

Foster Care: The Border of Family Identity Maintaining, (Re)creating, Destroying

Zanita E. Fenton*

INTRODUCTION

This session on foster care, in title, attempts to reflect the postmodern approach to life and legal theory of Mary Joe Frug. Where this title attempts to engage us in a postmodern approach to the subject, the underlying reality of foster care is one that could only be understood as postmodern. Defining family and, in many instances care, is elusive for those who participate in the system of foster care and for the children who are subjected to it. These participants include: the legal parent(s) (natural or adoptive), the foster parents or legal guardians, judges and court administrators, legislators, lawyers, social workers, and the children. In this list, I include children last because that is often the way the system effectively considers them; though the system was created *for* children, it is too often the case it is only *about* them. I also placed children last so that they will stay at the forefront of our conversation. I have not directly identified mothers, either biological or foster, as they are not explicitly considered in the policy objectives of the policy approaches. Though unstated, it is the unfulfilled maternal stereotypes and the vilification of impoverished and minority women that fuels the underlying purpose of the approaches.¹

The purpose of our session was to have a conversation about future directions for policy. There have been roughly two approaches to foster care policy in American history: the "child rescue orientation" and the "family support approach."² I asked conference attendees, and now I ask the

* Associate Professor of Law, Wayne State University Law School; A. B., Princeton University, 1990; J.D., Harvard Law School, 1993.

1. Professor Frug argued that the legal rules are structured to permit and sometimes mandate the "terrorization of the female body," the "maternalization of the female body," and the "sexualization of the female body." Mary Joe Frug, *A Postmodern Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1049-50 (1992). In the specific context of social services, specifically foster care, these three observations most assuredly combine and intensify.

2. Patricia Schene, *Past, Present, and Future Roles of Child Protective Services in Protecting Children from Abuse and Neglect*, in 8 THE FUTURE OF CHILDREN 23, 24

reader, to imagine themselves as members of an advisory board for a foster care facility and to consider the discussions of the speakers/authors as experts on their topics. To ground our policy considerations in some sense of reality, I asked the participants to consider the sample case studies,³ included at the end of this introduction, in their proposals for policy objectives.

In addition to those cases, we also considered the broad topics that affect foster care, such as abuse and neglect, drug use, unemployment, health care needs, and child care issues. Among the solutions explored, in addition to traditional placements, were kinship placements and open adoptions.

BRIEF HISTORY

State intervention for the protection of children is relatively recent in historical terms. During most of the nineteenth century, primarily destitute white children were sent to institutions operated by private charitable institutions or almshouses.⁴ A home specifically for the care of children, the Children's Aid Society, was founded by Charles Loring Brace in New York in 1853. Later, a model of care which is considered to be the precursor to the modern-day child protective services, spread throughout the Northeast and the Midwest.⁵ Between 1920 and 1950, the modern system of child welfare emerged.⁶

Of course, the history of foster care is not unitary because American history includes divergent racial histories. For example, the institution of slavery not only served to maintain black children, but also, in most instances, created the need for their care by dismantling existing families.⁷ Ratification of the 13th Amendment not only ended formal slavery, but

(Spring 1998). Both Susan Mangold and Richard Wexler discuss these approaches in their symposium pieces in this section. See Susan Vivian Mangold, *Transgressing the Border Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System*, 36 NEW ENG. L. REV. 69 (2001) (discussing the approaches as a "tension between parental empowerment/autonomy and child protection"); Richard Wexler, *Take the Child and Run: Tales From Age of AFSA*, 36 NEW ENG. L. REV. 129 (2001) (taking specific issue with the modern manifestation of the "child rescue orientation" exhibited by the Adoption and Safe Families Act).

3. I note that these are only samples and cannot reflect the vast and diverse sets of circumstances of each child, or even the majority of children.

4. See Schene, *supra* note 2, at 25.

5. See *id.*

6. See *id.* at 26-27.

7. This statement easily brings to mind the current welfare system. Perhaps this criticism is harsh, but it should not go unheeded.

also ended indentured servitude as a means of child care for white children. After emancipation, ratification of the 13th Amendment, and Reconstruction, the advent of "Jim Crow" laws prevented the care of black children by formal institutions in white society.⁸ Even upon the dismantling of legal segregation, the children of black families were turned away from services because they were considered "unadoptable,"⁹ and later identified within the "special needs" category of formal institutions.¹⁰ This is not to say that black children did not benefit from foster care, it was just most often informal through extended family networks.¹¹ Race must be included race in the history of foster care because it continues to have an impact on the system and necessarily must be part of policy formation.

SELECTED CURRENT STATISTICS

There are approximately 600,000 children in foster care today.¹² Of these children, approximately 110,000 are waiting to be adopted, with the majority (57%) waiting in foster homes:¹³

By Gender: Male (52%); Female (48%)

8. See JOYCE A. LADNER, *MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES* 67 (1977); see also ANDREW BILLINGSLEY, *BLACK FAMILIES IN WHITE AMERICA* 69-71 (1968).

9. See generally DAWN DAY, *THE ADOPTION OF BLACK CHILDREN: COUNTERACTING INSTITUTIONAL DISCRIMINATION* (1979).

10. Modern definitions of special needs generally include age of the child, race, and mental or physical disability, but differ from state to state. Special needs is broadly defined under the Adoption and Safe Families Act. See 42 U.S.C. §673(c) (2001).

11. See Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39, 42-43 (1993).

12. As of the end of 1998, there were 560,000 children in foster care. See U.S. Dept. of Health and Human Services, Administration for Children and Families, *Children in Foster Care, 1983-1998*, available at <http://www.acf.dhhs.gov/news/stats/fc.htm> (last visited June 11, 2001). The number of children in foster care has consistently gone up since 1983, so 600,000 is an extrapolation from this trend. See *id.*

13. See U.S. Dept. of Health and Human Services, Administration for Children and Families, *Children's Bureau AFCARS REPORT*, available at <http://www.acf.dhhs.gov/programs/cbpublications/afcars/rpt0199/ar0199e.htm> (last visited June 11, 2001) [hereinafter *AFCARS Report*].

14. See *id.*

15. See *id.*

By Race: White (28%); Black (56%); Hispanic (9%); American Indian/Alaskan Native (1%); Asian/Pacific Islander (1%); Unknown/Unable to Determine (5%).¹⁴

The mean age of children removed from their parents was 4.4 years with the median age at 3.3 years. The mean length of time in foster care was thirty-eight months, and the median was thirty months.¹⁵ Of the 124,500 children exiting foster care, 60% were reunited with their families, 13% were placed with other relatives, 12% were adopted and 5% were emancipated.¹⁶ Approximately 37,000 of children in foster care had parents whose parental rights were terminated.¹⁷

CASE STUDIES¹⁸

SAM

When Sam was almost two, his single mother married. A year later she gave birth to Jack. Sam's mother was cool and aloof with him, viewing Sam as a difficult child to parent. She frequently used harsh methods of discipline, such as tying his hands to a chair and leaving him there for several hours. She also belittled him and compared him unfavorably with Jack. Sam's stepfather was more nurturing and developed a relationship with Sam that was satisfying to them both. When Sam was almost five, and Jack two, his stepfather left the family because he could not tolerate his wife's parenting style. He was awarded custody of his son Jack. Sam remained with his mother and did not have any contact with either his stepfather or his brother. Within months, a substantiated report of physical abuse was made against Sam's mother, and Sam was placed in a non-relative foster home. After experiencing three disruptive foster home placements and one disrupted adoption, Sam is currently living with a foster family while he awaits adoption by a new, recently identified family. He is ten years old.

16. See *AFCARS Report*, *supra* note 13. Of the remaining children exiting foster care 2% were the subject of a guardianship, 3% were transferred to another agency, 2% were runaways, less than 1% was due to the death of the child, and 1% was other. See *id.*

17. See *id.*

18. The case studies are based on real foster cases with minor alterations for simplicity. The session used these cases as a point of departure in discussing broad policy objectives. We wanted the participants to be as engaged in the discussions as possible.

CARA

Cara is eleven years old. Cara first came into care three and a half years ago following a fire that left both she and her mother badly burned. Cara's mother suffered a miscarriage, her left arm and breast were amputated, her face was badly disfigured, and she lost her hearing. Over 60% of Cara's body was burned, and both of her legs were amputated below the knee. Following Cara's discharge from the hospital, she was placed in Children's Services foster home. She required the use of a jobst pressure garment, consisting of a face mask, body vest, and sleeves, which she needed to wear twenty-three hours a day. She also required a gel pad under the mask and had splints and prosthetic devices on both legs.

Cara was made a temporary court ward and placed in the home of her paternal grandmother. Her mother remained in the hospital. Her father was arrested following an investigation of the fire and was incarcerated. Cara was then placed in the home of her maternal great-aunt and uncle, where she is currently residing.

Since Cara's placement in foster care, she has had surgery to release the index and small finger on her right hand. Although she continues to wear the jobst garment, she now wears her gloves and mask primarily at night. Her face has healed well. She will continue to require occupational and physical therapy, ongoing medical care and additional surgery and skin grafting. Cara is self-conscious about the loss of her legs, and she has had problems adjusting to her mother's disfiguration.

PETE

Pete is six years old. For the first four years of his life, Pete lived with his mother and two younger brothers. He had no contact with his father. While living with his mother, Pete was not provided with proper clothing or helped to follow through with hygiene. The home was consistently unclean and lacked adequate furnishings or food. His mother had a history of physical and sexual abuse, used crack cocaine and other drugs, and was part of an escort service. The family moved frequently, often with little preparation.

When Pete was four, he and his brothers were removed from his mother's home and placed in separate foster care homes. Permanent custody was recently taken on the two younger children. After one previous placement, Pete was placed in the care of his aunt, who has been very nurturing and supportive of Pete. Pete's mother does not participate in assessments or visitations. Pete's aunt reports that she must constantly monitor him because he does not understand boundaries. He also has few self-care skills. Pete's aunt has been attempting to obtain respite care but has been unable to because of limited funds and resources.

ELLIE

Ellie is two years old. Ellie was removed from her mother's care at birth and placed in foster care. When she was eighteen months old, Ellie received a liver transplant. Two months ago she was placed with a second foster family, consisting of a mother, father, five biological children aged twelve to twenty-two and one adopted child, age ten. All of the biological children are currently living at home. The two eldest of these, aged twenty and twenty-two, neither work nor attend school. The adopted child was sexually abused prior to her arrival in the family two years ago.

The mother has assigned primary care of Ellie to the two oldest daughters. Recently, the oldest daughter reported to her mother that she had stopped giving Ellie her medication "because she seemed to do better without the medication." The foster mother concurred with her daughter, and has reported to the worker that she will not comply with giving Ellie her medication because Ellie's doctor has not made adjustments in the medication dosage as requested by the foster mother.

ROSA

Rosa's mother was the victim of domestic abuse. Rosa's mother was responsible for the childcare and housework. She and her husband argued a lot, and he belittled her mother. He also insisted on sex with her when she had health problems, isolated her from friends, controlled the finances, and would not let her get a job. When the verbal abuse began escalating into physical abuse, she went to a shelter.

Ten months after Rosa's mother left her father, Administrative Services (ADS) charged her with neglect for allowing Rosa to witness domestic abuse: "Respondents constantly argue in the presence of the child, with the child intervening and the child . . . states that she wished her parents would not argue as much." ADS placed Rosa in foster care while the neglect proceedings were pending. Charges were added that the mother "admits to being present when the father would beat the child" and that she "failed to protect the child from being beaten." Her mother says that she only told the social worker that she argued with her husband about spanking Rosa and that he refused to stop hitting the child.

JAMIE AND LINDA

Three year-old Jamie and his two year-old sister, Linda were placed in foster care because their mother's home was not a suitable environment. Social workers said that her home was unhealthy, dirty, and unsafe. Criticism ranged from having three pennies on the floor that the children could choke on to allowing dirt on the rubber seal of the refrigerator door. The report included that the children's bedroom was "cluttered with toys, clothing and other objects strewn about."

Social services first began monitoring the home of the twenty-year-old single mother when Linda's pediatrician reported that Linda was not gaining enough weight. The mother claimed that her daughter was like herself when she was young, smaller than most children. The social worker also stated in the report that there was not enough food in the home. The mother claimed that there was because four nights a week they ate dinner from Carl Junior's restaurant where the children's father worked. Eventually doctors diagnosed Linda's case as "failure to thrive."

The children's mother attempted to follow the social worker's instructions, but continued to clash with him. Their twenty-one-year-old father also requested custody but did not comply with the requests from social workers to become involved with his children. Thus, the children were removed.

Two weeks after the removal, their mother visited the children and noticed that Linda had a large bruise on the side of her face. A social worker told her that the foster mother said Linda fell on a concrete park bench when her brother tried to lift her from a grocery cart. Linda's mother thought the story was unbelievable because three-year-old Jamie is too short to lift Linda out of a cart. She also noted that Linda had no scratches from hitting the concrete.

Linda was taken to the hospital but details about the visit were unclear because the caregivers in the foster home speak mostly Spanish. Linda's mother requested a copy of the medical report, but never got one. Each week Linda's mother complained about a new bruise. She complained for months, but nothing happened. Social workers said that Linda had fallen or hit herself. Her pale skin seemed to bruise easily. Then during one visit with her mother, Linda's eye was nearly swollen shut and her bottom lip was cut. She had several bruises on her face and a red mark on the back of her head. When social workers removed Linda's clothes they found bruises all over her legs. Based on these findings, the children were removed to another foster home.

In the second home, the foster mother said Jamie was too hard to control. He pulled the sheets off the bed and did not follow directions. She wanted him out of her home immediately, but would keep Linda. Jamie was placed in another home a significant distance from where his mother and sister were. The siblings lived apart for two months, during which time they did not see their mother or each other. The children were reunited in a third foster home, and visits with their mother resumed.

During the shuffling, the children's mother worked to regain custody or to place the children with relatives. The sister of the children's father offered to take them, but plans fell through because she lived too far away. Now, the great-grandparents want them and are going through background checks.

JORDAN

It was 2:00 A.M. in a hospital emergency room. To the doctor on duty it was unimportant that the woman needing treatment for sickle cell anemia was an undocumented alien, or that her American-born child was healthy. The doctor admitted them both because the mother urgently needed hospital treatment, and the child had no one else who could take him.

The mother's poverty and recurrent hospitalizations had forced her several times to turn her son over to the foster care system. Getting Jordan back and providing adequately for his care at home was always difficult for her. This was because, as an illegal immigrant, she did not qualify for most government financial and medical assistance. In addition, the assistance her son was entitled to was often not enough, even with Supplemental Security Income for Jordan's learning disabilities and food stamps. Social workers said that the hospital was not a place for Jordan, and within days they charged that the mother's failure to make more suitable arrangements amounted to child neglect.

RANDY

At the age of two days, Randy, the baby of a sixteen-year-old unwed mother, was declared a dependent child and placed in the custody of the state. The child's mother was herself an incorrigible child who had been sexually promiscuous and who currently has no means of supporting herself or her child. The agency administering TANF refuses to approve aid for the child in the mother's home.

The mother wishes to care for her child in the home of her parents. Her father is eighty-years-old and disabled, her mother is seventy-two years old and has previously asked Children's Services to take the baby since she and her husband cannot help take care of it, physically or financially. Randy never lived with his mother prior to his removal.

DISCUSSION

As you read the points of the discussants that follow, please keep the facts of these case studies in mind and also consider the following questions:

1. What services would you recommend for this family?
2. What should be the ultimate case plan?

3. Should the state initiate a proceeding to terminate parental rights?
4. Is this case a good one for kinship care, open adoption, or some other form of care?
5. What additional information do you need to answer these questions?

In addition, the session participants tried to be realistic and mindful of the availability of information and the costs in time, money, and other resources in obtaining information desired for the best assessment of a child's needs.

PARTICIPANTS

The Participants in this session, acting as invited experts for our "mock board meeting," included Elizabeth Bartholet, Tonya Brito, Lynn Girton, Susan Vivian Mangold, and Richard Wexler. Elizabeth Bartholet's¹⁹ discussion of the nature of the current manifestation of foster care, problems faced within the system, and the need to make more foster children available for adoption earlier is described in a comprehensive fashion in her book, *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative*.²⁰ Tonya Brito²¹ focused primarily on progressive alternatives to the system of foster care, such as open adoptions. Lynn Girton²² focused on her experience representing foster parents, the reasons for the foster placements and the difficulties encountered by the foster parents, both in handling the children's needs and in attempting to adopt these children. Susan Mangold²³ discussed two separate issues: the particular problems associated with the use of foster care in cases of

19. Professor of Law, Harvard Law School.

20. ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999).

21. Assistant Professor of Law, University of Wisconsin-Madison Law School; A.B. Barnard College, 1986; J.D. Harvard Law School, 1989.

22. Lynn Girton is Chief Counsel of the Volunteer Lawyers Project of the Boston Bar Association. She was formerly the Senior Managing Attorney of the Employment and Welfare unit of Greater Boston Legal Services. Her current legal work has focused primarily on probate and juvenile issues, with an emphasis on the legal needs of low income children.

23. Associate Professor of Law, University at Buffalo Law School; A.B. Harvard University, 1982; J.D. Harvard Law School, 1987.

spousal abuse and the specific needs of children who "age out" of the foster care system without permanent placement.²⁴ Finally, Richard Wexler²⁵ addressed the problems associated with the overuse of foster care. For example, when existing families are unnecessarily torn apart, usually state costs are greater than that for the services necessary to assist those families.²⁶

FINAL REFLECTIONS

The discussions of the session participants in many ways captured the history of foster care at one moment in time and the respective policy approaches. We discussed the issues confronting foster care at many points on the spectrum, from problems originating with the biological family to those originating with the foster families. We also discussed administrative and resource problems of the agencies and administrators to the emotional/psychological/physical needs of the children subject to the foster system. The range of issues that challenge the foster care system obviates why there have been, and continue to be, differing approaches in policy choices. The most amazing thing about this discussion was that it evolved from the two stated policy approaches clashing, to a recognition that each position may be, both together and independently, recreating and perpetuating the problems they purport to address.²⁷ Once this was acknowledged, it was possible to examine other approaches that either incorporated both positions or ignored both of them in seeking solutions that were workable for the individual child involved.

The information and ideas discussed are only the beginning of the task. Hopefully we can now move forward to find broad solutions, an appropriate policy to assist the child welfare system, and individualized solutions for each child who becomes subject to the system.

24. See Susan Mangold, *Transgressing Borders Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System*, 36 NEW ENG. L. REV. 69 (2001).

25. Executive Director, National Coalition for Child Protection Reform; author of *Wounded Innocents: The Real Victims of the War Against Child Abuse* (Prometheus Books: 1990, 1995).

26. See Richard Wexler, *Take the Child and Run: Tales From the Age of ASFA*, 36 NEW ENG. L. REV. 129 (2001).

27. Deliberately, I state this situation to parallel Professor Frug's description of various feminist scholars in their approaches to difference and equality, culminating in a description of postmodernists who challenge such approaches, "which themselves are likely to recreate and perpetuate the problem of the relationship between sexual difference and equality." Mary Joe Frug, *Sexual Equality and Sexual Difference in American Law*, 26 NEW ENG. L. REV. 665, 665 (1992).