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# COMMENT

## NOT QUITE A FAMILY: THE SECOND CIRCUIT DECIDES AGAINST RECOGNIZING PROCEDURAL DUE PROCESS RIGHTS FOR A PRE-ADOPTIVE FOSTER FAMILY IN *RODRIGUEZ V. McLOUGHLIN*\*

### INTRODUCTION

The foster parent has evolved from acting solely as a temporary parent to representing, in many cases, a child's best hope for a stable and permanent family. The federal government recognized this fact in the Adoption and Safe Families Act of 1997 ("ASFA"). ASFA sought to achieve "permanent placement" for children through state foster care programs.<sup>1</sup> In addition, states such as New York have created statutory provisions that grant preferred status to the foster parent in adoption proceedings.<sup>2</sup> Despite this development, both state and federal courts have shown a general reluctance to award constitutional protection for the foster parent, even in cases where the biological parents' rights have been terminated and the foster parent has initiated adoption proceedings.<sup>3</sup> The Supreme Court, in the case of *Smith v. Organization of Foster Families for Equality and Reform* ("OFFER"), declined to directly comment on whether a foster parent should expect due process rights with respect to the care and custody of a foster

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<sup>1</sup> 42 U.S.C. § 671(a)(15)(E)(ii) (1997).

<sup>2</sup> N.Y. SOC. SERV. LAW § 383(3) (McKinney 1992).

<sup>3</sup> See *Rodriguez v. McLoughlin*, 214 F.3d 328 (2d Cir. 2000) [hereinafter *Rodriguez II*].

child.<sup>4</sup> However, the Court in *OFFER* hinted at the possibility of due process rights for long-term foster parents due to the relationship that emerges over time through "mutual care and support."<sup>5</sup>

Lower federal courts remain divided on how to interpret the *OFFER* decision.<sup>6</sup> In the case of *Rodriguez v. McLoughlin*, the Court of Appeals for the Second Circuit ("Second Circuit") ruled that a foster mother, biologically unrelated to her four-year-old foster child for whom she had cared since his infancy, did not possess a liberty interest in the preservation of her family.<sup>7</sup> Further, the court held that, notwithstanding that the biological parents' rights had long since been terminated and that petitioner Rodriguez had signed an agreement to adopt the child, the relevant New York statutory provisions did not afford her procedural due process.<sup>8</sup> This Comment agrees that New York law does not create a liberty interest. However, the court's decision is problematic because it fails to adequately address the issue of whether a liberty interest might arise under the Due Process Clause. In so doing, the court misinterpreted the *OFFER* decision. The Second Circuit should have concluded that the relationship between Ms. Rodriguez and the child was similar enough to that of a constitutionally-protected family to be guaranteed procedural due process.<sup>9</sup> Finding a liberty interest in a pre-adoptive foster family would not jeopardize the state's responsibility to protect foster children. The Second Circuit's decision in *Rodriguez*

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<sup>4</sup> *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) [hereinafter *OFFER*].

<sup>5</sup> *Rivera v. Marcus*, 696 F.2d 1016, 1024 (2d Cir. 1982) (footnote omitted) (citing *OFFER*, 431 U.S. at 844).

<sup>6</sup> See *Procopio v. Johnson*, 994 F.2d 325 (7th Cir. 1993); *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993); *Lipscomb v. Simmons*, 884 F.2d 1242 (9th Cir. 1989); *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989); *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982); *Kyeas v. County Dep't of Pub. Welfare of Tippecanoe County*, 600 F.2d 693 (7th Cir. 1979); *Thelen v. Catholic Soc. Servs.*, 691 F. Supp. 1179 (E.D. Wis. 1988); *Brown v. County of San Joaquin*, 601 F. Supp. 653 (E.D. Cal. 1985).

<sup>7</sup> *Rodriguez II*, 214 F.3d at 341.

<sup>8</sup> *Id.*

<sup>9</sup> Note that this Comment discusses the impact of the Second Circuit's decision on a particular class of foster families possessing characteristics like those of the Rodriguez foster family. Characteristics include the termination status of biological parents' rights, the foster parent's pre-adoptive status, and the psychological bonds between foster parent and child.

authorizes agencies to completely disregard the strong emotional ties between a pre-adoptive foster mother and child.<sup>10</sup>

## I. BACKGROUND

### A. *Rodriguez v. McLoughlin*

In *Rodriguez*, Ms. Rodriguez, a foster parent, sued several city agencies and Cardinal McCloskey Children's and Family Services ("McCloskey"), a private family services organization, for damages stemming from the temporary removal of a foster child, Andrew, from her home.<sup>11</sup> Ms. Rodriguez alleged three due process violations in her complaint.<sup>12</sup> First, Ms. Rodriguez claimed the circumstances of the foster home did not render necessary an emergency removal; thus, defendants denied Ms. Rodriguez notice and a pre-removal hearing.<sup>13</sup> Second, defendants did not allow Ms. Rodriguez a fair hearing to contest the removal, nor did defendants provide her with sufficient post-removal notice.<sup>14</sup>

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<sup>10</sup> Refusing to guarantee procedural protection to a pre-adoptive foster family in the event the agency removes the child jeopardizes the potential for a pre-adoptive foster parent to build strong emotional bonds with her child.

<sup>11</sup> *Rodriguez II*, 214 F.3d at 333. McCloskey was a foster care agency authorized by the City of New York. See *infra* note 17.

<sup>12</sup> *Rodriguez II*, 214 F.3d at 333.

<sup>13</sup> *Id.* The district court dismissed the first claim after finding the circumstances justified the emergency removal.

<sup>14</sup> *Id.* In a non-emergency removal situation, the authorized agency (here, McCloskey) must notify the foster parents in writing of the intention to remove the child. The notice must be given at least ten days prior to the proposed removal effective date except in cases where the health or safety of the child mandates the child's immediate removal. Notification must inform the foster parents that they may request a conference, a pre-removal review with the appropriate social services official at which they are entitled to a review of the reasons for removal (called an Independent Review in New York City). See N.Y. COMP. CODES R. & REGS. tit. 18, § 443.5 (1999). See also Brief for Municipal Appellants at 8, *Rodriguez v. McLoughlin*, 214 F.3d 328 (2d Cir. 2000) (No. 99-7020). The foster parents may submit reasons at such conference to demonstrate why the child should not be removed. If the foster parents request the conference, the social services official must set a time and place for the conference within ten days of receipt of such request and must send written notice of the conference to the foster parents. The social services official's decision as to whether the removal must happen must be rendered and issued within five days. The official must

Third, defendants denied Ms. Rodriguez visitation rights and refused her request to protest the ruling.<sup>15</sup>

Andrew's biological mother abandoned Andrew immediately following his birth in 1990.<sup>16</sup> Defendants placed Andrew into the foster home of Ms. Rodriguez thirteen days later.<sup>17</sup> A family court terminated the parental rights of Andrew's biological mother on June 25, 1993.<sup>18</sup> Custody of Andrew was then transferred to defendant McCloskey. On August 9, 1993, Ms. Rodriguez and McCloskey entered into an Adoptive Placement Agreement.<sup>19</sup> At the time of the removal, the parties were awaiting the culmination of the adoption finalization procedures.<sup>20</sup>

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send a written notice to the foster parents informing them (and their counsel, if any) of the decision, their right to appeal and their right to request a Fair Hearing conducted by the state pursuant to § 400 of New York's Social Services Law. See 18 N.Y. COMP. CODES R. & REGS. § 443.5(c).

In *Rodriguez*, McCloskey determined the situation appropriate for an emergency removal. See *Rodriguez II*, 214 F.3d at 332. The procedures for an emergency removal are not clearly outlined in New York's regulatory provisions. See 18 N.Y. COMP. CODES R. & REGS. § 443.5. Section 443.5 removes the initial ten-day notice requirement in the event the health or safety of the child requires immediate removal but does not specifically set out procedures to be followed after an emergency removal (i.e., whether post-removal notice is required, and what should be contained in such notice). See *id.*

<sup>15</sup> *Rodriguez II*, 214 F. 3d at 332.

<sup>16</sup> Andrew was an out-of-wedlock child whose father was never named. See Brief for Municipal Appellants, *supra* note 14, at 6 n.2.

<sup>17</sup> See *Rodriguez II*, 214 F.3d at 331. At the time of this case, McCloskey was an authorized foster care agency for the City of New York, which gave it the legal ability to "care for, to place out or to board out children." See N.Y. SOC. SERV. LAW § 371(10)(a) (McKinney 1992).

<sup>18</sup> See *Rodriguez II*, 214 F.3d at 331.

<sup>19</sup> Andrew's adoption is called an "agency adoption." In an agency adoption, the natural parent's rights have already been terminated. The authorized foster care agency has legal custody of the child. See N.Y. DOM. REL. LAW § 112 (3) (McKinney Supp. 1999). The Adoption Placement Agreement between McCloskey and Ms. Rodriguez was a standard New York State one-page form agreement. In the agreement, Ms. Rodriguez acknowledged that she was taking Andrew "with the intention of adoption although [she understood] that legal custody remains with . . . McCloskey and that this . . . agreement remains in effect until the date of legal adoption." Ms. Rodriguez further agreed that

if at any time prior to legal adoption it is determined by the agency or by [herself] that the child should be removed from [her] home, [Ms. Rodriguez] will cooperate with the agency in carrying this out in a way that serves the best interest of the child in the judgment of the agency.

*Rodriguez II*, 214 F.3d at 331.

<sup>20</sup> McCloskey reported to the New York Child Welfare Administration ("CWA") in November of 1993 that its new plan for Andrew was to complete Ms. Rodriguez'

On March 18, 1994, a McCloskey case planner made a scheduled visit to Ms. Rodriguez' home. Ms. Rodriguez was not at home because she was attending a court appointment regarding custody of her then twelve-year-old grandson, Edwin.<sup>21</sup> Upon arrival to the Rodriguez home, the case planner discovered that no supervising adult was present. Instead, Edwin apparently was left to watch over Andrew and Thomas, another foster child.<sup>22</sup> The case planner determined that Edwin seemed to be having difficulty managing the children.<sup>23</sup> Immediately, the case planner contacted his supervisor who instructed him to remove the two foster children from the home.<sup>24</sup>

On April 1, 1994, Rodriguez requested a fair hearing before the State Department of Social Services ("State DSS") and an Independent Review by the Child Welfare Administration ("CWA").<sup>25</sup> During investigation of the matter, Ms. Rodriguez requested a visit with Andrew. McCloskey denied her request pending a determination of whether

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adoption. All the necessary paperwork for adoption was filed before the removal in 1994. See *Rodriguez v. McLoughlin*, 49 F. Supp. 2d 186, 190 (S.D.N.Y. 1999) [hereinafter *Rodriguez I*]. However, a special adoption subsidy still required approval before the adoption application could be submitted to the court. *Rodriguez II*, 214 F.3d at 332.

<sup>21</sup> Edwin also lived with Ms. Rodriguez at the time the removal took place. *Rodriguez II*, 214 F.3d at 332.

<sup>22</sup> Thomas was three years old on the removal date. Ms. Rodriguez was not planning to adopt Thomas. In fact, Thomas was scheduled to be placed in an adoptive home later that month. Ms. Rodriguez claimed that she had arranged for a neighbor to baby-sit, however, no adult was present during the time the case planner was there. *Id.* The district court found Ms. Rodriguez was in violation of regulations requiring that an adult must be present at all times. See Brief for Appellees at 9, *Rodriguez v. McLoughlin*, 214 F.3d 328 (2d Cir. 2000) (No. 99-7020).

<sup>23</sup> According to the Municipal Appellant's brief, Edwin was an emotionally handicapped special education student. See Brief for Municipal Appellants, *supra* note 14 at 6. Appellee Rodriguez pointed out in her brief that McCloskey had confirmed that Edwin was a "bright child who demonstrated the ability to perform above average on an intellectual basis." See Brief for Appellees, *supra* note 22, at 9. Rodriguez also claimed Edwin was "known to be very capable of feeding, bathing, and otherwise caring for Andrew and Thomas." *Id.*

<sup>24</sup> Thomas and Andrew were then transferred to a new foster home. McCloskey filed a Report of Suspected Child Abuse or Maltreatment with the New York State Department of Social Services, which in turn triggered an investigation by the CWA's Office of Confidential Investigations. *Rodriguez II*, 214 F.3d at 332.

<sup>25</sup> *Id.* The Child Welfare Administration is now called the Administration for Children's Services.

visitation would be in Andrew's best interests.<sup>26</sup> McCloskey did not permit Ms. Rodriguez to visit Andrew until June 27, 1994.<sup>27</sup> Meanwhile, on April 19, 1994, the CWA's Office of Confidential Investigations ("OCI") determined that there was not sufficient evidence to establish child maltreatment.<sup>28</sup> OCI sent its report to McCloskey on June 20.<sup>29</sup> CWA issued its Decision After Independent Review on July 11,<sup>30</sup> ordering McCloskey to return Andrew to Ms. Rodriguez.<sup>31</sup> McCloskey returned Andrew to Ms. Rodriguez on July 13.<sup>32</sup> Ms. Rodriguez' adoption of Andrew was finalized in August 1995.<sup>33</sup> In March 1996, Ms. Rodriguez brought the present action in United States District Court for the Southern District of New York, pursuant to 42 U.S.C. §1983 on behalf of herself and Andrew.<sup>34</sup>

At trial, defendants moved to dismiss each of Ms. Rodriguez' complaints.<sup>35</sup> The district court granted in part and denied in part the motions.<sup>36</sup> The court dismissed Ms. Rodriguez' claim that Andrew's emergency removal was unjustifiable.<sup>37</sup> However, the court held that Ms. Rodriguez had a liberty interest under the Due Process Clause of the Fourteenth Amendment in her relationship with her prospective adoptive and foster child, Andrew, at the time he was removed from her home.<sup>38</sup> As such, the court found that the delay in granting Ms. Rodriguez visitation rights and an

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Rodriguez II*, 214 F.3d at 332.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 333.

<sup>33</sup> *Id.*

<sup>34</sup> *Rodriguez II*, 214 F.3d at 333.

<sup>35</sup> *Id.* at 333.

<sup>36</sup> *Rodriguez I*, 49 F. Supp. 2d at 208.

<sup>37</sup> The court ruled, "[a]s long as there is an objective basis for fear of imminent injury to the children, it is not the role of the court . . . to second-guess, with the benefit of hindsight, the case worker's and foster agency officials' on-the-spot determination to remove a child left without adult supervision." *Id.*

<sup>38</sup> *Id.* at 199. The district court noted that its holding "recognizes such a liberty interest in only a discretely identifiable set of foster parents." *Id.* A foster parent qualifies if (1) the foster child's biological parents' parental rights have been terminated; (2) the foster parent has cared for the child for at least twelve months since the child's infancy; and (3) and the foster parent has entered into an adoption placement agreement. *Id.*

opportunity to be heard to contest the action was unreasonable, and therefore, defendants violated Ms. Rodriguez' right to procedural due process.<sup>39</sup>

The Second Circuit reversed the district court's decision.<sup>40</sup> The Second Circuit held that Ms. Rodriguez and Andrew did not have a liberty interest under the Due Process Clause in their relationship at the time of Andrew's removal.<sup>41</sup> The court concluded that a liberty interest would arise only under state law, and not under the Fourteenth Amendment.<sup>42</sup> The court found, however, that the relevant New York statutes and regulations did not afford Ms. Rodriguez or Andrew a liberty interest.<sup>43</sup> Further, the court refused to recognize that a liberty interest was created when Rodriguez and McCloskey entered into an Adoptive Placement Agreement.<sup>44</sup> Ms. Rodriguez appealed her case to the Supreme Court of the United States. On May 29, 2001, the Supreme Court denied certiorari.<sup>45</sup>

## B. *Prior Case Law*

The *Rodriguez* case considers the question of what belongs within the definition of "family" for purposes of granting constitutional protection. For much of American history, the Supreme Court refused to extend the reach of the Due Process Clause beyond the biological family. Beginning in the second half of the twentieth century, the Court began stretching the concept of family to encompass other, less traditional familial structures.<sup>46</sup>

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<sup>39</sup> *Rodriguez I*, 49 F. Supp. 2d at 205-06. The court denied defendants' motion to dismiss based on a qualified immunity claim. *Id.* at 208.

<sup>40</sup> *Rodriguez II*, 214 F.3d at 341-42.

<sup>41</sup> *Id.* at 341.

<sup>42</sup> *Id.* at 337-38.

<sup>43</sup> *Id.* at 341.

<sup>44</sup> *Id.*

<sup>45</sup> *Rodriguez v. McLoughlin*, 121 S. Ct. 2192 (2001).

<sup>46</sup> See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (finding that extended family members could possess liberty interests in the preservation of family); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that unwed father had a due process right to a fair hearing before children could be taken away in a dependency proceeding). The Court has also established certain individual rights that are of "basic importance." *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). These rights concern choices relating to marriage, raising children, and family life. The Court has affirmed as



In the 1970s, two Supreme Court cases established the principle that family rights extend beyond the constraints of the nuclear family. In 1972, the Court held in *Stanley v. Illinois* that an unwed father did have a due process right to a fair hearing on his fitness as a parent before his children (whose mother had died) could be taken from him.<sup>47</sup> In *Stanley*, the Court emphasized that the family unit is of fundamental importance.<sup>48</sup> Therefore, the right to bear and raise children is among the most essential civil rights.<sup>49</sup> In addition, the Court pointed out that the law recognizes families that are not united by marriage, noting that children in less traditional families "cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit."<sup>50</sup> In *Moore v. City of East Cleveland*, the Supreme Court found a city ordinance that limited occupancy to members of a single family unconstitutional.<sup>51</sup> Holding that due process rights do not end at the boundary of the nuclear family, the Court determined that extended family members could also possess liberty interests in the protection of a family's sanctity.<sup>52</sup>

Despite its willingness to recognize the due process rights of unwed fathers and extended family members, the Supreme Court has not yet decided whether a foster parent has a similar liberty interest either under the Due Process Clause

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recently as 1996 that the Fourteenth Amendment protects individual's freedom of choice against unwanted State interference. *See id.* at 116; *see also* *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

<sup>47</sup> *Stanley*, 405 U.S. at 657-58.

<sup>48</sup> *Id.* at 651.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 652 (citing *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968)).

<sup>51</sup> *Moore*, 431 U.S. at 503-04.

<sup>52</sup> *Id.* at 504-05. It should be noted that while the Supreme Court has not recognized due process rights in "psychological families," where there are not biological ties, some state courts have. *See Phillip B. v. Warren B.*, 188 Cal. Rptr. 781 (Cal. Dist. Ct. App. 1983) (holding that non-parents were properly found to have established a psychological or "de facto" parental relationship with a mentally disabled child, even though the child had not resided with them on a full time basis. The court ruled that the child's biological parents did not have such an emotional attachment to the child and thus should not have custody); *Berhow v. Crow*, 423 So. 2d 372, 374 (Fla. Dist. Ct. App. 1982) (noting that the relationship with between foster parents and child covered nearly all of child's life).

or in the context of state law.<sup>53</sup> In the 1977 *OFFER* case, a group of foster parents alleged due process violations with respect to New York statutory procedures involving the removal of foster children.<sup>54</sup> The Supreme Court deemed it unnecessary to confront the due process question, reasoning that even if the foster parents in *OFFER* possessed liberty interests, the statutory provisions were constitutionally sound.<sup>55</sup> In the twenty-three years since the Court decided *OFFER*, the lower federal courts have split as to how to apply *OFFER* to the issue of whether foster parents should receive due process protection.<sup>56</sup>

One line of cases has interpreted *OFFER* as suggesting that foster parents possess a liberty interest in the preservation of the foster family.<sup>57</sup> These cases point out that in *OFFER*, the Supreme Court recognized that "biological relationships are not the exclusive determination of the existence of a family."<sup>58</sup> While this line of cases does not seem

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<sup>53</sup> To establish a claim of procedural due process, a plaintiff must first demonstrate that he or she possesses a constitutionally protected "interest," such as the interest in preserving the sanctity of the family unit. See, e.g., *Moore*, 431 U.S. at 504-05. See also *Thelen*, 691 F. Supp. at 1183 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972)). The interest must fall within the meaning of "liberty" or "property" under the procedural guarantees of the Fourteenth Amendment, or may include interests recognized and protected by state law. See *Hewitt v. Helms*, 459 U.S. 460, 466 (1983).

<sup>54</sup> See *OFFER*, 431 U.S. at 819-22.

<sup>55</sup> *Id.*

<sup>56</sup> See *Procopio v. Johnson*, 994 F.2d 325 (7th Cir. 1993) (holding foster parents did not possess a liberty interest); *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993) (holding foster parents did not possess a liberty interest); *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989) (holding that while foster parents possessed a liberty interest, the procedures for removal did not violate due process); *Kyees v. County Dep't of Pub. Welfare of Tippecanoe County*, 600 F.2d 693 (7th Cir. 1979) (holding foster parents did not possess a liberty interest); but see *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982) (holding foster parent possessed a liberty interest); *Thelen v. Catholic Soc. Servs.*, 691 F. Supp. 1179 (E.D. Wis. 1988) (holding foster parents did possess a liberty interest); *Brown v. County of San Joaquin*, 601 F. Supp. 653 (E.D. Cal. 1985) (holding foster parents did possess a liberty interest).

<sup>57</sup> See *Rivera*, 696 F.2d at 1024 (foster parent was the half-sister of foster children); *Thelen*, 691 F. Supp. at 1186 (pre-adoptive parents); *Brown*, 601 F. Supp. at 665 (foster child had lived in the foster home for over three years and never knew his real parents).

<sup>58</sup> See *Rivera*, 696 F.2d at 1024 (noting that *OFFER*, "suggested in dicta that long term foster parents may be entitled to some due process protection in light of the relationships developed through mutual care and support."); *Brown*, 601 F. Supp. at 665 (noting the *OFFER* court's point that "biological relationships are not the exclusive

to present a uniform set of criteria for establishing a liberty interest, each indicates that the *OFFER* case did not rule out a foster parent possessing a liberty interest. For example, in *Brown v. San Joaquin*, the District Court for the Eastern District of California held that foster parents had a liberty interest that could not be deprived without due process.<sup>59</sup> The *Brown* court noted that in *OFFER*, the Supreme Court "identifie[d] the role of the state in the creation of the [foster family] as a 'consideration,' a distinction between biological families and foster families, but not necessarily a dispositive difference."<sup>60</sup> The court also cited *OFFER* as acknowledging the possibility of due process protection arising between foster parents and a child who has lived with them since infancy, has stayed for several years, and has never known his or her biological parents.<sup>61</sup>

According to this reasoning, the State's continued supervisory role in the foster relationship thus does not preclude a liberty interest arising either under the Due Process Clause or under state law.<sup>62</sup> The Supreme Court in *OFFER*, however, indicated that the State's role in the foster care system is significant.<sup>63</sup> The Court warned that "whatever emotional ties . . . develop between foster parent and foster

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determination of the existence of a family).

<sup>59</sup> *Brown*, 601 F. Supp. at 662. The state of California had denied the foster parents' adoption application. *Id.*

<sup>60</sup> *Id.* at 665 (quoting *OFFER*, 431 U.S. at 845).

<sup>61</sup> *Id.* The Supreme Court noted in *OFFER*,

At least where a child has been place in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.

*OFFER*, 431 U.S. at 844.

<sup>62</sup> See *supra* note 17 and accompanying text (regarding the state's authorization of a foster care agency).

<sup>63</sup> See *OFFER*, 431 U.S. at 845. Indeed, the State, either through its own children services agency or through a private agency that has been authorized by the State to initiate and regulate foster care arrangements, retains legal custody of foster children until they have been reunified with their natural parents or are adopted. See, e.g., *Rodriguez II*, 214 F.3d at 340-41. Nevertheless, cases such as *Brown* have found a liberty interest to exist in certain foster families, notwithstanding the State's power to terminate a foster care relationship at any time. See *McLaughlin v. Pernsley*, 876 F.2d 308 (3d Cir. 1989); *Rivera*, 696 F.2d at 1024; *Thelen*, 691 F. Supp. at 1186; *Brown*, 601 F. Supp. at 665.

child have their origins in an arrangement where the State has been a partner from the outset.”<sup>64</sup> Nevertheless, courts since *OFFER* have held that certain foster families do have due process rights despite the State’s involvement.<sup>65</sup> In *Brown*, the major factors pointing toward a liberty interest included: (1) the significant duration of the foster family relationship; (2) the State’s termination of biological parents’ parental rights; and (3) the foster parents’ “willingness and ability” to adopt the child.<sup>66</sup>

A second line of cases has interpreted *OFFER* as suggesting that a liberty interest can only arise, if at all, under state law.<sup>67</sup> Declining to analyze the possibility of a liberty interest created under the Due Process Clause, these cases demonstrate that the State’s role in the foster family determines not only the scope of the liberty interest, but also the source. *Kyees v. County Dep’t of Pub. Welfare of Tippecanoe County* was one of the first cases to be decided subsequent to the *OFFER* decision.<sup>68</sup> In *Kyees*, the Court of Appeals for the Seventh Circuit (“Seventh Circuit”) held that Illinois law did not create a liberty interest “of constitutional magnitude” in petitioner foster parents.<sup>69</sup> The court in *Kyees* did acknowledge that familial bonds form in non-biological families.<sup>70</sup> The *Kyees* decision, however, emphasized more strongly the Supreme Court’s statement that the foster family is an “arrangement” to which the State is a party.<sup>71</sup> The court quoted *OFFER* as saying “it is appropriate (in determining the scope of the liberty interests at stake) to ascertain from state law the expectations

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<sup>64</sup> See *OFFER*, 431 U.S. at 845.

<sup>65</sup> See *McLaughlin*, 876 F.2d at 308; *Rivera*, 696 F.2d at 1024; *Thelen*, 691 F. Supp. at 1186; *Brown*, 601 F. Supp. at 665.

<sup>66</sup> *Brown*, 601 F. Supp. at 656.

<sup>67</sup> See *Rodriguez II*, 214 F.3d at 337 (ruling that a liberty interest would exist only under state law, and not under the Due Process Clause); *Procopio*, 994 F.2d at 330 (finding no procedural safeguards that override state’s ultimate power to terminate foster care arrangement); *Wildauer*, 993 F.2d at 373 (holding that foster parent did not have legal custody of the foster children, therefore, foster parent did not have a liberty interest); *Kyees*, 600 F.2d at 699 (ruling that foster parents had reason to believe that the state agency reserved the right to terminate the relationship).

<sup>68</sup> *Kyees*, 600 F.2d at 694.

<sup>69</sup> *Id.* at 699.

<sup>70</sup> *Id.* at 698-99.

<sup>71</sup> *Id.* at 698.

and entitlements of the parties."<sup>72</sup> Therefore, cases following the reasoning in *Kyees* use the *OFFER* decision's endorsement of state law analysis as the basis for denying a foster parent due process protection.<sup>73</sup>

C. *Ambiguity in New York Statutes and Regulations*

New York's statutory provisions and regulations pertaining to foster care set out procedures to be followed with respect to events such as a child's placement into a foster family, removal from a foster home, and adoption by a foster parent.<sup>74</sup> However, the facts in *Rodriguez* can support two vastly different interpretations of the policy underlying the provisions. The first interpretation is that New York law grants broad discretion to the custodial agency in determining what is in the best interest of the child during the period in which the child remains in the foster care system.<sup>75</sup> The second

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<sup>72</sup> *Id.* (quoting *OFFER*, 431 U.S. at 846).

<sup>73</sup> See *supra* note 67 and accompanying text.

<sup>74</sup> See N.Y. SOC. SERV. LAW § 92 (McKinney Supp. 2000) (agency review of foster care status); N.Y. SOC. SERV. LAW § 375 (McKinney 1992) (licensing of a foster parent); N.Y. SOC. SERV. LAW § 376 (McKinney 1992) (placement of a child in a foster home); N.Y. SOC. SERV. LAW § 377 (placement of a child in a foster home) (McKinney 1992); N.Y. SOC. SERV. LAW § 383(3) (McKinney 1992) (foster parents who have cared for children for more than twelve months are permitted to intervene as an interested party in any proceeding involving custody of the child); N.Y. SOC. SERV. LAW § 384(5) (McKinney 1992) (agency's placement of child in home with intention of adoption, adoption procedure); N.Y. SOC. SERV. LAW § 400 (McKinney 1992) (removal of children from foster care); N.Y. COMP. CODES R. & REGS. tit. 18, § 421.1(c) (1999) (definition of "adoptive placement", "adoptive parent", "authorized agency," "foster parent," and "legal guardian"); N.Y. COMP. CODES R. & REGS. tit. 18, § 421.2(b) (1999) (efforts to remove child from care and custody of biological parent, adoptive parent, or legal guardian only when it is clearly established that removal would be in child's best interest; the rights of the child, biological parents, legal guardians, foster and adoptive parents must be respected and protected through responsible agency action); N.Y. COMP. CODES R. & REGS. tit. 18, § 421.19 (1999) (procedures for adoption); N.Y. COMP. CODES R. & REGS. tit. 18, § 443.5 (1999) (removal of child from foster care).

<sup>75</sup> See Brief for Municipal Appellants, *supra* note 14, at 24 (citing N.Y. SOC. SERV. LAW § 383(2)). Essentially, this view points out (1) where the biological parent's rights are terminated, the agency retains legal custody over a foster child up until the adoption procedure is complete, and therefore the agency may use discretion to supervise the child's placement in the pre-adoptive home; and (2) since agencies are not infallible, the law grants foster parents and pre-adoptive parents procedures with which to challenge agency action, but these procedures do not constitute a rights-creating scheme. *Id.* at 24-28 (describing the significance of legal custody, and procedures available to foster parents in the event a child is removed).

interpretation is that New York law promotes, above all, "the healthy emotional development of children," which, in the absence of biological parents, often involves foster parents assuming a permanent role in a child's life.<sup>76</sup> This view insists that the law protects pre-adoptive foster families from agency intervention when such intervention would disrupt the child's bonding with his pre-adoptive parents.<sup>77</sup>

The different interpretations illustrate the difficulty legislators experience when drafting legislation regarding foster children. Legislators must enact laws to protect foster children's health and safety. However, legislators face constant pressure to improve the foster care system so as to provide permanency (either through reunification with biological parents or through adoption) to foster children in a timely manner, so that they will not remain in the system for an unnecessarily long period.<sup>78</sup> These two goals come into conflict because certain aspects of the law indicate a legislative willingness to recognize the potential for foster families to develop permanent bonds (leading to adoption), however, legislators have thus far been unwilling to expressly curtail

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<sup>76</sup> *In re Marie Jones*, 74 Misc. 2d 821, 822, 346 N.Y.S.2d 16, 18 (N.Y. Fam. Ct. 1973) ("[C]hildren not only need homes where they will receive good physical care—they also need homes where they can develop roots and ties and that sense of security which comes from belonging to a family on a permanent basis.").

<sup>77</sup> *In re Adoption of A*, 158 Misc. 2d 760, 764, 601 N.Y.S.2d 762, 766 (N.Y. Fam. Ct. 1993) (reasoning that pre-adoptive foster parents hold a special place in the statutory scheme because they are "resource[s], [who are] ready, willing and qualified to adopt a child, as well as anxious to do so").

<sup>78</sup> Recently, state and local agencies received a federal mandate for promoting permanency within the foster care system. On January 22, 1999, the Commissioner of New York City's Administration for Children's Services ("ACS"), Nicholas Scoppetta, announced the city's implementation of the Adoption and Safe Families Act of 1997 ("ASFA"). See *Letter From the Commissioner*, COMMISSIONER'S BULLETIN, Jan. 22, 1999, at 1, available at <http://www.ci.nyc.ny.us/html/acs> (last visited Apr. 8, 2002). According to Mr. Scoppetta, ASFA aims to minimize the time children spend in foster care. *Id.* For example, ASFA provides for a permanency hearing to be held in Family Court twelve months after a child enters foster care and at twelve month intervals after that. *Id.* At the hearing, the judge must determine whether and at what time the child will either be returned to the birth parents, placed for adoption, or in another planned permanent living situation. *Id.* Note, however, that the Second Circuit did not refer to ASFA in *Rodriguez*. However, Ms. Rodriguez alleged in her appellate brief that by January 21, 1992, the ACS (then known as the CWA) formerly changed Andrew's "permanency planning goal" to adoption, deciding that it would not be in Andrew's best interest to return to his biological mother. See Brief for Appellees, *supra* note 22, at 5.

agency authority before the adoption is final.<sup>79</sup> As a result, the agency retains the power to terminate the relationship whether it is an initial foster family placement or a pre-adoptive family who has lived together for at least a year as a foster family.

Therefore, when a pre-adoptive foster parent like Ms. Rodriguez argues that she should be guaranteed due process protection when the authorized agency removes a foster child from her home, she supports her argument with current legislative policy that has found favor on the federal and local level.<sup>80</sup> However, the difficulty is in demonstrating that permanency qualifies a pre-adoptive family for constitutional protection. The Second Circuit's decision in *Rodriguez* adds further fuel to the debate over whether New York's child welfare law should grant a liberty interest to pre-adoptive foster parents.

## II. ANALYSIS

In *Rodriguez*, the Second Circuit faced a newly-developed legislative policy advocating permanency for foster children and a sharply divided body of case law driven by the Supreme Court decision in *OFFER* that both recognized the

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<sup>79</sup> A "health and safety" legislative purpose conflicts with a "permanency" legislative purpose in a case like *Rodriguez* because the former promotes agency intervention (keeping Andrew out of the home until the agency has decided whether the environment is safe) while the latter defers more to the emotional attachment between the pre-adoptive parent and the child (which, in Andrew's case would be significant since Ms. Rodriguez is the only parent Andrew has ever truly known).

<sup>80</sup> The trend toward injecting "permanency" into the foster care system involves recognizing that a long-term foster parent is often a good candidate for adopting his or her foster child. Consider the agency's procedure for determining whether a prospective adoptive parent would be the right permanent parent for a particular child:

[c]lose scrutiny is accorded to the degree of bonding between the pre-adoptive parent(s) and child, the length of time the child has resided in the home, the child's adjustment to the home, the integration of the child into the pre-adoptive family unit, the responsiveness of the pre-adoptive parent(s) to the child's needs great and small, and special needs, if any. In addition, there is an in-depth investigation into such issues as the constancy and quality of resources provided for the child, be they emotional, medical, educational, physical, recreational, cultural, as well as the pre-adoptive parent's capacity to nurture the child.

In re *Adoption of A*, 158 Misc. 2d at 764, 601 N.Y.S.2d at 766.

integrity of the foster family and questioned its state law origins without ever deciding if a foster parent might, under any circumstances, possess a liberty interest. The *Rodriguez* court had the opportunity to reconcile the new trend in foster care with the divergent case history. The court only succeeded, however, in increasing the polarity of the issue. The court in *Rodriguez* reached the proper result in finding that New York law does not create a liberty interest. However, the court neglected to adequately discuss the possibility of a liberty interest in a pre-adoptive foster parent arising under the Due Process Clause.<sup>81</sup> In fact, the court dismissed the possibility of such a liberty interest without significant explanation. Had the court done such an analysis, it should have determined that Andrew and Ms. Rodriguez possessed a liberty interest.<sup>82</sup> Finally, the court should have addressed whether establishing a liberty interest in a limited set of foster parents would undercut the ability of child welfare agencies to protect children within the foster care system.<sup>83</sup>

A. *No Liberty Interest for Pre-Adoptive Foster Parents Under New York Law*

The court in *Rodriguez* applied the appropriate test and correctly held that the New York statutory provisions do not create a liberty interest in the protection of Ms. Rodriguez' foster family. The existing statutory provisions do not contain precise language that expressly elevates the pre-adoptive foster parent to a parental status equivalent to an adoptive or biological parent.<sup>84</sup> The provisions also do not explicitly instruct

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<sup>81</sup> While it recognized that "the Due Process Clause is the source of many interfamilial rights, the court declined to extend this to the foster family." *Webster v. Ryan*, 187 Misc. 2d 127, 134, 720 N.Y.S. 750, 755 (2001).

<sup>82</sup> See *supra* Part I.B.

<sup>83</sup> See *infra* Part II.B.

<sup>84</sup> New York statutory provisions do include the pre-adoptive foster parent in the definition of "adoptive parent," however, the provision guaranteeing procedural rights after removal only applies to "adoptive parents" having custody of the child. N.Y. COMP. CODES R. & REGS. tit. 18, § 421.1(c) (1999). Note that the Supreme Court in *OFFER* suggested that finding a liberty interest in a foster parent "for purposes of the procedural protections of the Due Process Clause would not necessarily require that foster families be treated as fully equivalent to biological families for purposes of



state officials to confer certain procedural rights upon a foster parent following a child's removal from the home. In order to establish a state-created liberty interest, the statutory provision must contain mandatory language directing that specific procedures be followed upon a particular state action (such as removing a foster child).<sup>85</sup> The current provisions do not protect long-term foster families awaiting adoption finalization against state intervention. The court's decision sends a clear message to the New York legislature that the statute should be amended in order to avoid the terrible impact of this kind of separation between foster parent and child.<sup>86</sup>

### 1. Applying the Appropriate Test

The Supreme Court has held that a state creates a liberty interest by providing: (1) specified substantive predicates restricting official discretion; and (2) procedural safeguards presented in "language of an unmistakably mandatory character."<sup>87</sup> The first element requires that the statute includes express conditions that must occur prior to a state official depriving an individual of life, liberty, or

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substantive due process review." *OFFER*, 431 U.S. at 842 n.48 (quoting *Moore*, 431 U.S. at 546-47 (White, J., dissenting)).

<sup>85</sup> See *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 462 (1989); *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983); *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983).

<sup>86</sup> The CWA itself acknowledged the tragic consequences of McCloskey's denial of post-removal visitation to Ms. Rodriguez, saying it was "very questionable since . . . visiting could have helped the child's understanding of the situation." *Rodriguez II*, 214 F.3d at 341. The court in *Rodriguez* agreed that the legislature should get involved: "Ensuring appropriate treatment by the private agencies that the City chooses to authorize to administer foster care remains a matter for supervision by state and local legislative and administrative bodies." *Id.*

<sup>87</sup> *Thompson*, 490 U.S. at 462-63; *Olim*, 461 U.S. at 249; *Hewitt*, 459 U.S. at 471-72. In *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995), the Supreme Court ruled that the mere presence of mandatory language does not necessarily mean that a liberty interest has been created. The Second Circuit in *Rodriguez* found the Court's holding in *Sandin* to be limited to the context of due process for prisoners. *Rodriguez II*, 214 F.3d at 338-39. Thus, the court in *Rodriguez* found that the formula articulated by the Court in *Thompson* and in the two prior cases was an accurate measure as to whether a state-created liberty interest exists. *Id.* All four Supreme Court decisions concern prison situations, however, it would seem that the court in *Rodriguez* drew the correct conclusion that simply because the formula can be altered in a prison situation does not mean it can be similarly changed in a foster care situation since the underlying circumstances are so different.

property.<sup>88</sup> For example, a statute applicable to a prison situation might describe the threat of serious disturbance inside the prison.<sup>89</sup> The second element must involve "specific directives to the decision maker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest."<sup>90</sup>

In *Rodriguez*, the court ruled that the statutes did not explicitly provide for certain procedures to be followed in the event of an emergency removal of a foster child.<sup>91</sup> The court noted that although certain statutory sections do grant foster parents procedural rights, New York law does not link those rights to the emergency removal situation; i.e., the "substantive predicate."<sup>92</sup> Further, the court pointed out that the sections indicating the State's preference for foster parents in adoption proceedings do not translate into a liberty interest. Once again, such statutory language clearly does not relate to emergency removal cases.<sup>93</sup> Even if the "preference" section did apply in *Rodriguez*, the court ruled that encouraging a foster parent to adopt a child presents no explicit directive to state officials as to procedures to be followed after removing a child from a foster home.<sup>94</sup>

However, the Court of Appeals for the Third Circuit ("Third Circuit") held in *McLaughlin v. Pernsley* that Pennsylvania law created a liberty interest in petitioner foster parents.<sup>95</sup> In *McLaughlin*, the foster parents claimed their due process rights were violated when their foster child was removed from their home without notice and the right to

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<sup>88</sup> See, e.g., *Thompson*, 490 U.S. at 462.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 463.

<sup>91</sup> Indeed, the court found that the statutory sections at issue contained neither substantive predicates nor mandatory language instructing as to a certain procedure to be followed after an emergency removal takes place. *Rodriguez II*, 214 F.3d at 341.

<sup>92</sup> *Id.* at 340.

<sup>93</sup> See *id.*

<sup>94</sup> *Id.* The court acknowledged appellee's contention that the statute included a pre-adoptive parent in its definition of "adoptive parent." However, the court ruled that since Andrew was still in state custody at the time of the removal, the regulation controlling "removals of a child from a parent or guardian's 'care and custody'" did not apply to Ms. Rodriguez. *Id.* at 340-41.

<sup>95</sup> See *McLaughlin v. Pernsley*, 876 F.2d 308 (3d Cir. 1989).

appeal.<sup>96</sup> Pennsylvania law differs from New York law regarding foster children in that “[the Pennsylvania] Code goes considerably beyond providing simple procedural requirements for state actors to follow when they make foster care relocation decisions.”<sup>97</sup> While the Pennsylvania Code expressly indicates that certain procedures be followed when a child is removed from a foster home, New York law provides no such guarantee for the foster parent. Certainly the definition of “adoptive parent” includes pre-adoptive foster parents; however, the New York legislature has not attached any procedural rights to that definition in the event of an emergency removal of a foster child.<sup>98</sup> In order to explicitly establish a state-created liberty interest for a foster parent, the statute must provide clear procedures to be followed in the event a foster child is removed from the home under emergency circumstances. The “[Pennsylvania Code] uses language of an unmistakably mandatory character requiring that certain procedures ‘shall’ or ‘must’ be employed.”<sup>99</sup> Thus, in *McLaughlin*, the Third Circuit found an explicit connection between the procedural safeguards and the removal process present in the Pennsylvania statute.<sup>100</sup> The Second Circuit in *Rodriguez*, however, made an accurate assessment of New York law when it determined that the relevant statutes and regulations did not create a liberty interest.

## 2. Inadequate Statutory Changes

Recent changes in New York law seek “permanency” for foster children. In New York, a permanency hearing must be

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<sup>96</sup> *Id.* The child was removed from petitioner foster parents’ home allegedly on the basis of race (the child was black and his foster parents were white). *Id.*

<sup>97</sup> See *McLaughlin v. Pernsley*, 693 F. Supp. 318, 326 (E.D. Pa. 1988), *aff’d*, *McLaughlin v. Pernsley*, 876 F.3d 308 (3d Cir. 1989).

<sup>98</sup> As the court pointed out, the regulation concerning removal of children from homes only applies to parents having custody of their children. Ms. Rodriguez did not have custody of Andrew at the time of his removal from her home. See *Rodriguez II*, 214 F.3d at 332.

<sup>99</sup> *Id.* The New York statutes and regulations pertaining to foster care include language such as “must” and “shall” but the language is found, for example, in the provisions pertaining to notice to foster parents regarding any proceeding concerning the foster child’s adoption. See N.Y. SOC. SERV. LAW § 392 (McKinney Supp. 2000).

<sup>100</sup> *McLaughlin*, 693 F. Supp. at 326.

held no later than twelve months after a child has been placed in a foster home.<sup>101</sup> At the hearing, the state endeavors to determine the best possible permanent living situation for the child.<sup>102</sup> These changes in the law reveal a legislative initiative to adjust the primary purpose of the foster care system from being that of a "temporary" care program to one with a "permanent" purpose. Unfortunately, the "permanency" provisions present in both federal and state law do not suffice to create a liberty interest. Having expressed the hope through the establishment of a permanency hearing that more foster children will escape the harsh uncertainties of the foster care system, the New York legislature has not yet implemented a provision that would clearly guarantee a foster parent due process rights after a foster child's removal.

The New York legislature must decide whether advocating a "permanency" policy within the foster care system ought to include protecting foster parents and children at a certain point in time before adoption. If the New York legislature is committed to promoting a policy dedicated to encouraging familial bonds between foster parents and children, then it should consider revising the foster care statutory provisions. The court in *Rodriguez*, expressing regret that the law has not advanced to the point at which children like Andrew no longer face traumatic removals from a long-term foster family, correctly found that New York law creates no liberty interest in the foster family. The outcome in *Rodriguez* demonstrates the need for legislative action. The legislature should amend the existing statutory provisions in order to create a liberty interest for pre-adoptive foster parents. Some legislators may disagree on whether foster parents should possess a liberty interest in the care of their foster children. Nevertheless, the tragic nature of Andrew's situation is too compelling to be left alone.<sup>103</sup>

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<sup>101</sup> N.Y. SOC. SERV. LAW § 383(3) (McKinney 1992). *See also supra* note 78 and accompanying text.

<sup>102</sup> *Id.*

<sup>103</sup> The court in *Rodriguez* was appalled by the agency's conduct, noting that even the City "acknowledges that" if plaintiffs had a constitutionally protected liberty interest, 'the hearing plaintiff received here was too long after the emergency removal to satisfy procedural due process standards' . . . [the] post removal denial of visitation [was] very questionable since neither Ms. Rodriguez nor . . . Andrew could obviously have been prepared for their separation from each other and visiting could have helped

### 3. The Southern District's Criteria For Establishing a Liberty Interest

In *Rodriguez*, the Southern District of New York suggested criteria for creating a liberty interest in only a discretely identifiable set of foster parents. Foster parents would have a liberty interest only when: (1) the biological parents' rights have been terminated; (2) the foster parent has cared for the child for more than twelve months since the child's infancy; and (3) the foster parent has entered into an adoptive placement agreement for the foster child.<sup>104</sup> The amended provision would have to expressly link this set of criteria to the emergency removal situation in order to protect a child like Andrew.

The district court's list of factors would distinguish the pre-adoptive foster parent from a foster parent who is a temporary caregiver. Currently, New York law contains a regulation that distinguishes a foster parent from a pre-adoptive parent.<sup>105</sup> However, there is no language that distinguishes pre-adoptive foster parents from other pre-adoptive parents. If the relevant provisions contained language that made a clear distinction between parents such as Ms. Rodriguez and pre-adoptive parents who do not have an already-established relationship with their children, a statutorily-defined liberty interest could emerge. The Seventh Circuit noted in *Procopio v. Johnson* that the concept of permanency coming out of foster care is present in Illinois law. However, if circumstances justify removal, procedural safeguards are not available to the foster parent to override the state's ultimate power to terminate.<sup>106</sup> Amending the law to ensure protection of the foster family in removal cases would not diminish the state's power to terminate the foster care

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the child's understanding of the situation.' " The court added, "It is to be hoped that [legislative and administrative] authorities will take appropriate steps to prevent the recurrence of judgmental errors such as this." *Rodriguez II*, 214 F.3d at 341.

<sup>104</sup> See *id.* (quoting *Rodriguez I*, 49 F. Supp. 2d at 199).

<sup>105</sup> See N.Y. COMP. CODES R. & REGS. tit. 18, § 421.1(c) (1999) (including "a person with whom a child has been placed for adoption").

<sup>106</sup> *Procopio*, 994 F.2d at 330.

relationship, but instead, would ensure that the child receives proper communication with the only parent he or she has ever known.

B. *Potential Liberty Interest Under the Due Process Clause*

The Second Circuit's decision in *Rodriguez* is flawed because it fails to adequately discuss the possibility of a liberty interest in a foster parent arising under the Due Process Clause. In *OFFER*, the "Supreme Court explained that . . . a liberty interest in the integrity and stability of a foster family may be found based on the Due Process Clause itself . . . ."<sup>107</sup> The Supreme Court also noted in *OFFER* that the foster family originates from a contractual arrangement to which the state is a party.<sup>108</sup> Having suggested that determining the entitlements and expectations available to foster families under state law would be the proper analysis, the Court did not conclude that state law was to be the *only* basis for a liberty interest.<sup>109</sup> Thus, in determining whether a liberty interest exists, a court should consider two sources for a liberty interest: state law and the Due Process Clause.<sup>110</sup>

The court in *Rodriguez* focused only on whether the New York statutory provisions created a liberty interest, thus misinterpreting the *OFFER* decision.<sup>111</sup> The court misinterpreted the Supreme Court's decision in *OFFER* to mean that only state law creates a liberty interest in a foster family. Further, the court's brief discussion of the Adoption Placement Agreement does not correctly characterize the

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<sup>107</sup> Brief for Appellees, *supra* note 22, at 56 (citing *OFFER*, 431 U.S. at 842).

<sup>108</sup> "[W]here . . . the claimed interest derives from a knowingly assumed contractual relationship with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties." *Rodriguez II*, 214 F.3d at 337 (quoting *OFFER*, 431 U.S. at 845-46). The court in *Rodriguez* took this reasoning to mean that a foster parent would possess a liberty interest only under state law. *Id.* at 337-38.

<sup>109</sup> See *supra* note 107 and accompanying text.

<sup>110</sup> *Rodriguez II*, 214 F.3d at 338 (quoting *Thompson*, 490 U.S. at 462 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983))). The court acknowledges that there are two sources for a liberty interest and then proceeds to discuss only one of them because it contended that the *OFFER* Court deemed it to be the only source for cases regarding foster parents.

<sup>111</sup> *Id.* at 337-38.

relationship between Ms. Rodriguez and Andrew. The court should have determined whether the relationship is "close enough" to liberty interests already protected under the Due Process Clause to be considered an element of liberty.<sup>112</sup> In declining to do so, the court neglected to consider that Ms. Rodriguez and Andrew might represent a limited class of foster families that deserve protection under the Due Process Clause because they have moved away from the temporary stage of the foster parent-child relationship toward a permanent family unit.

### 1. Finding a Liberty Interest in the Due Process Clause

There are two approaches available for determining whether a foster family possesses a liberty interest under the Fourteenth Amendment. The first approach (hereinafter referred to as the "malleable tradition" test) requires deciding whether a familial relationship is close enough to a "traditional" relationship already protected under the Due Process Clause.<sup>113</sup> This approach asserts that tradition is "as malleable and as elusive as 'liberty' itself . . ." and suggests "identify[ing] the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer."<sup>114</sup> The second approach argues that a family possesses a liberty interest only if it has "been treated as a protected family unit under the historic practices of our society . . ."<sup>115</sup> Determining that a familial relationship is "close enough" to families already protected under the Due Process Clause does

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<sup>112</sup> See *Michael H. v. Gerald D.*, 491 U.S. 110, 145 (1989) (Brennan, J., dissenting). The Supreme Court noted in *OFFER* that the test was whether "the relation of foster parent to foster child [is] sufficiently akin to the concept of 'family' recognized in our precedents to merit similar protection." *OFFER*, 431 U.S. at 842.

<sup>113</sup> *Michael H.*, 491 U.S. at 137-38 (Brennan, J., dissenting). The Supreme Court had previously referred to a similar approach in the *OFFER* case wherein it asked the question: "[I]s the relation of foster parent to foster child sufficiently akin to the concept of 'family' recognized in our precedents to merit similar [constitutional] protection?" *OFFER*, 431 U.S. at 842.

<sup>114</sup> *Michael H.*, 491 U.S. at 137-38 (Brennan, J., dissenting).

<sup>115</sup> *Id.* at 124 (plurality opinion).

not establish a liberty interest.<sup>116</sup> According to this approach, tradition is a static concept under the Due Process Clause.

Having declined to address whether a substantive liberty interest exists in a pre-adoptive foster family, the court in *Rodriguez* nevertheless indicated its likely position on this issue when it discussed the Adoptive Placement Agreement.<sup>117</sup> The court ruled that the Agreement did not signify that adoption was a “foregone conclusion” and reiterated that McCloskey retained custody over Andrew until his adoption.<sup>118</sup> The court thus signified its adherence to the “traditional” approach, under which the only familial relationships to which the Due Process Clause affords protection are biological families and adoptive families.<sup>119</sup>

If the Second Circuit indeed followed the “traditional” approach, it made the wrong choice. Once again, the court vastly misinterpreted the *OFFER* decision in its analysis of pre-adoptive foster families. The *OFFER* court explicitly noted: “[B]iological relationships are not [the] exclusive determination of the existence of a family.”<sup>120</sup> The Court recognized the potential for intimate relationships to develop between foster parent and child<sup>121</sup> and outlined a scenario nearly identical to the instant case: where a child enters the foster care system as an infant, lives for many years in the care of the same foster parent, and never comes to know his biological parents.<sup>122</sup> In such a situation, the Court suggested, “the foster family should hold the same place [as a natural family would] in the emotional life of the foster child.”<sup>123</sup> Thus, the Court inferred that the “malleable tradition” test would be the appropriate test for determining whether a foster family possesses a liberty interest under the Due Process Clause.<sup>124</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> See *Rodriguez II*, 214 F.3d at 341.

<sup>118</sup> *Id.*

<sup>119</sup> See *id.*

<sup>120</sup> *OFFER*, 431 U.S. at 843.

<sup>121</sup> *Id.* at 845.

<sup>122</sup> *Id.* Andrew lived with Ms. Rodriguez since his biological mother abandoned him at birth. He was four years old at the time the agency removed him from the foster home. Andrew only visited his biological mother a handful of times and never truly got to know her as a parent. The state terminated the biological mother’s parental rights. See Brief for Appellees, *supra* note 22, at 58.

<sup>123</sup> *OFFER*, 431 U.S. at 844.

<sup>124</sup> *Id.* at 842. The “malleable tradition” test focuses on the quality of the



The court in *Rodriguez* should have used the "malleable tradition" test to decide whether Ms. Rodriguez has a liberty interest under the Due Process Clause. The test would have required a comparison of the relationship between Ms. Rodriguez and Andrew to that between a biological mother and son.<sup>125</sup> The court should have confronted the threshold question of what factors establish the constitutionally protected biological family. The Supreme Court recently ruled that "the parental liberty interest [is] a function, not simply of 'isolated factors', such as biology . . . but of the broader . . . interest in family."<sup>126</sup> Therefore, more than the mere aspect of the biological tie between parent and child must be present to create a liberty interest. The Court has repeatedly emphasized that "emotional attachments," which emerge from "the intimacy of daily association," elevate the familial unit to the status of a sacred institution.<sup>127</sup>

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familial relationship, therefore, it would certainly advance notions of the best living situation for the child, particularly in the absence of biological ties. A more difficult analysis would involve the a long-term foster care relationship where the biological parents rights have not been terminated and the biological parents seek to re-take the primary care responsibilities for the child. If a liberty interest were limited to the long-term foster parent only in situations in which the biological parents rights have been terminated, an important question is what happens to other long-term foster parents who are shut-out of the picture but whom might nevertheless expect to have constitutional protection based on an intimate relationship of significant duration? Perhaps this problem will occur less frequently since many states have adopted ASFA's "permanency hearing," which determines the best permanent living situation for a foster child who has been in foster care for more than twelve months. The debate over whether the biological parent should remain in the child's life would be solved at an early point in the foster care relationship, hopefully before there is the development of strong emotional bonds.

Note that *OFFER* was decided before *Michael H.* The latter case involved a plurality of the Court deciding in favor of the "traditional" approach. See *Michael H.*, 491 U.S. at 124. However, a vigorous dissent, led by Justice Brennan, spoke out in favor of the "malleable tradition" test. *Id.* at 145 (Brennan, J., dissenting).

<sup>125</sup> The Supreme Court has long recognized that biological families have a liberty interest in protecting the sanctity of the family. "[T]he interests of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment . . . [f]ew consequences of judicial action are so grave as the severance of natural family ties." *M.L.B. v. S.L.J.*, 519 U.S. at 119 (quoting *Santosky v. Kramer*, 455 U.S. 745, 774, 787 (1982)). Therefore, it is necessary to compare the foster family in the *Rodriguez* case with the biological family.

<sup>126</sup> *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (quoting *Michael H.*, 491 U.S. at 123 (1989)).

<sup>127</sup> *Lehr v. Robertson*, 463 U.S. 248, 261 (1983), (quoting *OFFER*, 431 U.S. at 844 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972))).

In *Lehr v. Robertson*, an unmarried father filed a petition to vacate the adoption order of his child by the child's mother and her husband on the ground that it was obtained by fraud and in violation of his constitutional rights.<sup>128</sup> The Supreme Court held that an unmarried father lacking custodial, personal, or financial relationships with his child is not entitled to notice of the child's adoption proceeding.<sup>129</sup> The Court concluded that while "the relationship of love and duty in a recognized family unit is an interest in liberty . . . the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating . . . the rights of the parent."<sup>130</sup> A biological tie between parent and child does not guarantee "equivalent constitutional protection" without the parent's "full commitment to the responsibilities of parenthood."<sup>131</sup>

Ms. Rodriguez argued that neither biological nor formal legal ties are the touchstone of the family.<sup>132</sup> Rather, it is the "enduring relationship" between parent and child that forms the foundation for a liberty interest.<sup>133</sup> The court in *Rodriguez* should have looked at whether Ms. Rodriguez and Andrew's relationship resembled the constitutionally-recognized familial relationship. In the context of foster care, the appropriate question, then, is: when does a familial relationship created by a foster care agency and authorized by state law "come close" to the familial relationship already protected under the Due Process Clause?<sup>134</sup>

The court in *Rodriguez* should have analyzed certain factors in order to compare Andrew's pre-adoptive foster family to the traditional family unit. Such factors might include: (1) the presence of substantial psychological ties in the absence of a biological parent; (2) the "permanency" of Andrew's foster care relationship; and (3) the importance of Ms. Rodriguez' entering into an Adoptive Placement Agreement with the state

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<sup>128</sup> *Id.* at 249-50.

<sup>129</sup> *Id.* at 262.

<sup>130</sup> *Id.* at 258, 267.

<sup>131</sup> *Id.* at 261.

<sup>132</sup> Brief for Appellees, *supra* note 22, at 67.

<sup>133</sup> *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.").

<sup>134</sup> See *OFFER*, 431 U.S. at 842.

for the adoption of Andrew.<sup>135</sup> Examining elements such as these would have demonstrated that Andrew and Ms. Rodriguez had established (at the time McCloskey removed Andrew) an intimate, enduring relationship that, although lacking biological ties, strongly resembled that of a traditional family.<sup>136</sup>

#### a. Substantial Psychological Ties

The first factor, the existence of substantial psychological ties, is crucial to raising the status of a foster family close to that of a constitutionally protected family.<sup>137</sup> In *Brown v. San Joaquin County*, the plaintiff foster mother sought monetary, injunctive, and declaratory relief after the state removed a foster child from her home.<sup>138</sup> The District Court for the Eastern District of California concluded that this "foster parent-foster child relationship has precisely the same form and content as a healthy biological parent-child relationship."<sup>139</sup> In reaching its conclusion, the *Brown* court described "substantial psychological ties" as a product of the foster parent becoming a "de-facto parent" to the foster child.<sup>140</sup> A foster parent achieves the status of "de-facto parent" by "assum[ing] the role of parent, raising the child in his [or her] own home, [and] in time acquir[ing] an interest in the 'companionship, care, custody, and management' of that child."<sup>141</sup> The court explained that once a foster child has these "substantial psychological ties" to the parent, and the foster

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<sup>135</sup> See Brief for Appellees, *supra* note 22, at 59. See also JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTEREST OF THE CHILD* 39 (The Free Press ed. 1979) (1973).

<sup>136</sup> See *Berhow v. Crow*, 423 So.2d 371, 375 n.2 (Fla. Dist. Ct. App. 1982). The First District Court of Appeals of Florida noted that "as the nature of the foster parent/child's 'familial relationship' becomes closer and stronger, so as to approach the level of the relationship between natural parents and their offspring, so too do the rights of foster parents to preserve that relationship." *Id.*

<sup>137</sup> In a foster care situation "where all the psychological elements implied in a parent-child relationship are present and functioning effectively . . . [i]t is a state of affairs identical with a successful adoption in every sense except the legal sense." See GOLDSTEIN ET AL., *supra* note 135, at 27.

<sup>138</sup> *Brown v. County of San Joaquin*, 601 F. Supp. 653, 656 (E.D. Cal. 1985).

<sup>139</sup> *Id.* at 665.

<sup>140</sup> *Id.* at 660 (quoting *In re Shannon's Estate*, 218 Cal. 490 (1933)).

<sup>141</sup> *Id.* at 660. The court noted that it is the "de facto" parental status that renders the psychological ties "substantial."

parent is "willing and capable" of giving the child a safe and permanent living environment, then the state's subsequent removal of the child from the home without due process would destroy a liberty interest.<sup>142</sup>

Andrew and Ms. Rodriguez' relationship undoubtedly developed "substantial psychological ties."<sup>143</sup> Andrew lived with Ms. Rodriguez since his mother abandoned him, which was immediately following his birth.<sup>144</sup> In fact, Andrew lived with Ms. Rodriguez every day of his life until McCloskey removed him.<sup>145</sup> Andrew's biological mother's parental rights were terminated after McCloskey decided it would not be in Andrew's best interest to return to her.<sup>146</sup> McCloskey acknowledged, "because Andrew had been with Ms. Rodriguez since he was 13 days old, and because he was in preadoptive placement [with Ms. Rodriguez], a bond had formed between Ms. Rodriguez and Andrew . . . [and] separating the two for

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<sup>142</sup> *Brown*, 601 F. Supp. at 662. The court went on to emphasize that a young child who has no ties to his natural family is not able to distinguish a foster care family relationship from a biological family relationship.

"No one can caution an infant against loving the individual who provides for all of his needs, physical and emotional; no one can instruct the infant foster child that his foster parent is not his real or natural parent; no one can diminish the infant foster child's feelings toward his foster parent and cause them to be distinguished from the feelings of an infant child to his natural parents."

*Id.* at 665 (citation omitted).

<sup>143</sup> Biological ties between parent and child have "psychological effects" on the parent because such ties provide them with "first right to the possession of the child." GOLDSTEIN ET AL., *supra* note 135, at 16. On the contrary, the "physical realities of [a child's] conception and birth are not the direct cause of [the child's] emotional attachment." *Id.* at 17. Instead a psychological tie, i.e. a relationship with the parent which "results from day-to-day attention to [the child's] needs for physical care, nourishment, comfort, affection, and stimulation," is the source of attachment. *Id.* If a biological parent sees to the child's needs and thus builds psychological ties to the child on the basis of the biological attachment, then the biological parent "will become [the child's] 'psychological parent' in whose care the child can feel valued . . . [otherwise the] biological parent will . . . tend to become, a stranger" to the child, as was the situation in *Rodriguez*. *Id.* In *Rodriguez*, however, Ms. Rodriguez became Andrew's psychological parent, having cared for him nearly all four years of his life. See Brief for Appellees, *supra* note 22, at 6. Andrew's biological mother, having abandoned Andrew at the hospital following his birth, became a stranger to Andrew. See *id.*

<sup>144</sup> Brief for Appellees, *supra* note 22, at 6.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

even a month would be harmful to Andrew."<sup>147</sup> Therefore, since Ms. Rodriguez cared for Andrew for four consecutive years and because she is indistinguishable in Andrew's eyes from a natural parent, Ms. Rodriguez is a "de-facto parent."<sup>148</sup> The court ought to have considered the substantial psychological ties between Ms. Rodriguez and Andrew.

Nonetheless, had the *Rodriguez* court done such an analysis, it still might have concluded that psychological ties are not sufficient to establish the "integrity of the family unit."<sup>149</sup> In *Procopio*, the Seventh Circuit held that the plaintiff foster parents did not possess a liberty interest. The court in *Procopio* ruled that a foster parent is fundamentally different from a biological parent because the foster parent does not have legal custody of the foster child and the state retains the power to terminate the foster care relationship.<sup>150</sup>

In *Procopio*, the Seventh Circuit refused to widen the scope of due process protection to include pre-adoptive foster parents.<sup>151</sup> The court in *Procopio*, however, recognized that the Due Process Clause is a possible source for a liberty interest in

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<sup>147</sup> *Id.* In their brief, appellees also cited McCloskey's finding that "such a separation would cause feelings of abandonment and confusion in Andrew, which could affect his emotional well-being for years to come." *Id.*

<sup>148</sup> See *Brown*, 601 F. Supp. at 660.

<sup>149</sup> See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). In *Stanley*, the Supreme Court noted that the Due Process Clause protects the "integrity of the family unit," and that the right to have a family and raise children is one of the basic civil rights more important, even, than property rights. *Id.*

<sup>150</sup> *Procopio*, 994 F.2d at 328. The brief for the Cross-Claimants-Appellants (McCloskey) emphasized the *Procopio* case quite heavily in pointing out that the "comparison" test for finding a substantive liberty interest is inapplicable in a foster parent case since the state retains custody of the foster child. Such a distinction would render a liberty interest under the Due Process Clause unreachable until the foster parent adopts the child. See Brief for Cross-Claimants-Appellants at 17, *Rodriguez v. McLoughlin*, 214 F.3d 328 (2d Cir. 2000) (No. 99-7020).

<sup>151</sup> In *Procopio*, the Seventh Circuit reached a result similar to the Second Circuit's decision in *Rodriguez*. *Procopio*, 994 F.2d at 330. However, the circuits are divided on the issue of whether a pre-adoptive foster parent may possess a liberty interest. See *supra* notes 54-73 and accompanying text. The circuits split centers on the uncertainty stemming from the *OFFER* decision as to the Supreme Court's stance on whether foster parents may, at any stage up until adoption possess a liberty interest in the preservation of the family. *Id.* The federal courts seem to have difficulty deciding how to reconcile the traditional discretion afforded to agencies in supervising foster children with the unique status held by long-term foster parents who then become pre-adoptive parents. See *infra* Part II.B.1.c.

a foster family.<sup>152</sup> Acknowledging that the Due Process Clause is a possible source for a liberty interest in a foster parent, the Seventh Circuit noted the Supreme Court's position as of the *OFFER* decision: the "[Supreme] Court has stopped short of deciding that foster family arrangements achieve the status of a liberty interest that states cannot disrupt without due process."<sup>153</sup> Thus, in contrast to the Second Circuit in *Rodriguez*, the Seventh Circuit conceded that there are two sources of liberty interest in a foster parent. However, although the Seventh Circuit considered the existence of a substantive liberty interest, it opted to protect the traditional deference given to the state's supervisory role in the foster family relationship. Both the Second and Seventh Circuits should have discussed possible factors pointing toward a substantive liberty interest.<sup>154</sup>

b. The "Permanency" of the Foster Care Relationship

The second factor the *Rodriguez* court should have used to compare Andrew's pre-adoptive foster family to the traditional family unit was whether Andrew's foster family could have reasonably expected that their relationship would be permanent. If the foster family's expectation that the relationship is permanent finds substantial support, from state law or otherwise, then a court might conclude that the foster family has become a "family" entitled to a liberty interest arising under the Due Process Clause.<sup>155</sup> The court in *Rodriguez* should have first addressed the importance of a

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<sup>152</sup> See *Procopio*, 994 F.2d at 330. The Seventh Circuit ultimately abandoned the substantive liberty interest discussion based on its conclusion that foster parents are fundamentally different from biological parents because the state has the power to terminate a foster family arrangement. The court ruled that "the scope of the liberty interest at stake . . . is appropriately ascertained from . . . state law." *Id.* at 328.

<sup>153</sup> *Procopio*, 994 F.2d at 328.

<sup>154</sup> Recall that the Supreme Court in *OFFER* did not rule out the possibility of a liberty interest arising from the Due Process Clause. See *supra* note 107 and accompanying text. The existence of "psychological ties" is just one of several factors that establish a substantive liberty interest. Simply because the legal custody of the child remains with the state or authorized agency does not mean that the foster family is fundamentally different from a constitutionally-protected family. See *id.*

<sup>155</sup> Brief for Appellees, *supra* note 22 at 59.

foster care relationship that is clearly *not* temporary.<sup>156</sup> The Supreme Court has held that the termination of a biological parent's rights is "irretrievabl[y] destructi[ve] of the most fundamental family relationship" and requires the state to show clear and convincing evidence that the biological parent is unfit to raise the child.<sup>157</sup> Thus, terminating biological parents' rights renders the role of the pre-adoptive foster parent quite significant.<sup>158</sup>

The Supreme Court in *OFFER* did not find a liberty interest partly because the plaintiff foster families were based on temporary relationships.<sup>159</sup> The foster parents in *OFFER* were not in what could be characterized as permanent relationships with foster children since the biological parents' rights had not yet been terminated.<sup>160</sup> The Court refused to decide on a liberty interest for the foster parents in that case, noting that it risked severe derogation of the natural parents' rights.<sup>161</sup>

Lower courts have suggested other methods for measuring the permanency of a foster family and the Second Circuit could have followed one of these approaches, if not the Southern District's.<sup>162</sup> In *Sherrard v. Owens*, the District Court for the Western District of Michigan held that petitioner foster parents did not possess a liberty interest because they had "no reasonable expectation" that their relationship would become

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<sup>156</sup> An example would be a situation in which the child's biological parents' rights have been terminated and the foster parent becomes the child's pre-adoptive parent. See *Rodriguez II*, 214 F.3d 328.

<sup>157</sup> *M.L.B.*, 519 U.S. at 104 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

<sup>158</sup> See *Lipscomb*, 884 F.2d at 1249.

<sup>159</sup> *OFFER*, 431 U.S. at 846.

<sup>160</sup> *Id.* The Court noted that affording a liberty interest to the foster parent would almost certainly derogate from the natural parent's liberty interest. The "tension" intrinsic in such an action, would be "unavoidable." *Id.* The Court seemed to imply that it would be feasible for a foster parent to possess a liberty interest in "family-like associations," but that the foster parent's eligibility for a liberty interest changes dramatically when a biological parent remains in the picture: "It is quite another [matter] to say that one may acquire . . . another's constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right an interest the foster parent has recognized by contract from the outset." *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See *Rodriguez I*, 49 F. Supp. 2d at 199.

permanent.<sup>163</sup> The foster parents in the *Sherrard* case had a "provisional" foster care license.<sup>164</sup> The license was valid only for a six-month period and could not be issued more than four times for the same foster child.<sup>165</sup> The court in *Sherrard* analyzed the following factors, which resulted in the conclusion that the foster parents could not have perceived the relationship as permanent: (1) the children were not infants at the time they entered the foster home; (2) the children knew other "parents" aside from the Sherrards; and (3) the children lived in the Sherrard home for only one year.<sup>166</sup>

In contrast to the *Sherrard* case, Ms. Rodriguez is the only "parent" Andrew has ever known.<sup>167</sup> Ms. Rodriguez began caring for Andrew just thirteen days after he was born. Andrew had only limited contact with his biological mother, and McCloskey subsequently determined that it would not be in Andrew's best interest to return to her.<sup>168</sup> At that time, Andrew was only two years old.<sup>169</sup> McCloskey further noted that Andrew and Ms. Rodriguez shared a "close loving relationship," that Ms. Rodriguez "showed an enormous amount of love for Andrew," and that Andrew called Ms. Rodriguez "Mommy."<sup>170</sup> McCloskey and the CWA subsequently changed Andrew's permanency planning goal from "discharge to adoption" and designated Ms. Rodriguez' home as Andrew's "pre-adoptive home."<sup>171</sup> Ms. Rodriguez then began proceedings to adopt Andrew.<sup>172</sup> When the foster parent and child have established a long-standing and loving relationship, which has been recognized by the state as a pre-adoptive family, then the familial relationship has arrived at a level close to that of an adoptive or biological family.

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<sup>163</sup> *Sherrard v. Owens*, 484 F. Supp. 728, 741 (W.D. Mich. 1980).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* The provisional license therefore, does not carry the same duration and effect as a "valid state foster home license," according to the court in *Sherrard*. *Id.*

<sup>166</sup> *Id.* at 742.

<sup>167</sup> Brief for Appellees, *supra* note 22, at 4.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 5.

<sup>172</sup> It is important to note that the foster parent has preference in adoption proceedings under New York law. N.Y. COMP. CODES R. & REGS. tit. 18, § 421.13 (1995).



Had the court in *Rodriguez* considered the permanency issue, however, it might have concluded that despite indications of "closeness" between foster parent and foster child and despite the biological parent's absence, the contractual nature of the relationship precludes any expectations. In the case of *Drummond v. Fulton County*, the petitioner foster parents had cared for a two-and-a-half-year-old boy since he was only a month old.<sup>173</sup> The biological mother's rights were terminated and the child became eligible for adoption.<sup>174</sup> The agency denied the foster parents' adoption petition and the foster parents subsequently filed suit to enjoin the child's removal from their home.<sup>175</sup> The Georgia Supreme Court held that the foster parents possessed no liberty interest.<sup>176</sup> Having acknowledged that the Drummonds were, in fact, the child's "psychological parents," the court nevertheless concluded that the Fulton County Department of Family and Children Services had "all the legal rights of a natural parent" since it retained legal custody of the child.<sup>177</sup>

The *Drummond* case presents facts nearly identical to the *Rodriguez* case. In *Rodriguez*, however, Ms. Rodriguez had not been denied in her application to adopt Andrew. In fact, all parties to the case acknowledged or did not dispute Ms. Rodriguez' claim that the adoption process was in the final stages when removal took place.<sup>178</sup> The Drummonds'

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<sup>173</sup> *Drummond v. Fulton County*, 228 S.E.2d 839 (Ga. 1976).

<sup>174</sup> *Id.* at 845.

<sup>175</sup> *Id.* at 841.

<sup>176</sup> *Id.* at 454. This case is frequently cited and represents perhaps the strongest voice against the existence of a liberty interest in foster parents. Note that the Supreme Court decided *OFFER* the very next year and opted not to rule on whether foster parents possess a liberty interest. Courts interpreting *OFFER* as leaning against finding a substantive liberty interest in foster parents typically cite to *Drummond*. See *Procopio*, 994 F.2d at 330. However, although the Supreme Court left open the liberty interest question in *OFFER*, it did suggest that a long-term foster parent holds the same place in the emotional life of a child who has never known his or her biological parents. See *OFFER*, 431 U.S. at 844.

<sup>177</sup> *Drummond*, 228 S.E.2d at 846.

<sup>178</sup> See Brief for Cross-Claimants-Appellants, *supra* note 150, at 9 (agreeing that only finalization was needed, but disputing that finalization would not have been possible before the date Andrew was removed); Brief for Municipal Appellants, *supra* note 14, at 13 (not disputing that Andrew's adoption was close to completion at the time of his removal, but acknowledging only that Ms. Rodriguez and McCloskey had entered into an Adoption Placement Agreement); Brief for Appellees, *supra* note 22, at 7-8 (alleging that had McCloskey met New York City's adoption procedures, Andrew's

expectations as to the continuity of their foster family do not approach the expectations Andrew and his foster mother had with respect to making their relationship permanent. The Drummonds knew that they were not included in the agency's future plans for their foster child when their petition for adoption was denied. Ms. Rodriguez and Andrew expected that their relationship would be a permanent one since the adoption neared completion.

c. The Importance of Entering into an Adoptive Placement Agreement

The *Rodriguez* court did discuss the Adoptive Placement Agreement (the "Agreement") as possible evidence of a liberty interest in Ms. Rodriguez' foster family.<sup>179</sup> The court found, however, that the Agreement specifically stated that the state possessed legal custody of Andrew until the adoption's finalization.<sup>180</sup> The court cited several excerpts from the Agreement including the provision that in the event the agency decides to remove Andrew from the home, Ms. Rodriguez would cooperate with the agency in a manner that promotes Andrew's best interest (to be determined by the agency).<sup>181</sup> The court concluded that the Agreement did not augment the state law provisions so as to create a liberty interest.<sup>182</sup>

The court should have considered the Agreement as a factor for determining whether the foster family possessed a liberty interest arising under the Due Process Clause. The Agreement is significant because it is itself representative of the foster family's metamorphosis during the adoption process from a temporary care unit to a loving and nurturing family possessing the same fundamental integrity as a natural

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adoption would have been final six weeks prior to Andrew's removal).

<sup>179</sup> See *Rodriguez II*, 214 F.3d at 341. The court discussed this agreement in the context of a possible state-created liberty interest; however, it also should have been part of a discussion as to whether the foster care relationship has developed to a point at which it closely resembles a "family" protected under the Due Process Clause. See *Rodriguez I*, 49 F. Supp. 2d at 196-97.

<sup>180</sup> *Rodriguez II*, 214 F.3d at 341.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

family.<sup>183</sup> When Ms. Rodriguez entered into the Agreement she became a "pre-adoptive" parent. A pre-adoptive parent is included in New York's definition of an "adoptive parent."<sup>184</sup> While the court correctly determined that the inclusion of Ms. Rodriguez as an adoptive parent would not give rise to a state-created liberty interest, it neglected to note the importance of the title as it pertains to a possible liberty interest arising under the Constitution. The court should have discussed the Agreement's significance as it pertained to the nature of Ms. Rodriguez' parental status.

Having determined in the *OFFER* case that a foster family does not traditionally reach "the 'private realm of family life that the state cannot enter'," the Supreme Court seemed to leave open the possibility that a pre-adoptive foster family might be included.<sup>185</sup> Some lower federal courts have recognized the important distinction between foster parent and pre-adoptive parent. For example, in *Thelen v. Catholic Social Services*, the District Court for the Eastern District of Wisconsin distinguished foster parents from prospective adoptive parents, concluding: "Unlike foster parents, the prospective adoptive parents cannot be said to expect that their relationship with the child will be ended."<sup>186</sup> The court in *Thelen* pointed out that in *OFFER*, plaintiff foster parents should have had substantial doubt that their foster children would remain with them forever.<sup>187</sup> However, the court in *Thelen* ruled that a pre-adoptive parent validly expects a permanent relationship despite the fact that the state retains legal guardianship until adoption.<sup>188</sup>

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<sup>183</sup> See *supra* note 80 and accompanying text.

<sup>184</sup> See *supra* note 104 and accompanying text.

<sup>185</sup> See *OFFER*, 431 U.S. at 842-44. The Court recognized the interdependent relationship that can develop between a foster parent and child in a long-term foster care arrangement, therefore perhaps the Court might accept the "permanent expectations" of pre-adoptive foster parents as legitimate. *Id.* at 844.

<sup>186</sup> *Thelen*, 691 F. Supp. at 1184. The Thelens had fulfilled all of the state requirements for consideration as prospective adoptive parents. *Id.* The Thelens then entered into an Adoptive Parents' Agreement and the agency placed a child in their home. *Id.* The child was subsequently removed and the placement terminated. *Id.* at 1181.

<sup>187</sup> *Id.* at 1184.

<sup>188</sup> *Thelen*, 691 F. Supp. at 1185.

In addition, the Court of Appeals for the Tenth Circuit acknowledged the significant difference between a pre-adoptive agreement and a foster care placement arrangement in *Spielman v. Hildebrand*.<sup>189</sup> According to the court, a "preadoption agreement . . . represents an attempt to find a permanent, stable home for children [while] [f]oster care agreements, in contrast, typically involve temporary care during a transitional period of a child's life."<sup>190</sup> Although the court in *Spielman* reached a result similar to the *OFFER* case because it opted not to decide whether the Spielmans had a liberty interest arising under the Due Process Clause, *Spielman* nevertheless demonstrates that a pre-adoptive parent is at least eligible for a limited liberty interest upon the consideration of other factors in that circuit.<sup>191</sup>

The court in *Rodriguez* should have included the Agreement as a factor in a discussion of a constitutional liberty interest. The Agreement raises Ms. Rodriguez from the category of foster parent to a pre-adoptive parent. Such a change in status is notable because it elevates Ms. Rodriguez' already substantial expectation that her relationship with Andrew will become permanent.<sup>192</sup> The Agreement

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<sup>189</sup> 873 F.2d 1377, 1385 (10th Cir. 1989). Note the court in *Spielman* concluded that the pre-adoption agreement "may have given the Spielmans a reasonable expectation of developing a permanent relationship with the child that rises to a liberty interest meriting limited due process protection." *Id.* The court, however, assumed, "without deciding", that the state did not deprive the Spielmans of due process because the Spielmans received a fair hearing. *Id.*

<sup>190</sup> *Id.* at 1384.

<sup>191</sup> The Second Circuit in *Rodriguez* views the pre-adoptive parent in a different light than the Tenth Circuit in *Spielman*. See *Rodriguez II*, 214 F.3d at 341. According to the Second Circuit, the pre-adoptive parent can never be eligible for a liberty interest, regardless of any expectation of permanence, because the agency retains legal custody of the child until the adoption is final. *Id.* Nevertheless, the Second Circuit should have at least considered that *OFFER* suggested that foster families have the potential to form bonds comparable to a constitutionally-protected family. Note that McCloskey in its appellate brief criticized the district court for mischaracterizing the *Spielman* case, since the court in *Spielman* clearly stated that "pre-adoptive parents have not yet attained the status of adoptive parents, who, like natural parents, have a protected liberty interest . . . ." See Brief for Cross-Claimants-Appellants, *supra* note 150, at 28. However, the court in *Spielman* went on in the next sentence to acknowledge that "[o]n the other hand, the status of pre-adoption may be viewed as conferring a more significant relationship than foster care because of the possibility of developing a permanent adoptive relationship." 873 F.2d 1384.

<sup>192</sup> Andrew's perspective is also important. Though only four-years-old at the time McCloskey removed him, the agency's own reports indicated that Andrew called

demonstrates that the parties have agreed that Ms. Rodriguez is the parent who will provide Andrew's best living situation.<sup>193</sup> All agency reports characterize Andrew and Ms. Rodriguez' relationship as "loving"; the Agreement puts in writing the culmination of a family's development in accordance with agency approval.<sup>194</sup> While the agency retains legal custody of Andrew, the Agreement nevertheless demonstrates that Andrew's foster family is comparable to that of an adoptive family.

The court in *Rodriguez* insisted that because Andrew's custody remained with the state, no liberty interest existed.<sup>195</sup> This conclusion is consistent with a number of cases decided since the *OFFER* case.<sup>196</sup> Nevertheless, the court should have at least included the Agreement as one factor in assessing whether the foster family rises to the level of a family recognized as possessing a liberty interest under the Due Process Clause. The court did not analyze any factors lending support to a constitution-based liberty interest. Including the Agreement as part of a state-created liberty interest discussion does not preclude the court from also viewing the Agreement as possibly creating a Fourteenth Amendment-created liberty interest.

The three factors discussed above should have been duly taken into account by the court in the *Rodriguez* case: (1) the substantive psychological ties between Andrew and his foster mother; (2) indications of the relationship's permanency; and (3) the Agreement as it pertains to the difference between foster parent and pre-adoptive parent. If the court had done

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Ms. Rodriguez "Mommy" and had come to rely on her care and emotional support. See Brief for Appellees, *supra* note 22, at 5-6.

<sup>193</sup> See *supra* note 80 (discussing the procedure that determines whether a foster parent would be a suitable adoptive parent). See also Brief for Appellees, *supra* note 22, at 35 (comparing a pre-adoption agreement to a foster care placement agreement).

<sup>194</sup> *Id.*

<sup>195</sup> *Rodriguez II*, 214 F.3d at 341.

<sup>196</sup> See *Rodriguez II*, 214 F.3d at 337 (ruling that a liberty interest would exist only under state law, and not under the Due Process Clause); *Procopio*, 994 F.2d at 330 (finding no procedural safeguards that override state's ultimate power to terminate foster care arrangement); *Wildauer*, 993 F.2d at 373 (holding that foster parent did not have legal custody of the foster children, therefore, foster parent did not have a liberty interest); *Kyeys*, 600 F.2d at 699 (ruling that foster parents had reason to believe that the state agency reserved the right to terminate the relationship).

this analysis, it would have concluded that Ms. Rodriguez and Andrew had a liberty interest in the preservation of their family at the time when McCloskey removed Andrew from the foster home.

Had the court reached such a conclusion, it should then have discussed whether significantly delaying Ms. Rodriguez' access to a fair hearing and visitation rights constituted due process violations. The court in *Rodriguez* has already acknowledged that the agency's actions were "judgmental error." However, in ruling that Ms. Rodriguez' foster family did not possess a liberty interest, the court made it possible for the agency to repeat such conduct in the future. The court erred in failing to adequately address the issue of whether Ms. Rodriguez and Andrew possessed a liberty interest under the Due Process Clause. In doing so, the court misinterpreted the *OFFER* decision and undermined the potential for New York's foster families to maintain emotional bonds.

## 2. Effect of Finding a Liberty Interest

The appellants in *Rodriguez* objected to the district court finding a liberty interest in a limited set of foster parents.<sup>197</sup> The underlying theme supporting appellants' objection constitutes a significant concern that expanding the constitutional guarantee protecting familial privacy would prevent custodial agencies from protecting foster children who are living in an abusive foster home.<sup>198</sup> Such concern widens the split between circuit courts in the years following *OFFER* because while some courts have relied on the elements in *OFFER* that recognize the potential for permanency within a foster family, others have held fast to such clauses from *OFFER* as: "whatever emotional ties . . . develop between foster parent and foster child have their origins in an arrangement where the State has been a partner from the

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<sup>197</sup> See *infra* note 203 and accompanying text.

<sup>198</sup> Preventing the agency (either a state agency such as ACS in New York City, or an agency authorized by the state to place children in foster homes and to facilitate adoptions, such as McCloskey) from protecting a child's health and safety would put foster children at risk and draw more foster parents into court to fight agency authority in an effort to expand the limited liberty interest defined by the district court.

outset."<sup>199</sup> In other words, the battle comes down to balancing the significance of the "psychological" family against broad agency discretion.

Finding a liberty interest in pre-adoptive foster parents would not prevent agencies and, hence, the state from protecting foster children. First, new "permanency" provisions in New York law shorten the amount of time children stay in foster care.<sup>200</sup> Already, studies conducted on New York City's foster care system show a decline in the number of children in the system.<sup>201</sup> These kinds of results demonstrate that children are moving more quickly from the temporary, uncertain status of foster care toward a permanent family situation. Fewer children will find themselves in Andrew's situation, remaining in foster care for a four-year period and enduring a long adoption finalization process only to be abruptly removed and denied visitation with the woman who served as his parent for all his life. Foster parents will achieve pre-adoptive parent status at an earlier stage than Ms. Rodriguez did, but the state will still have the opportunity to ensure that permanent placement in the foster parent's home would be in the child's best interests. Therefore, foster families will achieve adoption finalization in a more efficient manner, which will hopefully avoid further occurrences like Andrew's removal. However, a liberty interest in limited situations such as Andrew's is still necessary. It will not disrupt the permanency procedures outlined above.

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<sup>199</sup> *OFFER*, 431 U.S. at 845. See *Rodriguez II*, 214 F.3d at 337 (ruling that a liberty interest would exist only under state law, and not under the Due Process Clause); *Procopio*, 994 F.2d at 330 (finding no procedural safeguards that override state's ultimate power to terminate foster care arrangement); *Wildauer*, 993 F.2d at 373 (holding that foster parent did not have legal custody of the foster children, therefore, foster parent did not have a liberty interest); *Kyeys*, 600 F.2d at 699 (ruling that foster parents had reason to believe that the state agency reserved the right to terminate the relationship).

<sup>200</sup> See *supra* note 78.

<sup>201</sup> A press release from ACS in December of 2000 reports that the foster care population in New York City has dropped eighteen percent over the past two years. See Press Release, Administration for Children's Services, Child Welfare Advisory Panel Final Report Finds ACS has Made "Remarkable Progress" (Dec. 8, 2000), available at <http://www.ci.nyc.us/html/acs> (last visited Apr. 8, 2002).

Second, opponents of a liberty interest in pre-adoptive parents argue that the *Rodriguez* ruling:

[C]reates a legal twilight zone where there is doubt about child care agencies' ability to make other important decisions not involving custody . . . as legal guardians agencies are often [required] to make such judgments and . . . preadoptive parents asserting parent-type liberty interests will claim some right to control or participate in that process.<sup>202</sup>

Defenders of the District Court's decision insist that the claim asserted in *Rodriguez* was a procedural due process claim, not a substantive due process claim.<sup>203</sup> The former asserts that Ms. Rodriguez and Andrew "had a liberty interest in the integrity and stability of their preadoptive foster family relationship, which could not be violated without adequate procedural due process."<sup>204</sup> The latter would question the state's fundamental right to regulate foster families.<sup>205</sup> A liberty interest in Ms. Rodriguez and Andrew's relationship would guarantee them a prompt fair hearing and visitation rights following the custodial agency's removal of Andrew; it would not prevent the agency from removing Andrew upon an agency official's determination that Andrew's safety was in jeopardy.

## CONCLUSION

The *Rodriguez* case presents two important challenges. First, the court's holding that the current New York statutory provisions do not give rise to a liberty interest should challenge the legislature to decide if the policy of "permanency" already added into the statute should also be added to emergency removal procedure provisions and include the pre-adoptive foster parent. The legislature should think about the consequences of carving out a limited class of foster parents for

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<sup>202</sup> Brief for Municipal Appellants, *supra* note 14, at 30 (citing *In re Hasani B.*, 195 A.D.2d 404, 600 N.Y.S.2d 694 (1993)).

<sup>203</sup> Ms. Rodriguez argued she deserved a constitutional guarantee of procedural protection after the state broke apart her long-term "family". She was not arguing that the state had no right to interfere with her family life before the adoption became final. See Brief for Appellees, *supra* note 22, at 20.

<sup>204</sup> See *id.*

<sup>205</sup> See *id.*



due process protection. In addition, the legislature should decide whether such a change would benefit foster children or whether foster parents would wield too much parental status prior to adoption. Second, the court's failure to give significant consideration to the possibility of a liberty interest arising under the Due Process Clause presents a challenge to future courts to reconsider the Supreme Court's decision in the *OFFER* case. Future courts should not limit the liberty interest analysis to state law. A liberty interest in the foster care scenario can be found either in state law or in the Due Process Clause itself. Finding a liberty interest under the Due Process Clause does not alter the state-created nature of the foster family. Rather, such a liberty interest would recognize that the foster parent and child have moved beyond their contractual origins and developed in some cases into a family sufficiently close to the biological family to qualify for some degree of due process protection.

A family like the one in the instant case, an emotionally bonded foster mother and child awaiting final approval for adoption, certainly should not be broken apart without protecting the bonds that have formed during the relationship's development. In order to avoid this "judgmental error" in the future, the courts and the legislature should expand the traditional definition of a family.

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