling visitation issue to ensure that the child’s emotional development will not be thwarted.” (footnote omitted)). On one occasion, exhibited by the Sorentino v. Family & Children’s Society of Elizabeth trilogy of cases, this concept of “exceptional circumstances” led the New Jersey Supreme Court to terminate the parental rights of a young child even though there was no legal basis for the child to have been removed. Sorentino v. Family & Children’s Soc’y of Elizabeth, 378 A.2d 18 (1977). The legal process took so long—two-and-a-half years—that it was found that the child would have suffered psychological harm if removed from her current foster parents, the only parents she had ever known. Id. The court specifically indicated that potential harm to a child was a legitimate reason for limiting any parents’ right to custody. Id. at 21.

100. V.C. v. M.J.B., 748 A.2d 539, 549 (N.J. 2000); Watkins v. Nelson, 748 A.2d 558, 559 (N.J. 2000); see also Sorentino v. Family & Children’s Soc’y of Elizabeth, 367 A.2d 1168, 1171 (N.J. 1976) (This case is the genesis of the “exceptional circumstances” category, stating that “[t]he court cannot evade its responsibility, as Parens patriae of all minor children, to preserve them from harm.”).

101. V.C., 748 A.2d at 548–49 (citations omitted). The exceptional circumstances doctrine has been expanded to include visitation rights. In V.C. v. M.J.B., the New Jersey Supreme Court held that the trial court could grant visitation rights to the same-sex former domestic partner of the children’s biological mother based upon the “exceptional circumstances” doctrine. See id. at 555. And in Watkins v. Nelson, a case which dealt with grandparent visitation, the court left the scope of the “exceptional circumstances” doctrine open. See id. at 555–62.
C. Constitutional Arguments

An alternative legal argument would be to find that the child seeking to preserve contact with siblings has a constitutional right to preserve the sibling relationship, which would equal or overcome the constitutional rights of the newly adopting parent. The U. S. Supreme Court has never specifically addressed the issue of the constitutional rights of siblings to the preservation of their relationship through contact, and most lower federal and state courts have also been reluctant to find a constitutional basis for the maintenance of these relationships. Nonetheless, some commentators have advocated that the sibling relationship warrants constitutional protection as a fundamental right, and have found such a supposition to be consistent with past Supreme Court decisions. The arguments made are twofold. The first is founded upon family privacy rights under the Due Process Clause of the Fourteenth Amendment and emphasizes the historical and fundamental importance of family relationships. The second is derived from the First Amendment’s protections of the right to associate.

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103. In fact, to date, the only familial relationship that consistently has been protected by the Supreme Court is that of the parent and child, which repeatedly has been referred to as a fundamental constitutional right, entitled to the highest degree of protection. See infra notes 107–122 and accompanying text.

104. See Jones, supra note 102; Patton & Latz, supra note 12, at 755; Patton, supra note 15.


106. See Roberts v. United States Jaycees, 468 U.S. 609, 628–29 (1984) (defining different close relationships, including family relationships, that “have led to an understanding of freedom of association as an intrinsic element of personal liberty”). See also Jones, supra note 105, at 55–56.
1. The Sanctity of the Family and the Due Process Clause

In considering whether the sibling relationship is one of those special familial relationships meriting constitutional protection, it is necessary to review how the Supreme Court has defined the scope of family relationships requiring protection by the Due Process Clause. This theory forces one to consider what it is parental rights are in fact protecting, and whether it is the rights of parents per se, or the rights of families to operate as families. In Smith v. Organization of Foster Families, the Court entertained a claim by foster parents who asserted that they had certain due process rights to the children placed in their care. In concluding that the foster-parent-foster-child relationship did not merit constitutional protection, and therefore the procedures for removal of foster children from their foster homes did not violate the foster parents’ due process rights, the Court, in dicta, defined the type of relationship that would be protected by the Due Process Clause. Specifically, the Smith Court set forth a three-part test. First, the relationship must be a biological one. Second, it must involve “emotional attachments that derive from the intimacy of daily association.” And third, unlike a foster parent and foster child relationships it must have “its origins entirely apart from the power of the State.” The relationship outlined by this three-part test certainly encompasses more than just the parent-child relationship and could easily be extended to an established biological sibling relationship, where the children have lived together for at least some period of time.

Similarly, in Moore v. City of East Cleveland, the Supreme Court held that it is the “family unit” that is protected by due process and that “personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amend-

107. See McCarthy, supra note 65 at 992–1006.
109. Id. at 843–45, 855–56.
110. Id. at 843–45.
111. Id. at 843.
112. Id. at 844.
113. Id. at 845.
114. William Wesley Patton, The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings, 24 GA. L. REV. 473, 492 n.69 (1990) (“[A]pplying the qualities of “family” as defined by the Supreme Court in Smith v. Organization of Foster Families, there is every reason to provide sibling relationships the equivalent constitutional status as the parent-child relationship.” (internal cite removed)); Jones, supra note 102, at 1208.
The Court continued, by stating that the “[protections of the Due Process Clause extend to] the sanctity of the family . . . because the institution of the family is deeply rooted in the Nation’s history and tradition[,] [and it] is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”

In Moore, the definition of family was extended beyond the traditional nuclear family, in this case to a grandmother who was raising her grandson. Specifically, it was found that the “tradition of . . . grandparents sharing a household along with parents and [their grand]children has roots equally venerable and equally deserving of constitutional recognition.” Thus, it seems that the Supreme Court was not simply looking at the sanctity of the parent-child relationship, but rather the importance of close familial connections, which could certainly extend to sibling bonds.

Following the holdings of Smith and Moore, the Second Circuit found that siblings possessed “liberty interests in preserving the integrity and stability of [their] family.” In Rivera v. Marcus, Rivera, an adult sibling who also was the foster parent for her younger siblings, claimed that the State of New York violated her due process rights by removing her half-brother and half-sister from her home without explanation and placing them in another foster home where they were not permitted to communicate with one another. The Second Circuit stated that Rivera “possessed an important liberty interest,” and that the two children also had “a liberty interest in maintaining, free from arbitrary state interference, the family environment that they have known since birth.”

The question of whether such principles can be applied to establish a right of siblings to preserve their relationships remains unanswered. Such relationships are typically analyzed under the rubric of visitation petitions, as was the focus in Troxel. Thus, it is not clear when considering the rights of siblings whether the concept of protecting the “family unit,” as it is articulated in Smith and Moore, can be reconciled with that of Troxel, and, if not, which would or should prevail.

116. Id. at 503–504.
117. Id. at 504.
120. Id. at 1017–18.
121. Id. at 1021, 1026.
122. See supra notes 61–65 and accompanying text.
2. Siblings’ Right to Associate Under the First Amendment

Scholars also have asserted that children have a constitutional right to maintain sibling relationships through the First Amendment’s right to associate.123 For example, Professor William Patton and Dr. Sara Latz argue that “the historical and contemporary evidence supports a clear finding that sibling’s association has been a relationship historically endemic to the American definition of family. Siblings, just like parents and children, should clearly be held to possess an inherent, fundamental liberty interest in continued contact and association.”124 Another commentator suggests that a sibling’s right to contact with an adopted brother or sister is encompassed within the fundamental right to intimate association.125

These First Amendment associational arguments are based, in part, on the holding of Roberts v. United States Jaycees, which found that the right to freedom of association was found to protect the “choice[ ] to enter into and maintain certain intimate human relationships [that] must be secured against intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”126 In this case, the Supreme Court held that the First Amendment offers “certain... highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.”127 Family relationships, which clearly could include the relationship between biological siblings, fall into this category because, “by their nature, [they] involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”128

Aristotle P. v. Johnson followed the reasoning of Roberts v. United States Jaycees when it found the policies of the Illinois child welfare agency to be unconstitutional.129 Illinois at the time had a foster care system, which placed siblings in separate foster homes with little to no effort dedicated toward finding them a home together, and denied the children

123. See Patton & Latz, supra note 12, at 778.
124. Id.
125. See Jones, supra note 102, at 1189, 1196–98; see also Ferraris, supra note 118 at 715, 732.
127. Id. at 618.
128. Id. at 619–20; see also Patton & Latz, supra note 12, at 778.
the opportunity to visit one another.\textsuperscript{130} Finding that these policies must be evaluated under a heightened standard of review, the court held that such state actors could infringe on the children’s right to associate only if there was a compelling state interest that could not be achieved through less drastic means.\textsuperscript{131}

Yet, these court cases and arguments are few and far between. In the majority of instances, like the hypothetical at the outset, courts have been reluctant to take any judicial action or to find a constitutional right, to preserve the sibling relationship. While best interest analyses and equity arguments have provided a basis for a few courts to order the maintenance of sibling ties, these approaches are inadequate to address the concerns that in many instances a critical relationship will be severed. Clearly more statutory guidance is needed. Such legislation needs to recognize that for many foster children the sibling relationship is unique and critical, and thus courts should be permitted to protect it when warranted. As will be seen in the next Part, the youth are calling for such affirmative action, and social science research confirms that the sibling relationship is significant for many siblings, especially foster siblings.

III. WHAT WE KNOW FROM SOCIAL SCIENCE LITERATURE

Relationships between siblings have been much less studied than most other kinds of family relationships in the psycho-social literature.\textsuperscript{132} What we do know is that relationships between siblings are likely to be a

\begin{footnotesize}
\textsuperscript{130} Aristotle P. 721 F. Supp. at 1004.
\textsuperscript{131} Id. at 1006; see also Trujillo v. Bd. of Cnty. Comm’rs, 768 F.2d 1186 (10th Cir. 1985) (The Tenth Circuit held that there was a constitutionally protected interest in the sibling relationship.). In this case a mother and sister brought a Section 1983 action against state officials alleging that the wrongful death of their son/brother while in jail deprived them of their constitutional right to familial association. Id. at 1187. The Court stated that “[a]lthough the parental relationship may warrant the greatest degree of protection and require the state to demonstrate a more compelling interest to justify an intrusion on that relationship, we cannot agree that other intimate relationships are unprotected and consequently excluded from the remedy established by [S]ection 1983.” Id. at 1189. But see Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) (which went the other way in denying sibling recovery).
\textsuperscript{132} Sonia Jackson, Foreword to Robert Sanders, Sibling Relationships: Theory and Issues for Practice xiii (2004); see also Brodzinsky, supra note 5, at 45 (explaining that it is only in the last ten to fifteen years that the sibling relationship has received much attention); Smith, supra note 5, at 21 (maintaining that “research on siblings in child welfare is only beginning to examine siblings in a comprehensive way”); Joel V. Williams, Comment, Sibling Rights to Visitation: A Relationship Too Valuable to Be Denied, 27 U. Tol. L. Rev. 259, 279–81 (1995) (remarking that “little psychological research has been conducted on the sibling relationship”).
\end{footnotesize}
person’s “longest-standing” relationship, longer than a parent, spouse, or many friends. Overall, siblings are a primary source of social support, and their dependency on each other increases with different life stages and circumstances. And for children who have been placed in foster care due to child abuse or neglect, these relationships can take on even more significant dimensions. The impact of poor, inadequate, or abusive parenting can create unusually intense sibling bonds and intense loyalties, which can last a lifetime.

A. Attachment Theory

Any assessment of the psychological bonds must begin with the basics of attachment theory. An attachment relationship has been defined as “a reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver through which a child forms their concept of self, others, and the world.” These attachments generally occur in the first eighteen months of life and form the bases of relationships for a child’s entire life. Children can form attachments in healthy and unhealthy relationships. But children also develop attachments with siblings and other peers that have little to do with receiving care. Stephen Bank and Michael Kahn, two psychologists who have researched and written extensively on

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133. See, e.g., Victor G. Cicirelli, Sibling Relationships Across the Life Span 2 (1995); Groza et al., supra note 20, at 481; Halpern, supra note 5, at 4; Sanders, supra note 132, at 1; Smith, supra note 5, at 14.
134. Smith, supra note 5, at 17.
135. Id. at 18 (explaining that in dysfunctional families “sibling relationships become even more salient and essential for survival”).
136. Bank & Kahn, supra note 6, at 122–23; Groza et al., supra note 20, at 481; Patton & Latz, supra note 12, at 766.
137. Sanders, supra note 132, at 177 (“Attachment is probably the single most important concept when working with children and families.”); see also Halpern, supra note 5, at 5–6.
139. John Bowlby, Attachment 24–34, 331–49 (2nd ed. 1982). But see Patton & Latz, supra note 12, at 763 (questioning “the determinative power of early childhood experiences with one primary caretaker,” and explaining how many factors have been identified as important in the psychological development of children, including the presence of alternative relationships such as siblings).
140. Bank & Kahn, supra note 6, at 28; Sanders, supra note 132, at 178–79; Rebecca L. Hegar, Assessing Attachment, Permanence, and Kinship in Choosing Permanent Homes, 72 CHILD WELFARE 367, 368 (1993).
the sibling bond, suggest that sibling attachments are strongest when children have ready access to each other and diminished physical or emotional access to parents, so long as they have had some basic caregiving figure with whom they attached in the first eighteen months of life. The emotional bond between the siblings depends on “access.” The earlier access begins, and the more prolonged it is, the more intense the relationship will be between the siblings when the children experience parental loss, abuse, or neglect. Thus, children who have lived through the trauma of abuse or neglect together are more likely to develop strong attachments to, and dependence on, one another. This is due to the fact that if there is no sustaining parent at home, the sibling relationship can become the only “caring force.” Accordingly, separation from a sibling can intensify a child’s grief and trauma. In fact, in some instances, a

141. BANK & KAHN, supra note 6 at 19.
142. Id. at 10 (defining “access” as siblings who “have often: attended the same schools, played with the same friends, dated in the same crowd, been given a common bedroom, . . . worn each other’s clothes, and so on”); see also Grigsby, supra note 138, at 270.
143. BANK & KAHN, supra note 6, at 19 (“Sibling bonds will become intense and exert a formative influence upon personality when, as children or adolescents, the siblings have had plentiful access and contact and have been deprived of reliable parental care.”); Groza et al., supra note 20, at 481 (“Often children grow more attached to their siblings when they have experienced severe parental losses, neglect, or abuse. Their attachment is greater than the attachment shown by siblings who have not experienced such losses. In these families, children learn early to depend upon and cooperate with each other in order to cope.” (internal citation omitted)).
144. See Halpern, supra note 5, at 4 (explaining that the sibling relationship has “special meaning for children whose other family ties have been twisted, frayed, or severed”); Margaret Ward, Sibling Ties in Foster Care and Adoption Planning, 63 CHILD WELFARE 321, 330 (1984) (emphasizing that “sibling ties can be more important to children than ties to parents”).
145. BANK & KAHN, supra note 6, at 112–13 (explaining that siblings in such home environments identities are “intertwined . . . because they have jointly faced traumatic psychological losses at crucial stages of their development. Mutual loyalty and caregiving . . . permit both physical and psychological survival”); Smith, supra note 5, at 18 (describing research that found for some children an older sibling was often their only perceived source of help); Ward, supra note 144, at 322 (opining that “[s]eparation from siblings may for some children be a greater stress than separation from parents” because “when parents are absent physically or emotionally, the principal attachment is to a sibling, often a sister, who assumes a parental role”).
child’s separation from his or her siblings can be even more traumatic than being removed from his or her parents.147

B. Child Development

Psychologists also emphasize how, in the early years, sibling relationships are important for a child’s development.148 Siblings are viewed as “socialization agents” who teach one another social skills through continuous interaction.149 From these social interactions, the child develops a foundation for later learning and personality development.150 Further, siblings are potentially a resource to each other in terms of developing identity, maintaining knowledge of self and family, and “providing support in shared adversity.”151

C. Protective Factor

A strong and healthy sibling relationship also has been found to have a “protective effect.”152 This “protective” aspect of the sibling rela-

147. Id.; see also Herrick & Piccus, supra note 27, at 31.
148. Sanders, supra note 132, at 1 (noting that “[t]he sibling relationship affects how children develop, particularly socially and emotionally”).
149. Judy Dunn & Carol Kendrick, Siblings, 210–11 (1982) (describing the relationship between young siblings as one “in which pleasure, affection, hostility, aggression, jealousy, rivalry, and frustration are freely and frequently expressed”); see also Smith, supra note 5, at 14; Brodzinsky, supra note 5, at 45.
150. Herrick & Piccus, supra note 27, at 31; Brodzinsky, supra note 5, at 45.
151. Marjut Kosonen, ‘Core’ and ‘Kin’ Siblings: Foster Children’s Changing Families, in WE ARE FAMILY: SIBLING RELATIONSHIPS IN PLACEMENT AND BEYOND 28–49, (Audrey Mullender ed. 1999); see also Brodzinsky, supra note 5, at 45 (noting that “as children approach adolescence, they often look to their brothers and sisters as a way of defining who they are and establishing a more secure identity”); Halpern, supra note 5, at 5 (asserting that “the sibling relationship helps children develop their self-identity and their knowledge about the world” and “older siblings transmit information about acceptable behaviors to younger siblings, and in this way, influence the[ir] attitudes and behaviors of the younger siblings”); Herrick & Piccus, supra note 27, at 32 (commenting that when children take on caretaking roles with their siblings “this relationship can provide the child with a sense of responsibility, clear self-concept, and enhanced self-esteem and serve as a source of social support”); Smith, supra note 5, at 20 (noting that placing siblings together “helps children to maintain a positive sense of identity and knowledge of their cultural, personal, and family histories”); Jane Brown, Adoption & Sibling Relationships: What Children Have Taught Me, ADOPTALK (Spring 2008) (explaining how “sibling relationships fundamentally affect the children’s sense of self, their self-assurance or insecurity, and other crucial aspects of their life’s journey”), available at http://www.nacac.org/adoptalk/siblingrelationship.html.
tionship is borne out by both psychological and social-work research. From a psychological standpoint, when siblings are placed together and can rely on one another, the relationship acts as a “protective factor . . . provid[ing] a source of emotional continuity” for one another.153 In other words, “[b]ecause of children’s experiences of separation and loss, contact with siblings can be one element of continuity for children in foster care.”154 Some psychologists have found that when children have each other, they are less likely to exhibit problems after experiencing stressful events.155

This stabilizing effect also can be seen in various studies of child welfare practice.156 While some of these assessments review why siblings are separated while in foster care,157 most of the more recent research studies examines the impact of siblings being placed together as opposed to apart, and in particular look at placement stability.158 Of seventeen studies of siblings who were adopted or in foster care between 1988 and 2005, twelve address the question of placement outcome.159 And while the reports are not completely dispositive,160 they generally confirm that children who are placed with at least one of their siblings are as stable, or more stable, than children who are separated from their siblings or who

153. Elsbeth Neil, The Sibling Relationships of Adopted Children and Patterns of Contact After Adoption, in WE ARE FAMILY, supra note 151, at 50, 51; see also Brodzinsky, supra note 5, at 45 (“[S]iblings can serve as confidants, providing care and emotional comfort during times of stress and loss (such as when they are placed in foster care).”); Halpern, supra note 5, at 6 (noting how positive sibling relationships can provide “mutual support” and “offer[] a buffer against the stress of disruptive homes”); Herrick & Piccus, supra note 27, at 33 ( remarking at how, during troubling times, siblings can “function as a buffer” and “provide each other with comfort”); Marjut Kosonen, Maintaining Sibling Relationships—Neglected Dimension in Child Care Practice, 26 BRIT. J. SOC. WORK 809, 813 (1996) (opining that “[b]ecause of the rapidly changing nature of the children’s family situations, maintenance of sibling relationships for children in care may be one means of sustaining continuity”).

154. Kosonen, ‘Core’ and ‘Kin’ Siblings, supra note 151, at 28, 45; see also Herrick & Piccus, supra note 27, at 33–34 (describing the results of several studies, which found that maintaining sibling relationships can “help nurture a sense of stability and continuity in the lives of foster youth” (internal citations omitted)).

155. Gass et al., supra note 152, at 172.

156. Hegar, supra note 21, at 719.

157. See discussion, supra note 21.


159. Id. at 728 (citing a variety of studies).

do not have siblings.\textsuperscript{161} Moreover, it also has been found that children placed with their siblings had more positive behavior toward their peers, fewer emotional and behavioral problems in general, and performed better at school.\textsuperscript{162}

\textbf{D. The Voices of Youth}

Young person accounts also are a powerful testament to the importance of the sibling relationship.\textsuperscript{163} In numerous studies the voices of youth have repeatedly confirmed the critical nature of the sibling relationship and its significance in the development of a young person’s sense

\begin{itemize}
\item \textsuperscript{161} Hegar, \textit{supra} note 21, at 729; \textit{see also} Brodzinsky, \textit{supra} note 5, at 51 (reporting that “children placed apart from their siblings had more emotional and behavioral problems including heightened anxiety, depression, acting out and other behavioral and psychological problems”); Leathers, \textit{supra} note 21, at 812–14 (finding that siblings placed apart from one another are more likely to have behavioral problems than siblings who are placed together and concluding that children placed with siblings throughout their stay in foster care have a significantly greater chance of permanency through adoption); Nathan, \textit{supra} note 98, at 655 (remarking how continued contact with biological relations can “promote a child’s integration into her adoptive family”).
\item \textsuperscript{162} Smith, \textit{supra} note 5, at 18 (noting that “[r]esearch has demonstrated that warmth in sibling relationships is associated with less loneliness, fewer behavioral problems, and higher self-worth” (citation omitted)). Because of these positive findings, “best practice” strategies have been developed by child welfare and social work experts to effectively address the needs of sibling groups involved in our child welfare systems. Deborah N. Silverstein & Susan Livingston Smith, \textit{Practice Strategies to Preserve Sibling Relationships, in SIBLINGS IN ADOPTION AND FOSTER CARE, supra} note 5, at 123, 124. These strategies include, but are not limited to: (1) “[d]esignating specific foster homes for large sibling groups and offering incentives to hold them open for these placements;” (2) entering into “contracts with private agencies to have specialized foster care programs for large sibling groups;” (3) “[a]ssigning all siblings to the same child welfare case worker;” (4) conducting comprehensive assessments of sibling groups and regular case reviews, especially if some of the siblings are not placed together; (5) if siblings are not placed together, “placing them in the same school district and in as close proximity as possible;” and (6) “[l]isting the siblings as a group” when recruiting for an adoptive placement. \textit{Id.}
\item \textsuperscript{163} Neil, \textit{supra} note 153, at 51 (“[R]eflections of young people in care demonstrate the value such individuals place on sibling relationships and the strong negative reaction to separation from siblings.”). “The other angle from which researchers have examined the issue is through the feelings of siblings who have grown up separated by adoption. Feats and Howe found that 25 percent of a sample of 366 adopted people who sought information through the Children’s Society had gone on to make contact with a birth sibling.” \textit{Id.} (citing Julia Feast & David Howe, \textit{Adopted Adults Who Search for Background Information and Contact with Birth Relatives, 21 ADOPTION \\& FOSTERING}, 8 (1997)).
\end{itemize}
of identity, emotional stability, and personal growth and development.\textsuperscript{164} A social worker who works with adopted children and is a foster and adoptive parent herself writes:

\begin{quote}
No matter what they share, it is clear that sibling relationships fundamentally affect the children’s sense of self, their self-assurance or insecurity, and other crucial aspects of their life’s journey. As parents and caring professionals, we must carefully consider and address sibling issues that enhance and complicate the lives of children in adoptive families.\textsuperscript{165}
\end{quote}

A longitudinal study conducted by researchers at the Chapin Hall Center on Children at the University of Chicago has been surveying youth in three states (Illinois, Iowa, and Wisconsin).\textsuperscript{166} To date, these researchers have met with former foster youth on four occasions, at ages 17, 19, 21, and 23-24.\textsuperscript{167} In their last report, 81 percent of the youth reported weekly contact with a family member after leaving care.\textsuperscript{168} Even more significant, 94 percent conveyed feeling somewhat or very close to at least one family member.\textsuperscript{169} When asked who they are most likely to feel close to and have contact with, their responses were their siblings.\textsuperscript{170}

Foster youth also describe being separated from their siblings as “extra punishment” and an unnecessary “loss” and “pain.”\textsuperscript{171} In 2003, two researchers, Jason Whiting and Robert Lee, analyzed the stories that pre-

\begin{footnotes}
164. Annette R. Appell, \textit{Legal Intersections}, 3 \textit{Adoption Q}. 85, 85 (2000) (describing how “many . . . children resist the limited options that the law offers them: be part of this family or that one”).

165. \textit{Brown}, \textit{supra} note 151.

166. \textit{Mark E. Courtney et al., Chapin Hall Center at the University of Chicago, Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Ages 23 and 24}, at 13 (2010), available at http://www.chapinhall.org/sites/default/files/Midwest_Study_Age_23_24.pdf.


168. \textit{Id.}

169. \textit{Id.} at 12.

170. \textit{See id.} at 12–14. Such findings are mirrored by a much earlier study of former foster youth, which found the attachments of the young adults to their siblings to be “striking.” \textit{Trudy Festinger, No One Ever Asked Us: A Postscript to Foster Care} 173 (1984). “A majority of those who knew of a sibling stated that they felt either very (62.9 percent) or moderately (18.3 percent) close to at least one sibling, and those who felt very close expressed such closeness toward two siblings on the average.” \textit{Id}.

\end{footnotes}
adolescent foster children told about their lives. An unexpected focus of the stories was the children’s reliance on siblings. Themes of suffering together and distress at being separated upon being placed in foster care ran through many of the stories. Similarly, in a study of Scottish primary-school children, researchers found that siblings were perceived to be a significant source of support and help to the children. Siblings were regarded proportionally as of almost equal importance to the children as their parents. It appears that older sisters and brothers were found to be of particular importance, especially where children were isolated and had few other supportive relationships available to them. In all, the majority of children perceived siblings to hold a special and essential place in their lives.

IV. WHAT CAN BE LEARNED FROM THE OPEN-ADOPTION TREND

A. Defining Permanency

Also important in the lives of children is the need for a stable, safe, and long-term “forever” family. Hopefully, a child’s biological family unit will be strengthened so that those ties are never severed and a child can remain with and/or be returned to his or her biological family. Unfortunately, this is not always possible, and when it is not, the need for an alternate plan, usually placement with a new family, becomes paramount. This focus on “permanency” is based on extensive research as

173. Id. at 292.
174. Id.
175. Marjut Kosonen, Siblings as Providers of Support and Care During Middle Childhood: Children’s Perceptions, 10 Child. & Soc. 267, 267 (1996).
176. Id. at 270 (“Ninety-two percent of the children mentioned mother, 86 percent mentioned father, and 83 percent mentioned at least one sibling as most important to them. Only eleven children . . . did not mention any of their siblings.”). “Siblings were mentioned more often than fathers as a source of support and help.” Id.
177. Id. at 271. (“Nearly one-third of the children who had no one else to turn to for support confided in their older siblings and nearly half of the isolated children mentioned their older siblings as their only source of help.”).
178. See id. at 267–79.
well as numerous psychological theories, which document that “connectedness to a family is important for the adaptive functioning and individuation of children.”

Not everyone has viewed the goal of “permanency” in such positive ways. While all agree that it is important, one’s opinion on how permanency should be defined, and how quickly it should occur, may vary depending upon one’s outlook, and the context and circumstances in which permanency is being discussed. Some commentators have felt that the time allotted to achieve permanency for children is too short, and that in a “rush toward permanency,” numerous important relationships, most notably the sibling relationship, may be lost. These scholars are so concerned that they have even accused our child welfare system of causing “devastating harm” due to “the significant relationships that are destroyed.” Other scholars have called for a more expansive definition of “permanency,” one which, in addition to a safe, stable, and long-term home, also includes the preservation of important biological relationships for the child.

publications/rethinking.pdf. Permanency is most often used to describe the objective of reducing the amount of time that children remain in foster care, by either quickly returning them to the care of their biological parent or parents, or if not, then turning to the identification of an alternative, typically an adoptive, family. See id.

181. See Sara Block, Comment, Not “Out of Sight, Out of Mind”: Defining Permanency as the “Continuity of Relationships” When Ending Legal Relationships Does Not Sever Ties, 26 CHILD. LEGAL RTS. J. 25, 25 (2006). The amount of time that is given to biological parents to rectify whatever problem or problems caused the children to enter foster care has been criticized by many as being unreasonably short, especially given limited resources. Id. In fact, many view the passage of ASFA as dramatically reversing the course of child welfare practice from one focused on family reunification and preservation to one focused on safety, stability, and permanency, for which the priority is adoption. See Patton, supra note 8, at 66.
182. Block, supra note 181, at 25; see also Patton, supra note 8, at 67 (concluding that a policy of “rapid permanency through adoption may result in a significant loss of sibling association[,] and states are left with a dilemma of balancing” these two important public policies).
183. See supra note 22 for a discussion of how “permanency” should be re-defined; see also Brodzinsky, supra note 5, at 56 (stressing that when children are placed for adoption, more attention must be given to helping children maintain their relationships with their siblings); Groza et al., supra note 20, at 484 (“When there is no alternative but to place siblings apart because of safety or other issues, all efforts should be made to help them to sustain their sibling bond.”); Halpern, supra note 5, at 8 (remarking “siblings who are not living together need to be able to visit and maintain contacts”); Children’s Bureau, U.S. Dep’t Health & Human Servs., Sibling Issues in Foster Care and Adoption, CHILD WELFARE INFO. GATEWAY, Dec. 2006, at 1, 9 (maintaining that “[w]hen siblings cannot be placed together, facilitating regular con-
Clearly, our principles of parens patriae, which call for the state to protect and nurture those children whose natural parents cannot, require that some attention be paid to sustaining the significant relationships in children’s lives. Given the critical nature of the sibling relationship in many instances, it is necessary for the state to develop meaningful statutory guidance, which will instruct a court when and how to continue such relationships—so as to prevent emotional harm while appropriately determining what would be best for a particular child or sibling group. The more direction that can be provided as to how this is accomplished throughout the entire process, the more likely it will be that a court will strike the right balance between parental rights and the children’s interests, and that there will be compliance with a court’s orders.

B. Open Adoptions

Statutory reform must be directed, at least in part, toward our adoption laws, as these are the statutes which determine when a new parent-child relationship can be created after the state has dissolved the biological parent-child relationship. In the past, an overwhelming number of adoptions concerned the private adoption of infants, where adoptive, and even birth families, wanted confidentiality. In reaction to these interests, the statutes that created this new parent-child relationship called for secrecy and “new beginnings.” All connections to the past were wiped away—legally, physically, and, it was hoped, emotionally. Proceedings were confidential and closed, records were sealed, and birth certificates were changed.


185. Id. at 1004–1007.


187. Kathleen Silber & Patricia Martinez Dorner, Children of Open Adoption and Their Families 7 (1990) (“Secrecy was designed to protect everyone from the knowledge of ‘illegitimacy.’ However, what was designed to protect has presented many problems for all concerned, especially the adopted individual.”).

188. Naomi Cahn & Jana Singer, Adoption, Identity, and the Constitution: The Case for Opening Closed Records, 2 U. P.A. J. CONST. L. 150, 154–57 (1999). See also McGough & Peltier-Falahahwazi, supra note 186, at 14 (maintaining that for the past half-century the adoption process has been one of secrecy).
In many jurisdictions, these closed adoptions laws remain,\textsuperscript{189} despite the fact that the majority of adoptions today are of non-infant children who are adopted by relatives or step-parents, or by foster parents through our child welfare systems.\textsuperscript{190} It is yet another example of how our family laws have not caught up with reality, or the social science research.\textsuperscript{191} Fortunately, there is a trend which allows for adoptions to have some degree of openness.\textsuperscript{192} Professor Annette Appell, who has studied the concept of adoption and has tracked adoption trends for years, attributes the growing openness to a confluence of factors, such as: the demands of adult adoptees, changes in how the family is defined, an increase in the divorce rate, an increase in the number of foster children remaining in foster care, and a situation where there is more demand for babies than there are

\begin{itemize}
\item See Annette R. Appell, Increasing Options to Improve Permanency: Considerations in Drafting and Adoption with Contact Statute, 18 Child. Legal Rts. J. 24, 25–26 (1998) (noting that currently, 20–25 percent of the adoptions that take place in this country involve foster children and approximately the same percentage involves the adoption of infants).
\item Appell, supra note 190, at 26 (remarking how our adoption laws “ha[ve] not kept pace with the “changing adoption demographics, experiences, and theories.”); see also Joan Heifetz Hollinger, The Uniform Adoption Act: Reporter's Ruminations, 30 Fam. L.Q. 345, 349 (1996-97) (noting how the “faces within adoptive families have changed substantially” and how “[f]ewer and fewer fit within the traditional model of infertile couples” seeking to adopt an infant). Interestingly, closed adoptions are no longer the case in other countries. See, e.g., Elsbeth Neil, Post-Adoption Contact and Openness in Adoptive Parents' Minds: Consequences for Children's Development, 39 Brit. J. Soc. Work 5, 6 (2009) (“Most children now adopted in England and Wales are planned to have some form of contact with members of their birth family, although in the majority of cases, this is likely to take the form of mediated written exchanges, as opposed to face-to-face meetings.” (internal citation omitted)).
\item But see McCough & Peltier-Falahahwazi, supra note 186, at 16 (describing the debate, which ensued between the Child Welfare League of America (in favor of open-adoption arrangements) and the National Council for Adoption (opposed), when the Uniform Adoption Act failed to include language that would have authorized enforcement of court-approved open-adoption arrangements) and Margaret M. Mahoney, Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents Under Uniform Adoption Act § 4-113, 51 Fla. L. Rev. 89, 90 (1999) (concluding that “no subject addressed by the UAA has been more controversial than the subject of open adoption”).
\end{itemize}
babies available. Open adoptions are viewed as more child-centered, as these arrangements recognize the need of some children to maintain their relationships with birth-family members.

How open adoptions are defined or classified will vary. In fact, most in the field acknowledge that the term “open adoptions” is a broad and “flexible concept encompassing a spectrum of relationships that range from the [pre-adoption] exchange of information among the two sets of parents to ongoing [post-adoption] participation of the birth family in the life of the adoptive family.” In other words, the manner, frequency, and degree of contact can vary depending on the circumstances, wishes of the parties, and, in a few jurisdictions, court orders. Some open-adoption arrangements are enforceable, many are not.

The merits and disadvantages associated with openness in adoptions have been debated for some time in the social science literature.

193. Appell, supra note 184, at 1008–13; see also Marianne Berry, Risks and Benefits of Open Adoption, FUTURE CHILD., Spring 1993, at 125, 125–26 (describing recent changes in the adoption system).

194. Appell, supra note 184, at 1002–1003, 1060 (“[A]doption should be viewed as a way to provide continuity and security for children whose parents are unable or unwilling to care for them, and not as a way to provide adults with children to build a family.”); see also Carol Amadio & Stuart L. Deutsch, Open Adoption: Allowing Adopted Children to “Stay in Touch” with Blood Relatives, 22 J. Fam. L. 59 (1983-84) (one of the first law review articles to introduce, discuss, and encourage the concept of open adoptions).

195. Marianne Berry, The Practice of Open Adoption: Findings from a Study of 1396 Adoptive Families, 13 Child. and Youth Servs Rev. 379, 379 (1991) (explaining how “[n]o two adoptions are alike” and how contact can take many different forms).

196. Appell, supra note 184, at 1001. Cooperative and open adoptions are not synonymous. Cooperative adoption refers specifically to agreed-upon levels of openness and contact among adoption triad members. Open adoption is more generic, including a range of possibilities from open records and exchange of identifying information to birth parents visiting the adoptive family after the adoption, whether by agreement or court order.

197. See infra notes 206–214 and accompanying text.

198. Michael P. Sobol et al., Paths to the Facilitation of Open Adoption, 49 Fam. Rel. 419, 419 (2000). Those who support open adoption cite evidence that indicates that openness gives birth parents more control over the adoption process, enhances adoptive
more recent years, there has been a flurry of studies examining the satisfaction of the parties involved in open or cooperative adoptions. How-
However, these have primarily concerned open adoptions where there is contact between the adoptive parents and/or the adoptee and the birth parents. Moreover, the focus of these studies has been on the experiences and attitudes of the birth and adoptive parents’, not those of the children. Very few, if any, studies have included research on the continuation of the sibling relationship through open adoption, and none have focused on the foster sibling relationship.

While the results have been somewhat mixed, the majority of persons surveyed, primarily birth and adoptive parents, view open-adoption arrangements positively. Even those adoptive parents who felt uneasy

parents’ ability to raise their adopted children, reduces fear of loss, enhances empathy toward the birth mother, and assists healthy identity formation of the child. Advocates who support maintaining confidentiality argue that open adoption interferes with proper grieving for the birth mother, has negative effects on the child’s development, leads to adoptive parent insecurity and uncertainty, and is more likely to result in identity confusion for the adoptee.

Id. (citations omitted).

199. For a comprehensive review of various studies focused on participants’ experiences with and attitudes toward open adoption, see Susan M. Wolfgram, Openness in Adoption: What We Know So Far—A Critical Review of the Literature, 53 Soc. Work 133 (2008) and Jeffrey J. Haugaard et al., Open Adoptions: Attitudes and Experiences, 4 Adoption Q. 89 (2000).


202. Neil, supra note 191, at 6. The results have been particularly mixed when the focus has been on the impact of contact on the children. Id.; see also Sobol et al., supra note 198, at 419 (reviewing two studies where no difference in satisfaction was found between open and closed adoptions).

203. See Haugaard et al., supra note 199, at 99 (concluding that “[o]penness includes a wide range of contact” and that most “families involved in open adoptions rate their experiences as positive” and beneficial). These authors also make the point that most, if not all, “studies involving openness in adoption are carried out with families who agree to openness before the adoption.” Id. at 99. See also Sobol et al., supra note 198, at 419 (finding that “[m]ost recent empirical evidence supports the move toward openness”); Appell, supra note 184, at 1017–18 (discussing studies that documented a growing comfort level with open adoption on the part of adoptive parents); Berry, supra note 195, at 392 (describing a study of adoptions, which occurred between 1988 and 1989, and finding that many families are practicing openness “with mostly positive regard”); Deborah H. Siegel, Open Adoption of Infants: Adoptive Par-
at first grew to become more comfortable. Studies do suggest that adoptive parents were most comfortable, and thus connections were maintained, where there was an expectation of openness from the beginning of the placement, the adoptive parents believed openness was in the best interest of the children, and the adoptive parents were able to maintain a sense of control through well-planned and mutually agreed upon contact.

Statutes authorizing enforceable open-adoption arrangements fall into two categories. The first type of statute permits enforcement, but only if all of the parties consent to the adoption being open, as well as the terms of the arrangement. Other types of statutes allow a court to impose post-adoption contact, without regard to whether the parties agreed to such an arrangement. The benefit of the former, which presumes an agreement between the biological and adoptive parents, is that it gives the parties autonomy and respect. It also is more likely that there will be compliance with agreements that are entered into voluntarily.

On the other hand, court-ordered arrangements allow for there to be contact when the parties are not able to come to an agreement and it clearly is in the best interest of the child or children for there to be ongoing contact. This inability to agree can be due to emotional stress on the part of the biological or adoptive parents, or both. It may also be due to the fact that the parties may never have had the opportunity to know each other. In situations where the parental rights are terminated in one proceeding, and the adoption is then finalized in a later, separate proceeding, it is likely that the biological and adoptive parents will not know the identity of one another.

204. Berry, supra note 195, at 380; Sobol et al., supra note 192, at 419.
205. See Wolfgram, supra note 199, at 137, 140–41; Berry, supra note 193, at 130–33.
206. See Appell, supra note 76 at 101 (dividing up the categories of post-adoption contact statutes into two).
207. Id.; see also Appell, supra note 190, at 24–25; statutes listed, supra note 76.
208. Appell, supra note 76, at 101; see also statutes listed, supra note 70.
210. Id.
211. Id.
212. See id.
213. Id.
214. Id. For those children who are unable to be adopted by their current foster parents or relative caregivers, parental rights may be terminated without the prospect
In fact, in these instances, it is the state, not the biological parents, who is in the position of consenting to the adoption. Thus, any agreements concerning open adoptions, which would allow exclusively for foster sibling contact, would need to be made between the prospective adoptive parents and the state. Because of this distinction, it is important to recognize that most of the existing open-adoption statutes do not address the situation of the adoption of siblings from the foster care system where the parental rights already have been terminated, typically in a separate and earlier proceeding.

The enforceability of court orders mandating some form of open adoption can be questionable, if not problematic. The Uniform Adoption Act does not expressly authorize judicial enforcement of such agreements except in the context of the adoption of a step-child. None of the statutes permitting courts to order post-adoption contact, whether by prior agreement or at the court’s discretion, allow for a breach of the post-adoption contact order to be a basis for setting aside the adoption. By extension, some courts find the enforcement of contact to be inconsistent with the concept of adoption. And, some statutes prohibit or limit the awarding of money damages. In short, judges may be relative adoptive parents having been identified. Often in practice, the search for adoptive parents has begun prior to the termination of parental rights trial, but has not yet yielded a match.

216. Id. at 32. In fact, most of the existing post-adoption contact statutes limit contact to birth parents, although a few allow for other relatives as well. Id.
217. See McGough & Peltier-Falahahwazi, supra note 186, at 44–50 (studying how courts have responded when faced with enforcement actions concerning post-adoption contact agreements and finding that the majority of courts have failed to impose the right to contact).
218. See UNIF. ADOPTION ACT § 4-113 (1994) (Section 4-113 of the UAA authorizes the judicial creation and enforcement of post-adoption visitation rights for the former parent, as well as certain other persons, based on a determination of the adopted stepchild’s best interests.). For a complete analysis of Section 4-113 of the UUA, see Mahoney, supra note 192. See also Hollinger, supra note 191, at 372–77.
219. Appell, supra note 190, at 27. The UAA also has a provision that the validity of the adoption cannot be challenged for failure to comply with a post-adoption contact agreement. UNIF. ADOPTION ACT § 3-707(c) (1994).
220. See McGough & Peltier-Falahahwazi, supra note 186, at 44–51.
221. See, e.g., VA. CODE ANN. § 63.2-1220.4(B)(2) (2010) (precluding a court from awarding monetary damages as a result of the filing of a petition for modification or compliance with the agreement.) However, orders for the payment of the prevailing party’s attorney fees typically are permissible. See, e.g., WASH. REV. CODE § 26.33.295(4) (2009). In fact, this has been recommended by some as a means of encouraging compliance. For example, requiring adoptive parents to pay the attorney fees when they are not complying with an agreement to permit contact with a birth
stricted in what actions can be taken when faced with a violation of a court order. It also is unclear how these violations would even come to the attention of the court when the contact that has been ordered is between siblings who are children. Even if the children had legal representation at the point of adoption, it is likely that this relationship has ended. Moreover, none of the statutes permitting court-ordered contact provide for any inherent accountability. Thus, the desires of these siblings are likely without any meaningful protection.222

V. STATUTORY REFORM—MODEL PROVISIONS

What is needed is statutory change that specifically addresses the needs of foster children to preserve their relationships with one another once some or all of the siblings are adopted. Any new statutes should focus upon the many difficult and emotionally laden balances that must be made.223 The needs and interests of the children to maintain critical sibling ties must be carefully weighed against the well-established rights of the prospective adoptive parents once they have adopted. Such reform also must reflect the children’s need for permanency and stability, and take into account the concern that if too many mandates and restrictions are placed on adoptive parents it may have a chilling effect on the pool of adoptive parents and the willingness of families to adopt foster children, especially if they are part of a sibling group.224

Before articulating the details of a proposed model statute, it is important to emphasize that reform can and must occur at both the federal and state levels, and must encompass more than the passage of a single statute.225 In addition to legislative change, there is a need for a funda-

parent might “discourage adoptive parents from dishonoring open adoption agreements.” Appell, supra note 184, at 1024. Another option is to simply require the losing party to pay the other party’s attorneys’ fees. Id. (“Perhaps the best solution would be to award fees to the person seeking enforcement, but to impose costs on the party who seeks modification and then loses.”).

222. Although in most states children ten, twelve, or fourteen years of age and older must consent to the adoption in order for it to be finalized by the court. Appell, supra note 190, at 34.

223. See Appell, supra note 184, at 1048 (finding it to be a “difficult balance to strike”).

224. Patton, supra note 8, at 65–66 (explaining that some courts are concerned about “setting up preconditions for adoption that might reduce the pool of prospective adoptive parents . . . ”).

225. California, which seems to have done the most out of any state to nurture and protect the sibling relationship, has references to siblings and the sibling relation-
mental reorientation of what the state, through its courts and child welfare agencies, must attend to when it steps in and removes children from their homes. Too often, the focus is almost exclusively on the children’s separation from one or both parents, and their need for permanency, if reunification is not possible. Sorely neglected in the process are the critical connections that children have to their siblings.

At the federal level, there is a need to clarify and strengthen the provisions of Fostering Connections, which mandates ongoing and frequent sibling contact. The confusion lies in “when” such contact must take place, and specifically whether it must be permitted to occur post-adoption, in at least some instances. As explained above, the current language of Fostering Connections directs that sibling contact occur whenever children are placed in separate foster care, kinship guardianship or adoptive placements, although it is not entirely clear what is meant by “adoptive placements.” Statutory amendments, which clarify that the term “adoptive placement” is meant to reference the time period both before and after an adoption is finalized, would spell out for state legislatures that they need to enact statutes, or reform current statutory schemes, which currently limit courts’ ability to order post-adoption sibling contact.

But, to ensure that the question of whether there is a need to maintain the sibling relationship is always considered by the family or juvenile court, each state must also revise its entire legislative scheme. In a truly child-focused world, this mandate would begin at the onset of the child protection proceeding—the initial removal hearing—and continue until the point of permanency. If this were to occur, it would reduce, perhaps

ship sprinkled throughout its entire statutory scheme. In re Valerie A., 43 Cal. Rptr. 3d 734, 736 (Cal. Ct. App. 2006) (The court, in referencing and interpreting many of the statutes affecting children in need of foster and adoptive homes and their sibling relationships, stated that “[t]he sibling relationship exception is but one of a number of measures enacted by the Legislature to address the significant relationships which exist between dependent children and their siblings, as well as other important family ties.”).

226. See supra note 33.

227. See supra notes 35–36 and accompanying text.

228. Appell, supra note 184, at 1048–49 (expounding on the need for courts to take a “more active role” in balancing all of the many, and potentially conflicting, interests.); see also Nathan, supra note 98, at 663-64 (proposing changes to adoption statutes that include encouraging courts to consider existing relationships).

229. Silverstein & Smith, supra note 162, at 125 (concluding that “[s]eparation of siblings in the initial foster placement creates ongoing obstacles to the youngsters’ ever being reunited” and recommending that “every effort be made to keep sibling groups together at initial placement or very soon after”); Ward, supra note 144, at 323 (explaining that the decision to separate or keep siblings together “must be of concern
greatly, the need to address the sibling relationship at the later stages—at the point of termination of parental rights or adoption—as the children would more likely be together in the same home. While there are clear federal and state mandates directing child welfare agencies to place children together if at all possible, reality tells a different story for many foster youth.

Accordingly, in the situation where children who are the subject of a termination of parental rights proceeding and are going to be adopted by a family without some or all of their siblings, the court needs to be able to address whether some action must be taken to maintain those sibling relationships. This would encompass the situation where all of the chil-

from the time at which they enter care.”). An analogy can be drawn to the federal mandate of concurrent planning, which begins at the initial hearing and continues until parental rights are terminated. Concurrent planning is a state’s obligation to pursue reunification between a child and his or her birth family, but also to focus and make efforts toward another permanency plan, should reunification not be feasible. See 42 U.S.C § 675(1)(B) (2006). The same requirements can and should be made for siblings not placed together. Such a mandate would elevate the maintenance of the sibling relationship to the same significance as efforts toward reunification with birth parents and the identification of alternative permanent placements, if returning home is not possible. Another way to consider this obligation is to broaden the definition of “permanency” to include the need to maintain the children’s relationships with one another. See supra notes 22, 183.

230. A few states already have such statutory provisions. In California, “[i]f siblings are not placed together in the same home, the social worker shall explain why the siblings are not placed together and what efforts he or she is making to place the siblings together” or why those efforts are not appropriate. CAL. WELF. & INST. CODE § 16002(b) (West 2010). In Iowa, if children cannot be placed in the same placement together, the department or other agency shall provide the siblings with the reasons why and the efforts being made to facilitate such placement, or why making efforts for such placement is not appropriate. Unless visitation or ongoing interaction with siblings is suspended or terminated by the court, the department or agency shall make reasonable effort to provide for frequent visitation or other ongoing interaction between the child and the child’s siblings from the time of the child’s out-of-home placement until the child returns home or is in a permanent placement. IOWA CODE § 232.108 (2007); see also Herrick & Piccus, supra note 27, at 40 (recommending that court hearings be held to review sibling placement and visitation and that child welfare agencies be made to document their efforts to place siblings together, or if not so placed, to document efforts toward frequent and meaningful visitation); Ward, supra note 144, at 323 (maintaining that “[s]eparations that occur during foster or institutional care are often perpetuated in adoption planning”).

231. A difficult question to answer is whether a model statute should be applicable only to children who are the subject of termination of parental rights proceeding and/or who are before the juvenile or family court concerning a child welfare matter, or whether it should extend to those situations where some of the siblings and/or their
dren in the sibling group are being adopted from the foster care system, but not all to the same adoptive home, such as in the case of Jason and John in the hypothetical at the beginning of this article. But it also could include those circumstances where one or more of the children are being adopted from the foster care system and other siblings are not, as is the case with Jessica in the same hypothetical.\textsuperscript{232} For the court to have such authority, significant reform of our adoption laws is necessary, as is discussed by the following model provisions.

\textbf{A. Jurisdiction}

Any new statutory scheme must ensure that consideration of the sibling relationship first occurs during a termination of parental rights proceeding (likely at the end) if rights are terminated; and then again at any adoption hearings, which typically happen later at separate proceedings.\textsuperscript{233} Specifically, a model statute would first vest the court presiding over the termination of parental rights trial with the authority to order caregivers are not under the jurisdiction of the court, either because they have been adopted, are not yet born, live with other relatives, are now adults, or because they were never removed from the biological parent or parents. In those instances, the answer will depend on whether the siblings with whom contact is sought, and to a lesser extent their caregivers (if the sibling is a minor), are under the jurisdiction of the court. Most courts are unwilling to order contact of children not under its jurisdiction, and such a reach is more difficult to justify. See \textit{In re Miguel A.}, 67 Cal. Rptr. 3d 307 (Cal. Ct. App. 2007) (holding that the juvenile court no longer had authority over Miguel’s brother because the adoption of the brother already was finalized); \textit{In re D.W.}, 542 N.W.2d 407 (Neb. 1996) (finding that the juvenile court did not have the power to order visits between D.W. and his younger sister because even though the parents were under the court’s jurisdiction the sister was not); \textit{In re M.J.L.}, 96 P.3d 996 (Wash. Ct. App. 2004) (concluding that the court lacked authority to order sibling visitation between two sisters where one of the sisters and the father of the sister were not under the court’s jurisdiction). \textit{But see In re Tamara R.}, 764 A.2d 844 (Md. Ct. Spec. App. 2000) (holding that the family court had jurisdiction to award sibling visitation even though the child’s sibling and half-sibling were not under the jurisdiction of the court, nor was the mother of the half-sibling).

\textsuperscript{232} Such a result also would be consistent with Fostering Connections, which clearly instructs the states to arrange for visitation for all children while they are in the custody of the state. 42 U.S.C.A. § 671(31)(B) (West 2010).

\textsuperscript{233} However, at no point should the decision of whether to terminate parental rights be tied to decisions about sibling placement or contact post-termination or post-adoption. See Patton, supra note 8, at 65 (cautioning that decisions concerning whether to terminate parental rights should not be linked to consideration of sibling placement or contact post-termination or post-adoption). As stated previously, California does exactly what Professor Patton cautions against. See \textsc{Cal. Welf. & Inst. Code} § 366.26(c)(1)(B)(v) (West 2010) (prohibiting the termination of parental rights if there would be substantial interference with the sibling relationship).
that the sibling relationship be maintained, either by ordering that the
children before the court be placed together in an adoptive home if they
are not already in prospective adoptive homes, and/or by ordering that
contact between all siblings, before the juvenile or family court in some
capacity, be maintained post-termination and post-adoption.\footnote{234}

The court presiding over the termination of parental rights matter is
in the best position to assess the sibling relationship and the totality of the
circumstances because, in the process of the termination of parental
rights trial, evidence would have been presented concerning the underly-
ing abuse and neglect, the needs of the children, the situation involving
the biological parents and family, and the long-term plans for the chil-
dren. All of these factors, among others, would have been considered by
the court in determining whether it was in the children’s best interest to
even terminate parental rights.

Next, the court in the adoption proceeding must be directed to
honor such orders, or at least the spirit of orders, unless provided with
current and new evidence to the contrary.\footnote{235} This second step is necessary

\footnote{234. Requiring that the court address the sibling relationship at the termination
of parental rights and adoption proceedings also resolves some of the concerns, which
have been voiced, about whether a court has jurisdiction, and whether a child has
standing, to raise these issues. See Williams, supra note 132, at 291–93. It also elimi-
nates the logistical questions as to how a child would otherwise be able to bring these
concerns before the court. At termination of parental rights and adoption proceed-
ings, the court already maintains jurisdiction over the children who are the subject of
the given proceeding. See also Marrus, supra note 62, at 348–49 (maintaining that
decisions about sibling placement and visitation should always be addressed by the
court); Appell, supra note 190, at 30.}

\footnote{235. Such a recommendation was first made in 1983 by Amadio and Deutsch:
[L]egislation . . . should provide a means to deal with any conflict that might
arise in the decision of the two courts. Legislation should provide . . . that
once the court hearing the petition for termination of parental rights has ap-
proved the agreement, absent new evidence demonstrating that the agree-
ment is contrary to the best interests of the child, the court hearing the
adoption petitions should be required to incorporate the agreement into the
decree of adoption.}

Amadio & Deutsch, supra note 194, at 87 (internal citations omitted). There is prece-
dence for one court having to honor orders from separate proceedings, and poten-
tially a different judge. For example, when custodial decisions are made, courts will
look to see if earlier custodial decisions had been made, and if so, to whom. In fact,
under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a
court in one state must honor a child-custody decision of another jurisdiction. Section
202 (1997). Similarly, prior child support and domestic violence restraining orders
must be honored, unless there are sufficient reasons provided for modification. See
because, in most jurisdictions, adoption proceedings often occur later and are entirely separate hearings from the underlying termination of parental rights matter, which freed the child or children up to be adopted. Specifically, the judge presiding over the adoption proceedings should adopt any voluntary agreements developed between the state and the adoptive parents that call for maintaining contact between all of the children who were the subject of the termination of parental rights proceeding and/or who are still in foster care. Arrangements that are voluntary and cooperative have the best chance of being implemented and continuing, and should be encouraged. These agreements would become part of the adoption decree and be enforceable by the court, which should maintain jurisdiction for this sole purpose. If no such agreement was developed, the court would adopt the sibling contact order emanating from the termination of parental rights proceeding, unless evidence is presented suggesting that modifications are needed.

With regard to how detailed orders concerning sibling contact should be, courts should be guided by the best interest factors set forth below, in addition to any geographical and logistical constraints. It also may be necessary to consider establishing a minimum threshold for what constitutes contact. For example, in some instances it may be necessary to set forth a regular schedule of face-to-face contact, while in other situations a more fluid approach combining phone calls, e-mails, and actual in-

236. See Appell, supra note 184, at 1043–45 (explaining how “even if a court terminating parental rights sanctioned a postadoption visitation plan, the adoption court need not reflect that ruling or plan in its decree”).

237. See supra Part III. It might be worth considering the use of trained mediators. Mediation may encourage understanding and be a less threatening venue for approaching such emotionally charged issues. Appell, supra note 190, at 35; see also McGough & Peltier-Falahahwazi, supra note 186, at 72–74 (proposing a model statute for the adoption of children under two, and mandating mediation for birth parents and adopting parents who are interested in exploring post-adoption contact arrangements or where there are enforcement issues after a post-adoption contact order has been entered).

238. See Amadio & Deutsch, supra note 194, at 88 (recommending that the court finalizing an adoption, where there has been an open-adoption agreement, should retain jurisdiction so that the court is available to resolve any disputes or the need to make modifications to the agreement) and McGough & Peltier-Falahahwazi, supra note 186, at 89 (proposing a model statute for the open adoption of children under two years of age where the court retains jurisdiction “for the purpose of hearing motions brought to enforce or modify” an open adoption agreement). But see Appell, supra note 190, at 35 (discussing the advantages and disadvantages of resting jurisdiction in the court that granted the adoption and the open-adoption agreement).
person meetings would be sufficient.239 Contact does not always have to occur through face-to-face meetings.240 Communication through phone, letters, and even such devices as web cameras also can be meaningful, although it is never a perfect substitute for children actually seeing and engaging with one another. Florida, which allows a court to order post-adoptive sibling contact, specifically addresses such creativity in its enabling statute.241

B. Attorneys for the Children

Counsel should be provided for the children involved in these proceedings.242 Such attorneys are in the best position to understand the importance of the sibling relationship to the children, and can most effectively assert and advocate for the children’s interests in maintaining that relationship.243 Nevertheless, while legal representation of the chil-
dren is best, a statute that instructs courts to always consider the sibling relationship—and permits courts to require some degree of accountability if sibling contact is ordered—will ensure that even in those states where attorneys are not provided, preservation of the sibling relationship will be considered.

C. Guiding Standards

The “best interest” standard should be the guiding criterion for courts considering whether to preserve the sibling relationship. In other words, a party moving to separate siblings into different placements or to terminate sibling contact should have the burden of proving, by clear and convincing evidence, that sibling contact is not in the interest of one or more siblings. While the “best interest” test is the principle associated with most decisions of a juvenile or family court, in this instance, it is important to set forth specific criteria to be addressed in the determination. Possible factors include: (1) the age of the children, (2) the needs of the children, including any special needs, (3) the emotional and psychological needs and stability of the children, (4) the children’s views, (5) the wishes of the adoptive parent(s), (6) opinions of experts, (7) the long-term plans for the children, (8) logistical concerns, and (9) whether the

244. The clear and convincing standard is the well-established standard at termination of parental rights proceedings. Santosky v. Kramer, 455 U.S. 745 (1982) (holding that due process requires a state to meet the clear and convincing standard in termination of parental rights proceedings). In a similar vein, when facing the question of whether to take action to maintain the sibling relationship, the court also is faced with the question of whether to sever important family connections. See Marrus, supra note 62, at 348–49 (arguing for clear and convincing evidentiary standard); see also William Wesley Patton, To Err Is Human, To Forgive, Often Unjust: Harmless Error Analysis in Child Dependency Proceedings, 13 U.C. DAVIS J. JUV. L. & POL’Y 99 (2009) (discussing burdens of proof and distinctions between the clear and convincing evidentiary standard and other standards of review).

245. Developing specific standards is important, because determining whether it is necessary to require that the sibling relationship be maintained may be a difficult and emotionally charged decision, at times turning on incomplete and conflicting information. Halpern, supra note 5, at 4 (describing decisions about the placement and needs of children as requiring “the wisdom of Solomon, the openhearted trust and faith of Big Bird, and perhaps the cunning ability of Wily Coyote (to cut through bureaucratic red tape)”); see also Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEMP. PROBS. 226 (1975) (examining the difficulty of determining which custody decision is in a child’s best interest).
benefits outweigh the risks.\textsuperscript{246} Providing some concrete factors for a court to consider not only helps decision-makers individualize these decisions, but it also helps to avoid situations where a judge is determining what is best for a child based on the judge’s values and life experiences rather than that of a particular child.\textsuperscript{247}

D. Rebuttable Presumption Provision for Established Sibling Relationship

Given the social science research, in addition to setting forth a detailed best interest test, a model statute also should include a provision that presumes the sibling relationship will be maintained whenever it can be shown that foster children have an existing and substantial connection with one another. This presumption should exist for all children currently in foster care or under the jurisdiction of the juvenile or family court in some capacity, so long as none of the children are living with the biological parents,\textsuperscript{248} and any of the following three situations exist: (1) the children were living together before coming into foster care, (2) the children spent a significant amount of time together while in foster care, or (3) there is some other indicia of a significant relationship between the chil-

\textsuperscript{246} See Appell, \textit{supra} note 190, at 35 (explaining the Nebraska statute, which, at the time, outlined the following factors for open adoption contact: child’s attachment, significant relationship, potential for harm, child’s view and attitude, child’s psychological needs, encourage agreements, whether benefits outweigh risks, geographic proximity, whether the children are close in age, whether the children are compatible, special needs of any of the children).

\textsuperscript{247} Appell, \textit{supra} note 190, at 34 (maintaining that best interest standards are indeterminate, and explaining that if there are no factors or values outlining how a court should make its decision, the decision-maker may substitute his or her values regarding what is best for the child, rather than what is best for this particular child); see also Williams, \textit{supra} note 132, at 293–95 (noting that legislators should outline factors for judges to consider).

\textsuperscript{248} Where some of the siblings are still residing with birth parents, any orders of post-adoption contact would be found to be beyond the limited scope of this proposed statute, which exclusively addresses the issue of contact among siblings post-termination and post-adoption. Where post-adoption contact also will involve contact with one or both birth parents, it raises different, and potentially more complex, issues than what is being proposed above. While some of these concerns may exist with regard to the sibling relationship, they likely are not as intense, if they are present at all. Moreover, under the contemplated statute, such concerns could be addressed. Thus, while there is much support in the social science literature for openness in our adoption laws, generally, and specifically between adoptees and birth parents, the statute proposed above calls for openness with regard to the sibling relationship only, and therefore would not be applicable.
This presumption can be rebutted only if there is either credible evidence that there is no significant and meaningful relationship between the children or if there is evidence which illustrates that maintenance of the sibling relationship will cause harm physically, psychologically, or otherwise to any of the children. For example, if there is evidence that one of the children has abused his/her sibling, contact likely should not occur.

While some may find that this rebuttable presumption provision goes too far and oversteps the constitutional rights of the soon-to-be adoptive parents, others may argue that because it does not extend to all sibling relationships, or at least not to all foster sibling relationships, it does not go far enough. Both arguments have some merit. Yet, what the proposed statute attempts to do is to ensure that courts recognize and protect the sibling relationship where it is most important. It presumes that the relationship must continue where research tells us it is absolutely critical. The psychosocial literature stresses the importance of preserving

249. See Herrick & Piccus, supra note 27, at 40 (recommending that there be a “presumption that it is generally in the child’s best interest to be placed with siblings and, when this is not possible to maintain contact”); Marrus, supra note 62, at 349 (calling for statutory preference for siblings to be together at all times absent extraordinary circumstances); Patton, supra note 8, at 65 (opining that after termination of parental rights, the rights of siblings should be viewed as “either a vested constitutional right or as a right with presumptive value.”). The rebuttable presumption is analogous to California’s statutory scheme, which does not permit parental rights to be terminated if there would be substantial interference with the sibling relationship. CAL. WELF. & INST. CODE § 366.26(c)(1)(B)(v) (West 2010). However, the rebuttable presumption approach is better as it does not force a court to choose between permanency and the preservation of the sibling relationship.

250. See infra Part VI.A.

251. See, e.g., Vanderbeek, at 378–79 (arguing that “a biological bond necessitates at least an attempt to cultivate a sibling relationship even where none has existed before”). Moreover, stories abound about siblings who seek out long-lost brothers or sisters, despite never knowing one another. See, e.g., Amar Toor, Long-Lost Brothers Find Each Other on Twitter After 20 Years, SWITCHED (May 20, 2010, 4:20 PM), http://www.switched.com/2010/05/20/long-lost-brothers-find-each-other-on-twitter-after-20-years/ (detailing a story about a young man who sought out his long-lost brother after being informed by his mother that his father had a bunch of other children elsewhere in the world); Amy Wilson, Back from the Dead, SIBLINGS REUNITED (Oct. 26, 2002), http://www.siblingsreunited.com/Ourstory.html (describing a reunion among siblings after the birth mother sold some of the siblings in an adoption); Katie Crosby, Siblings Meet Long-Lost Sister for the First Time, TEXOMA’S HOMEPAGE http://texomas homepage.com/fulltext/?nxd_id=93905- (last visited May 11, 2011) (discussing a reunion between siblings after learning that one of the siblings had been adopted); Paul Post, Lost-Lost Siblings Find Each Other, MORNING SUN (Feb. 4, 2010), http://www.themorningsun.com/articles/2010/02/04/news/srv0000007515098.txt (reporting on adopted siblings who reunited). Children also wonder, worry, and/or fantasize about siblings they never lived with, or even knew. Appell, supra note 184, at 1015–17.
existing relationships, where children have established bonds.\textsuperscript{252} Thus, these are the relationships where the need to maintain contact is greatest, and therefore the circumstance which most tips the scale toward the interests of the children.\textsuperscript{253}

VI. POTENTIAL CONCERNS ABOUT THE PROPOSED MODEL STATUTE

A. Constitutional Ramifications

Questions will most certainly be raised as to whether the proposed statute, especially the rebuttable presumption provision, infringes on the constitutional rights of the prospective adoptive parents. Specifically, there will be concerns as to whether it can withstand the constitutional directives of \textit{Troxel v. Granville}.\textsuperscript{254} Eliminating the rebuttable presumption provision and/or adding a requirement that harm to the children must be established before any order of post-adoption sibling contact is rendered would remedy any concerns about the statute’s constitutionality. Yet, for several reasons, we should not assume that in order to be in line with constitutional principles a “requirement-of-harm” standard must be added, or that the rebuttable presumption provision must be eliminated.

1. Distinguishing from \textit{Troxel}

First, \textit{Troxel} leaves open the question of whether evidence of harm is required, and many states have not imposed such a harsh standard.\textsuperscript{255} Additionally, the proposed statute addresses many of the concerns in \textit{Troxel}, specifically it is not nearly as broad as the Washington State statute,\textsuperscript{256} and it provides “appropriate weight” to a parent’s determination.\textsuperscript{257}

\begin{itemize}
  \item \textsuperscript{252} See \textit{supra} Part III.B.
  \item \textsuperscript{253} Appell, \textit{supra} note 17, at 102 (concluding that “the presence of a substantial relationship between the siblings may provide the necessary precursor” for state intervention, and that the “mere existence of a biological relationship without more, should not be a sufficient ground for court intervention”).
  \item \textsuperscript{254} 530 U.S. 57 (2000). See Patton, \textit{supra} note 8, at 60 (questioning the constitutionality of post-adoption sibling statutes after \textit{Troxel v. Granville}).
  \item \textsuperscript{255} See \textit{supra} notes 65, 69; see also Marrus, \textit{supra} note 65, at 803–804, 811 (proposing a model grandparent visitation statute and opining that harm to the child should not be the prevailing standard in the context of grandparent contact).
  \item \textsuperscript{256} The Washington State statute (1) permitted any person to petition a state court for child visitation rights at any time, and (2) authorized the court to order visitation rights for any person when visitation might serve the best interest of the child. \textit{Wash. Rev. Code} § 26.10.160(3) (2004), found unconstitutional by, \textit{Troxel}, 530 U.S. at 67.
\end{itemize}
For example, the model statute is limited to siblings, and contact is presumed only for siblings with an established relationship. Moreover, the wishes of the adoptive parents and their long-term plans for the children are included in the factors to be considered in determining the children’s best interest. Thus, the number of parties permitted to seek visitation is extremely limited and input is sought from the adopting parents. 258

Furthermore, the factual scenario of *Troxel* is very different from a situation concerning court-ordered visitation between foster siblings post-adoption. *Troxel* concerned a biological parent and a request by paternal grandparents to visit with their grandchildren after their son had committed suicide. 259 This is a far cry from the special (and limited) situation where siblings in foster care are attempting to maintain their relationship, while they reside separately, after their biological parents have been deemed permanently unfit.260

2. When Do Parental Rights Vest and Sibling Relationships Legally End?

Second, under the statutory scheme set-out above, any order sanctioning the maintenance of sibling relations is made prior to the finalization of the adoption, and therefore before the constitutional rights of the adoptive parents have vested.261 In fact, it is made at a point in time when the state is acting as a parent.262 With full knowledge of the mandate, the adoptive parents are free to consent to the adoption or not.

257. See Hon. Sandra Day O’Connor, *Remarks: The Supreme Court and the Family*, 3 U. PA. J. CONST. L. 573, 578 (2001). States are free to provide for nonparental visitation as long as they provide appropriate weight to the parent’s determination of the child’s best interests. In this way, we have given States the necessary space to create structures that promote the best interests of children. It is not the province of the Court to decide as a policy matter how best to allocate responsibility for the rearing of children.

*Id.*

258. Cf. *Troxel*, 530 U.S. at 67–69 (reviewing the statute that the Court ultimately held unconstitutional).

259. *Id.* at 60–63.

260. Patton, *supra* note 8, at 64 (concluding that *Troxel* should not be viewed as prohibiting post-adoption sibling contact); see also Ferraris, *supra* note 118 at 715, 721–25 (arguing that the holding in *Troxel* should not have been the basis for finding a California visitation statute unconstitutional).


262. See Patton, *supra* note 15, at 15 (finding this distinction significant and asserting that a trial court should have jurisdiction to order post-adoption visitation until the adoption has been finalized).
This issue of timing also raises an interesting point as to whether the sibling relationship legally ends when parental rights are terminated. Some take the position that all biological relations are derived from the parent-child relationship. Accordingly, when this relationship is terminated, so are all others. Others have found the sibling relationship to be independent from the parent-child relationship and therefore not altered when parental rights are terminated.

Because the dissolving of the parent-child relationship and the creation of a new parent-child relationship through adoption are statutorily created acts, the answer varies, depending on the state, and to some extent, federal statutory schemes. Some state statutes, and courts interpreting those statutes, cut off all familial ties at the point when parental rights are terminated. Other statutes and courts clearly limit the termination only to the parent-child relationship.

Interestingly, several federal statutory provisions rest on the assumption that the sibling relationship continues, which both supports the theory that the relationship continues post-termination and calls into question the legitimacy of those state statutes which terminate all familial relations when the parent-child relationship is terminated. The first illustration can be found in the fact that the federal government provides fiscal incentives to states which are able to secure adoptive families for sibling groups. Such strong encouragement would not be forthcoming if the relationship no longer existed.

Fostering Connections also makes plain that the obligation of the state to make reasonable efforts to provide “frequent and ongoing” contact between siblings extends to the time when the children are in “adoptive placements.” As explained above, while it is not entirely clear whether these mandates continue once the adoption is finalized, it is in...
disputable that they continue while the child is in an “adoptive placement,” and a placement can only be described as an adoptive placement once parental rights have been terminated.269 In sum, visitation between siblings continues to be mandated post-termination. If the sibling relationship did not withstand the termination of the parental rights, such would not be the case.

3. Private Versus Public Adoptions

These arguments as to timing and choice beget the next and perhaps most important distinction between the statute and principles set forth in Troxel and the proposed statute herein. In short, there is something uniquely different about the parent-child relationship when the child is adopted out of a state-run foster care system, as compared to a private adoption, which is typically of a baby. In the former, in its role as “parent,” the state has been intimately involved in the creation of the adopting parent–adopted child relationship and thus has an obligation to ensure that it is in line with the child’s best interest. This active presence of the state alters the balancing, which always occurs between the rights of parents and the interests of children and the state.270 To what extent the scales are tipped is not certain, but it does leave open the question of whether the rights of the newly adopting parents to complete autonomy and family privacy, without any state involvement, might be diminished. In fact, such rights, while well-established,271 are never absolute.272 But

269. See supra notes 230–36 and accompanying text.

270. See Marrus, supra note 65, at 794 (analyzing U.S. Supreme Court parental right cases and explaining how in each decision, the Court “balanced this parental interest against other interests—of the state, of the child, and of other family members”); McCarthy, supra note 65, at 978–79 (discussing the longstanding “tension” between the “state’s and the child’s interest on the one side and the parents’ interest on the other”); Twila Perry, Justice O’Connor and Children and the Law, 13 WOMEN’S RTS. L. REP. 81, 92 (1991-92) (explaining how “the balances one might strike in one context may not be those one might strike in another”).

271. See Meyer v. Nebraska, 262 U.S. 390 (1923) (declaring unconstitutional a state law that prohibited the teaching of foreign languages to children); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925) (invalidating a state law that required parents to send children to public, as opposed to private or parochial, schools); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Amish parents can be exempt from compulsory school attendance laws).

272. Troxel v. Granville, 530 U.S. 57, 88, 93, 98 (2000); see also Marrus, supra note 65, at 793 (noting that in Troxel, the Court stated that parental rights are not absolute). Over the years, scholars have examined the derivation of a parent’s right to raise one’s child, as well as the question of whether it should be considered a fundamental right. For further treatment of the subject, see McCarthy, supra note 65, at 985–92 (1988) (questioning from where parental rights are derived and suggesting
where children are being adopted from the foster care system, there is even more justification to pause and consider the constitutional dimensions.

When strictly assessing the balance between the adopting parent who refuses to permit ongoing sibling contact and the adopted child who wishes to maintain the sibling relationship, it is not clear that the balance tips toward the child.273 The only times that children’s rights have prevailed over those of their parents is when the children have been found to have constitutional rights themselves.274 As explained above, children have never been found to have a constitutional right, not to mention a fundamental right, to their sibling relations.275 Thus, when considering the

273. The only mention of the children’s interest in *Troxel* was in Justice Stevens’ dissent where he questions whether “there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a ‘person’ other than a parent.” *Troxel*, 530 U.S. at 90 (Stevens, J., dissenting). Justice Stevens also remarked that “the Fourteenth Amendment leaves room for the states to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interest of the child.” *Id.* at 91 (Stevens, J., dissenting). See also *Michael H. v. Gerald D.*, 491 U.S. 110, 118–31 (1989) (A plurality of the Court held that a natural father and child did not have the right to continue their relationship. Specifically, the natural father was not permitted the opportunity to rebut the presumption under California law that the child’s father was the husband of her mother, at the time of birth.).


balance in the post-adoption sibling contact, it is not uncertain whose rights would prevail.

Yet, when the children’s interest in maintaining these critical relationships with one another is considered along with the state’s interest in protecting and ensuring the well-being of children in its care and custody, it is less likely that the balance should tilt toward the parents. The presence of the state as well as the adopting parents’ acceptance of the state’s interventions both alter and diminish the adopting parents’ expectations as to complete autonomy and impose additional obligations on the part of the state. In actuality, the state is present from the onset of the relationship and continues its involvement throughout the child’s entire upbringing. The state is actively involved in recruiting prospective adoptive families, monitoring the placement, and consenting to the adoption. Even after the adoption is finalized, the state continues to have a role to play through the federal adoption subsidy program, the provision of supportive services, and, in some jurisdictions, the monitoring of the child’s well-being through the requirement of ongoing documentation. Thus, from the outset, this state presence alters the adoptive parent’s expectation that their relationship with their adopted child will be free from state interference. In fact, in many ways, the adoptive parent can be viewed as acquiescing to state intervention, when he and/or she agrees to adopt a child from the state and to accept the ongoing support from and obligations imposed by the state.

Moreover, in agreeing to adopt a foster child and accept a subsidy for the child’s care, the adoptive parents also consent to meeting the

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276. See Marrus, supra note 65, at 793 (studying the Troxel decision and concluding that “an analysis of the parental rights cases strongly supports the position that a balancing of interests may, in many cases, result in court coerced grandparent-grandchild visitation”); see also Seifert, supra note 86, at 1476–77 (distinguishing Troxel from the issue of post-adoption sibling contact of foster children, and finding that the sibling situation constitutes the “special circumstances” referred to in Troxel).

277. See infra notes 292–293.

278. See infra note 294.

279. As the court in Lofton v. Secretary of the Department of Children and Family Services, stated, “[a] person who seeks to adopt is asking the state to conduct an examination into his or her background and to make a determination as to the best interests of a child in need of adoption,” 358 F.3d 804, 811 (11th Cir. 2004). “In doing so, the state’s overriding interest is not providing individuals the opportunity to become parents, but rather identifying those individuals whom it deems most capable of parenting adoptive children and providing them with a secure family environment.” Id. Because of this distinction, a state “can make classifications for adoption purposes that would be constitutionally suspect in many other arenas.” Id. at 810.
needs of the particular child—whatever those needs may be. For children in foster care, who typically are not infants, a great deal is known about their needs and the adoptive parents are provided with this information prior to accepting the child into their home and their lives. Many foster children have specialized needs, in part due to the trauma they may have suffered and the neglectful and impoverished home environments they may have endured. For example, many require specialized medical care or specific mental health services. A holistic understanding of the needs of children, especially foster children, could and should encompass the need to maintain important relationships, such as their sibling connections.

As is explained above, for children in foster care, the state, as parent, has the parens patriae responsibility to ensure for their well-being. In this role, a state would never approve an adoptive relationship where the prospective adoptive parents did not agree to meet a child’s medical or developmental needs. Why then is it acceptable to approve a situation where an adoptive parent refuses to maintain the sibling relationship, when such a relationship has been documented as being emotionally, and even psychologically, important to the child’s well-being?

The special presence of the state in the adoption of foster children also was seen in Lofton v. Secretary of the Department of Children and Family Services, where the Eleventh Circuit upheld Florida’s preference for marital adoptive families and its refusal to allow homosexual foster parents and guardians to adopt children. The court specifically noted that “[i]n formulating its adoption policies and procedures, the State of Florida acts in the protective and provisional role of in loco parentis for those children who, because of various circumstances, have become

280. In order to receive an adoption subsidy payment, the adopting parents sign an agreement with the state, acknowledging that they have been apprised of the child’s history and needs, and that they agree to meet these needs. See 42 U.S.C.A. § 673 (West 2008). In fact, the adoption subsidy is based upon the needs of the child. A child with increased special needs will receive a higher subsidy payment. See id.
281. See United Cerebral Palsy and Children’s Rights, Inc., Forgotten Children: A Case for Action for Children and Youth with Disabilities in Foster Care 3 (2006) (citing studies that find that “at least one-third of the children in foster care] have disabilities, ranging from minor developmental delays to significant mental and physical disabilities”).
282. Id.
283. See supra Part II.B. In fact, two different branches of government are required to sanction the adoption of foster children. Specifically, the state child welfare agency consents to the adoption. The matter is then reviewed by the courts, another arm of the state, to determine if it is in the child’s or children’s best interest.
284. Lofton, 358 F.3d at 827.
wards of the state.”285 While Lofton raised serious questions about whether regulations banning adoption by gay and lesbian parents are merited and evidence-based, and has since been effectively overturned on that issue,286 its reassertion of the principle that the state has a role to play in determining who should adopt foster children—and the parameters that should be placed on this unique adoptive parent-adoptive child relationship—is important. In sum, parental rights, like all fundamental rights, are not absolute, and given the uniqueness of the relationship between an adopting parent and a child adopted from the foster care system, there may be even more room to question whether a strict reliance on parental rights is appropriate.

B. Enforcement

Questions of whether and how court-ordered contact can be enforced also must be addressed, given the inability of children to bring matters of noncompliance to the attention of the court.287 One is left to

285. Id. at 809; see also In re Opinion of the Justices, 530 A.2d 21, 25 (N.H. 1987) (“In foster care and adoption cases the State by law has either the exclusive, or a highly significant, responsibility to choose what is best for the child.”).

286. In fact, until October 2010, Florida was the only remaining state to expressly ban all gay adoptions without exception. However, after the appellate decision in Florida Department of Children and Families v. In re Adoption of X.X.G. and N.R.G., 45 So. 3d 79, 91–92 (Fla. Dist. Ct. App. 2010), which affirmed a trial court ruling permitting a single gay father to adopt two children and finding no rational basis for banning all adoptions by lesbian or gay parents, without any exceptions and case-by-case review, the Governor of Florida and Attorney General of Florida declared that they would not appeal the decision, effectively ending the ban on gay adoptions in Florida. Mary Ellen Klas, Bill McCollum Drops Gay Adoption Case, So Florida's Ban Is No More, TAMPABAY.COM, http://www.tampabay.com/news/politics/stateroundup/bill-mccollum-drops-gay-adoption-case-so-floridas-ban-is-no-more/1129752 (last modified Oct. 22, 2010, 8:45 PM); Tanya Roth, No Appeal: Florida Gay Adoption Ban Is Over, FINDLAW (Oct. 26, 2010, 1:33 PM), http://blogs.findlaw.com/law_and_life/2010/10/no-appeal-florida-gay-adoption-ban-is-over.html; see also Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010) (concluding that there is no rational basis for denying a marriage license to lesbians and gay men, and holding Proposition 8 in California unconstitutional). For critiques, which raise serious concerns about the Lofton ban on gay and lesbian individuals being permitted to adopt, see Barbara Bennett Woodhouse, Waiting for Loving: The Child’s Fundamental Right to Adoption, 34 CAP. U. L. REV. 297 (2005) and Mark Strasser, Lawrence, Lofton, Reasoned Judgment: On Who Can Adopt and Why, 18 ST. THOMAS L. REV. 473 (2006).

287. Even some of the fee-shifting mechanisms, mentioned above, will therefore not be effective. See supra note 221. Although, if a child could bring his/her issue to the attention of the court, the court could appoint counsel, making the fee-shifting mechanism more applicable. However, it is unlikely that most children will be able to get the matter before the appropriate court.
contemplate what can be done to mandate, or even encourage, compliance. Scholars contend that statutes that specifically provide for enforcement mechanisms, even if they never permit an infringement of the ultimate adoption, lead to significantly more compliance than when the authorizing statute does not contain enforcement language.288 The authority of the family court to retain jurisdiction should also be considered, so that a new action need not be filed.289 Further, statutes that provide for both modification and enforcement together, with the specific grounds that must be pled for each, can lead to increased compliance.290 Such specificity enables the parties to have an understanding as to the standards a reviewing court will apply. In addition, the ability to modify prior agreements or court orders also provides a remedy, other than noncompliance, for a situation that has become unworkable.291

Finally, given the difficulty of children filing court actions on their own, it may be worth considering whether adoptive parents can be required to report annually on the contact that has occurred between the siblings over the past year. Where persons are required to account for their actions, compliance is improved. In the case of foster sibling contact, such a requirement could be viewed as part of the adoption subsidy arrangement that is negotiated and agreed to between the adoptive parent(s) and the state prior to the adoption of the foster child. For most children adopted from the foster care system, the state, with the assistance of federal funds, provides a financial stipend and health insurance (Medicaid) for the care of the adopted child.292 As part of this arrange-

288. Appell, supra note 190, at 35 (“The most important factor in reducing the risk of litigation is a specific statute which clearly provides that agreements are enforceable, the standards for modification, and the procedure for accessing the judicial system.”); see also McGough & Peltier-Falahhwazi, supra note 186, at 86–89.

289. See supra note 238.

290. Appell, supra note 190, at 36.

291. Id. (explaining the importance of having a modification provision with specific grounds and recommending that any modification be based upon changed circumstances).

292. 42 U.S.C.A. § 673(a)(1)–(3), (b) (West 2010). As a means of encouraging the adoption of foster children, the federal government subsidizes almost all of the adoptions of foster children through the adoption subsidy program, which provides ongoing financial assistance to families who adopt a child with “special needs” from the foster care system. 42 U.S.C.A. § 673. “Special needs” is defined as any child of color and any child over the age of two years. Id. Thus, most adoptions of children out of the foster care system qualify for the adoption subsidy program. See Barbara Dalberth et al., RTI International, Understanding Adoption Subsidies: An Analysis of AFCARS Data 3–10 (2005), available at http://aspe.hhs.gov/hsp/05/adoption-subsidies/report.pdf (finding that nationally, 88 percent of children adopted in fiscal year 2001 received an adoption subsidy). What this means is that the adoptive
ment, the adoptive parent agrees to provide for the well-being of the child, including any and all known special needs of the child.293

In some jurisdictions, the adoptive parent is also required to provide some indicia of this care in the form of medical and/or school records.294 If one views the preservation of the sibling relationship as a need of a child, it becomes reasonable to require some documentation that this need is being met. With little administrative cost, an agency representative or court clerk can be charged with reviewing this documentation, alongside the corresponding court orders. If there is not substantial compliance, a court hearing can be scheduled, thus resolving the problem of how these violations would come to the attention of the court when the contact that has been ordered is not taking place.

C. No “Chilling Effect”

A final concern that is often raised about open adoptions of foster children is that it will have a “chilling effect” on the number of families who will choose to be foster and/or adoptive parents.295 Yet, there is no evidence, other than anecdotal evidence, to support such concerns. In fact, the vast majority of foster and adoptive parents are supportive of maintaining sibling relationships, given the importance of these relation-

parent(s) will receive health insurance, a monthly stipend (usually the equivalent of what the adoptive parent received as a foster parent), and the ability to access supportive services until the child is eighteen years of age (may be as high as twenty-one, depending on the state) or graduates from high school. See N. AM. COUNCIL ON ADOPTABLE CHILDREN, THE VALUE OF ADOPTION SUBSIDIES: HELPING CHILDREN FIND PERMANENT FAMILIES (2008), available at http://www.nacac.org/adoptionsubsidy/valueofsubsidies.pdf.

293. In fact, the adoption subsidy stipend will vary depending on the needs of the child. SPECIALIZED RATES ARE BASED ON THE EXTRAORDINARY NEEDS OF THE CHILD, AND/OR THE ADDITIONAL PARENTING SKILL NEEDED TO RAISE THE CHILD. See 42 U.S.C.A. § 673(a)(3). For information on each state’s adoption subsidy policies and subsidy amounts, see State Adoption Subsidy Profiles, N. AM. COUNCIL ON ADOPTABLE CHILD., http://www.nacac.org/adoptionsubsidy/stateprofiles.html (last visited May 11, 2011).

294. For example, in Maryland, eligibility for subsidized adoption is reviewed annually. Maryland State Subsidy Profile, N. AM. COUNCIL ON ADOPTABLE CHILD., http://www.nacac.org/adoptionsubsidy/stateprofiles/maryland.html (last updated Mar. 2007). This is accomplished by having the family file a reapplication form annually. Id. In Colorado, a redetermination of eligibility for the adoption subsidy is required every three years. Colorado State Subsidy Profile, N. AM. COUNCIL ON ADOPTABLE CHILD., http://www.nacac.org/adoptionsubsidy/stateprofiles/colorado.html (last updated Mar. 2006). For a complete discussion of whether, when, and how adoption subsidy agreements must be reviewed in each of the states, see State Adoption Subsidy Profile, supra note 293.

295. See supra note 224.
ships, as well as the laws and policies strongly encouraging, if not mandating, the preservation of sibling ties. 296 Moreover, to the extent that the need to facilitate sibling contact dissuades a few families from becoming foster or adoptive parents, it may be a tradeoff worth making. 297

In addition, there are steps that can be taken by child welfare agencies to enhance the understanding and to reduce the stress of prospective adoptive parents. First, educational programs for the adoptive parents are essential. 298 Many prospective parents understandably feel threatened by any links to the children’s past, especially their biological families. As a result, they may need assistance in understanding that, for the children, such memories of the past remain, and that by preserving at least some of

296. See In re D.C., 4 A3d 1004, 1022 (N.J. 2010) (concluding that “the desire to become a parent has deep emotional roots and it seems doubtful to us that families who have committed to adoption would simply drop out of the queue due to the possibility of non-harmful sibling visitation”).

297. Appell, supra note 184, at 1057–58 (speculating about whether prospective adoptive parents who are “discouraged by openness” should adopt children in the first place).

298. See id. California mandates the education of prospective adoptive parents on the importance of maintaining the sibling relationship and ways in which it can be maintained.

If parental rights are terminated and the court orders a dependent child to be placed for adoption, the licensed county adoption agency or the State Department of Social Services shall take all of the following steps to facilitate ongoing sibling contact, except in those cases provided in subdivision (b) where the court determines by a preponderance of the evidence that sibling interaction is detrimental to the child: (1) Include in training provided to prospective adoptive parents information about the importance of sibling relationships to the adopted child and counseling on methods for maintaining sibling relationships. (2) Provide prospective adoptive parents with information about siblings of the child, except the address where the siblings of the child reside. However, this address may be disclosed by court order for good cause shown. (3) Encourage prospective adoptive parents to plan for facilitating post-adoption contact between the child who is the subject of a petition for adoption and any siblings of this child.

CAL. WELF. & INST. CODE § 16002(e) (West 2010). Likewise, in Iowa, if an order is entered terminating the parental rights of a foster child, the child welfare agency shall do all of the following to facilitate frequent visitation or ongoing interaction between siblings:

a. Include in the training provided to prospective adoptive parents information regarding the importance of sibling relationships to an adopted child and counseling methods for maintaining sibling relationships. B. Provide prospective adoptive parents with information regarding the child’s siblings. The address of a sibling’s residence shall not be disclosed in the information unless authorized by court order for good cause shown. c. Encourage prospective adoptive parents to plan for facilitating post-adoption contact between the child and the child’s siblings.

these important relationships, they are actually enhancing the chances that their soon-to-be children will lead emotionally healthier, happier, and more stable lives.299 “Permitting children to maintain contact after adoption can satisfy their dual needs for birth connections and long-term stability. It also obviates the predicament of placing a child in the untenable position of choosing between families.”300

Prospective families can be creative about what contact means and how it can be undertaken.301 Further, adoptive families can receive financial assistance to help defray the costs of contact and visitation, through the adoption subsidy program.302 In other words, just as the agency provides increased subsidies to children with special medical or mental health needs, it can provide additional funds to cover expenses associated with preserving the sibling relationship. This assistance could compensate for the cost of airplane tickets, telephone calls, web camera equipment, or the like.

Finally, it bears repeating that the enactment of statutory provisions, such as the ones proposed herein, does not mean that post-adoption sibling contact will be ordered in every case where siblings are adopted by different families.303 What is mandated is increased attention to the sibling relationship, and it is hoped that this new awareness will permeate the entire child protection proceeding, thus reducing the number of sibling groups that are separated in the first place. The model statute is built around prioritizing the preservation of those sibling relationships where children already have connections. For all others, a best interest determination will be made, based on the consideration of a myriad of factors, including the needs and interests of the adoptive parents. The inclusion of the adoptive parents in the process, through voluntary agreements and mediation, is also encouraged. This will ensure that their voices and concerns can be heard.

CONCLUSION

The new laws proposed herein are not only consistent with the most recent psychosocial research, but also the latest thinking in legal scholar-
ship, where scholars seek to expand the way in which our courts and laws
define family, as well as recognize and provide legal protection to impor-
tant relationships that exist between children and family members other
than parents.304 As the plurality in Troxel acknowledged, “[t]he composi-
tion of families varies greatly from household to household.”305 In short,
there is no “average American family.”306 Some children are raised by
two parents, of either the same or different genders. Others are raised by
only one parent, while still others are cared for by someone other than
their biological parent. Because of these differences, defining the signifi-
cant familial ties of a particular child can be quite difficult.

For many children, their relationships with their brothers and/or sis-
ters may be critical. This may be especially true for foster children who
have suffered through many losses and traumas, and who, in the process,
may have lost many important familial connections. Thankfully, our laws
have begun to recognize these essential bonds. A review of the statutory
landscape reveals that Congress, as well as an increasing number of state
legislatures, is finally beginning to emphasize the importance of the sib-
ling relationship and the need to take steps to maintain these critical
ties.307 The passage of Fostering Connections, with its strong language,
along with the enactment of new statutes in some states, is a positive indi-
cator of these much-needed statutory developments.

Yet, what has not been occurring as steadily is reform of our state
adoption laws. Without these additional changes, these important sibling
relationships may cease once some or all of the children are adopted. The
current laws on sibling contact pre-adoption exist because it is clear, in
many instances, that the breaking of sibling bonds is detrimental to the
well-being of the children. It is illogical to then conclude that suddenly, at
the point of adoption, all of the sound reasoning behind these policies is
void, due to the rights of potential adoptive parents.

A social worker, writing over fifty years ago, likened the adoption of
a non-infant, verbal child, to a “marriage,” where individuals, “already
equipped with consciousness, memories, patterns of thought and reaction,
and large stores of life experiences, link their lives together.308 Such an analogy is especially apt for the adoption of foster children. It certainly is more appropriate than a birth or re-birth, which is what our closed adoptions laws seek to recreate. While adoptive parents may speak of “fresh starts” and “new beginnings,” in actuality, the finalization of an adoption does not (and should not) change much for the child with respect to her past and current functioning, nor does it extinguish the emotional connections upon which she relies.309 The child still has the same memories of the past and may still think about and rely upon the same siblings for emotional support. In the child’s mind, these siblings are no less her brother or sister today, than they were yesterday. As the Supreme Court of New Jersey recently declared:

> [P]ersons who adopt older children obviously understand that the adoptee is not an empty slate. Like all of us, the child is the agglomeration of all the relationships and happenstances, good or bad, of his or her lifetime. There is simply no use in pretending that a deep bond between siblings who have been adopted does not exist.310

308. Velma Bell, Special Considerations in the Adoption of the Older Child, 40 SOC. CASEWORK 327, 329 (1959).

309. SILBER & DORNER, supra note 187, at 168–69 (explaining that “it is unrealistic to expect a child of age 3 or 10 to simply ‘forget’ his birthparents and to pretend he was ‘born’ on the day of his adoptive placement”).

Sibling Bill of Rights
Approved by NEYC & NEACWCD January 2012

Preamble: The New England Association of Child Welfare Commissioners and Directors recognizes the importance and value of sibling relationships. These rights are intended to guide the New England Child Welfare agencies and their providers in the delivery of care and services to foster youth with the commitment to permanency, safety and well being. This Bill of Rights was developed by the New England Youth Coalition with the support of this Association.

Whereas: the importance of sibling relationships are recognized and respected; Whereas: sibling relationships provide needed continuity and stability during a child’s placement; Whereas: the sibling bond is unique and separate from the parent-child bond, and may include relations with people not linked by blood; Whereas: siblings share similar history, heritage, culture and often biology that must be preserved; Whereas: sibling separation is a significant and distinct loss that must be repaired by frequent and regular contact; Whereas: every foster child deserves the right to know and be actively involved in his/her siblings’ lives absent extraordinary circumstances.

Every foster child:

1. Shall be placed with siblings.
2. Shall be in close proximity to siblings if unable to be in same setting to facilitate frequent and meaningful contact.
3. Shall be afforded contact with siblings regardless of geographic barriers. The methods for contact should be outlined in the child’s service plan.
4. Shall be actively involved in his/her siblings’ lives and share celebrations including birthdays, holidays, graduations, and meaningful milestones.
5. Shall maintain consistent and regular contact that will be included in service planning.
6. Shall be included in permanency planning decisions relative to his/her siblings. Foster children should know what the expectations are for continued contact when a sibling is adopted or guardianed.
7. Shall be notified by the Child Welfare agency or its agents regarding a sibling’s change of placement.
8. Shall be informed when a sibling is discharged from foster care. Alumni shall be allowed to maintain contact with a sibling who remains in state care.
9. Shall be supported by the Child Welfare agency in his/her efforts to maintain relationships with siblings who are not in care or have been adopted or guardianed. The Department shall facilitate such contact as appropriate.
10. Shall have predictable, regular contact with siblings that shall not be withheld as a behavioral consequence absent safety concerns.

By signing this document, we affirm the rights of siblings in foster care as articulated above and pledge ourselves and our organizations will uphold and promote the Sibling Bill of Rights.

__________________________________________  _________________________________________
Joshua Calcia, Youth Leadership Advisory Team  Date

__________________________________________  _________________________________________
Daniel Despard, DHHS Office of Child & Family Services  Date