

# ORPHAN TRAIN MYTHS AND LEGAL REALITY

By

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## INTRODUCTION

Beginning in the 19<sup>th</sup> century, as many as 200,000 children across New York City's overcrowded boroughs, often from immigrant homes, were removed from their families and relocated to settlements in the American West. Contemporary views have credited this massive relocation as the impetus for American adoption laws, improved foster care practices, child labor law reform and the child welfare movement. To the contrary, records show this forced resettlement of primarily immigrant children slowed and opposed many child welfare reforms.

Laws and social views regarding the care and treatment of dependent children have evolved, grown and changed in tandem with the development of America as a whole. American practices and treatment of children have shifted from overt oppression to eliminating oppressive laws in order to define and implement successful child welfare policies and practices. This legal and social evolution has been and continues to be accomplished through various laws, policies and programmatic changes involving adoption, child labor and child welfare programs directed at public and private institutions that care for and interact with dependent children.

Part one of this article explores the orphan train movement, emphasizing the historical and legal context of the care of dependent children in the United States beginning in the colonial era and extending through the 19<sup>th</sup> century. Part two of this article assesses the legal impact of the unique century-specific orphan train movement on child-related laws and legal institutions in the United States. This examination challenges the accepted view that orphan trains contributed to child welfare and posits that, to the contrary, orphan trains were a detriment to the children the movement sought to protect. The forced relocation of 200,000 children, primarily from vulnerable immigrant families, worked against proper recognition of the rights of a child by substituting a "quick fix" for increased immigration and broader economic troubles. This article concludes with recommendations for 21<sup>st</sup> century child welfare practices and policies that, but for the orphan train movement, might have developed naturally in the United States.

## PART I—THE ORPHAN TRAIN MOVEMENT

Charles Loring Brace has been credited with initiating the orphan train movement in the United States through his Children's Aid Society of New York.<sup>1</sup> Brace's plan to move destitute and homeless children from the streets of New York to Western farms has been characterized as an unusual and inventive child care solution.<sup>2</sup> This is not, however, an accurate characterization. Placing large numbers of children into other homes was a common European practice.<sup>3</sup> This English process of placing children in homes as apprentices or indentured servants, the so called "putting out" or "placing out" of children, was later adopted in

the American colonies.<sup>4</sup> Records indicate that as early as 1627, Virginia-bound English ships carried between 1400 and 1500 children across the Atlantic and into child labor apprenticeship in the colonies.<sup>5</sup>

In England as well as the American colonies, children had no legal say in whether they were placed out. This authority rested with their parents or even local authorities, such as overseers of the poor.<sup>6</sup> If a parent died and the local authorities determined the surviving parent could not support the child, that child would be placed as an indentured servant or as an apprentice with a family who, in return for service, would provide food, clothing and training for the child. Local authorities made their determinations in conformity with pre-existing perceptions of gender and so were more likely to remove a child from the care of a surviving mother than from a surviving father. Colonial governments and predecessor states enacted laws to control this process and to regulate agreements involving indentured servitude and apprenticeships.<sup>7</sup>

As the population in the United States increased, almshouses, or charitable facilities that provided care for the destitute were established to house both indigent adults and children.<sup>8</sup> But this was not a preferred system as it imposed a financial burden on the jurisdiction that created the facility. During colonial times, the town level of government was generally responsible for the care of indigents in their jurisdiction, though the responsibility of indigent care sometimes shifted to the county.<sup>9</sup> State governments began assuming support of public charitable institutions in the 19<sup>th</sup> century.<sup>10</sup> Even with state support, local governments were expected to financially contribute to care efforts.<sup>11</sup> During this period, an early form of paid foster care also existed for infants who were placed with families.<sup>12</sup> Beginning as early as 1866, orphanages were established to remove children from almshouses and to care for them separately from adults. These publicly funded orphanages attempted to indenture or apprentice older children and place younger children in paid foster care.<sup>13</sup>

Private charities were also established to care for orphans and destitute children. The New York Orphan Asylum Society ("NY Society") was founded in 1806 as the first private U.S. children's charity.<sup>14</sup> The NY Society required that children be placed out as soon as they received a basic education.<sup>15</sup> Similar institutions were created in Baltimore, Maryland and Boston, Massachusetts.<sup>16</sup> In total, at least 62 private charities were created between 1800 and 1850,<sup>17</sup> most of which strove to place children in their care into apprenticeships or indentured servitude.<sup>18</sup>

Informal adoptions were also common where, for example, a relative would take in an orphaned child. Sometimes these adoptions were made official through private legislation or court proceedings.<sup>19</sup> The first modern adoption statute was passed by Massachusetts in 1851.<sup>20</sup> Even with statutory authority, some courts were reluctant to apply laws that conferred a right of inheritance on children adopted under these state statutes.<sup>21</sup>

Beginning in the mid-19<sup>th</sup> century, these public and private institutions faced three major obstacles in their work to

provide for the children in their care. First, jobs were scarce due to an economic recession. Second, jobs in labor-intensive cottage industries were cut as development in industrialization led to mass production.<sup>22</sup> Third, the influx of immigrant families in urban centers like Boston and New York expanded an already large labor pool while the need for apprenticeships diminished with so many immigrant adult laborers vying for work.<sup>23</sup> The combined effect of these conditions left many children from immigrant and some non-immigrant families destitute, neglected or orphaned. The needs of these children strained local public resources. George W. Matsell, New York City's first Chief of Police, provides a description of these conditions in his 1849 semi-annual report on "the problem of vagrant and delinquent children". He describes "the constantly increasing number of vagrants, idle and vicious children . . . who infest our public thoroughfares, hotels, docks, &c. [sic.]" He saw these children as "destined to a life of misery, shame and crime, and ultimately to a felon's doom."<sup>24</sup> Matsell points out that "a large proportion of these juvenile vagrants are in the daily practice of pilfering wherever opportunity offers, and begging when they cannot steal."<sup>25</sup>

There are no reliable records as to the exact number of the affected children. The 1854 First Annual Report of the Children's Aid Society, drawing on numbers from Matsell's report, identifies 10,000 "vagrant children" in New York City.<sup>26</sup> Other contemporary accounts indicate as many as 30,000 primarily immigrant children roamed the streets in New York and Boston in the mid-19<sup>th</sup> century.<sup>27</sup>

Publicly funded programs failed to adequately address these conditions. As a result, over 100 private charities were organized from the 1850's to the 1860's to meet child care needs.<sup>28</sup> Following practices established by previous organizations, most of these charities provided assistance to children through indentured servitude, generally indenturing boys by the age of 12 and girls by the age of 14.<sup>29</sup> Given the depressed economic conditions and lack of employment opportunities in the East, charities began to place and indenture affected children in rural areas where child labor was needed and welcomed.<sup>30</sup> This grew into the orphan train movement.

In 1849, the board of governors of the New York Almshouse favored placing children in families and sought legislation allowing children to be indentured outside the State of New York.<sup>31</sup> In 1855, New York State authorized "trustees, directors or managers of any incorporated orphan asylum, or institute or home for indigent children" to "bind out" any male orphan or indigent child under 21 and any female orphan or indigent child under 18.<sup>32</sup> Under this authority, the Boston Children's Mission sent a total of 150 children to out-of-state placements in 1850.<sup>33</sup>

The phrase "orphan train" was first used in 1854 to describe the transportation of children outside of their home localities on the railways.<sup>34</sup> There were no geographic restrictions for these indentures — the children could be placed anywhere. Other states enacted similar provisions giving charities the authority to indenture children in their custody without geographic restrictions.<sup>35</sup> While the first charities to use orphan trains were in the East, charities farther West also placed children

out in this manner.<sup>36</sup> Organizations in Missouri, Iowa, Texas and Nebraska also placed children across their states and in neighboring states.<sup>37</sup> Expansion of railway systems into the American frontier had a two-fold effect: children were placed on trains in transit to faraway cities while railroad companies made efforts to draw immigrants to the United States. For example, railroads advertised the United States throughout Europe as "the land of opportunity" and the "land of a second chance."<sup>38</sup> These same railroad companies offered reduced or free fares to charities seeking to transport children westward. Orphan train trips were also sponsored and financed by charitable contributions and wealthy philanthropists such as Mrs. John Jacob Astor III who, by 1884, had sent 1,113 children west on the trains.<sup>39</sup> Implicitly, various levels of government sponsored these trips as well, the government underwriting railroad companies using public funds.<sup>40</sup>

Reports provide various estimates of the number of children riding these trains. One conservative report estimated that 106,246 children were placed.<sup>41</sup> The most consistent estimates suggest that between 150,000 to 200,000 children were placed in 48 states, the District of Columbia and Indian Territory locations.<sup>42</sup> Various factors give rise to the differences in estimation: institutional records were not always well maintained; some children were counted multiple times; and records have been lost or destroyed.<sup>43</sup>

For purposes of placing the children, the charities could be granted guardianship in a variety of ways. In many cases, destitute parents would temporarily surrender child care responsibilities to a charity until the parents could sufficiently improve their financial circumstances to reassume child care responsibilities. A document transferring guardianship to the charity would be signed by at least one parent, typically transferring guardianship for a specified number of years. Guardianship would vest in the charity only upon expiration of the term when the child would

be considered abandoned due to the parent's failure to claim the child.<sup>44</sup> A charity could also be given guardianship over a child by order of a magistrate, an officer of the court or an overseer of the poor. This was the general practice when police or public officials found a vagrant or abandoned child on the streets.<sup>45</sup> A public institution could also transfer guardianship to a private charity if the public charity was overcrowded or if the private charity was determined to be better able to place out children for indenture or adoption.<sup>46</sup> In some instances, state laws granted charities guardianship over charges committed to their care.<sup>47</sup> In rare instances charities could petition for guardianship where the charity or its agent found an abandoned child.<sup>48</sup> Children with no surviving parent had the authority to agree to a charity guardianship.<sup>49</sup>

Charities generally asked the receiving family to sign an agreement accepting the child into that family to be cared for as a member of the family.<sup>50</sup> These agreements contained different provisions depending on the child's age.<sup>51</sup> Some organizations required formal indenture agreements for placed children and transferred guardianship as part of the indenture process, sometimes designating a trial period before transferring guardianship to the receiving family.<sup>52</sup> A successful trial period would conclude

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with a transfer of guardianship while a failed trial period would terminate the agreement.<sup>53</sup>

Children not already preplaced with a family or business were placed on trains traveling on a predetermined route. Placement committees composed of prominent members of towns along the orphan train route were formed to help place transported children. Advertising space, for instance in newspapers, was purchased to advertise the children's arrival, urging prospective adopters to contact committee members or to simply be present in town when the orphan train was scheduled to arrive.<sup>54</sup> Committees arranged for the children's lodging and meals while overseeing placement applications. The committee frequently requested community applications in advance of the train's arrival and were responsible for investigating those seeking a child. Agents either accompanied children on the train or met them upon arrival, and were to investigate placements before releasing the child. Agents were also expected to work with local committees in making periodic follow-up visits, typically a year or half-a-year after the initial placement.

Children were constructively split into two groups at every stop of the train along its route: children who were selected for adoption and children that were not. Selected children whose placement was approved by the local committee would go home with their new family. Children who were not selected would re-board the train and go to the next stop, where the process would be repeated. In this manner, siblings who were already taken from their parents would frequently be separated for placement in different geographic locations. Sometimes these children were reunited, but in many cases they never saw each other again.<sup>55</sup>

Children pre-placed for adoption were also placed on orphan trains and delivered to the adopters who sent requests to the charities. These requests usually included detailed requirements specifying the child's age and physical characteristics. If a child matching the description was found, a "receipt" for the child would be sent to the requesting family stating where and when the child would arrive by train. The family would present the notice of arrival receipt to the agent accompanying the child and if the numbers matched, they would take the child home.<sup>56</sup>

During its 75 year existence, the orphan train movement generated both supporters and critics. Criticisms of the orphan train movement focused on concerns that initial placements were made hastily, without proper investigation, and that there was insufficient follow-up on placements.<sup>57</sup> Charities were also criticized for not keeping track of children placed while under their care. Some placement locations charged that orphan trains were dumping undesirable children from the East on Western communities.<sup>58</sup> In 1874, the National Prison Reform Congress charged that these practices resulted in increased correctional expenses in the West.<sup>59</sup> Catholic clergy maintained that some charities were deliberately placing Catholic children

in Protestant homes to change their religious practices. Similar charges were made concerning the placement of Jewish children.<sup>60</sup> Another concern of critics was that not all orphan train children were true orphans, but were made into orphans by forced removal from their biological families to be placed out in other states.<sup>61</sup> Some claimed this was a deliberate pattern intended to break up immigrant Catholic families.<sup>62</sup> Some abolitionists opposed placements of children with Western families, viewing indentureship as a form of slavery.<sup>63</sup>

Orphan trains were the target of law suits, generally filed by parents seeking to reclaim their children.<sup>64</sup> Suits were occasionally filed by a receiving parent or family member claiming to have lost money or been harmed as the result of the placement. A more complicated lawsuit arose from a 1904 Arizona Territory orphan train placement in which the New York Foundling Hospital sent 40 Caucasian children between the ages of 18 months and 5 years to be indentured to Catholic families in an Arizona Territory parish. The families approved by the local priest for placement were identified in the subsequent litigation as "Mexican Indian."<sup>65</sup>

Nuns escorting these children were unaware of the racial tension between local Anglo and Mexican groups, and placed Caucasian children with Mexican Indian families. A group of white men, described as "just short of a lynch mob," forcibly took the children from the Mexican Indian homes and placed most of them with Anglo families. Some of the children were returned to the Foundling Hospital, but 19 remained with the Anglo Arizona Territory families. The Foundling Hospital filed a writ of habeas corpus seeking the return of these children. The Arizona Supreme Court held that the best interests of the children required that they remain in their new Arizona homes.<sup>66</sup> On appeal, the U.S. Supreme Court found that a writ of habeas corpus seeking the return of a child constituted an improper use of the writ. Habeas corpus writs should be used "solely in cases of arrest and forcible imprisonment under color or claim of warrant of law," and should

not be used to obtain or transfer custody of children.<sup>67</sup> These events were well publicized at the time with newspaper stories titled "Babies Sold Like Sheep," telling readers that the New York Foundling Hospital "has for years been shipping children in car-loads all over the country, and they are given away and sold like cattle."<sup>68</sup>

Charities attempted to guarantee successful orphan train placements by agreeing to remove children from failed placements and, where necessary, trans-

port the child back to the charity's Eastern office at the charity's expense.<sup>69</sup> Many children placed out west had survived on the streets of New York, Boston or other large eastern cities and generally were not the passive, obedient, respectful children that some families expected; this prompted placement changes and returns to the East.<sup>70</sup> Older boys wanted to be paid for their labor, sometimes asking for additional pay or leaving a placement to find a higher paying placement. It is estimated that young men

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## THE END OF THE ORPHAN TRAINS

initiated 80% of the placement changes that occurred as part of the movement.<sup>71</sup> As one young man wrote, “[a] boy could easily find work and set his own wages as a farm hand around here.”<sup>72</sup> These issues added to the perception that New York juvenile delinquents were being imported into Western communities.<sup>73</sup>

Efforts to refute or substantiate these criticisms led to several reviews of orphan train procedures and placement practices. Reviews were conducted by the criticized charities internally and also by independent organizations. Internal charity reviews defined failed placements as those where children were subsequently placed in prisons or almshouses. One charity maintained that a review of its 1858 placements of children under 15 indicated a 2% failure rate with a 4% failure rate for placements of children under 18.<sup>74</sup> An 1874 charity self-review found that only five children (four boys, one girl) out of 6,000 Indiana placements were in state reformatories.<sup>75</sup> Another charity found that of 45 children who were placed and identified in their records, 11 children (24.4%) were not found, while one of the remaining 34 children had committed a crime and fled the state.<sup>76</sup>

The Minnesota State Board of Corrections and Charities reviewed Minnesota orphan train placements between 1880 and 1883. The Board found that while children were placed hastily and without proper investigation into their placements, only a few children were “depraved”<sup>77</sup> or abused. The review criticized local committee members who were swayed by pressure from wealthy and important individuals in their community. The Board also pointed out that older children were frequently placed with farmers who expected to profit from their labor. The Board recommended that paid agents replace or supplement local committees in investigating and reviewing all applications and placements.<sup>78</sup>

An independent study from 1900 comparing orphan train placements with placements made by a public state charity within the same state revealed additional insight into the orphan train system. The study found that between 1888 and 1897 the state charity made fewer placements than the orphan train movement, but used similar strategies and procedures. Both placement groups relied on local advisory boards composed of prominent community members and Protestant clergy. Both placement groups required regular reports from foster parents, local advisory board members and local agents. In all cases, these reports were frequently late or missing entirely. State charities, the study concluded, were no more successful than orphan train charities in placing children.

There were no real differences between the placement practices and placement results of orphan train charities and an in-state charity. This highlights the frequently overlooked reality of the orphan train movement. Trains allowed large numbers of children to be transported farther than would other means available at the time. Using trains as a placement tool has been characterized and perhaps romanticized as the “orphan train movement.” This overlooks the fact that orphan train transport was just one child placement strategy among many used in the period. A comparison between state charity and orphan train placement illustrates the common shortcoming of both systems: the placement of older children was more difficult and generally for shorter duration than the placement of younger children. Child placement success, then, did not vary according to the vehicle used to accomplish the placement.<sup>79</sup>

Numerous factors came together to end the orphan train movement in 1929.<sup>80</sup> One factor was that railroad expansion in the United States was complete and most railroads ended subsidized fares provided to charities moving children.<sup>81</sup> Another critical and underlying factor was that the need for labor which drove the initial success of orphan train placements in the West was no longer as great. The trains had relocated children to rural areas where their labor was needed on the frontier. Movement of children to the Midwest and West paralleled settlement patterns. Laws like the Homestead Act of 1862 encouraged the migration of settlers, offering 160 acres to any settler who would farm and build a shelter upon received land. Thousands of settlers subsequently moved west to claim their land.<sup>82</sup> Railroads received government land, which was sold to finance further construction of railroads needed to connect the country. These settlers needed laborers to work their homesteads, build houses and farm their land purchases.<sup>83</sup> Orphan train children provided this labor. As the West was settled, the labor demand declined. In 1893, Frederick Jackson Turner presented his thesis that the American frontier had ended and the West had become civilized.<sup>84</sup> The orphan train children were no longer needed to settle the West.

Another factor that contributed to the end of the orphan train movement was the backlash from the Western states. They reacted to their role as “a dumping ground for dependents from other states”<sup>85</sup> by passing legislation limiting or prohibiting placement of out-of-state children. Many of these states had become urbanized and were facing their own child care and child placement issues. Cities such as Chicago and St. Louis began to experience the same problems in caring for neglected and destitute children that New York, Boston and Philadelphia had experienced in the mid-1800s.<sup>86</sup> These cities began to seek ways to care for their own orphan populations. In 1895, Michigan passed a statute prohibiting out-of-state children from local placement without payment of a bond guaranteeing that children placed in Michigan would not become a public charge in the State.<sup>87</sup> Similar laws were passed by Indiana, Illinois, Kansas, Minnesota, Missouri and Nebraska. Negotiated agreements between one or more New York charities and several western states allowed the continued placement of children in these states. Such agreements included large bonds as security for placed children. In 1929, however, these agreements expired and were not renewed as charities changed their child care support strategies.<sup>88</sup>

Lastly, the need for the orphan train movement decreased as legislation was passed providing in-home family support. Charities began developing programs to support destitute and needy families limiting the need for intervention to place out children.<sup>89</sup> State and local governments funded foster care for orphans while compulsory education and anti-child labor statutes were also being passed.<sup>90</sup> Social work had become a profession and social workers began to focus on keeping families together.<sup>91</sup> Hull House and other similar programs were established in urban areas to provide in-home assistance for families and children.<sup>92</sup> In 1909, Theodore Roosevelt called the first White House Conference on Children, which directed state and federal bodies to implement programs designed to aid destitute children and their families.<sup>93</sup> The Federal Children’s Bureau was established in 1912 with Julia Lathrop of Hull House as its first chief.<sup>94</sup> These 20<sup>th</sup> century laws and initiatives focused on keeping families

together first and paths such as foster care second. While a few states were continuing to allow indentured servitude, the national trend was moving away from child labor.<sup>95</sup> Orphanages and even almshouses were still used to provide care when needed, but family care and foster care were becoming the accepted preference.<sup>96</sup> Urbanization of the western states together with the growth of other programs, and strategies to support these needy children eliminated the need to use railroads to move children to the west. In 1929 the orphan trains stopped running.

## PART II—THE LEGAL IMPACT OF THE ORPHAN TRAIN MOVEMENT

The orphan train movement has been described as the driving force for changes to American adoption law, the creation of child labor laws, and reforming child welfare and foster care practices.<sup>97</sup> Beginning in 1854 and ending in 1929, the orphan train movement was but one aspect of these evolving legal and societal changes. A careful review of legal history indicates that it was not the driving force for these changes.

### ADOPTION LAW

The orphan train movement has been credited with establishing American adoption laws.<sup>98</sup> One author maintains that the increasing number of farmers who wanted to legalize the placement of orphan train children in their families resulted in states enacting adoption laws.<sup>99</sup> This proposition is not supported by the timeline of enacted state adoption laws. In 1846, Mississippi passed a law that authenticated and made a public record of private adoption agreements.<sup>100</sup> Texas passed a similar statute in 1850.<sup>101</sup> Massachusetts enacted the first general adoption law in 1851.<sup>102</sup> The Massachusetts statute mirrors modern adoption statutes in having a number of requirements such as written consent from the natural parents or guardian and the child's consent where the child was 14 years of age or older. In 1853, Pennsylvania followed suit.<sup>103</sup> All of these statutes were enacted before 1854, the date credited as the beginning of the orphan train movement. Given the dates of these adoption laws, the orphan train movement cannot be wholly credited with the establishment of American adoption law. A more likely cause was an effort to reduce requests for private legislation to formalize adoptions. Other states, recognizing adoption statutes as a way to reduce their own private legislative burdens, began to pass adoption statutes similar to those of Mississippi, Texas, Massachusetts and Pennsylvania.

No legislative history has been located indicating the role of orphan trains in the passage of state adoption laws. In fact, one author maintains that adoption laws were passed for the purpose of "securing to adopted children a proper share in the estate of adopting parents who should die intestate."<sup>104</sup> Even without orphan trains, it is reasonable to conclude that the pre-1854 trend in enactment of adoption laws would have led most states to promulgate similar laws by the early 20<sup>th</sup> century. There is no substantiation for the proposition that the influx of orphan train children resulted in greater urgency for some states to pass

adoption laws. It does not follow that the orphan train movement was central to the creation of adoption laws across the United States.

By 1925, every state and U.S. territory had some form of adoption law.<sup>105</sup> A guide to American adoption laws prepared in 1925 by the Department of Labor Children's Bureau identified a trend away from adoption by deed to a "procedure in which human values are carefully considered and the supervisory duty of the State is recognized."<sup>106</sup> This study identified Minnesota, North Dakota, Ohio, Oregon and Virginia as having the most modern adoption laws, with provisions focusing on the best interests of the child, and providing for notification and termination of the rights of natural parents.<sup>107</sup> Recognizing the need for clarification in adoption practices, states such as New York and Oregon enacted statutes that specifically addressed complex issues in adoption law like consent from the natural parent or from an institution regarding the adoption. For instance, under a 1923 New York statute, a parent who was unable to care for a child could place that child with an institution or children's aid society, and the institution or society could then place the child for adoption without any further consent from the natural parent.<sup>108</sup> In contrast, the 1920 Oregon statute allowed natural parents to place children with institutions or organizations, but required additional specific consent before a child could be placed for adoption. Courts addressed adoption practices by determining that adoption statutes required strict construction.<sup>109</sup> Courts also struggled with the question of whether adoption laws provided a right of inheritance for adopted children.<sup>110</sup>

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Despite the wave of newly enacted adoption statutes, not all children were formally adopted. Authors tracing adoption law history and the orphan train movement generally overlook the doctrine of equitable adoption. Equitable adoption, a judicial remedy which existed in colonial times and continues to be used today, is a remedy to establish inheritance or other rights for someone who has not been formally adopted. The court in *Johnson v. Johnson*<sup>111</sup> discussed the doctrine as arising from the "'placing out' of homeless and indigent children from urban areas in the East to the western United States."<sup>112</sup> The court recognized that "[m]ost of these placements were memorialized only with an oral agreement made at the train platform and few children were ever formally adopted leaving them in" legal limbo."<sup>113</sup> Drawing on a chain of equitable adoption cases, the court identified the equitable remedy as one grounded in a valid contract to adopt. Such a contract establishes the same rights for a child that would exist if the child is legally adopted, and these rights include both child support and a right to inherit.<sup>114</sup>

During the 75 years of the orphan train movement, adoption laws grew and evolved as part of society's growing recognition of a need to protect and nurture children. The orphan trains served as a placement vehicle for thousands of children who found homes in at least 45 states.<sup>115</sup> Studies indicate that only a small percentage of these children were formally adopted, despite enacted statutes and equitable adoption, and "the great majority of placements seemed to be characterized by a desire for a teenager's labor, even if warm feelings subsequently developed between the parties."<sup>116</sup> The greater percentage of non-adopted children were often placed in a "legal limbo" that was

not recognized until one or both “adopting” parents died, and the child, who was not legally adopted by the deceased, was barred from administering or inheriting the estate.<sup>117</sup> The relatively low percentage of orphan train adoptions together with the greater emphasis on placements to provide farm labor, might indicate that far from fostering American adoption law, the orphan train movement was actually a negative force in the process.

## CHILD WELFARE REFORM

Conflicting views exist regarding the orphan train movement’s role in child welfare reform. Some authors see improvements in child welfare as a reaction to poor orphan train placement practices,<sup>118</sup> while others see child welfare reforms resulting from positive and progressive orphan train practices.<sup>119</sup> Nineteenth and early 20<sup>th</sup> century child welfare organizations engaged in a variety of activities and programs they believed would promote the welfare of children; the orphan train movement was just one of these programs. When considered in the context of other child welfare programs at the time, it becomes clear that the orphan train movement was only a single part of a broad legal and social movement focusing on child welfare and child welfare reform.<sup>120</sup> In this light, it appears that other child welfare programs and laws may have had a more central role than the orphan train movement.

Many other strategies have been used to provide for the welfare of children and these strategies have varied to reflect changing ideas about childhood and what is best for children. In the 18<sup>th</sup> century, almshouses were constructed to care for destitute, ill or mentally deficient children and adults. As early as 1800, child welfare reformers recognized that children should be housed separately from adults and provided with different types of care. One almshouse recommended that children “should be kept as much as possible from the other paupers, habituated to decency, cleanliness, and order, and carefully instructed in reading, writing, and arithmetic. The girls should also be taught to sew and knit.”<sup>121</sup> Private charities were developed to care for children by supplementing the child welfare efforts of almshouses. Gradually, in the 19<sup>th</sup> century, facilities were established to house only children.<sup>122</sup> These residential institutions focused on providing children with discipline, work and education.

Contrary to the proposition that the orphan train movement drove child welfare reforms, various states’ legislative imperatives to address child welfare concerns may have driven the orphan train movement. Even from before the use of orphan trains, the preferred and most common publicly funded child welfare practices involved indentureship, apprenticeship, or placing out.<sup>123</sup> Growing awareness of child welfare issues in these unregulated practices led to legislative action to examine and change their child welfare strategies.

An 1869 Michigan commission examined the state’s child welfare practices and based on their recommendations, the Michigan legislature created a state public school for dependent children and mandated that all public charges be transferred there. All children in this institution were to be placed out with private families as soon as possible.<sup>124</sup> Other states adopted similar laws, requiring the removal of children from almshouses or limiting the time that children could remain in state institutions before being placed with families.<sup>125</sup> These institutions and laws

developed contemporaneously with the orphan train movement and the legislative imperatives to place out institutionalized children may have played a driving role in the use of orphan trains. Increased awareness and concern for child welfare reform led to increased state and federal involvement in child welfare and family placement programs, independent of any implications of the orphan train movement. Governments created state charity boards charged with overseeing all public and private charitable institutions within the state.<sup>126</sup> These state charity boards represented a significant departure from earlier practices in which private charities were incorporated within a state and then left to their own devices with limited or no state oversight. Such state oversight was met with resistance. The New York Society for the Prevention of Cruelty to Children [Society] refused to allow the New York State Board of Charities to inspect their facilities, maintaining that they were not a charity as defined by under New York law. By 1899, state charity boards were established in 30 states.<sup>127</sup>

On the national level, the National Child Labor Committee was created and, together with other child welfare organizations, lobbied for a federal children’s bureau to collect and disseminate information affecting the welfare of children. Legislation introduced in 1905-06 was endorsed by President Theodore Roosevelt, members of the Cabinet and members of both the House and Senate, but failed to reach the floor for a vote.<sup>128</sup> The bill was introduced again in 1908-09 and 1909-10.<sup>129</sup> During this period, the first White House Conference on Children and Youth was held in Washington, D.C. With almost 200 people in attendance, this conference emphasized the harm children incurred from institutionalization.<sup>130</sup> The conference reinforced the importance of family and home life, stating that “[h]ome life is the highest and finest product of civilization. It is the great molding force of mind and Children should not be deprived of it except for urgent and compelling reasons.”<sup>131</sup>

Creation of a federal children’s bureau was a central focus of the conference and President Roosevelt together with conference attendees endorsed the pending legislation. President Roosevelt sent a message to Congress urging favorable action on the Children’s Bureau bill, stating:

There are few things more vital to the welfare of the nation than accurate and dependable knowledge of the best methods of dealing with children, especially with those who are in one way or another handicapped by misfortune; and in the absence of such knowledge each community is left to work out its own problem without being able to learn of and profit by the success or failure of other communities along the same lines of endeavor.<sup>132</sup>

Legislation establishing the Children’s Bureau was passed and signed in 1910-11 and became effective in 1912 under President Taft.<sup>133</sup> The bill emphasized that the Children’s Bureau would investigate and report on issues and furnish information regarding children’s issues from all parts of the country. The Bureau was not to encroach on the rights of the states and would not eliminate the duty of the states to deal with child welfare issues within their jurisdictions. The Bureau would effectuate the federal government’s duty to make information available

to the various states, supporting them as they cared for children within their boundaries.<sup>134</sup>

The national child welfare movement continued as President Wilson hosted a second White House Conference in 1919, declaring the same year as “Children’s Year”. The Conference focused on child welfare standards, beginning as a series of meetings in Washington, D.C. and continuing across eight cities throughout America. Small committees determined minimum standards in the areas of child labor, health care for children and mothers, aid for special needs children, and general child welfare minimum standards. These standards were published by the Children’s Bureau and concluded with a charge to the individual states to review and evaluate state legislation in light of the standards.<sup>135</sup>

As a result of the 1919 White House Conference and the efforts of various child welfare organizations, state regulation of public and private child placement practices gained importance. In his 1919 work, *Child-Placing in Families*, Slingerland observed “[t]here seems to be a strong conviction among experts in social work that the public authorities, representing all the people should not only supervise and standardize all private agencies, but should enter directly into many phases of child-helping work.”<sup>136</sup> Slingerland proposed that this process be accomplished “a step at a time,” beginning with a general child welfare law. Using this approach, “reasonably advanced child welfare laws” could be passed in a number of states suffering from obsolete, inadequate and sometimes contradictory laws regarding child welfare and family placement.<sup>137</sup>

By the early 20<sup>th</sup> century, it was widely accepted that child welfare was best accomplished through family placement of dependent children. Despite contrary views, the concept of family placement for children did not originate with the orphan train movement. Family placement for children was practiced before and during colonial times. Between 1854 and 1929, large scale in-family placement of neglected and dependent children happened to be facilitated by the railroads. As child welfare became a more prominent subject of concern nationwide, state governments assumed responsibility for child welfare within their boundaries, creating and regulating the structures necessary to meet this responsibility, thus ending the orphan train movement.

## FOSTER CARE

While some claim the Children’s Aid Society was the first to offer foster care and that the modern concept of foster care evolved directly from the orphan train program, this view is not supported in the legal and social history.<sup>138</sup> It is important to first recognize the relationship between placing out and foster care. Legally, the term “‘place out’ shall mean to provide for the care of a child in a free home, in a family other than that of a relative within the second degree.”<sup>139</sup> A legal definition for foster care can be found in the *Code of Federal Regulations*, which defines foster care as “. . . 24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and pre-adoptive homes.”<sup>140</sup>

Though placing out and foster care both allow for the placement of a child in another family, the differences are found in payment for the care provided. Placing out usually involved a formal or informal indentureship whereby a child would work for a family in return for care.<sup>141</sup> Foster care generally involves payments to the foster family to provide for the child’s care, eliminating the need for the child’s labor as a form of payment.<sup>142</sup> Orphan train placements were almost always grounded in the assumption that the child would work in return for care, with or without an actual indenture agreement and the institutions did not pay the receiving families for the child care.

Not only were placing out and paid foster care fundamentally different in practice but paid foster care existed in the colonies and so cannot be uniquely attributed to the orphan train movement. Historically, paid foster care was described as “boarding out” and was essentially the equivalent of modern foster care. Infants were boarded out in colonial days at the cost of \$1.50 per week.<sup>143</sup> Boarding out became a more frequent practice in the late 19<sup>th</sup> century as states mandated the removal of children from institutions and their placement in families. Both public and private charities expanded their boarding out practices. One example, the Boston Temporary Home for the Destitute, which for a number of years had used the promise of “light service” to induce families to accept children, began, in the 1880s to make board payments in lieu of labor-service. By the 1890s, payment for board replaced all “light service” placements.<sup>144</sup>

While paid foster care existed independent of the orphan train movement, it also had a great impact on the movement itself. This growing practice of paying families to care for dependent children became a factor in reducing unpaid, labor-based orphan train placements. The system of payment for boarding out or foster care also increased emphasis on both pre-placement and post-placement investigation and supervision. Organizations making on-going placements for the care of children adopted improved policies and procedures for placement supervision.<sup>145</sup> As state governments became more involved in the placement of children within their jurisdictions, state regulations were promulgated to ensure adequate child placement supervision.

## CHILD LABOR

The orphan train movement has been described as a primary factor in child labor reform, but in light of history the orphan train movement seemed to contribute more to the problem of child labor rather than the push for child labor reform. As states adopted stricter regulations regarding child placement, child welfare and foster care, the casual placement and supervision practices of orphan train charities failed to meet regulatory standards thereby impacting the use of child labor which was the driving force of the orphan train movement. In the early 19<sup>th</sup> century with the expansion of the frontier, children were employed in mining, fishing, lumber, agriculture and almost every other industry.<sup>146</sup> Though society’s view of children changed in the mid to late 19<sup>th</sup> century, the driving force for these changes in child labor reform came from factory workers and educators. In 1832, the New England Association of Farmers, Mechanics and Other Workingmen adopted a resolution that “children should not be allowed to labor in the factories from morning till night, without any time for healthy recreation and mental culture” because such

work “endangers their . . . well-being and health.”<sup>147</sup> Massachusetts adopted the first state child labor law in 1836, linking mandatory education to a requirement that children under 15 working in factories must attend at least three months of school a year.<sup>148</sup> In 1876, the Working Men’s Party proposed banning employment of children under the age of 14,<sup>149</sup> and in 1881, the first national convention of the American Federation of Labor (AFL) passed a similar resolution.<sup>150</sup> The National Child Labor Committee was formed in 1904 to address the need for child labor legislation, and by 1909, primarily through their lobbying efforts, 43 states passed some sort of legislation prohibiting employment of children under a certain age.<sup>151</sup> However, state exemptions were numerous and varied significantly between states. Some of the most common exemptions from the prohibition on child labor were made for orphans, children of widowed mothers or disabled parents and for farm and domestic labor.<sup>152</sup> Special permits exempting children from the application of child labor laws were also available.<sup>153</sup> Parents and farmers complained that child labor was essential to their survival and opposed child labor restrictions.<sup>154</sup> Enforcement of these child labor laws became a significant problem.<sup>155</sup> Individual states complained that variations between state child labor laws created unfair competition resulting from the allowed or disallowed employment of children in various state industries.<sup>156</sup>

These concerns resulted in federal legislation passed in 1916, establishing national labor standards.<sup>157</sup> Declared unconstitutional,<sup>158</sup> legislation was again passed in 1918 and was also declared unconstitutional.<sup>159</sup> This resulted in an organized movement for a constitutional amendment giving the federal government authority to regulate child labor. While the constitutional amendment passed, it failed to be ratified by the necessary number of states.<sup>160</sup> Federal legislation regulating child labor was finally enacted in 1938 when the Fair Labor Standards Act was expanded to include a prohibition on the employment of children under 16 in industries whose products were shipped in interstate commerce.<sup>161</sup>

The orphan train movement found its utility in providing child labor and successful placement of children hinged on the need for the child labor in the Midwest and West. The founder of the Children’s Aid Society of New York commented on the success of orphan train placement: “[it] helps to solve, in the only feasible mode, the great economic problem of poverty in our cities, for it sends future laborers where they are in demand, and relieves the over-crowded market in the city.”<sup>162</sup> Orphan train placements, especially for children 12 and older, were made in response to the western need for farm labor. It is important to note that opposition to child labor laws came from the agricultural community dependent on child labor as was supplied by the orphan trains. Children were employed on their own family farms and hired out as extra hands on neighboring farms. In 1910, when major efforts were underway to limit child labor, 72% of children ages 10 to 15 were employed in agriculture.<sup>163</sup>

This agricultural opposition to child labor legislation is reflected in existing labor laws. American labor law includes significant exemptions allowing the employment of children in agriculture. The Fair Labor Standards Act’s minimum age requirements do not apply to minors employed by their parents or guardian, or to children working on a farm owned or operated by a parent or guardian. Children ages 10 and 11 may harvest short season crops outside of school hours, and children under 12 may work in nonhazardous farm jobs with parental consent or

if their parents are also employed on that farm.<sup>164</sup> The Human Rights Watch charges that agricultural work is the “most hazardous and grueling area of employment open to children in the United States.”<sup>165</sup> The 19<sup>th</sup> and 20<sup>th</sup> century child labor movement focused on protecting child workers, but was unable to secure protections for children working on farms and in agriculture, the very locations where orphan train children were being placed. Far from being a factor in securing protections against child labor, the orphan train movement reinforced the use of children as farm laborers, a practice that 21<sup>st</sup> century laws protecting children has failed to prevent.

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*The Fair Labor Standards Act’s minimum age requirements do not apply to minors employed by their parents or guardian, or to children working on a farm owned or operated by a parent or guardian.*

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forced the use of children as farm laborers, a practice that 21<sup>st</sup> century laws protecting children has failed to prevent.

## CONCLUSION

Orphan trains and the orphan train movement have become a romanticized legend. Children’s books have been written extolling the successes of orphan train placements. Documentaries have been filmed capturing orphan train nostalgia. Modern depictions show happy children in new clothes hanging out of train windows, a stark contrast to the image of “street rats” adorned in rags that were also taken at this time. A picture of what appears to be hundreds of children, all waiting to be adopted, standing on and around a railroad train catches the modern imagination.

The reality of the orphan train movement is very different. Orphan trains ran from 1854 through 1929, a period in American history of the greatest changes in views regarding childhood and laws affecting children. It is understandable that the orphan train movement would be linked to these changing views and laws, and that 21<sup>st</sup> century authors would see the emigration of 150,000 to 200,000 children, accompanied by dramatic photographs and other memorabilia, as the driving force in these changing views and laws. But a review of era generated records does not support this fantasy that the orphan train movement was the positive driving force in modern adoption law, child welfare laws, foster care practices and child labor laws.

Historical records, relevant legislation and case law provide an authoritative foundation in assessing the nature and extent of the orphan train movement’s role in these changes. The orphan train movement and orphan train placements were not the driving force for modern adoption laws, foster care practices and child welfare laws. Instead, many of these reforms came about to specifically oppose orphan train practices.

## ENDNOTES

\*Professor and Law Library Director, Stetson University College of Law, Gulfport, Florida. This project was generously funded by a grant for faculty research from Stetson University College of Law.

<sup>1</sup> The Children's Aid Society, *The Orphan Trains*, available at <http://www.childrensaidsociety.org/about/history/orphantrain> [hereinafter *Orphan Trains*].

<sup>2</sup> Mark E. Courtney, *Stephen O'Connor's Orphan Trains: The Story of Charles Loring Brace and the Children He Saved and Failed*, 79 SOC. SERV. REV. 742 (2005) (book review).

<sup>3</sup> Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 453-54, 456 (1971-72).

<sup>4</sup> HOMER FOLKS, *THE CARE OF DESTITUTE, NEGLECTED, AND DELINQUENT CHILDREN 3-4* (The MacMillan Company) (1902).

<sup>5</sup> 1 ARTHUR W. CALHOUN, *A SOCIAL HISTORY OF THE AMERICAN FAMILY: FROM COLONIAL TIMES TO PRESENT 306-307* (The Arthur H. Clark Company) (1917).

<sup>6</sup> FOLKS, *supra* note 4, at 3.

<sup>7</sup> *Id.* at 3-4; *see also id.* at 39 (The Pennsylvania poor relief law of June 13, 1836, P.L. 539 provided that poor children whose parents were dead could be bound out as apprentices by overseers of the poor, with the approbation and consent of two magistrates. Elaborate statutory provisions existed in many states regulating the practice of indenturing poor children and orphans, and required that indentured children be taught to "read, write and cipher.").

<sup>8</sup> *Id.* at 4-5 (Philadelphia, the largest American city with a population of 70,287, and New York with a population of 60,489 both constructed larger almshouses in the 18th century to deal with their growing populations of the poor and destitute).

<sup>9</sup> *Id.* at 37.

<sup>10</sup> *Id.* at 47.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 6 (showing that the 1823 city records indicate that 129 infants were placed out "at nurse" at a cost of \$1 per week paid by New York City).

<sup>13</sup> *Id.* at 73.

<sup>14</sup> *Id.* at 45.

<sup>15</sup> *Id.* at 46 (The Board of Directors specifically stated that a requirement of this charity is that "as soon as the age and acquirements of orphans shall, in the opinion of the board of direction, render them capable of earning their living, they must be bound out to some reputable persons or families for such object and in such manner as the board shall approve.").

<sup>16</sup> *Id.* at 49.

<sup>17</sup> *Id.* at 52-55 (Folks includes a chart grouping the number of private charities founded into date ranges. It is interesting to note that between 1801 and 1811 3 private charities were founded, and between 1831 and 1841 26 were founded with 30 founded between 1841 and 1851).

<sup>18</sup> *Id.* at 64.

<sup>19</sup> Presser, *supra* note 3, at 461-464.

<sup>20</sup> 1851 Mass. Acts, ch. 324.

<sup>21</sup> Presser, *supra* note 4, at 501-507.

<sup>22</sup> Kristine E. Nelson, *The Child Welfare Response to Youth Violence and Homelessness in the Nineteenth Century*, 74 CHILD WELFARE 56, 60 (1995).

<sup>23</sup> *Id.*

<sup>24</sup> George W. Matsell, *Semi-Annual Report of the Chief of Police from May 1 to October 31, 1849* (1850), available at <http://historymatters.gmu.edu/d/6526/>.

<sup>25</sup> *Id.*

<sup>26</sup> CHILDREN'S AID SOCIETY, *FIRST ANNUAL REPORT 4* (C.W. Benedict) (1854).

<sup>27</sup> Timothy J. Gilfoyle, *Street-Rats and Gutter-Snipes: Child Pickpockets and Street Culture in New York City, 1850-1900*, 37 J. SOC. HIST. 853, 854 (2004); *Orphan Trains*, *supra* note 1.

<sup>28</sup> FOLKS, *supra* note 4, at 55.

<sup>29</sup> *Id.* at 64.

<sup>30</sup> Tim Hacsí, *From Indenture to Family Foster Care: A Brief History of Child Placing*, 74 CHILD WELFARE 155, 165-167, Jan. 1995.

<sup>31</sup> FOLKS, *supra* note 4, at 22.

<sup>32</sup> EDWARD WADE, *THE CODE RELATING TO THE POOR IN THE STATE OF NEW YORK 45* (Weed, Parsons, and Co.) (1870).

<sup>33</sup> MARILYN IRVIN HOLT, *THE ORPHAN TRAINS: PLACING OUT IN AMERICA 84* (Univ. of Nebraska Press) (1992).

<sup>34</sup> STEPHEN O'CONNOR, *ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED 106-107* (Univ. of Chicago Press)

(2001) (In 1854 when the Children's Aid Society of New York sent 46 children to Dowagiac, Michigan for home placement the term orphan train began to be used to describe this type of Western placement).

<sup>35</sup> FOLKS, *supra* note 5, at 64.

<sup>36</sup> HOLT, *supra* note 33, at 84.

<sup>37</sup> Susan Whitelaw Downs & Michael W. Sherraden, *The Orphan Asylum in the Nineteenth Century*, 57 SOC. SCI. REV. 272, 282 (1983).

<sup>38</sup> HOLT, *supra* note 33, at 36-37 (quoting Mary Ellen Johnson, *Orphan Train Movement A History of the Orphan Trains Era in American History*, available at <http://www.orphantrainriders.com/otm11.html>).

<sup>39</sup> NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER 198* (Pantheon Books) (2001).

<sup>40</sup> *Id.* at 199.

<sup>41</sup> CHILDREN'S AID SOCIETY, *ANNUAL REPORT 16* (Children's Aid Society) (1910) (listing 47 states, the District of Columbia and Indian Territory as locations receiving a total of 106,245 children).

<sup>42</sup> Connie DiPasquale, *The History of the Orphan Trains*, KAN. COLLECTION ARTICLES, ¶ 1 (2007), available at [http://www.kancoll.org/articles/orphans/or\\_hist.htm](http://www.kancoll.org/articles/orphans/or_hist.htm) (Most estimates begin in 1854 even though orphan trains carried children west before this date. There is consensus that the last orphan train ran in 1929, and the 75 year period between 1854 and 1929 is generally considered the time frame for the movement. In 1919, 10 years prior to the end of the movement, the New York Foundling Hospital stated that it alone had indentured 24,658 children in free homes, and had placed 3,200 children in legal adoptions. At least 11 other public and private organizations placed children through the orphan trains, but reliable numbers for these placements are not available); *see generally* Jim McCarty, *They Rode the Orphan Trains*, RURAL MO., July 1997.

<sup>43</sup> *Orphan Train Genealogy*, ANCESTRY MAG., Jan. - Feb. 1995, available at <http://www.ancestry.com/learn/library/article.aspx?article=701>; *see also* Orphan Train: an IAGen Web Special Project, available at <http://iaigenweb.org/iaorphans/>.

<sup>44</sup> W. H. SLINGERLAND, *CHILD PLACING IN FAMILIES: A MANUAL FOR STUDENTS AND SOCIAL WORKERS* (Russell Sage Found.) (1919); *see also* H. A. Millis, *The Law Relating to the Relief and Care of Dependents*, 3 AM. J. SOC. 777-794 (1898).

<sup>45</sup> SLINGERLAND, *supra* note 44, at 80.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; Millis, *supra* note 44, at 777-794.

<sup>49</sup> O'CONNOR, *supra* note 34, at 304; CHILDREN'S AID SOCIETY, *ANNUAL REPORT 43* (Children's Aid Society) (1864) (Children's Aid Society of New York sought children who were deserted or homeless or "in such a state of poverty as to be improved by being taken to good homes in the country." These children were identified by volunteer or paid visitors who roamed the streets of New York and other large eastern cities looking for neglected, vagrant and destitute children. Inducements were not to be used to obtain agreement to a Western placement. Instead visitors were to explain to the children and their parents the advantages of going West, and obtain a written or witnessed verbal agreement to such placement from the child's parent or parents, or from a truly orphaned child).

<sup>50</sup> HOLT, *supra* note 33, at 64; O'CONNOR, *supra* note 34, at 150.

<sup>51</sup> *Asylum Children!*, Advertisement from the N.Y. Juvenile Asylum (Sept. 8, 1888) (on file with author)

<sup>52</sup> ANNETTE R. FRY, *THE ORPHAN TRAINS 89-92* (Macmillan 1994).

<sup>53</sup> *Id.*

<sup>54</sup> *Wanted Homes for Children*, Advertisement from the Troy Free Press (Feb. 11, 1910) (on file with author) ("A company of homeless children from the East will arrive at Troy, MO., on Friday, Feb. 25<sup>th</sup> 1910. These children are of various ages of both sexes having been thrown friendless upon the world. They come under the auspices of the Children's Aid Society of New York. They are well disciplined, having come from the various orphanages. The citizens of this community are asked to assist the agent in finding good homes for them. Persons taking these children must be recommended by the local committee. They must treat the children in every way as a member of the family, sending them to school, church, Sabbath school and properly clothe them until they are 17 years old.").

<sup>55</sup> National Orphan Train Complex, Inc., available at <http://www.orphantrain-depot.com/index.html> (Historical and genealogy organizations are collecting information directed at helping orphan train riders and their descendant identify

## ENDNOTES CONTINUED

parents, siblings and other relatives. Orphan train reunions are being held and a National Orphan Train Complex including a Museum and Research Center has been established in Kansas).

<sup>56</sup> Orphan Trains of Kansas, *Indenture/Adoption Forms*, available at [http://www.kancoll.org/articles/orphans/or\\_forms.htm](http://www.kancoll.org/articles/orphans/or_forms.htm) (“We take pleasure in notifying you that the little girl which you so kindly ordered will arrive at Anytown, Rock Island Train on Thursday January 30 on train due to arrive at 5:15 A.M. and ask that you kindly be at Railway Station to receive child, 30 minutes before train is due, and avoid any possibility of missing connection, as train will not wait should you not be there. The name of child, date of birth, and name and address of party to whom child is assigned will be found sewn in the Coat of boy and in the hem of Dress of girl. This receipt must be signed in ink by both husband and wife, and is to be given up in exchange for child who will have corresponding number. Yours very truly, SISTERS OF CHARITY.”).

<sup>57</sup> Hasci, *supra* note 30, at 168-169.

<sup>58</sup> Nelson, *supra* note 22, at 107; *Five Points Mission, New York, Arrest of Rev. W.C. Van Meter*, CLEV. MORNING LEADER, April 2, 1857, at 2 (Rev. W. C. VanMeter, an agent who sought Western placements for orphan train children was arrested in Illinois on the charge of bringing paupers from New York State to Illinois).

<sup>59</sup> O’CONNOR, *supra* note 34, at 239.

<sup>60</sup> *Id.* at 174; Hasci, *supra* note 30, at 169; Michelle Kahan, “Put Up” on *Plat-forms: A History of Twentieth Century Adoption Policy in the United States*, 23 J. SOC. WELFARE 51, 59 (2006).

<sup>61</sup> Clay Gish, *Rescuing the “Waifs and Strays” of the City: The Western Emigration Program of the Children’s Aid Society*, J. SOC. HIST. 122, 124-125 (1999) (Statistics maintained by the various charities support this contention. One charity indicated that 65% of all children placed out between February 1857 and February 1858 had at least one living parent at that time); CHILDREN’S AID SOCIETY, SIXTH ANNUAL REPORT 11 (Children’s Aid Society) (1859) (A random sample of Children’s Aid Society placements made between 1854 and 1890 indicated that 72.6% of all children placed had at least one living parent. These records also indicate that adult relatives frequently accompanied children on the orphan trains. According to this review of records “with the exception of the Civil War years, parents accompanied by their children consistently made up over half of those in the emigration program.”).

<sup>62</sup> Gish, *supra* note 62; Hasci, *supra* note 35.

<sup>63</sup> Milwaukee Public Library, *Now @ MPL...Reference Archives*, December 21, 2007, available at <http://blog.mpl.org/nowatmpl/reference/> (“Interestingly enough, the controversy came from both sides of the abolitionist movement. Many abolitionists believed that the children were ending up being slaves to their host families, while those who advocated slavery saw it as an outgrowth of the abolitionist movement. After all, who would need slaves when these children provided labor that made slaves unnecessary?”).

<sup>64</sup> *In Re Knowack*, 53 N.E. 676 (N.Y. 1899).

<sup>65</sup> *N.Y. Foundling Hosp. v. Gatti*, 203 U.S. 429, 435 (1906).

<sup>66</sup> *N.Y. Foundling Hosp. v. Gatti*, 79 P. 231 (Ariz. 1905).

<sup>67</sup> *Gatti*, 203 U.S. at 438 (citing *In Re Barry*, 42 F. 113 (C.C.S.D.N.Y. 1844)).

<sup>68</sup> HOLT, *supra* note 33, at 137.

<sup>69</sup> Amanda C. Pustilnik, *Private Ordering, Legal Ordering, and the Getting of Children: A Counter History of Adoption Law*, 20 YALE L. & POL’Y REV. 263 (2002).

<sup>70</sup> Gish, *supra* note 61, at 132.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (quoting documents in the Children’s Aid Society files).

<sup>73</sup> *Id.*

<sup>74</sup> CHILDREN’S AID SOCIETY, SIXTH ANNUAL REPORT *supra* note 62, at 10.

<sup>75</sup> Kristine E. Nelson, *Child Placing in the Nineteenth Century: New York and Iowa*, 59 SOC. SERVICE REV. 107, 109 (1985).

<sup>76</sup> *Id.*

<sup>77</sup> Hastings H. Hart, *Placing Out Children in the West*, (1884); NAT’L. CONF. OF CHARITIES & CORRECTION, 143-150 (1884) (Report of Conference Proceedings).

<sup>78</sup> *Id.* at 79; Nelson, *supra* note 22, at 110.

<sup>79</sup> Nelson, *supra* note 22, at 118.

<sup>80</sup> O’CONNOR, *supra* note 34, at 309 (explaining how the last orphan train left New York City for Sulphur Springs, Texas on May 31, 1929, marking the end of the orphan train movement).

<sup>81</sup> FRY, *supra* note 52, at 72.

<sup>82</sup> Trina Williams, *The Homestead Act: A Major Asset-Building Policy in American History* 3 (Center for Soc. Dev. George Warren Brown Sch. of Soc. Work, Working Paper No. 00-9, 2000) (In the 76 years following passage of the 1862 Homestead Act, 3 million people applied for homesteads and almost 1.5 million households received title to 246 million acres of land. The Homestead Act: A Major Asset-Building Policy in American History).

<sup>83</sup> *Id.* at 6 (Almost 225 million acres of land were granted for the support of railroads. This land was sold to provide revenue for the development of western railroads).

<sup>84</sup> FREDERICK JACKSON TURNER, *THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY* (Henry Holt and Co. of N.Y.) (1921) (Turner’s “frontier thesis” established the foundation for study of the American West, and has been viewed by some scholars as one of the most influential concepts in understanding American history).

<sup>85</sup> HOLT, *supra* note 33, at 149.

<sup>86</sup> BERNSTEIN, *supra* note 39, at 199.

<sup>87</sup> U.S. DEP’T. LAB., BUREAU PUB. NO. 139: LAWS RELATING TO INTERSTATE PLACEMENT OF DEPENDANT CHILDREN 1 (1924); 1895 Mich. Pub. Acts. 33, 120.

<sup>88</sup> O’CONNOR, *supra* note 34, at 308.

<sup>89</sup> Marian E. Saksena, *Out-of-Home Placements for Abused, Neglected, and Dependent Children in Minnesota: A Historical Perspective*, 32 WM. MITCHELL L. REV. 1046-1047 (2006).

<sup>90</sup> Donald Dale Jackson., *It Took Trains to put Street Kids on the Right Track Out of the Slums*, 17 SMITHSONIAN 94, 99-100 (Aug. 1986).

<sup>91</sup> Saksena, *supra* note 89, at 1046.

<sup>92</sup> SETTLEMENT HOUSES, *THE READER’S COMPANION TO AMERICAN HISTORY* 983-984 (Houghton Mifflin 1991); Encyclopedia of Chicago, *Settlement Houses* (2005), available at <http://www.encyclopedia.chicagohistory.org/pages/1135.html>.

<sup>93</sup> PROCEEDINGS OF THE CONFERENCE ON THE CARE OF DEPENDENT CHILDREN 6-7 (Wash. Gov’t Printing Office) (1909).

<sup>94</sup> Children’s Bureau Act, ch. 73, § 1, 37 Stat. 79 (1912).

<sup>95</sup> HOLT, *supra* note 33, at 178-179 (“in 1927 12 states, Wisconsin, Illinois, Michigan, Indiana, Pennsylvania, Arkansas, Maryland, Rhode Island, Virginia, West Virginia, Nebraska and Kansas still allowed indenture of institutional charges and children who had been turned over to the county poor farm authorities.”).

<sup>96</sup> Hasci, *supra* note 30, at 163-164 (“Between 1900 and 1930, the gradual professionalization of social work went hand in hand with increased government involvement in child welfare to cause a shift toward the boarding-out system and away from institutional care of children.”).

<sup>97</sup> *Orphan Train*, *supra* note 1.

<sup>98</sup> *Id.* (In the American colonial period through the 19th century, the term “adoption” was frequently used to describe the placement of a dependent child in a blood relative’s family. This informal arrangement might be legalized through a private law or court action, but more likely did not involve any legal proceedings); Presser, *supra* note 3, at 459.

<sup>99</sup> E. WAYNE CARP, *FAMILY MATTERS SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* 11 (Harvard Univ. Press) (1998).

<sup>100</sup> 1846 Miss. Laws page no. 231-232.

<sup>101</sup> Law of January 16. 1850, ch. 39, 1850 Tex. Gen. Laws (repealed 1931).

<sup>102</sup> 1851 Mass. Acts, ch. 324.

<sup>103</sup> Kahan, *supra* note 60, at 54.

<sup>104</sup> WILLIAM H. WHITMORE, *THE LAW OF ADOPTION IN THE UNITED STATES* iii-iv (J. Munsell) (1876).

<sup>105</sup> U.S. DEP’T LAB., EMELYN FOSTER PECK, BUREAU PUBLICATION NO. 148: ADOPTION LAWS IN THE UNITED STATES: A SUMMARY OF THE DEVELOPMENT OF ADOPTION LEGISLATION AND SIGNIFICANT FEATURES OF ADOPTION STATUTES, WITH THE TEXT OF SELECTED LAWS, 1 (1925).

<sup>106</sup> *Id.* at 4.

<sup>107</sup> MINN. STAT. § 7151 (1913), amended by 1917 Minn. Laws 335.

<sup>108</sup> 1916 N.Y. LAWS page no. 1220-1221.

<sup>109</sup> Children’s Bureau Act, ch. 73, § 1, 37 Stat. 79 (1912).

<sup>110</sup> See Presser, *supra* note 3, 501-507.

<sup>111</sup> *Johnson v. Johnson*, 617 N.W.2d 97 (N.D. 2000).

<sup>112</sup> *Id.* at 101.

<sup>113</sup> *Id.* at 102.

<sup>115</sup> *Id.* at 103-104.

## ENDNOTES CONTINUED

- <sup>115</sup> CHILDREN'S AID SOCIETY, 1910 ANNUAL REPORT *supra* note 41, at 8.
- <sup>116</sup> Catherine Ross, *Families Without Paradigms: Child Poverty and Out of the Home Placement in Historical Perspective*, 60 OHIO ST. L.J. 1249, 1274 (1999).
- <sup>117</sup> *Id.* at 1261; Presser, *supra* note 3, at 501-507.
- <sup>118</sup> Hacci, *supra* note 30, at 168.
- <sup>119</sup> SLINGERLAND, *supra* note 44, at 35.
- <sup>120</sup> Presser, *supra* note 3, at 472.
- <sup>121</sup> FOLKS, *supra* note 4, at 5 (quoting the Committee Report).
- <sup>122</sup> Jeanne Fogle Cook, Experiences of Orphan Train Riders: Implications for Child Welfare Policy 59-61 (1994) (Ph.D. dissertation, University of South Carolina (UMI ProQuest Digital Dissertation # AAT 9517261) (on file with author)).
- <sup>123</sup> FOLKS, *supra* note 4, at 91, 96-97.
- <sup>124</sup> *Id.* at 74-75.
- <sup>125</sup> *Id.* at 75-80 (New York, Wisconsin, Pennsylvania, Connecticut, Rhode Island, New Hampshire, Indiana and New Jersey passed legislation of this nature).
- <sup>126</sup> E. Munsterberg, *Poor Relief in the United States: View of a German Expert*, 7 AM. J. SOC. 504, 504 (1902).
- <sup>127</sup> Samuel E. Sparling, *State Boards of Control with Special Reference to the Experience of Wisconsin*, 17 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 74-91 (1901).
- <sup>128</sup> DEPARTMENT OF COMMERCE AND LABOR, Children's Bureau Establishment of the Bureau 2 (1912).
- <sup>129</sup> *Id.*
- <sup>130</sup> CHILD WELFARE LEAGUE OF AMERICA, THE HISTORY OF WHITE HOUSE CONFERENCES ON CHILDREN AND YOUTH 8 (2009), available at <http://www.cwla.org/advocacy/whitehouseconfhistory.pdf>.
- <sup>131</sup> *Id.* at Appendix A ("As to the children who for sufficient reasons must be removed from their own homes, or who have no homes, it is desirable that, if normal in mind and body and not requiring special training, they should be cared for in families whenever practicable. The carefully selected foster home is for the normal child the best substitute for the home.").
- <sup>132</sup> *Id.* at Appendix B.
- <sup>133</sup> Children's Bureau Act, ch. 73, § 1 Stat. 79 (1912).
- <sup>134</sup> S. Rep. No. 141,1 (1912).
- <sup>135</sup> U.S. DEP'T OF LABOR CHILDREN'S BUREAU, MINIMUM STANDARDS FOR CHILD WELFARE 15 (Gov't Printing Office) (1919), available at <http://www.mchlibrary.info/history/chbu/20443.PDF> ("The child-welfare legislation of every State requires careful reconsideration at reasonable intervals, in order that necessary revision and coordination may be made and that new provisions may be incorporated in harmony with the best experience of the day. In States where children's laws have not had careful supervision as a whole within recent years, a called-welfare committee or commission should be created for this purpose. Laws enacted by the several States should be in line with national ideals and uniforms as far as desirable, in view of diverse conditions in the several States. Child welfare legislation should be framed by those who are thoroughly familiar with the conditions and needs of children and with administrative difficulties. It should be drafted by a competent lawyer in such form as to accomplish the end desired by child welfare experts and at the same time be consistent with existing laws.").
- <sup>136</sup> SLINGERLAND, *supra* note 44, at 51-52.
- <sup>137</sup> *Id.* at 233.
- <sup>138</sup> Gish, *supra* note 62.
- <sup>139</sup> 1923 N.Y. Laws page no. 1263.
- <sup>140</sup> 45 C.F.R. § 1355.20 (2009).
- <sup>141</sup> Hacci, *supra* note 30, at 170.
- <sup>142</sup> *Id.*
- <sup>143</sup> *Id.*
- <sup>144</sup> P.L. Tyor & J.S. Zainaldin, *Asylum and Society: An Approach to Institutional Change*, 13 J. SOC. HIST. 23, 23-48 (1979).
- <sup>145</sup> Hacci, *supra* note 30, at 168.
- <sup>146</sup> BARRY W. POULSON, ECONOMIC HISTORY OF THE UNITED STATES 200 (Macmillan 1981).
- <sup>147</sup> *Id.*
- <sup>148</sup> 1836 Mass. Acts. page no. 960.
- <sup>149</sup> JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION (Harper N.Y.) (1923).
- <sup>150</sup> *Id.*
- <sup>151</sup> Beverly Stadum, *The Dilemma in Saving Children from Child Labor: Reform and Casework at Odds with Families' Needs*, 74 CHILD WELFARE 33, 34-35 (1995).
- <sup>152</sup> JOSEPHUS NELSON LARNED & DONALD EUGENE SMITH, THE NEW LARNED HISTORY FOR READY REFERENCE, READING, AND RESEARCH 1614 (Nichols Publishing Company) (1922).
- <sup>153</sup> *Id.*
- <sup>154</sup> 65 Cong. Rec. 7198-7199 (1924). Opposition as articulated by Congressman Lanham during the 1924 debate restated in defeat of the Child Labor Constitutional amendment.
- <sup>155</sup> LARNED, *supra* note 152, at 1614.
- <sup>156</sup> Jasper Yeates Brinton, *The Constitutionality of a Federal Child Labor Law*, 62 U. PA. L. REV. & AM. L. REG. 488 (1914).
- <sup>157</sup> Keating-Owen Act, Pub. L. No. 249, 39 Stat. 675 (1966).
- <sup>158</sup> Hammer v. Dagenhart, 247 U.S. 251 (1918).
- <sup>159</sup> The Child Labor Tax Law of 1918 amended by Pomerene Amendment (Feb. 24, 1919, title 12, § 1200 et seq. [Comp. St. Ann. Supp. 1919, §§ 6336 7/8 a to 6336 7/8 h]).
- <sup>160</sup> Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).
- <sup>161</sup> Fair Labor Standards Act, 29 U.S.C. § 201 (1938).
- <sup>162</sup> CHILDREN'S AID SOCIETY, SECOND ANNUAL REPORT 6 (Children's Aid Society) (1855).
- <sup>163</sup> FOREST CHESTER ENSIGN, COMPULSORY SCHOOL ATTENDANCE AND CHILD LABOR: A STUDY OF THE HISTORICAL DEVELOPMENT OF REGULATIONS COMPELLING ATTENDANCE AND LIMITING THE LABOR OF CHILDREN IN A SELECTED GROUP OF STATES (Athens Press) (1921).
- <sup>164</sup> 29 C.F.R. § 575.1 (1978).
- <sup>165</sup> HUMAN RIGHTS WATCH, FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARM WORKERS 2 (2000).