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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.”¹

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.² 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

* Clinical Professor of Law, Rutgers University School of Law–Newark, and Director of the Rutgers Child Advocacy Clinic. The author is extremely grateful to her colleagues at Rutgers for their thoughtful and valuable feedback, as part of the Rutgers colloquium series in April 2009. In addition, special thanks go to William Wesley Patton and Stuart Deutsch for their willingness to read and comment on prior drafts. Sincere appreciation is also extended to research assistants Andres Acebo, Nicole Bernard-Povio, Tamekia Hosang, Ana Murteira, Lisa Marie Regan, and Alisa Thatcher. This article is dedicated to the many foster children with whom, and on behalf of, this author has worked over the last twenty-five years, and who have shown her, in a myriad of ways, how important and special their brothers and sisters are to them.

1. L. v. G., 497 A.2d 215, 222 (N.J. Super. Ct. Ch. Div. 1985).

2. This narrative is a compilation of several cases in which the author has been involved. For one specific case on the issue of post-adoption sibling visitation in which the author was involved, see N.J. Div. of Youth and Family Servs. v. N.J., 990 A.2d 712 (N.J. Super. Ct. App. Div. 2010), *rev'd*, N.J. Div. of Youth and Family Servs. v. D.R., 6 A.3d 440 (N.J. 2010), *remanded to* N.J. Div. of Youth and Family Servs. v. N.J., No. A-3598-08T4, 2011 N.J. Super. Unpub. LEXIS 309 (N.J. Super. Ct. App. Div. Feb. 10, 2011).

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.³ 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.⁴ 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.⁵ 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.⁶ 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.⁷

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.*

6. STEPHEN P. BANK & MICHAEL D. KAHN, *THE SIBLING BOND* 310 (1982).

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.⁸ 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.⁹ 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.¹⁰ 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.¹¹

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.

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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.*

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11. See *infra* notes 217–221.

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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?¹² 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?¹³

Courts and child protection agencies grapple with these difficult questions and uneasy balances every day.¹⁴ 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.¹⁵ 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.¹⁶ At the core of the problem is the “question of how to reconcile strong reservations against state

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).

13. See MARY E. COOGAN, ASSOCIATION FOR CHILDREN OF NEW JERSEY, SPECIAL REPORT: POST-ADOPTION SIBLING CONTACT: SOME ISSUES TO CONSIDER 5–6 (2006), available at <http://www.acnj.org/admin.asp?uri=2081&action=15&di=863&ext=pdf&view=yes> and *Adoption of Vito*, 728 N.E.2d 292, 303 (2000).

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”).

16. See, e.g., N.J. Div. of Youth and Family Servs. v. N.J., 990 A.2d 712 (refusing initially to court order post-adoption sibling visitation) (N.J. Super. Ct. App. Div. 2010), *rev’d*, N.J. Div. of Youth and Family Servs. v. D.R., 6 A.3d 440 (N.J. 2010), *remanded to* N.J. Div. of Youth and Family Servs. v. N.J., No. A-3598-08T4, 2011 N.J. Super. Unpub. LEXIS 309 (N.J. Super. Ct. App. Div. Feb. 10, 2011).

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

17. Annette R. Appell, *Court-Ordered Third Party Visitation and Family Autonomy*, 3 ADOPTION Q. 93, 96–97 (2000).

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.*

19. See U.S. DEPT. OF HEALTH AND HUMAN SERVS., CHILD’S FINALIZATION AGE (GROUPED) OCTOBER 1, 2005 TO SEPTEMBER 30, 2006, available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/statistics/final_tbl3_2006.htm.

20. Rebecca L. Hegar, *Sibling Issues in Child Welfare Practice in CHILD WELFARE FOR THE 21ST CENTURY*, 536, 537 (Gerald Mallon & Peg McCart Hess eds., 2005). Thirty percent are sibling groups of four or more. Victor Groza et al., *Siblings and Out-of-Home Placement: Best Practices*, 84 FAMS. IN SOC’Y: J. CONTEMP. HUM. SERVS. 480, 483 (2003) (citing Gloria Hochman et al., *The Sibling Bond: Its Importance in Foster Care and Adoptive Placement*, ADOPTION.COM, <http://library.adoption.com/articles/the-sibling-bond-its-importance-in-foster-care-and-adoptive-placement.html> (last updated Dec. 28, 2003)).

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,

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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.”²² 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.²³ 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.²⁴ Those steeped in the study of adoption and adoption

or where at least one of the siblings has special needs. Rebecca L. Hegar, *Sibling Placement in Foster Care and Adoption: An Overview of International Research*, 27 CHILD. AND YOUTH SERVS. REV. 717, 726–28 (2005) (summarizing several recent studies).

22. For example, the National Foster Care Coalition defines “permanence” as “an enduring family relationship that: is safe and meant to last a lifetime; offers the legal rights and social status of full family membership; provides for physical, emotional, social, cognitive, and spiritual well-being[;] and assures lifelong connections to extended family, siblings, and other significant adults, and to family history and traditions, race and ethnic heritage, culture, religion, and language.” *Defining Families for Life and Family Permanence*, NAT’L FOSTER CARE COAL., <http://www.nationalfostercare.org/facts/definingpermanence.php> (last visited May 4, 2011) (quoting LAUREN L. FREY ET AL., ANNIE E. CASEY FOUND., A CALL TO ACTION: AN INTEGRATED APPROACH TO YOUTH PERMANENCE AND PREPARATION FOR ADULTHOOD 3 (2007), available at http://www.nationalfostercare.org/pdfs/AECFCFS_Call_to_Action.pdf). Recognizing that permanency is different for everyone, foster youth, who are members of the National Foster Youth Advisory Council, were questioned in May 2005 as to what permanency means to them. *Ensuring Permanency for Young People in the Foster Care System: National Foster Youth Advisory Council*, CHILD WELFARE LEAGUE OF AMERICA 1, <http://www.cwla.org/programs/positiveyouth/nfyacstatementspermanency.pdf> (last visited May 4, 2011). The top six of ten conclusions drawn from the responses were as follows: “[n]o young person should age out of the foster care system without life-long connections[;] . . . [n]o foster youth should leave foster care without a place to call home[;] . . . [n]o young person should age out of foster care without supports that extend beyond the time of discharge[;] . . . [n]o foster youth should ever feel that they don’t have a helping hand[;] . . . [n]o foster youth should be left to depend on themselves without access to resources or supports[;] . . . [n]o foster youth should leave foster care ill prepared to connect with their biological family . . .” *Id.* at 3–4.

23. See *infra* Part III.

24. For example, there is a line of thinking that examines how family is defined and how caregiving responsibilities are “actually performed,” and which seeks to provide some legal recognition to those important persons and caregivers in a child’s life who are not necessarily the child’s parents. A full exploration of this scholarship is

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.²⁵

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.²⁶ To the contrary, psychologists opine that separation without contact leads to curiosity, concern, and longing.²⁷

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-

beyond the scope of this article. For some illustrations, see Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 405 (2008) (finding that the law ignores the role that care networks and nonparental caregivers play in raising children); C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL'Y 431 (2004) (encouraging the Supreme Court to develop a new way of analyzing the scope of fundamental rights concerning families based upon a broad definition of kinship structures and a recognition of cultural differences); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 507 (1998) (positing that narrowly defining the family "serve[s] neither the interest of the children nor the interests of society as a whole"); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 Geo. L.J. 459 (1990) (questioning how parenthood is defined and arguing for an expansion of the definition).

25. See *infra* Part I.B.

26. 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").

27. 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).

ship more generally,²⁸ 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 2008²⁹ (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, 2008.³⁰ 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.

29. Pub. L. No. 110-351, 122 Stat. 3949 (codified at 42 U.S.C.A. § 671 (West 2010)).

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.

31. Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.).

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.³⁷ 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.³⁸ 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.³⁹ "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-

40. Patton, *supra* note 15, at 19.

41. IOWA CODE § 232.108(1) (2011).

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).

44. TEX. FAM. CODE ANN. § 153.551 (West 2009). *See also* ME. REV. STAT. tit. 22, § 4068(3) (2009) (allowing a child to request "visitation rights" in a "child protection proceeding"); VT. STAT. ANN. tit. 33, § 5319(e) (2007) (a child's attorney may make a motion requiring contact with a sibling).

45. MD. CODE ANN., FAM. LAW § 5-525.2(b)(1) (West 2010).

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.”⁴⁶

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.⁴⁷ 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.⁴⁸ Three of these seven (California, Florida, and New Jersey) include language concerning communication and/or visitation between siblings.⁴⁹ 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.⁵⁰ And in

46. 922 KY. ADMIN. REGS. § 1:310 (2008) (internal numbering omitted).

47. These states are: Arizona, ARIZ. REV. STAT. ANN. § 8-529 (2009); Arkansas, ARK. CODE ANN. § 9-28-1003 (2007); California, CAL. WELF. & INST. CODE § 16001.9(a)(7) (West 2009); Connecticut, CONN. GEN. STAT. § 17a-16 (2006); New Jersey, N.J. STAT. ANN. § 9:6B-4 (West 1991); and Rhode Island, RI GEN. LAWS § 42-72-15 (1991).

48. FLA. STAT. § 39.4085 (2010).

49. CAL. WELF. & INST. CODE § 16001.9(a)(7) (West 2009); FLA. STAT. § 39.4085(15) (2010); N.J. STAT. ANN. § 9:6B-4(f) (West 1991).

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.”⁵¹

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.⁵² 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.⁵³ 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.⁵⁴

Servs., 363 F. Supp. 2d 728, 745 (D.N.J. 2005) (finding a private right of action under New Jersey’s Child Placement Bill of Rights).

51. FLA. STAT. § 39.4085(15) (2010).

52. Arguably, once the child is in a permanent home, he or she is no longer in an out-of-home placement.

53. See Patton & Latz, *supra* note 12, at 750–51. “The mid-1980s and early 1990s focused upon the rights of various third parties, such as grandparents, aunts, uncles, and cousins, to maintain continuing relationships with minors after they were removed temporarily from their parents’ custody or after parental termination.” *Id.* at 750. “That movement led to dozens of statutes creating standing, visitation, and custody preferences for those third parties.” *Id.* In fact, some have remarked how “[s]iblings [were] last in line in receiving legislative and judicial recognition and protection because until very recently there were no interest groups or lobbyists advocating their cause.” *Id.*

54. Those states are: Arkansas, ARK. CODE ANN. § 9-13-102 (2008); California, CAL. FAM. CODE § 3102 (West 1994) (requiring that one of the parents be deceased); Connecticut, CONN. GEN. STAT. § 46b-59 (1983) (statutory amendments regarding a grandparent’s visitation rights pending as of May, 2011, H.B. 6453, 2011 Leg., Jan.

For example, New Jersey provides for grandparent and sibling visitation when visitation is in the best interest of the child.⁵⁵ 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.”⁵⁶ 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.”⁵⁷ And in Rhode Island, the family court, upon petition, “may grant reasonable rights of visitation of the sibling to the petitioner.”⁵⁸ 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.⁵⁹ Many children are not provided any legal representation in the child protection and termination of parental rights proceedings.⁶⁰ 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.⁶¹ Thus, in the last decade, many third-party visitation statutes

Sess. (Conn. 2011)); Delaware, DEL. CODE ANN. tit. 13, § 2410 (2010); Illinois, 750 ILL. COMP. STAT. 5/607 (2010); Louisiana, LA. CIV. CODE ANN. art. 136 (2009); Nevada, NEV. REV. STAT. § 125C.050 (2001); New Jersey, N.J. STAT. ANN. § 9:2-7.1 (West 1993, Ohio, OHIO REV. CODE ANN. §§ 3109.051, 3109.11, 3109.12 (West 2004); Oregon, OR. REV. STAT. § 109.119 (1999); Rhode Island, RI GEN. LAWS § 15-5-24.4 (2010); and Washington, WASH. REV. CODE § 26.20.260 (2004).

55. N.J. STAT. ANN. § 9:2-7.1(a).

56. *Id.*

57. DEL. CODE ANN. tit. 13, § 2410(c) (emphasis added).

58. R.I. GEN. LAWS § 15-5-24.4.

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).

61. 530 U.S. 57 (2000).

have been amended or more narrowly interpreted, rendering it more difficult for grandparents and other relatives, including siblings, to obtain visitation rights.⁶² *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 "breathhtakingly broad."⁶³ 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.⁶⁴ 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.⁶⁵

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.⁶⁶ For example, in Arkansas, its supreme court held that a par-

62. See Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279, 280–81 (2000) (remarking how *Troxel* "set in motion a nationwide project of assessing and retooling these statutes in an attempt to conform to the Court's apparent standards"). Some scholars have found such actions to be an overreaction. See Ellen Marrus, *Fostering Family Ties: The State as Maker and Breaker of Kinship Relationships*, 2004 U. CHI. LEGAL F. 319, 342 (2004) (explaining that those jurisdictions which now give greater deference to parental wishes "are probably reading more into *Troxel* than is warranted").

63. 530 U.S. at 67.

64. *Id.* See also Patton, *supra* note 15, at 28–37 (discussing *Troxel* generally, as well as its relationship to sibling visitation rights). R

65. *Troxel*, 530 U.S. at 73. See also Ellen Marrus, *Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post-Troxel?*, 43 ARIZ. L. REV. 751, 811 (2001) (explaining that "[h]arm is presumably a stricter requirement than best interests, although one might argue that if something is in the best interests of the child, failure to provide it would cause harm" (footnote omitted)); Buss, *supra* note 62, at 279, 303–304 (suggesting that the "line" the Court attempted to draw in *Troxel* "between the preservation of parental rights and the recognition of nonparental claims is untenable," and finding that the Court did in fact fail to adopt a harm standard because, even though Justices Kennedy and Stevens were the only justices to expressly conclude that the constitution does not require a finding of harm, the plurality rejects the harm standard by its avoidance of the issue and the fact that it references, "with apparent approval, to a number of state statutes that impose no such requirement"); Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 1005 (1988) (questioning if "there is any significant difference between a justification based on harm and one premised on best interests"). R

66. See *E.H.G. v. E.R.G.*, No. 2071061, 2010 Ala. Civ. App. LEXIS 82, at *30–31 (Ala. Civ. App. Mar. 12, 2010) (citing cases from fifteen different jurisdictions in which a court cannot award grandparent visitation without evidence demonstrating that denial of the requested visitation would harm the child).

ent can decide to permit visitation with a grandparent unless “harm to the child or custodial unfitness” can be shown.⁶⁷ 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.”⁶⁸ 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.⁶⁹

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.⁷⁰ These states’ respec-

67. *Linder v. Linder*, 348 Ark. 322, 352 (2002).

68. *In re D.C. & D.C.*, 4 A.3d 1004, 1021 (N.J. 2010). “[T]he sibling ‘bear[s] the burden of establishing by a preponderance of the evidence that visitation is necessary to avoid harm to the child.’” *Id.* (alteration in original) (quoting *Moriarty v. Bradt*, 827 A.2d 203, 223 (2003)); see also *N.J. Div. of Youth and Family Servs. v. N.J.*, No. A-3598-08T4, 2011 N.J. Super. Unpub. LEXIS 309 (N.J. Super. Ct. App. Div. Feb. 10, 2011).

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.⁷¹ Illinois, Maryland, and Massachusetts require a sibling to actually petition the court for ongoing contact.⁷² In Arkansas, the visitation simply does not terminate if such contact had been ordered prior to the adoption being finalized,⁷³ and in Florida the child has the right to have the court consider the appropriateness of post-adoption communication or contact.⁷⁴ 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

tion rights."); Massachusetts, MASS. GEN. LAWS ch. 119, § 26B(b) (2008) ("Any child over 12 years of age may request visitation with sibling[s] who have been separated and placed in care or have been adopted in a foster or adoptive home other than where the child resides."); Nevada, NEV. REV. STAT. § 125C.050 (2001) (If parental rights have been terminated, the court may grant to siblings the right to visit); and South Carolina, S.C. CODE ANN. § 63-3-530(A)(44) (2008) (The family court has jurisdiction "to order sibling visitation where the court finds it is in the best interest of the children."). While California does not directly permit a court to order post-adoption sibling visitation, it has been at the forefront of statutory enactments concerning the sibling relationship. California not only allows for voluntary agreements to be enforced, *see infra* note 76, it also recognizes the importance of maintaining sibling relationships by providing that parental rights may not be terminated if the court finds that termination would substantially interfere with the child's sibling relationships. The California Welfare & Institutions Code specifically states that a court should not terminate parental rights if "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." CAL. WELF. & INST. CODE § 366.26(c)(1)(B)(v) (West 2002). For further interpretation of this statutory provision, as well as other California statutes concerning the sibling relationship, see *In re Miguel A.*, 67 Cal. Rptr. 3d 307, 311 (2007) and *In re Valerie A.*, 43 Cal. Rptr. 3d 734 (2006).

71. 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).

72. 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).

73. ARK. CODE ANN. § 9-9-215(c).

74. 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.

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 NEV. 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).

76. ALASKA STAT. § 25.23.130(c) (1987); CAL. FAM. CODE § 8616.5 (West 2010) (requires preexisting relationship for actual contact); CAL. WELF. & INST. CODE § 366.29 (West 2002); DEL. CODE ANN. tit. 13, § 2410(d) (2010); IND. CODE § 31-19-16.5-1 (1997) (requires that the child be at least two years of age); LA CHILD. CODE ANN. arts. 1269.1-.7 (2008) (requires preexisting relationship); MINN. STAT. § 259.58 (2006) (requires preexisting relationship); MO. REV. STAT. § 453.080(4) (2001); N.H. REV. STAT. ANN. § 170-B:14 (2005) (must be accompanied by a voluntary surrender of parental rights); NMSA 1978, § 32A-5-35(A) (2009); N.Y. SOC. SERV. LAW § 383-c(2)(b) (McKinney 2010); OKLA. STAT. tit. 10, § 7505-1.5 (2000) (requires preexisting relationship); OR. REV. STAT. § 109.305 (2007) (requires preexisting relationship); VT. STAT. ANN. tit. 15A, § 4-112 (2010); WASH. REV. CODE § 26.33.295 (2009); W. VA. CODE § 48-22-7024 (2001); WIS. STAT. § 48.925 (1999) (permits binding agreements, but only where the adoption is by a relative or governed by the Indian Child Welfare Act). Eight states permit enforceable open adoptions for birth parents only. ARIZ. REV. STAT. ANN. § 8-116.01(A) (1999); CONN. GEN. STAT. § 45a-715(h) (2003); MASS. GEN. LAWS ch. 210 § 6C (2008); MONT. CODE ANN. § 42-5-301(2) (1997); NEB. REV. ST. §§ 43-162-65 (1998); R.I. GEN. LAWS § 15-7-14.1(b) (2001); TEX. FAM. CODE ANN. § 161.2061(a) (2003) (must be accompanied by a voluntary surrender of parental rights); VA. CODE ANN. §§ 16.1-283.1, 63.2-1220.2, -1220.3, -1220.4 (2010). For a review of the laws of all fifty states, see Child Welfare Info. Gateway *Postadoption Contact Agreements Between Birth and Adoptive Families: Summary of State Laws*, CHILDWELFARE.GOV (current through February 2009), http://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.cfm (this review is not limited to post-adoption sibling contact, but includes contact with any birth family member, including birth parents). *See also* Annette Appell, *Enforceable Post Adoption Contact Statutes, Part I: Adoption with Contact*, 4 ADOPTION Q. 81, 83-88 (2000) and Annette Appell, *Enforceable Post Adoption Contact Statutes, Part II: Court-Imposed Post Adoption Contact*, 4 ADOPTION Q. 101, 102-105 (2000).

more of the children are adopted.⁷⁷ 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.⁷⁸

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.⁷⁹ 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.⁸⁰

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.⁸¹

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.⁸² In *L. v. G.*, the court found that a sibling bond

77. See, e.g., *In re Dependency of M.J.L.*, 96 P.3d 996 (Wash. Ct. App. 2004); *Adoption of Hugo*, 700 N.E.2d 516 (Mass. 1998); *In re Interest of D.W.*, 542 N.W.2d 407 (Neb. 1996).

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.*

82. *L. v. G.*, 497 A.2d 215, 219 (N.J. Super. Ct. Ch. Div. 1985). *But see* Ken R. *ex rel. C.R. v. Arthur Z.*, 682 A.2d 1267, 1269–70 (Pa. 1996) (expressly refusing to adopt the equity analysis of the New Jersey court.) *and* *Scruggs v. Saterfiel*, 693 So. 2d 924,

is irreplaceable, and that siblings possess a right to visitation subject to it being in their best interest.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.”⁸⁴

Likewise, in *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.”⁸⁵ Massachusetts courts have focused on whether the child, for whom parental rights have been terminated, has an identified pre-adoptive family.⁸⁶ Where no family has been secured, the courts are more likely to find that post-termination and post-adoption contact orders are warranted.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 *L. v. G.* court, and expounded upon the critical nature of the sibling relationship.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.⁸⁹ However, the court strongly

926 (Miss. 1997) (concluding that the question of whether sibling visitation should be permitted was a matter for the legislature to decide.). See also Susan Solle, Note, *Sibling Relationships Should Not Be Denied by Formalistic Judges: Scruggs v. Saterfiel*, 693 So. 2d 294 (Miss. 1997), 23 U. DAYTON L. REV. 659 (1998) (discussing the *Scruggs v. Saterfiel* decision).

83. *L.*, 497 A.2d at 222.

84. *Id.* at 220–21.

85. 720 N.E.2d 1187, 1191 (Mass. App. Ct. 1998) (quoting *In re Dept. of Soc. Servs.*, 467 N.E.2d 861, 866 (Mass. 1984)).

86. See *Adoption of Rico*, 905 N.E.2d 552 (Mass. 2009) and *Adoption of Vito*, 728 N.E.2d 292 (Mass. 2000). In 2008, Massachusetts amended its statutes to enable the court to order visitation with siblings and grandparents in certain situations. 2008-176 Mass. Adv. Legis. Serv. *84 (LexisNexis). Thus, the court’s authority no longer needs to be based on strictly equity grounds. See also Meghann M. Seifert, Note, *Sibling Visitation After Adoption: The Implications of the Massachusetts Sibling Visitation Statute*, 84 B.U. L. REV. 1467 (2004).

87. See *Rico*, 905 N.E.2d at 556 and *Vito*, 738 N.E.2d at 303.

88. N.J. Div. of Youth & Family Servs. v. S.S., 902 A.2d 215, 218 (N.J. 2006).

89. *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, ha[d] 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).

92. *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1221–22 (1980). See also, William Wesley Patton, *Child Protective Services: Historical Overview*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/doc/1G2-3403200107.html> (last visited May 10, 2011).

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.⁹⁸ 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.⁹⁹ 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.”¹⁰⁰ Caselaw in New Jersey permits a state to intervene in a parent’s right to custody and control of his or her child if the parent “endangers the health or safety of the child . . . if there is a showing of unfitness, abandonment[,] gross misconduct, [or if] ‘exceptional circumstances’” exist.¹⁰¹

98. See Judy E. Nathan, Note, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633, 651–55 (1984).

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

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,¹⁰² and most lower federal and state courts have also been reluctant to find a constitutional basis for the maintenance of these relationships.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ The second is derived from the First Amendment's protections of the right to associate.¹⁰⁶

circumstances" doctrine open to case-by-case development. 748 A.2d at 565. The court specifically stated that it "has not, and need not in this case, define the full scope of this exception. Given the evolving dynamics within the family structure, the scope of 'exceptional circumstances' must await case-by-case development." *Id.*

102. The U. S. Supreme Court declined to decide whether siblings have a constitutional right to associate. *Adoption of Hugo*, 700 N.E.2d 516 (Mass. 1998), *cert. denied*, 526 U.S. 1034 (1999). *See also* Barbara Jones, Note, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187 (1993) (general discussion of the potential constitutional rights of siblings).

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.

105. *See* *Smith v. Org. of Foster Families for Equity and Reform*, 431 U.S. 816, 839–40 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). *See also* Alexander Jones, Comment, *Family Ties or Criminal Contacts: A Case for the Appointment of Counsel in Civil Gang Injunction Proceedings that Affect Family Relationships*, 39 GOLDEN GATE U. L. REV. 41, 56–60 (2008).

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.

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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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹ Specifically, the *Smith* Court set forth a three-part test.¹¹⁰ First, the relationship must be a biological one.¹¹¹ Second, it must involve "emotional attachments that derive from the intimacy of daily association."¹¹² And third, unlike a foster parent and foster child relationships it must have "its origins entirely apart from the power of the State."¹¹³ 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.¹¹⁴

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.

108. *Smith*, 431 U.S. 816.

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.

ment.’”¹¹⁵ 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 i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”¹¹⁶

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.”¹¹⁷ 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.¹¹⁸

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.”¹¹⁹ 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.¹²⁰ 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.”¹²¹

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*.¹²² 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.

115. 431 U.S. 494, 499 (1977) (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)).

116. *Id.* at 503–504.

117. *Id.* at 504.

118. Angela Ferraris, Comment, *Sibling Visitation as a Fundamental Right in* *Herbst v. Swan*, 39 NEW ENG. L. REV. 715, 730–31 (2004–2005) (applying the holding in *Moore* to the sibling visitation context); Jones, *supra* note 102, at 1214. R

119. *Rivera v. Marcus*, 696 F.2d 1016, 1024–25 (2d Cir. 1982).

120. *Id.* at 1017–18.

121. *Id.* at 1021, 1026.

122. *See supra* notes 61–65 and accompanying text. R

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.

126. *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984).

127. *Id.* at 618.

128. *Id.* at 619–20; see also Patton & Latz, *supra* note 12, at 778.

129. *Aristotle P. v. Johnson*, 721 F. Supp. 1002 (N.D. Ill. 1989). *But see* B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989) and Black v. Beame, 419 F. Supp. 599 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 815 (2d Cir. 1977) (each case denying the civil rights claims of the plaintiffs against the child welfare agencies).

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the opportunity to visit one another.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.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.¹³² What we do know is that relationships between siblings are likely to be a

130. *Aristotle P.* 721 F. Supp. at 1004.

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).

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”).

person's "longest-standing" relationship, longer than a parent, spouse, or many friends.¹³³ "Overall, siblings are a primary source of social support, and their dependency on each other increases with different life stages and circumstances."¹³⁴ 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.¹³⁵ The impact of poor, inadequate, or abusive parenting can create unusually intense sibling bonds and intense loyalties, which can last a lifetime.¹³⁶

A. Attachment Theory

Any assessment of the psychological bonds must begin with the basics of attachment theory.¹³⁷ 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."¹³⁸ These attachments generally occur in the first eighteen months of life and form the bases of relationships for a child's entire life.¹³⁹ 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.¹⁴⁰ Stephen Bank and Michael Kahn, two psychologists who have researched and written extensively on

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.

138. BEVERLY JAMES, *HANDBOOK FOR TREATMENT OF ATTACHMENT-TRAUMA PROBLEMS IN CHILDREN 2* (1994); see also R. Kevin Grigsby, *Maintaining Attachment Relationships Among Children in Foster Care*, 75 *FAMS. IN SOC'Y: J. CONTEMP. HUM. SERVS.* 269, 270 (1994).

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).

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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.¹⁴¹ The emotional bond between the siblings depends on “access.”¹⁴² 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.¹⁴³ 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.¹⁴⁴ This is due to the fact that if there is no sustaining parent at home, the sibling relationship can become the only “caring force.”¹⁴⁵ Accordingly, separation from a sibling can intensify a child’s grief and trauma.¹⁴⁶ In fact, in some instances, a

141. BANK & KAHN, *supra* note 6 at 19.

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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.

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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)).

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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”).

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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”).

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146. SHARON CONNOR, NATIONAL RESOURCE CENTER FOR PERMANENCY AND FAMILY CONNECTIONS, INFORMATION PACKET: SIBLINGS IN OUT-OF-HOME CARE 3 (2005), available at http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/information_packets/siblings.pdf.

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>.

152. Krista Gass et al., *Are Sibling Relationships Protective? A Longitudinal Study*, 48 J. CHILD PSYCHOL. AND PSYCHIATRY 167, 172 (2007).

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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.

158. Hegar, *supra* note 21, at 725–26.

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

160. L. Oriana Linares et al., *Placement Shift, Sibling Relationship Quality, and Child Outcomes in Foster Care: A Controlled Study*, 21 *J. FAM. PSYCHOL.* 736, 736–43 (2007).

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do not have siblings.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.¹⁶²

D. *The Voices of Youth*

Young person accounts also are a powerful testament to the importance of the sibling relationship.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

161. Hegar, *supra* note 21, at 729; *see also* Brodzinsky, *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, *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, *supra* note 98, at 655 (remarking how continued contact with biological relations can "promote a child's integration into her adoptive family").

162. Smith, *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, *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. *Id.*

163. Neil, *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." *Id.* (citing Julia Feast & David Howe, *Adopted Adults Who Search for Background Information and Contact with Birth Relatives*, 21 ADOPTION & FOSTERING, 8 (1997)).

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of identity, emotional stability, and personal growth and development.¹⁶⁴ A social worker who works with adopted children and is a foster and adoptive parent herself writes:

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.¹⁶⁵

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).¹⁶⁶ To date, these researchers have met with former foster youth on four occasions, at ages 17, 19, 21, and 23-24.¹⁶⁷ In their last report, 81 percent of the youth reported weekly contact with a family member after leaving care.¹⁶⁸ Even more significant, 94 percent conveyed feeling somewhat or very close to at least one family member.¹⁶⁹ When asked who they are most likely to feel close to and have contact with, their responses were their siblings.¹⁷⁰

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

164. Annette R. Appell, *Legal Intersections*, 3 *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. Brown, *supra* note 151.

166. 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.

167. *Id.* at 4.

168. *Id.*

169. *Id.* at 12.

170. *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." 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." *Id.*

171. *Youth Leadership Advisory Team Position Paper: Siblings in Foster Care and Adoption*, YOUTH LEADERSHIP ADVISORY TEAM, <http://www.ylat.org/results/Position%20Paper-%20Siblings.pdf> (last visited May 11, 2011); *see also* Marrus, *supra* note 62, at 351 ("Keeping siblings together dulls the pain of abuse and the loss of parents, and prevents more extensive emotional damage."); Herrick & Piccus, *supra* note 27, at 31.

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adolescent foster children told about their lives.¹⁷² An unexpected focus of the stories was the children's reliance on siblings.¹⁷³ Themes of suffering together and distress at being separated upon being placed in foster care ran through many of the stories.¹⁷⁴ 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.¹⁷⁵ Siblings were regarded proportionally as of almost equal importance to the children as their parents.¹⁷⁶ 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.¹⁷⁷ In all, the majority of children perceived siblings to hold a special and essential place in their lives.¹⁷⁸

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.¹⁷⁹ This focus on "permanency" is based on extensive research as

172. Jason B. Whiting & Robert E. Lee III, *Voices from the System: A Qualitative Study of Foster Children's Stories*, 52 FAM. REL. 288 (2003).

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.

179. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *RETHINKING CHILD WELFARE PRACTICE UNDER THE ADOPTION AND SAFE FAMILIES ACT OF 1997: A RESOURCE GUIDE* 16 (2000) ("ASFA emphasizes safety and the importance of moving children through the child welfare system more quickly to establish a permanent home."), available at http://www.vcu.edu/vissta/pdf_files/

well as numerous psychological theories, which document that “connect- edness to a family is important for the adaptive functioning and individu- ation of children.”¹⁸⁰

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.¹⁸¹ 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.”¹⁸² 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.¹⁸³

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.*

180. Halpern, *supra* note 5, at 9.

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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.

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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-

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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.¹⁸⁴ In the past, an overwhelming number of adoptions concerned the private adoption of infants, where adoptive, and even birth families, wanted confidentiality.¹⁸⁵ In reaction to these interests, the statutes that created this new parent-child relationship called for secrecy and "new beginnings."¹⁸⁶ All connections to the past were wiped away—legally, physically, and, it was hoped, emotionally.¹⁸⁷ Proceedings were confidential and closed, records were sealed, and birth certificates were changed.¹⁸⁸

tact is critical to maintaining these relationships"), available at <http://www.childwelfare.gov/pubs/siblingissues/siblingissues.pdf>.

184. Historically, adoption has been thought of as the "dissolution" of one family and the "creation" of another. Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1006–1007 (1995).

185. *Id.* at 1004–1007.

186. *See id.* at 1006–1007. For a comprehensive history of adoption law in the United States, see Lucy S. McGough & Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13, 14–55 (1999).

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. PA. 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,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.¹⁹⁰ It is yet another example of how our family laws have not caught up with reality, or the social science research.¹⁹¹ Fortunately, there is a trend which allows for adoptions to have some degree of openness.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

189. The following states have completely closed adoption laws: Alabama, Colorado, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Michigan, Mississippi, Nevada, New Jersey, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah, Wyoming. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., ACCESS TO ADOPTION RECORDS: SUMMARY OF STATE LAWS (2009), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/infoaccessapall.pdf.

190. 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).

191. 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)).

192. But see McGough & 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”).

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babies available.¹⁹³ 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.¹⁹⁴

How open adoptions are defined or classified will vary.¹⁹⁵ 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.”¹⁹⁶ 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.¹⁹⁷

The merits and disadvantages associated with openness in adoptions have been debated for some time in the social science literature.¹⁹⁸ In

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). **R**

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). **R**

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). **R**

196. Appell, *supra* note 184, at 1001. **R**

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.

Id. at 1001–1002; *see also* Amadio & Deutsch, *supra* note 194, at 89 (defining open adoption as an adoption where the child has “continuing contact with one or more members of his or her birth family after the adoption is completed”); Berry, *supra* note 193, at 126 (describing open adoption as referring “to the sharing of information and/or contacts between the adoptive and biological parents of an adopted child, before and/or after the placement of the child, and perhaps continuing for the life of the child”). **R**

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

198. Michael P. Sobol et al., *Paths to the Facilitation of Open Adoption*, 49 FAM. REL. 419, 419 (2000). **R**

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.¹⁹⁹ 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.²⁰⁰ 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.²⁰¹

While the results have been somewhat mixed,²⁰² the majority of persons surveyed, primarily birth and adoptive parents, view open-adoption arrangements positively.²⁰³ 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).

200. See, e.g., Harold D. Grotevant et al., *Many Faces of Openness in Adoption: Perspectives of Adopted Adolescents and Their Parents*, 10 ADOPTION Q. 79 (2007) (reporting on the second wave of a large and longitudinal survey of adoptive families participating in the Minnesota/Texas Adoption Research Project).

201. Children's Bureau, U.S. Dep't Health & Human Servs., *Openness in Adoption*, CHILD WELFARE INFO. GATEWAY, Feb. 2003, at 5, available at http://www.childwelfare.gov/pubs/f_openadoptbulletin.pdf (concluding that systematic research has not been conducted on open adoption of foster children).

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-*

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at first grew to become more comfortable.²⁰⁴ 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.²⁰⁵

Statutes authorizing enforceable open-adoption arrangements fall into two categories.²⁰⁶ 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.²⁰⁷ Other types of statutes allow a court to impose post-adoption contact, without regard to whether the parties agreed to such an arrangement.²⁰⁸ The benefit of the former, which presumes an agreement between the biological and adoptive parents, is that it gives the parties autonomy and respect.²⁰⁹ It also is more likely that there will be compliance with agreements that are entered into voluntarily.²¹⁰

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.²¹¹ This inability to agree can be due to emotional stress on the part of the biological or adoptive parents, or both.²¹² It may also be due to the fact that the parties may never have had the opportunity to know each other.²¹³ 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.²¹⁴

ents' Perceptions of Advantages and Disadvantages, 38 Soc. WORK 15, 17 (1993) (interviewing twenty-one adoptive couples who had adopted infants and reporting that, despite initial concerns, none of the couples regretted participating in an open adoption and none wished they had chosen closed adoption).

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.

209. Appell, *supra* note 190, at 30.

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 prospec-

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In fact, in these instances, it is the state, not the biological parents, who is in the position of consenting to the adoption.²¹⁵ 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.²¹⁶

The enforceability of court orders mandating some form of open adoption can be questionable, if not problematic.²¹⁷ The Uniform Adoption Act does not expressly authorize judicial enforcement of such agreements except in the context of the adoption of a step-child.²¹⁸ 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.²¹⁹ By extension, some courts find the enforcement of contact to be inconsistent with the concept of adoption.²²⁰ And, some statutes prohibit or limit the awarding of money damages.²²¹ In short, judges may be re-

tive 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.

215. See, e.g., N.J. STAT. ANN. § 9:3-47 (West 2011).

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). **R**

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. **R**

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). **R**

220. See McGough & Peltier-Falahahwazi, *supra* note 186, at 44–51. **R**

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.”).

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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.

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

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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 . . .”).

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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.²²⁶ 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."²²⁷ 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.²²⁸ 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.²²⁹ 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

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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.²³⁰ 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.²³¹ 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

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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.²³² For the court to have such authority, significant reform of our adoption laws is necessary, as is discussed by the following model provisions.

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.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 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); *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); *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). *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).

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).

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 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.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 underlying abuse and neglect, the needs of the children, the situation involving the biological parents and family, and the long-term plans for the children. 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.²³⁵ This second step is necessary

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 eliminates 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 proceedings, 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.

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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 approved the agreement, absent new evidence demonstrating that the agreement 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 precedence for one court having to honor orders from separate proceedings, and potentially 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 UNIF. INTERSTATE ENFORCEMENT OF DOMESTIC VIOLENCE PROT. ORDERS ACT (amended 2002), 9 U.L.A. pt. 1B, at 133 (2005); UNIF. INTERSTATE FAMILY SUPPORT ACT (amended 2008), 9 U.L.A. pt. 1B, at 159 (Supp. 2010).

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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.²³⁶ 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.²³⁷ 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.²³⁸ 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”).

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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).

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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).

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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-adoption 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-

239. In approving agreements or making orders, the parties and the courts should be mindful that arrangements made today may need to change as the children develop, relationships evolve, and logistical circumstances change. Neil, *supra* note 191, at 8. Accordingly, those arrangements that proscribe a minimum threshold, as well as those that allow for flexibility, both as to frequency and manner of contact, may be better than more detailed plans. Appell, *supra* note 190, at 31. Professor Appell suggests drafting agreements that call for contingencies if a certain action happens or does not occur. *Id.* at 31–36. She also recommends relying on objective indicators upon which contact can increase or decrease. *Id.*

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240. Ward, *supra* note 144, at 330 (finding that “[s]poradic contact or occasional news may be all that is necessary”).

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241. See FLA. STAT. § 63.0427 (2003). A child who has had their parental rights terminated and who is now the subject of an adoption petition “shall have the right to have the court consider the appropriateness of postadoption communication or contact, including, but not limited to, visits, letters, cards, or telephone calls, with his or her siblings . . . who are not included in the petition for adoption.” *Id.* § 63.0427(1). Courts in Florida are allowed to order these accommodations, if they find “that the child’s best interests will be served by postadoption communication or contact[.]” *Id.* § 63.0427.

242. As of 2007, in thirty-seven American jurisdictions, children will be afforded counsel, at least at the termination of parental rights trial. JEAN KOH PETERS, *supra* note 60, at 59 n.62. These jurisdictions are as follows: Alabama, American Samoa, Arizona, Arkansas, California, Colorado, Connecticut, D.C., Georgia, Guam, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Utah, Virgin Islands, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

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243. This author has previously argued elsewhere that children, of any age, in these proceedings, should be provided legal representation. Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1 (2000); see also Marrus, *supra* note 62, at 348–49 (advocating separate counsel for placement hearings). A

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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,²⁴⁴ 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.²⁴⁵ 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

lengthy discussion of the need for legal representation of children in all aspects of child protection and termination of parental rights proceedings is beyond the scope of this article.

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).

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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).

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benefits outweigh the risks.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.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,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-

246. See Appell, *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).

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247. Appell, *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, *supra* note 132, at 293-95 (noting that legislators should outline factors for judges to consider).

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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.

dren.²⁴⁹ 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,²⁵⁰ 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.²⁵¹ 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://texomasHomepage.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.

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existing relationships, where children have established bonds.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.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 *Troxel v. Granville*.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 *Troxel*

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

252. See *supra* Part III.B.

253. Appell, *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").

254. 530 U.S. 57 (2000). See Patton, *supra* note 8, at 60 (questioning the constitutionality of post-adoption sibling statutes after *Troxel v. Granville*).

255. See *supra* notes 65, 69; see also Marrus, *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).

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. WASH. REV. CODE § 26.10.160(3) (2004), *found* unconstitutional by, *Troxel*, 530 U.S. at 67.

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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).

261. Patton, *supra* note 8, at 60.

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).

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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.²⁶³ 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.²⁶⁴

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.²⁶⁵ Other statutes and courts clearly limit the termination only to the parent-child relationship.²⁶⁶

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 parental rights are 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.²⁶⁷ 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.”²⁶⁸ As explained above, while it is not entirely clear whether these mandates continue once the adoption is finalized, it is in-

263. See Nathan, *supra* note 98, at 635 n.16, 663, 663 n.164 (finding that children adopted as infants do not have the requisite ties to family to justify allowing their natural relatives to petition for visitation).

264. Patton, *supra* note 15, at 37.

265. See Marrus, *supra* note 62, at 348–49 (discussing how after termination of parental rights, “children often no longer see any of their blood relatives, and the legal system views them as not having these relations”).

266. See, e.g., *In re Miguel A.*, 67 Cal. Rptr. 3d 307 (Cal. Ct. App. 2007) (finding that the termination of parental rights does not dissolve the sibling relationship); *In re Valerie A.*, 43 Cal. Rptr. 3d 734 (Cal. Ct. App. 2006) (concluding that sibling relationships can withstand the adoption of one of the siblings); *In re Baby Girl D.S.*, 600 A.2d 71 (D.C. 1991) (holding that an order terminating parental rights has no effect on the relationships between the child and other biological relatives).

267. 42 U.S.C.A. § 673b (West 2008).

268. See Pub. L. No. 110-351, § 206, 122 Stat. 3949, 3962 (2008).

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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

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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

that parental rights are strongest, and perhaps only fundamental, when they are linked to other rights, such as the First Amendment's right to knowledge as in *Meyer v. Nebraska*, 262 U.S. 390, or the right to the free exercise of one's religion, as in *Wisconsin v. Yoder*, 406 U.S. 205; Perry, *supra* note 270, at 92 (addressing how Justice O'Connor approached issues concerning children's rights and maintaining that "it is not easy to discern a coherent approach"); Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1002 (1992) (arguing that a "property-based notion" of the child limits "consideration of the rights of all children to safety, nurture, and stability, to a voice, and to membership in the national family"); Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345 (1997-98) (reviewing Supreme Court cases concerning the parent-child relationship and categorizing the cases as either representing the Traditional Model, the Transforming Traditional Model, or the Individualist Model); Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683 (2001) (supporting the use of the traditional parental rights doctrine because it best protects disadvantaged mothers, defined as minority, single-mother, and lower-income mothers). A full exploration of the meaning and derivation of parental rights is beyond the scope of this article.

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.).

274. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976) and *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 647 (1979) (both holding that parents may not arbitrarily veto daughter's decision to terminate pregnancy).

275. See *supra* notes 102-103, 107-22.

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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.²⁷⁶ 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,²⁷⁷ the provision of supportive services, and, in some jurisdictions, the monitoring of the child's well-being through the requirement of ongoing documentation.²⁷⁸ 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.²⁷⁹

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

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.

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needs of the particular child—whatever those needs may be.²⁸⁰ 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.²⁸¹ For example, many require specialized medical care or specific mental health services.²⁸² 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.²⁸³ 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.²⁸⁴ 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*, TAMPA BAY.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-Falahahwazi, *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 adoptions 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

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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/adoptionssubsidy/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/adoptionssubsidy/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/adoptionssubsidy/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/adoptionssubsidy/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 children reside. However, this address may be disclosed by court order for good cause shown. (3) Encourage prospective adoptive parents to make a plan for facilitating postadoptive 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.

IOWA CODE § 232.108(6) (2007).

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-

299. Appell, *supra* note 184, at 1015.

300. *Id.*

301. See *supra* notes 239–241 and accompanying text; see also Berry, *supra* note 193, at 135 (noting that attorneys and social workers should help adoptive parents “devise . . . agreeable plan[s],” with which the adoptive parents are comfortable).

302. See Silverstein & Smith, *supra* note 162, at 135 (suggesting the use of subsidies to cover the cost of sibling contact).

303. See *supra* Part V.D.

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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 important relationships that exist between children and family members other than parents.³⁰⁴ As the plurality in *Troxel* acknowledged, “[t]he composition 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 significant familial ties of a particular child can be quite difficult.

For many children, their relationships with their brothers and/or sisters 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 sibling 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 indicator 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,

304. See *supra* note 24.

305. *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

306. *Id.*

307. International law also stresses the importance of a child’s relationship with all family members. The Convention on the Rights of the Child states that “States Parties” must “undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.” Convention on the Rights of the Child, G.A. Res. 44/25, Art. VIII, U.N. Doc. A/RES/44/25 (Nov. 20, 1989).

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”).

310. *In re D.C.*, 4 A3d 1004, 1022–23 (N.J. 2010).

