

## FOSTERING FAITH: RELIGION AND INEQUALITY IN THE HISTORY OF CHILD WELFARE PLACEMENTS

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*Each year in the United States, approximately 700,000 children live in foster care. Many of these children are placed in religiously oriented homes recruited and overseen by faith-based agencies (FBAs). This arrangement—as well as the scope and operation of child welfare services more broadly—is at a crucial moment of reckoning. Scholars and advocates focused on children’s rights and family integrity maintain that the child welfare system, increasingly termed the “family policing system,” harms children, families, and communities through unnecessary and racist child removal that is partly motivated by perverse financial incentives. Some call for abolition. Meanwhile, in a largely separate conversation, discussants focused on clashes between religious liberty rights and antidiscrimination laws spar over the legality and appropriateness of FBA involvement in fostering children because FBAs may exclude or provide ill-fitting services to LGBTQ individuals and religious minorities.*

*This Article excavates the persistent involvement of religious organizations in child placements in U.S. history to provide crucial missing context and valuable lessons for ongoing reform efforts. People and groups motivated by religion have participated in housing poor, orphaned, and otherwise dependent children since the colonial period, gradually securing*

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laws to ensure public funding for their private organizations and to safeguard control over coreligionist youth. Though these services have benefitted many children in the absence of satisfactory public alternatives, they have also inflamed interfaith controversies and left children from minority religious and racial groups with unequal and inadequate care. Criminal law innovations, including the enactment of child abuse laws and the creation of juvenile courts, reinforced religious organizations' involvement. As the preferred methods for child placement evolved, faith-based providers campaigned in legislatures and the press to preserve their power and control, slowing reforms. This Article's account supports calls for reform by emphasizing how the modern system developed through ad hoc and contingent changes that routinely prioritized cost concerns, crime reduction, and religious groups' interests over children's wellbeing.

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## INTRODUCTION

There is widespread recognition that child welfare services, and especially foster care programs, are due for major reform.<sup>1</sup> One of the most controversial features is the deep involvement of private faith-based agencies (FBAs), which often receive public funding to place and oversee vulnerable children in foster homes.<sup>2</sup> Some critics decry the perverse financial incentives that motivate private organizations to participate in a system that these commenters contend removes children from their families in a harmful and discriminatory manner.<sup>3</sup> Others debate the legality and utility of licensing and allocating public funding to FBAs that exclude or provide ill-fitting services to LGBTQ individuals.<sup>4</sup> A parallel consideration, less often noted, is that FBAs deny services to non-coreligionist adults and place minority-religion children in unwelcoming or coercive homes.<sup>5</sup> FBA proponents respond that religious group involvement in children’s services is a benevolent tradition protected by the First Amendment’s Establishment Clause and Free Exercise Clause (the “Religion Clauses”).<sup>6</sup>

Disputes regarding the operation of foster care are likely to increase in the coming years, given the U.S. Supreme Court’s ongoing reinterpretation of the Religion Clauses<sup>7</sup> and the anticipated increase in child placements necessitated by its overturning of *Roe v. Wade*.<sup>8</sup> The stakes of this conflict

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1. Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL’Y REV. 217, 220–21 (2022).

2. NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 116, 124–25 (2017).

3. The most prominent and influential scholar to take this position is Dorothy Roberts. See DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 138–55 (2022).

4. See Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343, 2345 (2019); Allison M. Whelan, *Denying Tax-Exempt Status to Discriminatory Private Adoption Agencies*, 8 U.C. IRVINE L. REV. 711, 713 (2018); Adrienne M. Spoto, Note, *Fostering Discrimination: Religious Exemption Laws in Child Welfare and the LGBTQ Community*, 96 N.Y.U. L. REV. 296, 299–300 (2021).

5. See Spoto, *supra* note 4, at 314 n.85.

6. See *infra* notes 21–27, 705–20 and accompanying text.

7. See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Carson ex rel. O. C. v. Makin*, 142 S. Ct. 1987 (2022); see also Lee Epstein & Eric Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 28 SUP. CT. REV. 315 (2022) (finding increased rulings in favor of religious organizations, especially mainstream Christian ones).

8. 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); see also *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2258–59 (2022) (noting the availability of adoption in states that restrict abortion access). In the wake of the *Dobbs* opinion, some Christian leaders called for followers to increase participation in foster care and adoption. See, e.g., Paul S. Coakley, Opinion, *A Catholic’s Duty in Post-Roe America*, WALL ST. J. (July 11, 2022), <https://www.wsj.com/articles/catholic-duty-post-roe-america-adoption-women-health-ministry-babies-mothers-11657576192> [<https://perma.cc/YRQ8-W794>].

were already high, as more than 400,000 children are in foster care at any given time and around 700,000 are in foster care at some point each year.<sup>9</sup>

This Article chronicles religious groups' historical influence over child placement laws and programs to enrich analysis of FBAs' role and to contextualize problems in the child welfare system more broadly. Religious groups' longstanding provision of services for dependent children is a frequent touchstone in debates over current practices, yet discussants' use of history has been oversimplified and misleading.<sup>10</sup> Historians have provided richer accounts, persuasively documenting the mixed consequences of religious groups' involvement. Historians' contributions, however, typically focus on limited time periods or specific locations and overlook the significance of law.<sup>11</sup> This Article synthesizes the disconnected historical literature and contributes robust primary source research to reveal the extensive participation of religious groups in child placements, reinforced by law. This approach finds that modern child removal and placement programs evolved from ad hoc efforts that often prioritized financial considerations, criminal law, and religious groups' power rather than children's wellbeing. Ongoing controversies are just the most recent chapter in centuries-long conflicts over the participation of religious groups in caring for the nation's vulnerable children.

This history contributes to two distinct and pressing lines of analysis. First, scholars and activists focused on children's rights and family integrity maintain that the child welfare system removes children from their homes unnecessarily and in a racially biased manner.<sup>12</sup> The most critical challengers identify connections between what they term the "family policing system,"<sup>13</sup> policing in the criminal legal system, and mass incarceration—intersections they cite in calling for abolition.<sup>14</sup>

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9. See ROBERTS, *supra* note 3, at 41–43.

10. See *infra* notes 26–34 and accompanying text.

11. For instance, historians have been attentive to religious considerations in the operation of orphanages and the so-called "orphan trains," but there is no comparable literature on indenture and poorhouses. For especially noteworthy examples, see generally MATTHEW A. CRENSON, *BUILDING THE INVISIBLE ORPHANAGE: A PREHISTORY OF THE AMERICAN WELFARE SYSTEM* (1998); TIMOTHY A. HASCI, *SECOND HOME: ORPHAN ASYLUMS AND POOR FAMILIES IN AMERICA* (1997); MARILYN IRVIN HOLT, *THE ORPHAN TRAINS: PLACING OUT IN AMERICA* (1992).

12. See, e.g., Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 155–56 (2021); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1409–10 (2020); Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. REV. 267, 287–88 (2021).

13. See Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 CALIF. L. REV. 1485 (2023); see also ROBERTS, *supra* note 3, at 26. Another popular recent term is "family regulation system." See, e.g., Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U. L. REV. 1057 (2023); S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1523 (2023).

14. See ROBERTS, *supra* note 3, at 9; S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1102–03 (2022); Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between "Child Welfare" and the Carceral State*, 17 STAN. J. C.R. & C.L. 255, 292, 318 (2021). For a critique

Many child-focused discussants point to the “foster-industrial complex,” in which private groups are key players, as an impediment to reform.<sup>15</sup> Federal, state, and local governments spend billions of dollars each year on child placements and related programs.<sup>16</sup> Much of the funding is allocated on a per capita basis, incentivizing service providers to support child removal and prolonged family separations.<sup>17</sup> Scholars and activists condemning this scheme commonly suggest that it would be in the best interests of children and their communities to redirect money currently allocated to child welfare agencies to instead support families directly.<sup>18</sup> They rarely recognize, however, that it matters politically and legally that a significant portion of the child welfare organizations dependent on public funds have been,<sup>19</sup> and continue to be, private religious agencies.<sup>20</sup>

A second pool of commentary comes from scholars and advocates concerned about what FBA involvement in child welfare programs means for First Amendment doctrine and antidiscrimination laws.<sup>21</sup> Scholarship and popular press typically cast the issue as pitting FBAs’ religious freedom against antidiscrimination laws that protect LGBTQ rights.<sup>22</sup> FBA

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of this argument, see Marie K. Cohen, *Torn Apart: A Skewed Portrait of Child Welfare in America*, CHILD WELFARE MONITOR (Apr. 7, 2022), <https://childwelfaremonitor.org/2022/04/27/torn-apart-a-skewed-portrait-of-child-welfare-in-america/> [https://perma.cc/M86B-V88U].

15. See, e.g., ROBERTS, *supra* note 3, at 138–55.

16. See *id.* at 142.

17. See *id.* at 150–52; see also DANIEL HATCHER, *THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA’S MOST VULNERABLE CITIZENS* 65–71 (2016) (explaining perverse incentives and alleging that children are viewed as a “revenue source”).

18. See, e.g., Gupta-Kagan, *supra* note 1, at 222; Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 678 (2021).

19. Historical accounts in the family policing literature typically begin in the 1960s, when there was renewed attention to child abuse and increasing federal involvement. See, e.g., Michael Wald, *Replacing CPS: Issues in Building an Alternative System*, 12 COLUM. J. RACE & L. 712, 713 (2022). Some accounts begin in the colonial period but omit discussion of religious group involvement. See, e.g., ROBERTS, *supra* note 3, at 88, 109.

20. See, e.g., MICAL RAZ, *ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY* 1 (2020) (assessing problems in child removal and placements since the 1970s, without attention to involvement of religious groups).

21. See, e.g., Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 300–02 (2021); Lawrence G. Sager & Nelson Tebbe, *Discriminatory Permissions and Structural Injustice*, 106 MINN. L. REV. 803, 807, 867–68 (2021); Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 72 FLA. L. REV. 1211, 1233 (2020); Zalman Rothschild, *Fulton’s Missing Question: Religious Adoption Agencies and the Establishment Clause*, 100 TX. L. REV. ONLINE EDITION 32, 36 (2021); Andrew Koppelman, *The Increasingly Dangerous Variants of the “Most-Favored-Nation” Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2269 (2023). Religion-focused scholars have not engaged with broader concerns about the child welfare system, an oversight that family law scholars have criticized. See, e.g., Chris Gottlieb, *Remembering Who Foster Care Is For: Public Accommodations and Other Misconceptions and Missed Opportunities in Fulton v. City of Philadelphia*, 44 CARDOZO L. REV. 1 (2022).

22. See, e.g., Louise Melling, *Religious Exemptions and the Family*, 131 YALE L.J.F. 275, 286–90 (2021); Adam Liptak, *Supreme Court Weighs Legacy of Same-Sex Marriage Case*,

proponents claim that FBA participation is justified by religious groups' long tradition of service to children<sup>23</sup> and is protected by the First Amendment's Free Exercise Clause.<sup>24</sup> Opponents counter that regulations and antidiscrimination laws are also rooted in history, remain warranted, and withstand constitutional scrutiny.<sup>25</sup>

The highest profile example of these dueling perspectives arose in *Fulton v. City of Philadelphia*,<sup>26</sup> which the Supreme Court decided in June 2021. The question in *Fulton* was whether Philadelphia's requirement that Catholic Social Services of the Archdiocese of Philadelphia ("CSS") certify same-sex couples as foster parents—in contravention of CSS's beliefs about marriage—violated the agency's religious liberty rights.<sup>27</sup> History featured prominently on both sides. CSS and numerous supportive amici repeatedly emphasized the Catholic Church's centuries-long service to needy children,<sup>28</sup> whereas Philadelphia and its allies pointed to the government's tradition of regulating private groups that provided such services.<sup>29</sup>

The Supreme Court's narrow holding in favor of CSS also employed historical framing.<sup>30</sup> Chief Justice Roberts opened the opinion by stating that "[t]he Catholic Church has served the needy children of Philadelphia for over two centuries" and "CSS continues that mission today."<sup>31</sup> In a concurrence, Justice Alito cast the care of orphaned and abandoned children as "dat[ing] back to the earliest days of the Church."<sup>32</sup> Noting that the first orphanage in what became the United States was founded by Catholic nuns in New Orleans in 1729, he traced the operation of Catholic orphanages through modern reliance on foster families.<sup>33</sup> In his telling, it is newfangled same-sex rights

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N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/us/politics/supreme-court-same-sex-marriage.html> [<https://perma.cc/AH58-7FDQ>].

23. See, e.g., Robert G. Marshall, *Biden, Pelosi Seek to Close Christian Adoption Agencies*, CATH. CULTURE (Mar. 25, 2021), <https://www.catholicculture.org/commentary/joe-biden-nancy-pelosi-seek-to-close-catholic-christian-adoption-agencies/> [<https://perma.cc/F3PL-HNEU>] (describing centuries of Christian involvement in child welfare, including a Catholic orphanage founded in 1729).

24. See TEBBE, *supra* note 2, at 115–16, 124–25.

25. See *id.*

26. 141 S. Ct. 1868 (2021).

27. See *id.* at 1868.

28. See Brief for Petitioners at 3–6, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 2386494; Transcript of Oral Argument at 5, 9–10, 25, *Fulton*, 141 S. Ct. 1868 (No. 19-123). For representative amici, see Brief for U.S. Conf. of Cath. Bishops & Pa. Cath. Conf. as Amici Curiae Supporting Petitioners, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 3065266; Brief for 76 U.S. Senators & Members of the House of Representatives as Amici Curiae Supporting Petitioners at 11–13, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 3078495.

29. See Transcript of Oral Argument, *supra* note 28, at 84–85; see also Brief for Historians of Child Welfare as Amici Curiae in Support of Respondents at 2, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5044729.

30. See *Fulton*, 141 S. Ct. at 1881.

31. *Id.* at 1874.

32. *Id.* at 1884 (Alito, J., concurring).

33. *Id.* at 1884–87.

that are interfering with the Catholic Church's honorable tradition of caring for needy children.<sup>34</sup>

In *Fulton*, none of the Justices discussed how the involvement of FBAs resulted in harms to religious minorities, though some advocates had raised that concern. Two amicus briefs detailed how FBAs that dominate some locations effectively exclude Jews, atheists, and other non-Christians from participating as foster or adoptive parents.<sup>35</sup> One also observed that the current approach can endanger children's religious identities and provided the example of a Catholic child's forcible conversion to the Baptist faith in foster care.<sup>36</sup> During oral argument, the lawyer for Philadelphia argued against framing the case as "religion versus same-sex equality," instead maintaining that "this is actually a case about religion versus religion because, if you accept [CSS's] argument . . . another [FBA] can say we won't allow Baptists, we won't allow Buddhists, or we'll only allow those things."<sup>37</sup> One reason the Justices were able to disregard this argument is that it was disconnected from the historical framing that the majority emphasized.

Relying on extensive historical research, this Article provides a more balanced account of religious groups' role in developing children's services and related laws. It is plainly correct that religious groups have long served children in need.<sup>38</sup> Motivated by religious teachings, charitable impulses, a desire to train children in their faith, and an effort to protect against proselytization (though sometimes also to engage in it), religious groups have participated actively in institutional and foster placements.<sup>39</sup> These efforts predate and have continued through the development of adoption as a permanent placement option.<sup>40</sup> Countless children have benefitted from

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34. More recently, when at least one Justice was willing to recognize the historical harms of child removal and placement in a case challenging the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963), attention to religious group participation fell away. See *Haaland v. Brackeen*, 143 S. Ct. 1609, 1641–50 (2023) (Gorsuch, J., concurring). Tellingly, even the historians' amicus brief gave minimal attention to religious groups. See Brief of Amici Curiae Am. Hist. Ass'n & Org. of Am. Historians in Support of Fed. & Tribal Parties at 10, *Haaland*, 143 S. Ct. 1609 (No. 21-376). For a more thorough and powerful amicus accounting of how Christian institutions were complicit in "the long and shameful history of treatment of Indian children," see Brief of Indian Law Professors as Amici Curiae in Support of Respondents at 2, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

35. See, e.g., Brief for Prospective Foster Parents Subjected to Religiously Motivated Discrimination by Child-Placement Agencies as Amici Curiae Supporting Respondents at 11, *Fulton*, 141 S. Ct. 1868 (No. 19-123); Brief of Amicus Curiae Coal. of Religious & Religiously Affiliated Orgs. in Support of Appellees City of Phila., et al. at 18, *Fulton*, 141 S. Ct. 1868 (No. 19-123) ("Discrimination against religious minorities seeking to foster children is therefore not a mere possibility, but instead is happening on a daily basis.").

36. See Brief for Prospective Foster Parents Subjected to Religiously Motivated Discrimination by Child-Placement Agencies as Amici Curiae Supporting Respondents, *supra* note 35.

37. Transcript of Oral Argument, *supra* note 28, at 82.

38. See generally *infra* Parts I, II.

39. See generally *infra* Parts I, II.

40. States began passing adoption statutes in 1848, but legal adoption remained rare until the mid-1940s. See É. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE

these services, especially during periods in which there were no comparable public or secular alternatives.<sup>41</sup>

Despite largely well-meaning origins, faith-based groups' involvement has repeatedly provoked political controversy, stoked interfaith hostility, and allowed inadequate services for the country's most vulnerable children. Especially when FBAs have come to dominate child placements in a particular location, their participation has complicated efforts to provide equal services to children across religious, ethnic, and racial groups. Moreover, FBAs have not been content to self-fund or to offer their services on a voluntary basis. They have pursued laws to protect and entrench their role and associated government funding.<sup>42</sup>

This Article proceeds in three parts. Parts I and II progress chronologically, tracing the treatment of religion in child placement options and the interrelated development of FBAs. Part I details how religion, cost considerations, and crime prevention influenced child placements spanning from the colonial period into the mid-nineteenth century. In this period, provision for poor and orphaned children was coarse and often treated children as laborers. The common option was apprenticeship, supplemented in urban areas by poorhouses, followed by "placing out," a practice that typically involved moving poor, urban children to rural areas, where they were expected to provide labor to host families. Religiously segregated private orphanages initially cared for a tiny portion of dependent children but became more common by the mid-nineteenth century—expanding to accept children with living parents. The coexistence of varied approaches in many locations resulted in superior services for children belonging to the majority and wealthier religious and racial groups. Meanwhile, religious and racial minority children were subjected to coercive private placements, relegated to inferior public options, or excluded entirely.<sup>43</sup> Interfaith conflict arose in locations with religious diversity and where politicians allocated taxpayer money to private organizations.

Part II turns to the foundations of the modern system. By the mid-nineteenth century, and especially after the Civil War, governmental entities became more active in funding and regulating child placements. Though approaches varied significantly by region, no jurisdiction provided adequate public options. Faith-based providers filled this void by operating

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HISTORY OF ADOPTION 11, 28–29 (2000). Because adoption was a minor feature of the child placement landscape during the studied period, it is not covered by this Article.

41. See, e.g., *infra* Parts I.C, II.A.2.

42. See generally *infra* Parts I.C, II.A.2, II.B, III.

43. Because there is already an extensive literature on the racism of child welfare practices historically and today, this Article prioritizes a religion-focused account while remaining attentive to race at key moments. For accounts focused on Black children, see ROBERTS, *supra* note 3, at 88–124; ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 21–97 (1972). For accounts focused on indigenous children, see MARGARET D. JACOBS, WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880–1940 (2009); Marcia Zug, *ICWA's Irony*, 45 AM. INDIAN L. REV. 1 (2020).

an increasing number of orphanages, often securing taxpayer funding along with laws to protect their ongoing involvement.<sup>44</sup> Faith-based groups further crystallized their role by influencing criminal law innovations that involved child placements: child abuse laws and juvenile courts.<sup>45</sup>

By around 1900, prominent reformers advocated for a transition from congregate institutions to reliance on “boarding out” or “foster care” in paid private homes or, sometimes, welfare payments to keep families together. Phasing out orphanages took decades because of lawmakers’ continued unwillingness to provide adequate public funding in combination with faith-based providers’ vested interests in maintaining the status quo.<sup>46</sup> One reason why the United States never developed a robust welfare system was that FBAs perceived direct payments to poor families as a threat to their own receipt of public funding.<sup>47</sup> As foster care slowly won out, organizations that ran orphanages reinvented themselves as faith-based foster care agencies.<sup>48</sup>

Part III connects this history to the involvement of FBAs in child placement services today. Historical continuities and missed opportunities support calls for reform. The longstanding unwillingness of governmental entities to provide adequate funding for public child placement programs leaves minority children with inadequate services and effectively excludes some adults from becoming foster parents—a situation presenting practical, moral, and constitutional problems.<sup>49</sup> Although FBAs are essential partners in providing modern services, this reality reflects compromises that have often been controversial and contrary to what experts believed was in children’s best interests. History counsels in favor of ongoing experimentation in approaches to child welfare services and against deferring to private groups that have a vested interest in freezing the status quo.

#### I. LAW AND RELIGION IN THE EARLY HISTORY OF CHILD PLACEMENT (1700S–1865)

From the colonial period to the Civil War, American localities experimented with several options to provide for dependent and orphaned children, unified by three major goals: minimizing costs, reducing crime, and promoting religion. In the colonial period and early United States, public provision for dependent children was stark and limited. Though some locations provided meager financial support to families that remained together in their own homes, it was common for indigent children to be placed with other families through indenture or for children to be sent to

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44. *See generally infra* Parts II.A.

45. *See generally infra* Parts II.A.3, II.B.2.

46. *See generally infra* Parts II.B.1, 3.

47. *See generally infra* Part II.B.3.

48. *See infra* Part II.B.4.

49. *Cf.* MARTHA MINOW, PARTNERS NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 37 (2002) (“Privatization that relies on faith-based groups . . . interferes with individual freedoms particularly when there is no available [alternative] . . . matching a person’s beliefs or tradition.”).

poorhouses, with or without their parents.<sup>50</sup> This period also saw the founding of a handful of orphanages, most of which were religiously affiliated.<sup>51</sup>

In the mid-nineteenth century, shifting views of childhood, poverty, and crime prompted two innovations: the spread of orphanages and the introduction of “placing out.”<sup>52</sup> Private, religiously motivated groups founded orphanages in increasing numbers starting in the 1830s, and they began to expand eligibility to non-orphans.<sup>53</sup> Orphanages typically catered to one faith, sometimes subdivided by ethnicity or race, which often led to inequalities.<sup>54</sup> In the 1850s, skepticism about orphanage care and concern about crime prompted reformers to consider alternatives.<sup>55</sup> Protestant leaders founded placing out agencies that transported children from poor, urban areas to homes in rural and often western locations that they viewed as more wholesome.<sup>56</sup> Catholics condemned early placing out agencies as covert proselytization operations, prompting Catholic leaders to open competing services.<sup>57</sup> State and local officials sometimes provided funding for these endeavors, a scheme that served short-term needs but created long-term complexities and controversies.<sup>58</sup>

#### A. Indenture

In the colonial period and early United States, children were routinely placed outside their homes in apprenticeships under indenture contracts.<sup>59</sup> In this model, also called “binding out,” the master provided sustenance and training in exchange for the child’s labor.<sup>60</sup> Apprenticeship remained popular for generations because it was economically efficient, facilitated social control, and accommodated religious preferences due to its individualized nature.

Apprenticeships were contractual relationships, regulated by statutes and backed by court enforcement.<sup>61</sup> Sometimes, parents found a voluntary placement for their child to learn a trade from an artisan or farmer, but other

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50. See MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 10–14, 23 (1986).

51. See *infra* Part I.C.

52. See Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, in *A CENTURY OF JUVENILE JUSTICE* 7 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002); MAUREEN FITZGERALD, *HABITS OF COMPASSION: IRISH CATHOLIC NUNS AND THE ORIGINS OF NEW YORK’S WELFARE SYSTEM* 88–89 (2006) (emphasizing how changes reflected Protestant middle-class beliefs).

53. See *infra* Part I.C.

54. See *infra* Parts I.C.1, I.C.3.

55. See *infra* Part I.D.

56. See *infra* Part I.D.

57. See *infra* notes 292–99 and accompanying text.

58. See *infra* notes 275–77 and accompanying text.

59. MARY ANN MASON, *FROM FATHERS’ PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 10 (1996).

60. See *id.* at 30.

61. See *id.* at 36.

times, apprenticeships were involuntary.<sup>62</sup> Poor law officials could bind out children if their parents died or were unable to support them<sup>63</sup> or if the children violated community behavioral norms.<sup>64</sup> There was an expectation that apprentices' training would include religious instruction<sup>65</sup> and that a good master could improve apprentices' moral and religious behaviors.<sup>66</sup>

Children's religious identities could be protected in the apprenticeship context in three ways. First, in religiously homogenous communities, placements preserved children's religious affiliations by default. Second, in locations with religious diversity, the parents in a voluntary placement or officials in an involuntary one had discretion to consider the religious faiths of the master and child to avoid conflict. The best evidence that individuals with placement discretion sought to protect children's religious identities comes from the records of orphanages, whose managers often placed children in apprenticeships.<sup>67</sup> For example, in legally binding indenture contracts executed in the early 1800s, the managers of the nation's first public orphanage sometimes included language requiring the master to take the child to church and later developed boilerplate language requiring that children be sent to Sunday school.<sup>68</sup> Third, and most proactively, legislators in a few jurisdictions passed statutes to protect the faith of apprenticed children. This approach began in Pennsylvania, the nation's most religiously diverse colony.<sup>69</sup> In 1713, the Pennsylvania legislature enacted a statute that forbade courts from placing children with guardians or masters "whose religious persuasion shall be different from what the parents of such orphan or minor professed, at the time of their decease, or against the minors' own mind or inclination, so far as he or she has discretion and capacity to express or signify the same," as long as people "of the same persuasion, may or can be found."<sup>70</sup> Several jurisdictions followed Pennsylvania's lead.<sup>71</sup>

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62. *See id.* at 31, 37.

63. *See id.* at 10.

64. *See* CATHERINE E. RYMPH, *RAISING GOVERNMENT CHILDREN: A HISTORY OF FOSTER CARE AND THE AMERICAN WELFARE STATE* 19 (2017).

65. *See* PETER C. HOLLORAN, *BOSTON'S WAYWARD CHILDREN: SOCIAL SERVICES FOR HOMELESS CHILDREN, 1830–1930*, at 19 (1989).

66. *See* ELIZABETH WISNER, *SOCIAL WELFARE IN THE SOUTH: FROM COLONIAL TIMES TO WORLD WAR I*, at 13 (1970).

67. For example, the Methodist minister responsible for an orphanage in Georgia in the 1740s refused to apprentice a child to someone "known to be a professed Deist and a Ridiculer of Christianity," a stand upheld by local magistrates. Clyde E. Buckingham, *Early American Orphanages: Ebenezer and Bethesda*, 26 *SOC. FORCES* 311, 320 (1948).

68. *See* JOHN E. MURRAY, *THE CHARLESTON ORPHAN HOUSE: CHILDREN'S LIVES IN THE FIRST PUBLIC ORPHANAGE IN AMERICA* 149–50 (2013).

69. Founded in 1681 as a refuge for Quakers, the colony was uniquely welcoming to religious minorities and enshrined protections for freedom of conscience in its laws. *See* David Little, *The Pennsylvania Experiment with Freedom of Conscience and Church-State Relations*, in *DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776–1883*, at 71–72 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019).

70. Act of Mar. 27, 1713, 1713 P.A. Laws 85.

71. In 1795, drafters of the Northwest Territory's code adopted Pennsylvania's orphans' court statute nearly verbatim, including the religion protection provision, which resulted in

Apprenticeship remained the most common placement option for dependent white children into the 1830s,<sup>72</sup> demonstrating the prioritization of cost considerations, behavioral control, and religious training in child placements. Apprenticeship gradually fell into disfavor over the course of the nineteenth century because children's labor became more useful in factories, reformers recognized abuses within the apprenticeship system,<sup>73</sup> and parallels to slavery raised discomfort about the arrangement for white children.<sup>74</sup> Still, apprenticeship was used into the twentieth century<sup>75</sup> and remained influential as the default option against which new approaches were measured.

### B. Poorhouses

In the early United States, most locations that utilized institutions to shelter and provide sustenance for dependent or orphaned children ran poorhouses that accommodated "pauper" families together.<sup>76</sup> Poorhouses were a crucial episode in child placement history because of the patterns they set.<sup>77</sup> First, they served as an early indication that public services would be barren and stigmatized, as poorhouses were designedly harsh and unwelcoming to discourage unnecessary use and to incentivize labor.<sup>78</sup> Second, they spread the norm that public asylums would be effectively nondenominational Protestant, especially in their care of children.<sup>79</sup> Third, and deeply connected to the first two, they motivated private individuals and groups to provide more generous and religiously specialized alternatives to coreligionist children.<sup>80</sup> This created a divide, whereby children of richer and more prevalent religious and racial groups received superior care and marginalized youth were relegated to harsher public options.

Over the course of the eighteenth century and into the first decades of the nineteenth, leaders in some cities (especially in the Northeast) embraced poorhouses as a supposedly effective and efficient way to provide for and reform "the poor."<sup>81</sup> Proponents contended that these institutions improved children's health and morals and were more humane than alternatives because they kept families together.<sup>82</sup> Children comprised a significant share

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some states carved from the Territory adopting similar language. *See* LAWS OF THE TERRITORY OF THE UNITED STATES, NORTH-WEST OF THE RIVER OHIO 123 (1801).

72. *See* HASCI, *supra* note 11, at 16.

73. *See* MASON, *supra* note 59, at 78.

74. *See* WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 96–97 (2d ed. 1979).

75. *See* MASON, *supra* note 59, at 78, 80.

76. *See* HASCI, *supra* note 11, at 16–17.

77. Poorhouses operated in tandem with indenture, not as an alternative or competitor; in some cities, poorhouse officials indentured children. *See* PRISCILLA FERGUSON CLEMENT, WELFARE AND THE POOR IN THE NINETEENTH-CENTURY CITY: PHILADELPHIA 1800–1854, at 46 (1985).

78. *See* KATZ, *supra* note 50, at 13, 22.

79. *See infra* notes 85–94.

80. Compare treatment described in Part I.B. to that described in Part I.C.

81. *See* KATZ, *supra* note 50, at 22–23.

82. *See id.* at 23.

of the poorhouse population in some cities. For instance, as of 1795, over 40 percent of the inhabitants in New York City's poorhouse were children, and the poorhouse remained the sole institutional option for children there until 1806.<sup>83</sup> Poorhouses occasionally offered a special children's wing, but most did not.<sup>84</sup>

Poorhouse managers expected religion to be a regular part of inhabitants' lives.<sup>85</sup> In New York City's poorhouse, special rules for children included that the schoolmaster would read to the children "proper prayers and sermons, with some passages or parts of the Bible, or some other religious book" twice each Sunday.<sup>86</sup> These rules were promulgated in 1800 and enacted in an ordinance five years later.<sup>87</sup> Some poorhouses included chapels or other designated areas for prayer.<sup>88</sup> Urban missionaries regularly visited these institutions<sup>89</sup> to perform services for poor and immigrant city dwellers in a manner similar to the foreign missionary work of the period.<sup>90</sup>

Religion sometimes provoked controversy. For example, during the War of 1812, when Philadelphia's poorhouse population increased significantly, the Evangelical Society of Philadelphia requested the exclusive use of a large space every Sunday afternoon to preach to residents.<sup>91</sup> The operations committee refused this request, instead permitting equal access to clergy of all faiths.<sup>92</sup> After noting that the institution housed "Baptists, Lutherans, Presbyterians, Catholics, Methodists, Episcopalians and other sectarians[.]" the committee observed that granting a special request to Presbyterian preachers "might be deemed a measure savoring of partiality; and . . . it might create a dissatisfaction in the disciples of the different doctrines, which would counterbalance the good effects arising from it."<sup>93</sup> Nevertheless, when it came to children, all sects apparently were not equal. The society succeeded in getting their preferred prayer framed and hung for use by the resident schoolchildren.<sup>94</sup>

Despite poorhouse proponents' high hopes, it was clear almost immediately that these institutions could not deliver on advocates' promises. Proponents saw that poorhouses did not reduce dependence or inculcate the

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83. See DAVID M. SCHNEIDER, *THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE: 1609–1866*, at 181, 185 (1969).

84. See CLEMENT, *supra* note 77, at 128.

85. See *id.* at 86 (describing group worship on Sundays).

86. SCHNEIDER, *supra* note 83, at 186.

87. See *id.* at 187.

88. See, e.g., BOARD OF ALDERMEN, *ANNUAL REPORT OF THE COMMISSIONER OF THE ALMS HOUSE*, DOC. NO. 44, at 10 (1848).

89. See Amy M. Godfrey, *Divine Benevolence to the Poor: Charity, Religion and Nationalism in Early National New York City, 1784–1820*, at 81–86 (July 27, 2007) (Ph.D. dissertation, Northern Illinois University) (on file with author).

90. See HOLT, *supra* note 11, at 28. Marilyn Irving Holt finds that by the mid-nineteenth century urban missionaries included both Protestants and Catholics. See *id.*

91. See CHARLES LAWRENCE, *HISTORY OF THE PHILADELPHIA ALMSHOUSES AND HOSPITALS* 60 (1905).

92. *Id.*

93. *Id.* at 60–61.

94. *Id.*

desired virtues of industry and temperance in adults, and they failed to provide a suitable environment to raise moral young Americans.<sup>95</sup> Housing “paupers” of all ages together seemed instead to expose children to disreputable adults and facilitate passing dependency to the younger generation.<sup>96</sup> By the 1830s, reformers increasingly claimed that it would be beneficial to remove children from their indigent parents and place them in orphan asylums instead.<sup>97</sup> In at least some cities, Catholics had an additional motive for opening orphanages: they feared that poorhouses run by Protestants and visited by Protestant missionaries threatened Catholic children’s faith.<sup>98</sup>

Despite growing critiques, poorhouses continued to spread to new locations because of skepticism about alternatives, such as providing support to needy families in their own homes.<sup>99</sup> Indeed, poorhouses remained the most common public institution for the poor—including children—into the mid-nineteenth century.<sup>100</sup> That the public option was so unpleasant and threatening left significant space for private religious groups to intervene in poor children’s care.

### C. Orphanages

For reformers who appreciated the cost efficiencies of institutions but believed that children should be housed separately from adults, the clear alternative was orphanages: congregate care institutions where children resided temporarily until apprenticed or retrieved by their families (or else lived until they reached the maximum age permitted by the institution).<sup>101</sup> Orphanages were rare in colonial America and the early United States, but they became increasingly popular starting in the 1830s.<sup>102</sup> Proponents expected that orphanages would provide children with shelter, food, education, vocational training, and religious instruction.<sup>103</sup> Though it was uncontroversial that religious teachings and prayer would be central in orphanage life,<sup>104</sup> diversity and local politics made the specifics of religious training a sensitive and sometimes heated topic.

This section begins with an overview of orphanage development from the earliest examples to the Civil War and then provides greater detail on three important aspects: the influence of settler colonialism, the shortcomings of

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95. See KATZ, *supra* note 50, at 25.

96. See *id.* at 103.

97. See *id.* at 103–04.

98. See Marian J. Morton, *The Transformation of Catholic Orphanages: Cleveland, 1851–1996*, 88 CATH. HIST. REV. 65, 67–68 (2002); SUSAN WALTON, *TO PRESERVE THE FAITH: CATHOLIC CHARITIES IN BOSTON, 1870–1930*, at 51 (1993).

99. See KATZ, *supra* note 50, at 25.

100. See Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 472 (1971).

101. HASCI, *supra* note 11, at 4.

102. See *id.* at 11.

103. See *id.* at 11, 59, 78–79.

104. See *id.* at 149–50. Catholic institutions were especially rigid and focused on children’s religious training. *Id.*

the first public orphanage, and the growth of public subsidies for religiously segregated institutions in some locations. The spread of orphanages is an essential chapter in the development of child placements because congregate care was long the dominant option and orphanage supporters slowed the acceptance of alternatives.

The handful of orphanages that operated by 1800 served a tiny portion of children in need, yet they set an important pattern for later developments.<sup>105</sup> The earliest institutions were private and religiously affiliated: a Catholic orphanage for girls in New Orleans (1728),<sup>106</sup> two Protestant orphanages in cities in Georgia (1748 and 1740),<sup>107</sup> an asylum for destitute Episcopalian girls in Baltimore (1792),<sup>108</sup> an orphanage for Catholic girls in Philadelphia (1797),<sup>109</sup> and an asylum for young Protestant girls in Boston (1800).<sup>110</sup> Charleston, South Carolina, opened the sole public orphanage in this period, in 1790.<sup>111</sup> At least some of these institutions accepted children whose parents were living but impoverished. For example, parents applied for their daughters to enter the selective Boston Female Asylum, where the children could obtain an education and placement as servants in respectable households.<sup>112</sup> At least a few of the earliest orphanages relied on the labor of enslaved people of African descent for their daily operations or income and sometimes attempted to convert them.<sup>113</sup>

Orphanage growth remained slow between 1800 and 1830, with only fifteen new orphanages opening.<sup>114</sup> Most were Protestant, and a few were Catholic.<sup>115</sup> In these decades, Jews created benevolent societies that placed orphaned Jewish children in private homes.<sup>116</sup> In 1822, Quakers in Philadelphia—at that time the nation’s second largest city, after New

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105. See HOMER FOLKS, *THE CARE OF DESTITUTE, NEGLECTED, AND DELINQUENT CHILDREN* 9–10 (1902).

106. See *infra* Part I.C.1.

107. See *infra* Part I.C.1.

108. See Mary Maushard, *Four Decades and Counting Celebration*, *BALT. SUN* (Oct. 16, 1998), <https://www.baltimoresun.com/news/bs-xpm-1998-10-16-1998289127-story.html> [https://perma.cc/246F-LS3S].

109. See CLEMENT, *supra* note 77, at 119.

110. See HOLLORAN, *supra* note 65, at 34–36 (describing the wife of a prominent Baptist minister as the founder and noting exclusion of Black and Catholic girls).

111. See MURRAY, *supra* note 68, at 3.

112. See HOLLORAN, *supra* note 65, at 34–35.

113. See EMILY CLARK, *MASTERLESS MISTRESSES: THE NEW ORLEANS URSULINES AND THE DEVELOPMENT OF A NEW WORLD SOCIETY, 1726–1834*, at 162 (2007); Gilbert P. Voigt, *Ebenezer, Georgia: An Eighteenth Century Utopia*, 9 *GA. REV.* 209, 213–14 (1955); Buckingham, *supra* note 67, at 320–21; MURRAY, *supra* note 68, at 25–26.

114. See DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 207 (2008).

115. See HASCI, *supra* note 11, at 18–19.

116. See REENA SIGMAN FRIEDMAN, *THESE ARE OUR CHILDREN: JEWISH ORPHANAGES IN THE UNITED STATES, 1880–1925*, at 6–7 (1994). Some sources claim that the first Jewish orphanage in the United States opened during this period, in New York City in 1822. See, e.g., HASCI, *supra* note 11, at 25. This, however, is a misunderstanding. In 1822, Jews in New York founded a benevolent society, which did not open an orphanage until the 1860s. See HYMAN BOGEN, *THE LUCKIEST ORPHANS: A HISTORY OF THE HEBREW ORPHAN ASYLUM OF NEW YORK* 47 (1992).

York<sup>117</sup>—founded the nation’s first institution for Black children, the Shelter for Colored Orphans.<sup>118</sup> By 1830, some of the largest cities had multiple orphan asylums.<sup>119</sup> This approach resulted in varied services depending on religion and race—a pattern that became starker and more entrenched over the following decades.

From the 1830s into the 1860s, several developments encouraged the rapid spread of orphanages.<sup>120</sup> Immigration and urban poverty left families in dire circumstances,<sup>121</sup> while cholera epidemics increased the orphan population.<sup>122</sup> A decline in the use of indenture exacerbated the inadequacy of existing options.<sup>123</sup> These demand-side changes merged with evolving ideas about the vulnerability and importance of childhood to increase interest in child-focused institutions.<sup>124</sup> By the mid-nineteenth century, the number of orphanages rose to more than 150.<sup>125</sup> By the Civil War, orphan asylums were the most common method for caring for dependent children outside of their homes.<sup>126</sup>

The burgeoning number of orphanages followed the earlier pattern of organizing along religious lines and sometimes further limited eligibility by denomination, nationality, ethnicity, and race.<sup>127</sup> For instance, the majority of Catholic orphanages opened by 1840 were run by and for Irish immigrants,<sup>128</sup> and later additions were designated to serve German, Polish, Italian, or other subgroups of Catholic children.<sup>129</sup> This period also saw the founding of the country’s first Jewish orphanages, starting with Philadelphia in 1855 and New Orleans in 1856.<sup>130</sup> Meanwhile, Black children remained excluded from most children’s institutions.<sup>131</sup>

Nearly all funding for orphanages came from private sources, though some locations experimented with public supplements through cash or land grants.<sup>132</sup> Founders and managers typically obtained contributions from

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117. See IRA ROSENWAIKE, *POPULATION HISTORY OF NEW YORK CITY* 16 (1972).

118. See CLEMENT, *supra* note 77, at 124.

119. See HASCI, *supra* note 11, at 20.

120. See *id.* at 21–22.

121. See *id.* at 21.

122. See *id.* at 22–23.

123. See STEVEN MINTZ, *HUCK’S RAFT: A HISTORY OF AMERICAN CHILDHOOD* 156 (2004).

124. See *id.* at 157.

125. See CARP, *supra* note 40, at 8.

126. See E. Wayne Carp, *Orphanages vs. Adoption: The Triumph of Biological Kinship*, in *WITH US ALWAYS: A HISTORY OF PRIVATE CHARITY AND PUBLIC WELFARE* 124 (Donald T. Critchlow & Charles H. Parker eds., 1998).

127. See HASCI, *supra* note 11, at 21.

128. See *id.* at 23.

129. See *id.* at 23, 120; Morton, *supra* note 98, at 67.

130. See MARLENE TRESTMAN, *MOST FORTUNATE UNFORTUNATES: THE JEWISH ORPHANS’ HOME OF NEW ORLEANS* 1–2 (2023). Jewish orphanages commonly accepted children from surrounding states due to the dearth of Jewish institutions. For example, the New Orleans orphanage accepted children from Alabama, Arkansas, Mississippi, Oklahoma, Tennessee, and Texas. *Id.* at 2.

131. See HASCI, *supra* note 11, at 35.

132. See *id.* at 30–33, 89–92. Professor Mark Storslee has found that in the early nineteenth century, many states funded religious schools—some of which served orphans or poor

churches, philanthropists, and fundraisers.<sup>133</sup> They also increased their asylums' economic efficiency by indenturing wards and by charging room and board to parents able to pay.<sup>134</sup> Financial strategies varied by religion. Catholic institutions tended to find indenturing less useful than Protestant ones did because of a dearth of Catholic families able to participate.<sup>135</sup> They could, however, operate frugally because their staffs worked for little money.<sup>136</sup> Jewish orphanages also found indenture ineffective, especially for boys, because urban Jewish families lacked the means to host children.<sup>137</sup> Managers of Jewish institutions avoided placing Jewish children with non-Jews because they were concerned such arrangements might interfere with religious observance.<sup>138</sup>

Taken together, the varied experiences of early orphanages provide no easy lessons. On one hand, private groups were instrumental for protecting religious identity and pluralism. Yet at the same time, private provision (sometimes supplemented by government partnership) resulted in inequalities. Public options did not ameliorate these shortcomings because they were inadequately funded and effectively dominated by the majority group. Celebratory accounts in recent litigation overlook these major drawbacks.

### 1. Early Orphanages and Settler Colonialism

The first several orphanages founded in what became the United States were motivated by religious goals deeply entangled with settler colonialism. The dangerous terrain in American colonies left settler children orphaned or otherwise in need, opening space for Catholic and Protestant leaders to organize asylums—which served the additional purpose of converting nonbelievers.

As was prominently noted in *Fulton* without acknowledgement of downsides,<sup>139</sup> the first orphanage in what became the United States was Catholic, founded in 1728 by French nuns in New Orleans.<sup>140</sup> The nuns served colonial goals by caring for orphaned French girls and by seeking to convert Native and enslaved African girls.<sup>141</sup> The colony provided the nuns with a per capita subsidy, which the city of New Orleans continued after Louisiana became part of the United States in 1803.<sup>142</sup> New Orleans

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children. See Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111, 150–58 (2020). More research is warranted to compare funding schemes for schools and orphanages in this period.

133. See HASCI, *supra* note 11, at 89.

134. See *id.* at 60.

135. See CLEMENT, *supra* note 77, at 136.

136. See HASCI, *supra* note 11, at 90; CRENSON, *supra* note 11, at 49.

137. See BOGEN, *supra* note 116, at 47.

138. See *id.*

139. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021); see also *supra* text accompanying note 33.

140. See CLARK, *supra* note 113, at 57.

141. See *id.* at 35, 58, 73–74, 167.

142. See *id.* at 249.

diversified in the following decades, and the Catholic institution lost its subsidy to a Protestant competitor in the 1820s.<sup>143</sup> The Protestant asylum accepted Catholic girls and permitted them to attend Catholic services (and was even run by nuns for a period), but Catholics preferred to use their own institutions, to the extent they had capacity to better regulate religious training.<sup>144</sup>

The New Orleans experience demonstrates the complex tradeoffs involved in the private provision of children's services. Even though they were providing crucial assistance, faith-based asylums carried the risk of proselytization, prompted interfaith competition, and resulted in children receiving different levels of services.

The two earliest orphanages in the British colonies were likewise motivated by settler colonialism and steeped in religious considerations. Both were Protestant institutions established in Georgia.<sup>145</sup> Lutherans founded the first in Ebenezer in 1738; they had immigrated there after the Archbishopric of Salzburg, located in present-day Germany, expelled non-Catholics.<sup>146</sup> The second, named Bethesda, became the best known orphanage in the British colonies after it was founded by George Whitefield near Savannah in 1740.<sup>147</sup> Whitefield was an ordained minister in the Church of England who became the most renowned orator in the Great Awakening—a wave of influential religious revivals.<sup>148</sup> Whitefield recognized the need for an orphanage soon after arriving in Georgia in 1738 and visiting the Ebenezer institution.<sup>149</sup> In requesting a 500-acre land grant from Georgia, he suggested that the existence of an orphanage would reassure potential colonists that their children would receive care if they became orphaned.<sup>150</sup> He also speculated that the orphanage would be a tool to convert local Native children to Christianity.<sup>151</sup>

Whitefield was a controversial figure, and his critics pointed to his operation of Bethesda to illustrate their concerns.<sup>152</sup> Whitefield preached Methodism, which was a rebellious breakaway from the Anglican Church, and he sought to convert others to his beliefs.<sup>153</sup> Critics contended that Whitefield forced children in his orphanage to spend too much time in prayer and that he was evangelizing them against the Church of England.<sup>154</sup>

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143. *See id.* at 243–53.

144. *See* Priscilla Ferguson Clement, *Children and Charity: Orphanages in New Orleans, 1817–1914*, 27 J. LA. HIST. ASS'N 337, 341–42 (1986).

145. *See* HASCI, *supra* note 11, at 17–18.

146. *See* Buckingham, *supra* note 67, at 312–13.

147. *See id.* at 313.

148. *See id.* at 313–15.

149. *See id.* at 315.

150. *See id.*

151. *See id.* at 314–15. The orphanage converted several people, though their identities are unclear. WISNER, *supra* note 66, at 20. For broader discussion of how British colonial policy included conversion of Native children, see Matthew Fletcher & Wenona Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 855, 911 (2017).

152. *See* Buckingham, *supra* note 67, at 315.

153. *See id.* at 313–14.

154. *See id.* at 319–20.

Another objection, which found greater traction, was that Whitefield was improperly removing orphaned children from families and friends who could support them, as well as youth who could support themselves.<sup>155</sup> This serves as an early example of a religiously affiliated institution prioritizing its own size and power over what many viewed as being best for children. Whitefield was undeterred, and the institution remained in operation with a Christian mission for more than two centuries.<sup>156</sup>

Thus, much like the Catholic orphanage in New Orleans, Bethesda demonstrates how private, faith-based orphanages had complex motives and consequences. Though Whitefield and others inspired by faith believed that their actions were for the children's benefit, their proselytizing goals and approach to children's welfare harmed at least some youth and communities.

## 2. The Public Option and Religious Minority Exclusion

The late eighteenth century saw the founding of the nation's first public orphanage, in Charleston, South Carolina, in 1790.<sup>157</sup> Supported by an interfaith effort and intended to reduce taxpayer expenses,<sup>158</sup> the Charleston Orphan House came to serve as a warning about the difficulty of creating a public asylum that would adequately respect the identities of religious minority children. Much like the poorhouses founded in the same era, the effectively Protestant public orphanage prompted Catholics and Jews to create alternatives.<sup>159</sup>

In the early years of the Orphan House's operation, Charleston residents were proud of their institution and touted its interfaith support.<sup>160</sup> In 1791, the religious leaders at St. Mary's Catholic Church, Beth Elohim Synagogue, and leading Protestant churches all urged their congregations to help collect money for a permanent building.<sup>161</sup> A Baptist pastor, who was invited to deliver an oration for the orphanage's benefactors, praised the orphanage for its inclusivity.<sup>162</sup> Noting that all the city's so-called "churches" contributed to its funding,<sup>163</sup> he proclaimed that the orphanage "unites good men of every denomination in vigorous and common efforts, to promote the best of causes."<sup>164</sup>

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155. *See id.* at 317.

156. *See Bethesda Orphan House*, NAT'L GALLERY ART, [https://heald.nga.gov/media/wiki/index.php/Bethesda\\_Orphan\\_House](https://heald.nga.gov/media/wiki/index.php/Bethesda_Orphan_House) [<https://perma.cc/5V5V-DDBZ>] (Aug. 10, 2021, 3:11 PM).

157. *See* MURRAY, *supra* note 68, at 3.

158. City leaders believed that the orphanage would be cheaper than previous approaches, i.e., paying women to take in young children and placing older children in workhouses. *See id.* at 13.

159. *See supra* Part I.B.

160. *See* MURRAY, *supra* note 68, at 19.

161. *See id.*

162. *See generally* RICHARD FURMAN, AN ORATION AT THE CHARLESTON ORPHAN-HOUSE (1796).

163. *See id.* at 13.

164. *Id.* at 6.

Although supporters valued the Orphan House's interfaith origins, its daily operations were decidedly Protestant—though without favoring any one denomination.<sup>165</sup> The children spent time in daily prayer led by their schoolmaster<sup>166</sup> and attended religious services on Sundays.<sup>167</sup> In later years, they received religious instruction from a rotating roster of Protestant clergy in the Orphan House's chapel.<sup>168</sup> This arrangement seemed admirable to Protestant leaders because of its seemingly nonsectarian inculcation of moral behaviors and religious beliefs.<sup>169</sup>

The orphanage managers initially accommodated the religious practices of the few Jewish and Catholic children who lived there on an ad hoc basis by allowing them temporary leaves with relatives.<sup>170</sup> But as the Jewish and Catholic populations increased,<sup>171</sup> reliance on the institution's discretionary furloughs became untenable.

Jewish leaders made alternative arrangements first. In the early nineteenth century, Charleston was home to the largest and wealthiest Jewish community in the United States.<sup>172</sup> The city's Jewish residents sought to provide for their coreligionist children privately. In 1801, they formed the Society for the Relief of Orphans and Children of Indigent Parents, which became known as the Hebrew Orphan Society.<sup>173</sup> The following year, the society began finding private homes for Jewish children.<sup>174</sup> Consequently, it is unlikely many Jewish children resided in the public orphanage.<sup>175</sup>

Charleston's Catholic community had fewer resources to support its dependent children, leading to a Protestant-Catholic confrontation about the Orphan House's policies. In 1820, reflecting the growth of the Catholic population, the Pope designated Charleston as the seat of a new diocese and consecrated John England as its first bishop.<sup>176</sup> Two years later, at the request of a Catholic widow who had placed her children in the orphanage, England asked the managers to permit him or another Catholic priest to

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165. See MURRAY, *supra* note 68, at 38.

166. See CHARLESTON ORPHAN HOUSE, RULES FOR THE GOVERNMENT 8–9 (1806).

167. See *id.*

168. See *id.* at 10.

169. See FURMAN, *supra* note 162, at 15.

170. See MURRAY, *supra* note 68, at 36–37.

171. See *Virtual Jewish World: Charleston, South Carolina*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/charleston-south-carolina-jewish-history-tour> [<https://perma.cc/GPU9-H9HR>] (last visited Mar. 3, 2024); *Our History*, ST. MARY ANNUNCIATION CATH. CHURCH, <http://www.sma.church/our-history.html> [<https://perma.cc/E5YH-QPMN>] (last visited Mar. 3, 2024).

172. See *Virtual Jewish World*, *supra* note 171.

173. See *Hebrew Orphan Society*, JEWISH HIST. SOC'Y S.C., <https://jhssc.org/hebrew-orphan-society/> [<https://perma.cc/MS2N-KFJP>] (last visited Mar. 3, 2024).

174. See *id.* The society was the earliest Jewish association of its kind in the country. FRIEDMAN, *supra* note 116, at 6–7.

175. Professor John E. Murray, Jr. found only two records indicating Jewish children were in the orphanage. For example, in 1857, the commissioners refused to permit two Jewish children staying in the orphanage to leave on a weekly basis to attend Jewish services. See MURRAY, *supra* note 68, at 38.

176. See *id.* at 36.

catechize her children on a regular basis.<sup>177</sup> The managers denied this request, explaining that they had applied the same policy to other clergy.<sup>178</sup> They instead invited England to join the clergy rotation, which would effectively permit him to come to the orphanage once every six to eight weeks.<sup>179</sup> England found this solution insufficient, an issue he raised again over the coming years.<sup>180</sup> In 1825, using the *United States Catholic Miscellany*, which he founded as the first Catholic newspaper in the United States,<sup>181</sup> England asked: “What would you think of a proposal on my part requiring you to give up the *religious instruction* of the children of Protestants to Roman Catholics?”<sup>182</sup> In the managers’ response, which England also printed, they reiterated the invitation to join the rotation.<sup>183</sup> England declined involvement on those terms and expressed concern that the managers’ stance violated “the principle that poverty shall not deprive its victim of religious rights.”<sup>184</sup>

Concluding that the public institution would be inadequate, England arranged for nuns to come to Charleston to care for Catholic orphans in the early 1830s.<sup>185</sup> After a yellow fever epidemic left many Catholic children fully or partly orphaned later that decade, he fundraised for a Catholic orphanage, which opened in 1841.<sup>186</sup>

Thus, even in the first city committed to a public orphanage, religious identity and goals interfered with the full promise of providing a service on truly equal and welcoming terms for all. Like the harsher public poorhouses, the Orphan House was dominated by the local majority population, white Protestants, who ran the institution in the manner they preferred for their own children. This resulted, at best, in disregard for the concerns of religious minorities. The inadequacy of the public institution prompted a splintering of children’s institutions—with Jews and Catholics creating (and self-funding) alternatives—leading to inequalities in access and levels of service according to religious faith. Though public institutions of this kind remained rare,<sup>187</sup> the Charleston experiment provided a harbinger of the problems to come.

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177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.* at 36–37.

181. *See id.* at 37.

182. *Domestic: Orphan House of Charleston*, U.S. CATH. MISCELLANY, June 22, 1825, at 398.

183. *See id.*

184. *Id.*

185. *See* Anne Campbell, *Bishop England’s Sisterhood, 1828–1929*, at 11, 17 (1968) (Ph.D. dissertation, St. Louis University) (on file with author).

186. *See id.* at 39–42.

187. Philadelphia ran a public orphanage for “healthy white children” (with Black children relegated to the poorhouse) from 1820 to 1835, and New York offered a public institution for poor children from 1833 to 1848. CLEMENT, *supra* note 77, at 124, 128. Both closed to save costs, leaving private faith-based orphanages and public poorhouses as the available options. *See id.* at 128.

### 3. Public Subsidies for Religious Segregation

Though the earliest orphanages typically relied on private funding,<sup>188</sup> a deeply consequential alternative developed in some locations: extensive public financial support. New York City was the most important location to embrace this approach. The New York experience demonstrates the gradual growth of a public-private partnership that respected population diversity at the expense of providing children with adequate and equal support.

From their earliest days, New York City's orphanages were religiously segregated institutions that relied on a blend of private and public funding. The city's first orphanage was founded in 1806 by a group of Protestant women who formed the Orphan Asylum Society of the City of New York.<sup>189</sup> The society accepted only full orphans, and it included in its constitution that the children receive "religious instruction" (impliedly nondenominational Protestant) and be bound out when they reached an appropriate age.<sup>190</sup> The women initially used private funds but soon secured public funding as well.<sup>191</sup> In 1817, Catholics organized the Roman Catholic Benevolent Society, which opened an orphanage run by nuns the same year.<sup>192</sup> That society also relied on a combination of fundraising<sup>193</sup> and financial assistance from the city and state.<sup>194</sup> These early orphanages failed to meet demand. As of 1819, more than 600 children remained in the city's public poorhouse.<sup>195</sup>

The 1830s through 1850s brought a flood of additional private children's institutions to the city and across the state, still divided by religion as well as by race.<sup>196</sup> Among these institutions was the city's first racially segregated children's institution, the Association for the Benefit of Colored Orphans, founded by a group of (mostly) Quaker women in 1836.<sup>197</sup> The women retrieved the first residents from the city's poorhouse.<sup>198</sup> Some orphanages theoretically accepted children from other groups but prioritized their "own" children. For example, the Orphans' Home and Asylum of the Protestant Episcopal Church in New York turned away children from other

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188. See HASCI, *supra* note 11, at 12.

189. See JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 206 (1967).

190. SCHNEIDER, *supra* note 83, at 189.

191. See *id.* at 190.

192. See PRATT, *supra* note 189, at 207.

193. See, e.g., Advertisements, EVENING POST (N.Y.), Feb. 14, 1817, at 3 (advertising a charity sermon).

194. See PRATT, *supra* note 189, at 207; see also DOROTHY BROWN & ELIZABETH MCKEOWN, THE POOR BELONG TO US: CATHOLIC CHARITIES AND AMERICAN WELFARE 21 (1997).

195. *Annual Census*, EVENING POST (N.Y.), May 20, 1819, at 2. Thirty-one of the children were Black. See *id.*

196. See SCHNEIDER, *supra* note 83, at 191.

197. See FROM CHERRY STREET TO GREEN PASTURES: A HISTORY OF THE COLORED ORPHAN ASYLUM AT RIVERDALE-ON-HUDSON, 1836 • 1936, at 6–8 (1936), <https://cdm16694.contentdm.oclc.org/digital/collection/p15052coll5/id/40485> [<https://perma.cc/2FTK-J8QJ>].

198. See *id.* at 8. As of 1830, approximately 7 percent of the city's population was Black. ROSENWAIKE, *supra* note 117, at 36.

denominations because of lack of space.<sup>199</sup> By 1850, the state had almost one hundred orphanages, mostly run by private religious groups.<sup>200</sup> Many received local and state funding.<sup>201</sup> Federal funding supplemented state support for the Thomas Asylum for Orphan and Destitute Indian Children, which was founded in 1855 by five members of the Seneca Nation and five white collaborators to “relieve the sufferings of orphan and destitute Indian children” and prevent them from becoming “idle and vicious vagabonds and beggars.”<sup>202</sup>

As the number of children’s institutions grew, the state legislature experimented with how to fund them and stacked the deck in favor of private institutions. In 1855, it established a common pool for private orphanages, to be divided on a per capita basis and distributed by county officials. In 1857, seeking to remove children from poorhouses, the legislature authorized officials in counties that did not have orphanages to pay to place children in private institutions elsewhere.<sup>203</sup> The state also awarded grants in increasing amounts to individual private orphanages, the number of which grew due to the Civil War.<sup>204</sup> Despite public funding for private children’s institutions, the number of children in public poorhouses exploded, from around 8,000 in 1861 to 26,000 in 1866<sup>205</sup> (from just over 0.5 percent of the state’s children to nearly 2 percent<sup>206</sup>). It was against this backdrop that Catholics and Jews opened major New York City orphanages, both of which would become the largest of their kind in the country and possibly the world.<sup>207</sup>

By the early 1860s, the Catholic Church had fallen behind in providing services to meet the needs of the city’s Catholic population, which was largely comprised of poor immigrants.<sup>208</sup> Catholics grew from a negligible presence in the 1820s to 400,000 by 1865, comprising half of the city’s residents.<sup>209</sup> The Catholic Church’s inability to meet demand led to reliance on Protestant-run charities.<sup>210</sup> At midcentury, increased immigration, as well as heightening suspicion about the proselytizing activities of Protestant groups such as the Children’s Aid Society (CAS),<sup>211</sup> prompted the Catholic Church to increase its charitable services.<sup>212</sup> An important component was

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199. See HASCI, *supra* note 11, at 120.

200. See MINTZ, *supra* note 123, at 157.

201. See SCHNEIDER, *supra* note 83, at 338.

202. *Id.* at 337.

203. *See id.* at 339, 342.

204. *See id.* at 339.

205. *Id.* at 344.

206. This calculation compares the approximate number of children in poorhouses in 1861 and 1866 to the number of children under age fifteen in 1860, to provide a sense of the scale of poorhouse use. See U.S. CENSUS OFF., POPULATION OF THE UNITED STATES IN 1860; COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS 326 (1864).

207. See FRIEDMAN, *supra* note 110, at 1; CRENSON, *supra* note 11, at 72.

208. See STEPHEN O’CONNOR, ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED 168 (2001).

209. *See id.*

210. *See id.*

211. *See infra* Part I.D. for a discussion of CAS.

212. See KATZ, *supra* note 50, at 62.

establishing new orphanages, including one for German Catholics in 1850 and for French Catholics in 1858.<sup>213</sup>

The most important development for Catholic child placements was the founding and legal entrenchment of the Society for the Protection of Destitute Roman Catholic Children in 1863 (“the Society”).<sup>214</sup> The Society was composed of twenty-five Catholic men from Irish backgrounds who were concerned about the number of impoverished children in their community.<sup>215</sup> They secured a charter from the legislature that required that whenever a magistrate committed a child to an institution and the parent requested that it be a Catholic one, the magistrate “shall grant the request.”<sup>216</sup>

To house these children, the Society opened the New York Catholic Protectory (“the Protectory”).<sup>217</sup> The founder was Levi Silliman Ives, a former Episcopal Bishop of North Carolina who converted to Catholicism.<sup>218</sup> After a failed effort to create a Catholic placing out agency to counter CAS,<sup>219</sup> Ives and supporters concluded that the best way to “save” Catholic children and ensure that they remained Catholic was to open an institution that would serve as a temporary haven and reunite children with their parents.<sup>220</sup> The Protectory was founded to serve this purpose and, according to Ives, to “insist upon the right to train Catholic children in the Catholic faith.”<sup>221</sup> The Protectory accepted a broader array of children than most institutions did at the time. It housed children under age fourteen committed by their parents; those between seven and fourteen committed by a judge for being idle, truant, vicious, or homeless; and those of the same age placed by the city’s poor officials in lieu of the poorhouse.<sup>222</sup>

The Protectory relied on a mix of public and private funding. When it first opened in 1863, funding came from private donors.<sup>223</sup> Society members made individual contributions, and members of religious orders provided inexpensive labor.<sup>224</sup> The directors fundraised through appeals to Irish nationalism and to Catholicism.<sup>225</sup> Parents contributed if they were able.<sup>226</sup> In the Protectory’s first full year of operation, the legislature allocated \$2,000 and authorized New York County to raise \$15,000 more, with additional amounts permitted at later points.<sup>227</sup> In 1865, after the Protectory outgrew

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213. *See id.*

214. *See* PRATT, *supra* note 189, at 208.

215. *See* FITZGERALD, *supra* note 52, at 104.

216. Sanford Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1228 (1970).

217. *See* SCHNEIDER, *supra* note 83, at 335.

218. *See* O’CONNOR, *supra* note 208, at 169.

219. *See id.* at 170.

220. *Id.* at 171.

221. CRENSON, *supra* note 11, at 72.

222. *See The New Protectory for Destitute Catholic Children*, N.Y. TIMES, July 24, 1865, at 5.

223. *See Destitute Catholic Children*, N.Y. TIMES, June 7, 1863, at 8.

224. *See* FITZGERALD, *supra* note 52, at 104.

225. *See id.* at 105.

226. *See* O’CONNOR, *supra* note 208, at 171.

227. *See* SCHNEIDER, *supra* note 83, at 335–36.

its original space, the state granted \$50,000 for a new building, and the Society fundraised an additional \$100,000.<sup>228</sup> Beginning in 1866, the state authorized New York County to pay \$50 per capita annually.<sup>229</sup>

New York City's Jewish community also opened a major orphanage in the early 1860s, an endeavor that had long been delayed by internal disagreements but finally came to fruition because of concerns about Catholic proselytizing. Starting in 1822, Ashkenazi Jews from central and eastern Europe provided for orphaned coreligionists through the Hebrew Benevolent Society (HBS), an organization that they created when breaking away from the institutions founded by the city's earlier-arriving and better-established Sephardic Jews, descended from Spanish Jews.<sup>230</sup> At that time, there were probably fewer than 1,000 Jews in the city, but the number increased substantially due to immigration, especially from Germany, reaching around 12,000 by the mid-1840s.<sup>231</sup> In 1844, German Jews resigned from HBS to create their own organization, the German Hebrew Benevolent Society (GHBS).<sup>232</sup> Repeated efforts at reconciliation and merger failed into the 1850s.<sup>233</sup> The lack of unity undermined efforts to open a Jewish orphanage, despite the fact that circulating stories about Christian asylums' conversion of Jewish children made a Jewish institution seem essential.<sup>234</sup>

Efforts to open a Jewish orphanage took on new urgency in 1858 because of events abroad. That June, papal troops in Bologna removed a child from the Jewish Mortara family in the middle of the night, based on a Catholic servant's claim that she had secretly baptized him.<sup>235</sup> When the news reached New York, it intensified Jewish fears that their children would be surreptitiously converted and prompted the Jewish community to stage a protest.<sup>236</sup> Early in the next year, the benevolent societies unified under the leadership of German Jews, and the group established the Hebrew Orphan Asylum of New York (HOA), housed in a temporary location.<sup>237</sup> The state helped fund a permanent building,<sup>238</sup> which was dedicated in November 1863.<sup>239</sup> The cornerstone ceremony received glowing coverage in the *New York Times*, which described interfaith attendance and suggested that the Jewish community should feel "a laudable pride in the result."<sup>240</sup> Though Jews from different national backgrounds were able to come together to form the HOA, conflict remained over the type of religious observance the

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228. See BROWN & MCKEOWN, *supra* note 194, at 21.

229. See SCHNEIDER, *supra* note 83, at 336.

230. See BOGEN, *supra* note 116, at 1–2, 4.

231. See ROSENWAIKE, *supra* note 117, at 54.

232. See BOGEN, *supra* note 116, at 6.

233. See *id.* at 7.

234. See *id.* at 8–10, 12–14.

235. See *id.* at 14.

236. See *id.* at 14–15.

237. See *id.* at 19.

238. See *id.* at 35. The building cost \$47,000. *Id.*

239. See *id.* at 33.

240. *The Hebrew Orphan Asylum*, N.Y. TIMES, Nov. 6, 1863, at 2.

institution should favor.<sup>241</sup> Unable to risk losing the support of Orthodox or Reform Jews, HOA managers took the children to different synagogues across the city.<sup>242</sup>

The founding and growth of faith-based orphanages in New York City reflected both the absence of public options and a respect for pluralism. Although offering benefits, this approach had the immediate drawback of affording unequal and sometimes ill-fitting services for children. Individual institutions offered shelter, education, and other essentials at varying levels of quality and availability—leaving excluded children to the public poorhouse. Moreover, since quality services were available only through religious organizations, children and their families were forced to conform to or at least be subjected to the religious instruction and rules of the available asylums—even if they preferred other or even secular approaches.

By the early 1860s, orphanages were a commonplace method for providing care to (white) orphaned or otherwise dependent children, especially in the nation's diverse cities. Most offered care far superior to poorhouses, which were deliberately harsh and stigmatizing. Though better than the alternatives, religiously segregated orphanages had downsides. They excluded Black children almost completely and resulted in unequal services even for the white children who were eligible.<sup>243</sup>

#### *D. Placing Out and Orphan Trains*

As reformers tried new methods to save city children whom they viewed as headed toward a life of pauperism or criminality, they introduced what became the most notorious child placement strategy: “placing out.”<sup>244</sup> Much like involuntary apprenticeship, placing out involved removing children from poor parents and relocating them to families that provided education, sustenance, and other basics in exchange for labor.<sup>245</sup> Because children were moved on trains, the practice became known as the “orphan trains.”<sup>246</sup>

Placing out was envisioned as an improvement over apprenticeship, in that it ideally led to each child's permanent acceptance as a member of the receiving family, and often relocated the child from a city to a rural area—further west—which proponents believed was a more wholesome location.<sup>247</sup> From a legal perspective, a key difference was that placing out typically did not involve an indenture contract.<sup>248</sup>

Scholars often trace the placing out method to the founding of New York's CAS by Charles Loring Brace in 1853.<sup>249</sup> Though there were earlier

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241. See BOGEN, *supra* note 116, at 21.

242. See *id.* at 40. The institution leaned more toward Reform Judaism practices over time. See *id.* at 46.

243. See HASCI, *supra* note 11, at 35.

244. MASON, *supra* note 59, at 78–79.

245. See *id.*

246. See *id.*

247. See *id.*

248. See *id.*

249. See *id.* at 79.

iterations of placing out,<sup>250</sup> Brace was especially influential in spreading this approach.<sup>251</sup> Born into a financially comfortable New England family,<sup>252</sup> Brace attended Yale Divinity School and Union Theological Seminary but was unsure about becoming a minister.<sup>253</sup> He decided to try urban missionary work instead, starting at New York City's Methodist Five Points Mission.<sup>254</sup> Based on his early experiences ministering to the poor, including in the city's poorhouse, he doubted adults could be reformed and instead decided to focus on children.<sup>255</sup>

By the late 1840s, there was significant juvenile crime in large East Coast cities like New York and Boston,<sup>256</sup> and some people questioned whether impoverished urban children could be redeemed.<sup>257</sup> Brace and his compatriots, many of whom were also ministers, believed these children could be raised into moral and productive citizens if they were placed in healthy environments.<sup>258</sup> A crucial component of children's salvation, in their view, was a Christian education.<sup>259</sup> To that end, Brace and colleagues from several Protestant denominations began organizing "Boys Meetings" to provide religious training, starting in 1848.<sup>260</sup> A few years later, participants in this effort formed CAS, with Brace as the secretary.<sup>261</sup> CAS sought to improve the lives of urban children by running workshops, night schools, training schools, and lodging houses.<sup>262</sup> On Sundays, the lodging houses offered religious services, which Brace led at one location.<sup>263</sup>

Even as CAS continued its effort to better the lives of children living in New York City, its members believed the best approach would be to send children to live in rural, Christian homes.<sup>264</sup> According to a CAS pamphlet that Brace authored in 1853, the organization's emigration plan would provide "ignorant and vagrant" children with work and "bring them under religious influence."<sup>265</sup> In Brace's words, "[t]he family is God's Reformatory."<sup>266</sup> In addition to benefitting the children, CAS expected

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250. See MINTZ, *supra* note 123, at 164.

251. See HOLT, *supra* note 11, at 40.

252. See *id.* at 41.

253. See *id.*

254. See *id.*

255. See *id.* at 42.

256. See *id.* at 21–22.

257. See *id.* at 24–25.

258. See *id.* at 26, 29.

259. See *id.* at 16.

260. Charles Loring Brace, *Child Saving: The Children's Aid Society of New York, in HISTORY OF CHILD SAVING IN THE UNITED STATES* 3–4 (Comm. Hist. Child-Saving Work ed., 1893).

261. See *id.* at 4–5.

262. See *id.* at 6–21.

263. See *id.* at 9–10.

264. See *id.* at 8, 24; HOLT, *supra* note 11, at 28.

265. Brace, *supra* note 260, at 3.

266. Presser, *supra* note 100, at 485.

Christianity to inspire financial support and cultivate a sense of duty and charity in host families.<sup>267</sup>

After its start in 1853, CAS's emigration plan grew quickly.<sup>268</sup> Within a couple of years, CAS transitioned from placements in nearby states to those then considered the West, including Illinois, Indiana, Michigan, and Ohio.<sup>269</sup> After the Civil War, increased labor needs in the West and worsening conditions in cities fueled the growth of CAS and the founding of similar organizations in other eastern cities.<sup>270</sup> Between 1854 and 1874, the New York CAS placed approximately 20,000 children.<sup>271</sup> In the following decades, the organization placed tens of thousands more.<sup>272</sup> Many of the children were retrieved by host families at Protestant churches.<sup>273</sup>

Funding for CAS and similar groups came from a blend of public and private sources. Churches, individual donors, and charity groups were major contributors.<sup>274</sup> In New York, CAS received public funding through annual allotments, larger grants, and per capita placement fees.<sup>275</sup> By the 1870s, more than half of the funding for Brace's operations came from public sources.<sup>276</sup> Public funding was justified in part by the cost savings as compared to institutional care.<sup>277</sup>

The orphan trains drew isolated complaints from the early years of their operation, but public concern toward CAS crescendoed by the 1870s.<sup>278</sup> First, CAS was condemned for "stealing" poor children.<sup>279</sup> Only around half of the participants were true orphans—i.e., those with two deceased parents.<sup>280</sup> Brace and many of his contemporaries were unconcerned about separating children from their families, believing that this was an effective strategy to break hereditary pauperism.<sup>281</sup> Though some (perhaps many) parents brought their children to CAS in hopes of providing them with a better future,<sup>282</sup> there were allegations that poor immigrants were pressured or enticed into handing over their children through the use of misleading information.<sup>283</sup>

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267. See HOLT, *supra* note 11, at 28–29.

268. See *id.* at 47.

269. *Id.* at 30, 48.

270. See *id.* at 75–76; Presser, *supra* note 100, at 474.

271. See CARP, *supra* note 40, at 9.

272. See *id.*

273. See HOLT, *supra* note 11, at 48–49.

274. See *id.* at 67.

275. See FITZGERALD, *supra* note 52, at 92.

276. See KATZ, *supra* note 50, at 107.

277. See FITZGERALD, *supra* note 52, at 92 (“Instead of the roughly \$100 per year that [New York City] paid for institutionalizing a child, . . . placing-out was fairly cheap, estimated at about \$10 for each child’s transportation costs.”).

278. See HOLT, *supra* note 11, at 119–20.

279. CARP, *supra* note 40, at 9–10.

280. See *id.*

281. See KATZ, *supra* note 50, at 107.

282. See CRENSON, *supra* note 11, at 65.

283. See HOLT, *supra* note 11, at 129.

Another frequent allegation was that CAS did not conduct sufficient investigations or monitor placements, allowing host families to mistreat children.<sup>284</sup> Brace saw CAS's avoidance of formal indenture as preserving helpful flexibility, but another consequence was that it removed legal protections.<sup>285</sup> Accordingly, some charity workers referred to Brace's approach as "the wolf of indentured labor in the sheep's clothing of Christian charity."<sup>286</sup> Some even accused CAS of selling children as laborers.<sup>287</sup>

The most damning and consequential accusation in the view of many at the time was that CAS was a cover for Protestants to proselytize among poor, immigrant children who were predominately Catholic.<sup>288</sup> Some alleged that CAS essentially kidnapped Catholic children in order to place them with Protestants far from their birth families.<sup>289</sup> CAS countered by publicizing examples of Catholic children placed with Catholic hosts.<sup>290</sup> Because of Catholic outcry, CAS narrowed the range of children it placed, so that by the 1890s its nearly exclusive focus was (white) children from Protestant orphanages.<sup>291</sup>

Concerns about CAS prompted Catholics to develop competing placement agencies.<sup>292</sup> One of the most significant was the New York Foundling Asylum (NYFA), founded by the Sisters of Charity of Saint Vincent de Paul in 1869.<sup>293</sup> NYFA quickly grew to rival CAS.<sup>294</sup> Between 1870 and 1872, NYFA placed 907 Catholic children in homes within the state, and they soon branched out to the West and Southwest.<sup>295</sup> Though operating similarly to CAS,<sup>296</sup> NYFA relied on local priests in states with relatively large Catholic populations, such as Louisiana and Texas, to facilitate placements.<sup>297</sup> In contrast to CAS, the NYFA retained the use of legal indenture, with the contract requiring that host families raise children in the Catholic faith.<sup>298</sup> By around 1900, NYFA placed over 400 children per year.<sup>299</sup>

NYFA encountered its own controversies regarding the treatment of children's identities in placing out.<sup>300</sup> In the most infamous episode, it placed

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284. See CARP, *supra* note 40, at 12.

285. See HOLT, *supra* note 11, at 62–63.

286. TRATTNER, *supra* note 74, at 102.

287. See HOLT, *supra* note 11, at 132.

288. See O'CONNOR, *supra* note 208, at 169.

289. See *id.* at 168–69.

290. See HOLT, *supra* note 11, at 135.

291. See O'CONNOR, *supra* note 208, at 299. There was almost no placing out for Black, Chinese, Native, Slavic, Spanish, or Turkish children because rural families, mostly white Protestants, did not want them. See HOLT, *supra* note 11, at 71.

292. See CRENSON, *supra* note 11, at 78, 80.

293. See O'CONNOR, *supra* note 208, at 171–73.

294. See HOLT, *supra* note 11, at 107.

295. See *id.* at 109–10.

296. See *id.* at 110.

297. See O'CONNOR, *supra* note 208, at 174.

298. See *id.* at 173.

299. See HOLT, *supra* note 11, at 136.

300. For more detail, see generally LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* (1999).

forty immigrant Catholic children of European descent with Mexican Catholic families.<sup>301</sup> The incident began in 1904, when NYFA decided to begin working in the Arizona Territory and received interest from a parish containing the towns of Clifton and Morenci.<sup>302</sup> Residents there were primarily Mexican Catholic laborers and wealthier Anglo-Protestants.<sup>303</sup> When the train transporting forty children arrived in Clifton, the local Catholic priest placed nineteen children with Mexican families, with the remainder to continue on to Morenci.<sup>304</sup> That night, Anglo men forcibly removed the children from their new homes and placed them with the city's leading Anglo families, believing that the children's white ethnic identity was most important.<sup>305</sup> The Anglo families were mostly Protestant, though a few were Catholic (many not practicing), one couple was Mormon, and one couple consisted of a Jewish man married to a woman who had been brought up Catholic.<sup>306</sup> NYFA filed a petition for a writ of habeas corpus for the return of the Clifton children (intending to place them with white Catholic families) and sent many of the children designated for Morenci back to New York.<sup>307</sup>

The following year, NYFA pled its case before the Supreme Court of the Territory of Arizona, with the U.S. Attorney General appearing as an amicus to support it.<sup>308</sup> The court rejected NYFA's petition in an opinion that ignored religious differences and showed the judges' racist thinking.<sup>309</sup> Referring to the original families as "degraded half-breed Indians," the court reasoned that the children's best interests would be served by remaining with their "present foster parents—persons of some means and education" who had "rescued" the children and now felt great affection for them.<sup>310</sup> The U.S. Supreme Court dismissed NYFA's appeal for want of jurisdiction.<sup>311</sup> This episode led NYFA to stop placing children in the West,<sup>312</sup> and it prompted further condemnation of placing out.<sup>313</sup>

Jewish children were mostly absent from the placing out story, perhaps because Jews were more likely than most immigrant groups to arrive in the country as family units.<sup>314</sup> NYFA, however, may have occasionally placed

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301. See O'CONNOR, *supra* note 208, at 174.

302. See HOLT, *supra* note 11, at 136.

303. See *id.*

304. See Elizabeth McKeown & Dorothy M. Brown, *Saving New York's Children*, U.S. CATH. HISTORIAN, Summer 1995, at 77, 89–90.

305. See *id.*

306. See *id.* at 92–93.

307. See *id.* at 90.

308. See *id.*

309. See *N.Y. Foundling Hosp. v. Gatti*, 79 P. 231, 237–38 (Ariz. 1905), *appeal dismissed*, 203 U.S. 429 (1906).

310. *Id.*

311. See *N.Y. Foundling Hosp. v. Gatti*, 203 U.S. 429, 441 (1906).

312. See McKeown & Brown, *supra* note 304, at 95.

313. See HOLT, *supra* note 11, at 137.

314. See *id.* at 70. Holt's combined estimate for placed out Italian and Jewish children is less than 1 percent. See *id.*

Jewish children with Catholics.<sup>315</sup> In one sparsely documented incident, NYFA allegedly forged a baptismal record in order to place a Jewish child as Catholic.<sup>316</sup> On another occasion, NYFA placed a Jewish girl with a German Catholic family, perhaps based on a mistaken assumption about her surname.<sup>317</sup> Jewish groups tried their own placing out experiments with little success because of the unavailability of Jewish host families.<sup>318</sup>

Although placing out was criticized, it remained influential for decades to come. The interfaith tensions stoked in CAS's early years motivated religious groups to found their own organizations, including NYFA, and to seek protective laws.<sup>319</sup> CAS and NYFA continued placing out into the 1920s,<sup>320</sup> with their methods contributing to modern foster care.<sup>321</sup>

From the colonial period through the mid-nineteenth century, child placement options were channeled by religious goals, cost constraints, and efforts to form children into productive American citizens. Approaches varied by location and over time, defying easy summary or straightforward lessons. Nevertheless, the cumulative experiences of this period highlight the potential risks of providing services to vulnerable children through religious providers—dangers including exclusion, inequality, and coercion. Meanwhile, the potential promise of public alternatives available to all was undermined by control of the majority group and politicians' unwillingness to allocate adequate funding. This meant that children excluded from the private asylums due to their religious or racial identities (or simply inadequate availability) lacked a comparable public option. Instead, they remained in stigmatized and harsh public poorhouses or were placed out in faraway locations, through unregulated and sometimes abusive arrangements, to earn their keep.

## II. FOUNDATIONS OF THE MODERN CHILD PLACEMENT SYSTEM (1865–1940s)

The transition to the modern child placement system began in the mid-1860s, with increasing recognition of public responsibility for dependent children.<sup>322</sup> Prompted by the needs of Civil War orphans, growing opposition to the use of poorhouses, and the enactment of child abuse laws, local and state governments became more involved in funding and regulating orphanages.<sup>323</sup> Although some localities opened public institutions, none

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315. O'Connor claims that NYFA "commonly changed the surnames of Jewish children and passed them off as Catholic," but the cited evidence does not substantiate this claim. O'CONNOR, *supra* note 208, at 174.

316. *See id.* (relying on oral interview of a person placed as a child).

317. *See* HOLT, *supra* note 11, at 112.

318. *See* HASCI, *supra* note 11, at 140; BOGEN, *supra* note 116, at 163.

319. *See* TRATTNER, *supra* note 74, at 150.

320. *See* HOLT, *supra* note 11, at 4, 162.

321. *See* TRATTNER, *supra* note 74, at 102.

322. For more detail on the increase in government regulation, see generally Brief of Amici Curiae Am. Hist. Ass'n & Org. of Am. Historians in Support of Fed. & Tribal Parties, *supra* note 34.

323. *See infra* Parts II.A.1–3.

offered sufficient capacity. This inadequacy led to ongoing reliance on private, typically faith-based orphanages. Some states, most importantly New York, controversially allocated significant taxpayer funding to private institutions.<sup>324</sup> Faith-based providers secured their continuing participation by lobbying for laws that required religion-matching in the placement of children.<sup>325</sup> New organizations focused on addressing child abuse strategically collaborated with religious institutions, further solidifying religious groups' role and funding.<sup>326</sup> The extensive involvement of faith-based providers provoked interfaith tensions and resulted in unequal services along religious, racial, and ethnic lines.

Around the turn of the century, influential reformers advocated for children to be removed from orphanages and raised in family homes—if not the children's own, then with foster parents.<sup>327</sup> Groups and individuals with vested interests in the orphanages they had created were reluctant to forego their control over children, as well as the associated funding.<sup>328</sup> Proponents of faith-based institutions achieved a major victory in 1899, obtaining concessions in what became the most influential juvenile court law in the country.<sup>329</sup> In the 1910s, reformers navigated religion-infused politics to authorize “mothers’ pensions” to “worthy” women to keep families together, and in the 1930s the federal government became involved in funding “welfare.”<sup>330</sup> In both episodes, religious groups slowed, complicated, and narrowed reforms.<sup>331</sup> In the following decades, as foster care gradually overtook institutional care, many faith-based orphanages reinvented themselves as foster care agencies.<sup>332</sup>

#### A. Orphanage Growth After the Civil War (1865–1900)

After the Civil War, local and state governments became increasingly involved in regulating, funding, and sometimes founding a rapidly growing number of orphanages.<sup>333</sup> The rise in demand was partly a reflection of conditions extending from the earlier period, including urban poverty, industrialization, and immigration.<sup>334</sup> Three new drivers built on these influences: the need to provide for Civil War orphans, opposition to placing children in poorhouses, and the development of new child abuse laws and enforcement machinery.<sup>335</sup>

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324. *See infra* notes 451–54 and accompanying text.

325. *See, e.g., infra* notes 462–70 and accompanying text.

326. *See infra* Part II.A.3.

327. *See infra* Part II.B.1.

328. *See infra* Parts II.B.1–2.

329. *See infra* Part II.B.2.

330. *See infra* Part II.B.3.

331. *See infra* Part II.B.3.

332. *See infra* Part II.B.4.

333. *See* CARP, *supra* note 40, at 124.

334. *See id.*

335. *See generally infra* Parts II.A.1–3.

This section begins by providing a general overview of the operation of orphan asylums from the mid-1860s to around 1900, before turning to how each of the three postbellum drivers shaped the operation of children's services in a manner that entrenched religious group involvement and created complex public-private partnerships. Although addressing short-term needs, these developments ultimately contributed to inequality, inefficiency, and interfaith strife.

In the postbellum period, religion remained a central organizing principle for orphan asylums.<sup>336</sup> Even though some orphanages, including public institutions, claimed to be nonsectarian, in practice this meant they raised children in a nondenominational Protestant manner.<sup>337</sup> Recognizing the true Protestant nature of the so-called nonsectarian institutions, Catholics and Jews opened alternatives.<sup>338</sup> Founders sought to protect children against proselytization<sup>339</sup> and to provide them with religious training.<sup>340</sup>

Many of the religiously organized institutions further subdivided by denomination, nationality, ethnicity, or race,<sup>341</sup> leading to unequal and inadequate services.<sup>342</sup> Catholic orphanages often catered primarily to French Canadian, German, Irish, Italian, or Polish children.<sup>343</sup> Protestant groups split by denomination in combination with nationality; for instance, Lutheran immigrants from Scandinavia and Germany founded their own asylums.<sup>344</sup> Sometimes groups were not large or wealthy enough to run multiple institutions, leading to intragroup conflict. For example, Orthodox Jews from Russia chafed at how Jewish orphanages run by German-descended Reform Jews attempted to "Americanize" their children.<sup>345</sup>

As more orphanages catering to specific groups became available, impoverished immigrant parents used these institutions as a safety net to provide temporary care for their children during unemployment, illness, or other difficulties.<sup>346</sup> In many instances, these parents rightly expected that faith-based orphanages would provide their children with a better education than was otherwise available.<sup>347</sup> Catholic leaders recognized this usage and

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336. See HASCI, *supra* note 11, at 25, 27.

337. See *id.* at 177.

338. See FRIEDMAN, *supra* note 116, at 4–5.

339. See *id.* at 5.

340. See HASCI, *supra* note 11, at 179.

341. See *id.* at 25–27, 65, 177.

342. For example, in postbellum Boston, Black, Jewish, and Italian children were excluded from existing services, leading them to create "alternatives to the racist public sector, the discriminatory private sector, and the Irish-dominated Catholic sector." HOLLORAN, *supra* note 65, at 137.

343. See CRENSON, *supra* note 11, at 44.

344. See *id.*

345. *Id.* at 97, 100, 106–107 (discussing the Cleveland Jewish Orphan Asylum, which served Jews from numerous states in middle America). A similar dynamic developed later between the Irish Catholic nuns who ran New York City's institutions and newer immigrant groups. See FITZGERALD, *supra* note 52, at 149, 156–62.

346. See CARP, *supra* note 40, at 126–27.

347. See *id.*; FRIEDMAN, *supra* note 116, at 163; HOLLORAN, *supra* note 65, at 171.

viewed temporary institutional care as a way to preserve and reinforce family ties.<sup>348</sup> Problems sometimes arose when parents sought to regain custody of their children, challenging the views and authority of orphanage managers.<sup>349</sup>

The same options were not available to Black children, a problem exacerbated by the involvement of religious groups. By 1890, almost no orphanages were interracial, and only twenty-seven catered to Black children.<sup>350</sup> Nearly all Black children in this period were Protestant and therefore automatically lacked access to Catholic and Jewish institutions, and Protestants failed to meet demand.<sup>351</sup> The unavailability of private institutions meant that Black children were disproportionately placed in inferior public institutions, and in some instances lacked any appropriate institution whatsoever.<sup>352</sup>

The religiously and racially segregated orphanage system inflamed disputes over funding. Initially it seemed reasonable to many people for governments to provide subsidies to private asylums that accepted children who would otherwise engage in criminal activities or live in poorhouses at taxpayer expense.<sup>353</sup> But once public money flowed to private institutions, there were concerns that asylums admitted and retained children unnecessarily and that the arrangement violated the separation of church and state.<sup>354</sup> Though this was a period when some states amended their constitutions to forbid public funding of private charitable endeavors,<sup>355</sup> these bans were sometimes skirted or disregarded.<sup>356</sup>

### 1. Homes for Soldiers' Orphans

A major reason that the postbellum period was distinctive was that feelings of sympathy and obligation toward soldiers' orphans or half-orphans prompted the creation of more than one hundred new asylums<sup>357</sup> and drew

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348. See FITZGERALD, *supra* note 52, at 106–07.

349. See Laura Savarese, Taking the Child-Savers to Court: Habeas Litigation and the Origins of Family Rights 46 (unpublished manuscript) (on file with author).

350. See HASCI, *supra* note 11, at 35–36, 121–22. Pittsburgh provides a representative example. Despite the existence of numerous private orphanages organized along religious lines, the only option for Black children was a poorhouse until the Home for Colored Children opened in 1880. JESSIE B. RAMEY, CHILD CARE IN BLACK AND WHITE: WORKING PARENTS AND THE HISTORY OF ORPHANAGES 34–39 (2012).

351. See Elizabeth D. Katz, “Racial and Religious Democracy”: Identity and Equality in Midcentury Courts, 72 STAN. L. REV. 1467, 1510 (2020) (discussing the availability of institutional placements in early twentieth-century New York City).

352. See *id.*; TERA EVA AGYEPONG, THE CRIMINALIZATION OF BLACK CHILDREN: RACE, GENDER, AND DELINQUENCY IN CHICAGO’S JUVENILE JUSTICE SYSTEM, 1899–1945, at 21, 35 (2018).

353. See *infra* Part II.A.2.c.

354. See *infra* Part II.A.2.c.

355. See generally Steven Green, “Blaming Blaine”: Understanding the Blaine Amendment and the “No-Funding” Principle, 2 FIRST AMEND. L. REV. 107 (2004).

356. See *infra* notes 373–75 and accompanying text for a discussion of Pennsylvania.

357. HOLLORAN, *supra* note 65, at 56 (describing child welfare in this period as “an unregulated boom business”).

novel governmental involvement.<sup>358</sup> The urgent need for child placements prompted states to either open public institutions specifically for soldiers' orphans or subsidize and regulate private orphanages.<sup>359</sup> Both options had drawbacks and came to influence care for other categories of children as eligibility rules expanded over time and institutions evolved. The public institutions were woefully underfunded, whereas the public-private partnerships reinforced segregated services and arguably violated states' laws against public funding of religious institutions.<sup>360</sup>

Much like earlier public children's institutions, state-run soldiers' orphan homes were undermined by inadequate funding.<sup>361</sup> For example, after the Illinois legislature authorized the Illinois Soldiers' Orphans' Home in 1865,<sup>362</sup> it took several years for the institution to open because the legislation anticipated private donations that were slow to materialize.<sup>363</sup> Despite this unpromising start, at least seven other states, mostly in the Midwest, established public institutions that were either for war orphans<sup>364</sup> or that prioritized war orphans.<sup>365</sup>

An alternative approach was to allocate funding to private institutions that housed soldiers' orphans. One of the earliest states to choose this approach was Pennsylvania, which authorized the use of a \$50,000 gift from the Pennsylvania Railroad for this purpose in 1864.<sup>366</sup> The following year, the legislature allocated \$75,000 of public money.<sup>367</sup> The amount increased significantly after the war concluded, to \$300,000 in 1866<sup>368</sup> and \$350,000 in 1867.<sup>369</sup> The funding was mostly distributed on a per capita basis to preexisting orphanages and new institutions founded specifically to care for soldiers' orphans.<sup>370</sup> These institutions were either nonsectarian (unofficially Protestant), denominational Protestant, or Catholic, and some were designated for Black children.<sup>371</sup> Under an 1867 law, the legislature

358. See HASCI, *supra* note 11, at 28.

359. See *id.* at 29.

360. See, e.g., *infra* notes 373–77, 605–10, and accompanying text.

361. See, e.g., BOGEN, *supra* note 116, at 56 (describing New York State's single available, yet overflowing, orphanage for war orphans); GEO. F. M'FARLAND, ANNUAL REPORT OF THE SUPERINTENDENT OF SOLDIERS' ORPHANS, MADE TO THE GOVERNOR IN PURSUANCE OF LAW, FOR THE YEAR 1867, at 3–4 (1868) (describing inadequate funding for Pennsylvania soldiers' orphan schools).

362. See HASCI, *supra* note 11, at 29.

363. See *Illinois: Governor Oglesby's Biennial Message*, CHI. TRIB. Jan. 8, 1867, at 2 (describing ongoing lack of funding).

364. See BOGEN, *supra* note 116, at 56; O. DAVID GOLD, THE CIVIL WAR SOLDIERS' ORPHAN SCHOOLS OF PENNSYLVANIA 1864–1889, at 172 (2016).

365. See *infra* Part II.A.2.a for a discussion of “state schools.”

366. See H.R. 25, 89th Gen. Assemb., Reg. Sess. (Pa. 1865).

367. *Id.*

368. See GOLD, *supra* note 364, at 13.

369. See M'FARLAND, *supra* note 361, at 4.

370. See Sarah D. Bair, *Making Good on a Promise: The Education of Civil War Orphans in Pennsylvania, 1863–1893*, 51 HIST. OF EDUC. Q. 460, 467–68 (2011).

371. See *id.* at 467 n.21, 471, 476.

expanded eligibility, increased government oversight, and authorized some direct funding to parents to keep children in their homes.<sup>372</sup>

Public funding of private, religiously affiliated institutions continued even after Pennsylvania amended its constitution to prohibit appropriations for “charitable, educational or benevolent purposes . . . to any denominational or sectarian institution” in 1873.<sup>373</sup> Proponents of the language sought to limit legislative power, discourage what many viewed as excessive and harmful grafting and lobbying, and ensure the separation of church and state.<sup>374</sup> Private orphanage funding nevertheless continued because of an understanding that there were “certain great charities which peculiarly belong to the state” that should therefore be funded by it—including institutions for soldiers’ orphans.<sup>375</sup> Though a scandal about the conditions in some schools<sup>376</sup> ultimately led to the creation of a state-run Pennsylvania Soldiers’ Orphans’ Industrial School in 1893,<sup>377</sup> the precedent had already been set that the state could provide per capita payments to private, religious institutions.<sup>378</sup>

The need to house children of Civil War soldiers provided a new motivation for government involvement in child placements. Yet, the heightened sense of public responsibility did not translate into sufficient public funding. Thus, states either slowly opened insufficient public institutions, subsidized religiously and racially segregated private institutions, or both.

## 2. Removing Children from Poorhouses

Meanwhile, some states focused on removing children from poorhouses, which could include children displaced or left in need by the war, as well as others.<sup>379</sup> Approaches included founding “state schools” that housed children before placing them out, creating county homes, and providing per capita subsidies to private orphanages.<sup>380</sup> All reflected a growing consensus that the public shared responsibility for providing for dependent children in a manner that protected childhood as a special, vulnerable stage. Because poorhouses had a long history of taxpayer funding,<sup>381</sup> it was relatively smooth for this same money to follow dependent children to newly designated public institutions but more controversial when it instead was

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372. See H.R. 4, 91st Gen. Assemb., Reg. Sess. (Pa. 1867).

373. Alexander Fleisher, *Pennsylvania’s Appropriations to Privately-Managed Charitable Institutions*, 30 POL. SCI. Q. 15, 15 (1915).

374. See *id.* at 18.

375. See *id.* at 24. By 1915, the bar on appropriations to religious institutions was completely disregarded by the legislature. See *id.* at 33.

376. See GOLD, *supra* note 364, at 130–31.

377. See Bair, *supra* note 370, at 484.

378. In 1956, the Supreme Court of Pennsylvania ruled that the prohibition on giving appropriations to religious institutions did not apply in the context of placing neglected children. See *Schade v. Allegheny Cnty. Inst. Dist.*, 126 A.2d 911, 914 (Pa. 1956).

379. See KATZ, *supra* note 50, at 104.

380. See *infra* Parts II.A.2.a–c.

381. See, e.g., KATZ, *supra* note 50, at 17.

funneled to private religious institutions. Yet, because no state provided adequate public services, faith-based providers remained important partners in child placements.<sup>382</sup>

The types of children’s asylums utilized to replace poorhouses, and the degree of government involvement with them, varied significantly by state and region—reflecting differing views on cost efficiencies and church-state relations.<sup>383</sup> There were three main approaches, detailed in the subsections below. Around ten states (mostly in the Midwest) followed the “Michigan Plan.”<sup>384</sup> Under this plan, states founded public orphanages, typically called “state schools,”<sup>385</sup> that housed children temporarily before placing them out with nearby families.<sup>386</sup> Private institutions in these states could participate in childcare but typically could not receive public funds.<sup>387</sup> Under the second approach, Ohio gave counties the power to create institutions, which in turn were expected to place children with families.<sup>388</sup> Localities also could choose to provide subsidies to private (religious) orphanages, an option embraced by the state’s diverse cities.<sup>389</sup> Ohio’s approach was followed by Connecticut and Indiana.<sup>390</sup> Under the third approach—most notably implemented in New York—religiously affiliated private groups received per capita public funding to provide the majority of institutional care for children. This became known as the “New York System.”<sup>391</sup> Followers included California and mid-Atlantic states.<sup>392</sup>

States’ varied approaches to housing children in need demonstrated the difficult political and financial considerations that legislators navigated. No location identified a formula that satisfied all stakeholders or provided equal and adequate care to all children. Rather, the three major options reflected efforts to save costs and to conform to local powerbrokers’ views on the appropriate relationship between church and state.

#### a. “Nonsectarian” State Schools

The creation of state schools to house and place out public wards followed closely from criticism of poorhouses. Although they were generally perceived as providing higher quality care, these institutions were no panacea. They demonstrated the prioritization of cost considerations, as well

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382. See HASCI, *supra* note 11, at 76.

383. See CRENSON, *supra* note 11, at 59.

384. KATZ, *supra* note 50, at 120.

385. There is no distinct line between homes for soldiers’ orphans and state schools. For instance, the Kansas home for soldiers’ orphans became the state school. See C.D. Randall, *The Progress of State Care of Dependent Children in the United States*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 243, 244 (Isabel C. Barrows ed., 1902).

386. HASCI, *supra* note 11, at 13, 76.

387. See *id.* at 12, 76.

388. See CRENSON, *supra* note 11, at 59, 154–55.

389. See *id.*

390. See *id.* at 59.

391. See *id.* at 45.

392. See *id.* at 59.

as the difficulty of creating public institutions that respect children's religious identities in a diverse community.

In 1866, the Massachusetts legislature made an early move, reorganizing its poorhouses so that one location was labeled the "state primary school" and designated for children, "especially such as are orphans, or have been abandoned by their parents, or whose parents have been convicted of crime."<sup>393</sup> According to the governor, the purpose was to separate children from "the vicious," educate them, and place them with families if possible.<sup>394</sup> Still, this arrangement effectively created a subdivision of the poorhouse, as the supervision and funding remained unified.<sup>395</sup> By the start of 1868, the institution held 400 children.<sup>396</sup> Many of the residents were placed out in the local community and attended public schools, which the state school's report promised would make them "no more foreigners, but Americans."<sup>397</sup> In 1879, the state mandated removing children from poorhouses, which funneled more children to the state primary school—by then the state's largest orphanage—on the path to indenture.<sup>398</sup>

Like other public institutions of the day, the religious orientation of the state school was unofficially Protestant.<sup>399</sup> The superintendent controlled the children's religious instruction and was expected to invite clergy from different Protestant denominations to lead services.<sup>400</sup> Until 1879, Catholic priests could be barred from all public institutions in the state.<sup>401</sup> Even after that changed, as of the early 1880s, no Catholic clergy had been invited to lead services at the state school, though they did teach Sunday school classes each week.<sup>402</sup> When boarding out children, the institution did not regard those under age ten as being old enough to have religious beliefs, so they did not attempt to protect their religious identity in placements.<sup>403</sup>

The state school's preferencing of Protestant teaching and placements helped motivate the creation of private Catholic orphanages in Boston.<sup>404</sup> These institutions were supported by private donations, including from Protestants, and they did not receive public funding.<sup>405</sup> The lack of public funding led to two cost-saving moves. First, the directors of Boston's Catholic orphanages provided financial assistance directly to families to minimize the number of orphanage placements, long before this approach

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393. An Act to Establish a State Primary School, 1866 Mass. Acts 161–62.

394. *Address of His Excellency Alexander H. Bullock*, BOS. DAILY EVENING TRANSCRIPT, Jan. 3, 1868, at 2.

395. See 1866 Mass. Acts 163.

396. See *Address of His Excellency Alexander H. Bullock*, *supra* note 394.

397. See CRENSON, *supra* note 11, at 52.

398. See *id.* at 52–53.

399. See *id.* at 80–81.

400. See *id.* at 192.

401. See *id.* at 80.

402. See *id.* at 192.

403. See *id.* at 193.

404. See *id.* at 80–81.

405. See *id.* at 81–82, 85. Religiously affiliated institutions had received public funding in at least the previous decade, but this terminated in 1872 because of advocacy against using public funds for religious purposes. See HOLLORAN, *supra* note 65, at 86.

was popular.<sup>406</sup> Second, Boston's Catholic orphanages were more inclined than their counterparts in New York to use placing out, despite skepticism about the results.<sup>407</sup>

Partly inspired by the Massachusetts model but departing in important respects,<sup>408</sup> the Michigan legislature authorized the founding of a "State Public School for dependent and neglected children" in 1871.<sup>409</sup> Legislators expressly rejected a proposal to pay private orphanages to take in poorhouse children because they believed that approach would encourage political conflict and violate the separation of church and state.<sup>410</sup>

Reflecting the child welfare concerns of the time, the school was authorized to accept children ages four to sixteen who were "neglected and dependent, especially those who are now maintained in the county poor-houses, those who have been abandoned by their parents, or are orphans, or whose parents have been convicted of crime,"<sup>411</sup> with priority given to the orphans and half orphans of the state's deceased soldiers.<sup>412</sup> The institution was designed to be a temporary haven to provide "physical, intellectual, and moral training"<sup>413</sup> before placing children in "good families on condition that their education shall be provided for in the public schools."<sup>414</sup> Though the plan was more expensive than maintaining children in poorhouses, there was an expectation that the cost "would be largely overcome by the necessary decrease in dependence and crime brought about by making the children good and exemplary citizens."<sup>415</sup> The plan came to fruition in 1874, with the opening of the Michigan State Public School at Coldwater.<sup>416</sup>

The state school's orientation was effectively Protestant,<sup>417</sup> but it gradually extended limited protections to Catholic children. When the school first opened, the children received Protestant religious lessons every weekday evening and on Sunday afternoons.<sup>418</sup> Older children attended a local church with the school's superintendent.<sup>419</sup> Within a few years, the school allowed

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406. See CRENSON, *supra* note 11, at 83–84.

407. *See id.* at 82–83.

408. *Id.* at 53.

409. An Act to Establish a State Public School for Dependent and Neglected Children, 1871 Mich. Pub. Acts 280.

410. See CRENSON, *supra* note 11, at 53.

411. 1871 Mich. Pub. Acts 283.

412. *Id.* at 284.

413. *Id.* at 283.

414. *Id.* at 284.

415. FIRST ANNUAL REPORT OF THE BOARD OF CONTROL OF THE STATE PUBLIC SCHOOL FOR DEPENDENT CHILDREN, TO THE LEGISLATURE OF THE STATE FROM APRIL 17, 1871, TO SEPTEMBER 30, 1874, at 20 (1874).

416. See CRENSON, *supra* note 11, at 53–54.

417. See, e.g., FIRST ANNUAL REPORT OF THE BOARD OF CONTROL OF THE STATE PUBLIC SCHOOL FOR DEPENDENT CHILDREN, TO THE LEGISLATURE OF THE STATE FROM APRIL 17, 1871, TO SEPTEMBER 30, 1874, *supra* note 415, at 35.

418. *See id.*

419. *See id.*

older children to attend other local churches,<sup>420</sup> which may have included the local Catholic Church.<sup>421</sup> By 1880, the school's report affirmed that older Catholic children could attend the Catholic Church, but younger children still attended the school's chapel services.<sup>422</sup>

The school's managers also focused more on religious observance than on religious identity when placing children in indentures. The school's 1890 report is particularly revealing on this point. The report was authored by Caleb Dwinell Randall, an Episcopalian lawyer and one-time state legislator who wrote the bill that created the school and served as its secretary and treasurer from 1874 into the early 1900s.<sup>423</sup> Randall had little patience or sensitivity regarding the placement of Catholic children. Criticizing New York's and California's use of sectarian asylums, which he alleged incentivized keeping children institutionalized,<sup>424</sup> he further observed: "In these States the religion of the child or its parents is in the way of its finding a home."<sup>425</sup> By contrast, he posited that the Michigan system "does not trouble itself with sectarianism."<sup>426</sup> The school received children from all religious backgrounds, taught them religion and morality that were not "specially sectarian," and indentured them with "moral and temperate" families regardless of religious faith or observance.<sup>427</sup> Perhaps reflecting a change in policy, in an 1896 article, Randall observed that the school "welcomes aid" from churches "to place children in families of the religion of the parents."<sup>428</sup>

Michigan's state school did not eliminate the need for private faith-based orphanages,<sup>429</sup> which Protestants and Catholics had operated in the state since the 1830s.<sup>430</sup> As the officers of the Protestant Orphan Asylum of Detroit discussed in 1878, their institution remained vital because there was insufficient space in the public institution.<sup>431</sup> Catholic institutions likely felt an even more pressing need due to concerns about proselytizing.<sup>432</sup>

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420. See *The State Public School at Coldwater*, DETROIT FREE PRESS, May 17, 1877, at 3.

421. See *Timeline of the 1800's*, COLDWATER, <https://www.coldwater.org/213/Timeline-of-the-1800s> [<https://perma.cc/W3S8-7T6H>] (last visited Mar. 3, 2024).

422. See SEVENTH ANNUAL REPORT OF THE BOARD OF CONTROL OF THE STATE PUBLIC SCHOOL FOR DEPENDENT CHILDREN, FOR THE YEAR ENDING SEPT. 30, 1880, at 40 (1880).

423. See *C.D. Randall Is Dead*, DETROIT FREE PRESS, Sept. 2, 1903, at 2.

424. For more information on these sectarian asylums, see *infra* Part II.A.2.c.

425. BIENNIAL REPORT OF THE BOARD OF CONTROL OF THE STATE PUBLIC SCHOOL FOR DEPENDENT CHILDREN FOR THE YEARS ENDING JUNE 30, 1889, AND JUNE 30, 1890, at 11 (1890).

426. *Id.*

427. *Id.*

428. C.D. Randall, *The Michigan System of Child Saving*, 1 AM. J. SOC. 710, 718 (1896).

429. See HASCI, *supra* note 11, at 41.

430. *Detroit's First Asylums, Orphanages & Public Institutions*, MICH. ROOTS, <https://web.archive.org/web/20220323161057/https://www.mi-roots.org/index.php/counties/wayne-county/279-history-detroit/detroits-first-asylums-orphanages-a-public-institutions> (last visited Mar. 3, 2024).

431. *Local Matters: The Orphans*, DETROIT FREE PRESS, Jan. 11, 1878, at 3.

432. See, e.g., *St. Vincent's Orphan Asylum: Laying the Corner-Stone of the New Edifice*, DETROIT FREE PRESS, Sept. 8, 1872, at 1.

At least some of these private, religious institutions received public funding, a situation Randall condemned. Michigan's constitution permitted public aid to private religious institutions with a two-thirds vote of the legislature based on the expectation that allowing public-private partnerships would save the state money, but Randall and many others believed this approach was more expensive and harmful because it encouraged institutionalizing children unnecessarily.<sup>433</sup> Moreover, Randall opined, when church charity "becomes semi-public, depending on public funds, then it ceases to be a charity. It becomes a public institution conducted by private parties for their own interest."<sup>434</sup>

The "Michigan Plan" inspired other states to found public "schools" that were orphanages for "pauper" and otherwise dependent children.<sup>435</sup> The next adopters included Colorado, Kansas, Minnesota, Montana, Nebraska, Nevada, Rhode Island, Texas, and Wisconsin.<sup>436</sup> Writing in 1902, Randall observed that the geographic pattern reflected that "newer states" did not face "ancient precedents and established interests, which sometimes retard progress in the East."<sup>437</sup>

Though not without faults, the public orphanage system offered meaningful advantages versus the alternatives—especially after concessions to respect the faith of children from minority religions. State schools provided better environments than poorhouses and avoided the perverse financial incentives of public subsidies to private institutions. They also left space for religious groups' voluntary and self-funded involvement. Although private group alternatives meant children had unequal options depending on their identities, a sufficiently funded and available public option could alleviate concerns about this disparity.

#### *b. County-Level Choices*

Ohio pioneered a less popular approach to public provision for dependent children. The state had been one of the first to remove children from poorhouses, with the legislature passing a law in 1866 that permitted but did not require counties to create children's homes.<sup>438</sup> By the 1870s, however, only ten counties had opted into this program.<sup>439</sup> In 1883, the state mandated removal of children from poorhouses, prompting a near-tripling of county homes.<sup>440</sup> Ohio county orphanages did not experience meaningful religion-related conflict, perhaps due to population homogeneity.<sup>441</sup>

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433. See Randall, *supra* note 428, at 712.

434. *Id.*

435. KATZ, *supra* note 50, at 108.

436. See Priscilla Ferguson Clement, *With Wise and Benevolent Purpose: Poor Children and the State Public School at Owatonna, 1885–1915*, 49 MINN. HIST. 2, 4 (1984).

437. Randall, *supra* note 385, at 245.

438. See CRENSON, *supra* note 11, at 56.

439. See *id.* at 57.

440. See *id.*

441. See *id.* at 322.

Tellingly, not all localities chose county homes to comply with the poorhouse removal mandate. In Cincinnati and Cleveland, home to the vast majority of the state's preexisting private and mostly religious orphanages, no public institutions were created for "pauper" children.<sup>442</sup> Instead, those cities opted to pay to place dependent children in the existing establishments.<sup>443</sup> In the smaller city of Columbus, where only Catholic orphanages had been founded prior to the law, the city opened a public children's home to accommodate Protestant children.<sup>444</sup>

Thus, Ohio localities' freedom to choose different paths created a microcosm of nationwide splintering: diverse, urban areas retained and subsidized preexisting private, religiously affiliated institutions, while rural areas with less developed infrastructure experimented with public options.

*c. Public Subsidies for Private, Religious Orphanages*

In other states, most notably New York, enhanced postbellum public interest in child placements increased government funding of a rapidly growing number of private children's institutions.<sup>445</sup> This approach attracted the most polarized commentary from reformers, politicians, and religious leaders.<sup>446</sup> Proponents claimed that it was the best way to protect children's religious identities and that it reduced costs because of religious groups' financial contributions and inexpensive labor.<sup>447</sup> Opponents countered that public funding for private religious groups violated the separation of church and state and introduced perverse incentives to institutionalize children that actually raised costs.<sup>448</sup> The expansion of religiously and racially segregated private children's institutions translated into unequal and often poor services for children.<sup>449</sup> The involvement of countless managers and staff, relying on a vast and expensive infrastructure, locked in this approach, despite increasing condemnation.<sup>450</sup>

After the Civil War, the New York legislature and New York City government allocated increasing sums to private, religious institutions that cared for children in need.<sup>451</sup> By the late 1860s, there was persistent criticism of this approach by people who claimed it burdened taxpayers and violated the separation of church and state.<sup>452</sup> Many of the most vocal commenters emphasized the disproportionate share of funding flowing to Catholic institutions.<sup>453</sup> Between 1867 and 1873, there were several failed attempts

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442. *See id.* at 57.

443. *See id.*

444. *See id.*

445. *See* PRATT, *supra* note 189, at 207, 209.

446. *See id.* at 211.

447. *See id.* at 205–06.

448. *See id.*

449. *See, e.g., infra* notes 462–75, 486 and accompanying text.

450. *See infra* Part II.B.1.

451. *See* PRATT, *supra* note 189, at 209.

452. *See id.* at 211.

453. *See id.* at 212–20.

to pass a constitutional amendment that would restrict public funding of private (religious) charities.<sup>454</sup> In 1874, New York adopted a constitutional amendment that forbade the state from giving money to “any association, corporation or private undertaking.”<sup>455</sup> Instead of halting public funding, this meant that local governments picked up the tab.<sup>456</sup>

The 1874 constitutional change ended neither discussion nor public funding of private institutions, in large part because of the implications of an 1875 law that focused on removing children from poorhouses.<sup>457</sup> Protestant charity workers and the State Board of Charities, organized in 1867, led the effort to bar children from the state’s poorhouses and require their placement in child-focused asylums instead.<sup>458</sup> Under the 1875 Act to Provide for the Better Care of Pauper or Destitute Children,<sup>459</sup> these institutions received a weekly per capita public subsidy.<sup>460</sup> To facilitate the plan, the law made it easier to declare children legally dependent and therefore eligible for public funds.<sup>461</sup>

Crucially, Catholic lobbying secured a provision to protect children’s religious identities, as well as the interests of Catholic institutions.<sup>462</sup> That language required that the children covered by the law—those aged three to sixteen who were vagrant, truant, disorderly, or indigent—be committed only to an institution “that is governed or controlled by officers or persons of *the same religious faith as the parents of such child*, as far as practicable.”<sup>463</sup> Supporters believed this approach would avert interfaith conflicts, save money because of private group contributions of funding and staffing, and be more manageable than the state handling placements.<sup>464</sup> Opponents condemned the religion-matching component of the law as violating norms about the separation of church and state.<sup>465</sup>

The 1875 law reinvigorated New York’s private children’s institutions and dramatically increased the number of children they held.<sup>466</sup> Proponents had expected cost savings because they envisioned institutions quickly placing out their wards.<sup>467</sup> But by providing a per capita subsidy, the law created no incentive for placing out or even for screening which children should be accepted in the first place.<sup>468</sup> Whereas 132 orphanages held around 12,000

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454. *See id.* at 215–18.

455. N.Y. CONST. art. VIII, § 10 (1875).

456. *See* PRATT, *supra* note 189, at 220.

457. *See id.* at 220–21.

458. *See* DAVID M. SCHNEIDER & ALBERT DEUTSCH, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1867–1940, at 61–63 (1969).

459. 1875 N.Y. Laws 150.

460. *See* FITZGERALD, *supra* note 52, at 123.

461. *See id.*

462. *See id.* at 123–24.

463. 1875 N.Y. Laws 150 (emphasis added).

464. *See* CRENSON, *supra* note 11, at 49.

465. *See* FITZGERALD, *supra* note 52, at 124.

466. The law also increased public-private cooperation to implement and came with new regulations and recordkeeping. *See* SCHNEIDER & DEUTSCH, *supra* note 458, at 65–66.

467. *See* FITZGERALD, *supra* note 52, at 123.

468. *See* CRENSON, *supra* note 11, at 49.

children across the state in 1874, by 1885 there were 204 institutions holding over 23,000 children.<sup>469</sup>

The consequences were especially striking in New York City. The immediate effect was that 348 children were transferred from poorhouses to orphanages, with all but seventeen going to Catholic institutions.<sup>470</sup> The year before the law was passed, the city had spent \$757,858 to support 9,400 children held in both public and private institutions, but by 1888 it was spending over \$1.5 million per year for 15,000 in private (mostly faith-based) institutions alone.<sup>471</sup> In the 1890s, one in thirty-five New York City children lived in orphanages, in comparison to the national average of one in 100.<sup>472</sup> Catholic institutions held 80 percent of the city's dependent children, compared to Jews' and Protestants' 10 percent each.<sup>473</sup> By 1900, the Catholic Protectory was the country's largest orphanage.<sup>474</sup> Meanwhile, children from smaller religious groups, such as Muslims, were excluded from superior private care.<sup>475</sup>

New York's Protestant charity reformers, who were prominent on the national scene, objected to rising costs and the share claimed by Catholic institutions. For instance, Josephine Shaw Lowell observed that although New York's laws represented "an immense step in advance," there were "drawbacks," including that the "number of dependent children increased in a ratio out of proportion to the increase of population, [and] the sectarian institutions in the city have likewise increased to a remarkable degree."<sup>476</sup> Perverse incentives were to blame in her view, as she noted that "[t]here is no economical reason for refusing children, while there is the strongest religious motive for seeking new inmates."<sup>477</sup> Similar critiques, sometimes more explicitly critical of Catholics, followed in the coming decades.<sup>478</sup>

A major reason for the Protestant-Catholic divide was fundamentally different views on the purpose of orphanages. Whereas Protestants envisioned orphanages as a limited option or stopping point before placing

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469. See SCHNEIDER & DEUTSCH, *supra* note 458, at 65.

470. KATZ, *supra* note 50, at 108.

471. SCHNEIDER & DEUTSCH, *supra* note 458, at 65.

472. See CRENSON, *supra* note 11, at 49–50.

473. See FITZGERALD, *supra* note 52, at 4. Catholics comprised around one-third of the city's population, Jews were between 10 and 20 percent, and Protestants were the remainder. See ROSENWAIKE, *supra* note 117, at 87–88, 123.

474. See CRENSON, *supra* note 11, at 71–72.

475. For example, a Muslim child in New Jersey was relegated to the poorhouse because it was not possible to follow the law requiring an intrafaith placement. See Clipping, *TIMES* (Phila.), Jan. 25, 1900, at 2.

476. Mrs. C.R. Lowell, *Dependent Children Supported by the City of New York*, LEND HAND, Mar. 1, 1886, at 1.

477. *Id.*

478. See, e.g., Henrietta Christian Wright, *State Care of Dependent Children*, 171 N. AM. REV. 112, 117–18 (1900) (suggesting per capita payment tempts institutions to keep children "as long as possible," and counting 1,975 children in Jewish institutions, 2,789 in Protestant institutions, and 10,567 in Catholic institutions).

out, Catholics treated these institutions as “a revolving door system” to support poor families and give them an opportunity to reunite.<sup>479</sup>

Despite highly publicized concerns, at least eight states followed New York in requiring attention to dependent children’s religious identities for placements. For example, Kentucky’s 1894 Act for the Protection of Vagrant and Destitute or Maltreated Children Actually or Apparently Under Sixteen Years of Age<sup>480</sup> tracked New York’s law, requiring that when placing a child in an institution, the preferences of the child’s parent or guardian “as to the religious denomination” be respected “as far as practicable.”<sup>481</sup> Montana also required following the parent’s religion “as far as practicable,” passing a law in 1907<sup>482</sup> that applied to both dependent and neglected children.<sup>483</sup> New Jersey made a notable change in its 1902 law,<sup>484</sup> requiring that placement match the child’s religious faith.<sup>485</sup>

Strikingly, religious groups pressed for laws to protect “their” children’s religious affiliations in institutions during the same period that they ran an increasing number of coercive and abusive Native American boarding schools, where a primary goal was to convert Native children to the school managers’ own brand of Christianity.<sup>486</sup>

There were important adjustments to the New York System in the following years—such as an increase in public regulation and restraints on admissions—but the general approach remained in place.<sup>487</sup> Although states following the New York System sought to respect religious diversity and save costs, there were serious doubts about whether the method accomplished those aims. Rather, allocating public funding to private charities seemed to increase the entanglement of church and state in a manner that inflamed interfaith tensions and drove up costs. It also resulted in unequal and sometimes even unavailable services based on religious affiliation.

### 3. Child Cruelty Laws and Institutionalization

A third major development that simultaneously increased government involvement and reliance on private religious orphanages was the creation of machinery to protect children from alleged harms inflicted by their parents

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479. FITZGERALD, *supra* note 52, at 134–35.

480. 1894 Ky. Acts 28.

481. *Id.* at 29.

482. Act of Mar. 5, 1907, 1907 Mont. Laws 223.

483. *Id.* at 228.

484. Act of Apr. 7, 1902, 1902 N.J. Laws 275.

485. *Id.*

486. Fletcher & Singel, *supra* note 151, at 939–40. Here, too, religious strife brewed in competition over public (federal) funds, with Protestants concerned about the share claimed by Catholics. See Nathan Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME L. REV. 677, 714 (2020).

487. FITZGERALD, *supra* note 52, at 163; BROWN & MCKEOWN, *supra* note 194, at 31–32.

or guardians.<sup>488</sup> Starting in large cities in the 1870s, prominent citizens motivated by religiously infused goals founded Societies for the Prevention of Cruelty to Children (SPCCs) that advocated for child abuse and neglect laws that they then helped enforce as quasi-public agencies.<sup>489</sup> When children were removed from their parents, and when parents were jailed for newly criminalized conduct, the children required placements. SPCCs recognized the need to cooperate with preexisting religious organizations to gain their own foothold. Consequently, they supported putting children displaced under child abuse laws with faith-based groups.<sup>490</sup> In some locations, religious organizations successfully secured laws mandating that children be placed with coreligionist individuals or institutions, further entrenching faith-based groups' role. Because private providers received per capita reimbursements for providing this care, they were incentivized to support child removal.

Historians identify a famous case from the early 1870s as the spark for heightened legal attention to child abuse. In 1873, Etta Angell Wheeler, a volunteer from St. Luke's Methodist Mission in New York City, was ministering to the poor when she heard about an abused and neglected girl.<sup>491</sup> The child, Mary Ellen Wilson, lived with a couple to whom she had been indentured by the Department of Public Charities after her father died and mother disappeared.<sup>492</sup> Wheeler sought police assistance but was told there was insufficient evidence for them to intervene.<sup>493</sup> She then turned to Henry Bergh, founder of the American Society for the Prevention of Cruelty to Animals, who consulted his lawyer Elbridge Gerry.<sup>494</sup> Gerry used an arcane law to rescue Mary Ellen,<sup>495</sup> who was first transferred to an orphanage and then had a pleasant childhood living with Wheeler's relatives.<sup>496</sup>

Although Mary Ellen's case had a happy ending, the nationwide press coverage of her ordeal inspired new organizations to protect children.<sup>497</sup> In 1874, Bergh and Gerry created the first of these new organizations, the New York Society for the Prevention of Cruelty to Children (NYSPCC).<sup>498</sup> Its early board members were, like Gerry, wealthy and prominent Protestant

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488. See Michael Grossberg, "A Protected Childhood": *The Emergence of Child Protection in America*, in AMERICAN PUBLIC LIFE AND THE HISTORICAL IMAGINATION 213 (Wendy Gamber, Michael Grossberg & Hendrik Hartog eds., 2003).

489. See *id.* at 220–23.

490. See generally *infra* notes 503–06 and accompanying text.

491. See SUSAN J. PEARSON, *THE RIGHTS OF THE DEFENSELESS: PROTECTING ANIMALS AND CHILDREN IN GILDED AGE AMERICA* 1 (2011).

492. See JOHN E. B. MYERS, *CHILD PROTECTION IN AMERICA: PAST, PRESENT, AND FUTURE* 27–29 (2006).

493. See *id.* at 29.

494. See *id.* at 30–33.

495. See *id.*

496. See *id.* at 33.

497. See *id.* at 34–37.

498. See *id.* at 35.

men.<sup>499</sup> Many other cities soon followed. There were thirty-seven SPCCs by 1880, and 161 by 1902.<sup>500</sup>

SPCCs lobbied for criminal statutes to prosecute adults for child abuse, abandonment, neglect, dangerous working conditions, and similar conduct.<sup>501</sup> In many locations, the SPCC was empowered with quasi-police functions; SPCC agents investigated complaints and arrested and prosecuted people who violated the statutes.<sup>502</sup>

SPCCs worked strategically to carve out space for their involvement, cooperating with and thereby strengthening private religious orphanages. For instance, NYSPCC's first annual report began by praising the city's societies and institutions, carefully acknowledging that "each Religious Denomination" was engaged in "grand and truly noble work" in offering children's asylums.<sup>503</sup> The report continued that the good work of these institutions was limited because of how they could help only after children were legally placed in their custody, and there was no group focused on enforcing child abuse laws.<sup>504</sup> The NYSPCC could fill the void, removing children from their parents and placing them with religious institutions.<sup>505</sup> NYSPCC's secretary explained that though the group did not have authority to dictate a child's placement, "its officers have in every case endeavored to ascertain the religious faith of the parents of the child, informed the Court thereof, and urged the commitment of the child" to an institution run by individuals of the same faith.<sup>506</sup>

SPCCs typically focused on impoverished and immigrant families and shared the view of orphanage proponents that it was preferable for these children to be removed from their parents.<sup>507</sup> Consequently, people in poor communities often called the SPCC "the Cruelty."<sup>508</sup> In New York, parents responded to the removal of their children by bringing hundreds of habeas corpus petitions demanding the children's return.<sup>509</sup> The NYSPCC routinely took the side of children's institutions, even providing them with legal representation.<sup>510</sup>

NYSPCC's involvement seemed to have a measurable impact on the flow of children to institutions, especially Catholic orphanages. In its first year, the society participated in placing seventy-two children, with twenty-two

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499. See BROWN & MCKEOWN, *supra* note 194, at 33. Nearly all the group's funding came from member dues and donations. See THE NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN FIRST ANNUAL REPORT 3, 5–6, 47 (1876).

500. See MYERS, *supra* note 492, at 37.

501. See *id.* at 35–36.

502. See PEARSON, *supra* note 491, at 3.

503. FIRST ANNUAL REPORT, *supra* note 415, at 5.

504. See *id.* at 6.

505. See *id.* at 7.

506. See *id.* at 27.

507. See MINTZ, *supra* note 123, at 168.

508. Grossberg, *supra* note 488, at 222.

509. See Savarese, *supra* note 349, at 26.

510. See *id.* at 27.

going directly to institutions—mostly Catholic.<sup>511</sup> The number and proportion of children sent to Catholic institutions through the NYSPCC's efforts increased in the coming years. By 1892, the society reported that it received 7,695 complaints and rescued 3,683 children, "the largest number, 600, being sent to the New York Catholic Protectory."<sup>512</sup>

The NYSPCC's contribution to orphanage growth was not limited to child abuse cases. In 1880, New York City judges, with support from the state legislature, sought to reduce the number of child placements and associated costs and delegated the task of investigating destitution and vagrancy commitments to the NYSPCC.<sup>513</sup> This move backfired. The NYSPCC did not follow the rules on means-testing for admissions, ignored the legal provision authorizing the collection of support payments from parents, and refused to place out children who were eligible for public support.<sup>514</sup> Even after a Protestant-dominated group secured legal changes to require more public oversight of children's admissions and discharges from institutions in the mid-1890s, the commitment rate continued to climb because the NYSPCC still had authority to admit children.<sup>515</sup>

Protestant leaders who opposed institutionalization, such as Homer Folks, condemned SPCCs as the most important "feeders of institutions."<sup>516</sup> Folks was known for reforming the CAS placing-out system in Philadelphia, and by the 1890s was the secretary of New York's State Charities Aid Association (SCAA).<sup>517</sup> The SCAA was an organization founded by elite Protestants who sought reforms based on "scientific charity"—the central understanding being that the poor were responsible for their own poverty.<sup>518</sup> To some extent, Folks' and others' criticism of NYSPCC reflected jockeying for public money and control; he and likeminded critics emphasized the immense power that the NYSPCC maintained because of the 1.5 million public dollars attached to the children the group oversaw.<sup>519</sup>

Other states followed and expanded upon New York's approach of relying on religious groups to house children removed from their parents. For example, Iowa's 1878 law governing "Homes for the Friendless" applied to children in need of placements due to parents' drunkenness, abandonment, or imprisonment.<sup>520</sup> The law required that "[i]f religious instruction is given any child while an inmate of such home, it shall be in the religious faith of

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511. *See id.* at 45.

512. *In and About the City: Rescued from the Slums*, N.Y. TIMES, Jan. 28, 1892, at 10. Similarly, the creation of an SPCC in Boston enhanced Catholic-Protestant cooperation in the 1880s and 1890s because of how the Protestant-dominated SPCC referred cases to Catholic institutions. *See* WALTON, *supra* note 98, at 53, 72.

513. *See* FITZGERALD, *supra* note 52, at 146.

514. *See id.*

515. *See id.* at 163–64.

516. *Id.* at 147.

517. *See id.* at 146, 165.

518. *Id.* at 117–22.

519. *See* BROWN & MCKEOWN, *supra* note 194, at 34.

520. Act of Mar. 26, 1878, 1878 Iowa Acts 164.

the parents of such child, if the same be known.”<sup>521</sup> It further mandated religion-matching if the home transferred custody to a person, “unless the parent or former guardian consent otherwise.”<sup>522</sup> Rhode Island’s 1908 law instructed courts to assign custody of abused or abandoned children to the state’s SPCC, which in turn had authority to place each child with an institution or society “which is of the same religious belief, or controlled by persons of the same religious belief, as the parents of said child.”<sup>523</sup>

Other state legislatures addressed religion-matching in child placement within child abuse statutes. The first to take this approach was Pennsylvania in 1878, when it passed an act “to protect children from neglect and cruelty, and relating to their employment, protection and adoption.”<sup>524</sup> When a parent was convicted of one of the included offenses, the law authorized a court to appoint a guardian or institution to care for the child.<sup>525</sup> If selecting an individual as a guardian, the law instructed the judge to have “due regard . . . to the religious persuasion of the parent or former guardian.”<sup>526</sup> If placing the child in an “asylum or home for children,” the law mandated “[t]hat the children of Roman Catholic parents shall be placed in asylums under the control and care of that denomination.”<sup>527</sup> Several states followed Pennsylvania in requiring courts to give “due regard” to the “religious persuasion” of parents in this scenario,<sup>528</sup> though only Delaware’s 1881 law included the specific language about Roman Catholics.<sup>529</sup>

By increasing the number of children in need of placements and collaborating with existing organizations, SPCCs fed the growth and power of faith-based orphanages. Though SPCCs receded to some extent during the Great Depression, they continued to operate in many locations, especially in the Northeast.<sup>530</sup> In the 1930s, there were calls to shift child protection functions to public agencies, which met some success.<sup>531</sup> In the mid-twentieth century, rules attached to federal funding initiatives prompted the conversion of the remaining SPCCs into public Child Protective Services (CPS)<sup>532</sup>—agencies that are condemned today by scholars and activists focused on children’s rights and wellbeing.<sup>533</sup>

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521. *Id.* at 165.

522. *Id.*

523. Act of Apr. 24, 1908, 1908 R.I. Pub. Laws 50.

524. An Act Relating to the Cruelty of Children in this Commonwealth, 1878 Pa. Laws 119.

525. *Id.* at 120.

526. *Id.*

527. *Id.*

528. *See, e.g.*, Act of Mar. 9, 1889, 1889 Ind. Acts 363.

529. *See* Act of Apr. 8, 1881, 16 Del. Laws 611 (1881).

530. *See* AM. HUMANE SOC’Y, CHILD PROTECTIVE SERVICES: A NATIONAL SURVEY 11 (1967).

531. *See* MYERS, *supra* note 492, at 71–72.

532. *See* VINCENT DE FRANCIS, CHILD PROTECTIVE SERVICES IN THE UNITED STATES 6 (1956).

533. *See generally, e.g., supra* notes 12–14; *infra* notes 721–31.

*B. From Orphanages to Home Care (1870s–1940s)*

By the late nineteenth century, there was a growing belief that dependent and neglected children should be raised in family settings instead of institutions.<sup>534</sup> To recruit families willing to host dependent children, public and private agencies experimented with “boarding out,” a practice that involved paying “foster parents.”<sup>535</sup> The appeal of foster care varied by religious group and location because of the differing feasibility of finding suitable families and the tradeoffs in using institutions. Even as foster care grew in popularity, faith-based orphanages remained a crucial component of the child placement system. The creation of juvenile courts, starting in 1899, further solidified religious institutions’ involvement because of the concessions required to pass the most influential juvenile court law.

By the turn of the twentieth century, reformers considered providing “mothers’ pensions” to “worthy” families to help them remain together in their own homes.<sup>536</sup> Yet again, religious groups’ entrenched interests shaped and slowed the rollout of this potential improvement. Even the gradual acceptance of what became known as “welfare” reflected religious politics. Moreover, since not all families were included in or adequately assisted by welfare programs, out-of-home placements remained necessary. Religious orphanages continued serving this need, until they gradually transformed into today’s faith-based foster care agencies.

1. Orphanages Versus Foster Care

From the 1870s into the first decades of the twentieth century, a gradually increasing number of reformers and politicians promoted foster care, but many religious leaders and orphanage managers maintained that institutions were superior. Foster care—initially more often called “boarding out”—typically involved placing a child in a screened and monitored private family that received compensation.<sup>537</sup> This contrasted with the predecessor practice of placing out, in which the child effectively “paid” for the placement by working.<sup>538</sup> Religious fault lines and understandings permeated the debate over foster care, as the perceived risks and benefits did not fall evenly across groups.<sup>539</sup> Developments centered in Massachusetts and New York were especially influential and revealing.

The Massachusetts experience demonstrates how protecting children’s religious identities could secure cooperation from crucial stakeholders, facilitating reform. The Massachusetts state school conducted the country’s

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534. See FRIEDMAN, *supra* note 116, at 55.

535. See *generally infra* Part II.B.1. Some viewed the ideal outcome as adoption by the foster family. Legal adoption, however, remained uncommon. See CARP, *supra* note 40, at 134.

536. See *infra* Part II.B.3.

537. HASCI, *supra* note 11, at 137; see also MEGAN BIRK, FOSTERING ON THE FARM: CHILD PLACEMENT IN THE RURAL MIDWEST 9 (2015).

538. BIRK, *supra* note 537, at 9.

539. See HASCI, *supra* note 11, at 74; see also MASON, *supra* note 59, at 111.

first major experiment in foster care in the 1870s,<sup>540</sup> when they paid private families to board children who were too young to be placed out.<sup>541</sup> After a small trial appeared successful, the program grew and received direct funding from the state in the early 1880s.<sup>542</sup>

During the first decades of foster care use, Catholic leaders opposed the practice because they believed it would permit proselytization.<sup>543</sup> The state school was not attentive to religious identity in placing young children,<sup>544</sup> and an insufficient number of Catholic families were deemed eligible to serve as foster parents.<sup>545</sup> A promise that Catholic children would be permitted to practice their faith while living in Protestant homes was insufficient.<sup>546</sup>

Over the following decades, greater protection of children's religious identity translated into more acceptance of foster care. In the early 1890s, the Massachusetts's Department of Indoor Poor developed a policy of placing Catholic children in Catholic homes<sup>547</sup> and even began to transfer Catholic children who had lived with Protestant families for years.<sup>548</sup> Likely benefitting from resultant eased tensions, Massachusetts became the first state to rely solely on foster homes for the placement of dependent state wards in 1895.<sup>549</sup> In 1905, the state passed a law, written by a prominent Catholic leader and supported by the newly formed Catholic Charitable Bureau of the Archdiocese of Boston,<sup>550</sup> that required that a child under the supervision of the state board of charity not be "denied the free exercise of the religion of his parents . . . nor the liberty of worshipping God according to the religion of his parents."<sup>551</sup> By around 1910, new orphanages rarely opened in the state, and many began to close.<sup>552</sup>

Foster care faced steeper political hurdles in New York, where the 1875 Act to Provide for the Better Care of Pauper or Destitute Children already protected children's religious identities and private religious orphanages received per capita subsidies.<sup>553</sup> Orphanage managers were concerned that their institutions would compare unfavorably to foster care, which was expected to cost less.<sup>554</sup> Moreover, Protestant leaders, such as Charles Brace

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540. See HASCI, *supra* note 11, at 138.

541. See CRENSON, *supra* note 11, at 171–72.

542. See *id.* at 173–89.

543. See *id.* at 32–33.

544. See *supra* notes 399–403 and accompanying text.

545. See CRENSON, *supra* note 11, at 33.

546. See *id.*

547. See *id.* at 223.

548. See *id.* at 223–24.

549. See *id.* at 51.

550. See WALTON, *supra* note 98, at 131, 141.

551. *Religion of Parents*, BOS. DAILY GLOBE, Apr. 5, 1905, at 14; see also Act of May 25, 1905, 1905 Mass. Acts 411. A stronger version that would have required religion-matching in placements did not pass. See *Religion of Parents, supra*. At least one opponent argued that religion-matching already happened for the major faiths and mandating it would complicate placing children from other groups. *Id.*

552. CRENSON, *supra* note 11, at 254.

553. See 1875 N.Y. Laws 150; see also *supra* Part II.A.3.

554. See CRENSON, *supra* note 11, at 51.

of CAS, argued that paying families to host children was contrary to Christian charity.<sup>555</sup> He and others likely recognized that foster care would undermine placing out programs by making all host families expect financial compensation.<sup>556</sup>

Nevertheless, broadening opposition to orphanages fed support for foster care in the 1880s.<sup>557</sup> A growing chorus proclaimed that orphanages could not raise productive, healthy, and well-adjusted American children because strict discipline and regimentation destroyed children's individuality and failed to inculcate independence.<sup>558</sup> Many orphanages responded by transitioning to the cottage system, in which children were placed in smaller group homes intended to resemble family units, but even this adjustment seemed to concede that family placements would be superior to congregate care.<sup>559</sup>

A key development in foster care's favor came in 1899, when prominent New Yorker and Catholic lay leader Thomas M. Mulry softened his previous stance in opposition. In 1898, Mulry had spoken against foster care at a meeting of the National Conference of Charities and Correction (NCCC), arguing that foster homes could be poorly supervised and undermine children's religious identities.<sup>560</sup> In his view, institutions were superior at inculcating religion, reforming children, and reuniting families.<sup>561</sup> Protestant charity leaders, including Homer Folks (a friend of Mulry's<sup>562</sup>), respectfully objected, and they strategically named Mulry to chair the NCCC committee on dependent and neglected children the following year.<sup>563</sup> In the interim, Mulry proposed and became president of the Catholic Home Bureau, which sought to address overcrowding in New York's Catholic orphanages by placing children in private homes if they did not have families to whom they could return.<sup>564</sup> Though a tiny operation, the bureau demonstrated openness to interfaith collaboration and efforts to save taxpayer money.<sup>565</sup> Under its charter, the Catholic Home Bureau became an official agency of the New York City's Department of Public Charities and therefore received public funding.<sup>566</sup>

When Mulry delivered his NCCC committee report in 1899, he presented a nuanced account of the tradeoffs between orphanages and foster care that

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555. *See id.* at 172.

556. *See id.* Brace was not alone in raising this concern. *See, e.g.,* SIXTH BIENNIAL SESSION OF THE NATIONAL CONFERENCE OF JEWISH CHARITIES IN THE UNITED STATES 225 (1910).

557. *See* HASCI, *supra* note 11, at 138.

558. *See id.* at 13, 37, 149, 160.

559. KATZ, *supra* note 50, at 120–21.

560. *See* CRENSON, *supra* note 11, at 206.

561. *See id.* at 207.

562. *See id.* at 206.

563. *See id.*

564. *See id.* at 181–82.

565. *See id.*

566. *See* John R. Sutton, *Bureaucrats and Entrepreneurs: Institutional Responses to Deviant Children in the United States, 1890–1920s*, 95 AM. J. SOCIO. 1367, 1377 (1990).

leaned toward favoring the latter.<sup>567</sup> Ideally families would be kept together, but foster care with careful investigation and supervision was the next best option.<sup>568</sup> Although Mulry did not speak fully for the Catholic community or acknowledge the range of reasons coreligionists preferred institutions,<sup>569</sup> the charity community saw Mulry's acceptance of foster care as indicative of a broader Catholic shift.<sup>570</sup>

Still, some Catholic leaders believed Catholic interests were best served by retaining orphanages. According to a prominent speaker at the first meeting of the National Conference of Catholic Charities ("Catholic Charities"), held in 1910, Catholic institutions provided children with "instruction and inspiration or stimulus in faith, in religion, in obedience, in justice, and in purity—the pillars of real character—more than he or she could receive, in many cases, from home training."<sup>571</sup> Financial considerations and existing infrastructure surely factored into Catholics' stance.<sup>572</sup> As a New York Cardinal acknowledged, placing children in family homes would render unnecessary the "splendid buildings and equipment" that the Church had erected over fifty years, and "withdraw from the salutary influence of the religious, thousands of our Catholic children, who would otherwise have been their wards."<sup>573</sup> The Cardinal further worried that the requirement to place children with coreligionists "when practical" would be laxly enforced and therefore permit Catholic "children to be smuggled out of the Church."<sup>574</sup>

Although the Catholic stance on foster care varied by location, there was a trend toward recognizing foster placements as a supplement to other services if children's faith could be protected. It became commonplace for children to be matched to foster homes by religion and race, especially in large, diverse cities.<sup>575</sup> By the 1910s, many Catholic institutions supported boarding out if they could retain control over Catholic children's placements.<sup>576</sup> Catholics, however, still viewed orphanages as necessary because it was difficult to find sufficient Catholic foster parents into the

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567. See CRENSON, *supra* note 11, at 209.

568. *See id.*

569. See FITZGERALD, *supra* note 52, at 167.

570. See CRENSON, *supra* note 11, at 210.

571. HASCI, *supra* note 11, at 39 (quoting NATIONAL CONFERENCE OF CATHOLIC CHARITIES, FIRST NATIONAL CONFERENCE OF CATHOLIC CHARITIES: PROCEEDINGS, PUBLISHED BY DIRECTION OF THE EXECUTIVE COMMITTEE OF THE CONFERENCE 285–332 (1910)).

572. See Paula F. Pfeffer, *A Historical Comparison of Catholic and Jewish Adoption Practices in Chicago, 1833–1933*, in ADOPTION IN AMERICA 112, 116 (E. Wayne Carp ed., 2002).

573. CRENSON, *supra* note 11, at 302.

574. *Id.*

575. *See id.* at 259. Large cities were also better suited to foster care because supervision was easier than in more rural, spread-out locations. *See id.* at 253.

576. See HASCI, *supra* note 11, at 140.

1930s;<sup>577</sup> by that time, around 50,000 children remained in Catholic orphanages.<sup>578</sup>

Jewish leaders were also divided on the relative strength of foster care versus orphanages.<sup>579</sup> Some warmed to boarding out to address the lack of capacity in Jewish institutions.<sup>580</sup> For instance, in 1904, the HOA in New York City began placing out because it could not accommodate all Jewish children in need of housing.<sup>581</sup> The following year, it joined with other Jewish groups to create a centralized Jewish agency, the Bureau of Boarding and Placing-Out Jewish Dependent Children.<sup>582</sup> The city's Department of Public Charities hired a special examiner to assist the bureau in locating acceptable Jewish homes and agreed to subsidize the boarded-out children for the same per capita rate as for institutions.<sup>583</sup> The bureau placed out over 1,000 children in the first four years.<sup>584</sup>

A *New York Times* article published in 1917 captures the importance of religion and private-public collaboration in the slow shift toward foster care.<sup>585</sup> The celebratory article marked the one-year anniversary of the "Home Bureau," a subdivision of the Department of Public Charities that had started as a privately funded experiment.<sup>586</sup> The Home Bureau's central contribution, the author contended, was the placement and oversight of foster children.<sup>587</sup> An institution was "not the proper place for a child except in extreme cases," because a child "need[s] the individual care of a good and intelligent woman in a real home."<sup>588</sup> The article continued that "[i]n all cases a child is placed in a home of the same religious faith as his parents and a home whose church standing is vouched for by the local priest, rabbi, or minister."<sup>589</sup>

Despite meaningful moves toward foster care, orphanages remained essential in the first decades of the twentieth century.<sup>590</sup> As of 1910, groups across the nation ran more than 1,000 institutions holding over 100,000

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577. See NURITH ZMORA, ORPHANAGES RECONSIDERED: CHILDCARE INSTITUTIONS IN PROGRESSIVE ERA BALTIMORE 188 (1993).

578. See BROWN & MCKEOWN, *supra* note 194, at 108.

579. In some locations, Jews employed boarding out in earlier periods. For example, a Jewish society in Philadelphia began paid boarding out in 1868. See HENRY SAMUEL MORAIS, THE JEWS OF PHILADELPHIA: THEIR HISTORY FROM THE EARLIEST SETTLEMENTS TO THE PRESENT TIME 125 (1894). Elsewhere, such as in Chicago in the 1890s, Jewish women supported creating an orphanage, rather than turning to foster care, because institutional settings afforded more control over children's upbringing. See MITCHELL HORWICH, CONFLICT AND CHILD CARE POLICY IN THE CHICAGO JEWISH COMMUNITY, 1893–1942, at 23 (1977).

580. For example, the Hebrew Orphan Asylum in Baltimore turned to boarding out in 1911. See ZMORA, *supra* note 577, at 181.

581. See BOGEN, *supra* note 116, at 163.

582. See *id.* at 164.

583. See *id.*

584. See *id.*

585. See *Children's Bureau Completes First Year*, N.Y. TIMES, Oct. 14, 1917, at 33.

586. *Id.*

587. *Id.*

588. *Id.*

589. *Id.*

590. See CARP, *supra* note 40, at 125.

children.<sup>591</sup> This meant that orphanages housed two-thirds of children placed outside their homes,<sup>592</sup> or roughly 3 percent of the nation's children.<sup>593</sup> Of the remaining third who were placed in private homes, a minority were in paid arrangements akin to modern "foster care," in contrast to unpaid placements.<sup>594</sup> By the 1920s, nearly every state had more orphanages than a decade earlier,<sup>595</sup> and the percentage of children in orphanages versus foster care remained virtually unchanged.<sup>596</sup> Cost concerns, vested interests in old methods, difficulty identifying enough foster homes, and a lingering belief in the advantages of institutional care slowed the transition to foster placements.<sup>597</sup>

## 2. Juvenile Courts and the Status Quo

Juvenile courts—first created in 1899 and spread in the years that foster care was gaining supporters—proved to be a crucial context for religion-infused politicking between foster care advocates and orphanage proponents. Juvenile courts had jurisdiction over the often-blended categories of dependent, neglected, abused, and delinquent children—all of whom sometimes required placements outside their homes.<sup>598</sup> It mattered enormously where juvenile court judges were empowered to place these children, given that the placements were backed by government authority and funding. To secure necessary support from the managers of preexisting religious institutions, drafters of the nation's first and most influential juvenile court law included language designed to preserve religious group involvement.<sup>599</sup> As the juvenile court model spread to new locations in the first decades of the twentieth century, this initial compromise was adopted in places where local politics might not have dictated the same approach.

More than a decade of advocacy preceded the creation of Chicago's juvenile court. Lucy Flowers, the president of the Chicago Woman's Club and an active participant in Chicago's Protestant charities, was the first to propose a "parental court" in 1888.<sup>600</sup> A few years later, she and her colleagues began working with the leaders of influential faith-based

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591. *See id.* at 125–26.

592. *See id.*

593. This calculation is based on the 1910 census count of nearly thirty million children under age fifteen. *See* DEP'T OF COM. BUREAU OF THE CENSUS, THIRTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1910: VOLUME I, POPULATION 1910, GENERAL REPORT AND ANALYSIS 298 (1913).

594. MASON, *supra* note 59, at 111.

595. *See* HASCI, *supra* note 11, at 34–36.

596. *See* CARP, *supra* note 40, at 125–26.

597. *See* RYMPH, *supra* note 64, at 25; HASCI, *supra* note 11, at 40; TRESTMAN, *supra* note 130, at 204. Additionally, some parents resisted foster care placements for their children because they perceived that orphanage placements afforded greater control over the location, kept siblings together, and preserved opportunities to visit. RAMEY, *supra* note 350, at 91–92.

598. *See* DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 4–6 (2004).

599. *See id.* at 18; MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 81 (2003).

600. TANENHAUS, *supra* note 598, at 4, 11.

organizations to draft a juvenile court bill.<sup>601</sup> The first version of the bill was authored by Timothy Hurley, founder and president of a Catholic child placement agency, Chicago's Visitation and Aid Society (CVAS).<sup>602</sup> Hurley had significant stakes in the law because his organization's role in child placements appeared threatened by an 1888 court case.<sup>603</sup>

Some background on Chicago's children's institutions is necessary to appreciate the impact of the 1888 case and Hurley's response to it. Under laws enacted between 1879 and 1887, private groups opened four "industrial schools" that received public funds to house and reform dependent children committed by Chicago courts.<sup>604</sup> These so-called industrial schools were in reality faith-based children's asylums that had been reinvented after the state passed a constitutional amendment that prohibited government funding "in aid of any church or sectarian purpose."<sup>605</sup> They were organized so that there was one institution each for Catholic girls, Catholic boys, Protestant girls, and Protestant boys.<sup>606</sup> This situation was objectionable in the view of charity reformers who argued that it violated state law, as well as an overlapping group who believed that housing dependent children should be a public rather than private service.<sup>607</sup> The 1888 case arose because one of the four "schools" was not a standalone institution but rather a front to place girls in two preexisting Catholic orphanages.<sup>608</sup> The Illinois Supreme Court ruled that this setup violated the constitutional provision against funding religious groups.<sup>609</sup> Though the case was not focused on agencies like CVAS, some of the reasoning cast doubt on the legality of a practice that had developed whereby private agencies cooperated with courts as "middle men" to place children.<sup>610</sup>

In his draft juvenile court law, Hurley proposed language that would have allowed courts to commit dependent children to any incorporated nonprofit child welfare agency in the state, which would have legitimated and increased CVAS participation.<sup>611</sup> When the bill did not pass, Flowers, Hurley, and other proponents sought additional assistance and allies, with significant attention to religion-based politics.<sup>612</sup>

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601. *See id.* at 11.

602. *See id.*; Fox, *supra* note 216, at 1226.

603. *See* Fox, *supra* note 216, at 1226.

604. *Id.* at 1225 n.189.

605. Sutton, *supra* note 566, at 1379 n.8.

606. *See* Fox, *supra* note 216, at 1228.

607. *See id.*

608. *County of Cook v. Chi. Indus. Sch. for Girls*, 125 Ill. 540 (1888). In fact, some girls who were already housed in those orphanages were taken to the court to be labeled dependent and thereby qualify for public funding. *See id.* at 557.

609. *See id.* at 544, 570–71. The organizers responded by founding an actual school effectively for Catholic girls, which was allowed to continue operating. *See* Arlien Johnson, *Subsidies from Public Funds to Private Children's Institutions and Agencies in Chicago*, 3 SOC. SERV. REV. 169, 174 (1929).

610. Fox, *supra* note 216, at 1226.

611. *See* TANENHAUS, *supra* note 598, at 11–12.

612. *See id.*

After securing the cooperation of a knowledgeable jurist and the Chicago Bar Association,<sup>613</sup> the savvy group recognized that one of the main hurdles to overcome was that the industrial schools would not support the juvenile court bill if it took a non-institutional approach, such as preferencing placement in foster homes.<sup>614</sup> In December 1898, the proponents met to discuss next steps and selected Hastings Hart to write a new draft.<sup>615</sup> Hart was an ordained Congregational minister<sup>616</sup> and the superintendent of the (Protestant) Illinois Children's Home and Aid Society,<sup>617</sup> Chicago's version of CAS.<sup>618</sup> Hart worked with other supporters on numerous revisions.<sup>619</sup> As Professor David Tanenhaus explains, "[o]verall, the bill revealed how carefully its drafters were trying to fit the proposed children's court into the state's existing institutional structure for child welfare."<sup>620</sup> For example, the draft disclaimed any intent to repeal the laws governing the industrial schools.<sup>621</sup> Nevertheless, the industrial school lobby remained opposed.<sup>622</sup>

The supporters went back to work, further compromising their vision in an attempt to get the industrial school stakeholders on board.<sup>623</sup> This time, their efforts worked. A few of their strategic adjustments are most notable here. First, they weighed the law in favor of institutions rather than foster care. Though the law authorized boarding out in some circumstances and proclaimed that the ideal placement was "an improved family home," it allocated no money for such placements.<sup>624</sup> In addition to undermining the feasibility of foster care, the law strengthened institutions by restricting the state's ability to inspect even those receiving public funding.<sup>625</sup> The law also extended industrial schools' role, permitting them to receive juvenile delinquents in addition to their previous dependent wards.<sup>626</sup>

The drafters of the final bill garnered further support from religious groups and served their own interests by incorporating protections for children's religious identities.<sup>627</sup> In Hurley's recounting, he and Hart proposed an amendment to a provision entitled "Religious Preference."<sup>628</sup> They replaced draft language *permitting* the juvenile court to "consult the religious preferences of the child or of its parents or guardian" with a provision *mandating* that the court place children "as far as practicable in the care and

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613. *See id.* at 14.

614. *See id.* at 14–15.

615. *See id.* at 16.

616. *Hastings H. Hart, Penologist, Dies*, N.Y. TIMES, May 10, 1932, at 21.

617. *See* TANENHAUS, *supra* note 598, at 16.

618. *See Child-Saving Work in Chicago*, CHI. DAILY TRIB., Aug. 13, 1899, at 31.

619. *See* TANENHAUS, *supra* note 598, at 16–18.

620. *Id.* at 18.

621. *See id.*

622. *See id.* at 20–21.

623. *See id.* at 21.

624. An Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children, 1899 Ill. Laws 131, 133–34, 137.

625. *See* TANENHAUS, *supra* note 598, at 21.

626. *See* Fox, *supra* note 216, at 1227.

627. *See* TANENHAUS, *supra* note 598, at 22.

628. TIMOTHY D. HURLEY, ORIGIN OF THE ILLINOIS JUVENILE COURT LAW 38 (1907).

custody of some individual holding the same religious belief as the parents of said child, or with some association which is controlled by persons of like religious faith of the parents of the said child.”<sup>629</sup> With institutional entrenchment and religion matching in place under the juvenile court law, Illinois institutionalized children at one of the highest rates in the nation in the following decades.<sup>630</sup>

Though Catholic leaders in Chicago had long resisted secular or Protestant involvement in charity and education, seeing this as a threat to the Church’s role, the Chicago Archdiocese supported the juvenile court.<sup>631</sup> The court helped the Archdiocese intervene in poor Catholic families and funneled subsidies to the Church by placing children in Catholic institutions. The benefits were reciprocal, as the Catholic Church’s involvement strengthened the court’s legitimacy in the eyes of Chicago’s Catholics.<sup>632</sup> In the following decades, Catholic children comprised the majority of those appearing before juvenile courts in Chicago and other large cities including New York, Boston, Philadelphia, and Cleveland, ensuring the ongoing involvement of Catholic institutions.<sup>633</sup> Further solidifying religious group buy-in, many juvenile courts matched children to probation officers by religion.<sup>634</sup>

Juvenile courts spread rapidly to other states, and many adopted Illinois’s statute with few changes. The Illinois religion-matching language appeared nearly verbatim—as did the compromise approach of authorizing but not funding foster care—in the juvenile court laws enacted by Pennsylvania (1901), Ohio (1902), Missouri (1903), Minnesota (1905), Nebraska (1905), Louisiana (1906), and more—totaling more than a dozen states by 1920.<sup>635</sup>

Though motivated by reform, the juvenile court movement solidified the involvement of faith-based institutions in child placement services. Unable to implement approaches that reformers believed were best for children on a blank slate, they narrowed their efforts to navigate religious group politics.

### 3. Religious Group Politics and Family Welfare

In the first decades of the twentieth century, a third option competed with foster care and institutions to aid impoverished children: financial support for families. Following closely from the reasoning used to justify foster care about a family home being best, some reformers proposed providing modest

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629. *Id.*

630. See TANENHAUS, *supra* note 598, at 21.

631. See WILLRICH, *supra* note 599, at 82.

632. See *id.*

633. See BROWN & MCKEOWN, *supra* note 194, at 113; see also HOLLORAN, *supra* note 65, at 201 (noting the dominant involvement of private child welfare agencies in juvenile courts in cities including Boston, Chicago, New York, and Providence into the 1930s).

634. See Katz, *supra* note 351, at 1515.

635. See, e.g., Act of May 21, 1901, 1901 Pa. Laws 279, 285–86; Act of Apr. 25, 1904, 1904 Ohio Laws 352 (citing earlier law); Act of Mar. 23, 1903, 1903 Mo. Laws 217; Act of Apr. 8, 1905, 1905 Mo. Laws 54, 61; An Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children, 1905 Minn. Laws 418, 424; Act of July 5, 1906, 1906 La. Acts 134, 138.

payments to “worthy” mothers. Leaders of religious institutions and agencies objected, recognizing that this approach would undermine their role. But other discussants appreciated how giving money directly to families could ease interfaith tensions by respecting children’s religious identities and reducing the flow of money to private institutions. Navigating these competing perspectives slowed and moderated the rollout of family support payments. When the federal government became involved in welfare in the 1930s, many of these same stakeholders secured changes to legislation regarding welfare and foster care to keep their funding and power.

The practice of giving financial aid directly to poor families fluctuated in its appeal throughout the nation’s history. During the colonial period, the “poor laws” permitted distributing money or in-kind aid.<sup>636</sup> “Outdoor relief,” as it was often called, was controversial because of the perception that it incentivized idleness; indeed, this was the thinking that inspired the creation of poorhouses.<sup>637</sup> In the absence of sufficient government-provided outdoor relief, some private charities granted financial aid to families they deemed deserving.<sup>638</sup> For example, New York’s Ladies Society for the Relief of Poor Widows with Small Children was founded in 1797 to provide small amounts to eligible women,<sup>639</sup> and United Hebrew Charities provided money to widowed and deserted mothers by the late nineteenth century.<sup>640</sup>

Family financial aid remained controversial into the 1890s, in part because of the interests and beliefs of religious groups.<sup>641</sup> Charity leaders of all faiths worried that public relief for individual families could undermine their operations.<sup>642</sup> Some also doubted the benefits of distributing cash. Protestant leaders, for example, thought that direct financial aid created bad incentives and messaging.<sup>643</sup> And though Catholic leaders emphasized their support for family preservation, they insisted that the best approach was to offer children temporary stays in orphanages.<sup>644</sup>

Debates about early welfare proposals in New York City capture the obstacles posed by religious and institutional politics. Under the Destitute Mother’s Bill proposed in 1897, the city would have given poor mothers (approved by the NYSPCC) two dollars per week instead of paying that same money to institutions.<sup>645</sup> Though the proposal seemed to flow naturally from Protestant criticism of orphanages, Protestant charity leaders led the

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636. See KATZ, *supra* note 50, at 17, 37.

637. See *supra* Part I.B.

638. See CRENSON, *supra* note 11, at 260.

639. See HASCI, *supra* note 11, at 42.

640. See ANNA IGRA, *WIVES WITHOUT HUSBANDS: MARRIAGE, DESERTION, AND WELFARE IN NEW YORK, 1900–1935*, at 32 (2006).

641. See CRENSON, *supra* note 11, at 260.

642. In 1914, Catholic leader Mulry admitted he had previously opposed public pensions for self-interested reasons; he thought private groups should have complete control over this work. See FITZGERALD, *supra* note 52, at 203. The head of United Hebrew Charities seemingly had similar motivations in opposing public pensions. See *id.* at 207.

643. See *id.* at 174–75.

644. See *id.* at 186.

645. See *id.* at 175–76.

opposition because of their beliefs about the causes of poverty.<sup>646</sup> Other important but less vocal opponents included the biggest players in the city's private placement regime: the Protectory, the HOA, and NYSPCC.<sup>647</sup> One NYSPCC official warned that the bill would encourage men to abscond to avoid their family obligations or entice couples to collude to get unwarranted support.<sup>648</sup> Though the state legislature passed the bill, the governor vetoed it.<sup>649</sup> Legislators reintroduced the bill repeatedly in the coming years without success.<sup>650</sup> In the face of public condemnation of the harsh options available to the poor, some agencies claimed they would increase private aid instead.<sup>651</sup>

The major episode that finally prompted states to grant financial aid to mothers was the 1909 White House Conference on the Care of Dependent Children, which was symbolically presided over by a Protestant, a Catholic, and a Jew.<sup>652</sup> The main question occupying attendees, who included the biggest names in child welfare, was whether institutional or home care was better.<sup>653</sup> Participants reached a general consensus that children should remain with their own families whenever possible and that poverty alone was not an acceptable reason to remove children.<sup>654</sup> Instead, the "worthy poor" should receive modest financial support.<sup>655</sup> Participants expected that keeping families together would be cheaper than using institutions and would reduce juvenile delinquency.<sup>656</sup> When children could not be kept with their own families, most discussants agreed that they should be placed with paid foster parents.<sup>657</sup> Institutions would sometimes still be necessary as a last resort.<sup>658</sup>

Religious considerations weighed heavily in attendees' ranking of family support first, foster care second, and orphanages third. Participants believed that allocating money to allow children to remain with their parents was the most likely way to imbue authentic religious belief.<sup>659</sup> Another advantage was that direct support to families could reduce interfaith tensions by skirting private agencies and institutions, thereby avoiding conflicts over funding or the appearance of favoritism.<sup>660</sup> Catholics came around to valuing family

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646. *See id.* at 176–78.

647. *See id.* at 179–80.

648. *See* IGRA, *supra* note 640, at 30–31.

649. *See* FITZGERALD, *supra* note 52, at 175.

650. *See id.* at 180.

651. *See id.* at 180–81.

652. *See* CRENSON, *supra* note 11, at 12, 15, 33. The Protestant was prominent New York charity leader Folks; the Catholic was Mulry, then-president of the Society of St. Vincent de Paul; and the Jew was Chicago juvenile court judge and former president of the National Conference of Jewish Charities, Julian Mack. *See id.*

653. *See id.* at 12.

654. *See* MINTZ, *supra* note 123, at 179.

655. CRENSON, *supra* note 11, at 13.

656. *See id.* at 262.

657. *See id.* at 15.

658. *See id.*

659. *See id.* at 259–60.

660. *See id.* at 260, 324.

support because it aligned with their ideas about family preservation, whereas Protestants favored it because of their aversion to institutionalization.<sup>661</sup> Notably, the conference did not settle on whether the payments should come from public or private money.<sup>662</sup> Leaving the choice to local communities suited religious groups who hoped to have control over disbursement.<sup>663</sup>

Religious considerations also featured in the preferencing of foster care over orphanages. Foster care appeared superior for sparking children's genuine faith,<sup>664</sup> and the conference-goers protected religious group involvement by instructing that placements be "suited to the racial and religious affiliations of the children to be placed out."<sup>665</sup> The only strong supporters of institutionalization at the conference were Catholics and Jews from New York, whose attendance "legitimated" the conclusions for a broad audience.<sup>666</sup>

Following directly from the White House Conference, states (especially in the Midwest) began passing "mothers' pension" statutes to make it financially feasible for select women to keep their children in their own homes.<sup>667</sup> A Chicago juvenile court judge who attended the conference drafted the law, enacted first in Illinois in 1911.<sup>668</sup> Missouri passed a similar law the same year.<sup>669</sup> Juvenile court judges in Ohio and Minnesota were the next movers; they were perfectly situated to advance and administer such laws because they oversaw children who would otherwise be placed in orphanages.<sup>670</sup> Getting approval for mothers' pensions in the East proved more challenging because of longstanding opposition to outdoor relief and political jockeying about how the money would be distributed.<sup>671</sup> For instance, New York passed its first narrow bill in 1915, granting aid to widows not to exceed the rate paid per child in institutions.<sup>672</sup> Most states passed mothers' pensions laws by 1919,<sup>673</sup> and by 1934, around 230,000 children received support through this approach.<sup>674</sup> Though the children benefitting from these payments comprised a tiny portion of the country's child population (around 0.5 percent<sup>675</sup>) and many families (especially racial

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661. *See id.* at 325.

662. *See* FITZGERALD, *supra* note 52, at 190.

663. *See id.*

664. *See* CRENSON, *supra* note 11, at 259–60.

665. *Id.* at 259.

666. *Id.* at 189–91.

667. KATZ, *supra* note 50, at 129.

668. *See* CRENSON, *supra* note 11, at 262.

669. *See* KATZ, *supra* note 50, at 128.

670. *See* CRENSON, *supra* note 11, at 265.

671. *See id.* at 268–71.

672. *See* FITZGERALD, *supra* note 52, at 204, 208.

673. *See* KATZ, *supra* note 50, at 128.

674. *See* RYMPH, *supra* note 64, at 45–46.

675. *See* U.S. DEP'T OF COM. BUREAU OF THE CENSUS, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, POPULATION VOLUME II, GENERAL REPORT, STATISTICS BY SUBJECTS 566 (1933). The census age categories for 1930 do not allow a precise calculation. If counting

minorities) were excluded, far more children received this form of support than were in foster care into the 1930s.<sup>676</sup>

Religious group involvement continued to shape the provision of what became known as “welfare,” as well as its relationship to foster care, when the federal government became involved in the 1930s.<sup>677</sup> One early version of Aid to Dependent Children (ADC) mandated state-level participation in funding child welfare services. This provision threatened religious institutions’ funding in the numerous states that prohibited the use of state funds for private institutions.<sup>678</sup> Accordingly, the National Conference of Catholic Charities lobbied the drafters to change this component and succeeded.<sup>679</sup>

Catholic lobbyists, aided by coreligionist Congressmen, also secured adjustments for their own benefit that were likely to the detriment of children and families. Specifically, their advocacy resulted in limiting the scope of ADC to dependent children who lived with their parents or relatives within the second degree of kinship.<sup>680</sup> This “kinship clause” avoided a situation in which local governments that funded private institutions would have been incentivized to transfer institutionalized children to extended family who could have been funded by ADC money instead.<sup>681</sup> Catholic Charities officials characterized the potential placement of children with extended relatives as foster care and argued that the federal government should not facilitate it.<sup>682</sup> One official estimated that if the federal government became involved in foster care, it would “reduce by one-half the volume of Catholic child care in the country.”<sup>683</sup> Limiting the range of children’s placements also increased the probability that Catholic children would be placed with other Catholics, as compared to placements with distantly related family members.<sup>684</sup> Able to secure their desired changes, Catholic Charities supported the Social Security Act<sup>685</sup> (SSA), passed on August 14, 1935.<sup>686</sup>

After the SSA’s enactment, Catholic Charities focused on implementation. Catholics advocated for and celebrated that in several states the legislation

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only children up to age 14, around 0.6 percent received pension support; if counting people up to age 19, around 0.4 percent received pension support. *Id.*

676. *See* CARP, *supra* note 40, at 132.

677. This section’s focus on Catholic influence follows available accounts. It is likely that additional research would identify similar efforts by other religious groups, which would be a valuable contribution.

678. *See* BROWN & MCKEOWN, *supra* note 194, at 8. Recall that some states, such as New York, permitted public funding of private institutions at the city and county levels. *See supra* Part II.A.2.c. Mandatory state funding also would have been problematic for Catholic charities in Pennsylvania. *See* BROWN & MCKEOWN, *supra* note 194, at 174.

679. *See* BROWN & MCKEOWN, *supra* note 194, at 8.

680. *See id.*

681. *See id.*

682. *See id.* at 176.

683. *Id.*

684. *See id.* at 175–76.

685. Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

686. *See* BROWN & MCKEOWN, *supra* note 194, at 177.

establishing a state ADC plan contained text designed to protect children's religious faith in placements.<sup>687</sup> Thus, religious group advocacy made its mark on yet another method of providing for impoverished children. Seeking to retain funding and control, lobbyists for religious organizations secured concessions that restricted the scope of welfare payments to families and federal payments for foster care. Numerous successive federal laws built on this foundation.

#### 4. The Rise of Modern FBAs

From the 1930s into the 1950s, orphanages reinvented themselves as modern foster care agencies. This shift allowed religious groups to retain significant control over child placements, even as financial considerations evolved due to the Great Depression and enactment of ADC. Rather than reflecting a considered choice about the best way to organize children's services, the turn to faith-based foster care agencies built on previous practices and showed providers' interest in following public money. Advocates of public foster care agencies found it difficult to dislodge private ones.

Demographic, financial, and policy changes converged to alter the child placement terrain in the mid-twentieth century. A declining birth rate in combination with lower parental mortality meant fewer children were orphaned and therefore in need of placements.<sup>688</sup> For families in financial crisis, ADC and other programs made it more feasible to preserve family unity.<sup>689</sup> Indeed, ADC quickly came to support more children than foster care and institutional placements combined.<sup>690</sup> Additionally, by 1936, twenty-nine states funded foster care.<sup>691</sup> Orphanages struggled to afford maintenance and repair of large facilities, as their traditional pool of residents shrunk and the Great Depression undermined their funding sources.<sup>692</sup> In some locations, orphanages also faced legal and social demands to racially integrate, a practice their managers wished to avoid.<sup>693</sup>

These pressures prompted previously reluctant orphanage managers to embrace foster care placements, especially if they could select and oversee foster homes and receive funding for these services.<sup>694</sup> As their focus shifted, many private, religious orphanages left behind their original programs and

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687. *See id.* at 186.

688. *See* TRESTMAN, *supra* note 130, at 227.

689. *See id.* at 228.

690. *See* HASCI, *supra* note 11, at 48.

691. *See* RYMPH, *supra* note 64, at 54.

692. *See* TRESTMAN, *supra* note 130, at 227–28; *see also* HASCI, *supra* note 11, at 45.

693. *See* Michaela Christy Simmons, *Becoming Wards of the State: Race, Crime, and Childhood in the Struggle for Foster Care Integration, 1920s to 1960s*, 85 AM. SOCIO. REV. 199, 209 (2020) (describing how some Protestant orphanages in New York became foster care agencies so they could employ race-matching in placements and avoid racial integration in housing children).

694. *See* HASCI, *supra* note 11, at 45–47, 140–41. Orphanage managers also repurposed their buildings to house children with special needs who were eligible for public funding. *See id.* at 48.

transformed into foster care agencies.<sup>695</sup> Building on past practices, foster care agencies routinely employed religion matching in placements as a matter of policy or law.<sup>696</sup> Religion matching conformed to the Child Welfare League's standards for foster placements, which further advised that children should be placed "with foster parents earnestly convinced of the importance of the child's spiritual development and religious nurture."<sup>697</sup>

The remodeled faith-based organizations competed against a new wave of public foster care agencies for money and control.<sup>698</sup> Though many social workers (including those in the U.S. Children's Bureau) believed that public money should fund only "public administration," private agencies continued to secure substantial amounts of taxpayer funding.<sup>699</sup> In 1954, the Child Welfare League of America identified nearly 1,500 agencies engaged in foster care placements, and a significant portion had clear religious affiliations.<sup>700</sup>

In the 1950s, the number of children in foster care surpassed those in institutional care for the first time,<sup>701</sup> and by the early 1960s, two-thirds of children in out-of-home placements were in foster care.<sup>702</sup>

The shift from orphanages to foster care had little impact on the power and involvement of faith-based groups. As the population of children in need transferred from institutions to foster care, providers reworked their organization and facilities to maintain control and funding. Private religious orphanages became private religious foster care agencies. Instead of starting with a fresh assessment of the best institutions and approaches to support modern American families, the present system maintains religious organizations' careful, centuries-long entrenchment.

As government entities increasingly participated in running, funding, and regulating children's services from the Civil War through the mid-1900s, religious groups remained persistent and influential participants. Although motivated partly by protecting the faith of coreligionist children and respecting religious pluralism, stakeholders routinely prioritized the control and funding of private religious groups, even when doing so ran contrary to

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695. Elise Hagesfeld, *Saving the World by Saving Its Children: The Birth of the Modern Child Welfare Agency and the Children's Homes of the National Benevolent Association of the Disciples of Christ, 1887–1974*, at 8, 157 (2018) (Ph.D. dissertation, Case Western Reserve University) (providing a list of the largest child welfare organizations as of 2005, many of which are religiously affiliated, and calculating that 70 percent began as orphanages). For a close account of one Jewish orphanage's reluctant transition into a foster care agency, see TRESTMAN, *supra* note 130, at 226, 238–40.

696. RYMPH, *supra* note 64, at 52.

697. CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR CHILDREN'S ORGANIZATIONS PROVIDING FOSTER FAMILY CARE 18 (1933).

698. See RYMPH, *supra* note 64, at 53–54.

699. See *id.*

700. See CHILD WELFARE LEAGUE OF AMERICA, DIRECTORY: PRIVATE FOSTER CARE AGENCIES FOR CHILDREN (1954). The tally of nearly 1,500 was determined by counting the agencies listed, and the religious affiliations were determined based on the names of the agencies.

701. See CARP, *supra* note 40, at 126.

702. See *id.*

what many experts believed was in the best interests of children and their families.

### III. CHILD PLACEMENT AGENCIES AND FUNDING TODAY

The operation of the modern child placement system is currently subject to serious concern and reform efforts. Commentary clusters in two areas, which should be joined for a holistic assessment. First, some discussants focus on how FBA involvement in foster care complicates the relationship between antidiscrimination laws and the First Amendment's Religion Clauses. These discussants miss the first step from a family law perspective: analyzing the extent to which children should be removed from their homes and placed elsewhere. Second, scholars and activists concentrating on children's rights and family integrity condemn the child welfare system for its harmful consequences, dubbing it instead the "family policing system."<sup>703</sup> These discussants should do more to grapple with the legal and political significance of FBA involvement. Drawing from this Article's historical account provides lessons about the stakes, tradeoffs, and possibilities.

#### A. Overview of Current Controversies

The organization, scope, and funding of child placement services has received significant attention in recent years from politicians, religious leaders, scholars, and activists.<sup>704</sup> Two major questions dominate this field. First, to what extent should FBAs be involved in child placements and have discretion to run their services in line with their religious beliefs, thereby excluding or harming people based on sexuality, religion, or other identity facets? And second, how can the child placement system be reformed to reduce the harms it currently inflicts and to better support American families?

The scope of FBA involvement in child placements is currently in play in several political and legal forums. There is a trend toward using law to protect FBA participation—a new wave in entrenching and empowering private groups that is reminiscent of earlier periods.<sup>705</sup> At least a dozen states recently enacted or are considering statutes to solidify FBAs' role in foster care programs.<sup>706</sup> These statutes authorize FBAs to exclude children and

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703. See *supra* note 13 and accompanying text.

704. There is little data available on the scope and cost of FBA involvement, but it is clear that private agencies are a huge part of the child welfare machinery and rely on public funding. See Bowen McBeath, Crystal Collins-Camargo & Emmeline Chuang, *The Role of the Private Sector in Child Welfare*, 6 J. PUB. CHILD WELFARE 459, 460, 474 (2012); see also Adam S. Hodge, Joshua N. Hook, Hansong Zhang, Aaron T. McLaughlin, Johan Mostert, Bill R. Hancock, Don E. Davi & Daryl R. Van Tongeren, *The Effectiveness of Faith-Based Organizations Designed to Support Adoptive and Foster Care Families: A Systematic Review of the Literature*, SPIRITUALITY IN CLINICAL PRAC., Jan. 13, 2022, at 1, 11 ("Empirical research on faith-based foster care and adoptive agencies is in an initial stage of development.").

705. For a deeper discussion of the earlier efforts, see *supra* Parts II.A.3, II.B.2.

706. Sager & Tebbe, *supra* note 21, at 807. Most of these laws were enacted after *Obergefell v. Hodges*, 576 U.S. 644 (2015). See Spoto, *supra* note 4, at 298.

would-be caretakers based on the organizations' religious beliefs.<sup>707</sup> Congress has also debated laws relevant to FBAs' involvement. For example, both houses considered the Child Welfare Provider Inclusion Act of 2021,<sup>708</sup> which would have prevented government entities from "taking adverse action" against FBAs that decline services based on their beliefs.<sup>709</sup>

State power in this realm is constrained by federal funding rulings, which led to another target: the U.S. Department of Health and Human Services (HHS). HHS's Children's Bureau provides states with federal dollars to pay for eligible children placed in foster homes and childcare institutions.<sup>710</sup> In 2016, HHS promulgated regulations that forbade service providers from discriminating on the basis of "age, disability, sex, race, color, national origin, *religion*, gender identity, or sexual orientation."<sup>711</sup> But under the Trump Administration, HHS provided waivers to Michigan, South Carolina, and Texas that permitted child welfare FBAs to receive federal funds despite refusing to work with same-sex couples and non-Protestants.<sup>712</sup> In November 2021, the Biden Administration withdrew that exception,<sup>713</sup> prompting objections.<sup>714</sup> More recently, in September 2023, HHS proposed a rule that would limit the placement of LGBTQ children to supportive foster homes.<sup>715</sup> Republican congresspeople and state attorneys general have objected, arguing in part that the rule would impermissibly discriminate against FBAs.<sup>716</sup>

State and federal courts have been the third major forum for sparring over FBAs' role. Some lawsuits target providers, whereas others challenge

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707. See Whelan, *supra* note 4, at 730–36; Spoto, *supra* note 4, at 307.

708. H.R. 1750, 117th Cong. (2021).

709. The law would not allow discrimination on the basis of race, color, or national origin, but impliedly it would permit exclusion by gender identity and religion. See *id.*

710. See *Foster Care*, CHILD.'S BUREAU, <https://www.acf.hhs.gov/cb/focus-areas/foster-care> [https://perma.cc/4T29-BG9W] (last visited Mar. 3, 2024).

711. 45 C.F.R. § 75.300 (2016) (emphasis added).

712. See Letter from Steven Wagner, Principal Deputy Assistant Sec'y, Admin. for Child. and Fams., to Henry McMaster, Governor of S.C. (Jan. 23, 2019), <https://governor.sc.gov/sites/governor/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf> [https://perma.cc/46RQ-RXGJ]. For further explanation, see Mark A. Kellner, *Biden Administration Rolls Back Trump-Era Religious Exemptions for Adoption Agencies*, WASH. TIMES (Nov. 18, 2021), <https://www.washingtontimes.com/news/2021/nov/18/biden-administration-rolls-back-religious-exemptio/> [https://perma.cc/W5EK-SMAR].

713. See Joo Yeun Chang, Comment Letter on the Withdrawal of Approval of Exception from Religious Non-discrimination Requirement of 45 CFR 75.300(c) & (d) (Nov. 18, 2021), <https://www.hhs.gov/conscience/religious-freedom/state-letter-to-texas-withdrawing-exception-from-non-discrimination-requirements/index.html> [https://perma.cc/A3AD-9WXC].

714. See, e.g., Roxanna Asgarian, *Texas Fights Federal Rule That Would Outlaw LGBTQ Discrimination in State Adoptions and Foster Care*, TEX. TRIB. (Dec. 14, 2022, 12:00 PM), <https://www.texastribune.org/2022/12/14/texas-adoptions-lgbtq-religion/> [https://perma.cc/7JMP-EMCJ].

715. See Brooke Migdon, *New Rule Designed to Protect LGBTQ Foster Children Draws GOP Opposition*, HILL (Jan. 3, 2024, 2:14 PM), <https://thehill.com/homenews/lgbtq/4385391-new-rule-designed-to-protect-lgbtq-foster-children-draws-gop-opposition/> [https://perma.cc/TC98-TNET].

716. See *id.*

HHS.<sup>717</sup> In a recent example, a Jewish couple living in Tennessee sued one of the state's licensed and publicly funded Christian child placement agencies for refusing to provide foster care training that was a prerequisite for their pending out-of-state adoption and unavailable through any other nearby providers.<sup>718</sup> Their lawsuit is ongoing.<sup>719</sup> Legal risks and social pressures have prodded some FBAs to provide LGBTQ adults with the opportunity to serve as foster parents, yet religious minorities remain excluded.<sup>720</sup>

Meanwhile, discussants focused on children's rights and wellbeing condemn the frequency of child removal and overuse of foster care.<sup>721</sup> Each year CPS agencies across the country investigate over 7 percent of all families with children—more than 2.5 million families.<sup>722</sup> Over one-third of all children are the subject of a CPS investigation by age eighteen, and the rates are even higher for Black children.<sup>723</sup> There is widespread agreement that at least some portion of these CPS investigations are unnecessary and are prompted by poverty and housing insecurity rather than deliberate neglect or abuse.<sup>724</sup> These investigations and subsequent surveillance fall disproportionately on low-income and racial minority communities,<sup>725</sup>

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717. See, e.g., *Holston United Methodist Home for Child, Inc. v. Becerra*, No. 21-CV-185, 2022 WL 17084226 (E.D. Tenn. Nov. 18, 2022); *New Hope Fam. Servs., Inc. v. Poole*, 626 F. Supp. 3d 575 (N.D.N.Y. 2022); *Buck v. Gordon*, 959 F.3d 219 (6th Cir. 2020); *Rogers v. McMaster*, No. 19-CV-01567, 2023 WL 7396203 (D.S.C. Sept. 28, 2023); *Dumont v. Lyon*, No. 17-CV-13080, 2018 WL 5292022 (E.D. Mich. Oct. 25, 2018); *Maddonna v. U.S. Dep't of Health & Hum. Servs.*, No. 19-CV-3551, 2023 WL 7395911 (D.S.C. Sept. 28, 2023); *Marouf v. Azar*, 391 F. Supp. 3d 23 (D.D.C. 2019).

718. *Tennessee Couple Says Adoption Agency Turned Them Away for Being Jewish*, N.Y. TIMES (Jan. 22, 2022), <https://www.nytimes.com/2022/01/22/us/tennessee-jewish-couple-adoption.html> [<https://perma.cc/J3PA-4W6Z>].

719. See Andrew Schwartz, *Denied Service by State-Funded Christian Group, Jewish Foster Parents Challenge Controversial Tennessee Law*, CHATTANOOGA TIMES FREE PRESS (Jan. 1, 2023, 4:07 PM), <https://www.timesfreepress.com/news/2023/jan/01/denied-service-by-state-funded-christian-group/#/questions> [<https://perma.cc/DHN3-3FXH>].

720. Mark Wingfield, *Catholic Bishops Drop Opposition to Lesbian Becoming a Foster Parent*, BAPTIST NEWS GLOB. (June 27, 2022), <https://baptistnews.com/article/catholic-bishops-drop-opposition-to-lesbian-becoming-a-foster-parent/> [<https://perma.cc/5FYX-6QGZ>]; Yonat Shimron, *Bethany Christian Services to Allow LGBTQ Couples to Adopt, Foster Children*, RELIGION NEWS SERV. (Mar. 1, 2021), <https://religionnews.com/2021/03/01/bethany-christian-services-to-allow-lgbtq-couples-to-adopt-foster-children/> [<https://perma.cc/5FYX-6QGZ>].

721. See, e.g., Michael Wald, *New Directions in Foster Care Reform*, JUV. & FAM. CT. J., Mar. 2017, at 7, 8.

722. See Wald, *supra* note 19, at 713.

723. See *id.* at 713–14.

724. See *id.* at 714; Kelly, *supra* note 14, at 265. Precision is difficult due to limited and irregular data. See Wald, *supra* note 721, at 12; Richard P. Barth, Jill Duerr Berrick, Antonio R. Garcia, Brett Drake, Melissa Jonson-Reid, John R. Gyourko & Johanna K. P. Greenon, *Research to Consider While Effectively Re-designing Child Welfare Services*, 32 RSCH. SOC. WORK PRAC. 483, 484 (2021). Available estimates are that around 10 percent of foster care children were removed from their families because of serious maltreatment or abuse. See MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 192–93 (2005).

725. See Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 536 (2019).

though the reasons are disputed.<sup>726</sup> Approximately 85 percent of families investigated by CPS are at or below 200 percent of the federal poverty line.<sup>727</sup>

When children are placed in foster care, the resultant harms are worse for at least some of the children than if they had remained with their parents or guardians.<sup>728</sup> The removal itself is traumatic,<sup>729</sup> and foster care brings heightened rates of abuse as well as instability because of repeated placements.<sup>730</sup> Numerous studies have found that children in foster care suffer worse outcomes on many metrics than similarly situated children who remain with their families.<sup>731</sup>

One reason for the dysfunctionality of the child placement system is the perverse financial incentives of the “foster industrial complex.”<sup>732</sup> The child welfare system costs \$33 billion per year,<sup>733</sup> with less than 10 percent of funding going to financial support for families.<sup>734</sup> Instead, much of the money goes to children’s agencies, including FBAs.<sup>735</sup>

Discussants from different disciplines and across the political aisle recognize the harmful consequences of this setup.<sup>736</sup> For instance, an article in the libertarian *Cato Journal* concluded based on numerous studies that “privately contracted foster care agencies make decisions based on financial interests rather than child welfare.”<sup>737</sup> Because these agencies are typically paid per child per day or month under their care, they are incentivized to focus on quantity over quality in recruiting and monitoring foster families.<sup>738</sup> They also have financial motives to keep children in their programs as long as possible.<sup>739</sup> Some private agencies receive nearly all of their revenue from the government and earn significant profits.<sup>740</sup> Nonprofits may be no better

726. See Kelly, *supra* note 14, at 266.

727. See Wald, *supra* note 19, at 720.

728. See Trivedi, *supra* note 725, at 528. *But see* Anthony Bald, Joseph J. Doyle Jr., Max Gross & Brian A. Jacob, *Economics of Foster Care*, 36 J. ECON. PERSPS. 223, 228–30 (2022) (noting that variation in state foster care programs makes it difficult to determine the consequences of child removal).

729. See Trivedi, *supra* note 725, at 528.

730. See *id.* at 542–44.

731. See *id.* at 550–52.

732. ROBERTS, *supra* note 3, at 141–58. *But see* Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 STAN. L. REV. 841, 883 (2020) (explaining that states are financially disincentivized from using foster care unnecessarily). Professor Josh Gupta-Kagan’s explanation, though compelling from a state-focused perspective, does not consider how the involvement of private agencies may shift the analysis.

733. See Burton & Montauban, *supra* note 18, at 675.

734. See *id.* at 671.

735. See ROBERTS, *supra* note 3, at 141. No statistical studies are available regarding the portion of funds that go to FBAs.

736. See, e.g., Kelly, *supra* note 14, at 272 (arguing that privatization has led to poor placements); ROBERTS, *supra* note 3, at 230 (describing how private organizations treat children as commodities); Bald et al., *supra* note 728, at 235 (explaining that privatization exacerbates problems by obscuring costs and leading to stakeholder buy-in).

737. Isabella M. Pesavento, *How Misaligned Incentives Hinder Foster Care Adoption*, 41 CATO J. 139, 143 (2021).

738. See *id.* at 141–43.

739. See *id.* at 151.

740. See *id.* at 143.

in how they respond to incentives and utilize public funds.<sup>741</sup> A U.S. Senate Committee on Finance report similarly concluded that in the case of both nonprofit and for-profit foster care agencies, “profits are prioritized over children’s well-being.”<sup>742</sup>

Despite the money flowing to child placement agencies, there is inadequate funding available to recruit, train, and support foster parents.<sup>743</sup> Foster families on average receive just over \$500 per month per child, as well as additional payments for specific needs.<sup>744</sup> Sparse resources have led states to pay relatives who serve as foster parents less than strangers, even though kinship foster care is widely recognized as the better option for children.<sup>745</sup> States’ efforts to reduce the cost of foster care also led to a hidden system of unofficial and therefore unregulated placements.<sup>746</sup>

Recognizing these serious problems, nearly all scholars and activists focused on children’s rights and wellbeing agree that the current approach should be scaled back, and some go so far as to call for abolition.<sup>747</sup> By restricting the use of foster care to serious situations, they observe that funding could be redirected to more beneficial efforts.<sup>748</sup> One popular proposal is to enrich the family services controlled by local communities.<sup>749</sup> There is concern, however, that even local nonprofits “may be focused more on their own interests than those of their clients.”<sup>750</sup> Therefore, some leading voices instead advocate for investing money directly in families.<sup>751</sup> The United States can also look abroad for inspiration, as it is an outlier among wealthy Western countries in how it funds child protection interventions more generously than supporting families.<sup>752</sup>

The child welfare system is in a state of flux. There are concerns that child protection interventions and resultant placements are discriminatory and harmful and do not make the best use of limited financial resources. Although inadequate data complicates reaching solid assessments, there is wide scholarly consensus that major change is warranted.

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741. *See id.* at 146–48.

742. *Id.* at 144.

743. *See Kelly, supra* note 14, at 267.

744. *See* Bald et al., *supra* note 728, at 239. This is twice the average Temporary Assistance to Needy Families benefit. *See id.*

745. *See id.*

746. *See* Gupta-Kagan, *supra* note 732, at 843–44.

747. Michael Wald, *Redesigning State Intervention on Behalf of “Neglected” Children*, 32 *RSCH. ON SOC. WORK PRAC.* 504, 504 (2022).

748. *See* Wald, *supra* note 721, at 28.

749. *See* Wald, *supra* note 19, at 715; Kelly, *supra* note 14, at 316.

750. Wald, *supra* note 19, at 732.

751. *See, e.g.,* ROBERTS, *supra* note 3, at 154 (“If we cared about the welfare of children, we would dismantle the foster-industrial complex and send all the cash it sucks up directly to the family members who care for them.”).

752. *See* Maxine Eichner, *Slow to Support Families, Quick to Remove Children: U.S. Exceptionalism in the Role of Government in Children’s Lives* (May 1, 2023) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4421484](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4421484) [<https://perma.cc/ZYS4-265C>].

*B. Historical Insights*

Continuities and parallels between past and present provide valuable insights about efforts to reform the child placement system. Although history does not provide unambiguous next steps, it underlines the importance of experimentation and points toward focusing on the allocation of public funding as a key starting point.<sup>753</sup>

One throughline in child welfare history is reluctance to provide financial support directly to families in need. Though the reasons have varied over time, opponents of family financial support often have worried about recipients' potential misuse of funds, the possibility of fraudulent claims, and disincentivizing work and other responsible conduct.<sup>754</sup> Rather than granting public or private support that would allow families to remain together in homes, localities (often in collaboration with private faith-based organizations) have implemented approaches intended to be cheaper and more coercive. These have included keeping families together in barren and stigmatized public poorhouses;<sup>755</sup> sending poor, urban children to live with other families in rural areas;<sup>756</sup> and subsidizing private orphanages that held the dependent children of poor, immigrant parents.<sup>757</sup>

At various points in these developments, reformers raised the possibility of using the funding these operations required to instead keep at least some "worthy" families together, yet implementation of this proposal was gradual and meager.<sup>758</sup> Although there are many reasons that what eventually came to be known as "welfare" was slow to materialize, one crucial factor was that FBAs had a vested interest in maintaining control over coreligionist children and the associated funding.<sup>759</sup>

Scholars and activists focused on children's wellbeing continue earlier calls to provide greater financial support to families.<sup>760</sup> Their proposal is backed by a growing body of studies that find that reallocating money to families could reduce the need for child removal and foster care. Studies find that increased income reduces the number of neglect cases,<sup>761</sup> and at least one found that restricting Temporary Assistance to Needy Families increases

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753. For more on the relevance of public funding for legal analysis, see TEBBE, *supra* note 2, at 137. *See also, e.g.*, *New Hope Fam. Servs., Inc. v. Poole*, 493 F. Supp. 3d 44, 59–60 (N.D.N.Y. 2020) (distinguishing *Fulton* on the basis that the FBA at issue did not have a government contract or receive government funding).

754. *See* KATZ, *supra* note 50, at 17, 37, 124; TRATTNER, *supra* note 74, at 48–51, 185–86.

755. *See supra* Part I.B.

756. *See supra* Part I.D.

757. *See supra* Parts I.C, II.A.2.

758. Scholarship often focuses on the gendered and racist reasons for the gradual and stingy rollout of welfare. For a representative and influential example, see generally LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935* (1994).

759. *See supra* Part II.B.3.

760. For discussion of earlier advocacy, *see supra* Part II.B.3.

761. *See* Wald, *supra* note 747, at 505; *see also* Bald et al., *supra* note 728, at 232 ("Experimental studies of welfare reforms suggest a causal relationship between family income and child maltreatment.").

the need for foster care.<sup>762</sup> Evaluating this enhanced welfare approach at a greater level of specificity is challenging because of insufficient information about present practices.<sup>763</sup> Redirecting at least some funds to families, however, seems likely to be a step in the right direction.<sup>764</sup>

Proponents of enhanced welfare provision should expect a mixed reception from religious organizations. Much like the compromises that facilitated the enactment of mothers' pension laws (state welfare payments) in the early twentieth century,<sup>765</sup> there could be religious group buy-in by those who support keeping families together and are skeptical about the share of public funding claimed by other groups.<sup>766</sup> On the other hand, FBAs that receive significant public funding<sup>767</sup> are likely to object, again as in earlier efforts.<sup>768</sup>

Even if the need for foster care is reduced by providing more financial support to families, a difficult question that would remain is how to provide services to children who nevertheless would need placements outside their homes.<sup>769</sup> Although a large portion of CPS investigations focus on "neglect" issues that are tied to poverty, some parents abandon, neglect, or abuse their children regardless of financial circumstances. For instance, LGBTQ children are disproportionately cast out of their homes,<sup>770</sup> and financial support or other government intervention will not eliminate this issue. Thus, the question becomes how services should be organized for these children.

Historical experience suggests that improving and expanding public agencies would help serve the needs of the country's most vulnerable children who require out-of-home placements. An enduring problem has been that public options have been underfunded and, in some instances, effectively exclusionary because of their domination by a majority group.<sup>771</sup> Ensuring that all locations offer a strong public, secular option would minimize the real and dignitary harms experienced by minority groups who are unable to access or are harmed by using private, faith-based services.<sup>772</sup>

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762. See ROBERTS, *supra* note 3, at 146.

763. See Wald, *supra* note 19, at 733.

764. The Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 232 (codified as amended in scattered sections of the U.S.C.), may provide some benefit, but its rollout was delayed and complicated by the pandemic. Observers have not reached firm conclusions about the consequences. See Wald, *supra* note 721, at 23.

765. See *supra* Part II.B.3.

766. For instance, some religious groups responded to the overturning of *Roe v. Wade* by calling for greater support to help families remain together. See, e.g., Timothy Dalrymple, *How to Greet the End of "Roe,"* CHRISTIANITY TODAY (June 21, 2022), <https://www.christianitytoday.com/ct/2022/july-august/dalrymple-end-roe-v-wade-abortion-adoption-foster.html> [<https://perma.cc/U3ZX-FBMJ>].

767. By the 1990s, Catholic Charities USA had a budget of nearly two billion dollars, around two-thirds of which came from public funding. See BROWN & MCKEOWN, *supra* note 194, at 194.

768. See *supra* Parts II.B.1–3.

769. See Wald, *supra* note 19, at 715 (child removal and foster care could be reduced by 50–80 percent without reducing children's safety).

770. See Woods, *supra* note 4, at 2404.

771. See *supra* Parts I.B, I.C.2, II.A.2.a.

772. See MINOW, *supra* note 49, at 37 (proposing secular alternatives to match religious options). For a similar argument in the healthcare context, see Elizabeth Sepper & James D.

It could also reduce the risk of religious coercion and proselytization created by FBA monopolization.<sup>773</sup>

History also supports the claim that selective FBA involvement could increase the availability of services, respect religious pluralism, and be responsive to the needs of minority children.<sup>774</sup> FBAs may be particularly successful at recruiting and assisting foster families of their faith,<sup>775</sup> which can increase the diversity of available placements. For example, Muslim religious organizations suggest that they are best situated to address the dearth of Muslim foster parents.<sup>776</sup> Because foster care typically is intended to be temporary,<sup>777</sup> with around half of children returned to their families,<sup>778</sup> intrafaith placements may be beneficial in providing continuity and facilitating reunification.<sup>779</sup>

Recognizing the benefits of placing foster children who have strong faith identities with coreligionists does not require treating religious identity or religious groups as special.<sup>780</sup> As was briefly noted but not fully considered in the *Fulton* litigation, cities including Philadelphia contract with agencies that specialize in working with specific groups, such as Latino children or Native children.<sup>781</sup> This arrangement—which seemingly has not attracted opposition—is understood as helpful to finding the best fit for children.<sup>782</sup> Similar reasoning should apply to children who strongly identify with a religious faith, yet it should not extend to children for whom religion is not a major aspect of their identity.

Finally, history supports a more general proposal to try new approaches. If politicians, reformers, and other stakeholders had deferred to religious groups' claims that their longstanding involvement should insulate them

Nelson, *Government's Religious Hospitals*, 109 VA. L. REV. 61, 117 (2023) (“A more democratic, egalitarian, and religiously plural politics might turn to public options.”).

773. For historical examples, see *supra* Parts I.B–D, II.A. For modern research, see Michael Howell-Moroney, *Fostering Capacity: The Role of Faith-Based Congregations in the Child Welfare System in the United States*, 32 INT'L J. PUB. ADMIN. 24, 39 (2009) (noting “unwanted proselytization” of foster children).

774. See *supra* Part II.

775. See Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare*, HERITAGE FOUND., May 2018, at 4–7.

776. See Josh Herman, *Striving to Find Foster Parents in America's Largest Muslim Community*, IMPRINT (June 2, 2016, 9:12 AM), <https://imprintnews.org/news-2/religious-cultural-continuity-key-stability-muslim-children-foster-care/18544> [<https://perma.cc/LX3G-3G23>]; Nargis Rahman, *The Aim in Michigan Is to Increase the Number of Licensed Muslim Foster Care Families*, NPR (Feb. 19, 2024, 5:09 AM), <https://www.npr.org/2024/02/19/1232383818/the-aim-in-michigan-is-to-increase-the-number-of-licensed-muslim-foster-care-fam> [<https://perma.cc/FD8V-HMKQ>].

777. See Bald et al., *supra* note 728, at 227.

778. See *Foster Care Explained: What It Is, How It Works and How It Can Be Improved*, ANNIE E. CASEY FOUND.: CASEY CONNECTS (Feb. 6, 2014), <https://www.aecf.org/blog/what-is-foster-care> [<https://perma.cc/U47A-P2B3>].

779. See Gottlieb, *supra* note 21, at 68.

780. See *id.* (discussing children's interests in being placed in foster homes that share their religious, racial, ethnic, or cultural heritage).

781. See Brief for the U.S. as Amicus Curiae Supporting Petitioners at 2, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123).

782. See *id.*

from regulation or change, we might still live in a world where, for instance, a significant portion of poor children were removed from their families and placed in religiously segregated orphanages. The current approach is neither the way that services have always been provided nor the result of well-considered plans. Rather, the child placement system developed from numerous contingent steps that often served short-term goals and prioritized cost considerations. The current approach should not be enshrined in law and practice going forward.

#### CONCLUSION

The modern child welfare system is in crisis. Critics of the “family policing system” call for a major reduction in child removal and foster care, while other advocates spar over what FBA involvement in child placements means for religious freedom and antidiscrimination laws.

Beginning from a historical perspective offers insights. History undermines a commonplace framing, in support of the status quo, that describes apparently benign and unchanging participation of faith-based groups in the provision of children’s services. In fact, child placements have been dynamic and contested. Religious groups have made positive contributions, but FBA involvement has also fed severe inequalities, increased costs, and delayed reforms. The story of child placement services is defined by change and experimentation, and it does not support freezing current practices in place. Rather than deferring to longstanding approaches that developed in an ad hoc manner—based largely on the priorities of religious groups and in conjunction with criminal law—policymakers should assess and implement strategies based on modern analyses of what is best for children and their communities.