

# USE AND ABUSE OF THE POWER TO SEVER FAMILY BONDS

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I will be until midnight tomorrow a judge of the Family Court of the State of New York. At least a third of the hundreds of cases I heard over the last three years required that I determine whether to transfer custody of a child; perhaps a sixth required that I decide whether to free a child for adoption without its parents' consent.

I entered the job with a healthy respect for psychoanalytic theory. I had studied it briefly, had done some research in the field, and was predisposed to attend to the effects the unconscious and the imprint of childhood have on all of our lives. I was impressed by many of the ideas I found in the Goldstein, Freud, and Solnit volumes,<sup>1</sup> and was fairly easily persuaded that a child's need for a secure, continuous emotional environment should outweigh the competing rights of adults.

The New York State legislature had acted, as had the legislatures of many states, to ensure that decisions about the custody and guardianship of children in foster care would be made with a concern for continuity.<sup>2</sup> The legislative provisions establishing the relative rights of foster and biological parents stopped far short of the Goldstein, Freud, and Solnit prescriptions.<sup>3</sup> Nevertheless, they were intended and were interpreted to require that action be taken to free a child for adoption—with or without the parents' consent—whenever foster care had continued for a year or more without satisfactory progress<sup>4</sup> toward return to the biological home. Courts and child care agencies were increasingly prone to conclude that the child's need for continuity of care by an autonomous parent figure required severance of biological ties, whether or not the child had an ongoing relationship with a surrogate parent who wished to adopt.<sup>5</sup>

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1. J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* (1973) [hereinafter *Beyond the Best Interests*]; J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* (1979) [hereinafter *Before the Best Interests*].

2. N.Y. Soc. Serv. Law § 384-b (McKinney Supp. 1980-1981).

3. See *Beyond the Best Interests*, supra note 1, at 44-51; *Before the Best Interests*, supra note 1, at 97-101 for a review of the relevant recommendations of Goldstein, Freud and Solnit.

4. The legislated measures of parental abilities and efforts are so complex and ambiguous (see, e.g., N.Y. Soc. Serv. Law §§ 384-b(4)-(7) (McKinney Supp. 1980-1981)) that the decisions of caseworkers differ radically as to the appropriateness of parental rights termination.

5. The practice in New York and elsewhere of freeing children for adoption when there is no "psychological parent" willing to adopt is inconsistent with the recommendations of

As I heard and decided cases involving foster placements and the termination of parental rights, I began to wonder whether our focus upon continuity and permanence had blinded us to other factors equally important to the emotional health of foster children and to the development of a social climate supportive of family vitality. My questions grew over three years of listening daily to custody disputes. In the faces of the children and in the faces of their biological and foster parents, I saw the enormity of the decisions I was required to make and struggled to anticipate the immediate and long-term effects those decisions would have upon their lives. As the cases mounted, I became concerned about the effects this kind of official decision-making must also have upon the social ethic that determines standards of parental behavior and responsibility.

I confess that as I witnessed child custody and parental rights termination cases I was often struck by the cruelty of the process. The last case I decided as a family court judge involved a schizophrenic mother, diagnosed by some expert witnesses as being in remission but by others as having residual symptoms. She was intelligent and lucid. Love for her child and a determination to participate in some constructive way in that child's upbringing had seen her through a difficult course of therapy. The legal question was whether she would be able to care for the child in the foreseeable future; a negative finding virtually assured termination of parental rights.<sup>6</sup> This mother had what most parents in her situation lack: an assertive attorney who would neither concede the case on the basis of the diagnosis nor take the mother through the motions of a *pro forma* defense. She was therefore required to sit through four days of testimony designed to prove her worst fear: that she was hopelessly insane. I do not deny that I was affected by the cruelty of that process and by the grace with which the evidence was heard and answered by a woman who, but for luck in the draw of assigned counsel, would have been summarily dismissed from the life of her child.

But sympathy for parents in this difficult situation was not the only, or even the principal, source of my reservations about current and emerging policy choices affecting custody rights and family status. Seeds of doubt were sown by interviews with children who had been in care for years but were nevertheless adamant in their wish to return to or maintain contact with their biological families. The laws of New York allowed me to consider the similar wishes of children caught up in custody and visitation disputes between biological parents,<sup>7</sup> but often precluded fulfillment of the needs

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Goldstein, Freud, and Solnit, who insist that the child "must not be made the victim of a state policy which favors adoption for adoption's sake," or removed from capable foster parents willing to continue care. Before the Best Interests, *supra* note 1, at 49-50.

6. N.Y. Soc. Serv. Law §§ 384-b(4)(c), (6)(a) (McKinney Supp. 1980-1981).

7. See, e.g., Fam. Ct. Act §§ 477, 652, 656 (McKinney 1975 & Supp. 1982-1983).

and wishes of these fostered children. Doubts arose when I heard seemingly thoughtful psychiatrists testify that it was in many cases impossible to identify one of several potential custodians as the psychological mainstay for a child. These experts believed that it was unwise to preserve one emotional tie without regard for the child's dependencies upon and feelings for other significant adults in its life, for, in doing so, we risk subjecting the child to both the grief of loss and the long term "emotional fallout" from failures to resolve feelings about the severed bond.

Further doubts emerged as I was called upon to tell a person who professed a desire to fulfill a strongly felt parental responsibility that the best thing she could do for the child was to get out of its life. It was more troubling that I said such things, not as an individual, but from a platform, robed in black and speaking with the authority of law and the power of government. Similar discomfort was aroused when I speculated about the judgments a child might make upon learning that because of handicap or misfortune, a parent had been banished from its life. The testimony of temporary caretakers was also a source of unease; for those who were less alienated than the typical pre-adoptive parent by class and subculture differences between biological and surrogate families often empathized with biological parents, were sensitive to the child's feelings about its biological ties, and were comfortable with the continuation of multiple attachments and dependencies. My confidence in governmental family planning was weakened by examples of failed adoptive placements and successful reunions of families judged unsalvageable by the foster care system.

In short, when I was called upon to reconfigure families, I began to wonder whether I knew, or anyone knew, what precisely was in the best interests of the child.

The Honorable Leo I. Glasser, once a New York family court judge, referred to the family court as a "legal and social emergency room."<sup>8</sup> It is precisely that; in a trial part each day brings as many as twenty or twenty-five urgent and painful human problems. In this setting, there is a particularly pressing need to be confident about one's premises, for life-altering decisions must be made without the luxury of meticulous analysis or prolonged deliberation.

In the face of these qualms, I began to review competing expert opinions concerning the effects upon children of separations and custodial changes. I also began to monitor the effects of a sample of decisions involving temporary and permanent family reconfiguration.<sup>9</sup> The prelimi-

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8. Informal address on the occasion of the swearing in of the Honorable Edith Miller as Justice of the Supreme Court of the State of New York, County of New York (Dec. 18, 1981).

9. Funds for a portion of the research reported in this presentation were provided by the Foundation for Child Development and the New York Community Trust. Valuable research

nary results of this research suggest that we must heed Goldstein, Freud, and Solnit's advice that biological and psychological family disruptions are harmful to children and must be handled cautiously by courts and agencies alike. But it has convinced me that we must take equal care to avoid rigid systems that preclude consideration of other psychological needs of children, the complexities of human development, and the limits of our ability to interpret and predict human behavior.

Before describing the findings that lead me to call for a reevaluation of current child placement policies, it is important to explain the ways in which those policies both reflect and diverge from the recommendations of Goldstein, Freud, and Solnit. I do this not only to frame the issues, but also to depersonalize what is too often referred to as "the Goldstein, Freud, and Solnit debate." Many of us are uncomfortable with permanency planning because focus upon continuity often results in irrevocable severance of family bonds in cases where justification for the initial intervention was doubtful. We cannot know the effectiveness of a system in which there is appropriate and equal respect for the integrity of biological and other psychological family bonds—the system advocated by Goldstein, Freud, and Solnit—because that system exists nowhere.<sup>10</sup> Thus, the criticisms voiced here should be understood as criticisms of permanency planning systems built upon selective acceptance—and, I believe, upon partial understanding—of the teachings of those eminent and thoughtful scholars.

In view of the tremendous popularity of the Goldstein, Freud, and Solnit volumes, one would have expected a reduction in state intrusions upon biological family autonomy, new legislated restrictions upon state action to disrupt custodial arrangements, and heightened agency worker awareness of the risks of ill-considered foster placements. For the authors of *Beyond the Best Interests of the Child* were adamant in insisting that we leave viable families intact:

We believe that a child's need for continuity of care by autonomous parents requires acknowledging that parents should generally be entitled to raise their children as they think best, free of state interference. This conviction finds expression in our preference for *minimum state intervention* and prompts restraint in defining justifications for coercively intruding on family relationships. . . .

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assistance was provided by Ms. Diane Hughes and by New York University law students Gary E. Moncrieffe and Gail Smith.

10. In such a system it would be less likely that permanent severance of family bonds would seem unjust or destructive of social forces which enhance parental responsibility. It would also be less likely that termination of parental rights would cut a child off from a potentially constructive or healing (custodial or noncustodial) biological tie.

So long as a child is a member of a functioning family, his paramount interest lies in the preservation of his family. Thus, our preference for making a child's interests paramount is not to be construed as a justification in and of itself for intrusion.<sup>11</sup>

But experiences with the family court and foster care systems, the breadth and vagueness of legislation authorizing intervention and coerced placements,<sup>12</sup> and the legal and social work literature<sup>13</sup> suggest that initial family disruptions continue to be made lightly,<sup>14</sup> with foster care placements used as "an easy way out for many workers pressured by the community to 'do something' about a difficult family."<sup>15</sup> Community pressures upon judges are only slightly less intense than those on social workers, and internalized, but unproved, notions concerning the "proper" environment for children function with similar force and effect when community pressures are absent. Thus, unwarranted state intrusions upon biological family autonomy continue.<sup>16</sup>

But despite their failure to heed Goldstein, Freud, and Solnit's admonitions against interferences with the autonomy of biological and other unsupervised family units, many courts, legislatures, and child welfare institu-

11. Before the Best Interests, *supra* note 1, at 4-5.

12. See Developments in the Law, The Constitution and the Family, 93 Harv. L. Rev. 1156, 1231-32 (1980).

13. See, generally, Institute of Judicial Administration & American Bar Association Juvenile Justice Standards Project, Standards Relating to Abuse and Neglect (1977); Wald, State Intervention on Behalf of Neglected Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985 (1975).

14. For evidence that intensified services to biological families can be effective in preventing or shortening foster placements, see Jones & Biesecker, Training in Permanency Planning: Using What Is Known, 59 Child Welfare 481 (1980); Torczyner & Pare, The Influence of Environmental Factors on Foster Care, 53 Soc. Serv. Rev. 358 (1979); Laird, An Ecological Approach to Child Welfare: Issues of Family Identity and Continuity, in Social Work Practice: People and Environments 174 (C. Germain ed. 1979); Boyd, They Can Go Home Again, 58 Child Welfare 609 (1979); Nayman & Witkin, Parent/Child Foster Placement: An Alternate Approach in Child Abuse and Neglect, 57 Child Welfare 249 (1978).

15. Jones & Biesecker, *supra* note 14, at 485.

16. The dearth of research concerning placement processes stands in striking contrast to the myriad studies concerning the effects of placement. See Crane, A Framework for Studies of Separation in Child Welfare, 44 Soc. Serv. Rev. 253, 255 (1970). Crane identifies the need for careful analysis of the initial, and often irreversible, decision to place a child in surrogate care:

The purpose of epidemiological research on child separation is not the control or elimination of disease, but the discovery of the circumstances under which social interventions may be developed which are more effective and/or desirable than child separation. For this reason the behavior of those who identify and define the problems leading to child separation must be brought into focus if child separation is to be understood.

*Id.*

tions have accepted the principle of continuity as it applies to children who have been separated from their biological families. Under the banner of this principle these institutions have moved doggedly to end "the limbo of foster care" by terminating biological ties in order that children might be given permanence.

Information concerning the number of termination petitions filed and the number of adoptions approved in state courts over the past decade would be helpful in determining whether children are being freed for adoption more frequently and whether those being freed are successfully adopted. Unfortunately, these figures appear to be unavailable. State courts generally do not issue reports concerning these matters. A search for the relevant data<sup>17</sup> revealed reports concerning the volume of termination petitions in only four states. These figures have been assembled only for 1977 and 1978.<sup>18</sup> In New York, the number of reported termination dispositions was 857 in 1977, 1,898 in 1978, 1,494 in 1979 and 1,719 in 1980; the number between 1967 and 1968 had been 92.<sup>19</sup>

If it is true that biological bonds are being severed more readily, then the bases and consequences of legislative, judicial, and agency efforts to sever those bonds require evaluation. The findings I report represent preliminary steps in the evaluative process.

Efforts to free children for adoption without parental consent are based upon two notions. The first is a belief that continuity of parental care represents the paramount developmental need of a child. The second is the

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17. The following sources were consulted: American Bar Association Information Services, Chicago, Illinois; Council of State Governments, Office of Court Administration, Lexington, Kentucky; National Center for State Courts, State Court Caseload Statistics: Annual Reports, 1977, 1978; National Conference of State Legislators, Denver, Colorado; National Council of Juvenile and Family Court Judges, Reno, Nevada; National Legal Resource Center for Child Advocacy, American Bar Association, Washington, D.C.; Voluntary Cooperative Information System, American Public Welfare Association, Characteristics of Children in Substitute and Adoptive Care: A Statistical Summary of the Voluntary Cooperative Information System National Child Welfare Base (Dec. 1983). Sources surveyed for New York statistics include: Annual Reports, State of New York Judicial Conference, 1968 through 1978; Annual Report of the Chief Administrator, State of New York Judicial Conference; Child Welfare Information Services, New York, New York; Special Services for Children, User Services Information Systems and Services, New York, New York.

18. National Center for State Courts, State Court Caseload Statistics: Annual Report, 1977 at 168, 224, 340, 385 (1982) [hereinafter 1977 Report]; National Center for State Courts, State Court Caseload Statistics: Annual Report, 1978 at 173, 228, 328, 339, 382 (1983) [hereinafter 1978 Report] (reporting figures from Connecticut, Iowa, New York, North Dakota, and Rhode Island).

19. 1977 Report, *supra* note 18, at 328; 1978 Report, *supra* note 18, at 328. 1979 and 1980 figures were provided by Robert Roper, National Center for State Courts, Williamsburg, Virginia. The 1967 to 1968 figure is reported in State of New York, Report of the Administrative Board of the Judicial Conference of the State of New York for the Judicial year July 1, 1967 through June 30, 1968 at 277 (1969).

belief that continuity can best be assured for foster children by severing ties with any parent who has not had custody for a year or two and who has failed to make, or is thought incapable of making, "satisfactory" progress toward family reunification.

These concepts are consistent with theoretical child development constructs<sup>20</sup> and with statistical research on the effects upon children of short- and long-term separations. It is important to recognize, however, that although validation of theoretical constructs concerning the child's interaction with significant adults is being attempted through increasingly sophisticated studies,<sup>21</sup> ignorance still prevails:

[W]e know next to nothing about the mediating mechanisms by which adverse social experiences like . . . [separation] interfere with the acquisition of cognitive structures. In spite of . . . assertions . . . that "what is . . . essential for mental health is that the infant and young child should experience a warm, intimate and continuous relationship with his mother," we know very little about the factors in the mother-child relationship that encourage the child to attain the necessary tools for coping with his technological environment. For that matter, we don't know what a "good mother" is supposed to do nor how a "good" child should respond to her.<sup>22</sup>

Moreover, early statistical studies which purported to establish correlations between separation per se and psychological harm have been seriously challenged. More recent scholarship has revealed that these early studies were inconsistent and flawed by a failure to distinguish the effects of separation and the effects of preceding family strife, prior neglect, illness and hospitalization, and poor impersonal institutional care.<sup>23</sup>

Michael Rutter has complained generally that

[w]e are still not sufficiently in the habit of critically examining the facts about a question before arriving at our conclusions about it.

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20. See *Beyond the Best Interests*, supra note 1, at 9-34.

21. See, e.g., Egeland & Sroufe, *Attachment and Early Maltreatment*, 52 *Child Dev.* 44 (1981); Ainsworth, *Infant-Mother Attachment*, 34 *Am. Psychologist* 932 (1979); Egeland & Vaughn, *Failure of Bond Formation as a Cause of Abuse, Neglect and Maltreatment*, 51 *Am. J. Orthopsychiatry* 78 (1981); Sroufe, *The Coherence of Individual Development, Early Care, Attachment, and Subsequent Developmental Issues*, 34 *Am. Psychologist* 834 (1979).

22. Chambers, *Maternal Deprivation and the Concept of Time in Children*, 31 *Am. J. Orthopsychiatry* 406, 417 (1961) (comment by Dr. P. Wolf).

23. The bases of this conclusion can be suggested by a review of a representative sample of existing studies. They are as striking for their variety and inconsistency as for their failure to establish clear cause-and-effect relationships between childhood separations and short- or long-term emotional harm:

—A comparison of mental patients with histories of maternal separations of longer than six months before the age of six with patients without such histories showed a statistically significant relationship between the separations and subsequent sociopathy, broken marriages, poor work records, and institutionalization. Earle & Earle, *Early Maternal Deprivation and Later Psychiatric Illness*, 31 *Am. J. Orthopsychiatry*, 181, 185 (1961). But, more significantly, the study found that “[t]he great majority of [separation] cases gave a history of unsatisfactory mother substitutes, such as a series of foster homes, a rejecting stepmother, or an orphanage run on old fashioned lines. . . .” *Id.* at 184. Moreover, “out of the total of 1,423 cases, maternal separation in the first six years of life occurred in only 27 out of 66 sociopathic personalities.” *Id.* at 184.

—Depression in adult life was found to be correlated with childhood and antecedent separation, but not with childhood separation alone. Sethi, *Relationship of Separation to Depression*, 10 *Archives Gen. Psychiatry* 486-96 (1964).

—In a review of his own work and that of others, John Bowlby concluded that childhood separations were correlated with, but not necessarily the cause of, sociopathic personality, suicidal traits, and depression. J. Bowlby, *Effects on Behaviour of Disruption of an Affectional Bond*, in *Genetic and Environmental Influences on Behavior* (J. Thoday & A. Parker eds. 1968). Bowlby noted that in the cases of sociopathic personality or suicidal traits the separations were likely “to have been both a permanent loss and to have been followed by . . . repeated shifts of parent figures.” *Id.* at 101.

—A study of adult adjustment among 316 former foster children found a syndrome involving fear of harm by society, excessive investment in defenses against that fear, and various levels of adult life adjustment. Murphy, *Long-Term Foster Care and Its Influence on Adjustment to Adult Life*, in *The Child in His Family: Children at Psychiatric Risk: III* (E. Anthony & C. Koupernik eds. 1974). It reported, however, that “the most significant prognostic indicator was clearly the structure of the natural family at the time the placement was initiated.” *Id.* at 431.

—A longitudinal study of 16,000 English school children, with measures taken at ages seven and eleven, revealed that those who went into care after age seven had displayed more behavioral problems before placement than those who never entered care and that increases in behavioral problems were greater among children in care who had experienced early placements or multiple placements. Lambert, Essen & Head, *Variations in Behavior Ratings of Children Who Have Been in Care*, 18 *J. Child Psychology & Psychiatry & Allied Disciplines* 335 (1977).

—The borderline personality diagnosis was found to be associated with separations before, but not after, the age of five. Bradley, *The Relationship of Early Maternal Separation to Borderline Personality in Children and Adolescents: A Pilot Study*, 136 *Am. J. Psychiatry* 424 (1979).

—A series of British studies of the effects of institutionalization, with measures at two and one-half, four and eight years of age, found that at two and one-half the institutionalized children had lower mental ages, vocalized less and were more fearful. Tizard & Joseph, *Cognitive Development of Young Children in Residential Care: A Study of Children Aged 24 Months*, 11 *J. Child Psychology & Psychiatry & Allied Disciplines* 177 (1970). At age four, the children ranked as follows in terms of cognitive development: adopted children scored highest, followed by the control group of children who had never been placed, then by the institutionalized children, with those who had been returned home scoring lowest. Tizard & Rees, *A Comparison of the Effects of Adoption, Restoration to the Natural Mother, and Continued Institutionalization on the Cognitive Development of Four-Year-Old Children*, 45 *Child Dev.* 92, 96 (1974). The adopted children also fared best in the areas of affectional relationships and behavior problems. Tizard & Rees, *The Effect of Early Institutional Rearing on the Behavior Problems and Affectional Relation-*



. . . [M]any . . . imply that we understand exactly what sort of upbringing a child needs and precisely which factors cause psychiatric disorder in children. But we do not, and it is our failure to recognize our ignorance which has led to these confident but contradictory claims. It is not our ignorance as such which is harmful but rather our 'knowing' so many things that are not true. Our theories on the importance of the family have multiplied and become increasingly certain long before we know what are the facts the theories have to explain.<sup>24</sup>

More specifically, he has concluded that the short-term effect of parental separation is potential, but not inevitable, emotional distress and that no long-term effects can be proven.<sup>25</sup> He asserts that by taking the view that "any kind of parting of parent and child [is] . . . harmful,"<sup>26</sup> child development specialists have overlooked the impact of both the age of the child and the circumstances of the separation. He argues that potentially beneficial

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ships of Four-Year-Old Children, 16 *J. Child Psychology & Psychiatry & Allied Disciplines* 61 (1975). At the age of eight, there were far more teacher-reported behavior problems among formerly or currently institutionalized children, but no difference was found in the level of parent- or caretaker-reported behavior problems; adopted children continued to score highest in measures of cognitive development. Tizard & Hodges, *The Effect of Early Institutional Rearing on the Development of Eight-year-Old Children*, 19 *J. Child Psychology & Psychiatry & Allied Disciplines* 99, 103-12 (1978).

—An analysis of institutionalized children who demonstrated "affectionless psychopathy," one of the syndromes commonly attributed to childhood separation, revealed that different factors might have been significant; for example, antisocial behavior was correlated to the absence of a father figure and to sibship size; and disinhibition was correlated to institutionalization before the age of two. Wolkind, *The Components of "Affectionless Psychopathy" in Institutionalized Children*, 15 *J. Child Psychology & Psychiatry & Allied Disciplines* 215 (1974).

—A longitudinal study of Swedish children, with measures at ages eleven and fifteen, found no statistically significant differences in performance and adjustment between children who had experienced institutional care and those who had not. Bohman & Sigvardson, *Long-Term Effects of Early Institutional Care: A Prospective Longitudinal Study*, 20 *J. Child Psychology & Psychiatry & Allied Disciplines* 111 (1979).

—A study in which researchers themselves fostered toddlers for periods of ten to twenty-seven days and compared their reactions with those of children institutionalized for comparable periods and under comparable circumstances found no support for the notion that all maternal separations cause acute grief and mourning, which was observed only among the institutionalized children. However, the researchers expressed concern that there might be less visible long-term effects of separations with a transfer of cathexis. Robertson & Robertson, *Young Children in Brief Separation: A Fresh Look*, 26 *Psychoanalytic Study of the Child* 264 (1971).

24. Rutter, *Parent-Child Separation: Psychological Effects on the Children*, 12 *J. Child Psychology & Psychiatry & Allied Disciplines* 233, 234 (1971).

25. *Id.* at 255.

26. Rutter, *Separation Experiences: A New Look at an Old Topic*, 95 *J. Pediatrics* 147, 152 (1979).

separations have therefore been discouraged as, for example, discontented mothers are dissuaded from seeking employment.<sup>27</sup> He notes that, even among institutionalized children, harm is limited to cases in which institutionalization occurred before the age of two, and that even then, the cause of the harm seems to relate more to the kind and quality of care provided than to parental separation.<sup>28</sup> Rutter concludes that "[c]hildren can cope with several caretakers, but they seem to suffer if they experience a large number of changing caretakers."<sup>29</sup>

Similarly, after an exhaustive review of existing research, Yarrow determined that although the effects of parental separation have been examined since the thirteenth century, no clear conclusions can be drawn. The immediate reactions of children appear to be mitigatable, age-variable and in some cases avoidable. Studies identifying long-term personal or social impairment have failed to isolate other possible causes—such as hospitalization, pre-separation relationships, age at separation, post-separation care, contacts during separation and subsequent reinforcing experiences.<sup>30</sup> Yarrow points out that there has been little or no research examining the effects of paternal separation.<sup>31</sup> Concerning the much studied problem of maternal deprivation, Skard has concluded: "the more the problem has received attention, the more involved it has seemed, and the more difficult to reach definite conclusions."<sup>32</sup> Another review of existing research concludes that it "does no more than suggest the possibility of unfavorable long-term effects [of short-term separations],<sup>33</sup> and that "[w]hether [long term] . . . separation can be considered as an aetiological factor in behavioral disturbances . . . is . . . as yet unresolved."<sup>34</sup>

In sum, the inconclusiveness of separation research undermines the notion that continuity of care is entitled to the nearly single-minded focus it has been given in our efforts to reform foster care systems.

The belief that continuity can be assured by termination of biological ties is also questionable. One researcher analyzed a sample of twenty-nine children who had been freed for adoption. Ten never entered an adoptive home, nine experienced disrupted placements and twelve were successfully adopted. Among the factors associated with successful outcome were con-

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27. *Id.* at 153.

28. *Id.* at 150-51.

29. *Id.* at 151.

30. Yarrow, *Separation from Parents During Early Childhood*, 1 *Rev. Child Dev. Research* 89, 121-27 (1964).

31. *Id.* at 117.

32. Skard, *Maternal Deprivation: The Research and Its Implications*, 27 *J. Marriage & Fam.* 333 (1965).

33. Weininger, *Effects of Parental Deprivation: An Overview of Literature and Report on Some Current Research*, 30 *Psychological Rep.* 591, 596 (1972).

34. *Id.* at 600.

sent of the biological parents and adoptive placement in a familiar home. In reviewing the reactions of the children and the effects of those reactions upon subsequent placement outcomes, the author concluded that "[i]nvoluntary termination of parental rights by court order seemed to create more serious problems for the children than it solved." Those problems included "[a]nxiety, . . . heightened loyalty conflicts, . . . grief, . . . [and] hostility toward the agency."<sup>35</sup> This confirmed prior studies that found that a majority of all children older than six who were freed for adoption experienced disruption when placed in adoptive homes.<sup>36</sup>

In addition, reanalysis of two of the most comprehensive American studies of children in foster care, the Fanshel research and the Oregon Project (both of which gave impetus to reform in the direction of permanency planning), reveals that legal placement status has no effect upon overall adjustment. The Oregon Project found that "[w]hether the child was in a legally permanent placement, adoption or returned home . . . made very little difference in his level of adjustment and health . . . . Perception of permanence was the key."<sup>37</sup> Fanshel and Shinn found no clear difference in the adjustment of fostered and other children.<sup>38</sup>

Thus, there is some evidence that severance of biological ties will fail in a substantial number of cases to lead to a stable family placement. Furthermore, severance of biological ties in the quest for continuity appears to dilute efforts to strengthen what should be the most promising resource for the child: its biological family. Pressures to seek continuity via adoption after a year or two in care combine with the natural inclinations of agency workers to identify with and work more closely with foster and pre-adoptive families, who are chosen by agency personnel and are likelier to conform to the value systems of agency workers. This leads child care agencies to be neutral or indifferent with respect to the biological family when strong agency support might lead to family reunification.<sup>39</sup>

Moreover, there is evidence that the severance of biological ties has harmful effects that are independent of, and may occur regardless of,

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35. Borgman, *Antecedents and Consequences of Parental Rights Termination for Abused and Neglected Children*, 60 *Child Welfare* 391, 402 (1981).

36. *Id.* at 392.

37. Mallucio, Fein, Hamilton, Klier & Ward, *Beyond Permanency Planning*, 59 *Child Welfare* 515, 522 (1980).

38. *Id.* at 522-23.

39. Bush & Goldman, *The Psychological Parenting and Permanency Principles in Child Welfare: A Reappraisal and Critique*, 52 *A.J. Orthopsychiatry* 223, 226 (1982). See also authorities cited in note 14 *supra* for evidence that attention to the service needs of biological families can have beneficial results. For evidence of the extreme reluctance of child care agencies to support the return of children to biological fathers, see Lagnese & Green, *Discharge Planning in Foster Care Cases Where the Father Is the Significant Parent*, 55 *Child Welfare* 612 (1976).

success or failure in achieving continuity in an adoptive home. Fernando Colon, a psychologist and former foster child, concludes from his own clinical experience that "persons who experience unresolved emotional cut-offs from significant others are persons at higher risk emotionally and psychologically than those who have resolved such cut-offs."<sup>40</sup> Believing that repression of feelings and memories surrounding separations is encouraged by the present systems of termination and adoption, Colon advocates that all adoptees have access to biological parents and that foster care with tenure be established as an alternative to termination against the wishes of biological parents.<sup>41</sup> The conclusion that children need to resolve rather than repress their feelings about separations from biological parents is not new. Twenty-seven years ago, Dr. Ner Littner said in advising foster care workers:

If we hold to a minimum the amount of repression of separation feelings forced upon the child, we simultaneously decrease the extent of the psychological scarring . . . . The worst thing that can happen, psychologically, is for the child to be torn from the unwilling arms of angry parents who never see him again after placement . . . . [We must] . . . have the courage to tolerate and help, rather than need to cover over, the upset feelings of the child, of his own parents, and of his new parents.<sup>42</sup>

More recently, and in the context of the controversy concerning permanency planning, Joan Laird has said:

We have often encouraged children to estrange themselves from and to repress painful family experiences. In doing so we robbed them of their rights to their own histories and of opportunities to gain freedom from the emotional "stuck togetherness" which can inhibit functioning. We have recognized that adults need the opportunity to experience and master the developmental and situational crises of death, of separation and divorce. Cannot we offer the same opportunity to children?<sup>43</sup>

In a recent study of older foster children, Bush and Goldman found that even among those children least likely to be able to return home, fifty-six percent did not wish to be adopted. Among those fifty-six percent, the reason most commonly given for not wanting adoption was a wish to

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40. Colon, *Family Ties and Child Placement*, 17 *Fam. Process* 289, 290 (1978).

41. *Id.* at 300-01.

42. Address by Ner Littner, National Conference of Social Work (May 22, 1956), reprinted in Littner, *Some Traumatic Effects of Separation and Placement* 24, 26, 32 (1981).

43. Laird, *supra* note 14, at 187.

maintain a tie with the biological family.<sup>44</sup> When these wishes are expressed in the courtroom—and they often are—they are usually attributed to an unhealthy and unrealistic wish for reunification of the lost family unit. Bush and Goldman concluded differently: “some older children . . . , while wanting stable living arrangements, prefer and are able to cope with several parent figures, . . . drawing strength from each.”<sup>45</sup>

In the literature generated by recent studies of children of divorce, continued interaction with noncustodial parent figures is increasingly seen not merely as something with which the child is able to cope, but as something which is essential to emotional adjustment. The Group for the Advancement of Psychiatry's prestigious Committee on the Family has produced a slim volume that will give the legal community new insights in making custody determinations. The committee reported:

The evidence and our own experience lead us to what can be called the family perspective on divorce and custody. Briefly, that perspective rests on the following concepts. A couple that comes together to form a family and raise children creates for those children something that is more than the sum of its parts—more than the dyadic relations one-on-one with mother and separately with father. We find no evidence for the existence of a single “psychological parent” with whom the tie is critically more important than with the rest of the network.

The relationships with mother and father, and with grandparents and others as well, constitute an emotional universe that, especially in the early years, forms a pattern for the child's later relations.

If, in the crisis of divorce, one part of that universe is cut off, labeled as bad, and becomes unavailable, there will be adverse consequences for the child's view of himself and of the people he will relate to later in life.

Even if the person who is cut off is a very ambivalently held parent with whom contact is difficult and painful, our experience and the evidence convince us that the later ability to put that relationship in emotional perspective is better served through contact than through separation.<sup>46</sup>

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44. Bush & Goldman, *supra* note 39, at 231-32.

45. *Id.* at 234.

46. Committee on the Family, Group for the Advancement of Psychiatry, *New Trends in Child Custody Disputes* 80-81 (1980) [hereinafter *New Trends*]. See also, Sonne, *A Family System Perspective on Custody and Adoption*, 2 *Int'l J. Fam. Therapy* 176 (1980).

The Committee declined to apply these concepts in the foster care context.<sup>47</sup> However, the emotional ties of the foster child to its biological family are likely to be as strong as those of children separated from a biological parent by divorce. How then can we continue to ignore the risks of emotional harm posed when a part of the foster child's "emotional universe . . . is cut off, labeled as bad, and becomes unavailable?"

The difficulties of continued interaction with unrelated adults are not insurmountable in the foster care context unless we make them so. We need only to look beyond existing, formal adoption patterns in seeking placements for children in need of long-term care outside their biological families. Robert Hill has noted that "historically, adoption policies have been dictated more by concern with satisfying the desires of families in need of children, than the desires of children in need of families."<sup>48</sup> Billingsley and Giovannoni observe that the first adoption agencies in the United States:

were established to provide children for couples unable to have their own children. Thus adoption, unlike other forms of substitute parental care, did not originate as a resource for dependent children, and especially not for poor children. In fact, until the last decade or so, most of the children adopted through agencies were not "poor children"; they were illegitimate babies born to white middle- and upper-income women.<sup>49</sup>

This history accounts for characteristics of the adoption system that seem antithetical to the needs of many children in foster care. Adoptive families were given a *de jure* resemblance to biological families. The biological parents underwent a "civil death" as parents and lost forever the right to know or relate to the child. The child was similarly denied access to the biological family. These legal mechanisms served both the interests of biological families deeply ashamed of illegitimate conception or the abrogation of parental responsibility, and of adoptive families with an emotional need to deny that the relationship with the child did not have a biological origin. But they may not serve the interests of children with conscious or unconscious needs to be in touch with their biological families, and with simultaneous needs for long-term care. Other models are available. Hill's study within the black community reveals a pervasive pattern of informal adoption: blacks informally adopt ten times the number of all children placed for formal adoption.<sup>50</sup> The overwhelming majority of informally adopted chil-

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47. New Trends, *supra* note 46, at 79-80.

48. R. Hill, *Informal Adoption Among Black Families* 14 (1977).

49. A. Billingsley & J. Giovannoni, *Children of the Storm: Black Children and American Child Welfare* (1970), quoted in R. Hill, *supra* note 48, at 21-22.

50. R. Hill, *supra* note 48, at 24.

dren are in positive contact with their biological parents.<sup>51</sup> The quality of care they receive appears "remarkable,"<sup>52</sup> and "children in informally adoptive settings [appear] . . . *least* likely to have mental health impairments."<sup>53</sup> Professor Stack has given us a detailed exposition of the intricate relationships among extended kinship (and friendship) group members and the ways in which adults accept, and children thrive within, shared parenting arrangements.<sup>54</sup> My experience indicates that similar relationships could be developed within the foster care system. Foster parents who are not alienated from biological families by extreme social class differences or restrictive agency policies against informal communication are able comfortably to allow the child a continued relationship with its biological family. This is likelier when the foster parents are motivated to value the role of participating in the nurturance of a child whether or not the child can be viewed as "their own."<sup>55</sup> But compatibility between foster and biological families is often shattered when the law requires that one adult figure or the other be given an absolute "right" to the child.

My foray into the social science literature supports the conclusion that the concerns I had as I watched children and families pass through the family court reflect common and systemic problems. The literature concerning the effects of separation is not sufficiently conclusive to allow us to be confident that we have avoided certain harm, and therefore done the right thing, when we decline to remove a child from surrogate care simply or primarily for the sake of avoiding a second custodial change. The literature suggests that the wishes of children to maintain biological ties ought not be disregarded as expressions of unrealistic reunion fantasies. It suggests that we should instead be attentive to the needs of all children—those who express a wish to maintain biological ties and those who do not—to avoid an unhealthy repression of the pain of severing the original family bond. The literature concerning children of divorce lends further support to the view that it may be in the interests of children to preserve even difficult relation-

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51. *Id.* at 67.

52. *Id.* at 73.

53. *Id.* at 74.

54. C. Stack, *All Our Kin* (1975).

55. There is support for the notion that foster children are better served by placement with families with altruistic motives, as opposed to those families who take a child to compensate for the absence of biological children. Tizard and Rees, who noted great success in such adoptive placements, noted that "[m]ost of the [adoptive] parents saw themselves as providing a needy child with a home, and this motivation, long suspect with adoption societies, may well provide a more favorable environment than the usual motivation of infertility." Tizard & Rees, *The Effect of Early Institutional Rearing on the Behavior Problems and Affectional Relationships of Four-Year-Old Children*, *supra* note 23, at 72. These motivations are not, of course, incompatible. See also Hampson & Tavormina, *Feedback from the Experts: A Study of Foster Mothers*, 24 *Social Work* 108 (1980).

ships with significant adults. If children can be better served by the continuation of relationships with significant adults in their lives, we must structure the foster care system to provide that possibility. We should be less quick to sever coercively a parental tie. And we must encourage, rather than prohibit, visitation and other forms of communication with adults who are important to the child, whether they be biological parents unable for long periods to assume custody or former foster parents.

Some of these concerns were foreseen by Goldstein, Freud, and Solnit. They recognized the need for cautious inquiry into the psychological allegiances of children over the age of five, at least in those cases in which placement had followed a period of three or more years of care within the biological family.<sup>56</sup> And they recommended enhancing the flexibility of the foster care and adoptive systems by developing foster "care with tenure" when a long-time custodian was unable to adopt but willing to continue care.<sup>57</sup> In other respects, however, the Goldstein, Freud, and Solnit view represents one side of an unresolved question. We have still to determine whether the right of custodial autonomy is consistent with the interests of children—children of divorce and older children in foster care—who have attachments to adults in different households. If it is not (and there is considerable evidence that it is not), then the responsibility of adults is not to discover and insulate the psychological mainstay for the child, but to minimize disruption of the child's emotional environment by allowing the child to maintain, with as little conflict as possible, its interhousehold attachments.

The concept of parental responsibility is central. We often speak of legal and social policy issues surrounding custody and guardianship as though it were necessary to choose between protecting the "rights" of children and protecting the "rights" of parents. This characterization of the issue causes us to lose sight of the ways in which our actions will affect societal perceptions of what parental responsibility should be. I have said that it was often troubling to order a parent to withdraw from parental obligations so that his or her child's interests might be protected. Of the concerns I have voiced regarding our foster care and adoption policies, this concern is least reflected in the legal and social science literature. It is, however, addressed by Dr. Colon:

Implicit in the principle of continuity with biological-familial roots is an assumption that deep, enduring, reciprocal loyalty commitments throughout the course of life are better for the child, the individual, the family, and the larger community. As one observes contemporary American culture, one is impressed by the degree to

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56. Before the Best Interests, *supra* note 1, at 47-48.

57. *Id.* at 49.



which powerful societal forces operate toward the loosening and the breaking down of family ties . . . . There is an increasing preoccupation with self and self-realization at the expense of the family or the community . . . .

Given such societal forces it is no wonder that child placement practices are not conscious of the need for a child and his family to retain mutual ties but tend rather to accentuate further society's acceleration toward fragmentation . . . . This is not to say that all child placement workers deliberately set out to pull children further and further away from their roots . . . . Rather, it is to say that some child care workers do place children without adequate attention to the principle of family continuity largely because societal forces do not seem to value the maintenance of family ties.<sup>53</sup>

Moral reinforcement should not be a concept limited to prohibitive laws. If the law regards parental responsibilities as fungible, parental responsibility will be less strongly felt. If we deny visitation rights to noncustodial parents on the ground that "[c]hildren have difficulty in relating positively to, profiting from, and maintaining contact with two psychological parents who are not in positive contact with each other,"<sup>53</sup> we decline to give legal force and social reinforcement to the continuing obligation of noncustodial parents to support and nurture their children. We also stifle the custodial parent's attempts to master old hostilities sufficiently to enable the child to have reasonably unconflicted access to its noncustodial parent. Similarly, as we increase the bases for and the frequency of absolute termination of parental rights, we withdraw legal force and social reinforcement from the notion that the decision to bear children implies an unalterable obligation to be available for and to provide for those children within the limits of one's ability. And we deny the obligation of new "psychological parents" to encourage the child to come to terms with old bonds and altered relationships. A legal system may not dilute parental rights without facing the risk of diminishing parental responsibility.

Family bonds must not be severed without confidence that the best interests of children are being served. But neither the production-line jurisprudence of juvenile and family courts or the conflicting teachings of the relevant social science literature can provide that confidence.

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58. Colon, *supra* note 40, at 290-91.

59. *Beyond the Best Interests*, *supra* note 1, at 38.

