

1983

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## Recommended Citation

35 Stan. L. Rev. 423 (1983)

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# Why Terminate Parental Rights?

Marsha Garrison\*

Some 500,000 American children live in foster homes as wards of the state.<sup>1</sup> Most of them have spent years<sup>2</sup> in the foster care system.<sup>3</sup> While in foster care, many have lost contact with their natural parents<sup>4</sup> and have suffered frequent shifts from one foster home to another,<sup>5</sup> thus losing the opportunity to form a close and long-lasting relationship with any parental figure. This problem, now generally described as "foster care drift," has drawn widespread attention in

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I wish to thank Joseph Goldstein, Trudy Hayden, Susan Herman, Alice Leonard, and Michael Wald for their helpful comments on earlier drafts of this article.

1. A study commissioned by the Department of Health, Education, and Welfare estimated that, in 1977, 508,000 children were in foster care: 400,000 children were in foster families, 35,000 were in public or private group homes, 30,000 were in residential treatment centers, and 43,000 were in public or private child care institutions. *See* S. REP. NO. 336, 96th Cong., 1st Sess. 10-11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 1460 [hereinafter cited as S. REP. NO. 336]; *see also* J. KNITZER & M. ALLEN, CHILDREN WITHOUT HOMES 2 (1978); NAT'L COMM'N ON CHILDREN IN NEED OF PARENTS, WHO KNOWS? WHO CARES? FORGOTTEN CHILDREN IN FOSTER CARE 6 (1979) [hereinafter cited as NATIONAL COMMISSION REPORT].

2. *See* note 15 *infra*.

3. I use the term "foster care" to refer to any type of 24-hour care where the child has been transferred outside his parents' home and into the child welfare system as a result of either court order or voluntary placement. "Foster care" includes placements in relative or nonrelative foster homes, group homes, and other residential placements.

4. *See* D. FANSHIEL & E. SHINN, CHILDREN IN FOSTER CARE 483 (1978) (57% of the children still in foster care at the end of a 5-year study were not receiving visits from their parents); *see also* A. GRUBER, FOSTER HOME CARE IN MASSACHUSETTS 48 (1973); E. SHERMAN, R. NEUMAN & A. SHYNE, CHILDREN ADRIFT IN FOSTER CARE: A STUDY OF ALTERNATIVE APPROACHES 32 (1973); Festinger, *The New York Court Review of Children in Foster Care*, 54 CHILD WELFARE 211, 241 (1975); *cf.* notes 30-34 *infra* and accompanying text (describing agency practices that discourage parent-child contacts).

5. *See* J. KNITZER & M. ALLEN, *supra* note 1, at 187 (of national sample of foster children, 38% had moved once or twice and 18% had moved more than twice since placement). For additional studies in various locations, *see* A. EMLIN, J. LAHTI, G. DOWNS, A. MCKAY & S. DOWNS, OVERCOMING BARRIERS TO PLANNING FOR CHILDREN IN FOSTER CARE 18 (DHEW Publ. No. 78-30138 (1978)) [hereinafter cited as A. EMLIN]; H. MAAS & R. ENGLER, CHILDREN IN NEED OF PARENTS 422 (1959); Fanshel, *Status Changes of Children in Foster Care: Final Results of the Columbia University Longitudinal Study*, 55 CHILD WELFARE 143, 164 (1976). For state-by-state estimates of the average number of placements per foster child, *see* NATIONAL COMMISSION REPORT, *supra* note 1, at 32-33.

the past few years from both legal and child care experts.<sup>6</sup> Relying on studies showing that the loss or absence of a continuous, permanent relationship with a parental figure is associated with higher rates of juvenile delinquency and psychological disturbance,<sup>7</sup> child care experts have called for changes in child welfare law and practice to ensure that children have the opportunity to form and maintain such relationships.<sup>8</sup> Some commentators have even suggested that the child has a constitutional right to a permanent home.<sup>9</sup>

Over the last ten years, a consensus has evolved, not only as to the goal of "permanency," but also as to the outline of a reform program to achieve this goal.<sup>10</sup> The main thrust of this program is to move as many children as possible out of foster care.<sup>11</sup> Accordingly, the new "permanency program" would generally permit termination of the rights of a natural parent whose child has been placed in foster care if the parent is unable to regain custody within a fixed time after placement. Following termination—the effect of which is to deprive the

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6. See, e.g., sources cited in note 5 *supra*; sources cited in note 8 *infra*. For a discussion of the foster care practices that cause foster care drift, see notes 18–43 *infra* and accompanying text.

7. For a discussion of these studies, see notes 155–68 *infra* and accompanying text.

8. See, e.g., J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (2d ed 1981) [hereinafter cited as GFS I]; Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children in Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).

9. See, e.g., Muench & Levy, *Psychological Parentage: A Natural Right*, 13 FAM. L.Q. 129 (1979); Musewicz, *The Failure of Foster Care: Federal Statutory Reform and The Child's Right to Permanence*, 54 S. CAL. L. REV. 633, 661–78 (1981); cf. Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 347 (1972) ("A child . . . should have a legal right . . . [t]o receive parental love and affection, discipline and guidance, and to grow to maturity in a home which enables him to develop into a mature and responsible adult."). To date, the Supreme Court has failed to recognize such a right. See *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). Most lower federal courts also have held that neither children nor foster parents have protectible liberty or property interests in a child's placement. See, e.g., *Sherrard v. Owens*, 644 F.2d 542 (6th Cir.), *cert. denied*, 454 U.S. 828 (1981); *Kyeys v. County Dept. of Pub. Welfare*, 600 F.2d 693 (7th Cir. 1979); *Drummond v. Fulton County Dept. of Family & Children's Serv.*, 563 F.2d 1200 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978); *Child v. Beame*, 412 F. Supp. 593 (S.D.N.Y. 1976). But see *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982) (foster mother who was half-sister to foster children has liberty interest in their continued placement with her); *Timmy S. v. Stumbo*, 537 F. Supp. 39 (E.D. Ky. 1981) (state-certified foster parents have property interest in that certification).

10. A. EMLÉN, *supra* note 5, at 9; GFS I, *supra* note 8, at 31–49, 99; See, e.g., NATIONAL COMMISSION REPORT, *supra* note 1, at 5; T.J. STEIN, E.D. GAMBRILL & K.T. WILTSE, *CHILDREN IN FOSTER CARE: ACHIEVING CONTINUITY OF CARE* 43 (1978); Mnookin, *supra* note 8, at 633–35; Wald, *supra* note 8, at 700–06.

11. For a general description of the permanency program, see notes 87–108 *infra* and accompanying text.

parent of both the right ever to regain custody and the right to exercise visitation privileges<sup>12</sup>—the child would be “freed” from foster care for placement in an adoptive home.

This program would effect a significant change in child welfare law, which has traditionally required a showing of parental fault as a precondition to termination.<sup>13</sup> Permanency program advocates have justified this change primarily on the basis of the child’s need for permanence. As long term foster care usually does not meet that need, they assert, it is necessary to free the child for adoption, and hence a permanent home, by terminating the rights of his parents.

It is the thesis of this article that, while the child’s need for permanence may justify depriving his parent of the right to regain custody, it does not justify terminating parental visitation rights.<sup>14</sup> To the contrary, I submit that termination of these rights is not only unnecessary to provide foster children with permanent homes, but it may indeed prove damaging for many children. The available evidence suggests that, even for a child who will never again live with his natural parents and whose contacts with them are infrequent, permanent placement that permits continued contact is better than adoption or any other placement that entails a total loss of contact with the natural parent. Moreover, since termination does not guarantee placement in a permanent home, looser termination standards alone cannot ensure that children will escape the limbo status of foster care. Nor will increased use of termination improve the quality or stability of foster care placements. In light of these considerations, I suggest a new standard for termination of parental visitation rights: Termination of these rights should be ordered only after a judicial finding that the child will otherwise suffer specific, significant harm and that any alternative short of termination will not avert that harm.

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12. *See, e.g.*, GA. CODE ANN. § 15-11-53 (1982) (a termination order terminates all the parent’s rights and obligations with respect to the child); NEB. REV. STAT. § 43-209 (1978) (the court may terminate “all parental rights” where parents are unfit or unable to care for the child).

13. Traditionally, the most frequent grounds for termination have been abandonment, neglect, and parental unfitness. *See* Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1, 56, 66-67 (1975).

14. All too often, courts and commentators have treated a permanent loss of custody and the termination of other parental rights as identical issues, which they are not. If a parent loses custody, he may not have the child live with him. If all parental rights are terminated, he has no right ever to see or visit the child again. To avoid confusion, I assume throughout this article that the hypothetical parent whose rights the state threatens to terminate has already been permanently deprived of custody of his child.

Part I of this article describes the problem of "foster care drift" and the reasons for its development. Part II describes the new permanency program which has been proposed to resolve the problem of foster care drift. Part III analyzes the arguments used to support the permanency program's position on termination of parental rights. Finally, Part IV proposes new standards to govern termination of parental visitation rights.

## I. THE PROBLEM: FOSTER CARE DRIFT

The problem that the permanency program seeks to resolve is now generally described as "foster care drift." Drift occurs when children in placement lose contact with their natural parents and fail to form any significant relationship with a parental substitute. Drift is indeed a pervasive problem among children in foster care. Once a child enters foster care, he has about a 50% chance of remaining there for at least two years;<sup>15</sup> the longer he remains in care, the more likely he is to lose contact with his natural parents<sup>16</sup> and to change foster homes.<sup>17</sup>

### A. Foster Care Practices that Produce Drift

A child enters foster care through one of two routes: Either a complaint is made about the child's family, or the family itself requests assistance. Following a complaint or request for assistance, a state agency investigates the family. After the investigation, the

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15. The House Ways and Means Committee recently reported that 48% of foster children spend more than 2½ years in care. H.R. REP. NO. 136, 96th Cong., 1st Sess. 46 (1979) [hereinafter cited as H.R. REP. NO. 136]. Professor Michael Wald has stated that "[t]here is probably a 50% chance that a child will remain in foster care for three years or more." Wald, *supra* note 8, at 626-27; see also A. GRUBER, *supra* note 4, at 16-18 (in 1971, mean foster care placement in Massachusetts was just under five years); J. KNITZER & M. ALLEN, *supra* note 1, at 6 (in 1975, 52% of national sample had been in foster care for two or more years).

The time children remain in foster care may, however, be decreasing. Compare Maas, *Children in Long Term Foster Care*, 48 CHILD WELFARE 321, 321-23 (1969) (of 422 children who entered foster care in 1957 in 8 counties across the nation, 31% were in care for ten or more years, 52% for six or more years, and only 24% for three years or less) with Fanshel, *supra* note 5, at 145, 148 (of 624 New York City children who entered foster care in 1966 and remained in care for at least 90 days, 56% had been returned to their parents 5 years later, and about 37% went home within two years).

16. See, e.g., D. FANSHIEL & E. SHINN, *supra* note 4, at 88-89 (percentage of unvisited children rose from 18% after six to nine months in foster care to 57% at the end of five years).

17. See, e.g., *id.* at 139-40 (80% of children discharged within one year had only one placement, but only 16% of children still in foster care after five years had only one placement).

agency may decide to drop the case, file a neglect petition in court,<sup>18</sup> or work out a voluntary foster care arrangement.<sup>19</sup>

Children enter foster care for extremely varied reasons. The most common are a parent's mental or physical illness, child neglect or abuse, abandonment, parental inability to provide child care, and child behavior problems.<sup>20</sup> But whatever the reason for placement, when a child enters foster care, his parent is required to cede legal custody—the right to decide where the child lives and the kind of day-to-day care he receives<sup>21</sup>—to the state's child welfare system.<sup>22</sup> A

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18. Generally, a court may order foster placement upon finding that the child's natural parent has abused, abandoned, or neglected him. For a description of typical standards within each category, see Katz, Howe & McGrath, *supra* note 13. In recent years, commentators have frequently criticized traditional neglect standards as being too vague to prevent arbitrary decisionmaking. See, e.g., Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1000-04 (1975).

19. Some "voluntary" placements simply reflect parental inability to obtain any other form of help. See note 49 *infra* and accompanying text. Others represent a kind of plea bargain, in which the parent agrees to placement in order to avoid the initiation of neglect proceedings. See Mnookin, *supra* note 8, at 601.

The proportion of placements that states classify as voluntary varies wildly from state to state, ranging from 2.0% to 95% in one recent national survey. NATIONAL COMMISSION REPORT, *supra* note 1, at 32-33. This variation may be partly due to the fact that, until recently, federal foster care reimbursement was only available in cases of court-ordered foster care. See 42 U.S.C. § 608(a)(1) (1974). Agencies in some jurisdictions may bring *pro forma* court actions to satisfy the reimbursement requirement. Thus, under The Child Welfare Act of 1980, voluntary foster care placements made in accordance with federal requirements are eligible for matching federal funds until Sept. 1, 1983. 42 U.S.C. § 608(a) (Supp. IV 1980).

20. Because a child may enter foster care for several reasons and because agencies classify these reasons in neither a uniform nor a reliable manner, placement statistics provide only a fuzzy picture of the reasons children enter foster care. One study, however, invested considerable effort in developing a reliable procedure for identifying the main reason for any given placement. See D. FANSHEL & E. SHINN, *supra* note 4, at 45-51. It determined that the placements it looked at were due to mental illness of the child-caring person (21.9%), neglect or abuse (14.6%), child behavior problems (11.7%), physical illness of the child-caring person (10.9%), abandonment (10.7%), a parent's unwillingness or inability to continue care (10.1%), a parent's unwillingness or inability to assume care (8.8%), other family problems (9.1%), and parental death (2.2%). *Id.* at 46. Other studies paint a similar picture. See A. GRUBER, *supra* note 4, at 15; E. SHERMAN, R. NEUMAN & A. SHYNE, *supra* note 4, at 26.

21. Legal custody includes the "right to the care, custody [and] control . . . of [the child] . . . [and] the duty to . . . provide food, clothing, training, shelter, medical care and education . . . ." CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR FOSTER FAMILY SERVICES 21 (1974) [hereinafter cited as CWLA STANDARDS]. Custody of the child usually does not entitle the agency to consent to major surgery or marriage. *Id.* at 22.

22. See, e.g., N.Y. SOC. SERV. LAW § 383.2 (McKinney 1976) ("custody of a [foster] child . . . shall be vested . . . in the authorized agency placing out or boarding out such child, and any such authorized agency may in its discretion remove such child from the home where placed or boarded").

Once the parent has surrendered custody, typically he may not obtain the return of the child without agency or court approval. See *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977) (mother who voluntarily placed her child when she was hospitalized spent years at-

state-authorized foster care agency then determines the type of care the child will receive as well as his particular placement.

In theory, foster placement is a temporary period during which the state will provide the child and parent with services designed to resolve the problems that forced their separation.<sup>23</sup> Typically, however, agencies do little to help parents regain custody of their children. The family problems that necessitated removal usually receive only perfunctory agency attention.<sup>24</sup> In most cases, the agency caseworker contacts the natural parent infrequently<sup>25</sup> and does not follow up referrals of the parent to other agencies.<sup>26</sup> Even when the agency tries to work with the family, it often assigns one caseworker to the child and another to the parents, with little or no communication between the two.<sup>27</sup> Contacts between agency and parent also tend to decrease markedly after the first year of placement,<sup>28</sup> and

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tempting to regain custody, even though there had been no adjudication of neglect); *In re Sanjivini K.*, 47 N.Y.2d 374, 391 N.E. 2d 1316, 418 N.Y.S.2d 339 (1979) (mother who had voluntarily placed child to complete education, contributed to child support, and visited regularly was unable to regain custody for nine years). Apparently, in some states, a voluntary surrender legally transfers only *physical* custody of the child, see CWLA STANDARDS, *supra* note 21, at 48, but agencies often have not honored parents' requests for a child's return. See Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. PITT. L. REV. 1, 24 n.129 (1973).

In recent years there has been some movement toward permitting voluntary placement for a definite term, at the end of which the agency must relinquish custody. See, e.g., N.Y. SOC. SERV. LAW § 384(a) (McKinney Supp. 1981).

23. See CWLA STANDARDS, *supra* note 21, at 8-13; A. KADUSHIN, CHILD WELFARE SERVICES 314 (3d ed. 1980).

24. Agencies offer few parents any help while their children are in foster care. For example, an Arizona survey found that 56% of mothers of foster children were offered no services during placement. S. VASALY, FOSTER CARE IN FIVE STATES 34 (1976). See generally J. KNITZER & M. ALLEN, *supra* note 1, at 24-25 (parental problems are "widely ignored").

One reason why natural parents receive so little assistance is that agencies typically give them lowest priority when allocating resources and manpower. See D. SHAPIRO, AGENCIES AND FOSTER CHILDREN 20 (1976) (proportion of child care workers responsible for work with the natural family was 14% in year one of survey and 3% in year five).

25. Surveys uniformly show infrequent contacts between agencies and parents. See, e.g., S. VASALY, *supra* note 24, at 32 (in Iowa, 65%, and in Massachusetts, 60%, of the mothers surveyed had no known contact with the agency within six months or more of their child's placement); COMPTROLLER GEN., GEN. ACCOUNTING OFFICE, CHILDREN IN FOSTER CARE INSTITUTIONS—STEPS GOVERNMENT CAN TAKE TO IMPROVE THEIR CARE 11 (HRD-77-40) (1977) [hereinafter cited as GAO REPORT] (over 40% of parents surveyed received no visit by agency within first six months of child's placement). This is especially disconcerting in light of evidence that frequency of contact between caseworker, parent, and child appreciably increases the likelihood that the child will return home during the first year of placement. See D. SHAPIRO, *supra* note 24, at 89.

26. See J. KNITZER & M. ALLEN, *supra* note 1, at 24-25.

27. See *id.* at 24.

28. D. SHAPIRO, *supra* note 24, at 73-75.

services necessary to enable the child's return home are rarely made available.<sup>29</sup>

Moreover, agencies often discourage parents from maintaining ties with their children. Agencies seldom involve natural parents in decisionmaking regarding their children's care.<sup>30</sup> And they frequently frustrate parental contact with the child<sup>31</sup> by, for example, placing children in locations which make parental visitation difficult,<sup>32</sup> allowing visits only at agency offices under the eye of a social worker,<sup>33</sup> and inflexibly restricting visiting hours.<sup>34</sup>

Nor do agencies act to ensure the formation of a stable relationship between the child and the foster parent. Agencies haphazardly "match" children and foster parents<sup>35</sup> and rarely provide foster par-

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29. See J. KNITZER & M. ALLEN, *supra* note 1, at 26; NATIONAL COMMISSION REPORT, *supra* note 1, at 16.

30. See A. GRUBER, *supra* note 4, at 47; J. KNITZER & M. ALLEN, *supra* note 1, at 23-24; E. SHERMAN, R. NEUMAN & A. SHYNE, *supra* note 4, at 4-5. For a description of a project that successfully increased parental involvement in foster care decisionmaking, see Simmons, Gumpert & Rothman, *Natural Parents as Partners in Child Placement*, 54 SOC. CASEWORK 224 (1973).

31. In a Massachusetts survey, 37.5% of parents who indicated that they did not see their children enough (60% of total) reported that their agency social worker had told them that visiting their child was inappropriate. A. GRUBER, *supra* note 4, at 49, 78; see also J. KNITZER & M. ALLEN, *supra* note 1, at 22-24; S. VASALY, *supra* note 24, at 33-35.

These practices are particularly troublesome, given that the existence and frequency of parental visitation are key factors in determining whether a child will be reunited with his family, D. FANSHEL & E. SHINN, *supra* note 4, at 85-111, 483-90, and in improving his emotional well-being. See notes 169-202 *infra* and accompanying text.

32. See J. KNITZER & M. ALLEN, *supra* note 1, at 22-23 & n.30 (9% of children in out-of-home care placed in a county other than parent's residence; 40% of San Francisco foster care placements in another county); Festinger, *supra* note 4, at 241 (70% of New York City foster care placements in a borough other than parent's residence); see also H.R. REP. NO. 136, *supra* note 15, at 48-49. Agencies sometimes even place children out-of-state. See J. KNITZER & M. ALLEN, *supra* note 1, at 57-74. At least one court has held that parents need not be given notice and an opportunity to be heard before such a placement. See *Sinhogar v. Parry*, 53 N.Y.2d 424, 425 N.E.2d 826, 442 N.Y.S.2d 339 (1981) (post-placement administrative hearings satisfy requirements of due process).

33. See J. KNITZER & M. ALLEN, *supra* note 1, at 22 (citing national survey).

34. According to one national survey:

[Visiting] policies . . . were often restrictive, implying that the majority of parents could not be trusted with their children. In one survey county, children were allowed visits from their parents "on birthdays and other special occasions." In another, visits were held in the courtroom—hardly a setting to elicit spontaneous interactions between parents and their children. A parent whose child entered foster care when her marriage was dissolving was told she could visit once a month, but a soft-hearted foster mother allowed her to visit once a week. Elsewhere, parents were not permitted evening visits. Some places required that caseworkers be present.

J. KNITZER & M. ALLEN, *supra* note 1, at 22.

35. According to a Massachusetts survey, only 36% of foster parents had met the child prior to placement, and of those foster parents who received a child with disabilities, only 25%



ent training.<sup>36</sup> As a result, some children must be moved because their placements do not work out or because the foster parents request removal. And even when a haphazard match does work, agencies have sometimes removed children from homes in which (according to the agency) the foster parents have grown "too attached" to the child.<sup>37</sup>

Even when it is apparent that a foster child will never return to his parents' custody,<sup>38</sup> foster care agencies generally have not sought a more stable placement. In such a case, an agency could either enter into a permanent care arrangement with the foster parents<sup>39</sup> or

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were aware of the child's special needs. A. GRUBER, *supra* note 4, at 79-80; *see also* S. VASALY, *supra* note 24, at 97-99. This carelessness or lack of concern leads agencies to inappropriately place many children. *See, e.g.*, B. BERNSTEIN, D. SNIDER & W. MEEZAN, A PRELIMINARY REPORT: FOSTER CARE NEEDS AND ALTERNATIVES TO PLACEMENT: A PROJECTION FOR 1975-1985, at 13-17 (1975) (more than one-half of the children studied had been inappropriately placed initially, and more than two-fifths were inappropriately placed at the time of the study); *see also* S. JENKINS & E. NORMAN, FILIAL DEPRIVATION AND FOSTER CARE 5 (1972); J. KNITZER & M. ALLEN, *supra* note 1, at 45-47.

36. *See* S. VASALY, *supra* note 24, at 97-98 (in Arizona, only 12% of foster parents surveyed received preplacement training, and only 21% received a preplacement visit from a social worker; in Massachusetts, less than 25% of foster parents surveyed received preplacement training, and frequently the only preplacement agency contact was a phone call to inquire into available space). *See generally* NATIONAL COMMISSION REPORT, *supra* note 1, at 17 (foster parents tend to be overworked, underpaid, and inadequately prepared).

37. *See, e.g.*, *State ex rel. Wallace v. Lhotan*, 51 A.D.2d 252, 259, 380 N.Y.S.2d 250, 256 (1976) (foster children removed from "well meaning" foster parents who "because of their love for the girls" encouraged a negative attitude toward natural mother), *appeal dismissed*, 39 N.Y.2d 743, 389 N.Y.S.2d 1030 (1976); *In re Jewish Child Care Ass'n*, 9 Misc. 2d 402, 403, 172 N.Y.S.2d 630, 631 (1957) (upholding agency decision to remove five and one-half year-old child from foster parents who had cared for her from birth because they had "become fond of the child to an extent which has resulted in an attempt by them to . . . adopt . . . her"), *aff'd*, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959).

The practice of removing foster children from overly devoted foster parents has been greatly criticized in recent years. *See, e.g.*, GFS I, *supra* note 8, at 35-38, 71-111; Katz, *Foster Parents versus Agencies: A Case Study in the Judicial Application of the "Best Interests of the Child" Doctrine*, 65 MICH. L. REV. 145 (1966).

38. Available data show that foster children return home, if at all, at widely varying rates. *See* M. BURT & L. BLAIR, OPTIONS FOR IMPROVING THE CARE OF NEGLECTED AND DEPENDENT CHILDREN 80-82 (1971) (of Nashville children who were placed by court order because of parental neglect, 13% returned home within 18 months); D. FANSEL & E. SHINN, *supra* note 4, at 115 (56.1% of New York City foster children were discharged from care before the end of five years); Wiltse, *Current Issues and New Directions in Foster Care*, in OFFICE OF HUMAN DEV. SERV., U.S. DEPT. OF HEALTH, EDUC., AND WELFARE, PUB. NO. 78-30158, CHILD WELFARE STRATEGY IN THE COMING YEARS 76 (1978) (20% of placed children returned home in San Francisco and New York City, and 25% in Monterey County). Methodological defects make comparisons or interpretation of available return data difficult. *See* Wald, *supra* note 8, at 662 n.158.

39. For a description of possible permanent care arrangements, see notes 100-07 *infra* and accompanying text.

petition the courts to terminate parental rights—the permanency program approach to ensuring stability—in order to free the child for adoption. Neither course of action has been frequently pursued.<sup>40</sup> The infrequency with which permanent homes have been sought cannot be explained by the fact that traditional termination standards impose heavy evidentiary burdens on agencies.<sup>41</sup> Even children whose parents have consented to their adoption often remain in foster care,<sup>42</sup> and permanent care arrangements with foster parents do not, of course, even require termination of parental rights.

For many children, the net result of foster care practice is foster care drift.<sup>43</sup> Upon entering foster care, these children can expect long term, temporary placements and the absence of any significant, ongoing parental relationship.

#### B. *The Origins of Foster Care Practices that Produce Drift: An Historical Perspective*

Foster care practices that produce drift—discouraging the child's maintenance of ties with his natural family, encouraging long term placement, and making difficult the development of substitute pa-

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40. "[L]ong term plans that would provide . . . [foster] children with a sense of security and stability are seldom made and rarely implemented." Mnookin, *supra* note 8, at 612. On agencies' failure to seek adoptive homes, see J. KNITZER & M. ALLEN, *supra* note 1, at 187 (in a recent national survey, in which 33% of the children had been in care at least four years, only 4% of the foster care cases were in adoptive homes; in every county visited, termination of parental rights was infrequent); see also D. FANSHEL & E. SHINN, *supra* note 4, at 131 (only 4.6% of New York City foster children studied were adopted at the end of a 5-year period); E. SHERMAN, R. NEUMAN & A. SHYNE, *supra* note 4, at 51 (one out of 413 foster children adopted by end of 2-year study). See generally Wald, *supra* note 8 (termination has been utilized infrequently).

41. Examples of typical termination standards can be found in Katz, Howe & McGrath, *supra* note 13, at 68.

42. One New York City study reported that, although many people try to adopt older children, minority children, and children with various "handicaps," agencies frequently reject or discourage these attempts for questionable reasons. NEW YORK CITY COMPTROLLER'S OFFICE, *THE CHILDREN ARE WAITING* 26-29 (1977). See J. KNITZER AND M. ALLEN, *supra* note 1, at 30-32 (agencies often fail to identify adoptive children or to complete adoption proceedings).

43. Traditionally, children injured as a result of inadequate foster care services have had inadequate legal remedies. See Note, *A Damages Remedy for Abuses by Child Protection Workers*, 90 YALE L.J. 657, 694-96 (1981). One federal court has held that government officials may be held liable under 42 U.S.C. § 1983 (1976) for failure to adequately supervise a foster home placement, see *Doe v. New York Dept. of Social Servs.*, 649 F.2d 134 (2d Cir. 1981), and several state courts have recently permitted damages actions by foster children for improper home supervision, see, e.g., *Bradford v. Davis*, 290 Or. 855, 626 P.2d 1376 (1981) (action not barred by statute of limitations or sovereign immunity); *National Bank [of South Dakota] v. Leir*, 325 N.W.2d 304 (S.D. 1982) (action not barred by sovereign immunity); see also Annot., 90 A.L.R.3d 1214 (1979).

rental relationships—are deeply entrenched within the child welfare system. Thus, drift is not amenable to any easy solution. Providing more money, more workers, or lighter caseloads, for example, would be unlikely to have any major impact on agency performance. Foster care is indeed poorly funded and staffed,<sup>44</sup> but agency attitudes and priorities dictating that available resources will not be allocated toward its reduction are a more important factor in producing drift.<sup>45</sup> These attitudes and priorities derive from the child welfare system's history and the conflicting goals which that history has produced. Understanding the problem of foster care drift—and the possibilities for its solution—therefore requires some understanding of the development of child welfare tradition.

1. *Discouraging ties with natural parents.*

The foster care system's lack of concern for natural parents reflects centuries of a dual family law—one for the rich and one for the poor. In practice, foster care is basically a form of welfare. A few statistics make this clear: Fewer than 20% of all children who do not live with either natural parent are in foster care,<sup>46</sup> but 60–80% of the children in foster care come from families receiving public assistance,<sup>47</sup> and almost all come from the bottom rung of the economic

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44. In some states, caseloads of 70 to 90 per worker are typical. NATIONAL COMMISSION REPORT, *supra* note 1, at 15. Also, high turnover rates among foster care workers mean that foster parents and children often have to deal with several different caseworkers; for example, one study found that only 16% of the cases studied had been assigned to the same worker for more than two years. A. GRUBER, *supra* note 4, at 26, 38; *see also* NATIONAL COMMISSION REPORT, *supra* note 1, at 6, 8–9, 36–37; D. SHAPIRO, *supra* note 24, at 22; Freudenberg, *Burn-out: Occupational Hazard of the Child Care Worker*, 6 CHILD CARE Q. 90 (1977).

Workers are often inexperienced and poorly trained. *See* D. SHAPIRO, *supra* note 24, at 19–20 (46% of child care workers surveyed had only a B.A. degree; their median experience was two years); Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause*, 4 SUFFOLK U.L. REV. 631, 642 (1970) (most Massachusetts child care workers had only B.A. degrees, often in fields other than psychology or social work).

45. For example, one recent study discovered that only 10% of child care workers were assigned to natural families, while 27% were responsible for admission procedures or supervisory responsibilities. D. SHAPIRO, *supra* note 24, at 20.

46. *See* Rein, Nutt & Weiss, *Foster Family Care: Myth and Reality*, in CHILDREN & DECENT PEOPLE 24, 26 (A. Schorr ed. 1974).

47. One New York City foster care study found that, in 1966, two-thirds of the sample families had incomes at or below the poverty line and that 52%, compared to 7.9% of the general New York City population, received public assistance. S. JENKINS & E. NORMAN, *supra* note 35, at 25–29. A later New York City study showed even higher percentages of families of foster children receiving public assistance. Festinger, *supra* note 4, at 227 (in 1977, 62.9% of sample mothers received welfare). An Oregon Study, conducted between 1973 and 1976, reported similar results. A. EMLIN, *supra* note 5, at 19 (76% of mothers surveyed had

ladder.<sup>48</sup> The explanation for this phenomenon is simply that middle and upper income families can obtain substitute care at the home of a friend or relative or at a boarding school, or they can employ services, such as day care or housekeeping assistance, that obviate the need for child care outside the home. But for the marginal family that cannot obtain such private services, public child care—foster care placement—is usually the only alternative.<sup>49</sup>

The present foster care system is thus part of what Jacobus tenBroek has aptly termed the "family law of the poor,"<sup>50</sup> a direct de-

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"always or usually" received public assistance); see also Boehm, *The Child in Foster Care*, in FOSTER CARE IN QUESTION: A NATIONAL ASSESSMENT BY TWENTY-ONE EXPERTS 220-27 (H. Stone ed. 1970) [hereinafter cited as FOSTER CARE IN QUESTION].

48. "It is the marginal family, whose characteristics and social circumstances are such that it cannot sustain further stress, which utilizes the placement system as a last resort when its own fragile supports break down." S. JENKINS & E. NORMAN, *supra* note 35, at 19. One recent foster care case study found that 83% of natural mothers and 85% of natural fathers had not gone to school past the eighth grade, that only 8% of the mothers, 31% of the biological fathers, and 44% of the legal fathers reported "having had steady [or consistent] employment," and that 8% of the mothers and 10% of the fathers were hospitalized or incarcerated. A. EMLIN, *supra* note 5, at 19; see also CWLA STANDARDS, *supra* note 21, at 3; S. VASALY, *supra* note 24, at 21.

49. In most communities, the child welfare system offers few, if any, alternatives to foster care. For example, in early 1976, Los Angeles County, with its population of seven million, had only 61 "homemakers" to provide housekeeping and child care assistance to families in their own homes; San Francisco had nine homemakers, but they were available only on an 8-to-5 o'clock basis and only if there was a parent at home. J. KNITZER & M. ALLEN, *supra* note 1, at 16-17. Gruber reported that, in Massachusetts, social workers almost never considered options which might have obviated the need for foster care: They discussed enlisting homemakers in about 3% of the cases even though 16.7% of the parents surveyed felt that a homemaker could have averted foster care, and they discussed using day care in less than 2% of the cases even though 28.8% of the parents surveyed felt that day care could have averted foster care. A. GRUBER, *supra* note 4, at 46-47; cf. S. VASALY, *supra* note 24, at 24 (an Arizona survey found that 51% of mothers and 30% of fathers were offered services prior to placement).

In many cases, however, in-home services could prevent the need for foster care. See, e.g., BOSTON CHILDREN'S SERV. ASS'N, TREATMENT ALTERNATIVES PROJECT ANNUAL REPORT (undated), cited in J. KNITZER & M. ALLEN, *supra* note 1, at 17 & n.10 (69% of the children whose families received preventive services—the experimental group—remained in their homes, compared to 24% of the control group); M. JONES, R. NEUMAN & A. SHYNE, A SECOND CHANCE FOR FAMILIES: EVALUATION OF A PROGRAM TO REDUCE FOSTER CARE 102 (1976) (A New York preventive services demonstration project dramatically reduced foster care placements: At the end of eighteen months, 92% of the children in the experimental group remained at home, compared to 77% of the control group); see also J. KNITZER & M. ALLEN, *supra* note 1, at 15-18; NATIONAL COMMISSION REPORT, *supra* note 1, at 28.

50. tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, Part I, 16 STAN. L. REV. 257, 262 (1964); see also Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS. 226, 231-40, 248 (1975) (differentiating private family law—divorce custody cases—from public family law—child neglect cases—in that the former involve primarily "private dispute settlement" while the latter involve "child protection").

scendant of the Elizabethan poor law<sup>51</sup> and successive welfare schemes administering public aid to children who are destitute or otherwise deprived of parental care. This public family law has seldom deferred to parental rights.<sup>52</sup> The doctrine of parental rights descends instead from common law inheritance and property concepts which developed to resolve *private disputes*,<sup>53</sup> and it has largely remained so confined. Thus, as between a parent and another private individual, courts have generally recognized superior parental rights to the custody and control of children,<sup>54</sup> but under the family law of the poor, courts have routinely ordered parents to cede custody to the *state* without any showing of fault.

Under the Colonial American poor laws, indigent parents who could not support their children simply lost custody of them; the children were indentured as apprentices on such terms and to such parties as the local authorities prescribed.<sup>55</sup> Independence did not

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51. Under the Elizabethan poor law public authorities bound out as apprentices abandoned or orphaned children without responsible relatives and children "whose parents shall not . . . be thought able to keep and maintain [them]." 43 Eliz. 1, ch.2, §§ I, V (1601). For a discussion of the origins and operation of the poor law, see tenBroek, *supra* note 50, at 258-91.

52. "For the poor, state intervention between parent and child was not only permitted but encouraged in order to effectuate a number of public policies, ranging from the provision of relief at minimum cost to the prevention of future crime. For all others, the state would separate children from parents only in the most extreme circumstances, and then only when private parties initiated court action." Arcen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 899 (1975); see also tenBroek, *supra* note 50.

53. The parental rights doctrine is ultimately traceable to the feudal era. The most important "family law" rules during this era governed wardship—the right to be the guardian—of a minor heir. These rules entitled the father of the heir to be his guardian; on the father's death, this right passed to the lord of the infant's lands rather than to the heir's mother. See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 544-45 (5th ed. 1956); 1 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 319 (2d ed. 1899, reissued 1968); tenBroek, *supra* note 50, at 287-88.

Apparently, the law regulating master and servant relations governed parental rights over children who were not heirs. Thus, Blackstone remarked that a father "may indeed have the benefit of his children's labor while they live with him, and are maintained by him: but this is no more than he is entitled to from his apprentices or servants." 1 W. BLACKSTONE, *COMMENTARIES* \*453; see also T. PLUCKNETT, *supra*, at 545; tenBroek, *supra* note 50, at 287-90.

54. Parental rights "may be limited or interfered with only for the most substantial, compelling and sufficient reasons. Only the most unusual of circumstances warrant refusal of custody to a parent in favor of any other relative" or person. 67A C.J.S. *Parent & Child* §§ 16, 18 (1978). Even when courts have found compelling grounds to grant custody to a private individual over the claim of the natural parent, they have typically preserved visitation and ancillary parental privileges. See, e.g., *Jackson v. Russell*, 342 Ill. App. 637, 97 N.E.2d 584 (1951) ("rights of natural parents to their children cannot be terminated unless clear and convincing case is made out"); *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976); *Wrescics v. Broughton*, 285 Pa. Super. 90, 426 A.2d 1155 (1981).

55. For example, the Massachusetts statute provided that:

change these practices; throughout the first half of the nineteenth century, the state removed children from their parents' custody solely because of the parents' poverty.<sup>56</sup> During this period, the poor house and various children's institutions supplemented indenture as methods of caring for children who had been removed from their parents' custody. But in neither type of placement was any effort made to maintain the parent-child relationship.<sup>57</sup>

In the second half of the nineteenth century, neglect officially replaced poverty as the legal basis for depriving parents of custody of their children, but for the most part, poverty was simply equated with neglect.<sup>58</sup> To the child savers of the era, the "simple dictate of humanity [was] . . . to rescue the child from . . . its contaminating

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[T]he Overseers of the Poor in any Town or District where such Officers are chosen, otherwise the Selectmen or the Major part of them, are hereby fully Authorized & Impowered by and with the Assent of two Justices of the Peace, to set to work, or bind out Apprentice, all such Children, whose parents shall in their opinion be unable to maintain them (whether they receive alms, or are chargeable to the Town or District or not) . . . Male Children until they arrive to the age of twenty-one years, and Females to the age of Eighteen, unless such females are sooner married, which binding shall be as good and effectual in Law to every intent & purpose, as if such Child being of full Age, had by Deed or Indenture bound himself.

An Act for the Support of the Poor (1781), ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 1788-89, at 99 (1894), *quoted in* 1 CHILDREN AND YOUTH IN AMERICA 265 (R. Bremner ed. 1970) [hereinafter cited as CHILDREN AND YOUTH]. For other colonial statutes and additional materials on indenture, see 1 CHILDREN AND YOUTH, *supra*, at 262-67. The New England colonies supplemented apprenticeship with the "vendue system," under which the poor were "sold" to the lowest bidder. These provisions for children mirrored those for adult relief recipients, who were similarly assigned to compulsory labor. See 1 CHILDREN AND YOUTH, *supra*, at 103-04, 267-70. See also Areen, *supra* note 52, at 899-910; Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CALIF. L. REV. 175, 201-33 (1955); tenBroek, *supra* note 50, at 291-305.

56. Some statutes authorized the separation of neglected, as well as poor, children from their parents. See, e.g., VI STATUTES AT LARGE OF VIRGINIA 32 (W. Hening ed. 1819), *quoted in* 1 CHILDREN AND YOUTH, *supra* note 55, at 263. But authorities apparently understood that only the children of the poor were to be taken by the state. Areen, *supra* note 52, at 900.

57. Nineteenth century commentary on methods and problems in the care of children in state custody rarely mentioned natural parents. For representative examples of such commentary, see 2 CHILDREN AND YOUTH, *supra* note 55, at 247-330, 338-47. When the nineteenth century commentary did mention natural parents, the tone was almost invariably negative. See, e.g., BOSTON SPECIAL COMM. TO INSPECT PUBLIC INSTITUTIONS, CITY DOC. NO. 122, FINAL REPORT 46-48 (1892), *quoted in* 2 CHILDREN AND YOUTH, *supra* note 55, at 269 ("It may surely be questioned whether justice to the [institutionalized] children should not shut some parents away from this privilege of visiting them.").

58. See, e.g., Field, *The Child and the State*, 1 FORUM 106-09 (1886), *quoted in* 2 CHILDREN AND YOUTH, *supra* note 55, at 205. Records of the New York Society for the Prevention of Cruelty to Children reflect the equation of poverty with neglect. During the Society's first ten months of operation, it brought 72 "cruelty" cases to court; in over forty of them, the Society responded to poverty, whereas only 20 involved any form of child abuse. A considerable

surroundings"<sup>59</sup>—or, in short, to rescue him from his parents. Administrators of the foster care system, which originated during this "rescue" era, still made no effort to encourage the maintenance of a rescued child's relationship with his natural parents.<sup>60</sup>

Centuries of tradition die hard. Thus, while official attitudes toward parents have changed, neglect proceedings are still brought almost exclusively against poor parents,<sup>61</sup> and, neglectful or not, poor parents still must almost invariably relinquish legal custody of their child to obtain a foster care placement.<sup>62</sup> The failure of today's foster care system to encourage parent-child contact or involve the parents

number involved organ grinders who used children in their begging routines. See Areen, *supra* note 52, at 903 n.94 (describing the Society's first annual report).

Nineteenth century neglect statutes made the same connection between poverty and neglect. For example, the Massachusetts neglect law provided that:

Whenever . . . any child under fourteen years of age, by reason of orphanage, or of the neglect, crime, drunkenness or other vice of his parents, is growing up without education or salutary control, and in circumstances exposing him to lead an idle and dissolute life, or is dependent upon public charity, [he should be] . . . commit[ted] . . . to [state] custody . . . until he arrives at the age of twenty-one years or for any less time.

An Act Relating to Indigent and Neglected Children, ch.181, 1882 ACTS AND RESOLVES OF MASSACHUSETTS 135 (emphasis added). Many modern state neglect statutes still equate poverty with neglect. See note 61 *infra*.

59. Field, *supra* note 58, at 205-06. For a general discussion of the child rescue movement, see J. AXINN & H. LEVIN, *SOCIAL WELFARE; A HISTORY OF THE AMERICAN RESPONSE TO NEED* 94-97 (1975); W. TRATTNER, *FROM POOR LAW TO WELFARE STATE* 93-113 (2d ed. 1979).

60. During this era, writers focused on the advantages of "boarding out"—as foster care was then called—over institutional care, on whether the availability of payments to foster families would reduce the number of families willing to board a child for free, and on problems in home selection and supervision; they never expressed concern about maintaining the child's relationship with his natural parents. For representative examples of the commentary of this era, see 2 CHILDREN AND YOUTH, *supra* note 55, at 322-30, 338-47. The prevalent belief was that early exposure to poor parents produced future generations of paupers; thus, continued exposure to their parents was deemed to be harmful to these children's development. See J. AXINN & LEVIN, *supra* note 59, at 95-97; see also note 57 *supra*.

61. A 1975 survey reported six jurisdictions which made "begging or receiving alms" and 26 jurisdictions which made "associat[ion] with vagrant, vicious or immoral people and/or environment, and associations injurious to the health, safety or morals of the child" grounds for finding neglect. See Katz, Howe & McGrath, *supra* note 13, at 25 (table IV).

Available information indicates that the poor have been vastly overrepresented among court findings of neglect. For example, a 1964 study in Minnesota found that 42% of parents that courts had found neglected their children were receiving public assistance, compared to just 3% of the general population. See Boehm, *The Community and Social Agency Define Neglect*, 43 CHILD WELFARE 453, 459 (1964); see also Kay & Philips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 735 (1966) ("substantial" numbers of children referred to California probation departments as dependent or neglected come from families receiving AFDC). Class biases may also lead child welfare agencies to remove children from poor homes without adequate investigation. *Id.* at 736-37.

62. See note 22 *supra*.

in planning for their child is thus deeply rooted in the poor law traditions of the child welfare system.

## 2. *Encouraging long term placements.*

The same poor law heritage, coupled with administrative convenience, has produced long term foster placements. From the era of the Elizabethan poor law until the twentieth century, placement by the child welfare system authorized the state to retain custody of a child until his maturity.<sup>63</sup> Although nineteenth century neglect laws left open the possibility of restoring the child to his parents after a period in placement, parents were "seldom able to recover their children by showing their fitness to care for them."<sup>64</sup> The same attitude that encouraged the child's "rescue" from his natural parents discouraged his return.

Until the latter half of the nineteenth century, indenture was the most common method of providing long term care.<sup>65</sup> Indenture was popular because the child worked for his keep and thus cost the state nothing. But during the second half of the century, changing economic and social conditions made the indenture of very young children increasingly difficult to obtain.<sup>66</sup> The child welfare system began to employ new methods of child care.

States employed institutional placement, foster care, and adoption<sup>67</sup> for those children who could not be indentured. Among these choices, adoption was the preferred means of providing for destitute children. Adoption was preferred because, unlike indenture, it

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63. For a typical nineteenth century custody statute, see note 58 *supra*.

64. MASSACHUSETTS SOC. FOR THE PREVENTION OF CRUELTY TO CHILDREN, SEVENTH ANNUAL REPORT (1887), *quoted in* 2 CHILDREN AND YOUTH, *supra* note 55, at 208.

The small possibility that a child would be restored to his parents reflected the child welfare system's emphasis on poverty as a proxy for neglect. See notes 58-59 *supra* and accompanying text. Parents could not easily escape their poverty. Today, economic status still correlates with whether a child will rejoin his parents at home. See S. JENKINS & E. NORMAN, BEYOND PLACEMENT: MOTHERS VIEW FOSTER CARE 30-31 (1975).

65. See note 55 *supra* and accompanying text.

66. For various reasons the age at which the children were bound out tended to rise and consequently the period during which the community continued to be responsible for their care lengthened. Whereas in the seventeenth and early eighteenth century it had been customary to bind the children to masters when they were barely out of infancy, the newer tendency was to maintain them as public charges until they reached the age of eight, ten or twelve.

1 CHILDREN AND YOUTH, *supra* note 55, at 262; see also Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 477-78 (1971) ("By the 1840's it had become apparent . . . that the . . . institution of 'putting out' for service . . . [was] becoming obsolete.").

67. Before the second half of the nineteenth century, all jurisdictions except Texas and Louisiana—which followed civil law—adhered to the English common law, which did not



obliged someone other than the state to pay for the child's keep.<sup>68</sup> Child welfare advocates of this era in fact viewed adoption as "the ideal,"<sup>69</sup> but it was an ideal that could "very rarely [be] secured."<sup>70</sup> Except for children under the age of three, adoptive homes<sup>71</sup> were simply too difficult to find. Agencies thus used children's institutions and foster placement to provide care for those children who could not be placed in adoptive homes.<sup>72</sup>

Until the 1950's, the demand for adoptive infants continued to be smaller than the supply,<sup>73</sup> precluding any large-scale effort to move children out of foster care into adoptive placements. The selection of children for foster care or for adoption was largely influenced by market forces. Healthy white foundlings were slated for adoption because they were most in demand; older, nonwhite, and chronically ill children were slated for foster care—even if their natural parents were willing to relinquish them permanently—largely because they were not in demand.<sup>74</sup>

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recognize adoption. See Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 745-49 (1956); Presser, *supra* note 66, at 443.

Twenty-four states enacted adoption statutes in the second half of the nineteenth century. See *id.* at 474 n.136. The passage of the statutes coincided with the peak of the foundling societies' child-placing activities and most probably resulted from their lobbying efforts. See *id.* at 453, 474; see also Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts*, 73 NW. U.L. REV. 1038, 1043-44 & n.13 (1979).

68. Legal adoption imposed upon the adoptive parent a duty to support the child. See sources cited in note 67 *supra*.

69. Folks, *Family Life for Dependent Children*, in CARE OF DEPENDENT, NEGLECTED, AND WAYWARD CHILDREN 75-80 (C. Birtwell & A. Spencer eds. 1893), quoted in 2 CHILDREN AND YOUTH, *supra* note 55, at 323.

70. *Id.* at 323.

71. Throughout the nineteenth century, and particularly during the first decades following the passage of the adoption acts, commentators failed to distinguish between legal adoption and "placing out" a child in a free foster home. See, e.g., Theis, *How Foster Children Turn Out*, PROC. NAT. SOC. WORK CONF. 121-24 (1924), quoted in 2 CHILDREN AND YOUTH, *supra* note 55, at 423; Letter from a correspondent in Battle Creek, Michigan, to the Children's Aid Society (Dec. 5, 1859), quoted in Presser, *supra* note 66, at 486; see also A. KADUSHIN, *supra* note 23, at 318 (describing placing out as "a kind of pseudo adoption . . . [whose] intent was actually to prevent the return of the child to his own home"); Presser, *supra* note 66, at 486 ("there are many indications that the children [who had been placed out] . . . were thought of in the way we now think of adopted children").

72. See Folks, *supra* note 69, quoted in 2 CHILDREN AND YOUTH, *supra* note 55, at 325 (state paid foster care should be obtained "for those children who are not especially attractive, are too old for adoption and too young to be serviceable"); see also H. FOLKS, THE CARE OF DESTITUTE, NEGLECTED AND DELINQUENT CHILDREN 130 (1900); Letter from L. Alden to American Social Science Association Meeting (Sept. 9, 1879), quoted in 2 CHILDREN AND YOUTH, *supra* note 55, at 294.

73. See notes 94-99 *infra* and accompanying text.

74. As late as 1958, two noted child welfare experts considered as "readily adoptable [only those] children who are under five years of age, white, average or above in intelligence,

Long term placement in foster care has thus resulted both from the child welfare system's traditional reluctance to return children to the parents from whom they have been rescued, and from the system's inability to find adoptive or other free homes for all of the children who come into state care. In recent years, child welfare funding and agency work allocation policies have reinforced these deeply ingrained patterns. Agencies typically receive money to provide support services for children in foster care, but do not receive money to provide such services for families of children who have been returned home or for adoptive parents.<sup>75</sup> In addition, agencies are usually structured such that one group of workers handles adoptions and another handles foster care with little or no coordination between the two groups.<sup>76</sup> Tradition, complemented by bureaucracy, has promoted long term foster care.

### 3. *Discouraging substitute attachments.*

Throughout its history, the child welfare system has largely selected placements for children on the basis of cost rather than quality.<sup>77</sup> Indenture provided the employer with free labor until the child reached maturity, but failed to provide the child with protection from neglect or abuse.<sup>78</sup> In the poorhouse and even in specialized

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with no irremediable physical disabilities and no serious personality problems." H. MAAS & R. ENGLER, *supra* note 5, at 383.

75. See J. KNITZER & M. ALLEN, *supra* note 1, at 26 (no funds for "restorative" services); NATIONAL COMMISSION REPORT, *supra* note 1, at 6 (federal financial aid pattern encourages continuation of foster care); Wald, *supra* note 8, at 679 (agencies lose money when the child is returned home even if he still receives services). See generally English, *The Foster Care System and the Role of Legal Services*, 14 CLEARINGHOUSE REV. 1234, 1244-1245 (1981).

76. See J. KNITZER & M. ALLEN, *supra* note 1, at 91-92 (describing organizational structure of the California, Massachusetts, and New Jersey agencies).

77. Discussions of child care alternatives have perennially included cost comparisons. A nineteenth century encomium on behalf of foster care is typical: "The cost, too, should [be] . . . a powerful inducement. A child's expense in an Asylum, Poor House, or Reformatory for a year, cannot be less than one hundred dollars, and may be much more; the placing out costs but a small sum." Brace, *What Is the Best Method for the Care of Poor and Vicious Children?*, 2 J. SOC. SCI. 93 (1880), quoted in 2 CHILDREN AND YOUTH, *supra* note 55, at 292. For additional examples, see 1 CHILDREN AND YOUTH, *supra* note 55, at 275-76, 647-49 (advantage of specialized institutions over poorhouse); 2 CHILDREN AND YOUTH, *supra* note 55, at 322-26, 370-72 (advantages of foster care over institutional care); see also Areen, *supra* note 52, at 896; tenBrock, *supra* note 50, at 286.

78. An 1865 report on indentured children in Massachusetts stated that: "[O]f all the children annually sent out . . . not more than ten per cent probably have their condition made known to the officers who sent them." Sanborn, *The Children Indentured at Monson*, in MASSACHUSETTS STATE BD. OF CHARITIES, FIRST ANNUAL REPORT (1865), quoted in 2 CHILDREN AND YOUTH, *supra* note 55, at 332; see also Folks, *supra* note 69, quoted in 2 CHILDREN AND YOUTH, *supra* note 55, at 323-24 ("the earlier forms of . . . indentures seem to have been

children's institutions, children were required to work for their keep in conditions that often resembled a reformatory more than a home.<sup>79</sup> Children who were neither indentured nor institutionalized were placed in homes without careful consideration of the care they would receive there.<sup>80</sup> For example, between 1853 and 1880, the New York Children's Aid Society, a leader in "child rescue" work, sent thousands of children by train from New York City to the mid-west, where they were handed over to any person who wanted a child.<sup>81</sup> Even when the state paid for the child's keep in a foster home, it devoted little attention to careful selection or supervision of the placement.<sup>82</sup>

Within such a system, multiple placements were common.<sup>83</sup> In-

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drawn with the sole idea of 'protecting' the foster parents against the loss of the child's services and afforded little or no safeguard to the child against the possible cupidity or cruelty of the master").

79. "The attitude of those responsible for the institution[s] was that the boys and girls were unfortunate objects of charity, and therefore should be content with whatever was done for them." H. THURSTON, *THE DEPENDENT CHILD* 70-71 (1930), *quoted in* 2 CHILDREN AND YOUTH, *supra* note 55, at 285. For other contemporary descriptions of institutional life, see 2 CHILDREN AND YOUTH, *supra* note 55, at 263-69, 285-91.

80. For discussion of a celebrated case that exemplifies careless nineteenth century child placement practices, see N.Y. Times, Apr. 10, 1874, at 8, col. 2 and Apr. 11, at 2, col. 5, *quoted in*, 2 CHILDREN AND YOUTH, *supra* note 55, at 185-87 (discusses the case of Mary Ellen Wilson).

81. Compare E. WINES, *THE STATE OF PRISONS AND OF CHILD-SAVING INSTITUTIONS* 129 (1880 & photo. reprint 1968) (40 to 50 thousand placed) with H. FOLKS, *supra* note 72, at 45 (1000 placed per year between 1854 and 1875). For an eyewitness' description of the placement process, see Hart, *Placing Out Children in The West*, in *PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION* 143-50 (1884), *quoted in* 2 CHILDREN AND YOUTH, *supra* note 55, at 305-07.

82. See, e.g., Folks, *State Supervision of Child-Caring Agencies*, in *PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION* (1895), *quoted in* 2 CHILDREN AND YOUTH, *supra* note 55, at 339-40 ("It is unfortunately the case that in most systems of State supervision and inspection, these children seem to be practically lost sight of, and to be regarded as no longer the wards of the state. The abuses . . . are . . . not limited to institutions . . . [but] extend . . . to the children who are in families.").

Problems of home selection and continued supervision after placement still exist today. A 1973 Massachusetts survey found that the child welfare agency had not visited 25.9% of the surveyed foster children within one year of placement; a California survey found that 20% had not been evaluated within one year of placement. See S. VASALY, *supra* note 24, at 51; see also note 35 *supra*.

83. Multiple foster care placements were apparently as common at the turn of the century as they are now. For example, a 1915 Boston Children's Aid Society's self-evaluation found that "129 children had been cared for in a total of 498 homes or families, this being an average of almost four homes for each child. . . . For the 498 homes there were 528 placements, which is an average of more than four placements for a child." Lawton & Murphy, *A Study of Results of a Child Placing Society*, in *PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION* 164-74 (1915), *quoted in* 2 CHILDREN AND YOUTH, *supra* note 55, at 421.

stitutionalized children were indentured or placed in homes when they became old enough to work; children who were placed were returned if they did not work out in accordance with their foster parents' needs.

Around the turn of the century, child labor gradually fell into disrepute, necessarily curtailing the number of free homes available for older children.<sup>84</sup> Concurrently, the idea of rehabilitating natural parents so that children could be returned home after a short period in state-financed placement gained currency.<sup>85</sup> This goal of family reconstruction provided a new rationale for agencies to pay only cursory attention to the number and quality of foster care placements. The rehabilitative ideal also led agencies to discourage the development of ties between foster parents and children. Foster parents were now warned not to take too great an interest in their foster child, and disobedience was sometimes met by abrupt removal of the child to another home.<sup>86</sup>

Of course, the rehabilitative ideal directly contravened the child welfare system's long tradition of disdain for natural parents. The resulting tension between tradition and the new goals produced the foster care system as we know it. Acting pursuant to the new family reconstruction ideal, agencies have discouraged the development of stable substitute relationships for children in foster care. Acting on the basis of tradition, the same agencies have invested little energy in parental rehabilitation and have discouraged the maintenance of ties between the child and his natural parents. Foster children have been caught in the middle: As a result of the system's conflicting aims, they

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84. For descriptions of the movement against child labor, see 2 CHILDREN AND YOUTH, *supra* note 55, at 601-04; W. FRIEDLANDER, INTRODUCTION TO SOCIAL WELFARE 393-99 (3d ed. 1968).

85. The rehabilitative ideal developed during the late nineteenth century in the context of the correctional system. It produced innovations such as the indeterminate sentence, probation, and the juvenile court. The child rescue movement itself was partially motivated by hopes of crime prevention; it originally sought to rehabilitate children by placing them in a new environment. The notion of rehabilitating parents did not gain much currency, however, until after the turn of the century. For descriptions of the rehabilitative ideal as applied to juvenile delinquency, see A. PLATT, THE CHILD SAVERS (1969); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

86. Placement agreements continue to provide explicitly that the child may be removed at the discretion of the child care agency. For example, Connecticut's "Agreement for Board and Care of Children Committed to the State Welfare Commissioner" provides that: "The State Welfare Commissioner reserves the right to remove [the] child at any time from the [foster] home and upon such removal this agreement is cancelled immediately." GFS I, *supra* note 8, at 24 n.11.

have been left to drift in long term temporary placements with little hope of any stable parental relationship.

## II. THE PERMANENCY PROGRAM

### A. *Adoption: The Remedy of Choice*

For many years, problems within the foster care system went largely unnoticed. Concern over foster care drift did not surface until the 1950's, when investigators suddenly "discovered" that many children in foster care remained there for long periods of time.<sup>87</sup> And not until the early 1970's did reformers react to drift with a consolidated permanency program.<sup>88</sup> By this time, the goal of family rehabilitation through social casework had itself come under attack. State intervention into family life was now seen as potentially harmful rather than merely beneficent, and the rehabilitative ideal of foster care deemed a failure.<sup>89</sup>

Because of this change in philosophy, the permanency program has focused less effort on the admittedly difficult task of improving foster care than on getting as many children as possible out of foster care. Toward this latter end, the program has called for increased efforts to keep children in their natural families,<sup>90</sup> mandatory periodic review of placements to ensure that children who can go home

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87. The national 1959 survey of foster care conducted by Maas and Engler was the first major study to note the problems of foster care drift. See H. MAAS & R. ENGLER, *supra* note 5.

88. For the first systematic permanency program proposals, see GFS I, *supra* note 8, at 97-101; Mnookin, *supra* note 8, at 628-35.

89. For a review of the literature on the impact of social casework, see 2 S. WHITE, M. DAY, P. FREEMAN, S. HANTMAN & K. MESSENGER, *FEDERAL PROGRAMS FOR YOUNG CHILDREN: REVIEW AND RECOMMENDATIONS* 238-87 (1973); see also INSTITUTE FOR JUDICIAL ADMIN., AM. BAR ASS'N, *STANDARDS RELATING TO ABUSE AND NEGLECT* 38-44 (Tent. Draft 1977) [hereinafter cited as ABA STANDARDS I]; A. KADUSHIN, *supra* note 23, at 98-108; Fischer, *Is Case Work Effective? A Review*, 18 SOC. WORK 5 (1973).

Just as the rise of the rehabilitative model of child welfare tracked similar developments in juvenile corrections, see note 85 *supra*, the decline of the rehabilitative ideal in child welfare paralleled a growing skepticism over the possibility of rehabilitating juvenile delinquents and criminals. See, e.g., AMERICAN FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1969); J. MITFORD, *KIND AND USUAL PUNISHMENT* (1971); E. SCHUR, *RADICAL NONINTERVENTION: RETHINKING THE DELINQUENCY PROBLEM* (1973).

90. See, e.g., ABA STANDARDS I, *supra* note 89, § 6.4(c) ("permit[ing] removal only when the child cannot be protected from the specific danger justifying removal without resorting to removal"); GFS I, *supra* note 8, at 100 (permitting removal from the child's current home (including foster home) only when it can be established "that the child is unwanted and that the child's current placement is not the least detrimental available alternative").

do so,<sup>91</sup> and most importantly, termination of parental rights to free the child for adoption in those cases in which it appears that the parents will not be able to resume custody in the near future.<sup>92</sup> Adoption, a linchpin in this scheme, is generally preferred to all other types of permanent care arrangements.<sup>93</sup>

The program's reliance on adoption as a solution to foster care drift has been made possible by changes in the "market" for adoptive children. Although the supply of exceeded demand for adoptive children throughout the nineteenth and early twentieth centuries, this is no longer the case. By the 1950's, the tide had turned, and fewer adoptive children were available than couples who wanted one.<sup>94</sup> The result was a black market for babies.<sup>95</sup> Although the gap between supply and demand narrowed during the 1960's,<sup>96</sup> by 1975 demand once again drastically exceeded supply.<sup>97</sup> The greater availability of abortion and contraception, as well as a new willingness of unwed mothers to keep their babies, all but dried up the supply of traditionally adoptable children.<sup>98</sup> The dearth of these highly desirable infants caused a reorientation by the child welfare system toward the adoption of older foster children.<sup>99</sup> While adoption of these "sec-

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91. See, e.g., ABA STANDARDS I, *supra* note 89, § 7.1, at 135-39 (requiring mandatory court review of placement every six months); Wald, *supra* note 8, at 679-81, 703 (same).

92. See notes 116-22, 128-139 *infra* and accompanying texts.

93. See, e.g., Wald, *supra* note 8, at 699 (adoption is generally preferred over guardianship or permanent placement, since it "provides the child with a stable family setting"); see also note 132 *infra*.

94. In 1955, two commentators estimated that 900,000 childless families were seeking to adopt 90,000 available children. Elson & Elson, *Lawyers and Adoption: The Lawyer's Responsibility*, 41 A.B.A. J. 1125, 1126 (1955). Nationwide, there was an 80% increase in adoption petitions between 1944 and 1953. See Schapiro, *A Study of Adoption Practice*, in I CHILD WELFARE LEAGUE OF AMERICA 16 (1956).

95. The problem became extensive enough that congressional hearings on black market adoptions were held in 1953. See *Senate Judiciary Comm., Subcomm. to Investigate Juvenile Delinquency, Hearings* July 15-16, 1953, 84 Cong., 1 Sess. (1955). The Senate passed several versions of a bill outlawing black market adoptions, but none were acted upon by the House of Representatives. See 3 CHILDREN AND YOUTH, *supra* note 55.

96. See Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 15 (1975); A. KADUSHIN, *supra* note 23, at 472.

97. See Bodenheimer, *supra* note 96, at 13 (reporting substantial decline in California adoptions between 1968 and 1973 despite continuing unsatisfied demand for adoptive children); A. KADUSHIN, *supra* note 23, at 469 (reporting decline in adoptions by nonrelatives in twenty representative states from 48,744 in 1970 to 29,528 in 1975).

98. A. KADUSHIN, *supra* note 23, at 472. In 1975, adoption agencies throughout the country stopped or slowed taking applications for white unhandicapped infants. Prospective adoptive parents were explicitly told that there was likely to be a three to five year wait for such a child. *Id.* at 470.

99. *Id.* at 447-48; see also Bodenheimer, *supra* note 96 at 13-14.

ond rate" children would have been highly unlikely in earlier years, by the mid-1970's it had become a realistic possibility.

Adoption is not, however, the only procedure by which foster children could be assured stable placements.<sup>100</sup> A guardianship order, for example, would enable the child to remain in a single foster home where he may have developed ties, while permitting continued visitation by the natural parents and other family members.<sup>101</sup> A long term foster care contract could accomplish a similar result; the contract could prohibit the child welfare agency from removing the child from the foster home and could clarify the rights of both foster and natural parents.

In some American jurisdictions, both a guardianship order and a long-term foster care contract would leave open the possibility of a subsequent attempt by the natural parent to regain custody<sup>102</sup> or by the foster parent to return the child to the child welfare agency.<sup>103</sup> But legislative amendment of foster care and guardianship statutes could easily foreclose these obstacles to permanency.<sup>104</sup> Moreover,

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100. For a detailed analysis of legal placement options other than adoption that are now available for children in foster care, see M. HARDIN, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, in FOSTER CHILDREN IN THE COURTS (1983).

101. Typically, a probate court handles the appointment of a guardian. A guardian generally has the exclusive right to custody, control, and discipline of the child, but frequently has no duty of support. For example, the Uniform Probate Code provides that: "A guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of his minor and unemancipated child, except that a guardian is not legally obligated to provide from his own funds for the ward and is not liable to third persons by reason of the parental relationship for the acts of the ward." UNIF. PROBATE CODE § 5-209, 8 U.L.A. 518 (1975).

Where a stepparent, foster parent, or relative with whom a child has lived wishes to be appointed guardian, some courts have denied objections by the noncustodial parent. *See, e.g., In re Marino*, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973); *In re Stuart*, 280 N.Y.2d 245, 20 N.E.2d 741, 10 N.Y.S.2d (1939).

102. *See, e.g., Forrester v. Livingston*, 216 Ga. 798, 120 S.E.2d 174 (1961) (parent has right to custody as against statutory guardian if fit); *Melroy v. Keiser*, 123 Kan. 513, 255 P. 978 (1927) (parent has right to custody if he has not legally surrendered it and has not been adjudged unfit).

103. Even devoted foster parents sometimes return a child to care in cases of serious illness, death, changed circumstances within the foster family, or when the child proves too difficult. *See* B. TIZARD, ADOPTION: A SECOND CHANCE 235 (1978). To minimize this danger, the guardianship order or foster care contract should specify that it is not revocable without court approval. *Cf.* UNIF. PROBATE CODE § 5-210, 8 U.L.A. 520 (1975) ("[r]esignation of a guardian does not terminate the guardianship until it has been approved by the court"). Of course, as a practical matter, neither an adoption order nor a guardianship order can prevent a child from being returned.

104. An English law reform commission recently suggested that guardianship should be considered whenever a relative or foster parent applies to adopt a child. The commission would require the court "first to consider whether guardianship would be more appropriate

this type of legislative action would require a considerably less drastic revision of current law than the revision required by the permanency program. Nor are these alternatives without precedent. Some other countries routinely utilize similar forms of "open" adoption.<sup>105</sup> And many innovative American courts, acting on the basis of the child's perceived needs but without the benefit of specific statutory authorization, have in fact simultaneously granted permanent custody to a nonparent and visitation rights to the natural parents<sup>106</sup> or to other

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in all the circumstances of the case, first consideration being given to the long term welfare of the child." HOME OFFICE & SCOTTISH EDUC. DEP'T, REPORT OF THE COMMITTEE ON THE ADOPTION OF CHILDREN, CMD. 38, No. 5107, §§ 115, 137 (1971-1972). Under this proposal, the guardian has the obligation to support the child; the noncustodial parent ordinarily has visiting rights and may be required to make a contribution to the child's maintenance. *See id.* §§ 123, 130. Parliament adopted these recommendations in the Adoption Act, 1976, ch. 36, § 14, ¶ 14(3), at 668, but they have not yet gone into effect. *Cf.* WASH. REV. CODE §§ 13.34.231-236 (Supp. 1983) (authorizing guardianship rather than termination of the parent-child relationship when "in the best interests of the family").

A prominent American commentator has also recommended routine use of "an intermediate alternative to adoption" in stepparent adoptions. Bodenheimer, *supra* note 96, at 44-47; *see also* Derdyn, *A Case for Permanent Foster Placement of Dependent, Neglected and Abused Children*, 47 AM. J. ORTHOPSYCHIATRY 604, 612 (1977) (recommending permanent foster care placement "[w]hen there are unbroken emotional or unbreakable legal ties to biological parents and a child might thereby remain unavailable for adoption").

105. The term "open adoption" apparently was coined by Baran, Pannor, and Sorosky in 1976. They defined an open adoption as one "in which the birth parent meets the adoptive parents [and] relinquishes all legal, moral and nurturing rights to the child, but retains the right to continuing contact and knowledge of the child's whereabouts and welfare." Baran, Pannor and Sorosky, *Open Adoption*, 21 SOC. WORK 97 (1976). In open adoption, ties to the former family are typically preserved, but the adopting parent assumes the primary obligation of support. Several European countries use this type of adoption proceeding. *See* 2. CODE CIVIL [C. CIV.] arts. 360-370 (76e ed. Petits Codes Dalloz 1976-1977) (France); CODIGO CIVIL art. 180 (Edicion oficial 1975) (Spain); A. EHRENZWEIG & E. JAYME, PRIVATE INTERNATIONAL LAW 232-33 (1973) (Italy). Germany has traditionally recognized only open adoptions, but a bill pending in 1975 proposed to limit open adoption to those by stepparents. *See* Bodenheimer, *supra* note 96, at 46 n.197.

106. *See, e.g., In re Marino*, 30 Cal. App. 952, 106 Cal. Rptr. 655 (1973) (awarding custody to aunt who had cared for child for six years with visitation to natural father); *Ross v. Hoffman*, 33 Md. App. 333, 364 A.2d 596 (Ct. Spec. App. 1976) (awarding custody to "baby-sitter" who had provided full-time care five days each week for eight years, with "liberal" visitation to the natural mother), *modified*, 280 Md. 172, 372 A.2d 582 (1977); *Bennett v. Marrow*, 59 A.D.2d 492, 399 N.Y.S.2d 697 (1977) (awarding custody to caretaker of eight years, with visitation to natural mother); *Reflow v. Reflow*, 24 Or. App. 375, 545 P.2d 894 (1976) (awarding permanent custody to relatives who had provided care during most of five year period, with visitation to natural parents). English courts have reached similar results. *See, e.g., In re S.* [1975] 1 All E.R. 109 (C.A. 1974); *In re J.* [1973] 2 All E.R. 410 (Fam. 1973). *See generally* Derdyn, Rogoff & Williams, *Alternatives to Absolute Termination of Parental Rights After Long Term Foster Care*, 31 VAND. L. REV. 1165, 1175-79, 1185-92 (1978) (detailed case history of successful permanent placement with foster parents permitting visitation by natural parents).



family members.<sup>107</sup>

The critical difference between adoption and these alternative means of securing stable placements is that adoption requires the severance of all ties with the natural family, while the other procedures do not.<sup>108</sup> The child welfare system's poor law heritage and its traditional disdain for natural parents undoubtedly fostered a bias among reformers in favor of the adoption approach. But permanency program advocates have supported their preference for adoption, and, concomitantly, for easier termination of parental rights, on the basis of psychoanalytic theory. This theory, they claim, establishes that termination of parental rights followed by adoption is the best means of satisfying foster children's psychological needs. To this theoretical basis for the permanency program we now turn.

### B. *Goldstein, Freud & Solnit: The Program's Theoretical Basis*

The permanency program owes much of its design and its entire theoretical basis to Joseph Goldstein, Anna Freud, and Albert Solnit. In 1973, this distinguished interdisciplinary trio<sup>109</sup> published *Beyond the Best Interests of the Child*,<sup>110</sup> in which they presented proposals for reforming the child welfare system that were supported by a conceptual framework drawn from psychoanalytic theory.<sup>111</sup> Every subse-

107. See, e.g., *People ex. rel. Sibley v. Shepard*, 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981) (granting paternal grandparents' adoption petition but giving visitation rights to maternal grandmother); *In re Anthony S.*, 113 Misc. 2d 26, 448 N.Y.S.2d 377 (Fam. Ct. 1982) (granting adoption petition giving visitation rights to biological siblings); cf. *Schomer v. Scheidt*, 89 Ill. App. 3d 92, 411 N.E.2d 554 (1980) (denying one set of grandparents' adoption petition in order to preserve the other grandparents' visitation rights).

108. An adoption decree generally "relieve[s] the natural parents of the adopted individual of all parental rights and responsibilities, and . . . terminate[s] all legal relationships between the adopted individual and his relatives, including his natural parents, so that the adopted individual thereafter is a stranger to his former relatives for all purposes including inheritance . . . ." REV. UNIF. ADOPTION ACT § 14(a)(1), 9 U.L.A. 44 (1979).

109. Joseph Goldstein is the Sterling Professor of Law at Yale University Law School and a professor at the Yale Child Studies Center; Anna Freud was the Director of the Hampstead Child Therapy Clinic and the author of numerous books and articles on child development and psychoanalysis; and Albert J. Solnit is the Sterling Professor of Pediatrics and Psychiatry at Yale University School of Medicine and the Director of the Yale University Child Study Center.

110. GFS I, *supra* note 8.

111. Goldstein, Freud, and Solnit indicate that they "used psychoanalytic theory to develop generally applicable guidelines to child placement," *id.* at 5, but they seldom provide support for or explanations of how psychoanalytic theory supports the standards they propose. For a discussion of evidence that undermines their theses, see notes 155-68 *infra* and accompanying text.

quent proposal to reform the child welfare system has drawn its vocabulary and central ideas from this framework.

Goldstein, Freud, and Solnit base their reform program on two fundamental beliefs. First, they claim "the law must make the child's needs paramount";<sup>112</sup> thus, in their view, the needs of the developing child restrict parental "rights." Second, they give permanency in relationships a paramount position among these developmental needs.<sup>113</sup> Accordingly, under their proposed standards, the state should not disrupt the relationship between a "wanted child"<sup>114</sup> and a "psychological parent" except in the gravest circumstances.

A psychological parent may be anyone—a biological, adoptive, or foster parent—who, "through interaction, companionship, interplay, and mutuality, fulfills the child's psychological . . . as well as physical needs."<sup>115</sup> Thus, a foster parent who has established a relationship with a child takes precedence over a natural parent, even if the natural parent has lost custody of the child through no fault of his own.<sup>116</sup> In *Beyond the Best Interests of the Child*, Goldstein, Freud, and Solnit grant such a foster parent a presumption in favor of continuing custody.<sup>117</sup> Under the scheme elaborated in their successor volume, *Before the Best Interests of the Child*,<sup>118</sup> a foster parent of a child placed before age five may obtain permanent custody by showing that he has continuously cared for the child for two years; showing one year of continuous care suffices if the child was placed before age three.<sup>119</sup> Goldstein, Freud, and Solnit give continuity of care such

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112. GFS I, *supra* note 8, at 7.

113. "The child's developmental needs are best served by continuing, unconditional, and permanent relationships." *Id.* at 99.

114. Goldstein, Freud, and Solnit define a "wanted child" as one "who receives affection and nourishment on a continuing basis from at least one adult and who feels that he or she is and continues to be valued by those who take care of him or her." *Id.* at 98.

115. *Id.*

116. *See id.* at 99-100.

117. To alter a child's placement, the natural parent must establish "(i) that the child is unwanted; and (ii) that the child's current placement is not the least detrimental available alternative." *Id.* at 100. Goldstein, Freud, and Solnit define the "least detrimental available alternative" as that placement "which maximizes, in accordance with the child's sense of time, the child's opportunity for being wanted and for maintaining on a continuous, unconditional and permanent basis a relationship with at least one adult who is or will become the child's psychological parent." *Id.* at 99.

118. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEFORE THE BEST INTEREST OF THE CHILD* (1979) [hereinafter cited as GFS II].

119. *Id.* at 188, 194-95. If the child was over five years old at the time of placement, had been in the continuous care of his parents for not less than the preceding three years, and was not separated from his parents because of sexual or physical abuse, the natural parent could request a hearing to contest termination. In order to succeed, the parent must show

weight that, for them, not even the infliction of serious emotional harm justifies removing a child from his current home.<sup>120</sup>

But Goldstein, Freud, and Solnit's proposals do more than provide continuity; this could be ensured through a simple custody transfer from the state to the foster parent, like that which can be effected through guardianship or a foster care contract.<sup>121</sup> Under their scheme, a grant of custody to the foster parents, like an adoption proceeding, serves to terminate *all* rights of the natural parents, including the right to visitation or contact with the child.<sup>122</sup> They further propose that, when a court denies visitation rights to the natural parents,<sup>123</sup> it should not even consider the reasons the natural parents cannot resume custody or the strength of the parent-child relationship.<sup>124</sup> Termination automatically follows a transfer of custody to the foster parent.

According to Goldstein, Freud, and Solnit, the custodial parent should have total control over the child's contact with his noncustodial parent because the risks of conflicting parental loyalties outweigh the advantages of maintaining contact:

Children have difficulty in relating positively to, profiting from, and maintaining contact with two psychological parents who are not in positive contact with each other. Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationships to both parents. A "visiting" or "visited" parent has little chance to serve as a true object for love, trust, and identification, since this role is based on his being available on an uninterrupted day-to-day basis.<sup>125</sup>

For Goldstein, Freud, and Solnit, permanence requires not just continuity of care but also the exercise of absolute authority and receipt

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that he is still the child's psychological parent and that the child's return to him would provide the least detrimental alternative. *Id.* at 195.

120. Goldstein, Freud, and Solnit's position that "emotional neglect" does not justify removal derives, at least in part, from the difficulty of defining the term precisely enough to avoid unwarranted state intrusion. *See id.* at 75-90; *see also* GFS I, *supra* note 8, at 99 (state policy should "minimize disruptions of continuing relationships between a psychological parent . . . and the child").

121. *See* notes 100-07 *supra* and accompanying text.

122. All placements are to be "unconditional and final, that is, the court shall not retain continuing jurisdiction over a parent-child relationship or establish or enforce such conditions as rights of visitation." GFS I, *supra* note 8, at 101; *see also id.* at 116-21.

123. The rationale by which Goldstein, Freud, and Solnit justify the custodial parent's denial of visits by the natural parents—a fear that visitation will undermine the custodial parent's authority—applies to visits by any other family members as well.

124. *See* GFS II, *supra* note 118, at 75-90.

125. GFS I, *supra* note 8, at 39.

of unquestioned loyalty by the custodial parent. They deem one unambiguously authoritative parental relationship to be so fundamentally important in child development that they are willing to sacrifice the child's relationship with some psychological parents to achieve it.

### C. *Reception of the Goldstein, Freud, and Solnit Proposals*

Although *Beyond the Best Interests of the Child* has provoked some controversy<sup>126</sup> in the ten years since its publication, its central conclusions about the needs of children in long term foster care have gained remarkably widespread acceptance.<sup>127</sup> Goldstein, Freud, and Solnit's premises have strongly influenced recent state foster care legislation<sup>128</sup> and several model acts dealing with termination of paren-

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126. For selected reviews of this book, through 1978, see Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child*, 13 FAM. L.Q. 49 (1979) [hereinafter cited as Crouch, *An Essay*]. Although some reviews were critical, Crouch indicates that the book quickly "became what any author could most fervently desire his or her book to become; that which everyone must mention or risk being deemed as an ignorant provincial." *Id.* at 50.

The critical response to *Before the Best Interests of the Child* has also been mixed. Compare Besharov, Book Review, 34 VAND. L. REV. 481, 483 (1981) ("occasional overbreadth of their definitions coupled with inflexibility of their decision making rules would often cause unwarranted and overly harsh intervention by the state") and Wald, Book Review, 78 MICH. L. REV. 645, 648 (1980) (grounds for intervention are "too narrow"; "basic premises supporting nonintervention are often unpersuasive") with Crouch, Book Review, 14 FAM. L.Q. 121, 140 (1980) ("deserves some of the accolades so freely bestowed on [*Beyond the Best Interests of the Child*]") and Frelich, Book Review, 58 TEX. L. REV. 1343, 1359 (1980) ("succeeds in putting family privacy into the right place"). The primary criticism of the book has been aimed at the authors' very restrictive standards for state intervention into the family, rather than at their standards for termination of parental rights for children in foster care. Wald, for example, dealing with termination in a footnote, "agree[s] with [the authors'] general position [on termination, but] . . . find[s] many problems with the specifics." Wald, *supra*, at 651 n.21.

127. Many commentators and reports have based their proposals on these central conclusions. See, e.g., NATIONAL COMMISSION REPORT, *supra* note 1, at 10 ("uniform national review guidelines should be established requiring that parental rights will be evaluated with[in] a fixed period of time, and upon termination of these rights, a plan should be developed for moving a child into adoption"); V. PIKE, S. DOWNS, A. EMLÉN, G. DOWNS, & D. CASE, PERMANENT PLANNING FOR CHILDREN IN FOSTER CARE: A HANDBOOK FOR SOCIAL WORKERS, 14 (1977) ("one should not consider returning a child [to his parents] when the parents will not be able to make a home for them [sic] soon (within a year, or perhaps longer), or when he has become . . . so deeply attached to his foster parents that he feels his future is inextricably bound with theirs"); Wald, *supra* note 8, at 691 ("parental rights [should] be terminated, in most cases, after the child has been in placement for a specified period of time"); see also notes 128-39 *infra* (describing recent model legislation).

128. See, e.g., CAL. CIV. CODE § 232(a)(7) (West 1982) (permitting termination when the child "has been cared for in one or more foster homes for two or more consecutive years, providing that the court finds by clear and convincing evidence that the return of the child to his . . . parents would be detrimental to the child and that the . . . parents have failed

tal rights for children in long term foster care.<sup>129</sup> For example, the influential *Standards for Juvenile Justice*, drafted under the auspices of the American Bar Association,<sup>130</sup> endorse "[p]rotection of the child's interest [as] paramount,"<sup>131</sup> the concept of psychological parent-

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during that period and are likely to fail in the future, to (i) provide a home for the child; (ii) provide care and control for the child; (iii) maintain an adequate parental relationship with the child; and (iv) maintain continuous contact with the child, unless unable to do so."); N.Y. SOC. SERV. LAW §§ 384-b(4)(d), 384-b(7) (McKinney Supp. 1982) (permitting termination when parent "has failed for a period of more than one year following the date such child came into . . . care . . . substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child"); VA. CODE § 16.1-283(C) (1978 & Supp. 1982) (permitting termination one year after placement when parent has failed to maintain contact with child or to remedy conditions that led to placement).

The judicial response has been somewhat less enthusiastic. For a summary of the cases, see Crouch *An Essay*, *supra* note 126, at 102.

129. Nine model acts addressing termination of parental rights have appeared since the publication of BEYOND THE BEST INTERESTS OF THE CHILD:

- 1) ABA STANDARDS I, *supra* note 89;
- 2) INSTITUTE FOR JUDICIAL ADMIN., AM. BAR ASS'N, STANDARDS RELATING TO ABUSE AND NEGLECT (final ed. 1981) [hereinafter cited as ABA STANDARDS II].
- 3) MODEL ACT TO FREE CHILDREN FOR PERMANENT PLACEMENT (1978), *reprinted in* Katz, *Freeing Children for Permanent Placement through a Model Act*, 12 FAM. L.Q. 204 (1978);
- 4) MODEL CHILD PLACEMENT CODE. See Wald, *supra* note 8, at 700-06.
- 5) REGIONAL RESEARCH INST. FOR HUMAN SERV., MODEL DISSOLUTION OF PARENT-CHILD RELATIONSHIP ACT (1976) [hereinafter cited as MDR ACT].
- 6) NATIONAL ADVISORY COMM. FOR JUVENILE JUSTICE & DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE (1980) [hereinafter cited as NAC STANDARDS];
- 7) NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, TERMINATION OF PARENTAL RIGHTS STATUTE (1976), *reprinted in* [Reference File] FAM. L. REP. (BNA) 201:0069 (1977), *and in* NATIONAL BENCH BOOK FOR JUVENILE COURTS 119-23 (L.G. Arthur ed. 1978) [hereinafter cited as JUDGES' ACT];
- 8) REGIONAL RESEARCH INST. FOR HUMAN SERV., RRI GUIDELINES FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (1980) [hereinafter cited as RRI GUIDELINES]; and
- 9) U.S. DEP'T OF HEALTH & HUMAN SERVICES, MODEL STATE ADOPTION ACT, 45 Fed. Reg. 10,622 (1980) [hereinafter cited as HHS MODEL ACT].

All of the model legislation except Wald's is summarized and compared in Hardin & Tazzara, *A Comparison of Model Acts on Parental Rights Termination*, 7 FAM. L. REP. (BNA) 4025 (July 14, 1981).

130. There are two different sets of ABA standards. The first, ABA STANDARDS I, *supra* note 89, published in 1977, provoked extensive debate and thus were not presented to the ABA House of Delegates for approval in 1979, as originally planned. Instead, the standards were redrafted and re-released in revised form as ABA STANDARDS II, *supra* note 129, in 1981. ABA STANDARDS II reflect Goldstein, Freud, and Solnit's influence less than ABA STANDARDS I. In particular, the revised standards make termination more difficult to obtain. For a comparison of the two sets of ABA standards, see notes 132-139 *infra*.

131. INSTITUTE FOR JUDICIAL ADMIN., AM. BAR ASS'N, STANDARDS FOR JUVENILE

age,<sup>132</sup> adoption as the preferred disposition for foster children,<sup>133</sup> and a presumption favoring termination of parental rights once a child has been in placement for three years if the natural parent appears unable to resume custody in the foreseeable future.<sup>134</sup> These standards do not require the state to show that termination is necessary to protect the child from harm or even that termination will benefit him. Instead, they place the burden of proof on the natural parent, who must show by clear and convincing evidence that termination would "be detrimental to the child" in order to retain visitation privileges.<sup>135</sup>

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JUSTICE: A SUMMARY AND ANALYSIS 106 (1977); see also ABA STANDARDS II, *supra* note 129, Standard 1.5, at 56; cf. HHS MODEL ACT, *supra* note 129, § 101, at 10,650 ("when conflicts arise between the rights of the adoptee and of others, the rights of the adoptee should prevail.").

132. Standard 1.6 provides that "[T]he entire system of intervention should be designed to promote a child's need for a continuous, stable living environment." ABA STANDARDS II, *supra* note 129, at 57. This goal of continuity, and the time limits established for foster care are based on the presumption that, after many years in the same foster home, children "will probably view the foster parents as their 'psychological' parents." *Id.* § 7.5 commentary at 145; see also *id.* § 8.3 commentary at 156 ("judges . . . [correctly] recognize that in most situations the foster parents are the child's 'psychological parents'"); cf. HHS MODEL ACT, *supra* note 128, § 102(a)(13), at 10,651 (foster parents who have cared for the child one year accorded legal standing as "de facto parents").

133. ABA STANDARDS II, *supra* note 129, § 8.5, at 161 ("Where possible, adoption is preferable"); cf. NAC STANDARDS, *supra* note 129, ¶ 3,183 commentary (adoption preferred disposition).

134. ABA STANDARDS II, *supra* note 129, § 8.3(c), at 163. If the child has been placed by court order, these standards also require that the agency have fulfilled its obligations to the parent as a precondition to termination. *Id.* If the child has been voluntarily placed, the state must show that "the parents do not want or are unable to accept custody at the present time; return of the child to the parent will cause the child to suffer serious and sustained emotional harm; or the child is twelve years old and wants to be adopted." *Id.* § 8.3 commentary at 162-63. These standards also permit termination on other grounds after a shorter period in placement. *Id.* ABA STANDARDS I permit termination of parental rights to a child under three after six months in placement. ABA STANDARDS I, *supra* note 89, §§ 8.3-8.4 commentary at 154-60. For a child over three, these standards also permit termination of parental rights after a 6-month review hearing if the court finds that the parents have failed to maintain contact with the child during the previous six months and to reasonably plan for resumption of care. *Id.* § 8.3(b), at 154. Both ABA STANDARDS I and II allow only five defenses to termination. For a description of these defenses, see note 135 *infra*.

The other recent model legislation generally follows this pattern of permitting termination upon a showing that the child has been in care for some time and that his parent will not be able to regain custody in the foreseeable future. See, e.g., NAC STANDARDS, *supra* note 129, § 3.185(c), at 346; JUDGES' ACT, *supra* note 128, § 12(1); HHS MODEL ACT, *supra* note 129, § 313(d)(5), at 10,676.

135. ABA Standards II, *supra* note 129, § 8.4 commentary, at 74.

The standards actually include five exceptions to the rule requiring termination, and only the first exception requires a showing of detriment to the child. ABA STANDARDS II, *supra* note 129, § 8(4), at XXX. The other exceptions involve: (i) a child placed with a relative; (ii) a child with special problems; (iii) a child for whom permanent family placement

The ABA and other model standards typically deviate from Goldstein, Freud, and Solnit's proposals, however, in two respects. First, the standards establish only a presumption in favor of termination after the child has been in foster care for a set period of time, which may be rebutted in a variety of situations.<sup>136</sup> In this respect, the model standards are more cautious than Goldstein, Freud, and Solnit's proposals, which urge *automatic* termination upon the request of a foster parent who has continuously cared for a young child for two years.<sup>137</sup> In another respect, however, the model standards are much less cautious than Goldstein, Freud, and Solnit's proposals: Typically, they permit termination after the child has been in foster care for a set period of time, whether or not he has been continuously cared for by a foster parent who wishes to keep him permanently. Children's ties to their natural parents are thus cut off in order to free them for adoption by strangers as well as by persons who have become psychological parents.<sup>138</sup> Indeed, the model standards do not

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is unavailable; and (iv) a child over ten who objects to termination. *Id.* § 8(4), at XXX. Exceptions (i), (ii), and (iv) by their terms apply only in limited circumstances, and exception (iii) "must be applied very cautiously." ABA STANDARDS I, *supra* note 89, § 8(4) commentary at 160. Furthermore, for all exceptions, a parent must show by clear and convincing evidence that the exception is applicable. ABA STANDARDS II, *supra* note 129, § 8(4), at 173.

136. Under the NAC STANDARDS, for example, the court is not to terminate if it finds that:

termination would be detrimental to the juvenile because of the closeness of the parent-child relationship; the juvenile has been placed in a residential facility because of his/her physical or mental health problems and termination is not necessary to provide a permanent family home; the juvenile has been placed with a relative who does not wish to adopt him/her; the juvenile cannot be placed in a family environment; or the juvenile objects.

NAC STANDARDS, *supra* note 129, § 3.185(c), at 346.

ABA STANDARDS I and II include five very similar exceptions to the rule that the court should order termination. *See* ABA STANDARDS II, *supra* note 129, § 8.4, at 173; note 135 *supra*.

137. Termination upon request is available only for children placed under the age of five. Parents of children placed over age five may request a hearing to contest termination. *See* note 119 *supra* and accompanying text.

138. None of the standards limit termination only to those instances in which the foster parent wishes to keep the child permanently. *But cf.* ABA STANDARDS II, *supra* note 129, at 163 (limiting termination for children in private placement to cases in which caretaker wishes to adopt the child). In part, this difference may reflect a practical difficulty with Goldstein, Freud, and Solnit's scheme: Under their standards, a child could remain in foster care indefinitely if no foster parent wanted to keep him permanently or if he moved so frequently that the time necessary for a foster parent to obtain permanent custody never accumulated. But the solution the model standards have generally adopted—substituting mere passage of time for passage of time with a particular caretaker—creates new problems: It gives no guarantee that the state will try to find the child a permanent home after termination.

There is evidence that an appreciable proportion of children freed for adoption will be adopted by strangers rather than their foster parents. For example, one recent demonstration

guarantee that anyone will ever adopt these children.<sup>139</sup> These standards therefore attribute even greater weight to the hypothesized need for an unconditional, permanent relationship than do Goldstein, Freud, and Solnit; they implicitly deem that the mere possibility of such a relationship outweighs the certain loss of the child's natural parent and the possible loss of a current foster parent.

The widespread acceptance of Goldstein, Freud, and Solnit's theories with respect to foster care sharply contrasts with the reaction to their parallel conclusions about divorce. Since divorce and separation, like foster care, create the possibility of conflicting parental loyalties, Goldstein, Freud, and Solnit would apply the same visitation rules in those situations as they do in the foster care context: Once one parent is awarded custody, they would give him total control over the child's contact with the noncustodial parent.<sup>140</sup> Unlike its foster care equivalent, this proposal has met with an extremely negative response,<sup>141</sup> and there has been no movement towards its adoption. Out of "concern for maintaining family relationships that can provide emotional security for the children of divorcing parents,"<sup>142</sup> most states have in fact gone in the opposite direction over the past decade and *expanded* postdivorce visitation rights to include at least

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project which sought to achieve permanency for children in foster family care returned 27% of the project's children home and freed 52% for adoption; 31% were adopted by their foster parents and 21% by parents unknown to them. See A. EMLIN, *supra* note 5, at 4-5.

139. Typically, termination does not require the *current* availability of an adoptive home. See, e.g., ABA STANDARDS I, *supra* note 89, § 8.5 commentary at 162; NAC STANDARDS, *supra* note 129, § 3,183. But see MDR ACT, *supra* note 129, § XXI(B)(3) (court shall order conditional decree of termination where it cannot determine whether an adoptive placement is available).

140. See GFS I, *supra* note 8, at 62 (proposing a least detrimental alternatives standard, "[w]hether the problem arises in separation, divorce, adoption, neglecting parent, foster care, or even juvenile delinquency proceedings"). Goldstein, Freud, and Solnit are, however, willing to abide by parental custody agreements following divorce or separation. *Id.* at 38. If the parents cannot agree and both are "equally suitable in terms of the child's most immediate predictable developmental needs," *id.* at 63, a "judicially supervised drawing of lots [is deemed] . . . the most rational and least offensive process" of resolving who will gain custody, *id.* at 153 n.12. Other things being equal, they would also permit the court to award custody to the parent most willing to permit visitation. *Id.* at 118.

141. See, e.g., Benedek & Benedek, *Post Divorce Visitation: A Child's Right*, 16 J. AM. ACAD. CHILD PSYCHIATRY 256, 270 (1977) (their scheme "would provide no insurance that further conflict would not ensue" and is a "simplistic formula"); Dembitz, *Beyond Any Discipline's Competence*, 83 YALE L.J. 1304, 1310 (1974) ("The proposal is blind and untenable."); Foster, Book Review, 12 WILLAMETTE L.J. 545, 550-51 (1976) (the no visitation rule is the "most objectionable statement" in the book); Strauss & Strauss, Book Review, 74 COLUM. L. REV. 998, 1002 (1974) ("we are entirely unpersuaded . . . that the law must turn its face from one of the divorcing parents").

142. *Trends in Grandparent Third-Party Visitation Rights Legislation*, 7 FAM. L. REP. (BNA) 2587 (1981).



the child's grandparents<sup>143</sup> and sometimes even his stepparents.<sup>144</sup>

Similar concerns have led a growing number of states to authorize, even to encourage, joint custody arrangements.<sup>145</sup> In California, for example, a court now *must* presume that joint custody is in the best interests of the child if both parents agree to a joint custody award.<sup>146</sup> When a court denies one parent's petition for joint custody, it must "state . . . the reasons for . . . denial," and in choosing the sole custodian, it must "consider . . . which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent."<sup>147</sup>

To date, there has been little attempt by either legal commentators or child care experts to explain why divorce law reform has focused on maintaining family relationships while foster care reform has focused on providing one unconditional relationship. A historical explanation lies in the traditional contrast between private family law, which has consistently recognized parental rights, and the family law of the poor, which generally has not. But if Goldstein, Freud, and Solnit are correct, there is no good reason to treat divorce and foster care cases differently; the noncustodial parent's right to maintain a relationship with the child should be severed in either case.

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143. By 1982, 40 states had statutes providing for grandparents' visitation rights after divorce. See [Reference File] FAM. L. REP. (BNA) 400: iv-v (1982). In other states, courts have recognized grandparents' visitation rights through judicial decision. See, e.g., *Hawkins v. Hawkins*, 102 Ill. App. 3d 1037, 430 N.E.2d 652 (1981).

This trend has also produced some movement to provide visitation rights to grandparents of adopted children. So far, however, grandparent visitation rights have been accepted primarily in the context of stepparent adoptions—adoptions likely to have resulted from a divorce. See, e.g., MONT. CODE ANN. § 40-9-102 (1981); N.M. STAT. ANN. §§ 40-9-2, 40-9-4 (1978 & Supp. 1982) (specifically denying rights to grandparents after adoption *unless the adoptive parent is a stepparent or another grandparent*); see also Bodenheimer, *supra* note 96, at 44-51 (supporting grandparent visitation rights in stepparent adoptions).

144. See, e.g., *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982) (child's best interests dictate post-divorce visitation rights to stepfather); *Wills v. Wills*, 399 So. 2d 1130 (Fla. Dist. Ct. App. 1981) (awarding visitation rights to stepmother); *Simpson v. Simpson*, 586 S.W.2d 33, 35-36 (Ky. 1979) (stating that court should award visitation rights to stepmother if it is in child's best interest to do so).

145. Approximately 27 states now have legislation authorizing joint custody. See [Reference File] FAM. L. REP. (BNA) 400: iii-v (1982). In other states, courts have upheld joint custody awards without specific statutory authorization. See, e.g., *Beck v. Beck*, 86 N.J. 480, 432 A.2d 63 (1981); see also 8 FAM. L. REP. (BNA) 2506 (1982) ("[j]oint custody legislation has been taking the country by a storm; more recent joint custody enactments have evidenced a trend toward elevating joint custody arrangements to a 'preferred' status").

146. CAL. CIV. CODE § 4600.5(a) (West 1970 & Supp. 1982).

147. *Id.* § 4600.5(b)(1); see also ARIZ. REV. STAT. ANN. § 25-332(6) (West 1976 & Supp. 1981-1982) (provision similar to California's).

There is much evidence, however, to suggest that Goldstein, Freud, and Solnit are wrong.

### III. EVALUATING THE PERMANENCY PROGRAM

Goldstein, Freud, and Solnit maintain that children require both continuity of care and a parental relationship unmarred by loyalty conflicts. The continuity principle mandates the transfer of legal custody to a foster parent if he has continuously cared for the child for a lengthy period of time. This principle alone, however, does not justify termination of parental rights: Arrangements like permanent guardianships or long term foster care contracts can ensure continuity while still permitting the natural parent to retain visitation rights.<sup>148</sup> Only the child's alleged need for an unconditional relationship with a parental figure provides support for termination. Despite hot dispute over the wisdom of cutting off a child's contacts with his noncustodial parent in the divorce and separation contexts, the new permanency program standards accept without question the "unconditional relationship" justification for terminating parental rights in the long term foster care situation.<sup>149</sup> Unless Goldstein, Freud, and Solnit are wrong to equate the needs of children following divorce and their needs following a transfer of custody to a foster parent, one of these reform movements is on the wrong track. But even if Goldstein, Freud, and Solnit are correct in treating divorce and foster care cases alike, the question remains whether the developing child is better off facing the "difficulty [of] relating positively to . . . two psychological parents who are not in positive contact with each other"<sup>150</sup> or facing the total loss of a noncustodial parent.

#### A. *The Needs of Children Post-Divorce and Post-Foster Care: Are They Comparable?*

Following divorce and following long term foster care, decisions regarding parental rights must respond to the same dilemma: The child has two (sets of) parents, and has probably had some kind of

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148. See notes 100-07 *supra* and accompanying text.

149. At least some portions of the psychiatric community have also taken this dichotomized stance toward the Goldstein, Freud, and Solnit proposals. See COMMITTEE ON THE FAMILY OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, NEW TRENDS IN CHILD CUSTODY DETERMINATIONS 79 (1980) (concluding that the Goldstein, Freud, and Solnit proposals "appear valid as they apply to adoption and foster care" while contesting their applicability to custody disputes in divorce; the authors report recent research on divorce but no research on foster care or adoption in reaching these conclusions).

150. GFS I, *supra* note 8, at 38.

relationship with both in the past, but he will be able to live with only one of them in the future.<sup>151</sup> He will be able to maintain a relationship with the noncustodial parent only through visitation. Moreover, in both cases courts generally will award custody to the parent who has played a more important role in the child's day-to-day life and can more adequately provide for his day-to-day needs. Thus, from the child's perspective the divorce and long term foster care situations pose similar issues.

Of course, these two situations present differences as well. First, in most divorce cases children will have lived with both parents until shortly before the divorce, whereas a child in long term foster care will have known his natural parent only as a visitor for some time. Second, there is almost certainly a larger percentage of inadequate parents among parents of children in foster care than among divorcing parents.<sup>152</sup> Neither of these factors, however, is likely to have any appreciable impact on the key variable in the Goldstein, Freud, and Solnit analysis: the risk of loyalty conflicts.<sup>153</sup> Indeed, if any difference at all exists as to this variable, one would expect the risks of conflict to be lower for foster children than for children of divorce because natural and foster parents are less likely to have a history of personal antagonism than divorcing parents.<sup>154</sup>

Conclusions in this area are necessarily impressionistic, since researchers have never directly compared children whose parents have divorced with children who have been in long term foster care. But at present, there is nothing to suggest that if children do derive bene-

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151. Increasing use of joint custody arrangements may change this pattern in divorce cases. See notes 145-47 *supra* and accompanying text.

152. This follows from the observation that children often enter foster care because of inadequate parenting. See note 20 *supra* and accompanying text. It should be noted, however, that inadequate parenting is far from uncommon among children of divorced parents. A recent study of divorce and its impact on children found that 15% of fathers suffered severe psychiatric illness, 40% of father-child relationships were "profoundly troubled," and 20% of the children moderately or intensely feared their fathers. J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: CHILDREN AND PARENTS COPE WITH DIVORCE* 253 (1980).

153. In some cases, a long separation from the noncustodial parent together with infrequent visits may reduce loyalty conflicts by nearly obliterating the child's tie to this parent. For most children beyond infancy, however, mere day-to-day physical separation from a parent destroys neither the parent's influence nor his importance to the child. See notes 207-09 *infra* and accompanying text. Researchers have reported children who retained a very strong attachment to a parent even though separated from the parent before they were three and visited by the parent very infrequently. See, e.g., A. EMLÉN, *supra* note 5, at 13 (despite living for seven years with the same devoted foster parents, a boy placed at age two retained primary attachment to his mother who visited only three times a year).

154. Of course, the natural and foster parents also have no history of mutual concern and cooperation. Possibly, these factors offset each other.

fits from the maintenance of family and parental ties—the view that has strongly influenced recent divorce reform—loyalty conflicts are more likely to reduce these benefits for children in long term foster care than for children of divorce.

Arguably, of course, foster children derive fewer benefits from maintaining parental ties than do children whose parents are divorced. The benefits of visitation for a foster child, whose parent is more likely than a divorced parent to be either inadequate or a relative stranger to the child, might be rather sparse. Because of this possibility, in evaluating the validity of Goldstein, Freud, and Solnit's hypothesis with regard to foster children we must rely primarily on evidence regarding these children rather than children of divorce.

Before looking at this evidence, however, a word is in order about the research now available relating to Goldstein, Freud, and Solnit's proposal and the proposal's deficiencies.

#### B. *Background: The Evidence Available*

Goldstein, Freud, and Solnit themselves do not burden the reader with any discussion of the studies, theoretical work, or other evidence supporting their proposals.<sup>155</sup> In fact, the evidence is sketchy and often addresses the issues they raise only indirectly. And much of the scant evidence that does exist contradicts their assertions.

On the continuity principle that they postulate, there is a cohesive body of research that over many years and within a consistent conceptual framework has directly addressed the relevant issues. This research describes the effects of "maternal deprivation."<sup>156</sup> Such deprivation, as described in John Bowlby's classic summation of the early research, encompasses any situation where "the infant and young child . . . [fails to] experience a warm, intimate, and continuous relationship with his mother (or mother-substitute), in which both find satisfaction and enjoyment."<sup>157</sup> The concept was devel-

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155. Several commentators have noted Goldstein, Freud, and Solnit's failure to provide evidentiary support for their conclusions. See, e.g., Katkin, Bullington & Levine, *Above and Beyond the Best Interests of the Child: An Inquiry into the Relationship Between Social Science and Social Action*, 8 LAW & SOC. REV. 669, 672-76 (1974); Miller, Book Review, 23 DE PAUL L. REV. 1093, 1096 (1974); Wald, *supra* note 125, at 669 n.56.

156. For a list of the literature on which Goldstein, Freud, and Solnit rely, see GFS I, *supra* note 8, at 127 n.3; GFS II, *supra* note 118, at 198-202 nn.8-10. In their second book, Goldstein, Freud, and Solnit attempted to distinguish the work of some maternal deprivation theorists that contradicts their claims. Professor Michael Wald has identified and discussed flaws in their argument. See, Wald, *supra* note 126, at 669 n.56.

157. J. BOWLBY, MATERNAL CARE AND MENTAL HEALTH 67 (1951).

oped from studies of institutionalized children conducted during the 1940's in which Bowlby and other researchers<sup>158</sup> discovered that children reared without a permanent parental relationship showed a high level of language retardation and mental subnormality and that both delinquency and serious personality disorders strongly correlated with multiple separations of a child from his parental figure. Based on this data, they postulated that a child's early experiences with his caretakers may have serious and lasting effects on his development.<sup>159</sup>

This general thesis is now widely accepted,<sup>160</sup> and it supports Goldstein, Freud, and Solnit's claim that continuity is important. But the results of recent research suggest that discontinuity as a cause of longrange<sup>161</sup> psychological problems<sup>162</sup> is, on balance, outweighed

158. Frequently cited studies from this period include J. BOWLBY, *Forty-Four Juvenile Thieves: Their Character and Homelife* (1946); Bender & Yarnell, *An Observation Nursery*, 97 AM. J. PSYCHIATRY 1158 (1941); Goldfarb, *Infant Rearing and Problem Behavior*, 13 AM. J. ORTHOPSYCHIATRY 249 (1943); Levy, *Primary Affect Hunger*, 94 AM. J. PSYCHIATRY 643 (1937); Spitz, *Hospitalism*, 1 PSYCHOANALYTIC STUDY CHILD 53 (1945); Spitz & Wolf, *Anaclitic Depression*, 2 PSYCHOANALYTIC STUDY CHILD 313 (1946).

159. See, e.g., J. BOWLBY, *supra* note 157, at 158 ("mother-love in infancy and childhood is as important for mental health as are vitamins and proteins for physical health").

160. See, e.g., M. RUTTER, *MATERNAL DEPRIVATION REASSESSED* 123 (2d ed. 1981) ("Bowlby's [conclusion] which was regarded as very controversial twenty years ago is now generally accepted as true"). For reviews of the maternal deprivation research since the 1940's, see *id.* at 131-218; J. BOWLBY, *ATTACHMENT AND LOSS III: LOSS* 443-62 (1980).

161. Separation from a parent undeniably produces *short term* distress and anxiety. Most children react to separation with acute distress and crying, followed by misery and apathy. Finally, the child may become detached and seem to lose interest in his parents. See J. BOWLBY, *ATTACHMENT AND LOSS: SEPARATION* 8-11, 34-56 (1977); J. DUNN, *DISTRESS AND COMFORT* 73-74 (1977). Pre and postseparation experience affects short term separation reactions, just as they do long term ones. See J. BOWLBY, *supra*, at 3-24, 33-56; J. DUNN, *supra*, at 74-77; M. RUTTER, *supra* note 160, at 32-42.

162. Researchers have reported less deviant behavior in children of divorce or separation than in those living in intact homes where there is chronic conflict. Moreover, several recent population epidemiological studies have shown strong links between marital discord and conduct disorders in children in the absence of any separation experience. Also, for children separated from parents in early childhood because of family discord or problems, researchers have found fewer disorders among those who go to happy, harmonious homes than among those who go to homes characterized by discord and disharmony. See, e.g., Rutter, *Parent-Child Separation: Psychological Effects on the Children*, 2 CHILD PSYCHOLOGY PSYCHIATRY 233 (1971). See generally M. RUTTER, *supra* note 160, at 109-13, 135-36 (summarizing recent research differentiating effects of separation from effects of inadequate care). Rutter concludes that "[a]ltogether the results strongly suggest that it is the quality of relationships which matter rather than the [mere] presence or absence of separations," *id.* at 165, and that "research has confirmed that, although an important stress, separation is not the crucial factor in most varieties of deprivation," *id.* at 217. This is apparently also the current view of even John Bowlby, who has long been the leading proponent of the maternal deprivation thesis. See J. BOWLBY, *supra* note 161, at 208-10 ("The main cause of such deviations (from

by insufficient or inadequate care.<sup>163</sup> Moreover, researchers now know that the impact of separation varies with the quality of the parent-child interaction both before and after the separation<sup>164</sup> and with the type of substitute care the child receives during the separation.<sup>165</sup> This evidence suggests that Goldstein, Freud, and Solnit probably overemphasize the importance of maintaining continuity of care and avoiding separations of a child from his psychological parent, while downplaying other factors such as the quality of care.<sup>166</sup>

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normality) is that during childhood, an individual's attachment behaviour was responded to in an inadequate or inappropriate way . . .").

This is not to suggest that separation has a neutral impact on the child. Multiple separations, even without adverse home conditions, have been linked to an increased risk of later psychiatric disturbance. See J. BOWLBY, *supra* note 161, at 410; M. RUTTER, *supra* note 160, at 193; Douglas, *Early Hospital Admissions and Later Disturbances of Behaviour and Learning*, 7 DEV. MED. CHILD NEUROLOGY 456, 460-63, 473-76 (1975). But see D. FANSHEL & E. SHINN, *supra* note 4, at 452 (multiple foster placements not associated with increased number of negative behavioral symptoms).

163. See M. RUTTER, *supra* note 160, at 15-16; see also Ainsworth, *The Effects of Maternal Deprivation: A Review of Findings and Controversy in the Context of Research Strategy*, in DEPRIVATION OF MATERNAL CARE: A REASSESSMENT OF ITS EFFECTS 97, 98-99 (World Health Organization 1962) (urging that the term "depriving" be reserved for interactions of insufficient quantity and that, for clarity, mother-child separation be excluded from the concept of maternal deprivation altogether).

164. See, e.g., Moore, *Stress in Normal Childhood*, 22 HUM. REL. 235 (1969) (reporting a correlation between the quality of a child's home life and psychological evaluation several years later, among children who had experienced one or more stressful episodes—stays in a residential nursery, hospital, or children's home, temporary absence of father, changes of home, or birth of sibling); Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 J. AM. ACAD. CHILD PSYCHIATRY 600 (1975) (strong correlation between post-divorce changes in quality of mother-child relationship and child's psychological condition); see also J. BOWLBY, *supra* note 161, at 16-24, 222-23; J. DUNN, *supra* note 161, at 74-76; M. RUTTER, *supra* note 160, at 34-42, 67-80, 135-36.

Studies of monkeys have also shown that pre- and postseparation experiences influence a baby's reaction to separation itself. See Hinde & Davies, *Removing Infant Rhesus from Mother 13 Days Compared to Removing Mother from Infant*, 13 J. CHILD PSYCHOLOGY & PSYCHIATRY 227 (1972); Hinde & McGinnis, *Some Factors Influencing the Effects of Temporary Mother-Infant Separation: Some Experiments with Rhesus Monkeys*, 7 PSYCHOLOGICAL MED. 197 (1977); Hinde & Spencer-Booth, *Effects of Brief Separation from Mother on Rhesus Monkeys*, 173 SCIENCE 111 (1971); Hinde & Spencer-Booth, *Individual Differences in the Responses of Rhesus Monkeys to a Period of Separation from Their Mothers*, 11 J. CHILD PSYCHOLOGY & PSYCHIATRY 159 (1970). For a summary of the results of these experiments, see J. BOWLBY, *supra* note 161, at 71-74.

165. See D. FANSHEL & E. SHINN, *supra* note 4, at 364-65; C. HEINECKE & M. WESTHEIMER, *BRIEF SEPARATIONS* 314-15 (1966); Robertson & Robertson, *Young Children in Brief Separation: A Fresh Look*, 26 PSYCHOANALYTIC STUDY CHILD 264 (1971). See generally CWLA STANDARDS, *supra* note 21, at 26-27; D. KLINE & H. OVERSTREET, *FOSTER CARE OF CHILDREN: NURTURE AND TREATMENT* 87-156 (1972).

166. Given this evidence, Goldstein, Freud, and Solnit's claim that a child should not be removed even from a psychological parent who subjects him to serious emotional harm has been justifiably criticized. See, e.g., Besharov, *supra* note 126, at 485-91; Wald, *supra* note 126, at 663-93.

The maternal deprivation literature has not, however, focused on whether the harm caused by loyalty conflicts between parents outweighs the harm caused by losing a parent altogether. Nor has it addressed the comparability of children's needs following divorce and following long term foster care. The only available evidence on these questions comes from research that varies remarkably as to time, methodology, conceptual framework, and quality. The evidence is also incomplete. For example, no one has directly compared children who leave long term foster care through adoption, and are thus precluded from visiting their natural parents, with children who leave long term foster care through a permanent custody arrangement, and are thus permitted to visit their natural parents.<sup>167</sup>

Given these deficiencies in the evidence, the relative importance of loyalty conflicts, relationships with noncustodial parents, and other variables cannot be described with certainty. We must stand prepared to revise our conclusions to conform to better data, should it arrive.<sup>168</sup>

### C. *Conflict Between Natural Parent and Foster Parent*

Goldstein, Freud, and Solnit assert that termination of parental rights is essential when a child's parents are not in positive contact with each other. While they give no support for this proposition, it does make intuitive sense that a child would experience more developmental problems in this situation than when the parents' relationship is harmonious. But the key question, of course, is a different one: Do the dangers of possible conflict between foster parent and natural parent (or between divorcing parents) outweigh the potential disadvantages of losing a parent altogether?

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167. One study has compared five previously institutionalized children who were adopted with seven who were restored to their natural parents after the age of four. Researchers evaluated the children 4½ years after their adoption or restoration. Both groups manifested worse-than-average behavioral, learning, and concentration difficulties. The adopted children, however, developed a stronger relationship with their new parents than did the restored children with their natural parents. The researchers postulated that this difference was a result of the natural parents' ambivalence toward their children. See B. TIZARD, *supra* note 103, at 151-79.

Another four children had remained in foster homes until evaluated 4½ years later. Although researchers made no direct comparisons of the children studied, they felt that these foster homes were inferior to adoptive homes, at least in part because both the foster children and parents apparently were anxious about the future stability of the placement. *Id.* at 198-211. Because the study involved only temporary placement in foster homes, it does not shed any light on the advantages of adoption vis-a-vis permanent custody with visitation.

168. For a useful list of child welfare research topics in need of data, see Wald, *Legal Policies Affecting Children: A Lawyer's Request for Aid*, 47 CHILD DEV. 1, 3-5 (1976).

1. *A visiting parent or no parent at all.*

On this question, the available evidence suggests that, for most children, the disadvantages of losing a parent are significant and that, in comparison, the dangers of conflict are relatively slight. Evidence from foster care research indicates that continued contact with the natural parent generally promotes the child's sense of well-being and emotional security.<sup>169</sup> The beneficial effect of maintaining these ties is apparently felt even by children who were separated from their parents at a very early age and whose subsequent contacts with their parents are sporadic. Moreover, these benefits have been found among randomly selected foster children, without excluding those who have neglectful or inadequate parents.

One early study<sup>170</sup> systematically analyzed the level of emotional security<sup>171</sup> displayed in the behavior of foster children. It found a substantially higher degree of security among children who were permitted some contacts with their previous homes (either their own or a foster home) than among children who were not.<sup>172</sup> This finding is especially striking since the child's contact with the previous home was, in many cases, quite tenuous. A particularly interesting subsample of 30 children had experienced both types of change, one where contact with the previous home had been maintained and another where it had not. There again, contact with their previous homes had a significant positive effect on the children's behavior.<sup>173</sup>

Another early study of children in extended foster care<sup>174</sup> found that children whose mothers wrote to them or sent them small gifts

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169. It must be kept in mind that most studies have not measured the child's well-being in any consistent manner, and one study measured it only by impressionistic evidence. See VanderWaals, *Former Foster Children Reflect on Their Childhood*, 7 CHILDREN 29 (1960). Only one study has determined well-being using a number of independent quantifiable measures. See D. FANSHEL & E. SHINN, *supra* note 4, at 486-88.

170. Cowen & Stout, *A Comparative Study of the Adjustment Made by Foster Children After Complete and Partial Breaks in Continuity of Home Environment*, 9 AM. J. ORTHOPSYCHIATRY 330 (1939).

171. Cowen and Stout measured insecurity by looking at seven behavioral symptoms: expressed loneliness for people or conditions from an earlier environment, enuresis, poor contact with reality (day dreaming, lack of interest in the environment, and inadequate motivation), chronic fear, general sense of inadequacy, keen sense of inferior status, and persistent disobedience. *Id.* at 333.

172. *Id.* at 337.

173. *Id.* For a discussion of this study, see J. BOWLBY, *supra* note 157, at 112-14.

174. VanderWaals, *supra* note 169 (followup study of 160 former foster children in Holland reported benefits from parental contact, but apparently determined benefits solely on impressionistic evidence).



experienced greater feelings of self-confidence.<sup>175</sup> Furthermore, maintenance of these parental ties was not found to interfere with the child's relationship to his foster parents. On the contrary, "[the] feeling of being loved by their own mothers evidently helped in their relationship with the foster parents, for these respondents also tended to speak kindly of their foster parents."<sup>176</sup>

More recent research has yielded similar conclusions. Weinstein,<sup>177</sup> for example, found that of 61 foster children age five or older who had been in care for at least one year, the highest level of well-being<sup>178</sup> occurred in those who identified<sup>179</sup> with their natural parents and whose parents visited them;<sup>180</sup> the second highest level occurred in children who identified with foster parents and whose natural parents visited them; much lower levels of well-being occurred in children who identified with foster parents and whose natural parents did not visit them.<sup>181</sup> Because half of the children in this last category had spent most of their lives in their current foster home, the study strongly supports the notion that permanent custody arrangements that permit continued contact between the child and his natural parent are preferable to absolute termination of parental rights.<sup>182</sup>

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175. *Id.* at 31.

176. *Id.*

177. E. WEINSTEIN, *THE SELF IMAGE OF THE FOSTER CHILD* (1960).

178. Weinstein measured "well-being" according "to what extent the child had developed the physical, intellectual, emotional, and social abilities and resources to weather his or her life situation." *Id.* at 65.

179. Weinstein determined "identification" by the child's responses to four questions: "If you had some trouble or were worried, whom would you like to talk to about it? Whom do you love most in all the world? Who loves you the most? If you could pick anyone in the whole world to live with, whom would you pick?" *Id.* at 47. A child was considered to be identified with his natural (or foster) parents only if he indicated his natural (or foster) parents in response to all four questions. Otherwise, his identification was considered mixed. *Id.*

180. Weinstein considered a child to be "visited" if his parent saw him more than twice a year. *Id.* at 51, 54.

181. *Id.* at 68-70. Only one child was identified with a natural parent who did not visit. His individual rating was lower than any group rating. *Id.* at 68.

182. A British researcher who attempted to replicate Weinstein's study has also reported that her results support his findings. See Thorpe, *The Experiences of Children and Parents Living Apart*, in *NEW DEVELOPMENTS IN FOSTER CARE AND ADOPTION* 90, 94 (J. Triseliotis ed. 1980). Thorpe measured the psychological adjustment of 21 children between the ages of 5 and 17 who had been in foster care for at least one year. She found that the degree of emotional disturbance was significantly related to the child's age at placement and that children who were in contact with their natural parents and/or siblings were better adjusted than those who were not. (The latter finding was not statistically significant, however.) Thorpe concluded that her "research supports . . . [the Weinstein] findings, and in addition it suggests that lack of contact may lead to feelings of insecurity, confusion or anxiety about personal identity."

A longitudinal study of children in long term foster care conducted under the auspices of Columbia University—the most recent and most thorough study to date—reported the same conclusions about the value of parental visitation.<sup>183</sup> In this study, researchers found that frequent parental visitation correlated strongly with higher ratings on a variety of scales designed to measure the child's intellectual and emotional development.<sup>184</sup> The researchers thus urged that, "in the interests of the child's emotional well-being," parental visitation should be encouraged.<sup>185</sup>

What is impressive about the sum of this research is the uniformity of its findings: Every study<sup>186</sup> has reported that parental contact had a positive influence on the children examined.<sup>187</sup> Because child

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183. D. FANSHEL & E. SHINN, *supra* note 4, at 486-88.

184. Fanshel and Shinn compared frequently and infrequently visited children in foster care at three points in time: Time 1—after being in foster care for at least 90 days; Time 2—after about 2½ years; and Time 3—after about five years. They found that frequently-visited children showed significantly greater gains than the other children in nonverbal IQ scores from Time 1 to Time 2; significantly greater gains in verbal IQ scores over the full five years of the study; more significant gains from Time 1 to Time 2 in emotional adjustment as measured by figure-drawing tests; significant improvement in Child Behavioral Characteristics scores; and more positive assessments of the child by his classroom teacher. *Id.*

185. *Id.* at 487. The researchers did not find, however, that parental visitation was an "unalloyed blessing." After 2½ years in placement, more frequently visited children showed less capacity to cope with both separation and the foster care environment and a greater propensity for identity conflicts than did less frequently visited children. After five years in care, however, all of these differences had diminished. In fact, differences in the children's ability to cope with the foster care environment were no longer statistically significant after five years. *Id.* at 411.

Fanshel and Shinn cautioned that they "[did] not know whether it is harmful for a child to openly struggle with the problem of conflicting loyalties to parents who visit." *Id.* at 412. Yet, they concluded that, "[i]n the main, children are more able to accept additional concerned and loving parental figures in their lives, with all the confusions inherent in such a situation, than to accept the loss of meaningful figures." *Id.* at 488. The authors thus "strongly support[ed] the notion that continued contact with parents, even when the functioning of the latter is marginal, is good for most foster children." *Id.* at 487.

186. For other studies reporting beneficial effects of parental visitation on children in long term foster care see, for example, R. HOLMAN, TRADING IN CHILDREN 192-93, 201-02 (1973); S. ISAACS, THE CAMBRIDGE EVACUATION SURVEY (1941); G. TRAWLER, IN PLACE OF PARENTS (1960); Jenkins, *Long Term Fostering*, 15 CASE CONF. 349 (1969); Lewis, *Long Time and Temporary Placement of Children*, in SELECTED PAPERS IN CASEWORK (1951); Pringle & Clifford, *Conditions Associated with Emotional Maladjustment Among Children in Care*, 14 EDUC. REV. 112 (1962); J. Gallop, *Three Factors Affecting the Reactions of Children to Foster Family Care* (1972) (doctoral dissertation, Catholic University of America).

187. Two British studies have reported, however, that foster children with no contact with their natural parents exhibited more problems than children with *regular* contact but less problems than children with *infrequent, irregular* parental contact. See R. HOLMAN, *supra* note 186, at 200-02 (children experienced "difficulties" with natural parents more often with infrequent contact than with "regular" (at least once a month) or no contact; this finding was statistically significant for fostering arrangements made privately by natural parents but not

psychology is so complex and studies contain so many uncontrolled variables, we might hesitate to rely on any one of these studies. But together they make a strong case that continued parental visitation benefits children in long term foster care. Furthermore, none of the studies that examined the children's perceptions about their placements found that parental visitation decreased the likelihood that the child would view his placement as permanent. For example, in the Weinstein study, almost 90% of the children who were questioned described their current placement as relatively permanent; over half of these children had a parent who visited them regularly.<sup>188</sup> Moreover, the studies found that visitation benefited even those children whose parents did not visit on a regular or frequent basis and were, undoubtedly, sometimes inadequate.

Researchers have also reported that children with divorced parents benefit from visitation by the noncustodial parent. Wallerstein and Kelly, who conducted a detailed study of divorced families, recently reported that a "good" relationship with the visiting parent "appeared linked to high self-esteem and the absence of depression" and that "boys and girls of various ages who had been doing poorly at the initial assessment were likely to improve with increased visitation . . . ."<sup>189</sup> Even when the parent-child relationship was "poor"

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for fostering arrangements made by the state); Jenkins, *supra* note 186, at 349, 352 (35% of children with "regular" (more often than every six months) parental contact found emotionally disturbed, as compared to 57% of children with no contact and 65% of children with "irregular" contact; of the 31 children with irregular contact, 5 had received only one visit since placement). Although these results have not been corroborated by other research to date, they deserve further study in order to determine how frequently visitation must occur in order to retain its beneficial impact.

188. E. WEINSTEIN, *supra* note 177, at 35-36. Contrary to Weinstein's original hypothesis, children did not exhibit "status anxiety" about the tenuous nature of their placements, despite continued contact with their parents. *Id.* at 36. Other studies have also found that a child's sense of permanence is not strongly correlated with the category of placement (i.e., foster versus adoptive):

Perception of permanence happens without legal sanctions. And it may be absent even when legal sanctions are there—whether the child was in a legally permanent placement, adoption, or returned home or was in a legally temporary foster care made very little difference in his level of adjustment and health at the time of the interview. Perception of permanence was the key.

A. KADUSHIN, *supra* note 23, at 389. Kadushin also reports that a 1975 study comparing a group of children in long term foster care with a group in adoptive homes showed that "there were no statistically significant differences in the functioning of the two groups of parents nor in that of the two groups of children." *Id.* More recently, Fanshel found that the majority of children studied who had been in foster homes for an average of six years thought of the foster home as their "real home." Most were "at peace with the current arrangement." *Id.*

189. J. WALLERSTEIN & J. KELLY, *supra* note 152, at 219.

or had deteriorated, Wallerstein and Kelly found visitation preferable to complete loss of contact. They found visitation undesirable only when the parental relationship was physically or psychologically destructive.<sup>190</sup>

Complementing these studies, modern psychoanalytic theory on childhood personality development helps to explain the advantages of continued contact with the natural parent. Psychologists now believe that the child's image of himself and the world is based on his early interaction with parental figures.<sup>191</sup> Thus, if the child perceives his parent as cold and rejecting, his personality development and self-esteem will suffer.<sup>192</sup> "For a healthy self-image, the child must not be allowed to 'forget' but be helped to a beginning acceptance of his parents."<sup>193</sup> Only those children who are helped to "regard their parents as unable rather than unwanting, and their placement as symbolizing worth rather than worthlessness"<sup>194</sup> will be likely to attain a feeling of self-worth.

Visitation and contact with the noncustodial parent can aid the child both in forming a healthy self-image and in realistically assessing the parental problems that necessitated placement. Without parental contact, the child will tend to base his impressions of the lost parent solely on fantasy; some children may therefore idealize their absent parents and dream about a future reunion.<sup>195</sup> This can im-

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190. *Id.* at 239.

191. See J. BOWLBY, *supra* note 161, at 208-09, 322-62, 369; E. JACOBSON, *THE SELF AND THE OBJECT WORLD* 172 (1964); see also A. FREUD, *NORMALITY AND PATHOLOGY IN CHILDHOOD* 46-47, 50, 156-57; M. MAHLER, *ON HUMAN SYMBIOSIS AND THE VICISSITUDES OF INDIVIDUATION: VOLUME I INFANTILE PSYCHOSIS* (1968); Winnicott, *The Capacity to Be Alone*, 39 *INT'L J. PSYCHOANALYSIS* 416, reprinted in D. WINNICOTT, *THE MATURATION PROCESSES AND THE FACILITATING ENVIRONMENT* 29 (1965).

192. See S. COOPERSMITH, *THE ANTECEDENTS OF SELF-ESTEEM* (1967); R.F. PECK & R.J. HAVIGHURST, *THE PSYCHOLOGY OF CHARACTER DEVELOPMENT*. For a collection of additional sources on this point, see note 191 *supra*.

193. Garrett, *Developing the Conviction in the Foster Child that He is Worthwhile*, in *FOSTER CARE IN QUESTION*, *supra* note 47, at 22.

194. *Id.* (quoting Rosner, *Crisis of Self-Doubt*, 23 (New York Child Welfare League of America (1961))); see also Littner, *The Importance of the Natural Parents to the Child in Placement*, 54 *CHILD WELFARE* 175, 178-81 (1975); Morisey, *Continuum of Parent-Child Relationship in Foster Care*, in *FOSTER CARE IN QUESTION*, *supra* note 47, at 151-52, 154; Thorpe, *supra* note 182, at 94-98.

195. See Littner, *supra* note 194, at 177, 179; see also J. BOWLBY, *supra* note 157, at 124-25; Garrett, *supra* note 193 at 22. For similar views about children with divorced parents, see J. WALLERSTEIN & J. KELLY, *supra* note 152, at 256.

This strong tendency of children to idealize their absent parents is both "a way to avoid the pain associated with accepting the shortcomings of their parents . . . [and] a way for the child to avoid feelings of devaluation and guilt resulting from whatever happened in the

pede the child's ability to form realistic current relationships.<sup>196</sup> Conversely, the child may exaggerate the parent's faults. This can hurt the child's own self-esteem,<sup>197</sup> since children tend to identify with the image they hold of their parents.<sup>198</sup>

The child's knowledge that the parent lives, but is unavailable, also hinders his ability to effectively mourn his loss.<sup>199</sup> Just as a child often blames himself for the death of his parent,<sup>200</sup> a foster child may blame either himself or his foster parent for the loss of contact with his natural parent.<sup>201</sup> Furthermore, a distorted parent-child relationship, which often precedes the foster child's separation from his parent, increases the likelihood that the child will have difficulty in adequately mourning his loss.<sup>202</sup>

Thus, visitation by natural parents can aid the child in elevating

home of [the] biological parents." Stein & Derdeyn, *The Child in Group Foster Care*, 19 J. AM. ACAD. CHILD PSYCHIATRY 90, 92-93 (1980).

196. The foster parents and the caseworker are often viewed as the persecutors who stole the child from his loving parents and keep him from returning to his family. This situation is more likely to arise when visitation is disallowed or otherwise limited. In directing the anger toward the foster parents, the child is remaining loyal to his now idealized parent(s).

Stein & Derdeyn, *supra* note 195, at 93; *see also* Littner, *supra* note 194, at 178-81; note 209 *infra* and accompanying text.

197. *See* Littner, *supra* note 194, at 177; *see also* sources cited in notes 191-92, *supra*.

198. When a child has had living experiences with his natural parents, he identifies with many of their personality traits. He carries images of his natural parents within his own mind. They become, in effect, a part of the child. This occurs even when the child has no conscious memories of his natural parents, e.g., when he is placed away from his parents before the age of 6 years.

Littner, *supra* note 194, at 177; *see also* sources cited in notes 191-92 *supra*.

199. *See* E. FURMAN, A CHILD'S PARENT DIES 46-48 (1974). Furman concluded that healthy mourning following a loss through separation poses particular difficulties for children, which are not ameliorated by making the separation total:

[T]he continued total separation from the love object appeared to evoke a mourning process, but its course was considerably affected by the ambiguous nature of the reality: "I do not see him, but he is alive somewhere." Other factors, such as feelings of rejection and guilt further complicated the picture.

*Id.* at 47; *see also* Benedek & Benedek, *supra* note 141, at 260 (child's symptoms following parental separation or divorce generally resemble those following parental death); Stein & Derdeyn, *supra* note 195, at 96 (same).

200. In one study, no less than 40% of children and adolescents attributed their parent's death either to themselves or to the surviving parent. *See* Arthur & Kemme, *Bereavement in Childhood*, 51 CHILD PSYCHOLOGY & PSYCHIATRY 37 (1964); *see also* J. BOWLBY, *supra* note 160, at 358-61 ("[N]othing is easier for a child than mistakenly to blame someone, including himself, for having caused or contributed to a parent's death.").

201. *See* Littner, *supra* note 194, at 177; *cf.* Benedek & Benedek, *supra* note 141, at 260 (noting the same phenomenon about divorce).

202. One of the variables that Bowlby identifies as accounting for differences in children's reactions to loss is "the patterns of relationship within the family prior to the loss, with special reference to the patterns obtaining between the parents themselves and between each

his self-esteem, understanding and coping with his parents' problems, and effectively mourning the loss of his natural parents. Both psychoanalytic theory and empirical data suggest that a visiting parent is better than no parent at all.

## 2. *The advantages of visitation versus the dangers of conflict.*

The advantages of visitation are complicated by antagonism between the natural and foster parents. Not surprisingly, researchers have found that interparental hostilities can cause children to experience severe stress.<sup>203</sup> They have reported that a link exists between psychological disturbance and active but irregular contact with a parent who has strongly conflicting feelings about his child's placement<sup>204</sup> and that long term care itself may create loyalty conflicts for some children.<sup>205</sup> But despite the permanency program's suggestion that terminating parental visitation will help the child with these problems,<sup>206</sup> there is no evidence to support this view.<sup>207</sup> Gone need not mean forgotten.<sup>208</sup> The child may still cling to an alliance with the absent parent that prevents him from becoming deeply involved in the foster home;<sup>209</sup> he may feel abandoned and rejected.<sup>210</sup> Rather

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of them and the bereaved child." J. BOWLBY, *supra* note 160, at 311; *see also* E. FURMAN, *supra* note 199; I. GLICK, R. WEISS & C. PARKES, *THE FIRST YEAR OF BEREAVEMENT* (1974).

203. *See, e.g.*, J. WALLERSTEIN & J. KELLY, *supra* note 152, at 49, 70-71 (discusses the impact of interparental hostilities following divorce).

204. *See* J. BOWLBY, *supra* note 157, at 116.

205. *See* D. FANSHEL & E. SHINN, *supra* note 4, at 487-88.

206. *See* note 149 *supra* and accompanying text.

207. Fanshel and Shinn reported that parental visitation significantly correlated with identity conflict when considered alone but that, when all variables were considered simultaneously, the influence of visitation was markedly reduced and was no longer statistically significant. D. FANSHEL & E. SHINN, *supra* note 4, at 404-07. The most significant predictor of identity conflicts was age at placement. *Id.*

208. There is evidence that parental visitation does not significantly affect identity conflicts. Fanshel and Shinn attempted to measure the extent to which children in long term foster care "became caught up in conflicting emotions about . . . identity, wondering to whom [they] . . . 'belonged,' and specifically, whether [they] . . . experienced conflicts in loyalty to surrogate and natural parents." *Id.* at 405. They found that unvisited children were *more* attached to their parents than visited children. Children placed at younger ages, who thus had less preplacement experience with their parents, were also more attached to their parents than children placed when older. Furthermore, the level of the younger children's attachment *increased* after 2½ years in foster care. These findings suggest that for many children in foster care parental absence, rather than causing the child to forget the parent, increases the parent's importance to the child. *See id.* at 402-05.

209. *See, e.g.*, J. BOWLBY, *supra* note 157, at 116; Littner, *supra* note 194, at 178-79; Stein & Derdeyn, *supra* note 195, at 92-93. For a similar view about children of divorce, *see* J. WALLERSTEIN & J. KELLY, *supra* note 189, at 248 (for many years, some children remained unreconciled to separation, and wove elaborate erotic and heroic fantasies around absent fathers).

than resolving the child's problems, cessation of contact with the natural parent is likely only to bury them. As one pair of commentators has stated,

[i]t is better for the child to have to cope with *real* parents who are obviously flawed in their parental behavior, who bring a mixture of love and rejection, than to reckon with *fantasy* parents who play an undermining role on the deeper level of the child's subconscious.<sup>211</sup>

This is not to say that parental visitation is appropriate in every situation. Young children of extremely abusive parents may find parental visitation too threatening. Some parents with severe mental disturbances may be incapable of meaningful interaction with their children, and visits by some psychologically destructive parents may do more harm to their children than good.<sup>212</sup> Even in these cases, however, rigidly proscribing visitation may not be the best approach:

The strength of the child's attachment could easily be underestimated and inadvertently reinforced by the rigid proscription of visiting. Unfortunately, the absolute prohibition of visiting with the psychologically ill parent is as likely to strengthen the relationship as to weaken it, and the well-intentioned strategy may boomerang because children, out of their own intense need, can all too readily idealize the parent they are prohibited from seeing.<sup>213</sup>

Even the children of emotionally disturbed parents may benefit more from structured visitation that includes counseling than from simple termination of contact.<sup>214</sup> This approach at least offers the child the

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210. See, e.g., Littner, *supra* note 194, at 177; Stein and Derdeyn, *supra* note 195, at 90-91. For a similar view about children of divorce, see J. WALLERSTEIN & J. KELLY, *supra* note 152, at 218 (an unvisited child is likely to feel rejected and unlovable).

211. D. FANSHIEL & E. SHINN, *supra* note 4, at 489; see also E. WEINSTEIN, *supra* note 177, at 69 (postulating that unvisited children had lowest well-being ratings because "unvisited children may develop feelings of being unwanted by their natural parents and being somehow inferior or unworthy because of this").

212. See J. WALLERSTEIN & J. KELLY, *supra* note 152, at 238-42 (following divorce, some visiting relationships could be considered detrimental to development because they infantilized the child, hurt his feelings, or exploited him for the benefit of the adult).

213. *Id.* at 256; see also J. BOWLBY, *supra* note 157, at 69 ("The attachment of children to parents who by all ordinary standards are very bad parents is a never-ceasing source of wonder to those who seek to help them. Even when they are with kindly foster-parents these children feel their roots to be in the homes where, perhaps, they have been neglected and ill-treated, and keenly resent criticism directed against their parents.").

214. See J. BOWLBY, *supra* note 157, at 120 (suggesting joint counseling when loyalty conflicts arise); D. KLINE & H. OVERSTREET, *supra* note 165, at 112-13, 151-53 (the presence of a caseworker during parental visits can ease the foster child's stress). For similar views concerning postdivorce visits by noncustodial parents, see Benedek & Benedek, *supra* note 141, at 264-65, 267; Futterman, *Child Psychology Perspectives: After the "Civilized" Divorce*, 19 J. AM. ACAD. CHILD PSYCHIATRY 525 (1980).

opportunity to understand his parent's inadequacies and thus avoid self-blame.

Finally, that visitation may produce loyalty conflicts which outweigh its advantages in certain individual cases could not justify generally denying visitation for children in long term foster care. As we have seen, researchers have uniformly found that visitation benefits most children in long term foster care. If visitation with natural parents *usually* causes loyalty conflicts that outweigh the advantages of continued contact for these children, the researchers should have reported the opposite conclusion. Thus, damaging loyalty conflicts appear to be the exception rather than the rule for foster children. And careful selection of foster parents as well as foster parent training that emphasizes the advantages of the child's development of a realistic relationship with his natural parent could substantially reduce any risks of conflict created by visitation.<sup>215</sup>

On balance, then, the risks of interparent conflict, even when coupled with the reality that some foster children have destructive or emotionally troubled parents, do not justify the permanency program. Instead, the evidence, taken as a whole, confirms what perhaps should be obvious. As John Bowlby put it:

[Children] are not slates from which the past can be rubbed off with a duster or sponge, but human beings who carry their previous experiences with them and whose behavior in the present is profoundly affected by what has gone before. [The evidence] confirms . . . the deep emotional significance of the parent-child tie which, though it can be greatly distorted, is not to be expunged by mere physical separation. Finally, it confirms the knowledge that it is always easier for a human being to adapt effectively to something of which he has direct experience than to something which is absent and imagined.<sup>216</sup>

#### D. *Children Who Are Adopted*

Studies of adopted children highlight the continuing importance of the absent parent to the child in placement. Some of these studies have reported that adopted children suffer from the same problems

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215. See Thorpe, *supra* note 182, at 95 (reporting that when natural and foster parents accepted each other, the foster children appeared to experience no conflict in loyalties and accepted the foster situation with equanimity). For discussions of the importance of foster parent training aimed at enabling the foster parents to accept the child's relationship with his natural parents, see D. KLINE & H. OVERSTREET, *supra* note 165, at 255-56; Garrett, *supra* note 193, at 23; Littner, *supra* note 194, at 181. Under current practices, foster parents generally receive little or no training or preparation. See note 36 *supra*.

216. J. BOWLBY, *supra* note 157, at 113-14.



of confused identity, insecurity, and guilt that beset children in long term foster care.<sup>217</sup> For example, after interviewing 200 adults who had been adopted as children, one researcher concluded that:

The picture that they almost universally gave was of a child struggling, alone, with overwhelming confusions and insecurities. They described themselves as isolated, insecure, lonely, usually obedient and well-behaved, different—and often disturbed. They reported that they did, and still do, lack self-confidence, self-esteem and a solid sense of identity.<sup>218</sup>

Other studies report that some adopted children have the same persistent fantasies about their natural parents as do some foster children.<sup>219</sup> Some adopted children also experience insecurities in their

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217. For a general discussion of the psychological problems confronting adopted children, see American Academy of Pediatrics, Comm. on Adoptions, *Identity Development in Adopted Children*, 47 PEDIATRICS 948 (1971) [hereinafter cited as American Academy]; Schwam & Tuskan, *The Adopted Child*, in 1 BASIC HANDBOOK OF CHILD PSYCHIATRY 342 (J. Noshpitz ed. 1979). It is unclear whether adoptees have a higher rate of mental disturbance than the general population. Studies have reported above-average psychiatric hospital admission rates for adoptees. See, e.g., Schechter, Carlson, Simmons & Work, *Emotional Problems in the Adoptee*, 10 ARCHIVES GEN. PSYCHIATRY 109 (1964); Simon & Senturia, *Adoption and Psychiatric Illness*, 122 AM. J. PSYCHIATRY 858, 867 (1966). But, some have questioned the validity of these figures and their utility in measuring rates of emotional disturbance. See Taylor & Starr, *The Use of Clinical Services by Adoptive Parents*, 11 J. AM. ACAD. CHILD PSYCHIATRY 384, 386 (1972).

There is no available data comparing the emotional disturbance rate of adoptees to that of foster children. There have been reports that foster children, like adoptees, have a high incidence of behavioral and emotional problems, see D. FANSHIEL & E. SHINN, *supra* note 4, at 10-16 (survey of reports), but Fanshel and Shinn found that the emotional impairment rate of 25-33% in the foster children they examined was "quite in line" with data on children from similar social circumstances who were not in foster care, see *id.* at 494-95.

218. Lawrence, *Inside, Looking Out of Adoption* (1976) (paper presented at the annual meeting of the American Psychological Association), quoted in A. SOROSKY, A. BARAN & R. PANNOR, *THE ADOPTION TRIANGLE* 138 (1979); see also American Academy, *supra* note 217, at 948 (adopted children experience emotional stress and have difficulty developing self-identity); Sorosky, Baran & Pannor, *Identity Conflicts in Adoptees*, 45 AM. J. ORTHOPSYCHIATRY 18 (1975) (reviewing literature, authors report that adoptees are more vulnerable to identity problems than is the population at large); Toussieng, *Thoughts Regarding the Etiology of Psychological Difficulties in Adopted Children*, 41 CHILD WELFARE 59, 65 (1962) (adopted children are more prone to emotional disturbances and personality disorders than are nonadopted children).

219. See Schechter, Carlson, Simmons & Work, *supra* note 217, at 116 (45% of emotionally disturbed adoptees had "noticeable overt fantasies about natural parents" that "often led to active searching in young adulthood for the natural parent"); Schwam & Tuskan, *supra* note 217, at 343 ("many [adopted] children fantasize themselves as step children with idealization of the fantasized biological parents"); see also Clothier, *The Psychology of the Adopted Child*, 27 MENTAL HYGIENE 222, 230 (1943); Schechter, *Observations on Adopted Children*, 3 ARCHIVES GEN. PSYCHIATRY 21 (1960). For children adopted in early infancy into stable, harmonious family situations, however, fantasies about their natural parents tend to be extremely negative rather than idealized and may be accompanied by guilt feelings. See Schwartz, *The Family Romance Fantasy in Children Adopted in Infancy*, 49 CHILD WELFARE 386,

relationships with their adoptive parents: In one sample, 70% of the adoptees stated that their adoptive parents used the fact of adoption to manipulate their behavior.<sup>220</sup> Regardless of whether adoptive parents actually exploit the child's status in this way, these adoptees' statements strongly suggest that adoption, by itself, does not resolve the insecurity that derives from not "belonging" to a natural parent.<sup>221</sup> In fact, for some adoptees, identity conflicts and feelings of not "belonging" continue into adulthood. Motivated by the desire to find their biological roots, these adult adoptees may spend years searching for the natural parents they have never met.<sup>222</sup>

Research also indicates that the severity of adoptees' emotional problems generally correlates with both their age at adoption and the extent of early maternal deprivation.<sup>223</sup> The child who is adopted at birth into a good home thus has the best chance of escaping later psychological problems. Such a child has no memories of his natural parents and, in his earliest years, perhaps no knowledge that they even exist.

By contrast, the vast majority of foster children have lived with, and have memories of, their natural parents. Usually, the parent-child relationship will have been disrupted by family breakdown or inadequate parental care. Adoption by itself cannot resolve the emotional problems that these experiences produce. Thus, as older children with more substantial ties to their natural parents have moved into the adoption "marketplace," failed adoptions—children who are returned by their prospective adoptive parents—have increased.<sup>224</sup>

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390 (1970); see also notes 195–98 *supra* and accompanying text (discusses tendency of children in foster care to idealize their absent natural parents).

220. Lawrence, *supra* note 218, at 138.

221. See Schwam & Tuskan, *supra* note 217, at 343 (adopted child may fear being given away again).

222. See A. SOROSKY, A. BARAN & R. PANNOR, *supra* note 218, at 114–38 (1979). For an account of several such searches, see B. LIFTON, *LOST AND FOUND* (1979).

223. See, e.g., Humphrey & Ounsted, *Adoptive Families Referred for Psychiatric Advice, I: The Children*, 109 BRIT. J. PSYCHIATRY 599, 604–05 (1963) (children adopted after six months of age are more likely to exhibit symptoms of disturbed social behavior, stealing, cruelty, destructiveness, and lying); Jameson, *Psychiatric Disorder in Adopted Children in Texas*, 63 TEX. MED. 83 (1967) (greater incidence of severe psychiatric illness in children adopted after infancy); Offord, Aponte & Cross, *Presenting Symptomatology of Adopted Children*, 20 ARCHIVES GEN. PSYCHIATRY 110, 116 (1969) ("[t]he later the age of adoption, the greater the frequency and severity of antisocial behavior"); see also S. WOLFF, *CHILDREN UNDER STRESS* 107–08 (2d ed. 1981) (child's age is a main factor associated with the adoption outcome). But cf. Schwam & Tuskan, *supra* note 217, at 346 (it is unclear whether these studies can be generalized throughout adopted population).

224. See Bass, *Matchmaker-Matchmaker: Older Child Adoption Failures*, 54 CHILD WELFARE 505, 506–07 (1975). There is evidence that older children and emotionally disturbed children

The child's natural parent and his previous family experiences remain important even if he lives in a loving permanent home. The child must somehow come to terms with his past, and the available evidence suggests that he is better able to do so if his natural parent remains a live presence rather than a fantasy.

### E. *The Current Realities of Foster Care*

The current realities of foster care placement render the permanency program's reliance on adoption and the termination of parental rights even more questionable. Over the last ten years, the average age of foster children has increased, as has the average age at placement. For example, in New York State, the mean age of children in care rose from less than 8.7 in 1970 to 11.8 in 1980; in 1982 the largest age group among the foster care population was 14 to 17 years old.<sup>225</sup> More than half of the New York children who entered long term foster care in 1979 were nine years old or older.<sup>226</sup> Children this age hardly can be expected simply to forget their natural parents and start over; by this point, ties and identifications are much too firmly established.

Moreover, termination of parental rights by no means ensures a child a more stable placement. In 1980, 75% of the children "free" for adoption in New York City had been free for more than one year.<sup>227</sup> These children had lost their natural parents but had not gained a more permanent parental substitute. The problem they confronted was not loyalty conflicts but the absence of *any* firm parental tie.

The permanency program standards implicitly presume that these children are better off without their natural parents.<sup>228</sup> But this

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constitute an increasingly larger proportion of foster care cases. See B. BERNSTEIN, D. SNIDER & W. MEEZAN, *supra* note 35, at 6-7, 30, 32; A. GRUBER, *supra* note 4, at 9-11, 33-36; see also notes 225-26 *infra* and accompanying text (discusses the rising age of adopted children).

225. New York State Dep't of Social Services, Press Release (June 24, 1982); see also J. KNITZER & M. ALLEN, *supra* note 1, at 186 (according to a 1976 national survey, 51% of the children in out-of-home care were 12 or older, and 31% were 15 or older).

226. New York State Child Welfare Information Service, Summary of Characteristics of Children in Care or Recently Discharged (Sept. 30, 1980).

227. *Id.*

228. Some of the proposed permanency program standards attempt to ensure that the rights of only truly inadequate parents will be terminated by coupling restrictive removal grounds with their liberal termination grounds. See, e.g., GFS II, *supra* note 117, at 193-96; ABA STANDARDS I, *supra* note 89, at §§ 6.4(c), 8.3, 8.4. The idea is, apparently, that if removal standards are tighter, and if preventive services are made more widely available, the risks of termination for parents will be very low. What this approach overlooks, however, is history, which suggests that state support for preventative services will not be sufficient to

presumption is no more than a modern variant of the nineteenth century child rescue fantasy.<sup>229</sup> It is unsupported by any evidence and simply ignores the important role that parents of children in long term foster care can and do play in their children's emotional development.

Moreover, the permanency program standards completely fail to address the causes of foster care drift.<sup>230</sup> The standards provide no incentives toward improving the stability of foster care placement<sup>231</sup> or the quality of foster care.<sup>232</sup> Rather, by espousing termination of parental rights as the answer to foster care drift, the permanency program provides yet another excuse for continuing to deliver poor services to parents and foster children.<sup>233</sup>

Termination of parental rights is not necessary to provide children in foster care with stable, loving homes; continuity of care can be ensured through permanent custody arrangements that, unlike adoption, do not disrupt parental visitation. Moreover, the permanency program's solution to the problem of foster care drift will probably hurt the interests of foster children more than it will help them. The program will deprive many children of the benefits of

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keep the bulk of children placed voluntarily out of foster care. Nor is it clear that all of these children *should* be out of foster care. Many family problems—serious mental illness, incarceration, uncontrollable behavior by the child—require substitute care; supportive services will be insufficient to satisfy the family's needs.

229. See notes 58–60 *supra* and accompanying text.

230. See notes 18–43 *supra* and accompanying text.

231. For example, Goldstein, Freud, and Solnit permit a "Long Time Caretaker" (an adult who has continuously cared for the child for one or more years if the child was under three at the time of placement or two or more years if the child was three or older at the time of placement) to contest removing the child from their home. But neither the parent nor the child has standing to contest a move *prior* to this time. See GFS II, *supra* note 118, at 188–95. The other model standards, see notes 128–39 *supra* and accompanying text, also fail to address this issue.

232. Goldstein, Freud, and Solnit do urge "the development of procedures and opportunities in temporary placement for maintaining relationships between child and absent parent," GFS I, *supra* note 8, at 39, and they assert that "[t]he goal of Temporary Foster Care is to maintain the child's ties to his parents and to assure their reunion as quickly as possible . . . ." GFS II, *supra* note 118, at 190. Yet, they propose *no* standards to ensure adequate foster care services. See *id.* at 189–90. Nor do the other model permanency program standards generally address the quality of foster care. For the one exception, see ABA STANDARDS I, *supra* note 89, §§ 6.5B, 6.6., 7.1–7.3, 7.5, at 28–30 (providing for periodic court review of placement, development of service plans, interim reports on service provision, and appointment of a grievance officer to receive complaints from foster children and parents).

233. Indeed, a national commission, inspired by the permanency program philosophy, recently recommended eight improvements in the foster care system; only one dealt with the quality of foster care itself. See NATIONAL COMMISSION REPORT, *supra* note 1, at 7–8. Even that one recommendation—for payment of fair reimbursement to foster parents—would have no impact on the quality or delivery of services to *natural* parents.

parental visitation, but will give the child welfare system no incentive to improve the practices that produce drift itself.

#### IV. A PROPOSAL FOR A NEW STANDARD

In view of the available evidence on the benefits of parental visitation, I reject the permanency program standards and propose a new standard for parental rights termination. This standard distinguishes termination—the denial of visitation and other ancillary parental privileges—from a denial of custody rights.<sup>234</sup> Under this standard, a court may not consider termination unless it has first deprived the natural parent of legal custody and appointed a permanent guardian<sup>235</sup> in his stead. Even then, the court may not terminate other parental rights unless it finds that the child would suffer specific, significant harm which cannot be averted by any less drastic alternative.

Section A, below, examines criteria for evaluating a termination standard and their application to the proposed standard. Section B examines the standard in practice, including its application to three typical problem cases. Section C describes limitations on what the standard can be expected to accomplish. The standard itself is set out in detail in the Appendix.

##### A. *Criteria for a Termination Standard*

A termination standard should reflect several different considerations. Below, I examine each of these considerations and compare how the proposed standard, the traditional standard based on parental unfitness, and the permanency program standards address them.<sup>236</sup>

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234. Discussion of the grounds on which a parent should be permanently deprived of custody is beyond the scope of this article; the proposed standard therefore does not specify the basis for permanent custody denial.

235. While I have referred to the permanent custodian of the child as a guardian, there is no reason why a legislature could not employ the term open adoption instead of guardianship. *See* note 104 *supra* and accompanying text. As the term adoption probably connotes, in general parlance, a closer and more permanent tie than does guardianship, use of the term open adoption might be psychologically advantageous to children and their prospective guardians. I have used the term guardianship herein simply to avoid confusion with adoption in its classic sense.

236. The first two criteria that are considered—adherence to the goals of the child welfare system and conformity with the available evidence on child development—I deem fundamentally important. The next two—providing uniform treatment of similar problems that arise in termination and divorce proceedings and avoiding adverse resource effects—I con-

### 1. *Child protection: the basic goal.*

The state's authority to intervene in family life ultimately derives from its *parens patriae* power to promote and protect the welfare of minor children.<sup>237</sup> Most commentators now agree that before the state significantly interferes with the parent-child relationship, it should show that the child will suffer harm in the absence of intervention.<sup>238</sup> Accordingly, courts typically require a showing that the child will otherwise suffer harm before overruling parental decisions about a child's medical care,<sup>239</sup> education,<sup>240</sup> or general upbringing.<sup>241</sup> Similarly, recent model neglect standards prohibit removal of a child from his parents' home without a demonstration that harm to the child cannot be averted by any less drastic alternative.<sup>242</sup>

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sider significant but secondary concerns. The last factor—behavioral effects on natural parents and foster care agencies—I consider a fairly minor consideration.

237. The state's child protection or *parens patriae* power originated as an equitable concept applied by the chancery courts to property or guardianship disputes between private parties. Since the early nineteenth century, American courts have invoked *parens patriae* authority in both the public and the private law contexts. For a history and discussion of the *parens patriae* concept, see Areen, *supra* note 52, at 894-917; *Developments in the Law—the Constitution and the Family*, 93 HARV. L. REV. 1156, 1221-42 (1980) [hereinafter cited as *Developments*].

238. See, e.g., Areen, *supra* note 52, at 919 ("Parental misconduct should justify state intervention only if it has a negative impact on the children."); Mnookin, *supra* note 8, at 628 ("Removal should be [permitted] only when the child cannot be protected in the home."); Wald, *supra* note 18, at 1037 ("intervention [should be] . . . permitted only in cases where a child evidences serious physical or emotional damage"); see also GFS II, *supra* note 118, at 24 ("the degree of intrusion on family integrity at each stage of decision should be no greater than that which is necessary to fulfill the function of the decision").

239. Compare *In re Hofbauer*, 47 N.Y.2d 649, 393 N.E.2d 1009, 419 N.Y.S.2d 936 (1979) (courts may not choose the most effective treatment when parents have chosen among reasonable alternatives) and *In re Green*, 448 Pa. 338, 348, 292 A.2d 387, 392 (1972) (state may not override a parental judgment about medical care that is based on religious belief when the child's life is not immediately imperiled) with *In re Custody of a Minor*, 375 Mass. 733, 752, 379 N.E.2d 1053, 1065 (1978) (ordering chemotherapy when the child's life was at stake and the parents were unwilling "to provide the type of medical care which was necessary and proper for their child's well-being"). But see *In re Sampson*, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972) (court ordered nonvital operation over parent's religious objection). See generally Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645 (1977).

240. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

241. The Supreme Court has recognized a fundamental right of parents to control the care and upbringing of their children free from unjustified state interference. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923); cf. *Stanley v. Illinois*, 405 U.S. 645 (1972). For discussion of the scope of parental rights under the Constitution, see *Developments, supra* note 237, at 1235-38, 1351-57 (1980); Note, *Constitutional Limitations on the Scope of State Child Neglect Statutes*, 79 COLUM. L. REV. 719, 722-27 (1979).

242. See, e.g., ABA STANDARDS I, *supra* note 89, § 6.4(c) commentary at 123; NAC

By contrast, the unfitness standard traditionally used in termination proceedings focuses on parental conduct rather than on the child's needs.<sup>243</sup> There is no valid justification for applying a child-focused standard to the original state intervention or foster care placement but not applying a similar standard to termination; the goal of child protection requires examining the child's needs in both contexts. A termination standard should therefore focus on whether termination will serve the child's interests not on whether the parents deserve to be punished.

The permanency program standards mark an improvement over the traditional unfitness standard because they explicitly establish the child's interest as the paramount value.<sup>244</sup> Most of these standards, however, fail to pursue this value with sufficient ardor. While they ostensibly promote permanence, they permit termination without any showing that it is necessary to provide the child with a stable placement; they do not require the court to consider alternatives, such as guardianship, that would assure the child a permanent substitute parent without termination.<sup>245</sup> Under many of these standards, the court need not even find that the child will benefit as a result of termination. Termination is typically permitted without any showing that the child's present foster parents are prepared to adopt him, or that any permanent home is currently available.<sup>246</sup> Thus, a child may lose his natural parents without gaining anything in return.

By contrast, the proposed standard, like those now applied to justify removal of the child from his natural home or interference with parental decisionmaking, requires courts to tailor the fact-finding process to focus on the child's needs. The court must consider alternatives short of termination and may not order termination unless the child has already been placed in a permanent home. The standard thus ensures that the state will not deprive a child of his parents

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STANDARDS, *supra* note 129, § 3.184 commentary at 344-45; GFS II, *supra* note 118, at 191-92; *see also* Areen, *supra* note 52, at 936; Wald, *supra* note 18, at 1039-40.

243. In 1975, parental conduct was still the focus of most state termination standards. The grounds for termination most frequently found in termination standards were abandonment (37 jurisdictions), neglect (35 jurisdictions), and parents' moral unfitness (20 jurisdictions). Only 16 jurisdictions considered the child's best interests. *See* Katz, Howe & McGrath, *supra* note 13, at 47-49, 66-67.

244. *See* text accompanying notes 112, 131 *supra*.

245. *See* notes 134-35 *supra* and accompanying text.

246. *See* notes 138-39 *supra* and accompanying text. This is not true of the Goldstein, Freud, and Solnit proposals.

unless this step is actually necessary to protect his interest and unless it has guaranteed him a substitute relationship in return.

2. *Conformity with evidence on child development.*

The standard I propose also satisfies the criteria suggested by the available psychological data. The data suggest three such criteria. First, because natural parents continue to be significant to a child long after he has been separated from them, the law should distinguish the decision to terminate parental visitation rights from the custody decision. Under the proposed standard, a permanent deprivation of custody does not automatically deprive the natural parent of the right to visitation and other contact with the child. Rather, it permits termination only when it can be shown that the exercise of these rights will harm the child.

Second, because continuing contact between parent and child generally correlates with higher levels of well-being for the child than does lack of contact,<sup>247</sup> the parent-child relationship should be severed only as a last resort. The proposed standard follows this approach and mandates that a court explore alternatives short of termination—such as mandatory counseling and supervised visitation—before it considers termination.

Finally, because the benefits, optimal frequency, and most desirable types of visitation vary according to the situation, courts should make termination decisions on an individualized basis. In some cases, supervised visitation, perhaps accompanied by counseling, will most benefit the child;<sup>248</sup> in other cases, supervision and counseling will be unnecessary. Sometimes weekend visits at a parent's home will be appropriate; other times visits should occur at a foster home or other location. And, in some cases—for example, when the parent is extremely disturbed or violent—the risks of visitation in any form will outweigh the potential benefits of continued contact. The proposed standard again satisfies this criterion of individual treatment.

By contrast, neither the traditional unfitness test nor the permanency program standards satisfy any of these criteria. The unfitness test makes parental conduct the sole basis for the termination decision; the permanency program standards generally presume termination to be beneficial to the interests of children in long term foster care.

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247. See notes 169–202 *supra* and accompanying text.

248. See notes 213–14 *supra* and accompanying text.



3. *Divorce decisions and termination decisions: Private family law and the family law of the poor.*

The private law standards which govern postdivorce custody and visitation already comport with the available psychological evidence on the nature of the parent-child relationship and its impact on child development. In marked contrast to the child welfare system's traditional disdain for the natural parent,<sup>249</sup> private family law has consistently recognized the importance of the child-parent relationship. An award of custody to one divorcing parent does not automatically deprive the other of the right of visitation and other contact; complete denial of visitation is extremely rare and is seen as a last resort,<sup>250</sup> and decisions about visitation are made on an individualized basis.<sup>251</sup> Because divorce law generally conforms to the criteria that a termination standard should satisfy, judicial decisions and experience in the divorce context could provide a rich resource for a court deciding termination cases.

Recognizing that divorce and termination are related problems could also help to bring child welfare law—the “family law of the poor”<sup>252</sup>—into alignment with private family law. Such a realignment would provide long overdue recognition that poor families, who are disproportionately forced to turn to the child welfare system for help because they lack alternatives,<sup>253</sup> should be judged under the same standards as all other citizens.

The traditional unfitness standard and the permanency program are markedly different from those applied in divorce cases, while the proposed standard is quite similar. The proposed standard, unlike the others, offers the opportunity to create a link between public and private family law.

4. *Resource effects.*

Turning to more practical concerns, a termination standard

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249. See notes 50–62 *supra* and accompanying text.

250. See, e.g., *Devine v. Devine*, 213 Cal. App. 2d 549, 29 Cal. Rptr. 132 (1963); *Elizabeth A.S. v. Anthony M.S.*, 435 A.2d 721, 724 (Del. Super. Ct. 1981); see also Henszey, *Visitation by a Non-Custodial Parent: What Is the “Best Interests” Doctrine?*, 15 J. FAM. L. 213, 215 (1977) (“[o]nly under extreme and unusual circumstances will visitation be totally denied”); Annot., 88 A.L.R.2d 148, § 3(c) (1963) (same).

251. See, e.g., *Gantner v. Gantner*, 39 Cal. 2d 272, 277, 246 P.2d 923, 928 (1952) (“[i]n each [divorce] case, the trial judge must determine what is in the best interests of the children”).

252. See notes 50–52 *supra* and accompanying text.

253. See notes 47–49 *supra* and accompanying text.

should not seriously strain the resources—financial, judicial, and parental—available for children in need of care away from their natural parents.

*Financial resources.* Foster care is costly. In 1977, the maintenance of a child in foster care in New York City cost \$4,900 per year.<sup>254</sup> Proponents of the permanency program have therefore claimed as one of its advantages the savings that would accrue from the increased use of adoption.<sup>255</sup> Traditionally, the state has not paid a penny for the maintenance of adopted children, and even when subsidized adoption exists, it costs much less than foster care.<sup>256</sup>

The proposed standard would, however, effect these same savings. Like adoption, the appointment of a permanent guardian would put an end to costly foster care services and payments to foster parents. And just as the state now often subsidizes adoptions, it could also make subsidies available to guardians who could not otherwise afford the full cost of maintaining a child.<sup>257</sup>

*Judicial resources.* The proposed standard might require a higher expenditure of judicial resources than the traditional unfitness test or permanency program standards. Under both of the latter standards, after a parent's rights are terminated, he has no legally enforceable claim to visitation or contact with the child. He therefore has no reason to go to court. Under the proposed standard, however, many parents who permanently lose custody would retain visitation rights, creating the possibility of subsequent judicial proceedings to enforce or modify the original visitation plan.<sup>258</sup>

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254. *Public Assistance Legislative Recommendations: Hearings on H.R. 7200 Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 282 (1977) (statement of Carol J. Parry) [hereinafter cited as *Public Assistance Legislative Recommendations*].

255. See, e.g., CALIFORNIA DEP'T OF FINANCE, A REVIEW OF THE CALIFORNIA ADOPTION PROGRAM 52 (1974), quoted in Bodenheimer, *supra* note 96, at 38 ("a reduction of 3,000 children in the foster home population would result in an overall \$81,000,000 savings to the State over a 15 year period"); NATIONAL COMMISSION REPORT, *supra* note 1, at 5 (10,000 children removed from foster care for adoption would result in \$1.3 billion savings over ten years); D. FANSHIEL & E. SHINN, DOLLARS AND SENSE IN THE FOSTER CARE OF CHILDREN: A LOOK AT COST FACTORS 24-25 (1972) (savings from adoption of 17 children estimated at \$1,132,098).

256. In New York City in 1977, subsidized adoption cost \$2,550; foster care cost \$4,900. See *Public Assistance Legislative Recommendations*, *supra* note 254, at 282.

257. Such a subsidy program is desirable because, under current law, a guardian is ineligible to receive federal foster care reimbursement. See 42 U.S.C. § 672 (Supp. IV 1980).

258. The case-by-case adjudication required under the proposed standard would also consume more time than adjudication under Goldstein, Freud, and Solnit's proposals, which require the court simply to determine whether the requisite number of years in foster care have passed. See GFS II, *supra* note 118, at 188-89, 194-95. It is not clear, however, whether

However, such cases probably would not consume a substantial amount of judicial resources. The available evidence suggests that judicial modification of visitation plans is unnecessary in the majority of divorce cases.<sup>259</sup> Given that guardians and natural parents are less likely to have a history of personal conflict, even fewer guardianship cases should require subsequent judicial intervention. Furthermore, those cases that do require further court action generally would involve simple, uncontested facts—for example, an intended move by a parent or guardian—which could be adjudicated without extensive proceedings. Lastly, all guardianship cases would involve fact patterns familiar to courts that have handled divorce litigation; the courts' deliberations would be guided by an already developed case law.

*Parent resources.* The most essential resource for the child welfare system is an adequate supply of dedicated individuals with the skills to become successful substitute parents, both for children in need of foster care—who will ultimately return to their natural parents—and for children in need of permanent care. Partly because of a decline in the number of adoptable infants, recent years have seen a substantial increase in the number of individuals willing to adopt older foster children.<sup>260</sup> Some of these individuals, however, would undoubtedly be less inclined to take a child who will maintain a relationship with his natural parent.

On balance, however, the proposed standard is unlikely to have any serious impact on the supply of individuals willing to become permanent substitute parents to former foster children. An individual who contemplates becoming a guardian is likely to be concerned about both the practical and psychological effects of a child's continuing relationship with a natural parent. On a practical level, the potential guardian may be concerned that the natural parent could prevent him from moving, changing jobs, or taking other steps that

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it would consume more time than adjudication under the other permanency program model acts, which involve varying levels of adjudicatory complexity. *See* notes 128-39 *supra* and accompanying text. I believe the benefits of individualized determinations that focus on the child's needs outweigh any additional costs.

259. *See* Benedek & Benedek, *supra* note 141, at 258; Westman, Cline, Swift & Kranen, *Role of Child Psychiatry in Divorce*, 23 ARCHIVES GEN. PSYCHIATRY 416 (1970). *But see* Cline & Westman, *The Impact of Divorce on the Family*, 2 CHILD PSYCHIATRY & HUMAN DEV. 78 (1971) (in 52% of 102 sample cases, hostile interaction between parents required court intervention).

260. *See* notes 86-99 *supra* and accompanying text; *cf.* A. SOROSKY, A. BARAN & R. PANNOR, *supra* note 218, at 207 ("[i]n recent years . . . retarded and handicapped children have been accepted more readily by adoptive parents because of the shortage of healthy [adoptable] babies").

would adversely affect the parent's visitation rights. To alleviate these concerns and avoid unnecessary litigation, the proposed standard provides that neither the state nor a natural parent may prohibit a permanent guardian from changing his residence, work, or other activities in order to enforce existing visitation rights, unless there is a showing of exceptional circumstances.<sup>261</sup> This clear specification of rights—which is similar, although somewhat more deferential, to the interests of the guardian than that typically employed in divorce litigation—should suffice to alleviate most of the potential guardian's practical concerns.<sup>262</sup>

A potential guardian may also be concerned about the psychological impact of a child's continuing relationship with his natural parents: Will the parent be a bad influence on the child, interfere with child discipline and child rearing decisions, or perhaps even turn the child against the guardian? For the many prospective guardians who have also served as the child's foster parent and thus have had actual experience with parental visitation, these questions probably will not represent a major concern. These individuals will have developed a relationship with a specific child whom they wish to keep. Throughout that relationship, they probably had no choice but to accept the child's relationship with his natural parent. Therefore, not many prospective guardians are likely to reject the guardianship role simply because of the prospect of continuing visitation to which they already have become accustomed. Indeed, some foster parents apparently prefer to keep their foster child under a long term foster care contract or other arrangement which maintains the visitation status

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261. A court should not infer exceptional circumstances merely from a showing that the guardian will derive no financial gain from the change. A court, however, could find exceptional circumstances upon a showing that the proposed change was substantially motivated by a desire to frustrate visitation or that it would be seriously detrimental to the child.

262. On this issue, the proposed standard is somewhat more deferential to the guardian's interests than the standard usually employed following divorce. In that instance, modification of a custody order permitting a move to another jurisdiction typically is sanctioned only when the petitioning parent can show that the interests of the children would be *advanced* by the move. See H. CLARK, *LAW OF DOMESTIC RELATIONS* 600-01 (1968). Some courts have even required the custodial parent to show more than augmentation of the child's interests. See, e.g., *Priebe v. Priebe*, 81 A.D.2d 746, 438 N.Y.S.2d 413 (App. Div. 1981), *aff'd*, 55 N.Y.2d 997, 434 N.E.2d 708, 449 N.Y.S.2d 472 (1982) (exceptional circumstances required to warrant disruption of relationship between children and father). Courts have been particularly reluctant to sanction moves when the noncustodial parent is able and willing to assume custody. See, e.g., *Bergstrom v. Bergstrom*, 320 N.W.2d 119 (N.D. 1982) (because an award of sole custody would have permitted mother to take her child abroad permanently to join her husband, the court granted father custody in the United States during school year).

quo rather than to adopt him.<sup>263</sup>

Fears of parental interference undoubtedly will influence persons who do not have a preexisting relationship with a specific child to a greater extent; certainly, many of these individuals would prefer adoption. But given the current dearth of children available for adoption, this preference probably would not dissuade significant numbers of individuals from becoming permanent guardians.<sup>264</sup>

##### 5. *Behavioral side effects on parents and foster care agencies.*

The standard a court employs in deciding whether to terminate parental rights will necessarily have some impact on the behavior of natural parents and child welfare agencies while the child is in foster care. The termination standard tells these parties what the law expects of them if they wish to obtain, or to avoid, termination. A termination standard should take account of these behavioral side effects, and to the extent possible, avoid encouraging undesirable parent or agency behavior.

*Natural parents.* Under traditional child welfare law, and even more so under the permanency program, the child welfare agency may threaten to terminate a natural parent's rights in order to induce him to make the changes in his behavior that the agency believes necessary for him to regain custody. Conceivably, if natural parents knew that they would be permitted to continue visitation even after they lost all possibility of ever regaining custody, this in-

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263. *See, e.g.,* Beaudoin v. McBain, 115 Misc. 2d 158, 453 N.Y.S.2d 589 (Fam. Ct. 1982) (awarding custody of three children to foster parents who did not wish to adopt them for reasons other than financial need).

264. Since no American jurisdiction frequently employs permanent guardianship like that proposed here or open adoption, ultimately one can do little more than guess about how many people would be willing to make a permanent commitment to become parents to a foster child only if they are guaranteed that they can deny natural parents the visitation that traditional adoption permits. I believe that there would not be a significant number of people in this category for two reasons. First, because of the current lack of children outside the foster care system available for traditional adoption, prospective adoptive parents would be forced to choose between allowing natural parents visitation and delaying adoption for four to five years or perhaps even forgoing it entirely. Second, the proposed standard provides guardians considerable protection against unreasonable interference by natural parents: Not only does the proposed standard permit the guardian to change his residence or employment except on a showing of exceptional circumstances, but it also ensures that a natural parent cannot regain custody after a guardian's appointment, *see* note 275 *infra* and accompanying text, and that parental visitation may be curtailed if it causes significant harm to the child, *see* notes 278-84 *infra* and accompanying text; *see also* notes 195-96 *supra* and accompanying text (discussing ways to deal with conflicts between guardians and natural parents).

centive to change their behavior during the initial years of foster care would be diminished.

There is no evidence, however, that threats of terminating parental rights actually improve the behavior of parents of children in foster care. The probability of discharge from care has been linked to a variety of factors,<sup>265</sup> but not to the existence or severity of agency threats. On the contrary, the foster care literature emphasizes that a nonpunitive working alliance with the natural parent is necessary to help him change his behavior.<sup>266</sup> Researchers have also found that parents who perceive their child care agency as unhelpful and as opposing their reunification with their child are less frequent visitors and are less likely ever to regain custody.<sup>267</sup> The proposed standard thus should have little, if any, detrimental impact on parental behavior.

*Foster care agencies.* Judges have sometimes refused to terminate parental rights when an agency has failed to provide any help or services to a parent whom it now claims to be unfit ever to regain custody.<sup>268</sup> This mechanism enables courts to hold agencies at least

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265. Factors correlating with the probability of discharge include the reason for placement, parental visitation, agency evaluation of the parent, caseworker activity, ethnicity, and the age of the child at the time he was placed. See D. FANSHIEL & E. SHINN, *supra* note 4, at 112-30; E. SHERMAN, R. NEUMAN & A. SHYNE, *supra* note 4, at 60-61; Fanshiel, *Parental Failure and Consequences for Children: The Drug Abusing Mother Whose Children Are in Foster Care*, 65 AM. J. PUB. HEALTH 604 (1975). No foster care studies describe either the effectiveness or the frequency with which child welfare agencies use the threat of termination.

266. See, e.g., D. KLINE & H. OVERSTREET, *supra* note 165, at 160-63 (1972) (parent is likely to feel distrustful, afraid, and hostile in his relationships with adults who represent authority and needs a nonpunitive atmosphere in which his provocations are not taken at face value); see also Britton, *Casework Techniques in Child Care Services*, 36 SOC. CASEWORK 3, 12 (1955); Glickman, *Treatment of the Child and His Family After Placement*, 28 SOC. SERV. REV. 279 (1954); Mandelbaum, *Parent-Child Separation: Its Significance to Parents*, SOC. WORK, Oct. 1962, at 26.

267. See S. JENKINS & E. NORMAN, *supra* note 35, at 245-49. Jenkins and Norman found "[a] definite relationship . . . between feeling changes and visits to the children while in care. Frequency of visiting the child in placement was associated with change for the better in [both mothers' and fathers'] . . . feelings toward the placement." *Id.* at 247; see also Simmons, Gumpert & Rothman, *supra* note 30, at 227-33.

268. See, e.g., *In re Leon RR*, 48 N.Y.2d 117, 397 N.E.2d 374, 421 N.Y.S.2d 863 (1979); *In re Sanjivini K.*, 47 N.Y.2d 374, 391 N.E.2d 1316, 418 N.Y.S.2d 339 (1979). Occasionally, courts even return the child to the natural parents; the paradigm case includes particularly egregious agency behavior and a very sympathetic natural parent. See, e.g., *id.*

In recent years, some state legislatures have required, in certain termination actions, that the judge deny a termination petition brought by an agency that has not provided services to help the parent recover the child. See, e.g., N.Y. SOC. SERV. LAW § 384-b(4)(d), (7)(a), (7)(e) (McKinney 1976 & Supp. 1982) (requiring agency's "diligent efforts to encourage and strengthen the parent-child relationship when such efforts will not be detrimental to the best interests of the child").

minimally accountable for their actions. Arguably, the proposed standard would reduce this judicial policing of agencies: Because visitation softens the impact on parents of a custody loss, judges might be more willing to tolerate agency inaction. The consequence might be that more parents would permanently lose custody, even though fewer would have their visitation rights terminated.

While this possibility merits attention, it is not a persuasive rationale for rejecting the proposed standard. To begin with, the denial of a termination petition provides few real incentives for an agency to improve its future practices. The only penalty the agency suffers as a result of this denial is having to keep the child in foster care, a duty for which it would continue to receive government payments. And without an improvement in agency practices, most of the parents whose visitation rights a judge has refused to terminate because of agency inaction will in fact never regain custody. For these parents, whether a judge permanently deprives them of custody under the proposed standard or refuses to order termination due to agency inaction under the permanency program standard makes little difference: Both approaches result in their permanent loss of custody but allow continued visitation.

Moreover, courts have available much better methods of ensuring agency accountability than the denial of termination petitions. A good child welfare system can and should employ early court review of agency action or inaction,<sup>269</sup> fines,<sup>270</sup> penalties,<sup>271</sup> and damage actions by parents and children<sup>272</sup> to improve agency practices. With

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269. New York enacted the first mandatory court review of foster care placements in 1971. A followup study found that "court review clearly had an impact on agencies actions." Festinger, *supra* note 4, at 237. Only 56% of sample children who were in foster care for two years were still in care as compared to 68% in an earlier study. *Id.* at 243; see Fanshel, *The Exit of Children From Foster Care: An Interim Research Report*, 50 CHILD WELFARE 65 (1971).

270. See, e.g., N.Y. SOC. SERV. LAW §§ 153-d, 387, 398(b) (McKinney 1976 & Supp. 1982) (state must refuse reimbursement of agency foster care expenditures when the agency has failed to comply with various statutory requirements).

271. See, e.g., *id.* § 387 (a foster care agency that does not substantially comply with state foster care standards may be declared totally ineligible to receive public funds).

272. See Note, *supra* note 43, at 696-701 (urging enactment of "legislation permitting parents who have been wrongfully separated by child protection workers to recover damages from state or local government. Damages should be recoverable on a theory of strict liability when child protection workers fail to comply with statutorily mandated procedures or with state or federal guarantees of due process."). Both state and federal courts, without the benefit of specific statutory authorization, have recently permitted suits for inadequate foster care services and supervision by foster children and natural parents. See, e.g., *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981) (action by child); *McTeague v. Sosnowski*, 617 F.2d 1016 (3d Cir. 1980) (action by parents); *Bradford v. Davis*, 290 Or. 855, 626 P.2d 1376 (1981) (action by child).

these means available, any minor reduction in agency incentives which the proposed standard might produce should not pose a significant problem.

The proposed standard thus compares favorably with both the traditional termination standard and the permanency program approach. On the basis of what we now know and the type of problems the child welfare system currently confronts, this standard would appear to be the best available approach to parental rights termination.

The substantive test for termination which we have just evaluated could be adopted by itself. But in order to ensure that the test is effectively employed, the standard I am proposing includes some directions regarding its implementation. It is to these directions that we now turn.

### B. *Implementing the Standard*

Under the proposed standard, a court may not consider termination until after the appointment of a guardian. In selecting a guardian, a court should give preference to a child's foster parent and adult relatives.<sup>273</sup> Among the candidates, a court should also prefer individuals who demonstrate the willingness and ability to accept the child's relationship with a natural parent.<sup>274</sup>

Upon appointment, the guardian will receive permanent custody of the child, which may not be revoked without court approval.<sup>275</sup> He will assume all the usual duties and privileges of parenthood, including a duty to support the child<sup>276</sup> and the right to make all major child care, educational, and medical decisions for the child. The guardian's appointment will not, however, automatically sever the child's relationship with his parents, siblings, or other members of his natural family.<sup>277</sup> On the contrary, these family members will con-

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273. The proposed standard gives preferential consideration to a current foster parent, a foster parent with whom the child has resided for at least one year, and an adult relative of the child.

274. Foster parent selection practices should, of course, reflect the same concerns. See note 215 *supra* and accompanying text.

275. The guardianship appointment may be revoked upon a showing of good cause. As with an adoption revocation procedure, this ensures that a failed guardianship placement can be terminated. A natural parent, however, may not seek revocation of a guardianship appointment; appointment of the guardian terminates the parent's right ever to regain custody.

276. The proposed standard permits a current foster parent, who does not wish to assume a duty to support the child but is an appropriate guardian in all other respects, to become a guardian. The guardian's duty to support is also subject to any guardianship subsidy he has been awarded.

277. This means that both the permanent guardian and the natural parent would enjoy



tinue to have visitation rights with the child unless the court specifically denies visitation.

The court may consider termination—the denial of visitation and all other ancillary rights—immediately after appointment of a guardian, or it may enter an interim visitation order, leaving final resolution of the termination issue until a later date. The court will not consider termination, however, without a request by the permanent guardian. And, as with custody disputes in divorce cases, courts will give great deference to any visitation plan agreed upon by the guardian and natural parent.<sup>278</sup>

When the guardian and natural parent cannot agree on the extent and type of visitation to be allowed or on whether visitation should be allowed at all, the court must decide on an appropriate visitation plan. Again, as in a typical divorce case, the court should use the best interests of the child standard as its criterion for evaluating the various alternatives presented by the natural parent and the permanent guardian.<sup>279</sup> If, however, the guardian proposes restric-

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reciprocal inheritance rights and the reciprocal right to maintain a wrongful death action. Traditionally, both of these rights have been denied to foster parents and children. *See, e.g.,* *Evink v. Edwards*, 106 Ill. App. 3d 635, 435 N.E.2d 1379 (1982) (foster parents who had custody of 13 year-old girl from the time she was three days old until her death at age 13 and who had consent to adoption from the child's natural mother could not maintain a wrongful death action for the girl's death). In preserving tort and inheritance rights between the child and natural parent, the proposed standard follows the law applicable to divorce cases rather than the law applicable in adoption cases. This is desirable because, with continued visitation between natural parent and child, their relationship would continue to be emotionally significant to each and thus, like the relationship between a noncustodial divorced parent and child, entitled to legal protection. The court may, in its discretion, terminate these reciprocal rights to inheritance and to maintenance of a wrongful death award between parent and child if it permanently denies parental visitation rights. *See* notes 278–84 *infra* and accompanying text.

Any inheritance or wrongful death award resulting from the child's death would have to be divided between the permanent guardian and natural parent. This could be done either by simple division (four parents would each get a one-fourth share) or by the length of time the child has spent in the care of each claimant.

278. "[A]vailable evidence on how the legal system processes undisputed divorce cases involving minor children suggests that parents . . . have broad powers to make their own deals. Typically, separation agreements are rubber-stamped . . ." Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 955 (1979). In the divorce context, the rationale for judicial deference to visitation plans that have both parents' consent is that parents know their children's needs better than the court does. Courts should treat visitation plans in the guardianship context similarly.

279. In structuring a visitation plan, the court should, as it would in a divorce case, focus on the child's age and developmental needs. For example, an older child may benefit most from longer but less frequent visits, whereas a younger child may benefit most from shorter but more frequent visits. Also, the court should order counseling or supervised visitation if it finds them to be in the child's best interest.

tions on parental visitation in excess of those typically imposed when a child is in foster care,<sup>280</sup> he must show by a preponderance of the evidence that the requested restriction is necessary to protect the child from specific, significant harm.<sup>281</sup> Foster care standards themselves permit only minimal visitation;<sup>282</sup> even greater restrictions on visitation should therefore require a showing of necessity.<sup>283</sup>

If the guardian requests termination of *all* visitation and contact, he must again show that this step is necessary to protect the child from specific, significant harm.<sup>284</sup> Furthermore, he must make this showing by clear and convincing evidence, rather than by a mere preponderance, since this step has a greater impact on both parent and child than the mere restriction of visitation. Simple restrictions on contact, such as temporary supervision or denial of overnight visits, pose less of a threat to the child's emotional well-being and less of an infringement on the parent's interests; no total deprivation occurs, and the court can subsequently modify the restriction. By contrast, termination completely severs the parent-child tie and therefore calls for a higher standard of proof.<sup>285</sup>

In order to terminate or impose restricted visitation, a court must find that this step is necessary to protect the child from harm that is *specific* and *significant*. Vague assertions, such as "visits with the parent are upsetting to the child," are insufficient to meet this standard. If the visits upset the child simply because they trigger his repressed feelings about separation, they may not be harmful: "The short term

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280. In jurisdictions with inadequate visitation standards or with none at all, the permanent guardianship legislation should specify some standards.

281. Placing the burden of proof on the guardian is fairer in light of the parties' relative abilities to present evidence. The guardian, who is chosen by the foster care agency, has the agency's resources at his disposal; he should therefore be better able to present evidence both about possible harm to the child from visitation and about the availability of services such as counseling.

282. See notes 30-34 *supra* and accompanying text.

283. Protecting this minimum level of visitation will also help bring child welfare law in line with divorce law: Divorced parents are unlikely to face more restrictive visitation than the foster care standard provides.

284. A court should also require clear and convincing evidence of harm to the child before suspending visitation privileges for any appreciable period of time. Cf. *In re Pablo C.*, 108 Misc. 2d 842, 439 N.Y.S.2d 229 (Fam. Ct. 1980) (requiring clear and convincing evidence before suspending visitation privileges for parent of foster child); *In re Rhine*, — Pa. Super. —, 456 A.2d 608, 614 (1983) (the state may not deny foster care visitation privileges unless it "demonstrates with clear and convincing evidence that even supervised visitation would severely endanger the child").

285. The Supreme Court has recently held that a "clear and convincing evidence standard" is constitutionally mandated for permanent termination orders. See *Santosky v. Kramer*, 455 U.S. 745 (1982).

disadvantage of the child being upset by the visit . . . [might instead be] outweighed by the long term benefit [of ventilating his feelings about separation]."<sup>286</sup> To evaluate the possible harm to the child, a court may order a psychiatric evaluation of the child and his natural parent. This evaluation should focus on the source of the child's emotional problems, on whether visitation and contact themselves are likely to resolve these problems over time, and on the desirability of some type of visitation restrictions.

The psychiatric evaluation—and ultimately the court's decision—should also focus on the child's current symptoms; psychiatry's ability to predict future problems in a child's development is too uncertain to justify present visitation restrictions.<sup>287</sup> Moreover, such speculation is unnecessary, since the court can later modify its visitation order.

In reaching a decision on visitation or termination with regard to an older child, the court may consider the child's wishes, but should not regard them as conclusive. This approach, similar to that employed in divorce litigation, is appropriate because a child's feelings of loyalty to his guardian or natural parent will often color his stated opinion. Moreover, giving the child full responsibility over the visitation decision would encourage parental attempts to influence him, placing the child in the difficult position of having to choose between his loved ones.<sup>288</sup>

Under the proposed standard, a termination hearing will almost invariably involve issues beyond the ordinary layperson's competence. To ensure that all of the relevant evidence is adequately presented, both the guardian and the natural parent therefore should

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286. Littner, *supra* note 194, at 179; see also notes 208–14 *supra* and accompanying text.

287. The best known predictive study is MacFarlane, *Perspectives on Personality Consistency and Change from the Guidance Study*, 7 VITA HUMANA 115 (1964). Arlene Skolnick has observed that "[t]he most surprising [finding] of the [MacFarlane study] was the difficulty of predicting what thirty year-old adults would be like even after the most sophisticated data had been gathered on them as children." A. SKOLNICK, *THE INTIMATE ENVIRONMENT: EXPLORING MARRIAGE AND THE FAMILY* 378 (1973), quoted in Mnookin, *supra* note 50, at 259; see also GFS I, *supra* note 8, at 49–52 (no one can "predict in detail how the unfolding development of a child and his family will be reflected in the long run in the child's personality and character formation").

288. These two factors have led to the use of a similar approach in divorce litigation: "The preference of the child above the age of discretion may be given weight in the judge's decision [regarding postdivorce custody], but it is normally not controlling." Mnookin, *supra* note 50, at 245 n.149; see also Siegel & Hurley, *The Role of the Child's Preference in Custody Proceedings*, 11 FAM. L.Q. 1 (1977); Annot., 4 A.L.R.3d 1396 (1965). The child's age and the intensity of his feeling often influence the weight given to the child's preference. See R. MNOOKIN, *CHILD, FAMILY AND STATE* 639–40 (1978).

be represented by counsel. If either the natural parent or the guardian cannot afford an attorney, the court should appoint one for him.<sup>289</sup>

After evaluating the evidence, the court should issue a written decision describing in detail the basis for its order. All parties involved should be able to appeal that decision.<sup>290</sup>

### C. *Three Typical Problems*

Under any termination standard, there will be hard cases. Indeed, each case will pose some special difficulties for a court to resolve. But a few hard cases are likely to recur. Thus, with the general requirements of the standard in mind, let us examine three of them.

#### 1. *The inadequate parent.*

Due to a disabling mental illness, retardation, addiction, or character defect, the parent of a foster child may, by ordinary standards, be inadequate. This parent's ability to interact with the child might be quite limited; at certain times, such as periods of hospitalization, it may be totally nonexistent.

The threshold inquiry under the proposed standard is whether a continued relationship with the parent will cause the child to suffer specific, significant harm. The mere fact that the parent is "inadequate" does not diminish his importance to the child.<sup>291</sup> Nor should the law simply presume harm from the existence of a parental condition, such as mental illness or addiction, that prevents the parent from maintaining custody of the child. Instead, the court must focus on the type of harm that might occur *because of continued visitation and contact*. For example, contact with a parent who cannot control vio-

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289. The Supreme Court has held that parents do not have an absolute right to counsel in termination proceedings, leaving the decision whether due process calls for counsel in any particular case to the trial court. *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981). However, I consider the assistance of counsel essential for any parent who wishes to contest termination under the proposed standard. The proposed standard requires the court to consider evidence on whether visitation would harm the child. Presentation of this evidence will certainly involve testimony by the guardian and, in many cases, will involve testimony by psychiatric experts. An indigent parent cannot be expected to cross-examine these witnesses effectively without legal assistance.

290. To avoid extended uncertainty and instability for the child, an expedited appeal process is desirable. Cf. GFS I, *supra* note 8, at 46-49 (decisions involving children should comport with the child's sense of time).

291. See note 213 *supra* and accompanying text.

lent impulses is likely to produce harm; contact with a parent who is loving but suffers serious intellectual deficiencies is not.

In cases where the parent's behavior is upsetting to the child, the court must assess the extent to which the child is disturbed, the reasons for the disturbance, and whether the distress could be alleviated by means that would still permit the child to retain the benefits of some parental contact. In making this assessment, the court should consider the child's age and the severity of the parent's behavioral problem. For example, an abused older child may benefit from parental visitation accompanied by counseling; an abused infant or toddler, however, would not have the cognitive ability to understand his parent's behavior. Thus, depending on how severe a reaction the infant has to his parent, a court might have to order cessation of parental contact to avoid harm.

## 2. *The parent who has not maintained contact.*

Some natural parents maintain only sporadic contact with their child during his initial stay in foster care and then later stop visiting him altogether. Such parents often repeatedly miss appointments with the child and with agency social workers. When asked, they may profess interest in the child, but they seem incapable of expressing this interest actively. In the most extreme cases, these parents are, for all practical purposes, complete strangers to their children.

Faced with facts of this sort, the judge must attempt to ascertain both the impact of the parent's behavior on the child and the explanation for that behavior. Depending on the child's age and life experience, scheduled visits with the parent that do not materialize may either greatly disturb him or leave him relatively unaffected.<sup>292</sup> The parent's behavior may simply reflect deep-seated feelings of guilt and helplessness engendered by his child's placement;<sup>293</sup> if so, the judge probably should order a period of intensive counseling before issuing a final order.<sup>294</sup> Conversely, if the parent's behavior reflects a desire

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292. See J. WALLERSTEIN & J. KELLY, *supra* note 152, at 239, 246-47 (even a partial relationship with sporadic, infrequent contact can protect the child from a sense of abandonment and thus be generally beneficial).

293. Placement causes many parents of children in foster care to experience negative feelings about themselves. Such feelings may conflict with these parents' wish to maintain contact with their children. See S. JENKINS & E. NORMAN, *supra* note 35, at 107; D. KLINE & H. OVERSTREET, *supra* note 165, at 170-73; Simmons, Gumpert & Rothman, *supra* note 30, at 277.

294. Counseling should be aimed at helping the parent understand that he can still play an important emotional role in the child's life even though he cannot resume custody. Cf. D.

to avoid the child, and the child has been deeply upset by the parent's haphazard visitation, the judge may find that termination is in the child's best interests. In this case, unless the guardian appears able to effectively assist the child in understanding and accepting the loss of his parent, the judge may choose to order a period of psychiatric counseling for the child.<sup>295</sup>

### 3. *Conflict between guardian and natural parent.*

A foster child's guardian and natural parent may exhibit hostility toward each other that causes the child to experience conflicting loyalties. In this situation, the court's first task is to discover the cause of these hostilities.

In some cases, the guardian's hostility will justifiably stem from the parent's behavior toward the child. In such instances of legitimate hostility, the court should take the guardian's concerns into account in determining whether restricted contact or outright termination is appropriate. On the other hand, if the guardian and the natural parent are hostile to each other without good cause,<sup>296</sup> the court probably should enter an interim order requiring mediation or joint counseling to help each party understand the problems their feuding may cause the child and to help them resolve their conflict.<sup>297</sup> If this process fails to resolve the conflict, the court must then determine the extent to which the conflict is harming the child and decide whether it must order restrictions on contact or termination to protect him.

### D. *What the Proposed Standard Will Not Accomplish*

The proposed standard is, I believe, a workable solution to the problem of parental rights termination and the one which, among available alternatives, creates the fewest risks for children in long term foster care. But, obviously, the proposed standard is not a panacea. It will not turn hard cases into easy ones. Nor will it, any more than can any termination standard, cure the ills of the child welfare

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KLINE & H. OVERSTREET, *supra* note 165, at 172-73 (parent's constructive participation in placement can reduce intensity of shame).

295. This counseling should be aimed at providing the child with a sense that his parent is unable rather than uncaring.

296. Guardian selection procedures that give preference to individuals who can accept the child's relationship with a natural parent should keep the number of unjustifiably hostile guardians to a minimal level. *See* text accompanying note 274 *supra*.

297. *Cf.* Benedek & Benedek, *supra* note 141, at 264-65 (suggesting a similar approach for divorcing parents).

system. Contrary to the representations of some permanency program advocates, the problems of children "adrift" in foster care will not be resolved simply by altering their legal relationships with their natural parents; by the time any such change becomes appropriate, most of the damage to the children already will have been done.

Hence, the proposed standard is only a preliminary step toward achieving a more pressing goal—restructuring the entire foster care system so that it will better meet the needs of both children and their parents. The time has come to recognize that simply taking some children out of placement will not make the deficiencies in foster care practice and policy go away. As one former foster child recently put it, "[t]here'll always be kids like me, and somehow we've got to come up with a system for supervising *them* while they're supervising *us*."<sup>298</sup> Only when the law provides children in foster care and their natural parents with adequate means to ensure that the child welfare system fulfills its promises will the problem of foster care drift be resolved.

## V. CONCLUSION

Terminating parental visitation rights is neither a necessary nor a sufficient means for providing stable, permanent homes to children in foster care. Furthermore, terminating visitation rights may create new problems for the child in foster care by depriving him of all opportunity to form a realistic relationship with his natural parent. For these reasons, neither traditional termination standards nor those proposed as part of the new permanency program serve the best interests of foster children. Therefore, I have proposed instead a standard that would allow termination only when necessary to protect the child from specific, significant harm which cannot be averted by less drastic means.

The proposed standard satisfies the various criteria to which a termination standard should respond. It conforms to the general goals of child welfare law and to the evidence currently available on child development. It makes use of our experience with divorce litigation and avoids discrimination against poor families. It poses no significant resource problems and creates no significant adverse incentives for parental or agency behavior. It appears to be the best available approach to the problem of parental rights termination.

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298. Collins, *Courts, the Congress and Citizens Are Redefining the Concept of Foster Care*, N.Y. Times, July 22, 1981, at B4, col. 6.

APPENDIX—*PROPOSED STANDARDS FOR PERMANENT GUARDIANSHIP,  
PARENTAL VISITATION, AND TERMINATION OF PARENTAL  
RIGHTS*

1. *Definitions*

When used in this Act, unless explicitly provided otherwise,

- a) "adult" means a person at least eighteen years old;
- b) "child" means a person under the age of eighteen;
- c) "court" means a court designated under state law to adjudicate petitions to terminate parental rights;
- d) "natural parent" means a child's father, mother, or both;
- e) "permanent guardian" means one or more persons appointed by a court in accordance with the requirements of section 4 of this title;
- f) "restricted visitation" means visitation that is shorter, less frequent, or subject to greater restrictions than that authorized under state law, regulation, administrative order, or administrative policy for a natural parent whose child is in foster care;

or

"restricted visitation" means visitation that is shorter, less frequent, or subject to greater restrictions than [a standard to be established by the legislature or by an appropriate state agency to which the legislature has delegated the task]\*;

- g) "visitation" means any and all forms of contact and communication between the natural parent and child, including but not limited to in-person visits at any location, telephone calls, and written correspondence.

2. *Rights and Obligations of a Permanent Guardian*

- a) A permanent guardian has all of the rights which state law accords to a parent with legal custody of a minor child, including the right to determine the child's residence and school, authorize medical care for the child, and consent to the child's marriage. A permanent guardian will assume the status of a parent under state law relating to intestate succession, maintenance of a wrongful death action, and the distribution of any other rights and benefits determined under state law.
- b) A permanent guardian has all of the obligations of a parent

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\* In many states, there will be no legislative or administrative standards governing foster care visitation; in other states, existing foster care visitation standards will be inadequate, vague, or non-uniform. In both situations, the state legislature must either establish visitation standards or delegate this task to an appropriate state agency.



with legal custody of a minor child. Except as specified in section 4, these obligations include an obligation to support the child.

- c) The rights and obligations of a permanent guardian may not be terminated without approval of the court, to be granted only upon a showing of good cause.

3. *Selection of a Permanent Guardian*

- a) The following persons may become a permanent guardian:
  - i) a married couple at least one of whom is an adult;
  - ii) an unmarried adult.
- b) In selecting a permanent guardian, the court must give preference to the following persons:
  - i) a foster parent or other adult with whom the child has resided for a continuous period of at least one year;
  - ii) a foster parent or other adult with whom the child currently resides;
  - iii) an adult relative of the child.
- c) In selecting a permanent guardian, the court must also give preference to individuals who have demonstrated a willingness and ability to accept the child's maintenance of a relationship with his natural parent.

4. *Appointment of a Permanent Guardian*

- a) A permanent guardian may be appointed only by judicial order following a judicial decision permanently depriving the child's natural parent of legal custody.
- b) When appointing a guardian, the court may provide, if doing so is consistent with the best interests of the child, that the guardian will assume no support obligation or only a limited support obligation.

5. *Effect of Permanent Guardian's Appointment on Existing Rights and Obligations*

- a) The appointment of a permanent guardian for a child will terminate all existing rights and obligations of the child's natural parents except:
  - i) the right to visitation with the child;
  - ii) the status of a parent for purposes of state law relating to intestate succession, maintenance of a wrongful death action, and the distribution of any other rights and benefits determined under state law.
- b) The appointment of a permanent guardian will not terminate any existing relationship, rights, or benefits, as provided

under state law, as between the child and his natural siblings, grandparents, and other relatives. All existing visitation rights between the child and his natural relatives will be preserved.

6. *Proceedings Between a Permanent Guardian and Natural Parent Regarding the Natural Parent's Visitation Rights*

- a) Following the appointment of a permanent guardian, the court will determine the visitation rights of the natural parent.
- b) When the natural parent and permanent guardian concur on a visitation schedule, the court must approve their agreement unless a preponderance of the evidence establishes that their agreement is not in the best interests of the child.
- c) When the natural parent and permanent guardian do not concur on a visitation schedule, the court will, subject to subsections (d) and (e) of this section, order visitation in accordance with the best interests of the child.
- d) In order to impose restricted visitation, the court must find, by a preponderance of the evidence, that any restriction(s) imposed is (are) necessary to protect the child from specific, significant harm that cannot be averted by a less drastic alternative.
- e) In order to suspend parental visitation for six months or longer or to permanently deny parental visitation, the court must find, by clear and convincing evidence, that such suspension or permanent denial of parental visitation is necessary to protect the child from specific, significant harm that cannot be averted by a less drastic alternative.
- f) The permanent guardian bears the burden of proof in establishing the need for restricted visitation, suspended visitation, or permanent denial of visitation rights.
- g) When the court permanently denies parental visitation rights, it may, if doing so is consistent with the best interests of the child, deprive the natural parent of his or her parental status under section 5(a)(ii) herein.

7. *Appointment of Counsel*

In all proceedings between a permanent guardian and natural parent, the court will appoint counsel for the natural parent and permanent guardian if they are financially unable to obtain counsel.

8. *Decisions and Appeals*

- a) The court may, in its discretion, enter an interim visitation order to apply for no more than six months.
- b) When issuing a final visitation or termination order, the court shall issue a written opinion giving reasons for its decision and describing the evidence upon which the order is based.
- c) A final order may be appealed by any party.
- d) All appeals from orders on visitation or termination shall be heard on an expedited basis.

9. *Enforcement and Modification of Orders*

- a) Any party may petition the court to seek enforcement or modification of an existing visitation order.
- b) Modification of an existing order may be obtained upon a showing that, due to changed circumstances:
  - i) modification of the order is necessary to protect the child's best interests, to be determined in accordance with the provisions of section 6 herein; or
  - ii) modification is necessary to prevent undue hardship to the petitioning party.
- c) A permanent guardian may not be prohibited from changing his residence or employment in order to enforce existing visitation rights, except on a showing of exceptional circumstances.