

## ARE YOU STILL MY FAMILY? POST-ADOPTION SIBLING VISITATION

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### I. INTRODUCTION

On Kayla's<sup>1</sup> first birthday in July of 1998, she was placed into foster care following allegations that her seventeen-year-old mother neglected her. Kayla was initially placed with her mother in a city-operated home for teenagers with children.<sup>2</sup> However, when her mother was no longer able to care for her, Kayla's paternal grandmother took over as her foster mother.<sup>3</sup> Soon after Kayla's new placement, her mother gave birth to another baby,

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

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with Kayla, Adoptee, Children's Law Center New York, in Brooklyn, N.Y. (Nov. 11, 2013) [hereinafter Kayla Interview] (unpublished) (on file with authors).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

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

<sup>3</sup> Kayla Interview, *supra* note 1.

Keisha.<sup>4</sup> Keisha was also removed from her mother's care, but was placed with a non-kinship foster mother instead.<sup>5</sup> Because Kayla's grandmother was not Keisha's biological relative (Keisha had a different father), she was never put forward as a possible resource for Keisha, and the siblings were separated.<sup>6</sup>

Despite the fact that the infant siblings were only related through their mother and had never lived in a home together, the New York City foster care agency responsible for their care was required to justify the girls' placement in different foster homes.<sup>7</sup> Furthermore, because the siblings were separated, the agency was required to document its compliance with mandated bi-weekly agency sibling visitation.<sup>8</sup> In Kayla's foster care

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<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.* New York State law requires that the Child Welfare Agency first look for appropriate relatives who are willing to become foster parents or who are willing to provide free care to the child. *New York State 2010 Foster Parent Manual*, N.Y. STATE OFFICE OF CHILD. & FAMILY SERVS. (2010), <http://www.ocfs.state.ny.us/main/publications/Pub5011.pdf>. If a grandparent agrees to become the foster parent, the grandparent has to be able to take appropriate care of that child, and must meet all other requirements. If children are placed with maternal relatives, separation of siblings is less of an issue. However, like this case, when a child is born after a sibling has been placed into foster care with a paternal relative, and they do not share the same father, they are separated due to prioritization of kinship foster care over non-kinship foster care. *See, e.g.*, OFFICE OF CHILDREN AND FAMILY SERVICES ADMINISTRATIVE DIRECTIVE FOSTER CARE, ADOPTION: REQUIREMENTS FOR SIBLINGS PLACEMENT, VISITATION AND COMMUNICATION, at 5 (June 8, 1992) [hereinafter ADMINISTRATIVE DIRECTIVE], available at [http://www.ocfs.state.ny.us/main/policies/external/OCFS\\_2007/INFs/07-OCFS-INF-04%20\(1\)%20Attachment%20-%202092-ADM-24%20Foster%20Care%20Adoption%20Requirements%20for%20Siblings%20Placement%20Visitation%20and%20Communication.pdf](http://www.ocfs.state.ny.us/main/policies/external/OCFS_2007/INFs/07-OCFS-INF-04%20(1)%20Attachment%20-%202092-ADM-24%20Foster%20Care%20Adoption%20Requirements%20for%20Siblings%20Placement%20Visitation%20and%20Communication.pdf) (“[A]n assessment may indicate that separate placements with approved relatives can best preserve the emotional ties of extended family relationships if such placements provide opportunities for continuing interaction among the siblings. In such cases, separation of the children while retaining a familiar environment and/or close contact may be preferable to placement together in an unfamiliar environment with certified foster parents. . . . When there is no documented factor for separation of the siblings other than the fact that the children would be placed with relatives, only the court can determine that placing children separately with relatives is preferable in itself to the placement of siblings together in a certified foster home or agency operated boarding home.”).

<sup>7</sup> ADMINISTRATIVE DIRECTIVE, *supra* note 6.

<sup>8</sup> *Id.* at 6. (“Biweekly visitation is required unless such visitation has been determined and documented to be contrary to the health, safety or welfare of one or more of the children

records, the caseworker documented that Kayla and Keisha were “very young” but “interact[ed] well with one another” and were “active and developmentally appropriate” during the visitation.<sup>9</sup> Though the girls’ biological mother never appeared for visits, their respective foster mothers nonetheless brought the siblings every other week for over a year to have visitation with one another. Both girls spoke only a few words.<sup>10</sup>

The foster care agency was fulfilling its responsibility to promote visits between the siblings while simultaneously planning to fulfill its ultimate goal of discharging them from foster care into the permanency of adoption by their current caretakers. Shortly after Kayla’s third birthday, the court finalized the adoption by her grandmother.<sup>11</sup> Soon thereafter, Keisha’s non-kinship foster mother became her adoptive mother.<sup>12</sup> Permanency in parenting may have been achieved, but the court papers finalizing the adoptions did not provide for visitation between Kayla and Keisha.<sup>13</sup> As a result of the permanency plan of adoption, the adoptive parents were no longer obligated to bring the girls together for bi-weekly visits, and the agency was no longer required to facilitate the visits.<sup>14</sup> Whether the two siblings saw one another was left completely to the adoptive parents’ discretion.<sup>15</sup>

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

<sup>9</sup> Kayla Interview, *supra* note 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> ADMINISTRATIVE DIRECTIVE, *supra* note 6, at 4 (“Authorized agencies have no authority or legal responsibility to maintain visitation and communication between separated siblings whose adoptions have been finalized, but should counsel with and encourage adoptive families at the time of placement regarding the importance of maintaining sibling connections in such cases.”).

Kayla is now sixteen years old and a client of The Children's Law Center New York's (CLCNY)<sup>16</sup> Broken Adoption Project.<sup>17</sup> Her grandmother passed away when she was ten years old, and the "forever home" her adoption was supposed to provide lasted for only seven years.<sup>18</sup> Kayla last saw her younger sister Keisha nearly thirteen years ago, around the time that their adoptions were finalized.<sup>19</sup> "I can almost remember it," Kayla said, when asked about her time visiting with her sister.<sup>20</sup> "But it's gray, and kind of fuzzy. I can't quite picture her."<sup>21</sup> Kayla still thinks about her sister and wonders where she lives, what she looks like, and if they have

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

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

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

<sup>19</sup> Kayla Interview, *supra* note 1.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

any shared interests.<sup>22</sup> She hopes to one day find a way to reconnect with Keisha via social media, as she did with her biological mother following her grandmother's death.<sup>23</sup>

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

In the past two decades, there has been increased recognition of sibling relationships as crucial, particularly for children who are removed from their birth parents.<sup>24</sup> Many children in foster care face daily uncertainty about where they will live and what will become of their families.<sup>25</sup> When they are moved from home to home, they are essentially asked to start over, often creating feelings of grief and loss on top of the existing neglect, abuse, or trauma that may have precipitated their removal from their birth parents.<sup>26</sup> Agency efforts towards protecting a sibling group's relationship while in foster care seem to have improved, perhaps due to an understanding that, for a child in foster care, the sibling relationship may be the most stable and consistent relationship available.<sup>27</sup> Yet, as soon as one of the siblings is adopted, the mandated visits cease and the relationship is no longer protected, despite the fact that the emotional connection between the siblings, as in Kayla and Keisha's case, has been encouraged by the adults and caseworkers involved in their lives.<sup>28</sup>

This shift—from carefully promoted and structured visits, to a complete cessation of all contact—parallels the shift that occurs when a child first enters foster care and when they are freed for adoption.<sup>29</sup> Initially, the agency was mandated to work towards a goal of reunifying Kayla and

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., Post & Zimmerman, *supra* note 17, at 495.

<sup>25</sup> *Id.*

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

<sup>27</sup> See Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption*, 41 N.M. L. REV. 1, 13–15, 33–34 (2011) (referencing New Jersey, which requires “best efforts” to keep the siblings together, and Florida, which requires, if the siblings are not placed together, mandatory visitation on a “regular basis” to maintain contact with each other).

<sup>28</sup> *Id.* at 15.

<sup>29</sup> *Id.* at 31–32 (arguing that this second separation can often be even more intense than the initial shift).

Keisha with their mother by offering her services, parenting classes, and opportunities to visit with her daughters.<sup>30</sup> Once their mother ceased to participate in those services, the agency moved forward with terminating her parental rights, insisting that adoption was in the siblings' best interests.<sup>31</sup> There was no case, however, that Kayla and Keisha's sibling relationship should be maintained or that their relationship was in one another's best interest.<sup>32</sup> Their relationship was simply *de facto* terminated.

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

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

The Post Adoption Sibling Visitations Project is an outgrowth of the Broken Adoption Project, consisting of presentations before members of the very systems that seem to overlook the complexity of sibling dynamics and also consisting of the study that inspired this Article.<sup>38</sup> The authors' work as

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<sup>30</sup> Kayla Interview, *supra* note 1.

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

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

<sup>33</sup> Mandelbaum, *supra* note 27, at 4.

<sup>34</sup> *See id.* at 21 (arguing that courts are sometimes willing to order a sibling relationship even without statutory or constitutional authority when they feel the relationship should be maintained).

<sup>35</sup> Post & Zimmerman, *supra* note 17, at 445–46.

<sup>36</sup> THE CHILD. LAW CENTER, *supra* note 16.

<sup>37</sup> *See infra* Part IV.

<sup>38</sup> *See supra* text accompanying note 1. *See also* Interviews, Children's Law Center New York, in Brooklyn, N.Y. (2014) (unpublished) (on file with authors).

AFCs with children like Kayla has put them in the unique position not only to inform child welfare systems of where they see unintended consequences, but to hear stories of people encountering those consequences first-hand.<sup>39</sup> Therefore, this Article is infused with the interview transcripts of former foster children, all of whom had been in contact with their siblings for some portion of their time in foster care, but had lost contact with a sibling either after they were adopted or their sibling was adopted.<sup>40</sup> These former foster children consistently described losing contact with their sibling as a traumatic and emotionally devastating event that continues to impact their emotional and psychological health and adults.<sup>41</sup>

This Article seeks to view sibling contact in a new light—one that focuses on maintaining healthy sibling relationships while realizing the systemic and practical limits of actualizing that contact. By combining psychological evidence supporting the importance of sibling contact, the current legal status of sibling visitation legislation, and the authors' own experiences as practitioners in the child welfare field, this Article presents a new juridical approach to how various stakeholders' interests can be met to foster and maintain sibling contact.<sup>42</sup> Often, the difference between sibling contact and sibling visitation is obscured by the fear that biological family contact will break adoptions.<sup>43</sup> This Article offers an interdisciplinary model to negotiate sibling contact with an emphasis towards a child's wishes and his or her definition of "sibling."<sup>44</sup> The authors confront the difficulties that haunt sibling contact and encourage a dialogue that balances the adoptive parents' interests in autonomously raising their child with the long-

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<sup>39</sup> Post & Zimmerman, *supra* note 17, at 445 ("In New York, the Attorney for the Child (AFC), formerly Law Guardian, takes a client-directed approach in advocating the client's position in all proceedings before the Court. This was codified in 2007 under rule 7.2 of the New York Rules of Court. According to this rule, the AFC must zealously advocate the child's position unless the child 'lacks the capacity for knowing, voluntary and considered judgment' or if 'following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child.'").

<sup>40</sup> See *generally* Interviews, Children's Law Center New York, in Brooklyn, N.Y. (2014) (unpublished) (on file with authors). The study and this Article both address only pre-existing or existing sibling relationships, not situations where a child may be born after placement or adoption and in which the siblings never met.

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

<sup>42</sup> See *infra* Part V.

<sup>43</sup> See *infra* Part V.A.

<sup>44</sup> See *infra* Part V.A.

term psychological interests of the child.<sup>45</sup> Further, this Article surveys the current jurisprudence surrounding sibling contact and discusses how our current legal framework does not equally weigh these two interests.<sup>46</sup> Through this, the authors offer recommendations for how readers can be agents of change through a principled approach while appreciating the sibling bond.<sup>47</sup>

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

## II. WHY DO SIBLING RELATIONSHIPS MATTER?

### A. *In Their Own Words*

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

Everything I lived for from when I was nine years old was for him. I didn't kill myself because of him I didn't freak out because of him. I think they wrote in the records—'those two cannot be separated ever.' We were like twins. If you had separated me from Rob, I would have laid down and literally died. Being apart from my sister was horrible,

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<sup>45</sup> See *infra* Part IV.

<sup>46</sup> See *infra* Part V.C.

<sup>47</sup> See *infra* Part VI.

<sup>48</sup> See *infra* Part II.

<sup>49</sup> See *infra* Part III.

<sup>50</sup> See *infra* Part IV.

<sup>51</sup> See *infra* Part V.

but as long as I had Rob, I was OK. If they would have come to the house and split us up right away, I would have dropped dead right away. What people need to understand is that going into foster care . . . it feels like an alien abduction. And it feels like caseworkers are looking at you like a wild, caged animal. With your siblings, when they are only people you have to rely on are each other, when you grow up like we did, you can't be separated from each other.<sup>52</sup>

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

It was at a foster care visit where nine-year-old T.C. and her siblings were abruptly told that their three-year-old brother Mark was going to a “permanent family.”<sup>57</sup> T.C. remembers thinking, “[a]ren't we his family?”<sup>58</sup> The caseworkers assured the siblings that their brother was “young enough to forget about everything you've all been through, to forget about all of this, and have a normal life.”<sup>59</sup> T.C. and her siblings did not understand, however, why they would be something that their brother would want to forget.<sup>60</sup> After all they had been through, T.C. remembered the shock of realizing “[o]h, it can get worse?”<sup>61</sup> To this day, she still has not been able to find her younger brother.<sup>62</sup>

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<sup>52</sup> Interview with T.C., Former Foster Child, Children's Law Center New York, in Brooklyn, N.Y. (Apr. 7, 2014) [hereinafter T.C. Interview] (unpublished) (on file with authors).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

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

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

T.C. described the day she learned of her brother's placement in an adoptive home as "traumatic," a description that aptly characterizes what occurred.<sup>63</sup> The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, describes a "traumatic event" as one in which the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the integrity of self or others.<sup>64</sup> In T.C.'s case, the traumatic event was the comment about her family and her brother's need for a "normal life," threatening her integrity and her relationship with others in her family.<sup>65</sup> T.C. described her helplessness in the face of the drastic change, feeling as if she could not even process what was happening.<sup>66</sup>

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

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

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<sup>63</sup> *Id.*

<sup>64</sup> AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL, at 274 (5th ed. 2013) [hereinafter DSM V.].

<sup>65</sup> T.C. Interview, *supra* note 52.

<sup>66</sup> *Id.*

<sup>67</sup> See generally Interviews, Children's Law Center New York, in Brooklyn, N.Y. (2014) (unpublished) (on file with authors). See also DSM V., *supra* note 64, at 275.

<sup>68</sup> Interview with D.S., Adoptee, Children's Law Center New York, in New York, N.Y. (Dec. 16, 2013) [hereinafter D.S. Interview] (unpublished) (on file with authors).

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

<sup>70</sup> *Id.*

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

[H]orrible . . . it made me more unstable in my mind than I already was, going to school and being bullied and tortured it was horrible not to have [my older sister] there. I just felt like it was all over . . . I shut down, I didn't want to talk to anyone.<sup>72</sup>

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

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

C.M.'s daughter cried herself to sleep every night and asked why she and her sister could not have been adopted together.<sup>81</sup> From C.M.'s perspective, "it was like there was this pain from the depth of her soul."<sup>82</sup> As a parent, she too was made to suffer, since the system had left C.M.

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Interview with C.M., Adoptive parent, Children's Law Center New York, in Brooklyn, N.Y. (Mar. 17, 2014) [hereinafter C.M. interview] (unpublished) (on file with authors).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

powerless to enforce any visitation between her daughter and the sister who she longed for.<sup>83</sup>

About six months later, C.M. managed to convince the older sister's adoptive mother that it was important for the sisters to see each other because they both had already "lost so much."<sup>84</sup> They now visit with one another at least once a year.<sup>85</sup> While she wishes that her daughter could see her sister more often, C.M. manages to facilitate at least some contact on her own accord, without any assistance from the foster care system or any court order mandating this visitation.<sup>86</sup>

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

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

We didn't understand why. We accepted that our parents lost their rights. That is totally fine but this is my sister. Our rights were not terminated. How can you say that? You would think that my caseworker at the time would say something but she didn't tell me at all. [She] told me two weeks before the adoption.<sup>89</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Post & Zimmerman, *supra* note 17, at 496.

<sup>88</sup> See generally Interviews, Children's Law Center New York, in Brooklyn, N.Y. (2013–14) (unpublished) (on file with authors).

<sup>89</sup> Interview with E.A., Adoptee, Children's Law Center New York, in Brooklyn, N.Y. (Oct. 29, 2013) [hereinafter E.A. Interview] (unpublished) (on file with authors).

We're all being punished . . . even though they're hurting the parents, and they're punishing the parents, you know they're hurting the siblings, because, I mean because we're supposed to be family and blood. And they're separating the siblings from each other, and it's like, who is to say that that's the best thing in the interest for the kids? We're still family.<sup>90</sup>

### *B. Social Science Background*

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

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

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<sup>90</sup> Interview with L.D., Adoptee, Children's Law Center New York, in Brooklyn, N.Y. (April 7, 2014) [hereinafter L.D. Interview] (unpublished) (on file with authors).

<sup>91</sup> See, e.g., Kee Jeong Kim et al., *Reciprocal Influences Between Stressful Life Events and Adolescent Internalizing and Externalizing Problems*, 74 CHILD DEV. 127, 130 (2003).

<sup>92</sup> VICTOR G. CICIRELLI, SIBLING RELATIONSHIPS ACROSS THE LIFE SPAN 57–58 (1995).

<sup>93</sup> Judy Dunn, *Sibling Relationships in Early Childhood*, 54 CHILD DEV. 787, 787 (1983).

<sup>94</sup> ROBERT SANDERS, SIBLING RELATIONSHIPS: THEORY AND ISSUES FOR PRACTICE 46 (Jo Campling ed., 2004).

<sup>95</sup> HARRY STACK SULLIVAN, THE INTERPERSONAL THEORY OF PSYCHIATRY 198 (Helen Swick Perry & Mary Ladd Gawel eds., 1953); JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 138 (Marjorie Gabain trans., 1965).

<sup>96</sup> Judy Dunn, *Siblings, Emotion and the Development of Understanding*, in INTERSUBJECTIVE COMMUNICATION AND EMOTION IN EARLY ONTOGENY 158–68 (Cambridge University Press, 1998).

leads siblings to maintain positive psychological adjustment and greater self-esteem.<sup>97</sup>

In addition to the developmental benefits of sibling contact, sibling relationships support children undergoing stressful life events.<sup>98</sup> It is well understood that children who experience stressful life events and trauma are at an increased risk of developing emotional difficulties.<sup>99</sup> Not all children exposed to trauma and life stressors show difficulties in childhood or later adolescence, but positive sibling relationships may be a protective factor for children who have experienced social deprivation.<sup>100</sup> Moreover, research demonstrates that positive affection between siblings is a protective factor for children experiencing emotional difficulties.<sup>101</sup> The warmth and care of a sibling relationship is associated with less loneliness, fewer behavioral issues, and a heightened sense of self-esteem.<sup>102</sup> A positive sibling relationship that includes frequent, meaningful interactions can help sibling pairs cope with stress and grief.<sup>103</sup> Another study found that children experiencing emotional stress would first seek support from their mothers, but would then look to their older siblings for support if their mothers were unavailable, even before turning to their fathers.<sup>104</sup>

The emotional power of sibling contact takes on greater significance with neglected children.<sup>105</sup> For neglected children, sibling relationships may

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<sup>97</sup> Clare M. Stocker et al., *Sibling Relationships in Early Adulthood*, 11 J. FAM. PSYCHOL. 210, 216 (1997).

<sup>98</sup> Krista Gass et al., *Are Sibling Relationships Protective? A Longitudinal Study*, 48 J. CHILD PSYCHOL. & PSYCHIATRY 167, 168 (2007).

<sup>99</sup> Elizabeth M. Swearingen & Lawrence H. Cohen, *Life Events and Psychological Distress: A Prospective Study of Young Adolescents*, 21 DEV. PSYCHOL. 1045, 1052 (1985).

<sup>100</sup> Armeda Stevenson Wojciak et al., *Sibling Relationships and Internalizing Symptoms of Youth in Foster Care*, 35 CHILD. & YOUTH SERVS. REV. 1071, 1071 (2013).

<sup>101</sup> Gass et al., *supra* note 98, at 168.

<sup>102</sup> Clare M. Stocker, *Children's Perceptions of Relationships with Siblings, Friends, and Mothers: Compensatory Processes and Links with Adjustment*, 35 J. CHILD PSYCHOL. & PSYCHIATRY 1447, 1452 (1994).

<sup>103</sup> Sigrid James et al., *Maintaining Sibling Relationships for Children in Foster and Adoptive Placements*, 30 CHILD. & YOUTH SERVICES REV. 90, 91 (2008) (stating that sibling relationships and joint sibling placement provide emotional support in stressful situations).

<sup>104</sup> *Sibling Issues in Foster Care and Adoption*, CHILD WELFARE INFO. GATEWAY (Jan. 2013), <https://www.childwelfare.gov/pubPDFs/siblingissues.pdf> (citing Marjut Kosonen, *Maintaining Sibling Relationships—Neglected Dimension in Child Care Practice*, 26 BRIT. J. SOC. WORK 809, 809–822 (1996)).

<sup>105</sup> Mary Anne Herrick & Wendy Piccus, *Sibling Connections: The Importance of Nurturing Sibling Bonds in the Foster Care System*, 27 CHILD. & YOUTH SERVICES REV. 845,

provide support and nurturance that may not necessarily be available from parents.<sup>106</sup> Therefore, sibling relationships “have the potential to ascend to primary importance” for children in foster care placements,<sup>107</sup> who otherwise have a diminished network of family relationships.<sup>108</sup>

The presence of a sibling relationship can also play a critical role for children in foster care who have been removed from a home due to concerns of abuse or neglect. Foster care youth often view their time in placement as characterized by worry, guilt, confusion, and identity loss.<sup>109</sup> Siblings can serve as a buffer to these reactions and provide comfort and support throughout the child’s time in foster care.<sup>110</sup> Siblings can also alleviate some of the fear, loss, confusion, and anxiety associated with being separated from parents.<sup>111</sup>

For children separated from birth family members, sibling relationships serve as a way to maintain a “link with the past” so that they might better understand themselves and their past experiences.<sup>112</sup> When asked about their placement preference, siblings in foster care have consistently preferred placement together or if separated, with frequent and regular

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851–52 (2005) (stating that children with abusive family circumstances can maintain stable relationships with siblings).

<sup>106</sup> Kosonen, *supra* note 104, at 812.

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

<sup>108</sup> *Sibling Issues in Foster Care and Adoption*, *supra* note 104 (citing Marjut Kosonen, “Core” and Kin Siblings: Foster Children’s Changing Families, in WE ARE FAMILY: SIBLING RELATIONSHIPS IN PLACEMENT AND BEYOND 28–49 (A. Mullender ed., 1999)).

<sup>109</sup> Christine Harrison, *Children Being Looked After and Their Sibling Relationships: The Experience of Children in the Working in Partnership with “Lost” Parents Research Project*, in WE ARE FAMILY: SIBLING RELATIONSHIPS IN PLACEMENT AND BEYOND (A Mullender ed., 1999). See also PETER WEDGE & GREG MANTLE, SIBLING GROUPS AN SOCIAL WORK: A STUDY OF CHILDREN REFERRED FOR PERMANENT SUBSTITUTE FAMILY PLACEMENT 14–16 (1991).

<sup>110</sup> Tracy Kempton et al., *Presence of a Sibling as a Potential Buffer Following Parental Divorce: An Examination of Young Adolescents*, 20 J. CLINICAL CHILD PSYCH. 434, 434 (1991).

<sup>111</sup> STEPHEN P. BANK & MICHAEL D. KAHN, THE SIBLING BOND (1982); Elizabeth M. Timberlake & Elwood R. Hamlin, *The Sibling Group: A Neglected Dimension of Placement*, 61 CHILD WELFARE: J. POL’Y, PRAC., AND PROGRAM 545, 548–49 (1982).

<sup>112</sup> Margaret Ward, *Sibling Ties in Foster Care and Adoption Planning*, 63 CHILD WELFARE: J. POL’Y, PRAC., AND PROGRAM 321, 322 (1984).

contact with each other.<sup>113</sup> Studies conducting qualitative interviews with preadolescent foster children have revealed a consistent theme of siblings relying upon each other as a means of support.<sup>114</sup> Further research has shown that alumni of foster care strongly preferred being placed together or having regular contact with siblings.<sup>115</sup>

When considering the psychological importance of sibling relationships for children, it is important to consider the psychological harm youth experience when they suddenly lose contact with a sibling. The consequences of losing a sibling bond involve anxiety, trauma, grief, and guilt, not to mention the loss of shared identity and history.<sup>116</sup> Child and adolescent development expert Dr. Maureen C. Smith found that children who were removed from their siblings when placed into foster care often exhibited more problematic behavior towards their peers than those who remained with their siblings.<sup>117</sup> Further, Dr. Smith found that children who were not placed with their siblings had greater emotional and behavioral problems than children who maintained contact.<sup>118</sup> Studies have also shown that separated siblings underperform in school<sup>119</sup> and are more likely to have their placement disrupted.<sup>120</sup>

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

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<sup>113</sup> TRUDY FESTINGER, NO ONE EVER ASKED US—A POSTSCRIPT TO FOSTER CARE 89–91 (1983).

<sup>114</sup> Jason B. Whiting & Robert E. Lee, *Voices from the System: A Qualitative Study of Foster Children's Stories*, 52 FAM. REL. 288, 292 (2003).

<sup>115</sup> Herrick & Piccus, *supra* note 105, 845–61; NELL BERNSTEIN, A RAGE TO DO BETTER: LISTENING TO YOUNG PEOPLE FROM THE FOSTER CARE SYSTEM (2000).

<sup>116</sup> Herrick & Piccus, *supra* note 105, at 845.

<sup>117</sup> Maureen C. Smith, *A Preliminary Description of Nonschool-Based Friendship in Young High-Risk Children*, 19 CHILD ABUSE & NEGLECT 1497, 1506 (1995).

<sup>118</sup> Maureen C. Smith, *Sibling Placement in Foster Care: An Exploration of Associated Concurrent Preschool-Aged Child Functioning*, 20 CHILD. AND YOUTH SERVICES REV. 389, 389 (1998).

<sup>119</sup> Cf. M. B. Thorpe & G. T. Swart, *Risk and Protective Factors Affecting Children in Foster Care*, 37 CANADIAN J. OF PSYCHIATRY 616, 621 (1992).

<sup>120</sup> Ilene Staff & Edith Fein, *Together or Separate: A Study of Siblings in Foster Care*, 71 CHILD WELFARE: J. POL'Y, PRAC., AND PROGRAM 257, 266 (1992).

who was moved to a different city from her sister, began to act out hoping that she would be returned to New York City where she could visit with her sister.<sup>121</sup> As she put it:

I done beat half the town up. Like, how much more people you want me to beat up? I'm going to beat up everybody! In my mind I'm thinking what I got to do? I done everything in my power to get back to Brooklyn. I got kicked out of schools, there was four high schools, four of them! I got kicked out of all four! I didn't even know I had that in me. I was like wow! You did a good job, they'll send you home now. I still stayed.<sup>122</sup>

The significant people in a child's life provide the language he or she needs for self-definition and forming an intimate identity, and siblings play an especially crucial role in the dialogical genesis of the human mind.<sup>123</sup> Siblings offer one another a shared history that cultivates their bond<sup>124</sup>—a bond which grows as siblings spend more time together, go through difficult experiences, and are there for each other as a source of love and support.<sup>125</sup> The loss of that shared history can have lasting effects on young people as they move into adulthood. One interviewee explained:

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

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<sup>121</sup> D.S. Interview, *supra* note 68.

<sup>122</sup> *Id.*

<sup>123</sup> CHARLES TAYLOR, MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25–73 (Amy Gutmann, ed., 1994).

<sup>124</sup> Cicirelli, *supra* note 92, at 58.

<sup>125</sup> *Id.* at 60–63.

you don't have any of those connections, any of those anchors, and there's times in your life when you need to be anchored, in your adult life.<sup>126</sup>

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

I believe I would have had more self confidence in myself, I would have had higher self-esteem. I probably would have been done with school right now. I probably would have more manners than I do. I probably wouldn't have . . . anger issues. I would probably be better at having relationships with people.<sup>127</sup>

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

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

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

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<sup>126</sup> Interview with Helen Ramaglia, Adoptee, Children's Law Center New York, in Brooklyn, N.Y. (Mar. 31, 2014) [hereinafter Ramaglia Interview] (unpublished) (on file with author).

<sup>127</sup> D.S. Interview, *supra* note 68.

<sup>128</sup> Herrick & Piccus, *supra* note 105, at 849.

<sup>129</sup> Interview with S.C., Adoptee, Children's Law Center New York, in Brooklyn, N.Y. (Dec. 23, 2013) [hereinafter S.C. Interview] (unpublished) (on file with authors).

crying.”<sup>130</sup> Seeing siblings under these circumstances acts as a trigger for the sadness she associates with losing that relationship.<sup>131</sup> CLCNY interviewees persistently revealed themes of “loss of identity,” “the desire to have someone to talk to,” “loss of association with a distinct past,” “emotional imbalance,” and “compounded grief,” when discussing the sibling contact they lost.<sup>132</sup>

In recounting how siblings confront separation, D.W., a foster care worker and an alumnus of foster care herself, who lost contact with her siblings after their adoption, expressed feeling “a natural instinct to have care and concern and wonder,”<sup>133</sup> about a sibling’s whereabouts. Many interviewees struggled with the anxiety and uncertainty of wondering how their siblings were doing, often using coping mechanisms like “shut downs,” “greater familial detachment,” and “loss of value in the biological family.”<sup>134</sup> In addition, the aftermath of separation also leaves children with a psychological mischaracterization of their family—children begin to consider certain important figures in their lives to be part of their family, while selectively disassociating from others. S.C., another foster care alumnus, completely disowned his brother in his mind after they were separated.<sup>135</sup> He explained:

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

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<sup>130</sup> E.A. Interview, *supra* note 89.

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

<sup>132</sup> *See generally* Interviews, Children’s Law Center New York, in Brooklyn, N.Y. (2014) (unpublished) (on file with authors).

<sup>133</sup> Interview with D.W., Foster Care Worker and Former Foster Child, Children’s Law Center New York, in Brooklyn, N.Y. (Mar. 24, 2014) [hereinafter D.W. Interview] (unpublished) (on file with authors).

<sup>134</sup> *See generally* Interviews, Children’s Law Center New York, in Brooklyn, N.Y. (2014) (unpublished) (on file with authors).

<sup>135</sup> S.C. Interview, *supra* note 129.

‘Whoa he is? You have a blood brother?’ I’m like, ‘I have all sorts of siblings.’<sup>136</sup>

S.C., like many interviewees, focused on “purging” himself of his connections with his biological family and cultivating a new life independent of his past.<sup>137</sup>

The psychological importance of maintaining sibling relationships is clear, both for its short- and long-term effects on a child.<sup>138</sup> Siblings serve as a support outlet for children, contributing to their self-esteem, emotional stability, and identity.<sup>139</sup> Disrupting sibling contact can cause irreparable harm, including the rebirth of suppressed grief a child may have experienced after her removal from her birth family.<sup>140</sup>

Despite the importance of maintaining the sibling relationship, the child welfare system is challenged to keep any sibling group together, both during their placement in foster care and, particularly, after adoption.<sup>141</sup> There are only a few foster homes able to take more than two children at a time, which causes immediate problems for caseworkers who are trying not to disrupt a sibling group’s relationship.<sup>142</sup> Recruiting families who are willing and able to take large sibling groups takes time, effort, and money, all three of which are limited in the overburdened child welfare system.<sup>143</sup> In addition to these practical challenges, there are legal hurdles and a lack of clarity in what exactly the law requires agencies to do for sibling groups, both while they are in foster care and after adoption.

### III. THE CURRENT STATE OF THE LAW

#### A. *Rights of Siblings While in Foster Care*

In *Roberts v. U.S. Jaycees*,<sup>144</sup> the Supreme Court stated that the First Amendment’s Freedom of Association clause includes the right to maintain

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Herrick & Piccus, *supra* note 105, at 846.

<sup>139</sup> *Id.* at 851.

<sup>140</sup> *Id.* at 849.

<sup>141</sup> Sonya J. Leathers, *Seperation from Siblings: Associations with Adaption and Outcomes among Adolescents in Long-Term Foster Care*, 27 CHILD. AND YOUTH SERVICES REV. 793, 794 (2005).

<sup>142</sup> *Id.* at 794.

<sup>143</sup> Herrick & Piccus, *supra* note 105, at 853.

<sup>144</sup> 468 U.S. 609 (1984).

“certain intimate human relationships,”<sup>145</sup> and posits that this right “must be secured against undue intrusion by the State.”<sup>146</sup> “The relationship between two family members” was cited by the Court in *Aristotle P. v. Johnson*<sup>147</sup> as “the paradigm of such intimate human relationships.”<sup>148</sup> The State may only infringe on this right of association when it has a compelling interest, and this interest “cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>149</sup> Thus, while the State has a compelling interest in protecting children from abuse and neglect and may remove children from parents, it should theoretically do so in a manner that does not unduly infringe upon those children’s associational freedoms.

Notably, in the late 1980s, a group of seven foster children, who were wards of the State and in the care of the Illinois Department of Children and Family Services (DCFS), alleged that the State’s practice of placing siblings in separate foster homes and refusing to facilitate visitation was an unconstitutional infringement of the right to association cited in *Roberts*.<sup>150</sup> In *Aristotle P. v. Johnson*,<sup>151</sup> the foster children accused DCFS of “placing siblings in separate foster homes or residential facilities and denying the plaintiffs the opportunity to visit their sisters and brothers who are placed elsewhere.”<sup>152</sup> DCFS moved to dismiss the entirety of the children’s complaint on the grounds that it failed to state a legal cause of action.<sup>153</sup> In discussing DCFS’ motion to dismiss, the Illinois District Court found that the sibling’s relationships with one another fell under the *Roberts* definition of an “intimate human relationship” that was afforded “a substantial measure of sanctuary from unjustified interference by the State.”<sup>154</sup> The Court declined to dismiss the foster children’s complaint and urged the parties to come to a settlement that would “facilitate sibling visitation.”<sup>155</sup>

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<sup>145</sup> *Id.* at 617–18.

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

<sup>147</sup> 721 F. Supp 1002 (N.D. Ill. 1989).

<sup>148</sup> *Id.* at 1005.

<sup>149</sup> *Roberts*, 468 U.S. at 623.

<sup>150</sup> *Aristotle P.*, 721 F. Supp. at 1004–05. See also Emily Kernan, *Keeping Siblings Together Past, Present, and Future*, 26 YOUTH LAW NEWS 1, 6 (2005), available at [http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/yln/2005/issue\\_4/05\\_yln\\_4\\_kernan\\_keeping.pdf](http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/yln/2005/issue_4/05_yln_4_kernan_keeping.pdf).

<sup>151</sup> 721 F. Supp. 1002 (N.D. Ill. 1989).

<sup>152</sup> *Id.* at 1004.

<sup>153</sup> *Id.* at 1003.

<sup>154</sup> *Id.* (quoting *Roberts*, 468 U.S. at 617–18).

<sup>155</sup> *Id.* at 1012.

The parties ultimately came to a settlement in which DCFS decreed that, in the future, siblings would be placed together when possible and have visitation rights when placed apart.<sup>156</sup>

The Fostering Connections to Success Act and Increasing Adoptions Act of 2008<sup>157</sup> (“Fostering Connections”) has codified in federal law the principles at issue in *Aristotle P.*<sup>158</sup> Today, a state’s child welfare department that has practices like the ones at issue in *Aristotle P.* would theoretically risk losing federal funding for its foster care system.<sup>159</sup> Fostering Connections mandates that each state make “reasonable efforts” to ensure that siblings be placed in the same “foster, kinship, or adoptive home” upon the child’s initial removal.<sup>160</sup> When such placement is not possible, the State is to ensure that “frequent visitation” occurs, unless that visitation is “contrary to the health, safety or well-being of one or more of

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<sup>156</sup> See Kernan, *supra* note 150, at 6.

<sup>157</sup> Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified in scattered sections of 42 U.S.C.).

<sup>158</sup> *Aristotle P.*, 721 F.Supp. at 1002.

<sup>159</sup> CHILD WELFARE INFO. GATEWAY, MAJOR FED. LEGIS. CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION 1, 8 (Apr. 2012) available at [http://www.nrc4tribes.org/files/Tab%204\\_1%20Major%20Federal%20Child%20Welfare%20Legislation.pdf](http://www.nrc4tribes.org/files/Tab%204_1%20Major%20Federal%20Child%20Welfare%20Legislation.pdf).

<sup>160</sup> In New York, placement together is presumptively in the children's best interest if it would not be contrary to their health, safety, or welfare. See, e.g., *Banks-Nelson v. Bane*, 625 N.Y.S. 131, 131 (App. Div. 1995) (once agency properly removed one sibling from the foster home, the other children had to be moved absent a strong countervailing reason not to); *In re Peters v. McCaffrey*, 569 N.Y.S. 797, 797 (App. Div. 1991); *In re H. R.*, 156 Misc. 2d 856 (Fam. Ct. 1993) (the Court rejects Commissioner's claim that foster parents would be overburdened).

the children.”<sup>161</sup> A state that does not comply with this mandate could lose federal funding—a crucial source of income for many states.<sup>162</sup>

Fostering Connections is an important step towards protecting sibling relationships. Yet, it far from guarantees that siblings’ relationships will be protected while they are in foster care. First of all, Fostering Connections is a funding statute which does “not provide assurance for any given group of siblings [in foster care] that contact will continue.”<sup>163</sup> Second, the only District Court to directly address the issue has found that Fostering Connections creates no private right of action, nor any right which could be asserted by a child in foster care under 42 U.S.C. 1983.<sup>164</sup> Third, “reasonable efforts” is an inherently amorphous term, and the statute provides no guidance as to exactly what those efforts must entail.<sup>165</sup>

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

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

<sup>163</sup> Mandelbaum, *supra* note 27, at 11.

<sup>164</sup> *BK v. New Hampshire Dept. of Health and Human Servs.*, 814 F. Supp. 2d 59, 66 (D.N.H. 2011).

<sup>165</sup> For a further discussion of this point, see Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 906 (2012).

The deeper issue, however, is that Fostering Connections is silent on what happens to sibling relationships after siblings are adopted out of the foster care system, which, statistically speaking, is a more likely outcome for a child in foster care in 2014 than it was in 1989.<sup>166</sup> Prior 1989, in the era when the *Aristotle P.* suit was settled, it was more common for a child who was unable to return to his or her parents to remain in foster care for an indefinite period of time.<sup>167</sup> The Adoption and Safe Families Act (ASFA), which was passed in 1997, caused a dramatic increase in the number of foster care adoptions by providing strict timelines for when states had to move to terminate the biological parent's rights,<sup>168</sup> as well as instituting "adoption bonuses" for states that increased their rate of adoptions.<sup>169</sup> For each adoption over the state's baseline rate—the previous year's number of adoptions—ASFA authorized a \$4,000 bonus, with an additional \$2,000 if the adoption was of a "special needs" child.<sup>170</sup>

In the four years after ASFA was passed, adoptions out of foster care rapidly increased 62%.<sup>171</sup> Fostering Connections further increased those payments, enabling states to claim an additional \$4,000 for each additional special needs adoption and providing an \$8,000 bonus for each extra adoption of a child older than nine.<sup>172</sup>

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

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<sup>166</sup> Sandra Bass, Margie K. Shields, & Richard E. Behrman, *Children, Families, and Foster Care: Analysis and Recommendations*, 14 CHILD. FAMS., AND FOSTER CARE 5, 7 (2004).

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

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

<sup>169</sup> 42 U.S.C. § 673b(d)(1) (2012).

<sup>170</sup> *Id.* § 673b(d)(1)(A)–(B).

<sup>171</sup> Sacha Coupet, *Swimming Upstream against the Great Adoption Tide: Making the Case for Impermanence*, 34 CAP. U. L. REV. 405, 409 (2005).

<sup>172</sup> 42 U.S.C. § 673b(d)(1)(B)–(C). See generally Dawn J. Post, *Do Adoption Bonuses Contribute to Broken Adoptions and Should They be Reinvested?*, 33 CHILD L. PRAC. 9 (2014) (discussing the impact of adoption bonuses).

*B. Rights of Siblings Post-Adoption*

Although the court in *Aristotle P.* found that the sibling relationship was constitutionally protected from state interference, the U.S. Supreme Court itself has never made any statement to that effect.<sup>173</sup> Courts deciding against post-adoption sibling visitation frequently cite this omission in their reasoning.<sup>174</sup> In a 2011 case concerning post-adoption sibling visitation, the Supreme Court of Nebraska noted that “no court has recognized a constitutionally protected right of one sibling to a relationship with another following termination or relinquishment of parental rights.”<sup>175</sup> Similarly, a Massachusetts court noted that the right to post-adoption sibling visitation “has not been found to be a constitutionally protected liberty interest requiring greater protection than in regard to other family relationships.”<sup>176</sup>

In contrast, the U.S. Supreme Court *has* found that parents have a fundamental constitutional right to raise their children as they see fit. In *Troxel v. Granville*,<sup>177</sup> the Court found a Washington statute, which permitted a court to order visitation with any person proven to be in the child’s best interest, unconstitutional.<sup>178</sup> The Court reasoned that the Statute infringed upon a parent’s right to direct the upbringing of her child.<sup>179</sup> This right is protected under the Fourteenth Amendment’s Due Process Clause, and, as *Troxel* clarifies, that right includes deciding who may visit with her child.<sup>180</sup> Though the *Troxel* case did not explicitly address adoptive parents, all 50 states confer the same rights on adoptive parents as they do biological parents.<sup>181</sup>

In addition to the *Troxel* precedent, the reluctance of state courts to order post-adoption sibling visitation is seemingly grounded in the belief that such orders would, in the words of one caseworker, be “just another shackle around a prospective adoptive family”<sup>182</sup> and deter families from adopting,

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<sup>173</sup> *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1005 (N.D. Ill. 1989).

<sup>174</sup> *See, e.g., In re Adoption of Pierce*, 790 N.E.2d 680, 685 (Mass. App. Ct. 2003).

<sup>175</sup> *In re Meridian H.*, 798 N.W.2d 96, 107 (Neb. 2011).

<sup>176</sup> *In re Pierce*, 790 N.E.2d at 684.

<sup>177</sup> 530 U.S. 57 (2000) (plurality opinion).

<sup>178</sup> *Id.* at 73.

<sup>179</sup> *Id.* at 72.

<sup>180</sup> *Id.* at 65.

<sup>181</sup> *See, e.g., OHIO REV. CODE ANN. § 3107.15(2)* (West 2011).

<sup>182</sup> *In re Donte A.*, 631 N.E.2d 257, 259 (Ill. App. Ct. 1994) (internal quotations omitted).

While the underlying court found that post-adoption visitation would be in the child’s best interest, without going so far as to order it, the Appellate Court relied upon the recently decided Supreme Court case, which held that “the juvenile court’s best interest

even if it is found to be in the child's best interest.<sup>183</sup> Given this precedent and the general fear that allowing post-adoption visitation would negatively affect the number of families willing to adopt, it is not surprising that state statutes proscribing some mechanism for post-adoption contact tend to give substantial weight to the wishes of adoptive parents in determining whether visitation is in the child's best interest.<sup>184</sup> State statutes dealing with post-adoption sibling contact can generally be divided into three categories: those that focus on "encouraging" adoptive parents to promote the relationship; those that allow for sibling visitation orders to be issued with the consent of the adoptive parents; and those that allow for post-adoption sibling visitation contact to be ordered over an adoptive parent's objection.<sup>185</sup> The majority of states have laws that fall into the first two categories; statutes in the third category, which theoretically allow a court to order sibling visits without an adoptive parent's consent, may be unconstitutional under *Troxel*.<sup>186</sup>

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

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considerations, in the context of a termination proceeding, [was] limited to a determination of whether it [was] in the child's best interests to be freed for adoption." *In re M.M.*, 619 N.E.2d 702 (Ill. 1993).

<sup>183</sup> *In re Donte A.*, 631 N.E.2d at 259.

<sup>184</sup> Hasday, *supra* note 165, at 910.

<sup>185</sup> *Id.* at 908–10.

<sup>186</sup> *Id.* at 911.

<sup>187</sup> Kernan, *supra* note 150, at 4.

<sup>188</sup> MD. CODE ANN., Fam. Law § 5-525.2(b) (LexisNexis 2006).

<sup>189</sup> *In re Victoria C.*, 88 A.3d 749, 750 (Md. 2014).

<sup>190</sup> *Id.* at 768.

The result of the tension between the constitutionally protected role of adoptive parents and the relatively unprotected sibling relationship is a patchwork of policies with no strong guarantee for any one child that they will remain in contact. Further, there are no legal protections for their relationship where either the child or one of the siblings is adopted out of foster care.

C. “*Permanency*”

The status quo reflects two distinct realities: First, the reality that the rights of parents are granted more robust protections than the rights of children; and second, that a child’s right to sibling contact is very often sacrificed in order to give children permanency through adoption.<sup>191</sup>

California, for instance, theoretically has a “sibling group” exception in termination of parental rights cases.<sup>192</sup> A court will not terminate a parent’s rights if a sibling (or the parents invoking the exception on her behalf) shows that their sibling relationship outweighs “the benefit of legal permanence through adoption<sup>193</sup> and that the parents’ termination would “substantial[ly] interfere[]” with the sibling group’s ability to stay in contact with one another.<sup>194</sup> Given this heavy burden, the courts have been clear: “[T]he application of this exception will be rare, particularly when the proceedings concern young children whose needs for a competent, caring and stable parent are paramount.”<sup>195</sup>

Siblings in California seeking to invoke the “sibling group” exception are asked to meet the nearly impossible burden to show their relationship outweighs the benefits of the “ideal” adoption.<sup>196</sup> In other states, placements that are most likely to lead to an ideal option win over placements that would facilitate sibling contact.<sup>197</sup> And yet, the goal of providing children with a loving family to guide them into adulthood and provide them with stability is not guaranteed through adoption.

Kayla, the young woman whose story opened this Article, only achieved permanency for seven years; the adoption by her grandmother was finalized when she was three, and her grandmother passed away when she was ten.<sup>198</sup>

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<sup>191</sup> See Kernan, *supra* note 150, at 5, 7.

<sup>192</sup> *Id.* at 4.

<sup>193</sup> *In re Hector A.*, 23 Cal. Rptr. 3d 104, 108-09 (App. Ct. 2005).

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

<sup>195</sup> *In re Valerie A.*, 61 Cal. Rptr. 3d 403, 424 (App. Ct. 2007).

<sup>196</sup> See Kernan *supra* note 150, at 4.

<sup>197</sup> *Id.* at 5.

<sup>198</sup> Kayla Interview, *supra* note 1.

Kayla then returned to live with her biological father<sup>199</sup> who surrendered his parental rights when Kayla was initially placed into foster care.<sup>200</sup> Kayla found herself back in foster care just a few years later, when the child welfare system filed a neglect case against her father for physically fighting with his girlfriend, using drugs, and failing to meet Kayla's basic needs.<sup>201</sup>

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

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

<sup>200</sup> Kayla Interview, *supra* note 1.

<sup>201</sup> *Id.*

<sup>202</sup> Dawn J. Post, *What are the Factors Leading Broken Adoptions?*, 72 ADOPTION ADVOC. 1, 2 (June 2014), [https://www.adoptioncouncil.org/images/stories/nfa\\_adoption\\_advocate\\_no72.pdf](https://www.adoptioncouncil.org/images/stories/nfa_adoption_advocate_no72.pdf).

<sup>203</sup> EVAN B. DONALDSON ADOPTION INST., WHAT'S WORKING FOR CHILDREN: A POLICY STUDY OF ADOPTION STABILITY AND TERMINATION 3 n.1 (2004).

<sup>204</sup> Kayla Interview, *supra* note 1.

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

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

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

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<sup>205</sup> MICHELLE COHN, SIBLING PLACEMENT: THE IMPORTANCE OF THE SIBLING RELATIONSHIP FOR CHILDREN IN FOSTER CARE 5 (Lyn Ariyakulkan ed., 2012) (2008).

<sup>206</sup> Kayla Interview, *supra* note 1.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Ramona W. Demby & Jessica Ayala, *Am I My Brother's Keeper: Siblings Raising Younger Siblings*, 23 J. OF HUMAN BEHAV. IN THE SOC. ENV'T. 193 (2013).

<sup>210</sup> *See generally* Interviews, Children's Law Center New York, in Brooklyn, N.Y. (2014) (unpublished) (on file with authors).

<sup>211</sup> Interview with R.M., Adoptee, Children's Law Center New York, in Brooklyn, N.Y. (Feb. 12, 2014) (unpublished) (on file with author).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

her younger siblings.<sup>216</sup> In another case, D.D. spent his life in foster care and learned as an adolescent that he had younger siblings who had also been removed from his mother long after he was placed into care.<sup>217</sup> When D.D. turned twenty-one, he searched and found his siblings who had been put out of their adoptive home and assumed custody of them.<sup>218</sup>

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

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

The realities of the child welfare system make this ideal impossible in most situations. Approximately two-thirds of children in foster care also have a sibling in care.<sup>219</sup> Agencies need to find a placement for children twenty-four hours after their removal, and out of necessity, focus on finding available beds.<sup>220</sup> Sibling groups may need to be split up, because many foster parents will not even consider taking multiple adolescents into their home.<sup>221</sup> At times, only part of a sibling group may be taken into foster care—only one child may require out-of-home care, or at least one sibling may be over the age of eighteen and thus beyond the reach of the child welfare system.<sup>222</sup> Siblings may also have dramatically different needs—a family that can provide excellent care for one member of a sibling group may be unequipped or lack the training to provide a permanent home for a

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<sup>216</sup> D.W. Interview, *supra* note 133.

<sup>217</sup> Interview with D.D., Former Foster Care Child, Children's Law Center New York, in Brooklyn, N.Y. (Apr. 3, 2014) (unpublished) (on file with authors).

<sup>218</sup> *Id.*

<sup>219</sup> CHILD WELFARE INFO. GATEWAY, *supra* note 104.

<sup>220</sup> Post & Zimmerman, *supra* note 17, at 508.

<sup>221</sup> Karen Rothschild & Daniel Pollack, *Revisiting the Presumption of Jointly Placing Siblings in Foster Care*, 12 SEATTLE J. FOR SOC. JUST. 527, 529–30 (2013).

<sup>222</sup> Keely A. Magyar, *Betwixt and Between but Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care*, 79 TEMP. L. REV. 557, 559 (2006).

child with more specialized needs. Further complicating the issue, children may have different mothers or fathers. A paternal grandmother who is a willing foster care resource for her son's child may be unwilling to take in her grandchild's half-sibling, with whom the grandmother has no biological relationship.

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

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

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

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

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

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

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<sup>223</sup> D.W. Interview, *supra* note 133.

<sup>224</sup> S.C. Interview, *supra* note 129.

<sup>225</sup> *Id.*

mandated, so the agency doesn't bother. *It's one more thing they don't have to do, they cross it off the list.* We were lucky that the foster parents managed to stay in touch. I've had other foster kids—they come and they go and they don't want you to maintain any kind of contact, because there's privacy issues. I mean, I think we could have had some social workers tell us we couldn't stay in touch—I don't know. So I guess we were lucky in that it was not hampered—it wasn't facilitated, but it wasn't hampered either.<sup>226</sup>

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

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

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

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<sup>226</sup> Interview with E.H., Adoptive Mother, Children's Law Center New York, in Brooklyn, N.Y. (Apr. 28, 2014) [hereinafter E.H. Interview] (unpublished) (on file with author).

<sup>227</sup> D.W. Interview, *supra* note 133.

<sup>228</sup> See Mandelbaum, *supra* note 27, at 2 n.5.

a disruptive dynamic, in which an older sibling tries to “parent” a younger one, and interferes with the adoptive relationship? What should be done if the child’s sibling is closely aligned with a birth parent, whom the pre-adoptive or adoptive parent does not want the child to see?

As these difficult situations suggest, maintaining sibling contact may not always be in the child’s best interest. Much like other issues in child welfare, the issues surrounding post-adoption sibling visitation and contact are nuanced. The authors are not suggesting that the techniques proposed in this Article can be universally applied to how practitioners approach children, cases, and visitation and contact plans. Each case presents unique challenges like the ones mentioned above,<sup>229</sup> and requires a balancing act that involves paying attention to the law available, knowing and understanding each child and their relationships—not only what they want for the short term but for the future as well, and individualizing any plan for post-adoption contact and visitation. Too often, the overburdened system throws up its hands and visits cease while the children are in care.<sup>230</sup> Even if visits continue between the siblings while they are in foster care, adoptive parents facing these issues may decide that it is in their child’s best interest to end visits as soon as the visits are no longer court-ordered after the adoption is finalized. We will discuss each of the challenging situations mentioned above,<sup>231</sup> and at the conclusion of the Article, discuss what solutions might be more appropriate and child-centered than the complete cessation of visits.<sup>232</sup>

A. “Acting Out” and Inter-Sibling Abuse

Many children in foster care have visits with their siblings at the beginning of their time in care, but soon lose contact after a caseworker or foster parent determines that siblings are a “negative influence on one another.”<sup>233</sup> For these children, visits will stop entirely after one or two negative “write ups” by a caseworker, or after a foster parent raises an

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<sup>229</sup> See *infra* Part IV.A–B.

<sup>230</sup> See Timothy Arcaro, *Florida’s Foster Care System Fails Its Children*, 25 NOVA L. REV. 641, 661 (2001) (“Caseloads have grown beyond the worker’s ability to provide minimal care to their constituents.”).

<sup>231</sup> See *infra* Part IV.A–B.

<sup>232</sup> See *infra* Part V.

<sup>233</sup> See Mandelbaum, *supra* note 27, at 2 (illustrating a case where one set of foster parents wanted to end sibling visitation between two biological brothers that were placed in two separate foster homes).

objection.<sup>234</sup> Children's ability to have a continuing relationship with their siblings may thus be determined by a caseworker's observations during a few hours at an agency. Once visits cease and there is documentation that the children should not see one another, children face virtually insurmountable obstacles in getting visits reinstated.<sup>235</sup>

Upon reflection, many interviewees knew that either they or their siblings were denied visits for "acting out," but felt that the uncertainties and anxieties around seeing their siblings contributed to their behavior problems. As one interviewee explained, "Of course [my siblings] were acting out. Because these weren't consistent visits, and it wasn't our fault that they weren't consistent visits, so they didn't know when they would see us again. —D.W." <sup>236</sup>

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

There's a stigma for foster and adoptive parents "there's an older sister, she didn't go into care, she's not placed up for adoption, she's part of this messed-up bunch." She's probably really messed up, she's older and she's been living in that environment—and really I wasn't messed up. I was just trying to see the siblings that I had tried so hard to take care of and protect, and all of a sudden, I hadn't done anything wrong, my mother had. But all of a sudden, they were taken from me, and not a whole lot was done to try to help me and help them keep that contact.<sup>237</sup>

In addition to general "acting out" behavior, which may stem from underlying trauma, sibling groups in foster care may have an abusive dynamic between them.<sup>238</sup> One of the few books to address the topic of sibling abuse opens with an acknowledgment that sibling abuse remains "largely undetected."<sup>239</sup> There can be considerable difficulty in

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<sup>234</sup> *See id.*

<sup>235</sup> *Id.*

<sup>236</sup> D.W. Interview, *supra* note 133.

<sup>237</sup> *Id.*

<sup>238</sup> *See* Herrick & Piccus, *supra* note 105, at 847 (stating that siblings in foster care may need to be separated due to sibling abuse or extreme trauma brought on by sibling contact).

<sup>239</sup> VERNON R. WIEHE, *SIBLING ABUSE: HIDDEN PHYSICAL, EMOTIONAL, AND SEXUAL TRAUMA* 3 (2d ed. 1997).

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

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

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

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<sup>240</sup> CHILD WELFARE INFO. GATEWAY, *supra* note 104, at 11.

<sup>241</sup> See Mel Schneiderman et al., *Mental Health Services for Children in Out-of-Home Care*, 77 CHILD WELFARE 29, 29–32 (1998) (discussing the prevalence of psychopathology, developmental, emotional, and behavioral problems of children in foster care).

<sup>242</sup> Post, *supra* note 172 (citing CITIZENS’ COMM. FOR CHILDREN OF N.Y. INC, BEFORE IT’S TOO LATE: ENDING THE CRISIS IN CHILDREN’S MENTAL HEALTH 488 (1999)).

<sup>243</sup> *Id.*

<sup>244</sup> E.H. Interview, *supra* note 226.

Yet children will often experience the loss of contact with a difficult, mentally ill, or abusive sibling as a profound loss that is not in their best interests. For instance, Helen Ramaglia, a speaker and author who presents her experiences of child abuse, foster care, and trauma, provides some insight into the issue of sibling separation due to abuse from a victimized sibling's perspective.<sup>245</sup> Helen's mother died when she was three years old, following complications from beatings by Helen's father during their relationship.<sup>246</sup> Following her mother's death, Helen was sexually, psychologically, and physically abused by her father until she was removed from his care at age ten.<sup>247</sup> For Helen and her siblings, life in their biological home was a solitary battle for survival.<sup>248</sup> While Helen and her older sister were initially placed together after being separated from their younger brother, their foster parents quickly became concerned about the abusive dynamic between Helen and her sister.<sup>249</sup> Helen's sister had been diagnosed with Reactive Attachment Disorder and other psychological disabilities that manifested themselves in violent and hostile behaviors towards Helen.<sup>250</sup> As Helen stated, "My sister . . . did take a lot of her anger out on me and [my foster parents] were scared that she would really hurt me, seriously hurt me . . . they were afraid for my life."<sup>251</sup> Unbeknownst to Helen, her foster parents decided that enough was enough, and ultimately removed Helen's older sister from their home.<sup>252</sup>

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

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

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<sup>245</sup> Helen Ramaglia Interview, *supra* note 126.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

realize what was going on because I stopped talking and I went back to my quiet little world where it was just me.<sup>253</sup>

Despite the abuse and anger she had endured, her sister had been the only constant in Helen's chaotic world.<sup>254</sup>

One might believe that Helen should have felt relieved and grateful to have escaped her sister's threats and violence. Yet her experience as a child was extremely different. Reflecting back nearly forty years later, Helen believes that the main trauma was not her sister's removal from the home, but the fact that no one talked to her about it, explained the situation to her, or told her whether or not she was going to see her sister again.<sup>255</sup>

It was very traumatic, I think if I had been sat down and talked to and explained, I knew that she was dangerous to me, but again at this point no one had ever sat down and explained anything to me—ever. So just sitting down and explaining and this is what is going to happen, we are going to give you time to say goodbye, it would have been very different.<sup>256</sup>

Had she been told, "it would have been hard and [she] probably would have went through a little bit of a depression, but [she] think[s] it would have minimized what happened greatly."<sup>257</sup>

Courts, likewise, have clearly struggled with cases in which one or more siblings have a history of abuse or mental health concerns. One New York case, *In re Keenan R. v. Julie L.*,<sup>258</sup> involved a fourteen-year-old boy in foster care who was petitioning for visits with his twin eight-year-old sisters, both of whom had been adopted into the same family.<sup>259</sup> Although Keenan had initially been placed with that same family, he was removed for "sexually inappropriate behavior and temper tantrums."<sup>260</sup> The court denied Keenan's initial case because he had only "extremely limited" contact with his sisters, and had thus not developed the "ongoing and affectionate relationship"

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> 775 N.Y.S.2d 468 (Fam. Ct. 2004).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 469.

necessary for him to have standing for visitation.<sup>261</sup> Keenan appealed, and the Appellate Division remanded it back to the Family Court, finding that the Family Court must “consider whether petitioner’s efforts to establish a relationship with his adopted sisters had been frustrated by their adoptive parents.”<sup>262</sup> Upon remand, the Family Court again denied the petition for visitation.<sup>263</sup> Keenan appealed a second time.<sup>264</sup> He was close to twenty and his sisters were close to fourteen when the final decision was released.<sup>265</sup> In a brief opinion, the Appellate Court found that “forced visitation would serve little purpose, except to exacerbate the sisters’ anxiety.”<sup>266</sup>

Similarly, in a 1999 Massachusetts case, *Degrenier v. Reid*,<sup>267</sup> the Appellate Court found that an adoptive parent’s decision to disallow visits between an approximately fifteen-year-old and her younger siblings was proper, given the older sibling’s “physical, verbal and emotional abuse of [her siblings] including an, as yet, unsubstantiated allegation of sexual abuse.”<sup>268</sup> The courts in both *Keenan R.* and *Degrenier* took a somewhat punitive tone towards the older siblings, and applied the “best interest of the child” standard to only the younger children with whom visits were being petitioned.<sup>269</sup> As the Family Court in the initial *Keenan* opinion stated, “[s]ince the childcare agency that has custody and guardianship of [fourteen-year-old Keenan] supports his request for visits, we must assume that such contact would promote [Keenan’s] best interests.”<sup>270</sup> The court, however, applied the “best interest” standard only to the interests of the younger siblings.<sup>271</sup>

A 2003 Massachusetts decision,<sup>272</sup> denied the sibling’s petition for visitation but demonstrated a more thoughtful approach to an inter-sibling

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

<sup>262</sup> *In re Keenan R. v. Julie L.*, 831 N.Y.S.2d 320, 320 (App. Div. (2007)).

<sup>263</sup> *In re Keenan R. v. Julie L.*, 899 N.Y.S.2d 51, 52 (App. Div. 2010).

<sup>264</sup> *Id.*

<sup>265</sup> *Compare id.* (decided in 2010), with *Keenan R.*, 775 N.Y.S.2d at 468 (decided in 2004 when Keenan was fourteen and his biological sisters, Kamila and Jamila, were eight).

<sup>266</sup> *Keenan R.*, 899 N.Y.S.2d at 52.

<sup>267</sup> 716 N.E.2d 667 (Mass. 1999).

<sup>268</sup> *Id.* at 668.

<sup>269</sup> *Compare id.* at 669, with *Keenan R.*, 899 N.Y.S.2d at 52.

<sup>270</sup> *Keenan R.*, 775 N.Y.S.2d at 469.

<sup>271</sup> *Id.* at 469–70 (“[A best interest] hearing would be pointless since Petitioner possesses no specific information concerning the best interests of [his siblings].”).

<sup>272</sup> *In re Pierce*, 790 N.E.2d 680 (Mass. App. Ct. 2003).

abuse case.<sup>273</sup> The petitioning child in that case was Louise, a teenager who “had a long history of psychological problems that included hospitalizations and antipsychotic medications” and who had “set a fire in a supermarket and had been ‘completely out of control, tipping over displays, biting and spitting.’”<sup>274</sup> More troubling, Louise’s telephone contact and visits with her younger brother, Pierce caused him to have “flashbacks of abuse perpetuated against him [by his sister].”<sup>275</sup> The opinion does not go into great detail about the nature of this abuse, but it is clear that there was an abusive dynamic between the two siblings.<sup>276</sup> The Appellate Court affirmed the Trial Court’s finding that “[a]ny future contact between [Pierce and Louise] should only take place if it was safe and appropriate for Pierce.”<sup>277</sup> The court left the door open for the petitioner to bring another case, stating “if and when Louise brings another petition under [Massachusetts’s sibling visitation statute] . . . the court will determine whether visitation is currently in Pierce’s best interests.”<sup>278</sup> The case has no accessible subsequent history—it is unknown whether Louise was ever successful in her petition. Yet the fact that the court left the door open to the possibility that such visitation could actually be in his best interest if properly structured, is a far cry from the court’s language in *Keenan R.* that visitation with an abusive sibling would “serve little purpose.”<sup>279</sup>

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

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<sup>273</sup> *Id.* at 685 (internal quotations omitted) (noting the siblings’ “best interests . . . will vary with the circumstances”).

<sup>274</sup> *Id.* at 682 n.3.

<sup>275</sup> *Id.* at 686.

<sup>276</sup> *Id.* (omitting details about abuse between siblings in the flashbacks).

<sup>277</sup> *Id.* at 683.

<sup>278</sup> *Id.* at 686.

<sup>279</sup> *In re Keenan R. v. Julie L.*, 899 N.Y.S.2d 51, 52 (App. Div. 2010).

<sup>280</sup> *See In re Pierce*, 790 N.E.2d at 682 n.3 (“[Petitioner] had a long history of psychological problems that included hospitalizations and antipsychotic medications.”); *Degrenier v. Reid*, 716 N.E.2d 667, 668 (Mass. App. Ct. 1999) (indicating that plaintiff was forbidden from visiting her siblings due to her “physical, verbal, and emotional abuse” of her siblings); *In re Keenan R. v. Julie L.*, 775 N.Y.S.2d 468, 469 (Fam. Ct. 2004) (“Since

supports, the discussion should concern *how* contact can occur (supervised or letter writing), not *whether* it can occur. As one adoptive parent expressed:

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

#### *B. Parentification*

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

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

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[petitioner] had been a foster child in the home of Respondents prior to the placement of his sisters there, but was removed due to sexually inappropriate behavior and temper tantrums.”).

<sup>281</sup> E.H. Interview, *supra* note 226.

<sup>282</sup> See *supra* text accompanying note 38.

<sup>283</sup> See *supra* text accompanying note 38.

<sup>284</sup> See *supra* text accompanying note 38.

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

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

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

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

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

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<sup>285</sup> D.W. Interview, *supra* note 133.

<sup>286</sup> E.A. Interview, *supra* note 89.

<sup>287</sup> T.C. Interview, *supra* note 52.

to their own parents.<sup>288</sup> In addition, the child may act as an advisor or confidant for a needy parent or sibling.<sup>289</sup> Parentification becomes a problem when a child no longer thinks or acts like a child, and is associated with negative outcomes for children, including depression, anxiety, and compulsive caretaking.<sup>290</sup> Unfortunately, parentified older siblings are often viewed even more as a problem when they are placed into foster care.<sup>291</sup> T.C. explained:

When they say the word mother, only my sister comes to mind. And I told her, I gave her a thank you letter recently . . . . We were in a foster home together when I was six and she was nine. There were three brothers there, who tried to molest me. My sister walked in when they had me on the bed and stopped them just in time. She freaked out, actually tried to burn down my foster mother's house when she walked in. The boys said that nothing ever happened, my sister tried to explain that "they were trying to get on top of my little sister." We went back to [the agency] and the whole incident was written off as the fact that "the sister's crazy." They put her in a mental home at nine years old. They wrote in my records "this sister is trying to be a mother figure, she's a troublemaker, she's crazy."<sup>292</sup>

This issue is compounded by the poor mental health treatment afforded to foster children.<sup>293</sup> In a study of foster parents' and workers' views on sibling

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

<sup>289</sup> See *id.* ("When a child is parentified, the child assumes the role of the parent including that of a protector instead of the other way around.").

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

<sup>291</sup> *Id.* See also Maureen C. Smith, *An Exploratory Survey of Foster Mother and Caseworker Attitudes about Sibling Placement*, 75 CHILD WELFARE, 357, 362, 372 (1996).

<sup>292</sup> T.C. Interview, *supra* note 52.

<sup>293</sup> See *Testimony of David Rubin, MD MSCE FAAP on behalf of the American Academy of Pediatrics: Foster Children and the Health Care System*, AM. ACAD. PEDIATRICS 2-4, <http://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/FosterChildrenandtheHealthCareSystem.pdf> (last visited Nov. 14, 2014).

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

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

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

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

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<sup>294</sup> Smith, *supra* note 291, at 368, 372.

<sup>295</sup> *Id.* at 368.

<sup>296</sup> Shantay Mines, *The Parentified Child: Monster or Savior? Treatment for the Parentified Child and Siblings in Foster Care*, INTER-DISCIPLINARY.NET 2 (2011), <http://www.inter-disciplinary.net/wp-content/uploads/2011/08/minesmpaper.pdf>.

sibling.<sup>297</sup> Caseworkers, social workers, or foster families had explicitly occasionally told them this. For instance, S.C., a former foster youth who is now thirty years old, stated that he had “basically been the caretaker” for his younger brother, even though he was only two years older.<sup>298</sup> When he entered foster care at age six and was placed in a residential treatment center, he remembers being separated from his brother because “they said they had to break me of [my caretaking tendencies].”<sup>299</sup> In response to losing contact with his brother after his brother’s adoption, S.C. learned to “sever everything. To quit hoping that I was going to have that connection, to have that family.”<sup>300</sup> The effects of this have been long-lasting. To this day, he struggles to “live in a world where family structure is built into everything,” and still has tremendous difficulty connecting and forming attachments.<sup>301</sup>

The issue of parentification appears in numerous sibling visitation cases. *In re Deborah*,<sup>302</sup> for instance, ten-year-old Myron and his infant sister Deborah were placed in a pre-adoptive home together. When Deborah was three, the adoptive parents corporally punished Deborah, and Myron complained to the authorities.<sup>303</sup> An investigation categorized the corporal punishment as a “child care deficiency” rather than abuse.<sup>304</sup> After making the allegation, Myron was removed from the home and placed with a relative.<sup>305</sup> He initially continued to have bi-weekly agency visits with his sister, and during those visits he asked his sister to refer to the pre-adoptive parents as “auntie” and “uncle” rather than “mom” and “dad.”<sup>306</sup> Upon learning this, the pre-adoptive mother told the caseworker that these visits were “confusing” to Deborah, and asked that they cease.<sup>307</sup> When his sister’s family moved forward with the adoption, Myron intervened and asked for leave to oppose the adoption or for the court to order sibling visits.<sup>308</sup>

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<sup>297</sup> Interviews, Children’s Law Center New York, in Brooklyn, N.Y. (2013–14) (unpublished) (on file with authors).

<sup>298</sup> S.C. Interview, *supra* note 129.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> 681 So. 2d 22, 23 (La. Ct. App. 1996).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 23–24.

<sup>307</sup> *Id.* at 24.

<sup>308</sup> *Id.*

In a dismissive opinion, the court found that Myron had no right to intervene in the adoption, and that “ordering [the adoptive family] to produce Deborah at fixed times and places to visit with her brother . . . would be unreasonable and not in Deborah's best interest.”<sup>309</sup> The opinion does not acknowledge the fact that, absent such an order, Myron is unlikely to ever see his sister again.<sup>310</sup> From both the court's and the adoptive parents' perspective, Myron overstepped his authority as a child by trying to interfere with the adoptive parents' right to build a relationship with their daughter.<sup>311</sup> Perhaps unsurprisingly, this explains why most foster parents believe that the presence of siblings makes it harder for foster parents to integrate a child into their family.<sup>312</sup>

Should we be surprised that siblings who have taken care of one another will be uneasy towards the idea of a stranger taking care of them? This is further complicated because “[t]raumatized children and those with attachment issues do not easily develop positive reciprocal relationships with their new caregivers.”<sup>313</sup> “Additionally, the loss of their birth parents may be unresolved, and the child may not be able to establish new relationships.”<sup>314</sup> “As a result, children may be vigilant around their foster and future adoptive parents, demonstrating a lack of trust in them, [which] interferes with the children's ability to attach to anyone in a healthy way.”<sup>315</sup> Critically, quality mental health treatment for the parentified children, siblings, and adults who are caring for them, or the caseworker's basic understanding of the issues involved is missing.<sup>316</sup> “Even for those families who [are able to] access mental health treatment . . . , they are generally restricted to one of many ‘Medicaid Mills’ which are in the business of processing as many patients as possible.”<sup>317</sup> Assuming they are given a block of time, these “mills” house practitioners simply do not understand

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<sup>309</sup> *Id.*

<sup>310</sup> *See id.* at 24–25 (affirming that the “trial court properly determined that ordering the Huttons to produce Deborah at fixed times and places to visit with her brother Myron would be unreasonable and not in Deborah's best interest”).

<sup>311</sup> *Id.* at 25.

<sup>312</sup> Smith, *supra* note 291, at 368–69.

<sup>313</sup> Post & Zimmerman, *supra* note 17, at 496. *See also* Wendy L. Haight et al., *Understanding and Supporting Parent-Child Relationships during Foster Care Visits: Attachment Theory and Research*, 48 SOC. WORK 195, 197 (2003).

<sup>314</sup> Post & Zimmerman, *supra* note 17, at 496.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 503.

<sup>317</sup> *Id.* at 504.

the dynamics of foster care and adoption and cannot offer successful treatment and interventions.<sup>318</sup> As a result of insufficient intervention, siblings lose physical and emotional connections to each other.<sup>319</sup> T.C., whose sister protected her from molestation in a foster home and was psychiatrically hospitalized as a result,<sup>320</sup> described her hope that the system would change: “I’d hope that nowadays, her records wouldn’t say that. Instead they’d say ‘This girl is really smart, she’s like a mother figure. We should warn the foster parents, this girl is really protective of her siblings. And we need to deprogram her, but in a good way, and not penalize her.’”<sup>321</sup>

## V. DISCUSSION - SHIFTS IN MINDSET AND APPROACHES

Throughout the life of a child protective case, advocates, judges, and referees are often faced with a steady stream of determinations that must be made in the best interest of the child.<sup>322</sup> Psychological issues are frequently overlooked in the area of sibling relationships and adoption, especially those adoptions that arise out of foster care.<sup>323</sup> Because family court practitioners are focused on the short-term result of achieving permanency, long-term emotional and psychological ramifications of losing sibling relationships are not well understood or taken into consideration.<sup>324</sup>

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

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

<sup>320</sup> T.C. Interview, *supra* note 52.

<sup>321</sup> *Id.*

<sup>322</sup> See, e.g., OFFICE OF ATTORNEYS FOR CHILDREN, APPELLATE DIV., SECOND DEPT., OFFICE OF ATTORNEYS FOR CHILDREN ADMINISTRATIVE HANDBOOK 2 (2013) (“The attorney for the child has the responsibility to represent and advocate the child’s wishes and interests . . .”).

<sup>323</sup> Post & Zimmerman, *supra* note 17, at 496.

<sup>324</sup> See Herrick & Piccus, *supra* note 105, at 856 (“Approximately half of the states in the US have enacted policy on siblings in out-of-home care, though most of these only address the issue minimally . . . . New York State has . . . passed some significant legislation on siblings, but does not require child welfare agencies to consider siblings in permanency planning, nor do they require post-adoption contact between siblings.”).

The CLCNY interviewees unanimously understood the need for the termination of their parents' rights and the potential concerns adoptive parents have in maintaining sibling relationships.<sup>325</sup> But it simply did not occur to them that their relationship with their sibling would be *de facto* terminated or that this loss of contact would be such a traumatic and emotionally devastating event that would continue to impact their emotional and psychological health as adults.<sup>326</sup> It is critical that child welfare and family court professionals make changes in their approach towards sibling contact.

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

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

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<sup>325</sup> See *supra* text accompanying note 38.

<sup>326</sup> See *supra* Parts III–IV.

<sup>327</sup> E.A. Interview, *supra* note 89.

<sup>328</sup> L.D. Interview, *supra* note 90.

*A. Attorneys for Children – Consultation with Clients*

An AFC is a zealous advocate that is prepared to litigate the particular legal and factual issues that arise from the child protective case.<sup>329</sup> However, the unique role of an AFC often involves responsibilities not ordinarily associated with the job of a lawyer.<sup>330</sup> An AFC often monitors the treatment and services the child is receiving while in foster care, intercedes on the child's behalf to help obtain services or financial benefits, and seeks redress if necessary.<sup>331</sup> As discussed earlier, AFCs in New York City generally take a client-directed advocacy approach unless the child is of insufficient age, intelligence, or maturity to provide much information or guidance, or their decision would place them at imminent risk of physical or emotional harm.<sup>332</sup> Therefore, in the context of a termination of parental rights proceeding, if a child is of sufficient age, intelligence and maturity, an AFC will take direction from the child on whether or not they wish to be freed for adoption.<sup>333</sup> If not, an AFC will conduct a thorough investigation and assessment and make a best interest determination.<sup>334</sup> In consulting with and advising children in termination of parental rights proceedings, an AFC "has a duty to explain to the child, in a developmentally appropriate manner, all information that will help the child to understand the proceedings, make decisions, and otherwise provide the lawyer with meaningful input and guidance."<sup>335</sup> The lawyer's duties as counselor and advisor include:

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<sup>329</sup> OFFICE OF ATTORNEYS FOR CHILDREN, APPELLATE DIV., SECOND DEPT., *supra* note 322.

<sup>330</sup> *Id.* at 3 (providing a non-exhaustive list of various activities an attorney may be responsible for accomplishing).

<sup>331</sup> *See id.*

<sup>332</sup> *Id.* at 2 ("When an attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes.").

<sup>333</sup> *Id.* at 2 ("If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests.").

<sup>334</sup> *See id.* ("In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.").

<sup>335</sup> STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CHILD PROTECTIVE, FOSTER CARE, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS § A-2

“[d]eveloping a thorough knowledge of the child’s circumstances and needs,”<sup>336</sup> “[i]nforming the child of the relevant facts and applicable laws,”<sup>337</sup> “[e]xplaining the practical effects of taking various positions, which may include the impact of such decisions on the child and other family members or on future legal proceedings,”<sup>338</sup> “[e]xpressing an opinion concerning the likelihood that the court will accept particular arguments,”<sup>339</sup> “[p]roviding an assessment of the case and the best position for the child to take, and the reasons for such assessment,”<sup>340</sup> and “[c]ounseling against or in favor of pursuing a particular position, and emphasizing the entire spectrum of consequences that might result from assertion of that position.”<sup>341</sup>

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(N.Y. State Bar Ass’n Comm. on Children & the Law 2007) [hereinafter STANDARDS FOR ATTORNEYS].

<sup>336</sup> *Id.* § A-2(1).

<sup>337</sup> *Id.* § A-2(2).

<sup>338</sup> *Id.* § A-2(3).

<sup>339</sup> *Id.* § A-2(4).

<sup>340</sup> *Id.* § A-2(5).

<sup>341</sup> *Id.* § A-2(6). *See also* NEW YORK LAWYER’S CODE OF PROF’L RESPONSIBILITY EC 7-8 (2007) (“A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations . . . . A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer’s objective viewpoint . . . . A lawyer may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions.”); *Id.* at EC 7-3 (“A lawyer serving as advisor primarily assists the client in determining the course of future conduct and relationships.”); STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § B-4 cmt. background (1996) (“The lawyer may express opinion concerning likelihood of court or other parties accepting particular positions . . . . [and] may the inform child of an expert’s recommendations germane to the issue.”); *Id.* (“A child, however, “may agree with the lawyer for inappropriate reasons . . . . Therefore, the lawyer needs to understand what the child knows and what factors are influencing the child’s decision. The lawyer should attempt to determine from the child’s opinion and reasoning what factors have been most influential or have been confusing or glided over by the child when deciding the best time to express his or her assessment of the case.”); Barbara Kabat et al., *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. 682, 684–85 (2006) (explaining that a lawyer should “let the child talk,” “listen to the child,” “[b]egin with the child’s agenda,” “[g]ather information from collateral sources,” “explain and establish the attorney-client relationship,” “[e]ncourage the child to speak with others,” “explain the court process,” “[h]elp child to understand that [he or she] has right to have wishes advocated for without attribution,” and “[h]elp child understand the

In advising a child about termination of parental rights and adoptions, AFCs are trained to focus on exploring whether or not a child wants to be adopted.<sup>342</sup> In sibling groups, particularly when children are separated and have different goals, an AFC would likely ask whether or not the child agrees or disagrees with their sibling's adoption to assess whether a conflict of interest exists in their representation.<sup>343</sup> As a practical matter, however, AFCs would likely never advise a child that consenting to a sibling's

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

<sup>342</sup> STANDARDS FOR ATTORNEYS, *supra* note 335, § C-1 cmt. background.

<sup>343</sup> In the context of sibling groups, if the children express different preferences about where and who they want to live with, or because of different ages, intelligence, or maturity, an AFC may have to substitute judgment for one while practicing direct advocacy for the other, the AFC is presented with an irreconcilable conflict of interest, in violation of the Code of Professional Responsibility. *See, e.g., Sidor v. Zuhoski*, 690 N.Y.S.D.2d 637, 638–39 (App. Div. 1999); *In re H. Children*, 608 N.Y.S.D.2d 784, 785 (Fam. Ct. 1994) ("[A]n attorney who undertakes the joint representation of two parties in a lawsuit [should] not continue as counsel for either one after an actual conflict of interest has arisen . . . [A]ny doubt about the existence of a conflict should be resolved in favor of disqualification."). *See also Gary D.B. v. Elizabeth C.B.*, 722 N.Y.S.2d 323, 326 (App. Div. 2001) ("[A]fter the children began to express different preferences concerning the parent with whom they wished to live, the Law Guardian moved to withdraw from representing all of the children. The court should have granted that motion because the Law Guardian articulated a conflict of interest."); NEW YORK LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 5-105(A) (2007) ("A lawyer shall decline proffered employment if the exercise of independent judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests . . ."). Further, it is important that an attorney avoid even the appearance of impropriety. Children who have different positions or interests could be concerned that information is or is not presented at risk of undermining another's position, or could be concerned that the attorney would sacrifice their position in order to advocate as strongly as possible for the result that another desires. *See Cardinale v. Golinello*, 372 N.E.2d 26, 30 (N.Y. 1977) ("[T]he lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship.").

adoption could possibly result in the child losing the ability to ever see that sibling again. Likewise, an AFC would probably not advise a pre-adoptive child that consenting to their own adoption could mean losing contact with their siblings entirely. Children—even teenagers—can have great difficulty understanding the difference between what *could* happen and what *will* happen, and AFCs must engage with their clients in a developmentally appropriate manner.<sup>344</sup> Yet, at the same time, these attorneys must follow ethical guidelines and “emphasiz[e] the entire spectrum of consequences that might result [from the child’s decision].”<sup>345</sup> Like many in the child welfare field, an AFC hopes that the adoptive parent will voluntarily facilitate relationships between biological siblings, whether some members of that sibling group reside with the birth parents, foster or adoptive parents, or in institutional care.<sup>346</sup> Nevertheless, an adoptive parent’s promise that they will facilitate a relationship is not a legally binding commitment.

Thus, to be consistent with their ethical duties, AFCs must make more efforts to both fully explore the range of consequences with their client and to file independent visitation petitions on their client’s behalf when appropriate. In failing to file visitation petitions, AFCs may unknowingly fail to protect their client’s rights to have a relationship with their siblings during their minority.<sup>347</sup> The ideal time to file a visitation petition is during the termination stage or before the adoption.<sup>348</sup> Without an order in place, children might lose contact until they are eighteen, at which point they can file their own visitation petitions.<sup>349</sup> Even an older sibling who was extremely close to his or her younger sibling may lose a visitation case as an adult, because of the court’s likely deference to the adoptive parent’s

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<sup>344</sup> STANDARDS FOR ATTORNEYS, *supra* note 335, § A-2 (2007).

<sup>345</sup> *Id.* § A-2(6).

<sup>346</sup> See generally CHILD WELFARE INFO. GATEWAY, *supra* note 104 (explaining in detail the desire of social workers that children will be able to visit with their biological siblings as well as the consequences of children being denied visitations).

<sup>347</sup> See Herrick & Piccus, *supra* note 105, at 856–57 (explaining a recommended policy of considering how a child’s best interest is intrinsically linked to sibling contact, and how planning a child’s life is crucial to this link).

<sup>348</sup> See *id.*

<sup>349</sup> See *id.* at 854 (“[M]any children’s attempts to visit their siblings have been met with so many difficulties that they have given up and attempted to move on with their lives without their brothers and sisters.”).

autonomy and a skepticism that ordering visits with someone who has been out of the child's life for years could be in that child's best interest.<sup>350</sup>

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

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<sup>350</sup> See CHILD WELFARE INFO. GATEWAY, *supra* note 104, at 8 ("[O]ver half of the foster mothers (55 percent) did not believe it was easier for a foster child to fit into the foster family if placed with siblings.").

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

<sup>352</sup> *Id.* at 847, 856.

<sup>353</sup> See CHILD WELFARE INFO. GATEWAY, *supra* note 104, at 2 ("In child welfare, the term 'fictive kin' has been introduced to recognize types of relationships in a child's life where there is no legal or biological tie, but a strong, enduring bond exists.").

<sup>354</sup> *Id.* ("[C]hild- and family-centered practice respects cultural values and recognizes close, nonbiological relationships as a source of support to the child. In these cases, the child may be one of the best sources of information regarding who is considered a sibling.").

<sup>355</sup> See Herrick & Piccus, *supra* note 105, at 857 (explaining that there is a "presumption that it is generally in the child's best interest to be placed with siblings and, when this is not possible, to maintain contact between siblings").

<sup>356</sup> Examples of age appropriate questions, could include:

- Which sibling do you enjoy spending time with?
- Which sibling enjoys spending time with you?
- Who will play a game with you?
- Which sibling do you turn to when you are afraid or hurt?
- Which sibling turns to you when he or she is afraid or hurt?

In addition to developing a working definition of “sibling,” AFCs should document their efforts to place siblings together when it is in their client’s best interest, along with the visitation plan if they are not placed together.<sup>357</sup> This documentation should include information such as who the child identifies as a sibling and information about siblings who were adopted into a different family.<sup>358</sup> Further, AFCs should record information on siblings who do not already have a relationship with the child.<sup>359</sup> Maintaining this record will preserve institutional memory for that child and help AFCs better advocate their client’s wishes by using it as a tool to emphasize the importance of sibling contact to judges and other stakeholders.<sup>360</sup> While this practice already takes place in some form either by the AFCs or caseworkers, the information could be used more productively.<sup>361</sup> The information is not only useful during the pendency of the case, but also in the future if the child needs another permanency resource.<sup>362</sup> As noted earlier in this Article, as well as in the Broken Adoption Project’s research, many young people whose adoptions have broken down find that the one adult who was willing to step forward and raise them to adulthood was their biological sibling.<sup>363</sup>

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

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CHILD WELFARE INFO. GATEWAY, *supra* note 104, at 9.

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

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* (“Documentation of sibling contact information in the child’s case file” is a recommended policy procedure.”).

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

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

<sup>363</sup> Post & Zimmerman, *supra* note 17, at 477 (“In 75% of the cases involving a broken adoption, the immediate biological family (parent, sibling, aunt, uncle, or grandparent) remained involved in the child’s life, either consistently or intermittently.”).

survive the adoption.<sup>364</sup> In consulting with their clients, AFCs should not only discuss whether the client wants to have a continuing relationship with the sibling post-adoption, but also whether the client wishes to take the affirmative legal steps necessary preserve it.<sup>365</sup>

A potentially effective, but rarely used option in many states, is for an AFC to file for a visitation order that will survive the adoption.<sup>366</sup> Like many states, New York has a “third party visitation statute” under which AFCs could file such a petition: New York Domestic Relations Law (D.R.L.) § 71.<sup>367</sup> Significantly, New York does not have a statute which allows for visitation to be incorporated into the adoption, except in very narrow circumstances when a parent executes a judicial surrender.<sup>368</sup> Under those circumstances, conditions can be incorporated allowing for communication with or contact between the adoptive child, the prospective adoptive parent or parents, a birth parent or parents, and biological siblings or half-siblings, as agreed upon and as set forth in the agreement, and as would be in the adoptive child's best interest.<sup>369</sup> As a result, D.R.L. § 71 would be the best legal mechanism to secure visitation, because the statute specifically authorizes the court to order visitation between siblings when such visitation would be in “the best interests of the child.”<sup>370</sup> D.R.L. § 71 clearly applies to cases in which a biological grandparent or biological sibling is seeking

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

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

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

<sup>367</sup> See DOM. REL. LAW § 71.

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

<sup>369</sup> See *id.*

<sup>370</sup> DOM. REL. LAW § 71.

post-adoption visitation.<sup>371</sup> As previously discussed, courts presume that a fit parent makes decisions in accordance with the best interests of her children,<sup>372</sup> and a grandparent or sibling who seeks court-ordered visitation over the objection of the parent bears the burden of proving that the requested visitation would be in the best interest of the child.<sup>373</sup>

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<sup>371</sup> See, e.g., *People ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049, 1051 (N.Y. 1981); *In re Ann M.C. v. Orange Cnty. Dep't of Soc. Servs.*, 682 N.Y.S.2d 62, 64 (App. Div. 1998); *In re Hatch v. Cortland Cnty. Dep't of Soc. Servs.*, 605 N.Y.S.2d 428, 429 (App. Div. 1993).

<sup>372</sup> See *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (“The decisional framework employed by the Superior Court directly contravened the traditional test that a fit parent will act in the best interest of his or her child.”).

<sup>373</sup> See *In re Fitzpatrick v. Youngs*, 717 N.Y.S.2d 503, 506 (Fam. Ct. 2000). The cases in which post-adoptive visitation has been ordered generally involve older children who have an established warm relationship with the biological grandparent and siblings who seek visitation. *Sibley*, 429 N.E.2d at 1049–50. In *Sibley*, the court found post-adoptive visitation appropriate where the thirteen-year-old child had lived with and repeatedly visited his maternal grandparents from birth until age four, and visited with them from time to time over the following six years. *Id.* The *Sibley* Court stated that the child “knows his relatives and enjoys playing with his cousins. He is old enough to comprehend their familial relationship and to remember them over the years.” *Id.* at 1053. Accordingly, the court “[r]ecogniz[ed] the established family relationship” and granted post-adoptive visitation. *Id.* In other cases, post-adoption sibling visitation has been ordered because “the severance by adoption of the existing emotional ties between children and their . . . siblings and grandparents may be harmful to the children and that it may be beneficial to provide for visitation after adoption.” *Hatch*, 605 N.Y.S.2d at 428. See also *In re Cocose v. Diane B.*, No. V-4205-04, 2005 WL 1792599, at \*5 (N.Y. Fam. Ct. July 22, 2005) (holding that the children “are old enough to remember living with, and having contact with their biological family, consideration must be given to whether deprivation of sibling visitation will have a negative effect on the children’s development.”); *In re Carl B. v. Broome Cnty. Soc. Servs.*, 537 N.Y.S.2d 456, 456, 459 (Fam. Ct. 1989) (directing hearing of “grandparents’ application for visitation” where a five-year-old child “ha[d] enjoyed regular visitation with his maternal grandparents since he was three years old”); *In re Anthony*, 448 N.Y.S.2d 377, 378 (Fam. Ct. 1982) (ordering post-adoptive visitation where “[d]espite the separation from his birth siblings, [the child had] maintained an ongoing relationship with them . . . [and] [b]oth the Agency and the adoptive parents agreed that [the child’s] relationship with his birth siblings was most important to [his] well being and should be continued”); cf. *In re Justin H. v. Katherine H.*, 626 N.Y.S.2d 479, 480 (App. Div. 1995) (affirming a decision denying post-adoptive visitation where the “Family Court properly determined that the subject children established no real familial bonds with their half-siblings, and that, especially in Justin’s case, his foster family was the only real family he has ever known”). See also *In re Keenan R. v. Julie L.*, 775 N.Y.S.2d 468, 469–70 (Fam. Ct. 2004), *rev’d*, 831 N.Y.S.2d 320 (App. Div. 2007) (denying fourteen-year-old post-adoption visitation with his eight-year-old sisters where the only contact between the

In deciding whether visitation will be awarded, “New York courts examine both the nature and basis of the parents’ objection to visitation as well as the nature and extent of the sibling relationship,” among other considerations.<sup>374</sup> “Special weight is given to the parents’ decision.”<sup>375</sup> Such deference to a parent’s right to make decisions regarding her child’s upbringing, and specifically to her reasons for opposing grandparent or sibling visitation, is required under the Supreme Court’s decision in *Troxel*.<sup>376</sup> Accordingly, D.R.L. §§ 71<sup>377</sup> and 72<sup>378</sup> have been held constitutional under *Troxel*, precisely because in applying those sections, the New York courts have recognized and respected a parent’s due process right to raise his or her child without interference from the state, by giving “special weight” to the parent’s reasons for opposing such visitation.<sup>379</sup>

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children since their placement had been one visit five years earlier). Thus, in *Keenan R.*, the court explained that “an ongoing and affectionate relationship between Petitioner and the girls has not developed. Courts have consistently held the existence of such a relationship to be the essential predicate to equitable intervention.” *Id.* at 469.

<sup>374</sup> See *Cocose*, 2005 WL 1792599, at \*5.

<sup>375</sup> *Id.*

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

<sup>377</sup> See N.Y. DOM. REL. LAW § 71 (McKinney 2010).

<sup>378</sup> See *id.* § 72.

<sup>379</sup> See *In re Hertz v. Hertz*, 738 N.Y.S.2d 62, 64 (App. Div. 2002). In *Hertz*, the Court stated that pursuant to *Troxel*, “a decision regarding visitation is for the parent in the first instance and, if a fit parent’s decision becomes subject to judicial review, the court must afford at least some special weight to the parent’s decision.” *Id.* It then held that “[D.R.L. section] 72 can be, and has been, interpreted to accord deference to a parent’s decision,” and therefore was constitutional. *Id.* at 65. See also *Cocose*, 2005 WL 1792599, \*4 (quoting *Troxel*, 530 U.S. at 70) (“[P]ursuant to *Troxel*, . . . the court’s interpretation of [a non-parental visitation] statute must require a presumption that a fit parent acts in the best interests of his or her child. ‘Special weight’ [sic] is to be accorded the determination of the parents.”); *In re Morgan v. Grzesik*, 732 N.Y.S.2d 773, 778 (App. Div. 2001); *In re Davis v. Davis*, 725 N.Y.S.2d 812, 814 (Fam. Ct. 2001) (“[C]ourts can remove doubt as to the constitutionality of DRL Sec. 72 by requiring that special weight be accorded the preference of parents.”); *In re Smolen v. Smolen*, 713 N.Y.S.2d 903, 906 (Fam. Ct. 2000) (“[D.R.L. section] 72 has generally been interpreted to require substantial deference to the authority of parents in both aspects of the analysis.”).

Notably, post-adoption sibling visitation does not have to be all or nothing—visitation or severance of the relationship.<sup>380</sup> Ultimately, the order will define the kind of “contact” as well as frequency.<sup>381</sup> It is important to recognize that a range of actions may amount to contact including annual letters or photographs from an undisclosed address, e-mail and Skype calls, or regular in-person visits.<sup>382</sup>

#### *B. Other Stakeholders*

Child welfare stakeholders, like AFCs, should have frequent, evaluative conversations with children about their relationships, visitation, and contact with siblings.<sup>383</sup> Through caseworkers and AFCs, judges and referees should learn from each child’s existing or desired connection with siblings, which would allow them to determine whether it is appropriate to direct sibling contact or visitation post-adoption.<sup>384</sup> These reviews of sibling interaction should occur on both the micro level and macro level to protect each child individually while also informing a larger legal practice.<sup>385</sup> To meaningfully discuss how sibling contact post-adoption affects individual children, stakeholders must have a sense of the child’s definition and understanding of “sibling” and with whom they have developing relationships.<sup>386</sup> These sibling contact reviews should occur regularly during court dates for termination of parental rights proceedings and other

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

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

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

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

<sup>384</sup> See *generally id.* (explaining the importance of sibling bonds to foster children).

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

<sup>386</sup> See *id.* at 854–55 (explaining that measuring the quality of sibling relationships can be determined by the “dynamics of the sibling group based on the context in which the sibling relationships developed”).

related matters.<sup>387</sup> Both judges and AFCs should take a more active stance when considering a child's best interest by following up on the time, place, and progress of the visitation.<sup>388</sup> If children are separated, the parties who arrange that separation must devote extra energy to ensure that at least some sibling contact is maintained within and beyond foster care placements.<sup>389</sup>

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

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

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<sup>387</sup> Leonard Edwards, *Connecting with Siblings*, CASA FOR CHILDREN (July 2011), [http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.7522095/k.9A0E/JP3\\_Edwards.htm](http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.7522095/k.9A0E/JP3_Edwards.htm) ("The judge should insist that social workers include information regarding sibling contact.").

<sup>388</sup> See Herrick & Piccus, *supra* note 105, at 857 (requiring "[d]ocumentation of efforts made to place siblings together when in their best interest").

<sup>389</sup> *Id.* ("If placement together is not possible, frequent meaningful visitation would be required, including documentation of such efforts.").

<sup>390</sup> *Id.* at 849–51.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.* at 855.

<sup>393</sup> *Id.* at 855–56.

<sup>394</sup> *Id.* at 858 ("[W]e hope to inspire others to . . . work toward empowering former and current foster youth to be their own advocates.").

<sup>395</sup> *Id.* at 854, 857 (explaining that "efforts should be made to mitigate difficult sibling relationships with counseling or services" and, "[w]henver possible, siblings placed separately [should be] referred to the same counseling agency when seeking therapy").

connected with adoption-competent therapists who can work with the siblings individually or as a group to provide both supervision and a therapeutic environment that facilitates a healthy sibling dynamic.<sup>396</sup> If sibling therapy is not an option, caseworkers should strive to place siblings in the same counseling agency.<sup>397</sup> This arrangement improves children's well being by localizing care for siblings who are trying to reconnect, develop a healthy relationship, and cope with similar kinds of trauma.<sup>398</sup>

Despite the positive impact of quality, localized therapeutic services for sibling groups, the reality of available services to families looks like a "Medicaid Mill."<sup>399</sup> Such medical centers "are in the business of processing as many patients as possible . . . [by offering] a block of time . . . [and] practitioners who simply do not understand the dynamics of adoption."<sup>400</sup> As a result, these centers cannot prescribe successful treatment or plan successful interventions, particularly for children who are experiencing grief and attachment issues.<sup>401</sup> Accordingly, it is incumbent that caseworkers seek specialists outside of the Medicaid Mills, individuals with the knowledge and experience critical to focus on a treatment plan addressing how sibling contacts can be fostered and preserved.<sup>402</sup>

"Although there has been a great deal of research on the need for quality post-adoption services, even years after the adoption finalization, programs . . . have little funding and are not readily accessible."<sup>403</sup> To draw attention to the need for more funding to crucial services, it may be useful to condition the adoption subsidy on facilitating post-adoption visits. The right to an adoption subsidy is based on a contractual agreement between the state and the adoptive parent.<sup>404</sup> The terms of the contract are set by respective states, rather than being uniform.<sup>405</sup> Accordingly, states prioritizing post-adoption sibling contact and visitation should contractually

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<sup>396</sup> *See id.*

<sup>397</sup> *Id.*

<sup>398</sup> *See id.*

<sup>399</sup> Post & Zimmerman, *supra* note 17, at 503.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 503–04.

<sup>403</sup> *Id.* at 503.

<sup>404</sup> Mandelbaum, *supra* note 27, at 62 ("[T]he adoption subsidy arrangement . . . is negotiated and agreed to between the adoptive parent(s) and the state prior to the adoption of the foster child.").

<sup>405</sup> *Id.* at 18 ("[P]ost-adoption sibling contact . . . statutes typically are part of a state's adoption laws, but statutory schemes will vary.").

oblige adoptive parents to coordinate it in cases where it would actually benefit the child and be geographically feasible.

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

When considering legislation supporting post-adoption sibling visitation and the role of stakeholders as advocates, it is critical to acknowledge the relative lack of political activism and support that siblings as a group can garner.<sup>406</sup> This unfair disadvantage in the realm of self-advocacy is reflected by a parallel scenario: “[b]y 2000, every state had enacted laws providing for some type of grandparent visitation . . . [due to] the extraordinary lobbying efforts and political power of groups promoting the interests of older Americans, such as the AARP.”<sup>407</sup> “Thomas Downey, a member of Congress who advocated for grandparent visitation rights, noted candidly in 1991 the ‘well-known fact that seniors are the most active lobby in this country, and when it comes to grandparents there is no one group more united in their purpose.’”<sup>408</sup> It is incumbent on child welfare and family court practitioners to similarly and promptly bring siblings’ voices to the forefront.

### C. Statute, Case Law and Practice

One state which appears to have successfully focused on preserving post-adoption sibling relationships through statute, case law, and practice is Massachusetts.<sup>409</sup> In *In re Adoption of Vito*,<sup>410</sup> the Supreme Judicial Court of Massachusetts provided a full analysis of the power of a judge to order post-termination and post-adoption contact between a child and his

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

<sup>407</sup> *Id.* (emphasis added).

<sup>408</sup> *Id.* (quoting *Grandparents Rights: Preserving Generational Bonds: Hearing Before the Subcomm. on Human Servs. of the H. Select Comm. on Aging*, 102d Cong. 2 (1991) (statement of Rep. Thomas Downey, Chairman, Subcomm. on Human Servs.)).

<sup>409</sup> § 99, 1997 Mass. Acts 241; *In re Rico*, 905 N.E.2d 552, 560 (Mass. 2009); *In re Zander*, 983 N.E.2d 1222, 1226 (Mass. App. Ct. 2013).

<sup>410</sup> 728 N.E.2d 292 (Mass. 2000).

biological parents.<sup>411</sup> The court recognized the limits of this equitable power as deriving from the need to respect the underlying policies governing adoptions as well as the rights of the parents, biological or adoptive, to raise their child without unwarranted intrusion.<sup>412</sup> Generally, an order directing post-adoption contact would be “unwarranted” where “the child has formed strong, nurturing bonds with his preadoptive family, and there is little or no evidence of a significant, existing bond with the biological parent.”<sup>413</sup> However, the court found that under other circumstances it was the court’s responsibility, pursuant to its duty of *parens patriae*, to intervene when it would be in the child’s best interest and issue specific orders rather than simply rely on the intent and promises of the adoptive parents or the agency.<sup>414</sup> Further, the judge, in fashioning an adoption decree concerning

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<sup>411</sup> *Id.* at 296, 298–304.

<sup>412</sup> *Id.* at 301–04.

<sup>413</sup> *Id.* at 303.

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

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

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

a child whose parents' rights have been terminated, may revisit the question of post-adoption contact if it pertains to the best interest of the child.<sup>415</sup>

In practice, Massachusetts has defied the popular belief that ordering post-adoption contact, even with biological parents, will "shackle" adoptive families and negatively impact adoption rates.<sup>416</sup> Consider this strong declaration which shows the court's true focus on the child's needs, rather than on the adults: "The purpose of post-adoption contact with the biological parent is not to strengthen the bonds between the child and his biological mother or father, but to assist as he negotiates, often at a very young age, the torturous path from one family to another."<sup>417</sup> But how does this work in practice? According to Mary Gambon, Assistant Commissioner of Adoption and Foster Care at the Massachusetts Department of Children and Families, there is a fundamental acknowledgement in the child welfare community that early family relationships will be sustained over the child's lifetime, which has sprung from a decade-old pro-open adoption stance:

Certainly we give the adoptive parent the right to set some parameters around that, where they happen, when they happen – it's not that should stop them. We try to take it from a legalistic position and what's in this child's best interest over a life time. With siblings, there is often more of a need to reconnect than with parents and we get more inquiries about bio siblings than we do about parents. We take a liberal view of brothers and sisters, including half siblings to really try to have the individual define the family. We don't want them to have an antagonistic relationship and we try to set the family with an understanding of why this is going to be important overtime. These kids are going to search when they are older otherwise they will push parents away.<sup>418</sup>

Perhaps Massachusetts is most unique in that every caseworker is recommended to obtain a social work degree, and as a result, approaches

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<sup>415</sup> *In re Vito*, 728 N.E.2d at 303. See also MASS. ANN. LAWS Ch. 210, §§ 5B, 6D (LexisNexis 2011).

<sup>416</sup> See, e.g., *supra* Part IV.C.; cases cited *supra* note 414.

<sup>417</sup> *In re Vito*, 728 N.E.2d at 304.

<sup>418</sup> Interview with Mary Gambon, Assistant Comm'r of Adoption and Foster Care, Mass. Dep't of Children and Families, in Brooklyn, N.Y. (June 30, 2014) [hereinafter Mary Gambon Interview] (unpublished) (on file with authors).

each child and case from a clinical and therapeutic perspective.<sup>419</sup> Discussions with the adoptive family about post-adoption contact are held in a very child-centered way and are focused on educating them about how they are not only adopting the child but also an extended family with siblings.<sup>420</sup> As a result, “they gain an understanding of why it’s so critical and that helps the conversation with them—it’s presented in a very positive manner [from the perspective of] the importance to these children.”<sup>421</sup> We can all learn from this approach.

## VI. RECOMMENDATIONS

The authors specialize in children's rights, advocacy and litigation,<sup>422</sup> and the central aim of their work is to give children and adolescents a voice and representation in legal proceedings that have a significant impact on their lives. Therefore, it must be acknowledged that the issues and solutions that have been discussed are necessarily from the perspective of the child. While much of what is addressed is specific to New York and published in a law review article, the authors hope that the dialogue can serve as an impetus for change. All readers, whether they are judges, lawyers, caseworkers, social workers, mental health professionals, or foster and adoptive parents, can be agents of this change, first on a micro level in how they practice and approach such issues, and then on a macro level in seeking reform within their agency and state.

### *A. Educate Stakeholders About the Importance of the Sibling Bond*

It is important to educate stakeholders about the importance of the sibling bond with an eye towards moving away from an automatic rejection of post-adoption sibling contact based upon fear and lack of information. Social science research supports that sibling relationships are crucial, and these relationships have unique implications for the child’s well-being and development in the short and long term.<sup>423</sup> Post-adoption sibling visitation does not have to be all or nothing—visitation or severance of the

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<sup>419</sup> See *Quality Improvement Report*, CHILD WELFARE LEAGUE OF AM. 46, (May 22, 2014), <http://www.cwla.org/wp-content/uploads/2014/02/MA-EOHHS-cwla-final-report.pdf>.

<sup>420</sup> See *supra* note 418 and accompanying text.

<sup>421</sup> Mary Gambon Interview, *supra* note 418.

<sup>422</sup> See *supra* text accompanying notes 35–37.

<sup>423</sup> See CHILD WELFARE INFO. GATEWAY, *supra* note 104, at 4 (“[C]hildren would first seek out their mothers but then turn to older siblings for support, even before they would go to their fathers . . . . [F]or isolated children (as is the case for many children in foster care), sibling support is especially crucial.”).

relationship. In working together, caseworkers and pre-adoptive parents can talk about the uniqueness of adoption, what the family needs and wants at the current time, and what it might want in the future when siblings are involved. Once practitioners in child welfare are familiar with sibling research and the issues which accompany the loss of the relationship to effectively address post-adoption sibling visitation issues, we will then be able to develop plans and procedures to achieve those objectives recognizing that visitation and contact can be tailored to the unique needs of the families and siblings.

*B. Confront Authority, Ask Questions*

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

*C. Legal and Legislative Advocacy*

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

*D. Involve Children in Decision-Making*

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

*E. Quality Therapeutic Services*

When siblings are initially placed into foster care they should engage in family therapy in order to address issues that stem from living with their parents. Family therapy is especially important to those children who are parentified, due to a lack of understanding on the part of foster parents and caseworkers of the influence that those children may have on their siblings and their new families.<sup>424</sup> Later, adoptive families should be connected with adoption-competent therapists who, in addition to working with the children individually, can work with the sibling group as a whole, providing both supervision and a therapeutic environment addressing how sibling contact can be fostered and preserved. Families and children should have the support and services post-adoption as often as they need, and they should have help understanding and navigating new and ongoing relationships well after the adoption is completed whether it is ordered or not.

## VII. CONCLUSION

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

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<sup>424</sup> See *supra* notes 316–23 and accompanying text.

years.”<sup>425</sup> “The Judge acted like I was some deadbeat dad,” Bianca said.<sup>426</sup> “I thought, what do you mean ‘where have I been?’ I’ve been trying to get in touch with my sister ever since she was taken from me.”<sup>427</sup>

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

As described in the Introduction, the authors combined their personal experiences, with the current legal and mental health literature surrounding this issue to reimagine a stronger foster care system that is responsive to maintaining sibling contact in a child’s lifetime.<sup>428</sup> This Article touches on the needed dialogue between the child and various other stakeholders in her life when assessing the importance of sibling contact, along with collectively thinking about alternatives when sibling visitation may not be in a child’s best interest.<sup>429</sup> As practitioners in the field, the authors not only came across compelling cases such as Bianca’s, but also experienced their shocking prevalence in New York City courts.<sup>430</sup> The authors’ experiences in these cases have helped to form reasonable recommendations for moving forward that are applicable beyond New York City’s foster care system.

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<sup>425</sup> Interview with Bianca, Sister, Children’s Law Center New York, in Brooklyn, N.Y. (July 14, 2014) (unpublished) (on file with author).

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> *See supra* pp.14–16.

<sup>429</sup> *See supra* pp. 15–17.

<sup>430</sup> *See supra* text accompanying notes 332–35.