

FOSTER CARE PLACEMENT: REDUCING THE RISK OF SIBLING INCEST

David J. Herring*

The Westermarck theory maintains that incest avoidance arises from the physical proximity of siblings during a critical period of early childhood. This proximity gives rise to an inhibiting effect on post childhood sexual interest. Two recent studies of sibling relationships have verified and refined the Westermarck theory, indicating that the critical period extends through the first four years of childhood. The theory and the studies have implications for child welfare laws, policies and practices surrounding the placement of siblings in foster care. Namely, the findings provide powerful reasons for placing siblings together during the critical period in order to minimize the risk of post childhood sibling incest. Although public child welfare systems currently recognize the value and benefits of placing siblings together, these systems fail miserably in this area because of a lack of resources. By focusing on children in the critical period of development, resource-poor public systems can marshal their will and target their resources to actually place this discrete group of siblings together, avoid increasing the risk of post childhood sibling incest, and realize all the benefits of maintaining sibling relationships.

INTRODUCTION

Studies from the field of evolution and human behavior provide insights into human conduct and relationships that are relevant to child welfare law, policy and practice.¹ This Article examines a specific line of research that addresses incest avoidance between siblings. The longstanding Westermarck theory maintains that incest avoidance arises from the proximity of siblings during a critical period of early childhood.² This proximity gives rise to an inhibiting effect on post childhood sexual interest.³

* Dean and Professor of Law, University of Pittsburgh School of Law; B.B.A. 1980, University of Michigan; J.D. 1985, University of Michigan Law School. Professor Herring would like to thank Lawrence Frolik, Margaret Mahoney, Francis Barry McCarthy, John Parry, Thomas Ross, Edward Sites, Mark Strauss and Lu-in Wang for comments and support.

1. See, e.g., Owen Jones, *Evolutionary Analysis in Law*, 75 N.C. L. REV. 1117 (1997); David J. Herring, *Behavioral Genetics and the Best Interests of the Child Decision Rule*, 36 MICH. J.L. REFORM 1 (2002) [hereinafter Herring, *Behavioral Genetics*]; David J. Herring, *Child Placement Decisions: The Relevance of Facial Resemblance and Biological Relationships*, 43 JURIMETRICS J. 387 (2003) [hereinafter Herring, *Child Placement*].

2. See Irene Bevc & Irwin Silverman, *Early Separation and Sibling Incest: A Test of the Revised Westermarck Theory*, 21 EVOLUTION & HUM. BEHAV. 151 (2000).

3. See *id.* at 151.

Researchers have conducted a series of studies to verify and refine the Westermarck theory.⁴ These studies have largely verified the theory, but have also provided additional insights. For example, researchers have begun to define the specific age range within which sibling proximity gives rise to post childhood incest inhibitions and determine the specific types of sexual activities that are inhibited by proximity during early childhood.⁵

The findings from these studies are relevant in making placement decisions for children involved in public child welfare systems. Namely, the separation of siblings during early childhood could have serious implications for their subsequent interactions upon reunification. This Article focuses on identifying and exploring these implications.⁶

Legal scholars can make important contributions by engaging the work of scientific scholars. They can begin a dialogue among scholars in relevant fields that allows each participant to take small, careful steps to further knowledge and improve practice in focused areas of inquiry.⁷ Specifically, the work flowing from the Westermarck theory provides an opportunity to modestly improve a particular aspect of foster care placement policy and practice. The body of work also provides suggestions for additional research that will further inform foster care policy and practice in a particular area. Additionally, the work hopefully will spur a broader discussion among legal and scientific scholars that will lead to cooperative efforts to improve many aspects of foster care policy and practice.

This Article explains the Westermarck theory in Part I. In Part II, the Article explains two studies of the Westermarck theory using biological siblings as subjects. Researchers Irene Bevc and Irwin

4. See *id.* at 152.

5. See *id.* at 152, 154.

6. See discussion *infra* Part IV. It must be noted that in exploring the implications of separation and reunification of siblings this Article recognizes that post childhood sibling incest occurs with a frequency that is significant and certainly non-trivial. Arthur Wolf, in his review of studies of the incidence of incest in the general population, concludes that the best evidence available indicates that the frequency of incest reaches a probability of approximately 2% in brother-sister relationships in some localities. ARTHUR P. WOLF, SEXUAL ATTRACTION AND CHILDHOOD ASSOCIATION: A CHINESE BRIEF FOR EDWARD WESTERMARCK 443 (1995). In addition, this Article takes as given that post childhood sibling incest entails serious negative consequences that child welfare systems should strive to avoid. Such sexual activity is often illegal. See, e.g., ALA. CODE § 13A-13-3 (2003); CAL. PENAL CODE § 285 (West 2003). Even if not formally illegal, this activity can damage family relationships and social standing because of the stigma of incest. This in turn can lead to significant psychological trauma and family disruption. See ALA. CODE § 13A-13-3 cmt. (2003); WOLF, *supra*, at 454-61; S. Kirson Weinberg, *Incest Behavior*, in SEX AND SOC'Y 172-78 (John S. Edward ed., 1972).

7. See Herring, *Child Placement*, *supra* note 1; Herring, *Behavioral Genetics*, *supra* note 1, at 2; Jones, *supra* note 1.

Silverman designed and conducted both studies, publishing the results in 1993⁸ and 2000,⁹ respectively. The 2000 study was designed to test and extend the results from the earlier study. In Part III, the Article turns to an examination of current child welfare agency policies and practices surrounding the placement of siblings in foster care, along with a description of relevant legislation and legal doctrine. It begins with a discussion of the value of sibling relationships, the harms caused by separating siblings, and the benefits of placing siblings together. An integral component of the examination addresses policies and practices surrounding the reunification of siblings within their original biological families following placement in foster care. In Part IV, the Article describes the potential risks faced by siblings involved in public child welfare systems in light of the findings from the research surrounding the Westermarck theory. In addition, this Part discusses the implications of the identified risks and proposes the development of foster care placement policies and practices that focus on minimizing the identified risks. The Article concludes by summarizing the implications of the new knowledge discussed in the article and calls for additional research in this area.

I. THE WESTERMARCK THEORY

The Westermarck theory posits that physical proximity of opposite sex siblings during early childhood has a significant inhibiting effect on later sexual interest in each other.¹⁰ In other words, as siblings enter adolescence and adulthood, they are not interested in sexual relations with each other because of the time they spent together during early childhood.¹¹

The Westermarck theory arises from insights into human development provided by the evolutionary paradigm.¹² This paradigm begins by identifying and articulating ultimate level adaptive functions.¹³ According to the Westermarck theory, one ultimate level

8. Irene Bevc & Irwin Silverman, *Early Proximity and Intimacy Between Siblings and Incestuous Behavior: A Test of the Westermarck Theory*, 14 *ETHOLOGY & SOCIOBIOLOGY* 171 (1993).

9. Bevc & Silverman, *supra* note 2.

10. *See id.* at 151; WOLF, *supra* note 6, at 1–19.

11. *See* Bevc & Silverman, *supra* note 2, at 151; WOLF, *supra* note 6, at 1–19.

12. *See* Bevc & Silverman, *supra* note 2, at 151–52; JOSEPH SHEPHER, *INCEST: A BIOSOCIAL VIEW* 43–50, 85–133 (1983).

13. *See* Shepherd, *supra* note 12, at 43–50, 85–133. Professor Owen Jones describes the biological term “ultimate cause” by comparing it to the term “proximate cause:”

adaptive function is for individuals to avoid sexual relations with others who are closely related to them biologically. Individuals who reproduce with others who are closely related to them incur a significant cost in terms of reproductive success because their offspring are more likely to inherit genetic flaws.¹⁴ For example, parents who are closely related are much more likely to possess some of the same latent genetic defects that become manifest only when one of their offspring receives a matching pair of the defective genes.¹⁵ This raises the risk that the child will inherit birth defects or other genetic flaws, resulting in a significant cost to the parents in terms of reproductive success.¹⁶ Their offspring, rather than reproducing and passing the parents' genetic material to a new generation, may die quickly, or survive with limited prospects for successful reproduction.¹⁷

Individuals benefit in terms of reproductive success if they avoid this increased risk.¹⁸ The identified reproductive benefit is the ultimate cause that leads to an adaptation; successful individuals will possess traits that lead to an avoidance of reproduction with other closely related individuals.¹⁹ More of their offspring will survive and reproduce, passing their genetic material to a new generation. This genetic material will include information that codes for the desired traits, and because of the heightened success of individuals who possess it, this genetic material and the related traits will become prevalent within a population.²⁰

In biology, the term "proximate cause" refers only to the "how" of behavior. It peacefully coexists with the term "ultimate cause," which describes the larger "why" of behavior. More precisely, "proximate causes" describe immediate causes, related to the internal mechanisms and development that cause an organism to manifest a particular behavior. They may be defined in terms of physiology and biochemistry, for example, as well as, at times, an organism's unique developmental-environmental history. "Ultimate causes," on the other hand, describe evolutionary processes by which the same behavior came to be commonly observable. These may be defined in terms of the history and reproductive consequences of behavior. Proximate and ultimate cause operate together, with all behavior depending on ultimately-shaped proximate mechanisms.

Jones, *supra* note 1, at 1127–28 (citations omitted). Professor Jones also explains that a function or trait is adaptive if it increases an individual's reproductive success—the survival and prevalence of the individual's genetic material in successive generations. *Id.* at 1132–40.

14. See SHEPHER, *supra* note 12, at 85–133.

15. See *id.*

16. See *id.*

17. See *id.*

18. See *id.*

19. See *id.*

20. See *id.*; Jones *supra* note 1, at 1132–40.

The Westermarck theory does more than identify the ultimate cause of a specific adaptation. It also proposes the proximate social mechanism that operationalizes this adaptation: physical proximity during the early years of childhood.²¹ Namely, individuals who live in close proximity (i.e. within a single family association) during early childhood are likely to develop a sexual aversion to each other.²² In this way, the adaptation developed in response to the ultimate cause is operationalized.

The proximate social mechanism identified by the Westermarck theory makes sense in light of the social environment within which human evolution occurred.²³ Humans developed fundamental traits in a highly stable social environment that extended over several million years.²⁴ This longstanding social environment consisted of small communities of individuals engaged in hunting and gathering.²⁵ Within these communities, individuals were most often raised in close proximity to siblings, parents, and other closely related relatives.²⁶ As a result, proximity to others during early childhood signaled a close biological relationship.²⁷

Researchers have constructed studies to test, verify and expound on the underlying logic of the Westermarck theory.²⁸ Initial studies did not involve biologically related children such as siblings. Instead, researchers examined biologically unrelated children who spent their early childhood in close proximity to each other.²⁹

One of the most frequently cited studies examined children raised in Israeli Kibbutzum.³⁰ Within these communities, unrelated children are raised together in the same house.³¹ The children live in very close proximity to each other, much like siblings within more traditional family environments.³² The researchers found that these children are disinclined to select one another as sexual or marital partners.³³ However, the researchers also found that this

21. See WOLF, *supra* note 6, at 1–3; Bevc & Silverman, *supra* note 8, at 172.

22. See WOLF, *supra* note 6, at ; SHEPHER, *supra* note 12, at 43–49.

23. See SHEPHER, *supra* note 6, at 67; MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUM. NATURE* 188–92, 282–86 (1993).

24. See RIDLEY, *supra* note 23, at 188–92; Jones, *supra* note 1, at 1129–32.

25. RIDLEY, *supra* note 23, at 188–92; Jones, *supra* note 1, at 1129–32.

26. See RIDLEY, *supra* note 23, at 188–92; DAVID J. HERRING, *THE PUBLIC FAMILY: EXPLORING ITS ROLE IN DEMOCRATIC SOCIETY* 20–28 (2003).

27. See HERRING, *supra* note 26, at 20–28.

28. See Bevc & Silverman, *supra* note 2, at 151–52.

29. See *id.*; see also SHEPHER, *supra* note 12 at 51–67; WOLF, *supra* note 6 at 20–40.

30. See SHEPHER, *supra* note 12 at 51–62.

31. See *id.*

32. See *id.*

33. See *id.*

disinclination is largely confined to the area of sexual/marital relations, with individuals raised together during early childhood tending to remain close friends during adolescence and adulthood.³⁴

In one of the most comprehensive studies, researchers examined individuals who experienced arranged marriages in Taiwan.³⁵ A significant number of the married couples consisted of individuals who had lived together as children, interacting much like siblings.³⁶ These couples experienced a high frequency of sexual dysfunction in comparison to couples consisting of individuals who did not grow up together.³⁷ This dysfunction was manifested in relatively low fertility rates, elevated divorce rates, and increased occurrences of adultery.³⁸ Similar studies of arranged-cousin marriages in Lebanon yielded consistent findings.³⁹

These non-sibling studies largely verify the Westermarck theory's prediction: proximity during early childhood has an inhibiting effect on subsequent sexual relations during adolescence and adulthood.⁴⁰ In the context of incest, what "is," biologically speaking, appears to equate with a strongly held human "ought"—namely that individuals should not engage in sexual relations with closely related individuals.⁴¹

While the initial non-sibling studies are helpful in verifying the general operation of the Westermarck theory, researchers felt that studies of actual sibling relationships would provide more cogent and detailed insights.⁴² They have now conducted two studies of actual sibling pairs. These studies are described in the next Part of this Article.

II. THE BEVC & SILVERMAN STUDIES

Irene Bevc and Irwin Silverman designed and conducted two successive studies of sibling pairs in order to test the Westermarck

34. See *id.*; Bevc & Silverman, *supra* note 2, at 152.

35. Wolf, *supra* note 6, at 20–40.

36. *Id.*

37. See *id.* at 78–165.

38. See *id.*

39. See Bevc & Silverman, *supra* note 2, at 152; J. McCabe, *FBD Marriage: Further Support for the Westermarck Hypothesis of the Incest Taboo*, in 85 AM. ANTHROPOLOGIST 50, 57–64 (1983).

40. See Bevc & Silverman, *supra* note 8, at 171–72; Bevc & Silverman, *supra* note 2, at 151–52.

41. See WOLF, *supra* note 6, at 508–15.

42. Bevc & Silverman, *supra* note 8, at 172.

theory. The first sibling study is described in Section A of this Part. Although this initial study verified the Westermarck theory, Bevc and Silverman recognized ambiguities arising from the study. They designed and conducted the second sibling study in order to address the identified ambiguities. This second study is described in Section B of this Part.

A. The First Sibling Study

In the first study examining the Westermarck theory in light of the experience of opposite sex biological siblings, Bevc and Silverman administered a survey to approximately 500 undergraduates at York University in Toronto, Ontario.⁴³ The survey results allowed the researchers to compare those who reported post childhood sexual encounters with a sibling to those who reported no such encounters.⁴⁴ In comparing the two groups, the study focused on any separation the sibling pair had experienced for a year or more during early childhood and on the extent of physical proximity and intimacy between the siblings during early childhood.⁴⁵

Overall, the comparison confirmed the Westermarck theory.⁴⁶ Separation during early childhood was positively related to post childhood sexual behavior between siblings.⁴⁷ This positive relationship was statistically significant.⁴⁸ Therefore, the researchers found that opposite sex siblings who had experienced separation during early childhood were more likely to engage in sexual relations with each other as adolescents and adults than those who had not been separated.⁴⁹

Beyond the general confirmation of the Westermarck theory, Bevc and Silverman discovered a dichotomy in the type of sexual activity inhibited by proximity during early childhood.⁵⁰ On one hand, they found that subjects separated from their siblings during early childhood are significantly more likely to engage in “mature”

43. *Id.* at 174.

44. *Id.* at 175–79.

45. *Id.*

46. *Id.* at 179–80.

47. *Id.* at 180.

48. *Id.* at 176.

49. *Id.* at 176, 180.

50. *Id.*

post childhood sexual behavior.⁵¹ They defined this type of sexual behavior operationally as “completed or attempted genital, oral and anal intercourse.”⁵² On the other hand, they found that separation is not characteristic of siblings who engage solely in “immature” post childhood sexual behavior, defined operationally as “exhibitionism, touching, or fondling.”⁵³ Siblings raised together are as likely as separated siblings to engage in “immature” sexual relations as adolescents or adults.⁵⁴

Bevc and Silverman consider these new findings to be consistent with the evolutionary paradigm.⁵⁵ The prevailing concept in evolutionary psychology is one of domain specificity of evolved psychological mechanisms.⁵⁶ Pursuant to this concept, ultimate causes give rise to very focused adaptations.⁵⁷ The ultimate cause in this context is the evolutionary pressure to avoid the significant costs that an individual incurs in terms of reproductive success when she reproduces with a close biological relative.⁵⁸ The resulting focused, efficient, and precise adaptation is a trait that inclines individuals to avoid activity with close relatives that could result in reproduction.⁵⁹ It would not be necessary for individuals to develop a trait that precluded all forms of sexual interest in, and play with, biological relatives.⁶⁰ Thus, findings that proximity during early childhood creates a specific barrier against intercourse, but does not inhibit other forms of sexual activity are consistent with the evolutionary concept of domain specificity.⁶¹ These findings lead to a modest reworking of the Westermarck theory—a theory that now identifies a mechanism focused only on inhibiting sexual intercourse between closely related individuals.⁶²

51. *Id.*

52. Bevc & Silverman, *supra* note 2, at 152.

53. *Id.*

54. *Id.*

55. *Id.* at 152; Bevc & Silverman, *supra* note 8, at 180.

56. “Domain specificity” is the concept that ultimate causes give rise to functions or traits that address only the particular ultimate cause, nothing more. *See* Leda Cosmides & John Tooby, *Cognitive Adaptations for Social Exchange*, in J. BARKOW ET AL., *THE ADAPTED MIND: EVOLUTIONARY PSYCHOL. AND THE GENERATION OF CULTURE* 163–228 (1992); *see also* Bevc & Silverman, *supra* note 2, at 152.

57. *See* Cosmides & Tooby, *supra* note 56, at 163–228; Bevc & Silverman, *supra* note 2, at 152, 159–60.

58. *See* SHEPHER, *supra* note 12, at 85–133.

59. *See* Bevc & Silverman, *supra* note 2, at 159–60.

60. *See id.*

61. *See id.* at 152, 159–60.

62. *See* Bevc & Silverman, *supra* note 2, at 159–60; Bevc & Silverman, *supra* note 8, at 180.

Bevc and Silverman recognized that significant ambiguities remained after completion of their original study involving siblings.⁶³ Specifically, their data did not allow for a full test of the revised Westermarck theory. Such a test would entail a comparison of cases of sibling sexual relationships involving genital intercourse with those involving all other forms of sexual activity.⁶⁴ It would allow researchers to fully verify the focused, domain-specific nature of the social mechanism postulated under the Westermarck theory.⁶⁵ Unfortunately, Bevc and Silverman's initial sibling study did not include enough cases of attempted or completed genital intercourse to allow for a statistically significant comparison in this area of inquiry.⁶⁶

In addition, the initial study included a disproportionate number of non-biologically related siblings in the group reporting mature sexual behavior.⁶⁷ As Bevc and Silverman have explained, biological relatedness should not be relevant to incest avoidance from the perspective of the Westermarck hypothesis.⁶⁸ Earlier studies had confirmed that the critical factor is proximity during early childhood, not biological relationship.⁶⁹ However, Bevc and Silverman also recognized that in the context of current social mores, the absence of a biological relationship between siblings may reduce inhibitions to intercourse independent of early separation.⁷⁰ Thus, it would have been better to remove non-biological siblings from the study's data set. However, if the researchers had removed this data, the number left in the group reporting mature sexual behavior would have been too small for a statistically meaningful comparison and analysis.⁷¹

Because of the identified ambiguities of their initial study, Bevc and Silverman decided to replicate the original study with a larger sample of incest cases involving opposite sex siblings.⁷² They were especially determined to obtain a sample that would include a significant number of cases involving attempted or completed genital intercourse.⁷³

63. Bevc & Silverman, *supra* note 8, at 180; Bevc & Silverman, *supra* note 2, at 152–53.

64. Bevc & Silverman, *supra* note 2, at 152–53.

65. *See id.*

66. *Id.*

67. *Id.* at 152.

68. *Id.*; Bevc & Silverman, *supra* note 8, at 176.

69. *See* Shepher, *supra* note 12; Wolf, *supra* note 6; McCabe, *supra* note 39.

70. Bevc & Silverman, *supra* note 8, at 176; Bevc & Silverman, *supra* note 2, at 152–53.

71. Bevc & Silverman, *supra* note 2, at 152–53.

72. *Id.* at 153.

73. *Id.*

B. The Second Sibling Study

Bevc and Silverman constructed their second study to test two primary hypotheses.⁷⁴ First, they wanted to test whether separation during early childhood corresponds to a higher frequency of genital intercourse, but not a higher frequency of other sexual activity between biologically-related, opposite sex siblings.⁷⁵ This is the core hypothesis of the revised Westermarck theory.

Second, they wanted to test whether the extent of day-to-day proximity and intimacy between siblings during early childhood correlates negatively to post childhood incest.⁷⁶ Based on the Westermarck theory, previous authors had postulated that sexual prudery in childrearing may lead to an increased frequency of post childhood incest.⁷⁷ Bevc and Silverman's first study failed to verify this hypothesis, so they designed the second study to more fully test this possible extension of the Westermarck theory.⁷⁸

In designing the survey instrument, the researchers reviewed the literature concerning the critical period of childhood for the development of incest avoidance.⁷⁹ They found a wide range of views, with one writer asserting that the critical period extends only through the first three years,⁸⁰ another stating that it extends through the first six years,⁸¹ and others arguing that there is a gradual reduction in the effects of separation through the first ten years, possibly lasting even until the adolescent period.⁸² In light of these disparate views, Bevc and Silverman decided to use the most

74. *Id.* at 152–53.

75. *Id.*

76. *Id.*

77. *See id.* at 153.

78. *See id.*; Bevc & Silverman, *supra* note 8, at 179–80. The second study recruited participants in two ways. First, the researchers placed advertisements in major Toronto newspapers seeking volunteers to answer a survey on sexual experiences between brothers and sisters. Eighty-two individuals completed the survey in response to the advertisements. Second, the researchers recruited volunteers from Toronto's York University evening classes in order to secure a control group of individuals who had no sibling sexual experiences. In addition, some of these volunteers may have had sibling sexual experiences and would thus increase the size of the incest group. Ninety-eight individuals completed the survey in response to this in-class request. All respondents were assured of complete anonymity. The researchers excluded seven respondents because their survey returns were inadequate, leaving a study sample of 173 individuals. *See* Bevc & Silverman, *supra* note 2, at 153.

79. *See* Bevc & Silverman, *supra* note 2, at 154.

80. *See* WOLF, *supra* note 6, at 198–213.

81. *See* SHEPHER, *supra* note 12, at 61.

82. *See* ARTHUR WOLF & CHIEH-SHAN HUANG, MARRIAGE AND ADOPTION IN CHINA 143–92 (1980); Patrick Bateson, *Uncritical Periods and Insensitive Sociobiology*, 6 BEHAV. BRAIN SCI. 102, 103 (1983).

comprehensive criterion of ten years for their examination of childhood intimacy and proximity.⁸³ Thus, their survey instrument focused on the subjects' experiences from ages one to ten.⁸⁴

The survey instrument included a series of questions concerning the subjects' childhood relationships.⁸⁵ The survey began by asking the specific study participant for general information about each of his or her opposite-sexed siblings.⁸⁶ This information included the age of the particular sibling, the nature of biological relationship between them, and the periods of time, if any, that they had lived separately during childhood.⁸⁷ The subjects were also asked their ages during any period of separation, whether they had any contact with their sibling during the separation, and if so, how frequently.⁸⁸

In addition, the survey instrument asked subjects for detailed information concerning their relationships with each opposite-sex sibling when both the respondent and the sibling were less than ten years old.⁸⁹ This information is pertinent to determining the extent of proximity and intimacy, and included "[h]ow much time they had spent together, how much time they had spent together by choice, how much physical contact they had with their sibling, how close or distant they had felt toward their sibling, how frequently they had seen the sibling in the nude or partially dressed, and how frequently the sibling had seen them in the nude or partially dressed."⁹⁰ The researchers also asked the respondents to recall the relevant period and to approximate how many years they had slept in the same bed with the particular sibling, in different beds in the same room, or in different rooms.⁹¹ Finally, the researchers asked the subjects to respond to questions about sexual activities with their opposite-sexed sibling.⁹² The survey instrument included a list of fifteen items describing sexual activities ranging

83. Bevc & Silverman, *supra* note 2, at 154.

84. *Id.* Because the survey instrument would rely heavily on subjects' memory of their childhood environments and interactions, the researchers pre-tested the instrument to ascertain if such reliance would be effective. They presented their questions to thirty-nine students with a mean age of 32.5 years and asked, for each question, whether the subjects could recall their sibling relationships in childhood clearly enough to give a valid response. Depending on the specific question, between 74% and 87% of replies were affirmative. Bevc and Silverman found these rates acceptable and proceeded with the study. *Id.* at 154-55.

85. *Id.* at 154.

86. *See* Bevc & Silverman, *supra* note 2, at 154.

87. *See* WOLF, *supra* note 6, at 198-213.

88. *See* SHEPHER, *supra* note 12, at 61.

89. *See id.*

90. *Id.*

91. *Id.*

92. *Id.* at 155.

from exhibitionism to genital intercourse, and an item allowing subjects to indicate that they had no sexual experiences.⁹³ The survey also included an open-ended item for activities not covered on the list.⁹⁴ If respondents checked any sexual activity item, the survey asked them to indicate their ages when the sexual activity with the sibling began and ended, if it had ended.⁹⁵

It should be noted that the survey asked respondents for several items of basic demographic data. The survey asked participants to provide their sex, age, and racial or ethnic identification.⁹⁶ For their childhood years, the survey asked respondents the population of their city or town and the religious affiliation and socioeconomic status (as determined by five measures) of their families.⁹⁷ The researchers did not make any specific demographic predictions with regard to sibling sexual activity.⁹⁸ However, they included the demographic measures to ensure that these measures were not confounding factors in the analyses of other variables related to the study's predictive hypotheses.⁹⁹

The survey results allowed the researchers to divide the participants into three groups.¹⁰⁰ They placed fifty-four respondents in the "genital intercourse" category.¹⁰¹ Nine of the individuals in this group reported attempted vaginal intercourse with an opposite-sexed sibling, ten reported vaginal intercourse without ejaculation, and thirty-five reported vaginal intercourse with ejaculation.¹⁰² The researchers placed thirty-five respondents in the "other sexual activities" category.¹⁰³ Individuals in this group reported some form of sexual activity with a sibling, but not attempted or completed vaginal intercourse.¹⁰⁴ The researchers included in both of these sexual activity groups only individuals for which the reported sexual activity extended beyond the time that one of the participants was eleven years old. They did this in order to exclude sexual activity that clearly represented childhood play, and thus was not relevant to the predictions of the Westermarck theory.¹⁰⁵ The researchers

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 154.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 155.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

assigned eighty-one respondents to the “no sexual activities” category.¹⁰⁶ Individuals in this group reported no post childhood sexual activity of any kind.¹⁰⁷

Bevc and Silverman report and discuss the study’s results in two primary areas.¹⁰⁸ First, they analyzed the effects of separation during early childhood.¹⁰⁹ The data revealed that the twenty-one sibling pairs separated for more than one year during the period when both were less than ten years old, accounted for 31.5% (seventeen) of the “genital intercourse” group, 2.9% (one) of the “other sexual activities” group, and 3.8% (three) of the “no sexual activities” group.¹¹⁰ Comparisons among groups indicated that, to a statistically significant degree, separation during early childhood was more prevalent in the “genital intercourse” group than in both the “other sexual activities” and “no sexual activities” groups.¹¹¹ The researchers also analyzed the study data after eliminating twelve biologically unrelated sibling pairs, nine of whom were originally in the “genital intercourse” group, one of whom was in the “other sexual activities” group, and two of whom were in the “no sexual activities” group.¹¹² This second analysis revealed that separated sibling pairs accounted for 20% (nine) of the “genital intercourse” group containing forty-five individuals, 2.9% (one) of the “other sexual activities” group containing thirty-four individuals, and 3.8% (three) of the “no sexual activities” group containing seventy-nine individuals.¹¹³ The differences among the groups remained statistically significant, with separation during childhood more prevalent in the “genital intercourse” group than in both the “other sexual activities” and the “no sexual activities” groups.¹¹⁴

Bevc and Silverman examined separately sibling pairs who lived apart for more than one year when both were less than three years old.¹¹⁵ They found that for the seventeen separated sibling pairs included in the study’s original “genital intercourse” group, fifteen had experienced separation when both were under three years

106. *Id.*

107. *Id.* Three respondents reported sexual activities that ended before either participant reached age eleven. The researchers excluded these three individuals from the study population because they were unsure whether they belonged in the no sexual activities category. As a result, the total study population was 170. *Id.*

108. *Id.* at 157–59.

109. *Id.* at 157–58.

110. *Id.*

111. *Id.*

112. *Id.* at 158.

113. *Id.*

114. *Id.*

115. *Id.* at 157.

old.¹¹⁶ In contrast, none of the four separated sibling pairs included in either the “other sexual activities” group or the “no sexual activities” group had lived apart when both were younger than three.¹¹⁷

The researchers concluded that the data confirmed the study’s main hypothesis at a “significant and robust level.”¹¹⁸ They stated that “early prolonged separation relates to attempted or completed genital intercourse between siblings but not to incestuous behavior exclusive of these acts. . . .”¹¹⁹ As to the Westermarck theory specifically, the researchers concluded that the study data “strengthened the revised interpretation of the Westermarck effect emanating from [their] 1993 study, that early sustained cohabitation between siblings operates as a barrier specific to potentially reproductive acts rather than as a general suppressor of sexual interest.”¹²⁰

Although Bevc and Silverman recognize that the definition of a critical period for the Westermarck effect is controversial and that their study did not generate the random sample of separated sibling pairs necessary for a precise test of the parameters of the critical period, they raise the possibility that their data may help to determine the critical period of development.¹²¹ Because fifteen of seventeen separated sibling pairs in the “genital intercourse” group experienced separation for at least a year before either reached the age of three, the study’s data support the concept of a critical period that terminates at age three.¹²²

Bevc and Silverman’s other primary area of analysis concerned the variables of proximity and intimacy.¹²³ They found statistically significant differences among the three distinct sexual activity groups for three measures of proximity and intimacy—how much physical contact the siblings had experienced; how frequently the respondent had seen his or her sibling nude; and how frequently the sibling had seen the respondent nude.¹²⁴ Sibling pairs included in either the “genital intercourse” or the “other sexual activities” groups had significantly higher levels of proximity and intimacy on these three measures than sibling pairs included in the “no sexual activities” group.¹²⁵ In other words, sibling pairs in the two sexually active groups had experienced significantly more physical contact

116. *Id.*

117. *Id.*

118. *Id.* at 159.

119. *Id.*

120. *Id.*

121. *Id.* at 160.

122. *Id.* See also WOLF, *supra* note 6, at 198–213.

123. Bevc & Silverman, *supra* note 2, at 158–59.

124. *Id.*

125. *Id.*

and viewing in the nude than sibling pairs who were not sexually active. The researchers found no significant differences among the groups in terms of sleeping arrangements (i.e. same bed, different beds, or different rooms), although they noted little variability on this factor, with 77.2% of sibling pairs sleeping in different rooms.¹²⁶

In contrast to the absence of findings concerning proximity and intimacy variables in their 1993 study, Bevc and Silverman note that their 2000 study “showed significant positive relationships with post pubertal sexual behavior of both physical contact and nudity.”¹²⁷ These findings call into question the predicted effects of childhood physical intimacy.¹²⁸ Accordingly, Bevc and Silverman assert that advice to parents that early intimate contact between siblings will actually decrease the probability of incest is misguided.¹²⁹ To decrease the probability of incest, siblings simply have to live together. They do not need extremely close physical contact or an especially intimate relationship.¹³⁰

The demographic data reveal that the study sample consisted of 67 women and 103 men, with an average age of 33.4 years and an age range of nineteen to sixty-four years.¹³¹ The racial makeup was 84% white, 11% Asian, and the remaining 5% divided among various racial categories.¹³² Fifty-one percent of respondents lived in cities with more than half a million residents, with the remainder living in small cities or towns.¹³³ Thirty-five percent of respondents classified themselves as “middle class,” with a normal distribution around this modal response.¹³⁴

The data analysis revealed no significant differences in sexual activities related to racial categories, size of community, or socioeconomic status.¹³⁵ The researchers did find significant differences in sexual activity related to the respondents’ religious affiliations.¹³⁶ Thirty-seven percent of the respondents stated that they were raised as Protestants, 34% as Catholic, 10% as Jewish, 9% in eastern religions (Hindu, Buddhist, Moslem, Eastern Orthodox), 4% in

126. *Id.*

127. *Id.* at 160.

128. *See id.*

129. *Id.*

130. *See id.*

131. *Id.* at 156–57.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

other or more than one religion, and 7% in no religion.¹³⁷ The analysis revealed that Protestants were significantly overrepresented in the “genital intercourse” group, Catholics in the “other sexual activities” group, and both Jews and eastern religions in the “no sexual activities” group.¹³⁸

In discussing their results, Bevc and Silverman expressly recognize the correlational nature of the study.¹³⁹ It remains a “consideration” that the data have shown nothing more than a relation between separation of siblings during early childhood and a higher frequency of post childhood sexual activities involving specific sibling pairs.¹⁴⁰ On one hand, this correlation might support the adaptationist explanation of incest taboos as an evolved mechanism that operates to prevent reproduction between closely related individuals.¹⁴¹ On the other hand, “[i]t is feasible that these findings are due to some latent socialization variable that underlies both early separation and later disregard for sexual convention.”¹⁴²

While noting this caveat to their study, Bevc and Silverman point out the weakness of the socialization explanation.¹⁴³ They initially note that “the observation that separation was correlated specifically with genital intercourse and not with other incestuous activities renders this interpretation less parsimonious than an adaptationist explanation . . .”¹⁴⁴ In other words, the adaptationist explanation provides the simplest and most efficient explanation for the study data, whereas the socialization explanation would have to be very complex in order to accommodate and explain these data. The researchers then assert that “the socialization interpretation also is rendered less tenable by the absence of relationships between sibling sexual activity and demographic variables associated with socioeconomic status.”¹⁴⁵ That is, if socialization plays a powerful role in relation to sexual inhibitions between siblings, one would expect to find relationships based on socioeconomic status, a factor that would significantly affect an individual’s socialization experience.¹⁴⁶

On the other hand, the significant differences in rates of sibling sexual activity based on religious upbringing might support the

137. *Id.*

138. *Id.*

139. *Id.* at 160.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *See id.*

socialization interpretation in some form. Religious categories and practices primarily play a role in the socialization of individuals and do not constitute evolved individual mechanisms or adaptations.¹⁴⁷ Unfortunately, Bevc and Silverman do not expressly address these data.¹⁴⁸ However, they do call for additional studies, stating that “[a]nimal studies would help resolve the question of cause and effect.”¹⁴⁹ Such studies would avoid the confounding effect of socialization within a human community.¹⁵⁰

Despite the need for further study, the Bevc and Silverman data allow for fairly strong conclusions in the two primary areas they examined. First, early sustained cohabitation between opposite sex siblings often operates as a barrier to potentially reproductive sexual activities, with indications that the critical period for cohabitation is before either sibling has reached the age of three.¹⁵¹ Conversely, separation of one year or more during this critical period raises the likelihood of post childhood genital intercourse between siblings.¹⁵² Second, early childhood physical intimacy appears to increase the likelihood of post childhood sexual activity between siblings.¹⁵³ As the researchers conclude, “The sole, critical, early proximity variable mediating sibling incest avoidance appears to be consistent cohabitation.”¹⁵⁴

The findings of Bevc and Silverman may have serious implications for individuals who have experienced separation from a sibling while in foster care and for public child welfare agencies that manage foster care systems. Placement in foster care during the critical period of early childhood may disrupt the sustained cohabitation that gives rise to sexual inhibition between opposite sex siblings.¹⁵⁵ In addition, siblings separated from each other in foster care are often reunited in later childhood or early adulthood, and thus have readily available opportunities to engage in

147. See generally TIMOTHY H. GOLDSMITH & WILLIAM F. ZIMMERMAN, BIOLOGY, EVOLUTION, AND HUM. NATURE 344–47 (2001).

148. See Bevc & Silverman, *supra* note 2, at 157.

149. *Id.* at 160.

150. See *id.*

151. See *id.* at 159–60.

152. See *id.* at 157–58.

153. See *id.* at 158–60.

154. *Id.* at 160.

155. A prominent trend in foster care is the high proportion of infants (age zero to one) in care, with the expectation that children under age six will dominate entries to foster care for some time. See JILL DUERR BERRICK ET. AL., THE TENDER YEARS: TOWARD DEVELOPMENTALLY SENSITIVE CHILD WELFARE SERVICES FOR VERY YOUNG CHILD. 57–8 (1998); PETER J. PECORA ET. AL., THE CHILD WELFARE CHALLENGE: POLICY, PRACTICE, AND RESEARCH 307–09 (2d ed. 2000).

post childhood incest.¹⁵⁶ The remainder of this Article explores the implications of this type of situation.

III. SIBLING PLACEMENT PRACTICE, POLICY AND DOCTRINE

This Part examines current child welfare agency policies and practices surrounding the placement of siblings in foster care. Section A discusses the general value of sibling relationships, the harms caused by separating siblings, and the benefits of placing siblings together. Section B describes current policies favoring the placement of siblings together even though the courts have largely failed to grant siblings a right to be placed together. Section C discusses how, despite policies supporting the placement of siblings together, public child welfare systems regularly fail to achieve this placement goal. Section D provides a case story illustrating a public system's failure to place siblings together during the critical period for development of sexual inhibition.

A. *The Value/Benefits of Sibling Relationships*

Literature in the field of child welfare recognizes the potential value of sibling relationships.¹⁵⁷ Sibling bonds can be especially close and intense because of the high degree of interaction among siblings.¹⁵⁸ In biological terms, full siblings share a substantial portion of their differential genetic material.¹⁵⁹ In fact, monozygotic twins share all of their genetic material.¹⁶⁰ Dizygotic twins and non-twin full siblings share 50% of their differential genetic material,

156. For example, a study of the California foster care system indicates that 40% to 60% of the children who enter foster care at zero to two years of age are reunited with their original families within a period of two to six years. See BERRICK ET. AL., *supra* note 155, at 59–62.

157. See generally Carole H. Depp, *Placing Siblings Together*, 12 CHILD. TODAY 14 (1983); Rebecca L. Hegar, *Legal and Social Work Approaches to Sibling Separation in Foster Care*, 67 CHILD WELF. 113 (1988); Eric B. Martin, *Maintaining Sibling Relationships for Children Removed from Their Parents*, 22 CHILD. LEGAL RTS. J. 47 (2002); Ilene Staff & Edith Fein, *Together or Separate: A Study of Siblings in Foster Care*, 71 CHILD WELF. 257 (1992); Margaret Ward, *Sibling Ties in Foster Care and Adoption Planning*, 63 CHILD WELF. 321 (1984).

158. See Depp, *supra* note 157, at 16–17; Martin *supra* note 157, at 47–48; Ward, *supra* note 157, at 322–23.

159. See ROBERT TRIVERS, *SOCIAL EVOLUTION* 45–46 (1984).

160. See *id.*

while half siblings share 25% of their differential genetic material.¹⁶¹

Because of this shared genetic material, siblings have an interest in each other's survival and successful reproduction.¹⁶² Through successful reproduction, one's sibling can help ensure that a significant portion of one's genetic material is carried forward to future generations.¹⁶³ This shared interest in successful reproduction is termed "inclusive fitness" and it underlies the concept of "kinship altruism," which holds that biologically related individuals will exhibit a strong interest in conferring benefits on each other.¹⁶⁴ This strong biological interest inclines siblings to form and maintain close bonds.¹⁶⁵

Other factors also support the strength and importance of the sibling bond. Because of the proximity in age between many siblings, the sibling relationship has the potential to be one of the longest and closest.¹⁶⁶ In addition, siblings often live within the same family environment throughout childhood, sharing many experiences during a significant period of growth and development.¹⁶⁷ Furthermore, siblings affect, and in many ways, construct each other's unique developmental environment within the family association.¹⁶⁸ They provide each other with the distinct experiences that contribute significantly to the development of basic personality traits.¹⁶⁹ In summary, interactions between siblings not only provide comfort, support and closeness, but also significantly influence an individual's developmental environment within the family association.¹⁷⁰

Sibling relationships may be especially important for children experiencing parental abuse or neglect.¹⁷¹ Siblings in this situation often must depend on one another for basic care and survival.¹⁷² In many instances, the older sibling will take on a parental role by

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *See id.*

166. *See* William Wesley Patton & Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings' Associational Rights*, 48 U. MIAMI L. REV. 745, 765-68 (1994).

167. *See id.*

168. *See id.*; JUDITH RICH HARRIS, *THE NURTURE ASSUMPTION* 60-62, 90-94 (1998).

169. *See* Patton & Latz, *supra* note 166, at 765-68; Harris, *supra* note 168.

170. *See id.*; Patton & Latz, *supra* note 166, at 765-68; Harris, *supra* note 168.

171. Sharon G. Elstein, *Making Decisions About Siblings in the Child Welfare System*, 18 A.B.A. CHILD L. PRAC. 97, 98 (1999-2000); *see also* Ward, *supra* note 157, at 322.

172. *See* Ward, *supra* note 157, at 322; Patton & Latz, *supra* note 166, at 766.

providing basic care and protection.¹⁷³ Within such a family environment, the bond between siblings often becomes especially intense and close.¹⁷⁴

Children who enter the foster care system often come from family environments within which siblings have developed very strong bonds.¹⁷⁵ For these children, if separation from a sibling accompanies separation from parents, the risk for psychological trauma and harm is significant.¹⁷⁶ They are likely to experience guilt for abandoning their sibling and to develop a sense of abandonment and a mistrust of relationships with others.¹⁷⁷ These feelings can lead to isolation and depression.¹⁷⁸

In contrast, when child welfare agencies place siblings together, there are often significant benefits.¹⁷⁹ A summary of research findings includes:

- Siblings placed together are more emotionally stable and have fewer behavioral problems than children separated from their siblings.
- Siblings placed together are more likely to stay in that first placement.
- Case planning benefits from keeping siblings together. Siblings benefit from reunification efforts that help them “learn to function as a group and develop the same expectations about what family life is.”
- Consistent visitation is the “single most important factor in getting children back with their biological families,” and visitation is “easier” if all the children are in one location.¹⁸⁰

173. Ward, *supra* note 157, at 322, 326–27; Depp, *supra* note 157, at 15–16.

174. See Elstein, *supra* note 171; Aristotle P. v. Johnson, 721 F. Supp. 1002, 1006 (N.D. Ill. 1989) (noting that foster children’s “relationships with their siblings are even more important because their relationships with their biological parents are often tenuous or non-existent”).

175. See Elstein, *supra* note 171, at 98.

176. See Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187 (1994) (citing William W. Patton, *The World Where Parallel Lines Converge: The Privilege Against Self Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 491 (1990)); Diane Riggs, *Sibling Ties Are Worth Preserving*, ADOPTALK (Spring 1999), available at http://www.nacac.org/adoptalk_articles/sibling_ties.html; Ward, *supra* note 157, at 322–23.

177. See Ward, *supra* note 157, at 322–23; Riggs, *supra* note 176.

178. See Riggs, *supra* note 176.

179. See Elstein, *supra* note 171, at 102.

180. *Id.* (citations omitted).

In addition, an older sibling can impart important information about family history to a younger sibling who may not remember incidents leading up to family dissolution, and other familial events and people.¹⁸¹ As the younger sibling matures he or she may have more questions and need help putting the past in a context; an older sibling can provide that context.¹⁸²

B. Current Law & Policy Regarding Sibling Placement

The recognized costs of sibling separation and the articulated benefits of sibling togetherness justify a strong presumption that placing siblings together in foster care is best.¹⁸³ Increasingly, the official policies of public child welfare agencies reflect and incorporate such a presumption.¹⁸⁴ Public agencies' protocols increasingly encourage, if not mandate, caseworkers to place siblings together.¹⁸⁵ In supporting caseworkers, agencies have begun to recruit foster parents who will care for sibling groups, rather than only individual children.¹⁸⁶ Some agencies have also begun to train and actively support foster parents in providing care to multiple children.¹⁸⁷ In addition, even when siblings are placed in separate homes, agencies have increasingly encouraged and facilitated sibling contact.¹⁸⁸ For example, the Illinois Department of Children and Families requires at least twice monthly visits between siblings in separate foster homes, except in special circumstances.¹⁸⁹ More specifically, the agency's policy requires a "sibling visitation plan"

181. *See id.* at 103.

182. *See id.*

183. *See* Jones, *supra* note 176, at 1189; Ward, *supra* note 157; Riggs, *supra* note 176.

184. *See* Maureen C. Smith, *An Exploratory Survey of Foster Mother and Caseworker Attitudes About Sibling Placement*, 75 CHILD WELFARE 357, 358, 369 (1996); Riggs, *supra* note 176.

185. *See, e.g.*, STATE OF OREGON DEPARTMENT OF HUMAN SERVICES, SIBLING PLACEMENT PLANNING IN ADOPTION, CLIENT SERVICES MANUAL 1 (2001), available at http://www.dhs.state.or.us/policy/childwelfare/manual_1/i-f6.htm (on file with the University of Michigan Journal of Law Reform); STATE OF MAINE DEPARTMENT OF HUMAN SERVICES, SIBLING PLACEMENT AND VISITATION, CHILD & FAMILY SERVICES POL'Y (2002), available at <http://www.state.me.us/dhs/bcfs/policy/policy.htm> (on file with the University of Michigan Journal of Law Reform).

186. *See* Elstein, *supra* note 171, at 104; Riggs, *supra* note 176.

187. *See* Elstein, *supra* note 171, at 104.

188. *See id.* at 104-06; Riggs, *supra* note 176.

189. *See* ILLINOIS DEP'T OF CHILDREN AND FAMILY SERVICES, TITLE 89, SECTION 301.220 available at http://www.state.il.us/dcf/policy/pr_policy_rules.shtml (on file with the University of Michigan Journal of Law Reform); Elstein, *supra* note 171, at 105; Riggs, *supra* note 176.

that specifies the frequency and length of, and possibly the location and supervision required for, planned visits.¹⁹⁰

The policy developments in this area reflect the cost/benefit considerations surrounding sibling separation and constitute good social work practice protocols.¹⁹¹ These considerations are also leading to legislative action. Several states have enacted legislation mandating that child welfare agencies place siblings together.¹⁹² For example, agencies in California, Ohio, Massachusetts, and New York must comply with such mandates.¹⁹³

In addition, although the United States Supreme Court has not spoken definitively on the issue, several lower courts have raised the possibility that siblings have certain rights to association.¹⁹⁴ For example, in *Aristotle P. v. Johnson*, plaintiff foster children challenged the state's practice of placing siblings in separate foster homes and denying them the opportunity to visit their siblings.¹⁹⁵ The federal district court held that siblings have a right to associate with each other and to develop and maintain their relationships.¹⁹⁶ The district judge relied on the Supreme Court's decision in *Roberts v. United States Jaycees* in which the Court held that "choices to enter into and maintain certain intimate human relationships . . . against undue intrusion by the state because of the role of such relationships in safeguarding individual freedom is central to our constitutional scheme."¹⁹⁷ The judge also held that siblings have a Fourteenth Amendment liberty interest in their continued relationship.¹⁹⁸ Applying a heightened level of scrutiny to the state practice because of the constitutional rights at stake, the judge held that a state actor may interfere with a child's right to associate with siblings only if the state has a sufficiently compelling interest that cannot be achieved through means that are less restrictive of associational freedoms.¹⁹⁹

Despite decisions like the one in *Aristotle P.*, the courts have not reached a consensus on whether siblings have a right to be placed

190. See Elstein, *supra* note 171, at 105.

191. See *id.* at 102-03; Staff & Fein, *supra* note 157, at 268; Ward, *supra* note 157.

192. See Elstein, *supra* note 171, at 104.

193. See CAL. WELF. & INST. CODE §§ 16002, 16004 (2003); NY CLS FAMILY CT. ACT § 1027-a (2003); OHIO ADMIN. CODE § 5101:2-48-16 (2003); MASS. REGS. CODE TIT. 102 § 508(10) (2001).

194. See Elstein, *supra* note 171, at 105; *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1002, 1005-06 (N.D. Ill. 1989).

195. *Aristotle P.*, 721 F. Supp. at 1004.

196. *Id.* at 1005.

197. 468 U.S. 609, 617-18 (1984).

198. *Aristotle P.*, 721 F. Supp. at 1009-10.

199. *Id.* at 1006.

together.²⁰⁰ Courts regularly acknowledge the importance of the sibling relationship, but they also indicate that siblings' right to be placed together, if such a right exists, is not absolute.²⁰¹ In some cases, siblings' claims are subject to a judge's determination of whether placement together would serve the best interests of the children involved in the particular matter, a decision rule that is extremely indeterminate because it calls for the virtually unlimited exercise of judicial discretion.²⁰² In addition, courts have indicated that the sibling relationship is not a determining factor in assessing a child's best interests; it is simply one factor to consider.²⁰³ In the end, courts are largely sympathetic to siblings' claims for placement together, sometimes expressly requiring state actors to establish compelling reasons to separate siblings, but the courts do not view siblings' claims as absolute or guaranteed.²⁰⁴

C. The Current Situation Regarding Sibling Placement

Despite widespread support for placing siblings together as expressed in agency policies and protocols, and increasingly in legal doctrine, public child welfare systems regularly fail to achieve this placement goal.²⁰⁵ In examining actual child welfare practices in this area, it is important to note that a clear majority of children entering foster care have one or more siblings, with 30% of them having four or more siblings.²⁰⁶ Once in foster care, a significant number of siblings are separated from one another.²⁰⁷ In fact, each year approximately 30,000 brothers and sisters are separated into different foster or adoptive homes.²⁰⁸ As Sharon Elstein summarizes, "It appears that most children in out-of-home care have siblings, most are separated from their brothers and sisters, and placement decisions are complicated for these children."²⁰⁹ In addition,

200. See Elstein, *supra* note 171, at 105; Hegar, *supra* note 157, at 116–19; Patton & Latz, *supra* note 166, at 747.

201. See Elstein, *supra* note 171, at 105.

202. See *id.*

203. See *id.*

204. See *id.*

205. See Elstein *supra* note 171, at 97.

206. See *id.*; Staff & Fein, *supra* note 157, at 258.

207. See Elstein, *supra* note 171, at 97,259; Patton & Latz, *supra* note 166, at 757–58; Staff & Fein, *supra* note 157, at 258.

208. Elstein, *supra* note 171, at 97; see also Patton & Latz, *supra* note 166, at 757–58.

209. Elstein, *supra* note 171, at 97.

visitation between siblings following separation is often non-existent or minimal.²¹⁰

Clearly, the strong presumption that child welfare systems should place siblings together is not in operation. Many factors contribute to this result. The primary factor is a lack of resources.²¹¹ The huge volume of cases in relation to the number of caseworkers, foster parents, and judges makes careful sibling placement practices virtually impossible.²¹² Public child welfare agency caseworkers carry high caseloads, often lack relevant training, and almost always have to act quickly to find an appropriate placement for each child whose family has entered a period of crisis.²¹³ Not only does the caseworker have to arrange a speedy placement, but he or she must also work quickly and effectively with parents and various service providers to devise and begin implementing a case plan to address the specific family's problems.²¹⁴ This type of pressure prevents both careful placement of siblings together and frequent visitation between siblings who are separated.²¹⁵

In addition, public child welfare agencies face a constant challenge in recruiting an adequate number of foster parents.²¹⁶ Because of the shortage of foster parents, agency caseworkers often place children anywhere there is an "open bed."²¹⁷ This inadequate environment for achieving placements tailored to the needs of particular children is especially acute in the context of sibling placements.²¹⁸ Even if enough beds are open in a particular home, a significant number of foster parents perceive sibling placements

210. See *id.*; Patton & Latz, *supra* note 166, at 749–52, 758–60; Ward, *supra* note 157, at 329–30.

211. See David J. Herring, *The Adoption and Safe Families Act—Hope and Its Subversion*, 34 *FAM. L.Q.* 329, 333–36, 344–45 (2000); see also DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

212. See NATIONAL ADOPTION INFORMATION CLEARINGHOUSE, *THE SIBLING BOND: ITS IMPORTANCE IN FOSTER CARE AND ADOPTIVE PLACEMENT* (1992), available at http://naic.acf.hhs.gov/pubs/f_siblin.cfm (on file with the University of Michigan Journal of Law Reform); Ward, *supra* note 157, at 324–25.

213. See Ellen Ryan, *Assessing Sibling Attachment in the Face of Placement Issues*, 30 *CLINICAL SOC. WORK J.* 77, 77–78 (2002); Emily Jean McFadden & Patricia Ryan, *Maltreatment in Family Foster Homes: Dynamics and Dimensions*, 15 *CHILD. & YOUTH SERVICES* 209, 213–17 (1991).

214. See Ryan, *supra* note 213.

215. See Patton & Latz, *supra* note 166, at 747–48. See generally McFadden & Ryan, *supra* note 213.

216. See McFadden & Ryan, *supra* note 213, at 213–17; James A. Rosenthal et al., *A Descriptive Study of Abuse and Neglect in Out-of-Home Placement*, 15 *CHILD ABUSE & NEGLECT* 249, 257–58 (1991).

217. See *id.*; McFadden & Ryan, *supra* note 213, at 217.

218. See Smith, *supra* note 184, at 371 (describing study findings indicating that a major factor in whether siblings are separated or kept together is simply the availability of space in a particular foster home); Ward, *supra* note 157, at 324–25.

as more difficult and are inclined to frustrate agency efforts to place siblings together in their home.²¹⁹

Judges who should be in a position to check caseworker placement decisions and enlist foster parents to accept siblings into their home also face tremendous pressures because of high caseloads.²²⁰ In urban areas, judges may have to decide thirty to eighty cases each day, with even contested hearings often lasting only ten to twenty minutes.²²¹ In such situations, judges cannot learn the facts of specific cases in sufficient detail to check caseworkers, convince foster parents, and fashion appropriate court orders that adequately protect sibling relationships.²²²

As a result of overloaded public child welfare systems, children are fairly easily removed from the custody of their parents, placed in foster care, and separated from their siblings.²²³ In addition, affected children and their families often do not receive timely services to address the problems that led to placement in foster care.²²⁴ Although the agency's official goal is most often family reunification, many children spend well over a year in foster care separated from both their parents and siblings, with family reunification being achieved only after an extended period of separation.²²⁵

D. A Sample Case Story

Consider a one-year-old girl, Ann, whose mother uses cocaine on a regular basis, sometimes binging for a period of several days.²²⁶ Ann has a two-year-old brother, Jake. Ann's mother, Jane, is nineteen years old. When she engages in binge behavior she usually leaves

219. See Elstein, *supra* note 171, at 102; Smith, *supra* note 184, at 368.

220. See Herring, *supra* note 211, at 333–36.

221. See *id.*

222. See generally *id.* at 331–48.

223. See Roberts, *supra* note 211; see also Martin Guggenheim, *The Foster Care Dilemma and What To Do About It: Is the Problem that Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141 (1999).

224. See Herring, *supra* note 211, at 344–45; Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO S. L.J. 1189, 1203–04 (1999).

225. See JANET R. HUTCHINSON & CECELIA E. SUDIA, FAILED CHILD WELFARE POLICY: FAMILY PRESERVATION AND THE ORPHANING OF CHILD WELFARE 23–24 (2002); David J. Herring, *Legal Representation for the State Child Welfare Agency in Civil Child Protection Proceedings: A Comparative Study*, 24 U. TOL. L. REV. 603, 606 (1993).

226. This case story is drawn from the author's experiences representing clients involved in the public child welfare system. All names have been changed.

Ann and Jake with her mother, the children's thirty-six-year-old grandmother, Betty.

On one occasion, Jane left Ann and Jake alone in her apartment, asking her neighbor to watch them while she ran out to the store. When she failed to return within the next eight hours, the neighbor called the county child welfare agency. An intake caseworker responded to the call, could not find Jane, and immediately placed Ann in one foster home that had one open bed and Jake in another.

When the initial court hearing occurred the next day, Jane still had not returned home. Betty appeared at the hearing and requested custody of both children. The caseworker informed the judge that she had not investigated Betty's home and could not recommend her home at this time. The judge continued Ann and Jake's placements in separate foster homes. The judge summarily ordered the agency to investigate Betty's situation prior to the next court hearing which would occur in thirty days.

At the next court hearing, the agency presented evidence on Betty's parenting history. Like Jane, Betty had abused drugs during her late teens and early twenties. As a result, Jane had been placed in foster care for a period of two years. Because of this history, the agency recommended that Ann and Jake remain in their separate foster homes. The judge accepted this recommendation. Jane did appear at this hearing and stated that she was prepared to enter a drug treatment facility. The judge ordered her to enter treatment and set a review hearing in six months.

Following the hearing, the agency referred Jane to a drug treatment program that had a six month waiting list. Jane actually entered the treatment program one year after the placement of Ann and Jake in separate foster homes and, after several false starts, eventually completed a residential drug treatment program. Three years after the initial foster care placements, Jane obtained housing. Accordingly, at the subsequent review hearing, the judge returned Ann and Jake to Jane's custody. Thus, after more than three years of separation, Ann and Jake were reunited in their mother's home. Ann was now five years old and Jake was six.

The agency and the court viewed Ann and Jake's case as a success story. Although the children had to be separated while their mother received treatment, their family was reunified and stabilized. The system had achieved its first preference for a permanency outcome—return of the children to the custody of

their original parent.²²⁷ It may have taken longer than was optimal for the children's healthy development,²²⁸ but nonetheless their family was preserved and they were all back together and safe.

However, the studies addressing the frequency of and conditions for post childhood sibling incest call into question this perception of success.²²⁹ Ann and Jake not only experienced the possibly temporary psychological trauma of sibling separation,²³⁰ they also experienced separation during the critical period for their development of an inhibition to post childhood reproductive sexual activities with a sibling.²³¹ Their separation during this period could significantly raise the risk of sibling incest as they live within the same household as teenagers.²³²

The consideration of the sibling incest studies in the context of foster care placements may provide a powerful and focused justification for the placement together of certain types of siblings groups. Specifically, siblings like Ann and Jake are affected by the public child welfare system at a critical stage in their development of sexual inhibition. Perhaps overwhelmed public systems that cannot meet policy or legislative mandates to place siblings together in all cases could meet a narrower mandate to place together siblings who are within an established critical period of development. The next Part of this Article explores this possibility.

IV. THE RISK OF POST CHILDHOOD SIBLING INCEST: IMPLICATIONS FOR FOSTER CARE PLACEMENTS

The revised Westermarck theory and the studies of post childhood sibling incest allow one to identify a specific risk related to foster care placements. Namely, children experiencing foster care may be separated from a sibling at a critical period for the

227. See PECORA ET AL., *supra* note 155, at 72-78; ANTHONY N. MALUCCIO ET AL., PERMANENCY PLANNING FOR CHILDREN: CONCEPTS AND METHODS (1986).

228. See David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L.J. 183, 191-93 (1995).

229. See Bevc & Silverman, *supra* note 2; Bevc & Silverman, *supra* note 8.

230. See Riggs, *supra* note 176; Jones, *supra* note 176; Ward, *supra* note 157.

231. See Bevc & Silverman, *supra* note 2.

232. See *id.* Although there are no specific studies that identify the frequency of post childhood sibling incest arising from separate foster care placements, the frequency of post childhood sibling incest generally is significant and non-trivial. See Wolf, *supra* note 6. As the Bevc and Silverman studies reveal, separation of siblings during the first three to six years of childhood significantly increases the occurrence of post childhood sibling incest. See discussion *supra* Part II.

development of an inhibition to engage in post childhood reproductive sexual activity with their sibling.²³³

The studies identify a critical period when children need to live in close physical proximity in order to develop an inhibition to engage in reproductive sexual activity with one another as teenagers and adults.²³⁴ The exact specification of this critical period is a matter of debate among researchers.²³⁵ Some have indicated that the critical period extends only through the period when both siblings are age three or younger.²³⁶ Others have defined the critical period as age six or younger, or possibly, age ten or younger.²³⁷ Bevc and Silverman's direct studies of siblings indicate that the critical period is when both siblings are age three or younger.²³⁸ When siblings are separated for a year or more during this period, the likelihood of post childhood reproductive sexual activities between the siblings increases significantly.²³⁹

The recognition of this critical period allows for the development of focused policies and practices designed to avoid increasing the risk of post childhood sibling incest. Initially, it is important to note the value of a narrow focus in addressing risks confronted by children and families within public child welfare systems. As noted above, these systems are overwhelmed because of a lack of resources,²⁴⁰ and public agencies and courts have been unable to comply with the basic mandates of legislative schemes designed to achieve both fairness and timely permanent resolution of child dependency matters.²⁴¹

The worst outcomes occur when public actors attempt to achieve too much. For example, many interpret the "best interests of the child" decision standard as requiring the public system to secure optimal placements and developmental outcomes for each child.²⁴² Not only is this interpretation in conflict with constitutional principles and wise approaches to child welfare matters, it is

233. See Bevc & Silverman, *supra* note 2.

234. *Id.* at 154, 160.

235. See *id.* at 154.

236. See Wolf, *supra* note 6, at 198–213; Bevc & Silverman, *supra* note 2, at 160.

237. SHEPHER, *supra* note 12, at 61; see WOLF & HUANG, *supra* note 82, at 143–92; Bateson, *supra* note 82, at 103.

238. Bevc & Silverman, *supra* note 2, at 160.

239. See *id.*

240. See Herring, *supra* note 211; Roberts, *supra* note 211.

241. See Roberts, *supra* note 211; Herring, *supra* note 211.

242. See Patton & Latz, *supra* note 166, at 753–54; PECORA ET AL., *supra* note 155, at 470–72.

simply not achievable.²⁴³ Seeking such an unrealistic goal for each child only sets up public actors and systems for failure. The “best” is never achievable in a resource-starved system. When public actors try to achieve this goal, they often trap children in “temporary” foster care placements for extended periods instead of returning them to their original parents who can provide at least minimally adequate care.²⁴⁴ Alternatively, children are denied permanent placements that may not be the “best,” but again would be minimally adequate.²⁴⁵

The goal of placing all sibling groups together in specific foster homes provides another example of a goal that current public child welfare systems cannot achieve.²⁴⁶ The value of a more focused approach in this area is that the public system may actually achieve some good results. By focusing on sibling groups within a certain critical age range, public child welfare agencies may realize that placing some siblings together is both beneficial and achievable, even with the limited resources available to them. In light of current system conditions, this type of focus provides real hope for achieving the placement of siblings together in specific foster homes.²⁴⁷

243. See PECORA ET AL., *supra* note 155, at 470–72; Rebecca Hegar, *Assessing Attachment, Permanence, and Kinship in Choosing Permanent Homes*, 72 CHILD WELF. 367, 367–71 (1993). See generally HERRING, *supra* note 26.

244. See PECORA ET AL., *supra* note 155, at 268–70; Herring, *supra* note 211, at 333–36; David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 140 (1992) (describing how state child welfare agencies and juvenile courts “often require parents to jump over higher and higher hurdles before their child will be returned to their custody”).

245. The longstanding practice of race matching provides an example of this result. Child welfare agencies would regularly attempt to secure a same-race adoptive placement for African American children in order to meet what they view as the child’s best interests. Because of a shortage of minority parent adoptive homes, the affected child would have to wait for an extended period to exit a temporary foster care placement. See ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 123–40 (1999).

246. See Elstein, *supra* note 171, at 97; Staff & Fein, *supra* note 157, at 259.

247. See PECORA ET AL., *supra* note 155, at 262–75, 472–73 (describing the creation, evolution, and growth of family-based service programs, intensive family preservation services, and casework approaches that focus on securing minimum standards of parenting within an environment of limited public resources). Of course, choosing a specific category or group of children for a focused allocation of a limited resource such as foster parents willing to accept sibling groups entails opportunity costs. Other groups may benefit more from these resources (e.g. adolescent children). Although there does not appear to be rigorous scientific evidence to justify a focus on a different category of children, policy makers will have to weigh all the costs and benefits in determining whether the focused approach suggested in this Article makes sense in their particular situation.

The focused approach supported by studies surrounding the Westermarck theory entails the creation of a strong presumption that agencies will place siblings together in foster care when both are three years old or younger.²⁴⁸ This presumption would be especially strong for siblings who are likely to be returned to the custody of their original parents and to live together as teenagers. With this presumption in full operation, public child welfare systems would significantly reduce the risk that foster care will result in post childhood sibling incest.²⁴⁹

By applying the strong presumption of placement together only in cases involving siblings within a discrete and limited age group, public child welfare systems would likely be able to marshal the resources necessary to fully implement the presumption. First, because the demand for “sibling together” foster homes would be limited, public child welfare agencies would likely be able to recruit an adequate number of foster parents willing to care for sibling sets who fall within the presumption’s target population.²⁵⁰ Additionally, in making efforts to recruit foster parents, agencies would be able to explain in very powerful terms the need to place certain siblings together. The concrete, understandable goal of avoiding post childhood sibling incest should convince many potential foster parents.²⁵¹ These foster parents would likely enter the system and take on sibling placements with a deeper understanding of the need for these placements and a stronger commitment to caring for the siblings together in their home.²⁵²

The focused approach in this area would also affect agency caseworkers. Even if they have not received comprehensive training concerning child development principles or the benefits of placing siblings together generally, caseworkers have the capacity

248. See Bevc & Silverman, *supra* note 2.

249. It should be noted that this is just one implication for public child welfare systems that can be drawn from the studies surrounding the Westermarck theory. The studies could also be used to support a considered, studied approach to siblings who engage in non-reproductive sexual play if they have lived together during the critical period for the development of sexual inhibition. Instead of overreacting and automatically separating the siblings, child welfare agency workers could understand that the siblings are not at high risk of engaging in sexual intercourse. In addition, the studies could be used to justify close monitoring of all children placed together in foster homes who did not live together during the critical period for the development of sexual inhibition. These children would be at a relatively high risk to engage in reproductive sexual activities.

250. See Ward, *supra* note 157, at 324 (stating that “[a]ggressive recruitment and the availability of adoption subsidy have proven that homes for sibling groups can be found”).

251. Smith, *supra* note 184, at 370. Smith notes that 77% of surveyed foster parents wanting sibling groups in their homes listed the importance of keeping siblings together as a primary reason. *Id.* Avoiding post childhood sibling incest would only make this reason more powerful.

252. See generally Depp, *supra* note 157, at 17–18.

to understand the importance of placing siblings together during a critical period in order to inhibit post childhood sibling incest.²⁵³ Both the concept of a critical age range and the presumption of placement together are easy to understand.²⁵⁴ The idea that separating siblings creates conditions favorable for what many view as especially repugnant behavior would likely motivate caseworkers to place siblings together.²⁵⁵

The result of this focused understanding and heightened motivation on behalf of agency caseworkers would likely lead them to exercise extreme care in placing siblings who are in the critical period of development. Initially, caseworkers would likely work hard to preserve an original family setting that includes siblings within the critical period, aggressively providing intensive family preservation services ranging from in-home service providers to direct financial assistance.²⁵⁶ Even if caseworkers do not take this aggressive initial approach, or if this approach fails, they would likely work hard to place affected siblings together in foster care.²⁵⁷ If, as posited above, the agency has recruited, trained and supported foster parents who are willing to accept sibling groups in their homes, caseworkers would likely use the foster care resources to place siblings together.²⁵⁸ In addition, caseworkers would likely exercise care in reunifying children with their original parents, making sure that siblings are returned together, or at least, not separated for an extended period.²⁵⁹ The result would be the development and implementation of a “best practices” approach

253. See generally Ellen Ryan, *Assessing Sibling Attachment in the Face of Placement Issues*, 30 CLINICAL SOC. WORK J. 77, 77–85 (2002); Smith, *supra* note 184, at 358, 369.

254. See generally Ryan, *supra* note 253.

255. For discussions of the longstanding, commonly held repugnance to incest, see ALA. CODE § 13A-13-3 cmt.(2003) (discussing religious justifications, biological justifications, and sociological and psychological justifications for the incest taboo); Weinberg, *supra* note 6 (discussing justifications for the incest taboo based on the disruption of family relationships); WOLF, *supra* note 6 (discussing justifications for the incest taboo based on biological concepts and the psychological trauma experienced by female participants).

256. See BARTHOLET, *supra* note 245, at 113–23; SUSAN WHITELAW DOWNS ET AL., *CHILD WELFARE AND FAMILY SERVICES: POLICIES AND PRACTICES* 225–44 (5th ed. 1996); PECORA ET AL., *supra* note 155, at 262–96.

257. PECORA ET AL., *supra* note 155, at 280; Ryan, *supra* note 213.

258. See Ryan, *supra* note 213; DOWNS ET AL., *supra* note 256, at 280; Elstein, *supra* note 171.

259. See Elstein, *supra* note 171, at 102–03 (stating that “[s]iblings benefit from reunification efforts that help them ‘learn to function as a group and develop the same expectations about what family life is’” and that visitation, the single most important factor in achieving reunification, “is ‘easier’ if all the children are in one location”) (citations omitted); DOWNS ET AL., *supra* note 256, at 285–94 (discussing the importance of family reunification efforts to casework practice).

surrounding the removal, placement, and reunification of siblings who are three years of age or younger.²⁶⁰

In addition to influencing caseworkers, the strong presumption to place certain siblings together would affect judges. In making decisions in child dependency matters, judges would be able to recognize siblings who fall within the target age range.²⁶¹ Upon this recognition, judges would be able to implement the strong presumption to keep siblings together.²⁶² Specifically, they would be able to check agency caseworker decisions to separate siblings during the critical period.²⁶³ By issuing focused court orders at initial judicial hearings in cases involving foster care placements, judges would ensure that agency caseworkers place siblings together.²⁶⁴ At subsequent review hearings, judges could make sure that caseworkers actively support foster parents in their efforts to keep the siblings safe and together during the critical period of development.²⁶⁵

The focused approach in this area would also affect legislators, providing them with an opportunity to enact a statutory scheme that would achieve intended results within resource-stretched public child welfare systems.²⁶⁶ By codifying the strong presumption to place siblings together during the critical period for the development of sexual inhibitions, legislators would encourage caseworkers to work carefully and diligently to keep siblings together and would provide judges with a powerful tool to check agency caseworker behavior.²⁶⁷ Most importantly, legislators would let public child

260. See, e.g., DOWNS ET AL., *supra* note 256, at 272–77; Elstein, *supra* note 171, at 102–106.

261. For illustrations of the capacity of juvenile court judges to understand complex child welfare system and practice issues, see NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (Spring 1995), available at http://www.pppncjfcj.org/pdf/Resource_guide/resguide.pdf (on file with the University of Michigan Journal of Law Reform); Mark Hardin, *Judicial Implementation of Permanency Planning Reform*, in ABA CENTER ON CHILDREN AND THE LAW (1992).

262. For a discussion of the extensive powers of juvenile court judges in monitoring and managing child welfare cases, see Herring, *supra* note 211, at 348–52.

263. See *id.*

264. See *id.*

265. See *id.*

266. Both Congress and state legislatures have demonstrated an interest in enacting legislation that guides and manages public child welfare systems. See *id.* at 329–48 (discussing the federal Adoption Assistance and Child Welfare Act of 1980 (Pub. L. No. 96-272, 94 Stat. 500 (1980)) and Adoption and Safe Families Act (Pub. L. No. 105-89, 111 Stat. 2115 (1997)), along with the 1989 reform of Michigan's child welfare laws).

267. For an example of the powerful effects legislative action can have on public child welfare systems and agencies, see the discussion of the federal Child Abuse Prevention and Treatment Act in Mary Ann Jimenez, *Permanency Planning and the Child Abuse Prevention and Treatment Act: The Paradox of Child Welfare Policy*, 17 J. OF SOC. AND SOC. WELFARE 55, 61–64

welfare agencies know that placing this group of siblings together constitutes an important public interest—one that calls for the allocation of resources necessary to preserve original families and to recruit and support appropriate foster parents.²⁶⁸ Legislative action would also lead public agencies to develop more detailed regulations supporting the full implementation of the presumption by caseworkers, including the aggressive use of family preservation services, the careful placement of siblings together, and the coordinated reunification of families.²⁶⁹ Finally, legislators' codification of the presumption would effectively require judges to explain, ideally in writing, any departures from the presumption.²⁷⁰ This would give rise to a common law supporting the placement of siblings together except in unusual or extraordinary circumstances.²⁷¹

In summary, the studies concerning the relative risks of post childhood sibling incest provide a solid foundation for a convincing, even compelling case to implement an incremental and focused adjustment in child welfare policies and practices.²⁷² Namely, agency caseworkers and judges should identify siblings who are three years old or younger and should work hard to keep them together. Legislators should support caseworkers and judges by enacting statutes that create a strong presumption to keep together siblings within the targeted group. In this way, state actors

(1990). See also the discussion of the potential impact of the promotion of adoption included in the federal Adoption and Safe Families Act in BARTHOLET, *supra* note 245, at 188–89.

268. For a discussion revealing the capacity of Congress to convey important and powerful, yet conflicting, public values and interests through passage of the Child Abuse Prevention and Treatment Act of 1974 and the Adoption Assistance and Child Welfare Act of 1980, see *Jimenez*, *supra* note 267. For a discussion revealing the capacity of Congress to convey powerful public values and interests surrounding child placement and adoption through enactment of the Multiethnic Placement Act and the Adoption and Safe Families Act, see BARTHOLET, *supra* note 245, at 186–89.

269. For a discussion of the response by public agencies to enactment of the Child Abuse Prevention and Treatment Act, see *Jimenez*, *supra* note 267. It must be noted that public agencies can resist fully implementing legislative mandates when they conflict with the values and interests of agency leaders and staff members. See BARTHOLET, *supra* note 245, at 202–03.

270. See, e.g., MICH. COMP. LAWS §§ 712A.18f, 712A.19 (2002); MICH. CT. R. 3.973A(4), (5) and B(2) (2004) (requiring judicial review of the public agency's case plan and calling for the judge, on the record, to assess the family's specific problems and to determine the services necessary to address the identified problems).

271. For an example of the development of legal doctrine through written judicial decisions in termination of parental rights cases, see Herring, *supra* note 244, at 174, 191–94.

272. See *Bevc & Silverman*, *supra* note 2; *Bevc & Silverman*, *supra* note 8.

can minimize the risk of sibling incest—sexual activity that society has deemed inappropriate, harmful, and unacceptable.²⁷³

This focused, careful approach holds great hope for actually keeping a discrete group of siblings together. Although it does not ensure that public systems will try to keep all siblings together, its more modest goal is achievable. It primarily requires the development of educational materials and training programs that allow caseworkers, judges and legislators to recognize the risks of separating siblings at a critical period and to develop the motivation to avoid such risks as they target their efforts. This can be achieved at minimal financial cost within current public child welfare systems.

The achievability of this goal is important for systems that have proven they cannot attain more comprehensive goals.²⁷⁴ Despite evidence, albeit somewhat amorphous and ambiguous, that placing all siblings together benefits children, public child welfare systems have failed miserably in trying to secure these placements.²⁷⁵ By significantly reducing the burden of achieving sibling placements on public systems, a more limited and focused goal comes into

273. The commentary to the Code of Alabama law of incest provides a concise discussion of society's views concerning sibling incest:

(1) The law against incest may represent a reinforcement by civil sanctions of a religious tenet. The incest taboo has been rationalized by religious theory in most societies from primitive societies forward. The traditional western theory involves the concept of "tainting of the blood." This mystical notion is responsible in part for the intense hostility to incestuous behavior which has resulted in this crime being regarded as especially shameful. Despite the admonition of the federal Constitution to separate church and state, this widespread, popular attitude is an important consideration in the employment of criminal sanctions for such conduct.

(2) A second justification lies in the science of genetics. There is secular utility in a prohibition against such inbreeding as would result in defective offspring by reason of the higher probability of unfavorable, recessive genes combining in the children of parents within certain blood relationships. While the science of human genetics has produced inconclusive proof that inbreeding in human populations would eventually show harmful effects, there is a higher probability of unfortunate, recessive gene combinations in the first generation offspring of closely related parents. BOYD, GENETICS AND THE RACE OF MAN 125 (1953).

(3) A sociological and psychological justification is that the prohibition of incest tends to promote solidarity of the family by preventing sex rivalries and jealousies within the family unit.

ALA. CODE § 13A-13-3 cmt. (1994). For discussions of the sociological and psychological justifications, see Weinberg, *supra* note 6; WOLF, *supra* note 6, at 454–61.

274. See *supra* notes 211–25 and accompanying text.

275. See *supra* notes 157–210 and accompanying text.

sight—a goal that public systems would likely achieve efficiently and quickly.²⁷⁶

On a more ambitious note, realization of this initial, limited goal may provide public systems an opportunity to more fully realize the benefits of placing siblings together. Not only will system actors reduce the risk of post childhood incest, they will also witness the general benefits of placing siblings together as discussed in Part III, Section A. Because of these observations and experiences, public child welfare policymakers and decision-makers may be motivated to find and dedicate the resources necessary to implement more comprehensive approaches to keeping siblings together.²⁷⁷

CONCLUSION

This Article presents recent research findings concerning the revised Westermarck theory.²⁷⁸ The theory postulates, and the evidence indicates, that children who live together during a critical period develop an inhibition to post childhood reproductive sexual activity among themselves.²⁷⁹ The research results indicate that the critical period of development is age three or less.²⁸⁰

This Article also explores the implications of the research for siblings at risk for placement in foster care. The findings surrounding the revised Westermarck theory justify a strong presumption to keep together siblings who are within the critical period of development. Although public child welfare systems have developed policies to ensure the placement of siblings together, these systems have failed miserably at achieving this goal,²⁸¹ largely because the public systems do not have the resources necessary to achieve such a comprehensive goal.²⁸² The presumption that arises from the revised Westermarck theory focuses on a discrete and limited group of siblings and could provide public child welfare systems with a

276. See *supra* notes 240–71 and accompanying text.

277. See, e.g., *PECORA ET AL.*, *supra* note 155, at 273 (describing how family-based services originated as “a few small-scale and isolated demonstration projects” and grew into statewide programs in a significant number of states).

278. See *Bevc & Silverman*, *supra* note 2.

279. See *id.*

280. See *id.* at 160.

281. See *Elstein*, *supra* note 171, at 97; *Patton & Latz*, *supra* note 166; *Staff & Fein*, *supra* note 157, at 259.

282. See *Herring*, *supra* note 211; *Roberts*, *supra* note 211.

realistic opportunity to marshal the resources necessary to keep targeted siblings together.²⁸³

This Article demonstrates one way in which new knowledge from the field of evolution and human behavior is useful in examining and adjusting child welfare policies and practices.²⁸⁴ It can provide a foundation for improvements that are well grounded in both theory and empirical research. These focused improvements may allow key decision-makers to abandon highly dysfunctional public child welfare system approaches that are based on comprehensive developmental theories and overblown expectations as to what they can achieve for affected children. A limited, focused approach would match more closely the public resources available and achieve real benefits for children who face identified and measured risks.²⁸⁵

Finally, this Article demonstrates the benefits of opening a dialogue among child welfare system decision-makers, child welfare scholars, and researchers in the field of evolution and human behavior. The researchers' current work is useful, but their work could become even more useful if directed through engagement with those actively participating in the field of child welfare. For example, as researchers such as Bevc and Silverman contemplate additional sibling-incest studies, they might discuss their approaches with child welfare scholars.²⁸⁶ Other researchers might investigate Bevc and Silverman's correlational findings related to religion and post childhood sibling incest.²⁸⁷ A discussion among those engaged in relevant fields of scholarship and practice would help to determine if such a research endeavor would be useful, and if so, how to construct it. These types of interdisciplinary discussions provide great hope for the careful, incremental improvement of public child welfare systems.²⁸⁸

283. See *supra* notes 240–77 and accompanying text.

284. See Jones, *supra* note 1.

285. See *supra* notes 240–77 and accompanying text.

286. See Bevc & Silverman, *supra* note 2, at 160 (discussing possible lines of inquiry for further study of the Westermarck theory).

287. See *id.* at 157.

288. See Herring, *Behavioral Genetics*, *supra* note 1; Herring, *Child Placement*, *supra* note 1; Jones, *supra* note 1.