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## Severing Hansel from Gretel: An Analysis of Siblings' Association Rights

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# Severing Hansel from Gretel: An Analysis of Siblings' Association Rights

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## I. INTRODUCTION

It is a national tragedy; it is invisible, hidden behind doors of confidentiality. Approximately 35,000 brothers and sisters a year are separated into different foster or adoptive homes without a formal or statutorily mandated due process hearing.<sup>1</sup> Siblings' rights to family

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1. For a detailed analysis of sibling statistics, see *infra* part III. Although siblings may have their rights resolved as part of other hearings to determine custody, wardship, parental severance, or adoption, statutes do not provide specific hearings to determine the scope of siblings' association rights.

integrity are so undervalued that no national data exists concerning their placements, and state and county records are non-existent or woefully incomplete.<sup>2</sup> Although recognized by the Federal Adoption and Assistance Act as "hard to place" children who require extra efforts and subsidies for placement, siblings have been substantially excluded from the definition and central goals of family reunification.<sup>3</sup> Brother and sister family units have not only been neglected by agencies, but lawyers and judges have also failed to focus adequately upon the emotional turmoil of siblings caught in the child dependency maelstrom. These children have been traumatized by family abuse or neglect, separated from their parents while court machinery labored, and torn from their last remaining psychological bond, a brother or sister, during the height of their greatest emotional plight.

It is a critical moment for siblings.<sup>4</sup> For example, California, the state with the largest number of siblings in out-of-home care, recently determined that the Juvenile Court has no statutory obligation to put siblings in the same out-of-home placement, but as the concurring opinion noted, "I am concerned with the majority's broad statement that juvenile law expresses no affirmative duty to keep siblings together."<sup>5</sup> It is time to provide siblings with protection. This Article will begin to build a due process structure, a mandatory legal barrier between siblings

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2. None of the following national children's organizations maintains any data regarding siblings: 1) American Humane Association American Association For Protecting Children; 2) National Center For Juvenile Justice; 3) Clearinghouse On Child Abuse And Neglect Information; 4) National Foster Care Resource Center; 5) National Association Of Counsel For Children; and 6) National Resource Center On Child Sexual Abuse. See Letter from Robyn Alsop, Information Services Coordinator, American Humane Assoc. Am. Assoc. Protecting Children (July 13, 1990) (on file letters to Professor Patton in the Whittier Law Library); Ellen Nimick, Manager of Data Collection, National Juvenile Court Data Archive (July 23, 1990) (same); Sandi McLeod, Information Specialist, Clearinghouse Child Abuse & Neglect Info. (July 31, 1992) (same); Patricia Ryan, Administrative Director, National Foster Care Resource Ctr. (Sept. 21, 1992) (same); Laura Freeman Michaels, Executive Director, National Ass'n Counsel for Children (July 2, 1992) (same); Kathryn Sisterman Keeney, National Resource Ctr. Child Sexual Abuse (July 6, 1992) (same).

3. 42 U.S.C.A. § 673.

4. It is a critical time for all children trapped by the child dependency system. The United States Supreme Court recently held in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), that there is no private federal remedy for children separated because of a state's failure to vigorously pursue family reunification services. In addition, the United States Court of Appeals for the Ninth Circuit, in *Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992), held that an Oregon statute excluding relatives from state foster care subsidies was constitutional and rationally related to the state's decisions regarding the best interests of the children. Therefore, children unlucky enough to have poor relatives will be forced to live with strangers in foster care or with relatives whose budget will be inadequate to meet the additional needs of the child. For a history and analysis of relative out-of-home care, see Elizabeth Killackey, *Kinship Foster Care*, 26 FAM. L.Q. 211 (1992).

5. *In re Gerald J.*, 2 Cal. Rptr. 569, 574 (Cal. Ct. App. 1991) (Nares, A.J., concurring).

and the state in the area of child dependency, parental severance, and state-mandated adoption hearings. A subsequent article will delineate siblings' rights in civil domestic relations cases.

## II. AN OVERVIEW OF THE GENESIS AND CURRENT STATUS OF SIBLINGS' RIGHTS

No supreme court has determined the constitutional nature of siblings' association rights. As late as 1987, the court in *Crim v. Harrison* noted that it was "unable to find, any cases which recognize the right of siblings whose custody has been granted to the state to reside together."<sup>6</sup> One court has determined that adult siblings do not even have standing to seek visitation with minor siblings still residing with their parents.<sup>7</sup> Still other courts have found that siblings do not possess a relationship sufficiently similar to that of parent and child to warrant wrongful death or § 1983 damages.<sup>8</sup> Although a few courts recently have begun to recognize the importance of sibling rights, case law has merely focused upon whether the trial court abused its discretion or ruled without sufficient evidence; constitutional analysis of siblings' due process rights is almost non-existent.<sup>9</sup>

One of the principal goals of this study is to ameliorate the harsh results of the historical genesis of siblings' rights. Unfortunately, most attorneys involved with children's issues have assumed that courts and social services personnel would not needlessly separate siblings. Children's advocates initially assumed that the family reunification mandates of the Federal Adoption and Assistance Act<sup>10</sup> would focus pressure upon agencies to keep brothers and sisters together whenever possible. Nevertheless, as the court in *Division of Family Services v. Florida* noted,

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6. 552 F. Supp. 37, 39 n.2 (N.D. Mass. 1987).

7. Weber v. Weber, 534 A.2d 498 (Pa. Super. Ct. 1987).

8. Cabrales v. County of L.A., 644 F. Supp. 1352 (C.D. Cal., 1986); Sanchez v. Marquez, 457 F. Supp. 359 (D. Colo. 1978); Ascani v. Hughes, 470 So. 2d 207 (La. Ct. App. 1985), later proceeding, 522 So. 2d 1259 (1988); see also Maureen Delaney, *What About the Children? Toward an Expansion of Loss of Consortium Recovery in the District of Columbia*, 41 AM. U. L. REV. 107 (1991).

9. See, e.g., *In re Elizabeth M.*, 283 Cal. Rptr. 483 (1991); *Division of Family Servs. v. Florida*, 319 So. 2d 72 (Dist. Ct. App. 1985); *Pullman v. Pullman*, 560 A.2d 1276 (N.J. Super. 1988); *Mark v. Gale P.*, 540 N.Y.S.2d 966 (Fam. Ct. 1989). It is common for courts to separate abused siblings into different foster homes without even giving the children a formal hearing regarding their interests to continue visiting with one another. See, e.g., *In re Brooke D.*, *Veronica D.*, *Jessica D.*, *Raven D.*, *Honey D.* and *Ronald D.*, 598 N.Y.S.2d 633, 634 (App. Div. 1993) (trial court ordered siblings "ranging in age from six to 17 . . . [into] foster care in different foster homes as a result of a finding of abuse of one child and neglect of the others by their father." The court relied on recommendations by the children's therapists rather than holding a hearing to determine whether the siblings should visit one another while in foster care).

10. 42 U.S.C.A. § 673 (6)(B)(C)(2)(A).

there is often a conflict between the best long-term interests of a sibling group and the social services agencies' short-term "fears that their foster home or shelter would be lost if the agency insisted that the . . . children remain together."<sup>11</sup> Therefore, platitudes such as "separation of siblings is discouraged" or statutory mandates to keep siblings together unless "overriding reason[s]" exist have failed to protect these children from being needlessly separated and permanently deprived of the benefits of their family relationship.<sup>12</sup> The following are a few examples of the current statutory and case law failures in protecting siblings' association rights:

1. When Linda Kocsis was 31 she was given her adoption papers as a Christmas present. Upon reading the documents she discovered that she lived "within a few miles" of her brother. Five other previously unknown siblings also lived in the same state. The siblings, however, did not know of one another because their birth father placed two of the siblings for adoption after his divorce and their birth mother never informed him that she was pregnant with a third sibling.<sup>13</sup>

2. In *In re Jennifer C.*,<sup>14</sup> a dependency petition alleged that parents had neglected their three children, Jennifer, Michelle, and John, Jr. Another child, Michael, was born eight months later. The department temporarily placed all of the children with their paternal grandmother. After a series of review hearings, the court removed the children from their parents. "Jennifer was placed with her grandmother again, but Michelle, John Jr., and Michael were placed in a non-relative foster home."<sup>15</sup> After a subsequent hearing, the parents' rights were terminated.

The social worker's report indicated that the siblings were emotionally bonded and wanted to stay together.<sup>16</sup> Although the paternal grandmother had expressed interest in adopting Jennifer, when a new social worker took over the case for the adoption assessment, she "did not contact the children, Cynthia [the birth mother] . . . Mrs. Massey [the pater-

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11. 319 So. 2d 72, 77 (1st DCA 1985).

12. See, e.g., *In re Marriage of Mayer*, 347 N.W. 2d 681 (Iowa Ct. App. 1984); *Moe v. Moe*, 676 P.2d 336 (Or. Ct. App. 1984); OR. REV. STAT. § 107.137(1)(a), (c). Of course, abuse of discretion is much easier to determine when the judge separates siblings without even considering the effect of the separation. See, e.g., *Wiskoski v. Wiskoski*, 629 A.2d 996 (Pa. Super. Ct. 1993) (the question whether siblings should be raised together even required consideration of separating half brothers or sisters).

13. Stephanie Simon, *Years Apart, 14 Find They're All in Family*, CHI. TRIB., July 6, 1990, Chicagoland sec. at 1.

14. Solano County Superior Court No. J22026; California Court of Appeal No. A058278 (all citations are from Appellant's Opening Brief, filed November 4, 1992).

15. Appellant's Opening Brief at 4-5, *In re Jennifer C.* (No. A058278).

16. *Id.* at 10-12.

nal grandmother], or the foster parents.”<sup>17</sup> During the Permanency Planning Hearing, Jennifer testified that she liked her foster parents and wanted to be adopted by them, but that she also liked living with her grandmother because she could frequently visit with her family. On cross-examination, however, she said that her real wish was to live with her natural family which included her four siblings.<sup>18</sup> During the permanency planning hearing the parents “repeatedly offered evidence that would show that the children were bonded to their siblings and grandmother, that they would be psychologically harmed if these bonds were permanently severed, and that their grandmother was willing and able to be their caretaker.”<sup>19</sup>

The court ruled that all evidence concerning sibling bonding and placement with a relative was inadmissible. The court also ruled that Jennifer could not testify regarding her relationship with her grandmother.<sup>20</sup> The likely result in this case will be that:

Jennifer C., age nine, and Michelle C., age six, will be adopted by a family in another community in Solano County; and John Jr., age four and Michael, age three, will be adopted by a family in a third community in Solano County. Any continued contact among the siblings will be left to the complete discretion of their adoptive parents.<sup>21</sup>

3. Living in New York State “where the highest priority is supposed to be given to reuniting siblings,” George and Elizabeth Whalen adopted Michael.<sup>22</sup> After a county social worker informed the Whalens that Michael had an infant sister who needed foster care, the Whalens stated that they wanted to adopt her also. But the Whalens were never contacted when the sister was placed into a foster home. After they contacted a Fulton County social worker to request sibling visitation between the brother and sister, they were informed “that such visits would be too difficult because of the distance, even though the Whalens previously made such drives to visit Michael” prior to his adoption.<sup>23</sup> After frequent calls to social workers, the Whalens were informed that the sister had not been freed for adoption; they found out about her prospective adoption “from an anonymous telephone caller, a woman who identified herself as a Montgomery County employee . . .”<sup>24</sup> The

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17. *Id.* at 14.

18. *Id.* at 15-16.

19. *Id.* at 18.

20. *Id.* at 18-19.

21. *Id.* at 3.

22. Lynda Richardson, *A Brother, His Sister, and 100 Miles*, N.Y. TIMES NAT'L, August 10, 1992, at A14.

23. *Id.*

24. *Id.*

Whalens went to court to get custody of the sister, or at the least to get visitation rights for the siblings. The court ruled that the Whalens could not gain custody of the sister since she had been with the prospective adoptive couple for over two years, and encouraged, but did not order, continued visitation between the siblings.

Those are just three illustrations of the tens of thousands of siblings separated each year through informal hearings where siblings' rights to associate are seldom formally discussed or argued by independent counsel. The serious due process issues inherent in permanently separating siblings from one another thus loom large: 1) What is the constitutional nature of siblings' association rights; 2) Who has the burden of proof and what is the constitutionally minimal standard of proof; 3) Do siblings have standing or a right to notice, counsel, confrontation, or cross-examination at such hearings; and 4) Do courts have jurisdiction to order sibling visitation as a condition of separate adoptive or long-term foster placements?<sup>25</sup>

Siblings have been last in line in receiving legislative and judicial recognition and protection because until very recently there were no interest groups or lobbyists advocating their cause.<sup>26</sup> The legal revolution of family rights in the 1970s focused primarily upon natural parents' due process protection. The early 1980s emphasized foster parents' issues and a multitude of interest groups managed to gain standing and a modicum of due process for foster parents. The mid-1980s and early 1990s focused upon the rights of various third parties, such as grandparents, aunts, uncles, and cousins, to maintain continuing relationships with minors after they were temporarily removed from their parents' custody or after parental termination. That movement led to dozens of statutes creating standing, visitation, and custody preferences for those third parties.<sup>27</sup>

Because siblings did not have an organized voice during the development of non-parental third party interests, causing siblings to be last

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25. In comments to the California Committee on the Judiciary, April 1, 1992, the Capitol Resource Institute and the Coalition of California Welfare Rights Organizations stated that "the issue of sibling visitation, something that is a collateral issue in most cases, and in those cases in which it is addressed, it is dealt with only in a cursory fashion." (on file in the Whittier Law Library.).

26. One of the first sibling cases to receive public attention was brought by the Children's Rights Project in the late 1980s. JOSEPH M. HAWES, *THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION* 123-124 (1991).

27. By the mid-1980s, 50% of the states had passed grandparent visitation statutes. In 1984, 48 states had grandparent visitation statutes, but only 4 states had separate sibling visitation statutes. Note, *Visitation Beyond the Traditional Limitations*, 60 IND. L. REV. 91 (1984); Note, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633, 638 (1984). See also 25 FAM. L.Q. 1-148 (1991) (special issue on Third-Party custody, visitation, and child support); CAL. CIV. CODE § 197.5; LA. REV. STAT. ANN. § 9:572 (West 1991).

in line, they suffered a tremendous theoretical and jurisprudential price. Courts and legislatures have merely begun to amend existing statutes to include siblings among all other third parties having an interest in children rather than determining *de novo* the nature of sibling rights. Courts and legislatures, without much analysis, have usually determined that siblings' associational rights are of less value than parent/child rights and have made those decisions without fully considering the contrary medical, psychological, and sociological data.<sup>28</sup> The derivative genesis of siblings' rights has permitted tens of thousands of brothers and sisters to be needlessly separated. Courts have not guaranteed these siblings either substantive or procedural due process, and appellate courts have merely looked at whether trial judges have abused discretion or statutory preferences regarding custody decisions.

The danger of merely providing siblings a statutory association right was recently demonstrated by the hearings on California Assembly Bill 3332, California's first attempt to statutorily recognize separated siblings' right to associate.<sup>29</sup> The initial bill required visitation for all siblings separated as a result of child abuse or neglect.<sup>30</sup> Assembly Bill 3332 originally stated that "the Legislature declares that it is the policy of the State of California that it is in the best interest of these children that they have regular and frequent visitation with their siblings."<sup>31</sup> During the Ways and Means Committee hearings, however, as soon as evidence was presented by state attorneys and social service agencies that visitation would allegedly cost \$9,000,000, the bill was amended to merely require sibling visitation when monitoring by social workers or probation officers was not necessary.<sup>32</sup> "When a child is adjudged to be

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28. See *infra* part IV, for a lengthy discussion of the nature of sibling relationships and the substantial differences between those bonds and third party bonds.

29. California Assembly Bill 3332 was introduced by California Assemblyman Tom McClintock on February 20, 1992 as a bill to amend Welfare & Institution Code Section 361.2. After numerous committee hearings and amendments the bill was signed by the governor on September 14, 1992. See California-Billtrack; CAL. WELF. & INST. CODE § 361.2.

30. AB 3332 originally stated:

Whenever a child is removed from the physical custody of his or her parent . . . the court shall order that reasonable sibling visitation be facilitated by the probation officer. The court shall order reasonable visitation with each of the minor's siblings, so long as agreed to by the siblings, whether or not the minor's siblings are dependents of the court, unless the court finds by clear and convincing evidence that the sibling visitation would be detrimental to the minor.

See Assembly Bill 3332, Amended in the Assembly April 21 and May 22, 1992 (on file in the Whittier Law Library).

31. CAL. WELF. & INST. CODE § 361.2 (g).

32. The County Welfare Directors Association of California opposed the sibling visitation bill and estimated that it would cost \$9,000,000 annually to implement. See Letter from Frank J. Mecca to Assemblyman McClintock (May 14, 1992) (on file in the Whittier Law Library). Professor Patton provided the Capitol Resource Institute with economic rebuttal evidence that the



a dependent of the court, the court shall make a finding, after soliciting from the child his or her consent for visitation, as to whether a visitation by siblings *unsupervised by a probation officer* is appropriate . . . ."<sup>33</sup> The policy of the State of California to guarantee sibling visitation quickly changed to a policy supporting sibling visitation unless it costs money; such is the ephemeral nature of statutory rights. Several county social service agencies that opposed the bill stated that they were already providing the prospectively required sibling visitation.<sup>34</sup> Yet, no data was presented to support such claims, and evidence from the Grand Jury of San Diego rebutted the counties' claims and stated that it supported the legislation because of "state-wide past failures" to assure and assist sibling visitation.<sup>35</sup> It is abundantly clear that statutory sibling visitation will be very limited and will be constantly subject to the economic ax.<sup>36</sup>

Other statutes will also continue to impede the development of sibling rights. For instance, the Federal Adoption Assistance and Child Welfare Act<sup>37</sup> has had a doubly negative impact on sibling groups. First, because the goal of permanent and stable placement of children is the centerpiece of the federal statutory scheme, states have complied by dramatically shortening the time within which family reunification can take place prior to parental severance.<sup>38</sup> Second, because the federal

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bill would cost less than the current \$6,000,000 budget because siblings could visit during currently required court appearances during periodic reviews. Such visits could use already existing child care/custody facilities and personnel at the dependency court. In addition, the \$9,000,000 figure was inflated because it did not discount the cost of relative-assisted visitation which would require no state funding. The bill as passed, however, eliminates all monetary requirements and places the full burden of sibling visitation on caretakers.

33. CAL. ASS. BILL 3332 (emphasis added). For a similar sibling statutory scheme, see *In re H.R.*, 594 N.Y.S.2d 968, 969 (Fam. Ct. 1993) (discussing N.Y. FAM. CT. ACT § 1027-a; N.Y. Dep't Soc. Servs. Reg., 18 NYCRR § 431.10(a)).

34. See, e.g., Letter from Kathy M. Gallagher, Director of Governmental Relations and Planning, County of Santa Clara to John Vasconcellos, Chair, Assembly Committee on Ways and Means (May 18, 1992) (on file in the Whittier Law Library).

35. Letter from Richard B. Macfie, Foreman, Grand Jury County of San Diego to San Diego County Commission on Children and Youth Legislative Committee (May 11, 1992) (on file in the Whittier Law Library).

36. "When economic constraints require tradeoffs in a state's budget, children's services are usually the first to go . . . ." Note, Lashawn A. v. Dixon: *Responding to the Pleas of Children*, 49 WASH. & LEE L. REV. 529, 531 (1992). It is not sufficient to merely provide that adult siblings will eventually have an opportunity to locate one another since the importance of the sibling bond in maturation and social development will already have been lost. See, e.g., MD. CODE ANN. FAM. LAW § 5-4A-02; TENN. CODE ANN. § 36-1-139. There are also real "limits to the amount of reform" that can be realized through federal legislation. Francis Barry McCarthy, *The Perils of Growing Up for Both Children and the Reform Efforts of Child Protection Laws: An Introduction to the Symposium on Child Protection*, 54 UNIV. PITTSBURGH L. REV. 129, 135 (1992).

37. 42 U.S.C.A. § 670.

38. For an exhaustive list of state statutory changes, see William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 477 n.16 (1990); see also Alice C.

statute assumes that adoption is the preferred model of stable custody for children separated from their natural parents, many siblings have been needlessly separated because they could not be quickly adopted as a sibling group.<sup>39</sup> Using adoption as the presumptively best placement, however, is potentially harmful to displaced children in a number of ways.

First, adoption is an unrealistic expectation which is almost certain to fail. For instance, in Los Angeles County in 1989 there were 30,000 children in out-of-home placements under the jurisdiction of the Juvenile Court; however, fewer than 4% were placed in adoptive homes.<sup>40</sup> In addition, since states can lose federal funding if they do not implement the federal mandate to end indeterminate placements of dependent children in foster homes or guardianships, social workers may find adoptive homes based upon economic necessity rather than the best interests of children or sibling groups. By denigrating conditions of long-term foster care or guardianship, children who are unadoptable or difficult to place will continue to have their self-esteem lowered rather than ratified, and prospective guardians and long-term foster parents will be treated as second-class providers, way stations or warehouses rather than the best homes for those children under the circumstances. Finally, if two or more siblings cannot be placed in the same adoptive home, the presumption of adoption as the best placement will result in brothers and sisters being split apart into separate placements rather than remaining together in alternative care.

The easy argument, though *an unacceptable response*, is that each child's best interest must be determined without regard to the best interests of the sibling group.<sup>41</sup> If, for instance, one sibling can be adopted

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Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 227 (1990).

39. During the hearings on the Adoption Assistance Act, Senator Morris Udall stated that its central goal was that children would "be adopted and lead more stable and happier lives." 1980 126 CONG. REC., H18649 (1980), reprinted in 1980 U.S.C.C.A.N. 14501; see also Cynthia D. v. Super. Ct., 851 P.2d 1307 (1993).

40. Note, *Where Have All The Children Gone?*, 21 S.W. L. REV. 125, 146 n.161 (1992) ("[T]he number of yearly adoptions in the U.S. has steadily decreased from a high of 89,200 in 1970 to approximately 50,000 annually over the past few years.") David Herring has recently argued that a "reasonable efforts" requirement for family reunification often frustrates permanent placement for children. See David Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 140-41 (1992).

41. See, e.g., *Meyer v. Meyer*, 663 P.2d 328, 330 (Mont. 1983) (stating that the Montana statute, § 40-4-212, required a determination of the separate interests of each child, "not the best interest of the children as a collective"); see also *In re Hiatt*, 621 N.E.2d 1222, 1228 (Ohio Ct. App. 1993) (holding that "the law requires the trial court make an 'independent' determination of the relevant criteria . . . for each child in a multichild permanent custody proceeding"). In *Arkansas Dep't of Human Servs. v. Couch*, 832 S.W.2d 265, 266-68 (Ark. Ct. App. 1992), the appellate court held that the trial court did not abuse its discretion by separating siblings into

into a family which refuses to continue visitation among other siblings, the court using existing law will likely permit the adoption rather than select another adoptive family willing to permit visitation or an alternative group placement where the brothers and sisters could continue their relationship. If the court determines that continuity of the sibling relationship is in the best interests of the children, the state should not be permitted to split the group solely because a prospective adoptive family expressed a desire to adopt only one or some of the group. The state should first be forced to demonstrate that, through reasonable efforts, the group cannot be adopted together *and* that splitting the group is more in the best interests of the children than providing stable long-term alternative care such as a subsidized guardianship or long-term placement with a relative.

### III. DOES ANYONE OUT THERE KNOW HOW MANY SIBLINGS HAVE BEEN JUDICIALLY ORDERED INTO SEPARATE PLACEMENTS?

Since the federal government does not maintain or collect statistics regarding sibling placements outside the home, the authors determined to cumulate data from the fifty states regarding the demographics of sibling custody.<sup>42</sup> We requested sibling data from each of the various state social services agencies, and in addition attempted to garner any data from dozens of private national and local children's organizations.<sup>43</sup> Although most agencies and organizations responded, almost none had any statistical data regarding siblings.<sup>44</sup> Fortunately, however, a few of

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different placements even though the Department located two prospective adoptive families willing to adopt the sibling group. The court did not permit the Department to complete its investigation because it was afraid that the Department was using the healthy sibling "as an inducement to get someone to adopt Misty [a handicapped sister] and that Misty would be better off with someone who was willing to accept her alone in light of her special needs." *Id.* This case is particularly troubling because of the court's rank speculation about the Department's motives and because the siblings were not given independent counsel to argue the case; the same guardian ad litem represented both girls even though there was an obvious conflict of interest. *But see In re M.*, 416 N.E. 2d 669, 672-74 (Ohio Misc. Ct. 1979) (rejecting a separation of siblings into different adoptive homes).

42. *See supra* note 2.

43. A representative sample of the agencies we contacted includes such organizations as: Casey Family Services in Hartford, Connecticut; Children Now in San Francisco; National Resource Center On Child Sexual Abuse; National Center For Missing & Exploited Children, Arlington, Virginia; Utah Chapter of the National Committee for Prevention of Child Abuse; National Association of Counsel for Children, Denver, Colorado; National Council of Juvenile and Family Court Judges, University of Nevada; National Center for Youth Law, San Francisco; American Prosecutors Research Institute (National Center for Prosecution of Child Abuse), Alexandria, Virginia; Federation on Child Abuse & Neglect, Albany, N.Y.; and the National Foster Care Resource Center, Eastern Michigan University.

44. For example, Richard L. Winters of the State of Washington Department of Social and Health Services, responded, "As you are probably aware by now, most states, including Washington, do not separately compile data on sibling placements and track that information to

the jurisdictions, which had the greatest foster care populations, provided us with sufficient sibling information from which a reasonably extrapolated, national sibling placement picture could be drawn. In addition, because California, which has the greatest foster care population in the country, does not keep sibling placement records,<sup>45</sup> we have received permission to access the computer records in the California Foster Care Information System and have compiled data regarding sibling placement in that state.<sup>46</sup> In order to compare jurisdictions we have included the state data for the year 1990, the last complete data compiled by the United States Department of Health and Human Services. We have also included information supplied by agencies and independent organizations, when available, for 1991 and 1992. The following charts summarize the sibling data we have been able to compile; the data and sources for these statistics are presented in the Appendix.

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determine outcomes." Letter to Professor Patton (Sept. 8, 1992) (on file with the author). Carolyn Godinez, Management Analyst, Kansas Department of Social And Rehabilitative Services Youth And Adult Services, stated, "I regret to inform you that Kansas . . . does not currently gather data specifically relating to sibling issues." Letter to Professor Patton (Sept. 9, 1992) (on file with the author). Similar responses were received from many other state agencies.

45. The House Select Committee On Children, Youth, and Families, H.R. REP. NO. 395, 101st Cong., 2d Sess. 5 (1990), estimated that one-fifth of the 500,000 out-of-home placed children live in California. In California more children enter the system than exit. For example, in 1989 2,584 more children entered than left court supervision. INTER-AGENCY COUNCIL ON CHILD ABUSE AND NEGLECT, DATA ANALYSIS REPORT FOR 1990, at 3 (1990) [hereinafter ICAN]. The average number of dependent children supervised by the Los Angeles Superior Court was 7,296 in 1975, 11,325 in 1979, 18,385 in 1983, and 21,722 in 1985. LOS ANGELES ROUNDTABLE FOR CHILDREN, THE CHILDREN'S BUDGET OF LOS ANGELES COUNTY GOVERNMENT 1 (May, 1986). In 1989 there were 30,000 children under dependency jurisdiction in Los Angeles. COUNTY OF L.A. DEP'T OF CHILDREN'S SERVS., 1987-89 BIENNIAL REPORT; *Where Have All The Children Gone*, *supra* note 40, at 146 n.161.

46. We wish to thank Connie Hudson, California Department of Social Services, Chief of Foster Care Information Systems, and Ray Bacon, state computer programmer, for their help in compiling the California sibling data.

CHART I  
1990 CHILDREN'S DEMOGRAPHICS

State	Child Population 1990	Abuse Reports	Abuse Substantiated	Children Removed From Home
AL	1,058,788	25,473	16,009	489
CA	7,250,725	343,222	78,512	78,221 (cumulative)
HI	280,126	3,652	2,078	657
IL	2,946,366	61,191	37,539	5,392
KY	954,454	30,420	13,933	1,674
MA	1,353,075	36,193	17,840	2,649
NY	4,259,549	129,709	26,053	19,856
SC	920,207	18,082	5,688	1,797

CHART II  
1990 STATE SIBLING STATISTICS

State	% of Placements W/Siblings	Siblings Placed Out Of Home	% Of Siblings In Diff. Placements	# Of Separated Siblings	# Of Sibl. Grps. W/Adoptive Goal	Sibling Group Adoptions
AL	N/A	N/A	N/A	N/A	N/A	37
CA	56.4 - 58.9	37,500 (cumul.)	40.0	19,066	N/A	N/A
HI	N/A	821	N/A	N/A	68 with at least one child adpt	N/A
IL	62.4	8,601	40.0	3,509	N/A	N/A
KY	31.0	3,139	N/A	N/A	N/A	N/A
MA	N/A	N/A	N/A	N/A	N/A	130
NY	50.0 - 70.0	9,867 (42,204 cumul.)	39.8 - 53.0	3,859 (23,989 cumul.)	N/A	N/A
SC	N/A	N/A	N/A	N/A	N/A	40

We wondered whether the early sibling studies conducted from the 1960s through the early 1980s were accurate since most involved very small empirical samples. We focused on two of the largest foster placement populations in America, Los Angeles and New York, as well as looked to several smaller state populations.

A. *Percentage of Foster Children with Siblings Also in Out-of-Home Care*<sup>47</sup>

The early sibling studies estimated that "between 56% and 85% of children in care also have siblings in care."<sup>48</sup> Our results demonstrate that the earlier estimates were fairly accurate. For instance, in California between August 9, 1990 and November 8, 1991, siblings comprised between 56.4% and 58.9% of children in out-of-home placements. In Illinois the 1992 placement figures demonstrate that 62.4% of out-of-home placements involved siblings. Kentucky had the lowest percentage of siblings in 1991, 31%. The percentage of New York siblings increased from approximately 50% in 1980-1981 to almost 70% in 1990. Although our data represents reports from only a few jurisdictions, the cumulative total of foster placements in those reported states constitutes a large percentage of the United States foster children population. It is therefore relatively safe to state that the percentage of siblings in out-of-home care in the early 1990s is approximately 50% to 60% of all foster placements, although individual state's sibling statistics may vary from 30% to 70%. Based upon the figure of 500,000 children in substitute care nationally, between 250,000 to 300,000 siblings are currently placed outside their parental homes through the child dependency system.<sup>49</sup>

B. *Percentage of Siblings Separated into Different Placements*

Early studies indicated that "75% of the siblings in foster care were not placed together."<sup>50</sup> Assuming that the earlier data was accurate, our research demonstrates that a smaller percentage of siblings are being separated during the early 1990s. The percentage of separated siblings, however, is still very high, especially in light of the 1980s focus on reunification services for these "hard to place" children.

For instance, in California between August 9, 1990 and November 8, 1991, the percentage of siblings separated into different homes ranged from 40% (19,016 out of 47,337 siblings) to 56% (26,464 out of 47,098). The Illinois statistics were comparable; 41% (3,509 out of 8,601) of siblings were separated. In 1991, New York separated 40% (3,859 out of 9,687) of siblings. The total sibling placement population

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47. Unless otherwise indicated, the state statistics quoted here are the same data presented under the individual discussions of each state's children's placements, *supra* part III.

48. Margaret Ward, *Sibling Ties in Foster Care and Adoption Planning*, 63 CHILD WELFARE 321, 323 (1984).

49. This estimate, of course, does not include children voluntarily placed outside their home, homeless children living on the streets, runaway children, or undocumented children.

50. LE PERE ET AL., *LARGE SIBLING GROUPS: ADOPTION EXPERIENCES* 29 (Child Welfare League of America, 1986).

in New York on December 31, 1991 included 23,989 separated siblings, or 57% (23,989 out of 42,204).

Therefore, if we accept 41% as the state median of out-of-home sibling placements in which siblings are separated into different custody arrangements, there are approximately 28,000 to 34,000 siblings separated each year nationally.<sup>51</sup>

C. *Relationship Between Initial Sibling Placement, Reunification, and Adoptive Placement*

Research over the past several decades has consistently demonstrated that the longer siblings remain separated in out-of-home placements, the less likely they will ever be reunited with their birth family or with the same adoptive family.<sup>52</sup> "If children are initially separated in foster care, it increases the chances of their not being placed together in adoption."<sup>53</sup> Current research continues to support the importance of the initial sibling placement in determining whether siblings will ever be reunited. A recent study of adoption placements at Casey Family Services in New England demonstrated that: 1) "[m]ost of the siblings [initially] placed together remain together throughout their placement history."; 2) "no [sibling] pair initially separate was ever brought together later"; and 3) if a sibling pair initially placed together was disrupted, "only 38% of the decisions made were to keep siblings together in a new placement."<sup>54</sup>

Unfortunately, there is even less national data on sibling adoptions than on sibling foster placements. Our research provided the following additional information:

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51. The number of separated siblings was derived from the following data: 1) There were 2,712,917 children reported abused in 1990. U.S. DEP'T HEALTH & HUMAN SERVS., NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM: WORKING PAPER 1, 1990 SUMMARY DATA COMPONENT 8 (April, 1992) (DHHS Pub. No. (ACF) 92-30361). Of those reports approximately 484,167 were substantiated. *Id.* at 11. In the 33 states reporting, 73,860 of those children were removed from their homes. *Id.* at 17. If we add the number of children removed in New York, 19,856, and the number of California children removed from home, 14,772, there were 113,493 children removed from those 35 states. *See supra* chart I. If we conservatively add 2,000 removed children from each of the 15 nonreporting jurisdiction (the median for the 35 reporting jurisdictions was 3,242), then there were 143,493 children nationally removed from their home due to child abuse or neglect. Since our research has demonstrated that between 50% to 60% of children in foster care are siblings, approximately 71,747 to 86,906 siblings were placed in out-of-home care during 1990. *See supra* chart II. If, as our research demonstrated approximately 40% of out-of-home placed siblings are separated, then in 1990 nationally approximately 28,699 to 34,762 were split apart into different facilities.

52. Ward, *supra* note 48, at 324.

53. LE PERE ET AL., *supra* note 50, at 29.

54. Ilene Staff et al., Siblings in Foster Care, Excerpts from remarks made at the presentation of the Child Welfare League of America's North Atlantic Regional Conference 2-3, June 3, 1991 (Prepared for Professor Patton on July 7, 1992) (on file in the Whittier Law Library).

A. Alabama, which substantiated 16,009 cases of child abuse in 1990, only placed 37 sibling groups for adoption in 1992. Since we were unable to obtain facts on the number of siblings in Alabama in out-of-home care or information on the percentage of abused siblings legally freed for adoption, it is impossible to intelligently interpret the data. Nevertheless, if the national median of siblings in foster care is approximately 50%-60%, then in Alabama in 1990 between 8004 and 9605 siblings were placed in substitute care. One would expect many more than 37 sibling groups legally freed and available for adoption out of that many out-of-home siblings. Therefore, the percentage of sibling group adoption appears quite meager.

B. California, which had 67,687 children in foster care on April 1989, placed very few children for adoption that year: 3,113 children were placed in adoptive homes; 2,651 adoptions were completed; and 3,141 children were legally freed awaiting adoptive placement.<sup>55</sup> Since California does not maintain separate information on sibling groups separated for adoption, it is difficult to draw conclusions. Only a small proportion of California children legally free for adoption are recommended for adoption after an adoptability assessment. For example, only 39% (4,854 out of 12,322) of referrals in 1989 were for adoption.<sup>56</sup> The California statistics provide additional support for the unrealistic goal of using adoption as the presumptive alternative to living with one's natural family. Failures will outnumber successes. More children will be rejected from than accepted into adoptive families after the extensive administrative and judicial interviews, hearings and reviews.

C. In Hawaii in 1991:

There were 320 sibling groups identified in substitute care, involving 821 children in placement. Sixty-one sibling groups had at least one child with an adoption goal. Seven sibling groups had at least one child with an adoption goal and at least one other child with a goal other than adoption (i.e., reunification and permanent substitute care).<sup>57</sup>

These statistics indicate that only a small percentage of sibling groups in Hawaii have the same adoptive home as the primary permanency plan.

D. Massachusetts has had the most ambitious and successful sibling adoption and long-term placement plan that we have discovered. In 1991, 49% of the children adopted were members of siblings groups and

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55. CAL. DEP'T SOCIAL SERVS. ADOPTIONS IN CALIFORNIA: RELINQUISHMENT, INDEPENDENT, INTERCOUNTRY, ANNUAL STATISTICAL REPORT JULY 1988 - JUNE 1989, table I (ADOP 2-1989-1).

56. *Id.* at Table 6.

57. Letter from Ricky Higashide, State Of Hawaii Department Of Human Service Planning Office, to Professor Patton (September 15, 1992) (on file with the author).



those adoptions increased by 8% over 1990.<sup>58</sup> The Massachusetts success may be a direct result of using a substantial portion, 29%, of their adoption subsidy budget to place sibling groups together in adoptive homes.<sup>59</sup> Generous adoption subsidies have long been determined to be a dramatic stimulus to increasing the number of sibling group adoptions.<sup>60</sup>

Massachusetts more than any other state has attempted to keep non-adopted sibling groups together. In Fiscal Year 1991, "103 children in 41 sibling groups received guardianships."<sup>61</sup> Since Massachusetts recognizes that "[p]roviding care and medical attention can be a huge burden for . . . guardians of special needs children," they provided guardianship subsidies to 67% of the guardianships granted in 1991.<sup>62</sup>

E. South Carolina, which has approximately 1,800 children a year placed in out-of-home substitute care, has had very few sibling group placements. In 1991 40 sibling groups were adopted, and in 1992, 42 sibling groups were adopted.<sup>63</sup>

The first out-of-home placement is the most critical for siblings. If separated, they rarely are reunited. The dependency courts and trial counsel focus during the early stages of dependency proceedings on good, safe care for siblings and rarely consider the long-term impact on severing sibling bonds. Therefore, a custody decision temporarily splitting siblings which is seen as merely a footprint in the sand is likely to become cast in concrete.

#### IV. SIBLING BONDS

Uncodified by law, uncelebrated by religious ritual, and unacknowledged by rights of passage, siblings bonds have been largely ignored by both legal and mental health literature.<sup>64</sup> Perhaps the significance of sibling relationships is so evident as a matter of common sense

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58. Richard Mo, Assistant Commissioner, Office For Policy and Program, *Profiles of Children Adopted and Children Who Received Guardianships During FY'91*, 3 (The Commonwealth of Massachusetts, Executive Office of Health And Human Services Department of Social Services).

59. *Id.* at 7.

60. Ward, *supra* note 48, at 324; LE PERE ET AL., *supra* note 50, at 37, 42, 47.

61. Mo, *supra* note 58, at 6.

62. *Id.* at 7.

63. Letter from Eddie Bogan, Assistant Director Division of Adoption and Birth Parent Services, Office of Human Services and Self Sufficiency, South Carolina Department of Social Services, to Professor Patton (September 25, 1992) (on file with the author).

64. STEPHEN P. BANK & MICHAEL D. KAHN, *THE SIBLING BOND: THE FIRST MAJOR ACCOUNT OF THE POWERFUL EMOTIONAL CONNECTIONS AMONG BROTHERS AND SISTERS THROUGHOUT LIFE* (1975). Sibling Placement has received little attention in child welfare literature. See Staff & Fein, *Together or Separate: A Study of Siblings in Foster Care*, 71 *CHILD WELFARE* 257-70, 258 (1993).

that it needs no documentation. After all, in Europe and the United States, 80% of children have siblings.<sup>65</sup> Brothers and sisters spend more time together and have longer relationships with one another than children have with their parents.<sup>66</sup> A sibling may be more likely than any other friend or relative to be present at one's death bed.

Historically, sibling relationships have received relatively little academic attention. Child development literature, for example, deals almost exclusively with parental influence, perhaps reflecting the importance of mother-infant bonding in classical psychoanalytic theory.<sup>67</sup> Family therapy's<sup>68</sup> emphasis on reciprocal social influences focused on group rather than interpersonal dynamics and as a result did little to further the understanding of sibling bonds.<sup>69</sup> Empirical studies of attachment, psychoanalytic theory, and social science research all describe some sibling features. For example, early social science studies hoped to characterize siblings through statistical analysis of family structure by discerning relationships between birth order and personality characteristics.<sup>70</sup> The complexity of interrelating factors, both within families and without, that contribute to individual development limited the utility of this research. Only recently have there been studies that focus directly on sibling bonds, and these studies offer incontrovertible evidence of such bonds' developmental importance and the significant influence they exert throughout adult life.<sup>71</sup>

Attachment research offers a rich empirical basis for evaluating the nature and importance of bonding. *Attachment* describes an enduring emotional bond manifest by efforts to be in close proximity, especially at times of stress. The evolutionary view of attachment understands it as

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65. J. Dunn, *Sibling Relationships in Early Childhood*, 54 *CHILD DEV.* 787-811 (1983).

66. T.H. POWELL & P.A. OGLE, *BROTHERS AND SISTERS: A SPECIAL PART OF EXCEPTIONAL FAMILIES* (1985).

67. Ainsworth, M.D.S., *The Development of Infant-Mother Attachment*, 3 *REV. CHILD DEV. RESEARCH* 1-94 (B.M. Caldwell & H. Ricciuti eds. 1973); J. BOWLBY, *ATTACHMENT AND LOSS. VOL. 1: ATTACHMENT* (1969); J. GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); S. FREUD, *AN OUTLINE OF PSYCHOANALYSIS* (1940).

68. IRENE GOLDENBERG & HERBERT GOLDENBERG, *FAMILY THERAPY: AN OVERVIEW* (1985).

69. BANK & KAHN, *supra* note 64.

70. These are often referred to as "constellation studies," so named because they purport to measure structural influences. A. Lawson & J.D. Ingelby, *Daily Routines of Preschool Children: Effects of Age, Birth Order, Sex and Social Class and Developmental Correlates*, 4 *PSYCHOLOGICAL MEDICINE* 399-415 (1974); J. DUNN & C. KENDRICK, *SIBLINGS: LOVE, ENVY, AND UNDERSTANDING* (1982); R.B. Zajonc & G.B. Markus, *Birth Order and Intellectual Development*, 82 *PSYCHOL. REV.* 74-88 (1975).

71. GALLAGHER & POWELL, *BROTHERS AND SISTERS: A SPECIAL PART OF EXCEPTIONAL FAMILIES* (1985); Furman & Buhrmeister, *Children's Perceptions of the Quality of Sibling Relationships*, 56 *CHILD DEV.* 448-61 (1985); D. Lobato et al., *Examining the Effects of Chronic Disease and Disability on Children's Sibling Relationships*, 13 *J. PEDIATRIC PSYCHOL.* 389-407 (1988).

a biologically-based behavior that furthers species survival by protecting and nurturing the young.<sup>72</sup> Historically, Freudian theory viewed mother-infant bonding as a mere correlate of basic needs provision, a notion that was reformulated by learning theorists in behavior reinforcement terms.<sup>73</sup> Subsequent research has proved, however, that the human need for emotional connection is independent of other biological imperatives.<sup>74</sup> Developmental psychology posits early attachment as the foundation of self-concept, basic trust in relationships, and adaptivity throughout adult life.<sup>75</sup>

Contemporary psychoanalytic theory expands on this empirical research and conceptualizes an early life process through which images of the self and others are internalized, creating a psychological template for the formation of all subsequent relationships.<sup>76</sup> Accordingly, the search for secure emotional relationships becomes a central goal of early development, and the extent to which a child achieves this goal theoretically determines such individual characteristics as self-esteem and capacity for intimacy. Psychoanalytic descriptions of this process have emphasized childhood longings for idealized, strong parental figures capable of "mirroring" responsiveness.<sup>77</sup> Current psychoanalytic thought is formulating new paradigms of attachment. This work emphasizes the importance of caregivers' affective responsiveness to their children and describes new co-created patterns of organizing experience.<sup>78</sup>

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72. R.A. Thompson, *Attachment Theory and Research*, in CHILD AND ADOLESCENT PSYCHIATRY: A COMPREHENSIVE TEXTBOOK 100-08 (Martin Lewis ed. 1991).

73. FREUD, *supra* note 67.

74. H.F. Harlow, *The Nature of Love*, 13 AMERICAN PSYCHOLOGIST 673-85 (1958) (rhesus infants chose terry cloth wire surrogate over bare wire surrogate with food); R.A. Spitz, *Hospitalism: An Inquiry Into the Genesis of Psychiatric Conditions in Early Childhood*, 1 PSYCHOANAL STUDY CHILD 53-74 (1945) (failure to thrive in orphans not held except for feeding and deprived of consistent caregiver).

75. I. Bretherton, *Open Communication and Internal Working Models: Their Role in Development of Attachment Relationships*, in 36 SOCIOEMOTIONAL DEVELOPMENT (R.A. Thompson ed. 1990); M. Main et al., *Security in Infancy, Childhood and Adulthood: A Move to the Level of Representation*, in GROWING POINTS IN ATTACHMENT THEORY AND RESEARCH 66-104 (I. Bretherton & E. Waters eds. 1985) (Monographs of the Society for Research in Child Development); L.A. Sroufe & J. Fleeson, *Attachment and the Construction of Relationships*, in RELATIONSHIPS AND DEVELOPMENT (W.W. Hartup & Z. Rubin eds. 1986).

76. BOWLBY, *supra* note 67; J. BOWLBY, ATTACHMENT AND LOSS. VOL. 2: SEPARATION (1973); B. Beebe & F.M. Lachmann, *Reformulations of Early Development and Transference: Implications for Psychic Structure Formation*, in INTERFACE OF PSYCHOANALYSIS AND PSYCHOLOGY (J.W. Barron et al. eds. 1992); H. KOHUT, THE RESTORATION OF THE SELF (1977); D. STERN, THE INTERPERSONAL WORLD OF THE INFANT (1985).

77. The self psychology movement, led by Heinz Kohut, has had a major influence on modern concepts of bonding. See J.L. Trop, *Recent Developments in Self-Psychology*, 7 CURRENT OPINIONS IN PSYCHIATRY 225-28 (1994).

78. Intersubjective theory represents an important new model for understanding the process through which meanings are ascribed to experience in relationships. See Beebe & Lachmann,

Thus, for contemporary psychoanalytic theory, the sibling bond develops in a cooperative, interactive process under the influence of parental values and preferences.

Early empirical studies of attachment asserted that parent-child bond quality during the first year determined future mental health.<sup>79</sup> Subsequent work has questioned the determinative power of early childhood experiences with one primary caretaker;<sup>80</sup> attachment research today reflects a new understanding of the complicated and interrelated determinants of adaptive and maladaptive behavior. Many important factors have been identified, including quality of care during infancy, father involvement, satisfaction in the marital relationship, socioeconomic status, infant temperament, and environmental stress.<sup>81</sup>

As a consequence, the developmental importance of alternative relationships has grown. Many studies find consistency in caregiving conditions over time to be a more important determinant of psychological functioning than the parent-child bond alone.<sup>82</sup> Psychological adaptation appears to be shaped by a totality of circumstances, not only by maternal care during the first year, as had been originally assumed. While this view limits the deterministic claims of early attachment research, it suggests the potential for therapeutic intervention in dysfunctional families and the larger social settings of which they are a part.<sup>83</sup>

Attachment research enhances our appreciation for the importance of sibling bonds. While evaluating the quality and number of important attachments cannot predict a child's future psychopathology, it can help to identify aspects of the modern family most likely to provide caregiving consistency. If children of all ages can make attachments to multiple caregivers, many more resources may be available to foster child development than courts now acknowledge.<sup>84</sup> Among these, sibling relation-

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*supra* note 77; J.L. Trop & R.P. Stolorow, *A Developmental Perspective on Analytic Empathy: A Case Study*, 19 J. AM. ACAD. PSYCHOANALYSIS 31-46 (1991).

79. M.E. LAMB ET AL., *INFANT-MOTHER ATTACHMENT* (1985); M.E. Lamb et al., *Security of Infantile Attachment as Assessed in the "Strange Situation": Its Study and Biological Interpretation*, 7 BEHAV. BRAIN SCI. 127-47 (1984).

80. M.F. Erickson et al., *The Relationship Between Quality of Attachment and Behavior Problems in Preschool in a High-Risk Sample*, in *GROWING POINTS IN ATTACHMENT THEORY AND RESEARCH* 147-66 (I. Bretherton & E. Waters eds. 1985) (Monographs of the Society for Research in Child Development); R.A. Hinde, *Attachment: Some Conceptual and Biological Issues*, in *THE PLACE OF ATTACHMENT IN HUMAN BEHAVIOR* 60-76 (J. Stevenson-Hinde & C. Murray Parkes eds. 1982).

81. LAMB ET AL., *supra* note 79.

82. LAMB ET AL., *supra* note 79; Lamb et al., *supra* note 79; R.A. Thompson & M.E. Lamb, *Infant-Parent Attachment: New Directions for Theory and Research*, in 7 *LIFE-SPAN DEVELOPMENT AND BEHAVIOR* 1-41 (P.B. Baltes et al. eds. 1986).

83. Thompson, *supra* note 72, at 104.

84. Sibling relationships have been shown to compensate for inadequate parenting. M. Eno,

ships are perhaps the most important and the least recognized.<sup>85</sup>

What can we understand about siblings from reviewing scientific research? The natural scientist views the sibling bond as a unique genetic relationship, one that represents the closest of all biological bonds.<sup>86</sup> Genetic principles underlying biological similarity have provided a scientific basis for comparing environmental and inborn influences on development through multigenerational family research, as in longitudinal twin studies.<sup>87</sup>

Although early social science research assumes a hierarchical family structure increasingly rare today, this work has general descriptive value and can suggest some factors relevant to understanding sibling relationships.<sup>88</sup> Gender studies offer especially interesting observations. These studies note significant differences in the way sisters and brothers structure relationships.<sup>89</sup> Girls are more influenced by siblings, more nurturing with younger siblings, and more likely to view themselves as caretakers than boys.<sup>90</sup> In contrast to these findings, there are no gender differences associated with imitation, pro-social behavior, and aggression, over time.<sup>91</sup> Other aspects of interactive style (e.g., "solidarity") appear to be associated with a particular developmental stage rather than

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*Sibling Relationships in Failures of Divorce*, in *DIVORCE THERAPY* 139-56 (1985); LAMB ET AL., *supra* note 79; R.A. Thompson, *Fathers and the Child's "Best Interests": Judicial Decision-Making in Custody Disputes*, in *THE FATHER'S ROLE: APPLIED PERSPECTIVES* 61-102 (M.E. Lamb ed. 1986); E. Waters & D.M. Noyes, *Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks in Doing the Right Things for the Wrong Reasons*, 12 *REV. LAW SOC. CHANGE* 505-15 (1984).

85. Judicial efforts to identify the "psychological parent" in child custody determinations show the influence of attachment theory in elaborating the best interest of the child. A. Goetting, *The Developmental Tasks of Siblingship Over the Life Cycle*, 48 *J. AM. FAM.* 703-14 (1986); W. Nichols, *Sibling Subsystem Therapy in Family System Reorganization*, 9 *J. OF DIVORCE* 13-31 (Spring 1986); B. Waters, *Sibling Relationships in Separated Families*, 8 *J. FAM. THERAPY* 13-17; Waters & Noyes, *supra* note 84.

86. Siblings can be biologically identical, of course, as in the case of twins.

87. Twin research has helped to identify environmental and genetic contributions to infantile autism, alcoholism, schizophrenia, and many other psychiatric disorders. See BANK & KAHN, *supra* note 64, at 5, 22-23, 253.

88. DUNN & KENDRICK, *supra* note 70; B.S. Jacobs & H.A. Moss, *Birth Order and Sex of Sibling as Determinants of Mother-Child Interaction*, 47 *CHILD DEV.* 315-22 (1976); H.L. Koch, *Some Personality Correlates of Sex, Sibling Position, and Sex of Siblings Among 5- and 6-Year-Old Children*, 52 *GENETIC PSYCHOL. MONOGRAPHS* 3-50 (1955); A.M. Minnett et al., *The Effects of Sibling Status on Sibling Interaction: Influence of Birth Order, Age Spacing, Sex of Child, and Sex of Sibling*, 54 *CHILD DEV.* 1064-72 (1983); B.G. Rosenberg, *Life Span Personality Stability in Sibling Status*, in *SIBLING RELATIONSHIPS: THEIR NATURE AND SIGNIFICANCE ACROSS THE LIFESPAN* 167-224 (M.E. Lamb & B. Sutton-Smith eds. 1982); Zajonc & Markus, *supra* note 70, at 74-88.

89. R. Abramovitch et al., *Sibling Interaction in the Home*, 50 *CHILD DEV.* 997-1003 (1979).

90. *Id.*; J.H.S. BOSSARD & E.H. BOLL, *THE SOCIOLOGY OF CHILD DEVELOPMENT* (3rd ed. 1960); B. SUTTON-SMITH & B.G. ROSENBERG, *THE SIBLING* (1970).

91. DUNN & KENDRICK, *supra* note 70.

gender.<sup>92</sup> First borns are thought to be more intelligent, verbal, and dominant than younger siblings, who have better social skills. Close age-spacing has been linked to more intimacy and conflict between siblings, especially if they are of the same sex.<sup>93</sup> Conflicting results have, however, limited the general usefulness of research on gender effects.<sup>94</sup>

Recent research acknowledges the importance of sibling bonds to individual and family functioning.<sup>95</sup> These studies have characterized developmental aspects of the sibling relationship as well as the impact of environmental influences on the individual, sibling pair, and family.<sup>96</sup> Using new methodological approaches that draw on individual report and direct observation, rather than statistical analysis alone, these studies acknowledge variations in subjective experience and cultural influence.<sup>97</sup>

Modern concepts of family functioning that feature developmental process and reciprocal influences provide a new dynamic context in which to study siblings.<sup>98</sup> As a result, sibling relationships, the family of which they are a part, and even the larger cultural context can be appreciated as factors that influence and are influenced by each other.<sup>99</sup> New models of family functioning provide a setting in which questions about the quality of family relationships can be posed. Why are some sibling bonds healthy and others detrimental? What features of sibling bonds might serve protective functions at times of family stress? What harms, if any, result from the loss of sibling contact? Without under-

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92. BANK & KAHN, *supra* note 64, at 339.

93. See BANK & KAHN, *supra* note 64, at 9 (concept of "high access" siblings); B.K. Bryant, *Sibling Relationships in Middle Childhood*, in SIBLING RELATIONSHIPS 87-122 (M.E. Lamb & B. Sutton-Smith eds. 1982); H.L. Koch, *The Relation of "Primary Mental Abilities" in 5- and 6-Year-Olds to Sex of Child and Characteristics of His Sibling*, 25 CHILD DEV. 209-310 (1954); H.L. Koch, *Children's Work Attitudes and Sibling Characteristics*, 27 CHILD DEV. 289-310 (1956).

94. Compare SUTTON-SMITH & ROSENBERG, *supra* note 91 and Abramovitch et al., *supra* note 90 with DUNN & KENDRICK, *supra* note 70.

95. S.B. CAMPBELL, BEHAVIOR PROBLEMS IN PRESCHOOL: CLINICAL AND DEVELOPMENTAL ISSUES 121-140 (1990); DUNN, *supra* note 65, at 787-811; P.A. Gallagher & T.H. Powell, *Brothers and Sisters: Meeting Special Needs*, in TOPICS IN EARLY CHILDHOOD. FAMILIES IN SPECIAL EDUCATION 24-37 (1989); K. Lewis, *Sibling Therapy with Multiproblem Families*, 12 J. MARITAL AND FAM. THERAPY 291-300 (1986); J. Wishart, *Siblings as Models in Early Infant Learning*, 57 CHILD DEV. 1232-40, 1247 (1986).

96. BANK & KAHN, *supra* note 64; W. Furman & D. Buhrmeister, *Children's Perceptions of the Qualities of Sibling Relationships*, 56 CHILD DEV. 448-61 (1985); Gallagher & Powell, *supra* note 96, at 24-37; D. Lobato et al., *Examining the Effects of Chronic Disease and Disability on Children's Sibling Relationships*, 13 J. PEDIATRIC PSYCHOL. 389-407 (1988).

97. Furman & Buhrmeister, *supra* note 96, at 448-61. Gallagher & Powell, *supra* note 96, at 24-37.

98. K. Nihira et al., *Home Environment, Family Adjustment, and the Development of Mentally Retarded Children*, 1 APPLIED RESEARCH IN MENTAL RETARDATION 5-24 (1980).

99. Furman & Buhrmeister, *supra* note 96; Lobato et al., *supra* note 71.

standing the bonding process, the impact of environment and the influence of sibling relationships on individual and family, research can contribute little to meaningful therapeutic intervention or enlightened social policy.

In their 1982 publication, *The Sibling Bond*, Bank and Kahn introduced a new qualitative approach to understanding sibling bonds.<sup>100</sup> Their clinical research characterizes emotional bonds between brothers and sisters, identifying detriments and benefits. They conclude that sibling bonds are influenced by the degree of "access" between siblings (defined as how near in age and how involved with one another's lives they are), the level of anxiety in the early mother-child attachment, and the availability of auxiliary parenting resources.<sup>101</sup>

For Bank and Kahn, both extrinsic and developmental factors are influential where sibling bonds are concerned. Extrinsic factors such as divorce and remarriage influence the sibling relationship in complex ways; the number of parenting figures may increase while many children receive significantly less parenting. Through this process, nonparental relationships, including sibling relationships, become more important.<sup>102</sup> In early childhood, where the need for parental involvement is great, the effects of deficient parenting can produce sibling bonds of unusual intensity in later life. The diversion of parental energies during other stages of development, such as adolescence, where peer relationships have assumed primary importance, may have less impact on sibling relationships. Whatever the developmental stage or degree of parental availability, a sibling who has been influential in a child's early development becomes a part of that child's forming identity.<sup>103</sup>

Psychological research shows the sibling bond follows a predictable developmental course that is related to stages in the family life cycle.<sup>104</sup> During preschool years, siblings are often constant companions whose interactions (along with differential treatment by parents) shape intellectual and personality development.<sup>105</sup> At this age, siblings function as socializing agents for each other. They practice social inter-

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100. BANK & KAHN, *supra* note 64, at 37, 141.

101. *Id.* at 37, 141.

102. Eno, *supra* note 84, at 139-56.

103. BANK & KAHN, *supra* note 64.

104. *Id.* at 64. The family "life cycle" is a construct developed by family therapists that applies developmental principles to the family and its subsystems. GOLDENBERG & GOLDENBERG, *supra* note 68.

105. See Dr. Laurie Eisenberg's valuable and exhaustive review of the psychology literature in her doctoral dissertation, *The Psychological Adjustment of Siblings of Placed and Non-Placed Severely Handicapped Children* (1993) (Ph.D dissertation, University of California, Los Angeles). See also CAMPBELL, *supra* note 95; Dunn, *supra* note 65, at 787-811; POWELL & OGLE, *supra* note 66.

actions by playing different roles and in this manner develop a fundamental approach to learning.<sup>106</sup> Later during school years, siblings take different roles within the family and extend familial social skills to non-family members. Adolescents often turn to siblings for counsel, despite growing ambivalence toward the family.<sup>107</sup>

As a primary socializing relationship, the sibling bond provides an important context for moral development. Piaget identified the capacity to appreciate competing interests, consensus, and interpersonal cooperation as critical components of the child's development of moral reasoning.<sup>108</sup> Kohlberg's notion of moral judgment also posits mutuality in relationships as essential to moral behavior based on internalization of norms.<sup>109</sup> The important role of empathy in the development of prosocial behavior has been described by many, including sibling researchers, who found that siblings as young as 18 months could engage in fantasy play with older siblings involving the feelings of others.<sup>110</sup>

The importance of associational ties to moral life is perhaps set out most clearly by moral philosopher, John Rawls.<sup>111</sup> He characterizes the morality of early life as a morality of authority, in which the child obeys out of fear that he would otherwise be punished by someone he adores.<sup>112</sup> This first stage of morality does not depend on a child's understanding of justification for rules, but on the value of the relationship to the child. Morality of association, a later development, is based on an appreciation of our social nature, a product of our innate capacity for fellow feeling.<sup>113</sup> The inborn wish for ongoing social connection helps to manage destructive impulses, and this process is critically dependent on associational ties. The internalization of norms essential to moral development is, therefore, a function of meaningful ongoing interpersonal association.

For Rawls, attachment is more than fulfillment of a biological or psychological imperative, it is the foundation of moral society. And

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106. POWELL & OGLE, *supra* note 66; Lobato et al., *supra* note 71.

107. See Goetting, *supra* note 85.

108. J. PIAGET, *THE MORAL JUDGEMENT OF THE CHILD* (1932); J. PIAGET & B. INHELDER, *THE PSYCHOLOGY OF THE CHILD* (1969).

109. A. Colby et al., *A Longitudinal Study of Moral Judgement*, in 48 *MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT* (1983); A. COLBY ET AL., *2 THE MEASUREMENT OF MORAL JUDGEMENT* (1987).

110. J. Dunn, *Understanding Feelings: The Early Stages*, in *MAKING SENSE: THE CHILD'S CONSTRUCTION OF THE WORLD* 26 (J. Bruner & H. Haste eds. 1987); A. FREUD, *NORMALITY AND PATHOLOGY IN CHILDHOOD* (1966).

111. J. RAWLS, *A THEORY OF JUSTICE* 395-577 (1971).

112. *Id.* at 462.

113. *Id.* at 467.



this, ultimately, explains the legal stake in preserving sibling relationships.

#### V. DO SIBLINGS HAVE A CONSTITUTIONALLY BASED RIGHT TO ASSOCIATE?

No supreme court has determined whether siblings have a constitutional right to associate with one another.<sup>114</sup> In fact, the United States Supreme Court has seldom determined any issues involving juveniles' substantive or procedural due process protection outside the area of juvenile delinquency and education. It is unnecessary to rehearse here the specific holdings of *In re Gault*,<sup>115</sup> *In re Winship*,<sup>116</sup> and *McKeiver v. Pennsylvania*,<sup>117</sup> other than to note that the Supreme Court does not require juveniles in delinquency proceedings to receive due process protection identical to that afforded to adult criminal defendants.<sup>118</sup> Since children cannot vote or donate to political campaigns, legislatures have historically refused to seriously determine their specific rights or respond adequately to their individual needs.<sup>119</sup>

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114. "The existence of a constitutionally protected associational interest between siblings is an open question." *Bell v. City of Milwaukee*, 536 F. Supp. 462, 468 (E.D. Wis. 1982), *overruled by* 746 F.2d 1205 (7th Cir. 1984). In 1974 there was "no court to date which recognizes a natural right of siblings to associate with one another." W. Homer Reddick, *Sibling Rights in Legal Decisions Affecting Children*, 25 JUV. JUST. 31, 32 (1974). A few appellate courts, however, are beginning to recognize a constitutional right of siblings to associate. See, e.g., *L. v. G.*, 497 A.2d 215, 222 (N.J. Super. Ct. Ch. Div. 1985) ("[T]his Court finds that siblings possess the natural, inherent and inalienable right to visit with each other.").

115. 387 U.S. 1 (1967).

116. 97 U.S. 358 (1970).

117. 403 U.S. 528 (1971).

118. For an extended analysis of the genesis of juvenile delinquent's due process rights, see Francis B. McCarthy, *Preadjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. (1981). The Court has articulated at least three reasons why children's rights are not consonant with adults' rights: 1) children are particularly vulnerable; 2) children are incapable of making "decisions in an informed, mature manner"; and 3) recognizing children as equal would dramatically frustrate parents' rights to rear their children. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). "The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2942 (1990). "There are five key elements in fully informed decision-making. These include: information, understanding, competency, voluntariness, and decision-making ability (i.e., reasoning)." Gerald Koocher, *Different Lenses: Psycho-Legal Perspectives On Children's Rights*, NOVA L. REV. 711 (1992); Eugene Verhellen, *Changes in the Images of the Child*, in MICHAEL FREEMAN & PHILIP VEERMAN, *THE IDEOLOGIES OF CHILDREN'S RIGHTS* 81 (1992). For an analysis of children's inequality under the law, see Steven Hobbs & Mary Mulligan, *Centrist Judging and Traditional Family Values: Or Why Papa Can't Be a Rolling Stone*, 49 WASH. & LEE L. REV. 345, 347-49 (1992). "Although the Supreme Court has said that children are possessed of fundamental rights that the state must respect, it is not clear what rights these are and whether, and in what situations, these rights preempt parental rights." David Elkind, *The Law and Postmodern Perceptions of Children and Youth*, 69 DENV. U. L. REV. 575, 579 (1992).

119. Lynn Stout has recently argued that a fundamental rights approach to infringements on

### A. Theoretical Underpinnings of Parental Rights

It should not surprise anyone that the Supreme Court has left the nature of children's rights undefined as the Court has been unable to agree on the political/philosophical basis of parents' rights. Therefore, before articulating the nature of siblings' rights, it is necessary to determine whether the Court's jurisprudence regarding the parent/child relationship should be applied to siblings. Is a parent's right to rear a child fundamental because it "provides for the best interests of children to be raised by their natural parents (instrumental basis), or because it follows from a coherent political philosophy about the limited power that a government should possess (individual dignity or autonomy basis)?"<sup>120</sup> The Court is peculiarly ill-equipped to define continually evolving social concepts like the "family," in part because these are highly individualistic, yet ironically normative, judgments requiring a delicate balance of individual predilections with empirical evidence which often belies gut-level reactions.<sup>121</sup> In addition, since the Court has not welcomed scientific evidence in deciding issues of the family, it continues "to approve legal rules based upon intuitive assumptions about human behavior that research by psychologists has shown to be erroneous."<sup>122</sup> The Court still operates on the false premise of the traditional nuclear family model; however, only 15% of U.S. households are comprised of a working husband, homemaker wife, and children.<sup>123</sup> Although the Court has so far

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privacy is justified "as a contractarian check against legislative failure only if the intensely interested individuals who suffer under privacy-infringing statutes are for some reason unable to express their preferences intensities effectively in the political process." Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1802, 1805 (1992). "Children's rights, of course, usually mean rights that adults think children should have. Historically, children's rights have been severely limited in practice because they depend upon adults for articulation, assertion, and enforcements." Barbara Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1051 (1992).

120. Herring, *supra* note 40, at 168. "Two apparently contradictory historical developments have occurred simultaneously in family law. One involves a gradually growing emphasis on privacy and individual rights; the other, a gradual increase in the involvement of the legal system in the internal functioning of families." Steven Mintz, *Children, Families and the State: American Family Law in Historical Perspective*, 69 DENV. L. REV. 635, 636 (1992).

121. For a discussion of the normative basis of family law issues, see William Wesley Patton, *Evolution in Child Abuse Litigation: The Theoretical Void Where Evidentiary and Procedural Worlds Collide*, 25 LOY. L.A. L. REV. 1009, 1013-15 (1992); see also Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 943-44 (1991); John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 MICH. L. REV. 1709 (1990). For a discussion of the basic constitutional right to procreate, see Stacey Arthur, *The Norplant Prescription: Birth Control, Woman Control, Or Crime Control?*, 40 UCLA L. REV. 1, 79-80 (1992).

122. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L. REV. 137, 138-39 (1990).

123. Laurie Beckland, *The Word 'Family' Gains New Meaning*, L.A. TIMES, Dec. 13, 1990, at

resisted defining family protection as a fundamental right, state courts and legislatures have actively responded to people's needs to be formally and socially recognized as a family unit.<sup>124</sup>

Although the constitutional bases for holding parents' rights to child rearing fundamental are uncertain and as yet ill-defined by the Court, the "primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition."<sup>125</sup> The variables of biological relationship, legal custody, and significant

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A-3, A-34. "Today, half of all marriages end in divorce, with a corresponding high rate of remarriage. A common by-product of this marital sequence is the 'blended' family—a family consisting of at least one stepparent and one or more children of a previous marriage." Note, *Stepparent Visitation Rights: Toward the Best Interests of the Child*, 30 J. FAM. L. 943, 943 (1991-92).

The United States Census defines family as "two or more persons related by birth, marriage or adoption who reside in the same household." Jerrold Footlick, *What Happened To The Family?*, in *Special Edition: The 21st Century Family*, NEWSWEEK, Winter/Spring 1990, at 18. The American Home Economics Association (AHEA) has adopted a definition of family as "two or more individuals who share goals, resources and a commitment over a period of time." Kris Franklin, *A Family Like Any Other Family: Alternative Methods of Defining Family in Law*, 18 N.Y.U. L. REV. L. & SOC. CHANGE 1027, 1029 (1990-91). "The postmodern family is a pastiche of different kinship structures. Two-parent working families, single parent families, blended families, adoptive families, like-sex parent families, test-tube babies and surrogate mothers . . . [w]hat characterizes these kinship structures is that they often necessitate mutual independence and autonomy." David Elkind, *The Law And Postmodern Perceptions Of Children And Youth*, 69 DENV. U. L. REV. 575, 575 (1992).

124. For instance in California, for a "\$10 filing fee, any family—traditional or not—can receive an ornate color certificate bearing a gold seal that declares the household an association called the 'Family of [Doe].'" Beckland, *supra* note 123, at A-3. Courts using a functional approach "look beyond traditional definitions of family and include relationships that share the fundamental characteristics of the nuclear family . . . such as long-term commitment and economic interdependence." Note, *Family Law—Visitation Rights—New York Court of Appeals Refuses to Adopt a Functional Analysis in Defining Family Relationships*—Alison D. v. Virginia M., 105 HARV. L. REV. 941, 941 (1992). Courts and legislatures have begun to recognize "equitable parenthood" for non-biological caretakers who provide children the equivalent support of traditional parents. See, e.g., *Atkinson v. Atkinson*, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987); *In re Patricia L.*, 11 Cal. Rptr. 2d 631, 633-34 (Ct. App. 1992); *In re Robin N.*, 9 Cal. Rptr. 512, 516 (Ct. App. 1992); *In re Rachael C.*, 1 Cal. Rptr. 2d 473, 476-78 (Ct. App. 1991); CAL. R. CT., Rule 1412(e); HAW. REV. STAT. § 571-46(2) (1990); Susan Goldstein & Christopher Soltys, *Mothers and Significant Others: Parental Standing to Seek Visitation Rights in the Best Interests of the Child*, 7 ST. JOHN'S J. LEGAL COMMENT. 417, 424-28 (1991); Beverly Horsburgh, *Redefining the Family: Recognizing the Altruistic Caretaker and the Importance of Relational Needs*, 25 U. MICH. J. REF. 433, 457-59, 482 (1992) (arguing that we should redefine family to include all full-time caretakers); John Kydd, *Abandoning Our Children: Mothers, Alcohol and Drugs*, 69 DENV. L. REV. 359, 362 (1992) (arguing that parents should be able to choose, with court approval, persons to assist natural parents in rearing children who would provide care and a voice for children if family problems arise); Janet Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 NOVA L. REV. 733, 735 (1992).

125. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Children's rights advocates, however, have long maintained that a parent-centered system ultimately harms children because many abuses can be shielded behind the private doors of the proverbial nuclear family. For an excellent argument for a child-centered definition of family, see Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

relationship and support have been identified as relevant in determining whether an adult has a relationship with a child sufficient to constitute a fundamental liberty interest protected by substantive and procedural due process.

### 1. BIOLOGICAL RELATIONSHIP

In *Lehr v. Robertson*, the Court determined that mere biological parentage is insufficient to give rise to a fundamental parent/child relationship requiring notice and a hearing before the adoption of a child.<sup>126</sup> And in *Michael H. v. Gerald D.*, the Court upheld a California statute that created a presumption that a child born to a married woman living with her husband is a child of that marriage and that the putative father possessed neither substantive nor procedural due process protection.<sup>127</sup> *Michael H.* was interesting because it also determined that the child did not have a due process right to maintain a filial relationship with both the putative natural father and the presumed marital father because such a triadic relationship "has no support in the history or traditions of this country."<sup>128</sup> Some children's advocates have applauded the Court's devaluation of biology since "[d]octrines that focus on genetic parentage to the exclusion of those who care for the child . . . overvalue procreation and undervalue nurture, at a time when nurture is in very short supply."<sup>129</sup>

A biological connection, although not dispositive, is a critical constitutional precept in defining a person's liberty interest in a child. In *Stanley v. Illinois*, the Court held that a statute automatically making a child of a dead mother and an unwed father a ward of the state without a hearing violated the Equal Protection Clause.<sup>130</sup> The Court has also relied on the absence of a biological connection to deny fundamental constitutional status to the relationship between foster children and foster parents.<sup>131</sup>

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126. 463 U.S. 248 (1983). See also *Caban v. Mohammed*, 441 U.S. 380 (1979); Michael Dale, *The Evolving Constitutional Rights of Nonmarital Children: Mixed Blessings*, 5 GA. ST. U. L. REV. 523, 533-34 (1989).

127. 109 S. Ct. 2333 (1989).

128. *Id.* at 2346.

129. Woodhouse, *supra* note 119, at 113-14. See also Christian Van Deusen, *The Best Interest of the Child and the Law*, 18 PEPP. L. REV. 417, 436-41 (1991). That psychological-parenting approach "recently has been challenged by supporters of 'attachment theory' . . . [which stresses] the importance of the child's continuing contact with the biological parents . . . [because] a child is capable of forming attachments of different kinds with a number of individuals." Susan Brooks, *Rethinking Adoption: A Federal Solution to the Problem of Permanency Planning for Children with Special Needs*, 66 N.Y.U. L. REV. 1130, 1139 (1991).

130. 405 U.S. 645, 647-51 (1972).

131. *Smith v. Organization of Foster Parents*, 431 U.S. 816, 823 (1977). In *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), the California Supreme Court ruled that the woman who provided the

## 2. LEGAL CUSTODY

Legal custody alone, especially by a non-biological parent, has been held insufficient to support fundamental substantive or procedural due process rights to associate with a child. Although the Supreme Court has not yet ruled, "it is generally held that the relationship [between a stepparent and stepchild] would terminate upon divorce or the death of the natural parent. Both statutes and common law uphold this proposition."<sup>132</sup> In addition, as was earlier stated, foster parents who have temporary custody of children do not possess fundamental due process rights.<sup>133</sup>

The Court has not yet ruled whether prospective adoptive parents who have custody of a child who has been legally freed for adoption after parental termination have a fundamental liberty interest in the relationship. Traditionally, however, "adoptive parents receive limited protection throughout the adoption process up until the final adoption order is granted."<sup>134</sup> Prospective adoptive parents' liberty interests are arguably less than those of biological custodial parents because permanent legal custody is still contingent upon the adoption's finalization. Because prospective adoptive parents do have a reasonable expectation of a permanent parent/child relationship unless a change of circumstance

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egg which, combined with her husbands sperm, created an embryo which was gestated by the surrogate mother, was the legal and biological mother. The court determined that when two women each seek declaration as a child's mother, genetic relation trumps gestation. The court noted that the decision best promotes certainty and stability for the child. The court also focused upon which woman had the original idea to procreate this child and determined that in this case it was the genetic mother. The court's opinion is also strongly based upon the gestational mother's contractual waiver of parenthood.

132. Note, *Third Party Custody and Visitation: How Many Ways Should We Slice The Pie?*, 1 DET. C.L. REV. 163, 172 (1963). Nevertheless, in *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978), the court held that a stepparent had a right to a hearing before association with the child could cease due to a divorce. But that case was decided not on the custody of the child, but rather on a best interests of the child/psychological bonding theory. See *Third Party Custody and Visitation*, *supra*, at 173 and nn.73-74.

133. *Smith*, 431 U.S. at 823. Foster parents, however, are frequently accorded statutory preferences for adoptive placement if the natural parents' parental rights have been severed. See, e.g., CAL. WELF. & INST. CODE § 366.25(g). In addition, if the agency placed the child with foster parents "for adoptive placement," the foster parents are often entitled to the rights accorded prospective adoptive parents. *Jinny N. v. Super. Ct.*, 241 Cal. Rptr. 95, 96-97 (Ct. App. 1987). Also, if the child had lived with foster parents for a considerable period of its life, the child's best interests in the continuity of that relationship may outweigh a recently appearing natural parent's right to custody. *In re L.W.*, 613 A.2d 350, 351-54 (D.C. 1992). The nation has been inundated with reports and fictional accounts of *Deboer v. Schmidt*, Nos. 96366, 96441, 96531, 96532 (Mich., July 2, 1993). Because the natural parents' rights had not been terminated and since the adoption was not final, the child was ordered back to her natural parents. See Douglas Donnelly, *When Interests Of The Child Prevail Over Parental Rights*, L.A.D.J., Aug. 11, 1993, at 6; *Case Updates*, THE GUARDIAN, Summer 1993, at 13.

134. Comment, *Best Interests Of Children And The Interests Of Adoptive Parents: Isn't It Time for Comprehensive Reform?*, 21 GONZ. L. REV. 749, 750 (1985).

occurs, they arguably have a greater liberty interest in the child than do foster parents.

It is likely that the Supreme Court under the *Smith* rationale will determine that because the custodial prospective adoptive parent/child relationship is not legally final, prospective adoptive parents have fewer rights than biological custodial parents.<sup>135</sup> The Supreme Court may determine that the liberty interest of such parents is sufficient to require a "rational relationship" test like it applied to the child's liberty argument in *Michael H.*<sup>136</sup> that she had a right to filial relationships with her presumptive father and her putative natural father. Just as custody does not automatically grant fundamental liberty, absence of custody is not a bar to due process rights. For instance, in *Caban v. Mohammad*<sup>137</sup> the Court held that a non-custodial natural father who had earlier lived with the children's mother for several years and who was identified on the birth certificates as their father, was entitled to a hearing before the mother and her husband could adopt the children. The Court held that the state statute which distinguished between unmarried mothers and fathers violated equal protection.<sup>138</sup>

### 3. SIGNIFICANT RELATIONSHIP AND SUPPORT

Because biological parenthood alone is insufficient to establish a fundamental liberty interest in a child,<sup>139</sup> courts have been forced to determine what additional factors are relevant and sufficient to support such an interest. The most frequently identified conditions for a natural parent are a "demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility."<sup>140</sup> One must wonder why the Court has been so insistent upon a biological parent's "good works" toward the child in defining the degree of liberty interest. Is it contractually based, a notion like quantum meruit? (If I as a parent pay to support the development of my child, it is only fair that I be given control over the rearing and be afforded substantial due process before the State can take away the benefit of my bargain and the fair return on my investment.) Of course, the contractual model tends to cast

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135. The court in *In re Adoption of Baby Boy Dzuovcak*, 600 N.E.2d 143, 144-148 (Ind. Ct. App. 1992), held that the trial court erred by denying custodial prospective adoptive parents standing and an opportunity to be heard in a custody hearing brought by a natural parent who recently had obtained a court order of paternity.

136. *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2346 (1989).

137. 441 U.S. 380, 382-91 (1979).

138. The Court in *Michael H.*, 109 S. Ct. at 2345 n.7, indicated that a different result might apply "with regard to adulterous fathering of a child whom the marital parents do not wish to raise as their own."

139. *Lehr v. Robertson*, 463 U.S. 248 (1983).

140. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2942 (1990).

children in the apparently anachronistic role of property or chattel, the equivalent of a branded animal under the control of its owner. "Children are not chattel . . . ." <sup>141</sup>

A second rationale for placing great emphasis on the parent's care of the child is that the closer the relationship the more likely the child will be harmed if the contact is severed. This "best interests" emphasis shifts the focus of the liberty deprivation to the effect upon the child. But a "best interests" standard is unworkable because the degree of harm cannot be determined until *after* a hearing and the interested parties' due process rights at such a hearing need to be determined *before* the hearing in order to decide whether counsel must be appointed or whether confrontation and cross-examination are applicable.

A third basis is economic. Society's interests are harmed if a nurturing, supportive parent is erroneously denied continued association with the child. In most cases, the taxpayers will be forced to assist the child for an indeterminate period and the child will suffer from adverse psychological and social effects from the separation.

If "good works" and support determine whether biological parents possess a fundamental liberty interest in the child, then what, besides genetics, differentiates other adults who provide children economic and psychological support? <sup>142</sup> Under a purely economic model it should not matter whether the support is from a parent or any responsible third party. The same conclusion results under the contractual model; the fairness of a return on one's investment does not vary with the donor unless we make a distinction between those legally obligated to provide support and those good-samaritans who volunteer financial aid, comfort, and emotional support. <sup>143</sup>

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141. *Mark V. v. Gale P.*, 540 N.Y.S.2d 966, 967 (Fam. Ct. 1989).

142. The waters become very muddy when courts must select between competing non-parental relatives and current custodial caretakers. For instance, in *In re C.B.*, No.1-92-1988 (Ill. App. Ct. June 11, 1993) the court held that the evidence of psychological bonding with a natural mother's friend was insufficient to support an award of permanent custody and guardianship to the friend rather than the maternal grandmother who also wanted to adopt the child's two siblings.

143. Some courts have argued that parental legal obligations support greater liberty interests than others who voluntarily provide such assistance. Courts "frequently consider dependency a criterion for determining who may recover in a wrongful death action. Dependence usually connotes pecuniary benefit but need not be confined to actual monetary support . . . ." Robyn Meadows, *Recovery by Stepchildren in Wrongful Death Actions*, 40 KAN. L. REV. 777, 787 (1992). For a discussion of third-party child support obligations, see Richard Victor et al., *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support*, 25 FAM. L.Q. 19, 24-25 (1991). It has also been argued that third parties who have been given consensual access to children by custodians and who provide those children emotional support have a right under equitable estoppel to continued association. For instance, if parents consent to a non-parent "significant other" visiting with and nurturing the child "the parent should be estopped from disavowing a relationship . . . [they] . . . both encouraged and relied upon when it was convenient

Professor Dolgin has recently stated that the determinative difference in the results of *Stanley* and *Caban*, which recognized an unwed father/child relationship, and *Quilloin* was that the first two resembled families, while the last did not.<sup>144</sup> She argued that because the father in *Michael H.* established a commitment with the child, the *Lehr* emphasis had been down played by the Court.<sup>145</sup> She sees the plurality opinion in *Michael H.* as holding that the unwed father cases are now predicated upon a determination of whether the relationships among the father, mother, and child developed within the sanctity of a "unitary family."<sup>146</sup> "A biological father does protect his paternity by developing a social relationship with his child, but this step demands the creation of a family, a step itself depending upon an appropriate relationship between the man and his child's mother."<sup>147</sup> The rationale behind distinguishing the fundamental rights of unwed mothers from unwed fathers is historically connected to the easily proven natural connection of mother and gestational child and the difficulty of establishing circumstantially the biological father/child connection. Evidence of relationships between father and child are socially based rather than biologically based.<sup>148</sup> Although

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to do so." GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 428 (1973). The role of extended family members in caring for abused or neglected children has dramatically increased.

On December 31, 1986 there were 45 children in New York City living in a newly created form of foster care known there as 'approved relative homes.' By December 31, 1991, there were 23,591, or well over half of the total children in family foster care. In five short years, the exception had become the norm.

Marianne Takas, *Kinship Care: Developing a Safe and Effective Framework for Protective Placement of Children with Relatives*, 13 *CHILDREN'S LEGAL RTS. J.* 12 (1992).

144. Janet L. Dolgin, *Just A Gene: Judicial Assumptions About Parenthood*, 40 *UCLA L. REV.* 637, 662 (1993).

145. *Id.* at 665.

146. *Id.* at 666 (citing *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989)).

147. *Id.* at 671. *But see In re Matter Of Raquel Marie X.*, 559 N.Y.S.2d 855 (Ct. App.), *cert. denied*, 111 S. Ct. 517 (1990), where the court struck down as unconstitutional a statute which premised the father's right to consent to adoption upon his living with the mother, because that requirement was not sufficiently related to the state's interest in assuring a quality relationship between the child and father.

148. *Id.* at 642, 669. Professor Dolgin's exegesis and synthesis of the unwed father cases are intriguing, but incomplete. There are a number of other reasons why the Court has treated mothers' rights differently from fathers'. First, allowing long forgotten fathers to reenter the family custody arrangement may create an "impediment to the smooth operation of child placement agencies" if the unwed father can "block adoption proceedings" and compete for the child's custody. Linda Crane, *Family Values and the Supreme Court*, 25 *CONN. L. REV.* 427, 449 (1993). In addition, the justices have an individual moral vision of what the legal family should look like and reject groups which deviate from that ideal. "The Supreme Court's rulings in the unwed father cases are inconsistent and generally reflect a subjective assessment of the worthiness of an unpopular party, the unwed father." *Id.* at 453, 466-68.

Of course, the Court's stereotype of mothers will be constantly under empirical pressure to change as the role women play in families continues to evolve.

The distinction between family life and civil society, coupled with women's entrance into civil society in large numbers, has thus created a disfunction between



Professor Dolgin's theories partially explain why the Court has limited unwed father's rights, the theory has little application to the questions regarding siblings' association rights.<sup>149</sup>

### B. *A Constitutional Basis for Siblings' Rights*

Professor Tribe has argued that " 'family rights,' " as recently analyzed by the Supreme Court, really emerge as "rights of individuals only" and that "the stereotypical 'family unit' that is so much a part of our constitutional rhetoric is becoming decreasingly central to our constitutional reality."<sup>150</sup> If he is correct, then it becomes increasingly critical that the Court determine children's association rights as distinct from parents' rights to associate with their children. Only then can children's interests be comparably balanced by the Court in determining with whom and under what circumstances they will have a right to live, visit, and know. Perhaps the easiest starting point in discussing children's association rights is an application of the current court standards for determining parental rights. Is the parent/child association analogy appropriate?

We will begin our analysis with the brightest line; do identical twins possess a constitutional right to associate with one another? Identical

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theory and reality. The divergent realms of male-dominated civil society and female-shaped family life have become entangled and confused in response to modern society's diverse pressures upon both men and women.

Julie Novkov, *A Deconstruction of (M)otherhood and a Reconstruction Of Parenthood*, 19 REV. L. & SOC. CHANGE 155, 166 (1991-1992). Traditional conceptions of biology and motherhood limit women's ability to function competitively in an economic marketplace because they "often lead employers to have different expectations regarding the behavior and conduct of their female employees than those they hold for their male employees." *Id.* at 168.

149. Homer Clark has noted that *Michael H.* "leaves open the question whether Michael's claim of paternity would be entitled to constitutional recognition if, after Victoria's birth, Carole and Gerald had been divorced, or separated, or were no longer caring for Victoria as a going family." Homer Clark, *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 16 (1992). Once the biological mother decides to abandon a child, the unwed father's interest coupled with the child's might provide sufficient grounds for giving custody to the unwed father. In *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2946 (1990), the Court stated in regards to a two-parent custodial family that "[i]t follows that the combined force of the separate interests of one parent and the minor's privacy interest must outweigh the separate interests of one parent." Once parental rights are severed, the basis of denying association rights in the unwed father cases is irrelevant to the issue of whether bonded siblings should be permitted to continue associating. The Court's moral opprobrium toward unwed fathers has no application to innocent siblings caught in a legal custody web.

150. LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1461 (2d ed. 1988). See also Barbara Woodhouse, "Who Owns The Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1039 (1992) ("[T]he redefinition of the family as a grouping of individuals with individual rights and interests created tensions among family members which, in turn, led to a growing involvement of legislatures and judges in setting standards of family behavior and in mediating disputes among family members.").

tical twins are "genetically indistinguishable," and thus have an even greater biological connection than a natural parent and child or even fraternal twins who "share, on average, 50 percent of their genes and may be the same or opposite sex."<sup>151</sup> Because identical twins possess an even closer genetic connection than an unwed father or mother with their child, they should be recognized as equivalently possessing a potential fundamental family association right under *Lehr*.<sup>152</sup> In addition, empirical studies have consistently demonstrated the intimate psychological bond between identical twins. Often separation from or death of an identical twin causes long-term grief significantly greater than the loss of a parent.<sup>153</sup>

Is a relationship between identical twins or any sibling group living together a relationship that has "support in the history and traditions of this country?"<sup>154</sup> Under contemporary law the answer is "yes" as siblings are recognized as legally related in every jurisdiction.<sup>155</sup> Siblings' family relationships are vested and perfected unlike the parent/child relationships between prospective adoptive parents or foster parents. Further, unlike foster parents, siblings have a realistic expectation that they will be able to sustain a continuing life-long relationship.

The history of children and siblings in early America is much less certain. Family law, including children's family association rights, in the colonies "varied sharply from one colony to another."<sup>156</sup> In Puritan regions such as Massachusetts and Connecticut, there was great "emphasis on family unity" which was subject to patriarchal control and community supervision. Children were considered "as subordinate and dependent beings"; children were often separated from indigent parents and were required "to work for strangers."<sup>157</sup> In Maryland, South Carolina, and Virginia, where "widows were more likely to be left with

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151. Lori Andrews, *Some Kind of Weird Twin Thing: Research on the Special Relationship of Twins Provides a Lucrative Legal Tool*, CAL. LAW., April, 1992, at 26.

152. *Lehr v. Robertson*, 463 U.S. 248 (1989).

153. Andrews, *supra* note 143.

154. Michael H. v. Gerald D., 109 S. Ct. 2333, 2346 (1989).

155. See, e.g., ALA. CODE § 13A-13-3(a)(2) (intercourse between siblings is incest); ARIZ. REV. STAT. ANN. § 25-332(A)(2) & (3) (court may consider sibling relationships in determining custody); ARK. CODE ANN. § 9-9-215(1) (sibling visitation); CAL. CIV. CODE § 230.8 (siblings can register to locate one another after age of majority); COLO. REV. STAT. ANN. § 25-2-113.5 (sibling registry); CONN. GEN. STAT. ANN. § 17-44(a)(b) (sibling adoption subsidy); FLA. STAT. ANN. § 409.166(1), (2)(a), (c), (e) (financial subsidy for sibling group adoption); KY. REV. STAT. ANN. § 199.575 (sibling registry); LA. REV. STAT. ANN. § 9-572 (sibling visitation); ME. REV. STAT. ANN. § 541 (adoption subsidy for siblings); MD. FAM. LAW CODE § 5-4A-02 (sibling registry); N.J. REV. STAT. § 9:2-7-1 (sibling visitation); OHIO REV. CODE ANN. § 3107.39(D) (siblings related); TENN. CODE ANN. § 36-1-139 (sibling registry).

156. Mintz, *supra* note 120, at 637.

157. *Id.* at 638, 640-41.

young children," women were given much more independent control and protection.<sup>158</sup>

The social and legal conception of children transmogrified during the eighteenth and nineteenth centuries due to "rapid population growth, increasing religious fragmentation, new ideologies emphasizing personal privacy and the spread of market relationships that undercut paternalistic social relationships."<sup>159</sup> By the mid-1800s, courts began to define parental control of children "not as absolute power conferred by God, but a civic duty conferred and regulated by the state."<sup>160</sup> By the nineteenth century, society began to formulate protectionist laws based upon "a new sentimental conception of children as vulnerable," and child labor laws were pressed by societies for the prevention of cruelty to children.<sup>161</sup> By the 1920s, family law was increasingly influenced by psychological and clinical studies of the family stressing "the importance of continuity and stability in caretakers."<sup>162</sup> Finally, since the 1960s, courts have begun to stress the individual rights of family members, including children. In certain areas, courts "have held that minors have independent rights that can override parental authority."<sup>163</sup>

Therefore, just as it is impossible to accurately define the role of father's and mother's association rights throughout the history of our country, so too have children's association rights continually evolved. Nevertheless, the most important point in applying the *Michael H.* standard to sibling relationships is that brothers and sisters living in the same family have *ALWAYS* been treated as natural members of a family unit, unlike the unwed father who was denied a fundamental liberty interest in *Michael H.* Therefore, the historical and contemporary evidence supports a clear finding that sibling's association has been a relationship historically endemic to the American definition of family. Siblings, just like parents and children, should clearly be held to possess an inherent, fundamental liberty interest in continued contact and association.

Although identical twins may not provide the same "personal, financial, or custodial responsibility" which an adult parent may provide, the twins' demonstration of an emotional and relational commitment is an alternative equivalent.<sup>164</sup> In fact several empirical studies have demonstrated that identical twins share not only the usual

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158. *Id.* at 638.

159. *Id.* at 641-42. Woodhouse, *supra* note 119, at 1037.

160. Woodhouse, *supra* note 119, at 1038.

161. Mintz, *supra* note 120, at 643-49; Woodhouse, *supra* note 119, at 1040-41, 1054-56, 1059-62.

162. Mintz, *supra* note 120, at 651.

163. *Id.* at 653-54.

164. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2942 (1990).

equivalent of parental support, but a much deeper and intense sharing of identity.<sup>165</sup> The separation of twins is perhaps a much greater liberty deprivation than a severance of parent and child.<sup>166</sup> It is therefore difficult to argue that identical twins, unlike an unwed father who provides a modicum of support, do not have a constitutionally based liberty interest in associating with one another.

The same analysis applies to other siblings. The only difference between identical twins and other biological siblings is the degree of genetic similarity.<sup>167</sup> In terms of psychological support and bonding, empirical studies clearly demonstrate the critical importance of siblings to one another. "[T]oddlers with close, affectionate relations with their siblings show an earlier development of the ability to role-play, to act as conciliator and to cooperate with others."<sup>168</sup> Older siblings also provide

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165. The intangible right of a child to preserve his or her identity is recognized in Article 8 of the *United Nations Convention On The Rights Of The Child*, G.A. Res. 44/25, U.N. GAOR Annex, U.N. Doc. A/44/736 (1989), reprinted in 28 INT'L LEGAL MATERIALS 1456 (1990). For a discussion, see George Stewart, *Interpreting the Child's Right to Identity in the U.N. Convention on the Rights of the Child*, 26 FAM. L.Q. 221 (1992).

166. The separation of identical twins is not just a normal custody decision, it is a loss of personal identity more equivalent to cases of involuntary sterilization.

167. Whether non-biological siblings have identical due process rights is an open question and will depend upon the associational theory applied. If the *Michael H.* test of an historically recognized family relationship and the *Lehr* biological connection tests are applied, then non-biological siblings have a weak case. One could argue, however, that neither of those cases is applicable since the siblings are part of a legally recognized family unit unlike the unmarried father and his child. But, if we apply a psychological bonding/best interests of the children test, then biology should not be required. Equal protection will also rear its Hydra head since it is possible that biological, adoptive, and step-siblings will be treated differently in regards to their right to continue associating even though the state interest in the best interest of the child would not compel such a result.

A state's interests may begin to fiercely compete. If adopted children are given a new birth certificate and become part of the adopted family in order to assure a family unit and as full a public acceptance as possible, what overriding public interest favors splitting the natural and adopted brother and/or sister after the parent's rights have been terminated? Should association rights be different depending upon the procedural mechanism used? In other words, should step-siblings be permitted to visit pursuant to a divorce custody order, but not according to a declaration of adoption into different families?

Such a distinction neglects not only the close emotional ties between even step-siblings, but also fails to consider the scope of the problem. "With a national divorce rate of 50% and a slightly higher re-divorce rate, researchers estimate that up to two-thirds of children who experience their own parents' divorce will go through a subsequent one involving a parent and stepparent." Paula Lynn Parks, *Stepping Carefully*, L.A. TIMES, March 8, 1995, at E3.

" 'The step-siblings I've talked to-and I've talked to lots-usually get along pretty well with each other and usually they would want to maintain some kind of relationship unless there is a huge age gap.' said Marilyn Coleman, stepfamily researcher and co-author with husband Lawrence Ganong of 'Remarried Family Relationships.' "

*Id.* at E8.

168. Robert Hannafor, *Timing, Fragility and Children's Law*, 69 DENV. U. L. REV. 593, 602 (1992). "Severance of existing emotional ties between the child and . . . siblings . . . may be

younger brothers and sisters substantial emotional support, and studies demonstrate that siblings as "young as 14 months old provide older siblings comfort."<sup>169</sup> In addition, siblings provide a family subsystem which lasts a lifetime, often for 60 to 80 years, and grieving over a lost sibling may be lifelong.<sup>170</sup> "A sibling relationship can be an independent emotionally supportive factor for children in ways quite distinctive from other relationships, and there are benefits and experiences that a child reaps from a relationship with his or her brother(s) or sister(s) which truly cannot be derived from any other."<sup>171</sup> It is quite telling that more siblings separated from their natural families search for their biological siblings than search for their biological parents. One of the most frequent reasons children run away from foster homes is to visit siblings.<sup>172</sup>

Several facets of contemporary family and social conditions have made sibling attachments even more critical than ever: 1) the shrinking size of extended families; 2) longer life spans; 3) increased divorce rates; 4) expanded geographic mobility; 5) more full and part-time working mothers; and 6) increasing numbers of parents without adequate parenting skills.<sup>173</sup>

Those few courts that have determined that children possess a fundamental family associational right have had great difficulty articulating the basis of that precept.<sup>174</sup> For example, the court in *L. v. G.* specifi-

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harmful to the child and may impede her formation of new relationships." Note, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633, 633 (1984). See *supra* part III, for an extended discussion of the positive aspects of sibling bonds.

169. Dunn & Kendrick, *supra* note 70, at 93-94, 114.

170. Ward, *Sibling Ties in Foster Care and Adoption Planning*, 63 CHILD WELFARE 321, 322 (1984); BANK & KAHN, *supra* note 64, at 6, 9-10, 13.

171. *L. v. G.*, 497 A.2d 215, 220 (N.J. Super. Ct. Ch. Div. 1985).

172. LE PERE ET AL., *supra* note 50, at 2. For extensive studies of adoptees' searches for natural family members, see JOHN TRISELIOTIS, IN SEARCH OF ORIGINS: THE EXPERIENCE OF ADOPTED PEOPLE (1973), and ARTHUR SOROSKY ET AL., THE ADOPTION TRIANGLE (1978); see also Alan Watahara, California's Foster Care-Dependency System: Forgotten Children in a Bureaucracy of Care 426 (Ph.D. Dissertation, University of California, Berkeley, 1987). A recent English study found "evidence of fairly widespread satisfaction—sometimes entirely unexpected—in discovering long-lost siblings." Heather Humphrey & Michael Humphrey, *Damaged Identity And The Search For Kinship In Adult Adoptees*, 62 BRIT. J. MED. PSYCHOL. 301, 306 (1989).

173. BANK & KAHN, *supra* note 64, at 12.

174. The United States Supreme Court in *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2346 (1989), stated, "[w]e have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship."

Nevertheless, children's independent rights have been recognized recently by a few courts. For example, in *In re Arturo A.*, 10 Cal. Rptr. 2d 131, 138 (Ct. App. 1992), the court recognized that the child's entitlement to maintain a family unit and to have a finalized permanent life plan is supported by the Supreme Court's recent recognition of "rights of personality" in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). Other courts, however, have held that the right of

cally held that siblings' "unbreakable links of heredity" and the "emotionally supportive" relationship lead to a conclusion that "siblings possess the natural, inherent and inalienable right to visit with each other."<sup>175</sup> Although the court did not expressly amplify the basis for its holding, the logic of *L. v. G.* is similar to the *Lehr* Court's requirement of biological connection plus commitment toward the child, here a brother or sister. Further, since the siblings in that case lived together in a traditionally recognized legal family relationship, the *L. v. G.* holding is also consistent with the *Michael H.* standard since relationships between brothers and sisters have strong "support in the history or traditions of this country."<sup>176</sup>

A few courts, afraid of burdening state and federal courts with new causes of action by siblings for wrongful death, loss of consortium, or statutory failure to facilitate family reunification, have suggested strained reasons why sibling relationships should not receive the same liberty protection as parent/child relationships.<sup>177</sup> For instance, in

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an adoptee to know his or her origins and identity is not a fundamentally protected liberty interest. See *In re Roger B.*, 418 N.E. 2d 751 (Ill. 1981); *Mills v. Atlantic City Dep't of Vital Statistics*, 372 A.2d 646 (N.J. Super. Ct. Ch. Div. 1977); Pamela Smith, *Regulating Confidentiality of Surrogacy Records: Lessons from the Adoption Experience*, 31 U. LOUISVILLE J. FAM. L. 65, 85-88 (1992-93). And in *Gregory K. v. Ralph K.*, No. C192-5127, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992), the court held that the child had an independent right to ask the court to determine whether his parents' rights should be severed and whether he should be reared by others. The Florida Supreme Court in *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), determined that minors possess constitutional rights, and the court in *Gregory K.* held that Gregory K., like any other natural person, had access to the court to redress his claim. See Miriam Rollin, *Gregory K.—The Legal Basis*, 14 GUARDIAN 12 (Fall 1992); Howard Davidson, From the Editor, *Making Too Much of 'Gregory K'—And Too Little*, 13 CHILDREN'S LEGAL RTS. J. (Fall 1992); *Mother Can't Meet with Son in Parental Termination Suit*, L.A.D.J., Sept. 23, 1992, at 3; *Boy Granted 'Divorce' from Parents*, L.A.D.J., Sept. 28, 1992, at 8; *Boy Is Granted 'Divorce' from Natural Parents*, L.A. TIMES, Sept. 26, 1992, at pt. 1, p. 1; *Child Has Standing to Bring Termination Petition*, 11 A.B.A. JUV. & CHILD WELFARE L. REV. 110. An issue in *Gregory K.* that has not received attention is whether Gregory's siblings' association rights were violated when the trial court refused to grant the siblings standing in the custody/parental termination hearing. See *supra*, *Mother Can't Meet with Son in Parental Termination Suit*, at 3. The court should have granted the siblings standing and determined whether association should continue even after the parental rights were terminated. In *In re Adoption of A.G.K.*, 728 P.2d 1, 7 (Okla. 1986), the court held that because the state's termination of the parental rights statute violated the child's "fundamental liberty interest in its continuation [of the parent\child relationship,] . . . [i]t offends the child's state and federal constitutional due process rights—both procedural and substantive." But in *DeBoer v. Schmidt*, Nos. 96366, 96441, 96531, 96532 (Mich. July 2, 1993), the court found that "while the child does have a due process liberty interest in her family life, her rights are dependent on the rights of her biological parents. Only if a parent is found unfit can a child assert her own independent rights." *Legal Analysis: The Latest Chapter in the DeBoer v. Schmidt Case*, 12 A.B.A. JUV. & CHILD WELFARE L. REV. 92, 94 (1993).

175. *L. v. G.*, 497 A.2d 215, 220-22 (1985).

176. *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2346 (1989).

177. For detailed analyses of the hostility toward children's loss of consortium claims, see, e.g., Michael Mogill, *And Justice for Some: Assessing the Need to Recognize the Child's Action*

*Ascani v. Hughes* a decedent's estate and his siblings brought a 42 U.S.C. § 1983 action under a wrongful death statute for "loss of freedom of association."<sup>178</sup> In denying relief, the court quoted *Sanchez v. Marquez*, which almost a decade earlier had denied siblings monetary wrongful death damages stating:

Where the right to raise, educate and associate with one's own child may rise to constitutional dimensions, the right of siblings to have their brother or sister continue living does not. The relationship between a parent and its off-spring and the relationship between a brother and sibling is not a difference in degree, it is a difference in kind. Though one has a constitutional right to have or not have a child, one does not have a constitutional right to have or not have a brother.<sup>179</sup>

The *Ascani* court also refused to recognize the sibling wrongful death action because it feared that courts would have no way of limiting similar damage actions brought by any other individuals who have established " 'emotional attachments that derive from the intimacy of daily associations.' "<sup>180</sup>

The *Ascani* and *Sanchez* courts' reasoning for denying siblings wrongful death damages is unconvincing, illogical, and inconsistent with over 40 years of United States Supreme Court precedent. First, the distinction between parents' free choice in having children and siblings' inability to choose whether to have a brother or sister relationship is a distinction without a substantive difference. The distinction may have

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for *Loss of Parental Consortium*, 24 ARIZ. ST. L.J. 1321 (1992); Maureen Delaney, *What About the Children? Toward an Expansion of Loss of Consortium Recovery in the District of Columbia*, 41 AM. U. L. REV. 107 (1991); John Palmeri & Christopher Kenney, *Consortium Claims Involving Children: Should Colorado Continue an Archaic Concept or Confront a Faulty Cornerstone?*, 69 DENV. U. L. REV. 481 (1992). See also *Wise v. Timmons*, 592 N.E.2d 840 (Ohio 1992). Applying the Ohio wrongful death statute that provides mental anguish damage to siblings, Justice Holmes in his concurring opinion stated "[h]owever, I continue to have a considerable problem with the issue of sibling recovery of damages for mental anguish under Ohio's wrongful death statute." *Id.* (Holmes, J., concurring). The United States Supreme Court in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), recently ruled that children do not have an independent federal cause of action against states which fail to use the suggested family reunification services in the Federal Adoption and Assistance Act. The court in *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1005 (N.D. Ill. 1989) had previously found "that the children's relationships with their siblings are the sort of 'intimate human relationships' that are afforded 'a substantial measure of sanctuary from unjustified interference from the state' ".<sup>178</sup>

178. 470 So. 2d 207, 208 (1985).

179. *Id.* at 211 (quoting *Sanchez v. Marquez*, 457 F. Supp. 359, 363 (D. Colo. 1978)).

180. *Ascani*, 470 So. 2d at 212. *Trujillo v. Board Of County Comm'rs*, 768 F.2d 1186, 1189 (10th Cir. 1985), rejected the notion that recognizing sibling association rights would open the floodgates under § 1983. Although the *Trujillo* court recognized the liberty associational rights of siblings, it held that the plaintiffs failed to demonstrate a specific intent by the defendant to interfere with that right.

some relevance to monetary damages,<sup>181</sup> but it decants the complex multifarious Supreme Court family association cases into a single dispositive element, the ability to voluntarily procreate. Not only does this belie the trend of Supreme Court opinions from *Lehr* forward which have delimited the significance of biological parentage, it also strips family association rights of their rich texture of group-shared ideals and emotional support as articulated by the Court in *Smith*, *Roberts*, and *Moore*.<sup>182</sup>

The *Ascani/Sanchez* focus on voluntary procreation would take away from some adults whose religion forbids the use of contraception or abortion a fundamental parent/child liberty interest. Even if one takes a strained view of human nature and holds such individuals have chosen to have a child if they do not practice sexual abstinence during their lifetime, women with those religious views who are raped certainly do not have a free choice in conceiving a child. But no court has ever held that a child conceived through rape has a lesser liberty interest in a parent/child family associational relationship than one conceived by premeditated parental intent. In fact, such a policy denying fundamental parenting rights to an unwed, raped mother who cares for the child is clearly against all of the contemporary Supreme Court rulings that have long decided claims to maternity "on biological motherhood."<sup>183</sup> It is also ironic that the *Ascani* and *Sanchez* cases strip association rights from siblings because of their status as involuntary family members since the Court in a series of earlier cases determined that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility."<sup>184</sup>

Second, the *Ascani* and *Sanchez* courts' fears of unlimited claims to fundamental associational rights are also misplaced. Granting siblings fundamental liberty association will not entitle other third parties to sim-

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181. The statutes which were promulgated to further family unity have been held inapplicable to family economic issues. For instance, in *County of Orange v. Leslie B.*, 17 Cal. Rptr. 2d 797, 799-800 (Ct. App. 1993), the court held that a putative father was a legal father obliged to pay statutory child support even though, pursuant to Evidence Code § 621, as an unmarried father he had no standing to seek child custody. The father was denied the benefit of the non-paternity presumption "as a financial prophylactic." *Id.* at 800.

182. *Smith v. Organization of Foster Parents*, 431 U.S. 816 (1977); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

183. Dolgin, *supra* note 136, at 672. Professor Dolgin raised interesting questions regarding whether biological maternity will remain the central issue in surrogate mother cases where "competing claims to maternity between different women and competing claims to parenthood between men and women" must be determined. *Id.* at 673-89. For a recent case pitting the rights of the genetic versus gestational mothers, see *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

184. *Lalli v. Lalli*, 439 U.S. 259, 265 (1978). See also *Trimble v. Gordon*, 430 U.S. 762 (1977); *Labine v. Vincent*, 401 U.S. 532 (1971); *Levy v. Louisiana*, 391 U.S. 68 (1968).



ilar access. The empirical data discussed in Section IV of this Article, clearly demonstrate that the sibling bond is substantially greater and different than other third-party relationships, and that siblings often emotionally need one another even more than they need parents, especially if their parents physically or emotionally abuse them. Further, as was earlier demonstrated, the relationship among siblings clearly meets the *Michael H.* test for relationships which are part of the American family fabric. Courts can easily distinguish siblings' association rights from others' rights just as the Court has already distinguished the association rights of biological parents, unwed fathers, prospective adoptive parents, and foster parents.

A host of variables support the conclusion that siblings have a fundamental substantive liberty interest in associating with one another.<sup>185</sup> Brothers and sisters have been extremely close members of nuclear families during the history of this country. At no time has the law or society treated them as anything but linked members of a family unit, and no state has ever determined that separating biological siblings is presumptively in the best interest of the children during maturation. Siblings have been legally separated only when some event such as parental death or incapacity, divorce, child abuse, or neglect has occurred. Psychological research overwhelmingly supports the continuation of the sibling bond. Longitudinal studies demonstrate that separated siblings' have an enduring desire to reunite, and changing demographics and increasing longevity mean that siblings need and may rely upon one another's support for over 80 years.

"[A]n increasing number of psychologists believe that relationships with siblings can be among the most important in life. And a growing body of research suggests that sibling ties become more, not less, important as we age."<sup>186</sup> The legislatures in all 50 states have recognized the importance of sibling bonds by passing statutes permitting adult siblings to voluntarily find one another through sibling registries. It is time for the Court to declare, as it has with the only other historically recognized

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185. Katie Watson has recently noted the importance of the right of association as a functional "wall between the moral autonomy of the citizenry and the normalizing power of the State." Katie Watson, *An Alternative to Privacy: The First Amendment Right of Intimate Association*, 19 N.Y.U. REV. L. & SOC. CHANGE 891, 925 (1992). It is particularly necessary for siblings to continue their intimacy once the child dependency system thrusts a socially masticated normative structure upon them; they will lose family and historical identity in the child welfare system. Continued sibling association and dialogue will "serve as bulwarks against totalitarianism" in the form of state-mandated, normative alternative family structures. *See id.* at 918. "It stands to reason that when the institution of the family is homogenized, the range of ideas and identities present in our society is also narrowed." *Id.* at 921.

186. Diane Swanbrow, *Brother, Can You Spare Some Time?*, L.A. TIMES MAGAZINE, Oct. 7, 1990, Part 2, page 9.

family relationship, parent and child, that siblings have a fundamental liberty interest in associating, and that only after a procedurally fair due process hearing may the State separate siblings and only then because it is the least drastic alternative in the children's best interest.

### C. *Siblings' Procedural Due Process Rights*

The Court's "preference for procedural solutions" to litigated children's issues "offer[s] the appearance of resolving difficult problems while actually sending substantive decisions to less visible levels of administrative or lower court decisions."<sup>187</sup> Rather than defining bright line substantive rights for children, the Court issues procedural machinery for deciding issues on a case by case basis. "Procedural solutions are not inapt for the kinds of problems posed by many issues of children's rights—where a general rule could well hurt some children even while helping others."<sup>188</sup> Therefore, assuming the Court recognizes a substantive sibling associational right, we should not expect a pronouncement that siblings must live together. Rather, tradition foretells an opinion that would set a balancing test for determining under what circumstances siblings must remain or be brought together and a definition of minimal procedures required in making that determination. Since children's rights have historically evolved after adult's rights,<sup>189</sup> the Court has usually engaged in a comparative analysis in determining the degree of procedural protection required. The Court has often applied a "'dual-maximal approach' that combines 'fundamental fairness' and 'functional equivalence'" which often provides juveniles more and/or different procedural protection than adults.<sup>190</sup> The Court has held that in juvenile delinquency hearings, which had for years been termed non-adversarial civil dispositions, juveniles are entitled to most

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187. Martha Minow, *Constitutional Bicentennial Symposium: The "Rights Revolution", Are Rights Right for Children?*, 1 AM. B. FOUND. RES. J. 203, 211 (1987).

188. *Id.* at 211.

189. Of course, not everyone agrees that children should be treated equally with adults or that granting children more extensive rights is in society's best interest. "There is good reason to think that, despite its appealing conceptual simplicity, a policy of granting children equal rights wouldn't be the best way to resolve the problems we face. Some version of protectionism is far more promising." LAURA M. PURDY, *IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN* 231 (1992).

190. Gary B. Melton, *Taking Gault Seriously: Toward A New Juvenile Court*, 68 NEB. L. REV. 146, 173-73 (1989) (quoting from Irene M. Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 659 (1980)). Whether different procedures for children is in their best interest is debatable since the "establishment of a separate body of law and specialized agencies to deal with [child] abuse and neglect both justifies and ensures differential treatment of children." Anne McGillivray, *Reconstructing Child Abuse: Western Definition and Non-Western Experience*, in MICHAEL FREEMAN & PHILIP VEERMAN, *THE IDEOLOGIES OF CHILDREN'S RIGHTS* 216 (1992).

procedures available to adult criminal defendants: 1) A statement of the allegations;<sup>191</sup> 2) an opportunity for a hearing;<sup>192</sup> 3) access to relevant data;<sup>193</sup> 4) right to counsel;<sup>194</sup> 5) right to confront witnesses;<sup>195</sup> 6) a privilege against self-incrimination;<sup>196</sup> 7) a right to cross-examine witnesses; and 8) a standard of proof of beyond a reasonable doubt.<sup>197</sup> The Court, however, has determined on several occasions that minor's due process rights are not identical to adults: 1) minors have no right to jury trial in delinquency hearings;<sup>198</sup> 2) double jeopardy is more flexible in juvenile cases;<sup>199</sup> 3) different standards apply to juvenile preventive detention;<sup>200</sup> and 4) capital punishment of very young children violates the Eighth Amendment ban on cruel and unusual punishment.<sup>201</sup> Nonetheless, the Court has not had many opportunities to test children's due process rights in determining family issues involving custody and association.<sup>202</sup> The remainder of this section will discuss whether the current procedural due process protection accorded parents in severance hearings is required for siblings whose association rights are being litigated.

#### 1. STANDING AND NOTICE

A state must use reasonable means to notify natural parents, even non-custodial parents, before parental custody is involuntarily changed or parental rights are severed because the fundamental right to parent is implicated.<sup>203</sup> Standing usually requires a demonstration that a claimant

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191. *Kent v. United States*, 383 U.S. 541, 561 (1966).

192. *Id.*

193. *Id.* at 561.

194. *In re Gault*, 387 U.S. 1, 41 (1967).

195. *Id.* at 56.

196. *Id.* at 55. For a history of the development of juvenile delinquents' procedural protection, see Michael Dale, *Children Before the Supreme Court: In Whose Best Interests?*, 53 ALB. L. REV. 513 (1989).

197. *In re Winship*, 397 U.S. 358, 364 (1970).

198. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

199. *Swisher v. Brady*, 483 U.S. 204, 210-11 (1978).

200. *Schall v. Martin*, 467 U.S. 253, 264-65 (1984).

201. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2689-91 (1988).

202. Of course, in *Parham v. J.R.*, 442 U.S. 584, 600 (1979), the Court stated that in determining the level of procedural due process accorded minors who have been voluntarily committed by parents to mental health institutions, the three-pronged *Mathews v. Eldridge* test should be used. See Note, *What Ever Happened To Parham and Institutionalized Juveniles: Do Minors Have Procedural Rights in the Civil Commitment Area?*, 14 L. & PSYCHOL. REV. 281, 293-97 (1990).

203. In *In re M.N.M.*, 605 A.2d 921 (D.C. 1992), the court held that a father could contest a final adoption decree after the statute of limitations ran because his due process rights were violated by placing his child without notice to him. In *In re Adoption Of Kelsey S.*, 4 Cal. Rptr. 2d 615 (1992), the California Supreme Court determined that an unwed father's rights are protected where the mother intentionally frustrated the father's attempts to develop a relationship with his child. See also *In re Female Infant F.*, 594 N.Y.S.2d 303 (1993) (unless an unwed father

has or will suffer actual injury as a result of the conduct being contested, that there is causation between the challenged action and the injury, and that the injury could be redressed by access to the court.<sup>204</sup> The Court has recognized that children's interests may be greatly impacted by state dependency and parental severance hearings. "For a child, the consequences of termination of his natural parents' rights may well be far-reaching."<sup>205</sup> Even the dissent in *Santosky* agreed that "[t]he child has an interest in the outcome of the factfinding hearing independent of that of the parent."<sup>206</sup>

Siblings' lives are significantly and permanently changed by child dependency and parental severance hearings. Even if siblings are initially separated in different foster placements for what is intended to be a short time, that separation dramatically increases the probability that they will not be placed together if their parents' rights are later severed.<sup>207</sup> In addition, if one or more siblings are adopted into separate homes, the siblings will lose all association rights since adoption ends all prior natural blood relationships. "Children are placed in a special emotional and legal limbo after the termination of parental rights and prior to adoption; legal ties and contacts with biological parents are cut off and no substitute permanent ties yet exist."<sup>208</sup>

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meets statutory requirements, no notice of an adoption hearing is required); *In re Robert O.*, 604 N.E.2d 99 (N.Y. 1992). In *Pattrell v. Ayers*, No. 0049825, 1991 WL 258144 (Conn. Super. Ct. Nov. 26, 1991), the court stated that only persons who are the biological, adoptive, or foster parents of a child have standing to seek custody. In *re Adoption of Baby Boy Dzuravcak*, 600 N.E.2d 143, 144-45 (Ind. Ct. App. 1992), the court held that prospective adoptive custodial parents had standing at the custody hearing even though they did not have a finalized legal relationship with the child. Finally, the Court in *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989), stated that it is uncertain whether a putative natural father has historically had standing to contest the marital child's legitimacy. In that context, however, the Court noted even with standing the putative father could still not state a cause of action. *Id.* at 2343.

204. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982).

205. *Santosky v. Kramer*, 455 U.S. 745, 760 n.11 (1982).

206. *Id.* at 788 n.13 (Rehnquist, J., dissenting). In *Department of Public Aid ex. rel., Cox v. Miller*, 586 N.E.2d 1251 (Ill. 1992), the court held that a mother's contractual agreement to dismiss her paternity action did not bar a later action by the child who was held to have an interest independent and different from his parent.

207. See *supra* parts II and III.

208. MARK HARDIN & ANN SHALLECK, COURT RULES TO ACHIEVE PERMANENCY FOR FOSTER CHILDREN: SAMPLE RULES AND COMMENTARY 110 (1985); Note, *Third Party Custody and Visitation*, *supra* note 124, at 176 ("grandparent visitation ceases to operate as soon as the child regains a nuclear family through adoption"); ARK. CODE ANN. § 9-9-215(1) ("so that the adopted individual thereafter is a stranger to his former relatives for all purposes"); *In re Adoption of Schumacher*, 458 N.E.2d 94, 97 (Ill. App. Ct. 1983) (adoption terminates all legal rights and relationships between parents and "the natural parents' relatives in the child"); *Ex parte Bronstein*, 434 So. 2d 780, 782 (Ala. 1983). See also *In re Robin N.*, 9 Cal. Rptr. 2d 512 (1992) (de facto parents may visit child over natural parents' objections if court finds that loss of contact will harm the child); *In re N.S.*, 821 P.2d 931 (Colo. Ct. App. 1991) (maternal grandmother's adoption after

Some courts have denied standing to siblings who are not still living in their parents' home. In one case, the mother's relatives who had already adopted one sibling were denied standing in a hearing alleging that the mother had abandoned her youngest child.<sup>209</sup> In *Weber v. Weber*<sup>210</sup> the court denied standing to an adult sibling seeking visitation with a minor sibling still residing with their natural parents. The court determined that it could not order visitation unless there had been a divorce or separation, a death of a natural parent, a dependency or delinquency hearing, or the petitioner already had custody of the child.<sup>211</sup> The concurring opinion, however, stated that because siblings have the "natural, inherent and inalienable right to visit with each other" the court had jurisdiction to hear the adult sibling's petition.<sup>212</sup> The court in *L. v. G.*<sup>213</sup> reached the opposite conclusion and granted adult siblings standing to petition for visitation with their minor sibling at a site away from the parents' home in order to avoid the animosity between the father and stepmother and themselves. "[T]his court is satisfied that it possesses inherent equitable jurisdiction to entertain this action."<sup>214</sup> The court held that it could grant sibling visitation over the objections of the parents.<sup>215</sup>

Even though most jurisdictions recognize that both parents and children are parties in child dependency cases, there is a split over whether a trial court can order visitation in parental severance trials.<sup>216</sup> For instance, in *T.F. v. H.F.*<sup>217</sup> paternal grandparents petitioned for visitation with their deceased son's child. The court granted visitation until adoption by the stepparent, but rejected visitation after adoption because

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termination of parental rights severed paternal grandparents' visitation rights); *In re Marriage Of Groleau*, 585 N.E.2d 226 (Ind. Ct. App. 1992) (adoption by stepparent did not end paternal grandparents' visitation order). But see *In re Marriage Of Gayden*, 280 Cal. Rptr. 862 (1991) (the court's finding of harm to the child by severing third party visitation must be found by clear and convincing evidence). "When a child is adopted, he is issued a new birth certificate which indicates that he was born to his adoptive parents." Note, *Adoptee's Equal Protection Rights*, 28 UCLA L. REV. 1314, 1314-15 (1981).

209. *Care and Protection of Zelda*, 534 N.E.2d 7, 8-9 (Mass. App. Ct. 1989).

210. 524 A.2d 498 (1987).

211. *Id.* at 499.

212. *Id.* at 499-500.

213. 497 A.2d 215 (1985).

214. *Id.* at 218.

215. *Id.* at 221.

216. In a dependency case "[a] parent and a child, both being parties, have a right to a speedy adjudication hearing." *D.M.B. v. T.B.*, 481 N.W.2d 905, 911 (Neb. 1992). "The minor has the right to participate in a severance proceeding involving her." *In re Cochise County Juv. Dep. Action*, 793 P.2d 566 (Ariz. App. 1990). In some permanency planning hearings, however, the child is presumptively not present at the hearing. For instance, CAL. WELF. & INST. CODE § 366.26(e)(1) provides, in relevant part, that "[t]he minor shall not be present in court unless the minor so requests or the court so orders."

217. 483 N.W.2d 803, 804-07 (1992).

the adoptive parents, like natural parents, should have the power to determine with whom the child may associate after adoption.<sup>218</sup> The appellate court rejected that reasoning and instead held that once the grandparents were granted visitation rights, they could not be deprived of that association, even after adoption, without a due process hearing.<sup>219</sup> But in *Adoption of Ridenour* the court held that the juvenile court abused its discretion in granting grandparents visitation rights after a non-relative adoption.<sup>220</sup> In *In re H.F. & F.F.* the court held that grandparent visitation could continue after a stepparent adoption if the father died, but not if the father voluntarily terminated his parental rights since grandparent visitation was derivative of parental rights.<sup>221</sup> One court has held that a "court rendering a judgment of adoption has no jurisdiction to simultaneously grant visitation rights to natural relatives of the adopted child, and such provisions in adoption orders are void . . . This has been held to be true even where the parties have consented to the provision."<sup>222</sup>

Once siblings' associational rights are recognized as a fundamental liberty interest, many of the distinctions articulated in conflicting holdings regarding jurisdiction to consider adoption and future sibling visita-

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218. The trial court's reasoning that parents have absolute control over the decision of with whom the children will be permitted to associate was rejected in *Mark V. v. Gale P.*, 540 N.Y.S.2d 966, 967 (Fam. Ct. 1989), which stated that "[c]hildren are not chattel and their right to continue to know their siblings must be considered to be co-equal with a parent's right to choose with whom his child associates."

219. *Id.* at 806. The concurring opinion relied, in part, upon a state statute giving the court jurisdiction to "grant reasonable visitation rights to relatives who have maintained 'a relationship similar to a parent-child relationship with a child who has been adopted.'" *Id.* at 807; see also Wis. STAT. § 48.925 (1991). A similar result occurred in *In re Adoption of Elizabeth Ann*, Nos. 16-CA-89, 15-CA-89, 1990 WL 16039 (Ohio Ct. App. Feb. 20, 1990). The court held that grandparents should be granted visitation subsequent to adoption and that it would be in the child's best interest to be adopted by a family that would welcome continued grandparent visitation. See also *In re Adoption No. 92A41*, 622 A.2d 150 (Md. Ct. Spec. App. 1993) (holding that an adoption decree does not automatically negate a grandparent's court-ordered visitation); *Dugas v. Adoption of Dugas*, 614 So. 2d 228 (La. Ct. App. 1993). In *In re Elizabeth M.*, 283 Cal. Rptr. 483, 489 (Ct. App. 1991), the court held that "[s]ibling visitation, just like parent visitation, is not inconsistent with an order authorizing a petition to terminate parental rights."

220. 574 N.E. 2d 1055, 1060 (Ohio 1991). The court relied upon OHIO REV. CODE ANN. § 3107.15 which provides that adoption terminates "all legal relationships between the adopted person and his relatives."

221. 483 N.W. 803, 804-06 (Wis. 1992). At common law, grandparents' visitation rights were derived through the natural parents. *In re Adoption of a Child By M.*, 355 A.2d 211 (N.J. Super. Ct. Ch. Div. 1976).

222. *In re Adoption Of Schumacher*, 458 N.E.2d 94, 99 (Ill. App. Ct. 1983) (citations omitted). See also *In re J.M.*, 589 N.E.2d 1101 (Ill. App. Ct. 1992) (a court may not condition adoption on the consent by adoptive parents to continued contact between child and the natural family); *In re Adoption Of Topel*, 571 N.E.2d 1295 (Ind. Ct. App. 1991) (consent to adoption by father on condition of his continued visitation was invalid and sufficient basis to vitiate consent).

tion at parental severance hearings disappear.<sup>223</sup> If the siblings will be separated during the period of legal limbo after parental severance but before permanent placement through adoption, then their rights will have been adversely harmed without a hearing. Because the longer siblings remain apart the less likely that they will be permanently placed together or that they will have liberal and frequent visitation if permanently placed apart, the liberty loss can be permanent.<sup>224</sup> Therefore, siblings have a right to a timely hearing on their placements should parental rights be severed. Since all parties will be present at the termination hearing, it seems the most efficient and effective moment to litigate sibling association rights.

Those opinions which hold that the issue of sibling custody and visitation must wait until after adoption to permit the new adoptive parents to determine with whom the adoptees can associate are not well reasoned. First, to deny siblings a current determination of their perfected association rights elevates a non-fundamental liberty interest (the prospective adoptive parents') over a fundamental interest (the siblings'). Second, as was earlier discussed, there is no certainty that the siblings will ever be adopted or that they will be adopted by the current prospective adoptive parents.<sup>225</sup> Therefore, the certain loss of sibling association rights at parental severance substantially outweighs the potential, yet not certain, rights of prospective adoptive parents to determine whether brothers and sisters should continue to see one another. Perhaps most importantly, if the court indicates after parental severance that siblings' best interests would be served by continued association, then that finding will drive the Department's search for a permanent placement which will either take custody of the siblings as a unit or which will be willing to grant liberal sibling visitation. Further, not only will siblings be able to continue associating until permanently placed,

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223. Denying access to court process to perfect family relationships may deny due process. Treiman, *Equal Protection and Fundamental Rights—A Judicial Shell Game*, 15 TULSA L.J. 183, 198-99 (1980) (discussing *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

224. For a lengthy discussion of the effects of temporary custodial separation of siblings on their permanent placements, see *supra* parts II and III.

225. Determining future child placements is not a science. "[In] adoption cases, courts must be particularly careful to avoid conjecture as to future possible departmental action." *Adoption Of Michelle T.*, 117 Cal. Rptr. 865 (Ct. App. 1975). Also, a significant number of adoptive parents seek to revoke adoptions. Kelley Bennison, *No Deposit No Return: The Adoption Dilemma*, 16 NOVA L. REV. 909 (1992); Kathleen M. Lynch, *Adoption: Can Adoptive Parents Change Their Minds?*, 26 FAM. L.Q. 257 (1992); Mary Schwartz, *Fraud in the Nursery: Is the Wrongful Adoption Remedy Enough?*, 26 VAL. U. L. REV. 807 (1992); Note, *When Love Is Not Enough: Toward a Unified Wrongful Adoption Tort*, 105 HARV. L. REV. 1761 (1992). See also Note, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. FAM. L. 549 (1983-84); Note, *Constitutional Implications of Adoption Revocation Statutes*, 8 PAC. L.J. 611 (1977); Note, *Abrogation of Adoption by Adoptive Parents*, 19 FAM. L.Q. 155 (1985).

but the court's best interest determination will also facilitate permanent placements where continued sibling association will not detrimentally affect the new permanent family relationships.

The second line of cases discussed above, which deny adult siblings standing to seek judicially ordered visitation with minor children still living with natural or adoptive parents, are equally vulnerable to due process attack. First, can the state sufficiently justify eviscerating all siblings' fundamental associational rights based upon the age of the siblings or upon the residence of the siblings? It is one thing to say that a court has jurisdiction to deny visitation between a minor sibling living with parents and an adult sibling living apart if the court determines after a due process hearing that such visitation would not be in the minor sibling's best interest. But denying all adult siblings standing to bring a visitation petition is overbroad and well beyond the compelling needs of the state. A generalized state claim that such contested hearings may be disruptive to some families is not a sufficiently compelling interest to deny siblings a hearing. There are enumerable reasons why parents may refuse to continue visitation between minor and adult siblings. Some of those reasons may be irrational and unreasonable and only the court is in a neutral position to determine whether the reasons are sufficient to warrant severance of siblings' associational rights.<sup>226</sup> Permitting siblings a hearing on their continued association after parental rights are terminated is consistent with the modern trend of expanding siblings' standing to bring custody issues on their own rather than through a parent, state attorney, or other third party representative.<sup>227</sup>

## 2. RIGHT TO COUNSEL AND RIGHT TO TESTIFY

The Court in *Lassiter v. Department of Social Services*<sup>228</sup> held that the three-pronged procedural due process test used in *Mathews v. Eldridge*<sup>229</sup> determines whether parents have a federal due process right to counsel when the state attempts to interfere with the parent/child relationship. "The Court placed the burden on the moving party to rebut the presumption that appointed counsel is not required in civil cases."<sup>230</sup> The *Lassiter* court did not decide whether all parents must be appointed

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226. Parents may refuse the sibling visits, not because they will harm the minor child, but because they are angry with the adult child for reasons completely separate from the question of what is in the minor child's best short and/or long-term interest.

227. See *supra* note 174 (citing recent cases granting children standing to bring actions to determine whether parental rights should be terminated or whether custody arrangements should be changed).

228. 452 U.S. 18 (1981).

229. 424 U.S. 319, 336 (1976).

230. William Wesley Patton, *It Matters Not What Is But What Might Have Been: The Standard of Appellate Review for Denial of Counsel in Child Dependency and Parental Severance*



counsel in dependency and parental severance trials, but rather left the decision to trial courts on a case by case basis.<sup>231</sup> In *Lassiter*, the Court summarized the interests to be balanced:

[T]he parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability . . .); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.<sup>232</sup>

Because the Court concluded that the evidence in *Lassiter* was not complicated, did not involve the examination of experts, did not involve any difficult legal issues, and presented a very strong case for the State's petition, denial of counsel was determined not to be fundamentally unfair.<sup>233</sup>

Cases where siblings wish to stay together are quite different from routine parental severance cases, especially those common cases which rarely involve battles among experts, such as allegations of abandonment or failure to attend rehabilitative family reunification services. The question of whether siblings should be placed together will require psychological testimony in order to determine whether sibling bonds should be preserved or whether the siblings' best interests will be better served by separate placement, by visitation, or by confidential adoption. Neither lawyers nor judges possess the necessary training to make those determinations. Further, because siblings have a constitutional right to remain together unless the State can prove otherwise, the State is likely to present substantial expert testimony in order to meet its burden. Because the State's position will be adverse to at least one of the siblings who is attempting to perfect association, such a conflict of interest requires the appointment of separate counsel. Nor can the parents' counsel, if one is retained or appointed, necessarily present the siblings' case because their interests may be completely conflicting. The children's counsel may agree that severance from parents and placement of siblings together may be in the children's best interests, while the parents' counsel argues for no parent/child severance.<sup>234</sup> Additionally, if

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*Trials*, 12 WHITTIER L. REV. 537, 538 (1991); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 25-27 (1981).

231. *Lassiter*, 452 U.S. at 30-31.

232. *Id.* at 31.

233. *Id.* at 32.

234. Children's interests are frequently forgotten when the state and parents battle. *John E. v. John Doe*, 564 N.Y.S.2d 439 (App. Div. 1990) provides a dramatic example. An unwed father who had no prior relationship with his now three year old son sought to set aside an adoption in

the parents' rights are severed, they may or may not want the children placed with a relative, a custody decision which the children may oppose.

Legal scholars have almost unanimously concluded that children need independent counsel in dependency and parental severance hearings.<sup>235</sup> In addition, "[b]y statute in almost every state, children in civil child protective proceedings [child abuse and neglect] initiated by the state or county have a right to have a representative appointed by the court to independently protect their interests in the litigation."<sup>236</sup> But few courts require appointment of counsel at parental termination hearings where the family's and child's interests are greatest.<sup>237</sup> Nonetheless, because attorneys are very expensive, about half the states appoint non-lawyers as lay guardians ad litem or as C.A.S.A.s (Court Appointed Special Advocate) to represent the child.<sup>238</sup> Most experts agree that lay

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which the son had strongly bonded with the adoptive parents. The majority opinion did not address the son's due process interests in the hearing and instead merely focused on what it determined was the child's best interest placement. Justice Rosenblatt, concurring, noted that:

[n]o Law Guardian has been appointed to represent Daniel's interest. Surely, no challenge to a child's legitimacy (and with it, custodial fate) should ever succeed with no one representing the child's interest. To even contemplate an order of filiation, which is to say, bastardization, with no representation for Daniel, would amount to a condition in which the child's rights are not being adequately protected . . . .

*Id.* at 448 n.4 (Rosenblatt, J., concurring).

235. "For over twenty-five years, observers and participants in the judicial process have discussed the need for representation of children involved in custody disputes." Linda Elrod, *Counsel for the Child in Custody Disputes: The Time Is Now*, 26 FAM. L.Q. 53, 53 (1992); *see id.* n.4 (providing a list of dozens of articles arguing for independent counsel for children). "Without independent representation, it is impossible to guarantee that the best interests test will be applied in such a manner as to protect the child's best interests." Emile R. Kruzick & David H. Zemans, *In the Best Interests of the Child: Mandatory Independent Representation*, 69 DENV. U. L. REV. 605 (1992). *See also* Note, *California Welfare and Institutions Code Section 317: Advocating a Change to Require Independent Counsel for All Children*, 23 LOY. L.A. L. REV. 1385, 1432 (1990). One court has determined that since contested adoption proceedings endanger children's rights as much as parental termination hearings, independent counsel is required for the children. *In re Jay R.*, 197 Cal. Rptr. 672 (Ct. App. 1983).

236. Howard Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 268 (1991). Even though representation is mandated "[a] recent study indicates that children . . . are frequently not provided representation." *Id.* at 276.

237. *Id.* at 269. However, the court in *In re Juan H.*, 13 Cal. Rptr. 716, 718 (Ct. App. 1992) held that failure to appoint separate counsel for a 4-year-old was not prejudicial error because as the child was "unable to effectively communicate his wishes to the social worker, he would also be unable to communicate with independent counsel." The reasoning is quite weak for several reasons. First, perhaps the child did not develop a trust relationship with the social worker because the worker may have appeared hostile based upon previous meetings with the child and other family members. Second, even if the child could not articulate desires in a sophisticated manner, the independent counsel could still use her lawyering skills in fact investigation, confrontation, cross-examination, motions, trial objections, and closing argument. The court's analysis misses the strategic benefits to the child of having independent representation.

238. Davidson, *supra* note 236, at 268-69.

representatives are not the equivalent of attorneys, and one court has recently determined that a C.A.S.A. can not file motions or appeals because the C.A.S.A. function is merely to conduct an independent investigation and report to the court.<sup>239</sup> The inadequacies of lay representation have been clearly delineated: 1) many jurisdictions define the duty of the guardian ad litem as representing what she perceives to be the child's best interests rather than the child's wishes; 2) there may not be a guardian ad litem/child confidentiality privilege; 3) if the guardian ad litem represents the child's wishes rather than the perceived best interests of the child, judicial immunity may be waived, thus creating a reason not to express the child's desires; 4) historically, guardians ad litem have failed to conduct adequate investigations or continue representing children in cases throughout their judicial life because of "poor reimbursement, heavy caseloads, and lack of supervision."<sup>240</sup>

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In what might seem to be a cost-containment measure, County Administration and the Office of County Counsel [the state agency that prosecutes dependency and parental severance cases] appear intent on eliminating or severely limiting the appointment of minors' counsel. Minor's counsel has the opportunity, if it properly performs its mandated investigatory function, to be the only totally objective party to proceedings.

FAMILIES IN CRISIS: REPORT NO. 2 SUPPLEMENT 6 (San Diego County Grand Jury June 29, 1992).

239. *In re D.D.P., Jr.*, 819 P.2d 1212 (Kan. 1991). Also in *In re Melicia L.*, 254 Cal. Rptr. 541 (Ct. App. 1988), the court held that a sibling in a dependency case was prejudiced by not being appointed separate counsel since she was the only sibling not personally sexually abused and no advocate argued whether she, as opposed to her brothers and sisters, should stay with her parents.

240. Elrod, *supra* note 235, at 59-69. New York has recently promulgated standards for guardians ad litem that require a fact investigation that includes obtaining all relevant documents, interviewing and observing the child, determining whether evaluations are necessary, and interviewing all relevant parties and prospective witnesses. The new rules require the guardian ad litem to continue with the case and represent the child in "any subsequent relevant proceeding, including a modification, a violation, or an enforcement action." See Marie Walton & Donna Schmalberger, *Standards of Practice for Guardians Ad Litem*, 12 ABA JUV. & CHILD WELFARE L. REP. 11-12 (March 1993). Under the Colorado Bar Association Standards of Practice For Guardians Ad Litem, the GAL is the attorney of record but "does not necessarily represent a child's desires but should formulate an independent position regarding relevant issues." Further, "[t]he child's wishes should be considered by the GAL, but need not be adopted by the GAL unless doing so serves the child's best interest." *Id.* at 13. In a survey of juvenile delinquents represented by guardians ad litem, 17% "did not know what the GAL was supposed to do." Regina Huerter & Bonnie Saltzman, *What Do "They" Think? The Delinquency Court Process in Colorado as Viewed by the Youth*, 69 DENV. U. L. REV. 345, 353 (1992). The adversary nature of dependency cases sometimes obfuscates the best interests of children as the state and parents' attorneys zealously represent their client's interests. Wanda Coats, *Settlement and Negotiation of Dependency, Neglect, and Abuse Cases*, in USING THE LAW FOR CHILDREN: NEW HORIZONS FOR ATTORNEYS AND EXPERT WITNESSES 78 (1992). Because the government attorneys bringing the dependency or severance case have conflicts with the children's interest, they "are not the most ideal representatives of children in dependency proceedings." Robert Fellmeth, *Judicial and Child Advocate Pilot Project*, in USING THE LAW FOR CHILDREN: NEW HORIZONS FOR ATTORNEYS AND EXPERT WITNESS 145; see also James Strickland, *Risk Reduction Techniques for Child Welfare and Protection Service Programs: Putting in Stop Bells and Whistles*, in REPRESENTING CHILDREN IN COURT 52-53 (1990). "One of the major difficulties confronting children are the

It is difficult to marshal any argument, other than cost, to deny separate counsel to children who may not only lose contact with their parents, but who may also permanently lose association with brothers and sisters. Some might argue that even if providing children with counsel is not prohibitively expensive, the additional lawyers will frustrate the informal nature of the hearings and will unduly delay the court process. Those arguments mischaracterize the reality of the system. First, these are not ordinary civil actions which take days, weeks, or months to litigate. A study of the Los Angeles Dependency Court System found that each day a dependency judge hears between five to ten new cases and as many as twenty-five periodic review hearings in other cases.<sup>241</sup> In addition, very few dependency cases are ever litigated in court; only 2% to 10% of the cases are even calendared for trial since almost all cases are informally resolved.<sup>242</sup> Children's interests are at even greater risk in those closed-door negotiations if they are not represented by independent counsel because the formal court machinery is not present to protect them.<sup>243</sup> When added to the numerous conflicts of interest between the state attorney and children, and the inability of guardians ad litem or C.A.S.A.s to zealously and competently represent the child's wishes, the necessity of appointing independent legal counsel for siblings becomes clear. Children, much more than parents, need an attorney to present their case and rebut critical evidence which will permanently determine with whom they associate, bond, and develop as mature citizens.<sup>244</sup> The description of most parent's inability to ade-

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changes in their legal representation. Throughout the proceeding, the representatives may change at different phases of the hearing process . . . [which] has a detrimental impact on the quality of the representation . . . ." Alan Watahara, California's Foster Care-Dependency System: Forgotten Children in a Bureaucracy of Care 340 (Ph.D. Dissertation, University of California, Berkeley, 1987). For an egregious example of representation by a guardian ad litem that the court termed merely perfunctory yet not sufficient to warrant reversal, see *In re J.V.*, 464 N.W.2d 887 (Iowa Ct. App. 1990). In *Bawidamann v. Bawidamann*, 63 Ohio App. 3d 691 (Ct. App. 1989), the court held that the guardian ad litem could not simultaneously act as the child's attorney and as a court factfinder because of the conflict of interest in an attorney using his client's statements against him.

241. THE CHILDREN'S BUDGET OF LOS ANGELES COUNTY GOVERNMENT: THE L.A. ROUNDTABLE FOR CHILDREN 112 (1986); *Children's Services Rx: More Money, Fewer Cases*, DAILY BREEZE, March 23, 1986, at A1; *Child Abuse a Growing Tragedy in L.A. County*, L.A. TIMES, Aug. 21, 1983, at 1.

242. See, William Wesley Patton, *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 U. LOUISVILLE J. FAM. L. 37, 48-50, n.45 (1992-93).

243. For an analysis of the dangers of informal dispute resolution in child dependency and parental severance cases, see Patton, *supra* note 121.

244. Children's right to counsel under *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), will provide them much greater procedural protection than a mere statutory appointment because many courts have held that statutory appointments do not provide the concomitant right to competent counsel. For a discussion, see Patton, *supra* note 230, at 539-41. In *In re Jamie T.T.*,

quately defend against termination proceedings applies logarithmically to siblings who are about to be permanently separated.

Expert medical and psychiatric testimony, which few parents [and no children] are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life [and children will have been abused and/or neglected], and who are, at the hearing, thrust into a distressing and disorienting situation.<sup>245</sup>

Obviously, the right to notice, standing, and counsel will mean very little if siblings can not present their case and rebut the State's, parents', and other third-party prospective adoptive parents', foster parents', and relatives' arguments.<sup>246</sup> Most state legislatures have recognized the importance of gaining the child's views either in court or in chambers if less hostile surroundings are needed to protect the child. "Approximately half the states have statutes listing the child's custodial wishes as one factor the court must consider, or give special weight to, when making custodial determination."<sup>247</sup> Since the child's personality, lifestyle, and emotional bonds will be permanently determined by the court's decision, denying access to the hearing to express their views and also to assist counsel in marshalling and rebutting evidence would deny them fundamental fairness.

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No. 66712 (N.Y. App. Div. July 1, 1993), the court held that a 13-year-old child was denied her constitutional right to effective counsel in an abuse and neglect proceeding since return of the child to her father's custody could result in a liberty deprivation if the father, who she claimed abused her, brought a status offense allegation against her.

245. *Lassiter*, 452 U.S. at 29.

246. In *In re Donna H.*, 602 A.2d 1382 (Pa. Super. Ct. 1992), the court remanded a dependency case where the trial court denied a child's counsel an opportunity to cross-examine witnesses, introduce testimony, or call witnesses. In *re Brooke D.*, 598 N.Y.S.2d 633, 634 (App. Div. 1993), the court stated that, "[i]n the absence of separate representation of children with conflicting interests concerning sibling visitation, it would have been impossible for the Law Guardian to participate meaningfully in a hearing on that issue." *Id.*

247. Davidson, *supra* note 236, at 270. For a list of cases and statutes recently promulgated to protect child victim/witness, see Patton, *supra* note 38, at 474 n.2. See also OHIO REV. CODE ANN. § 2151.414 (D)(2), (3) (providing that the court in determining permanent custody shall consider "[t]he wishes of the child, as expressed directly by the child or through his guardian ad litem, 'with due regard for the maturity of the child'"); CAL. WELF. & INST. CODE § 366.26(g) (providing that in "all termination proceedings the court shall consider the wishes of the child"); KY. REV. STAT. ANN. § 199.500 (providing that if a child is 12 or older, the child's consent to adoption "shall be given in court, provided that the court in its discretion may waive this requirement"); ARIZ. REV. STAT. ANN. 25-332 (A)(2), (3) (providing that the court may consider "[t]he wishes of the child as to his custodian"); GA. CODE ANN. § 19-7-3. The United Nations Convention on the Rights of the Child, Article 12, Section 1 provides that "[s]tates parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." Davidson, *supra* note 236, at 255 (quoting from the U.N. CHARTER).

### 3. THE PROPER BURDEN OF PROOF FOR SEPARATING SIBLINGS IS CLEAR AND CONVINCING EVIDENCE

The Court in *Santosky v. Kramer* held that the State must demonstrate by clear and convincing evidence that parental rights should be terminated; the standard of review has both "practical and symbolic consequences."<sup>248</sup> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"<sup>249</sup> After *Santosky* noted the tremendously unequal resources the State can marshal against parents' usually meager resources, and after assuming that in termination hearings the "State, the parents, and the child are all represented by counsel,"<sup>250</sup> the Court held that fundamental fairness required a clear and convincing demonstration of the necessity of parental termination and that the elevated standard would not create an economic burden on the State.<sup>251</sup>

It is difficult to argue that siblings who may not be represented by an attorney, or who are merely represented by a lay guardian ad litem or C.A.S.A., have the ability to marshal a case comparable to the State's. Children will be less able than adults to assist their representative in the complex fact investigation, case preparation, direct and cross examination of witnesses, and closing argument. If anything, when the court is

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248. 455 U.S. 745, 764 (1982). See also *In re Adoption of A.G.K.*, 728 P.2d 1, 7 (Okla. 1986) (holding that clear and convincing evidence is required before parental rights may be severed).

249. *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358 (1970) (Harlan, J., concurring)).

250. *Santosky*, 455 U.S. at 749 n.2, 761-62.

251. The California Supreme Court in *Cynthia D. v. Superior Court Of San Diego County*, 93 D.A.R. 6788 (Cal. 1993), held that parental termination pursuant to CALIFORNIA WELFARE & INSTITUTIONS CODE § 366.26 can be supported by a preponderance of the evidence standard because the California system differs significantly from the one reviewed in *Santosky*. The court noted that the California hearing centers on whether the child is adoptable and on a finding that family reunification services should end, and not on an initial determination of parental unfitness. *Id.* at 6790, 6792. Second, the court stated that the risk of erroneous factfinding was reduced in the California system which attempts to reunify the family members through a succession of hearings where parents are represented by counsel. Justice Kennard, dissenting, stated that:

When termination of parental rights is at issue under the California dependency statutes, the child will always be a dependent of the court and not in parental custody. This situation tends to magnify the state's ability to marshal its case.

Moreover, the potential for class or cultural bias in a decision . . . is no less acute in California than in New York.

*Id.* at 6797. The *Cynthia D.* holding was predicated to a great extent on the mandatory appointment of counsel for indigent parents. No similar California statute, however, mandates appointment of counsel for children in informal hearings where siblings may be separated. Therefore, even should the United States Supreme Court uphold the lower standard of proof in *Cynthia D.*, it would not change the need for the higher clear and convincing evidence standard when the court involuntarily severs siblings' association rights.

considering the permanent severance of sibling association, the risk of factual errors or undiscovered evidence is magnified. Because using a clear and convincing evidence standard will provide more fundamentally fair and accurate procedures, and because it will not impose "substantial fiscal burdens on the state," that standard should be adopted as a minimum factual threshold.<sup>252</sup>

Because siblings' association rights are fundamental, the state's burden to justify severance should require a showing of a compelling governmental interest and that severance is the least drastic alternative capable of achieving that interest. The entire child dependency system is centered on a less drastic alternative model. The Federal Adoption and Assistance Act and all state statutory child dependency schemes start with the premise that state intrusion into the family should be as limited as possible while still protecting children. State involvement begins with an investigation and then can proceed through a series of more drastic measures, such as informal supervision, formal supervision with court imposed conditions, temporary out-of-home custody of children, and as a last resort, parental severance.<sup>253</sup>

Although the Court has most often used a less drastic alternative analysis in First Amendment cases,<sup>254</sup> it has also similarly limited gov-

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252. See *Santosky*, 455 U.S. at 767. The failure of courts to recognize that separating siblings in a parental termination raises constitutional association issues has infected the standard of appellate review. Instead of applying a harmless error standard, courts treat the issue like one of custody determinations in divorce cases. The trial court's decision to separate siblings will be affirmed unless the appellate court finds that the decision was "plainly wrong or unsupported by the evidence." *Fowler v. City Of Manassas Dep't Of Social Servs.*, 1995 WL 16575 (Va. Ct. App. January 17, 1995).

253. See 42 U.S.C.A. §§ 670; CAL. WELF. & INST. CODES § 300; Patton, *supra* note 38, at 483-96. States have more than a humanitarian interest in using a less drastic alternative analysis because removing children temporarily or permanently from their parents is extremely expensive. "[I]t costs approximately \$3000 a year to provide a family with abuse counselling and in-home services through the civil dependency system" and "every \$1 spent on family preservation saved \$3 in long term costs." Patton, *supra* note 121, at 41, 49 (relying on WENDY LAZARUS & MICHELLE GONZALEZ, CALIFORNIA: THE STATE OF OUR CHILDREN 10 (1989)); THE CRISIS IN FOSTER CARE: REPORT NO. 7, 6 (Report by the 1991-92 San Diego Grand Jury, June 29, 1992) (analyzing LITTLE HOOVER COMM'N, MENDING OUR BROKEN CHILDREN: RESTRUCTURING FOSTER CARE IN CALIFORNIA (1992)). Nationally, the cost of foster care is approximately \$3 billion a year, with a general average of \$10,000 per foster child. Besharov, *The Misuse of Foster Care: When the Desire to Help Children Outruns the Ability to Improve Parental Functioning*, 20 FAM. L.Q. 213, 230 (1986). It costs \$6,000 per month to place children in the L.A. County run MacLaren Children's Center, \$1500-\$4,000 for a group home placement, and \$300-\$1,200 in foster care (depending upon the child's needs). Sandra Parker, *New Avenue for Legal Aid: Children's Rights Project*, L.A.D.J., May 22, 1990, section II, at 1. In New York, foster or adoptive subsidies for a special needs child cost \$371 to \$1290 per month, whereas "the standard welfare allotment for one's own biological child is about \$104 per month." Ellen Hopkins, *Adopting: The Color Line*, MIRABELLA, May, 1990, at 66.

254. See *TRIBE*, *supra* note 150, at 983-86. See also Guy M. Struve, *The Less-Restrictive Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967).

ernmental regulation of privacy. For instance, in *Hodgson v. Minnesota* the Court noted recently that the Minnesota abortion statute was unreasonable and that the state could "adopt less burdensome means to protect the minor's welfare."<sup>255</sup> State courts have also required a less drastic alternative analysis before terminating parental rights.<sup>256</sup> The same rationale applies to the state's assertion that siblings should be separated. Requiring a less drastic alternative analysis to sibling association issues is thus consistent with all current federal and state statutory policies of keeping families together whenever possible.

Under a less drastic alternative analysis the state must first demonstrate that it is not possible to find an acceptable placement which will maintain the sibling group. If no such placement exists, the state must next proffer a plan which will provide siblings in different placements the best opportunity to continue contact; frequent and extensive visitation should be provided. Finally, if the state argues that one or more siblings should be permanently severed into a confidential adoptive home, the state should be required to demonstrate: 1) that it has used reasonable efforts to secure adoptive placements for the entire sibling group and that it has attempted to locate such a placement for a reasonable period of time; 2) that splitting the siblings is in their best interests rather than keeping them together in long term guardianship or in a small group home;<sup>257</sup> 3) that if separation is required, reasonable efforts have been made to secure adoption with a family that will permit and encourage continued association among siblings; and 4) if confidential adoptive placement is needed, that the state will provide a means for adult siblings to locate one another.

Under the less drastic means test, state statutes that prohibit sibling visitation after adoption are unconstitutionally overbroad since they

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255. *Hodgson v. Minnesota*, 110 S. Ct. 2929, 2947 (1990).

256. See, e.g., *In re Carmaleta B.*, 146 Cal. Rptr. 623, 627 (1978). Sometimes the less drastic alternative test is no more than a demonstration that the custody plan is in the best interest of the child. The test "can be met by showing that return of the minor [to the parents] will mean disrupting a healthy existing bond with psychological parents in the mere hope that the biological parents will one day be able to provide a suitable 'home.' " Van Deusen, *supra* note 121, at 430; see also *In re Appeal In Maricopa County Juvenile Action*, 840 P.2d 730 (Ariz. 1990) (holding that before a father's contacts with the child could be severed, the state must demonstrate that the change would be in the child's best interest). See also *Petition of Department Of Public Welfare*, 381 N.E.2d 565, 569-73 (Mass. 1978) (the least drastic alternative analysis must consider the rights and needs of the parents, child and state).

257. Today, the preferred form of residential treatment is the group home. The group home theoretically has the dual advantage of offering a therapeutic setting and a personal atmosphere modeled on an extended family . . . yet the potential of group homes has not been realized, in part, because residential treatment has been relegated to a disfavored status.

Susan Brooks, *Rethinking Adoption: A Federal Solution to the Problem of Permanency Planning for Children with Special Needs*, 66 N.Y.U. L. REV. 1130, 1162-63 (1991).



totally sever all separated siblings' association rights without a demonstration by the state that visitation will either make permanent child placement unreasonably difficult or cause substantial harm to the children. In addition, it is not enough that the state present evidence that keeping siblings together may cause some harm to the children or may create some difficulty for the Department. The short-term psychological harm to siblings must be considered together with the long-term effects of separating them.<sup>258</sup> For instance, in *Hadick v. Hadick*,<sup>259</sup> an expert testified that separating two healthy siblings from their handicapped brother would be best because keeping them all together would disadvantage the healthy children in so far as the handicapped sibling's needs would always come first. The appellate court, however, noted that even though it might be easier to separate the siblings, it was just as likely that the healthy siblings would benefit and be strengthened by helping with the care because they would learn "sensitivity, caring, loving, and understanding."<sup>260</sup> If the state can demonstrate by clear and convincing evidence, in a hearing that affords siblings procedural protection, that the separation of siblings is in their long-term best interests, then justice will have been served.

## VI. CONCLUSION

In a recent divorce settlement Judge Dennis J. Quillen gave the divorcing spouses one dog each on Monday through Saturday. On Sundays each spouse was granted visitation with both dogs for four hours. The judge further ordered that the dogs have time to visit with one another and "undergo an examination by a veterinarian to determine if separation causes any psychological damage [to the dogs]."<sup>261</sup> Would that siblings were treated like dogs.

Tens of thousands of brothers and sisters are torn apart and placed in separate homes without adequate due process hearings, without a

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258. For a sophisticated analysis of short versus long-term effects of sibling placement, see *In re Carlos A.*, 1992 WL 161990 (Conn. Super. Ct. July 2, 1992). The court in *In re Guardianship of J.C.*, 608 A.2d 1312, 1320 (N.J. 1992) held that the state must prove "by clear and convincing evidence that separating the child from his or her foster parents [by returning her to her natural parents] would cause serious and enduring emotional or psychological harm."

259. 603 A.2d 915, 921-22 (1992).

260. *Id.* at 921-22. Courts and legislatures view children as vulnerable when convenient and as self-reliant when it serves purposes such as waiving constitutional rights or in declaring emancipation from their parents. "Declarations of emancipation are obtained with stunning ease and speed . . . the few hearings that were held were perfunctory, often taking five or ten minutes . . . [and the] exchange between the judge and minor was minimal at best." Carol Sanger & Elenor Willeman, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J. L. REF. 239, 247 (1992).

261. Dick Goldberg, *The Law Revue: Divorce Is Rough on the Little Ones*, L.A.D.J., Dec. 9, 1992, section II, at 1.

showing of necessity, without a demonstration of less intrusive violations of their liberty interest in associating, and without evidence that eliminating short-term trauma will provide long-term psychological health. It is time to protect Hansel and Gretel from legislative and judicial good intentions. It may be better they remain together in an old brick building than be unnecessarily separated into different candy-coated cottages.

## APPENDIX

The following sibling data was used to compile the comparative sibling placement chart, *supra* Chart II and the statistical discussion, *supra* Part III.

## I. ALABAMA

Alabama has very few children in foster care. In 1990, there were 1,058,788 children under 18 living in state and only 25,473 reports of child abuse were received.<sup>262</sup> In 1990, 37,173 children were the subject of child abuse investigations and in 16,009 of those cases abuse was substantiated.<sup>263</sup> Of the substantiated cases, only 489 children were removed from their home, and 5,785 families received additional services regarding child abuse.<sup>264</sup> In 1992, Alabama placed 37 sibling groups for adoption:

1. 19 groups of 2 siblings;
2. 14 groups of 3 siblings;
3. 3 groups of 4 siblings; and
4. 1 group of 6 siblings.<sup>265</sup>

Data regarding the number of siblings separated into different placements and the frequency of sibling visitation in Alabama was not available.

## II. CALIFORNIA

In 1990, there were 7,750,725 children under 18 living in California and there were 343,222 reports of child abuse or neglect involving 553,782 children.<sup>266</sup> Of those reports, 53,236 were substantiated, involving 78,512 children.<sup>267</sup> California has a very high percentage of children removed from their homes during dependency hearings. "Consistently since 1981 courts have removed two-thirds of all children at the dispositional hearing."<sup>268</sup> Between 67,000 to 100,000 children lived in

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262. NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM, *supra* note 51, at 8.

263. *Id.* at 12.

264. *Id.* at 17. The number of children removed from their home in Alabama is lower than the national median. "Thirty-three States reported that approximately 73,500 children were removed from their homes during 1990. These children were approximately 13 percent of the children who were substantiated and/or indicated in their States." *Id.* at 27. However, those 33 reporting states did not include the states with the largest number of substantiated cases of abuse such as California and New York.

265. Letter from Judge Richardson, Consultant Office of Foster Care, State of Alabama Department of Human Resources, to Professor Patton (Oct. 5, 1992) (on file with the author).

266. NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM, *supra* note 51, at 8.

267. *Id.* at 8, 12. "In California, there were 45,924 dependency court filings during fiscal year 1988-1989. *Where Have All the Children Gone?*, *supra* note 40, at 126 n.5 (citing 2 JUDICIAL COUNCIL OF CAL., 1990 ANNUAL REPORT 63 (1990)). In 1989, "2,584 more children entered the system than exited." *Id.* at 129 n.30.

268. *Where Have All The Children Gone?*, *supra* note 40, at 130 n.31. In Los Angeles dependency dispositional hearings in 1989, 68% of the children were removed from the parents'

out-of-home placements in California each year between 1989-1992.<sup>269</sup> Although California does not keep records of sibling out-of-home placements, it was recently stated to the California Legislature that "between 56% and 85% of children in care also have siblings in care."<sup>270</sup> Therefore, if we take the most conservative estimate of the number of California children living in out-of-home placements in 1990, 67,000, and multiply it by the most conservative estimate of the percentage of those children with siblings, 56%, we determine that approximately 37,500 siblings were living in out-of-home placements in California in 1990. California, however, does not formally track or report the number of siblings who are placed into different out-of-home care.

In order to determine how many siblings were placed into separate out-of-home arrangements, we twice ran computer analyses on the California Foster Care Information Data System.<sup>271</sup> Our data demonstrates that approximately 19,000 or 40% of siblings were sent into different placements in 1991.

*August 9, 1990 California Computer Program*

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|--|--------|
| 1. Approximate number of children in California out-of-home placements:  | 80,000 |
| 2. Total number of siblings in out-of-home placements:   | 47,098 |
| 3. Number of siblings in separate out-of-home placements searching by (1) duplicate case serial number and (2) name of placement facility: | 26,464 |

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home: 134 (1%) were placed with relatives; 6316 (65%) were in placed in suitable out-of-home placements; and 221 (2%) were put in other placements. ICAN DATA ANALYSIS REPORT FOR 1990, II-6, p. 6 (Los Angeles Inter-agency Council on Child Abuse and Neglect 1990).

269. The House Select Committee On Children estimated that 100,000 California children lived in out-of-home placements in 1990. *See supra* note 45. It is difficult to determine the exact number of California children in out-of-home placements because federal reporting criteria are not standardized and since reports use different dates for reporting. There were 67,687 in out-of-home placements in 1989. LAZARUS & GONZALEZ, *supra* note 253, at 21. By April, 1990, the number had grown to 78,221. CHILDREN NOW, THE 1990 CALIFORNIA CHILDREN'S REPORT CARD: THE RIGHT START FOR CALIFORNIA'S CHILDREN, AN ACTION PLAN 42 (1990).

270. This data was presented by the Capitol Resource Institute and the Coalition of California Welfare Rights Organizations to the California Assembly Committee On Judiciary, Phillip Isenberg, Chair, Hearing on Assembly Bill 3332, Record of April 1, 1992. (copy of report in the Whittier Library).

271. *See supra* note 46. The computer program number was 90-120.

*November 8, 1991 California Computer Program*

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|--|--------|
| 1. Approximate number of children in California out-of-home placements:  | 84,000 |
| 2. Total number of siblings in out-of-home placements:   | 47,337 |
| 3. Number of siblings placed in separate out-of-home placements searching by (1) duplicate serial number and (2) name of placement facility:                 | 27,016 |
| 4. Number of Siblings placed in separate out-of-home placements searching by (1) duplicate serial number, (2) name of placement facility, and (3) last name: | 19,016 |

The data suggests that in California the relative number and percentage of siblings in separate out-of-home care has been constant for the past two years. By refining our computer search to three variables, the percentage of separated siblings on November 8, 1991 was approximately 40% (19,016 of 47,337 siblings), and the number of separated siblings was approximately 23% of all California children placed in out-of-home care (19,016 of 84,000).

### III. FLORIDA

In 1990, there were 2,866,237 children under 18 living in Florida.<sup>272</sup> During 1990, there were 127,034 reports of child abuse involving 182,527 children; 24,718 cases were substantiated and 11,840 children were removed from their homes.<sup>273</sup> Approximately 4500 children entered foster care and only 1065 children were placed for adoption, but Florida does not keep records regarding sibling placements.<sup>274</sup>

### IV. HAWAII

Hawaii had 280,126 children under 18 living in the state in 1990.<sup>275</sup> There were 3652 child abuse reports involving 3421 children; 2078 cases were substantiated and 657 children were removed from their homes.<sup>276</sup> Although data regarding siblings was not available for 1990, in 1991 there were "320 sibling groups identified in substitute care, involving 821 children in placement."<sup>277</sup> The placement objectives for those 320 sibling groups were:

1. 61 sibling groups had at least one child with an adoptive goal;
2. 7 sibling groups had at least one child with an adoptive goal and

272. NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM, *supra* note 51, at 8.

273. *Id.* at 8, 12, 17. "Permanency planning assumes that every child is adoptable." Paul Christoff, *Children In Limbo*, 10 J. JUV. L. 73, 75 (1990).

274. Letter from Linda Radigan, Assistant Secretary for Children and Family Services, Florida Department of Health and Rehabilitative Services, to Professor Patton (Oct. 7, 1992) (on file with the author).

275. NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM, *supra* note 51, at 8.

276. *Id.* at 8, 12, 17.

277. Higashide, *supra* note 57.

at least one child with a goal other than adoption, such as reunification or permanent substitute care.<sup>278</sup>

## V. ILLINOIS

In 1990, Illinois had 2,946,366 children under 18.<sup>279</sup> The state had 61,191 reports of abuse affecting 104,449 children; in 37,539 cases child abuse was substantiated.<sup>280</sup> Of those children, 5392 were removed from their home.<sup>281</sup> For the period of January to August 1992 there were 13,788 out-of-home placements. The greatest concentration of placements were:

1. 5,859 were placed in foster care with relatives;
2. 2,787 were put in foster-home board;
3. 1,280 went to emergency shelters;
4. Only 121 were placed in group homes.<sup>282</sup>

There were 8601 siblings in the 13,788 out-of-home placements. Of those siblings 5092 were placed with the same care provider and 3509, or 41%, were separated into different placements.<sup>283</sup> The smaller the sibling group, however, the more likely they were placed together with the same provider. For instance, of the 2742 "2 children sibling groups," 2058 were placed together and 684, or 25%, were separated into different placements.<sup>284</sup> Of the 1488 "4 children sibling groups," 704 were placed in the same home, while 744, or approximately 50% were put into different placements.<sup>285</sup>

## VI. KENTUCKY

In 1990, there were 954,454 children under 18 living in Kentucky.<sup>286</sup> There were 30,420 child abuse reports involving 48,645 children; of the 13,933 substantiated reports, 1674 children were removed from their homes.<sup>287</sup> Kentucky maintains little sibling data, but, in 1991, 3139 of 9894 children placed in foster care had siblings.<sup>288</sup> Therefore, 32% of foster placements involved siblings.

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278. *Id.*

279. NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM, *supra* note 51, at 8.

280. *Id.* at 12.

281. *Id.* at 17.

282. These statistics were compiled by Carl Sciarini, Bureau of Quality Assurance, Department Of Children And Family Services, State of Illinois, Letter to Professor Patton at 1 (Sept. 23, 1992) (on file with the author).

283. *Id.* at 2.

284. *Id.*

285. *Id.*

286. NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM, *supra* note 51, at 8.

287. *Id.* at 8, 17.

288. Letter from Mary Stewart, Program Coordinator Child Abuse/Neglect Central Registry, Cabinet For Human Resources Commonwealth of Kentucky, to Professor Patton (Nov. 2, 1992) (on file with the author).

## VII. MASSACHUSETTS

In 1990, Massachusetts had 1,353,075 children under 18.<sup>289</sup> There were 36,193 child abuse reports involving 57,983 children and out of 17,840 substantiated reports, 2649 children were removed from their homes.<sup>290</sup> Although Massachusetts was unable to provide us with data regarding sibling pre-adoption statistics, the data regarding sibling adoption placements demonstrated Massachusetts's commitment to maintaining sibling association. For example, "[o]f the 595 children adopted [in 1991], 290 (49%) were members of 130 sibling groups. Adoptions of siblings rose 8% over FY'90."<sup>291</sup> Twenty-nine percent of all adoption subsidies went to sibling group adoptions.<sup>292</sup> In addition, in 1991, "103 children in 41 sibling groups received guardianships."<sup>293</sup> Although no data exists regarding the percentage of Massachusetts sibling guardianships receiving guardianship subsidy, there was a 13% increase in subsidized guardianships compared to 1990.<sup>294</sup>

## VIII. NEW YORK

New York maintains the most detailed and complete sibling placement data of any state. Between November, 1980 and June, 1981, there were between 40,000 and 45,000 New York children in out-of-home placement.<sup>295</sup> "Approximately half of the children in out of home care also had siblings in out of home care."<sup>296</sup> Between 1986 and 1991, the New York City foster care population increased 279% from 18,205 to 50,714; the Upstate New York foster care population increased 32% from 10,693 to 14,144 during the same period.<sup>297</sup> In 1990, New York had 4,259,549 children under 18 living in the state.<sup>298</sup> There were 129,709 child abuse reports involving 212,767 children.<sup>299</sup> The number of substantiated reports was 26,053.<sup>300</sup> In 1990, "70% of the siblings of

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289. NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM, *supra* note 51, at 8.

290. *Id.* at 8, 11, 17.

291. *Mo*, *supra* note 59.

292. *Id.* at 7.

293. *Id.* at 6.

294. *Id.* at 7.

295. JOSEPH COCOZZA & ROBERT INGALLS, THE OUT OF HOME PROJECT: CHARACTERISTICS OF CHILDREN IN OUT OF HOME CARE 12, 14 (NEW YORK STATE COUNCIL ON CHILDREN AND FAMILIES, 1984).

296. *Id.* at 15. "More children from New York City had siblings in out of home care than did children from other parts of the state." *Id.* at 66 (51% versus 43%). By 1991, New York City accounted "for approximately three-quarters of all children in foster care" in the State of New York. FAMILY & CHILDREN SERVS. IN N.Y., A SEMI-ANNUAL REPORT TO THE LEGISLATURE ON SELECTED SERVICES AS REQUIRED BY CHAPTER 409 OF THE LAWS OF 1991, i (NEW YORK DEP'T OF SOCIAL SERVS. 1992).

297. FAMILY & CHILDREN SERVS. IN N.Y., *supra* note 296, at ii.

298. NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM, *supra* note 51, at 8.

299. *Id.* at 8.

300. *Id.* at 11.

the child in the foster care sample were also in foster care."<sup>301</sup>

The number of child abuse cases processed in New York continued to increase in 1991 to 131,796.<sup>302</sup> Child abuse was indicated after investigation in 25,226 of those reports.<sup>303</sup> In 1991, there were 19,856 new foster care admissions, 18,399 discharges, and 64,858 children in state-wide foster care.<sup>304</sup> In total, "83,257 children were in care at some time during 1991."<sup>305</sup> The sibling population in New York was:

*Siblings Statewide Placed In Foster Care During 1991*<sup>306</sup>

Group Size	<u>Separated</u> <sup>307</sup>		<u>Partly Separated</u> <sup>308</sup>		<u>Intact</u> <sup>309</sup>	
	N <sup>310</sup>	% <sup>311</sup>	N	%	N	%
2	958	24.2			3002	75.8
3	111	4.0	762	28.7	1779	67.0
4 or More	24	0.7	2,006	65.2	1047	34.0

*Siblings In Foster Care On December 31, 1991 Statewide*<sup>312</sup>

Group Size	<u>Separated</u>		<u>Partly Separated</u>		<u>Intact</u>	
	N	%	N	%	N	%
2	5100	34.3	9750	65.7		
3	1800	14.0	4683	36.5	6333	49.4
4 or More	781	4.7	11625	70.3	4131	25.0

301. FAMILIES IN THE CHILD WELFARE SYSTEM: FOSTER CARE AND PREVENTIVE SERVICES IN THE NINETIES, EXECUTIVE SUMMARY, ii (NEW YORK DEP'T SOCIAL SERVS. 1992).

302. 1991 MONITORING AND ANALYSIS PROFILES WITH SELECTED TREND DATA: 1987-1991, 2 (MONITORING AND ANALYSIS UNIT 1991, DIV. FAMILY AND CHILDREN SERVS. PERFORMANCE, NEW YORK DEP'T SOCIAL SERVS.).

303. *Id.* at 3.

304. *Id.* at 14a.

305. FAMILY & CHILDREN SERVS. IN N.Y., *supra* note 289, at 12.

306. All data for this chart is from *id.* at 9. All definitions of the terms in this chart are from 1991 MONITORING AND ANALYSIS PROFILES WITH SELECTED TREND DATA, *supra* note 295, at 16.

307. "Separated" means all of the siblings in a sibling group of the specified size are in separate facilities.

308. "Partly Separated" means some of the siblings in a sibling group of the specified size are in separate facilities.

309. "Intact" means all of the siblings in a sibling group of the specified size are in the same facility.

310. "N" equals the number of children in foster care on December 31, 1991 who had a sibling in foster care.

311. "%" is the number of siblings who are separated, partly separated, or intact as a percentage of all siblings in a sibling group of the same size.

312. All data for this chart is from 1991 MONITORING AND ANALYSIS PROFILES WITH SELECTED TREND DATA, *supra* note 302, at 16.



## IX. SOUTH CAROLINA

In 1990, South Carolina had 920,207 children under 18 living in state.<sup>313</sup> There were 18,082 reports of child abuse involving 28,615 children; of the 5688 substantiated cases, 1797 children were removed from their homes.<sup>314</sup> South Carolina was unable to provide sibling foster care placement data; however, they stated that in 1991 the Department of Social Services placed 40 sibling groups for adoption, and in 1992, they placed 42 sibling groups for adoption.<sup>315</sup>

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313. NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM, *supra* note 51, at 8.

314. *Id.* at 8, 11, 17.

315. Bogan, *supra* note 63.