

AMERICA’S HIDDEN FOSTER CARE SYSTEM

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In most states, child protection agencies induce parents to transfer physical custody of their children to kinship caregivers by threatening to place the children in foster care and bring them to family court. Both the frequency of these actions – this Article establishes that they occur tens and likely hundreds of thousands of times annually – and their impact – they separate parents and children, sometimes permanently – resemble the formal foster care system. But they are hidden from courts because agencies file no petition alleging abuse or neglect and from policymakers because agencies do not generally report these cases.

While informal custody changes can sometimes serve children’s and families’ interests by preventing state legal custody, this hidden foster care system raises multiple concerns, presciently raised in Supreme Court dicta in 1979. State agencies infringe on parents’ and children’s fundamental right to family integrity with few meaningful due process checks. Agencies avoid legal requirements to make reasonable efforts to reunify parents and children, licensing requirements intended to ensure that kinship placements are safe, and requirements to pay foster care maintenance payments to kinship caregivers.

This Article explains how the present child protection funding system and recent federal financing reforms further incentivize hidden foster care without regulating it. Moreover, relatively recent state statutes and policies codify the practice without providing much of any regulation. In contrast to this trend, this Article argues for regulation – the opportunity for a parent to challenge the need for the custody change in court, limits on the length of time such custody changes can remain in effect without more formal action, the provision of counsel to parents (using money from a separate recent change in federal child protection funding), and requiring states to report cases in which its actions lead to parent-child separations.

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INTRODUCTION

The state child protective services (CPS) agency receives a call alleging that a parent has abused or neglected a child. The CPS agency¹ investigates and concludes that the parent has, in fact, abused or neglected the child, and further determines that the child is in such danger in the parent’s custody that the child needs to live elsewhere immediately. Accordingly, the agency identifies kin who can take care of the child—the child’s grandparent, aunt or uncle, or godparent—and acts to ensure the child lives with that person, at least temporarily.

At this point, one might expect the CPS agency to involve a state family court. The state is limiting one of the most precious substantive liberty rights recognized by the Constitution—that of parents to the care, custody, and control of their children, and the reciprocal right of children to live with their parents. Balancing that fundamental right to family integrity with the state’s *parens patriae* power to protect children from abuse and neglect is the subject of a complex body of federal and state constitutional and statutory law requiring court hearings focused on parental fitness and child safety.²

Yet in states across the country, this fact pattern happens without court involvement or oversight.³ Instead, the agency threatens to remove children and take parents to court unless they agree to change their children’s physical custody to the identified kinship caregiver. The state thus effectuates the child’s loss of their parent’s care and the parent’s loss of their child’s custody without any other branch of government checking or balancing the agency’s actions or anyone getting a lawyer. It

¹ These agencies have different names in different jurisdictions—for instance, departments of social services, children’s services, child and family services, etc. For simplicity, I refer to “CPS agencies” throughout this Article.

² *Infra* notes 99–103 and accompanying text.

³ *Infra* Part I.A.

is as if a police department investigated a crime, concluded an individual was guilty, did not file charges or provide him with an attorney, and told him he had to agree to go to jail for several weeks or months, or else they would bring him to court and things could get even worse.

Available data shows the practice occurs with great frequency.⁴ States do not track the number of these cases precisely (a problem on its own), but this Article combines a variety of empirical studies and state-specific documentation to demonstrate that these cases likely separate tens or hundreds of thousands of children from their parents annually,⁵ often for significant periods of time and sometimes permanently.⁶ It is thus a practice on par with formal foster care—both in the number of families affected and in the impact on those families.

This is America’s hidden foster care system.⁷ It is a legally undomesticated⁸ process in which state agencies effectuate a change of custody for thousands of children with few, if any, meaningful due process checks. State agencies thus coerce a surrender of fundamental constitutional rights with no lawyers or legal checks. This action, and what happens to the children and families subsequent to this action, is hidden from courts, because agencies file no petition alleging abuse or neglect. It is hidden from the public, the federal government, and policy-makers because federal funding statutes do not require states to count or report cases in which they arrange for hidden foster care.

Hidden foster care raises multiple concerns. The first and most obvious is whether threatening to remove children if parents do not place them with kinship caregivers renders such placements involuntary, thus violating due process. Substantively, this lack of oversight of agency determinations that children must be separated from their parents risks unnecessary and harmful separations. Given CPS agencies’ wide discretion, the limited information often available at the beginning of a case, and the need to make quick decisions, it is easy to imagine many errors occurring, especially without court oversight.

Second, the hidden foster care system undermines important legal protections for children, parents, and kinship caregivers. By avoiding formal foster care, agencies avoid court oversight of their actions, and legal requirements to develop case plans and make reasonable efforts to reunify parents and children.⁹ They avoid foster care

⁴ *Infra* Part I.B.

⁵ *Id.*

⁶ *Infra* Part I.A.

⁷ Others have used similar phrases. *See, e.g.*, DIANE L. REDLEAF, THEY TOOK THE KIDS LAST NIGHT 191 (2018) (“shadow foster care”); Andrew Brown, *How Safety Plans Allow CPS to Avoid Judicial Oversight*, THE HILL, May 31, 2019 (“shadow removal”).

⁸ This phrase is taken from the U.S. Supreme Court’s pathbreaking case, *In re Gault*, 387 U.S. 1, 22 (1967), which required the “constitutional domestication” of delinquency cases. In *Gault*, “domestication” meant the imposition of basic procedural rights for defendants, including the provision of counsel, in delinquency cases.

⁹ *Infra* Parts III.B.1-2.

licensing requirements intended to ensure kinship placements are safe, thus potentially leaving some children in dangerous situations.¹⁰ They avoid requirements to pay foster care maintenance payments to kinship caregivers, thus leaving caregivers without the financial supports available to formal foster parents and jeopardizing their ability to take care of children.¹¹

The Supreme Court has linked these sets of concerns; a 1979 Supreme Court opinion presciently worried that permitting states to provide kinship foster parents less financial support would allow states to remove children from their parents without triggering the judicial checks that formal foster care and its financial payments require.¹² Hidden foster care shows how the Court's concern is borne out.

Despite these concerns, informal changes in children's physical custody can sometimes be useful—allowing children to live at home with kin and limiting state control over their families.¹³ Parents may sometimes benefit from avoiding the court process, which introduces a judge who might believe a more invasive intervention is required. Hidden foster care leaves children in parents' legal custody, while court cases could lead a judge to shift legal custody to the CPS agency. Even if a brief separation from parents is necessary, it may be in children's interest to avoid family court intervention which could cause a separation from all family members, even the kinship caregiver. Kinship caregivers may prefer informal physical custody of children rather than a process which may require CPS agencies to decide whether to grant them a foster care license and subjects the kinship caregiver to agency oversight.

This Article's concern is that, absent legal regulation, the status quo gives CPS agencies tremendous power to determine the unusual case in which hidden foster care is appropriate. Given the weighty stakes involved and the state power exercised, more procedural protections than are currently provided should be required.

The hidden foster care phenomenon, and critiques of it, are not new. Indeed, it has been criticized from multiple ends of the child protection law spectrum, including those who want to limit state intervention in families (who worry about the state effectively changing custody without due process)¹⁴ and those who want the state to

¹⁰ *Infra* Part III.B.4.

¹¹ *Infra* Part III.B.3.

¹² *Miller v. Youakim*, 440 U.S. 125 (1979); *infra* notes 267–268 and accompanying text. The Court prevented states from paying formal kinship foster caregivers less than other foster parents, the correct result which, nonetheless, strengthened financial incentives for states to use hidden foster care. *Infra* Part IV.B.1.

¹³ See ANNIE E. CASEY FOUND., *THE KINSHIP DIVERSION DEBATE: POLICY AND PRACTICE IMPLICATIONS FOR CHILDREN, FAMILIES AND CHILD WELFARE AGENCIES* (2013), <https://www.aecf.org/resources/the-kinship-diversion-debate/> (summarizing benefits and risks of hidden foster care).

¹⁴ *E.g.*, Ryan C. F. Shellady, *Martinis, Manhattans, and Maltreatment Investigations: When Safety Plans Are a False Choice and What Procedural Protections Parents Are Due*, 104 IOWA L. REV. 1613 (2019) (arguing safety plans are unconstitutionally coercive); Katherine C. Pearson, *Cooperate or We'll*

intervene in more families (who worry that hidden foster care leaves children in unsafe conditions).¹⁵

Hidden foster care requires renewed attention because, as this Article establishes, a growing set of recent federal and state statutes and policies institutionalize and incentivize the practice, without imposing meaningful regulations. This Article is the first to explain how the present child protection funding system creates incentives for states to avoid formal foster care and, as importantly, how recent (and otherwise positive) federal financing reforms risk further institutionalization of hidden foster care without regulating it. Moreover, relatively recent state statutes and policies codify the practice without providing much of any regulation. Rather than add essential substantive limits and procedural protections to ensure safety plans that respect the rights of affected parents, children, and kinship caregivers, state policies formalize hidden foster care without addressing its core problems.

This Article argues for the legal domestication of what is now hidden foster care. First, using state power to change child custody should trigger strong legal protections for family integrity—including the opportunity for a parent to challenge the need for the custody change in court, and limits for the length of time such custody changes can remain in effect without more formal action. Second, any change in physical custody requested by the state should trigger a right of parents to obtain legal counsel (appointed if necessary) to advise them on their rights and negotiate appropriate plans with CPS agencies. New federal financing guidance makes federal funding available to states to provide attorneys to parents in precisely these cases. These steps recognize that hidden foster care is sometimes appropriate and therefore would not require CPS agencies to bring families to court whenever they use hidden foster care. But they would ensure that parents have a means to protect their and their children’s right to family integrity.

Third, the federal government should take this parallel system of foster care out of hiding by requiring states to track the number of cases in which its actions lead to parent-child separations without formal foster care, and what happens to affected children and their families. Presently, the absence of clear data on the frequency of its use, its duration, the safety of children in hidden foster care, and other impacts on children and families limits policy discussions regarding this practice. Given its prominence and the severity of its infringement on family integrity, gathering basic data regarding hidden foster care is essential to future development and evaluation of policies governing this practice.

Part I of this Article defines the practice of hidden foster care and provides the descriptive evidence of its incredibly wide scope, analogous to the formal foster care

Take Your Child: The Parents’ Fictional Voluntary Separation and a Proposal for Change, 65 TENN. L. REV. 835 (1998) (same).

¹⁵ E.g., Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV. 1321, 1365 (2012). (expressing concern that safety plans left children with unsafe caregivers).

system. Part II addresses the due process concerns with the practice, including a discussion of competing U.S. Circuit Court of Appeals cases regarding the voluntariness of hidden foster care. Part III explains the policy concerns and policy benefits of the practice. Part IV describes the perverse incentives to use hidden foster care created by federal child protection funding laws. Part V describes how recent federal and state statutes and state agency policies institutionalize the practice of hidden foster care without adequately regulating the practice. Part VI offers a range of individual case and systemic administrative oversight steps which would provide long overdue legal regulation to this practice.

I. HIDDEN FOSTER CARE: A SYSTEM SIMILAR IN FUNCTION AND SCOPE TO FORMAL FOSTER CARE

Every year, CPS agencies nationally separate more than 250,000 children from their parents and place them in formal foster care, in the state's legal custody, under the oversight of a family court judge.¹⁶ Some are placed with strangers, and a growing proportion – now about one-third of all foster children – are placed with kinship caregivers.¹⁷ Some of these children leave foster care within weeks or months, largely to reunify with their parents, but others have their custody permanently changed. The hidden foster care system separates a roughly similar number of children, many of whom reunify and some of whom are separated permanently from their parents. A key difference is that in formal foster care, CPS agencies take legal custody of children, while in hidden foster care they induce parents to transfer physical custody to kinship caregivers through threats of the state taking legal and physical custody. This supposed voluntariness exempts hidden foster care from both court oversight and federal data tracking requirements (which means a precise count of the number of hidden foster care cases is impossible).

This Part describes generally what hidden foster care is, how it operates, its impact on children, and its context in relationship to kinship foster care.¹⁸ This Part also uses available data to show the wide scope of the hidden foster care system, affecting at least tens and likely hundreds of thousands of children each year, placing it on par with the formal foster care system.¹⁹

¹⁶ This is the number of children counted as having “entered foster care” in a given year. U.S. DEP'T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN, YOUTH, & FAMILIES, ADMIN. ON CHILDREN AND YOUTH, CHILDREN'S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2017 ESTIMATES AS OF AUGUST 10, 2018 1 (2018), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport25.pdf>.

¹⁷ *Infra* note 59.

¹⁸ The practice varies in some details from state to state, though a complete breakdown of such differences is beyond this Article's scope.

¹⁹ *Infra* Part I.B.

A. *Hidden Foster Care*

Hidden foster care occurs when CPS agencies cause a change in a child’s physical custody without any family court action, without placing the child in the agency’s own custody, and without reporting a child’s removal to the federal government. It follows the same sort of concerns about child safety which trigger the formal foster care system—such as concerns about a parent’s drug abuse or mental health condition, limiting their ability to parent a child; physical or sexual abuse of a child by a parent or other adult; or an unsanitary house. CPS agencies effectuate hidden foster care via “safety plans”²⁰—agreements between CPS authorities and parents intended to keep children safe. Safety plans have a particular meaning in this context. The social work literature defines a safety plan as “a plan that is developed by the parent, worker, children (depending upon their age) and [safety] network members to ensure the safety of their children.”²¹ Safety plans have their roots in social work practice involving domestic violence, where it seeks to empower family members to design plans intended to keep them safe while taking into account all of their individual circumstances.²² Safety plans are intended to identify a “safety network”—individuals who can help keep adults and children safe as needed.²³ Crucially, safety plans leading to hidden foster care²⁴ follow a CPS agency threat to remove children and/or initiate child protection proceedings in family court if parents refuse to change the child’s custody as the CPS agency insists.

1. *How Hidden Foster Care Begins: Threats of Deeper Involvement*

Social work goals of safety planning include “increase[ing] family engagement.”²⁵ It bears analysis whether safety plans are truly voluntarily accepted by families and thus whether this goal is met. That analysis is especially essential when the social worker works for a CPS agency and has authority to remove children from parents’

²⁰ The term “safety plans” can also refer to plans developed after a CPS agency has removed the child directly or filed a petition. For instance, the District of Columbia’s code refers to a “safety plan” developed after the CPS agency removed a child and pending a petition and family court hearing within 72 hours. D.C. CODE § 16-2312(a-1).

²¹ Stephanie Nelson-Dusek et al., *Assessing the Value of Family Safety Networks in Child Protective Services: Early Findings from Minnesota*, 22 CHILD & FAMILY SOC. WORK 1365, 1365 (2017).

²² *E.g., id.* at 1365–66.

²³ *Id.* at 1366.

²⁴ Safety plans need not lead to hidden foster care; they can, instead, require parents to comply with steps short of changes in children’s custody. While important to child protection practice, such safety plans are beyond the scope of this Article. These safety plans present somewhat different legal and policy issues—they, for instance, do not introduce alternative caretakers and they infringe less on the right of family integrity. *See, e.g. id.* at 1372 (describing safety plans that do not aim to change custody but to “identify specific people and strategies that support parents and act as safety monitors for the children”).

²⁵ *Id.* at 1365.

custody and initiate legal action to declare the parents unfit. As will be discussed in Part II, a central legal debate is whether these safety plans are voluntary agreements akin to any contract or civil settlement or whether a CPS threat to remove children renders them coercive.²⁶

While the debate over the implication of CPS agency threats remains open, there is no question that CPS does threaten to remove children immediately if parents do not agree to a safety plan that calls for children's physical custody to change, typically shifting the child to the custody of a kinship caregiver. CPS agency policies and safety plan forms, and caseworker reports all confirm that CPS induces agreements to safety plans through threats to remove children. Threats are sometimes stated explicitly on safety plan forms. A Kentucky safety plan form stated in all capital letters that "ABSENT EFFECTIVE PREVENTATIVE SERVICES [through the CPS agency's safety plan], PLACEMENT IN FOSTER CARE IS THE PLANNED ARRANGEMENT FOR THIS CHILD."²⁷ The form used in South Carolina is similarly forceful, providing in bold type, "If the parent(s) refuse to sign a valid safety plan, an out of home placement must be sought by Law Enforcement or ex parte Order to keep the child safe, pending the completion of the investigation."²⁸ Other states use somewhat subtler, but similarly threatening language.²⁹ Such threats are confirmed by CPS agency policies which make clear that agencies will seek the immediate removal of children if parents do not agree to a safety plan, and emphasize that this threat is essential to inducing compliance—a safety plan "is only effective if all parties agree to the plan and understand that [CPS] will consider the child unsafe if the parties do not comply with the agreed terms of the plan and DSS will initiate the legal action to protect the child through the removal of the child from the parent's custody and control."³⁰ Threats are sometimes otherwise stated in communications between CPS authorities and parents—often with little nuance.³¹ As one CPS worker told the Annie

²⁶ *Infra* Part II.A-II.B.1.

²⁷ *Schulkers v. Kammer*, 367 F.Supp.3d 626, 634 (E.D.Ky. 2019).

²⁸ S.C. Dep't of Soc. Serv., Form 3087, Safety Plan, https://dss.sc.gov/resource-library/forms_brochures/files/3087.pdf (last visited 13 May 2019). *See also* *Dupuy v. Samuels*, 462 F. Supp. 2d 859, 868 (N.D. Ill. 2001) (finding that Illinois CPS officials used safety plan forms with boilerplate language stating that they could remove children if parents refused to agree to the safety plan).

²⁹ *See, e.g.* *Smith v. Williams-Ash*, 520 F.3d 596, 598 (6th Cir. 2008) (reporting form language threatening that if parents "will not be able to continue following the plan, [CPS] may have to take other action(s) to keep your child(ren) safe").

³⁰ S.C. DEP'T OF SOC. SERV., HUMAN SERVICES POLICY AND PROCEDURE MANUAL, CHAPTER 7, CHILD PROTECTIVE AND PREVENTIVE SERVICES, § 719.02 SAFETY PLANNING 1 (adopted July 1, 2015) [hereinafter SC DSS SAFETY PLANNING POLICY].

³¹ For instance, in *Smith*, the parents alleged that the CPS case worker threatened that they could lose their children forever if they did not follow the safety plan. 520 F.3d at 598. In a case in South Carolina, a CPS agency lawyer wrote to a parent's attorney that "If she [the parent] chooses to violate the safety plan, we can seek a court action and a finding of physical abuse and central registry along with removing custody, if she wants to go that route OR she can continue to cooperate, and we can attempt to resolve this matter without court intervention." *Adams v. Dep't of Soc. Serv.*, Plaintiff's Response to motion, Exh. A, 2019

E. Casey Foundation, a major child welfare research and funding organization, “We say we want a child welfare system that values family decisions, but once the government gets involved, relatives and parents don’t always have a choice. It’s sometimes auntie or else.”³²

Even without explicit threats, the absence of court oversight over safety plans provides “opportunity for manipulation of the parents” through implied threats or by CPS agencies’ failure (intentional or not) to fully inform parents of their options.³³ CPS agencies can, through form language and verbal threats, communicate that parents must agree to safety plans or see the agency place their children in foster care even when no plans to follow through on that threat exist.³⁴ The absence of court oversight also means that CPS’s precise words and actions taken to induce parental agreement to a safety plan can remain subject to dispute, and remain unresolved.³⁵ Indeed, without court oversight, a strong incentive for CPS officials to be careful to avoid overly threatening language is lost.

CPS’ role in inducing safety plans creates definitional challenges for scholars. Consider this distinction between private and public kinship care by leading scholar Dorothy Roberts: “As a matter of definition, private kinship care is arranged by families without child welfare agency involvement; kinship foster care, meanwhile, is provided to children who are in the legal custody of the state.”³⁶ Hidden foster care not only follows CPS agency involvement, but is usually specifically requested by CPS authorities. Still, legal custody does not transfer, and certainly does not transfer to the state, leaving parents, children, and kinship caregivers without a clear legal status governing the situation insisted upon by the CPS agency.

Similarly, child protection agencies and policy leaders have struggled to define precisely CPS agencies’ role in setting up hidden foster care. They often use language which avoids stating that CPS agencies direct the process, but nonetheless makes clear that CPS agencies have central, even decisive, roles. Consider, for instance, a 2016 white paper published by Child Trends, a leading child welfare think tank. It opens by using the passive voice to describe the phenomenon—“kinship diversion” occurs when “children *are placed with* relatives as an alternative to foster care”—avoiding the

CP 38000036 (S.C. Ct. Common Pleas Apr. 12, 2019). In full disclosure, the author was retained as an expert by the plaintiff in that case.

³² ANNIE E. CASEY FOUND., *supra* note 13, at 1.

³³ Pearson, *supra* note 14, at 842.

³⁴ *E.g.* Schulkers, 367 F.Supp.3d at 634, 640 (reciting threats from CPS agencies even though “there was, in fact, no planned arrangement for foster care”).

³⁵ *Id.* Pearson also cites to cases raising questions about the specific circumstances of safety plan agreements, such as one alleging that CPS staff made a parent sign a safety plan agreement that was partially blank, threatening to “tell the judge” if she did not. *Id.* at 841 (citing *In re J.H.*, 480 So.2d 680, 683 (Fla. Dist. Ct. App. 1985)).

³⁶ Dorothy Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1623 (2001).

question of who precisely does the placing.³⁷ The federal Children's Bureau has similarly used the passive voice—"children who are known to the child welfare agency *are placed with* relatives without the State or Tribe assuming legal custody."³⁸ By the next section, Child Trends moves on to an ambiguous verb—"a child welfare agency *facilitates* the placement of a child with relatives or fictive kin . . ."³⁹ Deeper in, the white paper makes clear that CPS agencies are "the primary influence in suggesting" a change in custody, and seeking parental agreement.⁴⁰ The Children's Bureau chose a different, slightly less ambiguous verb—"the child welfare *arranges* for a placement without any court involvement."⁴¹ Multiple other scholars and think tanks emphasize state authorities' central role in making kinship diversion placements happen.⁴² CPS case workers are "often" the ones to call potential caregivers and ask if they will take the child into their home.⁴³

Safety plans are arranged without provision of counsel to parents.⁴⁴ Parents therefore do not generally have a lawyer to consult about the validity of CPS threats to remove children, their likelihood of success in any court hearing, or the tactical advantages or disadvantages of cooperating temporarily with CPS officials. Moreover, parents lack a lawyer to help negotiate terms of any safety plan, such as duration, events which would trigger the plan's termination, visitation, or decision-making authority.

2. *What Hidden Foster Care Does: Change Physical Custody*

In hidden foster care, CPS agencies effectuate changes in physical but not legal custody,⁴⁵ while in formal foster care, a court order shifts legal custody from parents to a CPS agency. But hidden foster care effectuates the same day-to-day changes in children's reality—they change the person with whom they live, often permanently.

³⁷ KARIN MALM & TIFFANY ALLEN, CHILD TRENDS, RESEARCH BRIEF: A QUALITATIVE RESEARCH STUDY OF KINSHIP DIVERSION PRACTICES 1 (2016), <https://www.childtrends.org/publications/a-qualitative-research-study-of-kinship-diversion-practices-2-2> (emphasis added).

³⁸ U.S. DEP'T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN, YOUTH, & FAMILIES, ADMIN. ON CHILDREN AND YOUTH, CHILDREN'S BUREAU, WORKING WITH KINSHIP CAREGIVERS 3 (2018) (emphasis added).

³⁹ MALM & ALLEN, *supra* note 37, at 1. "Fictive kin" refers to family-like relationships that lack a relationship through blood or marriage.

⁴⁰ *Id.* at 3.

⁴¹ WORKING WITH KINSHIP CAREGIVERS, *supra* note 38, at 3 (emphasis added).

⁴² *E.g. supra* note 32.

⁴³ Gerald William Wallace & Eunju Lee, *Diversion and Kinship Care: A Collaborative Approach Between Child Welfare Services and NYS's Kinship Navigator*, 16 J. FAM. SOC. WORK 418, 422 (2013).

⁴⁴ Tara Grigg Garlinghouse & Scott Trowbridge, *Child Well-Being in Context*, 18 U. PA. J. L. & SOC. CHANGE 105, 117 (2015).

⁴⁵ SC DSS SAFETY PLANNING POLICY, *supra* note 30, at 1. Legal custody refers to who holds decision-making authority regarding a child. Physical custody refers to where the child lives.

Family court judges can, of course, remove children from their parents' physical custody and place them in foster care, including kinship foster care.⁴⁶ Family courts can also keep children in their own homes and order parents to leave.⁴⁷ Both steps mirror what happens in hidden foster care. A safety plan could require the child to leave his/her home and move in with a kinship caregiver—with or without a parent present.⁴⁸ Or the child could remain in the home, but a parent who CPS has concluded has maltreated the child would be required to leave. The child could remain in the home, and a kinship caregiver could be required to move in.⁴⁹ These two options could be combined, with parent(s) required to leave their child and their home, and a kinship caregiver agreeing to move in and take physical custody of the child.⁵⁰ Through the most severe of these options—when parents leave their home without their children or when children move into a kinship caregiver's home without their parents—parents and children lose their right to live together. Even when parents and children can remain together, the required addition of another adult in the home gives that person significant power and diminishes the parent's authority over the child.⁵¹

Kinship care is not limited to hidden foster care and physical but not legal custody changes. In fact, kinship care is frequently used in the formal foster care system and has a strong research base in that context. While CPS agencies placed only about 18% of foster children in kinship homes in the early 1980s, they dramatically increased their usage of kinship care in the 1980s as the number of children those agencies removed increased sharply in the wake of the crack-cocaine epidemic.⁵² Begun initially to fill an urgent need for more foster placements, a growing body of research showed

⁴⁶ *E.g.*, S.C. CODE ANN. § 63-7-1660.

⁴⁷ *See e.g. In re Blakeman*, 326 Mich. App. 318, 320 (Mich. Ct. App. 2019) (describing parent's appeal from family court order that he remain out of the family home).

⁴⁸ SC DSS SAFETY PLANNING POLICY, *supra* note 30, at 5.

⁴⁹ *Id.* at 5.

⁵⁰ *See, e.g., Redleaf, supra* note 7, at 22–24 (describing cases with this element in Illinois as “routine” and one such case).

⁵¹ Safety plans can also require parents to change a parenting practice, without changing physical custody. For instance, in one well-publicized case, CPS authorities were concerned about 10- and 6-year-old siblings walking home from a park alone, and required the parents to sign a safety plan agreeing to not leave their children unsupervised or face the removal of their children. David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 239 n.8 (2015) (describing case and citing its media coverage).

⁵² MARK F. TESTA & JENNIFER MILLER, EVOLUTION OF PRIVATE GUARDIANSHIP AS A CHILD WELFARE RESOURCE, IN CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 405 (Gerald P. Mallon & Meg McCartt Hess eds., 2005). *See also* Roberts, *supra* note 36, at 1624 (“An exploding foster care population combined with a shortage of licensed nonrelative foster homes made relatives an attractive placement option.”).

significant benefits from kinship care⁵³—children are more likely to feel that they belong with kinship caregivers than in stranger foster care,⁵⁴ can more easily remain with their siblings,⁵⁵ have better behavioral and mental health,⁵⁶ and are significantly less likely to have their initial placement disrupted and less likely to experience multiple moves from one foster placement to another.⁵⁷ Other advocates argue that kinship foster care is consistent with long traditions of extended family and fictive kinship care, especially among Black families.⁵⁸ Kinship care rates have continued to grow in recent years; in 2016, about one-third of all children in formal foster care live with a kinship caregiver, up from 24% over the preceding decade.⁵⁹

3. *How Long Hidden Foster Care Lasts and How It Ends*

The length and long-term outcomes of hidden foster care are analogous to the formal foster care system. Relatively little data demonstrates hidden foster care cases' duration, or how they end, and significant variations between states are likely. One detailed review in Texas, however, reveals that in most cases, hidden foster care triggers a long-term if not permanent change in custody. A 2015 review found that in fiscal year 2014, Texas authorities used hidden foster care in 34,000 cases, and reunified children and parents that same year in nearly 13,000 of those⁶⁰—meaning that in more than 60% of Texas hidden foster cares, children remained with kinship caregivers. While CPS authorities brought some cases to court (about 4,000 or about

⁵³ For a recent summary of research findings on the benefits of kinship care, see Christina McClurg Riehl & Tara Shuman, *Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families*, 39 CHILDREN'S LEGAL RTS. J. 101, 104–08 (2019).

⁵⁴ Eun Koh & Mark F. Testa, *Propensity Score Matching of Children in Kinship and Nonkinship Foster Care: Do Permanency Outcomes Still Differ?*, 32 SOC. WORK RES. 105, 115 (2008).

⁵⁵ WORKING WITH KINSHIP CAREGIVERS, *supra* note 38, at 4.

⁵⁶ MARC WINOKUR, AMY HOLTAN, & KERI BATCHELDER, KINSHIP CARE FOR THE SAFETY, PERMANENCY, AND WELL-BEING OF CHILDREN REMOVED FROM THE HOME FOR MALTREATMENT (REVIEW), THE COCHRANE COLLABORATION: COCHRAN DATABASE OF SYSTEMIC REV. 10 (2014), https://www.cochrane.org/CD006546/BEHAV_kinship-care-for-the-safety-permanency-and-well-being-of-maltreated-children.

⁵⁷ *E.g.*, Eun Koh, *Permanency Outcomes of Children in Kinship and Non-Kinship Foster Care: Testing the External Validity of Kinship Effects*, 32 CHILDREN & YOUTH SERVS. REV. 389, 390, 393, 396 (2010); Koh & Testa, *supra* note 54, at 112.

⁵⁸ Roberts, *supra* note 36, at 1621–22; Maria Scannapieco & Sondra Jackson, *Kinship Care: The African American Response to Family Preservation*, 41 SOC. WORK 190 (1996).

⁵⁹ U.S. DEP'T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, ADMIN. FOR CHILDREN, YOUTH & FAMILIES, CHILDREN'S BUREAU, FOSTER CARE STATISTICS 2016 3–4 (2018).

⁶⁰ Supreme Court of Texas Children's Commission Round Table Report on Parental Child Safety Placements (PCSPs) (Aug. 28, 2015), <http://texaschildrenscommission.gov/media/1152/pcsp-round-table-report-final.pdf>, 3, 13, [hereinafter Texas Children's Commission Round Table Report].

12%), most of the remaining children lived with kinship caregivers without a formal change in custody or the court oversight that such a change would require.⁶¹

Safety plans last for inconsistent periods of time, and agency practice and policy do not always align. In South Carolina, for instance, a policy provides that safety plans may only be in place for 90 days.⁶² But individual cases show the agency enforcing safety plans beyond 90 days.⁶³ Beyond South Carolina, a majority of state CPS agencies surveyed by Child Trends said they used hidden foster care, and a majority of those states reported that they “discontinue ongoing supervision with the caregiver and leave the caregiver as the physical custodian of the child.”⁶⁴ That is, CPS agencies often cause (or, if one prefers, facilitates⁶⁵ or arranges⁶⁶) a change in a child’s physical custody and then ends their involvement with the family without doing anything to change legal custody. Most agencies reported that there was no need to go to family court and seek an adjudication of neglect.⁶⁷

Long-term (and certainly permanent) parent-child separations through hidden foster care resemble the most drastic consequences of formal foster care cases. Even when hidden foster care does not last long and children return to their parents’ physical custody quickly, the system resembles the formal foster care system. Children who reunify within weeks or months follow a timeline that is normal in formal foster care cases; 9% of all children removed into foster care leave in less than one month; about one quarter leave in less than 6 months; and 43% leave in less than 12 months.⁶⁸

B. Scope of Hidden Foster Care

There is no precise count or even estimate of hidden foster care cases. States do not generally track the number of children whose custody changes through safety plans, and certainly not in a consistent manner across states, preventing any precise and reliable national estimate.⁶⁹ This data gap exists because federal foster care

⁶¹ *Id.*

⁶² SC DSS SAFETY PLANNING POLICY, *supra* note 30, at 1, 2.

⁶³ *E.g.*, Adams v. Dep’t of Soc. Serv., Complaint at ¶ 13, 2019 CP 38000036 (S.C. Ct. Common Pleas 2019).

⁶⁴ TIFFANY ALLEN, KERRY DEVOUGHT, & ROB GEEN, CHILD TRENDS, FINDINGS FROM THE 2007 CASEY KINSHIP FOSTER CARE POLICY SURVEY 12 (2008).

⁶⁵ *Supra* note 39.

⁶⁶ *Supra* note 41.

⁶⁷ *Id.* at 13.

⁶⁸ U.S. DEP’T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN, YOUTH, & FAMILIES, ADMIN. ON CHILDREN AND YOUTH, CHILDREN’S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2017 ESTIMATES AS OF AUGUST 10, 2018 3 (2018), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport25.pdf>.

⁶⁹ *See, e.g.*, MALM & ALLEN, *supra* note 37, at 6 (“With no standardized policies and procedures for kinship diversion practice, and no data gathered to track children who have been diverted, agencies do not know exactly how practice is carried out and how diverted families are beings served.”); Wallace & Lee,

reporting requirements do not require its collection. States must report data regarding all children in foster care,⁷⁰ and federal data reporting regulations apply only to children living in formal foster care.⁷¹ Children in hidden foster care are simply not covered, so states need not track these cases.⁷²

Despite this data gap, strong evidence suggests that the scope of the hidden foster care system is quite large; the number of children who pass through hidden foster care each year is roughly comparable with the number of children removed from their families, brought to court, and placed in formal foster care each year.

The few studies to offer specific estimates suggest that hundreds of thousands of children go through hidden foster care each year. Detailed data regarding 5,873 children with child protection cases in 2008–2009 in 83 counties across the country⁷³ revealed that 47% of children who did not live at home following a CPS investigation lived in informal kinship care.⁷⁴ That is, when a CPS investigation leads to a child not living with a parent, about half the time a child ends up in the formal foster care system (with a court case and in some kind of formalized placement with kin, with non-kinship foster parents, or in a group home), and about half the time the child ends up living

supra note 43, at 419 (“Many of these diversion placements are unlikely to be included in official child welfare data bases. Therefore the actual number of children placement with child welfare agency involvement is unknown . . .”).

⁷⁰ 45 C.F.R. § 1355.40(b)(1). These requirements govern the Adoption and Foster Care Analysis and Reporting System (AFCARS). U.S. DEP’T OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILDREN’S BUREAU, AFCARS, <https://www.acf.hhs.gov/cb/research-data-technology/reporting-systems/afcars> (last visited 15 Aug. 2019).

⁷¹ 45 C.F.R. § 1355.42(a) (listing three circumstances which trigger reporting requirements, all of which require CPS agencies to have placement and care responsibility or pay foster care maintenance payments).

⁷² A different federal child welfare data collection program, the National Child Abuse and Neglect Data System (NCANDS) similarly fails to collect data regarding hidden foster care. That data, and publications based on it, report the number of cases investigated by CPS agencies and the findings of those investigations, but do not count CPS-agency arranged changes in custody as results of such investigations. *See also* U.S. DEP’T OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILDREN’S BUREAU, About NCANDS, <https://www.acf.hhs.gov/cb/resource/about-ncands> (last visited 15 Aug. 2019); U.S. DEP’T OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILDREN’S BUREAU, *Child Maltreatment 2017*, <https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf>. Moreover, this data reporting system is voluntary, not mandatory, for states. 45 C.F.R. § 1355.20(a).

⁷³ Data was gathered from the second National Survey of Child and Adolescent Well-Being (NSCAW II), a federally-funded study of children whose child protection investigations closed between February 2008 and April 2009. ELISSA DOLAN ET AL., U.S. DEP’T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, OFFICE OF PLANNING, RES. & EVALUATION, NSCAWII BASELINE REPORT: INTRODUCTION TO NSCAW II I (2011), https://www.acf.hhs.gov/sites/default/files/opre/nscaw2_intro.pdf.

⁷⁴ Wendy A. Walsh, *Informal Kinship Care Most Common Out-of-Home Placement After an Investigation of Child Maltreatment* (The Carsey School of Public Policy at the Scholar’s Repository 189, 2013), <https://scholars.unh.edu/carsey/189/>.

with kin informally in hidden foster care. Extrapolated nationwide, this study suggests that 250,000 or more children enter hidden foster care every year.⁷⁵ A 2002 study estimated at least 137,000 abused or neglected children were living with kinship caregivers with CPS agency, but not court, involvement.⁷⁶ Other data points are consistent with tens, and likely hundreds, of thousands of children in hidden foster care each year. A 2007 survey of state CPS agencies found that 39 states used hidden foster care—or, in the language of the survey, “rely on kin to divert children from foster care.”⁷⁷ Whatever the precise number, multiple scholars and think tanks reviewing the topic describe the practice as frequent—it is “quite common,”⁷⁸ “increasing,”⁷⁹ “an increasingly important part of child welfare practice,”⁸⁰ and “often” used.⁸¹

Data from some specific states confirm that tens of thousands of children nationally pass through hidden foster care each year in those states alone – suggesting the national figure is likely in the hundreds of thousands. Texas authorities documented in 2014 that they facilitated “informal kinship placements” about 34,000 times⁸²—more than three times as often as Texas authorities brought alleged child abuse or neglect victims to court.⁸³ Hidden foster care cases in Illinois have been estimated at

⁷⁵ The number of children who enter formal foster care (kinship or otherwise) is reported by each state to the federal government, and has ranged from 251,000 to 280,000 over the past ten years. U.S. DEP’T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN’S BUREAU, TRENDS IN FOSTER CARE AND ADOPTION FY 2008–2017 (2018), <https://www.acf.hhs.gov/cb/resource/trends-in-foster-care-and-adoption>. Walsh’s study suggests comparable numbers of children enter hidden foster care. Walsh, *supra* note 74.

⁷⁶ This estimate, based on a 2002 survey, distinguishes formal foster care from kinship families “involved with courts,” and those “involved with social services” but not courts. Jennifer Ehrle, Rob Geen, and Regan Main, Urban Institute, *Kinship Foster Care: Custody, Hardships, and Services*, SNAPSHOTS OF AMERICA’S FAMILIES III, No. 14 (2002), http://webarchive.urban.org/UploadedPDF/310893_snapshots3_no14.pdf. This survey did not define “involved with courts.” The 137,000 estimate counts only those reported as having no court involvement. The estimate increases to more than 400,000 when excluding only those children in formal foster care, as at least one think tank has done. ANNIE E. CASEY FOUND., *supra* note 13, at 5.

⁷⁷ ALLEN, DEVOOGHT, & GEEN, *supra* note 64, at 13.

⁷⁸ James P. Gleeson et al., *Becoming Involved in Raising a Relative’s Child: Reasons, Caregiver Motivations and Pathways to Informal Kinship Care*, 14 CHILD & FAMILY SOC. WORK 300, 308 (2009).

⁷⁹ MALM & ALLEN, *supra* note 37 at 6.

⁸⁰ Wallace & Lee, *supra* note 43, at 427.

⁸¹ Eunju Lee et al., *Placement Stability of Children in Informal Kinship Care: Age, Poverty and Involvement in the Child Welfare System*, 95 CHILD WELFARE 83, 85 (2017). Lee et al. found that “[a]lmost two-third of children informally living with kin” had at least one CPS record prior to moving in with the current caregiver,” *id.* at 94, although public child welfare agencies along with other community sources helped identify families for the study, which may have skewed results. *Id.* at 89.

⁸² Texas Children’s Commission Round Table Report, *supra* note 60, at 3.

⁸³ Texas reported 11,334 “victims with court action” in 2014. U.S. DEP’T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN, YOUTH, & FAMILIES, ADMIN. ON CHILDREN & YOUTH, CHILDREN’S BUREAU, CHILD MALTREATMENT 2014 85 (2016), <https://www.acf.hhs.gov/sites/default/files/cb/cm2014.pdf>.

10,000 per year.⁸⁴ In Virginia, data for some local CPS agencies suggest that statewide, CPS agencies placed about 5,000 children in hidden foster care between July 2016 and December 2017⁸⁵—a figure greater than the number of children placed in formal foster care in the same period.⁸⁶ In South Carolina, at least 2,318 children were living in kinship care rather than with their parents under a safety plan in the summer of 2018, without having gone to court.⁸⁷ South Carolina authorities reported 4,239 children who “entered foster care” that year;⁸⁸ had they brought all of the hidden foster care cases to court and counted them as removals, the number of reported removals would have increased 53%. Data taken from a New York State program to better support kinship caregivers found that, of those with prior CPS involvement, the vast majority—77%—had children placed in their homes without any court proceedings.⁸⁹ Arizona media reported 702 children “removed under a present-danger plan” in 2018.⁹⁰ Studies of states’ differential response programs—which are designed to provide alternatives to formal investigations, court proceedings and removals—found that “at least five states

⁸⁴ Redleaf, *supra* note 7, at 43.

⁸⁵ Katie O’Connor, *Every Year, Children Are Diverted away from Foster Care and Placed with Relatives. Nobody Knows What Happens Next*, VIRGINIA MERCURY (June 3, 2019), <https://www.virginiamercury.com/2019/06/03/every-year-children-are-diverted-away-from-foster-care-and-placed-with-relatives-nobody-knows-what-happens-next/>. See also VIRGINIA DEP’T OF SOC. SERV., REVIEW OF CURRENT POLICIES GOVERNING FACILITATION OF PLACEMENT OF CHILDREN IN KINSHIP CARE TO AVOID FOSTER CARE PLACEMENTS IN THE COMMONWEALTH AND THE RECOMMENDATIONS FOR REGULATIONS GOVERNING KINSHIP CARE PLACEMENTS 4 (2016), <https://rga.lis.virginia.gov/Published/2016/SD9/PDF> (reporting that 94% of local Virginia CPS agencies use the “widespread” practice) [hereinafter VIRGINIA REVIEW OF CURRENT POLICIES].

⁸⁶ Virginia removed and placed into formal foster care 2,158 children in fiscal year 2017. U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH, & FAMILIES, CHILDREN’S BUREAU, CHILD MALTREATMENT 2017 90 (2019), <https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf>. Assuming a roughly similar removal rate, there would have been about 3,300 children placed in formal foster care in the same time period 5,000 were placed in hidden foster care.

⁸⁷ This includes 105 “children living with a kinship caregiver during an open investigation” and “2,213 children living with a kinship caregiver while their [sic] receiving family preservation/in home treatment services.” Taron Brown Davis, S.C. Dep’t Soc. Serv., State of Child Welfare Service, Aug. 31, 2018, Slide 34 (on file with author).

⁸⁸ S.C. DEP’T SOC. SERV., REASONS YOUTH ENTERED FOSTER CARE DURING SFY 2018 1 (2018), <https://dss.sc.gov/media/1827/reasons-that-children-entered-foster-care-18-08.pdf>.

⁸⁹ Wallace and Lee, *supra* note 43, at 422.

⁹⁰ Patty Machelor, *Arizona’s Voluntary Child Removals Use Method Challenged in Other States*, ARIZONA STAR (May 25, 2019), https://tucson.com/news/arizona-s-voluntary-child-removals-use-method-challenged-in-other/article_f04d31a5-1563-58ef-914c-fc6746e88416.html. As a percentage of the system, this count is relatively modest—4.6% of all removals in Arizona—likely because they are limited to 28 days. *Id.*

permit a child to be removed from the home while the family participates in a differential response system.”⁹¹

These authorities show that hidden foster care is used both while a child protection investigation is pending and after the agency concludes its investigation.⁹² The distinction is important because limiting the practice to pending investigations would limit its scope significantly, both in overall number and in length, because state laws require CPS agencies to complete investigations within a set time period.⁹³ The record of CPS agencies using hidden foster care well beyond investigation periods—and sometimes for permanent changes in custody⁹⁴—is thus a key element of its wide scope.

As important as the wide scope, evidence also suggests that the practice is growing in frequency over the last decade and a half. A 2007 survey found an increasing reliance by states on the practice as part of a larger trend in which states sought to avoid foster care placements.⁹⁵ By 2010, the National Conference on State Legislatures listed “divert[ing] children from foster care . . . through voluntary placement with relatives” as a recommended practice.⁹⁶ Moreover, Congress enacted federal statutes which facilitate the practice in 2008 and again in 2018,⁹⁷ making continued expansion likely.

This large and growing scope leads to an important conclusion—hidden foster care is so common, it is roughly on par in frequency as formal foster care itself. It affects roughly as many children – many of whom likely are unaware of the difference between being in the formal or hidden foster care systems. This practice is not a narrow one used in unusual cases,⁹⁸ but one which is a system of its own, and one that requires a comparable amount of regulation and critical analysis.

⁹¹ Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 633 (2012).

⁹² Safety plans are sometimes described as only governing cases during pending investigations. *E.g.*, Shellady, *supra* note 9, at 1616. But, as authorities cited in *supra* notes 87–91 have found, the practice is used in cases when investigations are complete and CPS agencies seek to work with the family without using formal foster care, and in some states’ differential response programs, which do not involve any investigation.

⁹³ *E.g.*, D.C. CODE § 4-1301.06(a) (30-day time limit); S.C. CODE ANN. § 63-7-920(A)(2) (45 days).

⁹⁴ *Supra* Part I.A.3.

⁹⁵ ALLEN, DEVOUGHT, AND GEEN, *supra* note 64, at 12.

⁹⁶ NAT’L CONFERENCE OF STATE LEGISLATURES, LEGISLATIVE STRATEGIES TO SAFELY REDUCE THE NUMBER OF CHILDREN IN FOSTER CARE 9 (2010). The NCSL went so far as to recommend legislation requiring CPS agencies to use hidden foster care. *Id.*

⁹⁷ *Infra* Part A.

⁹⁸ *Cf.* ANNIE E. CASEY FOUND., *supra* note 13, at 3 (noting that supporters argue that kinship diversion is only appropriate for “cases in between” and critics argue that it is used “too often as a default”).

II. DUE PROCESS CHALLENGES AND JUSTIFICATIONS

Any state action that interferes with parental authority over children—and certainly state action that separates parents and children—raises substantive and procedural due process concerns. Parents have the fundamental right to the care, custody, and control over their children, as the Supreme Court has recognized in a long set of opinions for nearly a century.⁹⁹ The law also presumes that children benefit from this arrangement—absent evidence of parental unfitness, parents are presumed to act in their children's best interest.¹⁰⁰ Consistent with that presumption, multiple lower courts have recognized that children also have a fundamental constitutional right to live in their parents' custody.¹⁰¹ To protect these rights, the Supreme Court, as well as state courts and state legislatures, has adopted a range of due process protections. Before the state can declare a child neglected or dependent, the state must prove a parent unfit.¹⁰² If the state seeks to remove a child before it is able to prove a parent unfit at trial, it must meet an even more difficult standard—not only that the parent has abused or neglected the child, but that the abuse or neglect presents a risk so substantial and imminent that emergency action is necessary to protect the child.¹⁰³

Hidden foster care avoids court hearings constitutionally required in the formal foster care system, so the most obvious legal question is whether that avoidance of court oversight violates the parents' and children's rights to family integrity without due process of law. The question hinges on the voluntariness of parents' agreements to safety plans calling for their children to live in someone else's physical custody. If parents voluntarily choose to shift physical custody, then hidden foster care is no different than the millions of children who live with individuals other than their parents without state child protection agency intervention.¹⁰⁴ If, however, the state coerces

⁹⁹ *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 758-59 (1982); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-45 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹⁰⁰ *Troxel*, 530 U.S. at 68; *Parham*, 442 U.S. at 602; *In re Juvenile Appeal*, 455 A.2d 1313, 1318-19 (Conn. 1983).

¹⁰¹ *E.g.*, *Wallis ex rel Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 1998); *Franz v. United States*, 707 F.2d 582, 595 (D.C. Cir. 1983); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977); *In re Juvenile Appeal*, 455 A.2d at 1318; *Amanda C. ex rel. Richmond v. Case*, 749 N.W.2d 429, 438 (Neb. 2008). Consistent with this view, the Supreme Court in *Stanley* wrote that when children are removed from their parents, they "suffer from uncertainty and dislocation." *Stanley*, 405 U.S. at 647.

¹⁰² Parents are entitled to a "hearing on [their] fitness as a parent before [their] children were taken from [them]." *Stanley*, 405 U.S. at 649.

¹⁰³ *E.g.*, S.C. CODE ANN. § 63-7-620(A); *In re Juvenile Appeal*, 455 A.2d at 1319-20.

¹⁰⁴ The U.S. Census Bureau's Current Population Survey estimates that more than 3.1 million children live without any parents. *See* U.S. DEP'T OF COMMERCE, CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS OLD: 1960 TO PRESENT (2018), <https://www.census.gov/data/tables/time-series/demo/families/children.html> (estimating that 2,386,000 children live with relatives without parents, and 755,000 live with non-relatives without parents). Only

parents to give up custody through threats to remove children and initiate court proceedings, then that is not a voluntary choice and the state has violated the Due Process Clause.

All federal courts to address these questions agree that CPS authorities violate parents' due process rights if they make legally unjustifiable threats to induce parents to accept a change in their children's physical custody.¹⁰⁵ The question of whether hidden foster care is acceptable when CPS agency threats to remove children have some legal basis, however, has split federal circuits,¹⁰⁶ and this Subpart will outline arguments from competing circuit courts. This Article takes the position that threatening to remove a child and file an abuse or neglect case against a parent is inherently coercive, thus creating a procedural due process problem with hidden foster care. The remainder of this Article, however, does not depend on that conclusion; As the next subpart establishes, courts finding that hidden foster care is truly voluntary still use analysis that supports the legal regulation proposals in Part VI.

A. Foster Care or Hidden Foster Care: Like a Choice of Cocktails

The leading case which held hidden foster care is voluntary and thus violates no due process concern is *Dupuy v. Samuels*. The Seventh Circuit rejected a class action challenging the Illinois CPS agency's frequent practice of threatening to remove children and initiate child protection proceedings if parents did not agree to change a child's physical custody via a safety plan.¹⁰⁷ *Dupuy* described a safety plan as requiring a parent to leave the home or only see their child in the presence of an approved family member.¹⁰⁸

The trial court¹⁰⁹ findings include several details used by the plaintiffs to cast doubt on safety plans' voluntariness. CPS case workers usually presented plans for parents to sign with no meaningful parental input.¹¹⁰ The CPS agency, both in writing and

about 450,000 children are in formal foster care. THE AFCARS REPORT, *supra* note 68, at 1. And the number of children who pass through hidden foster care is likely in the low six figures, *infra* Part I.B, leaving the vast majority of children in kinship care without any CPS agency involvement.

¹⁰⁵ *Infra* notes 115–118 and accompanying text.

¹⁰⁶ See Daniel Pollack, Kirsteen MacKay, & Katie Shipp, *The Use of Coercion in the Child Maltreatment Investigation Field: A Comparison of American and Scottish Perspectives*, 22 U. MIAMI INT'L & COMP. L. REV. 129, 142–46 (2014) (describing circuit split).

¹⁰⁷ *Dupuy v. Samuels*, 465 F.3d 757 (7th Cir. 2006). For a description of the *Dupuy* litigation, including a critique of the Seventh Circuit's ruling by an attorney for the plaintiffs, see Redleaf, *supra* note 7, at 37–50.

¹⁰⁸ *Dupuy*, 465 F.3d at 760.

¹⁰⁹ For a detailed summary of the litigation and court decisions, see McGrath, *supra* note 91, at 677–81.

¹¹⁰ *Dupuy v. Samuels*, 462 F. Supp. 2d 859, 867 (N.D. Ill. 2001).

verbally, threatened parents with the removal of their children if they failed to agree.¹¹¹ Safety plans generally did not specify a time period for which they would be in effect, nor did the agency create a procedure to contest a safety plan.¹¹²

Nonetheless, Judge Richard Posner's opinion for the U.S. Court of Appeals for the Seventh Circuit concluded that hidden foster care is the result of voluntary choices by parents to temporarily relinquish physical custody of their child. In the Seventh Circuit's view, an agency demanding that a parent relinquish physical custody through a safety plan and threatening to remove a child and open a CPS case in family court if the parent does not is simply giving a parent an option they would not otherwise have—the safety plan as merely an “offer” provided by CPS authorities as an alternative to going to court.¹¹³

We can't see how parents are made worse off by being given the option of accepting the offer of a safety plan. It is rare to be disadvantaged by having more rather than fewer options. If you tell a guest that you will mix him either a Martini or a Manhattan, how is he worse off than if you tell him you'll mix him a Martini?¹¹⁴

Judge Posner's reasoning offers several important points in support of this conclusion. First, this scenario is only truly voluntary when the CPS agency *legitimately* threatens to remove the child and/or go to court. If the CPS agency lacks the factual basis or legal authority to carry out such a threat, then making it would render an insistence that a parent agree to a safety plan coercive.¹¹⁵ Posner distinguished legitimate legal threats from “objectionable” coercion based on a legally unjustifiable threat.¹¹⁶ (Posner did not address the reasonableness of expecting parents to evaluate the legitimacy of a CPS agency threat to remove their children.¹¹⁷) Further,

¹¹¹ *Id.* at 868–69.

¹¹² *Id.* at 871.

¹¹³ *Id.* at 760 (“But sometimes, in lieu of immediately removing the child from its parents, the state will offer the parents the option of agreeing to a ‘safety plan’”); *id.* at 761 (“The state does not force a safety plan on the parents; it merely offers it.”).

¹¹⁴ *Dupuy v. Samuels*, 465 F.3d 757, 762 (7th Cir. 2006).

¹¹⁵ *Id.* at 762.

¹¹⁶ *Compare id.* at 762 (“It is not a forbidden means of ‘coercing’ a settlement to threaten merely to enforce one’s legal rights.”) *and id.* (“Coercion is objectionable . . . when illegal means are used to obtain a benefit. . . . There is no suggestion that the agency offers a safety plan when it has no suspicion at all of neglect or abuse”)

¹¹⁷ Ryan Shellady criticizes *Dupuy*'s focus on the legitimacy of a state threat as “suggest[ing] that parents looking down the barrel of the state’s gun ought to know whether its chamber is loaded.” Shellady, *supra* note 14, at 1629.

Posner distinguished seemingly contrary precedent as involving situations in which CPS authorities made improper threats.¹¹⁸

Second, Judge Posner analogized a safety plan leading to hidden foster care as the equivalent of a negotiated settlement—either a criminal plea bargain or a civil pre-trial settlement.¹¹⁹ Criminal plea bargains provide significantly more formal procedural protections for defendants, so present a curious analogy. Plea bargains occur after grand jury formally charges a defendant, while safety plans occur without CPS agencies filing petitions outlining alleged instances of abuse or neglect. Plea bargains occur after a defendant retains or is appointed a lawyer, and the prosecutor and defense attorney negotiate a settlement based in large part on what would likely happen if the case proceeded to trial,¹²⁰ while safety plans occur without either side having benefit of counsel and therefore with a weaker ability for the law and possible legal process to inform the safety plan. Moreover, criminal defendants not only have the right to counsel, but are protected from plea decisions which result from erroneous legal advice through ineffective assistance of counsel cases.¹²¹ A judge conducts a colloquy with the defendant to ensure the voluntariness of the plea; indeed, a typical question includes whether anyone has threatened the defendant to induce the plea.¹²² No such colloquy occurs with safety plans.

Civil pre-trial settlements provide a closer, but still imperfect analogy for the Seventh Circuit. They also involve important due process protections—all of the

¹¹⁸ *Dupuy*, 465 F.3d at 763 (citing *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003) and *Croft v. Westmoreland Cty. Children 7 Youth Serv.*, 103 F.3d 1123 (3d Cir. 1997). In at least one reported case in a circuit following *Dupuy* has applied *Dupuy*'s distinction to recognize a valid procedural due process claim. *Schulkers v. Kammer*, 367 F.Supp.3d 626, 639-40 (E.D.Ky. 2019) (describing CPS agency threat to remove children if parents did not agree to safety plan to lack a sufficient basis in facts and law).

¹¹⁹ *Dupuy*, 465 F.3d at 761. Cases in other circuits relied on *Dupuy*'s analogy to civil settlement. *E.g.*, *Smith v. Williams-Ash*, 520 F.3d 596, 600 (6th Cir. 2008) (citing *Dupuy*, 465 F.3d at 761–62); *Sangraal v. City & Cty. of S.F.*, 2013 WL 3187384 *9 (N.D. Cal. 2013).

¹²⁰ At least, that is how plea bargaining ought to work. Deviations from this norm—such as exploding or “take it or leave it” plea offers, or “meet ‘em and plead ‘em” practice—are rightly criticized by commentators. Margareth Etienne, *A Lost Opportunity for Sentencing Reform: Plea Bargaining and Barriers to Effective Assistance*, 68 S.C. L. REV. 467, 482–83 (2017); David Cole, *Gideon v. Wainwright and Strickland v. Washington: Broken Promises*, in *CRIMINAL PROCEDURE STORIES* 101, 121 (Carol S. Steiker ed., 2006).

¹²¹ *Lee v. United States*, 137 S. Ct. 1958, 1968-69 (2017) (overturning a defendant’s guilty plea based on incorrect legal advocate about the immigration consequences of that plea); *Lafler v. Cooper*, 566 U.S. 156, 174-75 (2012) (ruling for a defendant who declined a plea offer based on incorrect legal advice and faced more severe consequences following trial); *Missouri v. Frye*, 566 U.S. 134, 147 (2012) (finding constitutionally deficient performance when attorney failed to communicate a plea offer and the offer lapsed as a result); *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (holding that failure to advise a client regarding the immigration consequences of a plea bargain is constitutionally deficient).

¹²² *See* FED. R. CRIM. P. 11(b)(2) (“Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)”).

procedures of civil litigation, sometimes coupled with representation of all parties.¹²³ Moreover, they are typically negotiated over relatively longer periods of time, permitting for calmer deliberation than a threat to take custody might permit.¹²⁴

In contrast, hidden foster care cases are not just any civil cases. Rather, they involve the fundamental liberty interest of parents to have the “care, custody, and control” of their children,¹²⁵ and state action intended to effectuate infringement of that interest. Moreover, in the safety plan context, the only check on an overbearing state agency is a parent’s willingness to say no and insist on her day in court. And this decision cannot be separated from its legal and social context. It is not a cocktail party in which a privileged host offers a drink to a privileged guest. It occurs when a state agency with awesome powers to destroy families and create new ones interacts with families largely of low socioeconomic status, and typically without funds, without counsel, without nearly as much education, and often with low social capital.¹²⁶ Indeed, the Supreme Court has noted the risk of error which can result from power imbalances between the state and disproportionately poor parents in contact with CPS.¹²⁷ Other factors—such as a parent’s immigration status or disability—may exacerbate this power imbalance further.¹²⁸ In this context, without the procedural protections held by criminal defendants or civil litigants, it is doubtful much meaningful negotiation occurs.¹²⁹

Despite these concerns about *Dupuy*’s logic, several other federal courts have ruled similarly.¹³⁰ In *Smith v. Williams-Ash*, the Sixth Circuit rejected David and Melody Smith’s claim that a safety plan shifting physical custody of their children to

¹²³ There is generally no right to appointed counsel in most civil cases, but parties frequently do have counsel, or at least access to pro se centers to obtain basic information about the law and legal process.

¹²⁴ Shellady, *supra* note 14, at 1628–29.

¹²⁵ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

¹²⁶ See e.g. Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILDREN & YOUTH SERVS. REV. 42, 42 (2019) (describing poverty and related factors describing “[t]he vast majority of child welfare-involved parents”); Amy Sinden, *Why Won’t Mom Cooperate: A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEM. 339, 385 (1999) (“In child welfare cases, where the individual is pitted against the vast power and resources of the state, the power imbalance is particularly extreme. And in the vast majority of cases, the fact that the parent is female, poor, uneducated, and nonwhite, exacerbates this inherent power disparity.”).

¹²⁷ *Santosky v. Kramer*, 455 U.S. 745, 762–63 (1982).

¹²⁸ See, e.g. Annie E. Casey Foundation, *Undercounted. Underserved. Immigrant and Refugee Families in the Child Welfare System*, 3–5 (2006), <https://www.aecf.org/resources/undercounted-underserved/> (describing immigrant families’ vulnerability in the child protection system); Ella Callow, *Maintaining Families When Parents Have Disabilities*, 9 Child L. Prac. 129, 133–34 (2009) (describing high removal rates from parents with disabilities).

¹²⁹ See McGrath, *supra* note 91, at 666. See also *id.* at 679 (questioning whether meaningful negotiation occurs).

¹³⁰ E.g., *Smith v. Williams-Ash*, 520 F.3d 596, 597–98 (6th Cir. 2008) (affirming dismissal of civil rights litigation because parents “consented to the removal of their children pursuant to a voluntary ‘safety plan’”); *Sangraal v. City and Cty. of S.F.*, 2013 WL 3187384 *9 (N.D. Calif. 2013) (holding that voluntary consent to safety plan would eliminate any constitutional claim).

family friends violated their procedural due process rights.¹³¹ Following CPS officials' concern that the Smiths' house was too "filthy" and "clutter[ed]" to be safe, a social worker "persuaded the Smiths to consent to a safety plan that removed the children."¹³² The Smiths alleged they promptly cleaned their home and asked the CPS social worker what additional steps they needed to take in order to regain custody of their children, and the worker added requirements, "ignored their requests for information and threatened to permanently remove their children if they stopped cooperating."¹³³ CPS authorities only permitted the children to return to their parents two days after they filed a federal lawsuit alleging a due process violation.¹³⁴ The Sixth Circuit emphasized written elements of the safety plan at issue, included form language reciting the parent's "decision to sign this safety plan is voluntary," threatening that if parents "will not be able to continue following the plan, [CPS] may have to take other action(s) to keep your child(ren) safe," and requiring parents to inform their caseworker they intend to not abide by the safety plan."¹³⁵ Relying on that form language, the Sixth Circuit followed *Dupuy* and concluded the custody change was voluntary.¹³⁶

B. An Inherently Coercive Practice

The stronger view is that even legally-justified threats to remove children are so coercive as to render involuntary subsequent parental agreements to change physical custody. This Subpart describes the U.S. Court of Appeals for the Third Circuit case law which so holds, and offers additional reasons to consider these agreements involuntary. As importantly, this Subpart notes the many legal and policy questions which remain even if this view of the constitutional issue prevails.

1. Croft v. Westmoreland County Children & Youth Services

The Third Circuit stands apart from *Dupuy* through a decision that has been understood to hold that safety plans based on a threat of child removal are inherently coercive and thus require some amount of due process protections. *Croft v. Westmoreland Cty. Children & Youth Servs.* involved a CPS investigation of vague concerns that Henry and Carol Croft were abusing their four-year old daughter following a child protection hotline call that the child "had recently been out of the

¹³¹ *Smith*, 520 F.3d at 597–98.

¹³² *Id.* at 598.

¹³³ *Id.* *Smith* was decided at summary judgment, so these allegations were assumed to be true. *Id.* at 598–99.

¹³⁴ *Id.* at 599.

¹³⁵ *Id.* at 599–600.

¹³⁶ *Id.* See also *Teets v. Cuyahoga County*, 460 Fed. Appx. 498, 503 (6th Cir. 2012) (applying *Smith* and *Dupuy* to hold that parents' agreement to safety plan was voluntary).

house naked, walked to a neighbor's house, knocked on the door, and told the neighbors that she was 'sleeping with mommy and daddy.'"¹³⁷ The parents denied abuse and explained the conduct at issue, but the CPS investigator gave the father "an ultimatum: unless he left his home and separated himself from his daughter until the investigation was complete, she would take [the child] physically from the home that night and place her in foster care."¹³⁸

The Third Circuit pointed to evidence that the CPS authorities acted beyond their legal authority. An emergency removal was not justified on the facts, which the court described as "a six-fold hearsay report by an anonymous informant."¹³⁹ Absent stronger evidence, CPS authorities could not lawfully remove a child, either directly or through a safety plan.¹⁴⁰ Moreover, CPS witnesses had even testified the agency required that a "parent accused of sexual abuse must prove beyond any certainty that there was no sexual abuse before [the agency] would . . . leave a child with his or her parents"¹⁴¹—a practice which unconstitutionally shifted the burden of proving parental unfitness from the state to the parent.¹⁴² And this unconstitutional burden shift was evident in the record—the CPS investigator had testified that she lacked enough information to determine if the Crofts had abused their daughter and needed to investigate further, yet still insisted on separating the father from his daughter despite admitting to lacking enough evidence to do so.¹⁴³ *Croft* could thus be read as consistent with *Dupuy*—that the problem was not the safety plan itself, but the CPS authorities' lack of adequate evidence to justify their insistence on that plan.

However, *Croft* also included a different key holding, which suggests no CPS threat of removal could lead to a truly voluntary safety plan. CPS gave the Crofts an "ultimatum," which caused a "dilemma" for the parents.¹⁴⁴ And the Court scoffed at the CPS defendants' effort to describe the parents' subsequent actions as "voluntary": "This notion we explicitly reject. The threat that unless Dr. Croft left his home, the state would take his four-year-old daughter and place her in foster care was blatantly

¹³⁷ *Croft v. Westmoreland Cty. Children & Youth Serv.*, 103 F.3d 1123, 1124 (3d Cir. 1997).

¹³⁸ *Id.*

¹³⁹ *Id.* at 1126.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1125.

¹⁴² State statutes universally impose on states the burden of proving that parents have abused or neglected their children. Ashley J. Provencher, Josh Gupta-Kagan, & Mary Eschelbach Hansen, *The Standard of Proof at Adjudication of Abuse or Neglect: Its Influence on Case Outcomes at Key Junctures*, 17 SOC. WORK & SOCIAL SCI. REV. 22, 27, 51–52 (2014). These statutes comport with the constitutional command that the law must presume that parents act in children's best interests. *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

¹⁴³ *Croft*, 103 F.3d at 1127.

¹⁴⁴ *Id.* at 1125.

coercive. The attempt to color his decision in this light is not well taken.”¹⁴⁵ This language stands in marked contrast to *Dupuy*’s repeated use of the term “offer” to describe CPS authority’s conduct and “voluntary” to describe parents. Academic commentators have echoed these concerns that CPS agencies arrange hidden foster care through coercive threats of removal and court action, describing parents’ decision to acquiesce to such agency threats as ““voluntary””—complete with scare quotes.¹⁴⁶

Subsequent district court cases in the Third Circuit have interpreted *Croft* to deem any safety plan resulting from a CPS threat to remove a child as coercive. For example, *Starkey v. York County* involved abuse and neglect allegations that were supported by significantly more evidence than those in *Croft*—to the point that the district court described the two cases as “entirely distinguishable.”¹⁴⁷ But the court understood *Croft* to have clearly established a legal rule that does not depend on the strength of the state’s evidence of abuse—“that coercing parents to sign a safety plan under threat that the county or state will otherwise take emergency custody of their children raises procedural due process concerns.”¹⁴⁸ Responding to the CPS defendants’ reliance on *Dupuy*, the trial court cited *Croft*’s dicta as foreclosing any argument the safety plan was voluntary.¹⁴⁹ Other courts have similarly held that *Croft* “explicitly rejected” any *Dupuy* argument that safety plans resting on threats to remove a child were anything other than “blatantly coercive.”¹⁵⁰

The dissents in *Smith v. Williams-Ash* uses *Dupuy*’s logic to show hidden foster care can, in practice, be coercive. Judge Ronald Lee Gilman emphasized that *Dupuy* rested on the conclusion that state authorities only threatened to enforce their actual legal rights and did not threaten to take action without a legal basis.¹⁵¹ He reasoned that specific statements from the CPS case worker to the parents threatened that the

¹⁴⁵ *Id.* at 1125 n.2. See also Pearson, *supra* note 14, at 856 (describing this “important aspect” of *Croft*).

¹⁴⁶ Garlinghouse & Trowbridge, *supra* note 44, at 117. See also Pearson, *supra* note 14 (critiquing safety plans as not truly voluntary); Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 633, 677–81 (2012) (critiquing voluntariness analysis in *Dupuy*); Sacha M. Coupet, *What Price Liberty?: The Search for Equality for Kinship-Caregiving Families*, 2013 MICH. ST. L. REV. 1249, 1256 (2013) (describing *Dupuy* holding as something that “would surely not be tolerated elsewhere”).

¹⁴⁷ *Starkey v. York County*, 2012 WL 9509712 *8 (M.D. Penn. 2012).

¹⁴⁸ *Id.* at *9. Because the plaintiffs alleged a violation of federal civil rights law and defendants claimed qualified immunity, the plaintiffs had to show that a clearly established federal right existed, and the court found such a right in *Croft*. *Id.*

¹⁴⁹ *Id.* at *10–*11.

¹⁵⁰ *Isbell v. Bellino*, 962 F.Supp.2d 738, 747. At least one trial court holds that *Croft* did not clearly establish a procedural due process rule, but that holding depends on a narrow reading of what constitutes a clearly established right, and *Croft*’s focus on substantive due process. *Exel v. Govan*, 2016 WL 1118781 *5 (D. N.J. 2016).

¹⁵¹ *Smith v. Williams-Ash*, 520 F.3d 596, 601–02 (6th Cir. 2008) (Gilman, J., dissenting) (citing *Dupuy*, 465 F.3d at 761–63).

“children would not come home, period,” perhaps forever, go beyond a threat to enforce a valid legal right.¹⁵² Indeed, the facts of *Smith*—in which CPS authorities permitted the children to return merely two days after the parents filed a lawsuit challenging CPS’ actions—“suggests that the agency may not have had good reason for continuing to detain the children.”¹⁵³

2. *Coercion in Other Bodies of Law*

Case law governing voluntariness in other contexts could also support the view that threatening to remove children is inherently coercive. In a different child protection context, the Supreme Court raised in dicta (but did not decide) whether “supposedly ‘voluntary’ [foster care] placements are in fact voluntary.”¹⁵⁴ Cases beyond child protection provide additional support for the conclusion that state actors threatening to take children into foster care is at least sometimes grounds for finding subsequent actions by parents involuntary.

Police interrogation cases are particularly informative because the presentation of a safety plan and a police interrogation involve state actors with massive power (to arrest or to remove children) speaking to an (usually) unrepresented person under suspicion and seek cooperation, and sometimes making some kind of threat to induce cooperation. Cases evaluating the voluntariness of criminal suspects’ confessions have explored what amounts to an unconstitutional threat and what constitutes permissible warnings of consequences of a suspect’s decisions.¹⁵⁵ And the Supreme Court has held police threats to take children away, possibly forever, are unduly coercive and render a subsequent confession involuntary.¹⁵⁶ As Katherine Pearson has argued, those

¹⁵² *Id.* at 602 (Gilman, J., dissenting).

¹⁵³ *Id.* at 603 (Gilman, J., dissenting).

¹⁵⁴ *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 834 (1977). While related to the hidden foster care discussed in this Article, that practice differs in that parents place children in state legal custody, and the practice is generally subject to long-standing statutory regulation. *E.g.*, N.Y. SOC. SERV. LAW § 384-a.

¹⁵⁵ In *Miranda v. Arizona*, the Court wrote that “any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.” 384 U.S. 436, 476 (1966). In contrast, police statements that certain decisions would or would not help suspects are not necessarily threatening. *See, e.g.*, *Fare v. Michael C.*, 442 U.S. 707, 727 (1979) (stating what “would be to the respondent’s benefit” was not threatening).

¹⁵⁶ *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963). The parent/defendant alleged that one police officer said, “I could get 10 years and the children could be taken away, and after I got out they would be taken away and strangers would have them . . . and I had better do what they told me if I wanted to see my kids again.” *Id.* at 531. The officers “largely corroborated” this account. *Id.* at 532. One subsequent lower court case held that a similar threat to separate parent and child “for a while” rendered a resulting confession involuntary. *United States v. Tingle*, 658 F.2d 1332, 1334 (9th Cir. 1981). *See also* *United States v. Byram*, 145 F.3d 405, 408 (1st Cir. 1998) (“Certainly some types of police trickery can entail coercion: consider a confession obtained because the police falsely threatened to take a suspect’s child away from her if she did not cooperate.”).

holdings support the *Croft* conclusion that threats to remove children if parents do not agree to hidden foster care render any such agreement inherently suspect.¹⁵⁷

Similar issues have arisen in Fourth Amendment search cases, with some courts holding that threats to remove children at least sometimes render consents to search involuntary. In *United States v. Ivy*, the Sixth Circuit held that “hostile police action against a suspect’s family is a factor which significantly undermines the voluntariness of any subsequent consent.”¹⁵⁸ In *Ivy*, the “hostile police action” included a law enforcement officer threatening to take the suspect’s child into state custody if he did not consent to a search of his home, leading the court to declare the suspect’s consent was involuntarily.¹⁵⁹ In *United States v. Tibbs*, an officer’s threat to call the CPS agency to remove a child rendered his parent’s consent involuntary.¹⁶⁰ Determining the voluntariness of a search depends on the totality of the circumstances and thus depends on the facts of particular cases,¹⁶¹ and some courts have held alleged threats do not rise to coercion if they were not explicit,¹⁶² or if they accurately share law enforcement plans without other indicators of coercion.¹⁶³

3. No Prohibition on Safety Plans

Courts in the Third Circuit finding constitutional violations make clear they do not prohibit CPS agencies from using safety plans to effectuate changes in physical custody. Rather, they hold “a parent is entitled to some level of procedural protection to challenge the alteration of their parental rights, and that such opportunities must be provided in a meaningful and timely manner after the deprivation.”¹⁶⁴ As with any procedural due process violation, the remedy is not a prohibition on the practice, but more process. Courts in the Third Circuit have not specified what specific process is required,¹⁶⁵ leaving it to legislative and executive branches to determine in the first instance what process would suffice, subject to future court challenges.¹⁶⁶

¹⁵⁷ Pearson, *supra* note 14, at 836.

¹⁵⁸ *United States v. Ivy*, 165 F.3d 397, 403 (6th Cir. 1998).

¹⁵⁹ *Id.* at 402–03.

¹⁶⁰ *United States v. Tibbs*, 49 F.Supp.2d 47, 53 (D. Mass. 1999).

¹⁶¹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

¹⁶² *E.g.*, *United States v. Henderson*, 437 Fed. Appx. 96, 99 (3d Cir. 2011); *United States v. Santiago*, 428 F.3d 699, 705 (7th Cir. 2005).

¹⁶³ *United States v. Miller*, 450 F.3d 270, 273 (7th Cir. 2006). The Seventh Circuit decided *Miller* three months before *Dupuy*, in a decision by Judge Easterbrook, who also sat on the *Dupuy* panel.

¹⁶⁴ *Isbell*, 962 F.Supp.2d at 758. *Cf.* Starkey at *11–*12 (describing the law as preventing separating parents and child “absent any procedural safeguards,” and faulting CPS documents for “mak[ing] no mention of . . . the Plaintiffs’ rights” related to the safety plan) (emphasis in original).

¹⁶⁵ *E.g. id.*

¹⁶⁶ These courts likely could order some specific rights – for instance, a procedure which permits a parent to challenge a safety plan within, say, 48 hours. But courts’ apparent preference to defer to other

An earlier Second Circuit case also demonstrates procedural protections can justify safety plans and kinship diversion. In *Gottlieb v. County of Orange*, the court considered the procedural due process claim of a father who CPS officials required, under threat of immediate removal of the children, to leave his home pending an investigation into sex abuse allegations.¹⁶⁷ The Second Circuit acknowledged that the father suffered a substantive deprivation, but noted that under the applicable local procedures, he could have insisted upon judicial review of that deprivation at any time, and that he had the opportunity to consult with an attorney before agreeing to give up physical custody of his children.¹⁶⁸

In sum, while the coercive beginnings of hidden foster care cases raise profound due process concerns and this Article concludes that they likely violate parents' and children's due process rights, one cannot escape the need to outline a set of legal regulations to govern this practice. Before outlining such regulations, a deeper exploration of the risks and benefits of hidden foster care, and the regulatory and financial structures which lead to the practice is necessary.

III. POLICY CONCERNS ABOUT AND JUSTIFICATIONS FOR HIDDEN FOSTER CARE

Hidden foster care has elicited criticism from all corners of the child protection ideological spectrum. Those concerned about CPS agencies removing children too frequently have litigated against the practice and written critically of its implications for family integrity.¹⁶⁹ Those concerned that CPS agencies defer to family integrity too much have critiqued hidden foster care for leaving children in what they see as unsafe situations without the safety precautions of formal foster care.¹⁷⁰ At the same time, there is an argument to be made for hidden foster care in some situations—it is less legally invasive, reduces the risk of the state placing children in stranger foster, and it threatens parents and children with less state intervention.

The comparative pros and cons of hidden foster care and formal kinship foster care could lead some parents and kinship caregivers to seek one option and others to seek

branches of government to define specific procedures, as well as the potential for greater breadth through legislative and executive branch regulation, underscores that legislative and regulatory changes are necessary reforms, even if courts uniformly followed the *Croft* analysis, as other scholars have concluded. Pearson, *supra* note 14, at 837; *infra* notes 327-330 and accompanying text.

¹⁶⁷ The father's five-year-old daughter had alleged abuse, but later medical examinations lead doctors to conclude that there was no evidence of sexual abuse. *Gottlieb v. Cty. of Orange*, 84 F.3d 511, 515 (2d Cir. 1996).

¹⁶⁸ *Id.* at 522.

¹⁶⁹ Diane Redleaf, then the director of the Family Defense Counsel, was counsel for the plaintiffs in *Dupuy*, and has written about that case and related safety plan issues. Redleaf, *supra* note 7, at 37-50. Other commentators have raised similar concerns. Shellady, *supra* note 14, at 1626-34; Pearson, *supra* note 14, at 836.

¹⁷⁰ Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV. 1321, 1365 (2012).

the other—which raises the question of how these individuals make these decisions. But the social work and think tank literature give reason for concern that CPS agencies do not provide caregivers or parents with the information necessary to make that decision, and instead effectively make that decision for families. One recent think tank summary concludes “practice varies” and “families do not obtain consistent and comprehensive information about the service and custody options available during a family crisis,” and, in particular, CPS caseworkers “rarely” tell kinship caregivers that formal foster care brings with it financial assistance.¹⁷¹

A. Benefits of Hidden Foster Care and Downsides of Formal Kinship Care

Despite concerns raised in Part III.B, there are strong reasons why some families might prefer informal changes in custody to avoid the formal foster care system. Placing the child in CPS agency custody subjects the child—and his/her kinship caregiver—to agency rules and supervision—something many families “consider[] intrusive and not family friendly.”¹⁷² Kinship caregivers face a potential trade—they could receive foster care maintenance payments and other supports from the state CPS agency, but in exchange for greater oversight. Dorothy Roberts has argued “that transferring parental authority to the state is the price poor people must often pay for state support of their children.”¹⁷³ Commentators have long critiqued public programs designed to enhance poor families’ welfare as exercises in social control.¹⁷⁴ In the CPS context, family members may reasonably chafe at CPS agencies taking on greater formal authority over their lives.¹⁷⁵ For many, the financial benefits will make this trade worth it, but for some it will not.¹⁷⁶ Many families would choose to forego state assistance to avoid paying that price—but many would also accept state aid even with that price.¹⁷⁷

One particular concern is imposition of formal foster care licensing requirements could prevent children from living with kin and instead lead to stranger foster care. Foster care licensing typically imposes multiple requirements that could disproportionately limit licenses for poor families—such as minimum bedroom space

¹⁷¹ MALM & ALLEN, *supra* note 37, at 5–6.

¹⁷² MALM & ALLEN, *supra* note 37, at 3.

¹⁷³ Roberts, *supra* note 36, at 1621.

¹⁷⁴ *E.g.* Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 959-61 (1991) (describing welfare policies relating to single mothers as “social control” of those women and their families).

¹⁷⁵ *See* McGrath, *supra* note 146, at 655-60 (describing parents’ distrust of and “feeling of vulnerability” in the face of CPS authority).

¹⁷⁶ ANNIE E. CASEY FOUND., *supra* note 13, at 18.

¹⁷⁷ Coupet, *supra* note 146, at 1259; Dorothy E. Roberts, *Child Welfare’s Paradox*, 49 WM. & MARY L. REV. 881, 892–93 (2007).

requirements or limits on the total number of people in a home,¹⁷⁸ or criminal background checks.¹⁷⁹ CPS agencies may waive such requirements if they deem the standard to be “nonsafety.”¹⁸⁰ Thus, kinship families, which are disproportionately poor, may reasonably fear they will face difficulty getting licensed. While CPS agencies could license them even with some concerns, many parents and kinship caregivers may (reasonably) not trust CPS agencies with that discretion¹⁸¹ or be willing to risk that children could end up with strangers rather than kinship foster care.

A family court case and formal foster care brings with it certain other risks, which parents or children might choose over the risks of hidden foster care. The child's fate will be up to a judge—who may be more or less favorable to the parent than the agency. Removal into formal foster care also triggers a timeline which can lead to termination of parental rights; states are often required to seek such terminations when children have been in foster care for 15 months,¹⁸² and some state termination statutes authorize judges to permanently sever the legal relationship between parents and children if the problem leading to removal is not rectified on an even shorter timeline.¹⁸³

B. Risks of Hidden Foster Care

Formal kinship foster care requires several steps which trigger family court involvement, due process protections, and CPS agency support to and oversight of kinship caregivers.¹⁸⁴ In such cases, a CPS agency files a petition alleging parents have abused or neglected their children, convinces family courts both that the petition is accurate and that the court should order custody of children transferred to the CPS

¹⁷⁸ *E.g.*, D.C. Mun. Regs. tit. 29, §§ 6005.2-6005.3; 6007.16-22.

¹⁷⁹ All adults in a home must submit to criminal background checks and rules prohibit foster care licenses based on certain convictions, including any felony drug conviction within the past 5 years, and require consideration of any other conviction. 42 U.S.C. § 671(20)(A). State licensing codes apply this federal requirement. *E.g.*, D.C. Mun. Regs. Tit. 29, § 6008.

¹⁸⁰ 42 U.S.C. § 671(a)(10)(D).

¹⁸¹ Indeed, some evidence suggests state practice in granting kinship waivers of foster care licensing requirements varies widely. U.S. DEP'T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, A REPORT TO CONGRESS ON STATES' USE OF WAIVERS OF NON-SAFETY LICENSING STANDARDS FOR RELATIVE FOSTER FAMILY HOMES 5-7 (2011), https://www.acf.hhs.gov/sites/default/files/cb/report_congress_statesuse.pdf (reporting widely varying frequency of CPS agencies granting waivers and the actual number of children placed in formal kinship foster care by state).

¹⁸² 42 U.S.C. § 675(5)(E).

¹⁸³ *See e.g.*, S.C. CODE ANN. § 63-7-2570(2) (six-month timeline).

¹⁸⁴ For a summary of the procedures triggered by formal kinship foster care, compared with the absence of such procedures in hidden foster care, see S.C. GENERAL ASSEMBLY, LEGISLATIVE AUDIT COUNCIL, A REVIEW OF CHILD WELFARE SERVICES AT THE DEPARTMENT OF SOCIAL SERVICES 53-56 (2014).

agency.¹⁸⁵ The agency then, in the language of federal child welfare financing statutes, has “placement and care” authority over the child.¹⁸⁶ When the agency has identified a kinship caregiver with whom it wishes to place the child, it can grant that caregiver a foster home license, and place the child in that home.¹⁸⁷ The agency then has a set of court-supervised obligations to affected children, parents, and kinship caregivers. The agency must provide services to help the parent and child reunify.¹⁸⁸ The agency pays the kinship caregivers a foster parent subsidy (as it does to any unrelated licensed foster parent), provides social work case management and other services to the child, and oversees the placement to ensure it meets the child’s needs.¹⁸⁹ The family court holds regular hearings until the child has a permanent legal status—either by reunifying with parents or forming new permanent legal connections with a family through permanent guardianship or adoption.¹⁹⁰

All of those steps are missing from hidden foster care. This Part will outline distinct policy concerns with the use of hidden foster care to both advocates for less state intervention in families and advocates for greater intervention, as well as advocates for kinship caregivers. In so doing, this Part will also argue that all sides contribute to the issue, as is the perspective that in at least some cases the practice has benefits. That nuanced view underscores the need for regulation, and the specific proposals in Part VI.

1. Denial of Court Oversight

The absence of court oversight raises multiple significant concerns—both the due process concerns discussed in Part II and several overlapping policy concerns.

First, avoiding court proceedings removes an important opportunity to provide a check on unnecessary removals. Hidden foster care happens when CPS officials determine children cannot remain safely in their homes, and they then catalyze a change in physical custody. There is good reason to think that CPS officials often incorrectly determine a change in physical custody is necessary and, absent court hearings to check such decisions, children are unnecessarily separated from their parents. The most analogous decision in the formal foster care system is whether CPS should remove children and initiate court proceedings, and existing research

¹⁸⁵ The Constitution requires states to give parents hearings on their fitness before removing their children. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972). States have codified these requirements. *E.g.* S.C. Code § 63-7-1660(A)-(E) (describing process for filing and adjudicating petitions alleging abuse or neglect).

¹⁸⁶ 42 U.S.C. § 672(2)(B).

¹⁸⁷ *E.g.* S.C. Code § 63-7-2320 (describing kinship foster home licensing)

¹⁸⁸ 42 U.S.C. § 671(a)(15)(B)(ii).

¹⁸⁹ *See* 42 U.S.C. § 672(a)(1) (payments to licensed foster homes); 42 U.S.C. § 675(1)(B) (“case plan” requirements, including “services . . . to the parents, child, and foster parents”).

¹⁹⁰ 42 U.S.C. § 675(5).

demonstrates that CPS agencies remove a large number of children, only for them to return home in a matter of days.¹⁹¹ Studying this phenomenon, Vivek Sankaran and Christopher Church conclude many of these children should never have been removed at all.¹⁹² Frequent errors in initial removal decisions have been documented in multiple specific jurisdictions.¹⁹³ The decision that a child has to be separated from a parent is a decision ripe for inaccuracy—it requires balancing multiple complex factors, but typically must be made early in a case, often with incomplete and imperfect information.¹⁹⁴ It is thus unsurprising that errors related to hidden foster care are evident in some case decisions.¹⁹⁵

Recognizing the existence of such errors is essential for the due process analysis. Even those circuits rejecting any due process concerns with safety plans do so on the premise that CPS agencies must have a factual and legal basis for the threat to remove the child or file a case asking the family court to order a removal.¹⁹⁶ Recognizing a significant risk that CPS agencies may make errors in determining when they can lawfully threaten to remove a child should lead to significant skepticism about endorsing that practice without some judicial check. In practice, CPS caseworkers often make that judgment on their own, perhaps in consultation with a supervisor, but without any consultation with a lawyer. Consider, for instance, the South Carolina CPS agency's policy manual. It only requires caseworkers to consult with agency attorneys when they are preparing to file a petition, thus preventing any legal advice, even by

¹⁹¹ Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children who Spend Less than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 216-26 (2017).

¹⁹² *Id.* at 210. Sankaran and Church also question the effectiveness of family court checks on agency removal. *Id.* While those checks could be strengthened, they remain stronger than having no judicial checks, as occurs in hidden foster care.

¹⁹³ See, e.g., Kathleen B. Simon, *Catalyzing the Separation of Black Families: A Critique of Foster Care Placements Without Prior Judicial Review*, 51 COLUM. J.L. & SOC. PROBS. 347, 358-59 (2018) (describing such findings in the District of Columbia); Ark. Div. of Children & Family Serv., Title IV-E Waiver Demonstration Project Proposal 14 (2012), (on file with author) (acknowledging that many children who enter and leave foster care quickly “should have never come into care” in the first place).

¹⁹⁴ Simon, *supra* note 193, at 361.

¹⁹⁵ See, e.g. *Schulkers v. Kammer*, 367 F.Supp.3d 626, 639-40 (E.D.Ky. 2019) (describing CPS agency's threat to remove child if parents did not agree to safety plan as unsupported by facts and contrary to legal standards). As an illustration, consider *S.C. Department of Social Services v. Wiseman*, 825 S.E.2d 74 (S.C. Ct. App. 2019). In that case, the CPS agency found no evidence to support physical abuse allegations. *Id.* at 75. Nonetheless, the CPS case worker testified that upon the child's release from a psychiatric hospitalization, the agency “would have asked for relative placement until the agency was able to complete its investigation.” *Id.* at 77. The courts ruled that the parents had not maltreated their child, *id.* at 76-77, making clear that any such insistence upon a temporary informal relative placement would not have been justified.

¹⁹⁶ *Supra* notes 115-118 and accompanying text. The Seventh Circuit noted that a trial on the “administration of the safety plans”—not a facial challenge to their use—had not yet occurred, and evidence of “misrepresentations or other improper means” by CPS officials had not yet been produced. *Dupuy v. Samuels*, 465 F.3d 757, 763 (7th Cir. 2006).

the agency’s own counsel, to caseworkers before they threaten to remove children.¹⁹⁷ Parents also generally lack counsel to advise them or challenge the caseworker on the legal basis of the threat. Thus, all parties involved are flying blind on an essential legal foundation to safety plans.

Second, due process checks in a court proceeding can provide a modest correction to racial and economic disparities within the child protection system and help limit the contribution of racial stereotypes or implicit or explicit biases to removal decisions. A central concern regarding those disparities is that high levels of discretion can permit implicit biases based on race, class, sex, disability, or other characteristics to infect decisions—a particularly significant concern given the imperfect information often available.¹⁹⁸ Racial disparities are particularly high at these initial stages of a case,¹⁹⁹ calling for particular vigilance at this stage. Unchecked decisions can have more disparities; Kathleen Simon concluded that reducing individual removal discretion by limiting circumstances in which emergency removals are permitted and thus strengthening judicial review of post-removal decisions reduced racial disparities in removals.²⁰⁰

Third, court proceedings trigger statutory right to counsel laws in child protection cases, ensuring the parents will have an attorney to aid them, not only in challenging the state’s evidence but in negotiating temporary or permanent arrangements with CPS agencies, and advocating for prompt reunifications.²⁰¹

2. *Denial of Reasonable Efforts to Reunify*

The child protective system is intended to be rehabilitative—even when the state must remove children from their parents, the law presumes reunifying children with their parents will serve their best interest and, indeed, reunification is the most common

¹⁹⁷ Compare S.C. DEP’T OF SOC. SERVS., HUMAN SERVS. POLICIES & PROCEDURES MANUAL, ch. 7, No 10-01, § 718 (requiring DSS attorney reviews before initiating family court proceedings), and *id.* ch. 7, HSP 15-07, § 719.02 Safety Planning (not referencing legal review or consultation).

¹⁹⁸ Simon, *supra* note 193, at 363.

¹⁹⁹ *Id.* at 354–55; U.S. DEP’T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN’S BUREAU, ISSUE BRIEF: RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 9 (2016).

²⁰⁰ Simon, *supra* note 193, at 354–55.

²⁰¹ The vast majority of states provide parents with a categorical right to counsel, and the remainder provide a discretionary or qualified right to counsel. See *Status Map*, NCCRC NAT’L COALITION FOR A CIVIL RIGHT TO COUNSEL, <http://civilrighttocounsel.org/map> (last visited June 26, 2019). [Note to eds: choose the “right to counsel status” button at the top, and then “abuse/neglect/dependency—Accused Parents” in the top drop down menu]

means by which children leave foster care.²⁰² But hidden foster care exempts agencies from the core legal requirements to meet this rehabilitative goal.

Child protection law furthers reunification through two core requirements—first, that agencies make “reasonable efforts” to reunify parents and children,²⁰³ and, second, that agencies work with families to develop individualized case plans to aid rehabilitation and reunification.²⁰⁴ If a state removes a child due to concerns arising from a parent’s substance abuse, a parent’s untreated mental health condition, or a parent’s abusive partner, then the state must work to connect the parent to appropriate services or find a way to protect the child from the abusive partner so that parent and child can reunify. Some states have provided more explicit guidance—such as requirements to ensure parents with disabilities receive services tailed to their needs and abilities.²⁰⁵

Crucially, the legal obligation to help parents reunify with their children is triggered by placing children in foster care—thus agencies avoid it by using hidden foster care. Agencies must also make reasonable efforts to prevent the need to remove children from their parents,²⁰⁶ but that obligation is only adjudicated if the agency brings the case to court, which an agency relying on hidden foster care need not do. As at least one CPS agency has acknowledged explicitly, using hidden foster care means the agency “has no further legal obligation to the parent in terms of reunification.”²⁰⁷

In addition, when agencies bring a case to court and place a child in formal foster care, they must craft case plans which include details of services to parents “to improve the conditions in the parents’ home [and] facilitate return of the child.”²⁰⁸ Case plans must describe “the appropriateness of and necessity for the foster care placement.”²⁰⁹ Procedurally, CPS agencies must “develop[case plans] jointly with the parent(s) or guardian of the child.”²¹⁰ Some state laws go further—providing due process checks by requiring family courts to approve case plans and providing for specific roles for parents and sometimes their attorneys,²¹¹ and adding substantive details to the types of

²⁰² About half of all children leaving foster care do so via reunification. The next most frequent outcome—adoption—accounts for 24% of children leaving foster care. The AFCARS REPORT, *supra* note 68, at 3.

²⁰³ 42 U.S.C. § 671(a)(15)(B)(ii). Narrow exceptions to this requirement apply, § 671(a)(15)(D).

²⁰⁴ 42 U.S.C. § 675(1).

²⁰⁵ *E.g.*, S.C. Act 36 (2017) § 3 (codified at S.C. CODE ANN. § 63-7-720(B)).

²⁰⁶ 42 U.S.C. § 671(a)(15)(B)(i).

²⁰⁷ VIRGINIA REVIEW OF CURRENT POLICIES, *supra* note 85, at 5.

²⁰⁸ 42 U.S.C. § 675(1)(B).

²⁰⁹ 45 C.F.R. § 1356.21(g).

²¹⁰ 45 C.F.R. § 1356.21(g)(1).

²¹¹ *E.g.*, N.M. STAT. ANN. § 32A.-3B-15(A) & (C) (requiring the development of case plans and dissemination to all parties before a disposition hearing); OKLA. STAT. tit. 10A § 1-4-704(C) (requiring CPS agencies to obtain signatures from parties and their counsel and creating court procedures to challenge

services which ought to be listed.²¹² These requirements, including the opportunity to bring disputes to court, are not triggered when CPS agencies do not remove children or file abuse or neglect petitions against their parents.

The loss of these two critical protections—reasonable efforts to reunify and case planning obligations—is particularly acute when hidden foster care lasts longer than a few days. Then the invasion of family integrity becomes even more severe, and the need for a meaningful plan to resolve the case even more important. When such separations are triggered by real concerns about parents’ ability to raise their children, rehabilitation is crucial to address those concerns. But the CPS agency may perceive the case as lower priority—there is no legal obligation for the state to develop a detailed case plan or provide rehabilitative services, no pending court hearing to prepare for and thus no moment when a judge will question the agency’s efforts to prevent removal or reunify the child,²¹³ and the agency may perceive the child as stable in the kinship caregiver’s home and thus deprioritize the case compared to others with pressing concerns.

The loss of reasonable efforts to reunify and related case planning duties is even more acute when hidden foster care leads to permanent changes in children’s custody—as it did in more than 60% of hidden foster care cases, covering about 21,000 children in one year, studied in Texas.²¹⁴ It is reasonable to wonder how many of those children and their parents might have reunified had these legal obligations applied.

3. *Denial of Services to Help Kinship Families—Especially Financial Support*

Much criticism of hidden foster care involves concerns about how it enables CPS agencies to avoid providing financial and other services to kinship caregivers that would be available had CPS agencies taken a more formal route,²¹⁵ and so include calls for CPS agencies to enhance services and financial support to kinship caregivers.²¹⁶

elements of case plans); UTAH CODE ANN. § 2A-4a-205(1)-(4) (requiring involvement of parents and others in developing case plans and informing courts of disagreements regarding their contents).

²¹² *E.g.*, N.M. STAT. ANN. § 32A-3B-15(B); OKLA. STAT. tit. 10A § 1-4-704(D)-(E); UTAH CODE ANN. § 2A-4a-205(6).

²¹³ Pearson, *supra* note 14, at 848.

²¹⁴ *Supra* note 61 and accompanying text.

²¹⁵ Walsh, *supra* note 74, at 2 (“Our findings point to the need to develop ways to better support informal kin, especially among very poor households.”); Ehrle, Geen, & Main, *supra* note 76, at 2 (“Many children in kinship foster care, therefore, may not be receiving the services needed to ensure the safety of their placements.”); Coupet, *supra* note 146, at 1256; Jill Duerr Berrick, *Trends and Issues in the U.S. Child Welfare System*, in CHILD PROTECTION SYSTEMS: INTERNATIONAL TRENDS AND ORIENTATIONS 17, 30 (Neil Gilbert, Nigel Parton, and Marit Skivenes, Eds. 2011) (describing “two-tiered system” of care caused by “voluntary kinship care”).

²¹⁶ Lee et al., *supra* note 81, at 101.

Critics also worry that CPS agencies use hidden foster care “motivated . . . by budget deficits and the desire to keep foster care numbers low.”²¹⁷

The most prominent illustration of this concern is how hidden foster care enables CPS agencies to avoid its obligations to kinship caregivers in the formal foster care system, most prominently paying foster care maintenance payments. The absence of such payments raise a particular concern that CPS agencies are failing to support kinship caregivers (and children in their homes) who in the aggregate, tend to have lower incomes than non-kinship foster parents.²¹⁸ Hidden foster care thus denies financial assistance to families who, in general, are most likely to need it. Kinship caregivers in these situations have raised concerns about the absence of both foster care subsidies and related services—such as automatically provided Medicaid cards, and vouchers for furniture and clothing to help take care of children.²¹⁹ Other child welfare services are also often only available to children in foster care (kinship or otherwise) but not in hidden foster care—such as respite care²²⁰ or assistance with transportation to school.²²¹ The absence of a change in legal custody can also raise questions about kinship caregivers’ authority to make health care, educational, or other decisions for children in kinship caregivers’ home.

Defenders of hidden foster care justify denying these financial supports because hidden foster care cases involve kinship caregivers, arguing that people should take care of their kin “without compensation.”²²² Indeed, the wide scope of hidden foster care seems to suggest that states do not need to pay kinship caregivers direct subsidies to recruit them to take care of their relatives. The ability to recruit kinship caregivers is a different matter, however, than the needs of those caregivers to provide for children brought into their home through CPS agency action. Moreover, the purpose of foster care maintenance payments as established by Congress and described by the U.S. Supreme Court focuses on children’s needs, not perceived kinship duties.²²³ That legal standard asks what financial and other supports are necessary to help raise a child,

²¹⁷ ANNIE E. CASEY FOUND., *supra* note 13, at 7. Part IV will discuss in more detail financial incentives for agencies to use hidden foster care.

²¹⁸ Riehl & Shuman, *supra* note 53, at 109, 111. This concern has attracted some media attention. *E.g.*, Katie O’Connor, ‘They Forgot About Us:’ Thousands of Families Are Doing the Same Work as Foster Parents in Virginia, Without the Support, VIRGINIA MERCURY (June 2, 2019), <https://www.virginiamercury.com/2019/06/02/they-forgot-about-us-thousands-of-families-are-doing-the-same-work-as-foster-parents-in-virginia-without-the-support/>.

²¹⁹ Ofelia Casillas & Dahleen Glanton, *Is DCFS Diverting Cases to Save Costs?*, CHI. TRIB. (Apr. 5, 2010), <https://www.chicagotribune.com/news/ct-xpm-2010-04-05-ct-met-dcfs-family-court-20100405-story.html>.

²²⁰ Roberts, *supra* note 36, at 1631.

²²¹ 42 U.S.C. § 675(4)(A).

²²² ANNIE E. CASEY FOUND., *supra* note 13, at 5–6.

²²³ *Infra* notes 263–265 and accompanying text.

especially a child who may have been traumatized by past abuse or neglect or by the CPS-induced move to live with kin.

4. *Potential Safety Risks to Children of Hidden Foster Care*

Hidden foster care can also leave children in danger that the formal foster care system could mitigate. Kinship foster families typically facilitate more informal visitation between parents and children than stranger foster children.²²⁴ Normally that is a good thing, but can be dangerous when parents are dangerous to children. Family court and agency oversight of kinship foster homes can help protect against such dangers in formal kinship care cases through visitation orders and CPS agency and court oversight of kinship placements—steps absent in hidden foster care cases.²²⁵ Moreover, hidden foster care does not involve any change in legal custody, so a parent has every legal right to take the child at any time. When parents are an immediate physical danger to children, hidden foster care provides weak protection.

Moreover, hidden foster care may lead CPS agencies to approve children living with kin who could present an unsafe home. Think tanks that have surveyed caseworkers found a dearth of policies regarding how to determine the safety of potential kinship homes and “inconsistent” guidance to individual caseworkers.²²⁶ Surveys of CPS state agencies reveal most, but not all, require kinship caregivers to undergo a background check, but this is less than a full kinship licensing assessment.²²⁷ Overly rigid rules could screen out perfectly safe kinship caregivers, but removing too many safety checks could leave children vulnerable to further maltreatment.

Given these concerns, Elizabeth Bartholet—an advocate for more state intervention to protect children and against more family preservation efforts—has written critically of the “stunning” scope of hidden foster care, and the possible harmful results.²²⁸ “Surely a child-friendly system would question such massive diversion program and insist at a minimum on research assessing how children do in such informal, uncompensated, and unsupervised kinship care as compared to formal foster care.”²²⁹ Other critics have raised concerns that the more modest assessment of informal kinship caregivers (compared with kinship foster care) may lead “[o]verworked agents [to] save time and resources by placing children with relatives” outside of foster care and court oversight.²³⁰ These concerns are reflected in data from

²²⁴ Riehl & Shuman, *supra* note 53, at 110.

²²⁵ S.C. Legislative Audit Council, *supra* note 190, at 53–56.

²²⁶ MALM & ALLEN, *supra* note 37, at 4.

²²⁷ ALLEN, DEVOOGHT, AND GEEN, *supra* note 64, at 13.

²²⁸ Bartholet, *supra* note 170, at 1365.

²²⁹ *Id.*

²³⁰ Naomi Schaefer Riley, *Reconsidering Kinship Care*, NAT’L AFFAIRS (2018), <https://www.nationalaffairs.com/publications/detail/reconsidering-kinship-care>.

Texas' hidden foster care system. Texas authorities found when they closed hidden foster care cases with children still living with kinship caregivers who lacked legal custody, children were deemed to be victims of later abuse or neglect at higher rates than other children in kinship placements.²³¹

IV. FOLLOW THE MONEY—FEDERAL FUNDING AND PERVERSE INCENTIVES TO SKIP DUE PROCESS

Effectively regulating hidden foster care requires an understanding of the existing federal funding structures and how that creates incentives for state CPS agencies to use the practice. Many of the practices that CPS agencies avoid by using hidden foster care²³² are connected to federal child protection funding and, more specifically, requirements for states to access that funding. This Subpart will explore how the federal child protection funding system contained in Title IV-E of the Social Security Act²³³ (and known in the field simply as “Title IV-E”) creates a perverse incentive to avoid all of these costs. Under our existing federal funding scheme, hidden foster care allows CPS agencies to effectuate the change of children’s custody from parents to kinship caregivers on the cheap.

In explaining the incentives to use hidden foster care, this Subpart offers an adjustment to the occasionally made claim that the federal financing system “encourages agencies to separate families” through formal foster care.²³⁴ Federal funding structures provide *partial* federal reimbursement to the cost to state CPS agencies of providing for children in foster care and thus makes foster care cheaper for states than it otherwise would be and, more specifically, makes foster care for Title IV-E-eligible families—that is, poor families²³⁵—less expensive than it is for ineligible families. Nonetheless, there is a difference between making foster care less expensive and making it more financially appealing than other options; foster care remains an expensive enterprise, so avoiding foster care at all remains cheaper for state agencies. While much could be said to critique foster care financing policies—for instance, that it makes it cheaper to remove poor children, or supports too many services for children in foster care rather than services to prevent abuse and neglect or otherwise prevent the need for foster care—the financial incentives remain to avoid foster care, especially

²³¹ Texas Children’s Commission Round Table Report, *supra* note 60, at 13.

²³² *Supra* Part III.B.

²³³ 42 U.S.C. § 671 *et seq.*

²³⁴ Simon, *supra* note 193, at 360. *See also* Pimentel, *supra* note 51, at 271 (“The greatest incentive for CPS to remove children is the resulting financial benefit associated with foster care under [Title IV-E].”).

²³⁵ For the state to be eligible to receive Title IV-E funds in individual foster care cases, the child removed by the state and placed in foster care must be from a family which would have been eligible for Aid to Families with Dependent Children (AFDC), as it existed in 1996 before welfare reform (which converted AFDC into Temporary Aid to Needy Families) took effect. 42 U.S.C. § 672(a)(3).

because Title IV-E requires states to take on certain expenses when they use formal foster care. CPS agencies thus have strong financial incentives to use hidden foster care—they do not need to pay foster care subsidies and do not need to provide as many services to children and families.²³⁶

A. Child Welfare Federal Financing Overview

Removing children and placing them in foster care triggers a range of costs to states—to name a few: payments to foster parents to take care of the children; services for the children and their parents to facilitate reunification; and costs associated with court hearings to adjudicate CPS agency petitions alleging abuse and neglect and requesting a court order changing custody to the agency.²³⁷ A partial accounting of these costs including payments to foster parents and some services for children and agency administrative costs—and excluding reunification services for parents—reveals an average annual cost of more than \$25,000 per child in foster care.²³⁸

The federal government partially reimburses state CPS agencies for many of these costs through Title IV-E. That exercise of federal spending power accounts for a significant proportion of child protection spending—federal spending accounts for about 45% of overall child protection spending (nearly \$13 billion annually), and Title IV-E accounts for the largest share of that federal funding (about \$6.5 billion annually).²³⁹ This substantial federal financial commitment provides the federal

²³⁶ A related issue is whether hidden foster care could absolve state agencies for liability if children faced harm in kinship care. When the state takes custody of a person, that triggers a constitutional obligation “to assume some responsibility for his safety and general well-being.” *Deshaney v. Winnebago Co. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989). CPS agencies could plausibly argue that because they do not take legal custody of a child in hidden foster care that this practice does not trigger such liability. If accurate, that would add an additional financial and legal incentive to use that practice. However, CPS agencies likely would be liable even in hidden foster care cases because the state role in arranging hidden foster care placements could be viewed as a state-created danger; if a kinship placement in hidden foster care creates a danger for the child, the state created the danger by arranging the placement. *Kneipp v. Tedder*, 85 F.3d 1199, 1208 (3d Cir. 1996). *See also Deshaney*, 489 U.S. at 201 (distinguishing cases in which the state had a role in the “creation” of dangers); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (“If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.”). A full analysis of whether frequent tests to establish a state-created danger, *e.g.*, *Kneipp*, 85 F.3d at 1208–09, are met in hidden foster care cases is beyond the scope of this Article.

²³⁷ Federal spending statutes require states to take these steps as a condition of receiving federal funding. 42 U.S.C. § 672 (foster care maintenance payments); 42 U.S.C. § 671(a)(15)(B) (“reasonable efforts to . . . reunify families”); 42 U.S.C. § 675(5)(B) (“case review system” including regular court reviews). Some steps are required as a matter of constitutional law; due process requires states to provide parents with a hearing on their fitness. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

²³⁸ NICHOLAS ZILL, BETTER PROSPECTS, LOWER COST: THE CASE FOR INCREASING FOSTER CARE ADOPTION 3 (2011), https://www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf.

²³⁹ *How States Fund Child Welfare Activities*, CHILD TRENDS (2016), 1, <https://www.childtrends.org/wp-content/uploads/2016/01/2016-05HowStatesFundChildWelfare.pdf>.

government—both Congress and the Children's Bureau, the subdivision of the Department of Health and Human Services which administers child welfare funding—substantial influence over state child welfare policy decisions.

Importantly, Title IV-E focuses largely on what happens *after* CPS agencies remove a child and open a court case—thus foster care is necessary to trigger both most federal child protection funding and the conditions the federal government imposes on states to receive that money. In particular, Title IV-E requires states to pay foster care maintenance payments, including subsidies to foster parents, and offers partial federal reimbursement for those costs,²⁴⁰ and requires states to operate a case review system, including regular court hearings for foster children.²⁴¹ These obligations to kinship caregivers are triggered by transferring “placement and care . . . responsibility” to a state child welfare agency.²⁴² In contrast, if children remain in a kinship caregiver's informal custody via a safety plan, then this obligation does not exist. In addition to these substantive obligations triggered by removing children and placing them in formal foster care, Title IV-E imposes administrative requirements on CPS agencies—at least when they use formal foster care.²⁴³

In 2018, Congress acted to permit states greater flexibility in using federal funds to prevent the need for foster care rather than insisting that CPS agencies go to court and remove children. The Families First Prevention Act, discussed in more detail below, provides states which meet certain conditions the ability to use Title IV-E funds for prevention efforts.²⁴⁴ Below, this Article will discuss whether Congress's means of achieving that goal risks incentivizing greater use of hidden foster care.²⁴⁵

Congress's action responded to concern that Title IV-E focused too much on foster care spending and not enough on prevention of abuse or neglect or on alternatives to foster care. Some have even suggested that Title IV-E federal funding incentivized removing children.²⁴⁶ That overstates the financial dynamic. Title IV-E provides federal funding only for certain eligible children²⁴⁷—and only about half of children in foster care are eligible.²⁴⁸ Moreover, even for eligible children, federal funds only

²⁴⁰ 42 U.S.C. § § 671(a)(1) & 672(a).

²⁴¹ 42 U.S.C. § 675(5).

²⁴² 42 U.S.C. § 672(a)(2)(B).

²⁴³ *Supra* notes 70–71 and accompanying text.

²⁴⁴ *Infra* Part V.A.2.

²⁴⁵ *Id.*

²⁴⁶ Simon, *supra* note 193, at 360.

²⁴⁷ 42 U.S.C. § 672(a).

²⁴⁸ Kristina Rosinsky & Sarah Catherine Williams, *Child Welfare Financing SFY 2016: A Survey of Federal, State, and Local Expenditures*, CHILD TRENDS (2018), 16, https://www.childtrends.org/wpcontent/uploads/2018/12/CWFSRreportSFY2016_ChildTrends_December2018.pdf.

cover a portion of costs.²⁴⁹ The costs of foster care, however, generally apply to all children in the formal system; states provide foster care maintenance payments to families even if they do not qualify for IV-E reimbursement.²⁵⁰ Thus, on average, state and local CPS agencies still bear the majority—57%, according to a recent estimate—of total costs for foster care.²⁵¹

B. Federal Requirements for Equal Payments for Formal Foster Care—and Incentives for Informal Foster Care

Title IV-E’s incentives for states to avoid formal kinship foster care’s costs are ironically strengthened by caselaw limiting states’ efforts to provide less financial support to kinship foster families than to stranger foster families. CPS agencies had long sought to arrange for kinship foster care on the cheap—that is, kinship foster care without paying kinship foster parents the same foster care subsidies that agencies pay non-kinship foster parents. The U.S. Supreme Court rejected these efforts in 1979 in *Miller v. Youakim*, insisting that CPS agencies pay kinship and non-kinship foster homes the same subsidies.²⁵² While the Court was right on the statutory interpretation and right to push against state efforts to provide kinship foster care on the cheap, this decision made the difference between formal kinship foster care and hidden foster care even stronger. So *Miller* strengthened a perverse incentive—the only way for CPS agencies to avoid paying kinship caregivers was to avoid licensing them as foster parents.

1. Miller v. Youakim’s Unintended Financial Incentives and Prescient Fears

Miller challenged an Illinois policy which excluded children living with related foster parents from the state’s foster care funding.²⁵³ The state CPS agency placed four foster children with their adult sister and her husband, Linda and Marcel Youakim, after determining that the Youakims’ home met state foster home licensing standards.²⁵⁴ The agency had placed the children in non-kinship foster homes and paid

²⁴⁹ The relative percentage covered by the federal government and by each state is calculated by the same formula used to calculate federal Medicaid funding to states. 42 U.S.C. § 674(a)(1). That formula varies between 50–83% federal reimbursement by the state’s relative wealth, measured by its per capita income, so poor states receive a higher federal reimbursement rate than rich states. 42 U.S.C. § 1396d(b) (cited in 42 U.S.C. § 674(a)(1)).

²⁵⁰ See e.g. D.C. CHILD AND FAMILY SERVICES AGENCY, RESOURCE PARENT HANDBOOK 93–95 (2018) (describing foster care board rates and their calculation without reference to Title IV-E eligibility).

²⁵¹ Rosinsky & Williams, *supra* note 248, at 4.

²⁵² *Miller v. Youakim*, 440 U.S. 125, 145-46 (1979).

²⁵³ *Id.* at 126-27.

²⁵⁴ *Id.* at 130.

\$420 per month (\$105 per month per child) to the foster care providers.²⁵⁵ But the state refused to pay the same rate to the Youakims, asserting that because theirs was a kinship placement, it did not count as foster care, citing a state law definition of “foster care” as limited to adults providing a home to children who were not related.²⁵⁶ The state did pay the Youakims \$252 per month in welfare benefits (\$63 per child)—40% less than the state paid non-kinship foster parents.²⁵⁷

The Supreme Court held that the federal funding statute prevented states from treating kinship foster families differently than other foster families.²⁵⁸ The federal statutory definition of “foster family home” made no mention of the kinship status of any foster family, requiring only that the CPS agency license their home.²⁵⁹ Other provisions of the statute require states to pay foster care maintenance payments for children “in the foster family home of *any individual*,” providing no distinction between kinship and non-kinship foster care.²⁶⁰ The conclusion is straightforward—once a state gave foster care licenses to kinship caregivers, and placed children with those caregivers following a family court order to remove the children from their parents,²⁶¹ the state had to pay kinship caregivers the full foster care subsidy.

The *Miller* Court envisioned a foster care system in which anytime a child needed to be removed from his/her parents, the state would financially support whoever it placed the child with via foster care payments commensurate with the child's anticipated needs, and that all such removals would be reviewed by a family court judge to ensure a meaningful due process check. That is, the Court emphasized the importance of two features of kinship foster care that are lacking in hidden foster care.

Miller also described foster care maintenance as payments to meet children's needs, not about any perceived obligation that family members could have towards children in their extended family.²⁶² The Court emphasized Congress's determination that trauma endured by children in foster care led to a “need for additional . . . resources—both monetary and service related—to provide a proper remedial environment” for abused and neglected children.²⁶³ That is why Congress increased the payments for foster children above those made via welfare payments—“to meet the special needs of neglected children[, which] cost more than

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 130–31.

²⁵⁷ *Id.* at 131.

²⁵⁸ *Id.* at 133.

²⁵⁹ *Id.* at 135 (citing 42 U.S.C. § 608 (1976)).

²⁶⁰ *Id.* (emphasis in original) (citing 42 U.S.C. § 608(b)(1)).

²⁶¹ *Miller* made clear that these other criteria were necessary to trigger a state's obligation to pay foster care maintenance payments. *Id.* at 134–35.

²⁶² *Id.* at 138–45.

²⁶³ *Id.* at 145.

basic . . . care.”²⁶⁴ This view of foster care maintenance payments has been strengthened in the intervening years as Congress has defined foster care maintenance payments as those necessary to pay for a list of needs of children in foster care.²⁶⁵ Foster care maintenance payments exist, therefore, to meet the presumptively significant needs of foster children. They do not exist to provide financial incentives to recruit foster parents. If it were the latter, one could justify (at least on policy grounds) paying a lower rate to kinship foster parents, who largely agree to take in a child because of their already existing relationship with the child or the child’s parent and thus may need less of a financial incentive to agree to take that step.

The *Miller* Court also emphasized the essential role of requiring judicial findings to justify removing children from parents and placing them with anyone else—and it presciently feared that permitting states to treat kinship foster families differently than non-kinship foster families could erode this essential due process check. The federal foster care financing system required judicial approval before states could make (and seek partial federal reimbursement for) foster care maintenance payments.²⁶⁶ But if states could exclude kinship placements from those requirements, the Court feared

the State would have no obligation to justify its removal of a dependent child if he were placed with relatives, since the child could not be eligible for Foster Care benefits. But the same child, placed in unrelated facilities, would be entitled under the Foster Care program to a judicial determination of neglect. The rights of allegedly abused children and their guardians would thus depend on the happenstance of where they are placed²⁶⁷

All children—even those placed with kin—deserve “protect[ion] from unnecessary removal.”²⁶⁸

The irony of *Miller v. Youakim*, therefore, is that its decision rested precisely on the concerns triggered by states’ use of hidden foster care. At the same time, by rejecting states’ efforts to make formal kinship care less expensive than foster care, *Miller* strengthened the distinction between informal and formal kinship care and thus created stronger financial incentives for states to use informal arrangements.²⁶⁹

Given that incentive, it is not surprising that *Miller* did not lead Illinois to treat kinship caregivers equally to non-kinship foster parents. Indeed, Illinois—the state whose discrimination against kinship foster placements the Court rejected in *Miller*—

²⁶⁴ *Id.* at 143.

²⁶⁵ 42 U.S.C. § 675(4)(A).

²⁶⁶ *Id.* at 139.

²⁶⁷ *Id.* at 139–40.

²⁶⁸ *Id.* at 140.

²⁶⁹ To be clear, I do not suggest that the Court decided *Miller* incorrectly; quite the contrary. Rather, I suggest that additional regulation of hidden foster care is necessary to prevent the apt fears that *Miller* articulated from continuing.

is today a leading example of hidden foster care. It is the state which gave rise to the *Dupuy* litigation, and its frequent use of hidden foster care has been documented years after *Miller*.²⁷⁰

2. *Enforcing Rights Under Miller v. Youakim?*

One important issue related to *Miller v. Youakim* remains subject to inconsistent application around the country—whether kinship foster parents have a private right of action to enforce their right to equal treatment in federal court. Three circuits have ruled kinship foster parents do have a private right of action.²⁷¹ The Eighth Circuit has ruled differently—holding kinship caregivers lack a private right of action to enforce *Miller*.²⁷² Like *Miller*, the majority rule appears correct on the individual facts and in its application of the test for private rights of action,²⁷³ but risks strengthening incentives to avoid formal foster care altogether—states could avoid federal courts forcing them to pay equal foster care subsidies to kinship caregivers by arranging for the child to go to kin via hidden foster care.

C. *Other Sources—Less Costly to State Agencies—Can Be Used for Hidden Foster Care*

Families with hidden foster care cases are not entirely without state support. Two points, however, are essential for comparing this support with the formal foster care system. First, from the perspective of kinship caregiving families, it is substantially less generous financially, as the facts of *Miller* illustrate. Kinship caregivers who have physical custody of children can obtain public benefits to help take care of those children through Temporary Aid to Needy Families (TANF).²⁷⁴ While such benefits surely help, they are quite modest in comparison to foster care subsidies.²⁷⁵ Thus, to kinship caregivers, there is a significant financial difference between informal kinship

²⁷⁰ *Supra* note 84 and accompanying text. The *Chicago Tribune* documented a large share of probate court cases—which could shift custody from a parent to a kinship caregiver—involved families pushed by the CPS agency to proceed there rather than the agency filing a juvenile court cases. Casillas & Glanton, *supra* note 219.

²⁷¹ *N.Y. State Citizens' Coalition for Children v. Poole*, 922 F.3d 69, 74 (2d Cir. 2019); *D.O. v. Glisson*, 847 F.3d 374, 378 (6th Cir. 2017); *Calif. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 977 (9th Cir. 2010).

²⁷² *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1203 (8th Cir. 2013).

²⁷³ That test, and a full analysis of the competing cases, is beyond the scope of this article.

²⁷⁴ U.S. DEP'T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, KINSHIP CAREGIVERS AND THE CHILD WELFARE SYSTEM 5, 10 (2016), https://www.childwelfare.gov/pubPDFs/f_kinshi.pdf.

²⁷⁵ Roberts, *supra* note 36, at 1626–27. In Virginia, for instance, one kinship family receives \$247 per month for two children, compared with potential foster care subsidies of \$470–\$700 per child. O'Connor, *supra* note 218.

care through safety plans and formal kinship foster care through a CPS agency family court action.

Second, from the perspective of state agencies, this support does not require a state match—that is, it is essentially free to state agencies, compared to any formal foster care intervention, which as discussed above, requires sizable state matches. While federal funds only partly reimburse states for foster care subsidies,²⁷⁶ TANF funds come as federal block grants to states, which do not require state matching funds for each new case, so adding a child in hidden foster care to the state’s TANF rolls does not add to state costs.²⁷⁷ So a CPS agency which steers a child into hidden foster care can also help that family obtain TANF benefits at no cost to the agency.

Third, using TANF for kinship caregivers diverts TANF funds from other impoverished families. TANF block grants have a fixed value,²⁷⁸ so allocating those funds is a zero-sum game; giving those funds to a kinship caregiver diminishes TANF funds available for all other purposes. That result is especially concerning given the availability of an alternative funding stream (Title IV-E) to at least partially support kinship caregivers who could be in the formal foster care system.

D. The Bottom Line: Strong Financial Incentives for CPS Agencies to Use Hidden Foster Care

Putting the pieces of child protection financing together reveals a clear fiscal conclusion: formal kinship foster care is significantly more expensive than hidden foster care, thus state CPS agencies have strong financial incentives to use hidden foster care. Going to family court and obtaining legal custody of a child triggers a range of costs and legal obligations on CPS agencies. While federal funds will help CPS agencies pay those costs, those agencies will be left with significant financial obligations, possibly for a long time. In contrast, hidden foster care is both cheaper in total dollar figures (with no foster care subsidies or family court costs), and federal financing systems make it even cheaper to CPS agencies because no state funding is required for TANF grants to hidden foster care kinship caregivers.

States are conscious of these incentives. Any rudimentary child protection agency budgeting would account for these funding differences. And CPS agencies have

²⁷⁶ *Supra* notes 247–249.

²⁷⁷ States do have a maintenance of effort requirement which replaced a matching fund obligation. See Gene Falk, *The Temporary Assistance for Needy Families (TANF) Block Grant: A Primer on TANF Financing and Federal Requirements* 5–6 (Congressional Research Service 7-5700, 2017), <https://fas.org/sgp/crs/misc/RL32748.pdf>. States must therefore spend a certain amount of money on various TANF-related activities in order to access federal TANF block grants. This structure creates a different incentive in individual cases. Adding an individual child to the state’s TANF rolls does not add new state costs; the state will have already arranged for its maintenance of efforts obligations, and no state matching funds will be required. That contrasts with using formal foster care, which, even if the child is IV-E-eligible, will trigger a requirement that the state pay matching funds.

²⁷⁸ See *id.* at 4 (describing TANF block grants as “fixed,” with only narrow exceptions).

explicitly noted the cost. Consider South Carolina, which, as noted above, frequently uses hidden foster care.²⁷⁹ When a state legislative audit recommended eliminating hidden foster care and applying “similar oversight by the family court and” CPS agency whenever abuse or neglect leads CPS to facilitate a relative placement, the CPS agency responded with a thinly veiled focus on costs and impacts on the state’s bottom line: “Before mandating a probable cause hearing and court oversight for all alternative caregiver cases, the General Assembly should consider the impact on . . . DSS [the Department of Social Services].”²⁸⁰

V. INSTITUTIONALIZING WITHOUT STRONGLY REGULATING HIDDEN FOSTER CARE

Following legal developments since 2008, hidden foster care is now more institutionalized and financially supported than ever before—but is not significantly more regulated. In 2008, Congress added provisions to Title IV-E which both implicitly recognized the hidden foster care system and provided federal financial support for it.²⁸¹ In 2018, Congress added further provisions more directly recognizing and funding hidden foster care.²⁸² In the same time period, state efforts to codify the practice have grown. Recent statutory enactments provide, at most, minimal regulation of hidden foster care, so their greatest impact is to codify the practice. Similarly, some states have adopted policies which impose minimal limits on hidden foster care. The overall trend, therefore, is that new statutes and policies have institutionalized the practice without imposing much regulation on it.

A. Federal Statutes

1. 2008: Kinship Navigator Programs

The first federal statute which recognized—however implicitly—hidden foster care was when Congress created “kinship navigator” grants in 2008.²⁸³ These grants were intended to help state CPS agencies connect kinship caregivers to non-Title IV-E services and supports outside of formal foster care and thus prevent the usage of

²⁷⁹ *Supra* notes 87–89 and accompanying text.

²⁸⁰ S.C. General Assembly, Legislative Audit Council, *A Review of Child Welfare Services at the Department of Social Services* 56 (2014), https://lac.sc.gov/reports/reports-agency-1-z/DSS_CWS_2014; S.C. Dep’t of Social Services, *Letter to Legislative Audit Council* 7 (2014), https://lac.sc.gov/reports/reports-agency-1-z/DSS_CWS_2014.

²⁸¹ *Infra* Part V.A.1.

²⁸² *Infra* part V.A.2.

²⁸³ Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 101(3) (codified at 42 U.S.C. § 627(a)(1) & (g)).

foster care.²⁸⁴ These grants were explicitly for “children who are in, or *at risk of entering*, foster care.”²⁸⁵ With the vast majority of children in kinship care living outside of the formal foster care system, state CPS agencies saw those grants as an opportunity to support children living with kin outside of family court jurisdiction, including through “diversion practices where child welfare services utilize kin as a nonfoster care resource.”²⁸⁶ These grants also served to address one (and only one) of the policy concerns discussed in Part III—the lack of support and services to support kinship caregivers.²⁸⁷

The statute creating these grants said nothing explicitly about hidden foster care. States have used kinship navigator grants to help connect kinship caregivers to TANF and other public benefits to help them take care of children informally in their care.²⁸⁸ Some of these kinship caregivers had obtained physical custody of children with no CPS agency involvement, and thus did not form part of hidden foster care. But some kinship navigator programs explicitly sought to “place the children with suitable kin caregivers”—that is, operate a small hidden foster care system and use kinship navigator funds to help kinship caregivers after CPS agencies effectuated a change in custody to them.²⁸⁹

Kinship navigator program’s wide eligibility standards also helped CPS agencies work with families involved in hidden foster care. CPS agencies could use federal kinship navigator funds for these purposes for any family, regardless of whether the family would be otherwise eligible for Title IV-E services.²⁹⁰ That broader eligibility enables CPS agencies to use the funds to serve families regardless of income, contrasting with Title IV-E support for formal kinship foster care limited to children

²⁸⁴ 42 U.S.C. § 627(a)(1).

²⁸⁵ 42 U.S.C. § 627.

²⁸⁶ Wallace & Lee, *supra* note 43, at 418–19.

²⁸⁷ *Id.*

²⁸⁸ See e.g., U.S. DEP’T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN’S BUREAU, SYNTHESIS OF FINDINGS: TITLE IV-E FLEXIBLE FUNDING CHILD WELFARE WAIVER DEMONSTRATIONS 18 (2011) (describing efforts of kinship navigator program in Ohio); U.S. DEP’T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN’S BUREAU, ACYF-CB-PI-18-05 2 (2018) (reporting that the Children’s Bureau had funded 20 kinship navigator programs, including 7 focusing specifically on “improving coordination between Child Welfare and Temporary Assistance to Needy Families (TANF) agencies to better support families providing kinship care”); James Bell Assoc., *Family Connection Discretionary Grants: 2009-Funded Grantees Cross-Site Evaluation Report—Final*, viii, 24 (2013), <https://www.jbassoc.com/wp-content/uploads/2018/03/Family-Connection-Evaluation-2009.pdf> (reporting that kinship navigator programs provided “information and referral” regarding “existing programs and services to meet caregiver needs”).

²⁸⁹ Bell Assoc., *supra* note 288, at 25. The impact of this practice is evident in the short time frame many kinship caregivers served by kinship navigator programs had had physical custody of children—nearly half in South Carolina, for instance, had been kinship caregivers for less than three months. *Id.*

²⁹⁰ U.S. DEP’T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN’S BUREAU, ACYF-CB-PI-18-11 3 (2018).

from families who meet very low poverty thresholds.²⁹¹ That contrast strengthens the financial incentives for CPS agencies to use hidden foster care: CPS agencies can get federal financial assistance for providing *any* child in hidden foster care with kinship navigator services, but receives federal support for only *some* children that they place in formal kinship foster care.

This Article does not intend to criticize kinship navigator programs. Indeed, some evidence exists that they have both helped kinship caregivers obtain legal custody and reunify children with parents, rather than live in limbo with kinship caregivers, while protecting children's safety.²⁹² Rather, this Article asserts that kinship navigator programs helped support hidden foster care without regulating that practice by providing a relatively easy and federally funded mechanism to better support kinship caregivers with no corresponding requirement or support for efforts to address other concerns about hidden foster care. Virginia's experience illustrates this concern. Charged by the legislature with reviewing its hidden foster care practices, the state CPS agency noted the practice was "widespread" and raised concerns that the practice was sometimes implemented poorly.²⁹³ But the agency's recommendations were all about better supporting kinship caregivers, including through the creation of a kinship navigator program.²⁹⁴ The agency made no recommendations regarding how to ensure hidden foster care was only used when necessary, was entered in a truly voluntary way, or that the agency would have to work to reunify families when using hidden foster care.²⁹⁵

2. 2018: Family First

While IV-E funding primarily supports CPS agency actions *after* placing a child in foster care, the 2018 Family First Prevention Services Act²⁹⁶ seeks to provide financial support to state efforts to *prevent* the need for foster care placements by providing prevention services to children and families.²⁹⁷ This essential reform rests on the recognition of the harms of removing children from their parents—as the federal Children's Bureau put it in 2018, "the trauma of unnecessary parent-child separation."²⁹⁸ Unfortunately, the Family First Act provides funds to help states avoid

²⁹¹ *Supra* note 235.

²⁹² Bell Assoc., *supra* note 288, at ix, 33–41.

²⁹³ VIRGINIA REVIEW OF CURRENT POLICIES, *supra* note 85, at 1, 5.

²⁹⁴ *Id.* at 2, 17–18.

²⁹⁵ *Id.*

²⁹⁶ The Family First Act was enacted as part of the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, tit. VII (Feb. 9, 2018).

²⁹⁷ *Id.* at § 50702 (Purpose).

²⁹⁸ U.S. DEP'T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN'S BUREAU, ACYF-CB-PI-18-09, STATE REQUIREMENTS FOR ELECTING TITLE IV-E PREVENTION AND FAMILY SERVICES AND PROGRAMS 2 (2018),

foster care, even if states can do so without avoiding parent-child separations. This point is written into the statute’s goals—funding is available both for services “directly related to the safety, permanence, or well-being of the child *or* to preventing the child from entering foster care.”²⁹⁹

The statute explicitly envisions avoiding formal foster care through kinship placements, and a review of the statute shows how it could be used to support state efforts to use hidden foster care to prevent a child from entering formal foster care. The Family First Act provides funding to CPS agencies to serve foster care “candidates”—children “at imminent risk of entering foster care” but “who can remain safely in the child’s home *or in a kinship placement*” with some kind of prevention services.³⁰⁰ Those services must be mental health or substance abuse treatment services, or “in-home parent skill-based programs.”³⁰¹ These services could include a range of services relevant to hidden foster care cases—services to aid reunification with parents, to help the child with a mental health or substance abuse condition (including mental health care to help the child adjust to their new living arrangements), and any assistance offered to the kinship caregivers to facilitate permanence.

So Family First *could* lead to more reunification services in hidden foster care cases, addressing an important concern with present practice.³⁰² But the statute does not require states to do so. CPS agencies could facilitate a change in physical custody through hidden foster care, provide the kinship caregiver with TANF supports, and provide some kind of mental health service to the child or some kind of “parenting” skills program to the kinship caregiver.³⁰³

<https://www.acf.hhs.gov/sites/default/files/cb/pi1809.pdf>. This view responds to well-documented harms of removing children from their families. See e.g., Joseph J. Doyle, *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POL. ECON. 746, 748 (2008), http://www.mit.edu/~jjdoyle/doyle_jpe_aug08.pdf (finding that children placed in foster care for any length of time were two to three times more likely to be arrested, convicted, and imprisoned for adult crimes than similarly at-risk children left with their parents); Joseph J. Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1607 n.2 (2007), http://www.mit.edu/~jjdoyle/fostercare_aer.pdf (finding that children placed in foster care had higher delinquency and teen birth rates, and lower earnings than similarly at-risk children left with their parents). See also Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse than the Disease? The Impact of Removal on Children and their Families*, 102 MARQ. L. REV. 1163, 1165-69 (2019) (collecting and summarizing studies demonstrating harms to children from removal).

²⁹⁹ 42 U.S.C. § 671(e)(1) (emphasis added).

³⁰⁰ 42 U.S.C. § 675(13) (emphasis added). See also § 671(e)(2)(A) (permitting states to use funding to support services to foster care candidates who “can remain safely at home *or in a kinship placement* with receipt of services or programs”) (emphasis added). CPS agencies must meet certain other conditions to access this funding. 42 U.S.C. § 671(e)(4)-(5).

³⁰¹ *Id.*, codified at 42 U.S.C. § 671(e)(1).

³⁰² *Supra* Part III.B.

³⁰³ Indeed, discussion of how to implement Family First in one state with a high usage of hidden foster care has focused on more funding for kinship navigator programs so they exist statewide. O’Connor, *supra* note 85.

Other provisions of Family First explicitly envision using federal funds to support children in hidden foster care, including the most extreme forms which effectuate permanent changes in custody. To access federal funds, state agencies must develop a “written prevention plan” for each child it seeks to keep out of foster care.³⁰⁴ Those plans require agencies to “identify the foster care prevention strategy for the child so that the child may remain safely at home, *live temporarily with a kin caregiver until reunification can be safely achieved, or live permanently with a kin caregiver.*”³⁰⁵ Congress thus explicitly envisioned that these new federal funds would be available to provide services to children and their family members when state action temporarily—or even permanently—changed their custody. The Family First Act contains no provision ensuring any such change of custody meets any particular legal standard, or that states provide any specific due process protections before effectuating such a change in custody.

Moreover, the Family First Act creates a new performance measure which further incentivizes CPS agencies to use hidden foster care. Starting in 2021, the federal Children’s Bureau must create a measure of the percentage of foster care candidates who CPS agencies successfully keep out of foster care.³⁰⁶ Given the Act’s purpose of keeping children out of foster care, this seems like a reasonable data point. Yet Congress explicitly included “those [children] placed with a kin caregiver outside of foster care” as children to be counted as *not* entering foster care,³⁰⁷ and Congress did not require states to report the number of foster care candidates who were successfully kept with their parents. Federal agency guidance for reporting data for children with “prevention plans” similarly omits any requirement to distinguish foster care candidates successfully kept in their homes from those moved through CPS action to informal kinship placements.³⁰⁸ CPS agencies can thus make themselves look good to federal overseers by using hidden foster care—that practice will successfully keep children out of foster care and thus look like successful foster care prevention. Such actions will not, of course, involve successfully protecting family integrity—CPS agencies will still facilitate changes in children’s custody.

B. State Codification and Minimal Regulation of Hidden Foster Care

Parallel to federal statutes institutionalizing and further incentivizing hidden foster care, several states have acted over the last decade to codify hidden foster care while imposing only modest regulations on it, if any at all.

³⁰⁴ *Id.*, codified at 42 U.S.C. § 671(e)(4)(A).

³⁰⁵ *Id.*, codified at 42 U.S.C. § 671(e)(4)(A)(I) (emphasis added).

³⁰⁶ 42 U.S.C. § 671(e)(6)(A)(i).

³⁰⁷ *Id.*

³⁰⁸ U.S. Dep’t of Health & Human Servs., Administration on Children and Families, Children’s Bureau, *Technical Bulletin #1: Title IV-E Prevention Program Data Elements* (Aug. 19, 2019).

A small number of states have enacted statutes to this effect. In 2014, the Illinois legislature passed a brief statute which added one paragraph regarding safety plans, explicitly recognizing them in statute for the first time.³⁰⁹ That law imposes minimal requirements on safety plans: they must be written, they must be signed by all parties including a parent or guardian, the “responsible adult caregiver” who is taking physical custody of the child, and a CPS representative.³¹⁰ CPS must provide all parties a copy of the plan, along with information on their legal rights, and must obtain supervisory approval of the plan.³¹¹ But the statute does not define what those rights are, nor establish any procedures for resolving disagreements about any safety plan provisions or the length a plan would be in place, nor put any substantive limitations on safety plan contents, nor require consultation with agency attorneys, nor provide attorneys for parents or children. As Diane Redleaf described these changes, they did not provide “much comfort to the parents who were still coerced into accepting safety plan separations.”³¹² They codified the practice without regulating it.

Florida similarly enacted legislation in 2014 which codified hidden foster care without regulating it much.³¹³ The legislature required CPS investigators to use safety plans when identifying a danger to a child, and explicitly permitting safety plans to be “in-home” or “out-of-home.”³¹⁴ The legislation includes no limits on safety plan contents nor any procedural limitations close to those proposed in Part VI.A.³¹⁵

Somewhat more frequent than statutes are CPS agency policies, and occasionally regulations, that address safety plans which change children’s custody.³¹⁶ These policies have increased in number in recent years, institutionalizing the hidden foster care practice.³¹⁷ Despite their number, these policies do not impose much regulation. Some states describe “out-of-home” safety plans in their policies, but without imposing limits.³¹⁸ Others limit safety plans to certain time limits – usually from one

³⁰⁹ Pub. Act. 98-830, 2014 Ill. Legis. Serv. P.A. 98-830, § 5 (codified at 20 ILL. COMP. STAT. ANN. § 505/21(f)).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Redleaf, *supra* note 7, at 190.

³¹³ 201 Fla. Sess. Law Serv. ch. 2014-224, § 8 (codified at FLA. STAT. § 39.301(6)).

³¹⁴ *Id.*

³¹⁵ Implementing regulations direct that CPS investigators “must develop an out-of-home safety plan” when they determine that the child cannot remain safely at home. FLA. ADMIN CODE 65C-29.003(3)(a)(1). Florida regulations do require supervisory review within 24 hours of a safety plan, but no agency lawyer review or any other due process checks. *Id.* at 65C-29.003(3)(c).

³¹⁶ Shellady has helpfully catalogued these policies and regulations. *Supra* note 14, at 1634 n.130.

³¹⁷ For instance, Georgia and South Carolina adopted their policies in 2015. *Supra* note 30; Ga. Div. of Family & Children Servs., Child Welfare Policy Manual, § 5.6 (2015). Texas adopted its in 2018. Texas Family & Protective Servs., Parental Child Safety Placement (PCSP) Resource Guide 1 (2018) http://www.dfps.state.tx.us/handbooks/CPS/Resource_Guides/PCSP_Resource_Guide.pdf.

³¹⁸ *E.g.* Idaho Child Protection Manual, 18-20; Ohio Admin Code § 5101:2-37-02; Va. Dep’t of Soc. Servs., Division of Family Servs., Child Protective Services: A Guide to Investigative Procedures 4 (2017).

to three months.³¹⁹ Others require reviews by agency staff or other ongoing agency monitoring of safety plans, but no external checks and balances or even internal legal reviews.³²⁰ Agency policies that require court oversight when physical custody changes are the outliers.³²¹

A central feature of this state-by-state policymaking is that it is mostly just that—policymaking, not law making. CPS agencies write the policies that they want and may adjust them as they desire. With the exceptions noted above, state safety plan policies lack legislative approval, or the comparative difficulties of amending statutes. Similarly, because they are policies and not regulations, CPS agencies adopted them without notice and comment rulemaking or any other checks provided through administrative law.³²²

Moreover, agencies' compliance with their own policies can be lacking—especially in hidden foster care, which does not involve court oversight. Indeed, there is evidence that CPS agencies frequently violate their own policies. In Illinois, the Family Defense Center (with law firm assistance) documented CPS agency violation of their own policies requiring regular reviews of safety plan terms, notice to parents of the factual basis for insisting upon a safety plan, and meaningful consideration of parental requests to terminate or amend safety plans.³²³ In South Carolina, litigation has revealed a safety plan in effect for far longer than the 90 days permitted by CPS agency policy.³²⁴

³¹⁹ *E.g.* Ala. Code Regs. 660-5-34-.06(3)(a)(2) (90 days); Ga. Div. of Family & Children Services, Child Welfare Policy Manual, § 5.6 (2015) (45 days); Me. Child and Family Servs., Child and Family Service Policy at IV.D (2010), <http://www.maine.gov/dhhs/ocfs/cw/policy> (30 days); Mont. Dep't Pub. Health & Human Services: Child & Family Servs. Div., Child and Family Services Policy Manual, at 13, Sec 202-3 (2015) (30 days); *supra* note 30 (South Carolina, 90 days); Texas Family & Protective Servs., Parental Child Safety Placement (PCSP) Resource Guide 1 (2018), http://www.dfps.state.tx.us/handbooks/CPS/Resource_Guides/PCSP_Resource_Guide.pdf; Vt. Dep't for Children and Families: Family Services Policy Manual ch. 52 at 7 (2017), <http://dcf.vermont.gov/sites/dcf/files/FSD/Policies/52.pdf> (one month).

³²⁰ *E.g.* Arizona Dep't of Child Safety: Policy and Procedure Manual, Ch. 2 § 7: Safety Planning: Safety Plan Oversight and Management; Ga. Div. of Family & Children Services, Child Welfare Policy Manual, § 5.6, at 3-4 (2015); Ohio Admin. Code § 5101:2-37-02(J); Oregon Dep't of Human Servs., Child Welfare Procedure Manual, ch. 3, § 4, at 1, http://www.dhs.state.or.us/caf/safety_model/procedure_manual/ch03/ch3-section4.pdf (review every 30 days).

³²¹ I have identified only one state that so requires. Alaska Office of Children's Services Policy Manual, Present and Impending Danger and the Child Safety Plan: Procedures § 2.2.5.1(F)(1)(c).

³²² Shellady, *supra* note 14, at 1636-37.

³²³ Family Defense Center, *Understanding and Responding to Department of Children & Family Services' Abuse and Neglect Investigations in Illinois: A Basic Guide for Illinois Parents and other Caregivers* 48-50, app. B (2016), <https://www.familydefensecenter.net/wp-content/uploads/2016/04/Responding-to-Investigations-Manual-FINAL.pdf>; Shellady, *supra* note 14, at 1626-27.

³²⁴ *Adams v. Dep't of Soc. Serv.*, Complaint ¶13, 2019 CP 38000036 (S.C. Ct. C.P. Apr. 12, 2019).

VI. LEGALLY DOMESTICATING SAFETY PLANS AND HIDDEN FOSTER CARE

Many advocates have called for greater regulation of hidden foster care—some mostly with the goal of requiring CPS agencies to work more effectively with and provide more supports to kinship caregivers,³²⁵ others focused on protecting parents’ and children’s rights to family integrity.³²⁶ Both are important goals, and greater regulation is necessary not only to ensure kinship caregivers get necessary support, but to ensure children’s custody changes only when legally warranted, and that the process leading towards such decisions gathers the essential evidence and hears all related perspectives.

This Article’s call for regulation requires two prefatory comments. First, regulation rather than prohibition is necessary because informal and truly voluntary changes in custody are sometimes appropriate actions, as described in Part III.A. Second, while this section is largely focused on legislative and executive branch regulation, court-imposed reforms through litigation remain worth pursuing. Courts can declare that procedures leading to hidden foster care are unduly coercive, and could even order certain reforms to meet minimal standards of due process – such as a requirement that parents be able to challenge agency actions in hidden foster care cases, as discussed in Part VI.A.5. This Part will focus on legislative and executive regulation because the litigation history discussed in Part II reveals significant limitations in courts’ willingness or ability to regulate this practice fully. Several circuits have ruled that there is no due process issue at all.³²⁷ Moreover, no matter how the circuit split regarding the due process implications described in Part II is resolved, such legislative and administrative action is necessary. Even if courts universally held hidden foster care violates the constitutional right to family integrity without due process, courts are unlikely to replace existing practice or to prohibit the use of any safety plans.³²⁸ Rather, courts which have found safety plans violate parents’ due process rights indicate that these state actions trigger the need for some procedural protections—but do not specify what those protections are.³²⁹ These courts suggest that, institutionally, they want to defer to other branches of government to define the precise structure of procedural reforms. And even if courts were to impose their own reforms, courts could only order reforms necessary to meet constitutional minimums, leaving out several important reforms that could be achieved through legislative or

³²⁵ *E.g.*, Wallace & Lee, *supra* note 43, at 425 (arguing for services to “diverted kinship families”).

³²⁶ *E.g.*, Redleaf, *supra* note 7, at 37-50 (critiquing *Dupuy v. Samuels*); Simon, *supra* note 193; Pearson, *supra* note 14, at 836 (criticizing safety plans as unduly limiting family integrity without adequate procedures); Shellady, *supra* note 14, at 1626-34 (criticizing *Dupuy*).

³²⁷ *Supra* Part II.A.

³²⁸ *Supra* Part II.B.3. Others have concluded that legislative reforms are needed. Pearson, *supra* note 14, at 837.

³²⁹ *Supra* note 164 and accompanying text.

executive action.³³⁰ Accordingly, this Article advocates hidden foster care be hidden no longer, and that the practice be legally domesticated³³¹—regulated to ensure accurate and voluntary decision-making, fair procedures, and individual case and systemic oversight.

To that end, this Subpart proposes a set of protections for individual cases, and also a set of federal child welfare law reforms designed to bring hidden foster care cases under the umbrella of federal data tracking and oversight. Both sets of recommendations recognize kinship diversion is a practice that will continue, and that the practice involves a severe enough exercise of state power involving important rights of multiple people to warrant strong regulation.

A. *Procedural Protections and Substantive Limits*

Congress, state legislatures, the federal Children's Bureau, and state CPS agencies should enact a set of procedural protections and substantive limits to follow in each individual case to ensure CPS agencies effectuate changes in custody only when necessary and mitigate the concerns outlined in Part III.B. These protections should be enacted by legislatures or, at a minimum, promulgated as agency regulations to alleviate the challenge of an agency regulating itself via its internal policies.³³²

These procedural reforms would impose costs on state child protection systems—costs of lawyers for parents, costs of court hearings when sought by parents, and costs of additional staff. CPS agencies are sensitive to these costs and have invoked them when pressured to provide more procedural protections for families in hidden foster care.³³³ These costs are well worth incurring. As the Supreme Court said in an early due process case involving the child protection system, “the Constitution recognizes higher values than speed and efficiency,” and constitutional protections serve to protect individuals “from the overbearing concern for efficiency” that can drive government agencies.³³⁴ Moreover, these procedural costs are essential to address the policy concerns discussed in Part III.B. Nonetheless, addressing those concerns within real-world budgetary and political constraints is important for any achievable reform agenda, so this Part will also address both how states can use federal financial

³³⁰ The most significant reform that would likely be beyond court authority – at least under current federal constitutional law – is the right to counsel proposed in Part VI.A.1. The Supreme Court has ruled that the Constitution does not guarantee parents facing a termination of parental rights the right to counsel. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981). So it is unlikely that a court adjudicating a due process clause challenge could order the provision of counsel to parents facing a choice whether to agree to a safety plan.

³³¹ *Supra* note 8 and accompanying text.

³³² *Supra* notes 322–324.

³³³ *Supra* note 280 and accompanying text.

³³⁴ *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

assistance to pay for one of these proposed reforms (pre-petition counsel for parents) and how the proposed reforms moderate additional costs.

1. *Appoint Attorneys for Parents Subject to Possible Safety Plans*

a. *Why Parents' Attorneys Are Crucial*

Whenever CPS agencies ask parents to agree to change the physical custody of the child, they should provide for an appointed attorney for the parent.³³⁵ As the Seventh Circuit explained in *Dupuy*, a justification for safety plans is that they are like criminal plea bargains or civil settlements.³³⁶ As discussed above, safety plan situations differ in several key ways from plea bargains and civil settlements—especially in the absence of attorneys for parents.³³⁷ Providing attorneys to parents can help create much more fair bargaining situations. After all, an agency and a parent negotiate “in the shadow of the law,”³³⁸ so having a lawyer advise a parent as to her rights and the agency’s rights under the law provides essential information about the law’s shadow.³³⁹

Providing lawyers at this stage would expand existing statutory rights to counsel, which are typically triggered by the initiation of court proceedings.³⁴⁰ A central point of this Article is that state CPS agencies engage in critical intervention in families without ever initiating court proceedings. That level of intervention outside of court justifies providing counsel to parents.

Lawyers are essential for helping parents navigate safety plan negotiations—perhaps more so than any of this Article’s other recommendations—because legal analysis is required to understand parents’ leverage in safety plan negotiations. Parents’ leverage will depend on substantive legal standards, especially whether the CPS agency is justified in declaring a child abused or neglected, and, even if so, if an

³³⁵ Time pressures could affect how such attorneys could interact with their clients. CPS agencies could reasonably impose on parents safety plans that last for no more than 24 or 48 hours, until an attorney could consult with the parents and then negotiate a somewhat longer-lasting safety plan with the agency.

³³⁶ *Supra* note 119.

³³⁷ *Supra* notes 120–129 and accompanying text. As noted above, the presence of counsel is less frequent in some civil cases. *Supra* note 123. It is, however, the norm in formal foster care cases.

³³⁸ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

³³⁹ See *Gottlieb v. Cty. of Orange*, 84 F.3d 511, 522 (2d Cir. 1996) (noting parents’ consultation with an attorney as an important factor in procedural due process analysis). See also Garlinghouse & Trowbridge, *supra* note 44, at 117 (“[A]dvice of counsel as to likely outcomes and rights regarding voluntary participation can be helpful.”).

³⁴⁰ See e.g. D.C. Code § 16-2304(b)(1) (triggering appointment of counsel for parents of children named in court petitions); S.C. Code § 63-7-1620(3) (providing a right to counsel only to parents “subject to any judicial proceeding”). Katherine Pearson proposed informing parents of their right to counsel if a case proceeded to court. Pearson, *supra* note 14, at 873. But establishing a clear right to counsel before agreeing to a safety plan would broaden existing right to counsel statutes.

emergency or pre-trial removal is legally justified,³⁴¹ the state's burden of proof to prove abuse or neglect to a family court,³⁴² application of the state's obligation to prove that it made reasonable efforts to prevent removal,³⁴³ and whether the particular facts rise to abuse or neglect under the state's statute or the related question of whether the state can prove such facts through admissible evidence at trial. Exercising a parent's leverage requires a lawyer to understand the case and advise the parent accordingly. Otherwise, the agency has a tremendous information advantage—they are repeat players negotiating with parents who, in the aggregate, are of a low socioeconomic status and likely do not understand the nuances of child protection law, but certainly understand that the agency is threatening their relationships with their children.

Lawyers for parents can help craft safety plans that address each family's individual needs more effectively. Indeed, the Children's Bureau has concluded that legal representation enhances the parties' engagement in case planning and leads to more individualized case plans.³⁴⁴ Similar benefits to the quality of safety plans should be expected—including more accurate determinations regarding the need both for a safety plan at all and specific safety plan provisions.

Providing parents with attorneys could lead CPS agencies to catch some of their own errors. Some kind of internal review by agency lawyers is commonplace before bringing a case to court, but is often lacking in hidden foster care cases.³⁴⁵ Providing lawyers to parents in these cases should trigger CPS agency lawyers to become involved as well, and thus provide appropriate counseling to agency case workers (including when that counseling is that the caseworkers lack legal authority to remove and thus leverage to insist upon a safety plan).

This call for parent representation also finds some empirical support. Emerging evidence from two quasi-experimental studies demonstrates parent attorneys generally help achieve positive outcomes for their clients *and* the system—increasing speed to reunifications and guardianships, reducing length of stays in foster care, and doing so without compromising safety.³⁴⁶ Children reunify with parents significantly faster

³⁴¹ These standards may also vary by jurisdiction. *See* Simon, *supra* note 193, at 368–75 (categorizing state removal statutes).

³⁴² This burden also varies by state. Provencher, Gupta-Kagan, & Hansen, *supra* note 142, at 27.

³⁴³ *Supra* Part III.B.

³⁴⁴ U.S. DEP'T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN'S BUREAU, ACYF-CB-IM-17-02, HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS 2 (2017).

³⁴⁵ *Supra* note 197 and accompanying text.

³⁴⁶ Gerber, *supra* note 126, at 52; Mark E. Courtney & Jennifer L. Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 34 CHILDREN & YOUTH SERVS. REV. 1337, 1340–42 (2012). Other studies have found similar benefits, but have various limitations. Gerber et al., at 43–44.

when they had attorneys from model parent representation offices.³⁴⁷ Importantly, this increased speed to reunification did not leave children in any greater safety risk, measured by the likelihood of documented repeat maltreatment.³⁴⁸ That finding suggests parent representation is not likely to jeopardize the safety of children subject to safety plans. Of course, state CPS agencies would be free to bring cases to family court if they could prove a parent had abused or neglected a child and that foster care was necessary. In addition, both studies found speed to other forms of permanency—guardianships and adoptions in the Washington study,³⁴⁹ and guardianships in the New York study³⁵⁰—increased through model parent representation. That finding suggests parents’ lawyers do negotiate permanent custody arrangements that involve their clients’ losing custody of their children. A reasonable extrapolation is that parent attorneys would negotiate reasonable safety plan conditions in appropriate cases.³⁵¹

b. Newly Available IV-E Funding for Lawyers for Parents and Children

The Children’s Bureau expanded IV-E funding eligibility in January 2019 to include legal representation for parents.³⁵² Title IV-E authorizes the Children’s Bureau to reimburse states for one-half of the expenditures “found necessary by the Secretary . . . for the proper and efficient administration of the State plan.”³⁵³ Through the January 2019 guidance, the Children’s Bureau determined that providing “independent legal representation by an attorney” for both children and parents qualifies under this standard.³⁵⁴ This federal funding is available both when children are in a CPS agency custody and subject to an open family court case *and* when the child is a “candidate for Title IV-E foster care.”³⁵⁵ The statute defines foster care “candidate” as someone “at imminent risk of entering foster care” but “who can remain safely in the child’s home *or in a kinship placement*” with some kind of prevention services.³⁵⁶ A child subject to safety plans seems to fit easily in the statutory definition

³⁴⁷ Gerber et al., *supra* note **Error! Bookmark not defined.**, at 52; Courtney & Hook, *supra* note **Error! Bookmark not defined.**, at 1340–42.

³⁴⁸ Gerber et al., *supra* note **Error! Bookmark not defined.**, at 51, 52.

³⁴⁹ Courtney & Hook, *supra* note **Error! Bookmark not defined.**, at 1340–42.

³⁵⁰ Gerber et al., *supra* note **Error! Bookmark not defined.**, at 52.

³⁵¹ These extrapolations from existing data should, of course, be subject to evaluation; states should create pre-petition parent representation so such evaluations may occur.

³⁵² U.S. DEP’T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN’S BUREAU, CHILD WELFARE POLICY MANUAL § 8.1B(30), https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp_pf.jsp?citID=36.

³⁵³ 42 U.S.C. § 674(a)(3)(C).

³⁵⁴ Child Welfare Policy Manual § 8.1B(30).

³⁵⁵ *Id.*

³⁵⁶ 42 U.S.C. § 675(13).

of a foster care “candidate,” thus the new Children’s Bureau guidance establishes that federal funds may support the provision of counsel to the parents of these children.

This reform opens the door to significant increases in funding for parent and child representation—estimated to be in the hundreds of millions of dollars³⁵⁷—and thus pay much of the cost to provide counsel in safety plan cases when that reform was not possible in prior years. The new federal funding will cover 50% of the cost of counsel in eligible cases.³⁵⁸ Roughly half of cases are IV-E eligible,³⁵⁹ so this new funding would cover about 25% of the total cost. However, that percentage applies not only to an *expanded* provision of counsel—that is, in safety plan cases without a petition—but to all provision of counsel. Currently, states must pay the full cost of providing appointed counsel, but can now receive a federal reimbursement of significant percentage of that total amount—which should be sufficient to provide counsel in pre-petition cases.

2. *Provide Parents with Notice of the Factual Basis for a Change in Custody*

Some amount of notice appropriate to the circumstances of a case is “no doubt” a required part of due process.³⁶⁰ In safety plan cases in which CPS agencies insist on any form of a change in custody, the agency should provide the parent with specific written notice of the factual basis for that insistence.³⁶¹ Even cases like *Dupuy*, which held safety plans are voluntary, recognize that voluntariness depends on the legitimacy of the CPS agency’s insistence on that separation.³⁶² Providing notice forces CPS agencies to write down their justification and enables parents (ideally with their lawyers, as described below) to evaluate the legal strength of that insistence and determine whether to contest or agree to it.

3. *Maximum Length of Time for Safety Plans*

No safety plan should change a child’s physical custody indefinitely. On the contrary, a relatively brief maximum length of time should govern such safety plans, after which either the safety plan ceases to be in effect and the child must be able to reunify or courts must become involved, as several states and commentators have

³⁵⁷ John Kelly, *Trump Administration Rule Change Could Unleash Hundreds of Millions in Federal Funds to Defend Rights of Parents, Children in Child Protection Cases*, CHRONICLE OF SOC. CHANGE (Feb. 5, 2019), <https://chronicleofsocialchange.org/child-welfare-2/how-the-fight-for-family-legal-support-was-won/33631>.

³⁵⁸ CHILD WELFARE POLICY MANUAL § 8.1B(30).

³⁵⁹ Child Trends, *Title IV-E Spending by Child Welfare Agencies*, 4 (2018), childtrends.org/wp-content/uploads/2018/12/TitleIVESFY2016_ChildTrends_December2018.pdf.

³⁶⁰ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 206, 313 (1950).

³⁶¹ Shellady, *supra* note 14, at 1644–45.

³⁶² *Supra* notes 115–118 and accompanying text.

recognized.³⁶³ If a case cannot be resolved in that time frame, if for instance a parent's need for rehabilitation is so severe that he or she cannot regain custody, the case deserves court oversight. A maximum timeline also creates a deadline pressure for the agency to help a parent reunify (and for the parent to cooperate with those efforts) to avoid the cost and uncertainty of court proceedings.

The Family First Act, discussed in Part V, implies the need for time limits. The Family First Act provides funding flexibility to provide services “for not more than a 12-month period.”³⁶⁴ Some state policies provide even shorter timelines, such as 90 days.³⁶⁵

Maximum time limits should be quite brief—not longer than 30 days. Many formal foster care cases are resolved faster than that.³⁶⁶ Longer time periods—like the 12 months permitted under the Families First Act—make sense for provision of services to a family that remains intact. But when CPS agencies effectuate a break-up of the family, even a temporary one, 12 months is far too long. If separations of parents and children longer than 30 days are truly necessary, it suggests a need for court oversight—because the parent poses a more significant danger to the child or needs a more intensive set of rehabilitative services before reunification is safe. When either is the case, family court checks and balances and oversight is particularly important, for all the reasons explained in Part III.B.

In addition, statutes or regulations should make clear that once a maximum timeline expires, absent court rulings to the contrary, a parent has the right to regain physical custody of their child without negative repercussions. Such statements are necessary given cases in which safety plans are extended indefinitely, even past state agency policy guidelines.³⁶⁷

4. *Include an Exit Strategy*

Formal foster care triggers obligations on the state to develop detailed and individualized case plans and to provide reasonable efforts to prevent the need for removal and to reunify parents and children, and hidden foster care avoids those requirements.³⁶⁸ A reasonably short time limit avoids many of the concerns with the loss of those requirements; either families will reunify or CPS agencies would have to go to court and thus trigger those requirements. Nonetheless, plans should be clear regarding what would enable parents and children to reunify, especially when that

³⁶³ *Supra* note 319. Other critics have recommended such rules, without specifying a precise limit. Pearson, *supra* note 14, at 873.

³⁶⁴ 42 U.S.C. § 671(e)(1)(A)-(B).

³⁶⁵ *Supra* note 62.

³⁶⁶ Sankaran & Church, *supra* note 191.

³⁶⁷ *Supra* note 63.

³⁶⁸ *Supra* Part III.B.

could be possible fairly quickly. This proposal recognizes a maximum time limit is just that, and a change in a child's custody should last no longer than necessary given the individual needs of a case, and the length in a specific case should be subject to case-by-case negotiation, and renegotiation as the case develops. Perhaps a restraining order against or arrest of a parent's partner who had abused the child, medical or mental health treatment that stabilizes a parent after an acute crisis, or securing new housing would suffice. When that is the case, it should be spelled out in safety plans so when parents meet those conditions they can insist upon reunification.³⁶⁹

5. *Permit Parents to Seek Court Review of Safety Plans*

Much room exists for reasonable debate regarding the contents of individual safety plans—CPS agencies and parents could reasonably disagree on whether abuse or neglect has occurred, whether a change in physical custody is necessary, whether one or both parents or adults in a home need to be separated from children, what level of supervision of a parent's contact with children is required, or what is necessary before parents and children can reunify. Parents should be allowed to challenge such safety plan provisions without risking foster care and an abuse or neglect petition against them.

Absent any provision to trigger court oversight during a safety plan, parents must either abide by CPS agency safety plan demands or face tremendous risks—and parents rarely choose the latter.³⁷⁰ Providing a mechanism for parents to challenge a safety plan in court without triggering an abuse or neglect petition or removal would provide a more meaningful check on CPS agency authority while respecting the occasional benefits of safety plans. Parents should be able to insist on a court hearing to review a safety plan under the same standards that govern pre-adjudication removals, and under the same timeline—usually 48 or 72 hours—provided to review emergency removals because those are the most closely analogous actions.³⁷¹

Parents should be able to trigger this provision at any point. Consider, for instance, a case of suspected physical abuse. The evidence early in a case might raise probable cause of abuse justifying an emergency removal, and a parent might therefore agree to a safety plan to avoid going to court, even if the parent insists that she did not abuse her child.³⁷² But additional medical evidence might raise doubts about the abuse

³⁶⁹ Spelling out such conditions would also aid decision-making in closer cases when parents claim that they have substantially complied with conditions, or have met as many as ought to be necessary.

³⁷⁰ Indeed, *Dupuy* made no reference to even a single parent rejecting a CPS agency request to agree to a safety plan, and an attorney for the plaintiffs has asserted that the full trial record revealed no such parent. Redleaf, *supra* note 7, at 44–45.

³⁷¹ Other critics of safety plans have made similar recommendations. Shellady, *supra* note 14, at 1646–47; Pearson *supra* note 14, at 873.

³⁷² See, e.g., *Gottlieb v. Cty. of Orange*, 84 F.3d 511, 522 (2d Cir. 1996) (“[F]rom the departing parent's standpoint, judicial review may not be the preferred method of resolving the matter, for the

allegations,³⁷³ and the parent could then request the termination of the safety plan. If the agency does not agree, the parent should be able to press their case in court, rather than be bound by the earlier decision made with less information.

These reviews would impose only minimal procedural costs. They would involve single hearings reviewing a safety plan – rather than a formal foster care case which involves the potential for a full trial, and a series of review hearings for an indeterminate period of time.³⁷⁴ Moreover, they would only be triggered by parents who feel aggrieved by a safety plan decision; cases which serve families’ interests³⁷⁵ and involve a more genuine agreement with families need not trigger court reviews.

B. Bring Hidden Foster Care Under the Federal Administrative Apparatus

The federal government plays an essential role in the operation of and policy debates within the modern child protection system. While the federal child welfare legal architecture now implicitly recognizes the hidden foster care system through the steps discussed in Part V, it has not brought the practice within the federally regulated system. That is a central reason why the practice remains hidden—basic data is not gathered or reported, federal requirements do not regulate the practice, and federal reviews of state performance do not evaluate state use of the practice. This Article calls on Congress and the federal Children’s Bureau to bring hidden foster care within the federal child protection regulatory system, and this Subpart discusses three central elements for such federal regulation.

1. Data Gathering

States gather and report key data as a condition of receiving federal funding. One central result is this data then informs policy discussions. If the data is not gathered or reported, important policy discussions either do not happen or happen without adequate information.³⁷⁶ As discussed above,³⁷⁷ there is a dearth of hard data about states’ use of hidden foster care, and this is a key reason hidden foster care is hidden. An essential step is for the federal government to require state CPS agencies to report the number of cases in which it effectuates a change in physical custody through safety

statutory procedures envision a hearing within three days, and the evidence or allegations may be such that the parent believes the matter likely cannot be adjudicated quickly.”).

³⁷³ See, e.g., *In re Juvenile Appeal*, 455 A.2d 1313, 1317, 1321 (Conn. 1983) (describing medical evidence which eventually exonerated parents after a child’s unexplained death).

³⁷⁴ Federal funding law spells out requirements for regular reviews for children in formal foster care. 42 U.S.C. § 675(5).

³⁷⁵ *Supra* Part III.A.

³⁷⁶ See Shellady, *supra* note 14, at 1648 (arguing for better data gathering to inform policy discussions).

³⁷⁷ *Supra* Part I.B.

plans, the duration of such changes in custody, safety outcomes for affected children, and how such cases are resolved (that is, by reunification with the parent with whom the child lived prior to the safety plan, by permanent custody with the alternative caregiver, the state opening a family court case, or some other means).³⁷⁸

Such data reporting is important everywhere, and especially in states using flexible federal funding pursuant to the Family First Act, lest removals via safety plans become a way for states to use federal dollars to prevent foster care without preventing children's removals. Congress should amend Family First data reporting requirements to require reporting on the number of foster care candidates for whom CPS agencies prevent a parent-child separation, not only those who CPS agencies keep out of foster care.³⁷⁹

Even without congressional action, provisions within the Family First Act could provide the basis for important data tracking. States using flexible funding under the Act must provide data regarding child's placement status at the start and end of a one-year period in which the state provides some mental health or caregiving support service.³⁸⁰ States must also identify individual strategies used to prevent foster care.³⁸¹ The Children's Bureau should read these two provisions together to require states to report detailed data on when they use changes in physical custody to prevent foster care and what happens to children, parents, and kinship caregivers in those cases. Unfortunately, existing administrative guidance from the Children's Bureau does not require states to report when they effectuate a change in physical custody to hidden foster care;³⁸² the Bureau should revisit that issue.

Requiring greater data reporting would resolve one of the oddities of the present child protection data reporting regime—states need not report what happens with the majority of children who CPS agencies deem to be abused or neglected. CPS agencies report that they take into formal foster care only 24% of children deemed victims of abuse or neglect.³⁸³ That percentage varies significantly from state to state—from a low of 3.9% to a high of 53.1%, with states spread roughly evenly in between.³⁸⁴ What happens to the more than 500,000³⁸⁵ of children deemed victims who CPS agencies do

³⁷⁸ Such data is currently excluded from federal data reporting requirements. *Supra* notes 70–71 and accompanying text. Some states require it to be collected, minimizing the administrative burden of a new reporting requirement. *E.g.* Arizona Dep't of Child Safety: Policy and Procedure Manual, Ch. 2 § 7: Safety Planning: Documentation. Safety outcomes include whether the child was the subject of further child protection hotline reports and whether any such reports were substantiated by child protection agencies.

³⁷⁹ *Cf. supra* note 306 and accompanying text.

³⁸⁰ 42 U.S.C. § 671(e)(4)(E)(iii).

³⁸¹ 42 U.S.C. § 671(e)(4)(A)(i).

³⁸² *Supra* note 308 and accompanying text.

³⁸³ CHILD MALTREATMENT 2017, *supra* note 86, at 81.

³⁸⁴ *Id.* at 90.

³⁸⁵ CPS agencies identified roughly 674,000 children as abuse or neglect victims in 2017. *Id.* at 20. If 76% were not removed, *id.* at 81, that amounts to 512,240 children.

not bring into formal foster care? Federally required data cannot say. This Article projects that a large portion of these children—from the high tens to the low hundreds of thousands³⁸⁶—end up in hidden foster care. And what happens to those children—for instance, how many reunify with parents (and after how long), how many stay with kinship caregivers permanently, and how many eventually enter foster care? Federally required data cannot say, and some CPS agencies even admit they do not know.³⁸⁷ Requiring states to report all uses of hidden foster care would go a long way towards providing important insight into a large population of children.³⁸⁸

2. *Focus on these Cases as Part of Federal Child and Family Service Reviews*

The Children’s Bureau should regulate CPS agencies’ use of kinship diversion through its Children and Family Services Reviews. CPS agencies are already subject to these federal reviews of their work in cases involving removals to formal foster care and court petitions, and expenditure of certain abuse and neglect prevention grants.³⁸⁹ These reviews have become a primary means of the federal government’s oversight of the quality of state child protection systems.³⁹⁰ The Children’s Bureau should evaluate use of hidden foster care to ensure CPS agencies use it only when necessary and consistent with procedural requirements outlined above.

Indeed, federal regulations already provide a basis for evaluating hidden foster care cases—the Children’s Bureau evaluates states for how well they balance children’s need for safety with the goal that “[c]hildren are safely maintained in their own homes whenever possible and appropriate.”³⁹¹ Notably, the regulation focuses on keeping children in their own homes—not merely keeping them out of foster care. Thus, causing children to leave their own homes through safety plans should fall well

³⁸⁶ *Supra* Part I.B.

³⁸⁷ The *Virginia Mercury* quoted the director of the Division of Family Services within the Virginia Department of Social Services as follows: “If you’re asking me, at the state, what’s occurring with that diversion practice—how is that happening, how is it occurring, which families are getting services, which are not, how quickly are the kids going back to the family, . . . what are the outcomes, do they ultimately stay with that family, that sort of thing, I can’t answer those questions for you.” O’Connor, *supra* note 85. See also Virginia Review of Current Policies, *supra* note 85, at 4 (“However, once diverted, the case is often closed and no additional tracking of the child occurs.”).

³⁸⁸ The federal government could go even broader and require more detailed reporting about what happens to children deemed victims but not removed by CPS agencies, including those who remain at home subject to CPS agency oversight of some kind. While such a step would be beneficial, it is beyond the scope of this Article.

³⁸⁹ 45 C.F.R. § 1355.31 *et seq.*

³⁹⁰ See generally, Sankaran & Church, *supra* note 191, at 234 (describing CFSR history, process, and function).

³⁹¹ 45 C.F.R. § 1355.34(b)(1)(i)(B).

within the Children's Bureau's mandate when performing Child and Family Services Reviews.

3. *Family First Act Funding Reforms*

The Family First Act wisely permits states to use federal funds to prevent the need for removing children from their parents rather than, as Title IV-E has historically done, simply help states pay for foster care. As discussed in Part V.A.1, however, the Family First Act's references to kinship care risks paying states to use hidden foster care—and thus prevent foster care without preventing the *need* for removing children from their parents.

Congress should amend Family First to ensure it is implemented consistent with the goal of preventing unnecessary parent-child separations and not merely preventing formal foster care placements. When CPS agencies effectuate a change in physical custody of a child, Congress should require them to use Family First funds to support reunification efforts, and not merely services to support the new kinship placement. Congress should further insist that when state action causes physical custody changes states follow requirements like those discussed in Part VI.A as a condition of using Family First funds.

Even without congressional action, the Children's Bureau has authority to impose similar requirements. Crucially, federal funding via Family First is discretionary—the Children's Bureau “*may* make a payment to a State”³⁹²—compared with other provisions of Title IV-E which are mandatory.³⁹³ Requirements reasonably related to the purpose of preventing “the trauma of unnecessary parent-child separation,” as the Children's Bureau has put it, are thus relevant to how the Bureau exercises its discretionary funding authority.³⁹⁴ Other more specific provisions of Family First also imply this authority. For each child, the state must “identify the foster care prevention strategy” it will use.³⁹⁵ When that strategy is a change in physical custody, it is reasonable to expect states to explain why that strategy is necessary, and the Bureau may reasonably insist on some steps to ensure identified prevention strategies are appropriate.³⁹⁶

³⁹² 42 U.S.C. § 671(e)(1) (emphasis added).

³⁹³ *E.g.*, 42 U.S.C. § 671(b) (“The Secretary *shall* approve any plan which complies with” the pre-Family First Title IV-E requirements) (emphasis added).

³⁹⁴ U.S. DEP'T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN'S BUREAU, ACYF-CB-PI-18-09 STATE REQUIREMENTS FOR ELECTING TITLE IV-E PREVENTION AND FAMILY SERVICES AND PROGRAMS 2 (2018).

³⁹⁵ 42 U.S.C. § 671(e)(4)(A)(i).

³⁹⁶ The Bureau has not yet issued details regarding this provision. U.S. DEP'T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN'S BUREAU, ACYF-CB-PI-18-09 STATE REQUIREMENTS FOR ELECTING TITLE IV-E PREVENTION AND FAMILY SERVICES AND PROGRAMS 6 (2018).

CONCLUSION

Beyond the well-established foster care system operated by CPS agencies and supervised by family courts, most states operate hidden foster care systems—systems that make profound decisions without court involvement or oversight, or any meaningful checks and balances. The hidden foster care system changes custody of children (sometimes permanently), removes legal obligations for the agency to help reunify parents and children or to supervise children to ensure their safety and well-being, and fails to provide kinship caregivers with supports comparable to those in formal foster care. This system is literally hidden in that existing data tracking and reporting laws do not require states to count how frequently they use this system, let alone what happens to children who are in it. Despite the lack of data, it is clear the hidden foster care system is large—roughly on par in size with the number of children CPS agencies remove from their families and place in formal foster care every year. And the hidden foster care system intervenes in families analogously to the formal foster care system. This hidden system is likely growing, and it is certainly becoming institutionalized through federal funding incentives, new federal funding which strengthen those incentives, and state policies which seek to codify the practice.

The legal defenses to due process challenges—that these are voluntary placements—are unconvincing in light of the threats to remove children built into the practice. That conclusion alone requires consideration of meaningful procedures to protect children's and parents' fundamental constitutional right to family integrity. Even if these defenses were convincing as a matter of constitutional due process, they are unconvincing as a policy defense to the system. Taking the due process defense of hidden foster on its own terms—terms which insist CPS agencies only make legally justifiable threats to remove children, and which analogize development of safety plans to plea bargains and civil settlements—underscores the need for significant reforms. Checks and balances are required to ensure CPS threats are legally justified in the tens or hundreds of thousands of cases in which they occur, and to make safety plan agreements truly voluntary.

It is thus time to legally domesticate this hidden system through a mixture of state legislation, and reform of federal funding and oversight systems.