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Fostering Family Ties: The State as Maker and Breaker of Kinship Relationships

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Fostering Family Ties: The State As Maker And Breaker of Kinship Relationships

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Gloria never had the opportunity to live with her biological parents. Following her birth, she was placed in Ms. L's foster home by the Massachusetts Department of Social Services ("D.S.S.").[1] Her parents, who were drug abusers, failed to comply with the state's plan for reunification of the family, and, therefore, their parental rights over Gloria were terminated.[2] Ms. L adopted Gloria at the age of four.[3] When Gloria was two years old, her biological parents had another child, Hugo, who was also removed from the parents' care immediately after birth.[4] Hugo was also placed in foster care, but not with Ms. L, who at that time had no room for him in her house.[5] Shortly after Hugo's second birthday, however, his foster mother refused to continue car-

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[1] *Adoption of Hugo*, 700 NE2d 516, 518 (Mass 1998), revg 694 NE2d 377 (Mass App 1998). The *Hugo* case did not involve Gloria's placement or future adoption by Ms. L. Rather, the opinions examine the adoption of Hugo and whether he could maintain a relationship with his biological sister, Gloria. We know very little about Gloria. There was no indication that her adoption by Ms. L was appealed or that any relative came forward to try and adopt her before Ms. L. did. One of the petitions regarding certiorari to the United States Supreme Court on the adoption of Hugo does mention an older brother who was also placed out of the home, but there is no indication as to why Gloria and Hugo were not placed with this other sibling. Brief for Respondent n 4, Opposition for Writ of Certiorari.

[2] *Hugo*, 694 NE2d at 377-78 (noting that parental unfitness is conceded on appeal).

[3] *Hugo*, 700 NE2d at 518.

[4] Id.

[5] *Hugo*, 694 NE2d at 378.

ing for him, and D.S.S. planned to place him in Gloria's adoptive home.[6] At that point, a paternal aunt came forward and expressed an interest in obtaining custody of Hugo. D.S.S. denied her request.[7] None of the court opinions ever alluded to the reason for this denial. After Hugo was placed with Ms. L, his biological parents were again deemed "unfit," and the state terminated their parental rights as to Hugo.[8] Ms. L, whom Hugo called "Mommy," wanted to adopt him, and D.S.S. found her to be a suitable adoptive parent.[9] The paternal aunt objected and indicated her desire to adopt Hugo; the biological parents supported the aunt's plan.[10]

Evidence at Hugo's adoption hearing indicated that he had bonded with Ms. L and Gloria, and was thriving despite emotional and developmental problems.[11] Experts testified that Hugo was "a fragile child for whom transitions were difficult."[12] The trial judge determined that the aunt would provide the best placement for Hugo, and ordered him to live with her in New Jersey.[13] An intermediate appellate court reversed the judge's decision,[14] but the state supreme court reinstated the trial court's ruling.[15] The United States Supreme Court denied certiorari.[16]

The state makes and breaks families in different ways, and the facts of this case reflect only one possible scenario. In *Adoption of Hugo*,[17] Gloria and her brother did not know each other initially because Hugo was born when his sister was two years old, and because the state, in the form of the Massachusetts D.S.S., originally could not place them together.[18] When D.S.S. belatedly united them, it enabled an emotional attachment between the siblings to form.[19] Yet the state, in the form of a Massachusetts trial judge, then permitted an aunt, who had appar-

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[6] *Hugo*, 700 NE2d at 518 and n 2.
[7] Id at 518.
[8] Id at 518 n 4.
[9] Id at 518-19.
[10] *Hugo*, 700 NE2d at 519.
[11] Id.
[12] Id at 523.
[13] *Hugo*, 694 NE2d at 378.
[14] Id at 377.
[15] *Hugo*, 700 NE2d at 526.
[16] *Hugo*, 526 US 1034.
[17] 700 NE2d 516.
[18] *Hugo*, 694 NE2d at 378.
[19] Id.

ently never seen Hugo, to take him away from his sister and surrogate mother.

The state often ignores important family and sibling bonds when making placement and visitation decisions for abused and neglected children. For example, siblings may be removed from their parents' care at the same time, and yet be placed in different foster or group homes, depending on their ages and needs.[20] During the course of the dependency action, the state might return the siblings to the parental home as an intact group or return only some children to the parents, turning others over to relatives or foster or group homes.[21] If parental abuse reoccurs at a later date, the state may again remove and separate the returned children.

Similarly, the state initially may place siblings together in a foster home while the parents work towards reunification.[22] If the parents cannot comply with the state's plan for reunification,

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[20] See William W. Patton, *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 U Miami L Rev 745, 746-47 (1994) (stressing that in dependency proceedings many siblings are separated during one of the most traumatic periods of their lives). In another variation, members of a sibling group may have different fathers. The state may remove the children from their mother's care due to abuse, and place them in a foster home together. One or more of the fathers, or their relatives, may be in a position to take custody, temporarily or permanently, of the biologically related children. The court, however, may keep the half-brothers and sisters in foster care, or return them to the mother, or place them for adoption with someone else. Again, this state action separates brothers and sisters. See, for example, *In re Celine R*, 71 P3d 787, 790 (Cal. 2003). In *Celine R*, the children shared the same mother but not the same father. Id. The older half-sister initially was placed with her maternal aunt, and the younger siblings were placed with their paternal uncle. Id. The paternal uncle wanted to adopt the younger siblings, but not the older half-sister, who was placed in permanent foster care because the maternal aunt was unwilling to adopt. Id. See also *In the Interest of SV*, 395 NW2d 666 (Iowa App 1986). In this case, four siblings were removed from their parents' home. Id at 667-68. The father and mother divorced and all four children were placed in foster care. Id. Two of the children were later returned to the mother. Id. The court placed a third child with her natural father, and the court granted SV's father a trial home placement. *SV*, 395 NW2d at 668, 672.

[21] See Patton, 48 U Miami L Rev at 748 (cited in note 20) (discussing *In re Jennifer C*, Solano County Sup Ct No J22026, Cal Ct App No A058278). In *Jennifer C*, four siblings were initially placed with their paternal grandmother. Id. After subsequent hearings, however, one sibling remained with the grandmother, while the other three siblings were placed in a non-relative foster home. Id at 749. See also, William W. Patton, *The Status of Siblings' Rights: A View Into the New Millennium*, 51 DePaul L Rev 1, 1 (2001) (noting that based on his 1994 study, about 40 percent of siblings taken from the home were separated into different placements).

[22] See Patton, 48 U Miami L Rev at 758 (cited in note 20) (noting that the initial placement of siblings during dependency or reunification procedures is the most important factor in determining whether siblings will be placed together once the court terminates parental rights).

the state terminates their rights.[23] To facilitate adoption the children may be divided and sent to several potential adoptive homes.[24] It is also possible that the ages of two or more sibling groups differ significantly, so that the older siblings could potentially provide a home for the younger siblings.

Frequently, one child, "the scapegoat," may be removed from his or her parents' care because of abuse, while the other children remain in the family home.[25] The parents may not want to facilitate contact between the siblings and may refuse to let the child placed out of the home visit with his sisters and brothers.[26]

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[23] See William W. Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 Ga L Rev 473, 477 n 16 (1990) (providing examples of state statutes which allow a short period of time in which parents may demonstrate that family problems have been resolved, or else mandate parental severance and adoption).

[24] See Patton, 48 U Miami L Rev at 753 (arguing that both federal and state statutes governing child placement may needlessly and prematurely separate siblings under the belief that it may be difficult and time-consuming to place an entire sibling group in an adoptive home).

Consider another hypothetical. Jamie, age eight, Troy, age six, and Bill, age four, are removed from their parents' care because of abuse. Jamie and Troy are placed in one foster home and Bill, because of his special needs, is placed in a different foster home. The siblings visit each other and attend family counseling with their biological parents. The parents do not make enough progress on the state-mandated reunification plan and the state terminates their parental rights as to all of the children. Jamie and Troy want to live in the same home as Bill. Bill's foster parents are willing to adopt him, but not the other two children. Jamie and Troy have no adoptive prospects. Their therapist testifies that it would cause emotional harm for Jamie and Troy to lose their parents and contact with Bill at the same time. The court finds that it will serve Bill's best interests to be adopted by his foster parents, and declines to order continued contact between the siblings. Bill's adoptive parents do not let him visit with his brothers. A similar case is *In re Jason R*, 2003 WL 22464053 (Cal App), where the two older siblings had been under the department's jurisdiction, but at the time of the case they lived with the mother. Id at *1. The youngest child's foster mother wanted to adopt him, but would not continue visitation with the other siblings. Id. The court stated that the child had only lived with the siblings during the first two months of his life and that severing those ties would not be detrimental. Id at *12. See also Patton, 48 U Miami L Rev at 753–54 (cited in note 20) (noting that many statutes make it difficult to place a sibling group, focusing on adoption as the best placement, and using each child's best interests as the determining factor, rather than the best interests of the sibling group, especially when one sibling can be adopted).

[25] See, for example, *In Re Tamara R*, 764 A2d 844 (Md 2000). Tamara was found to be a child in need of assistance ("CINA"), but her younger siblings remained with her father and stepmother. Id at 844.

[26] See id. The sexual abuse allegations Tamara made against her father were never resolved. Id at 846. The court, however, found her to be CINA because of the parent-child conflict. *Tamara R*, 764 A2d at 846. Tamara requested visitation with her siblings but the father denied this request. Id. The court remanded the case for the trial judge to balance the children's interest in maintaining the sibling relationship against the father's constitutional right to raise the children is his custody as he saw fit. Id at 857. See also *Ken R on Behalf of CR v Arthur Z*, 682 A2d 1267 (Pa 1996). In *Ken R*, the petitioner sought visitation with her two younger sisters who remained with her natural mother and stepfather. Id at 1269. She had previously lived with her mother but had accused her stepfa-

The thread connecting these and other placement and visitation variations is the state's ability and willingness to create, destroy, or recreate family ties in ways that are frequently detrimental to children. I have previously written about the legal rights of and psychological impact on children separated from their siblings by their parents,[27] and also about parents who deny visitation between grandparents and grandchildren.[28] I argued that in such contexts children should have standing to sue to obtain visitation rights,[29] or at least to have their voices heard when the court determines visitation.[30] There is, however, a difference between cases in which parents, whose interests have strong constitutional protection, prevent visitation with their children, and cases in which the state uses its *parens patriae* power to remove siblings from their parents' care and custody and then separates them.[31] In the latter situation, the consequences may be far more serious. The psychological effect heightens because the child loses the connection, not only to the sibling group, but also to his or her parents and other members of the extended family.[32] In such situations the child is the "res" of dependency proceedings brought by the state, and is usually represented by counsel.[33] In that context, it is not so much a question of whether children should be granted standing, or whether the court has jurisdiction over them, but rather what substantive rights they have or should have to protect sibling or other family relationships.

Concern for the child's best interests serves as the overriding principle in dependency cases, and to that end a majority of states regard kinship relations as a priority when determining

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ther of sexual abuse. Id at 1268. The stepfather denied the allegations, but all parties entered into a Protection from Abuse order and agreed that she would stay with her natural father. Id at 1268-69. The court decided that she did not have standing to seek visitation with her siblings. *Ken R*, 682 A2d at 1271.

[27] Ellen Marrus, *Where Have You Been, Fran? The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation*, 66 Tenn L Rev 977 (1999).

[28] Ellen Marrus, *Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post*-Troxel?, 43 Ariz L Rev 751 (2001).

[29] Marrus, 66 Tenn L Rev at 1018 (cited in note 27).

[30] Marrus, 43 Ariz L Rev at 756, 812 (cited in note 28).

[31] The state also has police power to punish the parents if the abuse constitutes criminal conduct.

[32] See Patton, 48 U Miami L Rev at 746-47 (cited in note 20) (noting the traumatic consequences to siblings separated from each other and their parents during court proceedings).

[33] See Cal Welf & Inst Code § 317(c) (West 2003) (stating that if a child is unrepresented during a dependency hearing the court shall appoint counsel).

placements either for foster care or adoption.[34] The manner of application, however, is not always in the child's best interests. Thus, the *Hugo* case is not aberrational, and similar cases present complex psychological and legal issues.

In this Article, I analyze how states utilize their power in detrimental ways in determining how and with whom children should reside when parents fail. First, I examine the various stages of a dependency proceeding. In that context, I discuss state statutes and federal legislation that list preferences for a child's placement and how those options support or conflict with the continuation of the sibling and family relationship and the child's best interests. Second, I address the *Hugo* case specifically and suggest that a different result may have been more beneficial to Hugo, Gloria, the aunt, and Ms. L. One of the difficulties in *Hugo* is Hugo's conflicting kinship connections with the unknown aunt and his beloved sister. Thus, fulfilling the statutory hierarchy of priorities often becomes more challenging, but gives more leeway to the state in deciding where to place children and with whom they can maintain contact. Third, I analyze the United States Supreme Court cases that discuss family relationships and the guidance they offer for the existence of a fundamental right in sibling relationships. Finally, I suggest how to further the best interests of all the children in a sibling group in dependency proceedings, and how to make the benefits of a continued sibling and family relationship more likely to occur.

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[34] See, for example, Ariz Rev Stat Ann § 8-514.03(a) (West 2003) (promoting child placement in kinship foster care); Cal Welf & Inst Code §§ 309(a), 16605(a) (West 2003) (encouraging kinship placement during reunification services and mandating an appropriation of funds to assist relative caregivers in the Kinship Support Services Program); Md Fam Law Code Ann § 5-534(c) (West 2003) (mandating that in determining the best interests of a child, first priority is given to placing the child with a kinship relation); Okla Stat Ann § 7004-1.5 (West 2003) (establishing the Kinship Foster Care Program and stating that the social service agency should attempt to place the child who has been removed from his or her home with a kinship relative). See Patton, 51 DePaul L Rev at 23 (cited in note 21) (noting state statutes mandating that courts consider sibling contact throughout the dependency proceeding). Patton also discusses the shift in courts' attitudes to prefer a kinship placement over a non-family placement. Id.

See also *Matter of H R*, 594 NYS2d 968, 970 (NY Fam Ct 1993) (deriving from both regulatory and statutory law the strong policy of keeping siblings together); *In re Dante H*, 2003 WL 22664646 (Cal App) (noting a statutory exception to the presumption that adoption is in the best interests of the child when there would be a "substantial interference" with a sibling relationship, Cal Welf & Inst Code § 366.26(c)(1)(E) (West 2003)).

I. HOW PRE-TERMINATION PLACEMENTS AFFECT POST-TERMINATION DECISIONS: PROCEDURES AND LEGISLATION

The child welfare system regulates abused and neglected children and their families and has three primary goals: the protection of the child, the strengthening of the family unit, and the establishment of permanency for the child.[35] Families in the system present a myriad of factual variations. Examining a "typical" dependency proceeding at its different stages clarifies the various opportunities that the state has to make or break sibling relationships.

A. Initiation of a Dependency Case

Allegations of abuse[36] and neglect[37] against a parent or caregiver initiate a dependency case. These allegations can come from a parent, family member, school official, neighbor, doctor, teacher, or any other person who may have knowledge of the situation.[38] All states have mandatory reporting statutes requir-

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[35] See 42 USC § 5106a (2000) (instituting grant funding for state child abuse and neglect prevention programs, adopting the goals of protecting the legal rights and safety of children and families at all stages, and protecting children from abuse and neglect); 42 USC § 5111 (2000) (adopting the goal of permanent placement of foster children by removing barriers to adoption). See also NJ Stat § 9:6-8.7 (2003) (declaring that the safety of the children"shall be of paramount concern," and "that reasonable efforts be made to preserve the family," and requiring that if the child is not returned home, the agency will attempt to find a permanent placement for the child in a timely manner).

[36] See, for example, Fla Stat Ann § 39.01 (West 2003) (defining abuse as any willful or threatened act resulting in "any physical, mental, or sexual injury or harm that causes the child's physical, mental, or emotional health to be significantly impaired"); Tex Fam Code Ann § 261.001(1)(A)-(K) (West 2003) (listing acts and omissions that constitute child abuse, including mental, emotional, or physical injury that results in substantial harm to the child; sexual conduct that is harmful to the child's mental, emotional, or physical welfare; or failing to make reasonable efforts to prevent an act that results in physical injury causing substantial harm to the child).

[37] Fla Stat Ann § 39.01 (defining neglect as depriving or allowing a child to be deprived of necessary food, clothing, shelter, or medical treatment; or allowing a child to live in an environment that causes the child's physical, mental, or emotional health to be significantly impaired); Tex Fam Code Ann § 261.001(4)(A)-(C) (listing acts or omissions constituting neglect, including leaving a child in a situation where he or she would be exposed to a substantial risk of physical or mental harm; failing to seek appropriate medical care; or failing to provide basic necessities such as food, clothing, and shelter).

[38] See, for example, Fla Stat Ann § 39.201 (West 2003) (ordering "any person" who knows or has reasonable cause to believe that a child is being abused, abandoned, or neglected to report such knowledge to the Department of Education); Md Fam Law Code Ann § 5-705 (Michie 2003) (listing reporting procedures for persons having reason to believe that a child is being abused or neglected); Tex Fam Code Ann § 261.101(a) (West 2003) (ordering any person who has cause to believe a child is being abused or neglected to immediately make a report pursuant to the statute's mandates).

ing either certain classes of people or any person to notify child welfare authorities if they suspect child abuse.[39]

The state agency for child protection investigates these allegations, and, if it believes they are substantiated, the agency may file a petition alleging abuse and neglect and requesting the court to grant particularized relief.[40] The requests vary depending on the facts of the case. The child welfare agency may ask the court to order the parents to participate in a variety of activities including attending parenting classes, substance abuse clinics, and counseling, as a way of keeping the family intact. Or they may request permission to remove the children from the parents' care and provide additional resources to reunify the family. If the children have already been removed on an emergency basis the agency seeks judicial approval of its action and asks the court to order the parents to avail themselves of various services with a view to reuniting the family. When the abuse is very severe, the agency may seek immediate termination of the parent-child relationship. If the agency requests and receives an order removing the children from the home, even at this early stage, the children's placement is crucial to the continuation of family and sibling ties. Thus, what the state does at this point in terms of placement may affect the child's psychological and physical well-being. All of these issues are the focus of the hearing on temporary placement.

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[39] Typically doctors, teachers, and mental health professionals have the duty to report. See, for example, Cal Penal Code § 11165.7 (West 2003) (listing mandated reporters, including teachers, instructional aides, social workers, probation officers, parole officers, firefighters, and certain unlicensed therapists and psychological assistants). In other states, anyone who sees the abuse must notify the proper authorities. See note 39. Willfully failing to report abuse or neglect is usually punishable as a misdemeanor. See, for example, Tex Fam Code Ann § 261.109(b) (West 2003) (classifying a knowing failure to report child abuse or neglect as a Class B misdemeanor). Although it is unusual for charges to be brought against a non-reporter, informants have good faith immunity if the abuse charges are not sustained. See, for example, Md Cts & Jud Proc Code Ann § 5-620 (2003); Tex Fam Code Ann § 261.106 (West 2003).

[40] For example, in California a social worker is to conduct an immediate investigation into the facts and circumstances of a child being taken into custody under the abuse and neglect statutes. See Cal Welf & Inst Code § 309(a) (West 2003). Upon the filing of the petition by the social worker, a proceeding to declare the child to be a dependent child of the court will immediately commence. Cal Welf & Inst Code § 325 (West 2003). California law also outlines what must be contained in this petition, including identifying information of the parties and the facts to support the child coming under the court's jurisdiction because of abuse or neglect. Cal Welf & Inst Code § 332 (West 2003).

B. Hearing on Temporary Placement

Prior to an adjudicatory hearing to determine the accuracy of the charges, the court holds a hearing to determine if a temporary placement out of the home is necessary for the safety of the child.[41] At this hearing, the state agency must establish a reasonable basis for believing that the child needs to be temporarily removed from the home pending the adjudicatory hearing.[42] The standards for removal include a reasonable belief that by remaining in the home the child will suffer further harm, that the parents will abscond with the child, or that a parent is unwilling to care for the child.[43] Therefore, at this stage, the nebulous "best interests of the child" standard is generally not invoked; rather, the state simply seeks to prevent further injury or death.[44] Parents have no federal constitutional right to counsel at this hearing,[45] and many states do not automatically provide attorneys for indigent parents in these preliminary proceedings.[46] This first placement decision at the initial hearing is usually made very quickly, within hours of the child's emergency removal,[47] without

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[41] See, for example, NY Fam Ct Act § 1027 (stating that the family court "shall hold a hearing as soon as practicable to determine whether the child's interests require protection" prior to a final placement decision).

[42] See NJ Stat Ann § 9:6-8.28 (West 2003) (stating that the court can enter an order to remove a child from a parent's care if it is necessary to avoid harm to the child); NY Fam Ct Act § 1022 (McKinney 2003) (permitting a child to be removed from a parent's care with a court order if "necessary to avoid imminent danger to the child's life or health"); NY Fam Ct Act § 1024 (McKinney 2003) (allowing for removal without court order if a designated individual has "reasonable cause to believe" that if there is an "imminent danger to the child's life or health; and there is not time enough to apply for an order").

[43] See, for example, Cal Welf & Inst Code § 309(a)(1)(2)(3).

[44] See NJ Stat §§ 9:6-8.28, 8.31, and 8.32 (West 2003) (mandating that the child is to remain out of the home unless it is safe to return the child to the parents' care). But see NY Fam Ct Act § 1022 (stating that the court is to determine if "continuation in the child's home would be contrary to the best interests of the child and . . . whether reasonable efforts were made . . . to prevent or eliminate the need for removal of the child from the home").

[45] See *Lassiter v Department of Social Services*, 452 US 18 (1981) (holding that the Due Process Clause of the Fourteenth Amendment does not require the appointment of counsel for indigent parents in every parental termination case).

[46] See *Garramone v Romo*, 94 F3d 1446, 1449-50 (10th Cir 1996) (adopting the *Lassiter* approach but finding that under the circumstances in the case, the mother had a right to counsel at a preliminary stage of a neglect proceeding); *Davis v Page*, 714 F2d 512, 514 (5th Cir 1982) (holding that the right to counsel in Florida dependency cases is not guaranteed in every case, but is to be determined on a case-by-case basis).

[47] See, for example, Cal Welf & Inst Code § 309 (mandating that a social worker is to investigate immediately any reported allegations of child abuse and must either take the child into custody or return the child home).

deep investigation of the family or resources, and without psychiatric evaluations.[48] The issue at this stage is not *where* the child will be placed, but rather *if* the child is to be removed from parental care pending the adjudicatory hearing.

In reconciling the somewhat conflicting goals of the child welfare system, states try not to remove children from their homes, but rather to leave them in the parents' care under the supervision of the state.[49] During this time the state agency provides services that it believes are essential to provide for the safety of the children and to make the "reasonable efforts" required to keep the family intact.[50] On the other hand, if the state agency meets its burden of proving removal is necessary, it places the children in temporary protective custody for the child's safety and well-being.[51] The state attempts to make the temporary placement of the children, both before and after adjudication, as minimally restrictive and as much like home as possible.[52]

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[48] Since an abused child needs to be placed immediately, it is almost impossible for the social worker to complete a thorough investigation of resources that may be available for the child and family. Social workers are usually authorized to investigate the home situation of any family member who has indicated a willingness to care for the child, see, for example, Cal Welf & Inst Code § 309(d)(1), but if this information is not given to child protective services workers, it is unlikely that they will know of family members to contact. Furthermore, since the initial investigation is cursory, if the child is left at home, he or she can be removed later if the social worker receives additional information that is determined to be detrimental to the well-being of the child. See Cal Welf & Inst Code § 309.

[49] See, for example, Cal Welf & Inst Code §§ 306(b)-(b)(1) (West 2003) (stating that a social worker must first consider whether a child can remain with his family before taking the child into custody, and directing the social worker to determine if there are any reasonable state actions that would eliminate the need to remove the child from his parents' custody); NJ Stat Ann § 9:6-4 (West 2003) (providing that a child shall be placed outside of his home "only after the department has made every reasonable effort, including the provision or arrangement of financial or other assistance and services as necessary").

[50] NJ Stat Ann § 9:6-4.

[51] See, for example, Cal Welf & Inst Code §§ 305-07 (West 2003) (mandating that peace officers and social workers may, without a warrant, take a child into temporary protective custody where there is a reasonable suspicion of abuse, and when such custody is necessary to preserve the child's health and safety).

[52] See, for example, NJ Stat Ann § 9:6B-4 (listing the rights of children placed out of the home, including the right to placement in the least restrictive setting appropriate to the needs of the child, and the right to sibling visitation or contact); W Va R Child Abuse & Neglect P Rule 28 (2003) (mandating a priority for home or kinship placement; if these placements are not available, the Department's report has to include a description of the outside placement including the distance from the home and must indicate whether it is the "most family-like" placement available).

Removal from the home can last weeks,[53] which may seem like forever to a child. The state has several options, even at this early stage. The state may place the child with relatives, in foster care, in emergency shelter, in group homes, in residential treatment centers, in hospitals, or in mental health institutions.[54] Moreover, if the child exhibits status offense behavior[55] or commits a delinquent act[56] in any of these placements, the state, with judicial approval, can transfer the child to a locked facility.[57]

The choice of placement can deeply affect the child. Children, particularly young ones, often do not wish to leave their homes no matter how badly they have been abused.[58] In their eyes, it is better to live with the known devil, rather than the unknown; as strange as it may seem, a bond exists between the abusing parent and the abused child.[59] Therefore, removal from the home is a traumatic event for the child—akin to the abuse

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[53] See Tex Fam Code § 262.201 (West 2003) (noting that if the child is not returned to the parent or guardian's care, the court must hold a full hearing within fourteen days). Although the adjudicatory hearing must be held within a statutorily fixed time period after the removal of a child from the home, if the petition is sustained there is no guarantee that the child will be able to go home after the adjudicatory hearing.

[54] See, for example, Cal Welf & Inst Code §§ 319.1-19.2 (West 2003).

[55] See, for example, Ga Code Ann § 15-11-2 (West 2003) (defining a status offender as a child who is accused or adjudicated of a crime that would not be an offense if committed by an adult); Tex Fam Code Ann § 51.02 (West 2003) (defining a status offender as a "child who is accused, adjudicated, or convicted for conduct that would not . . . be a crime if committed by an adult").

[56] See, for example, Ga Code Ann § 15-11-2 (defining a delinquent child as a child who commits a crime by the laws of the state or another state, if the act occurred in that state); Tex Fam Code Ann § 51.03 (West 2003) (defining delinquent conduct as "conduct, other than a traffic offense, that violates a penal law of this state or the United States punishable by imprisonment or by confinement in jail;" conduct that violates a court order; or conduct that violates the listed provision of the Alcoholic Beverages Code).

[57] See, for example, Tex Fam Code Ann § 51.02(14)-(15) (West 2003) (providing that adjudicated juvenile offenders may be placed in correctional facilities and accused offenders may be temporarily placed in detention facilities).

[58] See Lisa Bloom, *Gretel Fights Back: Representing Sexual Harassment Plaintiffs Who Were Sexually Abused as Children*, 12 Berkeley Women's L J 1 (1997). Bloom cites research that shows abused children generally will make "superhuman" efforts to remain with an abusive parent and stay in familiar surroundings, and compares this psychosocial aspect of abuse to the classic Hansel and Gretel fable. Id at 1-2. In the fable, Hansel and Gretel did everything in their power to return home to their parents, who had twice tried to murder them. Id.

[59] See David A. Wolfe, *Child Abuse: Implications for Child Development and Psychopathology* 33 (Sage 2d ed 1999) (discussing the psychological impacts of child abuse and stating that the abused child has strong ties to the family and abuser). See also Cynthia Crosson-Tower, *When Children are Abused: An Educator's Guide to Intervention* 123 (Allyn & Bacon 2002) (noting that children feel a greater sense of security in their own homes no matter how dysfunctional or abusive they may be).

suffered at the hands of his or her parent.[60] If a child is also separated from his or her siblings, the event causes even greater pain and suffering and psychological isolation.[61]

State resources are generally insufficient to provide proper care for abused and neglected children.[62] As a result, the state may place abused or neglected siblings in different homes or institutions.[63] The environments in these facilities may also be dangerous.[64] Abused children are often difficult to handle and may act out;[65] this conduct may cause them to be shuffled several times between foster homes and institutions.[66] Moreover, if the

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[60] See Rachel Venier, *Parental Rights and the Best Interest of the Child: Implications of the Adoption and Safe Families Act of 1997 on Domestic Violence Victims' Rights*, 8 Am U J Gender Soc Pol & L 517, 535-36 (2000) (arguing that the removal of abused and neglected children often re-victimizes them when one parent is a non-abuser). Venier cites various sources that discuss removal—even from an inadequate or abusive home—as a form of child abuse. Id at 535 n 93.

[61] See *In re Tamara R.*, 764 A2d 844, 855 (Md App 2000), citing *Obey v Degling*, 337 NE2d 601 (1975) (stressing that the separation of young brothers and sisters is traumatic and harmful); Patton, 48 U Miami L Rev at 746 (cited in note 20) (describing the traumatic emotional upheaval of dependent children who are taken from an abusive home, and then lose their last psychological bond with their siblings "during the height of their greatest emotional plight").

[62] See Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 Wm & Mary J Women & L 413, 417 (2003) (noting that by providing funding for foster care rather than preventive services, the state is using foster care as the primary method of treating child abuse and causing more children to remain in foster care "limbo" separated from any family connections). See also General Accounting Office, *Child Welfare: HHS Could Play a Greater Role in Helping Child Welfare Agencies*, GAO-03-357 (Mar 31, 2003), available online at <http://www.gao.gov> (visited May 3, 2004) (reporting that the lack of training and resources as well as the high caseloads for state social services workers makes it difficult for state agencies to ensure safe, appropriate, and permanent placements for abused and neglected children); Paul Chill, *Burden of Proof Begone The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 Fam CR 457, 459 (2003) (stating that incidents of abuse, including fatalities, occur more often in foster care than in family homes).

[63] See Patton, 48 U Miami L Rev at 756 (cited in note 20) (noting that 1990 data indicates that in California, New York, and Illinois, approximately 40 percent of all siblings placed outside of the family home due to abuse receive different placements).

[64] See David J. Herring, *Child Placement Decisions: The Relevance of Facial Resemblance and Biological Relationships*, 43 Jurimetrics J 387, 401 (2003) (discussing studies that reveal higher incidences of abuse and neglect for foster children as compared to children in the general population).

[65] See D. Lee Khachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows*, 44 Wayne L Rev 1745, 1758 & n 70-72. (noting the various psychological and behavioral problems that abused children may exhibit).

[66] See Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 Harv CR-CL L Rev 199, 208 & n 38 (1988) (noting that foster placements are often extremely unstable, and that four or more foster placements for a single abused child is not uncommon); Katherine A. Hort, Note, *Is Twenty-Two Months Beyond the Best Interest of the Child?*, 28 Fordham Urban L J 1879, 1880 & n 21 (2001) (noting the use of the term "foster care drift" to describe children left

state believes the family can be reunited, the agency may shift children from one foster family to another, in order to prevent attachment between the children and the foster parents.[67]

Although parents are usually permitted to have supervised visitation, state agencies do not always permit sibling visitations.[68] Hugo, for example, was originally placed in a foster home where he had no family relations, and likely had visitation with his parents but not his sister, who had been placed in a different foster home.[69] This is the point at which the state can make or break a family. Had the state placed Hugo with Ms. L initially, or at least allowed him to visit with Gloria, the state would have created a sibling attachment which is particularly important when the state destroys the parent-child relationship. Such an outcome is certainly preferable to what the state did in Hugo's case initially: failing to allow Gloria and Hugo to form a sibling bond which could last the rest of their lives.

C. Adjudicatory and Dispositional Hearings

At the adjudicatory hearing, the state has the burden of establishing the truth of the allegations of abuse or neglect, either by a preponderance of the evidence[70] or by clear and convincing evidence,[71] depending on the jurisdiction. If the allegations in the petition are found to be true, the court must determine whether to return the child to his or her parents' home, continue with the same placement, or place the child in another facility or foster home.[72] The burden of proof necessary to establish the truth of the charges is not applicable to the decision regarding the child's

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in the foster care system for lengthy periods of time, moving from one foster home to another).

[67] Hort, Note, 28 Fordham Urban L J at 1917 (cited in note 66) (noting that foster children are moved from one foster home to another specifically to "decrease the chance of substantial attachments developing between the foster child and his foster parents").

[68] See Cal Welf & Inst Code § 306.5 (giving a social worker discretion, when taking a minor into custody, not to place that minor with any siblings, if the worker provides a report justifying the denial of co-placement); see also Patton, 48 U Miami L Rev at 747 and n 7 (cited in note 20) (citing *Weber v Weber*, 534 A2d 498 (Pa Sup 1987)) (noting that at least one court has held that adult siblings do not have standing to seek visitation rights with the minor siblings still living with their parents).

[69] *Adoption of Hugo*, 700 NE2d 516 (Mass 1998).

[70] See, for example, Fla Stat § 39.507(b) (West 2003) (requiring that findings of dependency be by a preponderance of the evidence).

[71] See, for example, NC Gen Stat Ann § 7B-805 (Lexis 2003) (mandating clear and convincing evidence at adjudicatory hearings in dependency proceedings).

[72] See, for example, Tex Fam Code § 262.201 (requiring the court to order the return of the child to the appropriate individuals).

placement.[73] Usually the child will remain in the same placement that the court selected after the emergency hearing until the court holds a dispositional hearing. If the department of social services has not yet developed a service plan for the family, and it is appropriate to do so, the department will develop and present such a plan at the dispositional hearing.[74]

At the dispositional hearing, which often immediately follows the adjudicatory hearing especially if the service plan has already been developed, the court must approve either the reunification plan, which may take up to twelve months, or a plan to terminate parental rights and provide permanent care for the child.[75] If the latter occurs, a date is set for the termination hearing. At the dispositional hearing, the court may also decide whether the current placement for the child is still appropriate.[76] Usually no standard of proof governs the court's placement decisions,[77] and sometimes children are moved to other homes or facilities for unclear reasons. Such decisions are basically unreviewable because they are merely interim rulings rather than

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[73] See, for example, Tex Fam Code § 262.201 (noting that the standard for determining the child's placement is whether there exists "sufficient evidence to satisfy a person of ordinary prudence and caution" that there is a danger to the child's health or welfare).

After the emergency removal of the child and prior to the adjudicatory hearing, the child welfare worker (if he is a good one and is not overwhelmed by a huge caseload) will attempt to develop a service plan with the parents in order to assist with reunification of the family over the next twelve months. In some cases this proves difficult because the parents' attorneys may advise their clients not to cooperate with the welfare authorities for fear that their participation in creating a service plan will be considered an admission of guilt. See Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U Miami L Rev 79, 129-30 & n 166-67 (1997) (noting that parents will see acceptance of a service plan as an "admission of guilt," and that parents' attorneys will often encourage the parent to be uncooperative, in the interest of denying the existence of any abuse or neglect). In certain instances, however, such as if the parents have murdered another child, the state will usually move for an immediate permanent plan, which may include termination of parental rights over all of the parents' children. See, for example, Tex Fam Code § 262.2015 (West 2003) (providing examples of "aggravated circumstances" which permit the state to move immediately to a permanency hearing without affording the parents a service plan or reasonable efforts for reunification).

[74] See, for example, NY Fam Ct Act § 1052(b)(1)(A) (McKinney 2003) (noting that at the dispositional hearing the court will find as to whether reasonable efforts are being made to develop a permanency plan, and will determine what type of plan is appropriate).

[75] See, for example, NY Fam Ct Act § 1052(a) (McKinney 2003) (listing the various orders the court can make at the end of a dispositional hearing).

[76] See, for example, NY Fam Ct Act § 1052(b)(1)(A).

[77] See, for example, NY Fam Ct Act §§ 1052, 1055(b)(i)(A) (McKinney 2003) (stating that the court can place the children back in the parents' home, in the custody of a relative, or in the custody of child welfare, as long as it is in the child's best interests and reasonable efforts were made to keep the child in the home).

final judgments. The shifting of children in this way can cause emotional damage, in some cases leaving the children unable or unwilling to form attachments. If the siblings are separated they feel isolated and are unable to develop the emotional support that comes from the sibling relationship.

In the context of establishing permanent care, most jurisdictions recognize the importance of the sibling relationship. In some states, the department is simply urged to try and put siblings in the same placement.[78] In others the statutes create a rebuttable presumption that keeping siblings together serves the best interests of the children.[79] In a few jurisdictions, siblings must remain together absent clear and convincing evidence that it would harm the children or would not serve the best interests of one or more of the children to remain together.[80] Although most jurisdictions recognize the strength and value of the sibling bond in their statutory schemes, unless a statute mandates that the children be kept together absent the showing of harm to the children, siblings are often placed in separate foster or adoptive homes. The less urgent language of most statutes permits the state greater flexibility in disrupting sibling groups. Few, if any, of these states protect sibling relationships as effectively and sufficiently as the measures I advocate in Part IV.

D. Permanency Hearings

If the child has been removed from the home, but the state is working towards reunification, a court must hold a permanency hearing within twelve months of the initial removal.[81] If the parents have complied with the reunification plan, the court will order the child to be returned to the parents within the twelve-month period.[82] The court can grant the parents up to six additional months to satisfy the requirements of the reunification plan if the parents have shown substantial compliance with it.[83]

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[78] See, for example, Fla Stat § 39.001(k) (West 2002) (requiring that the state merely make an effort to keep siblings together).

[79] See, for example, NY Fam Ct Act § 1027-a (stating that placement of siblings together is presumed to be in the child's best interests).

[80] See W Va Code § 49-2-14(e) (2003).

[81] See, for example, Cal Welf & Inst Code § 366.21(f) (West 2003) (mandating that the permanency hearing be held within twelve months after the child is removed from parental care).

[82] See, for example, Cal Welf & Inst Code § 361.2 (West 2003).

[83] See, for example, Cal Welf & Inst Code § 366.21(g)(1) (allowing for a six month continuance of the permanency hearing if it is found that reasonable services had not

If the parents have failed at reunification, the court will order a termination of parental rights hearing.[84] Before that termination hearing, the state may once again move the child to another placement, sometimes because the foster home can no longer keep the child, or because the child needs a higher or lower level of care than what he or she is currently receiving. It was at this point in the process that Hugo was moved to Ms. L's home, which allowed him and his sister to form the sibling bond.[85]

Not all abuse and neglect cases result in termination.[86] Many children return home, possibly with some state supervision to insure the child's safety.[87] But newspaper stories of children who have been murdered by their parents after they have been returned home provide vivid reminders that resources are scarce and huge caseloads prevent extensive supervision in most cases.[88]

E. Termination Hearing

At the termination hearing, as a matter of federal constitutional law, the state must first prove by clear and convincing evidence that the parents have committed specific harmful acts or omissions towards the child.[89] These harms can include parental behavior during the child's placement outside the home. Once

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been provided by the department or if there is "substantial probability" the child can be returned home within the next six months).

[84] See, for example, Cal Welf & Inst Code § 366.21(2).

[85] *Hugo*, 700 NE2d at 516.

[86] One study examined the number of children exiting foster care during Fiscal Year 2001, and found that 57 percent of these children were reunified with their parents, and only 18 percent were adopted. See *Foster Care National Statistics*, National Clearinghouse on Child Abuse and Neglect Information 1, 3 (2003) available online at <http://nccanch.acf.hhs.gov/pubs/factsheets/foster.cfm> (visited May 3, 2004).

[87] Id.

[88] See *Truth is Elusive on Abused Children*, Newsday 50 (Nov 20, 1997) (discussing various cases in New York City in which the Department of Child Welfare knew of ongoing abuse in the home, either left the children in the home or allowed for unsupervised visitation, and the child died while in the parents' care). In *DeShaney v Winnebago Department of Social Services*, 489 US 189 (1989), the Supreme Court held that it did not violate due process for the child welfare agency not to remove a child being severely abused while living with his father. The majority concluded that since the child was not in state custody there was no obligation to protect him. Id at 199-201. What if the child is in foster care? See Laura Oren, DeShaney's *Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 NC L Rev 113 (1990) (arguing that when the state places a child in a foster home it constitutes custody for purposes of due process).

[89] See *Santosky v Kramer*, 455 US 745 (1982) (holding that the standard of proof for terminating parental rights must, at a minimum, be clear and convincing).

the court makes that factual determination, some states require additional evidence before the parents' rights can be terminated.

States use different standards in the termination segment of the hearing. Some jurisdictions require proof that termination serves the best interests of the child,[90] proof that the child can be adopted,[91] or proof that termination of the parent-child bond will not be detrimental to the child.[92] At this proceeding, the parent is not constitutionally entitled to counsel absent extenuating circumstances.[93] However, most jurisdictions statutorily provide indigent parents with counsel.[94] Partly because states pursue only the most egregious cases, most termination proceedings result in termination.[95] Those statutes that permit termination—if in the best interests of the child—without any other requirements, such as adoptability, can result in children becoming orphans both in fact and under the law.

With respect to children whose parents' rights have been terminated, if the children are deemed to be adoptable, and they had previously not been placed in a pre-adoptive home, their placement, depending on the jurisdiction, will most likely change.[96] Older children or children with special needs are diffi-

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[90] See, for example, Tex Fam Code § 161.001(2) (West 2003) (stating that in addition to finding unfitness, the court must also determine that termination is in the child's best interests).

[91] See, for example, Cal Welf & Inst Code § 366.21(i)(6) (requiring an agency report to include information regarding a child's adoptability if parental rights are terminated).

[92] See, for example, Cal Welf & Inst Code § 366.26(c)(1)(A) (stating that if the parents had continued visitation with the child and the child benefited from that visitation, termination of parental rights may not be appropriate).

[93] *Lassiter v Department of Social Services*, 452 US 18, 18 (1981) (holding that although parental interest in the care, custody, and control of children was strong, due process did not require appointment of counsel in all termination proceedings, but rather should be determined on a case-by-case basis).

[94] See, for example, Tex Fam Code § 107.013(a)(1) (West 2003) (calling for appointment of counsel for an indigent parent opposing termination of parental rights).

[95] However, there are times that termination is not appropriate, yet Child Protective Services will seek termination and usually succeed. For example, there was a case in the legal clinic at the University of Houston Law Center in which the children had been out of home for over three years. The mother had continued contact with the children, whose ages ranged from six to sixteen years old. All of the children were bonded with the mother, had special needs, and were very unlikely to be adopted. The mother had been in therapy for the previous two years and her therapist testified that she had made remarkable improvement. The children wanted to remain in contact with the mother, but parental rights were terminated. The department concentrated on two factors to obtain termination: first, the early abuse that occurred prior to the children entering the system, and second, the fact that the mother was a lesbian.

[96] See Martin Guggenheim, *The Effects of Recent Trends To Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 Fam L Q 121, 136-37 (1995) (explaining how children may be repeatedly moved from

cult to place for adoption, and their placements are often shifted in the attempt to find an adoptive home.[97]

If a child is not adopted, the court holds a review hearing every six months until the child reaches majority.[98] At the age of eighteen, or after the child has completed high school, the state releases the child from its custody with little or no follow-up care or services.[99] However, even if a court denies the petition for termination, the court still holds a separate permanency planning hearing at which the court determines the child's long term care and custody.[100] In other words, the parents may still retain parental rights, but not physical custody of their children. As with temporary placements,[101] states' standards for placement review vary. The majority of jurisdictions require only that the placement continue to serve the child's best interests.[102]

F. Adoption

If children are to be adopted, the court holds an adoption hearing[103] in which the former parents have no legal rights or standing.[104] However, they are sometimes behind the scenes, as in the *Hugo* case, hoping that if a relative can adopt the child, they will still be able to see the child or spirit him or her away.

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one foster home to another after parental rights are terminated).

[97] See Susan L. Brooks, *Rethinking Adoption: A Federal Solution to the Problem of Permanency Planning for Children With Special Needs*, 66 NYU L Rev 1130, 1132 (1991) (stating that 60 percent of children waiting for adoption have special needs and that only one-third will be placed for adoption within a year; the remaining children face the "foster care drift").

[98] See, for example, Tex Fam Code § 263.501 (West 2003) (requiring that a review hearing be held every six months if parental rights are not terminated). But see NY Fam Ct Act § 1055(b)(i) (stating that placements only need to be reviewed annually).

[99] NY Fam Ct Act § 1055(e) (permitting jurisdiction over a child until the age of eighteen, without the child's consent, and between the ages of eighteen and twenty-one if the child consents); Fla Stat § 39.521(d) (2003) (directing that the court cannot continue jurisdiction past the age of eighteen); NY Fam Ct Act § 1055(b)(iv)(B)(6) (McKinney 2004) (providing services for a child of sixteen years old and older to assist in the transition from foster care to independent living).

[100] See, for example, Cal Welf & Inst Code §§ 366.26(1), (3-4) (describing the options available to the court in deciding the long-range plan for the child: adoption, guardianship, or long-term foster care).

[101] See text at supra notes 78-80.

[102] See, for example, Tex Fam Code § 263.501 (stating that review hearings are held to insure that placements remain appropriate).

[103] See, for example, Cal Welf & Inst Code § 366.26(e) (setting the matter for an adoption hearing after termination of parental rights).

[104] *Interest of McAda*, 780 SW2d 307 (Tex App 1989) (holding that a failure to give a mother a copy of an adoption report was not a denial of due process since the mother's parental rights had been terminated).

Although the parents are not entitled to know the name and address of the adoptive parents, if a relative adopts, it is in fact an open adoption.[105] Once someone adopts a child, the state agency no longer plays a role in his or her life, unless allegations of abuse arise against the adoptive parents. Then, the process begins again.[106]

II. ADOPTION OF HUGO

The trial judge in *Hugo* held two consecutive hearings that merged into one another: a hearing regarding the termination of parental rights and the proceeding regarding the boy's adoption.[107] Only the latter ruling was appealed.[108] At the adoption proceeding, the judge listened to eight days of testimony from mental health experts, child protection workers, Hugo's parents, and the paternal aunt, Ms. J.[109] The parents were drug addicts; indeed Hugo was born with cocaine in his system, and had developmental lags and behavioral problems that required early intervention.[110] The parents strongly supported the aunt's request for adoption.[111] Based on all of the testimony, the judge determined, contrary to D.S.S.'s recommendation, that the aunt would be the best to care for and raise Hugo.[112] Ms. L, at D.S.S.'s sug-

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[105] See Charles P. Kindregan, Jr. and Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 Villanova L R 169, 194 (2004) (noting the existence of the theory of open adoption, which involves a scenario where "some form of post-adoption visitation exists between the child and its biological parents").

[106] Lydia Polgreen and Robert Worth, *New Jersey Couple Held in Abuse Case*, NY Times A1 (Oct 27, 2003) (reporting that a couple who had adopted four boys were starving the children, and that the abuse had not been discovered by the Division of Youth and Family Services even though agency personnel had visited the home thirty-eight times).

[107] *Hugo*, 700 NE2d at 518. The juvenile court conducted a hearing on the merits concerning the care and protection petition for Hugo and committed him to the permanent custody of D.S.S. Id. All parties agreed to vacate this first order and place the issues before a new judge. Id. The second trial took place between August and December of 1997, and the judge conducted a fitness and placement hearing. Id. In February of 1998, the judge also issued a decree finding both parents unfit and dispensing with consent of either parent for any subsequent adoption petitions. *Hugo*, 700 NE2d at 518. The next month, the judge issued an order finding that it would be in Hugo's best interests to be adopted by his paternal aunt. Id. By the commencement of the second trial, Hugo had lived with his foster mother and sister for approximately one year. Id at 519.

[108] Id at 518 (noting that the trial court's holding of parental unfitness was unchallenged).

[109] *Hugo*, 700 NE2d at 518 n 3.

[110] Id at 518 n 4.

[111] Id at 518 n 3.

[112] Id at 518. See also *Smith v Organization of Foster Families for Equality and Reform*, 431 US 816 (1977) (holding that the associational relationship between foster par-

gestion, did not testify.[113] The trial judge recognized Hugo's attachment to his sister and foster mother, the importance of siblings being together, the love and care the foster mom had provided to Hugo, and the fact that Hugo would be moving away from everyone and everything he knew in order to live with his aunt.[114] These factors, however, did not outweigh the long-term benefits that the judge believed would derive from the aunt's adoption of Hugo.[115] The Massachusetts statute in effect at that time provided that children should remain with biological family when possible and that the state should use all resources available to try and maintain the biological family unit.[116] The judge noted, however, that Gloria and Hugo had never lived together with their parents, although they had done so in Ms. L's home.[117]

Ms. J was raising a son with learning and physical disabilities and understood how to care for a child with special needs.[118] The judge thought that she was better prepared to assure that Hugo kept his appointments and received all necessary services, and that she could work with Hugo independently on remedying his deficits.[119] There was also testimony, however, that Ms. L, who did not work outside the home, also took Hugo to all of his appointments.[120] Nothing indicated that she would not continue doing so.[121] Ms. L also read to Hugo regularly to help him with his educational development.[122]

The judge did not specifically state that the class difference between Ms. L and the aunt influenced his decision.[123] Ms. L. made her living by being a foster parent.[124] This led the judge to conclude that there would be too much instability for Hugo in a house with foster children coming and going.[125] Hugo's aunt, on

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ent and child was insufficient to guarantee the foster parent anything more than the right to request an "independent review" of any placement change).

113 Id at 521 n 11.

114 Id at 520.

115 *Hugo*, 700 NE2d at 520-22.

116 Id at 523 n 17 (discussing chapter 210, § 3(c)(vii) of the Massachusetts general laws).

117 Id at 524 & n 19.

118 Id at 519.

119 *Hugo*, 700 NE2d at 519-20.

120 Id at 519.

121 Id.

122 Id at 519.

123 *Hugo*, 700 NE2d at 521.

124 Id at 519.

125 Id at 521 n 10, 522.

the other hand, was employed by the police department.[126] Her fiancé, with whom she was living, was an electrician.[127] The aunt was raising a cousin and her son.[128] The judge was apparently unconcerned that the aunt, who did work outside the home, would be raising two special needs children simultaneously, thereby increasing the parental workload and heightening family tensions.

In an odd twist, the judge alluded to the possibility that Hugo's natural parents could still visit him if the aunt adopted him.[129] Since the parents' rights had been terminated for unfitness, it is unclear why that fact served as a positive factor in the decision to allow the aunt to adopt. It would appear that the possibility of parental contact would favor the adoption of Hugo by Ms. L. Indeed, judges often refuse family adoptions because of the concern that the parents will have unlimited, unsupervised access to the child, or will actually be the ones raising the child.

The intermediate appellate court in Massachusetts reversed the trial court's decision.[130] The appellate court argued that Hugo had formed a strong bond with his caretaker, would be well cared for in Ms. L's home, and would have the additional advantage of remaining in the same residence with his sister.[131] The court also commented on the experts' testimony that Hugo needed consistency and did not react well to change.[132] It may be that the aunt's superior financial situation would allow her to offer Hugo more material objects and access to resources; however, it was speculative whether the aunt could fulfill Hugo's emotional needs.[133] The appellate court opinion did not state whether the

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[126] Id at 519.

[127] *Hugo*, 700 NE2d at 519.

[128] Id.

[129] *Hugo*, 694 NE2d 377, 379 (Mass App 1998) (noting the trial court's order that the paternal aunt allow the child to visit with his biological parents if the aunt considers them to be sober and healthy enough for such a visit).

[130] Id at 380.

[131] Id at 378.

[132] Id at 380.

[133] *Hugo*, 694 NE2d at 380. It is not clear what additional benefits the aunt may have been able to provide Hugo. Although she had been raising a special needs child, it does not necessarily follow that she would be able to provide Hugo with more educational or psychological benefits than Ms. L could provide. The aunt had the responsibility of two children and worked full time. *Hugo*, 700 NE2d at 519. Ms. L was a stay-at-home mother, deriving her income from foster care. Id at 521 & n 10. The indication may have been that the aunt's income was greater than Ms. L's, but there was no information regarding the expenses that both parties had. Ms. L had the advantage of already having provided Hugo with a secure, nurturing environment. Any benefits that might come from moving

aunt had ever visited with Hugo or whether she had tried to adopt Gloria. Nor is there any information in the opinion as to whether the parents had challenged Gloria's adoption.

The Massachusetts Supreme Court reversed the intermediate appellate court's decision primarily because the latter had invaded the trial court's discretion.[134] The trial judge had the best opportunity to evaluate the testimony and the evidence supported the trial court decision.[135] The fact that Hugo would be separated from his sibling was simply one circumstance in the overall assessment of his best interests.[136]

The courts did not address two major issues in *Hugo*. First, do children have a fundamental right to maintain a relationship with biological siblings? Second, if so, what standard should the court use when deciding whether to terminate or restrict that sibling relationship? The intermediate appellate court did not address the first question at all. It focused only on the benefits to Hugo of staying in a familiar placement versus the speculative future benefits that Hugo might gain through adoption by his aunt.[137] The state supreme court recognized that the siblings had developed a strong bond, but focused on the fact that sufficient evidence supported the trial judge's decision to place Hugo with his aunt for adoption.[138]

III. SIBLINGS AND THE CONSTITUTION

Since the 1920s, the United States Supreme Court has held that parents have a fundamental right to the care, custody and control of their children.[139] In *Meyer v Nebraska*,[140] followed shortly by *Pierce v Society of Sisters*,[141] the Court found that the involvement of parents in the upbringing of their children out-

Hugo out of Ms. L's home were speculative.

[134] Id at 521.

[135] Id.

[136] *Hugo*, 700 NE2d at 524 & n 21.

[137] *Hugo*, 694 NE2d at 380.

[138] *Hugo*, 700 NE2d at 524.

[139] See, for example, Emily Buss, *"Parental" Rights*, 88 Va L Rev 635, 655 (2002) (noting that the Supreme Court first recognized parents' fundamental right to child-rearing in the 1920s with its decisions in *Meyer v Nebraska*, 262 US 390 (1923), and *Pierce v Society of Sisters*, 268 US 510 (1925)). Buss observes that prior to *Troxel v Granville*, 530 US 57 (2000), a grandparent visitation case, the Court had directly addressed this core right in only four cases: *Meyer*, *Pierce*, *Prince v Massachusetts*, 321 US 158 (1944), and *Wisconsin v Yoder*, 406 US 205 (1972). Id.

[140] 262 US 390 (1923).

[141] 268 US 510 (1925).

weighs the state's interests in fostering a homogenous society.[142] In a later case, the Court held that parents had the right, under certain circumstances, to discontinue their children's education in violation of state law.[143] "[T]he integrity of the family unit" prompted the Court to require that the state give an unwed father, who had lived with his offspring, a due process hearing to determine his fitness to raise his children.[144] The father's interest trumped the state's concern for administrative convenience: it was simply "more convenient to presume than to prove" that unwed fathers were unfit.[145]

The Court's view of the importance and value of the family unit applies not only to parent-child relationships, but also to extended family ties. In *Moore v East Cleveland*,[146] a plurality invalidated a city ordinance that permitted "intrusive regulation of the family," because the "right to live together as a family" extended beyond the parent-child relationship—in *Moore*, between grandparent and grandchildren and between cousins.[147]

Troxel v Granville[148] appears to denigrate the grandparent/grandchild relationship.[149] The plurality and other opinions, however, do not settle questions regarding visitations between children and grandparents in all contexts,[150] and the case does not in any way settle all of the issues dealing with grandparents' or other family members' unique relationships, particularly when the state becomes involved in separating family members. Since *Troxel*, many jurisdictions have given greater deference to paren-

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[142] *Meyer*, 262 US at 402; *Pierce*, 268 US at 534-35.

[143] Consider *Yoder*, 406 US at 205 (holding that the state could not prevent Amish parents from removing their children from public school after the eighth grade). But in *Prince*, 321 US at 158, where the court upheld a guardian's conviction under the child-labor statute because she allowed her ward to sell religious tracts on the streets at night. The Court stated that the interest of society in protecting the welfare of the child overrode a guardian's or parent's right to raise his child as he or she sees fit. Id at 166, 170.

[144] *Stanley v Illinois*, 405 US 645, 651, 658 (1972).

[145] Id at 658. Biological connection does not, however, always dictate the result of contests between parents and the state. In *Michael H v Gerald D*, 491 US 110 (1989), a plurality of the Court held that a biological father's right to visitation with his child, born while the mother was married to another man, must yield to a state presumption that a child born during a marriage is a child of the marriage. Id at 125-29.

[146] 431 US 494 (1977) (plurality).

[147] Id at 499-500. The local zoning ordinance prohibited a grandmother from residing with her grandchildren who had different parents. Id.

[148] 530 US 57 (2000) (plurality).

[149] Id at 72-75.

[150] Marrus, 43 Ariz L Rev at 793 (cited in note 28) (noting the narrowness of the *Troxel* opinion).

tal wishes when determining if grandparents can have access to their grandchildren.[151] These states and judges are probably reading more into *Troxel* than is warranted. The plurality addressed only a one-of-a-kind, broad state statute which gave "any person" the right to petition for visitation at "any time" and permitted the court to grant visitation if it would serve the best interests of the child. The plurality took special care to note it was not "defin[ing] today the precise scope of the parental Due Process right in the visitation context."[152] Furthermore, Justice O'Connor, who wrote the plurality opinion, noted her agreement with Justice Kennedy that results would depend on the facts and circumstances of each case.[153]

The Court has not spoken explicitly on the issue of siblings, but that relationship is as important as the ones between grandparents and grandchildren and between cousins.[154] Several lower courts have alluded to the unique relationship of siblings and the state's duty to protect that bond.[155]

As I have noted elsewhere, sibling "relationships can provide emotional security, affect the intelligence, social, emotional, and moral development of [the siblings] and offer lifetime companionship . . . . Given the eminent worth of this relationship, it is in

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[151] For example, we are finding that the judges in Harris County, Texas are refusing to allow grandparents access against the parents' wishes even though the statute would permit it.

[152] *Troxel*, 530 US at 73.

[153] Id

[154] Marrus, 66 Tenn L Rev at 1015-18 (cited in note 27) (arguing that it is not rational to grant access to grandparents but not to siblings, when studies show that the sibling relationship may be the most important personal bond in a person's life).

[155] See *In re Jamie P*, 2003 WL 1154197 (Cal App) (noting California's statute mandating that the sibling relationship be maintained—even if one child is adoptable—unless there is clear and convincing evidence otherwise); *In re Guardianship of Jordan*, 764 A2d 503 (NJ App 2001) (weighing bond between sisters very heavily when making a placement determination). Compare *In re Daniel W*, 529 NW2d 548, 553 (Neb App 1995) (affirming trial court's decision to order visitation between siblings, although the juvenile court did not have direct jurisdiction over the sister). The court in *Daniel W* reasoned that it had jurisdiction over the parents and could order them to facilitate visitation between the siblings based on the best interests of Daniel W. Id at 555. The Nebraska Supreme Court reversed and vacated the visitation order. *In Interest of DW*, 542 NW2d 407, 410 (Neb 1996) (holding that a juvenile court cannot interfere with parental rights over a non-adjudicated child if the court does not have jurisdiction over that child). See also Leslie Boellstorff, *State Justices Weigh Rights in Sibling Visits*, Omaha World Herald 1 (Nov 4, 1995). Parents turned their son over to juvenile court for foster care when he was thirteen years old. Id. At the age of seventeen, the child sought visitation with his four-year-old sister. Id. The parents denied visitation and argued that it would harm their daughter. Id. The newspaper stated that the biggest issue was determining whether the court could enforce visitation without also taking jurisdiction over the younger sister. Boellstorff, *State Justices Weigh Rights*, Omaha World Herald at 2.

the best interests of children and society to weigh all factors carefully before disturbing this [unique kinship]."[156]

Certainly, if we assume the sibling relationship to be of fundamental importance, the state's burden when it attempts to destroy or dilute that relationship should be very heavy, particularly when the siblings experience the additional loss of parents, as they often do in dependency and termination proceedings. The Court has imposed a heavy burden when the state attempts to terminate parental rights.[157] The clear and convincing standard of proof insures greater accuracy in ferreting out which parent-child relationships should be destroyed. This accuracy is warranted because the state, the parents, and the children all have a strong interest in avoiding wrongful terminations. Is there any reason that sibling relationships should not be protected in the same way? Unlike intergenerational connections, sibling relationships usually span a lifetime and involve common family history. Long after parents die, siblings can continue to create new family ties, stories, and histories.

The clear and convincing standard of proof constitutionally mandated in termination proceedings does not, however, always apply to placement or adoption decisions.[158] If it had applied in *Hugo*, the state agency probably would have removed at least one of the children living in Ms. L's home so that Hugo could have been with his sister immediately after his birth. If that was not feasible at that time, he could have been moved to Ms. L's home sooner than he was. Had the higher standard of proof applied in Hugo's adoption hearing, it is very questionable whether the state supreme court would have upheld the trial judge's determination to place Hugo with an unknown aunt—with whom he shared a blood kinship, but not a psychological bond.

Instead of the clear and convincing standard of proof in decisions regarding post-termination placements, state statutes

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156 Marrus, 66 Tenn L Rev at 987 (cited in note 27).

157 *Santosky v Kramer*, 455 US 745 (1982) (holding that due process requires a state to meet the clear and convincing standard in termination proceedings). See also *MLB v SLJ*, 519 US 102 (1996) (holding that the state cannot deny an indigent parent the right to appellate review of termination of parental rights due to her inability to pay for a transcript).

158 See 42 USC § 675(5)(A) (2003) (mandating that the standard for placement decisions must be based on the child's best interests and special needs). See also *In re LL*, 625 A2d 559, 564 (NJ App 1993) (determining that child placement is based on the best interests standard); *In re Dependency of AC*, 873 P2d 535, 539 (Wash App 1994) (stating that the paramount concern in placement decisions is the best interests of the child, which in turn is based on various factors).

merely require that the court adhere to the best interests of the child standard, and simply list the factors to be considered by the judge in making the ruling.[159] This does little to provide guidance, avoid arbitrariness, and assure protection of the special sibling relationship. Indeed, had the trial judge in *Hugo* decided the case differently, that judgment, presumably, would also have been upheld by the state supreme court. The Massachusetts Supreme Court ruling in *Hugo* effectively insulates the trial judge's decision from any effective appellate review.[160] If the case had been heard by a different judge, or even by the same judge on a different day, Hugo might have remained in Ms. L's home with his sibling.

Such irrational factors as the personality and idiosyncrasies of judges are endemic in the law, but the particular vagueness of the statutes governing the lives of children in this context make the vagaries of law even more extreme. Had the court allowed Ms. L to adopt Hugo, arguably Hugo, Gloria, the aunt, and Ms. L all would have benefited more than they did from the actual judgment imposed. Hugo and Gloria would have remained together with a woman who obviously loved them. Hugo would have been spared another wrenching tear in his chaotic life. The aunt concededly would have provided a good home for Hugo, but one wonders why she had not tried previously to adopt Gloria or visit with Gloria and Hugo. As an aunt, she could seek a court order permitting her to visit with both Hugo and Gloria,[161] and could provide additional support without worrying that the parents, who had been deemed unfit, would attempt to regain care of Hugo by legal or other means. The parents may have considered that possibility when they supported the aunt in her quest for adoption. Indeed, it is not unusual for unfit parents to take their children unlawfully from the adoptive relative, knowing that the

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[159] See, for example, Iowa Code Ann § 232.21(2) (West 2003) (using the best interests standard in child placement decisions); Kan Stat Ann § 38-1584 (2003) (basing placement preference on best interests standard); Cal Welf & Inst Code § 361.3(a) (West 2003) (requiring that relative-kinship placement be based on the best interests standard and listing various factors that the court and department considers in this determination).

[160] *Hugo*, 700 NE2d at 521-22 (holding that the proper standard of review of the trial court's decision involves evaluating "whether the trial judge abused his discretion or committed a clear error of law," thus deferring to the trial court on almost all matters of factual analysis and interest-balancing).

[161] Ms. L, as the adoptive parent, could refuse the aunt visitation. However, the court could order it to take place as being in the children's best interests. The court encouraged the aunt to allow Gloria to visit with Hugo after she adopted him, but did not provide any resources to insure that this would occur. Id at 518.

relative will not likely report them to the police.[162] Had the statute mandated the importance of keeping siblings together, and required a heavy burden of proof before disturbing that relationship, Hugo's best interests would have been better served.

IV. PROPOSALS FOR KEEPING THE SIBLING RELATIONSHIP INTACT IN DEPENDENCY PROCEEDINGS

Research indicates that the sibling connection is one of, if not the, most important kinship bond that exists between family members—even including the parent-child relationship.[163] This is true for intact families, and the benefits of sibling connections assume an even greater importance for children who have been removed from parental care.[164] Finding solutions that would allow siblings to remain together during dependency and termination proceedings is not an easy task. It must be attempted, however, if the emotional well-being of children enmeshed in the throes of a dependency case is going to be protected in a realistic way.

From the beginning of the dependency process, even at the emergency removal hearings, brothers and sisters should be kept together. Federal regulations and state statutes should mandate such preferences. The state should bear the burden of proving that breaking sibling connections serves the best interests of the child by clear and convincing evidence, even though the emergency removal hearing takes place at a time when the state agency may know little about the family—a factor that concededly militates in favor of a mere preponderance of the evidence standard. However, because early placements have abiding impacts on later decisions regarding the child's placement,[165] the

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[162] See John W. May, *Utah Kinship Placements: Considering the Intergenerational Cycle of Domestic Violence Against Children*, 22 J Contemp L 97, 134 n 147 (1996) (stating that relatives who adopt may allow access to the biological parents whose rights have been terminated—a situation that non-relative foster or adoptive parents would almost certainly not permit). May notes that children may be reabused or reneglected by their parents in such scenarios, and that this is a primary concern in kinship placements. Id at 134.

[163] See Marrus, 66 Tenn L Rev at 981-82 (cited in note 27) (describing the sibling bond and stating that over a lifetime siblings will generally interact more with each other than with their parents).

[164] Id at 984-87 (discussing the benefits of the sibling bond and how it affects the child's development and learning process, and how it nurtures and supports children within the sibling group).

[165] See Patton, 48 U Miami L Rev at 758 (cited in note 20) (highlighting studies that show the initial placement of siblings is one of the most important factors in determining

court must take heightened care to assure an appropriate early placement—one that can continue and can provide a permanent home for the child, if appropriate.

Keeping siblings together is the lesser gamble in this context, certainly more so than wrongfully separating them. Only extraordinary circumstances should permit the state to separate siblings. For example, a brother and sister should be placed in different homes or facilities if the boy has sexually abused his sibling. In that situation, the safety of the child obviously comes before the importance of the sibling relationship.

Sometimes, however, sibling relationships present difficult issues that will not be readily solved by my proposed solution. For example, if one child is removed from the family and the other children remain in the family home, the former should be placed in a foster home that is prepared to accept the other siblings, should that become necessary. If one member of the sibling group has special needs, the state agency should have foster homes that can care for all of the children in a family, with or without special needs. If one or more members of the sibling group were removed from the home at an earlier time, the court should place the sibling currently falling under dependency proceedings in the same home as the previously removed children. Perhaps if the state initially had placed Hugo with his sister in Ms. L's home, then Hugo and his sister would have had even more time to bond, and the trial judge may have rendered a different decision.

In other cases, one member of a sibling group may need a higher level of care than the others. One child may have suffered longer and more severe abuse and may need residential treatment or placement in a mental institution. The state could provide the appropriate level of care for the child with the intent of reunifying the sibling group after treatment was completed. Under these circumstances, it would be imperative, depending on the extent of the emotional damage, for the state to arrange for meaningful and frequent visitation between members of the sibling group in order to assist with a smooth transition later.

Troubling issues also may arise when members of the sibling group come from different racial backgrounds. Although I am generally against transracial adoptions for reasons independent

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whether they will be adopted together or otherwise reunited).

of the issues discussed here,[166] I recognize the importance of evaluating the individual needs of each child. I do not advocate the division of the sibling group to ensure racial matching. Under current law, however, such division is made more likely. For example, the Indian Child Welfare Act ("I.C.W.A.") gives tribal nations exclusive rights in determining the placement of any Indian child.[167] These exclusive rights can be further complicated if the children come from different tribes or one or more members of the sibling group are of non-Indian racial make-up.[168] Language could be added to the federal I.C.W.A. to mandate that if the tribe desires to take jurisdiction over the Indian child, they must also take jurisdiction over the non-Indian children. This position is concededly difficult to maintain given the autonomy of Indian tribes and the importance to the tribes in maintaining closeness.

If an agency subsequently wants to separate siblings, it should address the relevant issues at a hearing. Courts should hear and afford great weight to siblings' feelings about remaining together, and the change should not occur without clear and convincing evidence that the new arrangement is best for all the children. Of course, I do not expect the state to maintain a placement that is harmful to one or more of the children in order to keep the sibling group together. But, when feasible, the agency should facilitate visitation between siblings, and such visitation should be made a condition of the change in placement. In these situations, each child should have separate counsel who can in-

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166 Except for the Indian Child Welfare Act, 25 USC § 1911(a) (2003), federal law mandates, as a condition of funding, that race cannot be a factor for adoption placement if it will interfere with the timely adoption of the child. See 42 USCA § 671(a)(18) (West 1998). This provision was included because it is believed that there are an insufficient number of African-Americans who want to adopt African-American children. See Scott Baldaut, *More African-Americans Reach Out to Adopt*, Christian Science Monitor (Oct 12, 2000) (stating that many African-Americans distrust state agencies, and therefore do not look at adoption). There are various reasons why this insufficiency exists, and much has to do with matters of state inaction. States could take measures to ensure that there are sufficient African-American homes for African-American children by, for example, providing payments for low-income families who adopt, such as those given to foster parents adopting special needs children or relatives who are able to collect benefits after they have adopted a child of a relative. In addition, the state could consider waiving some screening conditions that would not endanger the child's welfare. The author discusses several methods that agencies have been using to encourage African-American adoptions. Id.

167 25 USC § 1911(a).

168 Id (mandating that custody proceedings concerning Indian children are subject to the jurisdiction of tribal courts, but without providing a resolution for the reconciliation of different tribal systems or for part-Indian children).

vestigate the facts and advocate each child's position.[169] The state would have to show that it made all reasonable efforts to keep the siblings together. However, in the end, it may be that for the emotional well-being of one child, it is better to remain with his or her brothers and sisters while to protect another child from harm it may be necessary to separate the child from the other siblings. In this Scylla-Charybdis scenario, the latter child should prevail because it is the only way to prevent harm to that child. Thus, the likelihood of harm to one child trumps the possibility of emotional well-being of another.

When the state attempts to terminate parental rights because of past abuse, the federal constitutional burden of proof is clear and convincing evidence that the parent is unfit.[170] The standard is high because the intact family is of great value and importance in society. Thus, the assurance of accuracy is necessary for all parties—state, parents, and child.[171]

Moreover, not just the parent and child lose the family connection in a termination proceeding. If parental rights are terminated, children often no longer see any of their blood relatives, and the legal system views them as not having these relations.[172] Aunts are no longer aunts, grandparents are no longer grandparents, and siblings are no longer siblings, unless they are adopted by the same people.[173] This doctrine, however, is only statutory, and it may be possible to amend statutes to order

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[169] See *Carroll v Superior Court*, 124 Cal Rptr 2d 891 (Cal App 2002). In *Carroll*, appointed counsel entered a motion to be relieved from representing a seven-member sibling group because of a conflict of interest. Id. Counsel argued that California's newly adopted sibling relationship standard would require her to advocate for adoption on behalf of some of the siblings and against it for the others. Id at 894. The appellate court ordered that the trial court grant counsel's request. Id at 898. The appellate court suggested that separate counsel would have to be appointed for each of the children because a court cannot appoint one attorney for multiple siblings when it is reasonably likely an actual conflict may arise. *Carroll*, 124 Cal Rptr 2d at 898. See also American Bar Association, *Standard of Practice for Lawters Who Represent children in Abuse and Neglect Cases* (adopted Feb 5, 1996), available online at <http://www.abanet.org/child/repstandwhole.pdf> (visited May 3, 2004) ("If a lawyer is appointed as a 'child attorney' for siblings, there may also be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children.").

[170] *Santosky*, 455 US at 765-66 (noting that society is not neutral in its balancing of the risk of error in wrongful termination cases, and that society places more emphasis on maintaining the biological family even when it is imperfect).

[171] Id.

[172] Patton, 48 U Miami L Rev at 789 (cited in note 20) (noting that some courts view all biological relatives' rights as derivative of those of the natural parents; once the parents' rights have been terminated, other relatives' legal interests are terminated as well).

[173] Id at 789 & n 222 (noting that a court ordering adoption has no jurisdiction to also grant visitation rights to natural relatives).

adoptive parents to permit visitation with blood relatives. At the very least, if siblings are adopted together, they can maintain arguably the most important kinship relationship.

At the permanency planning hearing, whatever the long-term plan may be, as with intermediate placements, the sibling group should remain together. If the state makes a recommendation to separate the sibling group, the court should hold another hearing at which the state should have to prove that it would be detrimental for the siblings to remain together, that all steps were taken to keep them together, and that the state will assist with frequent visitation between siblings. The burden of proof for the hearing should be "clear and convincing," and legislation should state that lack of resources is not an adequate defense.[174]

Critics might raise doubts about this method of determining placements because of a lack of state resources and the costs involved with implementing this system. However, when children are placed in the wrong environment and when they lose contact with loved ones, they are more likely to grow up troubled and at-risk.[175] Children removed from their homes often need additional help in school, extensive therapy or hospitalization, and are more prone to become violent and commit delinquent and criminal acts resulting in incarceration.[176] These problems result in increased costs and burdens on the system, and may cost society more than using the appropriate resources in the beginning. In the long term, it is always more expensive to repair a system than it is to build it correctly in the first place.

Under a clear and convincing burden of proof and a mandated preference for siblings to remain together absent extraordinary circumstances, it is unlikely that the judge's decision to remove Hugo from Ms. L and let his aunt adopt him would have

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[174] Consider *HK v Taylor*, 289 SE2d 673, 679 (W Va 1982) (suggesting that a lack of resources is not a sufficient reason for failing to provide an appropriate placement in status offender cases). In *Taylor*, the court stated that the juvenile courts and child welfare department are not limited to their own resources but have the authority to cooperate with private and state agencies to assure adequate placements for children under their jurisdiction. Id.

[175] See Rebecca L. Hegar, *Sibling Relationships and Separations: Implications for Child Placement*, Social Service Review 446, 457 (Sept 1988) (discussing a study which indicated that the primary reason for "depression, retardation and starvation" was the separation of siblings).

[176] See Dorothy Otnow Lewis et al, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 Am J Psychiatry 584, 585-87 (1988) (describing the fact that almost all of the studied juveniles on death row had been "brutally, physically abused" as children).

been upheld by the Massachusetts Supreme Court. The outcome in *Hugo* resulted directly from an abuse of discretion standard for appellate review,[177] and a lack of statutory mandates requiring that siblings remain together.

In West Virginia, a statute provides that siblings are to be put in the same placement unless it is shown by clear and convincing evidence that residing in the same home will be harmful to one or more of the siblings, that one child has a disability that can be better cared for in the existing placement, or that sibling reunification would not serve the best interests of one or more of the siblings.[178]

The advantages of such a rule are demonstrated by *In re Carol B.*,[179] a case similar to *Hugo*. *Carol B.* arose in West Virginia where the statute favors the preservation of sibling relationships. The state removed a younger sibling from the parental home after a maternal aunt and uncle adopted two older siblings.[180] The state originally placed the younger sibling with a paternal aunt and uncle who wanted to adopt her, and who appeared to be providing appropriate care for her, but who did not encourage visitation among the siblings.[181] Several months prior to termination of the parents' rights, the state moved the younger child in order to place her with her siblings.[182]

The trial judge decided that the paternal aunt and uncle, with whom the child was originally placed, should adopt the girl because the siblings had not enjoyed adequate time to build a bond, and because the child would excel in a household where she was the only child and could receive more attention.[183] The maternal aunt and uncle appealed, and the appellate court reversed the trial court's decision.[184] The court held that both sets of adoptive parents were more than capable of being good parents to the girl, but "the law prefers, in the absence of compelling circumstances, that siblings enjoy the many advantages of grow-

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[177] *Hugo*, 700 NE2d at 521-22 (holding that in a case where expert testimony and heavy factual scrutiny is central to a determination of a child's best interests, the task of the appellate court is not to review the trial court decision de novo, but rather to determine "whether the trial judge abused his discretion or committed a clear error of law").

[178] W Va Code Ann § 49-2-14(e).

[179] 550 SE2d 636 (W Va 2001).

[180] Id at 639.

[181] Id at 640.

[182] Id at 639.

[183] *In re Carol B*, 550 SE2d at 640-41.

[184] Id at 639.

ing up together and the attendant opportunities to forge meaningful, life-long relationships."[185] This preference is the result of a state statute with a high burden of proof and standards mandating that siblings stay together. Without such statutory preferences, the state has the power to parcel out children as prizes to placate various relatives with scant regard to the children's needs—as the trial judge unsuccessfully attempted to do in *Carol B*, and as the trial court in *Hugo P* succeeded in doing.

CONCLUSION

Children are not responsible for the harm that leads the state to remove them from their parents' care and custody, although many abused children view it in that light.[186] The loss of parents is a psychologically devastating event. The tearing apart of other family relationships can enhance this trauma. Therefore, termination of sibling relationships should be treated as seriously as the termination of parental rights. "[F]ew consequences of judicial action are so grave as the severance of natural family ties."[187]

The triangle of state, parent, and child that is usually invoked in family matters is too simplistic. It fails to reflect that the child has family connections, such as siblings, beyond the parent-child relationship. The state has to acknowledge and foster these other kinship ties that provide security and support in times of trauma. Keeping siblings together dulls the pain of abuse and the loss of parents, and prevents more extensive emotional damage. Even if promoting sibling ties seems more complicated and difficult to achieve, in the long run it is actually easier and more humane for the state to try to keep brothers and sisters together. If keeping siblings together is more likely to diminish emotional damage to neglected and abused children, which in turn decreases the need for special services, the state may actually come out as a winner too.

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[185] Id at 646.

[186] Beth Bjerregaard and Anita Neuberger Blowers, *Chartering a New Frontier for Self-Defense Claims: The Applicability of The Battered Person Syndrome as a Defense for Parricide Offenders*, 33 U Louisville J Fam L 843, 869 & n 153 (1995) (noting that abused children often "perceive their family situation as normal and therefore feel that intervention is not necessary," and that such children "often blame themselves, feeling that their parents' use of violence is legitimate and socially acceptable").

[187] *Santosky*, 455 US at 787 (Rehnquist dissenting).