Procedural Due Process For Foster Children: Liberty and Property Interests Implicated By Temporary Custody Determinations

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Foster care is increasingly being used as an alternative living arrangement for abused and neglected children. One of the goals of foster care is to provide the child with a home environment offering the type of custody, care, and discipline that the biological parents should be providing.[1] While foster care has done much to provide the child with a loving and caring environment, it has not always provided him with another element crucial to his development—stability.[2] Because the foster child is often transferred from one home to another,[3] he is often denied the stability and permanence that a child in a conventional family enjoys. The foster child senses this impermanency and this clashes with his acute need for stability.[4]

Foster care and its failure as an institution has been the focus of much public attention in recent years, with primary emphasis on the foster child's need for a permanent and stable home.[5] However, the legal rights of a foster child to be protected from arbitrary administrative action have not been fully explored. Only recently, in *Smith*

1. D.C. CODE ENCYCL. § 32-781 (West 1968); ILL. ANN. STAT. ch. 37, § 701-2 (Smith-Hurd Supp. 1977).

2. R. GEISER, THE ILLUSION OF CARING 61 (1973); J. GOLDSTEIN, A. FREUD, & S. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 24-25 (1973) [hereinafter cited as J. GOLDSTEIN]; *see* D. KLINE & H. OVERSTREET, FOSTER CARE OF CHILDREN: NURTURE AND TREATMENT 64 (1972) [hereinafter cited as D. KLINE]; H. SIMMONS, PROTECTIVE SERVICES FOR CHILDREN 9 (1968); Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 347 (1972). The Florida State Legislature has recently acknowledged this problem and has enacted a statute with the goal of ensuring a permanent home for children in foster care. FLA. STAT. ANN. § 409.168(1) (West Supp. 1978).

3. The average child in foster care is moved from two to three different homes while in foster care. Geiser, *The Shuffled Child and Foster Care*, 10 TRIAL 27, 29 (May-June 1974). *See also* R. DINNAGE & M. PRINGLE, FOSTER HOME CARE: FACTS AND FALLACIES 7 (1967) [hereinafter cited as R. DINNAGE].

4. J. GODLSTEIN, *supra* note 2, at 25.

5. *See generally* R. DINNAGE, *supra* note 3; R. GEISER, *supra* note 2; J. GOLDSTEIN, *supra* note 2; D. KLINE, *supra* note 2.

v. Organization of Foster Families for Equality & Reform,[6] has the Supreme Court even addressed the question of what rights are involved in the transfer of a foster child from one home to another. This Note will explore the possible constitutionally protected property and liberty interests of the child in a transfer from one foster home to another. First, the statutory framework for neglect and termination proceedings and the procedures for a transfer of a foster child and a redetermination of custody will be discussed. Then, theoretical property and liberty interests of a foster child will be advanced. Finally, this Note will discuss what procedures will satisfy due process with respect to these interests.

CHILD CUSTODY PROCEDURES AND FOSTER CARE

Parents have a natural and fundamental right to the custody and rearing of their own children.[7] In any proceeding challenging that right, the parents will have the benefit of two presumptions: that the biological parents are fit, and that they are the ones best suited to rear their children.[8] Yet, courts recognize instances when the state may intervene in this parent-child relationship for the welfare of the child[9] and for the protection of the state's interest.[10] The interest of the state is in having a productive and self-sufficient citizenry which helps ensure that the state will continue as a strong political unit.[11] Essential to this goal is the rearing of emotionally and physically healthy, happy, and

6. 431 U.S. 816 (1977). See text & notes 153-211 *infra*.

7. Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); May v. Anderson, 345 U.S. 528, 533 (1953); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Wilson v. Mitchell, 48 Colo. 454, 458, 111 P. 21, 25 (1910).

8. *In re* B.G., 11 Cal. 3d 679, 698, 523 P.2d 244, 257, 114 Cal. Rptr. 444, 457 (1974); *In re* Ferrier, 103 Ill. 367, 372 (1882); Painter v. Bannister, 258 Iowa 1390, 1396, 140 N.W.2d 152, 156 (1966), *cert. denied*, 385 U.S. 949 (1967); Jackson v. Jackson, 164 Kan. 391, 395, 190 P.2d 426, 430 (1948); Ross v. Pick, 199 Md. 341, 351, 86 A.2d 463, 468 (1952). These presumptions would apply as well to adoptive parents where by statute the adoptive relationship takes on the same rights and duties as though the child had been born to the adoptive parents in lawful wedlock. *See* ARIZ. REV. STAT. ANN. § 8-117(A) (1947), which provides in part:

> Upon entry of the decree of adoption, the relationship of parent and child and all the legal rights, privileges, duties, obligations and other legal consequences of the natural relationship of child and parent shall thereafter exist between the adopted person and the adoptive petitioner the same as though the child were born to the adoptive petitioner in lawful wedlock.

9. *See* Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944); *In re* McDonald, 201 N.W.2d 447, 453 (Iowa 1972); Bryant v. Brown, 151 Miss. 398, 415-16, 118 So. 184, 188 (1928); Sullivan, *Child Neglect: The Environmental Aspects*, 29 OHIO ST. L.J. 85, 91 (1968).

10. Prince v. Massachusetts, 321 U.S. 158, 168 (1944); Fladung v. Sanford, 51 Ariz. 211, 217, 75 P.2d 685, 687 (1938); Wilson v. Mitchell, 48 Colo. 454, 458-59, 111 P. 21, 25-26 (1910); Bryant v. Brown, 151 Miss. 398, 415-16, 118 So. 184, 188 (1928).

11. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." Prince v. Massachusetts, 321 U.S. 158, 168 (1944); *accord*, Wilson v. Mitchell, 48 Colo. 454, 458-59, 111 P. 21, 25-26 (1910). See discussion note 17 *infra*.

productive citizens.[12] The child's interest is in being saved from the physical and psychological damage caused by abuse and neglect.[13] Abused and neglected children are often unable to mature into their full level of productivity because of the deprivations suffered during childhood.[14]

Child abuse and neglect are commonly caused by the psychosocial breakdown of the family unit.[15] Psychosocial breakdown is manifested by various behavior on the part of the parents including mental or physical illness of a care-taking parent, alcoholism, drug addiction, desertion, or an unwillingness to care for the child, physical abuse, and child personality problems.[16] When abuse or neglect occurs, the state has the power to intervene in the family unit to protect the welfare of the child.[17] Such intervention usually begins with a report[18] of suspected abuse or neglect to either a public or private welfare agency[19] or to the police.[20] The agency then investigates to determine whether the

12. Wilson v. Mitchell, 48 Colo. 454, 458-59, 111 P. 21, 25-26 (1910).

13. *See* text & notes 131-41 *infra*.

14. *See* H. SIMMONS, *supra* note 2, at 8; Thomas, *Child Abuse and Neglect: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. REV. 293, 335 (1972).

15. J. KOSHEL, DEINSTITUTIONALIZATION—DEPENDENT AND NEGLECTED CHILDREN 3 (1973); Geiser, *supra* note 3, at 17.

16. Geiser, *supra* note 3, at 27. For a profile of the neglecting parent, see R. GEISER, *supra* note 2, at 1-34; S. KATZ, WHEN PARENTS FAIL 23-27 (1971).

17. The basis for state intervention is the parens patriae doctrine. Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Fladung v. Sanford, 51 Ariz. 211, 217, 75 P.2d 685, 687 (1938); *In re* Ferrier, 103 Ill. 367, 371-72 (1882); Bryant v. Brown, 151 Miss. 398, 415-16, 118 So. 184, 188 (1928); Sullivan, *supra* note 9, at 91. The doctrine was of 18th century origin and gave to the Crown power to protect persons unable to protect themselves. Wellesley v. Wellesley, 4 Eng. Rep. 1078, 1081 (H.L. 1828); Eyre v. Shaftsbury, 24 Eng. Rep. 659, 662 (Ch. 1722). The doctrine also promoted the Crown's interest in having children develop into useful and productive subjects. *See* Wilson v. Mitchell, 48 Colo. 454, 111 P. 21 (1910); Wellesley v. Beaufort, 38 Eng. Rep. 236, 239 (Ch. 1827); Note, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1058 (1975). Being a common law doctrine, parens patriae was adopted by all the American states, with the state replacing the Crown. *See* Fladung v. Sanford, 51 Ariz. 211, 217, 75 P.2d 685, 687 (1938); *Ex parte* Crouse, 4 Whart. 9 (Pa. 1839); ARIZ. REV. STAT. ANN. § 1-201 (1974); Sullivan, *supra* note 9, at 85 n.1. The interest of the state is the same as that of the Crown—the promotion of good citizenship, something that is essential if the state is to remain a viable political and social unit. Prince v. Massachusetts, 321 U.S. 158, 168 (1944); Wilson v. Mitchell, 48 Colo. 454, 458, 111 P. 21, 25 (1910). For a discussion of the parens patriae doctrine, see *In re* Gault, 387 U.S. 1, 14-25 (1967); Kleinfeld, *The Balance of Power Among Infants, Their Parents, and the State*, 5 FAM. L.Q. 64 (1971); Note, *supra* at 1057-59.

18. The report may be in the form of a petition to the court. Typical parties who may file such neglect petitions include relatives, physicians, teachers, foster parents, social workers, and private welfare agencies. *See, e.g.*, ALASKA STAT. § 47.10.020 (1975) (voluntary reports); *id.* § 47.17.020 (persons required to make reports); ARIZ. REV. STAT. ANN. § 8-533 (1974); MINN. STAT. ANN. § 260.131(1) (West 1971); NEV. REV. STAT. § 128.040 (1975); N.H. REV. STAT. ANN. § 169:3 (Supp. 1977) (voluntary reports); *id.* § 169.40 (persons required to report).

19. A private welfare agency is one that is run under private direction whereas a public welfare agency is one maintained directly by the state or a political subdivision thereof. *Compare* ARIZ. REV. STAT. ANN. § 8-501(1)(a) (Supp 1977-78), *with id.* § 8-501(1)(c).

20. S. KATZ, *supra* note 16, at 27. Instances of neglect or abuse may come to the attention of authorities when police respond to a report of a family fight or when welfare workers visit the home. *Cf.* Wyman v. James, 400 U.S. 309, 317-18 (1971) (home visits by welfare worker as a precondition to receiving welfare benefits do not violate the fourth amendment notwithstanding that instances of child neglect discovered through such visits must be reported to the appropriate agency); *id.* at 341-42 (Marshall, J., dissenting).

situation warrants intervention.[21] If intervention is considered necessary, the agency may offer supportive services to the family,[22] although the family is free at that point to reject such services.[23]

One alternative to direct intervention by a welfare agency is a voluntary adjustment between the parents and the agency in which the parents voluntarily agree to place their child with the care-taking agency.[24] This arrangement does not require the intervention of the court.[25] It also permits the parents to regain physical custody of their child when the parents determine that they are able to properly care for the child again.[26]

If there is no voluntary placement and the agency decides that intervention by the court is necessary for the protection of the child,[27] the agency[28] must file a petition with the court which challenges the biological parents' right to the custody[29] of their child.[30] The petition may allege neglect,[31] or seek a termination of parental rights.[32] A neglected

21. S. KATZ, *supra* note 16, at 29. *See, e.g.*, ALASKA STAT. § 47.10.020(a) (1975); ARIZ. REV. STAT. ANN. § 8-546.01(C)(3) (1974); IDAHO CODE § 16-1625(a) (Supp. 1977); N.H. REV. STAT. ANN. § 169:9 (Supp. 1977).

22. Supportive or protective services are defined as services offered to the parents on behalf of the child in order to prevent the breakdown of the family to the point where the child would have to be removed. ARIZ. REV. STAT. ANN. § 8-546(5) (1974); J. KOSHEL, *supra* note 15, at 10; H. SIMMONS, *supra* note 2, at 7. These services are offered after the complaint of abuse or neglect has been made but before an adjudication by the court. *See* CONN. GEN. STAT. ANN. § 17-32d(k) (West Supp. 1978). In protective services, the focus is on working out problems in the home while keeping the child in the home. ARIZ. ADMIN. R. & REGS. tit. 6, R6-5-5504(1976).

23. ARIZ. REV. STAT. ANN. § 8-546.02(A) (1974); ARIZ. ADMIN. R. & REGS. tit. 6, R6-5-5508 (1976); H. SIMMONS, *supra* note 2, at 7.

24. Interview with Wanda Burgess, Social Services Administrator, Department of Family and Child Welfare Services for Pima County, in Tucson, Ariz. (Feb. 15, 1977) [hereinafter cited as Burgess Interview].

25. *Id.*

26. *Id.*

27. *See* ARIZ. REV. STAT. ANN. § 8-546.02(B) (1974).

28. These petitions are generally filed by the agency that investigated the situation, but some statutes allow private parties to make the petition. *See* discussion note 20 *supra*.

29. Custody concerns the day-to-day physical care of the child and includes providing discipline, food, shelter, medical care, clothing, and education. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-531(8) (1974); FLA. STAT. ANN. § 39.01(7) (West Supp. 1978); ILL. ANN. STAT. ch. 37, § 701-12 (Smith-Hurd 1972); N.H. REV. STAT. ANN. § 170-C:2(IV) (SUPP. 1977).

30. *See* ARIZ. REV. STAT. ANN. §§ 8-533, -546.02(B) (1974); MINN. STAT. ANN. § 260.131(1) (WEST 1971); NEV. REV. STAT. § 128.040 (1975); S. KATZ, *supra* note 16, at 37. A determination of custody can be made without a termination of parental rights. Parental rights can be defined as "the sum total of the rights of the parent or parents in and to the child as well as the rights of the child in and to the parent or parents. In other words, . . . parental rights . . . include both parental rights and parental obligations." Anguis v. Superior Court, 6 Ariz. App. 68, 71, 429 P.2d 702, 705 (1967) (the court's holding, however, that parental rights may not be servered in the absence of pending adoption has subsequently been changed by ARIZ. REV. STAT. ANN. § 8-533 (1974)). When parental rights are terminated, there is a change in legal guardianship. Legal guardianship is defined as the duty and authority to make important decisions for the child with respect to marriage, major medical treatment, legal matters, visitation, legal custody, etc. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-531(6) (1974); CONN. GEN. STAT. ANN. § 17-32d(d) (West Supp. 1978); ILL. ANN. STAT. ch. 37, § 701-11 (Smith-Hurd 1972).

31. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-221 (1974); ILL. ANN. STAT. ch. 37, § 704-1 (Smith-Hurd 1972); MINN. STAT. ANN. § 260.131 (West 1971); NEV. REV. STAT. § 128.040 (1975); N.H. REV. STAT. ANN. § 169:3 (1977).

32. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-533 (1974); MINN. STAT. ANN. § 260.221 (West

child is one who lacks proper parental care necessary for his health, morals, or general well-being.[33] All states have made some statutory provision for such children.[34] Part of such provision may be a procedure for termination of parental rights.[35] A termination procedure permanently severs the legal ties between the parent and the child.[36] Statutory grounds for termination include neglect, physical abuse, abandonment, willful failure to provide material essentials such as medical care, and unfitness or incompetency of the parents.[37] In most states the parents may voluntarily relinquish their rights.[38]

Supp. 1978); MO. ANN. STAT. § 211.441 (Vernon 1959); NEV. REV. STAT. § 128.105 (1975); N.H. REV. STAT. ANN. § 170-C:4 (1977); N.C. GEN. STAT. § 7A-289.24 (Cum. Supp. 1977).

33. *See, e.g.*, ALA. CODE § 26-14-1(2)(1975); ARIZ. REV. STAT. ANN. § 8-201(10) (1974); CAL. WELF. & INST. CODE § 300 (West Supp. 1978); CONN. GEN. STAT. ANN. § 17-53 (West Supp. 1978); GA. CODE ANN. § 24A-401(h) (Supp. 1976); IDAHO CODE ANN. § 16-1602(n)(1) (Supp. 1977); MONT. REV. CODES ANN. § 10-1301(2) (Supp. 1977).

34. ALA. CODE § 26-14-2 (1975); ALASKA STAT. § 47.10.010 (1975); ARIZ. REV. STAT. ANN. § 8-202 (1974); ARK. STAT. ANN. § 45-403 (1977); CAL. WELF. & INST. CODE § 300 (West Supp. 1978) (jurisdiction); COLO. REV. STAT. ANN. § 19-10-103 (Supp. 1976); CONN. GEN. STAT. ANN. § 17-53 (West Supp. 1978); DEL. CODE ANN. tit. 10, § 901 (1974); D.C. CODE ENCYCL. § 11-1551 (West 1966) (jurisdiction); FLA. STAT. ANN. §§ 39.01(8), 39.02(1) (West Supp. 1978); GA. CODE ANN. § 24A-401 (1976); HAW. REV. STAT. § 571-11 (1976); IDAHO CODE § 16-1602 (Supp. 1977); ILL. ANN. STAT. ch. 37, § 702-1 (Smith-Hurd 1972) (jurisdiction); IND. CODE ANN. § 33-12-2-3 (Burns 1975 & Supp. 1977); IOWA CODE ANN. § 232.2 (West Supp. 1977); KAN. STAT. § 38-802 (Supp. 1977); KY. REV. STAT. § 199.011 (1978); LA. REV. STAT. ANN. § 13:1569 (West Supp. 1978); ME. REV. STAT. ch. 22, § 3792 (Supp. 1975) (jurisdiction); MD. CTS. & JUD. PROC. CODE ANN. § 3-801 (Supp. 1977); MASS. ANN. LAWS ch. 119, § 24 (Michie/Law. Co-op Supp. 1975) (jurisdiction); MICH. STAT. ANN. § 27.3178 (598.2) (Supp. 1978) (jurisdiction); MINN. STAT. ANN. § 260.015 (West 1971); MISS. CODE ANN. § 43-23-3 (Supp. 1973); MO. ANN. STAT. § 211.031 (Vernon Supp. 1977) (jurisdiction); MONT. REV. CODES ANN. § 10-1301 (Supp. 1975); NEB. REV. STAT. § 43-201 (1974); NEV. REV. STAT. § 62.040 (1977) (jurisdiction); N.H. REV. STAT. ANN. § 169:2 (Supp. 1975); N.J. STAT. ANN. § 9:6-1 (West 1976); N.M. STAT. ANN. § 13-14-3 (1976); N.Y. FAM. CT. ACT. § 1012 (McKinney 1975 & Supp. 1977-78); N.C. GEN. STAT. § 110-117 (Supp. 1975); N.D. CENT. CODE § 27-20-02 (1974); OHIO REV. CODE ANN. §§ 2151.03-.04 (Page 1976); OKLA. STAT. ANN. tit. 10, § 1101 (West Supp. 1977-78); OR. REV. STAT. § 419.476 (1977) (jurisdiction); PA. STAT. ANN. tit. 11, § 50-102 (Purdon Supp. 1978-79); R.I. GEN. LAWS ANN. § 14-1-3 (Supp. 1977); S.C. CODE § 43-17-10 (1977); S.D. COMPILED LAWS ANN. § 26-8-6 (Supp. 1976); TENN. CODE ANN. § 37-202 (1977); TEX. FAM. CODE ANN. tit. 2, § 15.02 (Vernon Supp. 1978); UTAH CODE ANN. § 55-10-64 (1974); VT. STAT. ANN. tit. 33, § 632 (Supp. 1977); VA. CODE § 16.1-241(A) (Supp. 1977) (jurisdiction); WASH. REV. CODE ANN. § 13.04.010 (1962); W. VA. CODE § 49-1-3 (1977); WIS. STAT. ANN. § 48.13 (West 1957 & Supp. 1977-78); WYO. STAT. § 14-115.2 (Supp. 1975).

35. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-532 (1974); MINN. STAT. ANN. § 260.221 (West Supp. 1978); MO. ANN. STAT. § 211.441 (1959); N.H. REV. STAT. ANN. § 170-C:3 (Supp. 1975); N.C. GEN. STAT. § 7A-289.22 (Cum. Supp. 1977); N.D. CENT. CODE § 27-20-44 (1974).

36. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-539 (1974); FLA. STAT. ANN. § 39.11(6) (West Supp. 1978); N.H. REV. STAT. ANN. § 170-C:12 (Supp. 1975); OR. REV. STAT. § 419.525(3) (1977); TEX. FAM. CODE ANN. tit. 2, § 15.07 (Vernon Supp. 1978). This termination has the consequence, among other things, of freeing the child for adoption. *Cf.* ARIZ. REV. STAT. ANN. § 8-106(I)(b) (1974) (no consent for adoption needed from parent whose parental rights have already been terminated).

37. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-533 (1974); CONN. GEN. STAT. ANN. § 17-43a (West 1958); MINN. STAT. ANN. § 260.221 (West Supp. 1978); MO. ANN. STAT. § 211.441 (Vernon 1959); NEV. REV. STAT. § 128.105 (1975); N.H. REV. STAT. ANN. § 170-C:5 (Supp.1975); N.C. GEN. STAT. § 7A-289.32 (Cum. Supp. 1977).

38. *See, e.g.*, ALASKA STAT. § 47.10.080(c)(3)(A) (1975); ARIZ. REV. STAT. ANN. § 8-533(1), (5) (1974); CONN. GEN. STAT. ANN. § 17-43a(a) (West 1958); MINN. STAT. ANN. § 260.221(a) (West Supp. 1978); TEX. FAM. CODE ANN. tit. 2, § 15.01 (Vernon 1978). Voluntary relinquishment of rights must be distinguished from a voluntary placement of a child. The former procedure permanently ends the parent-child relationship, freeing the child for adoption. The latter

Whether the petition is one to have the child adjudged neglected or to have the parental rights terminated, the court must first make a determination that the jurisdictional grounds exist.[39] Until this has been done, the court can make no determination of the disposition or custody of the child.[40] Both neglect and termination petitions are first heard at an adjudicatory proceeding.[41] At one time these proceedings were informal and nonadversary as the proceedings were not meant to punish but only to protect the welfare of the child.[42] *In re Gault*[43] has had a substantial impact on all proceedings in juvenile court because it requires hearings to be more formal and more adversarial.[44] In *Gault* the Supreme Court held that a juvenile in a delinquency proceeding has a right to counsel, notice of charges, and confrontation and cross-examination of witnesses, and a privilege against self-incrimination.[45] The Court reasoned that when a minor is faced with the possibility of commitment to a training or industrial school, that is a deprivation of his liberty.[46] Thus, minors must be accorded the same procedural protections accorded to adults when faced with a deprivation of their liberty.[47] Principal among these protections is the right to counsel.[48]

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procedure does not end the parent-child relationship, and the parents not only may regain custody of their child upon demand, *see* text accompanying notes 24-26 *supra*, but also have the right as well as the responsibility to make major decisions for the child because they are still the legal guardians, *see* discussion note 30 *supra*.

39. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-538(A) (1974); FLA. STAT. ANN. § 39.10(4) (West Supp. 1978); N.H. REV. STAT. ANN. § 170-C:11 (1977); S. KATZ, *supra* note 18, at 37. The majority of jurisdictions treat this as a two stage process with the neglect and the child's dispostion being handled separately. *See, e.g.*, FLA. STAT. ANN. § 39.01 (West Supp. 1978); IDAHO CODE § 16-1602(c), (j) (Supp. 1977); MINN. STAT. ANN. § 260.191 (West Supp. 1978); ARIZ. R.P. JUV. CT. 16(c)-(e); Note, *supra* note 17, at 1077. Other jurisdictions make the determination in a one stage process. *See* MASS. ANN. LAWS ch. 119, § 26 (1975).

40. Caruso v. Superior Court, 100 Ariz. 167, 173, 412 P.2d 463, 467 (1966).

41. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-537(A) (1974); ILL. ANN. STAT. ch. 37, § 701-20 (Smith-Hurd Supp. 1978); MINN. STAT. ANN. § 260.155 (West 1971); N.H. REV. STAT. ANN. §§ 169.9, 170-C:10 (1977).

42. *See In re* Gault, 387 U.S. 1, 15-16 (1967); S. KATZ, *supra* note 16, at 40. Informality was intended to make the proceedings less traumatic for the child. However, it is now more widely recognized that informality has no necessary connection with therapeutic benefits. *In re* Gault, 387 U.S. at 26, 38 n.65. Even the introduction of counsel for the child can be beneficial for him because it reduces trauma by forcing the parents to be more realistic in their presentation and it makes the child articulate his emotions so that he feels that he has some say in his future. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. CIV. RIGHTS CIV. LIB. L. REV. 565, 592-93 (1976). Nor does formality necessarily destroy a friendly atmosphere. CHILDREN IN THE COURTS—THE QUESTION OF REPRESENTATION 164 (G. Newman ed. 1967). Additionally, informality has often been abused to the detriment of the child. *In re* Gault, 387 U.S. at 38 n.65. The child seems to have gotten "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Kent v. United States, 383 U.S. 541, 556 (1966).

43. 387 U.S. 1 (1967).

44. *See id.* at 31-57. *But see* ALASKA STAT. § 47.10.070 (1975); MINN. STAT. ANN. § 260.155(1) (West 1971) (hearings to be conducted informally).

45. 387 U.S. at 31-57.

46. *Id.* at 27.

47. *Id.* at 31-57.

48. *Id.* at 41.

More and more frequently, states are statutorily providing for the right to counsel for children, either directly in their neglect and termination statutes[49] or indirectly in their procedures for juvenile court.[50] Some statutes provide that counsel may be appointed at the discretion of the court.[51] Other statutes provide that where the parents and the child have conflicting interests, separate counsel shall be appointed for the child.[52] Some statutes provide the right to counsel in all cases.[53]

After the court has made a determination that the child is neglected or that the parents' rights should be terminated, the court must decide what disposition would be in the child's best interests.[54] Best interests is defined in terms of what it is meant to achieve—the normal development of the child into a mature and productive adult[55]—or in terms of what it is not meant to achieve—pure economic or cultural advantage for the child.[56] The juvenile court is given the task of defining the child's best interests because most statutes do not define the

49. *See* ARIZ. REV. STAT. ANN. § 8-535(E) (1974); IDAHO CODE § 16-1618 (Supp. 1977). *But see* N.H. REV. STAT. ANN. § 170-C:8 (1977) (guardian ad litem only).

50. *See, e.g.*, ALASKA STAT. § 47.10.050 (1975); ARIZ. REV. STAT. ANN. § 8-225(A) (1974); CONN. GEN. STAT. ANN. § 17-66c (West Supp. 1978); MINN. STAT. ANN. § 260.155(2) (West 1971); *cf.* FED. R. CIV. P. 17(c) (court shall appoint guardian ad litem for unrepresented child or make other order to protect child's interests). Although neglect and termination proceedings occur in state courts, if there is a challenge of state procedures in the federal courts based on constitutional grounds, Rule 17(c) would require some form of representation for the child's interests.

51. *See, e.g.*, ALASKA STAT. § 47.10.050 (1975); ARIZ. REV. STAT. ANN. § 8-535(D) (1974); MONT. REV. CODES ANN. § 10-1310(12) (Cum. Supp. 1977); NEV. REV. STAT. § 128.100 (1975).

52. *See* ARIZ. REV. STAT. ANN. § 8-225 (1974); ARIZ. R.P. JUV. CT. 22(2).

53. *See, e.g.*, CONN. GEN. STAT. ANN. §. 17-66b (West Supp. 1978); IDAHO CODE § 16-1618 (Supp. 1977); ILL. ANN. STAT. ch. 37, § 701-20(1) (Smith-Hurd Supp. 1978); MINN. STAT. ANN. § 260.155(2) (West 1971); N.Y. FAM. CT. ACT. §§ 241-249 (McKinney 1975).

54. IDAHO CODE § 16-1602(j) (Supp. 1977); MINN. STAT. ANN. § 260.191(1) (West Supp. 1978); United States v. Green, 26 F. Cas. 30 (C.C.R.I. 1824) (No. 15256); Wilson v. Mitchell, 48 Colo. 454, 111 P.21 (1910); *see In re* McDonald, 201 N.W.2d 447, 453 (Iowa 1972); Chapsky v. Wood, 26 Kan. 650 (1881); Hall v. Harris County Child Welfare Unit, 533 S.W.2d 121, 122 (Tex. Civ. App. 1976); *In re* Palmer, 81 Wash. 2d 604, 503 P.2d 464, 466 (1972). *See also* Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 676-79 (1941-42).

Some commentators note that, in reaching a proper disposition for the child, the best interests test should only be applied after a finding of neglect or a termination of parental rights. Sullivan, *supra* note 9, at 95. *Contra*, Hall v. Harris County Child Welfare Unit, 533 S.W.2d 121, 122 (Tex. Civ. App. 1976). *See also* Stapleton v. Dauphin County Child Care Serv., 228 Pa. Super. 371, 390-91, 324 A.2d 562, 572-73 (1974). However, where the child is already with a foster family and another move is contemplated, either back to the biological parents or to other foster parents, the best interests test will be applied to determine whether that move should even be made in the first place. The fitness of the biological parent may be immaterial. *See* Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (1966), *cert. denied*, 385 U.S. 949 (1967) (child who had been left by his biological father with the child's grandparents allowed to remain with the grandparents even though the court noted that the father was fit).

55. Freud, *Psychoanalytic Knowledge and Its Application to Children's Services*, in 5 THE WRITINGS OF ANNA FREUD: 1956-1965, at 469 (1969), *cited in* S. KATZ, *supra*, note 16, at 82 n.3; Katz, Book Review, 64 MICH. L. REV. 756, 763 (1966).

56. [T]he Juvenile Court Law was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take the children of the illiterate and give them to the educated, nor to take the children of the crude and give them to the cultured, nor to take the children of the weak and sickly and give them to the strong and healthy.

In re Rinker, 180 Pa. Super. 143, 148, 117 A.2d 780, 783 (1955).

phrase but only designate it as a general standard.[57] The court is given wide latitude to define and apply this standard.[58]

Although the best interests analysis is supposed to be the guiding standard, in reality it is not always followed. The child's interests are all too frequently balanced against and subordinated to the rights and interests of adults or agencies.[59] Frequently, courts give verbal recognition to the best interests analysis but emphasize instead the importance of the biological tie.[60]

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57. *See* ILL. ANN. STAT. ch. 37, § 701-2(3)(c) (Smith-Hurd Supp. 1978); MINN. STAT. ANN. § 260.191(1) (West Supp. 1978); N.Y. FAM. CT. ACT § 614(e) (McKinney Supp. 1977-78).

58. *In re* Guardianship of Rodgers, 100 Ariz. 269, 275, 413 P.2d 744, 748 (1966); Orezza v. Ramirez, 19 Ariz. App. 404, 409, 507 P.2d 1017, 1021 (1973); Hall v. Harris County Child Welfare Unit, 533 S.W.2d 121, 122 (Tex. Civ. App. 1976). However, there are some constraints. The court may be required to set forth in writing "what alternative dispositions were considered by the court and why such dispositions were not appropriate in the instant case." MINN. STAT. ANN. § 260.191(1)(c)-(d) (West Supp. 1978).

59. J. GOLDSTEIN, *supra* note 2, at 4, 54. *See* discussion note 60 *infra*.

60. *See In re* Stilley, 37 Ill. App. 3d 193, 345 N.E.2d 777 (1976); People *ex rel.* Scarpetta v. Spence-Chapin Adoption Serv., 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971); *In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959). In *Spence-Chapin*, a mother placed her child for adoption four days after birth, executed a surrender 10 days later, and requested the child's return 22 days later, after adoptive parents had already been found. In returning the child to its mother, the court stated that the status of natural parent is so important that it may outweigh anything adoptive parents have to offer, reasoning that adoptive parents apparently can offer only material and cultural advantages while a biological mother can offer enduring love. 28 N.Y.2d at 192, 269 N.E.2d at 791, 321 N.Y.S.2d at 70. In *Jewish Child Care*, the court ordered the foster child removed from her foster home of four and one-half years, despite psychiatric testimony that removal at that time would have serious adverse effects on the child, because the court feared that the child and her foster parents were becoming too attached. The court reasoned that this threatened the child's relationship with her biological mother, who had bothered to visit the child only a few times in those four and one-half years. 5 N.Y.2d at 227, 156 N.E.2d at 703, 183 N.Y.S.2d at 68-69. In *Stilley*, a four year old child had come to the attention of authorities several times for problems such as unexplained burns on her feet and wandering the streets late at night. The child's mother was a prostitute and a drug addict. She frequently left the child with "friends" for long periods of time. On one occasion when the mother discovered the child missing she waited until the following day to begin searching for the child. 37 Ill. App. 3d at 198-99, 345 N.E.2d at 781 (dissenting opinion). The court found that the incidents were "isolated," that the state had failed to prove neglect by a preponderance of the evidence, and ordered the child returned to her mother. *Id.* at 197-98, 345 N.E.2d at 780.

When giving such significance to the status of biological parenthood, the courts show little concern for the trauma the neglected child has suffered. *See* Meyers v. State, 124 Ga. App. 146, 183 S.E.2d 42 (1971); *In re* I.M.J., 428 S.W.2d 18 (Mo. 1968). In *I.M.J.*, the foster parents wished to adopt a child but the biological mother wanted her child back. The court decided to give the biological mother another chance to show fitness even though they noted that removing the child from her foster home could result in emotional trauma and have a disastrous effect on the child's future. The court reasoned that neglect proceedings are not aimed at finding substitute parents for the child, *id.* at 22, apparently ignoring the fact that the parents may never be fit to regain custody. In *Meyers*, a mother had abandoned her newborn infant in a phone booth. The court held that where custody is to be denied to a parent, the acts must be construed in favor of the parent and against abandonment. The court put the child in foster care until some undetermined time when the mother could show she was fit. 124 Ga. App. at 148, 183 S.E.2d at 44.

The courts have also subverted the child's best interests to the policies of agencies that have placed him by enforcing contractual agreements with the foster parents that allow the agency to remove the child at will, no matter how disastrous the effect. *See In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959) (discussed above); Turner v. Children's Home Soc'y of Va., Inc., 158 Va. 406, 163 S.E. 399 (1932) (allegedly insolvent child welfare agency was allowed to remove child from foster family that wished to adopt child despite allegations that agency had no place to relocate the child).

The disposition made for the child also depends on the type of proceeding that brought the child before the court. If the proceeding is pursuant to a neglect petition and the court finds that neglect in fact exists, the court has essentially two options: it can return the child to his natural parents contingent upon their accepting supportive services within the home;[61] or it can order the child removed and placed in foster care.[62] In either case, legal guardianship[63] remains with the biological parents, and they may seek the return of their child when they are able to demonstrate to the court or the agency that the situation giving rise to the neglect has been corrected.[64] If the proceeding is pursuant to a petition to terminate parental rights and the court has found grounds for terminating those rights, the court has the options of placing the child for adoption[65] or placing the child in foster care,[66] also with adoption as a possibility.[67] Since the parents' rights have been terminated, they are no longer the child's legal guardians and are not entitled to the return of their child by merely showing changed circumstances.

Under either type of proceeding, foster care is typically a part of any disposition.[68] Foster care[69] is any arrangement for physically car-

61. *See, e.g.*, ALASKA STAT. § 47.10.080(C)(2) (1975); CONN. GEN. STAT. ANN. § 17-32d(i) (West Supp. 1978); FLA. STAT. ANN. § 39.10(3) (West Supp. 1978); IDAHO CODE § 16-1610(b)(1) (Supp. 1977); ILL. ANN. STAT. ch. 37, § 705-2(1)(c)-(d), (2) (Smith-Hurd Supp. 1978); MINN. STAT. ANN. § 260.191(1)(a) (West Supp. 1978).

62. *See* FLA. STAT. ANN. § 39.11(1)(a) (West Supp. 1978); ILL. ANN. STAT. ch. 37, § 705-7(1)(f) (Smith-Hurd 1972); MINN. STAT. ANN. § 260.191(1)(b) (West Supp. 1978).

63. See discussion notes 29-30 *supra*.

64. *In re* Welcher, 243 N.W.2d 841, 844 (Iowa 1976). In Arizona, where a child has been voluntarily placed with the Department of Family and Child Welfare Services, the parents can request a return at any time. Where the court has placed the child, the parents can go into court and show that they are able to care for the child. Or a worker may determine that the child's best interests require his return to the biological parents. This can be done by agreement between the department and the natural parents and does not require the intervention of the court. However, where the court has removed the child and specifically prohibited the return of the child except on court order, the parents or the department must demonstrate to the court's satisfaction that the parents are now fit. This usually applies to abuse cases. Burgess Interview, *supra* note 24; *see* ILL. ANN. STAT. ch. 37, § 705-2(1)(c)-(d) (Smith-Hurd Supp. 1978). In California, a parent may petition the court to modify or set aside a dispositional order or may petition for a termination of the court's jurisdiction based on a change of circumstances or new evidence indicating such a change would be in the child's best interests. CAL. WELF. & INST. CODE § 388 (West Supp. 1978).

65. *See, e.g.*, ALASKA STAT. § 47.10.080(d) (1975); ARIZ. REV. STAT. ANN. § 8-106(A)(1)(b) (Supp. 1976-77); *id.* § 8-538(B) (1974); FLA. STAT. ANN. § 39.11(1)(d) (West Supp. 1978); ILL. ANN. STAT. ch. 37, § 705-7(f) (Smith-Hurd 1972); N. C. GEN. STAT. § 7A-289.33 Cum. Supp. (1977).

66. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-510 (1974); ILL. ANN. STAT. ch. 37, § 705-7(f) (Smith-Hurd 1972); MINN. STAT. ANN. § 260.241(1) (WEST 1971).

67. ILL. ANN. STAT. ch. 37, § 701-2(1) (Smith-Hurd Supp. 1978). This statute encourages placement of the child with a family that will possibly adopt him. *See also* N.H. REV. STAT. ANN. § 170-B:4 (IV) (1977). In Arizona, foster parents are considered along with other prospective adoptive parents when considering which disposition would further the child's best interests. The department looks to the length of time a child has been with a foster family and the strength of the bonds between them. Burgess Interview, *supra* note 24.

68. Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283, 283 (1971).

69. For a brief account of the history of foster care, see R. GEISER, *supra* note 2, at 137; Katz, *supra* note 68, at 284; Thomas, *supra* note 14, at 301-03.

ing for the child outside of the environment of his biological family[70] and is the primary means that the state has developed to care for these abused, neglected, and deprived children.[71] Facilities used to house children in foster care range from foster to group homes to residential institutions. The foster home is the most widely used alternative,[72] both because it is cheaper than institutional care and because it is supposed to provide a close, family-like relationship for the child.[73]

Once in foster care, the child's life is uncertain. Foster care was designed as a temporary solution,[74] its goal being either adoption[75] or reuniting the child with his biological parents.[76] Although intended to provide an interim period for the parents to resolve their problems so that their child might return,[77] foster care has become long term, unplanned care. Often, neither the placing agency nor the biological parents have worked hard enough to make that return possible.[78] In effect, foster care has become a legally sanctioned way for the biological parents to abandon their children.[79] These factors combine to put the foster child's future in limbo.[80] Frequently, the courts refuse to terminate

70. J. KOSHEL, *supra* note 15, at 4; *see, e.g.*, ALASKA STAT. § 47.35.080(1) (1975); FLA. STAT. ANN. § 409.168(2)(a) (West Supp. 1978); IDAHO CODE § 39-1209(4), (9) (Supp. 1977); N.H. REV. STAT. ANN. § 170-E:1(X)(e)-(f) (1977).

71. Katz, *supra* note 68, at 288; Tamilia, *Neglect Proceedings and the Conflict Between Law and Social Work*, 9 DUQ. L. REV. 579, 582 (1971).

72. J. KOSEHL, *supra* note 15, at 2; Tamilia, *supra* note 71, at 582.

73. J. GOLDSTEIN, *supra* note 2, at 25; J. KOSHEL, *supra* note 15, at 27; *see* ILL. ANN. STAT. ch. 37, § 701-2(1) (Smith-Hurd Supp. 1978).

74. R. GEISER, *supra* note 2, at 81; Katz, *supra* note 68, at 283.

75. R. GEISER, *supra* note 2, at 81.

76. Geiser, *supra* note 3, at 27; Katz, *supra* note 68, at 283.

77. Geiser, *supra* note 3, at 27.

78. R. GEISER, *supra* note 2, at 17. For two-thirds to three-fourths of the children in foster care, the agency that placed the child is not proceeding on the basis of any plan to return the child to his biological parents. *Id.* Often the parents have no definite plans to make the return possible. *See In re* Orlando F., 50 App. Div. 2d 791, 377 N.Y.S.2d 502 (1975) (mother had not bothered to see child for eight months, had not even contacted the welfare agency, and had absolutely no plans for the child's future). Children who stay in foster care for over a year run a very high risk of remaining in foster care indefinitely. R. GEISER, *supra* note 2, at 17. The Florida State Legislature has recently incorporated into its statutes a finding that not enough is being done to ensure the child's return to the biological family or to otherwise make permanent plans for him:

> The Legislature finds that 7 out of 10 children placed in foster care do not return to their biological families after the first year and that permanent homes could be found for many of these children if their status were reviewed periodically and they were found eligible for adoption. It is the intent of the Legislature, therefore, to help ensure a permanent home for children in foster care by requiring a periodic review and report on their status.

FLA. STAT. ANN. § 409.168(1) (West Supp. 1978).

79. Geiser, *supra* note 3, at 35. Often neither the biological parents nor the agency that placed the child show a continuing interest in the child. Children are not returned to their biological parents even for trial visits, and all too commonly, neither the parents nor the agency maintain any meaningful kind of relationship with the child. Less than 30% of children in foster care have parents who still show interest in them. Many social workers see these children only once or twice a year. *Id.* Thus, while foster care is intended to serve either as a stepping stone to adoption or as a means of enabling the rebuilding of the biological family, *see* text accompanying notes 75-76 *supra*, in reality it frequently becomes merely a means of housing unwanted children. Geiser, *supra* note 3, at 35.

80. Geiser, *supra* note 3, at 35.

the rights of the biological parents, which would free the child for adoption.[81] For the child, this can mean an uncertain future and an indeterminate stay in foster care with the prospect of being shuffled from foster home to foster home.[82]

After the orignal placement, both the placing agency and the court maintain a continuing role in the child's future.[83] The juvenile court may be required to review dispositional orders periodically. In Arizona, the juvenile court must review such orders after the first year and at least once a year thereafter.[84] The court may reaffirm the disposition or order a new one.[85] The criterion for this review is whether the continued placement is in the child's best interests.[86] The placement agency must also keep an ongoing watch over the foster family and the child to ensure that the placement is furthering the best interests of the child.[87] If the agency believes this is no longer so, the agency has the power, pursuant to either statute[88] or private contractual agreement,[89]

> [Limbo] refers to the legal status of a neglected child who is not legally free for adoption but who has been removed from the custody of his parents by court order and placed in the custody of a child-welfare agency for placement. This occurs when the family situation is so bad that it appears doubtful that the child can ever return to his family. . . . He is not legally free for adoption without parental consent in the absence of statutory authority for termination of parental rights.

Thomas, *supra* note 14, at 341 n.173.

81. *See* Thomas, *supra* note 14, at 341 n.173. Of course, freeing the child for adoption does not necessarily mean that the child placing agency will actively recruit adoptive parents, but it does mean there will at least be hope for adoption.

82. The average child in foster care is moved from two or three different homes while in foster care. Geiser, *supra* note 3, at 29. *See also* R. DINNAGE, *supra* note 3, at 7.

83. Unfortunately, that role is often ineffective. *See* discussion notes 78-79 *supra*.

84. ARIZ. REV. STAT. ANN. § 8-515(C) (1974); *see* ALASKA STAT. § 47.10.080(f) (1975) (annually); FLA. STAT. ANN. § 409.168(3)(a)-(b) (West Supp. 1978) (initially at six months, at least annually thereafter); ILL. ANN. STAT. ch. 37, § 705-8(2) (Smith-Hurd Supp. 1978) (every 24 months); MINN. STAT. ANN. § 260.191(2) (West 1971) (annually). This review may apply as well to dispositions not involving placement in foster care, see text & note 61 *supra*, where the child has nevertheless been adjudicated neglected or dependent. *See* ALASKA STAT. § 47.10.080(f) (1975). In California, the child himself, through counsel or guardian ad litem, may petition the court to modify or set aside the dispositional order. CAL. WELF. & INST. CODE § 388 (West Supp. 1978).

85. ARIZ. REV. STAT. ANN. § 8-515(C) (1974); *see* MINN. STAT. ANN. § 260.191(2) (West 1971).

86. *See* ALASKA STAT. § 47.10.080(f) (1975). The parents, guardian, or welfare department may be entitled to a review of the order on application to the court with the same criterion being used. *Id.* When this is the case, there is no relitigation of the original finding of neglect but rather a determination of what will serve the child's present best interests. People v. Hoerner, 6 Ill. App. 2d 994, 997, 287 N.E.2d 510, 512 (1972).

87. ARIZ. REV. STAT. ANN. § 8-516 (1974); *see* IDAHO CODE § 16-1623(d) (Supp. 1977) (at least every six months); ILL. ANN. STAT. ch. 37, § 705-8(2) (Smith-Hurd Supp. 1978)(every 24 months).

88. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-517 (1974); DEL. CODE ANN. tit. 31, § 354(a) (1974); NEV. REV. STAT. § 424.060 (1975).

89. Private welfare agencies maintain this power by including provisions in their contracts with foster parents in which foster parents acknowledge that the arrangement is only temporary and that the agency has the right to remove the child at will. *See In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959); Turner v. Children's Home Soc'y of Va., Inc., 158 Va. 406, 163 S.E. 399 (1932); J. GOLDSTEIN, *supra* note 2, at 24; J. GOLDSTEIN & S. KATZ, THE FAMILY AND THE LAW 1022 (1965). Some courts have held that such contracts are voidable when in conflict with the best interests of the child. Stapleton v. Dauphin County Child Care Serv., 228 Pa. Super. 371, 381-82, 324 A.2d 562, 568 (1974).

to move the child from one foster home and place in him in another. Again, the criterion is the best interests of the child.[90]

Once the agency has made a determination to transfer the child, the court's role of review of this administrative decision is less clear. Statutes and administrative regulations are usually silent on this very specific point. At least one state provides some right to challenge a transfer.[91] However, this procedure is for the benefit of the foster parents, not the child.[92]

More frequently, the right to challenge and/or procure a review of a new disposition can be inferred from various statutory and constitutional provisions. For instance, rules governing procedure in juvenile court may give a right of appeal from acts of the juvenile court.[93] Where the agency has made its redetermination without intervention of the juvenile court, this provision is not of much help to anyone in securing a review. However, where the redetermination has been made by the court pursuant to its statutory obligation to periodically review dispositional orders,[94] a right of appeal can be a tool for the foster parents although it is not clear how the aggrieved foster child would utilize this procedure. Another problem with this type of provision is that ordinarily the order is not stayed pending the appeal.[95] Thus, although the foster parents may prevail on appeal, the child will already have suffered the trauma of a separation from his foster family.

One frequent tool for court review of dispositional determinations

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Public welfare agencies also frequently use contracts in addition to a statute authorizing removal of the foster child. *Cf.* Organization of Foster Families for Equality & Reform v. Dumpson, 418 F. Supp. 277, 279-81 (S.D.N.Y. 1976), *rev'd sub nom.*, Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977) (in addition to statute authorizing removal upon 10 days notice, all plaintiffs, including those dealing with public agencies, had signed contracts giving agencies right to recall child upon request).

90. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-517 (1974); DEL. CODE ANN. tit. 31, § 354(a) (1974); NEV. REV. STAT. § 424.060 (1970).

Although such removal is meant to further the child's best interests, it often works to the detriment of the child by disrupting his environment and the continuity of his relationship with a parental figure, thus impairing his potential for normal development. R. GEISER, *supra* note 2, at 36, 60, 89; J. GOLDSTEIN, *supra* note 2, at 14, 25, 32, 34; D. KLINE, *supra* note 2, at 64-65; H. SIMMONS, *supra* note 2, at 8; Geiser, *supra* note 3, at 35; Tamilia, *supra* note 71, at 584; *see* Organization of Foster Families for Equality & Reform v. Dumpson, 418 F. Supp. 277, 283 (S.D.N.Y. 1976), *rev'd sub nom.*, Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977).

91. N.Y. SOC. SERV. LAW § 400 (McKinney 1976); N.Y. CODES R. & REGS. tit. 18, § 450.14 (1974). These allow foster parents to appeal an adverse decision to obtain a full adversarial adminstrative hearing which is in turn subject to judicial review. *See* text accompanying notes 149-54 *infra.*

92. The procedures are all aimed at the rights of the foster parents in the event of a transfer. *See* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 829-30 (1977).

93. *See, e.g.*, ALASKA STAT. § 47.10.080(i) (1975); ARIZ. REV. STAT. ANN. §§ 8-236, -543 (1974); FLA. STAT. ANN. § 39.14 (West 1974); IDAHO CODE § 16-1617 (Supp. 1976); MINN. STAT. ANN. § 260.291(1) (West 1971).

94. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-515 (1974); ILL. ANN. STAT. ch. 37, § 705-8(2)(Smith-Hurd Supp. 1978); MINN. STAT. ANN.§ 260.191(2) (WEST 1971).

95. *See* ARIZ. REV. STAT. ANN. § 8-236(B) (1974).

is the writ of habeas corpus.[96] This procedure, originally a creature of the common law, is generally based on constitutional provisions[97] and effectuated through statutes.[98] When it is used to attack a custody disposition, the petitioner must make a prima facie showing that he has some legal right to custody.[99] The foster parents may have difficulty showing that they have such a right to custody, especially in light of statutory and contractual provisions that give the placing agency the power to remove the child at the agency's discretion.[100] Habeas corpus is more frequently used by the biological parents to petition the court for the return of their child.[101] In hearing the petition, the standard applied is the welfare and best interests of the child.[102]

It can be concluded that procedures available to the foster parents and the foster child to challenge a redetermination of custody by the agency or the court are either inadequate or not clearly delineated.

A FOSTER CHILD'S CONSTITUTIONALLY PROTECTED INTERESTS

Certain minimal protections would be guaranteed to the foster child if his interest in a redetermination of his custody could be found to be a constitutionally protected interest. To apply the standard of fourteenth amendment due process, it must first be determined that the child is a person within the meaning of the fourteenth amendment.[103]

96. *See* Charboneau v. Superior Court, 101 Ariz. 586, 588, 422 P.2d 702, 704 (1967) ("We note also that in Arizona, if a minor is held either unlawfully or in a manner which is inimical to his welfare, the remedy of habeas corpus has always been available."); Giacopelli v. Florence Crittenton Home, 16 Ill. 2d 556, 158 N.E.2d 613 (1959).

97. *See* ARIZ. CONST. art. 6, § 18; MINN. CONST. art. 1, § 7.

98. *See* MINN. STAT. ANN. § 589.01 (West 1971).

99. *See* Lopez v. Smith, 146 Colo. 180, 360 P.2d 967 (1961); W. v. M., W. & W., 490 S.W.2d 64, 67 (Mo. 1973); Commonwealth *ex rel.* Ebel v. King, 162 Pa. Super. 533, 537, 58 A.2d 484, 486 (1948); *In re* Stuart, 138 Wash. 59, 61, 244 P. 116, 117 (1926).

100. See text & notes 88-90 *supra*.

101. *See* Curtiss v. Hagen, 280 Minn. 296, 193 N.W.2d 549 (1968); ILL. ANN. STAT. ch. 37 § 705-8(3) (Smith-Hurd Supp. 1978).

102. *See* Arizona State Dep't of Public Welfare v. Barlow, 80 Ariz. 249, 252, 296 P.2d 298, 301 (1956); *In re* Marriage of Saucido, 85 Wash. 2d 653, 658, 538 P.2d 1219, 1222 (1975).

103. Because the fourteenth amendment addresses only state action, a determination must also be made that state action exists. To find state action, significant involvement of the state in any of its manifestations, *see* Peterson v. Greenville, 373 U.S. 244 (1963); Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961), and a sufficiently close nexus between the state and the challenged action must be found, *see* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972). Some affirmative state governmental activity must also exist. *See* Reitman v. Mulkey, 387 U.S. 369, 393 (1967) (Harlan, J., dissenting); Evans v. Newton, 382 U.S. 296 (1966).

Where a court or governmental agency makes a custody determination, clearly there is state action because it is the state that enacts and enforces the legislation which authorizes the courts and agencies to transfer the child from one foster home to another. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-517 (1975); DEL. CODE ANN. tit. 31, § 354(a) (1974); NEV. REV. STAT. § 424.060 (1970). Where the right of removal is expressly extended by statute to a private child welfare agency, then state action will again be implicated. In Arizona, the right of removal provided in ARIZ. REV. STAT. ANN. § 8-517 (1974) is extended to any agency, which is defined in ARIZ. REV. STAT. ANN. § 8-501(1) (1974) to include private welfare agencies.

A more difficult question is raised where the statute is silent on the issue of removal and a

The Supreme Court has affirmatively recognized that minors are persons within the terms of the fourteenth amendment for the purposes of some constitutional safeguards.[104] The rationale supporting the extension of safeguards to minors is that constitutional rights do not attach at some magical age[105] and can be just as compelling for minors as they are for adults.

Beyond this threshold requirement, the procedural due process analysis involves two additional determinations: whether there is a liberty or property interest sufficient to invoke the fourteenth amendment; and after such an interest has been found, what procedures will satisfy due process. In determining whether due process applies, it is the nature of the right at stake, and not its weight, that is controlling.[106]

Foster Child's Liberty Interests

A foster child may have two closely related but distinct interests in a redetermination of his custody: he may have a liberty interest in being a member of a psychological family unit;[107] and he may have a liberty interest in a permanent, stable home[108]—arbitrary transfers from one home to another violate a foster child's right to be treated with dignity.

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private welfare agency contracts with the foster family for such a right. *See generally In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959); Turner v. Children's Home Soc'y of Va., Inc., 158 Va. 406, 163 S.E. 399 (1932); J. GOLDSTEIN, *supra* note 2, at 24; J. GOLDSTEIN & S. KATZ, *supra* note 89. In this final situation, it can be argued that if the court, an arm of state government, is invoked to enforce the private contractual provision, the state would be putting its imprimatur on the provision so as to make its enforcement state action. *See* Shelley v. Kramer, 334 U.S. 1, 17-19 (1948).

104. Although the Supreme Court "long has recognized that the state has *somewhat* broader authority to regulate the activities of children than of adults," Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (emphasis added), it has also recognized certain types of situations in which minors must be given the same constitutional protection as adults. In *Planned Parenthood*, the Supreme Court struck down a Missouri act which required written parental consent to an abortion in the first six weeks of pregnancy for any unmarried woman under the age of 18 unless a physician certified that the abortion was necessary to save the life of the mother. The Court held that the state cannot give a third party an absolute veto which the state itself cannot exercise. *Id.* In Goss v. Lopez, 419 U.S. 565 (1975), the Court held that due process requires that before a student can be suspended from a public school for a period of 10 days or less, he must be given notice and an opportunity to answer to the charges. *Id.* at 574. In Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), the Court held that the first amendment protected the right of students protesting the war in Viet Nam to wear black armbands in public school, despite proscription against such activity by the school's administration. *Id.* at 511. In *In re* Gault, 387 U.S. 1 (1967), the Court held that a juvenile in a juvenile delinquency proceeding has a right to counsel, notice of charges, confrontation, and cross-examination of witnesses, and a privilege against self-incrimination. *Id.* at 31-57. In Board of Educ. v. Barnette, 319 U.S. 624 (1943), the Court held that school children could not be required to salute the flag if their religious beliefs collided with such action. *Id.* at 642.

105. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.*

106. Board of Regents v. Roth, 408 U.S. 564, 571 (1972).

107. See text & notes 109-45 *infra*.

108. See text & notes 146-53 *infra*.

Liberty is an amorphous concept; the Supreme Court has declined to precisely define it,[109] but has indicated some of the situations that give rise to a liberty interest.[110] Until *Smith v. Organization of Foster Families for Equality & Reform*,[111] one of the situations that the Court had begun to give limited recognition to as requiring fourteenth amendment protection was that of the psychological family.[112] The Court has always recognized the great importance in our society of the family unit and has enunciated a strong policy of protecting the stability of that unit.[113] The older cases have dealt with a more traditional type of family that had its beginnings in a ceremonial marriage.[114] However, more recently the Court has recognized a different concept of family that looks more to the psychological relationships existing within a family than to the legal formalities that created it. In *Levy v. Louisiana*,[115] the Court held unconstitutional a Louisiana wrongful death statute that denied illegitimate children a cause of action for the death of their parent.[116] The Court noted that although this was not a traditional family, certain factors indicated that it was a family worthy

109. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). "[T]he Court has not assumed to define 'liberty' with any great precision. . . ." *Id.; accord*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

> "Liberty," and "property" are broad and majestic terms. They are among the "[g]reat constitutional concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."

Board of Regents v. Roth, 408 U.S. 564, 571 (1972), *quoting* National Ins. Co. v. Tidewater Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

> 110.Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Liberty is also implicated where governmental activities interfere with the opportunity to achieve those goals that are within the full range of conduct all individuals are free to pursue. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

111. 431 U.S. 816 (1977).

112. "The mutual interaction between adult and child, which might be described in such terms as love, affection, basic trust, confidence, is considered essential for the child's successful development, and is the basis of what may be termed psychological parenthood." Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 158 (1973); *accord*, J. GOLDSTEIN, *supra* note 2, at 17-20; Foster & Freed, *supra* note 2, at 349. See text & notes 142-45 *infra*.

113. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Levy v. Louisiana, 391 U.S. 68 (1968); Ginzberg v. New York, 390 U.S. 629 (1968); Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

114. *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923). Ceremonial marriage is a relationship arising out of a civil contract, *see* ARIZ. REV. STAT. ANN. § 25-111 (1976); CAL. CIV. CODE § 4100 (West 1970), that creates legally binding obligations between the parties. Common law marriage also creates legally binding obligations between the parties but it is of dwindling significance as now only 13 states recognize such marriages. H. CLARK, DOMESTIC RELATIONS, CASES AND PROBLEMS 67 (1974) [hereinafter cited as CLARK CASEBOOK].

115. 391 U.S. 68 (1968).

116. *Id.* at 69-70.

of constitutional protection: "These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would."[117] While the Court noted, without discussing its relative importance, the biological relationship existing between mother and children, this was not entirely dispositive of the matter. The Court repeatedly emphasized the nature of the relationship existing between them.[118]

This notion of a parent-child relationship with the characteristics of dependency by the child and nurturing by the parent is evident in later decisions of the Court. In *Stanley v. Illinois*,[119] the Court held that an Illinois statute that presumed the father of illegitimate children to be unfit to have the custody of his children upon the death of the mother violated both the due process and equal protection rights of the father.[120] The Court began by acknowledging the significance of the biological relationship as involving the fundamental rights to conceive and raise a family[121] and, since the case involved dependency proceedings, by noting that the primary right and responsibility for caring for children falls on the biological parent.[122] But the Court also discussed other aspects of the relationship, such as the warm and enduring familial bond that can develop in such relationships,[123] and the interest of a parent in the "companionship, care, custody, and management of his or her children."[124] Furthermore, the Court expressed its understanding that the child had a reciprocal interest in this relationship by noting that the statute by presumption "needlessly risks running roughshod over the important interests *of both parent and child*."[125] The Court stated: "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. . . . [F]amilial bonds in such cases [are] often as warm, enduring, and important as those arising within a more formally organized family unit."[126]

In *Weber v. Aetna Casualty & Surety Co.*,[127] the Court struck down, as violating the equal protection clause, a Louisiana workmen's compensation law that precluded unacknowledged illegitimate children from recovering equally thereunder.[128] The Court's discussion of the

117. *Id.* at 72.
118. *Id.* at 70-72.
119. 405 U.S. 645 (1972).
120. *Id.* at 649.
121. *Id.* at 651.
122. *Id.*
123. *Id.* at 651-52.
124. *Id.* at 651.
125. *Id.* at 656-57 (emphasis added).
126. *Id.* at 651-52.
127. 406 U.S. 164 (1972).
128. *Id.* at 165.

biological relationship only addressed the question of whether illegitimacy was a permissible classification under the equal protection clause. In finding that it was not, the Court noted that the purpose of the workmen's compensation laws was to provide relief for those who were dependent upon the deceased.[129] The Court again emphasized the relationship existing between parent and child: "[T]he dependency and natural affinity of the unacknowledged illegitimate child for her father were as great as those of the four legitimate children whom the Louisiana law has allowed to recover."[130]

What is important in these cases is the relationship that has the characteristics of dependency by the child and support by the parent and the mutual love and affinity between the two. These factors have also been recognized by psychologists as crucial to a beneficial family relationship. All children have certain developmental needs. The most basic of these needs is for love and affection from parental figures.[131] Other basic needs are those for discipline and guidance,[132] a stable, uninterruped home environment,[133] continuous relationship with at least one parental figure,[134] to be accepted, valued, and wanted as a member of a family unit,[135] and to have everyday emotional and physical needs attended to.[136] These are necessary for normal development and maturation.[137] For the foster child, many, if not all, of these needs are not satisfied. In fact, foster care often compounds the child's problems by shuffling him in and out of different homes, thereby keeping him from having the stability he needs.[138] It also makes it extremely difficult for the child to experience any continuity of love, affection, discipline, and guidance.[139] As a result, the child is unable to feel that he is an accepted, valued, and wanted member of a family unit. The child senses the impermanency of the relationship and this clashes with his acute need for a stable home and continuity of relationships.[140] He reacts with anger, sadness, fear, frustration, hurt, rejection, disappointment, and a sense of worthlessness and incompetence.[141]

129. *Id.* at 171-72.
130. *Id.* at 169.
131. Foster & Freed, *supra* note 2, at 347; Solnit, *Child-Rearing and Child Advocacy*, 1976 B.Y.U.L. REV. 723, 732; Tamilia, *supra* note 71, at 585-86.
132. Foster & Freed, *supra* note 2, at 347.
133. *Id.*; D. KLINE, *supra* note 2, at 64; H. SIMMONS, *supra* note 2, at 9.
134. J. GOLDSTEIN, *supra* note 2, at 20; D. KLINE, *supra* note 2, at 66; Foster & Freed, *supra* note 2, at 347; Solnit, *supra* note 131, at 731; Tamilia, *supra* note 71, at 586.
135. J. GOLDSTEIN, *supra* note 2, at 14.
136. *Id.* at 17; Solnit, *supra* note 131, at 731-32.
137. R. GEISER, *supra* note 2, at 102; Tamilia, *supra* note 71, at 582.
138. R. GEISER, *supra* note 2, at 60, 89; J. GOLDSTEIN, *supra* note 2, at 25; D. KLINE, *supra* note 2, at 64-65.
139. J. GOLDSTEIN, *supra* note 2, at 32; Tamilia, *supra* note 71, at 585.
140. J. GOLDSTEIN, *supra* note 2, at 25.
141. R. GEISER, *supra* note 2, at 36, 60.

Despite the impermanency of the relationship, strong bonds often develop between the foster child and the foster parents. It is unimportant to the child that these parents are not his biological parents. A child has little understanding of a blood relationship until late in his development.[142] The act of physical conception is unimportant to the child's perception of parenthood. To the child, his parent is the person who cares for his day-to-day emotional and physical needs.[143] This parent has frequently been termed the psychological parent and is the one whom the child identifies as his natural parent.[144] When a child develops emotional ties to a psychological parent and is then taken away from that parent, the impact is no less than it would be in the case of separation from or death of a biological parent.[145]

Thus, there are strong similarities between the factors that make up the psychological parent-child relationship and the factors the Supreme Court has stressed in its decisions recognizing the nontraditional family unit—the physical and emotional dependency of the child on the parent, the day-to-day support and care by the parent, and the mutual love and affinity existing between the parent and child.

As a corollary to the foster child's interest in being a member of a psychological family unit, he also has a liberty interest in a permanent, stable living environment and in not being arbitrarily removed from the foster family unit.[146] In *Meachum v. Fano*,[147] the Supreme Court held a prisoner was not entitled to a due process hearing when transferred from one prison to another.[148] Justice Stevens dissented:

> [I]t demeans the concept of liberty . . . to ascribe to [it] nothing more than a protection of an interest that the state has created. . . . [I]f the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases. I think it clear that even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore.
>
> . . . .
>
> . . . Within the prison community, if my basic hypothesis is correct, he has a protected right to pursue his limited rehabilitative goals, or at the minimum, to maintain whatever attributes of dignity are asso-

142. J. GOLDSTEIN, *supra* note 2, at 17; Foster & Freed, *supra* note 2, at 349.

143. J. GOLDSTEIN, *supra* note 2, at 17; Foster & Freed, *supra* note 2, at 349; Note, *supra* note 112, at 158.

144. J. GOLDSTEIN, *supra* note 2, at 17; Foster & Freed, *supra* note 2, at 349; Note, *supra* note 112, at 158-59. See discussion note 112 *supra*.

145. J. GOLDSTEIN, *supra* note 2, at 27; Foster & Freed, *supra* note 2, at 350; Note, *supra* note 112, at 161.

146. "The Due Process Clause also forbids arbitrary deprivations of liberty." Goss v. Lopez, 419 U.S. 565, 574 (1975).

147. 427 U.S. 215 (1976).

148. *Id.* at 216.

ciated with his status in a tightly controlled society.[149]

Although the prison community is not a perfect analogy for child custody determinations, it is a helpful one. With the suspension or termination of parental rights, a child becomes a ward of the state. Certainly the state can change a child's status. However, "if the change is sufficiently grievous, it may not be imposed arbitrarily. In such a case due process must be afforded."[150] The foster child's need for a stable, uninterrupted environment[151] and for a continuous, loving relationship with at least one parental figure[152] mandates the conclusion that the foster child can be transferred to another home only when fair procedures are utilized to ensure that the transfer is actually in the child's best interests.

The liberty interests of being a member of a psychological family and of not being arbitrarily removed where the result would be to inflict grievous loss on the foster child were recently before the Supreme Court in *Smith v. Organization of Foster Families for Equality & Reform* [*OFFER*].[153] In *OFFER*, three separate foster families sought to invalidate certain New York statutory[154] and regulatory procedures.[155] The statutes and procedures provided that the child placing agency could remove the foster child from the foster home at its discretion and on ten days notice to the foster family.[156] Objecting foster parents were entitled to request a conference with the social services department at which they could present reasons for their objections.[157] Foster parents were entitled to notice of the decision made within five days of the conference.[158] The foster parents were then allowed to appeal an adverse decision to the department of social services where a full adversarial administrative hearing would be conducted, with the results subject to judicial review.[159] In addition to these procedures, certain administrative regulations for New York City provided additional procedures under which the foster parents were entitled to a full trial-type preremoval hearing if the child were being transferred to another foster

149. *Id.* at 233-34.
150. *Id.* at 234.
151. D. KLINE, *supra* note 2, at 64; H. SIMMONS, *supra* note 2, at 9; Foster & Freed, *supra* note 2, at 347.
152. J. GOLDSTEIN, *supra* note 2, at 20; D. KLINE, *supra* note 2, at 66; Foster & Freed, *supra* note 2, at 347; Solnit, *supra* note 131, at 731-32; Tamilia, *supra* note 71, at 585-86.
153. 431 U.S. 816 (1977).
154. N.Y. SOC. SERV. LAW §§ 383(2), 400 (McKinney 1976); *see* 431 U.S. at 818-20 & 820 n.3.
155. N.Y. CODES R. & REGS. tit. 18, § 450.10 (1974); *see* 431 U.S. at 818-20 & 820 n.3.
156. N.Y. SOC. SERV. LAW § 383(2) (McKinney 1976); N.Y. CODES R. & REGS. tit. 18, § 450.10(a) (1974); *see* 431 U.S. at 829.
157. N.Y. CODES R. & REGS. tit. 18, § 450.10(a) (1974); *see* 431 U.S. at 829.
158. N.Y. CODES R. & REGS. tit. 18, § 450.10(c) (1974); *see* 431 U.S. at 830.
159. N.Y. SOC. SERV. LAW § 400 (McKinney 1976); N.Y. CIV. PRAC. LAW & R. § 78; *see* 431 U.S. at 830.

home.[160]

In the three fact situations involved, the foster children had been placed voluntarily[161] in foster care by their biological parents and had been living in their respective foster homes from two to five years.[162] Two of the families were informed by the child placing agencies that the children would be removed and the third feared a removal on the basis of unofficial statements.[163] The first family was only informed that the children would be removed because " 'it is now in their best interests to leave your home.' "[164] The only reason given to the other family was that the children had grown too attached to the foster parents.[165] The United States District Court for the Southern District of New York, basing its decision upon the grave impact that transfers may have on a foster child and the grievous loss that may be inflicted upon him,[166] held that before a foster child could be transferred from one home to another, or returned to his biological family, due process required a preremoval hearing as a matter of course at which all parties could present information relevant to the future placement of the child.[167] The Supreme Court reversed, rejecting the grievous loss standard applied by the district court,[168] stating that a finding of grievous loss alone does not implicate the due process clause.[169] The Court noted that it is not the weight but the nature of the interest that determines the application of the fourteenth amendment.[170]

The plaintiffs had argued in the district court that when a foster child has lived in a foster home for an extended period of time, a relationship develops between the child and parents in which the foster parents become the psychological parents[171] and that this psychological family unit has the same liberty interest in its preservation as does the

160. 431 U.S. at 831.

161. Voluntary placement is only one means of handling a neglect case. *See* text & notes 24-26 *supra.*

162. *See* 431 U.S. at 818 n.1.

163. Organization of Foster Families for Equality and Reform v. Dumpson, 418 F. Supp. 277, 280 (S.D.N.Y. 1976).

164. *Id.*

165. *Id.*

166. *Id.* "In cases such as these, the harmful consequences of a precipitous and perhaps improvident decision to remove a child from his foster family are apparent." *Id.* at 283.

167. *Id.* at 282.

168. 431 U.S. at 840.

169. *Id.*

170. *Id.* at 840-41 (quoting Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972)). The Supreme Court's treatment of the district court's grievous loss finding was very summary, merely citing Meachum v. Fano, 427 U.S. 215, 224 (1976), for the proposition that more is needed than a finding of grievous loss. *See* 431 U.S. at 840-41. Although the district court stated the interest involved in terms of grievous loss, that court was arguably making a statement about the nature of the interest, not merely its weight, with the interest being the right of every child not to be arbitrarily treated by the state for no apparent reason and with the result of great harm being inflicted upon the child. *See* 418 F. Supp. at 282-83. The Supreme Court did not explore this possibility.

171. See text & notes 142-45 *supra.*

biological family.[172] The Court was troubled by this argument,[173] as was the district court,[174] but did not decide the point, finding narrower grounds for its holding.[175] The Court phrased the issue before it as whether the "relation of a foster parent to foster child [is] sufficiently akin to the concept of 'family' recognized in our precedents to merit similar protection?"[176] In answering this question, the Court began by noting that in the usual context, family connotes a biological relationship[177] and that most of the cases decided by the Court have stressed that element.[178] The Court conceded that a biological relationship is not a necessary element of a family relationship, as marriage, the foundation of the family, does not have its origins in the biological relationship.[179] The Court stated that the basis of the family relationship "stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life,"[180] as well as from the fact of biological relationship.[181] The Court further acknowledged that a "deeply loving and interdependent relationship" can develop in the foster care context with the foster parents holding the "same place in the emotional life of the foster child, and fulfill[ing] the same socializing functions, as a natural family."[182] Thus, the Court seemed to be implying that there was some merit to the plaintiffs' claim.

In stating that its previous cases had stressed the biological relationship of the family, however, the Court was giving an incomplete picture. As discussed previously, the biological relationship was involved in all those cases but the Court also stressed the physical and emotional dependency of the child on the parent, the day-to-day caring of the parent for the child, and the mutual love and affection between them.[183] Indeed, the Court in *OFFER* conceded that the importance of the familial relationship "stems from the emotional attachments that derive from the intimacy of daily association,"[184] that the basis of the

172. 431 U.S. at 839-40. Counsel for the children had argued that the foster parents had no interests independent of the interests of the children and that the interests of the children would not be served by further procedural safeguards. *Id.* at 839. This had the effect of leaving the children without advocacy for the position that they had possible interests independent of the foster parents that were entitled to due process protection. *See id.* at 857 n.1 (Stewart, J., concurring in the judgment).

173. *Id.* at 842.

174. 418 F. Supp. at 281.

175. 431 U.S. at 847; *see* 418 F. Supp. at 282.

176. 431 U.S. at 842.

177. *Id.* at 843.

178. *Id.*

179. *Id.*

180. *Id.* at 844.

181. *Id.*

182. *Id.*

183. *See* text & notes 112-30 *supra*.

184. 431 U.S. at 844.

family is the marriage contract, not blood,[185] and that this sort of relationship can exist in the foster family context.[186] It thus seems that the situations before the Court in *OFFER* would meet all of those criteria and should qualify as a family relationship worthy of constitutional protection. The evidence in all three cases showed that the lengths of the foster care relationships were long, that the children were part of a family setting that had its basis in the marital relationship, and that the children had become physically and emotionally dependent upon their foster parents.[187] The only real difference here is that the children were not of the parents' blood, a difference of almost no importance to the child,[188] a difference even the Court noted was immaterial in an adoptive relationship, which nevertheless qualifies as a protected family.[189] Thus, the blood relationship has not always been and should not be the dispositive factor in determining whether a family deserves constitutional protection.

Despite the similarities already noted, the Court found two important distinctions between the foster family and the biological family. First, the Court felt it was important that the foster family relationship has its origins in state law and in contractual relationships in which the state is a partner from the start,[190] whereas the biological family has its origins totally apart from the state.[191] The Court stated that any relationship that develops within the foster family has its origins in an arrangement in which the state and foster parents have been partners from the start, and only the most limited liberty interest can be inferred from the statutes for the foster family.[192] While it is true that foster care is a statutory creature, it does not necessarily follow that a liberty interest cannot be present. Although marriage, the foundation of the family to the Court,[193] is older than the Bill of Rights,[194] it is also a creature of state law in that the state regulates the manner[195] and sometimes the

185. *Id.* at 843.
186. *Id.* at 844.
187. 418 F. Supp. at 279-80. The defendants did not "dispute the strength of the emotional ties binding plaintiffs and their foster children nor the loss that will be felt if these ties are severed." *Id.* at 280. The Supreme Court's decision did not recite very many facts with respect to the relationship between the parties involved, which seems to demonstrate an insensitivity to the interests involved.
188. *See* text & notes 142-45 *supra.*
189. *See* 431 U.S. at 844 n.51.
190. *Id.* at 845.
191. *Id.*
192. *Id.* at 846.
193. *Id.* at 843.
194. *Id.* at 845.
195. "[T]he American states have from the earliest days asserted the power to regulate marriage." CLARK CASEBOOK, *supra* note 114, at 58. Some typical examples of these regulations include the requirement of a license to marry, a waiting period, a physical exmination, and witnesses to the ceremony itself. *Id.* at 58-60.

right to enter into the relationship,[196] controls the right to end the relationship by divorce or legal separation,[197] and further mandates many of the obligations both during and after the marriage.[198] Nevertheless, the marital relationship has been afforded constitutional protection.[199] Thus, it proves too much for the Court to dismiss the foster family as a statutory creature while ignoring the state's role in the marital relationship.

Furthermore, the dichotomy between rights created by statutes and rights emanating from natural law is meaningless when viewed from the perspective of the child's best interests; it is immaterial to the child how the relationship was created. The child does not understand the significance of this, nor does he understand the significance of a biological relationship to his parents.[200] Furthermore, despite the source of the relationship, a removal from a foster family can be just as disastrous for the child as a removal from the biological family.[201]

The second distinction the Court found between the biological family and the foster family was that while ordinarily one person's lib-

196. For instance, typical restrictions on who may enter into a marriage contract include prohibitions against marriage for certain degrees of blood relationship, such as first cousins, *see* H. CLARK, LAW OF DOMESTIC RELATIONS § 2.8 (1968) [hereinafter cited as CLARK HORNBOOK], establishment of minimum age at which one can enter into marriage, *see id.* § 2.9, prohibitions against homosexual marriages, *see* Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), disqualifications based on mental incompetence, achieved by means of annulment statutes, *see* interlocutory divorce decree making any remarriage during the interlocutory period, typically six months to one year, a bigamous one, *see* Fraser v. Fraser, 334 Mass. 4, 133 N.E.2d 236 (1956), or a prohibition in the divorce decree itself against remarriage for a specified period of time, *see* TEX. FAM. CODE ANN. § 3.66 (Vernon 1975).

197. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 25-312 to -313 (1976); CONN. GEN. STAT. ANN. § 46-32 (West Supp. 1978); ILL. ANN. STAT. ch. 40, §§ 401-402 (Smith-Hurd Supp. 1978).

198. "Anglo-American law has for centuries prescribed rules for the proper behavior of husbands and wifes in marriage." CLARK HORNBOOK, *supra* note 196, § 6.1, at 181. The husband has the obligation to provide food, clothing, shelter, and as many amenities as possible for his family. The wife, on the other hand, has the obligation to maintain the home with the resources provided by the husband and to care for the children. *Id.* The husband has the primary obligation for supporting the children, with the wife becoming liable when the husband defaults. *Id.*, § 6.2, at 187-88.

In ending the marriage by divorce or in a legal separation, state statutes authorize the courts to grant alimony to either the wife or the husband. *Id.*, § 14.1, at 421. Statutes also authorize the courts to provide for child support. *Id.*, § 15.1, at 488. The Uniform Reciprocal Enforcement of Support Act, which has been adopted by all the states, CLARK CASEBOOK, *supra* note 114, at 251 n.1, provides a means of enforcing support obligations both interstate and intrastate, *see* ARIZ. REV. STAT. ANN. §§ 12-1651 to -1691 (Supp. Pamphlet 1957-77). The jurisdiction of the courts to award custody in a divorce or legal separation proceeding has also been recognized in the United States since the earliest times and is also covered by statutes. CLARK HORNBOOK, *supra* note 196, § 17.1.

199. *See, e.g.*, Zablocki v. Redhail, — U.S. —, 98 S. Ct. 673 (1978) (statute may not condition right to marry upon proof that prior court ordered child support is current); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage is one of man's basic civil rights); Griswold v. Connecticut, 381 U.S. 479 (1965) (intimate relation of husband and wife and their decision whether or not to conceive children protected by constitutional right of marital privacy); *cf.* Boddie v. Connecticut, 401 U.S. 371 (1971) (state may not deny, solely on inability to pay, access to the courts for the purpose of procuring a judicial dissolution to a marriage).

200. *See* text & notes 142-43 *supra*.

201. *See* text & note 145 *supra*.

erty can be protected without interfering with another's interests,[202] the foster parents liberty could not be protected without derogating the biological family's absolute right in a voluntary placement to the return of their child.[203] The Court stated that one may not acquire a liberty interest in the face of another's constitutionally recognized liberty interests,[204] and that whatever interests exist must be subordinated to the rights of the biological family.[205] This distinction, however, is limited to situations like the one before the Court where the child has been voluntarily placed in foster care by the biological parents. These parents have an absolute right to the return of their child.[206] However, where there has been an adjudication of neglect, the parents have no such right.[207] Such parents must demonstrate that they are once again fit to handle the responsibilities of parenthood[208] before the court can return the child to them. Thus, the Court's distinction based on the conflicting interests may not exist where there has been an adjudication of neglect and a court ordered foster care placement. It could be argued, however, that even in this situation the biological parents have a right superior to the foster parents because the biological parents seem to have some sort of "contingent" right to the return of their child. Nonetheless, statistics indicate that many biological parents show little if no interest in their child once placed in foster care and do not bother to seek the return of their child.[209] Even if the biological parents have a superior right to the return of their child, it is the child who suffers if the right is not exercised so that the child's future remains in a state of flux. It seems that it is the right of the child to a stable and permanent environment, and not the rights of either the biological or the foster parents, that needs protection here. This is especially so when considering that the initial removal was to protect and benefit the child, not the biological or foster parents. Thus any subsequent removal should satisfy the same criteria.

The Court's second distinction would also be inapplicable in another situation—where the biological parental rights have been terminated[210] and the biological parents have absolutely no right to the return of their child.[211] The only parties whose liberty would be in question would be the foster parents and the child. Thus, to recognize

202. 431 U.S. at 846.
203. *Id.* See text & notes 24-26 *supra.*
204. 431 U.S. at 846.
205. *Id.* at 846-47.
206. *See* text & notes 24-26 *supra.*
207. *See* text & notes 61-64 *supra.*
208. *See id.*
209. *See* text & notes 78-79 *supra.*
210. *See* text & notes 35-38 *supra.*
211. *See* text accompanying notes 65-67 *supra.*

a liberty interest under such circumstances would not derogate the biological parents' rights.

It is difficult to say where *OFFER* leaves the status of the psychological family since the Court declined to decide whether such a family is entitled to the same constitutional deference as a biological family. The Court will undoubtedly face the issue again since not all placements are voluntary and many states have procedures which are less protective than those of New York. Future decisions, however, should give more focus to the rights of the child. While it is true that the infliction of a grievous loss alone is not enough to invoke the fourteenth amendment,[212] the foster child, whose future is in question and who is at the mercy of the state, has the right, at a minimum, to be treated with dignity.[213]

In contrast to the decision in *OFFER* is *In re Tyease J.*,[214] in which a New York court, focusing its attention on the interests of the child, held that a child has a constitutional right to a stable, permanent home.[215] The case involved a child born out of wedlock to a seventeen-year old mother. The child had been placed with foster parents when six weeks old and had remained with this family for five years.[216] After this period, the agency filed a petition to terminate the mother's rights as the foster parents desired to adopt the child.[217] The mother argued that her right to custody of the child was superior to any right of the child[218] and that she had never intended to abandon her child.[219] The court approached the problem from the perspective of the child's best interests, noting that it was immaterial whether the mother "intended" to abandon the child since the effect on the child was the same.[220] The mother had visited the child only three times during the child's five years.[221] The court felt it would be totally unjustified to subject the child to the trauma of being removed from the only home she had ever known in light of the mother's past record.[222] The court concluded that the mother had abandoned the child and the child's right to a stable and permanent home must prevail over any rights of the mother.[223]

212. Meachum v. Fano, 427 U.S. 215, 224 (1976).
213. *See* text & notes 146-50 *supra*.
214. 83 Misc. 2d 1044, 373 N.Y.S.2d 447 (Sur. Ct. 1975).
215. *Id.* at 1049, 373 N.Y.S.2d at 452.
216. *Id.* at 1045, 373 N.Y.S.2d at 448.
217. *Id.* at 1046, 373 N.Y.S.2d at 449.
218. *Id.*
219. *Id.* at 1049, 373 N.Y.S.2d at 452.
220. *Id.*
221. *Id.* at 1045, 373 N.Y.S.2d at 449.
222. *Id.* at 1049, 373 N.Y.S.2d at 452.
223. *Id.* at 1049-50, 373 N.Y.S.2d at 452.
The constitutional rights of the infant to a stable permanent home cannot be disrupted by the mother's desire to have her child for the first time after four years of inexcusable sleeping on her duties and on her rights. . . . The Supreme Court of the United States

Tyease J. is in keeping with the findings of psychologists that a child needs stability and permanence for healthy development.[224] Any scheme for foster care that ignores these factors and arbitrarily moves the child from home to home defeats one of the goals of foster care—to give the child a chance for healthy development and maturation into adulthood.[225] Furthermore, such a scheme defeats the state's interest in producing healthy, happy, and productive citizens since impermanency impairs the normal development of the child.[226]

Foster Child's Property Interests

A foster child may also have a property interest in a transfer of his custody.[227] Within recent years, the Supreme Court has recognized a sophisticated notion of property that extends beyond the traditional common law concepts; it has recognized property as including statutory entitlements[228] and legitimate expectancies.[229] In *Goldberg v. Kelly*,[230] the Court gave legal recognition to the concept of statutory entitlements.[231] The issue was whether the Constitution required a hearing before termination of welfare benefits.[232] In holding that only a pretermination hearing would satisfy due process,[233] the Court rejected the older constraints of the definition of property and recognized that in modern society, welfare benefits are more like property than gratuities:[234] "Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. "The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.' "[235] Two factors were important to the Court. First, a state, by statutorily creating the right to benefits for those meet-

is in the process of elevating the "best interests" of infants to constitutional dimensions no less compelling than those human rights of parents. This mother here is saying, in effect, "This child is mine, and the law must sustain me."; this child is saying through her lawyer, in effect, "This mother is not mine, I have always had other parents, and the law must sustain me."

Id.

224. See text & notes 131-45 *supra*.

225. *See* D.C. CODE ENCYCL. § 32-781 (West 1968); ILL. ANN. STAT. ch. 37, § 701-2(1) (Smith-Hurd Supp. 1978); TENN. CODE ANN. § 37-201 (1977).

226. *See* text & notes 131-41 *supra*.

227. This issue was not before the Court in *OFFER*. *See* 431 U.S. at 839.

228. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

229. Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957). *Compare* Perry v. Sinderman, 408 U.S. 593, 599-603 (1972), *with* Board of Regents v. Roth, 408 U.S. 564 (1972).

230. 397 U.S. 254 (1970).

231. *Id.* at 262 n.8.

232. *Id.* at 260.

233. *Id.* at 264.

234. *Id.* at 262 n.8.

235. *Id.* at 262.

ing the qualifications, creates a constitutionally cognizable interest.[236] Second, once a recipient comes to rely on the statutory benefits, such benefits cannot be discontinued without some kind of notice and hearing.[237]

Since *Goldberg*, statutory entitlements have increasingly become the focus of due process challenges.[238] In *Board of Regents v. Roth*,[239] the question was whether a nontenured teacher at a state university was entitled to a hearing before being denied a new contract.[240] Under the applicable Wisconsin statutes, a tenured university teacher was entitled to his job during good behavior but a nontenured teacher was subject to removal at the discretion of university officals.[241] Although the Court held that the respondent had no entitlment under the statutes and thus no property interests beyond the terms of his contract,[242] it noted that the case might have been different had the statutes given the respondent a legitimate claim to his position: "[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[243] The common element in these entitlement cases is that the state, in its statutes or administrative rules, has provided for some interest or right afforded to those who meet the statutory requirements. Having chosen to extend the right, the state may not withdraw it without "fundamentally fair procedures."[244]

A foster child may have a claim of entitlement where a state, through its statutes or administrative regulations, has provided that the foster child should receive a home life that is as near as possible to that which he should have received from his own family. For instance, the Illinois statutes[245] state that one of the policies of the state is "when the

236. *Id.* at 262.

237. *Id.* at 264. The fact that the interests involved could be characterized as "brutal needs," Kelly v. Wyman, 294 F. Supp. 893, 900 (S.D.N.Y. 1968), *aff'd sub nom*, Goldberg v. Kelly, 397 U.S. 254 (1970), was a factor in determining the form of hearing.

238. In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court held that an evidentiary hearing such as that in *Goldberg* was not required prior to the termination of social security disability benefits. *Id.* at 349. In Goss v. Lopez, 419 U.S. 565 (1975), the Supreme Court held that once a state has statutorily provided for the right to a public high school education, it may not withdraw that right on grounds of misconduct without fundamentally fair procedures to determine whether misconduct has actually occurred. *Id.* at 574. In Bell v. Burson, 402 U.S. 535 (1971), the Court held that drivers' licenses, once issued, become entitlements that cannot be taken away without observing procedural due process. *Id.* at 539.

239. 408 U.S. 564 (1972).

240. *Id.* at 569.

241. *Id.* at 566-67.

242. *Id.* at 578.

243. *Id.* at 577.

244. Goss v. Lopez, 419 U.S. 565, 574 (1975).

245. ILL. ANN. STAT. ch. 37, § 701-2(1) (Smith-Hurd Supp. 1978).

minor is removed from his own family, to secure for him the custody, care and discipline as nearly as possible equivalent to that which should be given by his parents."[246] The statute states that the care the child receives should further his "moral, emotional, mental, and physical welfare."[247] Furthermore, whenever possible, the child shall be placed with a foster family that may potentially adopt him.[248] These provisions indicate that the foster child is entitled to two things: a home that can provide for his total emotional and physical welfare, and a home that is stable and hopefully permanent. The state may have no constitutional obligation to provide this type of care for the foster child,[249] but once it has extended the right, the state may not arbitrarily withdraw it.

Administrative rules and regulations that secure benefits may also support claims of entitlement.[250] Administrative rules for child welfare agencies often delineate the family environment to which a foster child is entitled. For instance, in Arizona administrative regulations for the Department of Economic Security state that, among other requirements, the foster family must demonstrate an understanding of "healthy adult and child relationships" and be able to provide the child with the necessary "guidance and assistance."[251] The regulations also set out two goals of foster care: providing a substitute living arrangement for the child,[252] and developing a permanent plan for him.[253] Again, these provisions indicate that the foster child is entitled to a caring, stimulating, stable, and hopefully permanent home. Once the state has extended the right to such an environment, it may not arbitrarily deny that right.

PROCEDURAL REQUIREMENTS OF DUE PROCESS

Once a protected liberty or property interest has been found, it is necessary to determine what procedures will satisfy due process in the given context. Due process is a flexible notion; what satisfies it in one context may not satisfy it in another.[254] At a minimum, it requires no-

246. *Id.*
247. *Id.*
248. *Id.*
249. *But see* text & notes 107-226 *supra* (if child has liberty interest in being member of psychological family or in a permanent stable home, the state would have an obligation to provide this care).
250. See text & notes 239-44 *supra*.
251. ARIZ. ADMIN. R. & REGS. tit. 6, R6-5-5809(B) (1977).
252. *Id.* at R6-5-5702(1).
253. *Id.* at R6-5-5702(2).
254. *See* Bell v. Burson, 402 U.S. 535, 540 (1971); Cafeteria Workers v. McElroy, 367 U.S. 886, 894-95 (1961). *See generally* Note, *Procedural Due Process in Parole Release Decisions*, 18 ARIZ. L. REV. 1023, 1046-60 (1976) (applying procedural due process analysis to parole release decisions).

tice and a hearing appropriate for the nature of the case.[255] The full range of procedural protections need not apply in every case; the nature of the hearing depends on an accomodation of the competing interests.[256] Therefore, it becomes necessary to identify the specific interests at stake, to balance these interests, and then to determine, within the balancing context, what minimum procedures are necessary to protect these interests.

Factors to Weigh

There are three factors to consider in administrative action dealing with foster children.[257] First, the private interest, here the foster child's, that will be affected by the official action must be weighed.[258] The child's interest is in having a permanent and stable home environment[259] and in being a part of a psychological family unit.[260]

The second factor to consider is the risk or likelihood of an erroneous deprivation under the current procedures and whether additional procedures would reduce that risk.[261] For the child, the risk of an erroneous decision is always present and such errors do occur.[262] Whether additional safeguards would reduce the risk would depend on the na-

255. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

256. Goss v. Lopez, 419 U.S. 565, 579 (1975); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1278 (1975).

257. The Supreme Court in *OFFER* quoted the three factor test as enunciated in Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), in determining what minimum procedures would satisfy due process in that case. 431 U.S. at 848-49. In *Mathews*, the Court stated:
More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.
424 U.S. at 334-35.

258. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

259. See text & notes 131-45 *supra*.

260. *See In re* Tyease J., 83 Misc. 2d 1044, 1049, 373 N.Y.S.2d 447, 452 (Sur. Ct. 1975). See text & notes 163-66 *supra*.

261. Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 848-49 (1977); Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

262. A recurring reason given by agencies for the removal of the child is that the child has grown too attached to the foster parents. *See* Organization of Foster Families for Equality & Reform v. Dumpson, 418 F. Supp. 277, 280 (S.D.N.Y. 1976), *rev'd sub nom.*, Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977); *In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 226, 156 N.E.2d 700, 703, 183 N.Y.S.2d 65, 68 (1959). The flaw in this reasoning is that it ignores the child's best interests, *i.e.*, it may be much better for the child to experience this close relationship with the foster parent on an uninterrupted basis. *See* text accompanying notes 131-41 *supra*.

ture of those safeguards.[263]

The third factor to consider is the government's interest in "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[264] Although the state has a substantial interest in the fiscal savings and administrative ease that a summary adjudication provides, the Supreme Court has recognized that matters of cost and efficiency do not control when procedural protections are required but are merely factors to be weighed along with the rest:[265] "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."[266] The fiscal and administrative burdens imposed on the state would depend on the nature of the hearing involved.

Balancing the Factors

The ultimate balance of these factors involves a determination of when judicial type of procedures must be imposed upon adminstrative actions to assure fairness.[267] If the foster child's interest in avoiding an erroneous decision outweighs the state's interest in summary adjudication, procedures will be necessary to protect that interest.

In the balancing context, the foster child's interests should be given the most weight. Since the original removal of the child from his biological family was for the purpose of protecting him and furthering his best interests,[268] any subsequent moves should also meet those criteria. The risk of erroneous decisions is also real, which goes in favor of according procedural protection. As stated previously, the state has an interest in minimizing fiscal and administrative burdens. However, fiscal considerations cannot control the amount of procedures due.[269]

263. See text accompanying notes 271-98 *infra*.

264. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

265. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern of efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972); *accord*, Mathews v. Eldridge, 424 U.S. 319, 348 (1976); Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) (Harlan, J., concurring); Bell v. Burson, 402 U.S. 535, 540-41 (1971); Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

Although cost and efficiency are but two elements in the balance, the Court in *OFFER* seemed to give them overriding weight. *See* discussion note 290 *infra*.

266. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

267. *Id.; see* Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

268. *See* text accompanying notes 9-14 *supra*.

269. *See* cases cited note 265 *supra*.

Thus, the balance must be struck in favor of providing as much procedural protection as is necessary to achieve the proper balance.

The Procedures Due

When procedural due process is applicable, there are two elements that are deemed essential—notice and a hearing appropriate for the nature of the case.[270] In the context of a transfer from one foster home to another or a return to the biological family, due process requires notice be given within a meaningful time to the interested parties[271] of the contemplated removal and of any hearings thereon. In *OFFER*, the statute provided for ten days notice to the foster parents[272] and the Court apparently felt this was sufficient.[273] Due process also requires that any notice contain the reasons for the contemplated removal so that the foster parents can adequately prepare their objections with those reasons in mind.[274] A frequent problem encountered in this respect is that foster parents are given little indication of why the child must be removed.[275] In *OFFER*, for example, one of the foster parents was merely told that it was now in the children's best interests to leave.[276] This sort of notice is of little help to foster parents in preparing relevant information bearing on the child's best interests to present to the appropriate agency.

Because of the nature of the interests at stake, namely, the child's interests in a permanent, stable environment and in being a part of a psychological family, due process requires the hearing to occur before any removal occurs.[277] In *OFFER*, the Court found New York's stat-

270. Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Armstrong v. Manzo, 380 U.S. at 550.

271. The district court in *OFFER* had indicated that interested parties encompassed foster parents, biological parents, and the child or a representative, regardless of whether the move was to another foster home or back to the biological family. *See* 418 F. Supp. at 282, 285. The Supreme Court rejected the notion that the biological family would be an interested party where the move would be to another foster home, reasoning that the biological parents probably would have no information to offer relevant to the situation in the foster home that required the move. 431 U.S. at 851.

272. N.Y. SOC. SERV. LAW § 383(2) (McKinney 1976); N.Y. CODES R. & REGS. tit. 18, § 450.10(a) (1974); *see* 431 U.S. at 829.

273. Although the Court did not specifically discuss the notice element, it did find the procedures as a whole to be adequate. *See* 431 U.S. at 849.

274. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) (welfare recipients must be given "adequate notice detailing the reasons for a proposed termination" so they may prepare for their hearing).

275. For instance, in *OFFER*, one set of foster parents was told only that the children had grown too attached to them. 418 F. Supp. at 280.

276. *Id.*

277. It is, at the least, paradoxical to suggest that a hearing designed to forestall the hasty and ill-advised separation of a foster child from his foster home can occur after

utes and regulations which provide a preremoval conference[278] and a preremoval judicial hearing upon request to those foster parents who had children in their home for eighteen months or longer,[279] were adequate to protect any interests that might be involved.[280] Since the former conference was not a full blown adversarial hearing,[281] it can be inferred that an informal conference that simply gives the foster parents an opportunity to present their views is sufficient to satisfy due process requirements.

Determining in what instances a hearing must be provided, as opposed to at what stage of the controversy, is a more difficult problem. The district court in *OFFER* held that a hearing must be provided as a matter of course in all removals.[282] The court reasoned that since it is the foster child's right to avoid arbitrary dislocations which is at stake,[283] the occurence of a hearing could not be left to depend upon a request by the foster parents. The Supreme Court, however, found the latter scheme sufficient.[284] The Court reasoned that the foster child's only interest is in being a member of a psychological family and if the foster parents make no effort to protest his removal, there is no "psychological family" to protect and therefore no independent interest of the child which requires procedural protection.[285] This rationale, however, ignores the interest of the child in a permanent environment. Even if the child has not grown so attached to his foster parents as to consider them his psychological parents, nevertheless, any removal from familiar surroundings can have a grave impact on the child's psy-

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> that separation has already taken place. We are unpersuaded by defendants' contention that a decision by the hearing examiner to reverse the agency's action and reunite the family effectively restores the status quo. Such a reunion may ameliorate but it cannot eradicate the injury caused by uprooting the child. Indeed, to the degree that implementation of the hearing examiner's decision requires the disruption of arrangements made in the interim, it may further exacerbate the child's sense of loss. It is in the best interests of the child that the risk of such dislocations be avoided or minimized.

Id. at 284. Although the district court's decision was reversed, both that court and the Supreme Court seemed to be in agreement that if a hearing is provided, it must be before the removal occurs; the Supreme Court construed the statutes as allowing such before removal. *See* 431 U.S. at 829-30. The district court, however, had ruled that due process requires such hearings to be held as a matter of course, whereas the Supreme Court held it is sufficient if the hearing is available upon request of the foster parents. *Id.* at 850-51.

278. N.Y. CODES R. & REGS. tit. 18, § 450.10(a) (1974); *see* 431 U.S. at 829.

279. N.Y. SOC. SERV. LAW § 392 (McKinney 1976); *see* 431 U.S. at 831.

280. *See* 431 U.S. at 853-55.

281. *See id.* at 829-30. The foster parents were allowed to appear with counsel, would be given the reasons for removal, and could then submit reasons why the child should not be removed. The official would not make a decision then, but would send notice of the decision to the foster parents within five days. N.Y. CODES R. & REGS. tit. 18, § 450.10 (1974); *see* 431 U.S. at 829-30.

282. 418 F. Supp. at 282, 285.

283. *Id.* at 285.

284. 431 U.S. at 850.

285. *Id.*

chological development.[286] If the purpose of foster care is to protect and nurture the child, then any removals that ignore this negative impact will have the effect of defeating the purposes for which the child was placed in foster care in the first place.

The Court also reasoned that if the foster parents care enough about the foster child, they will always demand a hearing.[287] The Court offered no support for the "logic"[288] of this conclusion, and indeed, it is not a necessary conclusion. It is just as "logical" to argue that when faced with a contract that has already given the state the absolute right to remove the child,[289] and when faced with all the machinery that the state can marshal to back its removal, the foster parents would feel overwhelmed and conclude that it would be useless to fight the decision. Furthermore, the Court's logic ignores the child's right to avoid arbitrary dislocations.[290]

Another important element of procedural due process is the right to be represented by counsel. The procedures in *OFFER* did not mandate counsel for the foster parents but neither did they prevent foster parents from having counsel with them at the conference.[291] Whether counsel for the child would be mandated would depend upon the particular facts of the individual case. If counsel were appointed for the child, his main function would be to ensure that the decisionmaker is presented with all the information necessary for making a determination that protects the child's best interests.[292] However, it would seem that a lay child-advocate could perform this function in place of counsel.

Another procedural safeguard that should be available is the right to a review or appeal from the decision made pursuant to the original hearing. Under New York's procedures at issue in *OFFER*, the foster parents were given the right to appeal the decision made pursuant to the conference and this appeal would provide a full adversarial administrative hearing.[293] Further, this administrative decision would be sub-

286. *See* text & notes 126-41 *supra*.
287. 431 U.S. at 850.
288. *See id.* at 850 n.57.
289. See text & note 89 *supra*.
290. See text & notes 146-52 *supra*. The Court's real concern, however, seemed to be the fiscal and administrative burdens that would be imposed on the state if hearings were required in all cases. The Court noted that between August 1974 and June 1976 there were approximately 2,800 transfers per year in New York City alone. *Id.* at 851. The implications in terms of cost and time were apparent to the Court.
291. 431 U.S. at 829.
292. Fain, *The Role and Responsibility of the Lawyer in Custody Cases*, 1 FAM. L.Q. 36, 40 (Vol. II, No. 3 Sept. 1967); Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108, 120 (1971); *see In re* D., 24 Or. App. 601, 609, 547 P.2d 175, 180 (1976).
293. N.Y. SOC. SERV. LAW § 400 (McKinney 1976); *see* 431 U.S. at 830.

ject to judicial review.[294] These provisions go far in ensuring that any removal will only be the result of careful consideration. The one flaw, however, is that the appeal and judicial review do not automatically stay the removal.[295] This is probably not critical, however, since the court apparently has the discretion to grant a stay.[296]

In summary, the Supreme Court did not specify what the minimal due process requirements would be but only that New York's procedures satisfied at least that minimum. Satisfying that minimum apparently includes the right of foster parents to demand some sort of conference—not necessarily adversarial—to be held before the removal occurs. Any adverse decision should then be appealable for a full adversarial hearing which in turn should be subject to judicial review.

These procedures are quite adequate where the foster parents actively pursue their rights. However, such procedures fail to protect those children whose foster parents for one reason or another do not request a conference. Therefore, in addition to these procedures, there should be some mechanism for actively reviewing the status of all foster children. One possible solution is the establishment of independent citizen review boards with the sole function of reviewing foster care placements on a frequent basis, perhaps every six months, as a means of ensuring that the child welfare agency has a permanent plan for each child which is in fact being followed. South Carolina has had such a plan since 1977,[297] and Arizona just recently adopted a similar proposal.[298] While such a plan would not actually have the effect of providing a hearing for any contemplated transfer, it would hopefully have the effect of making the child welfare agency more accountable for its actions with the result that children would be found permanent homes and thus the need for transfers would be obviated.

CONCLUSION

Foster care is an institution that touches the lives of increasingly large numbers of children. While foster care has done much to provide the child with a substitute living arrangement, it has not always

294. N.Y. CIV. PROC. LAW & R. § 78, *see* 431 U.S. at 830.

295. 431 U.S. at 830.

296. *Id.* at 830 n.27.

297. S.C. CODE ANN. §§ 43-13-10 to 43-13-80 (1977 & Supp. 1977). Section 43-13-20 sets up local review boards for each judicial circuit. Section 43-13-40 states that the review boards must review each child placement every six months to determine what efforts have been made to provide a permanent home and to promote and facilitate the implementation of a permanent disposition if none exists.

298. Ch. 102, § 3, 1978 Ariz. Legis. Serv. 408 (to be codified at ARIZ. REV. STAT. ANN. § 8-515.01-.04). This act provides for foster care review boards with similar functions and powers as those in South Carolina. Independent boards will review each case every six months to determine what efforts have been made for permanent placement of the child and to encourage and facilitate implementation of a permanent plan.

provided the child with the stability and permanence he needs. The impact this impermanence has on the child has ramifications throughout the remainder of his life. The time is ripe for recognizing that the foster child has constitutional rights too—the right to a stable and permanent home and the right to be a member of a family unit. Because the foster parent-child relationship frequently takes on all the psychological dimensions of a conventional biological parent-child relationship, this foster family unit—for the purpose of protecting the child's interests—should be given a constitutional protection analogous to that given the conventional family. The foster child deserves the chance to have a normal and healthy maturation into adulthood.