

Protection, Privatization, and Profit in the Foster Care System

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The 1996 Personal Responsibility and Work Opportunity Reconciliation Act included an amendment to the Social Security Act allowing for-profit private providers to subcontract with public child welfare agencies to provide foster care services for abused and neglected children. Allowing profit making in the delivery of foster care expands the privatization of service delivery in the child welfare system. Nonprofit private providers have historically operated foster care systems and in fact preceded public providers. The entrance of profit making into the system raises issues of accountability and oversight unique to the profit making structure of the corporations. These include concerns for size and location of the placements. Professor Mangold asserts that the history of private provider involvement in the foster care system and an analysis of corporate structural differences suggest reforms of the regulations governing public monitoring of all foster care placements, especially of those regulating foster care provided for profit.

I. INTRODUCTION

Abused and neglected children are today cared for through a system governed by *public family law*. This area of family law is not the doctrinal field studied as domestic relations involving the private family and the exchange of rights and responsibilities between parents or related private parties.¹ Instead, the system combines both family law and administrative law by substituting a public agency for a parent in the exercise of certain custodial rights. In public family law, the private family is replaced with a combined state/family effort to raise the children safely. There is no outside state; instead, the state becomes an integral part of the family, temporarily holding some of the custodial rights to the child. The state is required to exercise the parental role in the “least restrictive (most family like) . . . setting available in close proximity to the parents’ home.”²

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¹ See Susan Vivian Mangold, *Challenging the Parent-Child Family Triangle in Public Family Law*, 47 BUFFALO L. REV. (forthcoming 1999). For a discussion of two types of family law in California, one public and one private, 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).

² 42 U.S.C. § 675(5)(A) (1994 & Supp. III 1997); 45 C.F.R. § 1356.21(d)(3) (1998).

Before the advent of the public family law system, abused and neglected children were cared for through formal and informal arrangements by private families and private philanthropic agencies dedicated to the care of such children. Private provider agencies today work in a contractual relationship with public agencies to care for abused and neglected children. Part of the 1996 Personal Responsibility and Work Opportunity Act³ (1996 amendment) amended the Social Security Act to allow *for-profit* private corporations to provide placement services for these children. This change in the privatization of the state's custodial role in public family law is the focus of this Article. The 1996 amendment was not passed with additional provisions to insure that these new actors in public family law would follow the preference for family-like, local placements for children.

The 1996 amendment allowed federal reimbursement for foster care provided by for-profit companies.⁴ Little attention was given to this amendment by the Congress or child welfare community. This Article brings attention to this change in the delivery of foster care services and begins to consider the implications of the change.⁵

Initially, the author and the audience at the Implications of Welfare Reform for Children Symposium were alarmed at the notion of profit making in the foster care system.⁶ However, after considering the long-standing role of nonprofits⁷ and their

³ 42 U.S.C. § 672(c) (Supp. III 1997).

⁴ See *id.*

⁵ Empirical analysis would contribute greatly to the study of for-profit and nonprofit foster care. This Article is limited to a legal analysis of the new amendment based on consideration of the goals of public family law, identification of possible conflicts, and suggestions for law reform to mitigate harmful results. As part of the purpose of the Symposium and this Article is to heighten awareness of the welfare legislation including the 1996 amendment, empirical study of the problems of private for-profit foster care is encouraged.

⁶ Advoserv, the for-profit corporation behind the lobbying for the amendment, operates sites in Delaware and Florida which house children from 24 states. It is a small privately held corporation that places children with complicated histories and complex problems. See Nina Bernstein, *Deletion of One Word in Welfare Bill Opens Foster Care to Big Business*, N.Y. TIMES, May 4, 1997, at A1. Public agencies have trouble placing these children and were willing, before the 1996 amendment, to pay for the placements with local dollars since federal reimbursement was not available. For-profit providers have also flourished in the industry of at-risk teens—youths at risk of being involved with the child welfare system due to status offenses such as truancy, incorrigibility, and ungovernability. In servicing at-risk teens, much of the funding that goes to the privately held or publicly traded corporations is privately paid by parents and supplemented by government funds. According to the Independent Educational Consultants Association, there has been an approximately ten-fold increase in the number of teens served by such for-profit settings in the past five years. In 1998, 10,000 at-risk youth were attending for-profit programs generating \$300 million in revenue. See Rebecca Kuzins, *Second Chance at Success: Private Sector Is Tackling Critical Need for Intervention Programs*, L.A. BUS. J., Mar. 22, 1999, at 6. Many for-profit providers in the foster care business are large publicly traded corporations, which similarly

partnership with public child welfare agencies, corporate structural differences do not seem to be the keys to quality service delivery. The distinction between profit-making and nonprofit corporations is not necessarily a vital focus for regulation. Instead, consideration of the 1996 amendment provides an opportunity to consider the role of private providers generally, both nonprofit and for-profit, as well as the unique attributes of for-profit corporations, which may heighten accountability concerns. It is an opportunity to reexamine the oversight of placement providers whether they be public, nonprofit, or for-profit.

Whether provided by the public agency directly, nonprofit agencies, or for-profit corporations, foster care services must be closely monitored to protect against abuse of children and misuse of funds. Until now, the many problems in foster care settings have occurred mainly in nonprofit or public placements. Private providers are allowed by law to provide a spectrum of placements, some larger and more distant from a child's home than can be provided by public agencies. The 1996 amendment expands the pool of providers of private placements. I assert that the size and location of the foster care site and the oversight mechanisms should be regulated for all providers. That said, there are unique concerns raised and heightened by for-profit companies in the foster care system, especially by large, publicly owned corporations, and those are also addressed in this Article.

The 1996 amendment allowing for-profit providers expands the *privatization* of the child welfare system by allowing profit-making corporations to provide placement services for abused and neglected children. In this Article, the term *privatization* means the general delegation of public functions to private actors. It can involve delegation of policy making, regulation, and service delivery. Legal scholarship in a variety of doctrinal and substantive areas is focused on the increasing delegation of public functions to private actors.⁸ Here, the focus is exclusively on the delegation of *service delivery* from a public child welfare agency

accept out-of-state children to aggregate care sites.

⁷ The nonprofits referred to here are often religiously affiliated. See generally *Wilder v. Bernstein*, 848 F.2d 1338, 1341 (2d Cir. 1986) (describing the relationship between New York City and the 60 private agencies that service over 90% of the children in foster care. This case is part of decade-long litigation brought by the ACLU to challenge placement practices by religiously affiliated foster care providers.). Policymakers often only parenthetically note the range of nonprofits and their distinction from for-profit providers without full consideration of the consequences of the distinction. See, e.g., *Foster Care: Problems and Issues: Before the Subcomm. on Select Educ. of the Comm. on Educ. & Labor*, 94th Cong. 120, 126-27 (1976) (statement of Joseph B. Gavrín, Director, New York State Council of Voluntary Child Care Agencies) [hereinafter *Foster Care: Problems and Issues*].

⁸ See generally JOEL F. HANDLER, *DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT* (1996); Lester M. Salamon, *The Marketization of Welfare: Changing Nonprofit and For-Profit Roles in the American Welfare State*, 67 SOC. SERV. REV. 16 (1993).

to a private foster care provider. Uniquely, foster care had originally been provided by private agencies with public agencies later joining as partners. It was always a "privatized" system, never an exclusively public one. While many of the same issues of accountability and legitimacy which are prevalent in the literature are relevant here, the focus on delegation of service implementation, not policy making or regulation, narrows the focus of this inquiry.

Definitions of a few terms necessary for an understanding of this substantive area are important. The term *child welfare system* is used to mean the entire spectrum of services available for children including childcare, health, and nutrition. While income maintenance programs are a form of *public* welfare, child welfare services do not usually include income maintenance programs. Child welfare services include the *dependency system*, which is aimed at preventive and rehabilitative services for abused and neglected children and their families. The dependency system includes both in-home services available to children and their families without transferring physical custody of the children to the state or local child welfare agency and placement services. The *foster care system* is a part of the dependency system. It is a spectrum of placement services available to abused and neglected children. These placement services range from care provided by individual families, which may or may not be related to the children, to group home care and larger institutional settings. Public family law governs the care of all children in foster care. Even when the child is at home but services by a public or private agency are mandated by the court into a home against the parents' wishes, such dispositions are governed by public family law.

This Article begins by describing the historical involvement of private providers in the foster care system. Private *nonprofit* providers have long been part of the provision of foster care for abused and neglected children and in fact predated the formation of public agencies. This Article considers the implications of the amendment allowing *for-profit* corporations to compete with nonprofit private agencies to provide foster care services to abused and neglected children.

In Part II, the history of private providers in the foster care system is briefly summarized. This history depicts a privately operated child welfare system that preceded the entry of public agency participation. The care of vulnerable children has never been an exclusively public enterprise. The evolving role of private providers as contractors with public agencies is illustrated by the reliance of large child welfare systems on nonprofit private providers. With the longstanding privatization of the system, delegation of the parental role was eventually shared between a public agency exercising case management and a nonprofit private agency subcontracting to provide the custodianship.

Part III describes the evolution of public family law through the history of public funding of foster care. The history begins with the White House Conference on Children in 1909 and continues through the 1996 welfare reform and the

Adoption and Safe Families Act of 1997.⁹ The role of the public state agency acting to fulfill part of the parental role is described through the federal mandates imposed on the states regulating the public child welfare agencies.

In Part IV, I analyze how the differences between for-profit and nonprofit providers may impact the provision of services to vulnerable children. Foster care is a special good or service that the for-profit company model does not produce in sufficient quantity or deliver to all of those in need.¹⁰ Public entities and private nonprofit foster care providers, which operate with a public service mission, have evolved to produce such special services.¹¹ While they have been criticized for the operation of the foster care system, their only provision is providing services to needy clients.¹² Despite this purity of mission, as nonprofits increasingly tailor their services to compete for public contracts, the services become decreasingly different from those delivered by a for-profit company.¹³

In addition, Part IV addresses the differences between public agency relationships with private nonprofit foster care providers and for-profit providers. The structural differences inherent in a profit-making enterprise, oversight, location, and size of the for-profit settings are considered in four parts and the implications for the well being of foster children are addressed.

First, how may corporate structure impact the delivery of foster care? Are the structural differences between nonprofits, which currently provide foster care, and for-profits relevant to the delivery of foster care? One aspect of the difference in

⁹ Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

¹⁰ Although often referred to as an entitlement program, foster care is really only a federal entitlement for children who are eligible for public assistance at the time of placement. *See* 42 U.S.C. § 608(a) (repealed 1980) (current version at 42 U.S.C. § 672(a) (1994 & Supp. III 1997)).

¹¹ *See* Eleanor D. Kinney, *Legal and Ethical Issues in Mental Health Care Delivery: Does Corporate Form Make a Difference?*, 28 HOUS. L. REV. 175, 180 (1991).

¹² *See id.* at 180-81 Kinney states:

The distinguishing characteristic of the private, nonprofit corporation is that it cannot engage in business for the purpose of making a profit and must use profits made to further the main purpose of the corporation. Additionally, it cannot distribute profits to its members for personal consumption and exists for public benefit, mutual benefit, or religious purposes.

Id. (citations omitted).

¹³ *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 63 (Walter W. Powell & Paul J. DiMaggio eds., 1991). Is there a problem with the overuse of public subcontracts with private providers generally or is there a distinct problem with the entrance of for-profit private providers into the foster care field? *See generally* 1 *THE PRIVATIZATION OF HUMAN SERVICES: POLICY AND PRACTICE ISSUES*, (Margaret Gibleman & Harold W. Demone, eds., 1998).

corporate form is profit distribution. Is the public and nonprofit operation of the foster care system so inefficient that a profit can be made and services maintained or improved? Nonprofits often engage in a variety of fundraising activities to subsidize the public contracts they receive to provide services to needy children and their families. These activities involve the larger local community in caring for abused and neglected children and also enhance the services that can be provided with limited and often inadequate public funds.

Second, while the public agency maintains the responsibility to provide oversight for the child's placement in whatever setting it places the child, what implications for oversight does the move to for-profit care entail? Oversight of for-profit companies is different than oversight of public or nonprofit entities. Nursing home care, mental health services, and juvenile justice and prison¹⁴ systems preceded child welfare in allowing federal reimbursement for services provided by for-profit providers and the history of those systems raises cause for concern.

Third, does the provision of service by a nationally based as opposed to a locally based provider make a difference to the children receiving the service? For-profit companies that currently provide foster care services are nationally based, unlike most locally based nonprofits that historically contracted to provide in-home and out-of-home services. The history of private nonprofit provider involvement and the importance of the connection to the local community will be discussed.¹⁵

¹⁴ See generally *Children's Mental Health: Promising Responses to Neglected Problems*, Hearing Before the Subcomm. on Children, Youth & Families, 100th Cong. (1987); *Nursing Home Abuses: Hearings Before the Subcom. on Oversight & Investigations of the Comm. on Interstate & Foreign Commerce*, 95th Cong. (1977); ROBERT A. DORWART & SHERRIE S. EPSTEIN, *PRIVATIZATION AND MENTAL HEALTH CARE* (1993); PAUL L. GRIMALDI, *MEDICAID REIMBURSEMENT OF NURSING-HOME CARE* (1982); RICHARD W. HARDING, *PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY* (1997) (accepting existence of private prisons and arguing accountability is the central concern); MARY ADELAIDE MENDELSON, *TENDER LOVING GREED* (1974); FRANK E. MOSS & VAL J. HALAMANDARIS, *TOO OLD, TOO SICK, TOO BAD* (1977); OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, *CHILDREN'S MENTAL HEALTH: PROBLEMS AND SERVICES*, NO. OTA-BP-H-33 (1986); BRUCE C. VLADECK, *UNLOVING CARE: THE NURSING HOME TRAGEDY* (1980); Burton A. Weisbrod & Mark Schlesinger, *Public, Private, Nonprofit Ownership and the Response to Asymmetric Information: The Case of Nursing Homes*, in *THE ECONOMICS OF NONPROFIT INSTITUTIONS* 133 (Susan Rose-Ackerman ed., 1986); Patricia A. Butler, *Assuring the Quality of Care and Life in Nursing Homes: The Dilemma of Enforcement*, 57 N.C. L. REV. 1317 (1979); Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371 (1997); William R. Shadish, Jr., *Private-Sector Care for Chronically Mentally Ill Individuals*, 44 AMER. PSYCHOLOGIST 1142 (1989); Marc N. Sperber, *Short-Sheeting the Psychiatric Bed: State-Level Strategies to Curtail the Unnecessary Hospitalization of Adolescents in For-Profit Mental Health Facilities*, 18 AM. J.L. & MED. 251 (1992).

¹⁵ See generally Linda Gordon, *Child Abuse, Gender and the Myth of Family Independence: Thoughts on the History of Family Violence and Its Social Control 1880-1920*, 12 REV. L. & SOC. CHANGE 523 (1983-1984). For a summary of earlier foundations for child protection created to

Not only are the for-profit companies national in scope, they often provide specialized out-of-home care at a location far from the child's home. The implications of this separation from the community are explored.

Finally, will the entry of for-profit corporations as providers of foster care alter the type of placement service provided? For-profit companies, in providing specialized institutional care, receive reimbursement for aggregate settings larger than can be legally provided by public entities which are limited to twenty-five bed sites.¹⁶ For-profit companies do not usually provide foster care, instead providing an institutional alternative for often hard-to-place children. This niche market involvement may change as for-profit companies are given greater access to public dollars. It is also possible that use of out-of-state aggregate care for children labeled "hard to place," will increase as states can now be reimbursed for the expenditures. Before the 1996 amendment, some states found it fiscally sound to provide intensive services into the child's home or to set up specialized local foster or small group homes for children with severe disabilities or behavioral problems. With the advent of federal funding to for-profit providers, shipping hard-to-place children to out-of-state institutional sites may now become more fiscally tenable. Providing federal reimbursement to a wider array of institutional settings will be discussed.

In the Conclusion, I offer some suggestions to mitigate the harmful implications of the amendment in light of both the history of private provider involvement and the current funding schemes described in Part II and Part III. The suggestions will respond to the concerns raised in Part IV. My suggestions for reform focus primarily on the attributes of private placements—size and distance from a child's home—and not on problems uniquely posed by for-profit providers due to their for-profit organization. Generally stated, my reforms are targeted at strengthening the mandatory monitoring provisions dictated from the federal level so that oversight will be more meaningful and uniform in all fifty states.

II. THE HISTORICAL INVOLVEMENT OF PRIVATE PROVIDERS IN THE FOSTER CARE SYSTEM

Before the last quarter of the nineteenth century, there were no public or private agencies dedicated to the care of abused and neglected children. It was private

deal with the issues of child labor and orphans in colonial times and through the civil war, see generally Neil A. Cohen, *Child Welfare History in the United States*, in *CHILD WELFARE: A MULTI CULTURAL FOCUS* (Neil A. Cohen ed., 1992); Paul Gerard Anderson, *The Origin, Emergence, and Professional Recognition of Child Protection*, 63 SOC. SERV. REV. 222 (1989). For a discussion of the emergence of protection of children within the societies for protection of cruelty to animals before the Mary Ellen case in 1874, see generally Lela B. Costin, *Unraveling the Mary Ellen Legend: Origins of the "Cruelty" Movement*, 65 SOC. SERV. REV. 203 (1991).

¹⁶ See 42 U.S.C. § 672(c) (Supp. III 1997).

philanthropic agencies that first began this work, intervening into "private" families in the name of protecting vulnerable children. The private agencies sometimes used the criminal courts and received some public subsidy but there was no public regulatory framework under which they operated for nearly a century.

The 1874 case of *Mary Ellen* was brought by Henry Bergh, founder and President of the New York Society for the Prevention of Cruelty to Animals.¹⁷ Bergh, through the Society's counsel, Elbridge Gerry, argued to the court on behalf of Mary Ellen Wilson, a young girl whose care was at issue.¹⁸ Although he was acting as a "humane citizen" and not in his official capacity, the case heralds an era of private philanthropic agencies acting on behalf of abused children.¹⁹ The case succinctly depicts the roles which "important others" could assume on behalf of children—awareness of abusive activity in "private" families, investigation on behalf of children, rescue, prosecution, and placement.

The New York Times article reporting this case opened:

It appears from proceedings had in Supreme Court yesterday, in the case of a child named Mary Ellen, that Mr. Bergh does not confine the humane impulses of his heart to smoothing the pathway of the brute creation toward the grave or elsewhere, but that he embraces within the sphere of his kindly efforts the human species also.²⁰

The news article details that the child had been discovered when Etta Angell Wheeler was on an "errand of mercy" to a dying woman and was told by the woman of the desperate cries of a child in the next tenement.²¹ Wheeler had tried repeatedly to gain entrance to the apartment to see the child; the child's caretakers, Mary and Francis Connolly, denied access to her. Mrs. Wheeler was eventually let into the flat when Mr. Connolly was not present and was able to observe and have a short visit with Mary Connolly and Mary Ellen.²² Wheeler is then reported as having gone to several institutions to seek help for the child, before coming to Bergh and pleading for his assistance.²³ It was known at the first hearing that Mary Ellen

¹⁷ See Costin, *supra* note 15; *Mr. Bergh Enlarging His Sphere of Usefulness: Inhuman Treatment of a Little Waif—Her Treatment—A Mystery to Be Cleared Up*, N.Y. TIMES, Apr. 10, 1874, at 8 [hereinafter *Mr. Bergh*].

¹⁸ See *Mr. Bergh*, *supra* note 17, at 8.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² See *id.*

²³ See *id.* Perhaps because Mrs. Wheeler's husband was a newspaper man, the case is graphically and fully reported in the paper. See Costin, *supra* note 15, at 210; see also, e.g., *Mary Ellen Wilson: Further Testimony as to the Child's Ill Treatment by Her Guardians*, N.Y. TIMES, Apr. 12, 1874, at 12; *Mary Ellen Wilson: Further Testimony in the Case—Two Indictments Found*

was living with Mary and Francis Connolly and they were charged with cruel abuse against her, but that they were not her natural parents. The effect of this casual custodianship on the willingness of the agency, court, and public to champion this prosecution is unclear.²⁴

On the second day of the court proceedings, Mrs. Connolly took the stand and detailed how the child came to be in the custody of her and Francis Connolly.²⁵ Mrs. Connolly testified that she was formerly married to Mr. Thomas McCormack who was now deceased. They had three children together, all of whom were also deceased. Mary Ellen was indentured to Mr. McCormack and his wife on the basis that the child was his illegitimate daughter. Mrs. Connolly testified that the Commissioner of Charities and Corrections who released the child to them never inquired as to her relation to the child but had the name of Wilson down as the child's natural mother.²⁶ Mrs. Connolly is reported to have testified that she never knew the whereabouts of the mother but from time to time would hear from her husband's drinking buddies that she was still living downtown. Mrs. Connolly further testified that she never received a cent to care for the child. She reported on an annual basis to the Commissioner of Charities and Corrections on the condition of the child, missing the annual reporting requirement only two times.²⁷

The case was originally prosecuted against both Mr. and Mrs. Connolly. Mary Ellen's ill health, lack of proper clothing and frequent abuse with whips, scissors,

Against Mrs. Connolly by the Grand Jury, N.Y. TIMES, Apr. 22, 1874; *Mary Ellen Wilson: Mrs. Connolly, the Guardian, Found Guilty, and Sentence to One Year's Imprisonment at Hard Labor*, N.Y. TIMES, Apr. 28, 1874 [hereinafter *Mrs. Connolly, the Guardian, Found Guilty*]; *Mr. Bergh*, *supra* note 17, at 8; *The Mission of Humanity: Continuation of the Proceedings Instituted by Mr. Bergh on Behalf of the Child, Mary Ellen Wilson*, N.Y. TIMES, Apr. 11, 1874, at 2 [hereinafter *The Mission of Humanity*]. For a compilation of related articles and papers of the Society, see 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, 1866-1932, at 185-97 (Robert H. Bremner et al., eds., 1970).

²⁴ This case did not impinge on the rights of Mary Ellen's father since he was deceased. Her mother had abandoned or been separated from her much earlier so her rights are not at issue in the prosecution. See Costin, *supra* note 15, at 209; *Mr. Bergh* *supra* note 17, at 8; *The Mission of Humanity*, *supra* note 23, at 2. Mary Connolly, taking on the custodianship of Mary Ellen as her stepmother, may have been prosecuted because of this legal relationship. It is also possible that she was prosecuted, despite her ultimate willingness to allow Mrs. Wheeler into the flat against the wishes of her husband, because she was the "mother" of the child and was therefore responsible for the child's care under nineteenth century notions of parenting. Mr. Connolly's drunkenness, violence against Mary Ellen, and possible violence against Mrs. Connolly are ignored perhaps because he had no legal relationship to the child or perhaps because his behavior, as an unrelated "man in the house," was not as shocking to the norms of child care at the time.

²⁵ See *The Mission of Humanity*, *supra* note 23, at 2; see also Costin, *supra* note 15, at 207-08.

²⁶ See *The Mission of Humanity*, *supra* note 23, at 2.

²⁷ See *id.*

and slaps must have been known if not perpetrated by both adults in the home. Even if this cannot be proven, it was only Mrs. Connolly, on a day when Mr. Connolly was not present, who allowed Mrs. Wheeler into the apartment to discuss Mary Ellen's plight. Only Mrs. Connolly ever appeared in court. Only she was ultimately tried and sentenced for the abuse.²⁸ This celebrated case prosecuting abuse targeted the "mother" caretaker. No male was held accountable. The case triumphs the entry of private philanthropic agencies into the legal system on behalf of abused and neglected children. The prosecution of Mrs. Connolly also foreshadows the treatment of mothers and the failure to hold fathers accountable before dependency courts.²⁹

The publicity surrounding this case led to important results for the future of child protection. In the same year, a private provider agency, the New York Society for the Prevention of Cruelty to Children, was formed with Elbridge Gerry as its counsel.³⁰ The activities of private provider agencies acting on behalf of abused and neglected children increased significantly after this case. By 1880, thirty-three such societies existed in the United States,³¹ most rescuing both animals and children. As Henry Bergh of the New York Society for the Prevention of Cruelty to Animals explained:

The protection of children and the protection of animals are combined because the principle involved, i.e., their helplessness, is the same; because all life is the same, differing only in degree of development and expression; and because each profits by association with the other.³²

These earliest efforts were aimed at rescuing children and, sometimes, prosecuting the adults who brutalized them. The societies did not see within their mission the housing or care of children or treatment of the families. As Gerry explained:

²⁸ See *Mrs. Connolly, the Guardian, Found Guilty*, *supra* note 23, at 8.

²⁹ See Marie Ashe, *Postmodernism, Legal Ethics, and Representation of "Bad Mothers,"* in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 142 (Martha Albertson Fineman & Isabel Karpin eds., 1995); see generally Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 *TEX. J. WOMEN & L.* 75 (1993); V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 *HARV. WOMEN'S L.J.* 229 (1996); NATIONAL CTR. ON WOMEN & FAMILY LAW, *FAILURE TO PROTECT: A REFERENCE MANUAL FOR NEW YORK ATTORNEYS REPRESENTING BATTERED WOMEN AT RISK OF LOSING THEIR PARENTAL RIGHTS FOR FAILURE TO PROTECT THEIR CHILDREN FROM THE ABUSER* (1993).

³⁰ See Costin, *supra* note 15, at 205, 217.

³¹ See Gordon, *supra* note 15.

³² Costin, *supra* note 15, at 2.

[T]he SPCC 'was simply created as a hand affixed to the arm of the law, by which the body politic reaches out and enforces the law. The arm of the law seizes the child when it is in an atmosphere of impurity, or in the care of those who are not fit to be entrusted with it, wrenches the child out of these surroundings, brings it to the court, and submits it to the decision of the court—unless, on the other hand, it reaches out that arm of the law to the cruelest, seizes him within its grasp, brings him also to the criminal court and insures his prosecution and punishment. These are the functions of our societies.'³³

Gerry's speech was intended, in part, to distinguish the rescue mission of anticruelty societies from the placement services provided by children's aid societies. Contemporary with the emergence of aid and anticruelty societies were state laws requiring the removal of children from poorhouses.³⁴ While it was considered a progressive reform to move innocent children from the conditions of the poorhouses, it often meant separating them from their parents. Such laws furthered the notion that destitute children could be "helped" like orphans and like children voluntarily turned over to the societies by their parents who could not care for them.

The expansion of the railroad in the mid-nineteenth century provided the routes necessary to accomplish the goal of moving children out of the squalid environment of their families. Charles Loring Brace, founder of the New York Children's Aid Society, best expressed this goal. He believed that children of the poor could be productive citizens only if removed from their parents' negative influence and surroundings. The mission of the Children's Aid Society was moving children from their parental homes to "wholesome" settings, both near and far. From the founding

³³ Costin, *supra* note 15, at 219 & n.71 (citing Elbridge Gerry, Remarks at the Thirty First Annual Meeting of the American Humane Association 51 (Oct. 12–14, 1907)). In this 1907 speech at the Annual Meeting of the Society, Gerry was also clear that the Society's purpose was to rescue children and refer their parents for prosecution, not to provide treatment. The NYSPCC was "not created for the purpose of educating or reforming children, or seeing that they were transported into other homes." *Id.* at 219. This description was meant in part to differentiate the purposes of the Society from the work of the New York Children's Aid Society which gathered up children from the industrializing Northeast cities and sent them on "orphan trains" to the rural Midwest where they were given "proper homes" through an informal indenture. These *rescue* efforts are also distinguishable from turn-of-the-century *child protection* efforts. Carl Carstens led the first of these agencies, the Massachusetts Society for the Prevention of Cruelty to Children (MSPCC). In 1907, at that Society's Annual Meeting, Carstens stated the broader mission of child protection: "Children will still need to be rescued from degrading surroundings for many years to come, . . . but the society recognizes more definitely that it is a preventive agency." Paul Gerard Anderson, *The Origin, Emergence, and Professional Recognition of Child Protection*, 63 SOC. SERV. REV. 222, 224 (1989) (citing ANNUAL REPORT OF THE MSPCC 27, at 17 (1907)).

³⁴ See Act of Apr. 24, 1875, ch. 173, 10 N.Y. Stat. 74; see also, SEMI CENTENNIAL CELEBRATION: THE BUFFALO ORPHAN ASYLUM 46 (Apr. 26, 1887).

of the Society in the 1850s, some of the children placed out were from institutional settings and others were voluntarily turned over to the Society by their parents. Many were not legally orphans, but their destitute status qualified them for the placement services of the Society. The Children's Aid Society is perhaps best known for the "orphan trains," trainloads of East Coast urban children sent to the Midwest to work farms and otherwise settle new areas. Placing out sometimes involved the sending of individual children to identified couples seeking to increase the size of their families. It also included urban-based settings such as the lodging houses for newsboys.³⁵

Provider agencies grew in the model of both the rescue and prosecution mission of the anticruelty societies and the placing-out mission of the aid societies. Within a regime of private family law, private societies substituted their care for parental care. Public family law, with the states legally assuming certain parental rights, did not develop until the 1960s when states began to mandate the reporting of child abuse and took on the task of investigating the reports. Public funding of the placements, often paid to private providers who historically provided the service, also developed in the 1960s.³⁶

III. THE DEVELOPMENT OF PUBLIC FAMILY LAW: PUBLIC FUNDING OF OUT-OF-HOME PLACEMENT OF CHILDREN

In 1909, President Theodore Roosevelt convened the White House Conference on Dependent Children.³⁷ Among the proposals emanating from the conference was a call to provide funds to allow needy children to stay with their mothers instead of placing them in institutional settings.³⁸ States introduced mothers' pensions in 1911 and all but two states had some form of mothers' pensions by 1935.³⁹ Aid to Dependent Children, later Aid to Families with Dependant Children, was initiated in 1935 in part to allow poor children to remain with their families rather than be

³⁵ For a full description of Children's Aid Society, see generally MARILYN IRVIN HOLT, *THE ORPHAN TRAINS: PLACING OUT IN AMERICA* (1992).

³⁶ See The Social Security Act Amendments of 1967, Pub. L. No. 90-248 § 212, 81 Stat. 821, 897-98; (codified as amended in scattered sections of 42 U.S.C.); H.R. CONF. REP. NO. 90-1030 (1967) reprinted in 1967 U.S.C.C.A.N. 3179, 3206; S. REP. NO. 90-744 (1967) reprinted in 1967 U.S.C.C.A.N. 2834, 3132.

³⁷ See generally MATTHEW A. CRENSON, *BUILDING THE INVISIBLE ORPHANAGE: A PREHISTORY OF THE AMERICAN WELFARE SYSTEM* (1998).

³⁸ For a general discussion of the importance of this conference in the evolution from orphanages to home based care for needy children, see *id.*

³⁹ See JoAnne B. Ross, *Fifty Years of Service to Children and Their Families*, 48 SOC. SEC. BULL., Oct. 1985, at 5, 6.

sent to orphanages.⁴⁰ However, some states refused to aid children whose homes were deemed "unfit."⁴¹

Discrimination, mainly by southern states, in denying welfare benefits based on subjective assessments of fitness led to the "Flemming Ruling," named for the then Secretary of Health, Education, and Welfare, Arthur Flemming.⁴² The rule required states to either continue payments to the children while attempting to improve the child's home conditions or place the child in out-of-home care.⁴³ In 1961, amendments to the Social Security Act codified reimbursement for state and local foster care expenditures through Aid to Families with Dependent Children-Foster Care (AFDC-FC).⁴⁴

AFDC-FC was added to provide funding for temporary out-of-home placement for children who were removed from their homes based on allegations of abuse or neglect. A purpose of AFDC-FC was to keep poor children out of orphanages by providing home-like settings through foster care placements when they could not safely remain in their own homes. A judicial determination that remaining in the home was contrary to the welfare of the child was necessary to trigger eligibility for AFDC-FC.⁴⁵ Only children whose families were eligible for AFDC before the child was removed were eligible for AFDC-FC funding.⁴⁶ Although it is frequently stated that abuse and neglect can occur in all income levels, federal reimbursement for out-of-home care through AFDC-FC was only available for poor children. As had been

⁴⁰ See *id.*

⁴¹ FRANCIS FOX PIVEN & RICHARD A. COWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 138-41 (1971).

⁴² See *id.*; Mark E. Courtney, *The Foster Care Crisis and Welfare Reform: How Might Reform Efforts Affect the Foster Care System*, 53 PUB. WELFARE, Spring 1995, at 27; Marcia Lowry, *Derring-Do in the 1980s: Child Welfare Impact Litigation After the Warren Years*, 20 FAM. L.Q. 255, 256 (1986).

⁴³ See *id.*

⁴⁴ 42 U.S.C. § 608 (repealed 1980) (current version at 42 U.S.C. § 672 (1994 & Supp. III 1997)).

⁴⁵ See *id.* § 608(a)(1) (repealed 1980). This provision "reflected Congress' awareness" that removals needed to be ordered following formal proceedings. This was hoped to protect against unnecessary removals due to suitability rules imposing "various moral and social standards" on parents of dependent children. *Miller v. Youakim*, 440 U.S. 125, 139 (1979).

⁴⁶ See 42 U.S.C. § 608(a) (repealed 1980) (current version at 42 U.S.C. § 672(a) (1994 & Supp. III 1997); see also Courtney, *supra* note 42, at 27. AFDC was mandated for needy children, but because state eligibility limits were set so low, nearly one-third of the children living below the poverty level in 1992 did not qualify for cash assistance. Approximately 15% of the children receiving AFDC in that year were in foster care. See Stephen B. Page & Mary B. Lamer, *Introduction to the AFDC Program*, FUTURE CHILDREN, Spring 1997, at 20, 21 (citing U.S. HOUSE OF REPRESENTATIVES, COMM. ON WAYS & MEANS, 103RD CONG., 1994 GREEN BOOK, at 324, 409 tbl.10-31 (Comm. Print 1994).

true a century earlier, destitute children were more likely to be moved to alternative settings.

The amendment, which codified the Flemming Ruling, was the subject of little debate. There were no formal public hearings by the Senate Finance Committee before its enactment.⁴⁷ During the short debate, Senator Lausche expressed concern over issues raised in a letter to him from Reverend Monsignor Lawrence J. Corcoran, Diocesan Director of Charities in Columbus, Ohio.⁴⁸ Lausche's opposition was limited to the fact that public hearings had not been held at which interested parties, especially private providers, could speak.⁴⁹ The importance of private providers, especially religiously based agencies, was repeatedly mentioned during this short exchange in the Senate.⁵⁰

During this time, definitions of "unfit" were amorphous and allowed the separation of many poor children from their families. In the 1960s, led by the medical profession, new information on physical abuse of children⁵¹ prompted enactment of state reporting laws. Objective verification of physical abuse led to the further development of public family law. All states codified reporting laws in the 1960s. These laws required some professionals who work with children to report any suspicion of child abuse.⁵² Nascent regulatory regimes were established to then require the investigation of the reports and the care and protection of the children who were the subject of the reports.

These early state attempts were followed by the first federal law dealing with abuse and neglect, the Child Abuse Prevention and Treatment Act (CAPTA) enacted in 1974.⁵³ State child protective services systems were uniformly upgraded to meet the federal requirements to receive reports of abuse and neglect, investigate those reports and keep records on perpetrators and victims of abuse.⁵⁴ In order to be eligible for federal funds to operate their child protective services system, the states had to meet the requirements of CAPTA. The fifty separate state systems operated under the same federal guidelines imposing some uniformity while providing incentives and disincentives via various forms of federal

⁴⁷ See 107 CONG. REC. S6385, S6385-88 (1961).

⁴⁸ See *id.* at S6385-86.

⁴⁹ See *id.* at S6386-88.

⁵⁰ See *id.*

⁵¹ See generally Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17 (1962).

⁵² See BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 13 (1984); see generally JEAN YAVIS, CONGRESSIONAL RESEARCH SERV., CHILD ABUSE LEGISLATION IN THE UNITED STATES (1974), reprinted in 119 CONG. REC. S23900, S23901 exhibit 1 (1973).

⁵³ Pub. L. No. 93-247, tit. I, §§ 101-05, 88 Stat. 4 (1974) (partially repealed 1996 and partially amended 1975, 1978, 1979, 1984, 1986, 1987, 1988, 1989, 1992, 1996).

⁵⁴ See *id.*

reimbursement.⁵⁵ The expansion of information about child abuse and neglect and increased reporting to the child protective systems flooded the foster care system. From 1961 to 1977, there was a three-fold increase in the number of children in out-of-home care, rising to nearly 500,000 in 1977.⁵⁶

Concurrently, in the 1960s, the Social Security Act was amended to allow states to subcontract with private nonprofit companies to provide foster care services.⁵⁷ Many of these private nonprofit companies had been in existence long before the public entities played a role in the protection of abused and neglected children. Because there had long been a private philanthropic system of care, it is inaccurate to say the public system was "privatized," as the term usually implies the transfer of traditionally public functions to private contractors. Instead, public family law allowed philanthropic providers to receive public funds and work cooperatively with public agencies to provide placement services.

The states could now work in a contractual relationship with private agencies to provide a child protection and foster care system. Instead of a fledgling public system and an autonomous, disjointed philanthropic effort, subcontracting formalized the foster care system into an administratively regulated public family law regime. In the 1970s, child welfare agencies were given the mandate by federal and state law to respond to cases of child abuse and neglect with the provision of services ranging from investigation to placement of children at risk of further harm.⁵⁸ Some or all of these functions could be delegated by the public agency to private nonprofit providers and still be reimbursed with federal dollars.

In 1980, the Adoption Assistance and Child Welfare Act⁵⁹ was passed to renew efforts to keep poor children in their homes. The Act provided federal funding for in-home services and a mandate that reasonable efforts be made to prevent placement or to reunify children with their families when temporary placement became necessary.⁶⁰ Private nonprofit companies contracted with public agencies to provide not only the traditional foster care services, but also these newly mandated in-home services. The law also provided subsidies to remove

⁵⁵ See *id.*

⁵⁶ See 125 CONG. REC. 110, S22679, S22681 (statement Sen. Alan Cranston) (citing 123 CONG. REC. 24861 (1977)) (testimony of Assistant Secretary for Human Development Services, Arabella Martinez who provided a number of facts derived from the *National Study of Social services for Children and Their Families*).

⁵⁷ See sources cited *supra* note 36.

⁵⁸ See Pub. L. No. 93-247, tit. I, §§ 101-05, 88 Stat. 4 (1974) (partially repealed 1996 and partially amended 1975, 1978, 1979, 1984, 1986, 1987, 1988, 1989, 1992, 1996).

⁵⁹ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 amended by Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

⁶⁰ See 42 U.S.C. §§ 670, 671(a)(15) (1980) (amended 1997).

disincentives to the adoption of foster children by allowing adoptive families to receive continued funding up to the level the child could have received as a foster child.⁶¹

As with mothers' pensions originally, the emphasis was on correcting misuse of the foster care system by keeping poor children at home whenever it was reasonably possible and to move them to adoptive homes and out of placement when reunification was not possible. Despite this goal, funding for in-home services was capped and funding for foster care and adoption assistance remained uncapped entitlement programs.⁶² Today, federal funds for out-of-home care are the "last unlimited pool available for poor children."⁶³

Entitlement to welfare was ended with the limiting provisions of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act⁶⁴ leaving foster care payments as the final uncapped funding resource. The 1996 act originally included massive reform of the foster care and child protection system.⁶⁵ Early versions of the legislation ended the entitlement to foster care and changed the child protection and foster care funding systems to a block grant program. The original House welfare reform proposal, passed in March 1995, replaced existing entitlement and other child welfare services with the Child Protection Block Grant.⁶⁶ This proposal became less sweeping in the House-Senate conference version of H.R. 4, which was vetoed by President Clinton.⁶⁷

While most of the changes to the foster care system were eventually dropped from the legislation in its final form,⁶⁸ one change from the original House version

⁶¹ See *id.*

⁶² See *id.*

⁶³ Nina Bernstein, *Deletion of One Word in Welfare Bill Opens Foster Care to Big Business*, N.Y. TIMES, May 4, 1997, at A1; see also New York Times News Service, *For-Profit Orphanages Eligible for Federal Funds: Change in Law Raises Questions About Care and Who Should Provide It*, BALTIMORE SUN, May 4, 1997, at 11A.

⁶⁴ 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.).

⁶⁵ See KAREN SPAR, CONGRESSIONAL RESEARCH SERV., CHILD ABUSE AND CHILD WELFARE LEGISLATION IN THE 104TH CONGRESS 6 (1996).

⁶⁶ COMMITTEE ON WAYS & MEANS, U.S. HOUSE OF REPRESENTATIVES, 104TH CONG., SUMMARY OF WELFARE REFORM MADE BY PUBLIC LAW 104-193, THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT AND ASSOCIATED LEGISLATION 40 (Comm. Print 1996) [hereinafter SUMMARY OF WELFARE REFORM]. H.R. 4, the original House welfare reform proposal, replaced Titles IV-B and IV-E of the Social Security Act, CAPTA and other child welfare provisions. See SPAR, *supra* note 65, at 6.

⁶⁷ See SPAR, *supra* note 65, at 6.

⁶⁸ Discretionary and capped child welfare services under Title IV-B of the Social Security Act continue to be authorized. Uncapped entitlements for foster care and adoption assistance are likewise maintained. No amendments to CAPTA were passed as part of the welfare reform

did pass as part of the welfare reform legislative package. That change amended the Social Security Act by deleting the word "nonprofit" and allowing for-profit private providers to receive federal reimbursement for foster care funding.⁶⁹ The change makes over three billion dollars in federal foster care funding available to for-profit companies.⁷⁰ While some states were already contracting with for-profit providers, use of these placements was limited since states could not receive federal reimbursement for the expenditures.

Senator John Breaux stated that the change would give states more options.⁷¹ Some believe that this change in funding will result in a large "business of poverty" which will capitalize on the unlimited federal funding available in the "orphans for profit" industry.⁷² I argue that the possible consequences for children in for-profit foster care warrant more regulatory protection than was provided when the amendment was added to the welfare reform package without debate. The reliance on private providers generally warrants closer public scrutiny. The concerns are greatest for children in large institutional settings distant from their families. Such placements are privately operated because federal law limits the size of public placements. Currently, larger, more distant settings are likely to be offered by for-profit providers who were constrained until the 1996 amendment from developing a less restrictive range of placements.

Federal funding of these provisions should not be allowed without concurrent regulations insuring that the overarching goal of placement in the most family-like setting near to the child's home is achieved and verified. In fact, in 1980 when the child welfare system was overhauled by the Adoption Assistance and Child Welfare Act, for-profit companies were not made eligible for the federal funds.⁷³ There was concern that the nursing home scandals of the previous decade would be repeated.⁷⁴ The House Committee on Ways and Means Report on the 1996 legislative change

legislation. See SUMMARY OF WELFARE REFORM, *supra* note 56, at 40.

⁶⁹ See *id.* at 40; see also 42 U.S.C. § 672(c) (Supp. III 1997).

⁷⁰ See Bruce Alpert, *Profit-Makers Enter Foster-Care Field: Some Worry That Move Will Leave Children at the Mercy of Companies' Bottom Line*, SEATTLE TIMES, May 16, 1997, at A8 [hereinafter Alpert, *Profit-Makers*]; Bruce Alpert, *Advocates Fear Outcome of For-Profit Foster Care, Critics Say Youths' Needs Will Suffer Bottom Line*, NEW ORLEANS TIMES-PICAYUNE, May 11, 1997, at A6 [hereinafter Alpert, *Advocates Fear Outcome*]; Bernstein, *supra* note 6, at A1.

⁷¹ See Alpert, *Profit-Makers*, *supra* note 70, at A8; Alpert, *Advocates Fear Outcome*, *supra* note 70, at A6.

⁷² The New York Times News Service, *Change Unhinges Poverty Policy Welfare—Funding Scramble Fierce*, DENV. POST, May 31, 1997, at A19. The article cites literature from some of the companies which highlights the "emerging market in 'vulnerable, high cost populations.'" *Id.*

⁷³ See 42 U.S.C. § 672(c) (1982) (amended 1996) (defining "child care institution" to include only non-profit private child care institutions and public institutions of not more than 25 beds).

⁷⁴ See Bernstein, *supra* note 6, at 26; The New York Times News Service, *supra* note 72, at A19; see generally *Foster Care: Problems and Issues*, *supra* note 7.

notes: "States remain responsible for establishing and enforcing licensing standards and for ensuring that children are in safe and reliable care."⁷⁵ While there has always been concern that there is a shortage of quality foster care, expanding foster care expenditures to profit-making entities is not necessarily the best way to insure that out-of-home placement is used only when necessary and is then the highest quality of care.

The Adoption and Safe Families Act of 1997⁷⁶ amended many of the provisions passed in 1980 to encourage reunification.⁷⁷ The law makes federal reimbursement contingent upon following a new set of mandates to quicken the pace of cases heading toward termination of parental rights⁷⁸ and removing the mandate for reasonable efforts to reunify families under certain circumstances.⁷⁹ Weakening the reasonable efforts requirement may temporarily move more children into foster care and the emphasis on permanency through adoption will require extensive home finding and adoption support services. These changes are taking place as for-profit corporations are entering the child welfare reimbursement system following the 1996 amendment. Together, they may signal a sea-change in policy away from the goal of placing children in settings close and similar to their families to help reunification efforts. If such a change is occurring, more attention should have been paid to the 1996 amendment and its implications.

Understanding of these federal mandates is important to an understanding of the public family law regime because they govern the implementation of the dependency system on the local level. They determine the role of the public agency in holding parental rights and the subcontracting of that role to private providers. These federal mandates are all codified as amendments to the Social Security Act. They regulate the state implementation of a dependency system by conditioning federal reimbursement for local expenses on the fulfillment of the mandates.⁸⁰ There is no federal child welfare system, but the federal mandates frame the provision of services in each of the fifty states and their various local child welfare systems. The 1996 federal amendment allowing for-profit providers to contract with public child welfare agencies has an impact on the delivery of foster care services

⁷⁵ SUMMARY OF WELFARE REFORM, *supra* note 68, at 40; *see also* SPAR, *supra* note 65, at 5; Bernstein, *supra* note 6, at 26 (quoting Brian Murphy, Vice President for Advoserv, a for-profit company which lobbied for the amendment, "[m]y whole bottom line argument is if the state decides to send a child to a facility, if they like the track record and the cost, what does the form of ownership have to do with it?").

⁷⁶ Pub. L. No. 105-89, 111 Stat. 2116 (1997) (codified as amended in scattered sections of 42 U.S.C.).

⁷⁷ *See, e.g.*, 42 U.S.C. § 671(a)(15) (Supp. III 1997).

⁷⁸ *See id.* § 675 (Supp. III 1997).

⁷⁹ *See id.* § 671.

⁸⁰ *See id.*

at the local level because federal reimbursement is a key factor in the provision of services for all dependency systems.

Today, private provider agencies participate by delivering services to families voluntarily and by court order. Unless they are involved in an ongoing way with a family when new allegations arise, they do not usually participate in the front end or "rescue" aspect of cases. It is the public agency that receives reports and investigates as the anticruelty societies did for nearly a century before the formation of public child protection agencies. Today, public child protection agencies also maintain records on perpetrators and children.

In the modern public/private system, private agencies usually enter at the point of disposition and deliver the services that are agreed upon by the public agency and family or mandated by the court. In larger cities, the public agency may subcontract with over two hundred different private agencies to provide foster care, counseling, a variety of family supervisory functions, and a host of other services targeted to improve parenting and protect children.⁸¹ The work of private nonprofit provider agencies predated the establishment of state-based child protection systems and dependency systems. With the breadth of federal and state mandates, the complexity of each individual case and the growing volume of cases, the modern dependency system relies on them more than ever to fulfill some of the states' roles in exercising custodial rights to children.

⁸¹ States either directly operate dependency systems or funnel state/federal reimbursement to state regulated county-based systems. It is difficult to discern the number of subcontracting private agencies from the central state agencies. In New York State, there are approximately 225 private foster care agencies. Telephone Interview with Paul Gadre, New York State Office of Children and Family Services (May 8, 1998). In Pennsylvania, there are 209 approved agencies providing foster family care services which contract with the 67 county agencies in the state. Letter from Robert L. Gioffre, Director, Adoption and Residential Service Unit, Commonwealth of Pennsylvania Department of Public Welfare, Office of Children, Youth and Families, to Susan Vivian Mangold, Associate Professor, University at Buffalo Law School, State University of New York (Nov. 4, 1998) (on file with author). In Massachusetts, there are 86 separate private agencies. Telephone Interview with Susan Bane, Massachusetts Department of Social Services (May 7, 1998).

Florida estimates that there are 70 licensed child-placing agencies that offer foster, group, and shelter placements. Including those which offer only adoption services, there are 104 licensed child-placing agencies in Florida. Letter from Amy West, Program Specialist, Florida Department of Children and Families to Susan Vivian Mangold, Associate Professor, University at Buffalo Law School, State University of New York (Dec. 14, 1998) (on file with author). In some states, private providers have come together to negotiate joint or collaborative contracts with the public agency. *See generally*, Francis J. Ryan, *A Consortium to Coordinate Public and Voluntary Sectors Under Contract in Child Welfare*, 59 CHILD WELFARE 607 (1980). The norm remains individual contracts with each private agency.

IV. THE FURTHER DEVELOPMENT OF PUBLIC FAMILY LAW: SUBCONTRACTING WITH FOR-PROFIT CORPORATIONS

A. Corporate Structure

As discussed in Part II, nonprofit private providers preceded public agencies in the delivery of placement services to abused and neglected children. Nonprofit agencies are now major players in every state, fulfilling some if not all of the direct service delivery of the child welfare system as summarized in Part III. What are the implications for the delivery of foster care services when for-profit entities enter the reimbursement system? Should we be concerned about the wholesale privatization of foster care in general or focus on the specific concerns raised by for-profit corporations? In my view, the main problem is that private providers are regulated differently than public providers under both state and federal child welfare regulations. They are allowed to be bigger and farther from a child's home as will be discussed later in this Part. For-profits also pose unique accountability problems that require even further regulation to insure adequate monitoring. The structural differences giving rise to these accountability concerns are raised here. The accountability is addressed in the next section.

To understand the possible impact of for-profit private providers, it is important to summarize the distinctive nature of nonprofit corporations and thereby identify the differences from the for-profit structure. The study of nonprofits is fairly new to the law, with Henry Hansmann's seminal work being published in 1980.⁸² Nonprofits are studied as operating in a "third sector" distinct from both government on the one hand and profit-making corporations on the other hand. They are defined by a "nondistribution constraint," meaning they cannot distribute their profits, if any, to shareholders holding stock in the enterprise.⁸³ They can operate with a net gain at the end of the year, but this must be reinvested in the mission of the nonprofit instead of being distributed to shareholders.⁸⁴

In a nonprofit, no one owns the corporation. Directors' actions in a for-profit corporation, on the other hand, are accountable to owners or shareholders who elect them. Directors' primary purpose is to advance the wealth of shareholders. Directors in nonprofits are less clearly accountable to those who appoint them since they are

⁸² See generally Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980).

⁸³ See *id.* at 838. But see Evelyn Brody, *Agents Without Principles: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457 (1996). Brody accepts Hansmann's construct but challenges whether the nondistribution restraint results in more "worthy" entities. *Id.*

⁸⁴ See Hansmann, *supra* note 82, at 838.

not usually served by the corporation and may not oversee the other directors.⁸⁵ The role of the attorney general, discussed in the next section, is therefore important to provide formal accountability mechanisms.

The nondistribution constraint is integral to the existence of nonprofits since there are not traditional market forces in the third sector.⁸⁶ Those who fund nonprofits are often separate from those who will receive the service and the lack of profit may provide some assurance that funds will not be misused or services inadequately delivered. Some argue that altruism also defines true nonprofits and is a vital element of the third sector.⁸⁷

Hansmann developed a scheme to understand the various types of nonprofits, defining some as more like, and others less like for-profit entities which respond to market forces.⁸⁸ Under his descriptions, nonprofits can be "mutual," meaning they are controlled by the patrons or "entrepreneurial," meaning they are controlled by those providing the service.⁸⁹ Under this analysis, nonprofit providers in the foster care system are entrepreneurial nonprofits.

The next level of distinction is made based on how the nonprofit is funded. If it is supported by contributions it is a "donative" nonprofit. If it is instead supported by funds generated by the service they provide it is a "commercial" nonprofit.⁹⁰ Nonprofit providers in the foster care system are mainly commercial since their funding is via government contracts. These funds may be augmented by donations making them commercial/donative nonprofits.

Fundraising activities to subsidize the services provided by nonprofit entities may not be continued by for-profit providers. This is an important departure of for-

⁸⁵ See AMERICAN BAR ASSOCIATION, COMM. ON NONPROFIT CORPS., ABA GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 12-13 (George W. Overton ed., 1993).

⁸⁶ The case of *Gary W.* highlights some of the seemingly illogical market activity in the child welfare nonprofit sector and when the public agency contracts with out-of-state for-profit corporations. *Gary W. v. State of Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976) ("Yet, despite the shortage of facilities in Louisiana, the economic theory that supply will respond to demand is being ignored and, in some sort of antiparochialism, LHHRA is paying Texas institutions far more than it is paying Louisiana institutions. The private suppliers of every kind of Louisiana residential program are being paid less than the cost of the program they supply, and less than is being paid to Texas profit-making institutions."). *Id.* at 1221.

⁸⁷ See generally Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C.L. REV. 501 (1990). For a critical view of nonprofits against a background of general acceptance of the positive influence of altruistic motives, see generally Regina E. Herzlinger & William S. Krasher, *Who Profits from Nonprofits?*, 65 HARV. BUS. REV. 93 (1987).

⁸⁸ See Hansmann, *supra* note 82, at 841; Eleanor D. Kinney, *Legal and Ethical Issues in Mental Health Care Delivery: Does Corporate Form Make a Difference*, 28 HOUS. L. REV. 175, 181-82 (1991).

⁸⁹ See Hansmann, *supra* note 82, at 841.

⁹⁰ See *id.*

profit providers who do not have a donative aspect but are strictly commercial enterprises. Philanthropic giving may be sought by both kinds of private providers but grassroots fundraising such as bake sales, auctions, and walk-a-thons are unlikely to be hosted by for-profit corporations for their own benefit. These are important events for the donations they solicit but also because they get members of the community at least marginally involved in the foster care system. Those making a contribution, participating in a walk-a-thon, or otherwise engaging in fundraising activities develop some stakeholder status in the work of the nonprofit. As donors take an interest in the work of the nonprofit, some community oversight of the foster care system is provided. Instead of supplementing funding with such donations, for-profit providers will exact a profit from the foster care reimbursement.

Adopting Hansmann's categories,⁹¹ the nonprofits providing foster care are entrepreneurial commercial/donative nonprofits. Entrepreneurial commercial nonprofits are most like for-profit providers. This suggests that we should be concerned about these types of nonprofits as well as their for-profit counterparts. The donative aspect of the nonprofits in the foster care system mitigates this to some extent and illuminates the profit-making aspect of for-profits.

The donative aspects are some evidence that the public reimbursement alone is insufficient to cover the costs of delivering the services provided by the nonprofit. This suggests that the contracted reimbursement may not cover the expenses of providing foster care and that the fundraising supplements may be necessary revenue to meet foster care expenditures. If that is the case, how will for-profit providers extract a profit?⁹² On the other hand, involving donors from the community in some form of fundraising may not be the most efficient or effective way to insure community participation and oversight. Fundraising may consume an inordinate amount of time and energy of a nonprofit board and its staff. Like the for-profit, fiscal survival may become the key concern and detract from the operational work of the agency. This is especially true when the donor segment of the community is distinct from the recipients of the service, as is usually the case with foster care. Adequate reimbursement and quality oversight by the public agency or by community boards could be applied to both for-profits and nonprofits to better

⁹¹ See Hansmann, *supra* note 82.

⁹² See I.R.C. § 131 (1994) (exempting foster care payments from income tax consideration). The reason is that the payments are not income but rather funds to cover the cost of boarding the child. The payments considered under this provision of the tax code are the portion of foster care payments that go directly to the custodial individual or couple, not the portion of the payment that goes to the administration of the public or private agency with which the custodian subcontracts to provide the service. Perhaps some savings could come in the administration of the agency and this could be skimmed off as profit, but the competition for contracts would presumably eliminate much of the inefficiency in administration in an effort to offer the lowest bid.

insure quality of program. Fundraising could be maintained to the extent it strengthens the acceptance of nonprofits in the community and augments their programs.

Another possible implication is the impact of competition by for-profit companies on the other work performed by nonprofits in the community. In addition to or instead of supplementing the revenue available to provide foster care, the public contracts and fundraising activities may subsidize other work by the nonprofit, which is not publicly reimbursed. Will grassroots community work outside the foster care field be impacted by the loss of foster care contracts from nonprofit to for-profit competitors? This community work is often preventive in nature and may have an effect on who goes into foster care and how long they stay.

Opening the same pool of public funds for foster care to both for-profit and nonprofit providers obfuscates the third sector analysis and raises two questions. First, if entrepreneurial commercial nonprofits and for-profits are competing for federal monies to deliver services to needy children, can we trust that those services will be delivered properly? Second, should we be *more concerned* about for-profit participation in this scheme than we are by the extensive privatization of child welfare services in general by entrepreneurial commercial/donative nonprofits?

Focusing here on corporate structure and in the next section on oversight, the answer is that we should be concerned about the delivery of services to vulnerable populations by the government, nonprofit or for-profit entities. The insular nature of the relationship between the funding source and the service provider, with the recipient so far from the contracting scheme, raises the possibility of misuse of funds and poor services. This is a concern whether the provider operates under a for-profit or nonprofit organization.

While this is true, introduction of the profit motive and distribution raises the level of concern because it adds a further risk factor to the relationship between the funding source and the service provider with the recipient still removed from the exchange of authority and funds. As was discussed in Part II, the historical and longstanding mission of nonprofits to help destitute children gives some sense of reliance upon their service delivery. While altruism and mission may be idealistic and overplayed, it still plays a role in the delivery of human services, especially to children. It is unsavory to read shareholder information which speaks of "investment in vulnerable populations" and rates of return based on the use of public monies intended to provide room and board payments for abused and neglected children.⁹³ This language reflects one underlying distinction between for-

⁹³ See *Magellan Health Services Annual Second Quarterly Announces Second Quarter Fiscal Year 1999 Results in Line with Expectations: Adjusted Earnings Per Share Up 40% Over Prior Year*, Business Wire, May 5, 1999, available in WESTLAW, All News Plus Wires database, ALLNEWSPLUS [hereinafter *Magellan Health Services*]; see also *American Private Enterprises, Youth Services International, Inc.*, available in Hoover's Company Profile Database on CD-ROM

profits and nonprofits, namely, the focus on profits.

While all private providers must be closely monitored, the risk of misuse of funds and poor service delivery is increased when shareholders evaluate their investment at least in part based on return and not necessarily on quality. On the nonprofit side, misuse may be a concern when there is no competition for service delivery and management and service are of low quality but unchallenged. One answer to such concerns is stricter oversight of all private providers discussed below.

B. Oversight

The concern over accountability of private actors performing public functions is a ripe debate in administrative law and in other substantive law areas.⁹⁴ The concern is sometimes diminished when the private actor is engaging in service delivery, as is the case here, and not policy making or regulation. When the service delivery is to a population as vulnerable as abused and neglected children in foster care, accountability and oversight are crucially important.

Some of the for-profit corporations providing foster care are small, closely held companies with a few actively involved owners. Others are large, publicly traded corporations. Many of the same oversight concerns arise for both kinds of for-profits—as profit is one, if not the only, consideration. Large, publicly traded corporations are sensitive to shareholder pressure for return on an investment. Board choices may be motivated by profit maximization even at the expense of quality. In contrast, a local proprietary provider may more closely resemble a local nonprofit so the concerns raised in this section would be less relevant to such a provider.

Concerns for profit heightens the need for public oversight for quality of service. Both nonprofits and for-profits are accountable to their customers and to their staff.⁹⁵ The separation of the “customer,” or foster care client, from the exchange of funds is the same for nonprofits and for-profits. For-profits are also accountable to owners or shareholders, at least in terms of the “bottom line.” As opposed to market assumptions for most goods and services, a strong bottom line does not necessarily translate to quality services.

While donors and volunteers are interested in a “good investment,” they are donating to the nonprofit so that it will be able to offer quality services. There is no

(Gary Hoover ed., 1998) (“An increase in juvenile crime means more business for Youth Services International (YSI). The . . . company has left the unprofitable behavior health business (essentially treatment facilities for troubled youth) for the greener field of juvenile justice.”).

⁹⁴ See generally Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649 (1987); Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 U.C.L.A. L. REV. 911 (1988).

⁹⁵ See generally, Brody, *supra* note 83.

monetary gain to the donor, aside from tax benefits. Instead, any oversight provided is to insure that the community is receiving the services offered by the nonprofit.

Public oversight is important for all private providers but especially for-profits whose stakeholders may otherwise focus on profit, instead of—or even at the expense of—quality. The only public accountability legally held over for-profit corporations is via the public agency that sends the foster children to the private placement. Regulations for oversight and the contract provisions between the public agency and the placement provider are the two vehicles to insure accountability. Both must be strengthened for all providers, especially for placements for children sent a distance from their homes to aggregate settings where community and family oversight is less present.

The additional levels of public oversight extended to nonprofits may also offer protections not in place over for-profits. State attorneys general formally provide oversight over nonprofits. The directors of nonprofits would otherwise be free of such control. Especially for religious nonprofits, this oversight may be negligible, but it is a formal legal arrangement that can be exercised.⁹⁶ States attorneys general can impose monitoring, reporting, and investigating authority over nonprofits to protect against waste or diversion of funds.

Nonprofits are also regulated and monitored for compliance by the Internal Revenue Service (IRS) as part of the review of their designation for nonprofit status.⁹⁷ At least theoretically, the IRS has an ongoing role in overseeing the nonprofit's activities to insure it is not violating the terms of this nonprofit designation.

If public accountability by the IRS and attorneys general has any teeth, it adds to the oversight provided by the public child welfare agency. It is formally in place to oversee the work of directors who are otherwise unaccountable to the class of beneficiaries (here, foster children and their families) served by the work of the nonprofit. The directors must account and answer to the attorneys general. Even religiously affiliated nonprofits that enjoy First Amendment protections are subject to attorneys general's monitoring to protect against misuse of charitable funds. The risk of misuse of funds may therefore be heightened by the wholesale entry of for-profit providers into the foster care system since they are not subject to this additional public oversight.

⁹⁶ Volunteers and donors may also contribute some oversight to the work of nonprofits. Directors may be concerned about the donor or volunteer's perceptions of the nonprofit enterprise since these financial or in-kind donations are vital to the nonprofit's operations. Neither of these constituents is in a contractual relationship with the directors. They cannot legally control the functioning of the nonprofit although withdrawal of their support may offer some functional control.

⁹⁷ See I.R.C. § 6033(b) (Supp. 1999) (requiring section 501(c)(3) nonprofit organizations to file detailed annual information returns); see also I.R.C. § 501(c) (Supp. 1999).

For-profits are not susceptible to this public accountability which at least exists as part of the regulatory scheme and to a greater or lesser extent in practice.⁹⁸ Oversight is provided externally only by shareholders and the public agency. This suggests that accountability by the public agency must be increased to properly supervise the for-profits and maintain the integrity of public family law. This is also vital for the nonprofit providers if the IRS and attorneys general are negligent in their monitoring.

C. Nationally Based For-Profits

Concerns for oversight are heightened by the fact that the for-profit corporations currently providing foster care services are likely to be nationally, not locally, based.⁹⁹ Not only are their corporate headquarters out-of-state from the states with whom they contract, but the placement facilities are as well. This raises two distinct problems: first, lack of a corporate nexus in the community of services increases concerns for accountability; second, children are more likely to be placed at a setting far from their home.

A for-profit's corporate headquarters might be in Georgia but the corporation could operate foster care homes all over the country. With no historic or current ties to the community where the homes are provided, corporate boards are less reliable in providing oversight or exercising judgment based on local or individual needs as opposed to corporate profits. Distance from the community of service amplifies concerns already present from the privatization of child welfare services. Not only are the recipients distant from the contractual exchange of public funds for service delivery, but the parent corporation of a subsidiary corporate provider may be far removed from the community of service with no board or philanthropic ties to that

⁹⁸ See David Shichor & Clemens Bartollas, *Private and Public Juvenile Placements: Is There a Difference?* 36 CRIME & DELINQ. 286, 297 (1990) (suggesting that scrutiny by the public of private facilities is lacking).

⁹⁹ Some of the same providers, such as Magellan Health Services, Inc. and Correctional Services, Inc., which recently took over Youth Services International, are operating in a variety of systems. See generally MAGELLAN HEALTH SERVS., INC., 1998 ANNUAL REPORT (1998); CORRECTIONAL SERVS. CORP., INC., 1998 ANNUAL REPORT (1999). Magellan is one of the country's largest managers of mental health care. One of its business units, National Mentor, provides foster care. A division, Magellan Public Health Solutions, contracts with Hamilton County, encompassing Cincinnati, to manage the entire child welfare system. See Richard Curtis, *Children's Health Services Manager Criticized—Magellan "Overambitious" in Setting First-Year Goals*, CINCINNATI BUS. COURIER, Dec. 18, 1998, at 1. It is the state's managed health care company in Montana where it determines whether therapeutic foster homes will be allowed to continue to provide services to the children placed in them. See *Mental Health Providers Brace for Changes*, BILLINGS GAZETTE, Apr. 15, 1999, at C1. Recent figures indicate that company profits are up 40%. See *Magellan Health Services*, supra note 93.

locality.¹⁰⁰ While nationally based corporations may have collective expertise, the exercise of such expertise can only be assured through oversight.

The second concern regarding distance of placement from the child's home may be more an historic relic than a future problem. Because federal funds were not available to reimburse the states for the placements provided by for-profit providers before the 1996 amendment, the placements they provided were mainly for hard-to-place children. These children needed very specialized settings, such as a placement for autistic children in the dependency system. Any single state or local child welfare agency might have one or a few children needing such a placement. In some instances, it was cost effective to ship them out-of-state for the service, even if paid for exclusively with state and local dollars, when it would be more expensive to create the placement locally with a nonprofit agency for so few children.

Public policy has long recognized that family reunification is less likely when children are placed at a distance from their family and community.¹⁰¹ The preference for a homelike setting in close proximity to a child's home is codified at 42 U.S.C. § 675 (5)(A), which requires states to review their cases to insure that they meet the federal mandates. That section reads in part:

The term "case review system" means a procedure for assuring that—
(A) each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child¹⁰²

As all states receive federal reimbursement for their foster care systems, all are required to follow the federal mandates. The mandate regarding family-like setting and proximity preferences is codified by the states.¹⁰³ The law goes on to require

¹⁰⁰ Some have raised the contention that for-profit directors are actually more accountable than their nonprofit counterparts. See generally Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 J. CORP. L. 631 (1998). This argument is based largely on the lack of government enforcement of duty of care and duty of loyalty standards over nonprofit boards. While this may be accurate when comparing national nonprofits such as the United Way to nationally based for-profits, the local community nexus of most nonprofit foster care providers adds a degree of oversight and accountability not present with nationally based for-profit corporations.

¹⁰¹ See H.R. REP. NO. 136, at 48–49 (1979).

¹⁰² 42 U.S.C. § 675(5)(A) (1997 Supp III).

¹⁰³ See, e.g., ALA. ADMIN. CODE r. 660-5-28-.06(1)(b)(1), (2) (1998); ALASKA ADMIN. CODE tit.7, § 51.200 (b) (1996); IDAHO CODE § 16.06.01.424 (01)(c), (d) and 16.06.01.050 (04) (1998); IND. ADMIN. CODE tit.470, r. 3-9-3 (1996); MD. REGS. CODE tit.7, § 02.11.03(B)(6), (17), § 02.11.11(C) (1999); MASS. REGS. CODE tit.7, § 101(1) (1998); MINN. R. 9560.0545 (1)(C) (1997); N.J. ADMIN. CODE tit.10, § 1331-3.4(a)(5) (1996); N.Y. COMP. CODES R. & REGS. tit.18, § 430.11(d)(1) (1999); N.C. ADMIN. CODE tit.10, r. 41O.0204(b)(1) (Oct. 1999); OHIO ADMIN.

that the public agency sending the child or the public agency where a distant placement is located must visit the child no less frequently than *every twelve months*.¹⁰⁴ Such arm's length oversight provides fewer professional eyes and ears monitoring the quality of the service. This is a problem of oversight for all private agencies but is exacerbated with for-profit placements of which distant locations are a defining feature.

Now that for-profits are eligible for federal reimbursement, they may move beyond the niche market to less intensive foster care placements. With federal funds available to them as they are to nonprofits, they can compete for the entire spectrum of out-of-home care and not just regionally or nationally based facilities. This may lead to for-profit facilities and placements that are local with corporate headquarters far from the nexus of service delivery. The quality concerns raised by distance of headquarters and facilities should be addressed for all private providers even if the impact would be more concentrated on for-profit providers.

The federal government, as a requirement for reimbursement, should require all private providers to have local boards drawn from the community of service. This would create local oversight for all placement providers akin to the type assumed in a donative nonprofit. Second, to address concerns over distant placements, the court in a dispositional review hearing held no later than one month after placement should approve all out-of-locality placements. Dispositional reviews conducted as administrative formalities months after placement are not sufficient to protect the interests of foster children. Instead, full reviews with the safety and

CODE § 5101:2-47-02(E) (1999); 55 PA. CODE § 3130.67(b)(7)(i), (ii) (Apr. 1999); S.D. ADMIN. R. 67:42:09:17(1) (1997); 40 TEX. ADMIN. CODE § 700.1333(c)(4) (West 1998).

¹⁰⁴ 42 U.S.C. § 675(5)(A)(ii) requires:

The term "case review system" means a procedure for assuring that—(A) each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child, which— . . . (ii) if the child has been placed—foster care outside the State in which the home of the parents of the child is located, requires that, periodically, but not less frequently than every 12 months, a caseworker on the staff of the State agency of the State in which the home of the parents of the child is located, or of the State in which the child has been placed, visit such child in such home or institution and submit a report on such a visit to the State agency of the State in which the home of the parents of the child is located.

42 U.S.C. § 675(A)(ii) (1994 & Supp. III 1997). States codify this provision requiring annual visits. *See, e.g.*, IDAHO CODE § 16.06.01.424(01)(o) (1998); ILL. ADMIN. CODE tit.89, § 315.110(e) (1998) (requiring Illinois social workers to visit children in institutional settings monthly unless the setting is 50 miles or more away, then the visit must occur at least bimonthly); ILL. ADMIN. CODE tit.89, § 315.130(d)(10) (1998) (requiring Illinois social workers to visit children placed out-of-state annually); IND. ADMIN. CODE tit.470, r. 3-9-3 (1998); N.Y. COMP. CODES R. & REGS. tit.18 § 430.11(c)(2)(ix) (1999).

welfare of the child and the least restrictive, "most family like setting" standards applied would help insure that distant placements are not misused. For out-of-locality placements, reviews should be held monthly, not every six months as is required by federal law.¹⁰⁵ This will serve as an accountability mechanism to insure the necessity of the distant placement and an administrative burden to discourage the misuse of such placements. Such distant placements should also be visited with on-site contact with the child, no less frequently than once per month. Annual visits as currently required by federal law are frighteningly inadequate to provide meaningful oversight. A report on the monthly site visit, need for visitation, and other relevant concerns should be mandatorily considered on the record of monthly dispositional reviews.

D. *Size of Facilities*

Private agencies are allowed to operate large facilities to care for foster children. Federal law prohibits public agencies from operating placement settings with more than twenty-five beds.¹⁰⁶ Before 1980, private facilities could operate at any size, but public facilities could not be large-scale institutions. The 1980 provision was added to allow public facilities to increase in size to twenty-five beds in the hopes that more community based group homes would be developed.¹⁰⁷ The

¹⁰⁵ 42 U.S.C. § 675(5)(B) reads:

The status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review . . . in order to determine the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption or legal guardianship

42 U.S.C. § 675(5)(B) (Supp. III 1997).

In 42 U.S.C. § 675(6), administrative review is defined as:

[A] review open to the participation of the parents of the child, conducted by a panel of appropriate persons at least one of whom is not responsible for the case management of, or the delivery of services to, either the child or the parents who are the subject of the review.

42 U.S.C. § 675(6) (1994). States codify this requirement for six-month reviews. *See, e.g.*, ALA. ADMIN. CODE r. 660-5-28-.06(2) (1998); IDAHO CODE § 16.06.01.050(09) (1998); IND. ADMIN. CODE tit.470, r. 3-9-3 (1996); KAN. ADMIN. REGS. 30-4-80(f).

¹⁰⁶ 42 U.S.C. § 672(c) (Supp. III 1997). For a discussion of this provision, see S. REP. NO. 96-336, at 15-16 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1465.

¹⁰⁷ *See Hearing on H.R. 7200 Before the Subcomm. on Public Assistance of the Comm. on Finance*, 95th Cong. 249, (1977) [hereinafter *Hearing on H.R. 7200*]. The congressional intent is

private providers operating the large institutions were allowed to remain at unlimited size because they were seen as "specialized care facilities for handicapped children."¹⁰⁸ Allowing reimbursement for public facilities of no more than twenty-five beds was to encourage the development of smaller facilities than were offered by private nonprofit providers in every community. The hope was to move children to smaller settings and to keep them local.

Private providers are still allowed to contract for placements in larger settings, although the federal mandates dictate that the placement should be in as "family like" a setting as possible.¹⁰⁹ Despite the ninety years since the White House Conference on Children recommending mothers' pensions to keep children out of orphanages, aggregate care settings still exist.¹¹⁰ Will expansion of the private provider network, especially to for-profits, which have been providing large regionally based facilities, increase the likelihood of institutionalization of dependent children?

Any federal allowance which increases aggregate care at the expense of in-home or foster family home care should be closely monitored to insure that children are in the least restrictive, most family-like setting possible as is mandated by

clear in the legislative history of the Act:

At the present time Federal funding of foster care maintenance payments for children is available for children placed in foster care homes and also for children placed in a nonprofit private child care institution. The committee bill would broaden the provision to allow for Federal funding of foster care maintenance payments for children in public as well as private facilities, but only if the public institution serves no more than 25 resident children. While the committee recognizes that this change in the law does somewhat expand the foster care authority of the law contrary to the committee's overall goals of de-emphasizing foster care, the committee believes that such a change is important in order to encourage States to develop less intensive forms of institutional foster care. In other words, it is the intent of the committee that this authority be used by the States to make it possible to move children from large, highly institutional private institutions into smaller institutions which more nearly approximate the atmosphere of a home Because the intent of this provision is to encourage the development and utilization of group home care, the committee expects that the administration will closely monitor claims for reimbursement under this authority to assure that payments are not made with respect to care in large institutions which have made superficial changes, such as the establishment of a 'group home' wing within a larger institution. The committee intends that only institutions which are clearly and definitely separate entities serving 25 or fewer children will be covered by this provision.

S. REP. NO. 96-336, at 15-16 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1465.

¹⁰⁸ See *Hearing on H.R. 7200*, *supra* note 107, at 249.

¹⁰⁹ 42 U.S.C. § 675(5)(A) (1994 & Supp. III 1997).

¹¹⁰ In *Building the Invisible Orphanage*, Matthew A. Crenson argues that the lesson to be learned from the historical experience of orphanages is "just how little control we exercise over the institutions we create, and how difficult it is to escape them." CRENSON, *supra* note 37, at 331.

federal law.¹¹¹ Again, risk of more large-sized facilities may be greater with the reimbursement of for-profit providers in the foster care system, but the risk should be regulated for all private providers.

As with the concerns for distant placements, the federal provisions which codified the 1996 amendment¹¹² should be amended to require that the court in a dispositional review hearing approve all placements in settings exceeding twenty-five beds. The review should be held no later than one month after placement with no allowance for retroactive funding. Administrative reviews held months after placement are inappropriate to protect children in foster care. Ongoing reviews should be held monthly to insure that the rights of all parties—parent, child, state, and other recognized parties—as well as the responsibilities of all subcontracting providers with the state are properly protected and exercised.

V. CONCLUSION

Concerns and suggestions are raised here in the hope that attention will be generated on monitoring the foster care system generally and specifically the implementation of the 1996 amendment allowing for-profit providers to receive federal funds for foster care. Such attention is an interesting possible consequence of the amendment: the entrance of for-profit providers may bring new eyes to the foster care system which has long wallowed in a perhaps beneficent but often neglectful public/nonprofit sphere. Attention by additional members of the community may be the most important result of this amendment if it informally increases oversight.¹¹³

Oversight is crucial. Competition for public contracts to provide foster care may lead to cheaper services by a wider array of providers. The key is to insure that quality is not sacrificed. When the 1980 amendments were codified as part of the Adoption Assistance and Child Welfare Act, Congress explicitly cautioned states to take care in developing group home facilities, to insure that placements were not “wings” of existing large facilities but were in fact new, community based group homes. Any such concerns were not elaborated by the 1996 Congress which was focused on the complicated issues of welfare overhaul and not on the implications of for-profit foster care.

The federal government, as a condition of reimbursement, should amend the

¹¹¹ 42 U.S.C. § 675(5)(A).

¹¹² 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.).

¹¹³ While this is a hope, private for-profit management of child welfare services generally has not heralded a new dawn of better services for abused and neglected children. Instead, problems have arisen with Medicaid billing, confidentiality breaches, referrals, and a host of other areas. *See, e.g.,* Curtis, *supra* note 99, at 1.

reimbursement law and regulations to protect against possible abuses by all providers. First, local boards should be created in the community of services. Second, courts should approve institutional or distant placements within one month of placement, not as part of semi-annual administrative case reviews. They should be reevaluated for appropriateness and quality in monthly court dispositional reviews. Finally, the public agency where the placement is located should visit each out-of-locality child at least monthly to help insure the quality of care. These monthly visits should be considered at the dispositional reviews.

In sum, extracting a profit from foster care dollars may be unseemly, but if the children benefit from more quality placements, it is money well spent. The risk that profit may come at the expense of quality must be monitored by the public agency. The for-profit model raises unique issues in the foster care area because of the lack of public oversight by the attorney general and IRS as is at least formally afforded to nonprofits. Only the public child welfare agency is in a position to monitor the foster care services provided. This oversight must be clear and is best not only codified in regulations but also enumerated in the funding contract provisions.

The nature of the foster care service and the distant and aggregate structures of the placements provided by for-profits raise the greatest concern for vulnerable children. Such placements, if not absolutely necessary, may only serve to frustrate reunification with the child's family. They also pose oversight issues for the public agency sending the child to a distant location. Regulations to attend to these concerns will remedy the lack of consideration when the amendment allowing federal reimbursement to for-profit providers was made part of the 1996 welfare reform package.