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Ross, Catherine J.

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# Families Without Paradigms: Child Poverty and Out-of-Home Placement in Historical Perspective

CATHERINE J. ROSS\*

*In this Article, Professor Ross argues that no single paradigm of family relationships adequately serves the emotional needs of children who enter the foster care system due to the poverty of their parents. According to Professor Ross, the needs of such children are increasingly at issue because of the likely effect on poor families of interactions between the Personal Responsibility Act (PRA) and the Adoption and Safe Families Act (ASFA). Reliable data is not yet available on children who are moved into foster care as their families lose welfare benefits or on those who are placed in adoptive homes in compliance with ASFA's emphasis on permanency planning.*

*In order to illuminate how these legal changes are likely to affect children, Professor Ross examines the placing-out programs of the late nineteenth century, which sent indigent urban children to live on farms in western states. Placing out, a precursor of the current foster care system, led to a wide variety of treatment; some children were little more than farm laborers, while others became family members. Participants were unclear about what norms governed the child's relationships with both the new family and the family of origin, including biological parents, siblings and other relatives. Although the current law provides a clear taxonomy of family types which did not exist a century ago (i.e., biological, foster, and adoptive families) such categories do not always reflect the complexity of human relationships. Professor Ross argues for a more flexible approach to defining the families created or rearranged by the state, so that these varied families can better serve each child's needs.*

## I. INTRODUCTION

Welfare reform<sup>1</sup> and recent changes in the federal law governing foster care<sup>2</sup> intensify concern about the negative impact of the legal system on poor children. Yet the longstanding interaction between poverty and the care of children outside of their own homes, whether through foster care or adoption, has not received adequate attention.<sup>3</sup> Even before welfare reform and the Adoption and Safe

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<sup>1</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>2</sup> See Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

<sup>3</sup> See Mark E. Courtney, *Welfare Reform and Child Welfare Services*, in CHILD WELFARE IN THE CONTEXT OF WELFARE "REFORM" 1 (Sheila B. Kamerman & Alfred J. Kahn eds., 1997); see also Martha Matthews, *Assessing the Effect of Welfare Reform on Child Welfare*,

Families Act (ASFA) were enacted, contemporary family law was premised on a sharp distinction between adoption and foster care that posed special risks to poor children. All too often, legal decisions have the potential to harm the emotional development of children by separating them from nonabusive biological parents and from siblings. In such cases, in which children are removed from their homes due primarily or solely to poverty, the sharp differentiation between adoption and foster care threatens the flexibility that is needed to make sensitive legal decisions on a host of issues that are vital to children's rights and emotional needs.

This is not, however, merely a reflection of contemporary developments. Public intervention into the family life of poor people has a long, disheartening history.<sup>4</sup> Poor children have long been at risk of being placed in families other than their own, and the state has often been responsible for putting them there. Despite the much touted sanctity of the family, the state has often intruded in such families simply because they were poor, especially if those families did not share cultural values that the agents of the state deemed worthy. The arrangements under which children have lived with families other than their own have included indenture, placing out, and adoption.

In this Article, after briefly describing the bright line between foster care and adoption in contemporary law, I take the stance of the historian to revisit the plight of children under an earlier legal regime in which categories were less clear. The parallels are unsettling. Then, as now, human interactions took forms that the law neither anticipated nor proved adequate to govern. Children separated from their natural parents defined relationships in response to their circumstances—as did their siblings and the parents themselves. Young people sought continuity and scrutinized the motives of their caretakers.

In exploring historical narratives, my focus is on the needs and interests of children separated from their biological parents primarily due to poverty. I do not focus on the legal rights of biological parents or the potential liberty interests of foster parents in the children whom the state has placed with them, which are both rich topics in themselves. Unfortunately, the Supreme Court has never squarely inquired into the liberty interests of children in having continued relationships with their natural parents, their extended biological family or kin network, or with

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CLEARINGHOUSE REV., Jan. 1999, at 395, 397. On the relationship between poverty and government responses to child abuse and neglect, see generally Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L. J. 887 (1975); Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371 (1996); see generally Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts. I-III), 16 STAN. L. REV. 257 (1964); 16 STAN. L. REV. 900 (1964); 17 STAN. L. REV. 614 (1965).

<sup>4</sup> The following discussion does not differentiate between action performed by the government and state action delegated to private philanthropies operating under public mandates.

foster parents and the kin networks that may develop in those new relationships.<sup>5</sup>

## II. THE LEGAL STATUS OF FOSTER PARENTS AND CHILDREN: FROM OFFER TO RODRIGUEZ

The variety and fluidity of the forms that define the "post-modern" family is a constant theme of contemporary discussion. In *Michael H. v. Gerald D.*,<sup>6</sup> Justice Brennan took heed of this diversity in criticizing the plurality's exclusive definition of the "unitary family." The plurality's definition resulted in denying an unwed father the right to pursue his claims to a relationship with his daughter by a married woman. Justice Brennan denounced the formalism of the plurality opinion as out of step with both legal precedent and social reality.<sup>7</sup> Justice White agreed, emphasizing that "[i]t is hardly rare in this world of divorce and remarriage for a child to live with the 'father' to whom her mother is married, and still have a relationship with her biological father."<sup>8</sup>

Both Justices were confronting the limits of the law's preference for bright lines, embodied in the plurality's mechanistic ruling. Indeed, the entangled relationships that often come under the scrutiny of family law are particularly resistant to the simple ordering favored by legal formalism. *Michael H.* involved decisions made by individuals in which the state was not a central actor. Resistance to categorization is even more evident when the state becomes an active participant in creating new family relationships, as it does when it administers foster care and adoption.

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<sup>5</sup> Foster children were represented by independent court-appointed counsel in *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 841 n.44 (1977) [hereinafter OFFER] (involving the procedural protection due to foster parents when the state sought to remove foster children without cause). Counsel for the foster children opposed the position of the foster parents and "consistently . . . denied" that the children had any right to "avoid 'grievous loss'" caused by sudden separation from foster parents. *Id.* As a result, the Court did not consider the argument that the children might have an independent interest in their relationships with either their foster or natural parents. *See id.* However, the Court noted that "children usually lack the capacity" to protect their interests in litigation, *id.*, and that the regulations at issue did not "prevent[ ] consultation of the child's wishes." *Id.* at 852. *But see id.* at 856 n.1 (Stewart, J., concurring) (arguing that the children should be entitled to assert their own claims to an interest in continuing a relationship with their foster parents).

For an argument that children who can form and articulate preferences can play an active role in litigation that concerns them, see generally Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571 (1996).

<sup>6</sup> 491 U.S. 110 (1989).

<sup>7</sup> *See id.* at 145, 157 (Brennan, J., dissenting).

<sup>8</sup> *Id.* at 162 (White, J., dissenting). The new relationship may include a whole new set of kin including step-siblings, half-siblings, step-grandparents, step-aunts and step-cousins (many of whom are also part of a complex family structure). *See* David Chambers, *Stepparents, Biologic Parents, and the Law's Perception of "Family" After Divorce*, in DIVORCE REFORM AT THE CROSSROADS 102 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

For most of the twentieth century, the law in the United States has approached the taxonomy of families as if legal labels could impose predictable order on the vagaries of affection and responsibility, especially when state intervention results in children being removed from their families of origin and placed with temporary or permanent substitute parents. Courts and commentators have assumed that the legal and social definitions of foster care and adoption are clear to all participants.<sup>9</sup>

According to modern views, foster care means a “temporary” placement with a family that could not hope to adopt the foster children who lived with them.<sup>10</sup> Adoption has long meant a full abrogation of the rights and responsibilities of one set of parents—usually biological—and the transfer of the reciprocal relationship of parent and child to a new family formed under the law.<sup>11</sup>

The labels that attach to concepts amount to far more than word play or epistemological explorations. Labels help to construct the reality that individuals experience. As Pierre Bourdieu has stated, “[l]egal discourse . . . creates what it states . . . by producing the collectively recognized, and thus realized, representation of existence.”<sup>12</sup>

As much by what it has not said as by its holdings, the Supreme Court has perpetuated the legal taxonomy of families that the state has reordered. In its exploration of the due process interests of natural parents in avoiding termination of parental rights, the Supreme Court found those interests to be flexible enough to be determined on a case by case basis under a *Mathews v. Eldridge*<sup>13</sup> test.<sup>14</sup> Lower court opinions make clear that, even before ASFA’s modifications to the law limiting the length of time in foster care to “15 of the most recent 22 months,”<sup>15</sup> the lack of a bright line standard barring termination of parental rights on the basis of poverty which could be ameliorated through state aid has led to the permanent removal of poor children whose families lacked such essentials as

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<sup>9</sup> The historical record is especially important to understanding the emotional complexity of the lives of foster children because remarkably little social science research exists about the effect of contemporary placements. See Helen Gardner, *The Concept of Family: Perceptions of Adults Who Were in Long-Term Out-of-Home Care as Children*, 77 *CHILD WELFARE* 681, 683 (1998) (summarizing studies of perceptions of family membership among foster children).

<sup>10</sup> *OFFER*, 431 U.S. at 823, 833.

<sup>11</sup> Joan Heifetz Hollinger, *Introduction to Adoption Law and Practice*, in 1 *ADOPTION LAW AND PRACTICE* 1-1, 1-3 (Joan Heifetz Hollinger & Dennis W. Leski eds., 1999).

<sup>12</sup> PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 42 (1991).

<sup>13</sup> 424 U.S. 319 (1976).

<sup>14</sup> See *id.* at 332–35; see also *Santosky v. Kramer*, 455 U.S. 745, 752–54 (1982) (holding that the liberty interests of biological parents in their relationship with children in the child welfare system requires an elevated standard of proof prior to termination of parental rights); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 24–32 (1981) (holding that the right of parents to counsel may be determined on an individual basis).

<sup>15</sup> Adoption and Safe Families Act, Pub. L. No. 105-89, § 103(a)(3)(E), 111 Stat. 2118 (1997).

housing.<sup>16</sup>

The Supreme Court commented on the legal status of foster parents in the 1977 case of *Smith v. Organization of Foster Families for Equality & Reform (OFFER)*.<sup>17</sup> In *OFFER*, foster parents alleged that they were afforded inadequate procedural protections when the state decided to remove foster children from their homes. They based their arguments on the development of deep emotional ties between foster parents and the children for whom they care.<sup>18</sup> The opinion, authored by Justice Brennan, expressly limited the question before the Court to the narrow issue of whether the procedures provided by the state were adequate; it held that they were.<sup>19</sup> Notwithstanding the “narrowness” of the question, Justice Brennan discussed the fractured rights and interests that characterize foster care as opposed to other family forms. Foster care “divides parental functions among agency, foster parents, and natural parents, and the definitions of the respective roles are often complex and often unclear.”<sup>20</sup> In theory, the agency has custody of the child, the foster parents make day-to-day decisions, and the natural parent retains legal guardianship and assumes the obligation to remain involved with the child.<sup>21</sup> As Justice Brennan explained, this artificial division of functions normally concentrated in one set of parents “not only produces anomalous legal relationships, but also affects the child’s emotional status.”<sup>22</sup> The roots of this anomaly are clear in the origins of the foster care system—the placing out programs of the late nineteenth century discussed below.

The Supreme Court assumed, without expressly deciding, that foster parents also have some liberty interest in their established relationship with their foster children,<sup>23</sup> even though this relationship was not based in biology and had been

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<sup>16</sup> See, e.g., *Tilden v. Hayward*, CIV.A. No. 11297, 1990 WL 131162, at \*6 (Del. Ch. Sept. 16, 1990); Cheryl A. DeMichelle, *The Illinois Adoption Act: Should a Child’s Length of Time in Foster Care Measure Parental Unfitness?*, 30 LOY. U. CHI. L.J. 727, 755 (1999) (arguing that a legislative decision that the state may prove a parent unfit by showing that a child has been in foster care for 15 of the last 22 months “clearly lightens” the state’s burden of proof in termination proceedings); Catherine J. Ross, *The Failure of Fragmentation: The Promise of A System of Unified Family Courts*, 32 FAM. L.Q. 3, 24–25 (1998).

<sup>17</sup> 431 U.S. 816 (1977).

<sup>18</sup> See *id.* at 836, 839. Joseph Goldstein, Sonja Goldstein, Robert A. Burt, Paul W. Gewirtz, and Steven Wizner filed an amicus curiae brief supporting the foster parents on behalf of “A Group of Concerned Persons for Children.” The argument of the foster parents depended largely on the scholarship of Goldstein and his co-authors, Anna Freund and Albert J. Solnit, about the psychological importance of parents to children. See generally JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* (1996).

<sup>19</sup> See *OFFER*, 431 U.S. at 837, 847 n.19.

<sup>20</sup> *Id.* at 826.

<sup>21</sup> See *id.* at 827.

<sup>22</sup> *Id.* at 827 n.1.

<sup>23</sup> See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 158 (1997) (concluding that the Court suggested that “foster parents were entitled to

created by contract with the state.<sup>24</sup> But Justice Brennan astutely observed that a tension between the liberty interests of natural parents and foster parents was inevitable, making the issues far more complicated than in the typical due process case in which one person's liberty interest does not derogate the substantive liberty of another person.<sup>25</sup> Furthermore, the Court did not consider the liberty interests of the child to be at stake.

One can surely understand why judges seek a regime of legal clarity in this area of the law. Beyond the usual considerations, clarity satisfies a child's developmental need for continuity, especially for those children who enter the child welfare system primarily as victims of abuse or serious neglect.<sup>26</sup> In such cases, the interests of the state and the child alike may lie in as brief a stay in foster care as possible, the termination of parental rights, and settlement into a new and permanent adopted status.

Nonetheless, contemporary child welfare experts have begun to question whether such bright line definitions can adequately capture the social reality and emotional needs of participants in the hardest cases, especially those involving older children whose biological parents have been neither abusive or willfully neglectful.<sup>27</sup> Two recent changes in child welfare law and its philosophical underpinnings have muddied the prevailing definition of foster care. First, rising numbers of children live with grandparents and other relatives as part of the "kinship foster care" system, which was virtually unknown only twenty years ago and which enables relative caregivers to receive financial subsidies.<sup>28</sup> Second, the lines between forms of care are increasingly blurred because almost all adoptions

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constitutional protections as scrupulous as those given to biological parents").

<sup>24</sup> ASFA modifies the terms of that contract in a number of respects, and guarantees that foster parents will receive notice of, and an opportunity to participate in, any foster care reviews and permanency hearings. See 42 U.S.C. § 675(5)(G) (Supp. III 1997); see also Catherine J. Ross & Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 7 AM. U. J. GENDER & L. (forthcoming 1999).

<sup>25</sup> See *OFFER*, 431 U.S. at 846.

<sup>26</sup> See *GOLDSTEIN*, *supra* note 18, at 19–22.

<sup>27</sup> See DONALD N. DUQUETTE, ET AL., U.S. DEP'T OF HEALTH AND HUMAN SERVS., *ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE* ch. 2, at II-1 (1999) [hereinafter *ADOPTION 2002*] (arguing that permanency options for children who cannot return home should be broad enough to serve the individual needs of children, and could include adoption, permanent guardianship and stand-by guardianship). See generally Annette R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997 (1995) (arguing that adoptees are forever members of two families); Naomi Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189 (1999); Garrison, *supra* note 3; Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441 (1996).

<sup>28</sup> See *Miller v. Youakim*, 440 U.S. 125, 125 (1979) (holding that Congress designed AFDC to include foster children placed with relatives); see also Courtney, *supra* note 3, at 23–24; Ross & Cahn, *supra* note 24.

of older foster children involve foster parents adopting a child who is already living with them.<sup>29</sup> Until quite recently, child welfare agencies considered foster parents the least-favored candidates for adoption, regardless of their emotional bond to the child, because they wanted to discourage the hope of a "back door" adoption for parents who found waiting lists too long.

The importance of the latter change is clear in *Rodriguez v. McLoughlin*,<sup>30</sup> a recent federal district court decision with significant potential as a precedent. Most pertinent for this Article, the *Rodriguez* court confronted head-on the contradictions and potential harms of the bright line between foster care and adoption. In *Rodriguez*, Judge Kimba Wood of the Southern District of New York held that *OFFER* did not bar the legal conclusion that when a child has not known any other parent and the biological parents' rights in the child had already been terminated, a pre-adoptive foster mother who has cared for a child continuously since infancy has a liberty interest in the relationship requiring significant and prompt due process protections.<sup>31</sup>

Judge Wood distinguished *OFFER* on a number of grounds, including the foster mother's reasonable expectation of permanency in her relationship with four year-old Andrew, who was placed with her when he was less than two weeks old, and the fact that the foster mother was in the final stages of adopting Andrew when child welfare officials removed him from her home. The child welfare officials removed Andrew on an emergency basis after finding him in the care of his twelve year-old foster brother while his foster mother was in court for a hearing related to the adoption proceedings.<sup>32</sup> The district court held, among other things, that Ms. Rodriguez (the foster mother) should have been allowed to visit Andrew, "if only to provide him with her own explanation of the separation, attempt to reduce his sense of abandonment, and ease her own concerns about his well-being," all of which "derive[ ] from her underlying interest in her relationship with Andrew."<sup>33</sup>

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<sup>29</sup> See Judith K. McKenzie, *Adoption of Children with Special Needs*, in 3 FUTURE CHILDREN 4, 14 (1993); see also Marianne Berry, *Risks and Benefits of Open Adoption*, in 3 FUTURE CHILDREN 125, 130 (1993). On shifting legal preferences favoring foster parents as potential adoptive parents, see generally *Rodriguez v. McLoughlin*, 49 F. Supp.2d 186 (S.D.N.Y. 1999).

<sup>30</sup> 49 F. Supp. 2d 186 (S.D.N.Y. 1999).

<sup>31</sup> See *Rodriguez*, 49 F. Supp. 2d at 195-96. *Rodriguez* distinguishes other lower court cases decided since *OFFER* because neither the regulatory structure nor the case plans in those matters created a reasonable expectation of permanence in the foster home. See generally *Kyees v. County Dep't of Pub. Welfare*, 600 F.2d 693, 698 (7th Cir. 1979) (per curiam); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977); *Sherrard v. Owens*, 484 F. Supp. 728 (W.D. Mich. 1980).

<sup>32</sup> At the time of the decision denying the state's motion to dismiss Rodriguez's claim for declaratory relief and damages, Andrew was nine years old and had been successfully adopted by Ms. Rodriguez. See *Rodriguez*, 49 F. Supp. 2d at 189.

<sup>33</sup> *Id.* at 205.

In keeping with legal precedents, the *Rodriguez* court did not analyze Andrew's own underlying legal or developmental interests in his relationship with his foster mother, even though he was named as a co-plaintiff. Because Ms. Rodriguez was the only parent Andrew had ever known and had progressed so far in the adoption process, and because no "person" other than a state agency had legal custody of him, Andrew faced significant risks—he could be emotionally damaged if he lost contact with her, and he might be left to drift in the foster care system without ever finding a permanent home.<sup>34</sup>

A court looking at Andrew's situation faces far simpler facts than in the "standard" foster care situation, which involves at least two sets of parents, possible siblings,<sup>35</sup> and an extended family,<sup>36</sup> yet the significance of the *Rodriguez* decision surely extends to many other complex factual situations. For illustrative purposes, these may include the obliteration of an existing positive tie with a biological relative following adoption, separation from siblings in either foster care or adoption, or abrupt removal from a successful foster placement. Such fairly common scenarios suggest that a strictly-enforced distinction between family types may harm specific children.

### III. INDENTURE IN HISTORICAL PERSPECTIVE

Historically, the traditional response to the problem of childhood poverty was out-of-home placement, in private homes as indentured servants or in institutions. Apprenticeship of poor children initially developed in a society in which children of all social classes regularly lived with families other than their own.

Family placement rested on the tradition, brought from Europe to the American colonies, of indenturing youngsters to households in which they could complete their social and professional training.<sup>37</sup> At its height in the seventeenth

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<sup>34</sup> See *Meeting the Needs of Older Children in Foster Care: Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways & Means*, 106th Cong., (1999), available in LEXIS, Legis/Hearg, (statement of Carol W. Williams, Associate Commissioner, Children's Bureau, Administration on Children, Youth and Families, U.S. Department of Health & Human Services) (discussing the phenomenon known as "foster care drift").

<sup>35</sup> Andrew was also separated from two foster siblings with whom he may have formed a significant relationship. See *Adoption of Hugo*, 700 N.E.2d 516, 524 (Mass. 1998), *cert. denied*, 119 S. Ct. 1286 (1999) (stating that the emotional significance of the biological sibling tie is important but not dispositive in adoptive placements); see also *Rivera v. Marcus*, 606 F.2d 1016, 1017 (2d Cir. 1982) (recognizing the importance of the sibling relationship, but deeming it transformed when an older sibling became a foster parent under contract with the state).

<sup>36</sup> This is exemplified in the narratives discussed *infra* Part IV.

<sup>37</sup> See generally LAURENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500–1800* (1979); Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 NEW ENG. L. REV. 1113 (1997). For a discussion of the informal origins of adoption in the colonies, see Yasuhide Kawashima, *Adoption in Early America*, 20 J. FAM. L. 677 (1981).

century, indenture to persons whose social status resembled that of their parents provided children with legal protection of their rights to fair treatment and education, while multiplying their connections and possibilities for advancement.<sup>38</sup> Indenture rarely provided specialized training for working or for lower-class youngsters, but it did insure employment and perhaps some rudimentary skills. Apprenticeship was the only legal form through which a family could care for a child who was not a relative, because adoption was unknown at common law.<sup>39</sup>

Governments in the thirteen colonies used indenture to separate children from indigent parents.<sup>40</sup> Girls of all social classes served as domestic servants, and boys participated in the general round of chores.<sup>41</sup> Lack of training for a specific trade raised "complaints about the loose and unsystematic character of apprenticeship" as early as the seventeenth century. Modernization of the economy exacerbated these complaints.<sup>42</sup> The middle and upper classes in the American colonies had entirely abandoned the apprenticeship system for their own children by the late eighteenth century.<sup>43</sup> When skilled workers realized during the nineteenth century that apprentices had simply become child laborers, indenture became a form of training limited to those whose parents could not support them.<sup>44</sup>

In its original form, indenture addressed needs that all of those concerned could agree upon. With the exception of indigent or neglectful families upon whose children community officials forced indenture to insure their proper upbringing, parents in colonial America supervised the choice of a master for their children.<sup>45</sup> The child usually moved to a home within visiting distance so that the parents could keep in touch and ascertain whether the child received fair treatment.<sup>46</sup> A willingness to surrender a child to an indentured place did not

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<sup>38</sup> See STONE, *supra* note 37, at 84 (reporting that preliminary data shows "a mass exchange of adolescent children" in Seventeenth Century England); see also Dolgin, *supra* note 37, at 1119-23.

<sup>39</sup> See Burton Z. Sokoloff, *Antecedents of American Adoption*, 3 FUTURE CHILDREN 17 (1993).

<sup>40</sup> See Dolgin, *supra* note 37, at 1122-24.

<sup>41</sup> See JOSEPH F. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA, 1790 TO THE PRESENT 148 (1977).

<sup>42</sup> See *id.* at 145-52.

<sup>43</sup> See 1 CHILDREN AND YOUTH IN AMERICA: 1600-1685, at 64-71, 104-05 (Robert H. Bremner ed., 1970); see also 1 IVY PINCHBECK & MARGARET HEWITT, CHILDREN IN ENGLISH SOCIETY: FROM TUDOR TIMES TO THE EIGHTEENTH CENTURY 223-59 (1972) (describing apprenticeship of poor children by parishes in England); Dolgin, *supra* note 37, at 1174.

<sup>44</sup> See Dolgin, *supra* note 37, at 1179-84.

<sup>45</sup> See KETT, *supra* note 41, at 17-27.

<sup>46</sup> See *id.* at 27; STONE, *supra* note 37, at 84 (stating that families usually did not send children "very far" away as apprentices).

mean that the parent ceased to care what happened to the child. On the contrary, parents often gave up their children because they loved them too much. "Puritan parents," as one historian has noted, "did not trust themselves with their own children . . . they were afraid of spoiling them by too much affection."<sup>47</sup> In light of that understanding, neither parent, nor child, nor master was likely to become confused about the respective relationships, even if some bond of affection arose between a master and a child. Parents remained parents, merely having ceded the rights of daily authority, and masters were masters.

Yet apprenticeship did not always follow a smooth course. Despite parental watchfulness and the role of parents in choosing a master, abuse of apprentices certainly occurred.<sup>48</sup> Indenture could also exacerbate the tensions and rebellion that accompany the most normal adolescence. Even in the absence of articulated psychological theories about turbulence during the teenage years, many families doubtless experienced frustration and anger with their youngsters, which highlighted the allure of apprenticeship. However, while the emotional distance that separated master from apprentice may have cooled tempers down, it may also have removed the layer of patience often generated by the parental bond. Indentured youngsters faced the struggle to achieve autonomy without the benefit of longstanding affection toward adults who governed them. This complicating circumstance may well have affected the chances that any placement would satisfy both parties.

Long after indenture ceased to be a normal part of growing up, social reformers and legislators resuscitated it for impoverished children. Legislation in the mid-nineteenth century enabled orphan asylums to directly place children from their facilities—girls up to the age of eighteen and boys up to the age of twenty-one—but left legal custody of the child in the hands of the parents who had surrendered their children to the asylum.<sup>49</sup> In addition, indigent parents continued the folk tradition of informally placing young children with families that offered material security and promised affection.<sup>50</sup> Legislatures soon expanded the placement privileges of child-caring philanthropies to allow orphanages to "bind out by indenture destitute children" over whom they had legal custody, whom had three months of institutional care and whom were over age eight.<sup>51</sup>

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<sup>47</sup> EDMUND S. MORGAN, *THE PURITAN FAMILY, RELIGION AND DOMESTIC RELATIONS IN SEVENTEENTH-CENTURY NEW ENGLAND* 77 (1966).

<sup>48</sup> See Catherine J. Ross, *Lessons of the Past: Defining and Controlling Child Abuse in the United States*, in *CHILD ABUSE: AN AGENDA FOR ACTION* 63–81 (George Gerbner et al. eds., 1980).

<sup>49</sup> See Act of Apr. 5, 1855, ch. 159, § 1.

<sup>50</sup> See generally *In re Bistany*, 145 N.E. 70 (N.Y. 1924); *Shahan v. Swan*, 26 N.E. 222 (Ohio 1891).

<sup>51</sup> See 1878 N.Y. Laws 112.

The law introduced two major innovations. For the first time, custody of the indentured child would reside with the philanthropic agency instead of the parents, for the duration of the indenture.<sup>52</sup> But the law also attempted to protect the child by adding enforceable legal standards of care to govern placements. The child could sue to recover damages if the home he was in failed to provide "suitable and proper board, lodging and medical attendance."<sup>53</sup> In states such as New York, legislators further expanded the pool of children who could be placed out by providing for the automatic severing of parental rights for children whose parents neither visited them in the asylum nor paid any board for a period of one year.<sup>54</sup>

In the second half of the nineteenth century, many states, beginning with Massachusetts in 1851, passed statutes that allowed legal adoption of children of up to age eighteen by third parties.<sup>55</sup> At the same time, social reformers sought to move children from urban poverty to homes on farms with the families of strangers,<sup>56</sup> in an effort to move children out of the large orphan asylums<sup>57</sup> that had been the major child welfare experiment of the nineteenth century.<sup>58</sup> Some children entered asylums at the request of beleaguered parents and relatives, just as the majority of children in foster care today are placed "voluntarily" by their parents.<sup>59</sup> The perception that some poverty-stricken parents were adding to the swelling populations of orphanages in large cities like New York contributed to the placing-out movement, in an early version of welfare reform.<sup>60</sup> In a time before the state provided any subsidy to poor families in their own homes, policy makers realized that some parents might prefer to keep their children nearby where they could visit and check on the care that the children received, rather than having them move halfway across the country to live with strangers under virtually unsupervised conditions.<sup>61</sup>

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<sup>52</sup> *See id.*

<sup>53</sup> *See id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See* Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 465-75 (1971).

<sup>56</sup> *See id.*

<sup>57</sup> The term "orphanage" was a misnomer because the majority of children in orphan asylums had at least one living parent. *See* TIMOTHY A. HACSI, *SECOND HOME: ORPHAN ASYLUMS AND POOR FAMILIES IN AMERICA* 1-2 (1997).

<sup>58</sup> *See* MATTHEW A. CRENSON, *BUILDING THE INVISIBLE ORPHANAGE: A PREHISTORY OF THE AMERICAN WELFARE SYSTEM* 1-20 (1998).

<sup>59</sup> *See* ADOPTION 2002, *supra* note 27, at ch.5.

<sup>60</sup> *See* Catherine J. Ross, *Society's Children: The Care of Indigent Youngsters in New York City* 132, 145, 172-75 (1977) (unpublished Ph.D. dissertation, Yale University) (on file with author) [hereinafter Ross Ph.D.].

<sup>61</sup> *See id.*

Child placing arrangements were sometimes created through the rubric of indenture, were at other times formalized as adoption, and were sometimes accomplished as fairly undefined “placements,” the precursors of modern foster care.<sup>62</sup> All participants—children of various ages, biological parents, siblings and new family members—were confused about what each of these arrangements meant, how they differed from each other, and what emotional and economic expectations should govern the relationships.

Charles Loring Brace, who founded the New York Children’s Aid Society in 1853 and sent nearly 90,000 children West to live with families over the next 50 years, was the leading nineteenth century advocate of placing urban children of recent immigrants with farm families.<sup>63</sup> Heavily based on the rhetoric of the happy family, Brace’s placement scheme was marred by variations in individual treatment that reflected widespread confusion over whether placement constituted the beginning of a new family group, an agreement to exchange labor for shelter, or some vague arrangement that fell between these two extremes.<sup>64</sup> Placement—whether labeled as indenture, adoption, or foster care—offered great promise. But the unpredictable motivations of benefactors and the disparities in the treatment children received led youngsters to perceive placement as a risky emotional gamble, one that left them in an ill-defined and volatile situation.

Although many states established the new legal category of adoption, indenture remained the primary rubric for all forms of family placement into the twentieth century.<sup>65</sup> Indeed, the New York adoption law was enacted as an alternative to the indenture of small infants occasioned by the expansion of placing-out programs. “Thousands of children are actually, though not legally, adopted every year,” one lawmaker complained, “yet there is no method by which the adopting parents can secure the children to themselves except by a fictitious apprenticeship, a form which, when applied to children in the cradle, becomes absurd and repulsive.”<sup>66</sup> An adoption law passed in 1873 in New York State required the consent of the child, if over age 12, and of any living parent.<sup>67</sup> Parents lost the privilege of consent, however, if the courts found them insane,

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<sup>62</sup> See discussion *infra* Part IV.

<sup>63</sup> See CHARLES LORING BRACE, *THE DANGEROUS CLASSES OF NEW YORK AND TWENTY YEARS’ WORK AMONG THEM* 88–89 (1872); see also THOMAS BENDER, *TOWARD AN URBAN VISION* 134–53 (1975); E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* 8–14 (1998); Ross Ph.D., *supra* note 60, at 122–27. On Charles Brace, see generally THE LIFE OF CHARLES LORING BRACE, CHIEFLY TOLD IN HIS OWN LETTERS (Emma Brace ed., New York, C. Scribner’s Sons 1894).

<sup>64</sup> See Ross Ph.D., *supra* note 60, at ch.5.

<sup>65</sup> See MARILYN IRVIN HOLT, *THE ORPHAN TRAINS* 161–62 (1992).

<sup>66</sup> HELEN WITMER ET AL., *INDEPENDENT ADOPTION* 24 (1963) (quoting comments from THE N.Y. COMM’RS OF THE CODE, *THE CIVIL CODE OF THE STATE OF NEW YORK* 36 (1865)).

<sup>67</sup> See 1873 N.Y. Laws 830.

intemperate, or guilty of child neglect.<sup>68</sup> Adoption differed from indenture in several particulars; most significantly, the child assumed the family name of the adoptive parents, the relationship continued throughout the child's life instead of terminating when the child achieved legal majority, and the child's legal relationship to biological relatives was severed.

The adopted children were initially distinguished from the natural children of their adoptive parents by being denied the right to inherit; further legal changes rectified this discrimination.<sup>69</sup> Court records suggest that legal clarification did not resolve uncertainty among adoptive parents, the kin of the adoptive parents, or even the natural parents, regarding the legal conditions attached to adoption. Extended adoptive kin challenged the intestacy rights of adopted children to the estates of their adoptive parents.<sup>70</sup> Biological parents sought to inherit from children whose adoption had occurred with their consent.<sup>71</sup> Children sought to take from the estates of both sets of parents,<sup>72</sup> and courts held that the intestate rights of an adopted child reached the adoptive parents' estate, but not that of the extended adoptive family.<sup>73</sup>

Legal battles in situations formalized by adoption only begin to capture the emotional confusion that surrounded many ill-defined placements. Children who were placed out without the formalities of either indenture or adoption found themselves in both legal and emotional limbo.<sup>74</sup>

#### IV. THE CHILD'S EXPERIENCE IN NINETEENTH CENTURY PLACEMENTS

The use of indenture and the even more vague "placing out" left critical issues of definition unresolved, and abandoned the individual participants to determine the nature of each placement for themselves. Many individuals, and even social agencies, used the terms "adopted," "placed out," "apprenticed," and "indentured" almost interchangeably during the nineteenth century. The exact

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*; 1887 N.Y. Laws 703. On other aspects of the law surrounding indenture, adoption, and child custody, see Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 *Nw. U. L. REV.* 1038 (1979).

<sup>70</sup> *See* Appeal of Woodward, 70 A. 453 (Conn. 1908); *see generally* Merrit v. Morton, 136 S.W. 133 (Ct. App. Ky. 1911); Wright v. Wright, 58 N.W. 54 (Mich. 1894); Kofka v. Rosicky, 59 N.W. 788 (Neb. 1894).

<sup>71</sup> *See generally* Ransom v. New York, C. & St. Ry. Co., 112 N.E. 586 (Ohio 1915) (holding that natural parents may not collect damages for the death of a child legally adopted as an infant); Upson v. Noble, 35 Ohio St. 655 (1880) (holding that natural mothers may take from intestate adopted child over her adoptive parents and sibling).

<sup>72</sup> *See generally* Wagner v. Varner, 50 Iowa 532 (1879).

<sup>73</sup> *See generally* Phillips v. McConica, 51 N.E. 445 (Ohio 1898); Quigley v. Mitchell, 41 Ohio St. 375 (1884).

<sup>74</sup> *See* discussion *infra* Part IV.

nature of the relationship between the child and his or her new family remained unclear.<sup>75</sup> Was the relationship based on an emotional bond that might continue to provide nurturance and affection into adulthood? Did it stem from a kindly couple's desire to open their arms to a needy child, or to fill their home with laughter? Or did the more selfish need to add laboring hands to a flagging farm economy dominate the adult vision? Aspects of all of these scenarios can be found in the case records and in the rhetoric about placement.

In New York City, the Children's Aid Society (CAS) and the Juvenile Asylum, which ran the largest placement programs, used similar placement schemes. A placement agent traveled with a party of twenty or so children by train until they reached a predetermined small town in a Western state.<sup>76</sup> The children were awed, and sometimes fearful, during the train journey, which was unlike anything they had previously experienced.<sup>77</sup> One child who recalled seeing trees burning in brush fires said he had burst into tears, so certain was he that he, too, would burst into flames in that strange environment.<sup>78</sup> A little knowledge was a dangerous thing, as this same boy found: "We were told that we were going to Peru and this wrought consternation . . . and we began to whimper . . . I had learned in primary geography that Peru is in South America and I did not want to go there."<sup>79</sup>

In preparation for the children's arrival, a local committee of concerned citizens publicized the cause, sorted through applications to find those families it considered respectable—as determined by active church membership, property ownership, and public opinion—and approved possible homes.<sup>80</sup> But the committee did not attempt to match children with guardians.<sup>81</sup> When the agent and children arrived, the community gathered at the church or town hall for what amounted to a child auction.<sup>82</sup> The symbolism was not lost on participants. As one observer reported, "in the eyes of many women was a glister of tears; somehow it seemed to them . . . almost like an auction block."<sup>83</sup> The children themselves were "overwhelmed by the excitement . . . surrounded by half a dozen strange women and men, all talking and plucking at the child's garments in a hurried way."<sup>84</sup> After those preliminary examinations, the children stood up in

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<sup>75</sup> *Quinn v. Quinn*, 58 N.W. 808, 810 (S.D. 1894) (defining legal "adoption" with terms virtually identical to a standard indenture).

<sup>76</sup> See Ross Ph.D., *supra* note 60, at 128.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> John G. Brady, *Autobiography: The Zigzags of a New York Boy* (unpublished manuscript, on file with Beinecke Library, Yale University, Series III Box 10).

<sup>80</sup> See *The Spectator*, 101 *OUTLOOK*, May 11, 1912, at 80–81.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

turn as prospective employers claimed the ones they wanted.<sup>85</sup> The same witness was touched by a group of four siblings. As “the smaller ones saw brother or sister taken away by a stranger, the tears flowed. One large boy, whose baby sister was given to a farmer’s wife, sat at the edge of the stage and sobbed piteously . . . . The baby sister, too, cried all night.”<sup>86</sup> Days could elapse between the time the first child set off for his new home and the moment when the last child found a place.<sup>87</sup> We can only imagine the unclaimed child’s feelings of inadequacy and rejection, as in the case of the last little girl, “frail” and “very dejected,” who had seen her sister and her new friends “one by one, taken from her. Her sensitive soul must have felt the discrimination and she must have wondered why she was forsaken.”<sup>88</sup>

Fuzzy legal protections accompanied most placements, which were not formalized by adoption. Orphanages generally placed the children without a legal contract for a brief period of time, and then completed a formal indenture.<sup>89</sup> Brace emphasized, however, that his charges were not indentured.<sup>90</sup> The success of the venture depended on the efforts both parties made and on the development of natural affections, which Brace claimed legal formalities might stultify.<sup>91</sup> In practice, whether there was an indenture or not, mutual agreement was the only guarantee that a child and his employer would continue the arrangement. In either case, the employer promised to provide education, food and clothing, and to pay about one hundred dollars to the child at maturity—when a girl reached eighteen or a boy twenty-one.<sup>92</sup> The child, in turn, would provide an extra source of labor or affection in the household. All concerned hoped that the child would become sufficiently integrated into the household and community that he or she would remain in the area after completing the terms of the placement. Presumably, if no ties of affection developed, the child-turned young-adult would still realize the broader opportunities available in a labor-scarce farm community. Proponents of placement in western states tended to overlook the fact that the children were so welcome as laborers in part because young adults from rural communities were less and less willing to work as hired hands and increasingly likely to move to cities in search of their fortune.

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<sup>85</sup> *See id.*

<sup>86</sup> *Id.*

<sup>87</sup> *See id.*

<sup>88</sup> *Id.* at 81.

<sup>89</sup> *See* Ross Ph.D., *supra* note 60, at 128–30.

<sup>90</sup> *See* CHARLES LORING BRACE, *supra* note 63, at 243.

<sup>91</sup> *See id.*

<sup>92</sup> The terms were not always legally enforceable if the arrangements were oral or lacked the necessary consents. *See generally* Manuel v. Beck, 127 N.Y.S. 266 (Orleans Co. Ct. 1911) (holding that a boy informally indentured by an asylum could not collect his wages at the end of his term).

Brace recruited children from CAS lodging houses and schools by touting the excitement, adventure, and opportunity made possible by emigration to the West.<sup>93</sup> At the Juvenile Asylum, the institution's president met with the older youngsters on Sunday evenings to urge them to sign up for emigration. The tone of the enticements offered was perhaps captured best in the parody offered by a newsboy mounted on a chair to address his chums at the CAS lodging house:

Boys, gentlemen, chummies: Praps you'd like to hear summit about the West, the great West, you know, where so many of our old friends are settled down and growin' up to be great men, maybe the greatest men in the great Republic. Boys, that's the place for growing Congressmen, and Governors, and Presidents. . . . Do you want to be rowdies, and loafers, and shoulder-hitters? If ye do, why, he can keep around these diggins. Do you want to be gentlemen and independent citizens? You do—then make tracks for the West. . . . I hear they have big school-houses and colleges there, and that they have a place for me in the winter time; I want to be somebody, and somebody don't live here, no how. You'll find him on a farm in the West.<sup>94</sup>

Boys who understood that a "somebody" did not live in a lodging house for newsboys or an orphanage signed up with alacrity.

### A. *Love Lost for Labor*

The sexes and ages of the children sent West provide some hint about the relative importance of labor and affection in family placement. Social reformers, including Brace, worried that street girls "inevitably have become depraved women" and prostitutes.<sup>95</sup> Yet both the CAS and asylums placed more than three boys for every girl.<sup>96</sup> Boys over the age of ten were the prime candidates for

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<sup>93</sup> See CHARLES LORING BRACE, *supra* note 63, at 91–92 (reprinting a brochure describing the work of the CAS).

<sup>94</sup> See *id.* at 111–13.

<sup>95</sup> See *id.* at 118.

<sup>96</sup> See *id.* at 118; see also CHILDREN'S AID SOCIETY, FORTY-EIGHTH ANNUAL REPORT 14 (1900) [hereinafter 48 CAS]; Ross Ph.D., *supra* note 60, at 130.

Generalizations throughout this article about children placed from orphan asylums are based on a random statistical sample of one in five children or 619 case records from the Catholic Protectory and the Colored Orphan Asylum (COA) of children who entered the institutions between 1879 and 1900, as well as on specific cases from the Juvenile Asylum that were not part of my statistical sample. For a description of this methodology, see Ross Ph.D., *supra* note 60, at App.I. The archival records and case histories are those of children placed out from New York City. The recent work of historians about child welfare efforts in other locations is consistent with the results of my research. See CRENSON, *supra* note 58; see also HACSI, *supra* note 57; HOLT, *supra* note 65.

Professor Dolgin's excellent article on apprenticeship, drawn from cases that provoked litigation, was less likely to reveal positive experiences of indenture. See *generally* Dolgin,

emigration.<sup>97</sup> This disparity reflected a social environment of thriving street trades that brought so many more needy boys than girls to public attention, but it also stemmed from the desire potential employers expressed for boys who could perform heavy farm labor. However useful girls might be as household servants, they were a luxury that many farmers could forgo.

The fact that employers sought older children as wards underscored the importance of the child's labor to many placements. Orphanages tended to apprentice children at about the age of twelve, either to coincide with the age at which most of their charges left the institution or in order to give the children preparation the asylum considered adequate to improve the chances of a successful placement. But the CAS, which propagated the image of children incorporated into a loving family circle, also tended to place children who were old enough to earn their keep far more often than infants or toddlers; nearly eighty percent of the children whom the CAS sent West were over ten years of age.<sup>98</sup> A scant five percent fell into the category of children we would now consider easily adoptable—children under the age of five.<sup>99</sup> The predominance of older children did not simply reflect the increased chances that such a child would have come to the attention of the CAS or another agency. Employers could not have been clearer about what they were looking for in a child. Applicants for children regularly specified that the candidate should be old enough and large enough to work, and the agencies found such requests reasonable.<sup>100</sup> Even the CAS reassured farmers that “these children have all been in training schools in New York for at least a year . . . they are not street children.”<sup>101</sup>

Social reformers and asylum managers empathized with the needs of employers. Brace himself agreed that “nothing is more needed . . . by the public generally” than schools to train good servants.<sup>102</sup> The managers of the sole orphanage in New York City that specialized in African-American children—the Colored Orphan Asylum (COA)—refused to place their charges in summer positions because they feared that the children would be used as seasonal laborers.<sup>103</sup> The COA, however, made an exception for members of its own board of trustees, who often used inmates as domestic help at their summer homes.<sup>104</sup> Board members also supplied friends and relatives with help and knew first-hand how much investment went into accustoming a new servant to the

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*supra* note 37.

<sup>97</sup> See Ross Ph.D., *supra* note 60, at 130–31; see also 48 CAS, *supra* note 96, at 14.

<sup>98</sup> See 48 CAS, *supra* note 96, at 14.

<sup>99</sup> See *id.*

<sup>100</sup> See Ross Ph.D., *supra* note 60, at 135.

<sup>101</sup> 48 CAS, *supra* note 96, at 88–89.

<sup>102</sup> See CHARLES LORING BRACE, *supra* note 63, at 315.

<sup>103</sup> See Letter from Louise Thomas to Mr. Sherwin (Apr. 10, 1890), in COLORED ORPHAN ASYLUM PAPERS, INDENTURE BOOK (on file with New York Historical Society).

<sup>104</sup> See *id.*

household routine.<sup>105</sup> As one manager wrote to the superintendent, "I am so glad you had a boy for Mrs. Hoffman for I would be sorry to let her have Robert now that I have him well trained."<sup>106</sup>

Of course, the fact that the COA charges were African-American was a dominant consideration in the provisions made for them.<sup>107</sup> COA managers were sensitive to any suspicion that their wards were taken advantage of when compared to white inmates of other asylums. For a brief period after the Fourteenth Amendment abolished slavery, the COA stopped using the terms "indentured" or "bound out" in its contracts, crossing the words out on the printed form and substituting the term "placed."<sup>108</sup> But the Juvenile Asylum, which housed the rest of the dependent black children in the city, differentiated clearly between black and white inmates when it came to placing out.<sup>109</sup> The Juvenile Asylum did not allow white children to be placed in New York, New Jersey, or Connecticut; only African-American children could be placed near the city in situations where employers clearly requested servants.<sup>110</sup>

For white children going to work on Western farms, the general status of farm laborers contributed to misunderstandings about the expectations of employer, child, and placement agency. Midwestern farms, plagued by a scarcity of labor for both field and household, had relied heavily on hired help for decades. Every son and daughter of a farmer worked hard to contribute to the running of the farm. If their parents were employees themselves, or held only a small piece of land, teenagers were "hired out" to nearby farms.<sup>111</sup> The conditions of work for both teenage and adult hired hands seemed at the same time arduous and idyllic to many observers.<sup>112</sup> Although employers demanded long hours and assigned endless tasks, the availability of other places for hired men and the watchful oversight by the parents of hired boys and girls meant that farm hands could

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<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See* PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 147–49 (1997); *see also* HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925*, at 402–12 (1976) (discussing how the legal format of indenture was used to exploit black youngsters in Southern States shortly after the Civil War); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J.L. & HUMAN.* 251, 285–86 n.167 (1999) (noting that "parents of black children found themselves powerless to protect their children" from apprenticeship that resembled slavery).

<sup>108</sup> *See* COLORED ORPHAN ASYLUM PAPERS, *INDENTURE BOOK* (on file with New York Historical Society).

<sup>109</sup> *See* JUVENILE ASYLUM PAPERS, *MINUTES OF COMMITTEE ON ADMISSIONS, DISCHARGE AND INDENTURE* (on file with Teachers College, Columbia University, Special Collections).

<sup>110</sup> *See id.*

<sup>111</sup> *See* DAVID E. SCHOB, *HIRE HANDS AND PLOWBOYS, FARM LABOR IN THE MIDWEST, 1815–60*, at 228 (1975).

<sup>112</sup> *See id.*

demand certain considerations. Foremost among these was the idea that “farm hands in pre-Civil War America were usually considered members of the family, or at least treated on a fairly equal basis.”<sup>113</sup> Family and hired help slept under the same roof, shared the same table, and, when work was done, spent their few moments of leisure sitting together by the fire. That tradition continued even when farmers began to import adult help from nearby cities.<sup>114</sup>

Dissatisfactions abounded on both sides of the apparently idyllic arrangement, and circumstances varied from farm to farm. Even if the farm hand seemed almost like a member of the family, and sometimes married into it, everyone understood that farm labor remained a contractual and transient arrangement.<sup>115</sup> When the farm hand was a dependent child, bound out far from his or her protectors and in search of both family and material support, how were participants to know exactly how these new circumstances should modify the accustomed norms? Sitting in New York, reformers could look at the shared meals in farm households and assume a deeper mutual involvement than generally existed. Farmers, asked to take a youngster into their households, easily categorized the new arrival as just another hired boy. But reformers ignored the warning they might have gleaned from a comparison of the treatment of dependent bound-out children and hired hands in the 1840s, before the emigration of children from large cities on the East Coast began. Even a local child placed with a farmer because of destitution often suffered “social ostracism” and lacked the protection provided by parents whom could set limits or remove the child if the demands became too burdensome.<sup>116</sup>

Many farmers who opened their homes to New York’s dependent youngsters in the latter half of the nineteenth century sought nothing more than another hired boy or girl.<sup>117</sup> Sometimes employers planned all along to use children as seasonal laborers, accepting them on a trial basis in the spring and sending them back East in the fall or when the first payment toward the child’s stipend account fell due.<sup>118</sup> In a typical letter, one such employer wrote that William “is so very slow it takes him all day to do a little . . . I will have to bring him back for he is not worthy [sic] paying money for.”<sup>119</sup> Other youngsters more than earned their keep. One boy, sent West at the age of nine, reported that he loved his “splendid home,” even though his employers were so old that they contributed little to the running of the

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

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> For a discussion of local children indentured because of indigence, see SCHOB, *supra* note 111, at 180–85.

<sup>117</sup> *See* discussion *supra* notes 98–101 and accompanying text.

<sup>118</sup> *See* Letter from William J. Gordon to Mr. Hutchinson (July 5, 1878), in COLORED ORPHAN ASYLUM PAPERS, INDENTURE BOOK (on file with New York Historical Society).

<sup>119</sup> *Id.*

farm.<sup>120</sup> When this boy was placed, the farmer was seventy-five and his wife sixty-nine.<sup>121</sup> By the time the boy became a teenager, he ran the entire operation.<sup>122</sup> "I do all the work," he wrote to his sponsors, "I farm sixty acres all myself. This year I mowed twenty acres of grass, and planted sixteen acres of corn, and five acres of oats, and raised twenty-five hogs."<sup>123</sup> His employers, predictably pleased with the boy's contribution to their home, decided to send for a girl from the asylum as well.<sup>124</sup> Many farm youngsters labored just as hard as this boy, and many natural sons would have shouldered the burden for their aging parents without complaint. But the age of these employers when they first brought the nine year-old boy into their household suggests an element of planning for retirement, and belies the popular image of indenture as a means to insure a boy a carefree childhood.

Many children understood the motivations of such employers and registered their complaints in words through letters sent to New York and in action by running away to look for better situations. Most of all, children resented the arduous work demanded of them and the pitiful compensation they received for their labor under the guise of family life. "It is very hard at first," a typical letter reported, "to become accustomed to work."<sup>125</sup> Another man recalled, "I had to work very hard for two years and a half for nothing but my board and clothes, and no holidays."<sup>126</sup> Finally he had enough: "I then rebelled at such treatment, and left, and found another place at one of the neighbors, where I hired out by the month, \$10 and board."<sup>127</sup> Many employers felt the children lacked skills and did not work hard enough. They did not "repay" the "trouble and expense" involved.<sup>128</sup> Teenagers tended to become "discontented and troublesome," especially after the age of fifteen or so.<sup>129</sup> They demanded "fair play" and resented the fact that at the end of their terms they received less than a third of what they could have earned in the open labor market.<sup>130</sup> These children stripped the illusions away from their placements and brought them back to the terms of labor market exchange. One boy, on reaching his majority, revealed that he had

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<sup>120</sup> See NEW YORK JUVENILE ASYLUM, TWENTY-FIFTH ANNUAL REPORT 52 (1879).

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> *Id.*

<sup>124</sup> See *id.*

<sup>125</sup> CHILDREN'S AID SOCIETY, THIRTY-FIFTH ANNUAL REPORT 75 (1887).

<sup>126</sup> CHILDREN'S AID SOCIETY, THIRTY-SEVENTH ANNUAL REPORT 68 (1889) [hereinafter 37 CAS].

<sup>127</sup> *Id.*

<sup>128</sup> See NEW YORK JUVENILE ASYLUM, THIRTY-SEVENTH ANNUAL REPORT 62 (1888).

<sup>129</sup> See *id.* at 47-49.

<sup>130</sup> See *id.*

been the only boy in his town to complete his indenture without running away.<sup>131</sup> His employer, believing the boy to be "happy," hoped to continue the relationship as it had been.<sup>132</sup> "I think Mr. Huffman is expecting me to stay with him," the boy explained, "but he has not said what he will give me, and as I can get good wages, I do not intend to stay here for little or nothing."<sup>133</sup>

Children who expressed their anger by running away before their terms expired did not always find they were free to labor on their own behalf, as the case of William Best illustrates.<sup>134</sup> When William was eleven years old, his father surrendered him to the Juvenile Asylum because he was disobedient; two years later the asylum sent him West.<sup>135</sup> After a brief placement that did not work out, William was indentured in the home of a farmer named Kent.<sup>136</sup> Kent sent William to school for a least part of the year and found him to be an "industrious, steady boy."<sup>137</sup> After two years, for reasons that are unclear, William ran away and sought out the Asylum's western agent.<sup>138</sup> The agent asked Kent to release the boy from the terms of his indenture, but the farmer refused.<sup>139</sup> As the agent recorded the exchange, Kent indicated that "he has been to much expense on his [William's] account [and d]esires either the passage money refunded, or that William shall serve him or else be placed in the 'workhouse!'"<sup>140</sup>

William refused to return to the Kent family, but he was perfectly willing to earn his keep.<sup>141</sup> He struck out on his own, hired out, and found a satisfactory place where he planned to remain until he reached his legal majority.<sup>142</sup> A few months later he moved on to still another place, this time in the town where his sister had been indentured.<sup>143</sup> Kent tracked William down and demanded all of his wages from William's new employer, a Mr. Weber.<sup>144</sup> Weber asked the asylum whether Kent could really be entitled to William's wages. The asylum

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<sup>131</sup> See NEW YORK JUVENILE ASYLUM, THIRTY-NINTH ANNUAL REPORT 55 (1890).

<sup>132</sup> See *id.*

<sup>133</sup> *Id.*

<sup>134</sup> See JUVENILE ASYLUM PAPERS, INDENTURE BOOK (1880) (on file with Teachers College, Columbia University, Special Collections) [hereinafter JUVENILE ASYLUM PAPERS, INDENTURE BOOK 1880].

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

<sup>140</sup> *Id.*

<sup>141</sup> See *id.*

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

answered yes, that Kent “has a right to the boy’s services.”<sup>145</sup> Although most employers did not exercise the paternal right to claim an indentured child’s wages once the child left a place, the issue came up regularly. The expectation rested on a parallel to the treatment of natural children rather than to the treatment of slaves, though no one explicitly stated the assumption because it seemed obvious. Nineteenth century farmers believed they were entitled to “time obligation,” a rural custom that allowed the father to “claim earned wages of his son until the twenty-first birthday, after which the young man was free from further obligation.”<sup>146</sup> If many boys resented working for their fathers’ benefit once they left home, the burden must have seemed unbearable to teenagers whom had only a passing acquaintance with those who reaped their profits.

A number of children were subjected to physical abuse, serious neglect, and sexual exploitation. Such children often returned to New York to seek support from the agencies that had sent them West. One boy, for instance, returned to the COA having lost portions of his feet from frostbite following exposure during long hours in the fields.<sup>147</sup> In another case, Bridget Murphy and another girl from the Juvenile Asylum were indentured to the Hausmann family, which lived up to fictional excesses.<sup>148</sup> As the Asylum’s western agent discovered, “Mrs. H. did not marry into an unfortunate family, but rather into one that the neighbors claim have well developed criminal tendencies.”<sup>149</sup> The household included a large number of men, including the uncles and in-laws of the Hausmanns, and both girls worked long hours responding to the needs of all the members.<sup>150</sup> By the time the agent removed the girls, Mrs. Hausmann had stolen all of their clothes, and Bridget was pregnant.<sup>151</sup> The Asylum superintendent stopped short of accepting responsibility for what had happened to Bridget, but he was not harsh with her either.<sup>152</sup> He arranged for a widow in Ohio to care for Bridget until shortly before her confinement and then paid to bring her to New York, where he

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<sup>145</sup> *Id.*

<sup>146</sup> *See id.*; *see also* SCHOB, *supra* note 111, at 179; *see also* JUVENILE ASYLUM PAPERS, INDENTURE BOOK 1880.

<sup>147</sup> *See* COLORED ORPHAN ASYLUM PAPERS, INDENTURE BOOK (on file with New York Historical Society).

<sup>148</sup> *See* Letter from J.W. Shields to Mrs. W.T. (June 20, 1903), *in* JUVENILE ASYLUM PAPERS, CORRESPONDENCE (1903) (on file with Teachers College, Columbia University, Special Collections) [hereinafter CORRESPONDENCE]; Letters from J.W. Shields to Mrs. E.C. (June 20, 1903 & July 17, 1903), *in* CORRESPONDENCE, *supra*; Letter from J.W. Shields to Charles Hillis (Aug. 19, 1903), *in* CORRESPONDENCE, *supra*; Letter from John Klein to M.L. (Dec. 5, 1903), *in* CORRESPONDENCE, *supra*.

<sup>149</sup> *Id.*

<sup>150</sup> *See id.*

<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

could supervise her medical care.<sup>153</sup> Most importantly, even though he avoided any moral responsibility for her predicament, he encouraged Bridget to hope she could still earn a respectable position in the world: "What happened cannot be helped now but you can work at it never to allow it again and by constant prayer and effort you will succeed in leading the right kind of life hereafter and be happy and well thought of by everybody [sic] won't you try from now on?"<sup>154</sup>

Mother Regina of the Catholic Protectory, which on the whole preferred institutional care to placing out,<sup>155</sup> lamented the condition of children who had been subjected to abuse while indentured. Boys and girls, she reported, "daily returned to the institution broken down in health and spirits, with scarcely clothes to cover them decently, and yet they have lived in families for two, three, and even five years, and during that time not one [sic] came to learn how they were treated."<sup>156</sup> The good sister resorted to sarcasm in her anger: "It not infrequently happens that little girls of twelve and thirteen years are expected to do the labor of women, and when they cannot accomplish all that their considerate, kind mistresses require, they are stigmatized as being saucy, stubborn and disrespectful."<sup>157</sup>

Many indentured relationships betrayed Brace's faith in human nature, but only a few were stripped of all pretense of nurturance. Extraordinary lapses occurred when the desire to remove children from the city and from asylums led to placements that did not hold any promise of family life. At the end of the nineteenth century, in the midst of agitation to abolish child labor, New York sent a number of boys to work as indentured helpers in glass factories in New Jersey where they lodged in large boarding houses.<sup>158</sup> Glass factories were among the least healthy and most unpleasant workplaces, characterized by intense heat, rapid changes of temperature, and shifts that forced workers to alternate day and night hours. The boys sent to situations in glass factories were labeled as "the especially difficult cases, the rougher and lazier boys."<sup>159</sup> Most of the boys ran away shortly

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<sup>153</sup> *See id.*

<sup>154</sup> Letter from John Klein to M.L. (Dec. 5, 1903), in CORRESPONDENCE, *supra* note 148.

<sup>155</sup> In New York City, where public funds supported children under the auspices of religious charities, denominational and religious differences had strong policy implications. *See* Ross Ph.D., *supra* note 60, at 146–49; *see also* Hollinger, *supra* note 11, at 1–31.

<sup>156</sup> GEORGE PAUL JACOBY, CATHOLIC CHILD CARE IN NINETEENTH CENTURY NEW YORK 153–54 (1941) (quoting letter from Mother Regina to P.C. Dooley (Mar. 1879)). Even proponents of placing out shared these concerns, especially for children who were over the age of ten when they entered families. *See* 21 STATE CHARITIES AID ASSOCIATION, TWENTY-FIRST Annual Report 16 (1894).

<sup>157</sup> JACOBY, *supra* note 156, at 154.

<sup>158</sup> *See* Florence D. Dale, *Foster-Children and the Shop: A Study of the Inter-Action of Placing-Out Standards and Child-Labor Laws in Different States*, CHARITIES & COMMON, Apr. 2, 1904, at 343–46.

<sup>159</sup> *Id.*

after they arrived at the factory, but their brief experience created debate about what standard of care placing-out societies should demand.<sup>160</sup> If laboring parents were allowed by law to send their children into factories, did that make such work all right for public wards? By logical extension, the labor that some farm children performed on the family homestead might be an unfair price for bed and board when demanded of an indentured child.

### B. *Affectionate Relationships*

Despite the central role that labor played in many placements, affection developed between many children and their guardians. Emotion provided an increasingly important motive in the decision to open a farm home to a child from the city, which was consistent with images of the child as an emotional focus for family life that solidified among the middle and upper classes during the nineteenth century.<sup>161</sup> The CAS always instructed families to treat the child placed with them “as one of their own,” and children who felt they had become part of the family often reported that they received care befitting an “own child.”<sup>162</sup> Children who developed close emotional ties with employers viewed the adults as guardians or substitute parents. They informed their New York sponsors that they enjoyed the same educational privileges and material rewards as the natural children of their employers. Letters the children sent to New York commonly referred to the adults in their new homes as my “foster parents,” my “mama,” my “aunt,” or my “grandmother,” indicating both a familial bond and a confusion about the exact definition of that tie.<sup>163</sup> Many of those children used the family names of their new guardians without undergoing legal formalities. Others used what they called their “real” names as middle names and added the surname of their foster families.

Those permutations must have caused confusion for some children, especially for the occasional child who received a totally new identity. Johnny may have felt a little bit lost when his mistress explained that “having a William and a John before he came here, we have given him the name of Frederick; he is generally called Freddy.”<sup>164</sup> Even with the comparatively unsophisticated knowledge of child psychology that prevailed at the time, legal commentators

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<sup>160</sup> *See id.*

<sup>161</sup> *See Dolgin, supra* note 37, at 1161–66 (discussing the evolution of the contemporary view that the family should protect the interests of children, and arguing that the continued use of apprenticeship for poor children masked their exploitation as laborers); *see generally* VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1985) (describing the transformation in the value assigned to children—from economic to emotional worth—between the 1870s and 1930s).

<sup>162</sup> *See, e.g.,* 31 CAS, *supra* note 170; 37 CAS, *supra* note 126; 48 CAS *supra* note 96.

<sup>163</sup> *See id.*

<sup>164</sup> CHARLES LORING BRACE, *supra* note 63, at 258–59.

understood that such name changes resulted in “a complete loss of . . . identity, personality or individuality” as a member of the family of origin and an “assumption” of a new identity, “as if [the] whole being, both mental and physical had been changed.”<sup>165</sup> “Freddy” was fortunate, for his guardians boasted of their success in incorporating him into a large family.<sup>166</sup> “I will unhesitatingly say that we surely love him as our own; and we have had visitors here for a number of days,” his new mother added, “without once [sic] thinking that he was not our own child.”<sup>167</sup>

Another woman reported that:

[Her ward] does not wish to write and I will do so. She is anxious to forget the past as far as she can and become as fully as possible identified with us, and we have encouraged this. It seems to be the only sore spot to mar her happiness that she is not *really* our child. She is everywhere received and treated by all as one of us. She will graduate from our High School next year . . . .<sup>168</sup>

A significant minority of these lucky children seem to have maintained lifelong ties with the families they entered as apprentices. Fanny, for example, finished her indenture and wrote that she married a young farmer “who lives three miles from papa’s farm,” an arrangement that she happily assumed would preserve her relationship with her “foster parents.”<sup>169</sup>

The experiences of prodigal children suggested the depth of some of these loving relationships. Minnie, the daughter of a felon, went West as a small child.<sup>170</sup> The Burns family agreed to care for her through the first winter until the CAS could find a permanent home for “the little waif.”<sup>171</sup> Though they had no intention of keeping the sickly Minnie, Mrs. Burns recalled, “I soon found myself loving her.”<sup>172</sup> The family “decided to keep her and make her [their] own daughter.”<sup>173</sup> The couple reported that they tried to make Minnie happy and raise her well, but she became stubborn and disobedient.<sup>174</sup> Finally, like many unhappy adolescents, she ran away from home.<sup>175</sup> The distraught Mrs. Burns told the CAS

<sup>165</sup> *Kofka v. Roskicky*, 59 N.W. 788, 791 (Neb. 1894).

<sup>166</sup> See CHARLES LORING BRACE, *supra* note 63, at 258–59.

<sup>167</sup> *Id.*

<sup>168</sup> CHILDREN’S AID SOCIETY, FIFTY-SIXTH ANNUAL REPORT 122 (1908) (emphasis in original).

<sup>169</sup> CHARLES LORING BRACE, *supra* note 63, at 259.

<sup>170</sup> See CHILDREN’S AID SOCIETY, THIRTY-FIRST ANNUAL REPORT 69–71 (1883) [hereinafter 31 CAS].

<sup>171</sup> *See id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See id.*

<sup>175</sup> *See id.*

of her anguish and concern:

[S]he is hundreds of miles away from us and among strangers, and God only knows what is to become of her. Our home is quiet and peaceful now, but there is a great vacancy. Our hearts are very sad. . . . Will she ever return? . . . Will she [see her mistake, and turn her face towards home]?<sup>176</sup>

She signed the letter, "your loving Mamma," in the hope that Minnie might see it in the CAS bulletin.<sup>177</sup> When Minnie finally returned from her journey, reportedly chastened and "much improved," Mr. and Mrs. Burns extended a joyous welcome.<sup>178</sup>

Placement agencies hoped that some children would be legally adopted and even receive a fair share of the new parents' estate. Some families did emphasize the deep attachment they felt for youngsters who lived with them by making the child "an heir to our earthly possessions when we have passed away."<sup>179</sup> Placement agencies painted Cinderella stories as the prototypes of what they hoped to obtain for their wards. Case histories recounted in the CAS annual reports appeared under dramatic headlines: "Mary Was Made Homeless by the Death of Both Parents. Now Has All a Girl Could Ask For," or "A Little Girl Who Was Left Without a Mother and Deserted by Her Father . . . Has Found a Loving Father and Mother in the Far West."<sup>180</sup> The CAS pointed to eight year-old Theresa, a waif adopted by the president of the local bank, as "a romance of real life."<sup>181</sup> More frequently children received the gift of a household pet, or a pony and cart.<sup>182</sup>

The complexity of individual relationships and the inadequacies of agency records make it difficult to differentiate clearly between relationships that seemed to rest primarily on affection and those based largely on economics. But despite the rhetoric about placement and the hopes it held out for romances of real life, 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.

The reality of most placements probably fell somewhere between affection and pure exploitation. Even when a child found a place at a tender age, employers might hope to see their own work loads alleviated, as in the case of six year-old

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<sup>176</sup> *Id.*

<sup>177</sup> *See id.*

<sup>178</sup> *See id.*

<sup>179</sup> *See* ADVOCATE & FAMILY GUARDIAN, Sept. 16, 1881, at 117.

<sup>180</sup> *See* CHILDREN'S AID SOCIETY, FIFTY-NINTH ANNUAL REPORT 104 (1911) [hereinafter 59 CAS]; CHILDREN'S AID SOCIETY, FORTY-SIXTH ANNUAL REPORT 21-22 (1898) [hereinafter 46 CAS].

<sup>181</sup> *See id.*

<sup>182</sup> *See* 59 CAS, *supra* note 180, at 104; 46 CAS, *supra* note 180, at 21-22.

Mary, placed with a childless couple who proclaimed they were “very much attached to her.”<sup>183</sup> Yet they were pleased as well that Mary was “growing fast and will soon be quite a help to them.”<sup>184</sup>

Six year-old Betsy, a full orphan, was surrendered by her aunt, who hoped the Juvenile Asylum would find her a home.<sup>185</sup> One month later Betsy headed West with a party from the Asylum.<sup>186</sup> After moving to three different families during her first eleven months in Illinois, Betsy finally found a stable place with a childless couple named Depler.<sup>187</sup> Within a few months of taking Betsy in, Mr. Depler wrote that “he shall always consider Betsy as an own child and that he could not ask for a more honest and industrious little girl.”<sup>188</sup> Betsy herself reported that “she has a good home and that she hopes to remain in it always.”<sup>189</sup> In subsequent years the Deplers found that Betsy was “smart,” “much attached” to them, and generally “as good a child as they could wish to have.”<sup>190</sup> As Betsy grew older she was no longer such a pleasure. By the time Betsy turned 15, the Deplers complained that she gave them “trouble.”<sup>191</sup> Unable to control the teenager, the Deplers asked the Asylum agent “to save her from disgracing herself” by removing her.<sup>192</sup> Shortly after they sent Betsy to the agent’s field office, the Deplers decided to give her one more chance, but within six months their relationship had ended.<sup>193</sup> Betsy moved out and went “to work on her own account.”<sup>194</sup>

Similar problems plague natural families, but many employers who reported satisfaction and pleasure from their young wards avoided unequivocal responsibility.<sup>195</sup> When children became difficult or fell ill, the employers asked agents to remove the youngsters or to care for them temporarily.<sup>196</sup> Other employers, however, provided that their own relatives should assume custody of the ward if death, illness, or difficulties prevented them from carrying out their

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<sup>183</sup> See JUVENILE ASYLUM PAPERS, INDENTURE BOOK (1879) (on file with Teachers College, Columbia University, Special Collections).

<sup>184</sup> *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> *See id.*

<sup>187</sup> *See id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *See id.*

<sup>194</sup> *Id.*

<sup>195</sup> *See id.*

<sup>196</sup> *See id.*

obligations.<sup>197</sup>

The proportion of placements that lasted through the proposed term offers one rude measure of mutual happiness. The average child moved two or three times before finding a family willing to keep him or her.<sup>198</sup> Children who did not work out at the first place they were received were likely to move more than three times, thus diminishing the chance that they would form a strong relationship with a caretaker. One child placed from the Juvenile Asylum moved to nine different homes.<sup>199</sup> Even after they settled in with an employer's family, and both parties agreed to a full term of indenture, only about one in three children stayed until they came of age.<sup>200</sup> Some children ran away, others became "saucy" or "disobedient" and were turned out,<sup>201</sup> while in other instances the employer's circumstances changed and the family no longer could care for the youngster.<sup>202</sup>

Children placed in the same town could hardly help noticing disparities in the arrangements made for them. The two Unger brothers provide a good such example. John was placed with a childless couple who "think very much of him . . . . He has a goat and a little cart, which his guardians made him and enjoys himself first rate. He is going to school and is learning rapidly. All in all, he has a most excellent home, is receiving the best of care."<sup>203</sup> James, on the other hand, entered the home of a fifty-five year-old widow who had two grown daughters, one of whom worked as a schoolteacher, the other as a bookkeeper.<sup>204</sup> No one could have hoped that they were looking for a family son. "James was well

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<sup>197</sup> *See id.*

<sup>198</sup> Such shuffling to serial foster homes remains common in contemporary placements. *See* ADOPTION 2002, *supra* note 27, at I-7 (noting that the average foster child spends time in more than three foster homes).

<sup>199</sup> *See supra* note 96 (describing methodology).

<sup>200</sup> *See id.*

<sup>201</sup> As late as 1936 a New York state court held that "foster parents" who adopted a child at the age of six had a lesser obligation to retain her as a temperamental teenager than would her natural parents; they could return the "ill-behaved" child to the institution from which she had come. *See generally In re Anonymous*, 285 N.Y.S. 827 (Surr. Ct. 1936) (stating that adoptive parents can abrogate an adoption of mischievous adolescent girl if she "will not heed reproof or correction"); *see also generally In re Souers*, 238 N.Y.S. 738 (Surr. Ct. 1930) (abrogating the adoption of a disobedient teenager).

<sup>202</sup> In the cases at the Juvenile Asylum, in which sufficient information enabled me to assess the relative importance of labor and affection in the arrangements made for the child, labor seemed the dominant factor in five times as many cases as emotion. In one of six cases information was too sparse to permit characterization. When a child moved within the same extended family, I counted that move as a continuation of the original placement. *See supra* note 96 (describing methodology).

<sup>203</sup> Letter from John Klein to Miss L.V. (Nov. 11, 1903), in CORRESPONDENCE, *supra* note 148.

<sup>204</sup> *See id.*

dressed, said he had plenty of everything he needed," a visitor reported.<sup>205</sup> "He helps around the place, doing various little chores. He is sent to school about six months in the year . . . James is hard to please, but this may be due to the fact that he thinks his brother's home is better than his."<sup>206</sup> Judging from the muted quality of the visitor's general insights, James probably made his feelings on the subject quite explicit.<sup>207</sup>

### C. Siblings and Hometown Friends

Although a comparison between siblings could be painful when they were in such disparate situations as the Unger brothers, in general, sibling relationships among indentured children appear to have helped them through an adjustment period that was difficult no matter how lucky they were in their assigned guardians.<sup>208</sup> The CAS and orphan asylums strove to preserve the sibling tie and made it a policy to indenture siblings in the same party of emigrants and in the same towns whenever possible. Occasionally, siblings even found a new home together, but that good start rarely guaranteed that both children would remain in the same home throughout their terms, given the high rate of terminations.<sup>209</sup> Nonetheless, siblings often succeeded in sustaining their relationships with each other after they were placed in different families or even in different towns.<sup>210</sup> Although some children used agency annual reports to send messages to their brothers and sisters, others included news of their siblings in their correspondence.<sup>211</sup> Those who wrote to the asylum as adults often included news of siblings indentured nearby or indicated that they had moved to be near their siblings.<sup>212</sup>

Many children also developed ties to other youngsters who had emigrated from New York with them. "I go see the New Yorkers every Saturday with a horse," one CAS boy wrote, "and Log has got a horse from the farmer he lives with. All the boys are right [sic] as far as I know of. I send my love to you and all in the East Side Lodging House."<sup>213</sup> These important friendships may have enhanced the emotional security of city children far from home, but they also reflected the fact that indentured youngsters remained outsiders in their new

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205 *Id.*

206 *Id.*

207 *See id.*

208 *See supra* note 96 (discussing the generalizations from case studies).

209 *See id.*

210 *See* Ross, Ph.D., *supra* note 60, at 131.

211 *See, e.g.,* JUVENILE ASYLUM PAPERS, INDENTURE BOOK, *supra* note 134.

212 *See, e.g., id.*

213 31 CAS, *supra* note 170, at 68–69. For a description of the importance of friends from home for country boys who emigrated to cities in search of employment during the same period, see KETT, *supra* note 41, at 96–102.

communities. The sense of being in exile naturally seemed strongest among children indentured by the COA to white families in towns that had no African-American residents. Even white children, easily labeled as "the New Yorkers," could hardly merge with the general population in the manner of many modern adopted children. Everyone knew both their history and their lack of history.

Friends from home were not sufficient to disguise the painful wrench that emigration caused. "I was so homesick it seemed to me that I should die," a typical man remembered.<sup>214</sup> Horatio Alger captured this sensibility well in the character of Johnny Nolan, Ragged Dick's good friend.<sup>215</sup> Johnny, who had been sent to a place in the West, ran away and headed back to New York, where he hid from the social worker who had placed him.<sup>216</sup> He explained to Dick that he had hated the place, although he had enough to eat and a place to sleep.<sup>217</sup> "I had to get up too early. It was on a farm, and I had to get up at five to take care of the cows."<sup>218</sup> Johnny summed up the experience by observing, "I like New York best," but admitted that most of all, "I felt lonely."<sup>219</sup> Real life contained equally compelling stories. One small boy ran away from his place in Illinois shortly after arriving there.<sup>220</sup> About two months later, the guards at the asylum that had sent him West caught the boy climbing over the playground fence in the middle of the night, trying to make his way back into the orphanage.<sup>221</sup>

When the children complained to their New York sponsors, they received advice to keep their chins up, learn to adjust, and do what their guardians expected of them. In a typical letter, the superintendent of the Juvenile Asylum wrote to a boy in Illinois:

My dear boy:

I got your note and was very, very much disappointed to hear that you are already dissatisfied with your place. You must remember that you are out there to make a home for yourself and you have got a good chance to become a man and if you throw it away you will have no one to blame except yourself.

You must remember, too, that you did not go out there for the purpose of visiting the boys whom you knew here, but you are out there to work and be just as good as you can. The people with whom you are naturally expect that you will be just as much of a help to them as you possibly can, and you must remember

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<sup>214</sup> 37 CAS, *supra* note 126, at 68.

<sup>215</sup> See HORATIO ALGER, JR., *STREET LIFE IN NEW YORK WITH THE BOOT-BLACKS* 23–24 (1868).

<sup>216</sup> *See id.*

<sup>217</sup> *See id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See Letter from Burdick to Shields (July 13, 1903), in *CORRESPONDENCE*, *supra* note 148.

that they are responsible for your welfare and behavior and that they are going to do everything they can to help you and make a man of you. I hope that hereafter when you find things a little disagreeable you will think of this and not feel discontented.<sup>222</sup>

The superintendent also held out the promise of companionship and the sibling tie as an incentive for good behavior:

I was talking the other day with your brother James. He was very anxious to hear all about you and to hear from you . . . I have told him that if you behave yourself and please Miss Bell that she is willing to have James come up to the farm and live with you. He is very anxious to be there, and I am sure you would like to have him with you.<sup>223</sup>

Meanwhile, he urged the boys to write to each other.<sup>224</sup>

Such blandishments probably failed to ease the pain of dislocation, in part because no matter how successful and nurturing a placement turned out to be, all placements created perplexity about a child's role and his ties to his natural family. Although agencies often sought to preserve the sibling tie, placing out ordinarily severed a child from biological parents even more thoroughly than did an asylum. This left the child in limbo, unclear about the relationship with either the new or the old family unit. Brace and others who favored family placement affirmed their belief in the family, but held as inviolable only the new families that they themselves selected for children.

#### D. *Ties with Biological Parents*

Just as agencies and participants failed to develop a uniform definition of placement as dominated by affection or by primarily economic concerns, doubts about the exact nature of the relationship between the child and the family in which the child lived and worked clouded the question of whether children should retain ties with their biological parents, and what the nature of those ties, if any, should be. Although the CAS in 1900 differentiated between the 22,121 children for whom it had found "permanent homes" in the country and the 24,601 children whom it had placed in "situations at wages in farmers' families" during the preceding half-century, the children themselves, the families that received children, and the children's natural parents all failed to appreciate this distinction.<sup>225</sup>

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<sup>221</sup> See *id.*

<sup>222</sup> Letter from Burdick to E.A. (June 25, 1903), in CORRESPONDENCE, *supra* note 148.

<sup>223</sup> Letter from Burdick to J.M. (May 15, 1903), in CORRESPONDENCE, *supra* note 148.

<sup>224</sup> See *id.*

<sup>225</sup> See 48 CAS, *supra* note 96, at 15.

For parents especially, the nuances of definition did little to change the reality of the separation. Many parents apparently believed rumors that the CAS sold their children into slavery.<sup>226</sup> Parents learned that when they surrendered their children to orphanages, they could lose the ability to prevent indenture.<sup>227</sup> Asylum managers frequently gave parents a deadline for reclaiming their children before sending them West—not too dissimilar from the contemporary requirement under ASFA that parents create a solid home within fifteen months or lose their children.<sup>228</sup> In other cases, agencies convinced reluctant parents to consent to arrangements that violated parental instincts. Several examples from the Juvenile Asylum records clarify the Asylum's control of the placement decision. When one widow surrendered her nine year-old son to the Asylum because she found herself destitute, the superintendent recorded, "M. signed a full surrender with understanding that children could be sent West unless she could provide for them in 2 years time."<sup>229</sup>

In a rather complicated case, two other boys entered the Juvenile Asylum with an explicit understanding that they would not be sent West.<sup>230</sup> Their mother had been in an insane asylum for some years, and their father had died about five years earlier.<sup>231</sup> The relative who brought them to the asylum was an "uncle," who was actually a brother-in-law of the father's first wife and no relation at all to the boys.<sup>232</sup> Nonetheless, he took an active interest in their welfare.<sup>233</sup> When the father died, the uncle had allowed two older brothers to be placed in the West, but sent the three and six year-olds to an asylum for young children.<sup>234</sup> After five years, that institution asked the uncle to remove the boys, and he brought them to the Juvenile Asylum.<sup>235</sup> He asked asylum officials to keep the boys until he could find a place where they could complete their educations.<sup>236</sup> He emphasized that he wanted the boys near him.<sup>237</sup> But the asylum, pleased that the older brothers

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<sup>226</sup> See JUVENILE ASYLUM PAPERS, 1890 ADMISSIONS BOOK (on file with Teachers College, Columbia University, Special Collections) [hereinafter 1890 ADMISSIONS BOOK]; see also JUVENILE ASYLUM PAPERS, MINUTES OF COMMITTEE ON ADMISSION, DISCHARGE AND INDENTURE, Apr. 13, 1891, (on file with Teachers College, Columbia University, Special Collections) [hereinafter MINUTES].

<sup>227</sup> See CHARLES LORING BRACE, *supra* note 63, at 234 (describing resistance among the poor and rumors that children were "sold as slaves").

<sup>228</sup> See *supra* note 2.

<sup>229</sup> See 1890 ADMISSIONS BOOK, *supra* note 226.

<sup>230</sup> See MINUTES, *supra* note 226.

<sup>231</sup> See *id.*

<sup>232</sup> See *id.*

<sup>233</sup> See *id.*

<sup>234</sup> See *id.*

<sup>235</sup> See *id.*

<sup>236</sup> See *id.*

<sup>237</sup> See *id.*

were “doing well” in the West, sent both younger boys to indentured places within a year after they were admitted.<sup>238</sup>

In another instance, when the indenture committee placed a boy named Hector in a western home, it noted simply, “the boy is to go west—mother and father not agreeing.”<sup>239</sup> The committee also induced parents to sign permission forms for indenture by refusing to release the children except to an indentured place.<sup>240</sup>

### E. Parental Resistance

Some parents did not submit passively to decisions made by others about their children’s lives. When parents objected to their child’s indenture or changed their minds after a child had been placed, they sometimes sought the child’s release, either by informal means or through law suits. The persuasive efforts of agency representatives sometimes sufficed to cut short such challenges. When one mother sought her son’s return from an indentured place, authorities warned her “to refrain from writing the boy any letters which would tend to make the boy dissatisfied with his present surroundings.”<sup>241</sup> By emphasizing the misery she would cause her son if she persisted, the trustees convinced the mother to drop her quest for her boy’s return.<sup>242</sup>

Other mothers, such as Mary Ann Warburton, resorted to court action.<sup>243</sup> Mrs. Warburton surrendered her daughter Harriet to the Juvenile Asylum because she could not afford to take care of the girl.<sup>244</sup> The Asylum apprenticed Harriet to a Mrs. Hoff in Western Illinois.<sup>245</sup> The Warburtons’ circumstances gradually improved, and they asked the Asylum to restore Harriet to them.<sup>246</sup> The asylum investigated, ascertained that Harriet’s mother could indeed resume care of her, and offered to bring Harriet back if her parents would pay her train fare.<sup>247</sup> They agreed, only to discover that Mrs. Hoff refused to release the girl.<sup>248</sup> Mrs.

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<sup>238</sup> *See id.*

<sup>239</sup> MINUTES, *supra*, note 226.

<sup>240</sup> *See id.*

<sup>241</sup> JUVENILE ASYLUM PAPERS, MINUTES OF COMMITTEE ON ADMISSIONS, DISCHARGE AND INDENTURE, June 6, 1903, (on file with Teachers College, Columbia University, Special Collections).

<sup>242</sup> *See id.*

<sup>243</sup> *See* Deposition of Mary Ann Warburton, Oct. 6, 1890, NEW YORK MUNICIPAL ARCHIVES 6048 (unpublished original document, on file with the New York Municipal Archives).

<sup>244</sup> *See id.*

<sup>245</sup> *See id.*

<sup>246</sup> *See id.*

<sup>247</sup> *See id.*

<sup>248</sup> *See id.*

Warburton complained to the court that the Asylum told her, "If I want [my daughter] I must go to Illinois and fight for her in the courts."<sup>249</sup> As a woman of modest means, she reminded the court, "This I cannot do, but I think that those who sent my child away ought to bring her back. When she went away she was hearty and healthy, but since then she has become lame, and I think I can care for her better than can strangers."<sup>250</sup>

In the case of Harriet Warburton, the institution simply refused to act to bring about her return, but in other instances it acted vigorously to block parental efforts. The story of the O'Neill family demonstrates some of the complexities that accompanied placing out.<sup>251</sup> The Society for the Prevention of Cruelty to Children (SPCC)—a nonprofit agency with special police powers over neglected children—picked up the four O'Neill children, aged six to twelve, on the streets of New York and committed them to the Juvenile Asylum for vagrancy in 1878.<sup>252</sup> Their parents, Irish Protestants, were reportedly both alive but intemperate.<sup>253</sup> The father worked as a longshoreman to support the family.<sup>254</sup> In 1880, after two-and-a-half years of asylum training, the children headed West in the same emigration party and found places in neighboring towns.<sup>255</sup> The fifteen year-old boy switched employers within a few weeks, pausing on the way to pick up fifty dollars from the farmer who had sheltered him.<sup>256</sup> When the theft was discovered, he entered the Pontiac Reform School, where he stayed for three years.<sup>257</sup>

A month after the boy was sentenced to Reform School in Illinois, the children's father showed up.<sup>258</sup> The guardian of the eldest daughter, Carmella, sent an urgent wire to New York: "During my absence yesterday Carmella O'Neill's father took her. What is to be done?"<sup>259</sup> Without hesitation, the Juvenile Asylum responded, "Protect Faith and Edward from Mr. O'Neill. Also recover Carmella if possible."<sup>260</sup> A trustee wrote the Asylum's western agent who was reviewing their position on the matter, after consulting with the SPCC "with whose advice we sent children west having first satisfied ourselves that the father

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> See JUVENILE ASYLUM PAPERS, INDENTURE BOOK 1880, *supra* note 134.

<sup>252</sup> *See id.*

<sup>253</sup> *See id.*

<sup>254</sup> *See id.*

<sup>255</sup> *See id.*

<sup>256</sup> *See id.*

<sup>257</sup> *See id.*

<sup>258</sup> *See id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

had no proper home for them.”<sup>261</sup> He continued: “I judge it will be a calamity for them if the father obtains custody of the children—yet he may so far vitiate their new relations as to render it impossible for their employers to retain them with any hope of good results.”<sup>262</sup>

He recommended that the agent keep the siblings with him until the crisis was resolved.<sup>263</sup> In the meantime, the agent was advised to take legal action to regain possession of Carmella and try to “ferret out her place of concealment.”<sup>264</sup> Within a few weeks, the agent located Carmella where her father had placed her, with a farmer in a nearby town.<sup>265</sup> During the fall, Carmella’s original employer demanded her services, but she refused to go back.<sup>266</sup> Although the agent felt reluctant to return Carmella to her employers because of “her unwillingness to go anywhere,” Carmella’s clear wishes and the desires of her father ultimately were ignored.<sup>267</sup> The Asylum’s western agent sent Carmella back to complete the terms of the indenture the asylum had arranged for her.<sup>268</sup> Carmella seemed “much dissatisfied,” but she remained with her employers when they moved to Kansas in 1881.<sup>269</sup>

The Asylum heard little more about the children until 1884, when Carmella sought her sister’s address.<sup>270</sup> The girls began to correspond after the post office helped Carmella to trace Faith and her employer through their moves to Michigan and Missouri.<sup>271</sup> Carmella was disturbed to find Faith and her employer in “very destitute circumstances” and asked the asylum to release the younger girl to their father.<sup>272</sup> Faith’s employer answered for her, telling the asylum that Faith did not want to live with her father “as he drinks,” but the asylum did not demand to hear from Faith herself.<sup>273</sup> In an interesting twist, by 1886 Faith’s employer had returned to Illinois, Edward had left his indenture to find a job nearby, and their father had relocated within a few miles of Carmella’s place.<sup>274</sup>

Drunk or not, O’Neill went to great lengths to keep his family together. Like any concerned parent, he responded at once when one child’s arrest made him

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<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *See id.*

<sup>264</sup> *Id.*

<sup>265</sup> *See id.*

<sup>266</sup> *See id.*

<sup>267</sup> *Id.*

<sup>268</sup> *See id.*

<sup>269</sup> *Id.*

<sup>270</sup> *See id.*

<sup>271</sup> *See id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *See id.*

wonder if the other children were all right in their new homes. Discovering that Carmella did not feel she was well treated, he found her a better situation. Carmella played a critical role by corresponding with her siblings, and on the way she revealed how inadequate the asylum's record-keeping procedures and critical choices had proven. Yet no one at the asylum viewed the family's actions in this light; a meddling parent could only be a troublemaker.

On the one hand, the managers of placement programs discouraged parental authority, but on the other hand they occasionally encouraged ongoing contact with children, confusing everyone along the way. When Maria developed typhoid in Illinois, the asylum regretted that "we haven't heard from her people since she went west."<sup>275</sup> Still, the superintendent wrote to inform her father of her illness and added, "I know it would please her to receive a nice long letter from you and hope that you will write her as soon as you receive this."<sup>276</sup> He enclosed Maria's address, which the family had not received before.<sup>277</sup> If other parents complained that their children never wrote to them from the West, the asylum regularly advised, "I think you can readily understand how reluctant children are about writing and how they keep putting it off, and this is probably the trouble with [name]. If you do not hear from her soon, please drop me a line and I will wake her up a little."<sup>278</sup> In one unusual instance, the asylum offered to help a boy get a special rate on a train ticket if he decided to visit his parents in New York, as he had suggested in a recent letter to the asylum.<sup>279</sup> But that visit was probably a pipedream, for the superintendent reminded the boy that "about two months ago . . . we received a letter from your father stating that he had not heard from you in 18 months. Don't you think it would be a good idea to drop him a few lines. They would be glad to hear from you, I know."<sup>280</sup>

#### F. *Identity Conflicts: The Search for a Past*

Modern attachment theory makes clear that even infants suffer acutely when separated from the adults who have cared for them.<sup>281</sup> The effects of such disruptions frequently manifest themselves in older children. As one expert witness explained in 1976 about an eight year-old who had experienced multiple placements, she "[i]s suffering from an identity crisis. She does not know who she

<sup>275</sup> Letter from John Klein to D.B. and A.H. (Nov. 18, 1903), in CORRESPONDENCE, *supra* note 148.

<sup>276</sup> *Id.*

<sup>277</sup> *See id.*

<sup>278</sup> *See* Form letter from Klein (Nov. 18, 1903) in CORRESPONDENCE, *supra* note 148.

<sup>279</sup> *See* Letter from Klein to W.Y. (Nov. 11, 1903) in CORRESPONDENCE, *supra* note 148.

<sup>280</sup> *Id.*

<sup>281</sup> *See generally* GOLDSTEIN ET AL., *supra* note 18; *see also generally* JOHN BOWLBY, 1 ATTACHMENT: ATTACHMENT (1969); JOHN BOWLBY, 1 ATTACHMENT: SEPARATION, ANXIETY AND ANGER (1973); JOHN BOWLBY, ATTACHMENT: LOSS: SADNESS AND DEPRESSION (1980).

is . . . . She has moved approximately six times in seven years of life. Six sets of rules, six sets of expectations. She's very confused about what is expected of her."<sup>282</sup> Just as a trend has developed in the past few decades in which children adopted as infants later search for their biological families, some proportion of children placed out in the nineteenth century sought to rediscover their natural parents and struggled to figure out the nature of their relationship to the two families in their lives. They were not frustrated by the sealed records that stymie many adoptees today,<sup>283</sup> but rather encountered a lack of record keeping that made such efforts very difficult.

Indentured children tended to lose touch with their parents, even if they received one or two letters from home early in their placement, as many children did. The CAS commonly received requests from young adults whom it had placed as children seeking information about their relatives and former addresses. Children shared whatever dim hints of the past they possessed with their New York sponsors to aid in the search, and asked if anyone knew their exact ages or their birthdays.<sup>284</sup> Often the trail had grown cold, and officials could not provide any information.

In other cases the stark truth hurt, as one young man in Iowa learned:

Several days ago I received a letter from Mr. J— S—, the gentleman you must have given my other letter to, and his letter informed me that he is not my father, but merely a step-father, which information was not only surprising but it caused a sense of disappointment and also helped me to realize why I had been neglected when a child. His letter explained everything and described in detail why I had been placed in the Orphans' Home, what had become of my parents, etc. In fact his letter was a revelation to me and I realize now I am alone and have only myself . . . .<sup>285</sup>

The search could be poignant and the results of success even more so. One woman received a letter from her parents and sister after more than twenty years.<sup>286</sup> Her vivid reply captured the pain and loneliness she had experienced during her years of wondering:

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<sup>282</sup> *Reflow v. Reflow*, 545 P.2d 894, 897 (Or. App. 1976).

<sup>283</sup> See CARP, *supra* note 63 (tracing the evolution of secrecy and sealed records in adoptions); Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CON. LAW (forthcoming 1999) (arguing for an adoptee's right to access information).

<sup>284</sup> See, e.g., CHILDREN'S AID SOCIETY, FIFTIETH ANNUAL REPORT 140-42 (1902).

<sup>285</sup> 59 CAS, *supra* note 180, at 102 .

<sup>286</sup> See CHILDREN'S AID SOCIETY, THIRTY-THIRD ANNUAL REPORT 80 (1885).

[I]t seems like a dream that the one great wish of my life has come [true]. Dear ones, if you knew how often my heart has called you, and found no response, you would know how overjoyed I am to find you . . . I thank God for this . . . How often have I wished for a father, mother, sister, or brother . . . Tell me how I was lost, what your name is . . . [A]ll about yourself . . .<sup>287</sup>

Some children, however, wanted nothing to do with their natural parents once they had left New York. The Western agent explained that the Santini sisters had succeeded in severing their legal ties to their parents in which the Asylum had failed.<sup>288</sup> After they went West they “secured a full surrender from their parents by their own unaided efforts. Both are with excellent families and neither would consent under any consideration to return to their parents.”<sup>289</sup>

Josie White put the issue even more starkly when she responded to the news that her mother might try to bring her back from Minnesota to New York.<sup>290</sup> She wrote to the Matron of the CAS that she was having “a very nice time” in her new home, and insisted: “let *that woman* come; she will have her ride for nothing. She denied me as being her daughter, and I believe I am not, as I said before.”<sup>291</sup> Josie protested in a reverse adoption fantasy:

[D]ear Mrs. Hurley, if you have not told them the address, do not let them know it. I will never go with them again. I have a splendid home that I never had before. There is no liquor drinking and swearing up here as it was there. We did not intend to go away and be bad, as some girls . . . but that woman almost drove me to it . . . I do not intend to go East if they come or not.<sup>292</sup>

The varied reactions to indenture and the disruption of families were clear in the way graduates and their families regarded placement when they looked back as adults. A fifty-two year-old man, orphaned at the age of fourteen, had lived on the streets with his brothers before the CAS picked them up in 1869.<sup>293</sup> He went to Kansas, was converted to the Baptist church, put himself through college, and became a minister. Although he had lost touch with both of his brothers, he rediscovered one of them “preaching the gospel” in Iowa during 1890.<sup>294</sup> In 1907 he was “pleased” to be able to help in placing a party of CAS children when the

<sup>287</sup> *Id.*

<sup>288</sup> See Letter from J.W. Shields to R.G. (June 26, 1903), in CORRESPONDENCE, *supra* note 148.

<sup>289</sup> *Id.* (emphasis in original).

<sup>290</sup> See 31 CAS, *supra* note 170, at 67.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* (emphasis added).

<sup>293</sup> See CHILDREN’S AID SOCIETY, FIFTY-FIFTH ANNUAL REPORT 116 (1907).

<sup>294</sup> *Id.*

agent arrived in his town.<sup>295</sup>

Caroline, however, was indentured at age eleven, just six months after her parents died.<sup>296</sup> Twenty years later, circumstances forced Caroline's sister, a recent widow, to place her son in the Juvenile Asylum.<sup>297</sup> She insisted that she "did not want him sent west because she had never heard from Caroline."<sup>298</sup>

An asylum graduate named Roger Fleetwood came up with a compromise that supported the placement of children but indicated his feelings about losing his own family.<sup>299</sup> Roger devised a creative plan to keep mothers and children together in response to his own experience of indenture.<sup>300</sup> A full orphan, Roger had been committed at his cousin's request "for a home" because none of his relatives could afford to care for him.<sup>301</sup> Aged fourteen, he left New York immediately with a company bound for Ohio.<sup>302</sup> Although he was "a good boy to work," he moved to four different places by the time he was seventeen and then fell out of sight.<sup>303</sup> Fifteen years later, Roger showed up at the asylum in New York.<sup>304</sup> He explained that "he owned a farm of 80 acres, and that his wife had recently died, leaving him with a daughter 4 years old, and that he desired to find a housekeeper who had a child in the Asylum to go west with him and take her child."<sup>305</sup> The Asylum found a suitable volunteer almost at once but never considered a wider application of the scheme.<sup>306</sup>

As individual histories indicate, the treatment of indentured youngsters varied greatly; their responses varied, and their ultimate fate in life probably varied as well. Highly publicized stories included boys who had grown up to be governors, bankers and college graduates;<sup>307</sup> on the other hand, critics pointed to a high rate

<sup>295</sup> *Id.*

<sup>296</sup> See JUVENILE ASYLUM PAPERS, 1876 APPRENTICESHIP REGISTER (on file with Teachers College, Columbia University, Special Collections).

<sup>297</sup> *See id.*

<sup>298</sup> *Id.*

<sup>299</sup> See JUVENILE ASYLUM PAPERS, 1877 APPRENTICESHIP REGISTER (on file with Teachers College, Columbia University, Special Collections).

<sup>300</sup> *See id.*

<sup>301</sup> *See id.*

<sup>302</sup> *See id.*

<sup>303</sup> *See id.*

<sup>304</sup> *See id.*

<sup>305</sup> *Id.*

<sup>306</sup> *See id.* At about the same time, the State Charities Aid Association of New York began an experiment to place destitute mothers of young infants in country homes where they could work as household help, while keeping their babies with them. That experiment succeeded, but was short-lived. See Ross Ph.D., *supra* note 60, at 156.

<sup>307</sup> See MIRIAM Z. LANGSAM, CHILDREN WEST: A HISTORY OF THE PLACING-OUT SYSTEM OF THE NEW YORK CHILDREN'S AID SOCIETY 1853-1890, at 56 (1964); see also HOLT, *supra* note 65, at 125-26 (reviewing CAS success stories).

of incarceration among children who had been raised in surrogate homes.<sup>308</sup> But too little systematic information was maintained about what ultimately happened to children placed in the homes of farmers to permit any generalizations about their adjustment in later life.<sup>309</sup>

## V. IMPLICATIONS FOR CONTEMPORARY CHILD WELFARE POLICY

Many experts anticipate that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA)<sup>310</sup>—with its time limits, life time caps and cutoffs—will exacerbate the risk that increasing numbers of children will be raised outside of their biological families for no reason other than their parents' poverty.<sup>311</sup> ASFA raises the odds that the children of poor parents whose benefits are terminated or reduced will not only find themselves in foster care but will move from foster care into adoptive placements on an expedited basis.<sup>312</sup> Historical understanding can enrich contemporary debates about whether under these circumstances child welfare law can and should accommodate a broader variety of definitions of "family" than is implicit in the dominant meanings of foster care and adoption.

The emotional and social costs of severing families are too high to allow children to be removed from nonabusive homes merely because their parents are too poor to take care of them.<sup>313</sup> As one commentator stated: "[It] is simply not possible, without a tremendous feat of dissemblance, to look a young child in the

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<sup>308</sup> See NATIONAL CONFERENCE OF CHARITIES & CORRECTION, PROCEEDINGS OF THE 1875 ANNUAL CONFERENCE 141-44; see also NATIONAL CONFERENCE OF CHARITIES & CORRECTION, PROCEEDINGS OF THE 1883 NATIONAL CONFERENCE 141-42, 148. (Noting that one critic—a President of the National Conference of Charities and Correction—recommended that "it would be as well if you cut their jugular veins in the first place.")

<sup>309</sup> A study by prominent social worker Hastings Hart concluded that it was impossible to reconcile the demand for older children with the higher success rate for children placed at the youngest ages. See NATIONAL CONFERENCE OF CHARITIES & CORRECTION, PROCEEDINGS OF THE 1884 ANNUAL CONFERENCE 143-50.

<sup>310</sup> See *supra* note 1.

<sup>311</sup> See, e.g., Courtney, *supra* note 3, at 21. Even before the full impact of the PRA, approximately 60% of foster children came from families that receive government support. See ADOPTION 2002, *supra* note 27, at I-10. Children of color are over-represented in the foster care system, just as children of immigrants were disproportionately likely to enter out-of-home care one hundred years ago. See *id.* at I-9 to I-10 (noting that the incidence of child abuse and neglect does not differ among racial or ethnic groups).

<sup>312</sup> See Barbara Vobedja, *Revamping of Foster Care Brings Surge in Adoptions: Push to Place Children Raises Fear About Rushed Decisions*, WASHINGTON POST, Apr. 13, 1999, at A3.

<sup>313</sup> See AMERICAN BAR ASS'N WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN, AMERICA'S CHILDREN AT RISK: NATIONAL AGENDA FOR LEGAL ACTION, 47-50 (1993).

eye and inform her of the arrangements for her care in full knowledge that what we are providing for her might not be good for her.”<sup>314</sup> That issue, however, has not been the focus of this inquiry. Suffice it to say that advocates for the poor warned Congress of the risk of escalating removal of children from their parents early on.<sup>315</sup> The ironies are even more pointed because the approach to childhood poverty has come full circle. The growing number of children cared for outside of their homes in the early twentieth century led to the enactment of state subsidies to enable the children of “worthy widows” to remain with their own mothers;<sup>316</sup> those subsidies in turn became federalized as Aid to Dependent Children in 1934, the very entitlement program that the PRA—popularly known as “welfare reform”—eliminated in 1996.<sup>317</sup>

During the Senate debate on the PRA, Senator Feinstein of California called the bill “the moral equivalent of a dear John letter to our Nation’s needy children.”<sup>318</sup> Like other critics of the particulars of welfare reform, she understood what happens to children when the world they have known—however impoverished—is taken away. As one child testified a decade ago:

My name is William. For those of you who don’t know me, my case number is J-957439. That way you can look me up. . . . [T]hey tell you you’re a foster kid for the first time. So you look it up in the dictionary, and it’s a substitute for something. So . . . you’re 13, you’re thinking, I’m a substitute for a kid. I mean, I am not a kid anymore, I’m only a substitute for it.<sup>319</sup>

A “substitute kid” is not any better off than a newsboy who understands that he cannot become a “somebody” living where he lives. The newsboy may even have been more optimistic because he still believed he could make something of himself on a western farm. It is hard to imagine what new legal definitions can convince a foster child who responds to a case number that he is still a real kid who somebody loves.

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<sup>314</sup> Elisabeth Lasch-Quinn, *The Kindness of Strangers*, NEW REPUBLIC, Dec. 28, 1998, at 46, 50.

<sup>315</sup> See Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 43, 53.

<sup>316</sup> CRENSON, *supra* note 58, at 17–18; see also HACSI, *supra* note 57, at 218–20; Ross, Ph.D., *supra* note 61, at 154 (stating that in 1893 New York City’s per capita payments for the care of institutionalized children equaled half of the budget for the Board of Education, which prompted increased interest in family placement).

<sup>317</sup> Social Security Act of 1935, ch. 53, tit. IV § 401–06, 49 Stat. 620, 627–29, *repealed* by Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

<sup>318</sup> 142 CONG. REC. S9352, S9379 (daily ed. Aug. 1, 1996) (statement of Sen. Feinstein).

<sup>319</sup> NATIONAL COMM’N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 282–83 (1991).

Placement in new families not only poses risks to a child's development; it is also hard to achieve. A shortage of foster homes exists throughout the nation.<sup>320</sup> As the twentieth century ends, the child welfare systems in nearly half of the states are overwhelmed. Many state systems are under the supervision of receivers, operating under consent decrees, or facing litigation due to their inadequacies.<sup>321</sup>

It seems ironic to presume as a matter of public policy that foster and adoptive families created, modified, or terminated by the intervention of the state should take a narrower variety of forms of emotional and social reality than those families in which participants create their own patterns without government involvement. If—as has been persuasively argued—no single model exists for successful stepparent relationships,<sup>322</sup> perhaps no single model should be forced on foster parents, biological parents whose children are in the permanent care of others, or the children themselves. Indeed, the pattern of creative, nondisruptive resistance among many disempowered peoples suggests that the varieties of family life among those who have experienced state intervention are likely to be more diverse than the patterns in families that have been allowed to carve their own reality.<sup>323</sup>

Separation from siblings remains one of the most devastating aspects of the foster care and adoption systems. Sibling groups are often broken up when placed in foster or adoptive homes. It is not uncommon for younger siblings of teenage foster children to be adopted under a sealed file. The secrecy of contemporary adoption records can prevent the teenager from locating the adopted sibling.<sup>324</sup> When one thirteen year-old learned that her six year-old brother was about to be adopted and that his name was being changed, she protested: "I'm his mother, I'm his sister, I'm everything to him!"<sup>325</sup> The social worker responded simply:

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<sup>320</sup> See Matthews, *supra* note 3, at 402 (referring to the shrinking pool of nonrelative foster parents).

<sup>321</sup> See Courtney, *supra* note 3, at 27; see also Lashawn A. v. Dixon, 762 F. Supp. 959, 960 (D. D.C. 1991) (detailing the failings of the foster care system in the District of Columbia); Robert Pear, *Many States Fail to Fulfill Child Welfare*, N.Y. TIMES, Mar. 17, 1996, at A1 (describing the "Dickensian" deficiencies in the foster care systems of the 21 or more states where child welfare operates under court supervision).

<sup>322</sup> See, e.g., David Chambers, *Stepparents, Biologic Parents, and the Law's Perception of "Family" After Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 102 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

<sup>323</sup> See Bruce Bellingham, *Institution and Family: An Alternative View of Nineteenth-Century Child Saving*, 33 SOC. PROBS., Dec. 1986, at S33, S41; see generally JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* (1990) (discussing resistance in Asian peasant societies); Ross Ph.D., *supra* note 60.

<sup>324</sup> See, e.g., Wunika Hicks, *I Lost My Brother to Adoption*, in *THE HEART KNOWS SOMETHING DIFFERENT* 30-32 (1996); EDWARD HUMES, *NO MATTER HOW LOUD I SHOUT: A YEAR IN THE LIFE OF JUVENILE COURT* 106-19 (1996).

<sup>325</sup> Hicks, *supra* note 324, at 31.

"That's the law."<sup>326</sup> The strength that children placed out in the nineteenth century gained from sibling relationships, the lengths they went to in order to preserve those relationships, and the mutual responsibility siblings demonstrated for each other indicates the importance of restructuring child welfare to sustain the sibling bond. The law should not make it impossible for siblings with a positive relationship to find each other, nor should invocation of "the law" resemble an emotional death sentence.

Social science research reinforces what history and legal theory teach us about the limits of law in defining family life, particularly in families arranged or rearranged by the state. A recent study of Australian adults raised in foster care between 1928 and 1991 suggests that variations in the definition of "family" and feelings about the variety of families remain as diverse as they were for children placed out in the nineteenth century.<sup>327</sup> Some adults who grew up in foster care omitted biological relatives altogether from their list of kin, while others excluded their foster families. It is hardly surprising that former foster children who included foster parents as members of their families recalled a "nurturing environment, where they felt loved, were made to feel part of the family, were treated the same as any other family member and were provided with ongoing support as an adult."<sup>328</sup> The Australian study confirmed the theories of American social scientists that, while rules about kinship "inform" people's ideas about families, the rules are applied "idiosyncratically" and do not determine behavior.<sup>329</sup>

## VI. CONCLUSION

Poor children placed with families other than their own in the late nineteenth century had few protections and, in many instances, lost touch with their origins and families without finding surrogates. The removal of children to distant states made it hard for parents to demonstrate their concern or remain involved in their children's lives, although some portion managed to do so. The rhetoric of family life that social reformers relied on to bolster placement and to restructure modern institutions disregarded the natural family because of its presumed inadequacies. Yet despite tremendous odds, some of those families remained in touch and even reunited.

The particular balance of labor and love in each child placement was determined by the participants alone. The resulting disparity of experiences may have been the placing-out system's greatest strength as well as its greatest weakness. For the lucky few, placement could turn out to be "a romance of real

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<sup>326</sup> *Id.*

<sup>327</sup> See generally Helen Gardner, *The Concept of Family: Perceptions of Adults Who Were in Long-Term Out-of-Home Care as Children*, 77 *CHILD WELFARE* 681 (1998).

<sup>328</sup> *Id.* at 694.

<sup>329</sup> *Id.* at 682 (discussing generally DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* (2d ed. 1980)).

life." For the majority, it may have been an improvement, on balance, to their previous life, or a workable compromise in response to hardship. But placement was neither a mere job that could be resigned if it became too exploitative nor an adoption based on a child's need for love and an adult's generative impulses. Today, the potential income derived from the child's labor has been removed from the equation, eliminating what was perhaps the greatest danger inherent in early child placement systems.<sup>330</sup>

On the whole, for most youngsters, legal clarification of the nature of substitute families is a positive development, which enlightens all parties about normative standards and clarifies expectations. For some young people, however, rigid legal categories may prove as problematic as the prior regime of legal vagueness if those categories disrupt or prevent the continuation of important supplementary emotional ties.

While the law cannot assure love or affection for children of any social class, it should not needlessly disrupt the lives of children. The welfare system should be flexible enough to encourage every potential source of nurturance, consistent with stability, for children removed from their families because the economic safety net failed them. Contemporary policy cannot serve such children adequately without acknowledging the powerful link between poverty and foster care. A significant number of children continue to be removed from impoverished parents who are not even allegedly abusive. Such innovative ideas as open adoption and permanent guardianship could secure the permanency these poor children need without sacrificing positive emotional relationships that already exist.

The record of individual resilience in redefining family form indicates that members of families created or disrupted by the state have never molded their family structures to fit an oversimplified legal taxonomy. Nor are they likely to do so in the near future, which is why the child welfare law must be able to accommodate a wider range of definitions of "family" than that in our dominant understanding of foster care and adoption. In the case of four year-old Andrew

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<sup>330</sup> See generally Ross & Cahn, *supra* note 24 (discussing lingering public skepticism about the motives of foster parents—especially kin—whose foster care payments constitute a significant portion of family income); see also generally Lois Pierce, *Kinship Foster Care: Policy, Practice and Research*, 80 FAMILIES IN SOC'Y: J. CONTEMP. HUM. SERVS. 423 (1999) (noting that although as many as half of the children in foster care today are in kinship care, the phenomenon has received little serious study and questions continue about whether relatives should receive payment for providing such care).

and Mrs. Rodriguez, his foster and pre-adoptive mother,<sup>331</sup> both believed that she was his “mother” and lived accordingly. The law can help the Andrews of the world by allowing them to sustain relationships with the people who love them. Legal categories must be able to accommodate the circumstances of individual children and the varied families that nurture them.

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<sup>331</sup> See *supra* notes 30–34 and accompanying text.

