

## ORPHANAGES BY ANOTHER NAME

*By: Juliana Moraes Liu\**

### I. INTRODUCTION

Orphanages were a dominant part of the American child welfare landscape in the late-nineteenth and early-twentieth centuries. By 1900, nearly 1,000 orphanages housed approximately 100,000 children in the United States.<sup>1</sup> Orphanages have been widely criticized over the years for their institutionalized treatment of children and their lasting effects on youth in their care. Today, the child welfare system in the United States and its foster care model seem to have replaced these traditional orphanages, but unfortunately, the remnants of historic orphanages remain overly prominent within our child welfare model. ‘Orphanage’ facilities that have supposedly been abandoned have been rebranded as group homes, residential treatment facilities, residential treatment centers, and a host of other congregate care centers. In 2018, 687,345 children were in the American foster care system.<sup>2</sup> Yet, despite the absence of traditional ‘orphanages’ in the child welfare system, not all of these children were placed in typical foster family homes. 47,293 youth in foster care were placed in congregate care facilities, specifically in group homes or institutions.<sup>3</sup> These congregate care facilities more closely resemble historical orphanages than our society would like to admit, and this article seeks to bring attention to the way the child welfare system continues to organize itself around an adapted orphanage model. This article will examine the undesirable features of orphanages that led to their downfall in the mid-twentieth century and compare these qualities to congregate care facilities being used throughout the country today, aiming to answer the question: how different are modern congregate care

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\* J.D., Yale Law School; B.A., Columbia University. This article grew out of the Child Policy Lab at Yale Law School, and Juliana would like to thank Professor Anne Alstott for running the course and for guiding this article through its development.

<sup>1</sup> Dale Keiger, *The Rise and Demise of the American Orphanage*, JOHNS HOPKINS MAG. (Apr. 1996), <https://pages.jh.edu/jhumag/496web/orphange.html> [<https://perma.cc/5PTB-7DYW>].

<sup>2</sup> CHILD’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., THE AFCARS REPORT 1 (2019), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf> [<https://perma.cc/6XB9-25RR>].

<sup>3</sup> *Id.* At the time of the AFCARS report, 19,253 youth had been most recently placed in group homes and 28,040 in institutions, for a total of 47,293 youth in congregate care. *Id.* This number heavily underestimates the number of children placed in congregate care facilities at some point during 2018 since these data points are specific to September 30, 2018.

facilities from the orphanages of the past?

The foster care ethos focuses on placing children in the least-restrictive family-like setting appropriate for each child, but in reality, too many children are placed in group settings that are overly restrictive and inappropriate to their needs.<sup>4</sup> For the purposes of this article, the term ‘congregate care’ will refer to all child placements in communal settings, group homes, shelters, and residential facilities. While there is significant variation between types of congregate care facilities, these institutions are united in being artificial environments designed for raising children in group settings, as opposed to traditional family homes. Federal policy and child welfare experts believe that family settings, such as kinship care and traditional foster families, are preferable for the development and well-being of children, and congregate care institutions operate in contrast to this ideal.<sup>5</sup>

The American foster care population is comprised of some of society’s most vulnerable youth. Nearly every child in foster care has experienced trauma, either from the abuse or neglect that led to removal, or due to the inherently traumatic nature of being separated from one’s parent(s).<sup>6</sup> Several courts and scientific studies have found that separation from a primary caregiver is itself traumatic for a child, regardless of the quality of their primary caregiver’s parenting.<sup>7</sup> Children in foster care are also disproportionately children of color, with black children being placed in foster care at approximately twice the rate of white children.<sup>8</sup> When the child welfare system takes kids into its care, it assumes important responsibility for protecting these youth. Its failure to do so puts the whole purpose of the child welfare system into question.

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<sup>4</sup> 42 U.S.C.A. § 675(5)(A) (West, Westlaw through P.L. 116-158).

<sup>5</sup> The federal Administration for Children’s Services explains that:

[T]here is consensus across multiple stakeholders that most children and youth, but especially young children, are best served in a family setting. Stays in congregate care should be based on the specialized behavioral and mental health needs or clinical disabilities of children. It should be used only for as long as it is needed to stabilize the child or youth so they can return to a family-like setting.

CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., A NATIONAL LOOK AT THE USE OF CONGREGATE CARE IN CHILD WELFARE, at I (2015), [https://www.acf.hhs.gov/sites/default/files/cb/cbcongregatecare\\_brief.pdf](https://www.acf.hhs.gov/sites/default/files/cb/cbcongregatecare_brief.pdf) [<https://perma.cc/HA3F-3NDE>].

<sup>6</sup> Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437, 496 (2012).

<sup>7</sup> See, e.g., CHILD.’S RTS. LITIG. COMM., A.B.A. SEC. LITIG., TRAUMA CAUSED BY SEPARATION OF CHILDREN FROM PARENTS 4–5 (2019), [https://www.americanbar.org/content/dam/aba/publications/litigation\\_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf](https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf) [<https://perma.cc/FM9L-G5PQ>].

<sup>8</sup> John H. Laub & Ron Haskins, *Helping Children with Parents in Prison and Children in Foster Care*, THE FUTURE OF CHILDREN 3 (2018). Of the children in foster care, twenty-three percent identified as black or African American, forty-four percent as white. CHILD.’S BUREAU, *supra* note 2, at 2. In contrast, that year’s census report indicates that only 13.4 percent of the U.S. population identified as black or African American, while 60.7 percent of the American population identified as white alone. U.S. CENSUS BUREAU, *QuickFacts* (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST0> [<https://perma.cc/F8GF-GUDN>].

This article makes an explicit comparison between modern congregate care institutions and historical orphanages. Foster care is infrequently discussed in legal scholarship circles, and authors who address the American child welfare system often focus on particular legislative issues or demographics.<sup>9</sup> Drawing the connection between orphanages and congregate care helps identify structural flaws in the treatment of children in the American child welfare system.

The child welfare system has an obligation to support and empower youth in its care, and federal best practices to achieve this goal were formally established by the Adoption Assistance and Child Welfare Act (AACWA) in 1980.<sup>10</sup> AACWA may have its flaws, but its core principle is correct: children should be placed in the least restrictive, most family-like setting.<sup>11</sup> Despite this mandate, the American foster system continues to place too many youths in congregate facilities. To truly help children in care, we must take another look at the way the American foster care system operates.

This article contextualizes the modern-day foster care system with the history of American child welfare and argues the reality that too many children already know: orphanages are not gone. We just call them something else.

By employing congregate care as a feature of the foster system, our society has made the value judgment that the higher cost of providing children with family-like settings justifies placing them in more ‘efficient’ congregate care facilities. This policy determination merits greater examination, calling for a detailed comparison of congregate care to the widely-denounced nineteenth and twentieth century orphanages. The reality is that these modern facilities are no more than 21<sup>st</sup> century versions of orphanages. Refusing to face this truth is a harmful papering over of the realities of too many children.

This article looks at the use of congregate care facilities in the American foster care system and compares the qualities, downsides, and outcomes of modern congregate care to institutional orphanages of the nineteenth and twentieth centuries. Part II provides a brief history of the American child welfare system, focusing on the policy reasons that led the shift away from orphanages and towards foster care. Part III analyzes the federal bills that shape the child welfare landscape and impact congregate care facilities, including AACWA, the Family Support and Family Preservation Act, the Personal Responsibility and Work Opportunity Reconciliation Act, and the Family First Prevention Services Act. Part IV of this article addresses the reasons why congregate care facilities remain ubiquitous in the foster care system despite federal guidelines discouraging their use. Part V then compares the realities of modern congregate

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<sup>9</sup> See, e.g., Anarida Delaj, Anna Schamberg, Nathalia Sosa & Camille Mendoza Soto, Comment, *Adoption and Foster Care*, 19 GEO. J. GENDER & L. 157 (2018); Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797 (2006); Katherine Moore, Comment, *Pregnant in Foster Care: Prenatal Care, Abortion, and the Consequences for Foster Families*, 23 COLUM. J. GENDER & L. 29 (2012).

<sup>10</sup> Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980).

<sup>11</sup> 42 U.S.C.A. § 675(5)(A) (West, Westlaw through P.L. 116-158); see also CHILD.’S BUREAU, *supra* note 5, at I.

care facilities to the condemned orphanages of the past, reaching this article's conclusion that modern institutions are simply updated versions of orphanages. Part VI provides some starting points for policy solutions to the United States' over-reliance on congregate care facilities.

## II. THE DEVELOPMENT OF THE FOSTER CARE SYSTEM

Orphanages in the United States became mainstream in the nineteenth century as part of a national institutionalization trend.<sup>12</sup> The term 'orphanage' in the American lexicon has always been a misnomer since the majority of children residing in these institutions were not truly orphaned. Historical records suggest that, just like the modern foster care system, orphanages served "a population of disadvantaged children whose parents were having difficulty providing them with adequate care."<sup>13</sup> In many ways, the same demographic of children who found themselves living in the twentieth century orphanages now find themselves deeply embedded in the foster care system. The most recent federal foster care data indicates that in 2017, only 27.9 percent of children in foster care were waiting to be adopted, while the rest presumably had at least one living parent with rights that were not terminated.<sup>14</sup>

The fundamental idea behind orphanages and other institutional asylums of the time was to take children away "from the corrupting influence of impoverished or immoral (the two were often equated) adults and put them on the path to productive, law-abiding adulthood."<sup>15</sup> Orphanages were originally designed to house impoverished and disadvantaged children, with the hopes that institutionalization would affect their moral development and make them 'better' than their parents.<sup>16</sup> At this point, orphanages operated with the mentality that "removal from the corrupting influence of parents was the step most likely to secure children against vice and dependency."<sup>17</sup> Many parents "viewed their children's institutionalization as a temporary necessity and often a service for which they were paying, a deliberate parenting choice and not an abandonment of their parenting responsibilities."<sup>18</sup> As a continuation of their

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<sup>12</sup> Keiger, *supra* note 1.

<sup>13</sup> FAM. & CHILD.'S SERVS. DIV., MINN. DEP'T OF HUM. SERVS., ORPHANAGES: AN HISTORICAL OVERVIEW 3 (1995), <https://www.leg.state.mn.us/docs/pre2003/other/950265.pdf> [<https://perma.cc/6U3Y-LYDK>]. A study of the Protestant Orphan Asylum in St. Louis, Missouri from 1847 to 1896 revealed that sixty-nine percent of the children in their care had at least one living parent. Many of these children stayed in orphanages for less than a year, to later be returned to families or friends. *Id.*

<sup>14</sup> CHILD.'S BUREAU, *supra* note 2, at 1. The report indicates that there were 442,995 children in foster care on September 30, 2017. *Id.* At that same time, only 123,437 were waiting to be adopted, of which, only 69,525 actually had parental rights terminated and were eligible for adoption. *Id.*

<sup>15</sup> Keiger, *supra* note 1.

<sup>16</sup> See MATTHEW A. CRENSON, BUILDING THE INVISIBLE ORPHANAGE: A PREHISTORY OF THE AMERICAN WELFARE SYSTEM 70 (1998).

<sup>17</sup> *Id.*

<sup>18</sup> JESSIE B. RAMEY, CHILD CARE IN BLACK AND WHITE: WORKING PARENTS AND THE HISTORY OF ORPHANAGES 67 (2012).

mission of making children productive members of society, unlike their parents, orphanages engaged in job training or sent their children off on indentures. Pragmatically, “[t]he asylum’s objective was to produce not just agreeable children but also competent wage-earners.”<sup>19</sup>

### A. *Progressive Welfare Policies*

Orphanages and foster care have been heavily linked to shifts in social welfare policy. The Progressive Movement brought about the demise of orphanages and considered orphanages to be the ideal vehicle for advancing the movement’s reform agenda: “Progressive leaders knew they stood a greater chance of promoting their broader social reform agenda if they started with children. . . . It was the turn-of-century version of ‘family values.’”<sup>20</sup> The choice of orphanages as their focus point was deliberate. Other institutions such as poorhouses were less sympathetic to the public because “[p]overty was a personal failure, but kids were innocent.”<sup>21</sup> The Progressive Movement sought to shift the responsibility for societal welfare away from private citizens and charities and toward the government. Orphanages became a central focus point of progressive policy campaigns, and the increased attention on orphanages led to public outrage.

In 1909, President Theodore Roosevelt hosted the first White House Conference on Children, with the purpose of allowing “those engaged in the work of caring for dependent and destitute children [to] exchange ideas and experiences.”<sup>22</sup> At this conference, participants expressed their belief that “wherever possible, the child should be placed in foster families and not in institutions.”<sup>23</sup> This conference transformed child welfare theory and helped shape the ideological direction of American child welfare policy moving forward, even though it would take decades for these ideals to begin changing the realities of American children in foster care.<sup>24</sup> Despite its role in shaping policy goals, “the conference’s conclusions had little impact on the number of children being placed in institutions,” and only 35 years later did the number of

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<sup>19</sup> CRENSON, *supra* note 16, at 105. Orphanages saw themselves as providing a vital opportunity to Americanize, religiously convert, and civilize impoverished, immigrant, or otherwise different children. American Indian children in particular faced extreme forcible orphanage placement as part of a federal policy of assimilation. “[T]here was large scale removal of thousands of American Indian children from their communities to boarding schools, mission schools, and orphanages as part of a policy to assimilate American Indians into white society.” FAM. & CHILD.’S SERVS. DIV., *supra* note 13, at 3. It would be improper to write an article about orphanages and not address the unique history of native peoples and forced institutionalization of children. The treatment of American Indian children was especially problematic and racialized and will not be fully addressed in this article.

<sup>20</sup> Keiger, *supra* note 1.

<sup>21</sup> *Id.*

<sup>22</sup> FAM. & CHILD.’S SERVS. DIV., *supra* note 13, at 4.

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

<sup>24</sup> *Id.*

children in orphanage care drop below the 1909 level.<sup>25</sup>

Following President Roosevelt's White House Conference on Children, many states authorized mother's pensions, which were designed to provide financial assistance for impoverished families that would otherwise be unable to care for their children. Although these pensions excluded women who were considered "immoral," they marked a key shift in the government's assumption of responsibility for children's well-being.<sup>26</sup> The progressive "Mother's Aid" movement led to the Federal Aid to Dependent Children program under the Social Security Act of 1935. This program, later renamed Aid to Families with Dependent Children, "embodied the concept that children should not be removed from their homes for reasons of poverty alone and that mothers of children, deprived of their primary breadwinner, presumably their father, should receive temporary support so they can care for their children."<sup>27</sup> Interestingly, "[t]he original program did not assume that mothers would work; on the contrary, it was hoped that public assistance would enable mothers *not* to work."<sup>28</sup> This approach to child welfare has been largely displaced in the contemporary American system.

#### **B. Issues with Institutionalization**

Critiques of orphanages also stemmed from emerging issues with institutionalization. "Experience taught, among other things, that asylum children did not develop like children raised in families. Children raised in an artificial community seemed somehow unsuited to function in real ones."<sup>29</sup> The rigid structure of orphanages, with matching clothes and strict schedules, deviated significantly from the experience of children growing up in family homes.<sup>30</sup>

By the start of the twentieth century, there was a name for the collection of disabilities that orphanages were alleged to impose on their inmates. It was called 'institutionalism.' The term referred to the stunted emotional development that seemed characteristic of asylum children, but it was also applied to the institutional practices that supposedly produced it.<sup>31</sup>

More contemporary studies have similarly found that "children raised in an institutional setting suffered from 'the inability to bond, inability to effectively problem solve, inability to turn to others for help, poor peer relations, disciplinary problems, disruptive behavior.'"<sup>32</sup> Concern over institutionalization

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<sup>25</sup> FAM. & CHILD.'S SERVS. DIV., *supra* note 13, at 4.

<sup>26</sup> *Id.*

<sup>27</sup> KAREN SPAR, CONG. RSCH. SERV., 94-986 EPW, ORPHANAGES: A NEW ISSUE IN WELFARE REFORM 2-3 (1994), *microformed on Major Stud. & Issue Briefs of the Cong. Rsch. Serv.*: 1995 Supp. (Univ. Publ'ns of Am.).

<sup>28</sup> *Id.* at 3.

<sup>29</sup> CRENSON, *supra* note 16, at 92-93.

<sup>30</sup> *See id.* at 113.

<sup>31</sup> *Id.*

<sup>32</sup> FAM. & CHILD.'S SERVS. DIV., *supra* note 13, at 6 (quoting MARY FORD & JOE KROLL,

has also been expressed over children living in institutions who reported feeling “less comfortable, loved, looked after, trusted, cared about, and wanted than children in any other form of surrogate care or than children who had been returned to their original families.”<sup>33</sup>

The concern over ‘institutionalism’ led orphanages to change their operating strategies and philosophies in the early twentieth century. By 1910, the people who ran orphanages “transformed their facilities, phasing out the large, single buildings that were difficult to supervise in favor of campus-like ‘cottage-systems.’”<sup>34</sup> Under the cottage-system, children were separated into smaller buildings based off their needs and behavior patterns, separating youth who were more likely to cause trouble from those that often fell prey to larger, stronger, or bolder peers.<sup>35</sup> Each cottage in an orphanage was overseen by one or two matrons, who operated their cottages with rules designed specifically for the children it housed.<sup>36</sup> The cottage-system was seen as a way of restructuring orphanages to “enhance[] the institutional discipline while making the place less institution-like.”<sup>37</sup> Many of these cottage-systems remain in place today for larger congregate care facilities, especially in residential treatment centers and residential treatment facilities.<sup>38</sup> “The cottage plan was the homage that the orphanage paid to the home, and the same deference was evident in a variety of more superficial measures by which orphan asylums tried to claim affinity with families.”<sup>39</sup> This shift toward the cottage plan marked the child welfare system’s recognition that children benefitted from family-like settings, beginning a transition away from the institutional orphanage model.

### C. *The Emergence of the Modern System*

Despite a unifying federal policy, foster care is managed on a local level, and different regions exhibit stark differences in their child placement practices. A national study of foster care found “significant variation in the level of congregate care use both between and within states” and noted that “the within state variation is striking because counties operate within a common state policy framework.”<sup>40</sup> Children in foster care tend to experience multiple placements, sometimes switching between family-like settings and congregate care facilities.

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CHALLENGES TO CHILD WELFARE: COUNTERING THE CALL FOR A RETURN TO ORPHANAGES (1980)).

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

<sup>34</sup> Keiger, *supra* note 1.

<sup>35</sup> Keiger, *supra* note 1; CRENSON, *supra* note 16, at 138.

<sup>36</sup> CRENSON, *supra* note 16, at 139.

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

<sup>38</sup> See, e.g., *Who We Are*, JEWISH CHILD CARE ASSOC., <https://www.jccany.org/who-we-are/history/> [https://perma.cc/Q9XH-YW6R]; *History*, BOYS TOWN, <https://www.boystown.org/about/our-history/Pages/default.aspx> [https://perma.cc/P8MF-9WCG].

<sup>39</sup> CRENSON, *supra* note 16, at 147.

<sup>40</sup> FRED WULCZYN, LILY ALPERT, ZACH MARTINEZ & AVA WEISS, CTR. FOR STATE & CHILD WELFARE DATA, WITHIN AND BETWEEN STATE VARIATION IN THE USE OF CONGREGATE CARE 15 (2015).

“Nationally, about 20 percent of children in foster care experience a congregate care placement at some point during their time in care.”<sup>41</sup> The variation across the country, however, is great. “In some jurisdictions, the likelihood a teenager will be placed in a group or residential setting is as high as 80 percent.”<sup>42</sup>

Congregate care is not equally employed for all demographics of youth. Teenagers are more likely than younger children to enter into group placements, and males are more likely than females.<sup>43</sup> Children in urban areas are more likely to be placed in congregate care than are their counterparts in rural areas, which reflects a greater percentage of African American children experiencing group care than children of other races.<sup>44</sup> Additionally, “[c]hildren in congregate care settings are almost three times as likely to have a D[iagnostic] S[tatistical] M[anual] diagnosis compared to children in other settings.”<sup>45</sup> This data, of course, varies by foster care locality. In some places in the United States, the placement of infants in a group setting is “surprisingly common.”<sup>46</sup>

### III. FEDERAL CHILD WELFARE POLICY

The ideal of placing every child in foster care into a loving family home is far from a reality. By the late 1970s, the rapid increase in the number of children entering foster care put the system in crisis. Out-of-home placements had become increasingly expensive, and the number of individuals signing up to serve as foster parents was decreasing.<sup>47</sup> Children spent longer periods of time in foster care, and often experienced multiple placements without returning to their birth parents.<sup>48</sup> During this time period, professionals started noting that many of the children entering foster care “suffered from psychological problems associated with abuse, abandonment or neglect.”<sup>49</sup>

To address the floundering foster care system, Congress passed AACWA “to establish a program of adoption assistance, to strengthen the program of foster care assistance for needy and dependent children, to improve the child welfare, social services, and aid to families with dependent children program.”<sup>50</sup> AACWA remains in effect today with the objective of encouraging adoption.<sup>51</sup> In 2017, ninety-three percent of the families that adopted a child from foster care

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<sup>41</sup> *Id.* at 1.

<sup>42</sup> *Id.* at 3.

<sup>43</sup> *Id.* at 1.

<sup>44</sup> *Id.*

<sup>45</sup> CHILD.’S BUREAU, *supra* note 5, at II.

<sup>46</sup> WULCZYN ET AL., *supra* note 41, at 3.

<sup>47</sup> FAM. & CHILD.’S SERVS. DIV., *supra* note 13, at 7.

<sup>48</sup> *Id.*

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

<sup>50</sup> *Id.*

<sup>51</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., ADOPTION ASSISTANCE FOR CHILDREN ADOPTED FROM FOSTER CARE 2 (2011), [https://www.childwelfare.gov/pubPDFs/f\\_subsid.pdf](https://www.childwelfare.gov/pubPDFs/f_subsid.pdf) [<https://perma.cc/HJC5-9C9K>].

received an adoption subsidy.<sup>52</sup> AACWA's policy of encouraging adoption works alongside the Adoption and Safe Families Act, which establishes adoption incentives to foster care agencies and foster families.<sup>53</sup> Together, these acts solidified a federal policy of placing children "in the least restrictive and most family-like setting" appropriate for their needs.<sup>54</sup>

The Adoption and Safe Families Act prioritizes having children raised in adoptive families, even if that means severing attempts of reuniting children in foster care with their birth parents.<sup>55</sup> Federal policies and financing structures incentivize states to pursue termination of parental rights proceedings to sever a child's legal relationship with their birth parents and make the child eligible for adoption. "[A]doption bonuses place value on adoption for the agency above all other forms of permanency, even when adoption may not be the best option for some families."<sup>56</sup> The new Adoption Incentives Program provided cash bonuses to states that were able to increase the total number of adoptions, with higher bonuses for the adoptions of children over the age of nine and children with special needs.<sup>57</sup> From 1997 to 2002, after which a congressional report was assembled, states earned nearly \$160 million through the Adoption Incentives Program.<sup>58</sup> Under this program, states do not receive bonuses for children released from foster care with successful outcomes other than adoption, such as a return to their biological parent(s). This adoption assistance policy has encouraged foster care agencies to push for the termination of parental rights, even when it might not be indicated, as a way of freeing children up for adoption and receiving additional federal funds.<sup>59</sup>

When unprepared families and bad matches are pressured into premature adoption, adoptions often fall apart. Adopted parents too frequently place their adopted children back into foster care through the voluntary placement procedures. "A large percentage of the voluntarily placed youth [in foster care] are the result of broken adoptions."<sup>60</sup> Without an adequate tracking mechanism, however, the adoptive parent(s) who no longer provides for the child typically continues to receive adoption subsidies.<sup>61</sup> Many of those who study "broken adoptions" believe that adoptions are often inappropriately motivated by the

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<sup>52</sup> CHILD.'S BUREAU, *supra* note 2, at 6.

<sup>53</sup> Dawn Post, *Adoption Bonuses and Broken Adoptions*, A.B.A. (Jan. 1, 2014), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-33/january-2014/adoption-bonuses-and-broken-adoptions/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/january-2014/adoption-bonuses-and-broken-adoptions/) [https://perma.cc/4YXL-2HME].

<sup>54</sup> FAM. & CHILD.'S SERVS. DIV., *supra* note 13, at 7.

<sup>55</sup> Post, *supra* note 54.

<sup>56</sup> *Id.*

<sup>57</sup> KENDALL SWENSON, CONG. RSCH. SERV., RL32296, CHILD WELFARE: THE ADOPTION INCENTIVES PROGRAM 1 (2004).

<sup>58</sup> *Id.* at 6.

<sup>59</sup> See Post, *supra* note 54, at 2.

<sup>60</sup> Post & Zimmerman, *supra* note 6, at 452–53 (2012).

<sup>61</sup> *Id.* at 453.

adoption subsidy, and not by the desire to care for the child.<sup>62</sup>

Following AACWA, Congress passed the 1993 Family Support and Family Preservation Act, which established a national policy that the primary goal of the child welfare system should be to prevent “out-of-home placement through more support to families.”<sup>63</sup> Reauthorized in 1997 as the Promoting Safe and Stable Families program, this Act provides community-based support and “preventive family preservation services for families that are at-risk or in crisis.”<sup>64</sup> Services were designed specifically to be flexible and responsive to family needs.<sup>65</sup>

From the mid-1980s to the mid-1990s “the number of foster family homes . . . declined, coinciding with a sharp rise in the number of children requiring care and an increase in the complexity and multitude of problems presented by children entering foster care, most notably the effects of parental substance abuse.”<sup>66</sup> As a result, Congress debated retreating from the family-based foster care model and employing the use of orphanages once more through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).<sup>67</sup> This bill sought to do the opposite of the Progressive agenda. Instead of providing more resources to families in need, PRWORA “cut[] welfare benefits to young unwed mothers and roll[ed] the savings back to the states so that they can build orphanages to care for these mothers’ children.”<sup>68</sup>

PRWORA ended the Aid to Families with Dependent Children Program that directly stemmed from the Progressive movement and replaced the program with Temporary Assistance for Needy Families (TANF).<sup>69</sup> The Republican Congress in 1996 noted that due to “growth in the total foster care population and a shortage of foster family homes,” more children were being placed into congregate care facilities “for reasons unrelated to the child’s own behavior or special needs.”<sup>70</sup> Their response was to dedicate more resources towards improving congregate care facilities, and initiating a discussion of orphanages as a viable alternative to foster care for some children.<sup>71</sup>

As TANF took effect, cash assistance for families in need decreased, which predictably had a negative impact on vulnerable children.<sup>72</sup> TANF’s priorities

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<sup>62</sup> *E.g., id.* at 483.

<sup>63</sup> FAM. & CHILD.’S SERVS. DIV., *supra* note 13, at 7.

<sup>64</sup> OFF. PLAN., RSCH. & EVALUATION, OFF. ADMIN. FOR CHILD. & FAMS., FAMILY PRESERVATION AND FAMILY SUPPORT SERVICES PROGRAM (FP/FS), 1994-2002 (2002), <https://www.acf.hhs.gov/opre/research/project/family-preservation-and-family-support-services-program-fp/fs-1994-2002> [<https://perma.cc/UW8N-F9KT>].

<sup>65</sup> *Id.*

<sup>66</sup> SPAR, *supra* note 27, at 1.

<sup>67</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>68</sup> FAM. & CHILD.’S SERVS. DIV., *supra* note 13, at 10.

<sup>69</sup> *See* Personal Responsibility and Work Opportunity Reconciliation Act, 110 Stat. at 2180, 2265.

<sup>70</sup> SPAR, *supra* note 27, at 3.

<sup>71</sup> *See id.* at 1.

<sup>72</sup> Mary Keegan Eamon & Sandra Kopels, ‘For Reasons of Poverty’: *Court Challenges to Child*

aligned poorly with the progress that had been made in the child welfare system, and its implementation forebode a heavier reliance on congregate care. “Considerable agreement exists among researchers, attorneys, and child advocates that members of congress paid little attention to the impact of TANF legislation on child welfare or the ways in which TANF objectives might be in conflict with the child welfare system’s objectives of protecting and preserving families.”<sup>73</sup>

Beyond poverty being an indicator for Child Protective Services involvement, poverty is also related to voluntary placements in foster care. Voluntary placements occur when a parent or guardian chooses to hand responsibility of their child over to the state, electing to place a child in foster care. A struggling parent may feel as though they no longer have the capacity to raise their child and seek state assistance through a voluntary placement, hoping that they will have more time and fewer expenses and be able to improve their realities. “In some cases, parental poverty causes the parents to voluntarily place their children in state foster care while the parents attempt to stabilize their situations.”<sup>74</sup> The rise in voluntary placements returns full circle to the orphanages of the late-nineteenth and early-twentieth centuries, in which families in need, which were most often single mothers, would choose to voluntarily institutionalize their children in orphanages due to a lack of resources.<sup>75</sup>

One decade later, the number of children in foster care and the proportion of children in congregate care facilities decreased. Between 2004 and 2013, the number of children in foster care declined 21 percent, and the proportion of children in foster care in congregate care decreased from 18 percent to 14 percent.<sup>76</sup> These shifts can be attributed to policies in some states aimed at decreasing the use of congregate care facilities.<sup>77</sup> These policies, however, vary greatly from state to state.

In 2018, Congress passed the Family First Prevention Services Act. This act provides federal funding for foster care prevention to begin in 2020, including mental health and substance abuse prevention and treatment, and in-home skill-based services for parents.<sup>78</sup> This Act also restricts group home funding for the first time.<sup>79</sup> At the time of writing this article, the Family First

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*Welfare Practices and Mandated Programs*, 26 CHILD. & YOUTH SERVS. REV. 821, 833–34 (2004).

<sup>73</sup> *Id.* at 834.

<sup>74</sup> *Id.* at 825.

<sup>75</sup> FAM. & CHILD.’S SERVS. DIV., *supra* note 13, at 3.

<sup>76</sup> CHILD.’S BUREAU, *supra* note 5, at II.

<sup>77</sup> *See, e.g.*, CONN. DEP’T OF CHILD. & FAMS., REVIEW OF EXITS FROM CONGREGATE CARE SETTINGS 1 (2014).

<sup>78</sup> NAT’L CONF. STATE LEGS., THE FAMILY FIRST PREVENTION SERVICES ACT (2018), <http://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx> [<https://perma.cc/EQL3-ABF7>].

<sup>79</sup> Teresa Wiltz, *Giving Group Homes a 21st Century Makeover*, THE PEW CHARITABLE TRS.: STATELINE (June 14, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/>

Prevention Services Act is still in the process of being implemented, with most states not yet having their proposals approved by the federal Children's Bureau.<sup>80</sup> The effects of this policy are still to be seen. The legislation specifies that the federal government will no longer pay for a child to stay in a group home for longer than two weeks, unless the child is pregnant or parenting.<sup>81</sup> While the impact of this may be a decrease of the number of children in congregate care, it may also lead to children who would otherwise be placed in group homes being transferred to larger residential treatment programs with round-the-clock supervision, which are exempted from the funding restriction.<sup>82</sup>

#### IV. RELIANCE ON CONGREGATE CARE AS A CONVENIENT SOLUTION

Children in foster care are more likely to have special developmental, psychological, or physical needs than other children, and the state should provide a greater standard of care for these youth.<sup>83</sup> The basic assumption underlying foster care is that the state will assume responsibility over children in its care and do a *better* job of raising children than their former caregivers. Without an 'upgrade' in the care and services for children, the foster system does not make sense on a fundamental level. For children with special needs, the state has an obligation to provide for psychological, psychiatric, or other type of professional help, but all of these health provisions are costly. At the same time, states are federally required to place children in the least-restrictive placements.<sup>84</sup> As a result of low funding and high expenses, states face numerous struggles meeting their obligations. A U.S. Department of Health and Human Services (HHS) study found that states reported "a number of challenges—financial and staff resources, a supply of alternative placements, workforce development and training, and leadership practices—impact their use of congregate care."<sup>85</sup> Foster care placement strategies also vary significantly from state to state. A national study found "major differences in counties' use of group care as a first placement option" with rates ranging from zero to 89 percent.<sup>86</sup>

For children with special needs, congregate care facilities can maximize treatment options at lower costs. The HHS report found "children with DSM and child behavior problem indicators may experience a need for higher levels of care than other children in congregate care."<sup>87</sup> Congregate care facilities are

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2018/06/14/giving-group-homes-a-21st-century-makeover [https://perma.cc/3FSH-3QWS].

<sup>80</sup> Press Release, Wash. State Dep't of Child., Youth and Fams., Children's Bureau Approves DCYF's Prevention Plan (Oct. 2, 2020), <https://www.dcyf.wa.gov/about/media/media-releases/2020-10-02> [https://perma.cc/266K-TXBM].

<sup>81</sup> Wiltz, *supra* note 79.

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

<sup>83</sup> *See* NAT'L COUNCIL ON DISABILITY, YOUTH WITH DISABILITIES IN THE FOSTER CARE SYSTEM 9 (2008).

<sup>84</sup> 42 U.S.C.A. § 675(5)(A) (West, Westlaw through P.L. 116-158).

<sup>85</sup> CHILD.'S BUREAU, *supra* note 5, at IV.

<sup>86</sup> WULCZYN ET AL., *supra* note 41, at 8.

<sup>87</sup> CHILD.'S BUREAU, *supra* note 5, at III.

consistently more expensive than foster family placement. From 2013 to 2014, Florida spent \$81.7 million for approximately 2,200 children in group homes, at a cost of \$37,000 per child.<sup>88</sup> During that same time period, Florida spent only \$6,180 per child placed with a foster family.<sup>89</sup> When congregate care facilities offer more services for children with special needs, the higher cost is easy to justify.

However, it is too common for children without any particularized need for congregate care to be placed in these facilities due to insufficient foster homes or administrative challenges. Despite federal policy, “[s]ome states rely heavily on congregate care as a first placement.”<sup>90</sup> For these children, not only does congregate care placement go against the federal policy of “least-restrictive placement” and counter the growing research indicating that family-like placement is preferable, but it also costs more.

Raising children is expensive, and foster care is no exception. This is especially true given the high percentage of children with special needs that require additional care.

Treating abused and neglected children costs federal, state, and local governments about \$29.4 billion dollars each year. Given that children entering out-of-care are often behind their peers on a wide range of developmental indicators, the true cost of caring for abused and neglected children over their lifetime is much, much higher.<sup>91</sup>

A national study found that only “[a]bout 61 percent of maltreatment victims receive[d] services” between 2010 and 2012.<sup>92</sup> It follows from this study that the remaining 39 percent of maltreatment victims in foster care do not receive these necessary services.

A lack of foster homes results in a large number of children being placed in congregate care facilities. Congregate care is often seen as a valuable tool for children with special needs, but for many children, therapeutic foster homes would offer better resources for personalized care.<sup>93</sup> Therapeutic foster homes are structured like traditional foster homes, with the added benefits of specialized training for foster parents and state provision of additional support resources, including professional staff when necessary.<sup>94</sup> Services such as

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<sup>88</sup> Margie Menzel, *Add Taxpayer Cost to the Controversy About Group Homes for Kids without Families*, FLA. TIMES-UNION (Jan. 11, 2015, 7:02 PM), <https://www.jacksonville.com/article/20150111/NEWS/801237145> [<https://perma.cc/AF4H-DSR7>].

<sup>89</sup> *Id.*

<sup>90</sup> CAPACITY BLDG. CTR. FOR STATES, U.S. DEP’T OF HEALTH & HUM. SERVS., *WORKING WITH CHILDREN AND YOUTH WITH COMPLEX CLINICAL NEEDS: STRATEGIES IN THE SAFE REDUCTION OF CONGREGATE CARE* 5 (2017).

<sup>91</sup> WULCZYN ET AL., *supra* note 41, at 3 (internal citations omitted).

<sup>92</sup> *Id.*

<sup>93</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-376, *FOSTER CARE: ADDITIONAL ACTIONS COULD HELP HHS BETTER SUPPORT STATES’ USE OF PRIVATE PROVIDERS TO RECRUIT AND RETAIN FOSTER FAMILIES* 2 (2018).

<sup>94</sup> LEE DORAN & LUCY BERLINER, WASH. STATE INST. FOR PUB. POL’Y, *PLACEMENT DECISIONS FOR CHILDREN IN LONG-TERM FOSTER CARE: INNOVATIVE PRACTICES AND LITERATURE REVIEW*

psychological care and occupational therapy are provided by the state either at-home or in locations close to the therapeutic foster home, allowing children to receive necessary care while residing in a family environment.<sup>95</sup> Some studies suggest that despite being resource-intensive, therapeutic foster homes have the potential to be more cost-efficient than congregate care; however, complexities in funding streams make them impractical.<sup>96</sup> When economic factors drive placement decisions, the state fails in its duty to safeguard the best interests of the child.

## V. MODERN CONGREGATE CARE FACILITIES EXHIBIT THE SAME FUNDAMENTAL FLAWS AS ORPHANAGES

By all accounts, modern American congregate care facilities are a significant improvement from the orphanages of the late-nineteenth and early-twentieth centuries. Our understanding of child psychology and development has made significant strides, and foster care practices and stated priorities largely reflect this progress. Practices such as striking children and requiring them to wear matching uniforms have long since been abandoned, and the congregate care facilities are significantly less ‘institutionalized’ than earlier orphanages.<sup>97</sup> However, the two systems are rife with similarities.

### A. *State Impositions on Underrepresented Families*

Since the passage of AACWA and PRWORA, the structure of foster care has slowly regressed toward the mentality that foster care is a tool to remove children from ‘undesirable’ homes and place them in new families. The child welfare system does not equally impose itself on all sectors of society. Lower-income households and black and African American individuals are disproportionately affected by foster care.<sup>98</sup> Nearly ten percent of black American children spend some time in foster care, compared to approximately five percent of white children.<sup>99</sup> Following in the footsteps of the orphanage system, foster care disproportionately affects lower-income families, who face

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3 (2001).

<sup>95</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 93, at 5.

<sup>96</sup> *E.g.*, JULIE SEIBERT, ROSE FEINBERG, ASHA AYUB, AMY HELBURN & DEBORAH GIBBS, U.S. DEP'T OF HEALTH & HUM. SERVS., STATE PRACTICES IN TREATMENT/THERAPEUTIC FOSTER CARE 1-1, 4-12 to 4-13 (2018).

<sup>97</sup> Compare the strict institutionalism Crenson describes as characteristic of early orphanages with modern congregate care practices. CRENSON, *supra* note 16, at 115.

<sup>98</sup> Karen Zilberstein, *Parenting in Families of Low Socioeconomic Status: A Review With Implications for Child Welfare Practice*, 54 FAM. CT. REV. 221, 222 (2016); *see also* Colleen E. Janczewski, *The Influence of Differential Response on Decision-Making in Child Protective Service Agencies*, 39 CHILD ABUSE & NEGLECT 50, 51–52 (2015) (“CPS decision making appears to be influenced by poverty not only at the family level, but also at the neighborhood- and community-level. Areas with concentrated poverty are more likely to have structural and social problems such as low-quality schools, high incidents of violence and criminal activities, few job opportunities, and high rates of social isolation.”).

<sup>99</sup> Laub, *supra* note 8.

higher incidences of abuse and neglect allegations, have more substantiated cases, and are more likely to experience a child's removal to the foster care system.<sup>100</sup>

The recurring theme in early American orphanages was the notion that “the less fortunate do not have the capacity to provide adequately for their children.”<sup>101</sup> Children were taken from their parents to be re-socialized in a more societally-acceptable manner and were shipped across the country on orphan trains to separate them from their families and their supposed ‘corrupting’ influences.<sup>102</sup> Indentured servitude for children was a widespread issue, that while providing important job training, often put children in situations of abuse or other harm. Parental wishes were often ignored, and children were sent to areas where maintaining contact with family members was nearly impossible. “[I]n numerous situations children were placed as indentured servants in remote areas of the country despite parents’ pleas to have their children returned home.”<sup>103</sup> The policy preferences and functioning of the contemporary foster care system continue orphanages’ unfortunate legacy of targeting people of color and lower-income families.

### ***B. Negative Effects of Institutionalization***

Congregate care facilities struggle from many of the same issues that led to the downfall of orphanages. Despite attempts to restructure congregate care facilities and make them more “family-like,” congregate care remains an institutional entity. “In general, congregate care does not work well for youth because it does not provide a ‘family-like’ setting and fails to meet the service and permanency needs of youth.”<sup>104</sup> A recent study found that “children in foster families reported higher levels of satisfaction with care settings and caregivers, higher levels of feelings of safety, and so forth” and connected this feeling of security to children’s development and well-being when compared to youth in congregate care settings.<sup>105</sup> “Increased feelings of safety have been postulated to allow children to focus more on school tasks and thus lead to increased scores on academic outcomes.”<sup>106</sup>

Although this feeling is often also reported for children placed in foster homes, the rate is significantly higher for children in congregate care. A global meta-data study that controlled for the GDP of different countries compared negative externalizing and internalizing behavior outcomes for youth in

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<sup>100</sup> Janczewski, *supra* note 98, at 51; Zilberstein, *supra* note 98.

<sup>101</sup> FAM. & CHILD.’S SERVS. DIV., *supra* note 13, at 3.

<sup>102</sup> CRENSON, *supra* note 16, at 68–69.

<sup>103</sup> FAM. & CHILD.’S SERVS. DIV., *supra* note 13, at 3.

<sup>104</sup> MADELYN FREUNDLICH, CHILD.’S RTS. JUV. RTS. DIV. OF THE LEGAL AID SOC’Y & LAWS. FOR CHILD., TIME RUNNING OUT: TEENS IN FOSTER CARE 6 (2003).

<sup>105</sup> Dongdong Li, Grace S. Chng & Chi Meng Chu, *Comparing Long-Term Placement Outcomes of Residential and Family Foster Care: A Meta-Analysis*, 20 TRAUMA, VIOLENCE & ABUSE 653, 660 (2017).

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

congregate care facilities (labeled ‘residential homes’ in the global study) as compared to youth in foster homes.<sup>107</sup> The study’s results confirmed prior beliefs, finding “considerable robust effects of poorer behavioral and psychosocial outcomes for children placed in residential homes as compared to those in family foster care.”<sup>108</sup> The study’s conclusion on youth outcomes from the different placement settings “imply that family foster care offers better caring environment, possibly due to the provision of more individualized, stable, and responsive caregiving and the provision of a safer, more home-like environment as compared to residential homes.”<sup>109</sup> For decades, popular wisdom in the child welfare sphere has suggested that children in family settings fare better in the long-run than children placed in foster care institutions. Modern studies now corroborate this belief, yet too many children unnecessarily remain placed in congregate care settings.

### C. Widespread Educational Neglect

Congregate care facilities also tend to neglect children’s educational objectives. Widespread educational neglect is reminiscent of early orphanages, in which children’s schooling was often deprioritized in favor of workforce training and indenturing orphans.<sup>110</sup> National studies have found that the percentage of youth leaving foster care who have graduated high school ranges from thirty-seven to sixty percent, compared to a national average of eighty-four percent of young adults between the ages of twenty-five and twenty-nine having a high school or high school equivalency diploma.<sup>111</sup> A study on foster care conditions in New York interviewed social workers, law guardians, judges, and other stakeholders to understand their qualitative experiences with New York’s foster care system.<sup>112</sup> In that study, “[o]ne social worker noted that ironically, children are removed from their parents’ custody when they are young because of educational neglect but when they are teens in foster care, their educational needs are not taken seriously.”<sup>113</sup> While educational outcomes for youth in foster care are dire, children placed in congregate care facilities often face even worse educational outcomes. The same study of foster care in New York found congregate care facilities to be guilty of overusing special education programs for kids who did not need them, stifling the education of students who could otherwise thrive in traditional classrooms.<sup>114</sup> While it is difficult to track whether foster youth placed in special education settings truly need those programs, observers of the foster care system have commented on the inappropriate overreliance on special education programs. One family judge, for example,

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<sup>107</sup> *Id.* at 661.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See CRENSON, *supra* note 16, at 172–73.

<sup>111</sup> FREUNDLICH, *supra* note 104, at 44–45.

<sup>112</sup> *Id.* at 50.

<sup>113</sup> *Id.* at 57.

<sup>114</sup> *Id.*

stated that “many [foster care] agencies just throw everyone into special ed.”<sup>115</sup> Others have noted similar issues inherent to the structure of congregate care facilities. Social workers and law guardians have reported that youth in Residential Treatment Centers, a form of congregate care used by states such as New York, enroll all of their residents in on-site schools that exclusively provide special education, “irrespective of whether . . . [a child] need[s] special education services.”<sup>116</sup> These policies are especially worrisome when children are removed from their families exclusively for educational neglect, only to have their education further neglected.

#### *D. Safety Issues for Children in Congregate Care*

Safety concerns for children in late-nineteenth and early-twentieth century orphanages were paramount to their decline. In the early orphanages, children “needed protection not just from the oppressiveness of institutional discipline, but also from the bad influence and bullying of their fellow inmates. The asylum’s outnumbered staff was engaged in a struggle for control of the institution.”<sup>117</sup> Orphanages even had high mortality rates since “[o]lder, bigger, tougher kids preyed mercilessly on younger, smaller inmates.”<sup>118</sup>

In the foster care system, congregate care facilities are unique in the high level of safety-related issues for youth in their programs. The majority of respondents in a New York study on congregate care facilities found that peer-on-peer violence was “a serious issue,” and gang-related activity was also found to be high.<sup>119</sup> Certain demographics, particularly LGBTQ youth, face additional safety threats in congregate care settings.<sup>120</sup> Other forms of violence including sexual intimidation and weapons brought into group homes are also frequent occurrences.<sup>121</sup> The stealing of personal items is also a serious issue, and social workers describe “stealing as ‘routine’” and occurring “on a daily basis.”<sup>122</sup> This type of theft is especially problematic because youth are dependent on the foster care system for their supplies, and “it takes months for youth to obtain new clothes, and in some cases, important items such as sneakers or jackets are stolen and agencies refuse to replace them.”<sup>123</sup>

There is great variation in the quality of congregate care facilities, but some modern facilities have been reported to utilize corporal punishment on youth as a form of discipline.<sup>124</sup> According to the study of congregate care facilities in

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See CRENSON, *supra* note 16, at 117–18.

<sup>118</sup> Keiger, *supra* note 1.

<sup>119</sup> FREUNDLICH, *supra* note 104, at 7, 62.

<sup>120</sup> *Id.* at 62.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* (quoting several social workers describing having personal items stolen in congregate care facilities).

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

<sup>124</sup> See *id.* at 63.

New York,

Law guardians and social workers reported the use of corporal punishment, the use of restraints, and the inappropriate use of isolation and deprivation. One social worker described instances of staff using physical force with youth, including an incident in which a staff member threw a youth to the ground, resulting in a rug burn on the child's face.<sup>125</sup>

Other social workers reported instances of staff bullying congregate care youth, as well as an instance in which "a young person was strip-searched and subjected to an anal cavity check when he arrived at the R[esidential] T[reatment] C[enter]."<sup>126</sup>

### ***E. Failure to Provide Necessary Supplemental Services***

Orphanages were frequently criticized for failing to prepare children under their care for society outside of an institution.<sup>127</sup> The outcomes of youth leaving congregate care facilities raise concerns about the quality of services being provided for youth. "Mental health services are seriously lacking for youth in foster care, in general, and youth in community-based group homes, in particular."<sup>128</sup> The lack of mental health services is particularly troubling given the characteristics of youth in foster care because "[a]lmost all children entering the child welfare system have suffered trauma at various states in their young lives, including upon removal and separation from their families."<sup>129</sup>

In a similar manner to how orphanages indentured children far away from their parents, congregate care facilities are often located far from children's homes and communities. Stakeholders report that this distance often creates a sense of isolation in youth.<sup>130</sup>

## **VI. LEGAL SOLUTIONS TO THE OVER-RELIANCE ON CONGREGATE CARE**

The 'congregate care' labels help us overlook the realities of the child welfare system for children housed in settings that are the modern-day equivalent to orphanages. Bringing light to the relationship between group facilities and orphanages help us realize that more needs to be done to protect youth in government care. The unfortunate reality of the foster care system is that children who experience foster care have significantly worse outcomes on a variety of metrics, even when compared to their peers from similar

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<sup>125</sup> FREUNDLICH, *supra* note 104, at 63.

<sup>126</sup> *Id.*

<sup>127</sup> See FAM. & CHILD.'S SERVS. DIV., *supra* note 13, at 6.

<sup>128</sup> FREUNDLICH, *supra* note 104, at 7.

<sup>129</sup> Post & Zimmerman, *supra* note 6, at 496.

<sup>130</sup> FREUNDLICH, *supra* note 104, at 52.

backgrounds.<sup>131</sup> For example, only 46 percent of youth exiting foster care have or will earn a high school diploma, and less than three percent of them will obtain a bachelor's degree.<sup>132</sup> Many states have recently adopted tuition assistance programs for youth exiting foster care, but these programs are highly restrictive and limited in reach.<sup>133</sup> Unemployment is a serious issue for youth exiting foster care. "30% of the youth who aged out of foster care in Illinois were unemployed; 23% of the youth in California were unemployed; and 14% of the youth in South Carolina left care without a job."<sup>134</sup> Unemployment rates affect youth poverty and ultimately contribute to a high homelessness rate for the aged-out foster care population. A study of youth aging out of care found that "14% of the men and 10% of the women reported being homeless at some point during the first 12 to 18 months following discharge from foster care."<sup>135</sup>

Youth in the foster system are also frequently subjected to the foster care-to-prison pipeline. Within two years of leaving care, a quarter of foster care alumni become part of the criminal justice system.<sup>136</sup> This number increases when focusing on black youth, LGBTQ youth, and youth with mental illness.<sup>137</sup> This pipeline begins during a youth's period in the child welfare system, and its effects are exacerbated for youth placed in congregate care facilities. "Foster youth in government-run group homes are particularly at risk of having police called on them by staff [for behavior that] include verbal arguments, physical fights, throwing things, running away, smoking marijuana or even masturbation, according to advocates."<sup>138</sup> These types of teenage behaviors would typically merit a scolding, grounding or other at-home punishment in a family-setting. But due to the institutional and rigid nature of congregate care facilities, these ordinary behaviors result in youth developing unwarranted criminal records.

Youth in congregate care face the harsh realities of modern orphanage life,

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<sup>131</sup> MOLLY SARUBBI, EMILY PARKER & BRIAN A. SPONSLER, STRENGTHENING POLICIES FOR FOSTER YOUTH POSTSECONDARY ATTAINMENT 3 (2016), [https://www.ecs.org/wp-content/uploads/Strengthening\\_Policies\\_for\\_Foster\\_Youth\\_Postsecondary\\_Attainment-1.pdf](https://www.ecs.org/wp-content/uploads/Strengthening_Policies_for_Foster_Youth_Postsecondary_Attainment-1.pdf) [<https://perma.cc/RQ4L-3QCC>].

<sup>132</sup> *Id.* at 1.

<sup>133</sup> *See id.* at 1, 4.

<sup>134</sup> FREUNDLICH, *supra* note 104, at 45.

<sup>135</sup> *Id.* at 46.

<sup>136</sup> Rachel Anspach, *The Foster Care to Prison Pipeline*, TEEN VOGUE (May 25, 2018), <https://www.teenvogue.com/story/the-foster-care-to-prison-pipeline-what-it-is-and-how-it-works> (last visited Oct. 3, 2020).

<sup>137</sup> Ryan Berg, *A Hidden Crisis: The Pipeline from Foster Care to Homelessness for LGBTQ Youth*, THE IMPRINT (Oct. 14, 2016), <https://imprintnews.org/child-welfare-2/hidden-crisis-pipeline-foster-care-homelessness-lgbtq-youth/21950> [<https://perma.cc/43YR-9L9M>] ("[M]any youth of color find their entry point into the school-to-prison pipeline through foster care."); SAMANTHA CALERO, KRISTINA KOPIC, ANNIE LEE, TAYLAR NUEVELLE, MARLIES SPANJAARD & TARYN WILLIAMS, RUDERMAN FAM. FOUND., RUDERMAN WHITE PAPER ON THE CRIMINALIZATION OF CHILDREN WITH NON-APPARENT DISABILITIES 16–17 (Aug. 2017), [https://rudermanfoundation.org/white\\_papers/criminalization-of-children-with-non-apparent-disabilities/](https://rudermanfoundation.org/white_papers/criminalization-of-children-with-non-apparent-disabilities/) [<https://perma.cc/K3VE-VTHB>].

<sup>138</sup> Anspach, *supra* note 136.

and greenwashing the names of these facilities makes it easier to ignore the realities of these institutions. Congregate care is not a necessary part of the foster system, and instead reflects a deliberate policy choice that must be directly confronted.

Oftentimes, children in congregate care facilities are placed there due to a lack of sufficient foster homes to provide for the number of youths in the child welfare system.<sup>139</sup> This issue can be addressed by either decreasing the amount of children entering foster care, or by increasing the supply of available foster homes. A report by the Children's Bureau found that "if [s]tates want to successfully reduce their use of congregate care to conform to emerging trends, they should employ a two-pronged approach: (1) use evidence-based interventions to target the complex mental health needs of youth and (2) provide additional services and supports for their home-based caregivers."<sup>140</sup>

States can choose to provide support services for families at risk of being subjected to the child welfare system, especially by providing training for families that have children with disabilities whose special needs may not be met due to lack of education, resources, or opportunity. A Connecticut study of congregate care usage in foster care found that in some cases "increased collaboration with family members might have resulted in the children avoiding placement in a foster home after exiting congregate care."<sup>141</sup>

Remedying the foster care system is an incredibly complex endeavor that must account for numerous factors ranging from funding mechanisms, foster family allocation, supervision strategies, as well as the underlying causes bringing children into the system—mass incarceration, substance abuse, poverty, mental health, among so many others. This article does not attempt to provide the perfect solution to fixing foster care, and such a solution is unlikely to exist. A host of approaches will be necessary to change the way that child welfare operates in the United States, and this section will provide some starting points of policy improvements for consideration.

#### **A. *Recruit More Foster Families***

The supply of foster homes can be increased by engaging in directed targeting efforts. Targeted recruitment has proven especially effective at recruiting prospective foster parents from faith-based communities and those of particular races.<sup>142</sup> A targeted recruitment strategy can also help identify families with skillsets that predispose them to serve as therapeutic foster parents for children in need of a higher level of care, such as doctors and nurses.<sup>143</sup>

Federal and state policy may also target the supply of foster homes. The federal government provides foster care subsidies for foster families to afford

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<sup>139</sup> See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 93, at 19–20.

<sup>140</sup> CAPACITY BLDG. CTR. FOR STATES, *supra* note 90, at 6.

<sup>141</sup> CONN. DEP'T. OF CHILD. & FAMS., *supra* note 78, at 18.

<sup>142</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 93, at 11.

<sup>143</sup> *Id.* at 11–12.

the cost of raising children.<sup>144</sup> Compared to the true costs of raising a child, these payments are very low and may not be enough to allow well-intentioned prospective foster parents from assuming the responsibility of caring for a child.<sup>145</sup> Increasing the monthly subsidy amount may help increase the amount of people willing to serve as foster parents, but careful monitoring of foster parents is necessary to ensure that those signing up to serve as foster parents are truly willing to raise foster children rather than merely trying to receive an additional paycheck. Adoption subsidies for those who add foster children to their families have not been free of scandals, for example, adopted children may be placed back into foster care by their adoptive parents, who continue to receive a paycheck.<sup>146</sup> For many children who were adopted but then voluntarily placed back into the foster system by their adoptive parents, “‘knowing that their parents are receiving an adoption subsidy for caring for them, and are not caring for them, reinforces the idea that they are just a paycheck.’”<sup>147</sup> This issue can be avoided by carefully screening prospective foster parents and monitoring them once approved. Recruiting foster families is challenging, but an increased supply of foster families can allow for more family-like placements and for greater matching between foster parents and foster child.

### **B. Provide Better Training for Child Welfare Workers**

The foster care system suffers from insufficient funding nationwide, and many of foster care’s issues could be remedied with more resources to allocate. Limited funding translates to underfunded facilities, staff, and resources for youth in state care. Stakeholders report that the lack of physical safety at congregate care facilities is “‘tied to having a sufficient number of adequately trained staff.’”<sup>148</sup>

Culturally cognizant training for social workers and state employees who make removal decisions can also decrease the amount of children in foster care. Cultural dissonance issues with the child welfare system date back for decades, if not for the entirety of the U.S.’s child welfare system. For example, a 1978 House Report found that “‘in judging the fitness of a particular family, many

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<sup>144</sup> Peoples, *Getting Paid to be a Foster Parent: State-by-State Monthly Guide*, WE HAVE KIDS (July 23, 2020), <https://wehavekids.com/adoption-fostering/What-does-being-a-foster-parent-really-pay> [<https://perma.cc/9V6N-PQNT>].

<sup>145</sup> See Marjorie Cortez, *After 8 Years with no ‘True Increase’ in Foster Care Stipends, Foster Parents Seek More Funding*, DESERET NEWS (July 24, 2016), <https://www.deseret.com/2016/7/24/20592571/after-8-years-with-no-true-increase-in-foster-care-stipends-foster-parents-look-for-more-funding#utah-would-need-to-increase-foster-care-stipends-as-much-as-70-percent-to-cover-actual-costs-of-providing-care-for-children-in-the-states-custody-one-national-study-says-utah-foster-parents-look-for-a-more-modest-increase> [<https://perma.cc/9TRY-NDJS>].

<sup>146</sup> *Keeping the Money but Not the Child: CR Joins Others to Tackle Adoption Subsidy Fraud*, CHILD’S RIGHTS (Oct. 29, 2015), <https://www.childrensrights.org/keeping-the-money-but-not-the-child-cr-joins-others-to-tackle-adoption-subsidy-fraud/> [<https://perma.cc/G2HU-9DBS>].

<sup>147</sup> *Id.* (quoting Betsy Kramer, Director of the Public Policy and Special Litigation Project at Lawyers for Children).

<sup>148</sup> FREUNDLICH, *supra* note 104, at 64.

social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.”<sup>149</sup> Until the Indian Child Welfare Act of 1978 created legal barriers to prevent children from federally recognized Indian tribes entering the foster care system, over a quarter of all Indian children were separated from their families.<sup>150</sup> The House Report indicated that only one percent of Indian children were removed from their families on the grounds of physical abuse, while “the remaining 99 percent of the cases were argued on such vague grounds as ‘neglect’ or ‘social deprivation’ and on allegations of the emotional damage that children were subjected to by living with their parents.”<sup>151</sup>

The House Report provides an example of inappropriate removal: a social worker considers the parents of children who are being cared for by extended family members to be neglectful, despite the dynamics of large Indian extended families.<sup>152</sup> Similar racial issues exist for other minority groups in the foster care system. A report sponsored by the HHS found that racial bias and discrimination by professionals involved in the child welfare system accounts for part of the racial disproportionality and disparity observed in the composition of foster youth.<sup>153</sup> Beyond outright racism, some congregate care facility staff are hired without sufficient scrutiny, or “the hiring of staff who do not like adolescents.”<sup>154</sup> Lack of staff training and high staff turnover rates also contribute to underwhelming services for youth in congregate care.<sup>155</sup> These types of issues can be addressed by providing child welfare employees with better pay, benefits, and workplace conditions. Too many of foster care’s problems stem from resource constraints including a lack of sufficient funding. Making the child welfare system a budgetary priority would lead to improvements for thousands of children in the foster system.

### ***C. Engage in Pre-Intervention Strategies to Decrease the Number of Children Entering Care***

A key aspect of any meaningful foster care reform is to consider how foster care might be over-used. Instead of waiting until a child’s at-home situation gets so bad that removal becomes necessary, the child welfare system should work toward avoiding the need for family separation in the first place. Policy initiatives focused on preventing a child’s removal may be a better use of

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<sup>149</sup> H.R. REP. NO. 95-1386, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

<sup>150</sup> *Id.* at 9. (“Approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions.”).

<sup>151</sup> *Id.* at 10.

<sup>152</sup> *Id.*

<sup>153</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 5–6 (2016), [https://www.childwelfare.gov/pubpdfs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf) [<https://perma.cc/AAM4-DRGV>].

<sup>154</sup> FREUNDLICH, *supra* note 104, at 64.

<sup>155</sup> *See, e.g., id.*

resources than placing children in the foster system. Many foster youth are removed due to “neglect” rather than to any particular form of abuse, and the forms of “neglect” that frequently lead to family separation are really outgrowths of poverty.<sup>156</sup> Too often, “neglect” conflates poverty with bad parenting—a neglect finding inappropriately blames a well-intentioned parent for not having sufficient resources to properly provide for a child, and instead of helping with additional resources or aid, worsens a family situation by removing a child from their family’s custody.<sup>157</sup>

Once a child is removed from a family home and placed in the foster care system, the state assumes the cost of providing for that child. These costs include the overhead expenses of maintaining congregate care facilities and staff, as well as the costs of providing clothing and other necessities for youth in care. Notably, the state provides foster parents with monthly stipends to cover the expenses of foster youth.<sup>158</sup> These stipends range from around \$300 to over \$1,000 per month, depending on the age and needs of the children being placed.<sup>159</sup> The effect of this combination of policies is that children are removed from their parent(s) and placed in a deeply flawed system due to poverty, yet once they are in the foster system, the state provides insufficient funds for the children’s new caregivers to provide for their needs.

Upon examination, this policy is incredibly wasteful and damaging—it traumatically removes children from loving and supportive parent(s) due to their financial situation and places these youth into a system with a limited supply of foster homes. Counterintuitively, the funds that the children’s birthparent(s) could have used to properly provide for their children and avoid a finding of neglect are instead directed to another individual for that very same purpose. The policy of removing children from their homes when issues arise due to poverty, and then placing the children into the foster care system where a foster family receives a monthly stipend, is harmful to children and wasteful for the child welfare system. The state should expend resources to directly address the issue—poverty—and provide families who are at-risk of having their children removed for financial-related causes with the same stipend they would pay out in the current arrangement of the foster care system.

Broader pre-intervention strategies can target any of the factors that lead to a child’s placement in the foster care system. The removal of children placed due to parental incarceration could be addressed by remedying this nation’s issue with mass incarceration. Placements due to parental substance abuse and mental health issues could be reduced with public treatment options and counseling services.<sup>160</sup> Many of the reasons underlying a child’s placement in the child

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<sup>156</sup> Jerry Milner & David Kelly, *It’s Time to Stop Confusing Poverty and Neglect*, THE IMPRINT (Jan. 17, 2020), <https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222> [<https://perma.cc/554W-GSQC>].

<sup>157</sup> *See id.*

<sup>158</sup> Peeples, *supra* note 144.

<sup>159</sup> *See id.*

<sup>160</sup> *See, e.g.*, NAT’L FOSTER CARE YOUTH & ALUMNI POL’Y COUNCIL, PREVENTING

welfare system can be directly traced to the incredible inequality within the United States. Child welfare reform works hand-in-hand with endeavors such as criminal justice reform. For example, eliminating mandatory minimums, addressing the over-policing of black and brown communities, and releasing individuals convicted for drug possession that is now legalized would return children to their parents and prevent more children from being placed in foster care. Reducing demand on the child welfare system will require policies and initiatives that ameliorate social, financial, and penal inequalities in this country.

## VII. CONCLUSION

The use of congregate care facilities as part of the foster care infrastructure reflects a deliberate policy choice. While congregate care may be lauded as ideal for ‘more challenging’ youth, the realities of these institutions are far from ideal—‘more challenging’ youth need additional support, not functional institutionalization. Foster care itself has many issues, but these problems are often exacerbated in congregate care facilities. Popular movies such as *Annie* and *Newsies* paint early-twentieth century orphanages in a dark light, but these films have become childhood classics with the implied message that these sorts of facilities and forms of child abuse are relics of the past. Compared to the terrible actions of Miss Hannigan,<sup>161</sup> the modern foster care system should epitomize child welfare theory. However, the stark reality is that congregate care shares many of the same forms of abuses and problems that brought an end to the orphanage system. In the 1990s, the orphanage system was largely brought back under the guise of diminishing the welfare state.

Although there have been changes, the modern foster care structure continues to exhibit many of the problems that led to the end of orphanages. Most of the concerns have been lessened, but the same fundamental issues still remain. Foster care continues to be a semi-permanent institution for many children, and the foster care-to-prison pipeline manages to create a more continuous institutionalization than even the orphanage system once did. Families living in poverty frequently have children taken away from them due to their inability to ‘adequately’ care for them, and these judgments are too often made on class- and race-based assumptions. Funding continues to be a major issue for the foster care system, and the quality and availability of services that would otherwise distinguish modern congregate care facilities from traditional orphanages are often too sparse to be effective.

Reliance on congregate care facilities is a deliberate policy, shaped by lawmakers who rarely confront the reality of the system they have put in place. By classifying group homes and residential centers as ‘congregate care’

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UNNECESSARY REMOVAL OF CHILDREN FROM THEIR FAMILIES 2 (2017). <https://www.fosterclub.com/sites/default/files/docs/landingpage/Prevention%20Priority%20%281%29.pdf> [<https://perma.cc/KE9R-2GVB>].

<sup>161</sup> See, e.g., ANNIE (Columbia Pictures 1982) (describing Miss Hannigan, the cruel and abusive caretaker of a New York City orphanage during the Great Depression Era in the *Annie* films and musical).

facilities, individuals in position of power are able to ignore the harsh and unpleasant reality of sending vulnerable youth to twenty-first century orphanages. Although congregate care facilities have been given new names such as 'group homes' and 'residential treatment centers,' the reality is a twenty-first century version of orphanages. The same problems exist in new manifestations, and if we are to continue to use congregate care as a foster care tool, then we must call these institutions what they really are: orphanages by another name.