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Adoption: A Plea for Realistic Constitutional Decisionmaking

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Drummond v. Fulton Cty. Dept. of Family, etc.,[1] a recent case involving an unsuccessful attempt by a white couple to adopt a child of "mixed racial ancestry," is the starting point of this article. In *Drummond*, the Fifth Circuit, en banc, rejected constitutional attacks on the child welfare agency's decision denying a white couple's request to adopt a child of "mixed racial ancestry." The court held that race may constitutionally be used as a factor, perhaps as the "decisive factor," in determining who should be allowed to adopt.[2] It also held that the particular child involved in the litigation, who had been in the foster care of the white couple for nearly two years, had no constitutional "right to a stable environment."[3] In effect the court found no authority for ordering the state officials to recognize the particular relationship between the foster parents, in this case a white couple, and the child of mixed racial ancestry as a constitutionally protected child-parent relationship.[4]

Part I of this article demonstrates that *Drummond* is not an isolated case. Rather the decisionmaking in *Drummond* illustrates how the present legal system,[5] including constitutional doctrine, encourages the agency to approach the adoption request in precisely the manner it did. It is the agency's and court's approach to child placement decisionmaking, not their particular handling of the "race" issue, that makes *Drummond* of enduring significance.[6]

Part II urges agencies and courts to reject the *Drummond* analysis as a

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1. 408 F. Supp. 382 (N.D. Ga. 1976), *rev'd*, 547 F.2d 835, *aff'd on rehearing en banc*, 563 F.2d 1200 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978).

2. "But can race be taken into account, perhaps decisively if it is the factor which tips the balance between two potential families, where it is not used automatically? We conclude, as did another court which grappled with the problem, that 'the difficulties inherent in interracial adoption' justify the consideration of 'race as a relevant factor in adoption. . . .' Compos v. McKeithen, 341 F. Supp. 264, 266 (E.D. La. 1972)." 563 F.2d at 1205.

3. 563 F.2d at 1209.

4. *Id.* at 1209.

5. Professor E.F. Roberts' description of a "legal system," although developed in a different context, might profitably be used in this discussion of child placement. He states:

> . . . that by 'legal system' I envisage three complementary phenomena: the law crowd, the law matrix, and the yearning for justice. By the law crowd I mean judges, lawyers, law professors, law review men, legislators, and lobbyists. The sum of the work-oriented activities of these people—that is, the total of their behavioral patterns—constitutes the physical dimensions of the legal system. The law matrix consists of the principles, rules, and canons believed by non-participants and by 'C' students to constitute 'law.' Justice, at least in our society, is the notion that the law crowd applying the law matrix to a dispute or problem ought to come up with a 'just decision,' which really means that the non-participants feel that in the long run the 'good guys' ought to triumph over the 'bad guys.'

Roberts, *Preliminary Notes Toward A Study of Judicial Notice*, 52 CORNELL L. Q. 210, 211 (1967).

6. *See* text accompanying notes 102-144 *infra*.

method for resolving fundamental conflicts within the adoption process. On its face, *Drummond's* balancing approach to racial considerations in adoption overplays the significance of "race" to the detriment of the child's interest in continuing his relationship to his foster parents. Implicitly, the *Drummond* court's analysis allows the state agency to act as substitute parent to the child under the guise of furthering his "best interests." Moreover, the court's opinion ignores the significance of foster care decisionmaking in the child's life and the child's chances of being adopted by another family.

Part III offers an alternative method for evaluating child placement decisions in adoption cases. This method requires courts to see the connection between foster care and adoption. To do so, a court must interpret the relevance of the recent United States Supreme Court precedents regarding family life. *Drummond* misinterpreted the only Supreme Court case dealing with the constitutional perimeters of foster care decisionmaking.[7] More importantly, neither the litigants nor the court in *Drummond* discussed the relevance of the Supreme Court's recent decision limiting the state's power to define "family."[8] This article proposes a constitutional theory based on an interpretation of these recent cases that protects the rights of the child in the adoption process. The major implication of the proposed theory is that constitutional analysis should consider the interests of the adults, the child, and the state as three distinct and potentially conflicting interests or "rights."[9]

Part IV acknowledges that acceptance of the proposed constitutional theory would require us to abandon a sacred cow of present day child placement decisionmaking: the presumption that the state is competent to act as parent to children. This presumption has confused child placement decisionmaking and could be eliminated if courts and legislatures used the proposed theory as a guideline for reforming present child placement laws. In adopting a perspective that focuses on the needs of the child, courts and legislatures should refrain from concentrating on the so called "best interests" of the child in the long run. Instead the goal of law should be to seek to avoid greater immediate harm to a child who is already in crisis because of the intervention of law into his or her life. With this short range goal in mind, the problem of transracial adoption and its proposed solutions appear in a new light. In particular, the attempts by agencies and courts to match black children with black adoptive parents seem misguided.

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7. Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816 (1977).

8. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

9. *See* Burt, *Developing Constitutional Rights Of, In, And For Children*, 39 L. & CONTEMP. PROB. 118 (Summer 1975).

I. THE LIFE OF A FOSTER CHILD

A. *The Facts of* Drummond

The child involved in the litigation in *Drummond*, Timmy, was born to a white mother on November 17, 1973. Since the mother was unmarried, state law assigned the child to her,[10] and without any action on her part, Timmy was labelled "an illegitimate child."[11]

Legal intervention into Timmy's life took a more active and complex form one month after his birth. The state agency removed Timmy from the home of his biological mother because of her "unfitness."[12] This initial removal set in motion a number of legal and social consequences for Timmy.[13] The most significant of these consequences is that legal custody remained in Timmy's mother, while the legal right to care for Timmy was lodged in the agency.[14] This legal right to Timmy's actual daily care was delegated immediately to the Drummonds who were assigned to be his foster care parents.[15] That Mrs. Drummond was 50 years old and Mr. Drum-

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10. "The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him as before provided. Being the only recognized parent, she may exercise all the paternal power." GA. CODE ANN. § 74-203 (1973).

11. "An illegitimate child, or bastard, is a child born out of wedlock, and whose parents do not subsequently intermarry, or a child the issue of adulterous intercourse of the wife during wedlock, or a child who is not legitimate within the meaning of section 74-101." GA. CODE ANN. § 74-201 (1973).

Although the purposes of this "illegitimate" label in the modern context are unclear, there is no doubt that the initial assignment of Timmy to his biological mother and the definition of his legal status are products of conscious lawmaking. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977). *See also*, GA. CODE ANN. §§ 74-204 & 74-205, and, Brinkley v. Dixie Const. Co., 205 Ga. 415, 54 S.E.2d 267 (1949) (for a construction of Georgia's statutory prohibition against judicial discrimination on the basis of illegitimate birth).

12. 547 F.2d 835 at 837. "Unfitness" is not a statutory basis for removal in Georgia. "A parent may lose the right to custody only if one of the conditions specified in Code §§ 74-108, 74-109, and 74-110 is found to exist, or, in exceptional cases, if the parent is found to be unfit." Bowman v. Bowman, 234 Ga. 348, 349, 216 S.E.2d 103, 104 (1975). The record does not indicate what particular incident brought Timmy to the agency's attention.

13. From this point on, law assumed a proactive rather than reactive role. Professor Donald J. Black has described the distinction between "proactive" and "reactive" functioning in the following terms:

> A case can enter a legal system from two possible directions. A citizen may set the legal process in motion by bringing a complaint; or the state may initiate a complaint upon its own authority, with no participation of a citizen complainant. In the first sequence a legal agency reacts to a citizen, so we refer to it as a *reactive* mobilization process. In the second sequence, where a legal official acts with no prompting from a citizen we may speak of a *proactive* mobilization process.

Black, *The Mobilization of Law*, 2 J. LEGAL STUD. 125, 128 (1973).

14. *See generally*, Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROB. 226, 240-245, (Summer 1975) [hereinafter cited as Mnookin I].

15. 547 F.2d at 837.

mond was 38 years old was of little significance since foster parents are usually somewhat older than adoptive or biological parents.

There is no indication that race played any part in the placement with the Drummonds.[16] Timmy's appearance at one month was such that adults in a racially conscious city such as Atlanta did not notice his "mixed racial ancestry."[17] The agency officials assumed Timmy was white. At this stage the agency officials were simply trying to find a place for Timmy, and the Drummonds were available.

From the agency's perspective, very little happened during the first year of Timmy's life other than an occasional home visit by a caseworker and payments to the Drummonds.[18] But from the Drummonds' perspective, something very dramatic must have happened. By the time Timmy was a year old, the Drummonds, a childless couple, had communicated to their current foster care caseworker their desire to adopt Timmy. This caseworker brought the Drummonds' adoption request to the attention of her supervisor, at a "staffing"[19] or conference of agency personnel. From this

16. The Drummonds never signed a foster care ageement in which foster parents promise not to attempt to adopt the child and to surrender the child upon demand. 563 F.2d at 1203. No one involved in the litigation thought that this deviation from standard practice was significant.

The lack of a standard foster care contract does have some implications for understanding the subsequent events. We could assume the Drummonds avoided signing the agreement for benevolent reasons. In contrast to some of their fellow foster parents, who might accept children in their homes to obtain the additional economic resources, the Drummonds might have become foster parents because they wanted to meet the needs of a parentless child. As a result the legal formality of fee, terms, conditions, and options to modify the contract were of little importance to the Drummonds. Under this assumption, we would view their subsequent expression of a desire to adopt Timmy as a manifestation of the growth of parental feelings generated by Timmy's presence. Since the Drummonds had not signed the standard foster care contract, we could view the subsequent loss of Timmy through litigation as a grave deprivation of "liberty" or "property" without adequate notice. Portions of the records support this assumption of benevolence and the accompanying line of reasoning.

On the other hand, we might assume the Drummonds set out initially to subvert and manipulate the foster care system to meet their own goal—adoption. The Drummonds had been foster parents to another foster child before Timmy so it can be assumed they knew the standard foster care practices and policies. By not signing the standard foster care agreement, the Drummonds may have been planning to attempt adoption in contravention of several state welfare policies, since the ages of the Drummonds at the time of the staffing, 51 and 39, probably made them ineligible for adoption of an infant or young child. Under this assumption, the Drummonds were using the foster care system to openly achieve what would otherwise have been a "black market" adoption, and the result of the litigation in *Drummond* would be viewed as preventing some adults, otherwise unsuited to be adoptive parents, from manipulating the adoption process.

Neither assumption changes the analysis offered in this article.

17. Petitioner's Brief for Certiorari at 6, Drummond v. Fulton Cty. Dept. of Family, etc., in the Supreme Court of the United States, No. 76-180 (1977).

18. GA. CODE ANN. § 74-423 (1973). 547 F.2d at 837.

19. 547 F.2d at 837. None of the people attending the staffing in late 1974 had ever seen Timmy or the Drummonds.

point on, late in 1974, race would be considered by the agency when making decisions about Timmy's future.

At the staffing, Ms. Grape, the foster care supervisor, indicated that the Drummonds' adoption of Timmy was not a "good plan" because of the racial differences.[20] After a meeting between Ms. Grape and the Drummonds in March, 1975, at which these racial differences were discussed,[21] Ms. Grape informed the Drummonds by letter that they would not be allowed to adopt Timmy. Despite this letter, towards the end of the summer, the Drummonds made new efforts to adopt Timmy.[22] After submission of their request, the agency took steps to terminate all the parental rights of Timmy's biological parents.[23] The renewed request of the Drummonds was formally considered in November, 1975 by the agency staff. Although an adoption caseworker had recommended that the Drummonds be allowed to adopt Timmy,[24] another staffing, consisting of nineteen persons, denied the request just before Timmy's second birthday.[25] The Drummonds were told by an agency official that it was still the agency's position that Timmy would be better off being adopted by a black family.[26]

In January, 1976, the Drummonds filed a complaint against the Fulton County Department of Family & Children's Service in the federal district court.[27] In their federal lawsuit they sought three remedies: a preliminary injunction preventing the agency from removing Timmy from their home; an order appointing a guardian for Timmy to represent his interests; and finally, an adjudication that the agency's denial of their request for adoption was unconstitutional because of the impermissible use of race in that decision.[28] Nine days after the filing of the complaint, the district court dismissed the complaint, and dissolved the preliminary restraining order it had entered, on the ground that the agency's action had been constitutional.[29]

At the same time the Drummonds filed a lawsuit in the state trial court seeking the same relief plus an additional remedy—an order compelling the

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20. *Id.* at 838.

21. *Id.* at 839. *See, e.g.,* Green v. City of New Orleans, 88 So.2d 76 (La. App. 1956), (a court's struggle with the racial designation of a child with a white and unknown father).

22. *Id.* at 841.

23. *Id.* at 845.

24. *Id.* at 846.

25. Ms. Payne had stated in her report that "This certainly is too risky a situation for any one person to make the decision alone." *Id.* at 846.

26. *Id.*

27. Drummond v. Fulton Cty. Dept. of Family and Children's Services, 408 F. Supp. 382 (N.D. Ga. 1976).

28. Although not reported in the District Court's opinion, this request is adverted to in Petitioner's Brief for a Writ of Certiorari at 7, Drummond v. Fulton Cty. Dept. of Family, etc., In the Supreme Court of the United States, No. 77-1381 (1977).

29. 408 F. Supp. at 383.

agency to consent to Timmy's adoption by the Drummonds.[30] The state court also dismissed the complaint, largely on the ground that the Drummonds lacked standing to challenge the agency's decision.[31]

While the Drummonds appealed both dismissals, Timmy was removed by the agency from their home in May, 1976. Timmy's actual placement after he left the Drummonds is not known. He was apparently placed in the home of a couple of "mixed racial ancestry," for the purpose of adoption.[32] This placement seemed to be unsuccessful. Timmy was later placed in his third foster home for the purpose of adoption. This family was described as "a young . . . . professional, mixed race couple who will adopt him if permitted by the courts."[33]

As for the Drummonds' appeal, the state supreme court upheld the state trial court dismissal in September, 1976.[34] A panel of the Fifth Circuit Court of Appeals reversed the district court's dismissal in February, 1977.[35] The appeals court instructed the trial judge to order the agency to hold a hearing where both Timmy and the Drummonds could receive constitutionally adequate opportunity to be heard on Timmy's adoption.[36] To insure that Timmy's rights were adequately represented the appeals court felt it necessary to appoint an attorney to represent Timmy. The court however denied the motions of the lawyer it had appointed to represent Timmy to issue a writ of habeas corpus and to hold the agency officials in contempt for not allowing him to have access to Timmy.[37]

Before the district court received the mandate of the court of appeals panel, the full court of appeals voted to hear the case en banc.[38] In November, 1977 the court of appeals reversed the initial decision of the panel.[39] Both the Drummonds' and Timmy's lawyers filed petitions for certiorari to the United States Supreme Court. In June, 1978, both petitions were denied.[40]

While the litigation concerning Timmy has ended, at least, for the pres-

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30. Drummond et al. v. Fulton Cty. Dept. of Family, etc., 237 Ga. 449, 228 S.E.2d 839, 841 (1976), *cert. denied*, 432 U.S. 905 (1977), *reh. denied*, 434 U.S. 881 (1977).

31. 237 Ga. at 450, 228 S.E.2d at 842.

32. Conversation with Timmy's counsel, Alan R. Turem, who stated that this fact was asserted by counsel for Respondent at oral argument before the 5th Circuit Court of Appeals.

33. Respondent's Brief on Petition for a Writ of Certiorari at 4, Drummond v. Fulton Cty. Dept. of Family, etc., In the Supreme Court of the United States, No. 77-1381 (1977). It is an open question whether, had the Drummonds not sought to adopt Timmy, the agency would have initiated such a placement.

34. 237 Ga. 449, 228 S.E.2d 839 (1976).

35. 547 F.2d 835 (5th Cir. 1977).

36. *Id.* at 847.

37. *Id.* at 857.

38. *Id.* at 861.

39. 563 F.2d 1200 (5th Cir. 1977).

40. 46 U.S.L.W. 3777 (1978).

ent,[41] it is worth recalling what we know, and do not know about his case. First, we do not know, nor will we ever know Timmy's particular fate. Whether he was adopted, and if so by whom, are questions that the present legal system does not make a matter of record, even after two and a half years of protracted litigation. Whether Timmy will enter the mass of "unadoptable" and "older" minority children in foster care is also unknown.[42] We do know, however, that Timmy has spent nearly the entirety of his five years in limbo, as the law has sought to define or untangle his relationship to various adults. This legal limbo is a function of the contemporary analysis of child placement. We also know that his entanglement with legal authority began long before the issue of his adoption was brought to the attention of the courts. And finally, we know that his fate was resolved by courts without the lawyer appointed to represent him ever having access to him or agency materials about him.[43]

B. *The Legal Context of Agency Actions in* Drummond

Judges and child welfare officials use various concepts to structure their decisions that affect a child's adoption. While the origins of these concepts are quite diverse, some of these concepts are inherent in the existing legal analysis of child placement decisions. *Drummond* itself illustrates three of these concepts. These concepts are that the interests of the biological parents are constitutionally protected and preferred; that the adult in the parent-child relationship that is nonbiological has no interest in the child of constitutional significance; and finally that it is appropriate for a court to use the substitute judgment theory when making legal decisions involving child care and adoption.

1. *The Parental Rights of Biological Parents are Constitutionally Protected.*

The statutory scheme establishing foster care is premised on the proposition that biological parents have rights in their children.[44] These "rights"

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41. Although the Fulton County Dept. of Family and Children's Services had stated that Timmy had been placed with a potential adoptive family, *supra* note 33, there was evidence that at least one such placement had already failed, *supra* note 32. Absent a permanent placement, there may well be further litigation over Timmy's custody. It is also hard to assess the long-term effects of the disruptions of Timmy's family relationships within his first five years. It is possible that this disruption will lead to further contact between Timmy and the legal system; *see,* GOLDSTEIN, FREUD, & SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 32-34 (1973) and, Burt, *supra* note 9, at 270-272.

42. *See* note 41 *supra* and Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599, 610-13 (1973) [hereinafter cited as Mnookin II].

43. Timmy's counsel's motion that the court hold the defendants in contempt for failure to make the child available to him was denied. 547 F.2d at 857. *See, also,* text, *infra*, accompanying note 75.

44. 237 Ga. at 455, n.4, 228 S.E.2d at 845, n.4.

reflect a postulate of current constitutional doctrine that biological parents have "fundamental rights" in their offspring.[45] One result of this ideology of parental rights was that Timmy's stay in foster care was thought of as temporary custodial care pending his return to his biological parents. Or put another way, the constitutional rights of biological parents are so paramount in foster care decisionmaking that neither judges nor agency officials were concerned with the relationship formed between Timmy and his foster parents and the "rights" of Timmy affected by their decisions.

Another consequence of this property-like notion of parental rights in children was that Timmy's mother was entitled to a formal court hearing before her legal status as his parent could be eliminated.[46] The hearing was required by constitutional doctrine even though there is no indication in the *Drummond* record that she had had any contact with Timmy for nearly two years. Had Timmy's biological father suddenly appeared, some commentators interpret constitutional doctrine as granting him a right to a hearing[47] and a greater claim to custody of Timmy than any other person other than his biological mother.[48] Thus, in *Drummond*, the agency officials informed the Drummonds that "termination" of Timmy's mother's parental rights was a prerequisite to any consideration of his adoption.[49]

At the very least the perception that Timmy's biological parents' interests are constitutionally protected encouraged the agency to act deliberately and slowly vis-a-vis termination of those interests. From the agency's perspective, a temporary foster care system could be said to be a necessary device for preserving the constitutional sanctity of the biological family.[50]

2. *Foster Parents Have no Constitutionally Protected Parental Rights.*

The child welfare agency's formal approach to terminating Timmy's biological mother's interest stands in stark contrast to their informal approach to the requests of his foster parents, the Drummonds. The decisions regarding the Drummonds' adoption of Timmy were made at a staffing, the authority of which is undefined and at which the Drummonds were not present. The explanation for this state of affairs is simple: the Drummonds were

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45. *See, e.g.*, cases cited at notes 209-11 *infra*.

46. *See* Stanley v. Illinois, 405 U.S. 645 (1972).

47. *See* Schafrick, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 7 FAM. L.Q. 75, 87 (1973). *See also*, GA. CODE ANN. § 24A-3202(b) "Proceeding for Termination of Parental Rights"; Quilloin v. Walcott, 434 U.S. 246 (1978).

48. *See* Quilloin v. Walcott, *supra* note 47.

49. 547 F.2d at 842.

50. *Cf.* Smith v. Organization of Foster Families for Equality Reform, 431 U.S. 816, 856-7 (Justice Stewart, concurring in the judgment), ("[F]oster care is intended only as a temporary way station until a child can be returned to his natural parents or placed for adoption . . . . [T]he New York Court of Appeals has '[p]articularly rejected the notion, if that it be, that third-party custodians may acquire some sort of squatters' rights in another's child'.").

considered to have no "rights" under the Constitution in Timmy, in contrast to his biological parents.[51] As to the Drummonds' interests as applicants to be Timmy's adoptive parents, the Georgia Supreme Court held that the Drummonds even lacked standing to contest the agency denial of their request in a court.[52]

Under this view of parent-child relationships, the *Drummond* majority stated the goal of adoptions as follows: ". . . to duplicate the relationship that most persons have with their natural parents during their entire lives."[53] Implicit in this statement is the idea that biological parenthood is a constitutionally preferred mode of parenthood. This legal view, in turn, carries with it subtle and largely unconscious influence on agency adoption decisions: the agency understandably perceives its duty as trying to match children with adoptive families of the same racial background.[54]

3. *A Child's Legal Interests are Defined by the Doctrine of "Substitute Judgment."*

Traditionally, our basic approach to legal controversies involving children has been to use the doctrine of "substitute judgment."[55] Using this approach, an adult decisionmaker should make child placement decisions by reference to what he perceives to be the child's best interests rather than by reference to what he perceives to be the child's wishes or desires. Despite numerous attacks on the doctrine of substitute judgment as a theory of child placement decisionmaking by commentators,[56] courts, legislatures, and

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51. 563 F.2d at 1207.

52. 237 Ga. at 454, 228 S.E.2d at 844.

53. 563 F.2d at 1206.

54. "All Negroes, mulattoes, mestizos, and their descendants, having any ascertainable trace of either Negro or African, West Indian or Asiatic Indian blood in their veins, and all descendants of any person having either Negro or African, West Indian, or Asiatic Indian blood in his or her veins, shall be known in this State as persons of color," GA. CODE ANN. § 79-103 (1973) (repealed 1979).

55. This term has been used recently by courts considering the propriety of withholding medical treatment from an "incompetent", *see* Superintendent of Belchertown v. Saikewicz, 77 Mass. Adv. Sh. 2461, 370 N.E.2d 417, 431-32 (1977), and ordering medical treatment for a child against its parent's wishes, *see* Custody of a Minor, 78 Mass. Adv. Sh. 2002, 379 N.E.2d 1053 (Mass. 1978). Commentators have criticized the substitute judgment doctrine on the grounds that it allows courts to purport to rely on the wishes of a party who is not present, or is unable to express their wishes, without recognizing that the court infuses its perception of the party's wishes with its own ambivalence and anxiety. Burt, *The Limits of Law and Regulating Health Care Decisions*, 7 THE HASTINGS CENTER REPORT 29, 32 (December 1977). Others have noted that while courts are willing to supervise parental judgment to the extent of disregarding parental autonomy in child medical treatment decisions, the state rarely accepts the responsibility for nurturing the children it "saves". Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L. J. 645, (1977).

56. *See* Burt, *supra* note 9, at 143; Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L. J. 887 (1975); Wald,

child welfare agencies continue to use the doctrine in defining a child's legal interests. We should not be surprised that agency officials in *Drummond* justified their rejection of the Drummonds in terms of doing what was in Timmy's "long range best interest."[57] Thus in the agency's view, Timmy had to suffer the immediate psychological harm of separation from the Drummonds to avoid the future social and psychological harms of being a child of an interracial family.[58] Even if Timmy wanted in his childlike way to live with the Drummonds, the agency treated this desire, however expressed, as incompetent and uninformed.

The Georgia Supreme Court gave practical effect to the theory of substitute judgment by declaring that Timmy was not even a party to the lawsuit.[59] Under this theory the agency, and perhaps the adults involved in the litigation, could protect Timmy's interests, but he clearly had no cognizable legal rights that a court need recognize or enforce.[60] The agency's action in *Drummond* was affirmatively sanctioned since the agency, as "substitute parent"[61] was under a moral and legal obligation to do what it thought to be in Timmy's best interests.

Constitutional litigation[62] and changing patterns in American family life have raised serious questions about the appropriateness of substitute judgment as a means of defining a child's legal rights in all circumstances. The initial panel opinion in *Drummond* at least recognized that Timmy might have interests independent of those of the Drummonds or the agency which might be judicially recognized.[63] As a result, the court of appeals, in accordance with the practice in other federal litigation over child placement[64] appointed a lawyer to represent Timmy's interests.[65] Even so, in the en banc opinion, Timmy's interests were considered secondary to those of the Drummonds and the agency.[66] Ultimately, the Fifth Circuit derived

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State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 STANFORD L. REV. 985 (1975).

57. 547 F.2d at 847.

58. This view is echoed in Judge Roney's opinion for the en banc opinion: "[T]he State's motive in interrupting Timmy's environment at any point was always to move him to a place which it considered superior, over the long range, for his particular needs at the time." 563 F.2d at 1209.

59. 237 Ga. at 455, 228 S.E.2d at 844.

60. *See* note 55 *supra*.

61. *See generally*, Burt, *supra* note 9.

62. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); In Re Gault, 387 U.S. 1 (1967); Parham v. J.L., 412 F. Supp. 112 (M.D.Ga. 1976), *rev'd*, U.S. Sup. Ct., No. 75-1690, 47 U.S.L.W. 4740 (June 20, 1979).

63. 547 F.2d at 856.

64. *See* Organization of Foster Families for Equality and Reform v. Dumpson, 418 F. Supp. 277 (S.D.N.Y. 1976), and Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976).

65. 532 F.2d 1001 (1976) (*pursuant to* FED. R. CIV. P. 24(a)).

66. *E.g.*, 563 F.2d at 1208, and *see* text accompanying notes 151-55, *infra*.

from its analysis of the Drummonds' rights its holding that Timmy had no constitutional rights that were violated.[67] This constitutional holding was made by a court which did not have the benefit of Timmy's lawyer's participation in the proceedings below.[68]

Despite this federal practice and commentators' support for independent party status for the child,[69] there has been very little discussion of the ramifications of party status for the child in judicial opinions. Not surprisingly, the judges in *Drummond* referred to Timmy's "rights" in terms of an idealized view of a proper American childhood.[70] There was no recognition that the intervention of law into Timmy's life required an articulation of his legal interests.[71]

Without a general theory of a child's legal rights, there was no definition of the role of the child's lawyer. Although Timmy's lawyer might have looked to commentators for guidelines on litigation strategy in this situation few, if any, commentators offer any explicit alternatives to the substitute judgment doctrine. The lawyer might have analyzed the litigation as an attempt by the state agency to exercise its "child protection function," an approach that has support among some commentators.[72] Using this analysis Timmy's lawyer would have argued that the agency underestimated the harm of removal in trying to protect the child. Under this theory Timmy's lawyer should have been motivated to join forces with the Drummonds' lawyer to prevent the removal. Adopting this role also would have put Timmy's advocate in the morally comfortable position of arguing that a racially-motivated denial of the adoption by the Drummonds was incorrect.[73]

But assuming Timmy's lawyer adopted this analytical framework, it did not provide continual guidance during the *Drummond* litigation.[74] Once a child has been moved to another family, there is no analysis that aids the child's lawyer in defining a position independent from adults involved in the case. In *Drummond*, Timmy's lawyer had no opportunity to define the issues as tripartite ones among Timmy, the Drummonds, and the agency,

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67. 563 F.2d at 1209, *and see*, text accompanying notes 139-41, *infra*.

68. Timmy's counsel was appointed on May 16, 1976, three months after the district court had dismissed the Drummonds' complaint. 532 F.2d 1001 (5th Cir. 1976).

69. *Cf.* GOLDSTEIN, *supra* note 41, at 65-67; Mnookin I, *supra* note 14, at 254-55.

70. *See, e.g.*, text accompanying note 53, *supra*.

71. Drummond v. Fulton County Dept. of Family Etc., 563 F.2d 1200 (1977).

72. *See* Mnookin I, *supra* note 14, at 229.

73. Petitioner's Brief for a Writ of Certiorari at 20, Timmy Lee Hill v. Fulton Cty. Dept. of Family, etc., In the Supreme Court of the United States, No. 77-6454 (1977).

74. *See* Mnookin I, *supra* note 14, at 254. *Cf.* Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L. J. 1126 (1978). (Lawyers representing children in divorce/child custody disputes have expressed confusion and the need for more guidance in their role, emphasizing its complex and shifting nature).

since Timmy's lawyer never had an opportunity to see Timmy or the agency's files on Timmy.[75]

Thus the legal context into which Timmy was born had certain constitutional perimeters that permitted or encouraged the agency to react or not to react in certain ways. First, the concept that the Constitution protects biological parenthood encouraged deliberate agency action toward legal dissolution of Timmy's relationship to his biological mother. The sanctity of biological parenthood also encouraged the agency practice of matching children to parents of the same race.[76] Second, any adult's relationship to Timmy not based on biology was seen as only a creation of positive law rather than as "fundamental" or constitutional in its nature. As a result, the agency used informal proceedings in denying the Drummonds' request to adopt Timmy. The Fifth Circuit opinion in *Drummond* has given constitutional sanction to this informal approach to potential adoptive parents' interests by state child welfare agencies. Third, Timmy's "rights" as a child were defined in terms of substitute judgment by adults or the agency even though we know that children are not to be viewed as chattels or parental property, but as "persons" within the fourteenth amendment.[77] As a result of this definition of Timmy's rights in terms of others' legal interests, his lawyer's role was not defined. As the next section illustrates, the cumulative effects of these concepts were to establish child welfare agency discretion as a constitutional theory of adoption.

II. THE CONSTITUTIONAL THEORY OF *DRUMMOND:* IN THE BEST INTERESTS OF THE CHILD WELFARE AGENCY

The constitutional theory of *Drummond* consists of a combination of the majority opinion in the en banc case, *Drummond II*,[78] and the dissenting opinion in the initial panel decision, *Drummond I*.[79] Both of these opinions, written by Judge Roney, are connected because the majority in *Drummond II* explicitly adopted the reasoning of the dissent in *Drummond I*. The constitutional theory of the majority in *Drummond II* is, however, more than the analysis of the dissent in *Drummond I*. During the eight month interval between *Drummond I* and *II*, the United States Supreme Court handed down its decision upholding the constitutionality of the system for removing children from foster care homes in New York, *Smith v. Organiza-*

75. *See* note 68 *supra*.

76. *See* text accompanying notes 134-38 *infra*.

77. *See* Organization of Foster Families for Equality and Reform v. Dumpson, 418 F. Supp. 277, 282 (1976), *accord*, Roe v. Wade, 410 U.S. 113, 156-8 (1973).

78. 563 F.2d at 1203.

79. 547 F.2d at 857.

tion of Foster Families for Equality and Reform.[80] The majority's discussion in *Drummond II* integrates this Supreme Court precedent on foster care decisionmaking into the analysis set forth in the *Drummond I* dissent. Thus, to discover the *Drummond II* majority's theory of the decisionmaking authority of courts, child welfare agencies, adults and children in structuring relationships between children and parents of all kinds, we must analyze all three opinions.

A. *Judge Roney's Theory in* Drummond I

Judge Roney's dissenting opinion in *Drummond I* defined the issue presented by the case in terms of the authority of the child welfare agency to make decisions regarding adoption. He asks: "may a state agency, charged with the responsibility of placing for adoption a child in its legal custody, take into consideration the race of the child and the race of the prospective adoptive parent without violating the Constitution of the United States?"[81] Judge Roney's characterization of the issue as racial is a perspective that led him directly to a case promulgating a constitutional doctrine on interracial adoptions.[82] That constitutional doctrine invalidated on equal protection grounds any statute prohibiting interracial adoption.[83] In this case the court was not confronted with a statute prohibiting interracial adoptions. In Judge Roney's view the record did not even support a finding that the agency had adopted a policy denying interracial adoptions. Rather the question was whether the agency, in the "exercise of its own discretionary concepts of successful child placement,"[84] could constitutionally consider the race of the child and the race of the adoptive parents as an important factor in adoption decisionmaking.

By framing the issue in terms of the agency's discretionary authority, Judge Roney misconstrued what the Drummonds were seeking both substantively and procedurally. Substantively, the Drummonds attacked the district court's conception of the case. The Drummonds were not complaining about a general agency policy regarding interracial adoption. Since everyone admitted race was a factor in the decision to deny adoption, the Drummonds were asking the court of appeals to establish a constitutional rule of how much consideration race could be given in an individual case. The gravamen of their argument was that the agency went too far in this regard: they had been rejected as adoptive parents because of their race without any additional inquiry into their suitability to be Timmy's parents. As factual support for their theory, the Drummonds were asking the court to find

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80. 431 U.S. 816 (1977) [hereinafter cited as *OFFER*].
81. 547 F.2d at 857.
82. Compos v. McKeithen, 341 F. Supp. 264 (E.D.La. 1972).
83. *Id.*
84. 547 F.2d at 858.

that a decision not to allow their adoption of Timmy had been made even before the March 10, 1975 meeting. The Drummonds' status as foster parents was significant to their proposed constitutional theory since everyone admitted they had been extremely successful foster parents. The Drummonds also believed the court should decide the case in their favor without formulating a new constitutional rule distinguishing their case, where there had been two years of day-to-day involvement with the prospective adoptive child, from those cases in which prospective applicants sought to adopt children with whom they had had no previous contact.

Because of the lack of procedures in the agency's decisionmaking, the Drummonds argued that the district court could not determine what the agency policies were regarding adoption in general or the adoption of Timmy in particular and therefore could not tell whether race was used in an unconstitutional manner vis-a-vis the adoption. This lack of procedure was the basis of the Drummonds' procedural due process claim. The general policy of the agency as demonstrated in the standard foster care contract would indicate that the Drummonds would not even be considered as adoptive parents.[85] Yet, their request to adopt Timmy was finally considered in November, 1975,[86] despite a possible argument that the agency had told them they would not be considered in March, 1975 because of their race.[87] In point of fact, unintentional and intentional miscommunication regarding Timmy's adoption was present throughout the agency's relationship with the Drummonds.[88] In asking for a reversal of the dismissal, the Drummonds were asking the court of appeals to establish a constitutional procedure for adoption decisionmaking that would enable a court to determine if their race or their suitability as Timmy's adoptive parents was the basis of the agency's decision.[89]

Having framed the issue in terms of agency discretionary powers, Judge Roney quickly disposed of the Drummonds' substantive due process claim. He found the Drummonds' "liberty interest" in adopting Timmy to be nonexistent.[90] Judge Roney reasoned that if the Drummonds had a liberty interest in choosing an adoptive child, Timmy must also have a liberty interest in "choosing the best suitable parents."[91] But since Timmy could not choose, the agency as his legal custodian had to choose his adoptive parents for him: "Because an infant is incapable of exercising that right for

85. 563 F.2d at 1203.
86. 547 F.2d at 846.
87. *Id.* at 839.
88. *E.g.*, Memo from Mrs. Dallinger to Miss Mollie Barlett (Aug. 1975): "I personally feel that the Drummonds are back into their earlier denial pattern. The approach I recommend for you is to stall with no encouragement." 547 F.2d at 841.
89. 547 F.2d at 849.
90. *Id.* at 858.
91. *Id.*

himself, however, under Georgia law either the parents who voluntarily give up a child for adoption or the *agency given legal custody of a child must exercise the right for him.*" (emphasis added)[92]

The Drummonds relied upon an equal protection theory in their claim that a hearing should have been granted where the impermissible factor of race may have been used. Since Judge Roney believed in the constitutional permissibility of the use of race in agency adoption decisionmaking he gave their equal protection argument very limited treatment.[93] Judge Roney did not discuss whether the use of race required the court to use "strict scrutiny" before validating the agency's decision.[94] Instead, he reduced the issue of race into one of factual interpretation of what the agency did: "This record reflects nothing more than a large number of agency and social workers with unquestioned credentials endeavoring to find a permanent family home for Timmy that would be best for him for the rest of his life."[95] The Drummonds' reliance on their two year status as foster parents as legally distinguishing their case from other cases did not alter Judge Roney's general view since state law did not create any legal interest in foster parents.[96] In concluding this discussion of the particular process of staffing used to deny the Drummonds' request to adopt Timmy, Judge Roney declared: "The case worker system of social service established by the state for the processing of these very difficult personal and social decisions should not be destroyed under constitutional edict."[97]

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92. *Id.* at 858-59.

93. *Id.* at 860.

94. There is some indication in the Supreme Court's recent case, University of California v. Bakke, 438 U.S. 265 (1978), that a court is required to use "strict scrutiny" when considering an individual's claim against the state's use of a racial classification. As a result, the burden is on the state to justify the use of race in terms of "compelling governmental interest". *Id.* 289-91, 299, and 305.

Judge Roney's approach, however, places the burden of proof on the Drummonds. *See* 563 F.2d at 1205.

Judge Roney's position on "race", while perhaps incorrect, is not discussed more fully in this article. A discounting of Judge Roney's analysis of the race issue might imply that the Drummonds had a "right" to adopt Timmy, a position which is explicitly rejected by this article. *See* Part III *infra*.

Another reason for not exploring the race issue is that under such an analysis, a court would try to determine the agency's "motive." *See, e.g.*, 564 F.2d 126; Comment, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L. J. 317 (1976). The agency's denial of the Drummonds' adoption request is sufficiently peculiar to make us more comfortable with an analysis that does not determine the agency's motive. The record of agency actions, its delays, reversals of position, and divergence of opinions on Timmy's adoption by the Drummonds supports a view of the result as a product of intra-agency forces rather than a reasoned decision on the weight of race in Timmy's adoption.

95. *Id.* at 858.

96. *Id.* at 859.

97. *Id.* at 860.

Judge Roney dealt with the claims advanced by Timmy's court-appointed counsel in *Drummond I* on the assumption that the agency's and Timmy's interests were identical.[98] The Drummonds' reliance on such cases in *In Re Gault*[99] to support their demand for a hearing was in Judge Roney's view misplaced because *Gault* involved a situation in which the child's interest in remaining in the custody of his parent conflicted with the state's interest in enforcing its penal laws. In his view, these cases were inapplicable "where the state interest in finding the best home for Timmy coincides perfectly with his interest."[100] A lawyer for Timmy or another adult appointed to represent his interests at a hearing could not protect his interest in agency adoption decisionmaking any better than the caseworker system did. The state's and Timmy's interest were apparently so congruent that Judge Roney, an appellate judge, could determine Timmy's rights without formal participation by his counsel in the trial below.[101]

B. Drummond II: *Judge Roney's Interpretation of* Smith v. OFFER

Judge Roney's conclusion about the influence of the child's and agency's interest in *Drummond I* colored his description of the facts in *Drummond II*. Having adopted the discussion, reasoning and result of his dissent in *Drummond I*, Judge Roney then recapitulated the facts as follows:

> In December, 1973 in an emergency situation, a one month old mixed race child named Timmy was placed for temporary care in the home of Mr. and Mrs. Drummond by the Fulton County children's service agency. Lengthy proceedings were commenced to determine whether the child should be permanently removed from his natural mother's custody and placed for adoption.[102]

Nothing in the record in *Drummond I* supports this description, particularly the statement about the lengthy proceedings regarding the rights of Timmy's biological mother.[103] But Judge Roney was merely setting the stage for a further elaboration of his constitutional theory of adoption in *Drummond I* in light of a new Supreme Court precedent.

The constitutional claims of both the Drummonds' and Timmy's counsel in *Drummond II* required more than a simple restatement of the *Drummond I* dissent.

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98. 547 F.2d at 860.
99. 387 U.S. 1 (1967).
100. 547 F.2d at 860.
101. *See* note 68 *supra.*
102. 563 F.2d at 1203.
103. *Cf.* 547 F.2d at 842. The record supports, rather, a picture of lengthy delay by the agency before such proceedings were ever commenced, and then a relatively short judicial termination process.

To best understand the significance of Justice Brennan's opinion a full description of *Smith v. OFFER*[104] is required. A group of foster parents originally brought a class action against the state, city, and county welfare officials as well as a voluntary child care agency in New York.[105] The foster parents sought to have a three-judge federal court declare the New York statutory scheme for removal of foster children from their homes unconstitutional.[106] The district court appointed independent counsel to represent the class of foster children,[107] and allowed a number of biological parents who had "voluntarily"[108] placed their children in foster care to intervene in the lawsuit. The court thus transformed the suit into a tripartite controversy. As defined by the district court, there were three classes of private litigants: (1) foster parents who had foster children in their homes for more than a year; (2) all foster children who had lived with foster parents for one year on a continuous basis; and (3) all biological parents who had voluntarily placed their children in foster care.[109]

The significant feature of the removal procedure was that the actual removal of the child was stayed if a foster parent objected pending the initial administrative review.[110] If the purpose of the removal was to transfer the child to another foster home, then administrative regulations required ten days advance notice to the foster parents of the intended removal.[111] This notice was to inform the foster parents that if they objected to removal they must request a conference.[112] The conference was essentially an informal internal agency review. If, after a conference, the agency still sought to remove the child, the parent could appeal for a full administrative "fair hearing" and judicial review.[113] The foster parent might, if a court granted a stay, keep physical custody of the child during these appeals. On the other hand, if a foster parent failed to object to removal of the child upon receipt of the notice, the agency could remove the child and the foster parent, as a "person aggrieved" by agency action, would have to sue in court to get the child back. If the foster parents wanted the foster child removed there was no requirement for a hearing.

A different procedure was required if the foster child was being returned to the biological parent.[114] In the case of a voluntary placement, the

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104. 431 U.S. 816 (1977).

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

106. *Id.* at 278 n.1.

107. *Id.* at 278.

108. *See* text accompanying notes 181-83 *infra*.

109. 418 F. Supp. at 278 n.3.

110. 431 U.S. at 830.

111. *Id.* at 829.

112. *Id.*

113. *Id.* at 830.

114. *Id.* at 829.

biological parent in theory had the right to demand the child back upon 20 days notice.[115] In such a case, the foster parent would have no statutory right to a pre-removal hearing. At least in New York City, however, it was the administrative practice to grant a pre-removal hearing to any objecting foster parent regardless of the child's destination.[116]

Although counsel for the class of foster parents had argued "that the foster home is entitled to the same constitutional deference as that long granted the traditional biological family,"[117] the district court found the New York statutory scheme for removal unconstitutional because the foster child had an independent right "to be heard before being 'condemned to suffer grievous loss'."[118] In the district court's view, the New York statutory scheme was constitutionally deficient because it failed to provide the foster child with a hearing without an objection to removal by the foster parent.[119]

The Supreme Court reversed the three judge court ruling. In Justice Brennan's view, the particular statutory and regulatory scheme for removal at issue was constitutional since it adequately accommodated the interests of the two classes of parents involved in the foster child's life. First, Justice Brennan reasoned that if the foster parents had a liberty interest, it was less than the liberty interest of biological parents.[120] The interests of foster parents were adequately protected by the system of removal that the agency had to use when it proposed to remove the foster child from the foster home.

Second, as in most states, the biological parents' interest was protected by the state's explicit policy asserting that the children should remain with their biological parents.[121] In Justice Brennan's view, if the child were being returned to the biological parent, the constitution allowed the legislature to ignore the foster parent's interest.[122] The statute provided that the biological parent could agree to a return date in the foster care agreement or force the agency to return the child upon twenty days notice.[123]

The legislature did not define the child's interests in the New York foster care transfer system. Perhaps the legislature presumed that the "often complex and often unclear"[124] definition of the role of foster parents, bio-

115. *Id.* at 825.
116. *Id.* at 831 n.28. This apparent confusion in New York law and administrative practice was not resolved by the court.
117. 418 F. Supp. at 281.
118. *Id.* at 282.
119. *Id.*
120. 431 U.S. at 846-47.
121. *Id.* at 823.
122. *Id.* at 825.
123. *Id.*
124. *Id.* at 826.

logical parents, and state welfare agencies in the New York system defined by implication the child's rights. Even if the confusion caused some emotional harm to some children,[125] the legislature seems to have assumed that the needs of the class of foster care children were met through the system that granted foster parents, biological parents, and the agency some measure of procedural protection. Justice Brennan apparently adopted this view for his opinion upheld the legislative assumption that a foster child's interests are protected if the foster and biological parents' interests are protected.[126]

The Supreme Court opinion upholding the constitutionality of the New York system for removing foster children from foster homes, *OFFER*,[127] contained language extremely favorable to the Drummonds. In the majority opinion for the Court in *OFFER*, Justice Brennan stated:

> The importance of the familial relationship, to the individuals involved and to the society, 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" through the instruction of children as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals.[128]

Based on this language and other statements in Justice Brennan's opinion suggesting that the legal status of the family was not controlling in constitutional adjudication,[129] the Drummonds attacked Judge Roney's earlier assertion in *Drummond I* that "foster parents had no legal interest."[130]

There are three possible ways of distinguishing *OFFER* from *Drummond*. First, Justice Brennan's language quoted above must be understood in

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125. *Id.* at 826 n.16.
126. *Id.* at 840 n.43.
127. 431 U.S. 816 (1977).
128. 431 U.S. at 844-45.
129. *E.g.*, "The legal status of families has never been regarded as controlling: 'Nor has the [Constitution] refused to recognize those family relationship unlegitimized by marriage ceremony.' Stanley v. Illinois 405 U.S. at 651." 431 U.S. at 845 n.53.
130. 547 F.2d at 859.

the context of his overall analysis that a foster parent unwilling to object to removal of the foster child was not entitled to complain about the child's return to a biological parent or his transfer to another foster home.[131] Nothing in Justice Brennan's basic reasoning implied a lack of liberty interest if the foster parent, like the Drummonds, objected to removal. Second, Justice Brennan's opinion did not deal directly with an actual controversy, as did *Drummond*, over the standards for removing a foster child since *OFFER* was a class action proceeding over what removal procedures were due rather than over the substantive standard for removal.[132] Third, *OFFER* said nothing explicit about the constitutional interests of foster parents seeking not only to prevent removal, but also to adopt the foster child who was legally free for adoption.

Judge Roney rejected all of the three proposed methods of distinguishing *OFFER* from the Drummonds' claim. Instead Judge Roney relied upon the fact that the Drummonds sought to adopt Timmy as a justification for holding the Drummonds had no liberty interest under *OFFER*. Judge Roney deemed a two year period in foster care to be merely a transitional phase in Timmy's ultimate adoption by the best adoptive parents[133] selected by the agency. He interpreted *OFFER* in light of his initial purpose of allowing the agency to "duplicate the relationship that most persons have with . . . their natural parents during their entire lives" in the adoption process.[134]

Moreover, Judge Roney stated that race could be considered in adoption because, "[i]t is a natural thing for children to be raised by parents of their same ethnic background."[135] He cited cases allowing consideration of the religion of adoptive parents to support his view on race without stating that an underlying justification of those cases is the protection of the interest of religiously based adoption agencies.[136] Judge Roney evaluated the use

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131. 431 U.S. at 850.
132. *Id.* at 819-820.
133. 563 F.2d at 1207.
134. *Id.* at 1206.
135. *Id.* at 1205.
136. Judge Roney cited generally to the Annotation, *Religion as a Factor in Adoption*, 48 A.L.R.3d 383 (1973). While it is true that "numerous courts have found no constitutional infirmity," 563 F.2d at 1205, in religious matching statutes, many courts have strictly limited the use of religion as a factor in evaluating prospective adoptive parents. Indeed, the head case of the annotation to which Judge Roney cited, In Re Adoption of E, 59 N.J. 36, 279 A.2d 785 (1971), held that religion should be used as a factor only when 1) the child's natural parents object to the religion of the potential adoptive parents or 2) a child's prior religious training cannot be pursued in the prospective adoptive home, or would cause the child emotional disturbance in the proposed placement. In Dickins v. Ernesto, 30 N.Y.2d 61, 66, 281 N.E.2d 153, 156, 330 N.Y.S.2d 346, 349 (1972), the court, sustaining the validity of New York's religious matching statute in the face of a constitutional attack stated: "Legislation which provides for the placement of a child with adoptive parents of the same religion so far as consistent with

of race in adoption to be part of the agency program to give the child a "normal" family experience by duplicating "his natural biological environment."[137] If the agency could consider physical aspects in adoption, it could necessarily consider race.[138] As elaborated in *Drummond II*, Judge Roney's theory of the use of racial considerations in adoption is a constitutional endorsement of the agency practice of "matching."

The attempts by Timmy's lawyer to use *OFFER* as support for Timmy's own constitutional interest against removal were also rejected by Judge Roney.[139] Timmy's counsel argued that Timmy's right to a "stable environment" meant that the agency must justify its interference with Timmy's foster family relationship with the Drummonds.[140] The Drummonds had been the only family Timmy had ever known, at least during his first two years. There were no competing liberty interests of biological parents at issue. Judge Roney, however, interpreted every state interference with Timmy's environment as "superior over the long range."[141] As a result, Timmy had no recognizable liberty interest under the circumstances of the case. Essentially Judge Roney read *OFFER* as allowing the state agency, as substitute parent, to decide for Timmy what his interests are.

Judge Roney's position on the lack of liberty interest on either the Drummonds' or Timmy's part, made his procedural due process analysis of *OFFER* in *Drummond II* rather straightforward. In Judge Roney's view, since *OFFER* did not hold that the New York system was the only constitutional model of removal of foster children, the constitution permitted flexible procedures.[142] Given the nature of the interests at stake, and the in-

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the best interests of the child and where practicable, . . . undoubtedly fulfills a secular legislative purpose and certainly reflects and preserves a benevolent neutrality toward religion." The court was silent, however, concerning what the legislative purpose was. Wilder v. Sugarman 385 F. Supp. 1013 (S.D.N.Y. 1974), construing the same statute plus its funding provisions, found that the statute preserved a balance between the First Amendment Establishment Clause and the free exercise rights of parents, *id.* at 1025, and children. *Id.* at 1026. The Court noted that, in examining the New York statutory scheme, one must take into account the long history of community contributions made by religously affiliated child care institutions. *Id.* at 1027. The Wilder analysis may be valid if applied only to children who are to be placed in foster homes, but if a child is being placed for adoption, any free exercise right of the natural parent has been abrogated. The state, *in loco parentis,* has no free exercise rights. *See* Note, *Religious Matching Statutes and Adoption,* 51 N.Y.U.L. REV. 262, 282-3 (1976). A state's imputation of a religous identity for a child in the absence of prior religious training, ignores the natural parents' indifference, and works against the best interests of the child by arbitrarily eliminating qualified adoptive parents. The only interest served is that of organized religion. *See* Comment, *A Reconsideration of the Religious Element in Adoption,* 56 CORNELL L. REV. 780, 817-18 (1971).

137. 563 F.2d at 1205.

138. *Id.* at 1206; *but see* note 97 *supra.*

139. *See* text accompanying note 128 *supra.*

140. 563 F.2d at 1208.

141. *Id.* at 1209.

142. *Id.*

quiry involved, as well as the overwhelming need for flexibility in the situation and the complexity of the decision to be made the "procedures" or the method used by the agency to decide upon Timmy's adoption were constitutionally adequate.[143] Judge Roney's ultimate goal was to free the agency adoption decisions from the "trial-like" procedures that he assumed Timmy's lawyer and the Drummonds were arguing were constitutionally required.[144]

C. *Judge Tuttle's Alternative Theory of* Smith v. OFFER *in* Drummond II

Judge Tuttle's dissent in *Drummond II* was more sensitive to Timmy's interests than Judge Roney's opinions. Yet, Judge Tuttle's dissent was not a complete answer to Judge Roney's opinions in *Drummond I* and *II*. Judge Tuttle failed to note that the *Drummond II* majority had initially adopted the *Drummond I* dissent, and by implication Judge Roney's formulation of the overall issue in the case. Where Judge Roney had defined the issue in terms of the authority of child welfare agencies to make decisions about a child's adoption in *Drummond I*, Judge Tuttle had defined the issue in terms of the federal courts' power to grant relief to white foster parents trying to adopt an interracial child.

Judge Tuttle's dissent in *Drummond II* ignored these different starting points in analyzing the problems presented by *Drummond*. Rather his dissent in *Drummond II* dealt primarily with the implications of *OFFER*, the foster care precedent, rather than with the basic inadequacies of Judge Roney's constitutional theory of adoption.

Judge Tuttle's dissenting opinion in *Drummond II* correctly pointed out that, in contrast to the concurring opinions in *OFFER*, Justice Brennan's majority opinion supported the view that the Drummonds as foster parents had some liberty interest.[145] The concurring justices' opinion in *OFFER* would have upheld the New York foster care removal system on the theory that the foster parents had no constitutional liberty interests.[146] Justice Brennan, on the other hand, upheld the system on the theory that the particular liberty interests of foster parents were adequately protected by a system that required them to make known to the agency their opposition to removal of the foster child.

Judge Tuttle's analysis in *Drummond II* did note one of the differences between *Drummond* and *OFFER*. *OFFER* was essentially a controversy among biological parents, foster parents, and foster children. *Drummond*, by contrast was, at least originally,[147] a suit between private parties and a state

143. *Id.* at 1210.
144. *Id.*
145. *Id.* at 1213-14.
146. 431 U.S. at 857.
147. *See* text accompanying notes 230-231.

agency. Judge Tuttle stated that, "but for the existence of the narrower ground in that case and but for the fact that the contest before the court was being waged between foster parents on the one hand, and natural parents on the other, the court would readily have determined that such constitutionally-protected liberty interest did exist."[148] In Judge Tuttle's view, the difference meant the Drummonds had a constitutional interest.

Judge Tuttle did not, however, recognize the other differences between *Drummond* and *OFFER*. The Drummonds were seeking, through litigation, an actual result vis-a-vis the child, whereas the plaintiffs in *OFFER* were seeking only a procedural innovation in agency practice. The original plaintiff foster parents in *OFFER* wanted pre-removal hearings without having to ask for them. These plaintiffs were thus asking for legal relief without affirmation that their relationship to the child be legally recognized as permanent.[149] In contrast, the Drummonds were actual "psychological parents" desiring to adopt a child in their care. By distinguishing the Drummonds' position in the litigation from that of the *OFFER* plaintiffs, Judge Tuttle could have forced the majority to confront the question of whether Timmy's emotional needs at that point in his life were more important than his "long range best interest."[150] Although the analysis of the majority is couched in procedural terms, in substance the majority holds that the agency's judgment that Timmy had to suffer present harm to avoid possible future harm was the constitutionally correct standard for child placement decisions. By accepting the reasoning of the welfare agency concerning Timmy's long range interests the majority essentially supports the use of race as a controlling factor in child placement. Had Judge Tuttle been able to raise this question, he would have at least forced the majority to see the issue of substantive constitutional rights that underlie its supposedly procedural analysis.

Judge Tuttle's opinion in *Drummond II* was elusive regarding the procedural due process claims. As he had stated in *Drummond I*, Judge Tuttle still believed that the solution in the case lay in devising a procedure for foster parents who seek to adopt.[151] Yet Judge Tuttle's analysis of Timmy's rights under *OFFER* suggested Timmy had an "opportunity to be heard" within the agency on his adoption.[152] While this view of Timmy's rights as possibly

148. 563 F.2d at 1213.

149. There may have been strategic reasons why plaintiffs attacked the procedures rather than expressing a desire to adopt. First, they may have recognized the hostility of the Court to a substantive due process argument. Second, at the time, there was no precedent such as Moore v. City of East Cleveland, 431 U.S. 494 (1977), that would suggest, if not mandate, substantive due process protection of alternative modes of parenting.

150. 547 F.2d at 847.

151. 563 F.2d at 1219.

152. *Id.* at 1218-19. *Cf.* 547 F.2d at 857.

independent of the agency's rights contrasts with Judge Roney's view that the interests of Timmy and the agency are congruent, Judge Tuttle's view misreads *OFFER*. The district court in *OFFER* had based its holding on the foster child's lack of opportunity to be heard on his removal. Justice Brennan's *OFFER* opinion obscures the reasoning of the district court on the procedural issue.[153] By focusing on Timmy's due process rights without recognizing the essential differences between the Drummonds and the *OFFER* plaintiffs, Judge Tuttle could find little solid support in *OFFER* for his analysis. In reiterating his earlier position in *Drummond I*, Judge Tuttle also apparently thought the constitutional permissibility of the consideration of race was linked to adequate procedures.[154] He asserted that Judge Roney's opinion gave the agency complete discretion regarding adoption,[155] but Judge Tuttle did not offer a constitutional theory of why the agency should not have this type of discretion, even where race is not involved.

Development of such a theory would have required Judge Tuttle to ask questions about the functions of foster care and adoption in terms of a child's interest. Judge Tuttle too easily accepted Judge Roney's fundamental assertion in *Drummond I* that foster care and adoption serve different functions for children. While foster care and adoption may serve different functions for adults or for the state child welfare agency, from the child's perspective the function of foster care and adoption are similar.[156] Agencies and courts concerned with child welfare should reject Judge Roney's analysis in *Drummond I & II* because it advocates that the Constitution imposes no obligation on the agency, even that of seeing the child's welfare as a distinct interest from the agency's own institutional interest. Judge Tuttle's alternative solution of allowing a child represented by counsel a hearing on the adoption is also unsatisfactory because it is based on an inadequate analysis of the substantive constitutional rights involved in contested adoption situations.

Judge Tuttle's analysis of Timmy's constitutional rights was essentially procedural. Under his analysis, Timmy would be entitled to a hearing regarding his adoption and to be represented by his own advocate at this hearing.[157] But it is unclear whether a child could ever use Judge Tuttle's analysis to compel the state agency to treat a particular non-biological child-adult relationship as a constitutionally-protected family relationship. Nor was it clear from Judge Tuttle's opinion whether Timmy's constitutional rights are any different in practice from the Drummonds' procedural due process rights in the adoption process.

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153. 431 U.S. at 840.
154. 563 F.2d at 1219.
155. *Id.*
156. *See* Part IIIA *infra*.
157. 547 F.2d at 856-57; 563 F.2d at 1219.

III. PROTECTION OF A CHILD'S RIGHT TO FAMILY

This article proposes a constitutional analysis of adoption which eliminates both of the deficiencies of Judge Tuttle's analysis. The analysis involves a broader interpretation of the child's "liberty interest" in the adoption process. In this respect the theory seeks to answer the question, "What would it mean to say a child has a constitutional right to be adopted?" On the procedural level, the theory proposes a method for handling child placement conflicts within courts rather than handling those conflicts through hearings within the child welfare agencies as suggested by Judge Tuttle's analysis. The substantive and procedural aspects of the theory together seek to allocate the decisionmaking authority of the child, adults, and state agencies in the adoption process.

To develop such a theory we must reexamine, from the perspective of a child, the constitutional doctrines which give substantive due process protection to the family[158] and determine how those cases protect a child's legal interests. The first step in this doctrinal reinterpretation is to demonstrate that the Court's only case on foster care, *OFFER*,[159] discussed in the previous section, is not, despite Judge Roney's interpretation, antithetical to a theory of a child's rights in the adoption process. The second step is to provide an analysis, from a child's perspective, of *Moore v. City of East Cleveland*,[160] the Court's most recent pronouncement on the substantive limitations of the state's ability to define the family. By approaching the analysis in this manner it can be demonstrated that a child's interest in a family is constitutionally protected and is distinct from that of adults or child welfare agencies. To define the child's interest in the family in the particular context of *Drummond*, there should have been no rigid, *a priori* constitutional distinction among the foster family, the adoptive family, or the biological family.

A. *A Re-interpretation of* OFFER: *A Definition of Foster Care from a Child's Perspective*

OFFER differs from most constitutional adjudications which involve the child's interests. In most of the Court's cases, the child's interest is dealt with as a derivative of the adult's or the state's asserted interests.[161] In contrast, the class of foster children involved in *OFFER* had an advocate

158. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. State of Nebraska, 262 U.S. 390 (1923). *See also* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113, 167-171 (1973) (Stewart, J., concurring).

159. 431 U.S. 816 (1977).

160. 431 U.S. 494 (1977) [Hereinafter cited as *Moore*].

161. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

throughout the litigation who took a position on the child's constitutional rights. *OFFER* is thus a case in which all interests—the child's, the adults', and state's—were actually asserted in the context of constitutional adjudication.

Consistent with most prevailing analyses of the child's constitutional rights, however, special counsel for the children in *OFFER* perceived the problem of litigation strategy as one-dimensional. For special counsel the choice was to side with either the biological parents or the foster parents rather than develop an independent position for the child. Special counsel's greatest concern was that a removal procedure which mandated a pre-removal hearing for *all* foster parents as proposed by counsel for the foster parents would cause an unnecessary and deleterious delay in placing the child in a stable environment.[162] On this procedural issue the special counsel's position was opposed to that of the foster parents and more closely aligned with that of the biological parents.[163]

Yet the interests of foster children are not always identical to the interests of the biological parents. First, Justice Brennan stated in his opinion that the position taken by the court-appointed counsel for the children, whereby counsel chose to align the children's interest with that of the New York system, was not definitive.[164] In holding that the foster parents had standing to define the liberty interests of foster children in a manner different from that of appointed counsel for the children, Justice Brennan indicated that all parties to the litigation could define the children's interests. In a concurring opinion, three other justices explicitly stated that the foster children should not have been left without an advocate for the position that they were entitled to a hearing.[165]

On the other hand, the foster parents and several *amici*[166] argued for pre-removal hearings, in opposition to counsel for the children. Following prevailing constitutional analysis, such hearings were proposed without any concrete definition of the foster children's constitutional rights: the conventional "due process" approach to children's constitutional rights is to focus on the prevention of arbitrary state decisionmaking.[167] In *OFFER*, this approach would have increased the stability of the foster child's environment

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162. With reference to the district court's finding, "The undersigned attorney for the infant plaintiffs had opposed such a finding, on the ground that time being of the essence for children, procedures which delayed the decisions concerning removal or non-removal were detrimental." Jurisdictional Statement of Appellant-Plaintiffs Danielle and Eric Gandy at 10, Smith v. Offer in the Supreme Court of the United States.

163. 431 U.S. at 839.

164. *Id.*

165. *Id.* at 857 n.l.

166. Brief of a Group of Concerned Persons for Children as Amici Curiae, Smith v. OFFER, 431 U.S. 816 (1977). This group included Anna Freud, Joseph Goldstein, and Albert Solnit.

167. *See* In Re Gault, 387 U.S. 1 (1967). *Cf.* Burt, *supra* note 9, at 125.

by seeking to decrease the incidence of arbitrary state disruption of foster home placements. The record in *OFFER* contains some evidence of the agency's tendency to transfer foster children precisely because of the intensity of emotional involvement of the foster parents with the foster children.[168] One amicus brief offered a more specific justification for more elaborate procedures in the context of foster care removal: The purpose of the hearing would be to encourage the state to define the complex relationship of the interests of both long term foster parents and natural parents in the foster child.[169] While this goal appears in accordance with the foster child's interest, the *amicus* failed to question whether this goal is possible under state law or agency practice.

The substantive child placement doctrine of New York State does not recognize the legal interests of foster parents in the child and, by implication, the interests of foster children in sorting out their conflicting loyalties.[170] In theory, under New York law, in any conflict between biological parents and foster parents, the agency should side with biological parents. But in point of fact the state resolves conflicts between biological parents and foster parents over children by reference to the best interests of the child standard. The use of this standard has led to an agency acting as institutional parent to the children under its supervision with little regard for any systematic policy.[171]

For instance, as indicated by the record in *OFFER*, on one occasion the agency saw its role as institutional parent as requiring it to place the child in foster care and to resist the efforts of a blind biological parent to have the child returned.[172] At other times, the agency's role as institutional parent required it to resist the efforts of long term foster parents to keep children who no longer remembered their biological parents.[173] Accordingly, New York law, despite its procedures for periodic judicial review of the status of

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168. 431 U.S. at 836 n.40. *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).

169. Brief of a Group of Concerned Persons for Children as Amici Curiae at 11, Smith v. OFFER, 431 U.S. 816 (1977).

170. *Id.* at 826 n.16.

171. *See, e.g.*, Scarpetta v. Spence-Chapin Adoption, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65, (1971), *cert. denied*, 404 U.S. 805 (1971). *But see* Nathan M. v. Catholic Guardian Society, 76 Misc. 2d 1003, 352 N.Y.S.2d 319 (1973), as evidence of the conflict between the states preference for biological parents and the "best interest of the child" standard of N.Y. SOC. SERV. LAW § 392 (McKinney 1976) where, says the court, "no preference has been given to returning the child to its natural parents, although the court may, in its discretion, choose to so order." 76 Misc. 2d at 1005, 352 N.Y.S.2d at 322.

172. Rodriguez v. Dumpson, 52 A.D.2d 299, 383 N.Y.S.2d 883 (1976) (granting the mother custody over the arguments of the agency).

173. *See* OFFER v. Dumpson, 418 F. Supp. 277, 279-80 (S.D.N.Y. 1976), *rev'd*, 431 U.S. 816 (1977).

foster care children,[174] is remarkably like Georgia law: It defines decision-making authority in terms of agency discretion.

From a child's perspective, the issues presented in *OFFER* should have been addressed in a substantive rather than a procedural constitutional context. A children's advocate could have argued that the system violated their liberty interests because of the functional lack of any standards for removing foster children. Despite the articulated standard of "best interests of the child" for removal,[175] the New York statute does not define the child's interest in terms of an actual realistic alternative placement for the particular foster child.[176] Rather, the removal system is built on the assumption that foster care ought to be categorized primarily as a contractual arrangement between adults and child welfare agency with the agency dictating the terms.[177]

Altering this statutory assumption about foster care would require the courts to restructure the foster care arrangement from the child's perspective. From a child's perspective, the primary function of foster care is to allow at least one adult to meet needs that would otherwise go unmet. The implications of this definition of the purpose of foster care stand in sharp contrast to the implication of the adult-centered definition of foster care as a temporary way station for the child en route to the biological family or prospective adoptive family.[178] The adult-centered definition of foster care places the state in the role of substitute parent for a child. In the guise of protecting the rights of those unfortunate biological parents who "voluntarily" give up their children, the agency allows foster care to become a more or less permanent feature of a child's life.[179]

Whether the child's entry into the foster care system was "volun-

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174. N.Y. SOC. SERV. LAW § 392 (McKinney 1976).

175. *Id.* § 392(7).

176. N.Y. SOC. SERV. LAW § 392 (McKinney Supp. 1977) provides that in reviewing the status of a foster care child, the judge may 1) direct that foster care be continued, 2) direct the agency involved to return the child to its natural parent(s), 3) direct the agency to institute a proceeding to free the child for adoption, or, 4) direct that the child be placed for adoption with its foster family or with any other person or persons. Given New York's statutory preference for natural parents (*see* note 125 *supra*), the last two alternatives might be approached with hesitation. Even after 24 months have passed in the child's life there would presumably be no consideration of alternative placement, *e.g.*, placement in the present foster care home, as long as the natural parents are found capable of resuming care for the child. The first alternative, continuing foster care, reflects a refusal to make any decision at all, and merely lengthens a child's "temporary" stay in the limbo of foster care.

177. *See, e.g.*, Ninesling v. Social Servs., 46 N.Y. 2d 382, 386 N.E.2d 235, 413 N.Y.S.2d 626 (1978).

178. *See, e.g.*, Judge Roney's characterization of foster care as "a transitional phase in a child's life." 563 F.2d at 1207.

179. *See* Mnookin II, *supra* note 42, at 610-12.

tary"[180] because of temporary parental illness, the strain of poverty on his biological family, the strain of divorce on a single parent, or "involuntary" because of parental neglect or abuse, would not be crucial. What would be crucial is the meeting of the child's needs by an adult other than his biological parent.

Accepting this proposed child's definition of foster care has implications for "constitutional values."[181] This definition of foster care means the rejection of the assumption of state competence as substitute parent in the adult-centered definition that pervades Justice Brennan's opinion in *OFFER*. Justice Brennan's assumption that the foster parents or biological parents could represent the interests of foster children in the intra-agency hearing is undermined when one considers that, as substitute parent, the state has influence over both foster parents and biological parents. The natural parents' ability to press any position vigorously against the agency is diminished by the agency's ability to change a voluntary placement into an involuntary placement. Involuntary placement could mean loss of the child permanently[182] or the commencement of criminal proceedings.[183] The foster parents who want to keep the child, because of deep emotional ties to the children, must maneuver carefully, lest the agency decide to de-certify their home as a suitable or licensed foster home.[184] This is a realistic threat to those foster parents who would like to continue to act as parents to children under the agency's supervision. In addition, those foster parents who need the additional resources that foster children represent for their household cannot afford to lose the favor of the dispenser of those funds, the state agency.[185]

Rejection of the assumption of agency competency as parent means that private party determinations of a child's needs should be given deference in foster care decisionmaking.[186] The agency's lack of deference to private party decisionmaking led the agency to threaten one of the litigants in *OFFER,* Ms. Smith, a 53 year old widow with arthritis, with removal of two foster children in her care, because the agency, but not she, thought that her arthritis impaired her ability to deal with children she had supervised

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180. For the potentially coerced nature of such voluntary placements, *see OFFER*, 431 U.S. at 834 and Mnookin I, *supra* note 14, at 601.

181. *See* Burt, *supra* note 9, at 137.

182. *See* N.Y. SOC. SERV. LAW § 384-b (McKinney Supp. 1976-1977) and N.Y. FAMILY COURT ACT § 1055 (McKinney 1975).

183. *See* N.Y. PENAL LAW § 260.00 (McKinney 1967) and 260.05 and 260.10 (McKinney Supp. 1977). *See also* N.Y. FAMILY COURT ACT § 254 (McKinney 1975).

184. N.Y. SOC. SERV. LAW § 379 (McKinney 1976).

185. *See* Mnookin II, *supra* note 42, at 610; *see* N.Y. SOC. SERV. LAW § 398-a (McKinney 1976).

186. Private definition of a child's needs are thus preferred to professional or bureaucratic definition of those needs.

for four years.[187] With a presumption in favor of private determination of a child's need, a court could determine that, in Ms. Smith's case, since she had met the needs of the two children for four years, her perception of the effect of her arthritis on her parental ability should be presumed correct.

If the foster parent as private party is presumed better able to determine the child's needs than the agency, then the agency should be forced to offer reasons for the removal. Yet in the New York system, the agency can change a child's foster care placement without explaining to an outside body that removal was the "least detrimental alternative."[188] For instance, New York law does not require the agency to explain the return of two of four children to their biological mother and the transfer of the other two siblings to a foster home, after spending four years united in one foster home.[189] Given the disruption in the child's life that foster care already represents, a presumption in favor of allowing the child to remain in the care of the foster parent increases the likelihood that the child's needs for stability are met. The presumption in favor of foster parents further emphasizes that foster care should be defined in terms of persons meeting a child's needs. Under this presumption no child would be removed until justification for the removal had been made to a body independent of the foster care officials. In effect, the burden of proof as to any changes in foster care placement would be on the agency.

To change the definition of foster care to a child-focused one in the context of constitutional adjudication requires a substantive due process analysis of a child's rights. Thus the question becomes whether there is any constitutional authority for redefining the foster family from the child's perspective and, therefore, to reject the prevailing adult-centered definition. A Supreme Court case decided in the same term as *OFFER* lends implicit support to a constitutional re-definition of "family" that favors the child's right approach.

B. Moore v. City of East Cleveland: *A Substantive Due Process Limitation on the State's Ability to Define Family*

Shortly before the opinion in *OFFER* was published, the Court decided *Moore v. City of East Cleveland*.[190] In *Moore* the Court held the definition of "family" in East Cleveland's zoning ordinance unconstitutional. A plurality

187. 431 U.S. at 818 n.1.

188. *See* GOLDSTEIN, *supra* note 41, at 53:

> The least detrimental alternative . . . is that specific placement and procedure for placement which maximizes, in accord with the child's sense of time and on the basis of short term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.

189. OFFER v. Dumpson, 418 F. Supp. 277, 280 (S.D.N.Y. 1976).

190. 431 U.S. 494 (1977).

of the Court, in an opinion by Justice Powell, held the definition invalid because it violated the home owner's substantive due process right of choice in a protected area of family life.[191] A concurring opinion by Justice Brennan, joined by Justice Marshall, also stated that the ordinance violated due process.[192] Justice Brennan's opinion held that the statute's definition of family was unreasonable and arbitrary. A concurring opinion by Justice Stevens, necessary to complete a five-man majority, held the ordinance unconstitutional as an unreasonable interference with the land owner's property right.[193] It is the plurality's holding that plays a significant role in developing a new theory of a child's constitutional rights.

The appellant in *Moore,* Mrs. Inez Moore, owned a duplex in the City of East Cleveland. In her portion of the duplex, Mrs. Moore lived with one of her two sons, Dale, Sr., and two grandsons, Dale, Jr., and John Moore, Jr.[194] This living arrangement violated the city ordinance that limited the occupancy of a dwelling unit to a family as defined in the ordinance. The reasons the living arrangement violated the statute's terms are unclear from the record. The Court proceeded on the theory that Mrs. Moore was the "nominal head" of the household. Her unmarried child, Dale, Sr., was apparently her dependent under the ordinance's definition of dependency.[195] Because of Dale, Sr.'s dependency, the ordinance allowed his dependent child to also live with the nominal head of the household, Mrs. Moore. John, Jr.'s presence was illegal because he was not the dependent child of Dale, Sr.[196] the ordinance classified John, Jr. as an "unlicensed roomer"[197] or as a "family" all by himself.[198] Mrs. Moore was not free to live in the house with her son and two grandsons as a single family under the ordinance without applying to the state for its approval of the family arrangement.[199]

The city notified Mrs. Moore that her seven-year-old grandson, John, Jr. was an illegal occupant. He had been living with Mrs. Moore since the death of his mother when he was less than a year old. The city argued that John, Jr.'s presence meant there were two families living in a single family unit. Mrs. Moore refused to remove John, Jr. from her home. She was con-

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191. *Id.* at 498-506.
192. *Id.* at 506-7.
193. *Id.* at 520-21.
194. *Id.* at 496-97.
195. *Id.* at 496 n.2, n.4.
196. *Id.* at 496 n.2, 497 n.4.
197. *Id.* at 507 n.3.
198. *Id.* at 496 n.2.
199. Justice Burger, in dissent, suggests that Mrs. Moore's failure to apply for a variance before seeking redress in the courts should bar her from raising the issue of the constitutionality of the local ordinance. 431 U.S. at 521. However, a substantive due process analysis of the case indicates that Mrs. Moore's right of choice implies that she does not have to seek the state's permission.

victed of violating the ordinance. She was sentenced to five days in jail and fined $25.[200]

The conviction was ultimately appealed to the United States Supreme Court. The Court reversed Mrs. Moore's conviction because the ordinance's definition of family was unconstitutional. Justice Powell reasoned that an individual's freedom of choice in family matters prevented the city from defining family as a nuclear family.[201] Mrs. Moore's decision to have her son and two grandsons live with her as a family was protected from state intrusion. To reach this result, Justice Powell had to distinguish *Village of Belle Terre v. Boraas*,[202] where the Court had upheld a definition of family in a zoning ordinance that excluded unrelated individuals. In distinguishing *Belle Terre*, Justice Powell focused upon the adult's interest in acting as the parent of the child as the basis of constitutional protection of family. In choosing to parent a child that she did not conceive and bear Mrs. Moore was protected, but the associational choice of the college students involved in *Belle Terre* was not.[203] Thus, substantive due process protected Mrs. Moore against the state's attempt to standardize child-adult relationships in one particular definition of family.[204] Mrs. Moore's right to define her family is comparable to an individual's right of choice in marriage or sexual procreation without state interference.[205]

Moore could be read solely as an extension of the Court's constitutional protection of child-adult relationships to include the grandmother-grandchild relationship or in Justice Brennan's term "the extended family."[206] Justice Powell's statement that "the accumulated wisdom of civilization . . . supports a larger conception of the family"[207] supports such a reading. Justice Brennan's concern in his concurring opinion, that failure to give constitutional protection to the extended family would have a disproportionately adverse impact on black families,[208] would also tend to support an interpretation of *Moore* as simply an extension of *Yoder v. Wisconsin*,[209] *Meyer v. Nebraska*,[210] and *Pierce v. Society of Sisters*.[211] A more traditional analysis of *Moore* would interpret and critique *Moore* along these lines.

Before accepting this interpretation of *Moore* as solely a protection of

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200. *Id.* at 497.
201. *Id.* at 504-06.
202. 416 U.S. 1 (1974) [hereinafter cited as *Belle Terre*].
203. 431 U.S. at 498.
204. *Id.* at 506.
205. *Id.* at 499.
206. *Id.* at 510.
207. *Id.* at 505.
208. *Id.* at 509-10.
209. 406 U.S. 205 (1972).
210. 262 U.S. 390 (1923).
211. 268 U.S. 510 (1925).

an adult's right to parent a child, we should analyze what was protected from John, Jr.'s perspective. First, even though Justice Powell did not discuss John, Jr.'s rights in his opinion, in protecting Mrs. Moore's decision to become a parent, his opinion protects John's relationship with the only adult who had met his daily needs during most of his life. Justice Brennan's concurring opinion was explicitly concerned with the disruption of John, Jr.'s emotional relationship, not only to Mrs. Moore, but to his first cousin, Dale, Jr.[212] Of particular interest is the Court's failure to discuss John, Jr.'s relationship, if any, to his biological father, John, Sr., in reaching their decision.[213]

Second, when the Court prevented the city from forcing Mrs. Moore to send John, Jr. elsewhere, in the absence of a showing of "compelling reasons," the Court protected John's right to remain. The state was relying on its constitutional power to zone, rather than on its *parens patriae* child welfare power in characterizing John as an "illegal occupant" after living seven years with his grandmother. From John's perspective, the particular state power relied upon to disrupt his family was of little significance. Had the state instead relied on its authority as child protector, the same constitutional protection should have been required. The removal of John by the state should have required as compelling a showing as would be required to dislodge him from his family under the state's zoning power. Thus the courts should, under their constitutional authority, protect the stability of a child's family relationship from state interference.[214]

Third, besides protecting John, Jr.'s functional familial relationship from state interference, the Court's opinion in *Moore* protected the rights of private parties to determine how John's needs should be met. The state argued that had Mrs. Moore sought to obtain guardianship or to adopt John, her relationship with him would then meet the ordinance's "family" definition.[215] But the Court rejected the argument that Mrs. Moore must put her relationship to John into some formal, legally recognized parent-child relationship.[216] Whatever "disorderliness" was caused by having John's daily care, economic support, and general rearing shared by Mrs. Moore and any other adult Moores, it should not have been a subject of state concern without a showing of actual harm to John. If the less than ideal circum-

212. 431 U.S. at 506 n.2.

213. *Id.* at 505 n.16.

214. *But see* Judge Roney's rejection of Timmy's counsel's assertion of Timmy's "right to a stable environment." 563 F.2d at 1208-09.

215. Brief for the Appellee at 17-18, Moore v. City of East Cleveland, No. 75-6289 (1977).

216. The court also rejected the appellee's argument (accepted by Burger, C.J., in dissent) that since Mrs. Moore failed to seek discretionary administrative relief, she had not exhausted her remedies and should be foreclosed from a hearing before the court. 431 U.S. at 497 n.5.

stances of John, Jr.'s life had led to the adults making private arrangements for his daily care, those private arrangements should have been protected from state attempts to define John's status in such a way that ignored his needs.[217]

The three interests of the child implicit in *Moore* taken together suggest that law has a limited role in defining a child's family. The preference for private definition of a child's needs means the actual social circumstances are of constitutional significance. If the circumstances of a child's life are such that an adult meets the daily needs of a child, the state must treat that adult-child relationship from the child's perspective as an authentic parent relationship. The requirement that the state show a compelling interest before disrupting the child's relationship to the adults meeting his needs means that the child has a right to a stable environment. By treating the choice of an adult to parent a child in need of nurturance as a constitutionally-protected right, the *Moore* analysis implicitly suggests that the state's *parens patriae* power or its substitute parent role should be limited by a constitutional doctrine.[218] The Court's analysis of *Moore* is, of course, devoid of any discussion of the child's rights. But, under prevailing constitutional analysis, the child was not even deemed to be a party to the litigation.

C. *A Child's Constitutional Rights in the Adoption Process: A Reexamination of* Drummond

A unique feature of *Drummond* makes possible the development of constitutional analysis of the adoption process from the child's perspective. *Drummond* is one of the few cases in which foster parents have resorted to litigation, based on an alleged deprivation of their constitutional rights, when a state agency denied their request to adopt a particular child.[219] By

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217. *Cf.* 431 U.S. at 505 n.16, 506; Zablocki v. Redhail, 454 U.S. 374 (1978) (holding invalid a Wisconsin statute prohibiting any person, having minor issue not in his custody which he is obligated to support, from marrying without a court order conditioned on a showing that the children are not likely to become public charges).

218. Some commentators suggest that a constitutional theory of the state's role in family life requires us to answer the question, "Is the fetus a child?" *See, e.g.*, R. MNOOKIN, CHILD, FAMILY, AND STATE 4 (1978) [hereinafter cited as MNOOKIN III]. The question, however, is a red herring in the context of this paper. A particular legal definition of a fetus' status is not necessary to a child-centered theory of adoption. To the degree that the proposed analysis focuses on a child's "wanted" status, the theory provides a less alarmist perspective on the effect on law of new biological and technological developments in human reproduction. Though GOLDSTEIN, *supra* note 41, at 115, states: "In the future, the development of artificial wombs and of reproduction by cloning may further blur the notion of biological parentage," it is my position that such developments will *not* blur the notion of the wanted child."

219. *See also* Kyees v. County Department of Public Welfare, No. 76-1723, slip. op. (7th Cir. June 22, 1979). The *Kyees* court specifically adopted the reasoning of the Drummond II court and rejected the Kyees' claim that they had a constitutionally protected liberty interest in

asserting that their status as foster parents and prospective adoptive parents made them eligible for constitutional relief, the Drummonds put the operation of two distinct legislative processes—foster care and adoption—under judicial scrutiny.

The distinctions among various child placement decisions serve primarily the interests of adults in children. As noted above, the legislative design of foster care systems only incidentally accommodates a child's interests. Similarly, recent adoption reforms usually seek to protect the adults' interests in children rather than protect the child's interest.[220] Under these circumstances, when the legislative process does not clearly accommodate the child's interests, constitutional adjudication can legitimately be used to focus upon the interests of those who cannot be heard in the normal legislative and judicial process.[221] A court could legitimately seize upon the unique posture of the litigants in a case like *Drummond* to begin to develop a new theory of the child's rights.

In the context of the *Drummond* case, all parties conceded that Timmy had an attachment to the Drummonds since they had met his needs practically from birth. The courts should have recognized that Timmy's emotional relationship with the Drummonds during his first two years was of fundamental significance regardless of how that relationship developed. From an emotional and psychological perspective the Drummonds were Timmy's family. This author's analysis of *Moore* supports characterizing Timmy's relationship as involving his rights. *Drummond* failed to mention the implications of *Moore* for the litigation, and the ensuing limited role for the state if Timmy's relationship to the Drummonds was recognized as a "family."

Even though the agency may have structured Timmy's relationship with the Drummonds as that of a child temporarily entrusted to a foster family, the Drummonds' desire to adopt Timmy should have been sufficient for courts to see Timmy as a wanted child.[222] This perspective on Timmy's right to family is compelled even if we think the Drummonds may have manipulated the foster care system to adopt Timmy.[223] Giving full recognition to a child's constitutional right to a family may mean foregoing other goals such as encouraging proper adult behavior.

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their relationship with a foster child. However, the Kyees were not seeking judicial permission to adopt the child themselves (they had sought such relief in a prior action, but the court there declined to overrule the county authorities, and the Kyees did not appeal), but rather to preserve their relationship with the child via a placement with another local family (the child had been removed from the Kyees' home and placed with a family in another state).

220. *See, e.g.*, GA. CODE ANN § 74.406, "Notice to putative father" (Supp. 1977), enacted subsequent to the Georgia Supreme Court Drummond decision.

221. *See* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703-18, (1975).

222. *See* GOLDSTEIN I, *supra* note 41, at 20-21.

223. *See* note 16 *supra*.

1. *The State Must Justify Disruption of a Child's Family in Terms of the Child's Present Needs.*

Since the stability of Timmy's relationship with the Drummonds should have been viewed as a constitutionally-protected right, the state should have offered a compelling justification for disrupting his family. In addition, under the above analysis of *Moore*, the agency's attempt as substitute parent to determine Timmy's interests should have been given less deference than the Drummonds' determination of Timmy's needs.

In *Drummond*, however, the agency decided that Timmy's long term interests would be met by denying the Drummonds' request to adopt him. The federal court deferred to the agency's judgment without discussing the implications of this deference from Timmy's viewpoint. The agency's judgment, as noted above, was a prediction that Timmy would risk less harm in the future if he suffered the immediate harm of separation from the Drummonds. By acquiescing in the agency's prediction, the court placed the burden on Timmy's counsel and on the Drummonds to prove the prediction incorrect.

If the decision about adoption is to be concerned with the child's interests, then the constitutional inquiry should focus on the present needs of a child.[224] The shift in focus to Timmy's immediate needs is based on the premise that the role of law in shaping family life should be minimal.[225] In *Drummond*, when Timmy was only two, the focus of the inquiry should have been on his present need for a family.

The effect of this perspective in *Drummond* would have been to require a demonstration of the agency's assertion about Timmy's long term needs. A prediction about an individual's future is hard to prove. But if the stability of the child's family is a constitutional imperative, then the state should be put to that difficult proof. To concentrate on Timmy's need for stability as a two-year-old is to grant his family the autonomy to grow and cope with his changing needs with a minimum of state interference. The court's deference to the agency's decision in *Drummond* allowed the state agency to divorce Timmy from his family, the Drummonds, without any articulated or substantial justification in terms of his immediate needs. It was as if the state, through legislative and administrative decisionmaking, decided which children should be removed because of a state judgment that the family relationship would not work out "in the long run."[226]

The proposed perspective is limited to a general presumption against state interference with a child's family. If, for instance, the state could

224. *See* GOLDSTEIN I, *supra* note 41, at 32-34.

225. For a child, the focus should be on his present needs on the corollary assumption that law cannot direct the behavior of adults in his future life in a positive fashion.

226. *See, e.g.*, Mrs. Grape's analysis of Timmy's relationship with the Drummonds. 547 F.2d at 839.

prove actual physical neglect of a child by an adult, be it a biological, foster, or adoptive parent, then state interference with the relationship would be justifiable. The presumption merely places the risk of uncertainty in child placement litigation on the state rather than on private individuals.

2. *State Ordered Changes in a Child's Family Must Seek the Least Detrimental Available Alternative for the Child.*

Before a state child welfare agency removes a child from its familial surroundings, courts should require the agency to demonstrate what the proposed alternative family situation is. Application of this requirement in *Drummond* would have authorized the courts to ask the agency: "What do you propose to do with Timmy?" Instead, the Court, using the existing analysis of child placement decisions did not question the agency's proposal of a hypothetical black adoptive family for Timmy. The proposed analysis would have required proof of the existence of an actual adoptive family and a comparison of that family to the Drummond family in terms of Timmy's needs.

The purpose of requiring proof of the alternative family for the child is to encourage agencies to make decisions that are realistic from a child's perspective. For instance, it was easy for the caseworkers in *Drummond* to refer to professional literature as the basis for the prediction that Timmy would be better off in a black adoptive family.[227] However, there was strong evidence that no such black adoptive family was available for Timmy in Atlanta.[228] If no such adoptive families were available, the agency's prediction was simply a way of increasing Timmy's chances of being permanently assigned to the foster care system. In other words, if the realistic options for Timmy were adoption by the Drummonds, an older white couple, or foster care with an older black family with remote possibility of adoption, Timmy's constitutional right to family demanded the Drummonds' be allowed to adopt.[229] Under this proposed analysis, the court should have declared that the removal of Timmy from the Drummonds' home by the state without an actual demonstration that an available alternative family was the least detrimental alternative violated Timmy's "fundamental right." This

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227. *See, e.g.,* Mrs. Grape's concerns about transracial adoptions, 547 F.2d at 837-38, and the concerns reflected in Judge Roney's dissent in the Drummond I decision, *Id.* at 860 n.4.

228. *See* Mrs. Hames' testimony about potential adoptive homes for Timmy, or the lack of same, 547 F.2d at 848. *See also* Fulton County Newspaper, April, 1978:

> "Those who hope to adopt children should know that getting a white infant may take three years, but those who accept special needs children may wait only a couple of months. *Black parents are especially needed, and currently, there are six boys under six years old available to them.*" [*emphasis added*]

229. *See* text accompanying notes 233-35 *infra*.

analysis avoids the question of whether the Drummonds' rights were violated by a denial of their petition to adopt Timmy.

By making Timmy's rights paramount, the courts could generate, but not necessarily answer, a fundamental question: Is it in Timmy's best interests today to be adopted by the Drummonds in light of his placement in a third home for the past two years? In other words, the court could ask, "Which adults, if any, constitute Timmy's family?" To expedite the proceedings, the court should have given notice of the pending litigation to Timmy's then custodians and granted them intervenor status.[230] If those custodians had accepted the court's invitation, then the case would have centered on which of the two private parties ought to prevail in being granted the status of parent.[231] Furthermore, Timmy should have had full party status. To give meaning to this status, his counsel should have had access to the agency files, and to the competing adults.[232] Despite the potential emotional trauma of such a suit for the adults, the child's rights are best delineated by litigation between private parties rather than by litigation between a private party and the state.

Had the courts taken this approach, the court decision could have more effectively ended the litigation in Timmy's life. By making a realistic decision about Timmy's placement, several years after his removal from the Drummond home, the court could have avoided the pitfall of assuming that it could repair the damages that had occurred in Timmy's life. Despite the hardship to the Drummonds, they may not "win" Timmy. A proper constitutional theory of child's rights would not award Timmy as damages for the adults' heartaches and misfortunes.[233] Using the proposed guidelines, a court could recognize that the new custodians are his "parents" despite the admitted unconstitutional disruption of his relationship to the Drummonds.

In summary, the proposed theory of a child's constitutional right to family means three things. First, there is a presumption against state interference with any child-adult relationship in which the adult is meeting the child's daily needs for emotional nurture. Using this presumption, there is no constitutionally significant difference between the foster family, biological family, adoptive family, or the extended family in *Moore* since the

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230. Pursuant to FED. R. CIV. P. 24(a).

231. *See* GOLDSTEIN, *supra* note 41, at 100, describing the burden on the intervenor in an attempt to alter a child's current placement, under the authors' proposed Model Child Placement Statute. The Drummonds, in this case, would have to show both that Timmy is unwanted by his present custodians and that the child's current placement is not the least detrimental alternative.

232. To make an independent judgement with reference to Timmy's interest, Timmy's counsel must have the right to seek out germane information by written and oral depositions of the competing parties, and the agency involved and the power to subpoena agency files.

233. *See* Goldstein *Why Foster Care—For Whom for How Long?* 30 PSYCHOANALYTIC STUDY OF THE CHILD 647, 653 (1975).

presumption focuses our attention on a child's dependency upon particular adults. Second, any attempts by the state to disrupt the adult-child relationship under the rubric of the child's "best interests" must be justified in terms of the child's immediate needs rather than his long term needs. This requirement would mean that the *Drummond*-type definition of the child's long range best interests was constitutionally inadequate to justify interference with Timmy's relationship to the Drummonds. Third, any proposed change in the identity of the adults who meet a child's needs requires not only an articulated adequate justification, but also the presence of an actual alternative placement that constitutes the least detrimental alternative from the child's perspective. In practical terms, the third requirement of a child's rights means a court would invalidate any changes in a child placement such as those in *Drummond* where no actual adoptive or foster family was proposed to replace the disrupted family.

Taken together the requirements mean that the conflicts among adults with interests in a particular child must be resolved by courts rather than by the current practice of the agency standing in place of one of the competing adults. Further, in choosing between available adults, a court should make a choice, "on the basis of short-term predictions and given the limitations of knowledge," that maximizes the child's opportunity for being wanted and maintains a child's relationship with at least one psychological parent.[234] By seeking to maintain existing relationships, the proposed theory takes account of the child's sense of time, which is a crucial aspect of his constitutional rights.

Using this statement of the proposed theory, we can now answer the question posed earlier regarding the child's right to be adopted.[235] In light of the presumption against state interference with parent-child relationships, the right to be adopted would not allow the state to determine a priori, for instance, that Timmy's unwed mother was "unfit" because of Timmy's long range interest. Rather the child's right to be adopted is a relevant consideration only when the child's biological parents indicate that they do not want the child by either voluntarily surrendering guardianship or by failing to meet the child's most basic emotional and physical needs. In the latter case, the state can disrupt the parent-child relationship, but its goal should be permanent placement as soon as possible. Thus, adoption is preferred to foster care placement because the adoptive parents are not only indicating that they want the child, but because adoption maximizes the child's opportunity to maintain the adult-child relationship. Foster placement has the opposite effect on the child's opportunity to maintain a relationship with an adult because it increases the child's chance of instability in his relationships to adults, even if in each relationship the child is wanted.

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234. GOLDSTEIN, *supra* note 41, at 53.

235. *See* text at 46, *supra*.

When placement of a child is contested before a court, the court should transform the child placement hearing into a hearing on the child's adoption between all interested private parties and the child welfare agency. After examining those parties who want the child, the court should choose that adult who can best meet the child's needs. Thus, under the proposed theory of the child's right to family, his right to adoption depends upon the particular social circumstance of the child's life.

In the context of *Drummond*, Timmy's right to adoption meant the Court of Appeals should have ordered his adoption in 1976. But giving recognition to the child's sense of time in 1978, the court should have allowed Timmy's present custodians to adopt him unless the Drummonds could demonstrate that Timmy was unwanted. If the Drummonds had succeeded in proving this, a court could have ordered Timmy's adoption by the Drummonds without agency inquiry as to whether the Drummonds were the "best parents" for Timmy out of the available pool of adoptive parents.

Finally, in proposing that courts should recognize a child's right to family and a specific right to adoption in a certain context, we should note two significant differences between the adult's and child's constitutional family rights. Courts should give some deference to legislative categories of family in their constitutional analysis when only adults' rights to family are at stake. Acceptance of the proposed theory does not imply, for instance, that two unmarried adults can force the state to treat their relationship as a "marriage."[236] Justice Brennan's position in *OFFER* that foster family and biological families receive different constitutional protections should be limited to situations where only adults' rights are at issue. As noted above, from a child's perspective there is no constitutionally significant difference between the foster family, biological family, or adoptive family. This constitutional analysis recognizes the dependency of children and their inability to choose their family in the sense that adults have freedom of choice in family matters. Justice Powell's analysis in *Moore* supports a definition of a child's family in terms of dependency.

Second, as a consequence of the child's being dependent on adults for having his needs met, the state's interference with the child's family requires not only a compelling justification, but a realistic alternative means of meeting those emotional needs. Thus, in constitutional analysis of family law issues the Court can declare a statute regulating marriage and the economic support of children unconstitutional by reference to the compelling state interests test.[237] If, however, the same case had actually involved children as parties, the Court would have had to weigh the actual available alternatives for the children in terms of meeting the child's emotional

236. *See e.g.*, Jomes v. Hallahn, 501 S.W.2d 588 (Ky. 1973).
237. Zablocki v. Redhail, 434 U.S. 374 (1978).

needs. Were the suit over child support actually resolved by reference to the child's interests, the definition of the child's needs by the private custodian—be he divorced parent, foster parent, biological parent or adoptive parent—must be preferred to the state's definition of the child's needs. The requirements of a realistic alternative placement in child placement litigation is a means of limiting the state's role as substitute parent under the proposed constitutional analysis.

The difference between the child's constitutional interests and an adult's interest in the family means that the proper subject matter of child placement litigation should be the child's rights.[238] The proposed theory implies that the rights of children within the family should also be paramount when parent-child conflicts come before courts. As a child's needs are met by different adults over time, the court must seek the least detrimental alternative for the child. The proposed theory would permit courts to recognize the legal significance of the child's dependency upon adults. In effect, this theory of the child's rights unites procedural and substantive due process analyses. In developing the doctrine of the woman's right to choice in family matters, the Court has had to rely on a combination of substantive and procedural analyses.[239] Similarly, in developing a theory of a child's constitutional rights in family matters the Court would have to eschew the traditional boundaries of substantive and procedural due process.[240]

IV. A LEGISLATIVE ANALYSIS OF THE ADOPTION PROCESS

Courts may be reluctant to use the constitutional analysis proposed in this article for a number of reasons. First, the proposed analysis suggests that adoption disputes ought to be decided by reference to the child's "substantive due process" rights at a time when the United States Supreme Court appears extremely reluctant to re-open the doctrinal debate over substantive due process.[241] Second, by arguing that courts should ignore the legislative distinctions between various child welfare systems such as foster care and adoption, the proposed analysis implicitly poses questions about the appropriateness of present child welfare legislative policies.[242] Some

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238. *See* GOLDSTEIN, *supra* note 41, at 7.

239. Roe v. Wade, 410 U.S. 113 (1972); Doe v. Bolton, 410 U.S. 179 (1972).

240. Some commentators have supported such a departure from a strict textual interpretation of the Constitution as a method of judicial analysis. *See, e.g.,* Grey, note 223, *supra* and Ely, *Constitutional Interpretivism; Its Allure and Impossibility*, 53 IND. L. J. 399 (1978).

241. The Court's most recent use of a "substantive due process" type analysis in the abortion cases generated vigorous criticism from commentators. *See, e.g.,* Ely *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L. J. 920 (1973). These criticisms reflect a concern among constitutional law scholars about the state of theoretical development in the field generally. *See, e.g.,* Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought,* 30 STAN. L. REV. 843 (1978); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. CIV. RIGHTS L. REV. 117 (1978).

242. For instance, the analysis in this article implicitly critiques the foster care system. A

courts may not see their constitutional role as encompassing the ability to raise such policy issues. Finally, because the proposed analysis has argued against present constitutional analyses as adult centered, courts may be reluctant to radically alter the idea of vested parental rights that now dominates legal decisions involving a child's adoption.

This article has argued that all of these objections have a common origin: the assumption that the state is competent to act as a substitute parent. Once this overall assumption is rejected by courts, the arguments against the proposed constitutional analysis should not be persuasive. If courts reject this assumption, the analysis urges them to develop a new perspective on legal disputes involving adoptions that would require the prevailing constitutional analyses to be reexamined from the child's perspective.

Even if courts reject the constitutional analysis offered in this article it nevertheless provides guidelines for reforming the child placement laws. It accomplishes this by asking legislatures and child welfare agencies to devise a new overall perspective on child placement laws that would determine whether the state should continue to act as substitute parent.[243] The answer under the proposed constitutional analysis is "No."

A legislature might view the *Drummond* analysis and result as demonstrating the need for reform of the laws governing adoption. If, using the *Drummond* analysis the legislature defined the problem as being one of interracial adoption, resolution of the competing interests would be even more difficult because of the overabundance of black infants (and other so-called "hard to place" children) compared to the scarcity of white infants available for adoption.[244] If interracial adoption is viewed as the issue, the

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court might be reluctant to use the analysis just because it implies the need for radical revision of the foster care system. If courts had an overall perspective on the role of law in a child's life, however, these implicit criticisms of the foster care system would not be seen as a barrier to using the analysis in a controversy over adoption. The analysis proposed here is consistent with the idea that legislature's ought to revise the foster care system. *See* Goldstein, *Why Foster Care—For Whom For How Long,* 30 PSYCHOANALYTIC STUDY OF THE CHILD 647 (1975).

243. *Cf.* GOLDSTEIN, *supra* note 41, Chapter 7, "Provisions for a Model Child Placement Statute."

244. *See* Shyne, *Adoption Trends*: 1976, 56 CHILD WELFARE 479 (1977); Haring, *Adoption Trends*: 1971-1975, 55 CHILD WELFARE 501 (1976); Haring, *Adoption Trends*; 1971-1974, 54 CHILD WELFARE 524 (1975). *See also* SIMON & ALTSTEIN, TRANSRACIAL ADOPTION 11 (1977), and GROW & SHAPIRO, BLACK CHILDREN, WHITE PARENTS: A STUDY OF TRANSRACIAL ADOPTION 3 (1974).

The Child Welfare League of America Research Center reports that non-white homes for non-white children continue to be in short supply: 74 non-white homes approved per 100 non-white children accepted for placement in voluntary agencies, and 67 non-white homes approved per 100 non-white children accepted in public agencies. Shyne, *supra*, at 480. This report, however, was derived from a data base of only 15 public and 40 voluntary child welfare agencies. Also, the data does not statistically separate the non-white infant from the group of non-white children.

White parents willing to adopt a black or minority child are assumed to be entering a spe-

legislature would have to address this market situation. In attempting to devise a solution, the legislature should use the growing body of social science literature on interracial adoption.[245] But, before such research material could be used as a basis for reformulating legislative policies, the legislators would need a perspective which would allow them to understand and debate the merits of adopting and implementing the goals which are implicit in this body of literature. With such a perspective, legislators would be equipped to explicitly identify and debate the goals of those who have studied interracial adoption. Therefore, they would be confronted with the issue of the role law ought to play in a child's life.

The studies by social scientists of interracial adoption have led to the development of two predominant approaches to this problem. First, some commentators suggest that policy makers ought to be primarily concerned with the social consequences that a child in an interracial adoption might experience, particularly in adolescence.[246] Some of the literature, for instance, supports the agency view in *Drummond*, that in the long run Timmy,

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cial or different adoption market. Assumptions vary, however, with each group involved in the market. For critics of transracial adoption, it is a market where white adults, responding to the scarcity of white children seek the black children whom black adults would adopt were they (1) aware of the children's availability or (2) economically capable of supporting another child. *Cf. Position Paper, National Association of Black Social Worker's Conference*, in Nashville, Tenn., April 4-9, 1972, *reprinted in* SIMON, *supra* at 50. To white adoptive parents, a child's "hard to place" status because of race may be an added factor in their desire to adopt him. GROW, *supra*, at 70, reports that 42% of the white parents in their study who had adopted transracially gave as their reason the social motivation of providing a home for a 'hard to place' child. Another 10% saw transracial adoption as a way of "furthering the cause of integration or a way of carrying out their Christian duty." For an analysis of the child adoption market from a more purely economic perspective, *see* Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

A final factor to consider here is the consequence of an "economic" response to the shortage of non-white families for non-white adoptive children. Subsidized adoption, for example, would impose upon the family not only the economic cost of an additional family member, but also the burden of continuing state intervention into family life.

245. *See, e.g.*, SIMON, *supra* note 244; J. LADNER, MIXED FAMILIES, 216-217 (1977); and BILLINGSLY & GIOVANNONI, CHILDREN & THE STORM, 197-199 (1972).

246. *See* LADNER, *supra* note 247 at 49, 79-81 and 252-254. *Cf.* COMER & POUSSAINT, BLACK CHILD CARE 19-20 (1975):

> In the past, black children were taught the rituals of servitude and docility from the time they could talk. These included addressing all whites, adults and children alike, with a "yes sir" or "no sir". In turn they were called names like "tar baby" or "Little Black Sambo" and otherwise cruelly mocked and tormented by whites. Today the black child is still made to feel inferior to whites. From his earliest days he senses that his life is viewed cheaply by white society and that he enjoys little protection at its hands. For example, black youths are frequently the victims of racially motivated police abuse at an early age . . . . The black child has been forced to learn to live in two cultures—his own minority culture and the majority one. He has had to teach himself to contain his aggression around whites while freely expressing it among blacks. Some people call this a survival technique.

the mixed-race child, will be better off with a black family than with a white family such as the Drummonds. A second group of commentators emphasize that the criteria used to deny prospective parents access to the adoption process irrespective of the race of any child involved ought to be revised. Scholars analyzing the interracial adoption issue from this perspective point to the economic and social standards imposed on adoptive parents, and to their discriminatory effect of excluding black parents who might adopt black children.[247] Under these two approaches, the policy objectives become, respectively, ensuring the racial identity of adoptive parent and child, and eliminating the selection criteria for adoptive parents that are facially neutral but discriminatory in effect.

Under the proposed analysis, neither of the implicit goals of the commentators on interracial adoption should be used by legislatures in reforming adoption laws because these goals are adult-centered goals. If, instead, the legislature used the goal of this proposed analysis, i.e., the maximization of the child's opportunity to be wanted and nurtured by at least one adult as a basis for reform, the commentators' goals would be viewed as adult-centered and rejected on that basis.

For example, those commentators whose concerns are with the effects of discriminatory standards for adoptive parents have recommended that the legislature enact subsidized adoption programs for "the hard to place child."[248] While these commentators readily include all black or interracial children within the hard to place categories,[249] the proposed analysis requires legislatures to be more refined in their own analysis. Given the scarcity of white infants available for adoption, the legislature should try to reverse present agency policies that discourage adoption of black infants by white parents.[250] With this perspective, healthy infants of whatever race would not be classified as "hard to place." The new "hard to place" category would include those older and disabled children who are presently trapped in the foster care system.[251] The goals of a subsidized adoption program would then be much more specific and limited in terms of the child's needs

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247. *See generally* LADNER, *supra* note 245 at 221-224, 242; BILLINGSLEY, *supra* note 245 at 188-197; SIMON, *supra* note 245 at 199-201; BENET, THE POLITICS OF ADOPTION 144-156 (1976); S. KATZ, *Subsidized Adoption in America,* 10 FAM. L. Q. 3 (1976).

248. *Cf.* SIMON, *supra* note 245 at 199-201; LADNER, *supra* note 245, at 242; KATZ, note 247 *supra.*

249. *See, e.g.,* KATZ, *supra* note 247 at 8, and the Model State Subsidized Adoption Act and Regulations. § 2, Comment 6, quoted in KATZ at 11-12.

250. There is political pressure which discourages such a policy reversal. *See, e.g., Position Paper, National Association of Black Social Worker's Conference, supra* note 244. *But see Black Child, White Parents, New York Times*, August 6, 1979, at 16, col. 1.

251. *Cf.* Mnookin II, *supra* note 42, at 610-13; LADNER, *supra* note 245 at 215-216; *Katz, supra* note 248. *Cf. Goldstein, supra* note 242, at 657 (a proposal for redefining foster care in terms of a child's needs for continuity of relationships).

rather than the larger goal of providing all adults equal access to the adoption process. The more limited goal for subsidized adoption is based on the premise that it is preferable for a child to live in a family without state intervention and supervision that is inherent in subsidized adoption. This view, of course, means that economically advantaged adults will have more opportunities to adopt than will less well-off adults. But this disparity should in turn be viewed as a misfortune of our society that today's children should not be obligated to cure.

Similarly, the goal of avoiding the social harm of being a member of an interracial family at adolescence should not be a goal of legislative reform for several reasons. The period of adolescence is a particularly difficult period for both youth and parents in this society. Conflict between parents and youth is the norm rather than the exception.[252] Law should not single out the conflict over interracial dating or the problem of positive racial identity formation for the adoptive child as controlling in the adoptive process as some commentators suggest. Implicit in the commentators' recommendation is the idea that social aspects of childhood ought to be controlling in the distribution of "parenthood rights."[253] In addition, the goal of protecting the child from some future imagined social censure ignores the parents' capacity to grow to meet the child's needs. In rejecting the idea that the adoption process should find the perfect parent for the child, the legislature would only be recognizing the law's incapacity to remedy a crisis in the child's life at the time of adoption. In focusing on the present needs of a child, legislatures would be offering the best protection against social harm that law can provide an individual.

Thus, the fundamental problem before the legislature is to implement the idea that the function of law is to protect a child from greater harm only at the point at which a crisis in a child's life comes to the attention of law. Under this view, the primary function of law is to provide a framework for resolving conflicts over children rather than planning their future lives. To protect the legal rights of children, these conflicts must always be adjudicated in terms of results to the child. Had Timmy's life in law begun under a legislative system built on these principles, there could have been no

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252. *Cf.* Burt, *supra* note 9, at 132-135.

253. *But see* CALABRESI & BOBBIT, TRAGIC CHOICES 73 (1978).

> "[I]f the right to bear and care for children were made dependent on 'a showing of good moral character and the completion of a satisfactory essay discussion on the role of the superego in child development', both being arguably relevant to parenthood, we would object, on egalitarian grounds as soon as it became apparent that moral character and essay writing reflected traits that tended to be paired with particular socioeconomic groups."

If we are to speak of these rights at all, the criteria for establishing them should be based on the care and nurturance of a child; a right emerging from that relationship, rather than an intrinsic right of all adults.

adjudication of Timmy's biological mother's "unfitness" without reference to Timmy's actual disposition even if, under the circumstances, institutional placement was the least detrimental alternative.[254]

Under the analysis proposed, Timmy's initial break with his biological parent would have been viewed as a crisis at one month of age. Rather than seek to find him a better parent, by adult standards, the goal of law should have been to recognize that the meeting of his needs was his "right." Thus the legislature should grant courts authority to meet the child's needs or to remedy the derogation of his rights. In Timmy's mother's situation the legislature should limit the court's options to: (1) an immediate return of Timmy to his biological mother with the offer of services or (2) immediate termination of her parental rights and placing Timmy immediately for adoption. But an indefinite sentence to foster care should not have been an option for the agency or courts. Once Timmy had remained with the Drummonds for two years, whether because of bureaucratic oversight or neglect, or their own manipulation of the foster care system,[255] the legislature should have viewed him as presumptively adopted. The agency would then have been interfering with Timmy's rights when he was removed.

Contrary to present agency practices that discourage foster parent adoptions, there should be a legislative presumption in favor of adoption by foster care parents.[256] Such a presumption would force legislatures to review the hodge-podge of adoption laws to determine whether they impede a child's adoption. For instance, what purpose is served by adoption abrogation?[257] Legislation requiring the recognition of religious matching preferences "whenever practicable"[258] and the sealing of adoption records might be viewed with a new perspective.[259] As to the religious matching statutes, the legislature might ask whether they actually allow for the rapid adoption of children.[260] As to the unsealing of adoption records, the legislature must

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254. *Cf.* GOLDSTEIN, *supra* note 41, at 53-64.

255. *See* note 16 *supra*.

256. *See, e.g.*, N.Y. SOC. SERV. LAW § 392(7) c & d (McKinney Supp. 1978); Datz, *supra* note 248, at 13-14; Goldstein, *supra* note 242, at 657-662.

257. Adoption abrogation statutes allow, for example, an adoptive parent to petition a court to annul an adoption where the child turns out to have a developmental disability not disclosed or apparent at the time of adoption. *See, e.g.*, CAL. CIV. CODE § 227b (West Supp. 1978), and Department of Social Welfare v. Superior Court, 1 Cal. 3d 1, 459 P.2d 897, 81 Cal. Rpt. 345 (1969). Many states have repealed their adoption abrogation statutes, *see, e.g.*, N.Y. DOM. REL. LAW § 118b (McKinney 1977) (repeal effective June 15, 1974, 1974 N.Y. LAW, c. 1035 § 1) but the waiting period between placement and a final order of adoption, *see, e.g.*, N.Y. DOM. REL. LAW § 112 (6) (McKinney 1977), gives the adoptive parents a chance to abrogate without explicit statutory provision.

258. *See, supra* note 136.

259. *Cf.* SOROSKY, THE ADOPTION TRIANGLE (1978), and Yesterday's Child v. Kennedy, 569 F.2d 431 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3777 (1978).

260. *See* BENET, *supra* note 247, at 208-209; Note, *Religious Matching Statutes and Adoption*, 51 N.Y.U.L. REV. 262 (1976).

distinguish the interests of the children and adults involved in this growing controversy. If legislatures were to reverse present policies and allow the adoption records to be unsealed at the request of an adult adoptee, an additional issue must be faced: what effect would such legislation have on the adoption of today's children which typically involves an unwed mother relinquishing a child for adoption? Neither of these current issues of legislative reform should be resolved without an overall perspective on child placement.

The presumption against state interference with the child's family relationship argues for legislative recognition of all existing child-adult relationships, where the child's needs are being met as the child's family regardless of their present legal labels. With such recognition, courts would have viewed all of the processes of law that intervened in Timmy's life as state interference with his family relationships. Were the other two aspects of the proposed constitutional analysis also used, courts would have required the agency to justify interference with his family by demonstrating that the alternative was the least detrimental from the child's perspective.

In practical terms, this would require legislatures to review the actual operations of our systems of foster care, neglect and abuse, and adoption, and the case law supporting these various systems. Even though the record of these agencies may not be "ideal," [261] the legislature need not fault the agencies. The agencies' performance may in fact be indicative of law's true incapacity to perform the role of substitute parent.[262]

V. CONCLUSION

Part I has demonstrated that a focus on parental rights in children allows legal decision makers to ignore the effect of legal decisions upon the lives of children. Part II demonstrated that the existing method of constitutional adjudication of adoption merely sanctions agency discretion. The alternative method offered in Part III is a constitutional theory that defines the child's legal rights in terms of a child's right to family and the actual consequences to the child of legal decisions. Part IV has suggested that judicial development of a theory of a child's constitutional rights should encourage legislatures and courts to reform the complex legal framework that presently governs child placement.

The analysis of *Drummond* presented here does not necessarily offer a complete constitutional theory to deal with "race."[263] Rather, a constitutional theory of a child's legal rights has been suggested as a better way of addressing the issues presented by the case. Recognizing a child's legal entitlement to a family means that his relationship to adults meeting his

261. *See* LADNER, *supra* note 245, at 216-221; BENET, *supra* note 247, at 200-212.

262. *See* GOLDSTEIN, *supra* note 41; BURT, *supra* note 9.

263. *See* note 94 *supra*.

needs must receive a maximum of constitutional protection from state intrusion alleged to be in his "best interest." More importantly, the recognition of a child's legal entitlement to family may mean in a conflict situation that adults have no entitlements in the child. In raising the child's entitlement to family to the highest level, the proposed constitutional doctrine gives the highest protection to those adults who nurture and care for children.